

RAS-1599

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
2000

BEFORE THE COMMISSION

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In the Matter of:)	
)	
HYDRO RESOURCES, INC.)	Docket No. 40-8968-ML
P.O. Box 15910)	ASLBP No. 95-706-01-ML
Rio Rancho, New Mexico 87174)	
)	

**OPPOSITION OF HYDRO RESOURCES, INC.
TO INTERVENORS EASTERN NAVAJO DINE AGAINST
URANIUM MINING'S AND SOUTHWEST RESEARCH AND INFORMATION
CENTER'S MOTION TO REOPEN AND SUPPLEMENT THE RECORD**

I. INTRODUCTION

Hydro Resources, Inc. ("HRI"), respectfully opposes the Motion (hereinafter, "Motion") of Intervenors, Eastern Navajo Dine Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") to Reopen and Supplement the Record in this matter. HRI opposes the Motion on the grounds that the Motion fails to satisfy the standard for reopening a closed record and is untimely. Moreover, Intervenors' Motion must be denied because it seeks to reopen the closed record to admit the opinion testimony of an individual unqualified to render the expert opinion proffered. Accordingly, HRI respectfully requests that the Motion be denied.

II. ARGUMENT

A. Intervenors' Motion Does Not Satisfy the Standard for Reopening the Hearing Record.

"Reopening the record is, of course, an extraordinary action." *Metropolitan Edison Company* (Three Mile Island Nuclear Station, Unit No. 1), LBP-82-34A, 15 N.R.C. 914 (1982).

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SECY-02

To reopen a closed record, the moving party must demonstrate that the motion to reopen is timely, the motion addresses a significant safety or environmental issue, *and* that the action at issue would have been materially different had the newly proffered evidence been considered prior to taking the challenged action. *See* 10 C.F.R. § 2.734 (emphasis added); *see also*, *Metropolitan Edison Company, et al.* (Three Mile Island Nuclear Station, Unit No. 1) ALAB-807, 21 N.R.C. 1195 (1985); *Union Electric Company* (Callaway Plant, Unit 1) ALAB-750, 18 N.R.C. 1205 (1983). Intervenors' Motion is not timely and the evidence proffered, opinion testimony of a non-expert, could not provide the basis for a materially different result. Accordingly, Intervenors' Motion to Reopen should be denied.

1. Intervenors' Motion is not timely.

“For a reopening motion to be timely presented, the movant must show that the issue sought to be raised could not have been raised earlier.” *Pacific Gas and Electric Company* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 N.R.C. 1361 (1984); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973). Intervenors' Motion is not timely and should be denied.

Intervenors readily admit that their Motion is not timely. *See* Intervenors' Motion at 7. Intervenors likewise concede that the studies cited by Dr. Fogarty as the basis for his opinion “were published before the close of the evidentiary record. . . .” *Id.* Intervenors' only excuse for this attempt to reopen the closed record long after this particular issue was decided is that “Intervenors could not have presented these studies in the hearing without the sponsorship of Dr. Fogarty, who did not move to Crownpoint or take up his investigation of these studies until after August of 1999, when the record had already closed.” *Id.*

Intervenors' argument is utterly without merit. The studies cited by Dr. Fogarty were published in 1995 and 1998. In January 1999, Intervenors filed their written presentation on groundwater protection, followed, in short order, by an amended presentation on groundwater protection. Those filings, consisting of more than 1000 pages of material, included argument regarding the appropriateness of the groundwater restoration standard selected by NRC. Moreover, Intervenors' proffered the voluminous testimony of three purported experts in support of their groundwater protection presentation.

Intervenors are disingenuous to claim that without Dr. Fogarty they could not have presented the information they now seek to introduce. As the record in this matter amply reflects, Intervenors have not been reluctant to retain all manner of purported experts to buttress Intervenors' various arguments in opposition to NRC's issuance of a materials license to HRI. Indeed, as noted above, Intervenors previously offered the opinion testimony of three individuals on the issue of groundwater protection. Intervenors offer no reason why the studies at issue could *only* be proffered by Dr. Fogarty. That Intervenors appear only now to have found a willing sponsor of this late-discovered information is not sufficient to reopen a closed record and further delay these proceedings.

2. The Motion does not address an exceptionally grave safety or environmental issue.

The second element of the standard for reopening a closed record is that the "motion must address a significant safety or environmental issue." 10 C.F.R. § 2.734 (a)(2). Where, as here, the motion to reopen is untimely, the movant must carry the greater burden of demonstrating that the motion addresses an "exceptionally grave" issue. *Public Service Co. of New Hampshire* (Seabrook Station Units 1 and 2). Intervenors' Motion to reopen the record does not satisfy this element of the regulatory standard.

Intervenors' Motion seeks to reopen the record to allow the introduction of Dr. Fogarty's opinion testimony regarding the appropriateness of the groundwater restoration standard selected by the NRC for the mine zone aquifer. The groundwater restoration issue is not "exceptionally grave" and has previously been addressed twice by Intervenors in briefs filed with the Presiding Officer and a third time in a brief presently pending before the Commission.¹

As reflected in the briefs filed below², groundwater in the mine zone is unfit for consumption *in its present condition*, i.e., before any lixiviant injection occurs.³ Consequently, the appropriate standard of groundwater restoration cannot be an issue so exceptionally grave as to warrant reopening the record to allow Intervenors to expand upon the thousand plus pages they previously have devoted to this issue. Intervenors' Motion fails to meet NRC's standard for reopening the record and their latest attempt at prolonging and delaying this proceeding should not be countenanced.

3. The Motion does not demonstrate the likelihood of a materially different result had the proffered opinion been introduced timely.

The third element of the standard for reopening a closed record is that the movant must demonstrate the likelihood of a materially different result "had the newly proffered evidence

¹ Intervenors challenged the propriety of the groundwater restoration standard before the Presiding Officer and their argument was found wanting. *See* LBP-99-30. Intervenors have petitioned for review of the Presiding Officer's ruling (*See* Petition for Review of Partial Initial Decisions LBP-99-18, LBP-99-19, and LBP-99-30, September 3, 1999). That petition presently is pending before the Commission.

² *See, e.g.*, HRI's Response to Intervenors' Brief in Opposition to Hydro Resources, Inc.'s Application for a License With Respect to Groundwater Issues (February 19, 1999), at 2-3.

³ Pursuant to the Presiding Officer's Bifurcation Order, the parties are addressing only issues applicable to Section 8 at this stage in the proceeding. HRI had obtained an "aquifer exemption" with respect to Section 8. By EPA regulation (*see* 40 C.F.R. § 146.4), an exempted aquifer is one that does not now and cannot in the future serve as a source of drinking water. The exemption, which currently is the subject of a state-federal jurisdictional dispute being litigated in the U.S. Court of Appeals for the Tenth Circuit, reflects the fact that groundwater in Section 8 is not suitable for drinking, irrespective of whether HRI proceeds with uranium extraction in this area.

been considered initially.” 10 C.F.R. § 2.734 (a)(3). Intervenors have failed to make the required demonstration.

Intervenors filed more than 1000 pages of argument and supporting affidavits on the issue of groundwater protection and the adequacy of the groundwater restoration standard adopted by NRC. Notwithstanding Intervenors’ voluminous effort, the Presiding Officer determined that the selected groundwater restoration standard was adequate.

Intervenors provide no explanation for why the proffered testimony of Dr. Fogarty would likely have materially changed that result. In fact, Intervenors fail to demonstrate that Dr. Fogarty is an expert entitled to provide opinion testimony regarding the human health effects, if any, of low levels of uranium in groundwater. With all due respect to Dr. Fogarty and his educational and experiential background, his resume evidences no expertise in the subject area for which Intervenors offer his opinion testimony.

To be qualified as an expert, a witness must demonstrate that he or she possesses academic training or experience or some combination of the two specifically relevant to the opinion testimony for which the witness is proffered. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-36, 8 NRC 567, 570 (1978). Training and experience that bear no particular relationship to the subject matter for which the witness proposes to offer an opinion is insufficient to qualify the witness as an expert. *Id.* at 571. Dr. Fogarty is not qualified to offer the opinion testimony Intervenors seek to introduce.

A review of Dr. Fogarty’s resume reveals that Dr. Fogarty obtained his medical degree in 1993 and completed a residency in Family Medicine in 1997. Presently, Dr. Fogarty apparently is engaged in coursework toward obtaining a master’s degree in public health. Dr. Fogarty’s resume details his professional experience and his many professional activities, honors,

presentations, and publications. Conspicuously absent from his resume, however, is any mention of anything related to radiological health impacts, human health effects of exposure to uranium in groundwater, or fate and transport of uranium in groundwater. Dr. Fogarty possesses no expertise that qualifies him to opine regarding the adequacy of the groundwater restoration standard adopted by the NRC.⁴ Dr. Fogarty's proffered testimony could not and cannot be the basis of a materially different result because it constitutes opinion testimony of a non-expert and thus is inadmissible.

B. Reopening the record to allow the untimely introduction of Dr. Fogarty's testimony results in further delay and additional expense and is prejudicial to HRI.

All parties had ample opportunity to brief issues relating to the adequacy of NRC's groundwater restoration standard. Intervenors, apparently unsatisfied with their initial groundwater filing of more than one thousand pages and the statements of three purported experts, filed an amended brief amplifying their groundwater arguments. Having failed to persuade the Presiding Officer and his appointed technical advisor that their groundwater concerns possessed any merit, Intervenors have requested review before the Commission. Still awaiting the Commission's decision, Intervenors ask to reopen the record in order to introduce unqualified opinion testimony, the studies underlying which could readily have been introduced in a timely fashion. If admitted in the record, the dubious evidence Intervenors seek to introduce is sure to elicit responsive argument from HRI and NRC Staff. Thus, reopening the record at this late date will result in additional delay and expense to all parties and is prejudicial to HRI. Consequently, and having failed to satisfy the applicable standard for reopening a closed record, Intervenors' Motion should be denied.

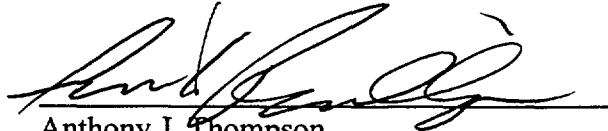
⁴ Intervenors also improperly attempt to introduce hearsay through Dr. Fogarty's Affidavit, relating portions of an alleged telephone conversation with NRC technical staff. See Fogarty Affidavit at Paragraph 14.

III. CONCLUSION

Intervenors are attempting to reopen the record in this marathon proceeding to introduce non-expert opinion testimony in order to sponsor two sets of scientific studies that Intervenors failed, without explanation, to introduce in a timely manner during briefing of the groundwater restoration issue more than one year ago. Intervenors' Motion to Reopen fails to satisfy NRC's regulatory standard and should be denied.

Respectfully submitted this 29th day of March, 2000.

SHAW PITTMAN



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OFFICE OF THE SECRETARY
ADMINISTRATIVE JUDGE
Docket No. 40-8968-ML
ASLBP No. 95-706-01-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document, OPPOSITION OF HYDRO RESOURCES, INC. TO INTERVENORS EASTERN NAVAJO DINE AGAINST URANIUM MINING'S AND SOUTHWEST RESEARCH AND INFORMATION CENTER'S MOTION TO REOPEN AND SUPPLEMENT THE RECORD in the above-captioned proceeding has been served on the following by electronic mail (as indicated) and on all parties by first class mail, postage pre-paid, on this 29th day of March, 2000.

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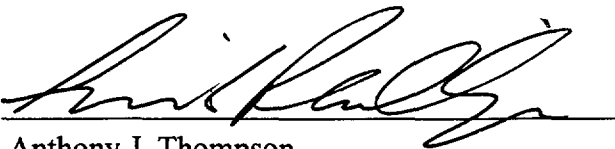
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