

DOCKETED  
USNRC

June 9, 1999

'99 JUN 10 12:52

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATIONS STAFF

Before Administrative Judges:  
Peter B. Bloch, Presiding Officer  
Thomas D. Murphy, Special Assistant

\_\_\_\_\_  
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

**HRI'S MOTION TO STRIKE INTERVENORS' RESPONSES TO QUESTIONS POSED  
BY THE PRESIDING OFFICER OR, IN THE ALTERNATIVE, FOR LEAVE TO  
REPLY**

**INTRODUCTION**

Hydro Resources, Inc. ("HRI"), hereby respectfully moves to strike Intervenors' Joint Response to HRI's and NRC Staff's Responses to the Presiding Officer's April 21, 1999 Memorandum and Order (Questions) ("Intervenors' Response") or, in the alternative, for leave to reply thereto. HRI brings this Motion to Strike on the grounds that Intervenors' Response was filed out of time and raises issues not previously raised by any party, causing HRI significant prejudice. Thus, Intervenors' Response should be stricken in its entirety for being untimely and prejudicing HRI or, at a minimum, those matters raised for the first time in Intervenors' Response should be stricken. In the event that the Presiding Officer is disinclined to strike Intervenors' Response, HRI should be afforded an opportunity to respond to matters raised for the first time therein.

20506

U.S. NUCLEAR REGULATORY COMMISSION  
RULEMAKING AND ADJUDICATIONS STAFF  
OFFICE OF THE SECRETARY  
OF THE COMMISSION

Document Statistics

Postmark Date FE  
Copies Received 3  
Add'l Copies Reproduced 0  
Special Distribution \_\_\_\_\_  
OGC, BIDS

## **BACKGROUND**

The Presiding Officer's April 21, 1999 Memorandum and Order (the "Order") posed eight questions to all parties and, with an exception not pertinent to this Motion, specified that responding to the questions was at the discretion of each party. The Order required that responses to the Presiding Officer's questions be filed not later than May 11, 1999. The Order further required that replies to the responses be filed not later than May 25, 1999.

HRI and NRC Staff chose to respond to the Presiding Officer's questions and filed their responses thereto on May 11, 1999, as required by the Order. Intervenors did not respond to the Presiding Officer's questions. Intervenors, on May 13, filed a Motion for Reconsideration, asking the Presiding Officer to withdraw his questions and Intervenors on May 14, 1999, filed a Motion for Interlocutory Appeal, requesting that the Nuclear Regulatory Commission (the "Commission") order the Presiding Officer to withdraw his questions. On May 27, the Commission denied Intervenors' request.

On May 25, 1999, Intervenors filed a document entitled "Intervenors' Joint Response to HRI's and the NRC Staff's Responses to the Presiding Officer's April 21, 1999 Memorandum and Order (Questions)". This document consists of a 55 page brief, four affidavits (one of which is itself 32 pages plus exhibits), and one additional exhibit. Intervenors' filing introduces one new expert (Lucas) and several new arguments based on theories, models, and data not previously introduced in this hearing.

## **ARGUMENT**

To the extent that Intervenors' Response filed May 25, 1999, is, in fact, a response to the Presiding Officer's questions, it is untimely and should be stricken. Intervenors did not file their

responses to the Presiding Officer's questions on May 11, when those responses were due. Instead, 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. Intervenors' artfulness in this tack does not hide the fact that Intervenors either were unprepared to file responses pursuant to the Presiding Officer's schedule or they were intentionally sandbagging HRI and the NRC Staff. Either way, those portions of Intervenors' Response filed on May 25 that are responses to the Presiding Officer's questions were due on May 11. Because Intervenors have not sought leave to file late and because HRI is prejudiced by being deprived of an opportunity to reply to these responses (as contemplated by the Presiding Officer's Order), those portions of the Intervenors' Response that consist of responses to the Presiding Officer's questions should be stricken.

Intervenors' Response also contains models, analysis, and data never before raised in the 11 year history of this proceeding. Additionally, a new expert witness is proffered for the first time. HRI's responses to the Presiding Officer's questions did not introduce new data, but relied entirely on data already in the FEIS. Intervenors should not be allowed to introduce entirely new theories and evidence in what purports to be a "reply" to HRI's answers. Because new theories and evidence are not implicated by HRI's responses to the Presiding Officer's questions and because HRI is prejudiced by being deprived of an opportunity to challenge any of this new information, the portions of Intervenors' Response proffering new theories or evidence should be stricken.

1. The Abitz and Wallace affidavits should be stricken from the record as they are intended to respond to the Presiding Officer's questions, not to reply to HRI and the Staff's responses.

Abitz admits that his affidavit is intended to respond to the questions posed by the Presiding Officer:

I am making this affidavit on behalf of [ENDAUM and SRIC] to provide responses within my areas of expertise to the questions on groundwater protection contained in the Presiding Officer's Memorandum and Order (Questions) dated April 21, 1999.

Abitz affidavit at 1. When referring to the material Abitz reviewed in preparation for his affidavit Abitz states: "I also reviewed the affidavit of Dr. Spencer G. Lucas, given on behalf of ENDAUM and SRIC in response to the April 21 Order . . ." Id. at 2. Thus, it appears that Mr. Abitz, at least, understood his task to be responding to the Presiding Officer's questions; such responses were required to be filed not later than May 11, 1999.

Wallace' affidavit, likewise, makes clear that it was prepared in response to the Presiding Officer's questions, and not in reply to HRI's or the Staff's responses to those questions:

21. . . . The model I have presented in this affidavit was built to respond, in less than one month's time<sup>1</sup>, to the questions posed by the Presiding Officer in his April 21 order.

Wallace affidavit at 12. Intervenors' obvious sandbagging and disregard of the Presiding Officer's Order make a mockery of this proceeding. The Abitz and Wallace affidavits, and the portions of Intervenors' Response they are proffered to support, were required to be filed not later than May 11 and should be stricken as untimely.

---

<sup>1</sup> Wallace' choice of words in stating that he conducted his modeling "in less than one month's time" may be illuminating: the Presiding Officer's questions were issued on April 21 and Wallace' affidavit is dated May 20.

2. The Wallace and Lucas affidavits should be stricken from the record as the introduction of new theories and evidence at this late stage of these proceedings is not warranted by HRI or the Staff's responses to the Presiding Officer's questions and is extremely prejudicial to HRI.

Intervenors' witness, Mr. Wallace, apparently has been involved in this proceeding for at least one and one-half years and has had access to all relevant data throughout that period. Indeed, Mr. Wallace has repeatedly avowed his familiarity with the data and has graced the record with hundreds of pages reflecting his views of what that data means. In his affidavit submitted with Intervenors' Response filed May 25, Wallace states:

7. In my April testimony, I presented some simple, plausible model simulations that dealt with issues of lixiviant containment during ISL operations at the Church Rock site. *In response to the Presiding Officer's more recent request, I have prepared new model simulations. . . .*

Wallace affidavit at 4 (emphasis added). The remainder of Wallace' 32 page affidavit and more than a dozen pages of exhibits thereto discuss Wallace' new "model simulations" and his opinions regarding same. This is an outrageous abuse of this proceeding. HRI and NRC Staff's responses to the Presiding Officer's questions do not introduce new information and do not warrant new modeling by way of reply. Wallace bases his modeling on multiple untested assumptions which, like the model itself, Intervenors now attempt to slip into the record unchallenged. Intervenors must not be allowed to unload new models and theories of their case only after waiting for the expiration of HRI's and the Staff's right to reply. Wallace' affidavit should be stricken in its entirety, as should those portions of Intervenors' Response that rely on it.

Mr. Lucas' affidavit likewise should be disallowed. As a quick review of Mr. Lucas' *curriculum vitae* and bibliography makes clear, his expertise lies in palentology; he does not

appear to possess particular training or experience in hydrology or hydrogeology. The parties have for several years debated the hydrology and hydrogeology pertinent to the Crownpoint project. It is grossly unfair to HRI to allow a heretofore unknown witness, who may be unqualified to offer opinions on hydrology or hydrogeology, to opine on this critical subject insulated from any challenge by HRI or NRC Staff. Consequently, Mr. Lucas' affidavit should be stricken in its entirety.

If the Presiding Officer is unwilling to strike the improper affidavits and corresponding sections of Intervenor's Response, then HRI and NRC Staff should be afforded an opportunity to respond.

If the Presiding Officer is unwilling to strike Intervenor's improper affidavits and the corresponding sections of Intervenor's Response, then HRI and NRC Staff should be afforded an opportunity to respond to the new information that Intervenor has presented. Fundamental fairness dictates that Intervenor not be allowed to litter the record with new, unchallenged opinions. Given the opportunity, HRI will show that:

Lucas is not qualified to offer opinions on groundwater issues;

Lucas has no particular knowledge of the geology of Churchrock Section 8;

Lucas' speculation regarding fractures (p.3) is not fact;

Parts of Lucas' opinion are inconsistent with his own earlier work;

Abitz' complaint that redox couples in downgradient waters were not investigated (p.6) is pointless;

Wallace has created his model in a manner that is designed solely to bolster his discredited pipeline theory;

Wallace has chosen to disingenuously mix theories; one theory to postulate pipelines in order to speed the flow of water to offsite locations and an opposite theory to describe contamination of broad areas in order to account for huge volumes of contaminated water (p.15-16);

Wallace' speculation regarding the possible placement of a new City water well (p.16) is absurd;

Wallace' newly stated concerns regarding artificial boreholes (p.20) is groundless;

Wallace' off-hand remarks regarding URI's Longoria, Texas pump tests (p.22) are groundless (in fact, NRC recently has approved closure of URI's Longoria site; and

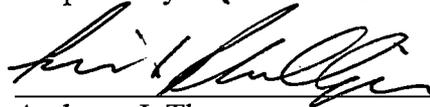
Sheehan's affidavit does not respond to the Presiding Officer's questions, but simply reiterates the arguments he has offered previously.

HRI respectfully requests that if the Presiding Officer is unwilling to strike Intervenors' affidavits and the corresponding sections of Intervenors' Response, then HRI should be allowed to respond to the above-enumerated points.

## CONCLUSION

For the reasons set forth above, HRI respectfully requests that the Presiding Officer strike from the record Intervenors' Response and the affidavits filed in support thereof for having been filed late or, alternatively, that he strike from the record the affidavits and those portions of Intervenors' Response described above for improperly attempting to introduce new, unchallenged materials into this proceeding. If the Presiding Officer is unwilling to strike the improperly introduced materials, then HRI requests that HRI and NRC Staff be afforded an opportunity to respond thereto.

Respectfully submitted this 9th day of June, 1999.



---

Anthony J. Thompson  
Frederick S. Phillips  
David C. Lashway  
SHAW PITTMAN  
2300 N Street, N.W.  
Washington, D.C. 20037-1128  
Tel.: (202) 663-8000  
Fax: (202) 663-8007

ON BEHALF OF HYDRO RESOURCES, INC.  
2929 Coors Road, Suite 101  
Albuquerque, New Mexico 87120

DOCKETED  
USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'99 JUN 10 P12:52

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:  
Peter B. Bloch, Presiding Officer  
Thomas D. Murphy, Special Agent

OFFICE OF SECRETARY  
RULEMAKING AND  
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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing documents, HYDRO RESOURCES, INC.'S MOTION TO STRIKE OR, IN THE ALTERNATIVE, FOR LEAVE TO REPLY, in the above-captioned proceeding were sent to the following by overnight mail on this 9th day of June, 1999.

Administrative Judge  
Peter B. Bloch, Presiding Officer  
Atomic Safety and Licensing Board  
Two White Flint North  
11545 Rockville Pike  
U.S. Nuclear Regulatory Commission  
Rockville, Maryland 20852

Adjudicatory File  
Atomic Safety and Licensing Board  
One White Flint North  
11555 Rockville Pike  
U.S. Nuclear Regulatory Commission  
Rockville, Maryland 20852

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

Office of Commission Appellate  
Adjudication  
One White Flint North  
11555 Rockville Pike  
U.S. Nuclear Regulatory Commission  
Rockville, Maryland 20852

Administrative Judge  
Thomas D. Murphy  
Atomic Safety and Licensing Board  
11545 Rockville Pike  
U.S. Nuclear Regulatory Commission  
Rockville, Maryland 20852

Atomic Safety and Licensing Board Panel  
One White Flint North  
11555 Rockville Pike  
U.S. Nuclear Regulatory Commission  
Rockville, Maryland 20852

Jep Hill, Esq.  
Jep Hill and Associates  
816 Congress Avenue, Suite 1100  
Austin, Texas 78701

Richard F. Clement, Jr., President  
Hydro Resources, Inc.  
2929 Coors Road, Suite 101  
Albuquerque, New Mexico 87120

Mitzi Young  
John Hull  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Douglas Meikeljohn  
Johanna Matanich  
New Mexico Environmental Law Center  
1405 Luisa Street Suite 5  
Santa Fe, NM 87505

Mr. Mark Pelizza  
Vice President  
URI, Inc.  
Lockbox 12 – 12750 Merit Drive, Suite 1020  
Dallas, TX 75251

Diane Curran, Esq.  
Harmon, Curran, Spielberg & Eisenberg  
2001 S Street, N.W., Suite 430  
Washington, D.C. 20009

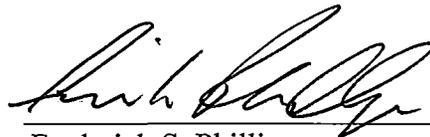
Mitchell W. Capitan, President  
Eastern Navajo-Diné Against  
Uranium Mining  
P.O. Box 471  
Crownpoint, New Mexico 87313

W. Paul Robinson  
Chris Shuey  
Southwest Research and Information Center  
P.O. Box 4524  
Albuquerque, New Mexico 87106

Marilyn Morris  
c/o Roderick Ventura  
and Samuel D. Gollis  
DNA - People's Legal Services, Inc.  
P.O. Box 306  
Window Rock, AZ 86515

Grace Sam  
c/o Roderick Ventura  
and Samuel D. Gollis  
DNA - People's Legal Services, Inc.  
P.O. Box 306  
Window Rock, AZ 86515

Administrative Judge Robin Brett  
U.S. Geological Survey  
12201 Sunrise Valley Drive  
917 National Center  
Reston, VA 20192



---

Frederick S. Phillips  
SHAW PITTMAN