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March 5, 1999

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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)	)	
	)	

**ENDAUM'S AND SRIC'S MOTION FOR LEAVE  
TO SUBMIT REPLY BRIEF AND REBUTTAL TESTIMONY  
IN RESPONSE TO HRI'S RESPONSE PRESENTATION ON  
GROUNDWATER PROTECTION ISSUES**

**INTRODUCTION**

Pursuant to 10 C.F.R. § 2.1233(d), Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") hereby move for leave to reply to the initial presentation filed by Hydro Resources, Inc. ("HRI") regarding groundwater protection at the proposed Crownpoint Project.<sup>1</sup>

<sup>1</sup>ENDAUM and SRIC submit that this motion is timely, because it is being filed within ten days of receipt of the complete written presentation by HRI. Although HRI filed electronic copies of its presentation and supporting testimony on February 20, 1999, the electronic filing did not contain all of the attachments to the filing, including a table and a statement of the witness's qualifications. The complete filing was not received by counsel until February 24, 1999. Further, on March, 1, 1999, ENDAUM and SRIC received an electronic copy of HRI's letter request to revise its written presentation, including expert testimony, without the attachments, which arrived today.

U.S. NUCLEAR REGULATORY COMMISSION  
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## **FACTUAL BACKGROUND**

On January 12, 1999, Intervenors' served their initial presentation on groundwater issues via e-mail and overnight delivery by personal courier. Intervenors Written Presentation in Opposition to Hydro Resources, Inc.'s Application for a Materials License with Respect to: Groundwater Protection ("Intervenors' Groundwater Presentation"). Corrected Certificate of Service (January 27, 1999). The presentation included expert testimony from Dr. William P. Staub, Dr. Richard Abitz, and Mr. Michael G. Wallace. Intervenors' Groundwater Presentation, Exhibits 1, 2, and 3. On January 18, 1999, with leave from the Presiding Officer, Intervenors filed an amended legal brief for the groundwater presentation. On February 20, 1999, HRI filed 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 ("HRI Response"). This presentation is primarily supported by affidavits from HRI employees Mark S. Pelizza, Craig Bartels, and Frank Lee Lichnovsky. Affidavits are also provided by Dr. Shlomo Orr, Dan W. McCarn, Maryann Wasiolek and Michael P. Spinks, and Steve Reed.

## **ARGUMENT**

### **I. STANDARD FOR REBUTTAL PRESENTATIONS.**

The NRC's Subpart L regulations generally provide that after a party has filed its initial written presentation, leave must be obtained to file any further presentations,

subject to the discretion of the Presiding Officer. 10 C.F.R. § 2.1233(d). In the context of formal adjudications, the Appeal Board has held that the Presiding Officer's discretion is subject to the limited "right" to present rebuttal testimony where it is needed for "full and true disclosure of the facts." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-787, 20 NRC 1097, 1178 (1984) (upholding Licensing Board's decision to require parties to conduct cross-examination, redirect examination, and re-cross examination in depositions, with deposition transcripts to be filed in lieu of testimony). The requirement to base a decision on a complete and accurate record is no less vital for this proceeding. The opportunity to file reply presentations is also required in order to ensure that the burden of proof is properly allocated to HRI on health and safety issues and to HRI and the Staff on environmental issues.<sup>2</sup> An opportunity for reply briefs and rebuttal testimony should be provided.

**II.. ENDAUM AND SRIC SHOULD BE GRANTED LEAVE TO FILE A REPLY PRESENTATION TO ADDRESS THE FACTUAL ERRORS IN HRI'S INITIAL PRESENTATION AND TO RESPOND TO ADDITIONAL INFORMATION.**

ENDAUM and SRIC seek leave to reply to a number of factual claims which are unsupported, misleading, or rely on new information not previously disclosed in this record. ENDAUM and SRIC also seek leave to response to HRI's complaints regarding the qualifications of their experts.

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<sup>2</sup> See *Louisiana Energy Services* (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331 (1996) for a discussion of the allocation of the burden of proof.

ENDAUM and SRIC seek an opportunity to respond to the numerous material factual assertions made for the first time in HRI's presentation. This opportunity is needed to correct the unfairness of requiring Intervenors to prepare presentations based on an incomplete hearing record.<sup>3</sup> For instance, in Table 9 of Mark Pelizza's affidavit, new information is provided on the water quality of the reverse osmosis contaminated water input and reverse osmosis permeate output during restoration of well-fields at Rosita Texas, and North Platte, Wyoming. Pelizza Affidavit at 72. The permeate output water quality appears to be quite dirty, with radium levels of 43 pci/L at North Platte. This information is of great concern, since HRI states elsewhere that it's permeate is "clean" and it will reinject permeate into the clean water outside the monitor well ring. HRI Response Brief at 14-15.

Also, HRI now claims that the bleed rate is not as important as well-field balance, which they will monitor and adjust each day. HRI Response Brief at 14. Dr. Staub had previously questioned HRI's ability to balance wellfields, and this is an issue that goes back to the overall qualifications and training of HRI. See Intervenors Groundwater Presentation, Ex. 2 Staub Testimony at 29-30. Since HRI has abandoned the bleed rate as its primary explanation for well-field control, Intervenors should have a right to respond

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<sup>3</sup> The Board has held that it would not be fair for an Intervenor to file written presentations setting forth all of their concerns without access to the hearing file. *Sequoyah Fuels Corporation* (Source Material License No. SUB-1010), LBP 94-39, 40 NRC 314 (1994). Likewise, it would not be fair for an Intervenor to have to complete its written presentations before information omitted by the Staff from the hearing file is presented.

and further evaluate HRI's ability to maintain well-field control, even under emergency circumstances.

For the first time, HRI provided its temporary aquifer exemptions for the URI sites. Pelizza Affidavit, Exhibit 13. In these other exemptions, the Environmental Protection Agency ("EPA") has directed that monitor wells be spaced closer together when private wells are near the mining area. Id. This is new information which supports the argument of Intervenor's experts that monitor wells should be placed closer together. Intervenor's Groundwater Presentation Brief at 36-43.

ENDAUM and SRIC also seek an opportunity to address numerous aspects of HRI's brief and affidavits which misrepresent or distort facts. For example, HRI represents that Dr. Shlomo Neuman "did not disagree with the Staff's conclusions regarding the potential for excursions at the site, that he stated that he did not find anything in the FEIS that would disqualify the site from ISL mining, and that "it was his 'gut feeling' that HRI's proposed ISL operation was safe." HRI Response, Brief at 4-5. HRI distorts these statements by attributing them to Dr. Neuman, when in fact they are from a Staff memo which Dr. Neuman had nothing to do with. See Intervenor's Groundwater Presentation Exhibit 3-H at 2. In recent correspondence with Michael Wallace, Dr. Neuman states that the Staff memo misrepresents his opinions,

Any statement or statements made by the NRC concerning opinions that I have allegedly voiced during [the March 19, 1998] teleconference are those of the agency, not mine. I have never been given a chance to review and/or comment on such statements. . .In particular, an NRC memo by

Joseph J. Holonich, Chief of the Uranium Recovery Branch, addressed to Peter B. Bloch, Presiding Officer of the Atomic Safety and Licensing Board, dated April 20, 1998, misrepresents my association with the NRC and my opinions about the site.

Electronic Letter from Shlomo P. Neuman to Michael Wallace ¶¶8, 9 (March 3, 1999) a copy of which is attached hereto as Exhibit 1. HRI's reliance on the Staff's memo about Dr. Neuman distorts the truth and Intervenors should have a chance to reply to clarify this matter.

In addition, HRI asserts that it has a valid temporary aquifer designation for Section 8. HRI Response Brief at 25. HRI does not disclose, however, that this temporary aquifer designation was issued by the State of New Mexico and approved by U.S. Environmental Protection Agency ("EPA") Region 6. EPA Region 9 has since determined that it has regulatory jurisdiction over Section 8, on behalf of the Navajo Nation, and revoked HRI's state-issued UIC permit. See Intervenors' Groundwater Presentation Exhibit 8. HRI has therefore, misrepresented that it has a valid aquifer exemption for Section 8, when in fact the State of New Mexico did not have jurisdiction to issue the exemption in the first place, and HRI must instead comply with EPA's federal Navajo UIC program.

Further, Mark Pelizza's affidavit presents Table 9 as evidence that it is easier to restore high quality aquifers than the poor quality aquifers in Texas. Pelizza Affidavit at 72. Mr. Pelizza represents his finding that reverse osmosis is more efficient when the input is high in quality, as support, but this point was never in dispute. The proper

comparison is between permeate output with baseline water quality data in the aquifer being restored, a comparison which Mr. Pelizza did not perform. Intervenors should be allowed to present rebuttal testimony on this point, which is particularly important in relation to HRI's calculation of the time required for restoration.

HRI questions the qualifications of the Intervenors' expert witnesses. Intervenors should be allowed to respond and address exactly why Dr. Staub, Dr. Abitz and Mr. Wallace are in fact qualified experts. The ISL industry is based on the scientific principles of hydrology, geology and chemistry. Intervenors' experts are more than qualified by experience and education in those areas.<sup>4</sup> See Exhibits 1-A, 2-A and 3-A. HRI's charge that because these experts have not operated an ISL mine, they should not be qualified is absurd. See HRI Response Brief at 6-7, Pelizza Affidavit. If that were true, neither the Staff nor the Presiding Officer would not be qualified to review HRI's application.

Intervenors should be given the opportunity to respond to the numerous specific and highly technical arguments by HRI regarding the reasonableness of Dr. Staub, Dr. Abitz and Mr. Wallace's assumptions and methods, and the erroneous characterization of the manner in which they performed their analyses. Rebuttal testimony is necessary to

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<sup>4</sup> On the whole, HRI's experts are less educated. Craig Bartels holds only a Bachelor of Science in petroleum engineering. Bartels Affidavit at 1 (the resume he claims is attached as Exhibit A to his testimony was omitted). Frank Lee Lichnovsky also omits his resume, but states he holds a Bachelors of Science in Geology. Lichnovsky Affidavit at 1. McCarn only has a Bachelor of Science in Geology. McCarn Affidavit at 1.



form a complete record on the numerous technical issues raised in the initial presentations in this case. For instance, HRI repeatedly attempts to call into question the sand channel and pipeline concepts used by Intervenor's experts by blowing the context, in which the concepts are used, completely out of proportion. See HRI Response Brief at 5-7, Bartels Affidavit. Pipelines were used as the worst-case scenario by Intervenor's experts, which is necessary when there is little data available on which to base a model. While HRI's experts analyze the available data with all the confidence of the captain of the *Titanic*, Intervenor's experts properly studied the most conservative scenario. Intervenor has never stated there are independent pipelines that restrict flow indefinitely. The pipeline was a conservatively-based concept because even some mud can isolate the flow for a length of time, even in the case of interlocking fans of sand. Rebuttal testimony is necessary to clarify the proper factual assumptions and analyses required for this issue and others, including pump testing, and groundwater flow.


## **CONCLUSION**

ENDAUM and SRIC should be allowed to respond to HRI's specific attacks on the factual assertions of Intervenor's groundwater experts. To do otherwise would result in an incomplete record that is insufficient to allow a meaningful decision on the adequacy of HRI's application. Such a result is unfair, and would effectively place the burden of proof on the Intervenor. For the foregoing reasons, ENDAUM's and SRIC's Motion for Leave to Reply should be granted. In consideration of the novelty of the legal

issues, the complexity of the technical issues involved, and the need to prepare expert rebuttal testimony along with a brief, ENDAUM and SRIC request that they be given a period of twenty days, from the Presiding Officer's order granting this motion, to submit their reply presentation.

Respectfully submitted,

  
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Douglas Meiklejohn  
Lila Bird  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD PANEL  
ADJUDICATION STAFF

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 5, 1999, I caused to be served copies of the following:

**ENDAUM'S AND SRIC'S MOTION FOR LEAVE TO SUBMIT REPLY BRIEF  
AND REBUTTAL TESTIMONY IN RESPONSE TO HRI'S RESPONSE  
PRESENTATION ON GROUNDWATER PROTECTION ISSUES**

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:

Office of the Secretary\*  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
Attn: Rulemakings and Adjudications  
Staff

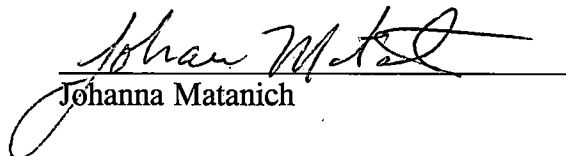
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Washington D.C. 20555

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Attorney for Hydro Resources, Inc.  
Jep Hill & Associates  
P.O. Box 2254  
Austin, TX 78768

Dated at Santa Fe, New Mexico,  
March 5, 1999,

  
\_\_\_\_\_  
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[Fwd: FYI, with regard to a charac...rs of your opinion on an ISL mine]

**Subject: [Fwd: FYI, with regard to a characterization by NRC and others of your opinion on an ISL mine]**

**Date:** Wed, 03 Mar 1999 19:57:13 -0700

**From:** michael wallace <mwallace@thuntek.net>

**Reply-To:** mgw@anacrolith.com

**Organization:** michael wallace

**To:** "nmelc@nets.com" <nmelc@nets.com>, SRIC <srlic@igc.org>

please forward this important email to Johanna Matanich and Chris Shuey respectively at the earliest possible opportunity.  
thank you,  
Mike Wallace

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**Subject: Re: FYI, with regard to a characterization by NRC and others of your opinion on an ISL mine**

**Date:** Wed, 3 Mar 1999 12:10:15 -0700

**From:** "Shlom P. Neuman" <neuman@hwr.arizona.edu>

**To:** <mgw@anacrolith.com>

**CC:** "Tom Nicholson" <tjn@nrc.gov>

Dear Michael:

It was good to hear from you, and I want to thank you for your candid note regarding the uranium ISL licensing issues associated with HRI's intentions in New Mexico's San Juan Basin, and the lingering controversy regarding my position on these issues.

Allow me to clarify some points regarding my "position" on these issues:

1. I have never formulated either a formal or an informal position regarding the above site or issues.
2. In the context of a generic research project on conceptual hydrogeologic models, on which I am working under the auspices of the US Nuclear Regulatory Commission (NRC), I reviewed NUREG-1508 titled Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico. The purpose of my review was merely to use this case as an example of a hydrogeologic framework, and its conceptual modeling, by the NRC.
3. My opinion about the manner in which hydrogeology at the site is conceptualized in NUREG- 1508 is summarized in overheads I presented to the NRC staff at the agency's headquarters in Rockville, MD, on January 29, 1998. My opinion is amplified in an internal letter report I submitted to the NRC, concerning my research for the agency, at about the same time.
4. In preparing my opinion, I was completely unaware of any controversy or litigation concerning the site.
5. To date, I have not reviewed any additional material concerning the site.
6. Based on the information in NUREG-1508, I stand behind every statement that I made in my talk to the NRC staff on January 29, 1998, concerning the site.
7. On march 19, 1998, I participated in a teleconference concerning my above opinion about the hydrogeologic conceptual framework for the site with NRC staff. This teleconference has not changed my opinion about hydrogeologic conceptualization of the site in any way.
8. Any statement or statements made by the NRC concerning opinions that I allegedly voiced during this teleconference are those of the agency, not mine. I have never been given a chance to review and/or comment on such statements.
9. In particular, an NRC memo by Joseph J. Holonich, Chief of the Uranium Recovery Branch, addressed to Peter B. Bloch, Presiding Officer of the Atomic Safety and Licensing Board, dated April 20, 1998, misrepresents my association with the NRC and my opinions about the site.

**EXHIBIT**

tabbles

3/4/99 12:53 PM

[Fwd: FYI, with regard to a charac...rs of your opinion on an ISL mine]

Feel free to bring these points to the attention of anyone concerned with this matter.

Best regards,

Shlomo Neuman