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Before Administrative Judge Peter B. Bloch, Presiding Officer

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

**EASTERN NAVAJO DINE 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**

January 11, 1999

Submitted by Attorneys for Eastern Navajo Dine Against Uranium Mining and Southwest  
Research and Information Center:

Lila Bird  
Johanna Matanich  
Douglas Meiklejohn  
Douglas Wolf  
New Mexico Environmental Law Center  
1405 Luisa St., Ste. 5  
Santa Fe, NM 87505  
(505) 989-9022

Diane Curran  
Harmon, Curran, Spielberg,  
& Eisenberg, LLP  
2001 "S" Street, N.W., Suite 430  
Washington, D.C. 20009  
(202) 328-3500

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FINANCIAL ASSURANCE FOR DECOMMISSIONING**

**INTRODUCTION**

As part of their presentations pursuant to 10 C.F.R. § 2.1233, Intervenor Eastern Navajo Dine Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") (hereinafter "Intervenors") hereby submit the following legal brief in support of their opposition to Hydro Resources, Inc.'s ("HRI's") April 13, 1988 materials license application, as amended, and its license. This brief addresses the reasons why HRI's license application fails to satisfy federal regulations governing financial assurance for decommissioning. It also addresses the failure of the Final Environmental Impact Statement to discuss the environmental impacts of HRI's failure to provide sufficient financial assurance for the clean-up of the Crownpoint Project site. NUREG-1508, Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico (February 29, 1997) ("FEIS") (Hearing Record ACN No. 9703200270). This brief is accompanied and supported by the expert testimony of Dr. Michael F. Sheehan. Dr. Sheehan is a qualified expert in energy, economics, and environmental risk. Sheehan Testimony is attached hereto as Exhibit 1. Dr. Sheehan's testimony explains and provides the factual basis for his opinion that HRI's application with respect to financial assurance is inadequate and incomplete.

As discussed below, HRI's license application must be rejected and its license revoked because they fail to satisfy applicable federal laws and regulations.

## **REGULATORY FRAMEWORK**

### **Decommissioning Financial Assurance and Recordkeeping Requirements for Uranium Mining and Milling**

Section 2099 of the Atomic Energy Act ("AEA") and implementing regulations prohibit issuance of a license to:

any person to transfer or deliver, receive possession of or title to, or import into or export from the United States, any source material if, in the opinion of the Commission, the issuance of a license to such person for such purpose would be inimical to the common defense and security or the health and safety of the public.

Atomic Energy Act, 42 U.S.C. § 2099 (1994). The Nuclear Regulatory Commission's ("NRC's") rules and regulations governing the Domestic Licensing of Source Material are set forth in 10 C.F.R. Part 40. Section 40.32(d) states that issuance of a specific license to an applicant must "not be inimical to the common defense and security or to the health and safety of the public . . ." 10 C.F.R. § 40.32(d). The Commission has determined that adequate financial assurance for decommissioning is essential to the protection of public health and safety. Final Rule, General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,019 (June 27, 1988). Therefore, the Commission has established specific regulations for the financing of decommissioning, in 10 C.F.R. § 40.36 and Appendix A to 10 C.F.R. Part 40.

General financial assurance requirements for source materials licensees are established in 10 C.F.R. § 40.36. In addition, pursuant to the Uranium Mill Tailings Radiation Control Act, 42 U.S.C. §§ 7901-7942 (1982 & Supp. IV 1986), the Commission has promulgated regulations for surety arrangements for uranium milling facilities in Criterion 9 of Appendix A to 10 C.F.R. Part 40 (hereinafter "Criterion 9").

In reviewing the license application for the Crownpoint Project, the NRC Staff has applied Criterion 9 to both the mining and milling operations of the Crownpoint Project. HRI's Source Materials License SUA-1508 (January 5, 1998) (Hearing Record ACN 9801160066), a copy of which is attached hereto as Exhibit 2. The Staff's approach, however, is not supported by the language of the NRC's regulations or by the general federal regulatory framework governing uranium mining and milling. First, the introduction to § 40.36 explains that financial assurance requirements of this section apply to all license applicants "(e)xcept for:"

licenses authorizing the receipt, possession, and use of source material for uranium or thorium milling, or byproduct material at sites formerly associated with such milling, for which financial assurance requirements are set forth in Appendix A . . .

Id. (Emphasis added). Because an in situ leach ("ISL") mine is a source materials facility that is not a "milling operation," it is subject to 10 C.F.R. § 40.36 rather than Criterion 9.

Second, the U.S. Environmental Protection Agency's ("EPA") regulations

governing effluent limits from uranium mine drainage and mill discharges clearly distinguish between uranium mines using in situ mining methods and uranium mills. EPA Ore Mining and Dressing Point Source Category, Subpart C, 40 C.F.R. § 440.33 (1997). Accordingly, financing for the decommissioning of ISL mines at the Crownpoint Project is governed by 10 C.F.R. Part 40.

### **Requirements for Decommissioning of ISL mines**

NRC regulations at 10 C.F.R. § 40.36(a) require that at the time a license application is filed, "each applicant for a specific license authorizing the possession and use of more than 100 mCi of source material in a readily dispersable form shall submit a decommissioning funding plan as described in paragraph (d) of this section."<sup>1</sup> As provided in paragraph (d), each decommissioning funding plan must contain a cost estimate for decommissioning; a description of the method of assuring funds for decommissioning from 10 C.F.R. § 40.36(e), including the means for adjusting cost estimates and associated funding levels periodically over the life of the facility; a certification by the licensee that financial assurance for decommissioning has been provided in the amount of the cost estimate for decommissioning; and a signed original of the financial instrument obtained to satisfy the requirements of 10 C.F.R. § 40.36(e). 10

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<sup>1</sup> The NRC Staff has also issued regulatory guidance which provides that "(n)ew applicants for Category A licenses must submit a DFP at the time of their license application." Standard Format and Content Guide for Financial Assurance Mechanisms Required for Decommissioning Under 10 CFR Parts 30, 40, 70, and 72, NUREG-1336, Rev. 1, Section 1.1.4 (August, 1989), the relevant page is attached hereto as Exhibit 3.

C.F.R. § 40.36(d).

### **Financial Surety Arrangements for Uranium Milling**

In the introduction to 10 C.F.R. § 40.36, the regulation states that financial assurance requirements for the decommissioning of uranium milling activities are set forth in Appendix A to 10 C.F.R. Part 40. The introduction to Appendix A requires surety information to be submitted in a license application and arrangements for payment of surety funds established before operations begin.

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

Appendix A to 10 C.F.R. Part 40.

"Uranium milling" is an activity which results in the production of byproduct material. 10 C.F.R. § 40.4. The term "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.

Id. Therefore, Criterion 9 of Appendix A's milling surety requirements applies to the decommissioning of ion exchange processing buildings, waste disposal sites, and soils at



the Crownpoint Project.

Criterion 9 of Appendix A states that each mill operator (this includes in situ operations) must establish financial surety arrangements before beginning operations, to assure that sufficient funds will be available to carry out decommissioning of the mill and site, and reclamation of any tailings or waste disposal areas." Technical Position on Financial Assurances for Reclamation, Decommissioning, and Long-term Surveillance and Control of Uranium Recovery Facilities, Division of Low Level Waste Management and Decommissioning, U.S. Nuclear Regulatory Commission 2 (October, 1988).

The amount of funds to be assured by any surety arrangements must be based on Commission-approved cost estimates in a Commission-approved plan for (1) decontamination and decommissioning of the mill and site to levels which allow unrestricted use of these areas upon decommissioning; and (2) the reclamation of tailings or waste disposal areas in accordance with technical criteria as delineated in Section I of Appendix A. Id.; Criterion 9, Appendix A, 10 C.F.R. Part 40. Moreover, the plan must be submitted in conjunction with an environmental report "that addresses the expected environmental impacts of the milling operation, decommissioning, and tailings reclamation, and evaluates alternatives for mitigating these impacts." Criterion 9, Appendix A, 10 C.F.R. Part 40. The surety must also cover the payment of the charge for long-term surveillance and control required by Criterion 10 of Appendix A.<sup>2</sup> Id. In

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<sup>2</sup> Criterion 10 stipulates that a minimum charge of \$250,000 (1978 dollars) to cover the costs of long-term surveillance must be paid by each mill operator to the general treasury of the

addition, it must "take into account total costs that would be incurred if an independent contractor were hired to perform the decommissioning and reclamation work." Id.

Although the Commission may accept sureties that are consolidated with financial or surety arrangements established to satisfy other agency requirements, it may only do so if (a) the arrangements are adequate to meet the NRC's standards in Criterion 9 of Appendix A, and (b) are clearly identifiable. Id. All of these requirements should "yield a surety that is at least sufficient at all times to cover the costs of decommissioning and reclamation of the areas that are expected to be disturbed before the next license renewal." Id.

## **FACTUAL BACKGROUND**

### **HRI's Application**

HRI submitted its original application in 1988, and amended it numerous times. In none of its license application-related documents has HRI submitted any of the decommissioning funding information required by 10 C.F.R. § 40.36 and Criterion 9. Instead, HRI's licensing documents state that HRI will address these requirements at some time in the future.

For example, in Revision 2 of the Consolidated Operations Plan, one of the final license application-related documents submitted by HRI prior to receiving its license, HRI stated the following:

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United States or to an appropriate State agency before the termination of a uranium mill license. Criterion 10 of Appendix A to 10 C.F.R. Part 40.

HRI will provide financial security for mine closure, including surface, and subsurface restoration, and reclamation. The amount of the surety will be determined by the NRC based on cost estimates for completion of the approved reclamation plan by a third party in the event that HRI defaults. The surety will be reviewed annually by the NRC, and adjusted to reflect expansions in operations, changed in engineering design, and inflation. The amount of the surety will also be subject to NMED, and/or EPA regulatory approval, and the form will meet the requirements of NMWQQC 5-210.B.17, and/or 40CFR144.63.

Consolidated Operations Plan, Rev. 2 ("COP Rev. 2.0"), Section 1.6 at 23 (August 15, 1997) (Hearing Record ACN 9708210179).

#### **NRC Staff Review of HRI's License Application**

In support of the issuance of a license to HRI, the NRC Staff conducted both an environmental review and a safety review of HRI's license application.

#### **Safety Evaluation Report**

On December 5, 1997, the NRC Staff reported the results of its safety review in the Safety Evaluation Report ("SER") for the Crownpoint Uranium Solution Mining Project. Docket No. 40-08968, Hearing Record ACN 9712310298. The SER reflects the Staff's intention to postpone any requirement for surety arrangements until after issuance of the license. Section 9.0 of the SER states, in part:

10 CFR Part 40, Appendix A, Criterion 9, requires the licensee to establish a financial surety arrangement to assure that sufficient funds will be available to carry out the decontamination and decommissioning of the site. The

surety is based on an estimate which must account for the total costs that would be incurred if an independent contractor were contracted to perform the work. The surety estimate must be approved by NRC and based on a NRC-approved decommissioning and reclamation plan. HRI must also provide the surety arrangement through a financial instrument acceptable to NRC. The licensee's surety mechanism will be reviewed by NRC annually to ensure that sufficient funds are available to complete reclamation.

### **Final Environmental Impact Statement**

On February 29, 1997, the NRC Staff issued the FEIS for the Crownpoint Project. In the FEIS, the NRC Staff states that before HRI can begin uranium recovery operations, "detailed restoration, reclamation, and decommissioning plans, related cost estimates, and an appropriate surety would be required." FEIS at 2-19. The FEIS also states that NRC regulations require that the licensee maintain adequate financial surety in the form of surety bonds, cash, certificates of deposit, deposits of government securities, or irrevocable letters of credit to cover the costs of decommissioning, reclamation, waste disposal, and groundwater restoration. Id. The actual amount of the surety would be based on cost estimates for completing the approved reclamation plan by a third party in the event that the licensee defaults. Id. The NRC would review and adjust the surety annually to reflect expansions in operations, changes in engineering design, and inflation. Id.

The NRC Staff also concluded that "practical production-scale groundwater

restoration activities would at most require a 9 pore volume restoration effort" and that the surety would 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 demonstrated by HRI." FEIS at 4-40.

### **HRI's Materials License**

The NRC staff issued a source materials license to HRI on January 5, 1998. License No. SUA-1508, (Hearing Record, ACN 9801160066), a copy of which is attached hereto as Exhibit 2. The license contains Administrative Condition 9.5 which states, in part:

As a prerequisite to operating under this license, the licensee shall submit an NRC-approved surety arrangement to cover the estimated costs of decommissioning, reclamation, and groundwater restoration. Generally, these surety amounts shall be determined by the NRC based on cost estimates for a third party completing the work in case the licensee defaults. 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.<sup>3</sup> If at any time it is found that the well field restoration requires greater pore-volumes or higher restoration costs, the value of the surety will be adjusted upwards. Upon NRC approval, the licensee shall maintain the NRC-approved financial surety arrangement consistent with 10 CFR Part 40, Appendix A, Criterion 9.

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<sup>3</sup> Referring to the Churchrock groundwater restoration demonstration, L.C. 10.28 states that the "demonstration shall be conducted on a large enough scale . . . to determine the number of pore volumes that shall be required to restore a production-scale wellfield."

## **ENDAUM and SRIC's Concerns**

On August 15, 1997, ENDAUM and SRIC filed their Second Amended Request, in which they raised, inter alia, concerns regarding the failure of HRI to comply with decommissioning funding requirements required by 10 C.F.R. § 40.36 and Criterion 9 of Appendix A to 10 C.F.R. Part 40. ENDAUM and SRIC's Second Amended Request For Hearing, Petition to Intervene, and Statement of Concerns (August 15, 1997) ("Second Amended Request") at 96-101. Petitioners asserted that HRI did not satisfy NRC's decommissioning funding requirements for the proposed in situ mining sites or for the proposed uranium processing sites. These concerns were admitted as germane by the Presiding Officer. LBP-98-9, 47 NRC at 282.

### **ARGUMENT**

#### **I. HRI FAILS TO COMPLY WITH FINANCIAL SURETY REQUIREMENTS FOR ITS ISL MINES**

##### **A. HRI Failed to Demonstrate Compliance with 10 C.F.R. Part 40.36 Financial Assurance Requirements for its ISL Mines.**

##### **1. HRI Violated 10 C.F.R. § 40.36 By Failing to Submit a Decommissioning Funding Plan at the Time of Application**

Contrary to the requirements of 10 C.F.R. § 40.36(a), HRI failed to submit a decommissioning funding plan at the time of its application to conduct in situ mining activities at the Crownpoint Project.<sup>4</sup> In fact, HRI has submitted no information

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<sup>4</sup> The § 40.36(a) requirement states:

Each applicant for a specific license authorizing the possession and use of more than 100 mCi of source material in a readily

whatsoever that addresses the criteria for decommissioning funding in § 40.36(d).

Sheehan Testimony at 12. Accordingly, HRI's license application must be rejected on the ground that it fails to satisfy the clear requirements of the regulations. NRC Order In the Matter of Sequoyah Fuels Corporation General Atomics, (Gore, OK, Site Decontamination and Decommissioning Funding) 58 Fed. Reg. 55,087 (October 25, 1993) (holding General Atomics Corporation and Sequoyah Fuels Corporation jointly and severally responsible for providing financial assurance for decommissioning in accordance with § 40.36); Sheehan Testimony at 12. The Commission's regulations in 10 C.F.R. Part 40 require applicants for and holders of source material licenses to have in place a funding mechanism which satisfies § 40.36. 58 Fed. Reg. 55,087.

**B. By Failing to Provide Decommissioning Funding Information in Its Application, HRI Fails to Show That Its Operation is Not Inimical to Public Health and Safety.**

NRC regulations at 10 C.F.R. § 40.32(a) forbid the issuance of a license if it would be inimical to the public health and safety. The Commission has recognized that decommissioning funding is an essential element of a safe nuclear operation. According to the Commission:

[I]nadequate or untimely consideration of decommissioning, specifically in the areas of planning and financial assurance, could result in significant adverse health, safety and environmental impacts. These impacts

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dispersable form shall submit a decommissioning funding plan as described in paragraph (d) of this section.

could lead to increased occupational and public doses, increased amounts of radioactive waste to be disposed of, and an increase in the number of contaminated sites. The regulations make clear that the licensee is responsible for the funding and completion of decommissioning in a manner which protects public health and safety.

53 Fed. reg. 24,018, 24,019. The proper time to develop and analyze the costs of decommissioning and restoration and the applicant's plans for guaranteeing funding for these costs is at the time of license application. NUREG-1336, Section 1.1.4; Sheehan Testimony at 8. It would be imprudent to issue a license if the decommissioning and restoration costs were uneconomically large, or if the applicant did not have the financial capability to provide the required financial assurance. *Id.* Having the product of the analysis available to the applicant ensures that the applicant internalizes the costs and risks it brings to other resource owners. *Id.* This timing requirement prevents valuable resources from being placed at risk from a lack of proper analysis and a lack of necessary guarantees in place.

**C. Even Assuming for Purposes of Argument that HRI May Postpone the Submission of Decommissioning Funding Information Until After the License Is Approved, the NRC Staff Has Unlawfully Permitted HRI To Begin Mining at Section 8 Without Any Surety at All.**

Even assuming for purposes of argument that HRI may lawfully postpone compliance with the decommissioning funding requirements of 10 C.F.R. § 40.36 until after its license application is approved, it would be clearly unlawful for the NRC to permit mining to commence at the Crownpoint Project before these requirements are met.



The HRI license itself provides that HRI may not begin mining until a surety is established. Nevertheless, according to correspondence between HRI and the NRC Staff, the Staff intends to allow HRI to begin mining at Section 8 *before* it has set up a financial surety or provided any of the other information required by 10 C.F.R. § 40.36. In a recent pleading before the Licensing Board, HRI represented that the NRC Staff is permitting HRI to begin mining operations at Section 8 so that HRI can conduct a restoration bonding demonstration project, after licensing, to determine appropriate bonding levels.

... consistent with HRI's license and COP, the NRC staff is requiring HRI to conduct a restoration bonding demonstration project at Section 8 to determine approximate bonding levels. HRI will be able to determine approximate costs for restoration/decommissioning and then establish a fund to cover such costs only after the completion of this demonstration project.

HRI's Response to Petitions to Intervene, at 38, (February 19, 1998). (Emphasis added).

Not only does this proposed strategy blatantly violate 10 C.F.R. § 40.36(a) and the terms of HRI's license, but it demonstrates the very behavior which the decommissioning funding regulations were intended to correct — i.e., the incursion of decommissioning expenses before any provision had been made to cover those expenses. NRC Order Suspending Licenses of Ledoux and Co., Teaneck, N.J., 59 Fed. Reg. 24,761, (May 12, 1994) (holding that source material licenses be suspended because licensee failed to meet financial assurance requirements and that such requirements were " . . . established to assure that licensees demonstrate adequate financial responsibility

that funds necessary for a safe decommissioning are available and planned . . .").

**D. The Amount of the Surety Required by the HRI License Must be Rejected as Inadequate Because it is Based on Convenience to the Licensee Rather than Protecting Public Health and Safety.**

The purpose of requiring a license applicant to submit a detailed decommissioning funding plan which includes a plan for decommissioning the site at the end of operations and the method of assuring funds to complete the actions described in the plan, is to assure that the applicant "possesses sufficient funds to eventually decontaminate and decommission the site to a level at which public health and safety is assured."

Shieldalloy Metallurgical Corp. (Newfield, NJ); Director's Decision Under 10 C.F.R. § 2.206, 62 Fed. Reg. 23,284, 23,286 (April 29, 1997) (finding source material licensee's decommissioning funding plan acceptable but imposing certain restrictions.) In violation of this requirement, the NRC has established an initial surety amount that is based on the convenience of the licensee, not public health and safety.

License Condition 9.5 provides that: "[s]urety for groundwater restoration of the initial well fields shall be based on 9 pore-volumes." As set forth in the FEIS, the establishment of the 9 pore volume basis for the surety is not founded on a safety rationale, but is based on the fact that diminishing returns may set in after that point. FEIS at 4-40. As explained in the FEIS, "plots of TDS concentrations and specific conductivity values . . . show little improvement with continued pumping after 8 to 10 pore volumes." *Id.* Thus, contrary to the content and purpose of the decommissioning

funding requirements, the 9 pore volume figure provides no assurance that groundwater at the Crownpoint Project can and will be cleaned up to baseline or EPA drinking water standards. Accordingly, it must be rejected.

Moreover, the "diminishing returns" standard as set forth in License Condition 9.5 conflicts with License Condition 10.21(A), which states, in part:

Groundwater restoration goals shall be established on a parameter-by-parameter basis, with the primary restoration goal to return all parameters to average pre-lixiviant injection conditions. If groundwater quality parameters cannot be returned to average pre-lixiviant injection levels, the secondary goal shall be to return groundwater quality to the maximum concentration limits as specified in the U.S. Environmental Protection Agency (EPA) secondary and primary drinking water regulations.

The 9 pore volume standard, therefore, must be rejected as inadequate.

**E. License Conditions 9.5 and 10.28 Requiring a Surety Only for Section 8 is Inadequate Because a Surety for the Entire Project is a Necessary Requirement**

License Condition 10.28 prevents HRI from injecting lixiviant at either the Crownpoint site or Unit 1 until HRI demonstrates how much it costs to "restore a production-scale well field" at Section 8. Financial assurance plans must cover all of the production and restoration activities contemplated in a license term. 53 Fed. Reg. 24,018. According to the Commission, decommissioning funding regulations are meant to ensure that "decommissioning of all licensed facilities will be accomplished in a safe and timely

manner and that adequate licensee funds will be available for this purpose." Id.

Therefore, HRI must be required to provide decommissioning funding plans and financial surety arrangements for all of the sites set forth in the COP. Sheehan Testimony at 14.

License Condition 9.5 states that if well field restoration requires greater pore volumes than the estimated 9 pore volume figure, "the value of the surety will be adjusted upwards." HRI has substantially underestimated its cost for restoration and reclamation, based on 4 pore volumes. FEIS 4-29 and 4-40; Sheehan Testimony at 15-17. Major revisions to surety requirements are not meant to be accommodated by a mechanism for making minor adjustments in a decommissioning funding plan. See, e.g. Wisconsin Electric Power Company (Point Beach Nuclear Power Plant, Unit 2), CLI-73-4, 6 AEC 6 (1973) (mechanism of post-hearing confirmatory findings cannot be used to satisfy initial licensing requirements.) It is absolutely necessary that HRI have a reasonable clean-up cost estimate at the time of licensing and before operations begin as part of their decommissioning funding plan and surety arrangements. Accordingly, HRI's license application must be rejected and its license revoked.

## **II. HRI FAILED TO DEMONSTRATE THAT ITS MILLING OPERATION COMPLIES WITH CRITERION 9 OF APPENDIX A TO PART 40.**

### **A. HRI Failed to Comply with Criterion 9.**

Similarly to 10 C.F.R. § 40.36, Criterion 9 of Appendix A to Part 40 requires a license applicant for a uranium mill or processing operation to establish surety arrangements "for the decontamination and decommissioning of the mill and site and for

the reclamation of any tailings or waste disposal areas." Id. The amount of the funds to be ensured by the surety must be:

based on Commission-approved cost estimates in a Commission-approved plan for (1) decontamination and decommissioning of mill buildings and the milling site to levels which allow unrestricted use of these areas upon decommissioning, and (2) the reclamation of tailings and/or waste areas in accordance with technical criteria delineated in Section I of [Appendix A].

Id. The plan must be submitted in conjunction with an environmental report "that addresses the expected environmental impacts of the milling operation, decommissioning and tailings reclamation, and evaluates alternatives for mitigating these impacts." Id.

The surety must also cover the costs of long-term surveillance and control. Id. In addition, it must "take into account total costs that would be incurred if an independent contractor were hired to perform the decommissioning and reclamation work." Id.

Although the Commission may accept sureties that are consolidated with financial or surety arrangements established to satisfy other agency requirements, it may only do so if (a) the arrangements are adequate to meet the NRC's standards in Criterion 9 of Appendix A, and (b):

that portion of the surety which covers the decommissioning and reclamation of the mill, mill tailings site and associated areas, and the long-term funding charges is clearly identified and committed for use in accomplishing these activities.

Id.

HRI has submitted no cost estimate or plan for decommissioning of the processing facilities; nor has it submitted any evidence of a surety arrangement, or submitted any documents showing surety arrangements made in conformance with USEPA or New Mexico requirements. Instead, HRI vaguely states that NRC will determine the surety amount and that the form and amount will meet USEPA and New Mexico requirements. COP Rev. 2.0 at 23.

Intervenors understand that HRI does not intend to submit the required information until sometime after licensing but prior to the commencement of operations. HRI's Response to Petitions to Intervene, at 38, (February 19, 1998). However, unless the information required by Criterion 9 is submitted with the license application and Intervenors have an opportunity to challenge the sufficiency of HRI's compliance with Criterion 9 in the course of this hearing, the license application must be denied. The adequacy of HRI's decommissioning cost estimate and surety arrangement, which must meet specific requirements set forth in Criterion 9, are material licensing issues which cannot lawfully be excluded from the scope of this licensing proceeding. Union of Concerned Scientists, 735 F.2d 1437, 1444-48 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985). Thus, Intervenors are entitled to a hearing on the Applicant's compliance with Criterion 9, before the license can be issued.

### **III. Postponing the Determination of the Adequacy of HRI's Decommissioning Funds Violates Intervenor's Right to a Prior Hearing on All Issues Material to the Licensing Decision**

Section 189(a)(1) of the Atomic Energy Act requires that in "any proceeding" for the granting of an operating license to a nuclear facility, "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding." Atomic Energy Act, 42 U.S.C. § 2239(a)(1)(A) (1994). The hearing must offer an opportunity for "*meaningful public participation*." Union of Concerned Scientists v. NRC, 735 F.2d at 1446, quoting Bellotti v. NRC, 725 F.2d 1380, 1389 (D.C. Cir. 1983) (emphasis in original). In order to be meaningful, the hearing must be complete in covering the full scope of material issues, and it must be reasonably timed. Postponing the determination of adequacy of HRI's decommissioning funds until after the hearing results in a violation of Intervenor's right to a prior hearing on all issues material to the licensing decision.

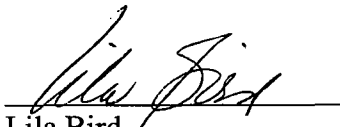
The hearing provided under Section 189(a)(1) of the AEA must include an opportunity to be heard on "all material factors bearing on the licensing decision raised by the [hearing] requestor." Union of Concerned Scientists, 735 F.2d at 1443. Determining the adequacy of HRI's decommissioning funds is a material factor bearing on the decision to issue a source material license to HRI.


## CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, the Presiding Officer should:

1. Reject HRI's application as inadequate to meet financial assurance requirements and thus inadequate to satisfy the requirements of the Atomic Energy Act.
2. Revoke HRI's license because it was unlawfully issued and supported by an inadequate EIS.

Respectfully submitted this 11th Day of January, 1999.

  
Lila Bird  
Johanna Matanich  
Douglas Meiklejohn  
New Mexico Environmental  
Law Center  
1405 Luisa Street, Suite 5  
Santa Fe, NM 87505  
(505) 989-9022

  
Diane Curran  
HARMON, CURRAN, SPIELBERG,  
& EISENBERG, LLP  
2001 "S" Street, Suite 430  
Washington, D.C. 20009  
(202) 328-3500



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

'99 JAN 15 A11:23

Before Administrative Judge Peter B. Bloch, Presiding Officer

OFFICE OF SECRETARY  
ADJUDICATION 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

January 11, 1999

**CERTIFICATE OF SERVICE**

I hereby certify that:

On January 11, 1999, I caused to be served copies of the following:

**ENDAUM and SRIC's Brief in Opposition to Hydro Resources, Inc.'s Application  
for a Materials License with Respect to: Financial Assurance for Decommissioning**

via e-mail and upon the following persons marked an asterisk (\*) by Federal Express,  
standard overnight delivery, and upon the following persons marked by a (+) by U.S. mail,  
first class, and in accordance with the requirements of 10 C.F.R. § 2.712.

Office of the Secretary\*  
U.S. Nuclear Regulatory Commission  
One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852  
Attn: Rulemakings and Adjudications  
Staff

Administrative Judge  
Peter B. Bloch\*  
Atomic Safety and Licensing Board  
Two White Flint North  
11545 Rockville Pike  
Rockville, MD 20852

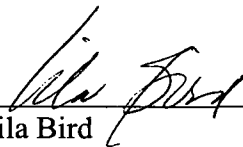
Office of Commission Appellate  
Adjudication\*  
One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852

Administrative Judge  
Thomas D. Murphy\*  
Special Assistant  
Atomic Safety and Licensing Board  
Two White Flint North  
11545 Rockville Pike  
Rockville, MD 20852

Jep Hill, Esq.\*  
Attorney for Hydro Resources, Inc.  
Jep Hill & Associates  
816 Congress Ave., Suite 1100  
Austin, TX 78701-2443

Signed at Santa Fe, New Mexico,  
January 11, 1999

Mitzi Young, John T. Hull\*  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
One White Flint North  
11545 Rockville Pike  
Rockville, MD 20852

  
\_\_\_\_\_  
Lila Bird

Roderick Ventura\*, Samuel D. Gollis  
DNA - People's Legal Services, Inc.  
The intersection of Indian Route 12  
and Route 264  
Window Rock, AZ 86515

Diane Curran+  
HARMON, CURRAN, SPIELBERG &  
EISENBERG, LLP  
2001 "S" Street, N.W., Suite 430  
Washington DC 20009

Anthony J. Thompson\*  
Frederick Phillips  
David Lashway  
SHAW, PITTMAN, POTTS &  
TROWBRIDGE  
2300 "N" Street, N.W.  
Washington, D.C. 20037-1128

Mitchell Capitan+  
President, ENDAUM  
P.O. Box 471  
Crownpoint, NM 87313

Chris Shuey+, Paul Robinson  
SRIC  
P.O. Box 4524  
Albuquerque, NM 87106