

**RAS 9199**

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

**DOCKETED 01/25/05**

**SERVED 01/25/05**

Before Administrative Judges:

Thomas S. Moore  
Richard F. Cole, Special Assistant  
Robin Brett, Special Assistant

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In the Matter of:

Docket No. 40-8968-ML

Hydro Resources, Inc.  
PO Box 777

ASLBP No. 95-706-01-ML

Crownpoint, New Mexico 87313

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January 25, 2005

MEMORANDUM AND ORDER

(Protective Order Governing Disclosure of Protected Materials)

Upon the oral instruction of the Presiding Officer directing the licensee, Hydro Resources, Inc. ("HRI"), and intervenors, Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC"), to submit for approval a proposed protective order to govern the use and dissemination of proprietary or other protected materials in this proceeding, the Presiding Officer grants the parties' motion and adopts a protective order, the terms of which are as follows:

A. This protective order shall govern the use of all protected materials produced by, or on behalf of, any party to this proceeding as defined in paragraph C below. Notwithstanding any order terminating this proceeding, this protective order shall remain in effect until specifically modified or terminated by the Presiding Officer or the Commission.

B. A participant may designate as protected materials information (1) that is of a type customarily held in confidence by its owner; (2) for which there is a rational basis for having customarily held it in confidence; (3) that has, in fact, been kept in confidence; and (4) that is

not found in public sources. See Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 NRC 408, 416-17 (1976).

C. Definitions -- For purposes of this protective order:

1. The term "party" shall mean ENDAUM, SRIC and HRI. For the purposes of this protective order, the term "party" does not include the NRC staff. The provisions of this protective order, unless expressly stated, do not apply to NRC employees, contractors, or consultants. Disclosure of protected material by the staff, including staff counsel, is governed by 10 C.F.R. §§ 2.390, 2.709, 9.17, 9.25.

2. The term "materials" means any audio or video tape recording or written matter of any kind, whether produced, reproduced, or stored on paper, cards, tapes, ribbons, disks, belts, charts, film, computer files, computer disks or diskettes, computer storage devices, or any other medium, and includes, without limitation, books, reports, studies, statements, speeches, notebooks, calendars, working papers, manuals, memoranda, notes, instructions, directions, records, correspondence, diaries, diagrams, drawings, lists, telephone logs, minutes, and photographs, and also includes, without limitation, originals, copies (with or without notes or changes thereon), and drafts.

3. The term "protected materials" means:

a. The following specific materials:

- I. Fence diagrams and/or structural cross-sections for Section 17, Unit 1, and Crownpoint. Fence diagrams and/or structural cross sections are referred to in the Consolidated Operations Plan, revision 0.0 at page 90 (1996). They are also referred to in Analysis of Hydrodynamic Control, HRI, Inc., Crownpoint and Church Rock New Mexico Uranium Mines, at 3 and 7 (Geraghty and Miller, 1993), and NUREG 1508 at 3-15. These diagrams are the bases for the site-specific determinations that no inter-aquifer connections caused by changes in geologic strata positions or thicknesses exist. In particular, they purport to support HRI's claims that mine fluids will not affect any

underlying or overlying fresh water aquifers;

- ii. Borehole information for Borehole 2.8/17/7, referred to at p. 3-35 of NUREG-1508 and the borehole upon which Fig. 3.7 in NUREG-1508 is based. This information should include down-borehole camera images, rock cores, core photos, drillers notes and loggers notes;
- iii. Documentation of driller's logs, pump test information and water level information, including hydrographs, for wells CP-1 and CP-4 and documentation of well completion difficulties for well CP-4. This information is referred to in the Crownpoint Technical Report at pages 46, 49-55 and at Appendix A, Table 4 (1992). The site-specific aquifer testing effort of which these wells were a part is explicitly referred to in NUREG-1508 at 3-29. While HRI provided pump test information for some of its exploration holes, it has not provided this information for CP-1 and CP-4, and this information is not part of the hearing file.

b. materials (including depositions) provided by a party in response to requests and designated by such party as "protected materials";

c. any information contained in or obtained from such designated protected materials;

d. any other materials that are made subject to this protective order by the Presiding Officer, by the Commission, by any court or other body having appropriate authority, or by agreement of the parties;

e. notes of protected materials; and

f. copies of protected materials.

4. The term "protected materials" does not include:

a. any information or document contained in the files of the Commission, or any other federal or state agency, or any federal or state court, unless the information or document has been determined to be protected by such agency or court, or

b. information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this protective order.

5. The term “notes of protected materials” means memoranda, handwritten notes, or any other form of information (including electronic form) that copies or discloses protected materials described in paragraph C.3 above. Notes of protected materials are subject to the same restrictions provided in this protective order for protected materials except as specifically provided in this protective order.

6. The term “nondisclosure declaration” shall mean the declaration included as Attachment A to this protective order by which any person who has been granted access to protected materials shall certify his or her understanding that such access to protected materials is provided pursuant to the terms and restrictions of this protective order, and that such person has read the protective order and agrees to be bound by it. All nondisclosure declarations shall be served on counsel for the parties listed in paragraph C.1 above and the staff, as provided on the official service list in this proceeding.

7. The term “reviewing representative” shall mean a person who has signed a nondisclosure declaration and who is:

a. an attorney who has made an appearance in this proceeding for a party, except for staff counsel;

b. attorneys, paralegals, and other employees associated for purposes of this case with an attorney described in paragraph C.7.a above;

c. an official or employee of a party, or a consultant or expert retained by a party (whether paid or unpaid) assisting or testifying on behalf of a party in this proceeding;

d. a person designated as a reviewing representative by order of the Presiding Officer or the Commission; or

e. court reporters engaged for depositions or record proceedings.

D. Protected materials shall be made available under the terms of this protective order only to parties and only through their reviewing representatives as provided in paragraphs H-L below. The party producing the protected materials shall physically mark them on each page as "PROTECTED MATERIALS" or "CONFIDENTIAL," or with words of similar import as long as either the term "Protected Materials" or "Confidential" is included in that designation to indicate that they are protected materials.

E. Protected materials shall remain available to parties until the later of the date that an order terminating this proceeding is no longer subject to judicial review, or the date that any other Commission proceeding relating to the protected material is concluded and no longer subject to judicial review. The parties shall, within fifteen (15) days of the later date described above, return the protected materials (excluding notes of protected materials) to the party that produced them, or shall destroy the materials, except that copies of filings, official transcripts and exhibits in this proceeding that contain protected materials, and notes of protected materials may be retained, if they are maintained in accordance with paragraph F below. Within such time period, each party shall also submit to the producing party an affidavit stating that, to the best of its knowledge, all protected materials and all notes of protected materials have been returned or have been destroyed or will be maintained in accordance with paragraph F below. To the extent protected materials are not returned or destroyed, they shall remain subject to this protective order.

F. Parties shall maintain all protected materials in a secure place. Access to those materials shall be limited to those reviewing representatives specifically authorized pursuant to paragraphs I-L below.

G. For documents submitted to the staff, the staff shall follow the notification procedures of 10 C.F.R. § 2.390 before making public any protected materials.

H. Protected materials shall be treated as confidential by each party and by the reviewing representative in accordance with the declaration executed pursuant to paragraph K below. Protected materials shall not be used except as necessary for the conduct of this proceeding, nor shall they be disclosed in any manner to any person except a reviewing representative who is engaged in the conduct of this proceeding and who needs to know the information in order to carry out that person's responsibilities in this proceeding. Reviewing representatives may make copies of protected materials, but such copies become protected materials. Reviewing representatives may make notes of protected materials, which shall be treated as notes of protected materials if they disclose the contents of protected materials.

I. Reviewing representatives may not use information contained in any protected materials obtained through this proceeding to give any party or any competitor of any party a commercial advantage.

J. If a party wishes to designate as a reviewing representative a person not described in paragraph C.7 above, the party shall seek agreement from the party providing the protected materials. If an agreement is reached, that person shall be a reviewing representative pursuant to paragraph C.7 above with respect to those materials. If no agreement is reached, the party shall submit the disputed designation to the Presiding Officer for resolution.

K. A reviewing representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to protected materials pursuant to this protective order unless that reviewing representative has first executed a nondisclosure declaration. A copy of each executed nondisclosure declaration shall be provided to counsel for the party asserting confidentiality prior to disclosure of any protected material to that reviewing representative.

L. Attorneys qualified as reviewing representatives are responsible for ensuring that persons under their supervision or control comply with this protective order.

M. Any reviewing representative may disclose protected materials to any other reviewing representative as long as the disclosing reviewing representative and the receiving reviewing representative have both executed a nondisclosure declaration. If any reviewing representative to whom the protected materials are disclosed ceases to be engaged in these proceedings, or is employed or retained for a position whose occupant is not qualified to be a reviewing representative under paragraph C.7 above, access to protected materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a nondisclosure declaration shall continue to be bound by the provisions of this protective order and the declaration.

N. Subject to paragraph U below, the Presiding Officer shall resolve any disputes arising under this protective order. Prior to presenting any dispute under this protective order to the Presiding Officer, the parties to the dispute shall use their best efforts to resolve it. Any party that contests the designation of materials as protected shall notify the party that provided the protected materials by specifying in writing the materials whose designation is contested. This protective order shall automatically cease to apply to such materials ten (10) days after the notification is made unless the designator, within said ten-day period, files a motion with the Presiding Officer, with supporting affidavits, demonstrating that the materials should continue to be protected. In any challenge to the designation of materials as protected, the burden of proof shall be on the party seeking protection. If the Presiding Officer finds that the materials at issue are not entitled to protection, the procedures of paragraph U below shall apply.

O. All copies of all documents reflecting protected materials that are filed by any party or the staff, including the portion of the hearing testimony, the portion of the exhibits, the portion of the transcripts, the portion of the pleadings, and the portion of other documents that refer to protected materials, shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this protective order. Such

documents shall be marked "PROTECTED MATERIALS" and shall be served only on the Presiding Officer, NRC's Office of the Secretary, and parties and persons authorized to receive protected material under this protective order. Counsel for the producing party shall provide to all parties who request the same, a list of reviewing representatives who are entitled to receive such material. Counsel shall take all reasonable precautions necessary to assure that protected materials are not distributed to unauthorized persons.

P. If any party desires to include, utilize, or refer to any protected materials or information derived therefrom in a pleading, brief, testimony, exhibit, or other filing in these proceedings in such a manner that might require disclosure of such material to persons other than reviewing representatives, such party shall first notify in writing both counsel for the disclosing party and the Presiding Officer of such desire, identifying with particularity each of the protected materials. Thereafter, use of such protected materials will be governed by procedures determined by the Presiding Officer.

Q. Nothing in this protective order shall be construed as precluding any party from objecting to the use of protected materials on any legal grounds.

R. Nothing in this protective order shall preclude any party from requesting the Presiding Officer, the Commission, or any other body having appropriate authority, to find that this protective order should not apply to all or any materials previously designated as protected materials pursuant to this protective order. The Presiding Officer may alter or amend this protective order as circumstances warrant at any time during the course of this proceeding.

S. Each party governed by this protective order has the right to seek changes in it as appropriate from the Presiding Officer or the Commission.

T. Nothing in this protective order shall prevent any party from seeking public disclosure of information designated as protected materials, in accordance with NRC regulatory procedures.



U. If the Presiding Officer finds at any time in the course of this proceeding that all or part of the protected materials need not be protected, those materials shall, nevertheless, be subject to the protection afforded by this protective order for ten (10) days from the date of issuance of the Presiding Officer's decision, and if the party seeking protection files an interlocutory appeal or requests that the issue be certified to the Commission, for an additional ten (10) days. None of the parties waives its rights to seek additional administrative or judicial remedies after the Presiding Officer's decision respecting protected materials or reviewing representatives, or the Commission's denial of any appeal thereof.

V. Nothing in this protective order shall be deemed to preclude any party from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this protective order.

W. None of the parties waives the right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of protected materials.

X. Protected materials or any other form of information that copies or discloses protected materials shall not be disclosed to anyone other than in accordance with this protective order and shall be used only in connection with this proceeding. Any violation of this protective order and of any nondisclosure declaration executed hereunder shall constitute a violation of an order of the Commission. Any violation of this protective order may result in the imposition of sanctions as the Presiding Officer or the Commission may deem to be appropriate, including, but not limited to, referral of the violation to appropriate bar associations and other disciplinary authorities.

It is so ORDERED.

By the Presiding Officer<sup>1</sup>

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Thomas S. Moore  
Administrative Judge

Rockville, Maryland

January 25, 2005

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\* Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) HRI, (2) Intervenors, ENDAUM and SRIC, and (3) the staff.

ATTACHMENT A

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
DOCKET NO. 40-8968-ML  
NONDISCLOSURE DECLARATION

Under penalty of perjury, I hereby certify my understanding that (1) access to protected materials is provided to me pursuant to the terms and restrictions of the Presiding Officer's January 25, 2005 protective order in this proceeding; (2) I have been given a copy of and have read the protective order; and (3) I agree to be bound by it. I understand that the contents of the protected materials, any notes or other memoranda, or any other form of information that copies or discloses protected materials shall not be disclosed to anyone other than in accordance with that protective order. I acknowledge that a violation of this declaration or the protective order, which incorporates the terms of this declaration, constitutes a violation of an order of the Nuclear Regulatory Commission and may result in the imposition of sanctions as the Presiding Officer or the Commission may deem to be appropriate, including, but not limited to, referral of the violation to appropriate bar associations and other disciplinary authorities.

WHEREFORE, I do solemnly agree to protect such confidential information as may be disclosed to me in this NRC proceeding, in accordance with the terms of this declaration.

Name (Printed): \_\_\_\_\_

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Title: \_\_\_\_\_

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Representing: \_\_\_\_\_

—

Signature: \_\_\_\_\_

—

Date: \_\_\_\_\_

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
 )  
HYDRO RESOURCES, INC. ) Docket No. 40-8968-ML  
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (PROTECTIVE ORDER GOVERNING DISCLOSURE OF PROTECTED MATERIALS) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 40-8968-ML  
LB MEMORANDUM AND ORDER (PROTECTIVE  
ORDER GOVERNING DISCLOSURE OF  
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[Original signed by Evangeline S. Ngbea]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 25<sup>th</sup> day of January 2005