

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

**DOCKETED 02/06/03**

**SERVED 02/06/03**

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  
February 6, 2003

MEMORANDUM AND ORDER  
(Rulings On Adequacy of Statement of Concerns and  
Motion to Hold Proceeding In Abeyance)

BACKGROUND

1. This proceeding involves a proposed amendment to the materials license (SUB-1435) held by the U.S. Army (Licensee) in connection with its Jefferson Proving Ground Site (JPG), located in Madison, Indiana. The amendment would permit, in accordance with the provisions of 10 C.F.R. § 20.1403, the restricted release of the site on which there is currently an accumulation of depleted uranium (DU) munitions that had been utilized by the Licensee under the aegis of the license.

The amendment application was submitted to the NRC Staff several years ago and, in response to a December 16, 1999 Federal Register notice of opportunity for hearing (64 Fed. Reg. 70,294), a hearing request was filed on January 13, 2000, by Save the Valley, Inc. (Petitioner). On March 23, 2000, in LBP-00-09, 51 NRC 159, the request was granted on a determination that, as required by 10 C.F.R. § 2.1205 (e) and (h), the Petitioner had both (1) demonstrated its standing to challenge the proposed amendment and (2) identified with

particularity one or more germane areas of concern regarding the site decommissioning plan that the Licensee had supplied to the Commission in connection with the license amendment application.

In normal circumstances, the grant of the hearing request would have moved the matter forward with some dispatch to a consideration of the merits of the controversy. That, however, did not happen here. Rather, as detailed almost 20 months later in LBP-01-32, 54 NRC 283 (2001), the proceeding took a quite unusual turn.

As explained in LBP-01-32, in the year following the grant of the hearing request all that happened of note was the Licensee's submission of quarterly status reports that reflected, among other things, that it had submitted its decommissioning plan to the Petitioner for its consideration and had received back the latter's comments on it.<sup>1</sup> Then, a seemingly unexpected development took place. On June 27, 2001, the Licensee furnished the NRC Staff with an entirely new plan, which it characterized as a "final decommissioning/license termination plan" (LTP). According to a letter that accompanied the plan, this LTP was being submitted for the purpose of facilitating the termination of the NRC license to which the sought amendment referred.

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<sup>1</sup>In LBP-00-09, 51 NRC at 161, I noted that the Licensee's response to the hearing request had pointed to a distinct possibility that the then current decommissioning plan would receive material revision. Accordingly, the response had explicitly requested that further proceedings be held in abeyance pending the outcome of the Licensee's further interaction with the NRC Staff with regard to the plan. In addition, the Licensee had stated its willingness to work with the Petitioner in an endeavor to resolve its concerns and thus to obviate the need for a hearing. Given the obvious fluidity of the situation and the equally manifest desirability of facilitating an endeavor to achieve a settlement, I saw no good reason to force the parties to move forward with a hearing at that time and therefore acceded to the Licensee's deferral request. The Licensee was, however, required to submit quarterly status reports to enable Judge Murphy and me to monitor, among other things, the progress of the settlement negotiations between the parties.

It turned out that the June 2001 LTP was not well received by the NRC Staff. In a September 27, 2001 letter, the Staff informed the Licensee that the plan had not been accepted for the commencement of a full technical review. According to the letter, the Staff had noted a number of deficiencies in the plan that would require correction before such a review could be initiated. In a subsequent letter, dated October 17, 2001, the Licensee was told by the Staff that the LTP was deemed to have superceded the previously furnished decommissioning plan, with the consequence that the latter would receive no further review.

Even before these Staff pronouncements surfaced, the Petitioner had filed a request on September 13, 2001, to hold the proceeding in further abeyance, the request being based on the fact that the LTP was "very different" from the earlier site decommissioning plan that had prompted Petitioner's decision to seek a hearing. In LBP-01-32, that request was granted with these directions: First, the Licensee was to continue to furnish quarterly status reports and to advise me immediately if it should withdraw or abandon the license amendment application. 54 NRC at 290. Second, should the Commission publish in the Federal Register a new notice of opportunity for hearing in connection with the LTP or some successor JPG site decommissioning plan, the Petitioner was to file and to serve within thirty days thereafter a statement specifying its areas of concern, if any, relative to that plan. Id.<sup>2</sup>

2. Nearly a year later, in a solicited October 17, 2002 memorandum, the NRC Staff informed me that it had completed its acceptance review of the LTP (as apparently revised during the course of that review) and the environmental report that the Licensee had submitted in connection with it. The two documents had been accepted for a detailed technical review that was projected for completion by October 2004. A month later, as had been anticipated

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<sup>2</sup>I saw no reason to freight the Petitioner with the obligation to rehearse the successful showing it had made in its hearing request on the question of its standing.

might occur, the Staff published in the Federal Register a notice of opportunity for hearing on the plan. 67 Fed. Reg. 69,049 (November 14, 2002).

As required by LBP-01-32, the Petitioner submitted on December 12, 2002, a statement of its concerns with regard to the version of LTP that had been accepted by the Staff for technical review.<sup>3</sup> Simultaneously, it filed a motion seeking to defer a hearing on the plan pending the completion of the Staff's technical review.

In a January 17, 2003 response to the Petitioner's statement of concerns, as supplemented on January 21, the Licensee maintained that none of the advanced concerns was germane to the LTP in hand and therefore the proceeding should be terminated. The January 21 submission added that, should I determine that the Petitioner had set forth at least one germane area of concern in its December 12 filing, the Licensee did not oppose the requested hearing deferral. For its part, in a solicited January 17 filing, the NRC Staff explained why the technical review of the current LTP would require so much time for completion. It then went on to endorse the deferral request.<sup>4</sup>

#### DISCUSSION

As the foregoing reflects, the first issue that must be addressed is whether, contrary to the Licensee's insistence, the Petitioner has specified at least one germane area of concern

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<sup>3</sup>Although the cover page of the filing bears a December 16, 2002 date, the certificate of service reflects that it was actually filed and served on the 12<sup>th</sup> and therefore was timely.

<sup>4</sup>Having elected pursuant to 10 C.F.R. § 2.1213 not to become a party to the proceeding, the Staff was not called upon by me to address the question of the adequacy of the Petitioner's statement of its areas of concern. I did want, however, the Staff's views on the deferral question, as well as an explanation regarding the apparent need to expend two years in the conduct of the technical review.

with respect to the LTP now before the NRC Staff for detailed technical review. If that question is answered in the affirmative, then the hearing deferral request must be confronted.

1. In granting in LBP-00-09 the Petitioner's hearing request submitted in the context of the original site decommissioning plan, I pointed to the fact that that request had identified with particularity several areas of concern with regard to that plan. In that connection, there was reference to "such issues as the extent of the proposed cleanup of the accumulated DU material; future monitoring requirements; and restrictions upon further use of the area in which the DU material has been stored." I added that those issues were "indisputably germane whether or not the Petitioner's articulated concerns are ultimately found to warrant the denial or alteration of the decommissioning plan as now presented." 51 NRC at 160.

If anything, as both Judge Murphy and I see it, having obtained in the meanwhile the assistance of legal counsel, the Petitioner has presented an even more particularized statement of concerns in the filing currently before us. Among other things, the Petitioner assigns five independent reasons why it believes that the LTP under present consideration does not meet the criteria imposed by 10 C.F.R. § 20.1403 with regard to the restricted release of the site that the Licensee desires. See Petitioner's December 12, 2002 filing at 10-15. In addition, Petitioner maintains that, for two stated reasons, the Licensee's characterization of the JPG site is flawed, inadequate and incomplete, making it impossible to verify that the LTP meets the necessary criteria for approval. Id. at 15-18.

Not surprisingly, as reflected in its January 17 response, the Licensee does not regard any of the claims to be meritorious. And it might well turn out that, in fact, none of them has substance. But, to reiterate what was said in LBP-00-09, that consideration is entirely irrelevant at this stage of the proceeding. It is enough that a hearing requestor present at least one area of concern that bears upon the matter at hand -- here whether the current LTP satisfies all

applicable Commission requirements with regard to the restricted release of the JPG site.

Judge Murphy concurs in my belief that the Petitioner has met that test, leaving the question of the justification for that concern to the hearing stage.

2. Accordingly, it is now necessary to reach the deferral question presented by the Petitioner. When I learned last October that the NRC Staff's technical review of the revised LTP might not be completed before late in 2004, I advised the parties in the course of an October 24, 2002 order (unpublished) that it was not my then inclination to hold up further proceedings to await the outcome of that review. I recognized, of course, that, although technically the proceeding had then been pending for almost three years, in a real sense its origin was the yet-to-be published new Federal Register notice prompted by the Staff's conclusion that there were substantial differences between the original site decommissioning plan and the LTP ultimately accepted for technical review. Nonetheless, I was loathe to put the proceeding into mothballs for such a long additional period.

The October 24 order went on, however, to invite any party who saw the matter differently to express its views once the new Federal Register notice was published. And, as we have seen, the Petitioner did precisely that in the form of its deferral request -- a request that not only is unopposed by the Licensee but also, perhaps more significantly, enjoys the affirmative support of the NRC Staff.

On that score, the Staff had this to say on the subject in its January 17, 2003 submission (at p. 3):

The history of this proceeding compellingly indicates that the mere filing of a [decommissioning plan], or even its acceptance for detailed technical review, is not determinative as to whether the Staff will conclude that the Licensee has satisfied the requirements for license termination on a restricted release basis. Thus, we consider that [the Petitioner] has a sound basis for its deferral request. Grant of the requested deferral is also consistent with the time needed to complete the Staff's technical review.

Beyond those observations, the Staff took note (id. at 2-3) of the fact that the activities that would be part of (or at least related to) the technical review would include the preparation of an environmental impact statement (EIS). Clearly, even if not deemed entitled to litigate the validity of the conclusions eventually reached by the Staff on safety issues, the Petitioner at some point would have the right to question the Staff's compliance with the National Environmental Policy Act once its environmental findings have been proffered.

In the totality of the present circumstances, and given that no objection has been forthcoming from any quarter, the appropriate course would appear to be a deferral of further proceedings to abide the event of the completion of the technical review of the current LTP. Accordingly, the Petitioner's request for such relief is granted. The Licensee shall continue to provide quarterly status reports and the NRC Staff is to notify Judge Murphy and me promptly when it is prepared to disclose the results of the technical review.

It is so ORDERED.

BY THE PRESIDING OFFICER<sup>5</sup>

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Alan S. Rosenthal  
ADMINISTRATIVE JUDGE

Rockville, Maryland

February 6, 2003

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<sup>5</sup>Copies of this memorandum and order were sent this date by Internet electronic mail transmission to the counsel for the parties and the NRC Staff.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULINGS ON ADEQUACY OF STATEMENT OF CONCERNS AND MOTION TO HOLD PROCEEDING IN ABEYANCE) (LBP-03-02) have been served upon the following persons by U.S. mail, first class, or through internal NRC distribution.

Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Administrative Judge  
Alan S. Rosenthal, Presiding Officer  
Atomic Safety and Licensing Board Panel  
Mail Stop - T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Administrative Judge  
Thomas D. Murphy, Special Assistant  
Atomic Safety and Licensing Board Panel  
Mail Stop - T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Dennis C. Dambly, Esq.  
David A. Cummings, Esq.  
Stephen H. Lewis, Esq.  
Office of the General Counsel  
Mail Stop - O-15 D21  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Dal M. Nett  
U.S. Army Test and Evaluation Command  
314 Longs Corner Road  
Aberdeen Proving Ground, MD 21005

Richard C. Wakeling, Esq.  
U.S. Army Garrison Aberdeen Proving Ground  
2201 Aberdeen Boulevard  
Office of the Staff Judge Advocate,  
AMSSB-GJA (Bldg. 310)  
Aberdeen Proving Ground, MD 21005-5001

Richard Hill, President  
Save the Valley, Inc.  
P.O. Box 813  
Madison, IN 47250

Michael A. Mullett, Esq.  
Jerome E. Polk, Esq.  
Mullett & Associates  
309 West Washington Street, Suite 233  
Indianapolis, IN 46204-2721

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[Original signed by Evangeline S. Ngbea]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 6<sup>th</sup> day of February 2003