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March 10, 1999
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKING AND
APPLICATIONS STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

The Honorable Peter B. Bloch, Presiding Officer

_____)
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

**ENDAUM'S AND SRIC'S MOTION TO STRIKE HRI'S LETTER
ATTEMPTING TO REVISE HRI'S GROUNDWATER RESPONSE**

INTRODUCTION

Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") hereby move the Presiding Officer to strike HRI's letter, which attempts to make several substantive changes to HRI's Response to Intervenors' groundwater presentation, and attaches a revised copy of the attachments to Craig Bartels' affidavit. In submitting this letter, that provides no explanation for the attempted changes, HRI unlawfully defies the Nuclear Regulatory Commission's ("NRC's") procedural rules, which require such requests to meet formal pleading requirements and be in motion or other pleading form. This letter is an inappropriate submission, with no justification.

BACKGROUND

Thirty-seven days after receiving Intervenors' entire Groundwater Protection

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Presentation in hard-copy, including complete exhibits and affidavits, and thirty-two days after receiving an amended legal brief for that presentation, on February 20, 1999, HRI filed its response presentation.¹ Hydro Resources, Inc.'s Response to Intervenors' Brief in Opposition to Hydro Resources, Inc.'s Application for a Materials License with Respect to Groundwater Issues (February 20, 1999) ("HRI Response"). On either Friday, February 26, 1999, or Sunday, March 1, 1999, HRI submitted a letter to the Presiding

¹ On January 12, 1999, Intervenors filed Intervenors Written Presentation in Opposition to Hydro Resources, Inc.'s Application for a Materials License with respect to: Groundwater Protection ("Groundwater Protection Presentation"). In the electronic message that accompanied the filing, counsel for Intervenors indicated that,

It was impossible to adequately address in this brief, all of the issues raised the ground water experts in their testimony. We do intend to seek leave to file an amended brief that better organizes and clarifies these issues on Friday, January 15, 1999.

The next day, the entire presentation was delivered in hard copy to the parties by personal courier and federal express. Corrected Certificate of Service for Three Written Presentations filed by ENDAUM and SRIC in January, 1999 (January 27, 1999). Also on January 13, 1999, Intervenors filed their Motion for Leave to File Amended Groundwater Brief, which explained that Intervenors sought more time to submit a legal brief that "would add discussion of some issues raised by the expert witnesses and clarify existing arguments, thus providing an improved guide to the numerous exhibits included in this presentation." Intervenors' Motion for Leave to File Amended Groundwater Brief at 2 (January 13, 1999). On January 18, 1999, Intervenors filed an amended legal brief to the Groundwater Protection Presentation. Intervenors Amended Written Presentation in Opposition to Hydro Resources, Inc.'s Application for a Materials License with Respect to: Groundwater Protection, Volume I, Legal Brief (January 18, 1999). On January 21, 1999, in an electronic message, the Presiding Officer granted Intervenors' motion to file an amended groundwater brief. Schedule Amendment (January 21, 1999).

HRI sought, and obtained, a revised schedule that allowed HRI to file its entire response presentation on February 19, 1999, rather than February 11, 1999. Hydro Resources, Inc.'s Request for Scheduling Clarification at 1 (February 3, 1999); Memorandum and Order (Procedural Issues) at 2 (February 4, 1999).

Officer.² Letter from David Lashway, counsel for HRI, to Administrative Judge Peter B. Bloch ("HRI letter"). Submitted a week after the response was filed, and without explanation, the HRI letter expresses HRI's desire to make four changes to the legal brief, two changes to Lichnovsky's affidavit, and 13 changes to Bartels' affidavit, and submits a revised copy of the attachments to Bartels' affidavit.

ARGUMENT

I. HRI'S LETTER IGNORES AND VIOLATES NRC PROCEDURES FOR THE SUBMISSION OF DOCUMENTS AND SHOULD BE STRICKEN.

A document filed in this proceeding must comply with the formal requirements in 10 C.F.R. § 2.708.

A document which fails to conform with the requirements of § 2.708 may be refused acceptance for filing and may be returned with an indication of the reason for nonacceptance. Any matter so tendered but not accepted for filing shall not be entered on the Commission's docket.

10 C.F.R. § 2.709. HRI's letter is a document requesting relief from the Presiding Officer, and should, therefore, comply with the formal document requirements and be in the form of a motion. Motions must "state with particularity the grounds and the relief sought, and shall be accompanied by any affidavits or other evidence relied on." 10 C.F.R. § 2.730(b).

HRI's letter purports to make numerous substantive changes to the HRI Response.

² The first page of the letter is dated February 26, 1999, while the other two pages are dated March 1, 1999. Presumably, the Presiding Officer received this letter on March 2, 1999, when the Intervenor received the letter without attachments by electronic mail.

Despite being prepared by experienced counsel, it fails to follow the formal requirements for pleadings, and it fails to provide either the grounds for requesting these substantive changes or supporting affidavits, as required in motion practice. Such conduct by experienced counsel is surprising and appalling; the letter appears to be relying solely on the good graces of the Presiding Officer.³

The HRI letter attempts to make several substantive changes to HRI's legal brief, the Lichnovsky affidavit, and the Bartels affidavit and attachments. The HRI letter also attempts to make several clerical corrections, which properly belong in a notice of errata.⁴

The original attachments to Bartels' affidavit were lettered A-Q. The revised attachments to Bartels' affidavit are lettered A-R, containing a new Exhibit K. Most of Exhibit K was contained in some form in Exhibit L in the original, but the four pages marked K:C.5, K:D.2, K:E.2, K:E.3 appear to be entirely new. The rest of the exhibits L-

³ HRI also sent this letter in a manner that ensured the Presiding Officer would receive the materials before the Intervenor. The Presiding Officer was served by Federal Express, which presumably arrived on March 2, 1999. The attachments were sent to Intervenor by first class mail. Diane Curran, counsel for ENDAUM and SRIC received the attachments on March 3, 1999. The New Mexico Environmental Law Center, also counsel for ENDAUM and SRIC, received the attachments on March 5, 1999.

⁴ Counsel for ENDAUM and SRIC has informed HRI that they do not object to a notice of errata listing the clerical errors listed in the letter. Telephone calls between Johanna Matanich, counsel for ENDAUM and SRIC and Frederick Phillips and David Lashway, counsel for HRI, March 8, 1999. Specifically, ENDAUM and SRIC do not object to a notice of errata for corrections 2 and 3 in the legal brief, correction 2 in the Lichnovsky affidavit, and corrections 7 and 8 in the Bartels affidavit. Corrections 12 and 13 contain both a clerical error and substantive changes. ENDAUM and SRIC do not object to a notice of errata that changes "Table 4" to "Table 7" in those corrections, but object to the other attempted changes.

R are contained in some form in the original attachments, but the order and content of each is not a duplicate of the previous attachments.⁵ For example, the revised Exhibit N appears to contain portions of the former Exhibit O. These are all substantive changes affecting the import and meaning of Bartels' testimony. HRI does not provide an explanation why this information was not properly submitted on February 20, 1999, nor does it provide an affidavit from Craig Bartels stating why he wishes to make these changes or explain how his testimony is now to be interpreted with half of the exhibit numbers revised.

The HRI letter contains two substantive changes to the legal brief, again without any explanation. Correction 1 carefully hedges HRI's representation of the Westwater canyon, a matter which has been in dispute. HRI Letter at 1. *See also* HRI Response, legal brief at 2-5; Intervenors' Groundwater Protection Presentation at 17-19. Correction 4 revises the entire meaning of a sentence in the brief. HRI Letter at 4.

The HRI letter attempts a substantive change to the Lichnovsky affidavit. Correction 1 adds an additional citation to the affidavit. This change is attempted without any explanation why it was not included in the first place and without an affidavit from Lichnovsky supporting this change.

In the HRI letter, eleven substantive changes to the Bartels affidavit are attempted. Each of these, Corrections 1, 2, 3, 4, 5, 6, 9, 10, 11, 12, 13 either adds additional text or

⁵ The flourish of explanatory titles has also been added to each exhibit page, without explanation for change or a reason for the delay.

references or revises the text to change the meaning of the testimony. Bartels does not provide an affidavit explaining the delay or supporting these changes to his affidavit.

Because none of the changes in the HRI letter and the revised Bartels affidavit attachments are proposed in a document that meets the formal pleading requirements of the NRC, nor in the form of a motion with the necessary supporting documentation, the HRI letter must be stricken in accordance with 10 C.F.R. § 2.709.

II. IT IS UNFAIR AND PREJUDICIAL TO INTERVENORS TO ALLOW SUBSTANTIVE CHANGES TO HRI'S GROUNDWATER PRESENTATION.

The HRI letter provides no explanation nor justification for making substantive revisions to its groundwater response. It is no wonder, since any such explanation would be riddled with hypocrisy. HRI has repeatedly resisted changes in the presentation schedule and mocked the Intervenor's concerns about the schedule. *See* HRI Opposition to Intervenor's Joint Motion for Reconsideration of Presiding Officer's Memorandum and Order of September 22, 1998 at 6 (October 6, 1998) ("Lawyers and experts having very busy schedules is hardly a phenomenon unique to this proceeding and is not cause for delaying this hearing.") at 7 ("HRI respectfully submits that Intervenor have had at least a year to retain experts; their failure to do so should not be allowed to inure to the HRI's extreme detriment.") at 8 ("With all due respect, Intervenor's hand-wringing [about lack of resources] should not warrant sympathy and does not warrant further delays in this proceeding."). *See also* Hydro Resources, Inc.'s Motion for Reconsideration of the


Presiding Officer's Order Extending the Filing Deadline for Intervenor's Final Brief to March 5, 1999 (January 25, 1999) at 3 ("Intervenor's repeated complaints and hand-wringing about how busy they and their consultants are and how difficult it is to prepare 'careful, detailed and clear filings,' . . . do not establish good cause for further delaying this proceeding.") at 5 ("Intervenor. . . should not now be allowed, to HRI's significant prejudice, to further drag out this proceeding because they are unable or unwilling to comply with the schedule imposed by the Presiding Officer. Extending these deadlines because Intervenor repeatedly fail to make time to bring their case is grossly unfair to HRI and deprives HRI of its right to have this matter decided in a reasonably expeditious manner."). It is hard to imagine any excuse HRI could come up with, that it has not already disdained.

Moreover, HRI had more time to prepare its groundwater response than the Intervenor had to prepare the Groundwater Presentation. Intervenor had from only December 10, 1998 to January 11, 1999 to prepare its presentation, a time period which included the winter holidays. HRI had the entire set of Intervenor's expert testimony and exhibits in hand from January 13, 1999 to February 20, 1999. When an amended legal brief for the presentation, which did not revise the testimony or exhibits in any way, was filed, HRI asked for and received an extension. *See note 1 supra.* To allow HRI to subsequently make substantive revisions to its response is absolutely unfair and without justification.

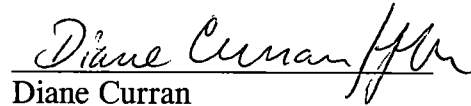
CONCLUSION

For the foregoing reasons, ENDAUM and SRIC request the Presiding Officer strike HRI's letter and the attached revised copy of Craig Bartels' affidavit.

Respectfully Submitted,



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Before Administrative Judge Peter B. Bloch, Presiding Officer

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2929 Coors Road)	
Suite 101)	ASLBP No. 95-706-01-ML
Albuquerque, NM 87120)	
)	

CERTIFICATE OF SERVICE

I hereby certify that:
On March 10, 1999, I caused to be served copies of the following:

ENDAUM'S AND SRIC'S MOTION TO STRIKE HRI'S LETTER ATTEMPTING TO REVISE HRI'S GROUNDWATER RESPONSE

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:

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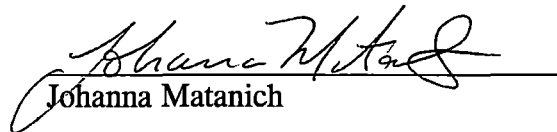
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Dated at Santa Fe, New Mexico,
March 10, 1999,


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