

LBP-04-01

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Alan S. Rosenthal, Presiding Officer
Dr. Paul B. Abramson, Special Assistant

DOCKETED
USNRC

January 7, 2004 (12:47PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

SERVED January 7, 2004

In the Matter of

U.S. ARMY

(Jefferson Proving Ground Site)

Docket No. 40-8838-MLA-2

ASLBP No. 04-819-04-MLA

January 7, 2004

MEMORANDUM AND ORDER
(Granting Hearing Request and Motion to Hold
Further Proceedings in Abeyance)

BACKGROUND

In hand is another application of the Department of the Army (Licensee) seeking an amendment to its outstanding materials license (SUB-1435). 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 (DU) munitions.

As recently chronicled in U.S. Army (Jefferson Proving Ground Site), LBP-03-28, 58 NRC ____ (December 10, 2003), a prior amendment application submitted some four years ago called for the decommissioning of the site in accordance with a plan that had been submitted to the NRC Staff. In response to a Federal Register notice providing an opportunity to seek a hearing on the plan, a hearing request was filed by an organization based in the vicinity of the JPG site, Save the Valley, Inc. (Petitioner). On a determination that the Petitioner had satisfied the requirements of 10 C.F.R. §§ 2.1205(e) and (h), the relevant provisions of that 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).

LBP-03-28 went on to record that, at least for the present, for practical reasons the Licensee has now abandoned any proposal for site decommissioning. By way of a substitute, it has put before the NRC Staff a different proposal. As recited in an October 28, 2003 Federal Register notice, the Licensee currently seeks a five-year, possession-only license (POLA) that would be renewable until such time as it once again became feasible to put forth a decommissioning plan. 68 Fed. Reg. 61,471.

In response to the October 28 notice, Petitioner filed a new and timely hearing request on November 26, accompanied by a motion asking that the hearing await the completion of the Staff's technical review of the POLA proposal. In the wake of that development, and given the fact that decommissioning is not now being considered by either the Licensee or the Staff, the proceeding instituted several years ago was dismissed in LBP-03-28 as moot. The dismissal was, however, expressly stated to be without prejudice to the filing by Petitioner of a motion to revive that proceeding should the decommissioning of the site once again receive active Staff consideration at the Licensee's behest.

In the present circumstances, what must be decided is whether, as was the case with regard to Petitioner's prior hearing request, the request currently on the table meets the requirements for a grant contained in sections 2.1205(e) and (h). Specifically, has the Petitioner established its standing to question the issuance of the sought POLA and, if so, has it also advanced at least one area of concern that is germane to the subject matter of the proceeding?

Although its December 8 response is somewhat elliptical, the Licensee appears not to challenge either the Petitioner's standing or its specification of at least one germane area of

concern. Moreover, in a separate filing on that date, it agreed that the proceeding should be held in abeyance pending the completion of the Staff's technical review of the POLA proposal.

For its part, in December 29 filings, the Staff announced its intention to participate in the proceeding and acknowledged that the Petitioner had met the area of concern requirement. The Staff maintained, however, that the Petitioner should be required to buttress its showing on standing. More specifically, the Staff would have it that the Petitioner should provide further particularization regarding the location of its members relative to the JPG site and should additionally be called upon to supply affidavits of members authorizing it to represent them in this proceeding. In common with the Licensee, should the hearing request be granted the Staff is agreeable to holding the proceeding in abeyance pending the completion of its technical review.

ANALYSIS

A. Standing

If this were the first endeavor by this Petitioner to seek a hearing with regard to the proposed disposition of the DU munitions accumulated on the JPG site, there might well be some merit to the insistence of the Staff that the current hearing request requires elaboration in the respects it suggests. As seen, however, the Petitioner was found to possess standing several years ago to challenge the site decommissioning plan then under Staff review. Although it might well be, as the Staff points out, that the POLA proposal now under consideration is not the precise equivalent of the shelved (at least for the time being) revised decommissioning plan, the fact remains that both the POLA and that plan are addressed to the same ultimate matter – what is to be done with the amassed DU munitions at this juncture to ensure that they do not pose a threat to the public health and safety. Thus, the interests potentially adversely affected by the issuance of the sought POLA are not significantly different from those associated with decommissioning.

In the circumstances, it seems enough here that the hearing request recites, among other things, that some of Petitioner's members possess property interests in the vicinity of the JPG site that might be affected by DU migration, should it take place. Given that the finding of standing in the now-dismissed earlier proceeding was based significantly upon the same concern regarding such migration, to require anything further of Petitioner at this date would clearly exalt form over substance. Stated otherwise, having once established its standing to question the proposed means of dealing with the DU munitions accumulated on the JPG site, there is no apparent good reason why Petitioner should be burdened with the need to go through the rehearsal that is now called for by the Staff. In that connection, it does not appear that the Staff is itself in real doubt that Petitioner in fact still retains members in the vicinity of the site whose interests might be affected by DU migration and who continue to desire that the Petitioner represent those interests.

B. Areas of Concern

Petitioner assigns several areas of concern, all of which appear indisputably germane to the subject matter of the proceeding. They include (1) whether the Licensee has provided an adequate factual or regulatory basis for the current proposal; (2) whether the proposal will present no undue radiation risk; (3) whether the Licensee's characterization of the site is flawed; (4) whether the Licensee's updated Environmental Radiation Monitoring Plan is inadequate in several material respects; and (5) whether additional conditions should be imposed upon the POLA.

C. Motion to Hold Proceeding in Abeyance

Given that the Staff has elected to participate in this proceeding, and in the absence of any objection thereto, the Petitioner's motion to hold the proceeding in abeyance is granted. Among other things, the conclusions reached on that review might have the effect of narrowing considerably the issues requiring adjudication.

For the reasons stated, the hearing request of Save the Valley, Inc. is hereby granted and further proceedings will be held in abeyance pending completion of the NRC Staff's technical review of the proposed possession only license. Upon completion, the Staff shall promptly file and serve upon the parties a notification to that effect. Upon receipt of that notification, an order will be entered restoring the proceeding to active status.¹

As a general rule, the grant of a hearing request triggers the Staff's obligation to provide a hearing file within thirty days. See 10 C.F.R. § 2.1231. In the present circumstances, however, it seems advisable to defer that obligation pending the outcome of the technical review to ensure that the file will be complete as adjudication moves forward. Accordingly, the file will be due within thirty days of the order reactivating the proceeding, to be presented in a manner consistent with the terms of that order.

It is so ORDERED.

BY THE PRESIDING OFFICER²



Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland

January 7, 2004

¹ During the course of the prior proceeding, the Licensee was required to submit quarterly status reports. That requirement is not being renewed. The Staff may, however, be called upon from time to time to report on the progress of the technical review.

² Copies of this memorandum and order were sent this date by Internet electronic mail transmission to the counsel for the parties.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)

U.S. ARMY)

Jefferson Proving Ground Site)

Madison, Indiana)

(Materials License Agreement))

Docket No. 40-8838-MLA-2

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (GRANTING HEARING REQUEST AND MOTION TO HOLD FURTHER PROCEEDINGS IN ABEYANCE) (LBP-04-01) have been served upon the following persons by U.S. mail, first class, or through internal NRC distribution.

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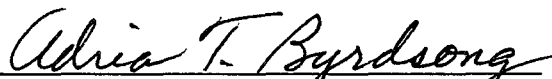
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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of January 2004