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

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Before Administrative Judges:  
Alan S. Rosenthal, Presiding Officer  
Thomas D. Murphy, Special Assistant

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

**ADDENDUM TO  
MEMORANDUM OF SAVE THE VALLEY, INC.  
REGARDING CONTINGENT REQUEST OF THE DEPARTMENT OF THE ARMY  
FOR A POSSESSION-ONLY LICENSE AMENDMENT**

On November 13, 2003, Intervenor Save the Valley, Inc., ("STV") filed and served – in response to a request from the Presiding Officer – its memorandum addressing the following questions:

1. Does this development [i.e., publication of a hearing opportunity notice for the Army's application for an alternate schedule for submittal of a decommissioning plan pursuant to 10 CFR § 40.42(g)(2)] have the effect of now requiring the dismissal as moot of the proceeding in hand that is addressed to the previously submitted decommissioning plan for the site? If not, why not?
2. If not subject to dismissal at this time as moot, what then should be deemed the present status of that proceeding and what, if any, action should now be taken by this presiding officer with regard to it?

In its Memorandum, STV explained its position that the current proceeding is not yet

moot because the Army has not yet withdrawn its 2002 Decommissioning Plan ("DP") and associated license amendment application, the review of which is pending in this docket. As a result, STV urged that the current proceeding should not be dismissed but should remain in abeyance pending a final determination of the Army's contingent request for a possession-only license amendment ("POLA") establishing an alternate schedule for subsequent submission of a replacement DP.

In its Memorandum, also submitted on November 13, 2003, the Army stated its position that the current proceeding is moot and therefore should be dismissed. Due to computer problems, the NRC Staff did not submit its Memorandum until November 14, 2003. Thus, it had the opportunity to review the Army and STV memoranda prior to filing its own. The Staff agreed with the Army's position that the current proceeding is moot. Moreover, the Staff contended:

The "Memorandum of Save the Valley, Inc. Regarding Contingent Request of the Department of the Army for a Possession-Only License Amendment," (November 13, 2003) obviously did not have the benefit of a review of the Licensee's memorandum because it relies upon an earlier position of the Licensee, that the Licensee's withdrawal of the 2002 DP was contingent upon NRC approval of the five-year, renewable, possession-only amendment application. Save the Valley's ("STV") memorandum, at 2. That position has been superseded by the position articulated in the Licensee's memorandum.

NRC Staff Memo, at 1-2.

STV files this Addendum to its November 13 Memorandum to make clear that its position has NOT changed as a result of reviewing either the Army's (or the Staff's) memorandum. Indeed, its position has been reinforced by its review of those memoranda. The Army's memorandum establishes beyond any doubt that its 2002 DP and associated license

amendment application have not been withdrawn. Indeed, the Army expressly states:

DA maintains the need for the Army to formally withdraw the prior license amendment request to permit, in accordance with 10 C.F.R. § 20.1403, restricted release supported by its revised Decommissioning Plan (June 2002) and Environmental Report (June 2002) for decommissioning of JPG administratively accepted by NRC for technical review on October 1, 2002 has been superseded and is no longer pending review and consideration by the NRC. DA maintains that NRC Staff acceptance for technical review of DA's request for license amendment to amend Materials License No. SUB-1435 to create a 5-year renewable possession-only license and notice of opportunity for hearing on DA's license amendment application constitutes approval of an alternative schedule for submittal of a decommissioning plan under 10 C.F.R. § 40.42(g)(2) and is an alternative to the requirement to submit a DP pursuant to 10 C.F.R. § 40.42(d). **DA will formally withdraw its previous proposed license amendment request to permit, in accordance with 10 C.F.R. § 20.1403, the restricted release of the Jefferson Proving Ground Site and revised Decommissioning Plan (June 2002) and Environmental Report (June 2002) if deemed necessary to further establish the current license amendment request for a possession-only license is not contingent and that such previous proposed license amendment request having been superseded is no longer pending.**

Army Memo, at 2 (emphasis added). Self-evidently, the Army's November 13 Memorandum is not a request to withdraw its previously proposed license amendment request and revised DP and ER.<sup>1</sup>

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<sup>1</sup>The Army does not explain *why* it has not filed a formal request to withdraw its prior license amendment application. However, the Staff memorandum may explain why the prior license amendment request and the associated 2002 DP have not been formally withdrawn – and perhaps cannot be formally withdrawn pending final determination of the Army's new POLA request:

[T]he 2002 DP is in the docket and its filing has regulatory significance. The 1999 DP was withdrawn. The 2001 DP was superseded by the 2002 DP. The 2002 DP is, thus, the decommissioning submittal in the docket that currently constitutes Licensee compliance with 10 C.F.R. § 40.42(d), pending the Staff's approval of the alternate schedule for submittal of a DP. [Section 40.42(d) establishes requirements for timely decommissioning of NRC-licensed sites.]

Staff Memorandum, at 2 n.1.

The jurisdictional consequence of the Army's decision is clear. As the Presiding Officer explained on a very similar prior occasion:

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 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.

In re U.S. Army (Jefferson Proving Grounds), 54 N.R.C. 283, 287 (Nov. 7, 2001). So, the Presiding Officer retains jurisdiction. Id. Moreover, the prudential considerations have not changed, either. There is once again no prejudice to the Army or the Staff in continuing this proceeding in abeyance pending final determination of the Army's request for an alternate decommissioning schedule. See id. at 289 ("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 . . ."). And,

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Additionally, the Army may be concerned that any formal request to withdraw its 2002 DP and associated license amendment application would trigger the provisions of 10 C.F.R. § 2.107(a):

The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

A formal request could potentially present complications for the Army in terms of the Presiding Officer exercising his discretion – at the request of STV or otherwise – to impose conditions on the withdrawal.

there is still no reason to make STV once again establish its standing to contest an LTP in the event the Army does not receive final Commission approval for its alternate decommissioning schedule. See id. (“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.”)

Given both the relevant legal considerations and the multiple changes in direction which the Army has taken with respect to its future plans for the Depleted Uranium test site at the Jefferson Proving Ground over the past five years, both the lawful and the prudent course is the one recommended by STV in its November 13, 2003 Memorandum – not to dismiss this proceeding at this time but to continue it in abeyance pending final determination of the Army’s request for a POLA establishing an alternate schedule for submittal of its DP. Compare, e.g. In re Fansteel, Inc., 2003 WL 22170174 (N.R.C.), at \*4 n.4 (“Th[e] lack of any pending Fansteel license amendment application distinguishes this situation from cases like U.S. Army (Jefferson Proving Ground Site), LBP-01-32, 54 NRC 283, 287-89 (2001), in which a presiding officer has retained jurisdiction over a Subpart L proceeding in the face of significant applicant revisions to the decommissioning plan underlying a pending license amendment request.”)

Respectfully submitted.



Michael A. Mullett  
Jerome E. Polk  
Mullett, Polk & Associates, LLC  
309 West Washington Street, Suite 233  
Indianapolis, IN 46204  
(317) 636-5165  
(317) 636-5435  
Attorneys for Save The Valley, Inc.

**MULLETT, POLK & ASSOCIATES, LLC**

**ATTORNEYS AT LAW**  
Old Trails Building, Suite 233  
309 West Washington Street  
Indianapolis, IN 46204-2721

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Phone: (317) 636-5165  
Fax: (317) 636-5435

November 18, 2003

Office of the Secretary  
ATTN: Rulemaking and Adjudications Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16-G-15  
Washington, D.C. 20555

Re: Addendum to Memorandum of Save The Valley, Inc. - In re U.S. Army (Jefferson Proving Ground), Docket No. 40-8838-MLA, ASLBP No. 00-776-04-MLA

Dear Secretary:

Enclosed please find the original and two conforming copies of the Addendum to Memorandum of Save the Valley, Inc., Regarding Contingent Request of the Department of the Army for a Possession-Only License Amendment for filing in the above referenced case. This pleading is also being forwarded electronically.

Also enclosed please find an additional copy of the Addendum to Memorandum to be file stamped and returned to me in the enclosed self-addressed, stamped envelope.

Thank you.

Sincerely,



Michael A. Mullett