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

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATION

ORIGINAL

Before Administrative Judges:  
Peter B. Bloch, Presiding Officer  
Thomas D. Murphy, Special Assistant  
Robin Brett, Special Assistant (Groundwater Issues)

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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

**HYDRO RESOURCES, INC.'S MOTION TO STRIKE  
OR IN THE ALTERNATIVE FOR LEAVE  
TO OBJECT TO ENDAUM AND SRIC REPLY TO HRI AND STAFF  
PRESENTATIONS ON GROUNDWATER ISSUES**

I. INTRODUCTION

Hydro Resources, Inc. ("HRI") respectfully submits the following motion to strike or in the alternative for leave to object to Intervenor's Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") (hereinafter "Intervenors") April 8, 1999 reply in response to HRI's and the Nuclear Regulatory Commission Staff's ("NRC Staff" or "Staff") presentations on groundwater issues (hereinafter "Reply").<sup>1</sup> See Hydro Resources, Inc.'s Response to Intervenor's Brief in Opposition to Hydro Resources, Inc.'s Application for a Materials License with Respect to Groundwater Issues (Feb. 20, 1999) ("HRI

<sup>1</sup> The Presiding Officer granted Intervenor's motion for leave to reply to HRI and the Staff presentations on groundwater issues in his Memorandum and Order (Motion to Reply and Rebut) dated March 24, 1999.

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Response”); NRC Staff’s Response to Intervenors’ Amended Presentation on Groundwater Issues (March 12, 1999) (“Staff Response”). As discussed below and in HRI’s Response, incredibly, though Intervenors have now filed more than 850 pages on the “groundwater issue,” they raise few issues addressing the subject of this proceeding<sup>2</sup> - - Churchrock Section 8 - - and fail to show that HRI’s license results in inadequate protection of public health and safety and that it is based on an inadequate consideration of environmental issues related to groundwater contamination.<sup>3</sup> More importantly however, the additional testimony proffered by Intervenors is, with *very few* exceptions, cumulative, if not merely repetitive. Such additional testimony should be stricken. In the event that the Presiding Officer is inclined to consider the proffered testimony, then HRI, as the party with the burden of defending its license, respectfully requests the opportunity to file substantive objections to the additional testimony.

## II. DISCUSSION

Intervenors’ initial complaints regarding groundwater issues resulting from HRI’s intended activities at Churchrock Section 8 addressed the following four points: (1) HRI “*misrepresented*” the hydrogeology and geochemistry of the Crownpoint Project area and its suitability for *in situ* leach (“ISL”) mining in its application (2) HRI failed to conduct hydrological testing in a proper manner, (3) the Westwater Canyon aquifer is an inappropriate

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<sup>2</sup> To the astonishment of HRI, in their reply, Intervenors continue to ignore the order of the Presiding Officer, affirmed by the Commission, and present page upon page of argument and supporting testimony regarding site specific, details of areas outside of Section 8. As HRI has requested in the past, the Presiding Officer should dismiss these arguments and testimony summarily as they are irrelevant to this stage of the proceeding. *See* September 2, 1998 Memorandum and Order at 2-3.

<sup>3</sup> The appropriate standard can be found at 10 C.F.R. § 40.32 and in the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (“NEPA”). *See also*, Hydro Resources, Inc., 40-8968-ML, Partial Initial Decision (Waste Disposal Issues) (Feb. 3, 1999).

site for ISL mining because it is a high quality source of drinking water (mostly a repeat of the first complaint); and, (4) the Final Environmental Impact Statement ("FEIS")<sup>4</sup> inadequately addresses the potential impacts of the project on groundwater. *See* Intervenors Initial Presentation at 1-2. As discussed in HRI's Response, Intervenors reached these conclusions based on incorrect assumptions regarding the nature of the Westwater aquifer, a total lack of understanding or experience<sup>5</sup> with the ISL industry and processes, sound science, and the relevant law and regulations, specifically the Safe Drinking Water Act (SDWA), Underground Injection Control (UIC) regulations, the Atomic Energy Act (AEA) and relevant portions of 10 C.F.R. Part 40, Appendix A and 10 C.F.R. Part 20. Incredibly, Intervenors ignored the fact that HRI already has an aquifer exemption for Churchrock Section 8. Because HRI currently has an aquifer exemption for Section 8, *by definition*, and contrary to Intervenors' claims, there is no "drinking water" in the mining zone because of the high concentration of naturally occurring radionuclides.<sup>6</sup> Intervenors also ignored the fact that ISL mining has been conducted on a commercial scale in the United States for over twenty years in similar geologic formations and HRI's proposed operating procedures and license conditions reflect the experience gained by the NRC, Agreement States under the AEA, states with primacy under the SDWA, HRI and other

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<sup>4</sup> NUREG-1508, Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico (February 29, 1997) ("FEIS") (Hearing Record ACN 9703200270).

<sup>5</sup> Notably, none of Intervenors' "experts have ever worked in the ISL mining industry or have any practical experience with ISL mining.

<sup>6</sup> EPA's regulations provide that an exempted aquifer is one that "does not currently serve as a source of drinking water" and "cannot now and will not in the future serve as a source of drinking water." 40 C.F.R. § 146.4. As noted by Mark Pelizza in his affidavit, the water in the Section 8 ore zone contains high levels of naturally occurring radionuclides. One way to show that the aquifer cannot now and will not in the future serve as a source of drinking water is to demonstrate that the aquifer contains commercially producible minerals. 40 C.F.R. § 146.4(b)(1).

producers during that time. Most importantly, ISL operations have generated no significant adverse public health or environmental impacts, such that Intervenors cannot point to *any* instance of actual harm to public health or the environment as a result of ISL mining generally or HRI's proposed operations.

Turning to Intervenors' Reply, here again, Intervenors offer no additional support for the premise that HRI's license will result in groundwater contamination that is inimical to public health. Intervenors' brief and supporting affidavits merely present the same arguments couched in different inflammatory rhetoric. For example, Intervenors dedicate a significant portion of their brief to challenging the qualifications of Mark S. Pelizza, Craig S. Bartels, Frank Lee Lichnovsky and Dr. Schlomo Orr. Through the filing of an objection, HRI will show that Intervenors have again failed to recognize the rule that: A witness is qualified as an expert by knowledge, skill, experience, training or education. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 732 n. 67 (1985), *citing* Fed. R. Evid. 702. Thus, HRI requests that Intervenors' Reply be stricken from the record, or in the alternative, that HRI be given the opportunity to file an objection to Intervenors' arguments regarding the qualifications of HRI's witnesses as HRI's experts have the knowledge, skill, experience, training or education to testify as to these matters.

HRI also seeks that the Presiding Officer strike, or grant HRI leave to file a objection to, Intervenors' claims that "HRI and the Staff posit new data, analysis, and arguments in their responses." Intervenors' Reply at 4. Certainly HRI asserted new arguments in their presentation as it has never had the occasion before to argue that its license should be upheld. All of the

arguments in HRI's brief were presented in direct response to Intervenors' presentation. With respect to Intervenors' argument regarding "new data and analysis," Intervenors rely on the testimony of Abitz. If given the opportunity to object, HRI will point out that because the proffered purpose of the Abitz testimony is based on a mistake of fact, the entire testimony should be disregarded. Specifically, Abitz states that the "purpose of my testimony is to reply to the new information presented in HRI's Response." Abitz goes on to state that it is misleading to say that Bison Basin was a commercial operation or that it was successfully restored. HRI will show that this issue is not new, thus not warranting further testimony by Abitz, as the Staff responded to Intervenors' previous discussion of the Bison Basin project and characterized it as a "successful restoration." Abitz merely takes issue with the characterization.

In its objection HRI will also provide evidence that Abitz's arguments that the Region VI aquifer exemptions cited in the Pelizza affidavit (Ex. 13) show that "EPA recommended closer spacing of monitor wells when private wells are near the mining area" are unfounded. As HRI stated in its presentation and as reflected in the record, there are no private wells near Section 8 at Churchrock as is the case at Kingsville Dome.

With respect to Abitz's gratuitous personal attack on Lichnovsky, the Presiding Officer should strike this testimony as unprofessional, unwarranted, and outright offensive. The "general conclusions" that Abitz takes issue with are just that – general conclusions, intended to provide background, context, and clarity on an issue that Intervenors have made overly complex and confused. As HRI would point out in its objection, the remainder of Abitz's testimony is mere reiteration of his prior testimony – a "second bite at the apple" that is unwarranted and should be

stricken.

Staub, too, states that the “purpose of my testimony is to reply to the new information presented in” HRI’s Response. Again, if HRI is given the right to file an objection, HRI would show that in fact, however, most of Mr. Staub’s testimony is devoted to rehashing the opinions he has offered previously. Data presented in the February 19, 1999 Affidavit of Mark Pelizza evaluating Texas and Wyoming reverse osmosis (“RO”) efficiencies is, indeed, “new information.” The point of Mr. Pelizza’s testimony regarding RO efficiencies is merely to evaluate the relative RO performance in water of different total dissolved solids (“TDS”) concentrations. Beyond that, Mr. Pelizza’s point here is that water will be progressively purified, in accordance with the operating efficiency of the RO unit, for each pore volume passed through the RO unit; achieving the desired water quality is simply a function of running the permeate through the RO unit a sufficient number of times. Mr. Staub fails to recognize that the information presented in Table 9 of Pelizza’s Affidavit represents water quality after a single pass through a RO unit and thus Mr. Staub’s comparison is valid only for the first pore volume. Likewise, Staub’s assertions that longer than anticipated restoration was required at Bison Basin resulted in longer-term land application, larger holding ponds, and more consumption of groundwater than originally anticipated bespeaks nothing relevant to this project. Staub makes no attempt to specify how the alleged impacts in Wyoming compare with the anticipated impacts evaluated for the CUP. Moreover, Staub has previously discussed these same restoration concerns. Staub testimony in support of Intervenors’ Presentation on Groundwater at 17-23.

Consequently, while Mr. Staub's added testimony at pages 2-8<sup>7</sup> does respond, in part, to information not presented prior to Mr. Pelizza's February 19, 1999 Affidavit, it is not relevant to the issue of whether groundwater at Section 8 can be restored; the point of Mr. Pelizza's testimony is that groundwater can be restored after ISL mining. Mr. Staub, in his added testimony (*see* p.8), agrees. Because Mr. Staub's additional testimony is either cumulative or irrelevant, it should be stricken.

Mr. Staub's discussion of the use of five standard deviations to establish excursions is purely a case of Intervenors taking another "bite at the apple." Abitz's previously offered his views on the appropriateness of employing five standard deviations as a means of establishing excursions. *See* Abitz testimony in support of Intervenors' Presentation on Groundwater at 38-39. The February 19, 1999 Pelizza Affidavit presents rebuttal to the aforementioned views of Abitz. Mr. Staub's additional testimony on this subject is nothing more than another attempt by Intervenors to elaborate on arguments already made and this testimony should be stricken.

Mr. Staub's criticism of Mr. Pelizza's statements regarding his experience at Kingsville Dome and Rosita also does not address new facts. Intervenors' Groundwater Presentation first raised the Texas projects as worthy of comparison to the proposed CUP. Again, this presents a case where Intervenors attempt to create an issue, HRI and/or Staff rebuts Intervenors' attempt, and Intervenors then claim they are entitled to try again. The facts here are not new. Notably, although Mr. Pelizza discusses both Rosita and Kingsville Dome in response to the criticisms set forth in Intervenors' Presentation, Mr. Staub elects to take a second swipe only at Mr. Pelizza's

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<sup>7</sup> Mr. Staub's testimony lacks page numbers; however, HRI has assigned sequential numbering to the pages

thoughts regarding Kingsville Dome.

Mr. Staub's criticism of Mr. Lichnovsky's statements concerning the integrity of Brushy Basin (Staub's additional testimony at 9-10) is based on no new facts and should be stricken. Mr. Staub previously addressed this issue at pages 25-28 of his first affidavit in support of Intervenors' Groundwater Presentation.

Mr. Staub's statements regarding HRI's discussion of bleed rate and well field balance (Staub additional testimony at 10-11) likewise are based on no new facts, misstate HRI's position on these issues, and consist wholly of self-serving speculation and a rather transparent attempt to modify and elaborate on Staub's opinions previously proffered at pages 28-30 of his first affidavit in support of Intervenors' Groundwater Presentation. This additional testimony should be stricken.

Finally, Mr. Staub's statements concerning monitor well spacing (Staub additional testimony at 11-12) could hardly be more cumulative. Asked to point to HRI's groundwater response for any information that "supports your view," Mr. Staub avails himself of the opportunity once more to elaborate upon testimony Intervenors have proffered previously. Allowing Intervenors to present evidence plainly cumulative of the thousands of pages they have presented before is unfair and is contrary to the intent of subpart L informal hearings. HRI asks that this testimony be stricken.

Mr. Wallace also purports to "reply to new information presented" by HRI. Reply Testimony of Michael Wallace ("Wallace Reply"), at 1. Amazingly, Mr. Wallace offers twenty

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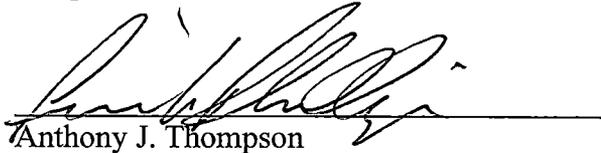
in the order in which they were presented.

pages of testimony, plus exhibits, in addition to the voluminous testimony he offered in support of Intervenor's Groundwater Presentation. Mr. Wallace does not even purport to offer his additional testimony in response to new facts. Rather, Mr. Wallace specifically responds to "HRI's new arguments" (*see* Wallace Reply at 2, 10), to "HRI's characterization" (Wallace Reply at 12), and to "HRI's new claim" (Wallace Reply at 13). Mr. Wallace's additional testimony shamelessly carries on for twenty pages trying to explain and elaborate on the erroneous theories he posited previously, enjoying the benefit of HRI having shed light on his mistakes without, presumably, any further opportunity to challenge his "expertise." Mr. Wallace's additional testimony does not address any new facts, but merely tries to correct or explain the misstatements he made last time out. This is grossly unfair to HRI and, as mentioned above, is contrary to the intended subpart L hearing process.

### III. CONCLUSION

Given infinite opportunity (and an adversary to point out your every misstep), every argument can be honed to perfection. Intervenor's previously were allowed to file their groundwater presentation and then an amended groundwater presentation to better explain the testimony submitted in support of their presentation. As discussed hereinabove, the additional testimony proffered by Intervenor's is, with *very few* exceptions, cumulative; the proverbial second bite at the apple. Such additional testimony should be stricken. In the event that the Presiding Officer is inclined to consider the proffered testimony, then HRI, as the party with the burden of defending its license, respectfully requests the opportunity to file substantive objections to the additional testimony.

Respectfully submitted this 19th day of April, 1999.



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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 OBJECT TO ENDAUM AND SRIC REPLY TO HRI AND STAFF PRESENTATIONS ON GROUNDWATER ISSUES, in the above-captioned proceeding were sent to the following by overnight mail on this 19th day of April, 1999.

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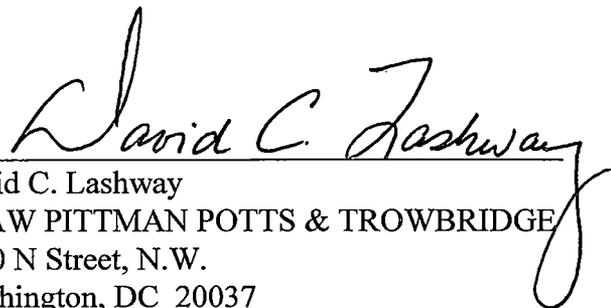
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