

May 5, 2003

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

In the Matter of
U.S. ARMY
(Jefferson Proving Ground Site)
Docket No. 40-8838-MLA; ASLBP No. 00-776-04-MLA

Dear Administrative Judges:

Attached is "NRC Staff Corrected Response to Presiding Officer's Order on Army's Contingent Request for Approval of Alternative Schedule for Submittal of Decommissioning Plan; and Impact of Such Approval Upon Pending Proceeding," which are being served this date and replaces the Staff response filed on May 2, 2003. This corrected response reflects editorial corrections on pages 1, 5 and 6. It also corrects a date referenced in the first full paragraph on page 5, so that the sentence now begins: "As noted in the footnote to the April 16, 2003 comments..." (correction underlined). On page 6, the section previously titled "C. Presiding Officer's question as to impact of alternative proposal on this proceeding," is now identified as section 2 under "B. Response to Board Questions." The Staff does not believe that the corrected response is materially different from the response filed on May 2nd. Staff Counsel, nevertheless, apologizes for any inconvenience its oversights may have caused.

Sincerely,

/RA/

Stephen H. Lewis
Counsel for NRC Staff

Att: As stated

cc w/att: R. Hill
Mullett & Associates
Adjudicatory File
Office of Commission
Appellate Adjudications

R. Wakeling
Atomic Safety and Licensing Board Panel
Office of the Secretary

May 5, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of)	
)	Docket No. 40-8838-MLA
U.S. ARMY)	
)	ASLBP No. 00-776-04-MLA
(Jefferson Proving Ground))	

NRC STAFF CORRECTED RESPONSE TO PRESIDING OFFICER'S ORDER
ON ARMY'S CONTINGENT REQUEST FOR APPROVAL OF ALTERNATIVE
SCHEDULE FOR SUBMITTAL OF DECOMMISSIONING PLAN;
AND IMPACT OF SUCH APPROVAL UPON PENDING PROCEEDING

INTRODUCTION

The Presiding Officer issued a "Memorandum and Order (Directing Further Filing by NRC Staff as a Party to the Proceeding)," dated April 21, 2003 ("Order") and a "Memorandum (Addendum to April 21, 2003 Memorandum and Order)," dated April 22, 2003 ("Memorandum") directing certain questions to the NRC staff (Staff). The Staff had earlier filed "NRC Staff's Comments in Response to Memorandum and Order, dated March 19, 2003," dated April 16, 2003, and a Board Notification, "Supplemental Information Potentially Relevant and Material to Proceeding in the Matter of the U.S. Army and the Jefferson Proving Ground Site," dated April 17, 2003. The Order and the Memorandum require the Staff, as a party to the proceeding,¹ to address certain identified questions. In response to the Order and the Memorandum, the Staff files this response and the Notice of Appearance of the undersigned as Counsel for the NRC Staff.

BACKGROUND

As modified by the Memorandum, the Order directs the Staff to address two questions:

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

¹ See 10 C.F.R. § 2.1213 authorizing the Presiding Officer to order the Staff to participate as a party to the proceeding.

public examination? It might well be that, for some reason, the inclusion of the document in ADAMS had been inadvertent. Once it had taken place, however, and the document thereby had 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?

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.

Order, at 6, as modified by Memorandum, at 2 (footnote omitted).

DISCUSSION

A. Background Documents

The Staff is pleased to have this opportunity to provide its view on current circumstances in this proceeding. There have been multiple documents issued and provided to the Presiding Officer and parties that warrant Staff comment as to their significance. For clarity, the Staff begins by listing and providing its characterization of those documents.

1. Letter from Dr. John Ferriter, U.S. Army Soldier and Biological Chemical Command, to Mr. Larry Camper, Chief of the Decommissioning Branch (DCB) in the Office of Nuclear Material Safety and Safeguards (NMSS), dated February 4, 2003.

In the above-cited letter, the Army proposed an alternative approach for Jefferson Proving Ground (JPG). That approach would invoke the flexibility provided in 10 C.F.R. § 40.42(g)(2).

Section 40.42(g)(2) states:

The Commission may approve an alternate schedule for submittal of a decommissioning plan required pursuant to paragraph (d) of this section if the Commission determines that the alternative schedule is necessary to the effective conduct of decommissioning operations and presents no undue risk from radiation to the public health and safety and is otherwise in the public interest.

The letter is one page and builds upon the:

acknowledged unexploded ordnance and the personnel safety hazard that would be created should the Army be requested by NRC to provide additional site specific data during technical review to

further validate termination of the JPG license under 10 C.F.R. § 20.1403, restricted conditions.

The Army's suggested alternative approach is continuation of the license, for possession-only, with a five year term, but an understanding that decommissioning likely will need to be put off for an indefinite time period, and the license may, therefore, need to be renewed numerous times.

2. SECY-03-0031, "Jefferson Proving Ground Decommissioning Status," dated March 3, 2003.

This Staff paper submitted to the Commission provides notice to the Commission of the Staff's receptiveness to the Army's alternative approach. The paper bears the header designation "Policy Issue" to alert the Commission to the novel nature of the Army's approach to the difficult decommissioning it faces, in the event that the Commission should choose to provide comment or direction to the Staff. As the Presiding Officer has correctly noted, the paper also bears the header designation "(Information)". The Presiding Officer accurately noted that an "Information Paper" connotes that the Staff is providing information to the Commission and is not awaiting Commission endorsement or comment.

3. Presiding Officer's Memorandum and Order, dated March 19, 2003.

The Presiding Officer took note of the Army's February 4, 2003 letter provided to the Presiding Officer and parties via Board Notification, dated March 11, 2003. Assuming that pre-application negotiations between the Staff and the Army mentioned in the February 4 letter must have already commenced, the Presiding Officer stated:

[I]n its quarterly status report due at that time [by March 31, 2003], the Army will be expected to provide detailed information regarding the then status of the negotiations and a best estimate as to the likely date of their completion. In addition, the Army should present its view respecting the impact that a Staff acceptance of the Army proposal would have on the proceeding.

Memorandum and Order, dated March 19, 2003, at 2.

The Presiding Officer afforded Intervenor Save the Valley (STV) the opportunity to comment on the alternative proposal. Additionally, the Presiding Officer indicated he would welcome the views of the Staff on two issues: “(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.”
Id.

4. Army’s Quarterly Status Report, dated March 27, 2003.

The Army advised the Presiding Officer and parties that negotiations had not been initiated regarding the alternate schedule. The Army further stated its view that if the NRC granted the request for an alternate schedule and, therefore, issued a five year renewable possession-only license, this proceeding would be rendered moot. The Army reasoned that if the alternate schedule were approved, it would withdraw its decommissioning plan (DP) upon which this proceeding is founded

5. “Motion to Extend the Time for Save the Valley, Inc. to File Comments Regarding Contingent Request of the Department of the Army for a Possession-Only License Amendment,” dated April 8, 2003.

STV requested that the time for it to file comments on the Army’s alternative proposal be extended until 15 days following the Staff’s filing on the same issues. STV asserted that it was unclear as to the present status of matters affecting the proceeding and would be in a better position to respond after receiving the Staff’s filing. This request was granted by an Order, dated April 9, 2003.

6. “NRC Staff’s Comments in Response to Memorandum and Order, dated March 19, 2003.”

The Staff responded on April 16, 2003 to the issues identified by the Presiding Officer, indicating that the Army faced significant personnel safety issues associated with necessary site characterization to supplement the DP. The Staff then described the conceptual alternative put forward by the Army in its February 4, 2003 letter. Additionally, the Staff noted that relevant

information had already been provided in SECY-03-0031, which was distributed to the Presiding Officer and parties as an attachment to STV's April 8, 2003 motion.

The Staff's comments were brief and relied in part on Staff Counsel's knowledge that a Board Notification that would provide additional information relevant to the Presiding Officer's questions was at that time being filed. (The Board Notification was actually filed on April 17, 2003, one day later). In footnote 1 to the Staff's comments, Staff Counsel acknowledged confusion as to the date by which the Staff's response was due. Staff Counsel had calculated its response date based upon 10 C.F.R. §§ 2.1237 and 2.730, since Staff's response was required within 15 days of the Army's Quarterly Status Report, which was due by March 31, 2003. As noted in the footnote to the April 16, 2003 comments, Staff Counsel was notified on April 16, 2003 by a law clerk to the Atomic Safety and Licensing Board Panel (ASLBP) that the Presiding Officer had considered the Staff's response due on April 15, 2003. It was not until this notification that Staff Counsel recalculated the response date and concluded that the response was, in fact, due that day - April 16, 2003.

To meet the April 16, 2003, response date, Staff filed admittedly brief comments in response to the Presiding Officer's March 19, 2003 order and indicated that it would augment its comments by April 30, 2003.² Due to the miscalculation of the response date, this was the most substantive response that the Staff was able to file at that time.

B. Response to Board Questions

1. Question Regarding Timing of Staff's Board Notification of SECY-03-0031.

SECY-03-0031, which the Staff recognized should be provided to the Presiding Officer and parties, was made public by the Office of the Secretary on March 21, 2003. Until that date, it was predecisional and would not normally have been released. The Division of Waste Management

² Per his April 21 Order and April 22 Memorandum the Presiding Officer subsequently established a filing date for the Staff's response as no later than May 2, 2003.

(DWM) Staff responsible for reviewing the Jefferson Proving Ground application was not aware that the SECY had been made publicly available, however, until receipt of STV's April 8, 2003 motion. Once made aware of the SECY's status, the DWM Staff promptly: a) transmitted a letter, dated April 8, 2003, to the Army stating its receptiveness to the alternate schedule proposal and the necessary attendant license amendment; and (b) prepared a Board Notification.³

The timing of the April 8th letter is informative as to why the DWM Staff was not aware sooner that the SECY was public. Plainly put, the responsible Staff were not expecting the SECY to be made publicly available and were not aware of the public release of the SECY.

Had Staff Counsel known that the SECY was publicly available, he would have informed the Board and parties via a Board Notification distributed contemporaneous with the release of the SECY.

2. Presiding Officer's question as to impact of alternative proposal on this proceeding.

If the NRC granted the alternative schedule for submittal of the DP and the Army remained as a licensee, then the DP would be withdrawn and this proceeding would become moot. The Staff and the Army have both indicated that an amendment of the existing license is required to effectuate the alternative discussed in the February 4, 2003 and April 8, 2003 letters, and in the SECY. Before an application for a license amendment is filed, however, the Staff plans to discuss the intended application with the Army at a public meeting in Rockville, MD. Also, the receipt and consideration of the license amendment would be the subject of a notice in the *Federal Register*, including notice of an opportunity for a hearing on the application pursuant to Subpart L of 10 C.F.R. Part 2.

Under the Commission's "Timeliness Rule," reflected for a Part 40 licensee in 10 C.F.R. § 40.42(d), the Army has a timely decommissioning plan pending before the NRC. The Army does

³ The April 8, 2003 letter is an enclosure to the April 17, 2003 Board Notification.

not propose to withdraw its DP before the alternative license amendment is granted. This approach would keep the Army in compliance with section 40.42(d).

CONCLUSION

In accordance with the Order and the Memorandum, the Staff submits this response to the Presiding Officer's questions.

Respectfully submitted,

/RA/

Stephen H. Lewis
Counsel for NRC Staff

Dated at Rockville, Maryland
this 5th day of May, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of)
) Docket No. 40-8838-MLA
U.S. ARMY)
) ASLBP No. 00-776-04-MLA
(Jefferson Proving Ground Site))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF CORRECTED RESPONSE TO PRESIDING OFFICER'S ORDER ON ARMY'S CONTINGENT REQUEST FOR APPROVAL OF ALTERNATIVE SCHEDULE FOR SUBMITTAL OF DECOMMISSIONING PLAN; AND IMPACT OF SUCH APPROVAL UPON PENDING PROCEEDING"; and "NOTICE OF APPEARANCE" in the above captioned proceeding have been served on the following or by U.S. Mail, first class, or through deposit in the Nuclear Regulatory Commission's internal Mail system as indicated by a single asterisk (*), or by e-mail, as indicated by a double asterisk (**), this 5th day of May, 2003.

Alan S. Rosenthal, Presiding Officer
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-mail: AXR@nrc.gov
rsnthl@comcast.net

Thomas D. Murphy, Special Assistant
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-mail: tdmurphy@erols.com
TDM@nrc.gov

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555

Richard C. Wakeling
U.S. Army Garrison APG
2201 Aberdeen Boulevard
Office of the Staff Judge Advocate
AMSSB-GJA (Bldg. 310)
Aberdeen Proving Ground, MD 21005
E-mail: Richard.Wakeling@usag.jpg.army.mil

Richard Hill, President
Save the Valley, Inc.
P.O. Box 813
Madison, IN 47250
E-mail: phill@venus.net

Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555

Mullett & Associates
309 West Washington Street
Suite 233
Indianapolis, IN 46204-2721
E-Mail: jpolk@mullettlaw.com
MulletGEN@aol.com

Office of the Secretary
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
E-mail: HEARINGDOCKET@nrc.gov

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555

/RA/

Stephen H. Lewis
Counsel for NRC Staff