

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

DOCKETED 12/10/03

SERVED 12/10/03

Before Administrative Judges:

Alan S. Rosenthal, Presiding Officer

In the Matter of

U.S. ARMY

(Jefferson Proving Ground Site)

Docket No. 40-8838–MLA

ASLBP No. 00-776-04-MLA

December 10, 2003

MEMORANDUM AND ORDER
(Dismissing Proceeding Without Prejudice)

BACKGROUND

This license amendment proceeding had its genesis in the publication on December 16, 1999 of a Federal Register notice providing an opportunity to seek a hearing on the application of the Department of the Army (Licensee) for an amendment to its outstanding materials license (SUB-1435). 64 Fed. Reg. 70,294. Under the auspices of that license, the Licensee had conducted over the course of several years activities on its Jefferson Proving Ground (JPG) site in Indiana that had resulted in the accumulation on the site of a substantial quantity of depleted uranium munitions. The sought amendment called for the decommissioning of the site in accordance with a plan that had been submitted to the NRC Staff.

In response to the Federal Register notice, Save The Valley, Inc. (Petitioner) filed a timely hearing request. On a determination that it satisfied the requirements of 10 C.F.R §§ 2.1205(e) and (h), the relevant provisions of the portion (Subpart L) of the Commission's Rules of Practice concerned with the adjudication of materials licensing proceedings, the hearing request was granted in LBP-00-9, 51 NRC 159 (2000).

As observed in LBP-00-9, the Licensee had noted the existence of “a distinct possibility that the [then] current decommissioning plan will undergo revision in material respects” and, accordingly, had 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. In accordance with that request, the proceeding was placed in a state of suspension. The Licensee was required, however, to submit quarterly status reports.

In June 2001, the Licensee submitted to the NRC Staff an entirely new plan, which it denominated its “final decommissioning /license termination plan” (LTP). Although the plan that had been provided the Staff in 1999 had been accepted on the administrative review that generally precedes the commencement of a full technical review, the Staff found the LTP to contain several deficiencies that required correction before such acceptance would be possible. The Staff did note, however, that it considered the LTP to supercede the earlier submitted plan, with the consequence that the Staff would not consider the latter any further.

In this circumstance, on the Petitioner’s motion, the proceeding was continued in a state of suspension to await the LTP becoming a fit subject for adjudication. See LBP-01-32, 54 NRC 283 (2001). That day, however, never arrived.

In the course of its review of the LTP, the Staff apparently advised the Licensee that certain additional site-specific sampling and modeling on its part would be required. In the Licensee’s view, such an undertaking would pose a safety threat to Licensee and contractor personnel because of the presence on site of unexploded ordinance. Accordingly, the Licensee put before the Staff a proposal that it be granted a license amendment that would create a five-year, possession only license (POLA) that would be renewable until such time as it became possible to perform the required site characterization safely. On October 28, 2003, the Staff published a Federal Register notice that indicated that it was considering the POLA request and

provided an opportunity to seek a hearing on it. 68 Fed. Reg. 61,471. In response to that notice, the Petitioner filed a timely hearing request on November 26 that is currently pending.

In the wake of the October 28 Federal Register notice, I entered an order (unpublished) on October 30 in which the parties were directed to file memoranda on the questions (1) whether this new development had the effect of mooted the current proceeding; and (2) if not, what should be deemed the present status of the proceeding and what action should now be taken with regard to it. In their November 13 and 14 responses, respectively, the Licensee and Staff took the position that the proceeding is now moot and, as such, should be dismissed. In its November 13 response, the Petitioner asserted to the contrary that, given that withdrawal of the LTP appeared to be contingent upon approval of the POLA, the proceeding should not be considered moot unless and until that approval was forthcoming and the LTP then was withdrawn. Consequently, Petitioner would have the proceeding continue in its present state of suspension to abide further developments.

On December 3, a telephone conference was conducted with counsel for the purpose of examining further the divergent views of the parties on the mootness issue. Also explored during the conference was whether there might be a means of accommodating the competing interests of those concerned.

DISCUSSION

A. It is clear from the written submissions as then supplemented at the December 3 telephone conference that, as is often the case in such matters, there is much to be said for both sides of the disagreement with respect to the course that should now be followed in this proceeding. To begin with, what gave rise to the proceeding was the decommissioning plan for the JPG site that the Licensee had submitted to the NRC Staff for its approval. Neither that plan nor the successor LTP remains, however, under any – let alone active – consideration at

this time. Rather, as seen, the latter has been replaced by an entirely different proposal that does not call for site decommissioning but, rather, would have the Staff issue a five year, possession-only license that, because renewable, would be of indeterminate duration. That proposal is now the subject of an entirely different adjudicatory proceeding, triggered by the Petitioner's recently-filed hearing request in response to the Federal Register notice addressed to it.

In light of these circumstances, there is weight to the insistence of the Licensee and Staff that there is not a current live controversy with regard to site decommissioning (the sole subject of the proceeding), with the consequence that there is no longer reason to keep the proceeding alive. As the Petitioner points out, however, the Licensee has not withdrawn the LTP and does not plan to do so unless and until the POLA proposal receives approval. Such approval is, of course, not a certainty and there is thus the possibility that the LTP might resurface in the relatively near term. In addition, even should the POLA be issued and the Petitioner's objections to it rejected, it would not perforce follow that the LTP will not be revived at a later date. As seen, the necessity for seeking the POLA apparently stemmed from the perceived inability of the Licensee, because of personnel safety considerations, to undertake at this juncture the site characterization activities that were insisted upon by the Staff. That situation might well be subject to change.

Given these factors, the Petitioner maintains with some force that the proceeding is not now technically moot and that the appropriate course is to keep it alive to abide further developments, albeit in a continued state of suspension. Were the LTP to be revived for one reason or another, the proceeding might then move forward without the Petitioner being burdened with the necessity to file a new hearing request addressed to decommissioning.

B. It was because there was obvious substance to the assertions put forth on each side of the disagreement that it seemed desirable to endeavor at the December 3 telephone conference to find some disposition that might satisfactorily accommodate the interests of all concerned. After some discussion, it became apparent that, consistent with those interests, this objective might be achieved by a dismissal of the proceeding without prejudice to its reinstatement should the LTP or another decommissioning plan akin to it once again come under active Staff consideration. On the one hand, a dismissal would now remove from the adjudicatory docket a proceeding concerned with a decommissioning plan that is not currently receiving consideration on the part of either the Licensee or Staff and, very possibly, will not receive further attention in the future. On the other hand, having the dismissal without prejudice to a reinstatement of the proceeding should decommissioning of the JPG site come to the surface anew would provide suitable recognition to the fact that the LTP has not been formally withdrawn and thus remains subject to further Staff action and possible approval should circumstances so warrant.

For the foregoing reasons, the proceeding is hereby dismissed on the sole grounds (1) that there is no plan for the decommissioning of the Jefferson Proving Ground site now being actively considered; and (2) the current substitute proposal of the Licensee with regard to that site is the subject of a recently-instituted separate proceeding in which the Petitioner has a pending hearing request. Because, however, the decommissioning plan has not been withdrawn and might be restored for active consideration at a later date, the dismissal is explicitly stated to be without prejudice to a motion by Petitioner to revive the proceeding should

the decommissioning of the site once again receive active NRC Staff consideration at the Licensee's behest.¹

Given that it attaches present finality to the proceeding, this order might well be deemed the equivalent of an initial decision. Although the result reached in it appears to have been accepted by all of the parties at the conclusion the December 3 telephone conference (see Tr. 21-23, 27), as such the order might be regarded as subject to the provisions of 10 C.F.R. § 2.1253 authorizing the filing of petitions for review with the Commission.

It is so ORDERED.

BY THE PRESIDING OFFICER²

/RA/

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 10, 2003

¹ Presumably, the Staff will publish a new Federal Register notice in connection with any renewed consideration of site decommissioning. In any event, the Petitioner will be entitled to be informed of such a development through one means or another.

² Copies of this memorandum and order were sent this date by Internet electronic mail transmission to the counsel for the Petitioner, the Licensee, and the NRC Staff.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DISMISSING PROCEEDING WITHOUT PREJUDICE) (LBP-03-28) have been served upon the following persons by U.S. mail, first class, or through internal NRC distribution.

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PROCEEDING WITHOUT PREJUDICE)
(LBP-03-28)

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 10th day of December 2003