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September 27, 1999

USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'99 SEP 28 P3:56

BEFORE THE PRESIDING OFFICER

OFFICE OF THE  
PRESIDENTIAL  
ADJUTANT

In the Matter of )  
 ) Docket No. 40-8968-ML  
HYDRO RESOURCES, INC. )  
P.O. Box 15910 ) Re: Leach Mining and Milling License  
Rio Rancho, New Mexico 87120 )

NRC STAFF RESPONSE TO MOTION FOR  
SUSPENSION, ALTERNATIVE RELIEF AND ATTORNEYS FEES

I. INTRODUCTION

On August 20, 1999, the Presiding Officer issued LBP-99-30, 50 NRC \_\_\_\_, slip op. at 2 (August 20, 1999), a partial initial decision affirming the validity of the 10 C.F.R. Part 40 license issued to Hydro Resources, Inc. (HRI) with respect to mining its Church Rock Section 8 property in New Mexico.

On August 26, 1999, Hydro Resources, Inc., (HRI or Licensee) moved to suspend, or in the alternative, reprimand or censure Intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC) and their counsel Douglas Meikeljohn, Johanna Matanich, Lila Bird, and Diane Curran from further participation in the above-captioned proceeding based on their alleged disruptive, contemptuous and borderline libelous conduct during the proceeding. Motion for Suspension or, In the Alternative, Reprimand Or Censure and Request for Attorneys Fees, dated August 26, 1999 (Motion). HRI further asked that it be awarded attorneys fees "equal to HRI's costs in bringing [the Motion] and defending against Intervenors' frivolous claims

which are contained in [Intervenors'] more than 9,000 pages of pleadings filed in this proceeding." Motion at 1-2.

For the reasons set forth below, the Staff opposes the Motion.

## II. BACKGROUND

This proceeding concerns the application of HRI to construct and operate an *in situ* leach uranium mining project at Church Rock Sections 8 and 17, Crownpoint and Unit 1, located in McKinley County, New Mexico. LBP-98-9, 47 NRC 261, 264 (1998). The development and operation of HRI's facilities are scheduled to occur incrementally (well field by well field) over a twenty-year period and are expected to begin at Section 8 at Church Rock inasmuch as the license prohibits HRI from injecting lixiviant at either Unit 1 or Crownpoint prior to successfully demonstrating groundwater restoration at Church Rock Section 8. See *Hydro Resources, Inc.* CLI-98-8, 47 NRC 314, 318-19 (1998) (petition for interlocutory review denied, temporary stay lifted and stay denied). An HRI motion requesting that the proceeding be bifurcated to consider Church Rock Section 8 (consistent with the well field by well field progression of in-situ leach mining projects and judicial economy) was granted, in part, on September 22, 1998, and written presentations have been filed. See HRI's Request for Partial Clarification or Reconsideration of Presiding Officer's Memorandum and Order of May 13, 1998; Request for Bifurcation of the Proceeding, dated June 4, 1998, at 2-11; Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation), dated September 22, 1998 (unpublished) (September 22 Order), at 2-3, *petition for review denied*, CLI-98-22, 48 NRC 215 (1998).

The Presiding Officer rejected each of their ten in decisions that declined Intervenor's requests that the HRI license be revoked.<sup>1</sup> Intervenor has filed petitions seeking Commission review of each partial initial decision.<sup>2</sup>

On August 26, 1999, HRI requested that Intervenor EDAUM and SRIC, and their counsel, be suspended from the proceeding (or alternatively, reprimanded or censured) and that HRI be reimbursed for costs incurred in litigation to date. *See* Motion at 1-2. As grounds for the Motion, HRI cites the "9,000 pages" of documents filed by EDAUM and SRIC, including "needlessly duplicative testimony of purported experts," the "endless procedural motions, . . . needless, premature appeals to the Commission," and the "series of premature petitions seeking review of the Presiding Officer's partial initial decisions

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<sup>1</sup> *See* LBP-99-1, 49 NRC 29 (1999) (liquid waste disposal issues); LBP-99-9, 49 NRC 136 (1999) (National Historic Preservation Act and Native American Graves Protection and Repatriation Act issues); LBP-99-10, 49 NRC 145 (1999) (performance based licensing issues); LBP-99-13, 49 NRC 233 (March 30, 1999) (financial assurance issues); LBP-99-18, 49 NRC 415 (May 11, 1999) (technical qualifications issues); LBP-99-19, 49 NRC 421 (May 13, 1999) (radioactive air emissions issues); LBP-99-30, 50 NRC \_\_\_\_ (August 20, 1999) (Partial Initial Decision Concluding Phase I (ground water, cumulative impacts NEPA [National Environmental Policy Act] and environmental justice issues) (August 20, 1999).

<sup>2</sup> *See* Intervenor's Petition for Review of Presiding Officer's Partial Initial Decision (Waste Disposal Issues), dated February 22, 1999 (LBP-99-1); Intervenor's Petition for Review of Presiding Officer's Partial Initial Decision LBP-99-9, dated March 11, 1999 (cultural resources issues); Intervenor's Petition for Review of Presiding Officer's Partial Initial Decision (Performance Based Licensing, dated March 11, 1999 (LBP-99-10); Intervenor's Petition for Review of Presiding Officer's Partial Initial Decision on LBP-99-13, Financial Assurance for Decommissioning, dated March 30, 1999; Intervenor's Petition for Review of Partial Initial Decisions LBP-99-18, LBP-99-19, and LBP-99-30 (September 3, 1999). Even though LBP-99-30 affirms the validity of the license granted to HRI to mine at its Church Rock Section 8 property, the Presiding Officer declined to address whether mining Church Rock Section 8 before Section 17 warranted supplementation of the Final Environmental Impact Statement until the litigation of Section 17 issues. LBP-99-30, slip op. at 2, 77, 63-64.



before the United States Court of Appeals." Motion at 3. HRI also contends that Intervenor's counsel "have engaged in blatantly improper conduct by impugning the integrity of the Presiding Officer in the press and by testifying before the Commission about this matter, in utter disregard of a Commission order prohibiting such testimony." *Id.* at 3. HRI claims that its costs in applying for and defending the license amount to almost 10 million dollars. *Id.* 3 n.3.<sup>3</sup>

Intervenors argue (1) that the Motion "is a blatant effort to harass the Intervenor and their counsel and to intimidate the Presiding Officer and the Commission,"<sup>4</sup> (2) that the Motion is based on unsupported allegations of disruption and prejudice, (3) that the sanctions provided by the NRC are not applicable, (4) that the Presiding Officer lacks jurisdiction over the issues raised due to the completion of Phase I of the proceeding and the filing of an appeal, and (5) that, if the Presiding Officer has jurisdiction and the authority to award costs and attorneys' fees, Intervenor should be awarded costs and attorneys' fees incurred in responding to the Motion. ENDUAM's and SRIC's Response to HRI's Motion for Sanctions, dated September 20, 1999 (Opposition), at 1-3, 4-10.

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<sup>3</sup> HRI has also filed a "Motion to Place Hearing in Abeyance," dated September 14, 1999, asking the Presiding Officer to hold litigation of concerns related to HRI's planned operations at Section 17, Crownpoint and/Unit 1 in abeyance until HRI gives 30 days notice of its intent to commence operations at those sites.

<sup>4</sup> Intervenor note that copies of the Motion were sent to the Chairman of the Commission, two United States Senators, and the House Majority Leader. Opposition at 2 n. 2.



The Staff opposes the motion inasmuch as HRI has not carried its burden<sup>5</sup> of showing that the conduct identified justifies the imposition of the requested sanctions and has not shown that the Presiding Officer has the authority to award HRI attorneys' fees and costs.<sup>6</sup>

### III. DISCUSSION

#### A. Standards for Conduct in NRC Proceedings and Powers of Presiding Officers

A presiding officer (1) has "the duty to conduct a fair and impartial hearing, to take appropriate action to avoid delay, and to maintain order" and (2) has all the powers necessary to achieve those ends, including the power "to regulate the course of the proceeding and the conduct of the participants." 10 C.F.R. § 2.718.

The conduct of attorneys in NRC proceedings is governed by 10 C.F.R. § 2.713, which includes provisions for reprimand, censure<sup>7</sup> or suspension from the proceeding, for any party or party representative who refuses to comply with the directions of the presiding

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<sup>5</sup> A movant has the burden of proof to show that the motion should be granted unless the presiding officer orders otherwise. 10 C.F.R. § 2.1237(b).

<sup>6</sup> The Atomic Energy Act, as amended, 42 U.S.C. § 2011 *et seq.*, does not provide for payment of attorneys' fees in licensing proceedings. The Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. § 504, which is not applicable here, authorizes the NRC to pay attorney's fees and expenses from its appropriated funds to a licensee when the NRC does not prevail in an enforcement action. *E.g., Advanced Medical Systems, Inc.*, LBP-89-11, 29 NRC 306, 311-13 (1989).

<sup>7</sup> "Censure, public or private, is generally a more appropriate remedy for an isolated instance of misconduct than suspension." Final Rule: Changes in Rules of Practice Governing Discipline in Adjudicatory Proceeding, 45 Fed. Reg. 69877 (October 22, 1980). In issuing the rule the Commission indicated that the right to appeal any sanction imposed pursuant to 10 C.F.R. § 2.713 was desirable because an administratively unappealable sanction could result in an individual having an irrevocable and possibly unjustified "black mark" that could affect bar admission. 45 Fed. Reg. 69878.

officer, or who engages in disorderly, disruptive and contemptuous conduct.<sup>8</sup> For example, describing the NRC Staff as being "totally incapable of making [a safety determination] in a sensible fashion" constitutes "'intemperate, even disrespectful, rhetoric' . . . [that] is wholly inappropriate in legal pleadings." *Curators of the University of Missouri*, CLI-95-17, 42 NRC 229, 232-33 n.1 (1995), citing, *inter alia*, 10 C.F.R. § 2.713(a), (c)(1); *University of Missouri*, CLI-95-8, 41 NRC 386, 392 (1995); *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 837-38 (1974); American Bar Association's *Model Code of Professional Responsibility* ("Model Code"); DR 7-101(A)(1), found in *ABA/BNA Lawyers' Manual on Professional Conduct* ("Manual") at p. 01:338 (1995).

General guidelines for the conduct of parties in NRC proceedings are set forth in the *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981). There, the Commission stated:

When a participant fails to meet its obligations, a board should consider the imposition of sanctions against the offending party. A spectrum of sanctions from minor to severe is available to the boards to assist in the management of proceedings. For example, the boards could warn the offending party that such conduct will not be tolerated in the future, refuse to consider a filing by the offending party, deny the right to cross-examine or present evidence,

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<sup>8</sup> 10 C.F.R. § 2.713(a)(1) states:

(c) *Reprimand, censure or suspension from the proceeding.* (1) A presiding officer or the Commission may, if necessary for the orderly conduct of a proceeding, reprimand, censure or suspend from participation in the particular proceeding before it any party or representative of a party who shall refuse to comply with its directions, or who shall be guilty of disorderly, disruptive, or contemptuous conduct.

(Emphasis in original).

dismiss one or more of the party's contentions, *impose appropriate sanctions on counsel for a party, or, in severe cases, dismiss the party from the proceeding*. In selecting a sanction, boards should consider the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances. Boards should attempt to tailor sanctions to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance.

13 NRC at 454 (emphasis added). *Accord, Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1402, 1410-1421 (1982) (dismissal of a party for failure to comply with a discovery order was too severe under the circumstances); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-89-2, 29 NRC 211, 223-232 (1989) (dismissal appropriate in response to repeated and willful failure to comply with board discovery orders).

Licensing Boards have a duty to regulate the course of hearing and the conduct of participants in the interest of ensuring a fair, impartial, expeditious, and orderly adjudicatory process. 10 C.F.R. § 2.718(e); *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-417, 5 NRC 1442, 1445-46 (1977) (licensing boards should curtail if not cut off exchanges of a personal character and dubious propriety that scarcely enhance a proceeding; province to pass judgment on a censure motion based on counsel's conduct during the course of licensing board proceedings lies with the licensing board).<sup>9</sup> An attorney or an entire law firm may be disqualified for engaging in unprofessional conduct, whatever its

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<sup>9</sup> The *Midland* special disciplinary proceeding was terminated based on a settlement agreement between the parties. See *Consumer Power Co.* (Midland Plant, Units 1 and 2), CLI-79-3, 9 NRC 107 (1979).



form. *Toledo Edison Co.* (Davis-Besse Nuclear Power Station), ALAB-332, 3 NRC 785 (1976) (dismissal appropriate where an attorney formerly represented a party with interests adverse to those of his present client in a substantially related matter and the former client protests the present representation).

B. No Suspension, Reprimand or Censure is Warranted

The Motion, while alleging instances where the performance of Intervenor's counsel has not been stellar, does not show a pattern of conduct that warrants the sanction of suspension, reprimand, censure, or the payment of attorneys' fees and costs, particularly since lesser actions (such as warnings, refusals to consider Intervenor's filings, or dismissal of Intervenor's concerns) are available to the Presiding Officer and have not been imposed.<sup>10</sup>

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<sup>10</sup>Moreover, it is not clear the Presiding Officer has the authority to order payment of attorneys' fees as there is no precedent for such an award. In *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1135 (1981), the Appeal Board stated:

We note that the case at bar did not entail lengthy discovery, or proceed through the trial stage. It hardly got off the ground. We leave open the question whether something short of a dismissal with prejudice, such as conditioning withdrawal of an application upon payment of the opposing parties' expenses might be within the Commission's powers and otherwise appropriate where the expenses incurred were substantial and intervenors developed information which cast doubt upon the merits of the application.

In *Pacific Gas & Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 54 (1983), a licensing board considered the question of whether the Commission is authorized to condition withdrawal of an application on the payment of an opposing parties' expenses and stated:

Under the circumstances of the proceeding there is no need to determine whether the Commission has the power to authorize the payment of litigation expenses as a condition of permitting withdrawal of an application without prejudice, but it would appear not. The Commission is

(continued...)

Reimbursement of legitimate expenses in litigating a complex proceeding would not be available without substantial evidence that the offending party intentionally caused unwarranted and unusual litigation costs. See e.g., *Yankee*, slip op. at 15-16.

Intervenors' argument that the Presiding Officer lacks jurisdiction to rule on the motion is misplaced. Opposition at 4-8. Intervenors properly cite *Vogle* for the proposition that an adjudicator loses jurisdiction over concerns/contentions that have been addressed in a decision that is appealed, *Georgia Power Co.*(Vogle Electric Generating Plant, Units 1 and 2), ALAB-859, 25 NRC 23, 27 (1987) (once the board issues a decision which disposes of a particular issue on the merits and a notice of appeal is filed, the board loses jurisdiction to act further on that issue), citing *Metropolitan Edison Co.*(Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC 1324, 1327 (1982). Intervenors do not show, however, that the matter raised by the Motion was previously litigated and they do not cast doubt regarding the Presiding Officer's authority to consider the past conduct of the same parties and counsel in the latter parts of a multi-phase proceeding.

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<sup>10</sup>(...continued)

a body of limited powers. Its enabling legislation has no provision empowering it to require the payment of a party's costs and expenses. The regulations the Commission has promulgated does [sic] not provide for it. It has no equitable power it can exercise as courts have. The concept is foreign to the Commission's adjudicatory process.

*Cf. Yankee Atomic Electric Co.*(Yankee Nuclear Power Station), LBP-99-27, 49 NRC \_\_ slip op. at 11-13 (July 29, 1999) (10 C.F.R. § 2.107(a) does not preclude the payment of cost and fees as a condition of withdrawal if there is legal harm); *Duke Power Co.*(Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1140-41 (1982) (absence of specific statutory authority does not prevent a board from exercising reasonable authority necessary to carry out its responsibilities; and a money condition is not necessarily barred from consideration as a condition for withdrawal of an application with prejudice if the condition furthers the agency's mission).

As for Intervenor's assertion that the standards for imposition of sanctions in CLI-81-8, *supra*, do not apply to cases that have concluded, *see* Opposition at 9-10, Intervenor conveniently ignore the fact that this case has not concluded and that the named counsel and parties will continue to litigate the remainder of this ongoing proceeding regarding concerns related to mining at the other two sites. Thus, the Presiding Officer has the continuing duty as well as the jurisdiction to curb any future offending conduct during the remainder of the proceeding.<sup>11</sup>

1. Ex Parte Communications

HRI argues that oral and/or written statements by Diane Curran, Chris Shuey, and Johanna Matanich, on behalf of SRIC during a public Commission meeting concerning proposed changes in uranium recovery regulation specifically violated admonitions by the Commission that parties refrain from making statements regarding issues presently pending in litigation before an NRC tribunal. See Motion at 7-10, *citing* Letter from Annette Vietti-Cook to Diane Curran, dated June 14, 1999 (Motion, Exhibit B) and "Staff Proposals for Uranium Recovery Regulatory Issues SECY Papers 99-011, 99-012 and 99-013 - Public Meeting," Transcript dated June 17, 1999, at Tr. S-5 to S-6.

Pursuant to 10 C.F.R. § 2.780(a) and (c), interested persons may not make, or knowingly cause to be made to any Commission adjudicatory employee, any *ex parte* communication relevant to the merits of the proceeding.

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<sup>11</sup> Despite Intervenor's view that it is not clear that there will be any other phases of this proceeding due to the motion to hold the proceeding in abeyance, *see* Motion at 10, this uncertainty concerning the future course of this proceeding would only obviate the need for, but not the authority of, the Presiding Officer to ensure that the proceeding is completed in an orderly manner by controlling the conduct of the parties.



In this instance, the Commission acknowledged, beforehand, that aspects of the generic issues to be discussed during a June 17, 1999 meeting were being litigated in certain ongoing proceedings and admonished the parties that it would not entertain any case-specific issues or facts involved in adjudicatory proceedings. *See* Motion, Exhibit B, at 1-2.

Mindful that comments during the meeting could be of concern to parties in ongoing proceedings, the Commission also invited the parties to attend, and indicated that, "if circumstances should so warrant, the parties to the adjudications will be provided an opportunity to submit written comments on the statements and discussions that take place at the June 17 meeting to the dockets in the pending adjudications." *See id.* at 2. The Commission repeated its admonition against case-specific arguments during the public meeting on generic rulemaking issues, Tr. S-5 to S-6, and served a copy of the June 17, 1999 meeting transcript on the parties, *See* Memorandum from Annette Vietti-Cook to Parties, dated June 24, 1999 (Opposition, Exhibit 3).

HRI argues that Intervenor ignored the Commission's directions when they discussed chemical concentrations in HRI's lixiviant and comparisons with characteristics of the Crownpoint water supply (in the prepared statement by Diane Curran and others, which included pages from the FEIS); and discussed jurisdictional issues. *See* Motion at 9-11. HRI contends that the fact that copies of the transcript of the meeting, including copies of written statements provided to the Commission, were served in the proceeding does not excuse Intervenor's disruptive, contemptuous and prejudicial conduct, and, thus, requires the imposition of sanctions. *See id.* at 10.

Intervenors argue (1) that the motion (made two months after the meeting attended by counsel for HRI) is untimely, (2) that Intervenors' statements did not constitute *ex parte* communication as defined in 10 C.F.R. § 2.4 ("an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given") and (3) that the case-specific information was not prejudicial, but shared publicly for illustrative purposes only in discussing generic issues. *See* Opposition at 13-14.

While the Staff agrees that the discussion of case-specific issues was inappropriate, the Staff questions whether sanctions are warranted in circumstances where HRI was not prejudiced by Intervenors' statements since: (1) the statements were made on the public record and distributed to the parties; (2) the statements consisted of information that was publicly available (*e.g.*, the published FEIS for HRI's project); (3) HRI's counsel, although present as counsel for the National Mining Association, *see* Tr. S-3, did not object; and (4) HRI waited until months after the meeting to complain about the conduct.<sup>12</sup>

In essence, HRI has not shown that the alleged *ex parte* statements have or will likely affect any decision in this proceeding or that Intervenors' statement were contemptuous or disruptive. Rather, it appears that the Motion reflects a generalized allegation of prejudice resulting from the submission of an alleged *ex parte* communication

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<sup>12</sup> In determining whether the submission of an *ex parte* communication has so tainted the decision making process as to require vacating a Board's decision, the Commission has considered: the gravity of the *ex parte* communication, whether the contacts could have influenced the agency's decision, whether the party making the contacts benefitted from the Board's final decision, whether the contents of the communication were known to others parties to the proceeding, and whether vacating the Board's decision would serve a useful purpose. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), CLI-86-18, 24 NRC 501, 506 (1986), *citing*, *Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority*, 685 F. 3d 547, 564-65 (D.C. Cir. 1982).

by counsel to an adjudicator, but does not warrant disqualification of the counsel. *See Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), CLI-86-18, 24 NRC 501, 504-05 (1986) (a movant must show that the *ex parte* communication resulted in a prejudicial ruling). Consequently, no sanction is warranted.

2. Accusations of Bias by Presiding Officer

HRI asserts that the following statement by Doug Meiklejohn to a reporter shows an unequivocal accusation that the Presiding Officer is biased:

This is a legal proceeding with serious consequences for real people. This is not an exercise in which HRI and the staff are to be given as many chances as they need to get their information right. *He is simply not dealing with them the same way he's dealing with us.*

Motion at 11, *citing* Motion, Exhibit C (*Gallup Independent* newspaper article, dated March 31, 1999). Noting that Rule 3.6 of the Model Rules of Professional Conduct prohibits attorneys from making statements to the press which the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing the proceeding, HRI argues that the Presiding Officer "consciously or unconsciously" may have acted in some manner to ensure that future claims of bias would not arise. *See* Motion at 11-12.<sup>13</sup> HRI notes that in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991), "the Supreme Court upheld the 'substantial likelihood of material prejudice' test as a 'constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials.'" *See* Motion at 14-15.

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<sup>13</sup> HRI does not provide any details to support this speculation. *See* Motion at 12-15.



HRI also cites Intervenor's statements that (1) "[f]or the second time in three weeks, the Presiding Officer has demonstrated this is not an impartial proceeding," (2) that "it is hard to imagine any action that could more pervasively and unusually affect this proceeding than this new confirmation that the case is not being handled in an impartial manner," and (3) that various orders in the HRI proceeding "demonstrate that this proceeding is not impartial," show favorable treatment toward the Staff and HRI and that "[t]he Presiding Officer has violated his principal duty by favoring the Staff," amount to charges of bias. *See* Motion at 15, *citing*, Petition for Interlocutory Review, dated March 26, 1999, at 1, 2, 4-8. HRI argues that "the claims of bias are disruptive to this proceeding and are discourteous and degrading to this tribunal" and warrant the imposition of sanctions on Intervenor's counsel.

Although the Staff, too, disputes Intervenor's claims that the Presiding Officer has exhibited bias against Intervenor in this proceeding, *see e.g.*, Opposition at 27-32, HRI does not show which, if any, ruling was prejudiced by Intervenor's misguided statements. Intervenor's unfounded charges of bias, while unfortunate, have not pressured the Presiding Officer into ruling in Intervenor's favor and have not disrupted the orderly course of this proceeding. Further, the Staff and HRI have addressed Intervenor's allegations of a bias in responsive pleading as the charges arose. *See e.g.*, NRC Staff Response to ENDAUM's and SRIC's Petition for Interlocutory Review, dated May 24, 1999, at 4-5. Therefore, the imposition of sanctions is not warranted.

3. "Disparagement" of HRI Experts

HRI further complains that Intervenor's statement that HRI's consultants, Geraghty & Miller, "misrepresent groundwater pathways and divides at all of sites [sic.] that were modeled," Motion at 22, *citing* Intervenor's Written Presentation in Opposition to Hydro Resources, Inc.'s Application for a Materials License With Respect To: Groundwater Protection, dated January 12, 1999, at 19, warrants sanctions. While the Staff agrees that unfounded accusations and inflammatory rhetoric serve no useful purpose in this proceeding, the Staff does not believe that such statements made in pleadings before the Commission, have in fact, have disrupted this proceeding. Rather, Intervenor's counsel have diluted the merits of their arguments with unsupported and intemperate remarks that are not appropriate in NRC proceedings. *See University of Missouri, supra* at 232-33 n.1. Consequently, it can be argued that Intervenor's rhetoric has done more to aid HRI's position in the proceeding than to thwart that position.

To the extent HRI is correct that statements about their consultant, Geraghty & Miller "extend beyond the realm of mere advocacy into the world of libelous activity," *see* Motion at 22, HRI or its consultant may pursue its judicial remedies beyond the confines of this proceeding. No action by the Presiding Officer is warranted.

4. Failure to Cite Complete or Adverse Authority or Facts

HRI argues that lawyers have a professional obligation to inform boards of legal authority that the lawyer knows is adverse to the position he or she propounds. Motion at 17, *citing Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1174 n.21 (1983), *citing* Rule 3.3(a)(3) of the ABA Model Rules

of Professional Conduct. HRI also notes that "[c]ounsel appearing before the NRC adjudicatory tribunals 'have a manifest and iron-clad obligation of candor. This obligation includes the duty to call to the tribunal's attention facts of record which cast a different light upon the substance of arguments being advanced in administrative proceedings.' *Public Service Company of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 532 (1978)." Motion at 17.

In almost every instance cited by HRI, the Staff or HRI pointed out Intervenor's misstatements or omissions regarding regulations, case law or the record in filings in the proceeding. See Motion at 19-20. Thus, the Presiding Officer has been generally informed of shortcomings in Intervenor's pleadings and weighed Intervenor's arguments accordingly. HRI does not demonstrate that such deficiencies were the result of intentional attempts to mislead the Presiding Officer. Intervenor's claim that any errors, when made, were not intentional and have not disrupted the proceeding or been prejudicial. See Opposition at 20-22, 25-27. Intervenor's have also admitted to their mistake. See Opposition at 36. While the Staff has often pointed out shortcomings in Intervenor's filings, the Staff is of the opinion that these deficiencies have been adequately considered in partial initial decisions of the Presiding Officer and do not warrant the imposition of the requested sanctions.<sup>14</sup>

5. Failure to Follow April 21, 1999 Order

HRI also argues that Intervenor's failure to file answers by May 11, 1999 to questions posed by the Presiding Officer in his April 21, 1999 Order warrants the imposition

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<sup>14</sup> The Staff agrees with Intervenor's assessment that the validity of the HRI underground injection control (UIC) permit issued by the U.S. Environmental Protection Agency is still being disputed in Federal court. See Opposition at 22-23.

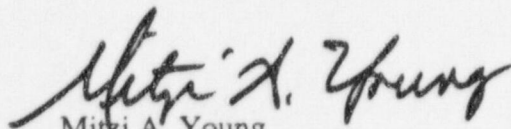


of sanctions. Motion at 20. HRI notes that the failure to respond in a timely manner was raised by both the Staff and HRI in motions to strike "Intervenors' Joint Response To HRI's And The NRC Staff's Responses To The Presiding Officer's April 21, 1999 Memorandum And Order (Questions)," dated May 25, 1999. However, Intervenors accurately state that the order could reasonably be read to allow Intervenors to file only responses to the filings of opposing parties by May 25, 1999, and that the Presiding Officer did not reject Intervenors' submittal as untimely. *See* Opposition at 17-19. Consequently, HRI has not shown that the imposition of a sanction is warranted for this alleged violation of the order.

#### IV. CONCLUSION

The Motion should be denied. HRI, after prevailing on Phase I issues adjudicated to date, has alleged a number of shortcomings in Intervenors' conduct and legal advocacy. Nevertheless, HRI has failed to show a pattern of conduct that is so offensive as to warrant the imposition of the requested sanctions, fees and costs, and has failed to show that the Presiding Officer has the authority to award costs, including attorneys' fees, in this proceeding.

Respectfully submitted,

  
Mitzi A. Young  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 27th day of September, 1999

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

'99 SEP 28 P3:56

BEFORE THE PRESIDING OFFICER

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATION STAFF

In the Matter of )  
 ) Docket No. 40-8968-ML  
HYDRO RESOURCES, INC. )  
P.O. Box 15910 ) (Leach Mining and Milling License)  
Rio Rancho, New Mexico 87174 )

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO MOTION FOR SUSPENSION, ALTERNATIVE RELIEF AND ATTORNEYS' FEES" in the above-captioned proceeding have been served on the following by U.S. Mail, first class, or, as indicated by a single asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by double asterisk, by U.S. Mail and/or e-mail, this 27th day of September, 1999:

Administrative Judge  
Peter B. Bloch\*  
Presiding Officer  
Atomic Safety and Licensing Board  
Mail Stop T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, D. C. 20555  
pbm@ nrc.gov

Administrative Judge  
Thomas D. Murphy\*  
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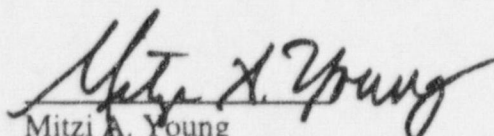
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