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

OFFICE OF SECULARY
RULEMAKING AND
ADJUDICATIONS STAFF

The Honorable Peter B. Bloch, Presiding Officer

In the Matter of)	
)	
HYDRO RESOURCES, INC.)	Docket No. 40-8968-ML
(2929 Coors Road, Suite 101)	ASLBP No. 95-706-01-ML
Albuquerque, NM 87120))	

**INTERVENORS' RESPONSE TO
HRI'S AND THE NRC STAFF'S MOTIONS TO STRIKE**

I. INTRODUCTION

Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM"), Southwest Research and Information Center ("SRIC"), Marilyn Morris and Grace Sam hereby submit their response to Hydro Resources Inc.'s ("HRI's") Motion to Strike Intervenors' Responses to Questions Posed by the Presiding Officer Or, In the Alternative, for Leave to Reply (June 9, 1999) ("HRI Motion") and to the Nuclear Regulatory Commission ("NRC") Staff's Motion to Strike Materials from the Record, Or, In the Alternative, for Leave to File a Reply (June 10, 1999) ("Staff Motion"). The Staff Motion seeks to strike specific portions of Intervenors' Joint Response to HRI's and the NRC Staff's Responses to the Presiding Officer's April 21, 1999 Memorandum and Order (Questions) (May 25, 1999) ("Intervenors' Joint Response"). The HRI Motion alternatively seeks to strike the entire Joint Response, or portions that

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allegedly are new materials.

Both motions are without merit and should be denied. Intervenors' Joint Response was properly submitted pursuant to the Presiding Officer's April 21, 1999 Memorandum and Order (Questions) ("April 21 Order").

II. FACTUAL BACKGROUND.

The April 21 Order poses eight questions to the parties in this adjudication. The Order, however, only requires the NRC Staff to answer questions 1-7, on May 11, 1999.¹ April 21 Order at 4. The April 21 Order specifically provides for other parties to file responses to the parties' answers to the Order's questions, on May 25, 1999.² April 21 Order at 4. Intervenors' Joint Response is a response to the answers submitted by the NRC Staff and HRI on May 11, 1999.³

The Staff admits that the April 21 Order did not require Intervenors to file answers to the questions on May 11, 1999. Staff Motion at 1. The Staff also admits that the Joint Response "had been authorized by the Presiding Officer." Id. The Staff argues however, that portions of the Joint Response "improperly introduce new

¹ The April 21 Order set this deadline for May 10, 1999. The parties subsequently agreed to a one day extension for the Staff, which was accepted by the Presiding Officer.

² The April 21 Order set this deadline for May 24, 1999, The parties agreed to a one day extension, which the Presiding Officer accepted. Letter from Douglas Meiklejohn, counsel for ENDAUM, to Presiding Officer (May 20, 1999).

³ Intervenors ENDAUM and SRIC submitted the material requested from them in question 8 of the April 21 Order on May 18, 1999. Intervenors' Submission of Information Requested in April 21, 1999 Order (May 18, 1999).

arguments, models, and concepts," which violates the April 21 Order. Id. at 2-3. HRI asserts that Intervenors should have submitted answers to the questions posed in the April 21, 1999 Order on May 11, 1999. HRI Motion at 2. HRI claims Intervenors raise issues not previously raised by any party, allegedly causing HRI prejudice. HRI Motion at 1.

III. ARGUMENT.

The April 21 Order states, "Parties other than the Staff of the Nuclear Regulatory Commission may choose not to answer Questions 1-7, above." April 21 Order at 4.

Other parties would then have the opportunity to respond to the answers that were filed.

Id. The Presiding Officer has discretion to set such a schedule for this Subpart L proceeding. 10 C.F.R. §2.1209(a). The Intervenors chose not to answer questions 1-7.

On May 25, 1999, Intervenors responded to the answers filed by the NRC Staff and HRI, as allowed by the April 21 Order. The April 21 Order did not restrict the parties to filing arguments based on the existing record, a cumulative exercise for which there would have been little point. Accordingly, the Joint Response includes information of the type that should have been included in the Staff's and HRI's answers. The information used by Intervenors to respond to the Staff's and HRI's answers reveals how the Staff and HRI failed to adequately address the Presiding Officer's questions.

A. The Staff and HRI Motions are Untimely.

The motions filed by the Staff and HRI both express their displeasure with the

schedule of answers and responses in the April 21 Order. The Staff claims that "Intervenors are attempting instead to introduce new material in their Joint Response, at a time when under the terms of the April 21 Order, the Staff would have no opportunity to comment on the new material." Staff Motion at 3. HRI also claims that because Intervenors did not file an initial set of answers and they incorporate new information in the Joint Response, it should be stricken.⁴ HRI Motion at 2-3.

The April 21 Order does not prohibit respondents from using new information to rebut the answers given by the parties to the Presiding Officer's questions. The Staff and HRI Motions boil down to a criticism that the April 21 Order did not schedule replies to responses. The HRI and Staff Motions are no more than motions for reconsideration of the April 21 Order, which did not schedule replies to parties' response filings. Because HRI filed its motion on June 9, 1999, and the Staff filed on June 10, 1999, more than ten days from the April 21 Order, both motions should be dismissed as untimely.

B. Neither HRI nor the Staff are Substantially Prejudiced by the Joint Response.

HRI and the Staff apparently argue that because they have not had the chance to reply to new information in the Joint Response, they have been treated unfairly.

However, on past occasions, the Intervenors did not have the right to reply to new information presented by the Staff and HRI. For example, the Intervenors were not

⁴ Typically, HRI contradicts its own premise by criticizing Dr. Sheehan's testimony on behalf of the Intervenors, precisely because it "simply reiterates the arguments he has offered previously." HRI Motion at 7.

allowed a reply under the schedule for initial written presentations. Under that schedule, the Intervenor sought leave to file replies, rather than seeking to strike the Staff's and HRI's presentations. Several of their requests for leave to reply were denied. See ENDAUM's and SRIC's Motion for Leave to Submit Reply Brief and Rebuttal Testimony in Response to HRI's and Staff's Initial Presentations Regarding Air Emissions (February 26, 1999), implicitly denied by Partial Initial Decision (Radioactive Air Emissions), LBP-99-19 (May 13, 1999); ENDAUM's and SRIC's Motion for Leave to File a Reply Brief and Rebuttal Testimony on Issues of Financial Assurance for Decommissioning and Financial and Technical Qualifications or, in the alternative, to Strike Documents Submitted on those Issues (February 26, 1999), denied in part by Memorandum and Order (Denial of Motion to Reply on Financial Assurance for Decommissioning) (March 10, 1999) and implicitly denied in part by Partial Initial Decision (Technical Qualification Issues), LBP-99-18 (May 11, 1999). The position that the only fair hearing is one in which the Staff and HRI get the first and last word is inappropriate and not supported by any authority.

HRI proudly claims that it "relied entirely on data already in the FEIS" in preparing its answers to the questions, and faults Intervenor for submitting new data and information. As Intervenor have made clear in their written presentations, the FEIS is inadequate. See e.g., ENDAUM's and SRIC's Written Presentation in Opposition to Hydro Resources, Inc.'s Application for a Materials License with Respect to: NEPA

Issues Concerning Project Purpose and Need, Cost/Benefit Analysis, Action Alternatives, No Action Alternative, Failure to Supplement EIS and Lack of Mitigation (February 19, 1999); Final Written Presentation of Grace Sam and Marilyn Morris (February 19, 1999); Intervenor's Amended Written Presentation in Opposition to Hydro Resources, Inc.'s Application for a Materials License with Respect to: Groundwater Protection at 65-69 (January 18, 1999). HRI and the Staff failed to adequately comply with NEPA in preparing the FEIS, and the April 21 Order directed the Staff to prepare its answers "in a form suitable for a supplement to the FEIS." It is entirely appropriate for the Intervenor to provide information that properly should have been, and could easily have been, included in the Staff's and HRI's answers. The purpose of Michael Wallace's contaminant transport model was to demonstrate the ease with which the Staff could have provided a response to question 3, which asked for a qualitative and/or quantitative assessment of the impacts on groundwater quality. April 21 Order at 2. Because HRI and the NRC Staff chose the strategy of defending the existing FEIS, this does not mean that the Intervenor must give up their own concerns about the quality and depth of the FEIS.

C. Intervenor's Joint Response is a Response to the Answers of HRI and the NRC Staff.

HRI, and to some extent the NRC Staff, allege the Intervenor have developed some "underhanded" strategy in responding only to the answers filed by other parties. HRI claims Intervenor were "sandbagging HRI and the NRC Staff." Id. The Staff claims the use of new information is an Intervenor "gambit". Staff Motion at 3.

These insinuations are false. HRI claims:

consistent with the manner in which they have conducted themselves throughout this proceeding, Intervenors underhandedly availed themselves of additional time in which to prepare their own responses by styling those responses as a "reply" to HRI and NRC Staff's timely-filed responses.

HRI Motion at 3. However, each portion of the Joint Response is directed at correcting the errors of the Staff and HRI answers. Moreover, the attached affidavit of Michael G. Wallace affirms that he did not begin work on his Response Affidavit until after he received the Staff and HRI answers. Exhibit 1 at 1-2. He also affirms that his purpose in preparing his Reponse Affidavit was "to respond to the inadequacies in the Staff's and HRI's answers." Id. at 1.

D. The Staff's Specific Arguments to Strike Portions of the Joint Response are Without Merit.

The Staff Motion goes through the Joint Response and states which specific portions it believes should be excluded. For all the reasons outlined above, none of the Joint Response should be stricken. In addition, the Staff makes several errors in targeting specific pieces of the Joint Response, which are discussed below.

The Staff claims that Mr. Wallace's discussion of his calibrated contaminant transport model in his affidavit should be stricken because, "As is evident from his statements (see, e.g. ¶26), Mr. Wallace could have created this transport model much earlier in this proceeding, at a time when the other parties would have had the opportunity to provide their comments." Staff Motion at 4. It should be pointed out that the Staff has

never developed a transport model based on HRI's application. Mr. Wallace states in the attached affidavit that he prepared his Response Affidavit, which includes the modeling results, to demonstrate the inadequacies of the Staff's answer. ¶ 26 of Mr. Wallace's Affidavit, does not provide evidence Mr. Wallace could have created this model earlier in the proceeding, contrary to the Staff's argument.

The Staff claims that the well to which Mr. Wallace's model pertains, a UNC well, is on private land, and therefore the use of this well is not responsive to question 3. Staff Motion at 4-5. The use of the UNC well is responsive to the question. First, Mr. Wallace references UNC's environmental monitoring report for 1997-1998, which identifies the UNC well as a "Domestic Water Well". Staff Motion, Exhibit 8, at 15 and note 10; See also Joint Response, Exhibit 2J, at 3. Second, Question 3 of the April 21 Order asks about the quantitative and qualitative effects on the quality of water "at the closest private water wells to Church Rock Section 8". The Staff's argument is nonsensical as a private water well would most probably be located on private land. Third, Mr. Wallace's model was developed in response to the Staff's answer to Question 3. The Staff's answer neither addressed the quantitative nor the qualitative effects on water quality at the closest private wells. Ford Affidavit at 20. Mr. Wallace's model demonstrates that quantitative and qualitative effects can readily be modeled for this project.

The Staff incorrectly asserts that Mr. Wallace introduces new testimony regarding environmental costs of \$3,000-\$4,000 per acre foot of water. Staff Motion at 5. The

Staff apparently does not recall Intervenors' NEPA issues presentation, in which this information was originally introduced. ENDAUM's and SRIC's written presentation in opposition to Hydro Resources, Inc.'s Application for a Materials License with respect to: NEPA issues Concerning Project Purpose and Need, Cost/Benefit Analysis, Action Alternatives, No Action Alternative, Failure to Supplement EIS and Lack of Mitigation (February 19, 1999) Exhibit C, testimony of Dr. Michael F. Sheehan, at 37-38 and note 11. The NRC Staff had the opportunity to respond to the use of these figures in its response presentation, but did not articulate any response. See NRC Staff's Response to Intervenor Presentations on NEPA issues (Purpose, Need, Cost/Benefit, Alternatives, and Supplementation) at 16 (April 1, 1999).

The Staff seeks to strike from Dr. Abitz's Affidavit the statement, "Mr. Ford produces no information on reaction kinetics to support the speculation that the concentrations of uranium and redox sensitive ions will rapidly decrease in the groundwater of the Westwater Canyon aquifer as water moves away from the ore zone." Staff Motion, Exhibit C at 10. The Staff claims the introduction of "reaction kinetics" into this proceeding is inappropriate because Dr. Abitz does not explain what it means and how it is relevant to Mr. Ford's application of the Deutsch studies to the Church Rock site. Staff Motion at 5-6. The Staff's claim is misplaced for several reasons. First, the Staff fails to articulate sufficient grounds to support a motion to strike. "Reaction kinetics" is a common term for the standard geochemical analysis that would be

necessary to support the Staff's position on redox attenuation in the Westwater. If there is anything in Dr. Abitz's Affidavit that is unclear to the Presiding Officer, he may seek clarification from the parties or disregard that testimony. Dr. Abitz likely presumed that the NRC would be familiar with this term. Second, Dr. Abitz's discussion of reaction kinetics is not new to this proceeding, as he has previously criticized Mr. Ford for his failure to look at the site specific conditions for the license application at issue. He stated in January, 1999, his concern that "contamination levels are likely to remain high in the excursion plumes". See Intervenors' Groundwater Protection Presentation, Exhibit 1, Abitz Testimony at 30-31 (January 11, 1999). Dr. Abitz explained that, "In my professional judgment, because contaminated groundwater will flow through very narrow sand channels, there will not be significant opportunity for dilution and dispersion of the oxidized uranium and its associated contaminants." Id. at 30. Mr. Ford has since cited the Deutsch study twice without applying its findings to the conditions that exist at Church Rock Section 8. See Affidavit of William H. Ford ¶10 (March 12, 1999); Affidavit of William H. Ford at ¶¶12-14 (May 11, 1999). The Deutch study does not supplant Mr. Ford's obligation to review the site specific conditions at Church Rock. The Staff faults Dr. Abitz for simply pointing out again the analysis Mr. Ford has failed to perform in his review of the license application.

The Staff asserts that ¶¶ 20-22 of the Abitz Affidavit are not responsive to question 3 because they refer to the potential placement of future wells. Staff Motion at

6. This statement ignores the fact that question 3 asks "what are the effects on the quality of water that may reasonably be foreseen at the closest private water wells to Church Rock Section 8." April 21 Order at 4 (emphasis added). Dr. Abitz's Affidavit demonstrates that future use may "reasonably be foreseen," and that future use is generally used in environmental planning and such use is foreseeable at Section 8. Staff Motion, Exhibit C, at 12-14. In any event, this testimony is relevant to Question 1 of the April 21 Order, which seeks a discussion of all unlikely but foreseeable difficulties for restoration and the environmental costs that may be expected.

The Staff argues that Dr. Lucas' Affidavit should be stricken because he is a new witness in the proceeding and "acceptance of his proffered testimony at this time would unfairly prevent the Staff from filing any technical comments on its substance, or on the qualifications of Dr. Lucas." Staff Motion at 7-8. The April 21 Order does not provide the Staff with leave to reply to the responses filed by other parties. Nor does it require the parties to limit their filings to their previous arguments and evidence in responding to the answers filed by others. Dr. Lucas is a recognized expert in the local geology surrounding the Westwater aquifer. His testimony is merely rebuttal testimony to the answers provided by the Staff and HRI, and can only serve to enhance the record in this matter.

It is interesting to note that the Staff did not seek to challenge the qualifications of HRI's counsel when counsel made unsworn technical allegations concerning the Cowan

article and other matters in answering the April 21 Order questions. See Joint Response at 2-6. If the Staff does not object to such statements, it is hard to imagine how the Staff would challenge the qualifications of an expert with a Ph.D. in geology, who has devoted much of his life's work to studying the Jurassic formations in Northwest New Mexico, where HRI seeks to mine. Joint Response at Exhibit 3, Lucas Affidavit, and Exhibits 3A and 3B thereto. The Staff does not state what, if any, its challenge to Dr. Lucas could be.

The Staff claims Dr. Lucas' ¶¶ 4-7 are the same as ¶¶ 28-44 of Mr. Wallace's Affidavit, and should be stricken as cumulative. Both experts, Dr. Lucas and Mr. Wallace, respond to HRI's and the Staff's answers to question 2 in these paragraphs. Their responses, however, cover different ground. In fact, Dr. Lucas lends his substantial expertise to the issue of fractures by discussing the gypsum beds underlying the Westwater aquifer, which are "easily deformed or dissolved". Staff Motion, Exhibit D, at 3. Mr. Wallace does not discuss the impacts of the gypsum beds. Dr. Lucas points out, while Mr. Wallace does not, Mr. Bartels' failure to properly identify the overlying geologic layers at Church Rock. Id. at 3-4.

Next, the Staff alleges Dr. Lucas' testimony is cumulative because, the Staff claims, Mr. Wallace says Dr. Lucas duplicates Dr. Staub's testimony in ¶ 31 of his affidavit. Staff Motion at 8. ¶ 31 states in relevant part,

The underlying Recapture is not a classic shale as inferred by HRI and the NRC staff, but a "complexly interbedded . . . mudstone interbedded with fine- to medium-grained . . . quartose sandstone" that was deposited in a fluvial environment, much as the Westwater was. Kirk and Condon

(1995) at 111; attached as Exhibit O to Dr. Staub's January testimony. A companion affidavit by the Morrison Formation expert, Dr. Spencer Lucas, also discusses these features of the Recapture.

Staff Motion, Exhibit B, at 18. Dr. Lucas has not duplicated Dr. Staub's testimony. ¶ 31 only refers to an exhibit introduced by Dr. Staub last January. Mr. Wallace does, however, state that Dr. Lucas discusses the same features of the Recapture as he does himself. However, it is far from cumulative for two qualified experts to endorse the conclusion that the Recapture shale is not, as the Staff and HRI claim, a classic, confining shale layer.

Finally, the Staff asserts that Dr. Lucas' ¶¶ 8-15 are the same as ¶¶ 52-53 in Mr. Wallace's Affidavit and Dr. Abitz' ¶¶ 23-24. Staff Motion at 8. These Affidavits are not cumulative. Dr. Lucas' detailed evaluation of the Cowan article provides a clear analysis of the article and lays the foundation for Mr. Wallace's and Dr. Abitz's limited comments. It is inappropriate for the Staff to seek to strike Dr. Lucas' testimony.

The Staff's attempts to strike portions of the Joint Response are aimed at eliminating the most damaging portions of the Joint Response.⁵ By seeking to eliminate Mr. Wallace's contaminant transport model, the Staff will not have to face evidence that

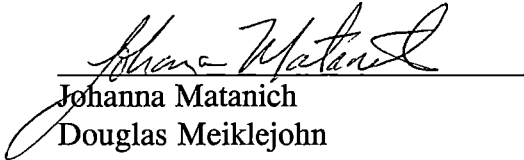
⁵ The Staff's own red-lining technique indicates it seeks to exclude more than what is new evidence in this case. On page 3 of Wallace's affidavit, the Staff seeks to strike the sentence, "Quantitative predictions of the quality of groundwater several miles downgradient from a contaminant source such as the Section 8 ISL mine not only are possible, but it is routinely used in industry." Staff Motion Exhibit B. This statement merely explains the fundamental problem with the Staff's answer to question 3 in concise language.

demonstrates groundwater impacts can readily be calculated qualitatively and quantitatively for the project. And by seeking to eliminate Dr. Lucas' testimony, the NRC Staff can avoid testimony from a supremely qualified expert on the local geology that the Cowan study supports the Intervenors' conceptual model. Intervenors will be denied their right to a fair hearing, a right guaranteed by their hearing petitions filed under the Atomic Energy Act, if the Staff is allowed to red-line the items it finds problematic in the hearing record.

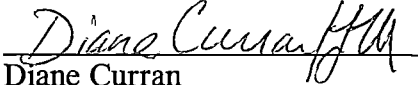
IV. CONCLUSION

For the foregoing reasons, both HRI's Motion and the Staff's Motion to Strike Intervenors' Joint Response should be denied as they are without merit.

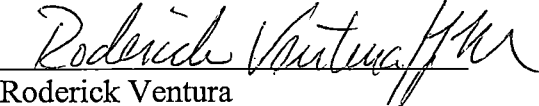
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UNITED STATES OF AMERICA
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Suite 101)	ASLBP No. 95-706-01-ML
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_____)	

CERTIFICATE OF SERVICE

I hereby certify that:
On June 21, 1999, I caused to be served copies of the following:

INTERVENORS' RESPONSE TO HRI'S AND THE NRC STAFF'S MOTIONS TO STRIKE

to the following parties marked by an asterisk via e-mail. Service was also made upon the following persons by U.S. mail, first class, and in accordance with the requirements of 10 C.F.R. § 2.712. The envelopes were addressed as follows:

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Dated at Santa Fe, New Mexico,
June 21, 1999,



Johanna Matanich

June 18, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judge
Peter B. Bloch, Presiding Officer

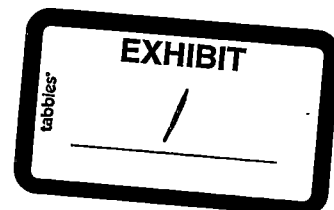
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AFFIDAVIT OF MICHAEL G. WALLACE

On behalf of Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC"), Michael G. Wallace, being duly sworn, states the following:

1. My name is Michael G. Wallace. On May 20, 1999, I submitted the Response Affidavit of Michael G. Wallace in support of Intervenors' Joint Response to HRI's and the NRC Staff's Responses to the Presiding Officer's April 21, 1999 Memorandum and Order (Questions).
2. I prepared my Response Affidavit in response to the answers filed by Hydro Resources, Inc. ("HRI") and the NRC Staff to the questions posed by the Presiding Officer in his Memorandum and Order of April 21, 1999. I was not authorized by ENDAUM and SRIC to perform this work until after the



Staff and HRI submitted their answers.

3. The entire purpose of my Response Affidavit was to respond to the inadequacies in the Staff's and HRI's answers. I reviewed those answers and accordingly prepared my response.
4. I have reviewed my work records for the dates and times on which I conducted the research and analysis in preparation of my Response Affidavit, and the dates and times on which I actually drafted the Response Affidavit. The date on which I first began work was May 12, 1999, which was after I reviewed the Staff's and HRI's answers.

AFFIRMATION

I

declare on this 18th day of June, 1999, at Albuquerque, New Mexico, under penalty of perjury that the foregoing is true and correct and the opinions expressed therein represent my best professional judgment.

Michael G. Wallace
Michael G. Wallace

Sworn and subscribed before me, the undersigned, a Notary Public, on this 18th day of June, 1999, at Albuquerque, New Mexico.

Auson R Taylor
Notary Public

My Commission expires on:

11-12-02