

DOCKETED
USNRC
January 29, 2001

UNITED STATES OF AMERICA '01 FEB -2 P4 :38
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD
OFFICE OF SECRETARY
ADJUDICATIONS STAFF

Thomas S. Moore, Presiding Officer

In the Matter of)) HYDRO RESOURCES, INC.) P.O. Box 15910) Albuquerque, NM 87174)	Docket No. 40-8968-ML ASLBP No. 95-706-01-ML
---	---

**INTERVENORS' MOTION FOR LEAVE
TO SUBMIT REPLY BRIEF AND REBUTTAL TESTIMONY IN RESPONSE TO
HRI'S AND STAFF'S PRESENTATIONS REGARDING HRI'S
RESTORATION PLAN AND COST ESTIMATES**

INTRODUCTION

Pursuant to 10 C.F.R. § 2.1233(d), Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") (collectively "Intervenors") hereby move for leave to reply to the presentations filed by Hydro Resources, Inc. ("HRI") and the Nuclear Regulatory Commission ("NRC" or "Commission") Staff regarding HRI's Restoration Action Plan ("RAP") and cost estimates of November 21, 2000.¹ A reply brief and rebuttal testimony are necessary to

¹ Intervenors submit that this motion is timely, because it is being filed on the same business day of receipt by counsel in New Mexico of the complete written presentation by HRI, and within 1 business day of the NRC Staff's presentation. Counsel in New Mexico for ENDAUM and SRIC received the complete copies of the Staff's presentation with attachments January 26, 2001 and HRI's presentation with attachments today, January 29, 2001. Intervenors

respond to new information and testimony in support of the RAP provided for the first time in both HRI's and the Staff's presentations and to ensure a full and complete record on these issues for this proceeding.²

This motion is opposed by HRI and Staff.

Factual Background

A more complete procedural history of the financial assurance issue is presented in Intervenors' Response to Hydro Resources Inc.'s Cost Estimates and Restoration Action Plan of November 21, 2000 (December 21, 2000) (hereinafter, "Intervenors RAP presentation"), at 3-7.

On November 21, 2000, HRI submitted the RAP and its cost estimates with no supporting testimony or documentation. On December 21, 2000, pursuant to the Commission's Order in CLI-00-08 to respond within 30 days, Intervenors submitted their response to the RAP. Intervenors' RAP presentation consisted of a brief supported by the testimony of Mr. Steven Ingle ("Ingle testimony") and Dr. Richard Abitz ("Abitz testimony"). Pursuant to the directions of CLI-00-08, HRI and the NRC Staff responded to the Intervenors RAP presentation on January 22, 2001 (hereinafter "HRI's presentation" and "Staff's presentation"). HRI's reply was supported by the affidavits of

received courtesy copies of both presentations by e-mail (without attachments) on Monday evening, January 22, 2001.

² In accordance with the former Presiding Officer's September 22, 1998 Order, Intervenors have not attached their reply to this motion.

Mr. Mark Pelizza ("Pelizza affidavit") and Mr. Richard Van Horne ("Van Horne affidavit"). The Staff's response was supported by the affidavit of William H. Ford ("Ford affidavit").

Argument

Although Subpart L regulations do not explicitly provide a right to reply, the NRC has recognized, in Subpart G proceedings, a limited "right" to present rebuttal testimony where it is necessary for "full and true disclosure of the facts." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-787, 20 NRC 1097, 1178 (1984) (upholding Licensing Board's decision to require parties to conduct cross-examination, redirect examination, and recross examination in depositions, with deposition transcripts to be filed in lieu of testimony). The same reasoning logically applies in a Subpart L evidentiary proceeding. In this instance, there cannot be a full disclosure of the facts and proper hearing of the arguments unless Intervenors are permitted to file a reply and rebuttal testimony.

The opportunity to file reply presentations is also required in order to ensure that the burden of proof is properly allocated to HRI on health and safety issues and to HRI and the Staff on environmental issues. See Intervenors' RAP presentation at 7-8 for discussion of burden of proof and Louisiana Energy Services (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331 (1996). As permitted by CLI-00-08, HRI was to submit its restoration plan and cost estimates, Intervenors were to respond, and HRI and

the Staff were to respond to Intervenor comments. However, HRI provided no supporting documentation or testimony when it submitted the RAP. As a result, while Intervenor have now had the opportunity to address the unsworn and general assertions in the RAP, they have not had the opportunity to address the more specific assertions, supported by expert affidavits and legal citations, which HRI and the Staff have made in response to Intervenor's RAP presentation. To rule on this record, without providing Intervenor with an opportunity to respond to these arguments and assertions, effectively shifts the burden of proof from HRI and the Staff to the Intervenor. To allow a reply would also be consistent with NRC precedent regarding the conduct of Subpart L proceedings, in which replies have been part of Subpart L hearing schedules. See In the Matter of Frank J. Calabrese Jr., LBP-97-16, 46 NRC 66, 69 (1997) (noting that applicant had opportunity to submit reply presentation to Staff's initial presentation). In order to ensure that the proponent of the license carries its burden of proof in the hearing, an opportunity should be provided for other parties to answer the legal sufficiency and factual probity of claims made by the proponent — during the hearing — that are intended to prove the applicant's entitlement to a license.

Specifically, Intervenor seek leave to reply to a number of legal and factual claims that are unsupported, misleading, or rely on new information not disclosed in HRI's initial presentation of the RAP. Intervenor are listing the issues that merit a response in general terms because of space considerations and the technical nature of the

issues.

First, Intervenors seek leave to respond to Staff's and HRI's erroneous interpretation of the law governing decommissioning cost estimates. Both the Staff and HRI assert that the level of accuracy sought by Intervenors for the decommissioning cost estimate is inappropriate and unnecessary, because License Condition ("LC") 9.5 is inherently flexible, and because the estimate can always be revised upwards sometime later in the operating life of the mine. Staff's presentation at 7; HRI's presentation at 9-10; see also Pelizza affidavit at 9, 17-18, ¶'s 4, 12, 13; Ford affidavit at 8, 16, ¶'s 7, 16. The Staff also claims that HRI should be held to a lower standard under Performance-Based Licensing. Staff's presentation at 14.³ Intervenors will demonstrate that the regulations, the history of the regulations, case law, and the Environmental Impact Statement supporting the regulations, all call for reasonable decommissioning estimates that can be relied on, and do not countenance waiting until after operations begin to

³ The Staff criticizes Intervenors use of the 1988 guidance document, "Technical Position on Financial Assurances for Reclamation, Decommissioning, and Long-Term Surveillance and Control of Uranium Recovery Facilities," and submits that Intervenors ignore the application of PBL to this license. Staff's presentation at 14. First, Intervenors appropriately responded to HRI's significant reliance on the Technical Position document in the RAP. See RAP at p. 1 of Sections B and E. Second, while the Commission has deemed that the health and safety risks associated with uranium enrichment are less than those associated with the operation of nuclear reactors (Staff at 15 and citing Louisiana Energy Services (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 306 and n.18 (1997)), such a holding does not mean that the potential health and environmental effects of proposed in-situ leachate mining on the groundwater and surrounding communities are entirely benign. With or without the application of PBL to HRI's license, a vigorous, conservative restoration plan and an adequate surety (that will not have to be doubled or tripled at an indefinite point in the future) are key to the RAP's ability to comply with the AEA and applicable NRC regulations.

determine the fundamental reasonableness of the estimates. Intervenors will also show that HRI's and the Staff's interpretation of the law would place public health in jeopardy, because there is no assurance that HRI will have access to additional resources if decommissioning costs prove to be significantly higher than estimated at this licensing stage. In addition, Intervenors should be given the opportunity to question the legal conclusion stated by Mr. Ford that meeting 74% of all pollution criteria is tantamount to compliance with the law. Ford affidavit at 9. To hold that failure to meet one quarter of the prescribed standards is adequate compliance cannot stand. Such a position obviates the fundamental reason for mandatory groundwater restoration during and at the end of operations, and essentially proposes to give HRI a license to pollute.

Intervenors also seek an opportunity to refute the legality of the basic premise of the Staff's position, which is that the adequacy of HRI's decommissioning cost estimate can be resolved by the Staff outside of the hearing process simply by adjusting LC 9.5. See Staff's presentation at 7-9. The Staff's position violates long-standing Commission precedents forbidding post-hearing resolution of licensing issues. Consolidated Edison Company of New York, (Indian Point Station, Unit 2), CLI 74-23, 7 AEC 947, 951-52 (1974) (minor procedural deficiencies may be left for post-hearing resolution by the Staff, but not controversial questions in controversy in the proceeding). To allow the Staff to solve critical decommissioning issues through adjustment of the surety under LC 9.5 would essentially write the Presiding Officer and the Commission out of this hearing

process.⁴

Second, Intervenor should be given an opportunity to respond to significant errors made by HRI and the NRC Staff regarding factual issues. HRI makes a number of claims for the first time that either need to be corrected or misrepresent our experts' characterization of the situation. Those issues include but are not limited to: HRI's assertion that an increased horizontal flare factor only results in a lower number of pore volumes (Pelizza affidavit at 9), and not a massive increase in restoration water volume as Intervenor contend; HRI's incorrect inference that Intervenor's experts used a well-field pattern method, not an "ore body outline method" (*Id.* at 10-11), to calculate pore volumes; the Staff's reliance on, and selective summary of, restoration data from the Mobil Section 9 pilot ISL operation (Ford affidavit at 10); and HRI's and the Staff's dismissal of the Intervenor's use of relevant restoration input values and results from analogous Wyoming uranium ISL mines (Pelizza affidavit at 11-14; Ford affidavit at 12-19). Intervenor seek the opportunity to respond to Staff and HRI on these and other crucially important factual issues.

Conclusion

In short, there are significant legal and technical differences between HRI's and

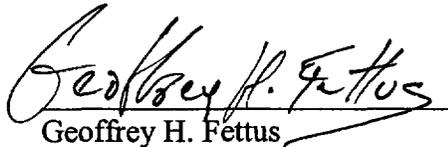
⁴ In CLI-00-15, the Commission was clear that the final arbiter of the adequacy of HRI's restoration plan and cost estimates is not the Staff, but the Presiding Officer and the Commission itself. The Commission stated in pertinent part: "[W]e have guaranteed [Intervenor's] right to challenge HRI's ultimate financial assurance showing, and the presiding officer, and ultimately the Commission itself, stand ready to reject HRI's license should HRI's showing prove inadequate." CLI-00-15, 52 NRC 65, 66 (2000).

the Staff's positions from those held by the Intervenors.⁵ Intervenors fundamentally disagree with several contentions forwarded, in some cases for the first time, by HRI and Staff, including who should be the final arbiter of these issues, the Staff through post-hearing licensing decisions or the Presiding Officer. HRI and the Staff have submitted extensive testimony in support of the restoration plan and cost estimates that Intervenors have never seen before and will never have an opportunity to respond to unless this motion is granted. The expertise of Mr. Ingle and Dr. Abitz to testify to these issues remains unchallenged, but their assessment of the RAP is called wildly speculative. HRI's presentation at 4. The importance of a complete record in this proceeding supports the granting of this motion.

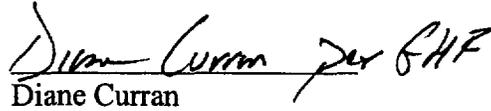
Accordingly, for the foregoing reasons, ENDAUM's and SRIC's Motion for Leave to Reply should be granted. In consideration of the novelty of the legal issues, the complexity of the technical issues, and the need to prepare expert rebuttal testimony along with a brief, ENDAUM and SRIC request that they be given twenty pages for the reply brief and a period of twenty days, from the Presiding Officer's order granting this motion, to submit their reply.

⁵ These are serious issues. The preamble language for the final rule for 10 C.F.R. Part 40, Appendix A, Criterion 9 states: "With regard to the required amount of surety coverage, it seems obvious the purposes of the surety mechanism is to protect the public from the possibility of a licensee's inability to perform the required decommissioning and reclamation ..." 45 F.R. 65521 (Sept. 1, 1982).

Respectfully submitted,



Geoffrey H. Fettus
Douglas Meiklejohn
NM ENVIRONMENTAL LAW CENTER
1405 Luisa Street, Suite 5
Santa Fe NM 87505
(505) 989-9022



Diane Curran
HARMON, CURRAN, SPIELBERG &
EISENBERG, LLP
1726 M Street, N.W., Suite 600
Washington DC 20036
(202) 328-6874

January 29, 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judge Thomas S. Moore

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

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2001, I caused to be served copies of the foregoing:

INTERVENORS' MOTION FOR LEAVE

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:

Office of the Secretary
U.S. Nuclear Regulatory Commission*
Washington, D.C. 20555-0001
Attn: Rulemakings and Adjudications
Staff

Administrative Judge
Thomas D. Murphy
Special Assistant
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Rockville, Maryland 20555-0001

Administrative Judge
Thomas S. Moore,* Presiding Officer
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington D.C. 20555-0001

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mitzi Young, Esq.
John T. Hull, Esq.
Office of the General Counsel*
Mail Stop - O-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

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

Diane Curran, Esq.
HARMON, CURRAN, SPIELBERG &
EISENBERG, LLP*
1726 M Street, N.W., Suite 600
Washington DC 20036

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

Kathleen Tsosie*
ENDAUM
P.O. Box 150
Crownpoint, NM 87313

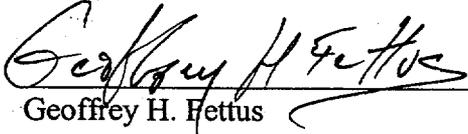
Wesley D. Jensen*
DNA-People's Legal Services, Inc.
P.O. Box 558
Keams Canyon, Arizona 86034

Levon Henry, Attorney General
Steven J. Bloxham, Esq.
Navajo Nation Department of Justice
P.O. Drawer 2010
Window Rock, AZ 86515

Jep Hill, Esq.
Jep Hill & Associates
P.O. Box 30254
Austin, TX 78755

Administrative Judge
Robin Brett
U.S. Geological Survey
917 National Center
Reston, VA 20192

Dated at Santa Fe, New Mexico,
January 29, 2001


Geoffrey H. Fettus