

RAS 6326

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED 04/21/03  
SERVED 04/21/03

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

April 21, 2003

MEMORANDUM AND ORDER  
(Directing Further Filing by NRC Staff  
as a Party to the Proceeding)

A. This materials license amendment proceeding is currently concerned with a revised plan for the decommissioning of the Department of the Army's Jefferson Proving Ground (JPG) site in Indiana, on which there are amassed quantities of depleted uranium munitions. For the reasons stated in LBP-02-03, 57 NRC \_\_ (February 6, 2003), the proceeding is being held in a state of suspension to await the completion of the technical review of the plan that the NRC Staff initiated last Fall.

On March 11, 2003, in Board Notification 2003-01, the Staff brought to the attention of Judge Murphy and me a February 4, 2003 letter it had received from the Army. That letter contained the "contingent" request that an alternative schedule be established for the submittal of a decommissioning plan for the termination of the JPG license. Specifically, the Army proposed that that license be amended to create a five-year renewable possession-only license for an indefinite time period. The letter went on to state that, if its negotiations with the Staff produced such an amended license, the Army would then withdraw the currently pending revised decommissioning plan and accompanying environmental report.

Upon receipt of this notification, I entered an unpublished order on March 19 directing the Army to include in its next quarterly status report, due on March 31, 2003, detailed information respecting the then state of negotiations regarding its proposal, together with its best estimate regarding when those negotiations might be completed. The Army was also asked to present its views respecting the impact that NRC Staff acceptance of the proposal would have on the existing proceeding. The intervenor Save the Valley, Inc. and the Staff were invited to present their views on these matters "within fifteen days of [their] receipt of the Army's status report." Order at 2. In the case of the Staff, the order was most specific (*ibid*) respecting what was to be addressed in its memorandum: "(1) the likelihood of acceptance of the Army proposal (assuming that it is still under review); and (2) the impact of such an acceptance upon the current proceeding."

The status report was received on March 27. It indicated that no negotiations had taken place with regard to the Army's proposal. Indeed, receipt of the February 4 letter had not been formally acknowledged by the Staff although the Army had been informed by telephone that the proposal was awaiting consideration by the NRC Commissioners (with no indication as to the timing of that consideration). The status report concluded by setting forth the Army's view that acceptance of the proposal would perforce moot this proceeding. Report at 2.

Given the representations in the status report pertaining to where the proposal then stood, a Licensing Board Panel law clerk advised NRC Staff counsel by telephone on March 28 that I now expected (rather than merely invited) the receipt of the Staff's views on the matter by the deadline that had been imposed in the March 19 order. On April 8, Save the Valley moved to extend the time for the filing of its comments to and including the fifteenth day following receipt of the Staff's submission. That motion was granted in an April 9 order.

Appended to the Save the Valley motion was a copy of a March 3, 2003 Memorandum from the NRC Executive Director for Operations to the Commissioners. Bearing the

designation SECY-03-0031, and captioned POLICY ISSUE with the subcaption INFORMATION, the document's background statement began with a recitation of the history of the JPG as a military ordnance testing facility prior to its closure in 1994. It then went on to summarize the progress of this proceeding, culminating with the proposal advanced by the Army in its February 4 letter (a copy of which was attached). In the discussion part of the document, the Executive Director for Operations explained why, as stated at the outset of the document, it was the Staff's intent, "because of unique conditions at the [JPG] site,"

to allow the licensee to indefinitely delay decommissioning. Rather than require the licensee to decommission the site at this time, the staff will continue the possession-only license currently in effect at the site. . . . The possession-only license will be issued for a 5-year renewable period, and the status evaluated at license renewal to determine if it is appropriate to begin site decommissioning.

B. The NRC Staff's memorandum in response to the March 19 order was filed on April 16. Apart from a possible question as to its timeliness,<sup>1</sup> it was neither responsive to my inquiry nor at all informative.

In essence, after rehearsing the developments that had prompted the request for the Staff's views, the Staff filing pointed to the March 3 Commission Information Paper (SECY-03-0031) that Save the Valley had furnished to me along with its extension motion. The Staff then indicated that it would be providing "very shortly" a Board Notification to which both

---

<sup>1</sup> In his filing, Staff counsel did not state explicitly when he received the Army's March 27 status report. Despite the fact that he clearly was aware of the existence of the report no later than March 28, the date upon which he was advised at my request that a response to it would be expected, the memorandum computed the fifteen-day period for that response as not having commenced until April 1. Given that my March 19 order specifically tied the commencement of the period to the receipt of the status report, I must take that computation as resting upon an implicit representation that counsel neither received a copy of the report by electronic transmission on March 27 nor otherwise obtained it prior to April 1. It might be, however, that no such representation was intended, with the consequence that the April 16 filing was untimely notwithstanding that a paper copy of the status report had been provided an April 1 receipt date stamp by someone in counsel's office. If that is the case, I will expect counsel to so acknowledge in his next filing in this matter.

SECY-03-0031 and a more recent letter received from the Army would be attached. Although professing confidence that those documents "will provide clarification of the matter at hand," the filing concluded with the Staff's commitment to provide a fuller statement of its views no later than April 30, 2003.

The difficulties with this purported response to the specific questions posed in the March 19 order are both numerous and manifest. To begin with, to the extent that the now promised Board Notification might be intended to bring SECY-03-0031 to my attention and that of the parties, it obviously will come far too late. As we have seen, Save the Valley discovered the document on its own, presumably through resort to the Agencywide Documents Access and Management System (ADAMS) in which SECY-03-0031 apparently had been incorporated. It then furnished it on April 8 to Judge Murphy and me, as well as to the Army (which seemingly was not already aware of its existence). What is not addressed in the Staff filing is why the Board Notification was not forthcoming upon the issuance of SECY-03-0031 over six weeks ago. Surely counsel must have appreciated that disclosure of Staff action clearly relevant to a particular pending adjudicatory matter should initially come from the Staff itself, rather than from an intervenor who has found it in a search of ADAMS. Indeed, that is what the Board notification procedure is all about.

Second, I fail to understand why the Staff chose to leave me now in the dark as to the content of the new Army letter that is also to be attached to the upcoming Board Notification. Assuming that it has some relevance to the questions posed in my March 19 order, one might have thought that its content would be divulged and discussed in the current filing.

Third, if I have read correctly SECY-03-0031, it is difficult to reconcile that document with the statement in the Army's status report (at 2) to the effect that it had been telephonically advised that its proposal was awaiting consideration by the NRC Commissioners and that no specific information had been provided regarding the timing of that consideration. At least I

discerned nothing in SECY-03-0031 to indicate that the Commissioners were being called upon by the Executive Director for Operations to pass judgment on the proposal. Rather, from all appearances, the Commissioners were merely being informed as to what the Staff had decided to do. If, however, the reality was otherwise, it was incumbent upon the Staff to so inform me in the April 16 filing, together with its best current estimate as to when the Commissioners' approval or disapproval of the proposal might be forthcoming.

Finally, the Staff's memorandum does not even make a pretense of addressing the other question expressly set forth in the March 19 order--namely, the impact that the acceptance of the Army proposal might have on this proceeding. In short, I am also left to speculate respecting whether the Staff agrees with the Army that, in such circumstances, the proceeding would become moot.

C. Although uncertain as to whether requiring the Staff to assume party status might improve the quality of future submissions in this proceeding, given that possibility I am now exercising my authority under 10 C.F.R. § 2.1213 to confer that status upon it. In its new capacity, the Staff is to file and serve a supplemental memorandum on or before May 2, 2003 that will answer in appropriate detail the following questions left open in the April 16 filing:

1. Why was SECY-03-0031 not made the subject of a Board Notification at or before the time that it was placed in ADAMS for public examination? It might well be that, for some reason, the inclusion of the document in ADAMS had been inadvertent.<sup>2</sup> Once it had taken place, however, and the document thereby had

---

<sup>2</sup> That possibility is at least suggested by the fact that, in bringing attention to the Army's February 4 letter containing the new proposal, Board Notification 2003-01 made no reference to SECY-03-0031 which had surfaced eight days earlier. Presumably, had SECY-03-0031 then been regarded as a public document, that Board Notification would have referred to it. In addition to that uncertainty, there is the matter of why over a month elapsed between the Staff's receipt of the February 4 letter and the March 11 issuance of Board Notification 2003-01. To be sure, the proceeding was placed in a state of suspension on February 6. Nonetheless, given the obvious significance of the February 4 letter, issuance of that Board Notification might have been given greater priority than seemingly was attached to it.

become available to the public, was not the Staff then under an iron-clad duty to bring the document immediately to the attention of all concerned with this proceeding? If not, why not?

2. Have I correctly interpreted SECY-03-0031 as reflecting a Staff determination essentially to accept the Army proposal, without the necessity of explicit Commission endorsement of that determination? If not, what specific language in that document calls for a different interpretation, where does the proposal now stand, and when is a final agency determination with regard to its acceptance likely to be reached?

3. Assuming Staff acceptance of the Army proposal at some point, what will be the resultant impact on this proceeding? In that connection, what recourse, if any, might be available to Save the Valley (or anyone else with standing to object) should it wish to contest the proposal?

Save the Valley's time to present its views on this matter is hereby extended sua sponte to and including May 16, 2003. In addition, if the Army has any further comments it desires to offer in light of the Staff's forthcoming response to the foregoing questions, it may present them in a memorandum to be filed and served by the same May 16 deadline.

It is so ORDERED.

BY THE PRESIDING OFFICER<sup>3</sup>

*/RA/*

---

Alan S. Rosenthal  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
April 21, 2003

---

<sup>3</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.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
 )  
U.S. ARMY ) Docket No. 40-8838-MLA  
 )  
(Jefferson Proving Ground Site) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DIRECTING FURTHER FILING BY NRC STAFF AS A PARTY TO THE PROCEEDING) 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 46204-27217

Docket No. 40-8838-MLA  
LB MEMORANDUM AND ORDER (DIRECTING  
FURTHER FILING BY NRC STAFF AS A PARTY  
TO THE PROCEEDING)

[Original signed by Evangeline S. Ngbea]

---

Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 21<sup>st</sup> day of April 2003