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NUCLEAR REGULATORY COMMISSION

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

November 7, 2001

MEMORANDUM AND ORDER

(Granting Request to Hold Proceeding In Abeyance)

Because of recent unanticipated developments, it is manifest that there are currently no issues susceptible of adjudication in this materials license amendment proceeding. Not quite as clear is what should be done with the proceeding at this juncture given those developments. Intervenor Save the Valley, Inc. (STV) has asked that the proceeding be held in abeyance until there are once again substantive issues possibly requiring adjudicatory consideration. For its part, the licensee Department of the Army (Army) is agreeable to that course on certain conditions. Having been invited to submit its views on the matter (although it is not otherwise participating in the proceeding), the NRC staff takes a different position. It maintains that, in the totality of the present circumstances, I should dismiss the proceeding.

Because there apparently is no record of a like situation having arisen in the past, it is not surprising that my research and that of the parties has failed to uncover anything in the Commission's jurisprudence that might shed light on the appropriate disposition of the question at hand. Moreover, there seemingly is nothing in the Rules of Practice pertaining to Subpart L

proceedings such as the one at bar that might provide some guidance. In short, the waters are entirely uncharted. That being so, my task is to determine what course seems to make the most sense, all relevant factors taken into consideration.

On the basis of what follows, I conclude that, although the staff's view might not be entirely devoid of merit, there is greater reason for holding the proceeding in abeyance rather than terminating it. Accordingly, the STV request seeking that relief, not opposed by the Army, is granted.

BACKGROUND

A. 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 (SUB-1435) that would authorize the decommissioning of its Jefferson Proving Ground (JPG) site located in Madison, 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 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.

In response to this notice, STV filed a timely hearing request. That request was granted in LBP-00-9, 51 NRC 159 (2000) on a determination that STV had established, as required by

10 C.F.R. § 2.1205(h), both its standing and the existence of an area of concern that was germane to the subject matter of the proceeding. In the course of reaching that conclusion, LBP-00-9 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. On that score, the decision went on to observe that, insofar as concerned the need for and timing of further adjudicatory action, the situation was "quite fluid." Ibid.

In point of fact, following the grant of the hearing request in April 2000, nothing transpired on the adjudicatory front apart from the submission by the Army of quarterly status reports that reflected, among other things, that it had submitted its decommissioning plan to STV for its consideration and had received comments from the intervenor.¹ Then, in June 2001, the Army took the unexpected step that triggered the issue now at hand. It furnished the NRC with an entirely new plan, which it characterized as a "final decommissioning/license termination plan" (LTP). According to the June 27 letter that accompanied its transmission, this LTP was being submitted for the purpose of facilitating the termination of the NRC license to which the amendment application referred. The letter went on to note that, as had been previously discussed with the NRC staff, the Army proposed to submit the supporting Environmental Report by the end of October 2001.

As it turned out, the June 2001 LTP received a very cool reception from the NRC staff. Although, as noted in the notice of opportunity for hearing, the 1999 site decommissioning plan

¹In a June 1, 2000 memorandum, memorializing a telephone status conference, I explicitly directed (at 2) that the proceeding be "held in abeyance until it appears appropriate to move forward." That directive did not, however, forecast the developments a year later that now require consideration.

had obtained the acceptance on administrative review that generally precedes the commencement of a technical review, in a September 27 letter the Army was informed that such acceptance was being withheld in the case of the new LTP. According to the NRC official who signed the letter, the staff had "noted a number of deficiencies [in the LTP] that must be corrected before the staff can initiate a technical review." (In an attachment to the letter, seven such deficiencies were summarized.) The letter went on to state that it was anticipated that the environmental report that the Army was to supply in late October would "answer some of the questions raised during the acceptance review." It then expressed the staff's desire to discuss the deficiencies with the Army in order both to ensure that the licensee understood the NRC concerns and "to develop a schedule for resubmission" of the LTP.

The September 27 letter was followed on October 17 by another communication signed by the same staff official. It provided the Army with formal notification that the staff considered the LTP to supercede the previously furnished site decommissioning plan, with the consequence that the latter would receive no further review.

B. On September 13, STV filed its request that the proceeding be held in abeyance. Coming before the staff had announced the results of its administrative review of the LTP, the request was essentially founded on the fact that that plan was "very different" from the earlier site decommissioning plan that had prompted the STV decision to seek a hearing. Further, STV noted that it had received an assurance that the NRC staff would solicit public comment on the LTP and, in a Federal Register notice, provide an opportunity to seek a hearing on it. In these circumstances, STV thought it inappropriate to pursue a hearing on the earlier 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."

While not objecting to holding the proceeding in abeyance, in its September 25 response to the STV request for that relief the Army noted that its agreement was conditioned upon STV setting forth at the appropriate time its areas of concern with regard to the LTP and the Army then having an opportunity to respond. The NRC staff, however, saw the matter quite differently in an October 1 filing.

Appending to that filing the September 27 letter to the Army summarized above, the staff maintained that, given the rejection of the LTP, the proceeding initiated by the STV hearing request should be deemed moot. The staff did acknowledge (at 3) that the Army might endeavor to correct or to explain the perceived deficiencies in the LTP and then to resubmit a revised version of that plan. In the staff's view, however, until that should occur "there can be no case or controversy before the Commission." Ibid. Given the current state of affairs, the staff concluded, "there can be no proceeding to consider the adequacy of" any site decommissioning plan.

On October 18, a telephone conference was held by Judge Murphy and me with counsel and other representatives of the parties and the staff for the purpose of further exploring the issues raised by the STV abeyance request and the staff's response to it. While not retreating from the position taken in that response, staff counsel did recognize that it was very likely that the Army would be submitting revisions to the LTP to accomplish the ultimate objective that it had in seeking the license amendment. Indeed, she observed, "the staff will be meeting with [the Army] to discuss the particulars of what needs to be put into the plan." (Tr. 27) Moreover, counsel acknowledged that holding the proceeding in abeyance would not disadvantage or prejudice the staff as a practical matter. In that connection, she agreed that, if for some reason the Army were to elect not to submit a new plan, upon that fact being brought to the Presiding Officer's attention the proceeding could be then terminated. (Tr. 27-28) On that subject, Army

counsel stated that it was his client's intent "at this juncture to proceed and to accomplish the goal that [it has] been pursuing here all along." (Tr. 28) Although an abandonment of the endeavor might be an option, he was "hard pressed to think of a circumstance" in which that option might be chosen. (*Ibid*).

ANALYSIS

A. Central to the position taken by the NRC staff is the premise that, because there has been a summary rejection of the LTP, the proceeding is necessarily moot with the consequence that there is no longer an existing case or controversy before me. (As the Army was advised in the October 17 letter, the staff regards the previously submitted site decommissioning plan to have been superceded by the LTP and, therefore, no longer under its review.) Should that premise survive scrutiny, it might well follow that a dismissal of the proceeding would be mandated. For there is assuredly no reason to continue to maintain on the docket a matter that has become entirely academic by reason of supervening events.² Accordingly, the first task is to determine whether the premise passes muster.

Had the Army chosen to withdraw its license amendment application upon receiving word of the staff's rejection of the LTP for technical review, there would be little room for doubt that the proceeding -- established for the sole purpose of considering whether that application should be granted -- would have become moot. Similarly, assuming without deciding that the staff could have chosen to deny the application upon determining that the successor LTP was deficient, had that option been selected the granted hearing request seemingly would have

²This is so notwithstanding that the restriction placed on the federal judiciary by the "case or controversy" clause in Article III of the United States Constitution does not govern our jurisdiction. See Texas Utilities Generating Co. (Comanche Peak Steam Electrical Station, Units 1 and 2), ALAB-714, 17 NRC 86, 93 (1983).

become academic. As we have seen, however, the Army has not withdrawn its application and, insofar as the record before me reflects, the staff has not formally denied it.

To the contrary, for all that now appears it is safe to assume that the Army has every intention of going forward with the license amendment application by endeavoring to cure the deficiencies that the staff has discerned in the LTP -- indeed, as seen, its counsel so represented during the October 18 telephone conference. This is scarcely surprising. The application was obviously motivated by the Army's desire to settle the matter of the long-term treatment to be accorded to the DU munitions now accumulated on the JPG site. There is no reason to believe that that desire was diminished to any extent by the staff's determination that, in its present form, the submitted LTP has fatal flaws. Rather, there is every reason to think that the Army regards its current task to be the remedying of those discerned flaws.

Insofar as the staff is concerned, its September 27 letter reflects with clarity not only an assumption that the Army will move forward to rectify the existing LTP efficiencies, but also a staff desire to meet with the licensee to facilitate the process -- including the development of "a schedule for resubmission" of the LTP. In short, far from considering the license amendment application to have failed, the staff is actively involved in the matter of the further development of its necessary underpinning -- an acceptable (to the staff at least) site decommissioning (i.e., license termination) plan.

In these circumstances, from the standpoint of mootness, it does not appear that analytically there is a material difference between the current seemingly novel situation and a more typical one in which there is but one submitted plan that must undergo substantial revision at the staff's insistence before an adjudicatory hearing on it might be held. If, for example, the Army had stayed with the plan submitted in 1999 but was now confronted with the need to

modify it substantially in order to meet staff concerns, would there be any possible basis for a claim of mootness? I would think not.

In that regard, we have seen that from the very beginning of this proceeding there was a recognition by the Army, noted in the decision granting the hearing request, that the plan then on the table might undergo significant revision along the way. In fact, to repeat, that recognition had led the Army to ask in its response to the STV hearing request that further proceedings be held in abeyance pending its further interaction with the staff with regard to that plan. Although it might not have been then foreseen that the interaction with the staff would extend to a substitute plan that the Army would elect to submit, it is difficult to see why that fortuitous circumstance should be accorded operative importance.

In sum, I conclude that the continued existence of the license amendment application,³ coupled with the likelihood that a revised LTP will surface that might adequately address the staff's current concerns and thus be ripe for adjudicatory consideration, precludes a dismissal of this proceeding on the ground of mootness. What remains to be determined is whether there is some other justification for terminating the proceeding given the current state of affairs. I now turn to that question.

³In an October 29 letter submitted by the staff following the telephone conference for the purpose of summarizing its position, its counsel maintains that, because the staff has discontinued its review of the site decommissioning plan submitted with the license amendment application, "the license amendment under consideration has become moot and is no longer pending before it." By "license amendment" counsel apparently has reference to the plan rather than to the license amendment application itself. At least insofar as the information at hand reflects, the staff did not require the Army to file a new and distinct application when it submitted the LTP last June and likewise presumably will not require a new and distinct application in connection with any revised LTP that might come to the fore. Absent contrary indication, and here there is none, it is reasonable to assume that a license amendment application concerned with the decommissioning of a particular site is deemed to cover not only the specific plan that accompanied it but, as well, any revisions to that plan or substitute plans that might surface during the consideration of what the decommissioning effort might require.

B. At the October 18 telephone conference, staff counsel confirmed that, as she had previously informed STV's representative, a new notice of opportunity for hearing would be published in connection with the LTP before any adjudicatory proceedings were conducted on it. (Tr.18) As she noted, the staff regards the LTP as being so different from its predecessor site decommissioning plan that the notice that had been issued in December 1999 did not adequately apprise the public of the content of what now might be considered. Given that intent, a dismissal of this proceeding would not foreclose STV from participation in any adjudicatory hearing on the LTP that might take place. It would, of course, be free to file a hearing request in response to the new notice.

The real question is not, however, whether it is necessary to keep this proceeding alive in order to ensure that STV will have an opportunity to challenge the LTP if not satisfied that, as revised in response to staff objections, the plan meets its concerns. Rather, it is whether any useful purpose might be served by requiring that intervenor in such circumstances to return to square one and to file a new hearing request in which it would be obligated to replot the entire ground covered in the hearing request granted 18 months ago in LBP-00-9.

If such a purpose exists, it is most elusive indeed. I can perceive no good reason for putting STV to the burden, light as it might turn out to be, of having to reestablish its standing to question an Army decommissioning plan (no matter how denominated) for the JPG site. Nor is there readily apparent cause for requiring it to do more than demonstrate that, as it had an area of concern that was germane to the 1999 site decommissioning plan, so too it has such an area of concern with regard to whatever version of the LTP might be cited in the new Federal Register notice.⁴

⁴Although I need not reach them here, the approach taken by the NRC staff in this matter raises a number of unanswered questions that might prove of procedural significance in
(continued...)

It need be added in this regard only that neither the Army nor the NRC staff has claimed, let alone shown, that it would be prejudiced by retaining this proceeding in a state of suspended animation pending further developments respecting the LTP. Indeed, once again, it was the Army itself that at the very outset had successfully sought holding a hearing in abeyance pending the outcome of the interaction between it and the staff regarding the plan for JPG site decommissioning.

For the foregoing reasons, the STV request to hold in abeyance further proceedings in this cause is hereby granted subject to the following conditions.⁵

1. Pending further order of the Presiding Officer, the Army shall continue to furnish quarterly status reports, the next one to be due at the end of December 2001. Should the license amendment application be withdrawn or abandoned, that fact is to be reported immediately by the Army.

2. In the event that the Commission should publish in the Federal Register a notice of opportunity for hearing in connection with the LTP or some successor JPG site decommissioning plan, within thirty (30) days of that publication STV shall file with the Presiding Officer, and serve upon the Army, a statement specifying its area(s) of concern, if any, relative to the plan in question.

⁴(...continued)
another case. One such question relates to the circumstances in which the staff is justified in concluding that a new hearing notice is required despite the fact that it has chosen to leave intact the license amendment application that was the subject of the prior notice.

⁵In actuality, the grant of the request has the effect of continuing the suspension of activity in the proceeding that had been decreed in June 2000. See supra note 1.

3. Within ten days of its receipt of the STV statement outlining its areas of concern regarding the new plan, the Army may file a response confined to the question of whether a germane area of concern has been adequately identified in the statement.

It is so ORDERED.

BY THE PRESIDING OFFICER⁶

/RA/

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland

November 7, 2001

⁶Copies of this memorandum and order were sent this date by Internet electronic mail transmission to the representative of STV, counsel for the Army, and the NRC staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (GRANTING REQUEST TO HOLD PROCEEDING IN ABEYANCE) (LBP-01-32) have been served upon the following persons by U.S. mail, first class, or through internal NRC distribution.

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Docket No. 40-8838-MLA
LB MEMORANDUM AND ORDER
(GRANTING REQUEST TO HOLD
PROCEEDING IN ABEYANCE)
(LBP-01-32)

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of November 2001