

**RAS 3473**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**DOCKETED 10/10/01**  
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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alan S. Rosenthal, Presiding Officer  
Thomas D. Murphy, Special Assistant

In the Matter of

U.S. ARMY

(Jefferson Proving Ground Site)

Docket No. 40-8838-MLA

ASLBP No. 00-776-04-MLA

October 10, 2001

MEMORANDUM

(Setting Forth Questions to be Considered at a  
Telephone Conference)

At hand in this materials license amendment proceeding is the September 13, 2001 request of intervenor Save the Valley, Inc. (STV) to hold the proceeding in abeyance to await further developments. As reflected by its September 25 response to the request, the licensee Department of the Army (Army) does not oppose the STV request, which it believes I have the jurisdiction to grant. At my request, set forth in a September 17 memorandum, the NRC staff (not otherwise a party to the proceeding) addressed the jurisdictional question in an October 1 filing and reached the opposite conclusion. In its view, in the current circumstances the proceeding must be dismissed.

A preliminary examination of the staff's submission suggests that the validity of its conclusion on the jurisdictional issue cannot be ascertained without at least an exploration of subsidiary questions that are not addressed in the submission. Rather than soliciting further written filings, it seems best to explore those questions in a telephone conference conducted by Judge Murphy and myself in which both the parties and the staff would participate. The conference has been tentatively scheduled for 11:00 a.m. (EDT) on October 18, 2001. (When

all of the participants have reported their availability at that time, confirmatory notification will be provided.) The purpose of this memorandum is to identify the matters to be considered so that the participants will be fully prepared to address them.

A.1. This proceeding had its genesis in the notice of opportunity for hearing that the Commission published in December 1999 in connection with the Army's application for an amendment to its materials license that would authorize the decommissioning of its Jefferson Proving Ground (JPG) site in Indiana. 64 Fed. Reg. 70294 (December 16, 1999). As the notice explained, under the aegis of that license the Army had engaged in activities on the site that had produced an accumulation thereon of depleted uranium (DU) munitions. What the Army sought by its application was authorization, in accordance with governing Commission regulations, for the restricted release of the site.

The notice went on to refer to a site decommissioning plan that the Army had supplied to the Commission. On administrative review, that plan had been found acceptable from the standpoint of allowing the commencement of a technical review. Before the sought amendment could be approved, however, the Commission would have to make the findings required by statute and regulation, to be documented in a Safety Evaluation Report and an Environmental Assessment. Ibid.

It was in response to this notice that STV filed its hearing request. In granting that request in LBP-00-9, 51 NRC 159 (2000), I noted that the Army's answer to the hearing request had pointed to "a distinct possibility that the current decommissioning plan will undergo revision in material respects" and had explicitly requested "that further proceedings be held in abeyance pending the outcome of its anticipated further interaction with the NRC Staff with regard to [that] plan". Id. at 161. In this regard, I observed that, insofar as concerned the need for and timing of further adjudicatory action, the situation was "quite fluid". Ibid.

2. The STV abeyance request now under consideration was prompted by the Army's decision (1) to withdraw the decommissioning plan that had formed the basis for the hearing request; and (2) to transmit to the NRC staff in July 2001 another plan that it denominated a License Termination Plan (LTP). According to STV, the new plan is very different in content from the former one. In addition, the STV representative had been advised by NRC staff counsel that the staff intends to solicit public comment on the LTP and, in a Federal Register notice, to provide an opportunity to seek a hearing on it. In these circumstances, STV deemed it inappropriate to pursue a hearing on the now discarded plan; rather, the intervenor thought it best that its granted hearing request be put on the shelf to "conform to the new timeline to be submitted by the NRC staff".

As above noted, although the Army does not oppose the abeyance request the NRC staff maintains that I have no jurisdiction to grant it. Instead, according to staff counsel, the proceeding should be terminated at this juncture.

In taking that position in her October 1 filing, staff counsel calls attention to a very recent development that antedated the submission of the September 13 STV abeyance request. Specifically, appended to the staff's filing is a September 27 letter sent by it to the Army along with an attachment. In the letter, the staff advised the Army that it had performed an acceptance review of the LTP and had noted "a number of deficiencies that must be corrected before the staff can initiate a technical review." A summary of seven such deficiencies was provided in the attachment and the letter itself went on to state that the staff "anticipated that the environmental report, to be submitted by the Army in late October, will answer some of the questions raised during the acceptance review." Still further, the letter indicated that the staff wished to discuss its concerns with the Army for the purpose, among others, of developing "a schedule for resubmission of the [LTP]".

In these circumstances, staff counsel insists, the proceeding initiated by the STV hearing request must be deemed moot. She acknowledges that the Army might endeavor to correct or to explain the asserted deficiencies and then to resubmit a revised version of the LTP. Response at 3. In her view, however, until that occurs, "there can be no case or controversy before the Commission." Ibid. Given the current rejection of the LTP that was substituted for the original decommissioning plan, I am told that the consequence is that "there can be no proceeding to consider the adequacy of" such a plan. Ibid.

B. As just seen, the staff's conclusion that the proceeding must be dismissed for want of an existing case or controversy rests totally on the fact that, in light of the rejection of the LTP submitted to it last June, there is not currently a decommissioning plan before it. Because of its belief that the absence of a plan warranting technical review is dispositive of the jurisdictional issue that it was asked to confront, the staff seemingly saw no necessity to address another question: what, if any, significance might justifiably be attached to the fact that the license amendment application that led to the institution of this proceeding apparently is still before the Commission notwithstanding the recent action taken by the staff with regard to the LTP?

Not only has the Army not informed me of a withdrawal of that application, but also its agreement to holding the proceeding in abeyance would appear to be a clear indication that it regards the application as being still alive. Moreover, there is no readily discernable reason why the Army might wish at this juncture to abandon the application. Despite the present difficulties that the staff is having with the latest decommissioning plan put before it, beyond doubt the Army is still interested in accomplishing the objective that prompted the filing of the application; namely, obtaining a resolution of the matter of the long-term treatment of the DU munitions accumulated on the JPG site. That being so, it is reasonable to assume that the

Army will now endeavor either to satisfy the staff that its concerns regarding the LTP are not meritorious or, more likely, to provide such revisions to that plan as might alleviate those concerns.

For its part, there is nothing in the staff's October 1 filing to suggest that it deems the license amendment application to have been withdrawn or to have failed as a matter of statute or regulation because of the rejection (likely just temporary) of the LTP. Rather, as we have seen, the staff explicitly acknowledges the possibility that the Army will attempt to explain or to correct the perceived deficiencies in the LTP and that a revised version of it might be forthcoming.

If, then, the license amendment application is to be regarded as still pending, one must ask whether, as the staff would have it, the jurisdictional issue perforce is susceptible of resolution on the basis that there is not at present a decommissioning plan before the staff that, without amendment, could receive its approval. To be sure, the STV hearing request was filed and granted in the context of the particular decommissioning plan then before the Commission. There was never any assurance, however, that that plan would not be significantly revised in the course of the proceeding, either on the Army's own initiative or because of staff concerns.

Indeed, as noted above, the opinion granting the hearing request made express note of the observation in the Army's response to that request to the effect that the decommissioning plan then on the table might receive material revision. There was, of course, nothing startling about that observation. To the contrary, I would think it most unusual if, following the licensee's own further consideration and the staff review, a decommissioning plan offered initially in support of a license amendment application such as the one at bar would obtain final approval without revisions being first required.

In these circumstances, it appears doubtful at best that the answer to the ultimate jurisdictional question turns on nothing more than the fact that the staff has discerned the presence of serious deficiencies in the present LTP and will not go forward with the required technical review unless and until the perceived deficiencies are either satisfactorily explained or cured. Rather, what seemingly must also be taken into consideration is the apparent continued existence of the license amendment application itself and the at least tacit understanding of all concerned that the plan that accompanied that application and triggered this proceeding might undergo substantial revision.

In this connection, it is not clear what position the staff would have taken on the jurisdictional acceptability of holding the proceeding in abeyance had the initial decommissioning plan not been withdrawn but the staff's technical review had determined that there were deficiencies in it that precluded staff approval -- or any further staff consideration of it -- unless and until those deficiencies were remedied. Given such a set of circumstances, would the staff still have maintained that dismissal of the hearing request was mandated because of a lack of a current case or controversy. If not, where is the line to be drawn?

It is these questions -- tied to the apparent continued existence of the license amendment application -- that I wish to have addressed at the forthcoming telephone conference. I would note that, while they arise in the context of this particular proceeding, their significance might well extend well beyond it. It is not at all difficult to envisage other similar license amendment proceedings initiated on the basis of hearing requester concerns regarding a proposed plan that then runs into rough seas during the course of staff review and must undergo revision. Obviously, as is recognized by both parties here, in such circumstances it would be improvident to go forward with a hearing before the revisions prompted by the staff concerns were made (hence the STV request to hold the matter in abeyance that is currently on

the table and not opposed by the Army). It is an entirely different matter, however, to require an intervenor such as STV to go back to square one with a new hearing request should the licensee produce a revised plan that meets the staff's threshold objections but does not entirely resolve that intervenor's concerns.<sup>1</sup>

BY THE PRESIDING OFFICER<sup>2</sup>

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Alan S. Rosenthal  
ADMINISTRATIVE JUDGE

Rockville, Maryland

October 10, 2001

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<sup>1</sup>I have not overlooked the fact that, should a revised plan surface that it determines to be worthy of technical review, the staff intends to issue a new opportunity for hearing. Although the staff did not attach any significance to that intention in its response on the jurisdictional question, it will be free to discuss its implications during the telephone conference.

<sup>2</sup>Copies of this memorandum were sent this date by Internet electronic mail transmission to the representative of STV and counsel for the Army and the NRC staff.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM (SETTING FORTH QUESTIONS TO BE CONSIDERED AT A TELEPHONE CONFERENCE) have been served upon the following persons by U.S. mail, first class, or through internal NRC distribution.

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LB MEMORANDUM (SETTING FORTH  
QUESTIONS TO BE CONSIDERED AT  
A TELEPHONE CONFERENCE)

[Original signed by Evangeline S. Ngbea]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 10<sup>th</sup> day of October 2001