UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 9669 **DOCKETED 03/31/05**

ATOMIC SAFETY AND LICENSING BOARD PANEL

SERVED 03/31/05

Before Administrative Judges:

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

In the Matter of	Docket No. 40-8838-MLA-2
U.S. ARMY	ASLBP No. 04-819-04-MLA
(Jefferson Proving Ground Site)	March 31, 2005

MEMORANDUM
(Bringing Matter of Concern to Commission's Attention)

Between 1984 and 1994, the Department of the Army (Licensee) conducted, under the auspices of a NRC materials license (SUB-1435), accuracy testing of depleted uranium (DU) tank penetration rounds at its Jefferson Proving Ground (JPG) site located in Madison, Indiana. Some five years after cessation of testing, on December 16, 1999, the NRC Staff published in the Federal Register a notice of opportunity for hearing on a license amendment application that had been submitted to it by the Licensee. The sought amendment called for the decommissioning of the JPG site, on which a substantial quantity of DU munitions had accumulated as a result of the testing activities, in accordance with a plan that had been submitted to the Staff. See 64 Fed. Reg. 70,294.

In response to the Federal Register notice, Save the Valley, Inc. (Petitioner), an organization with members residing in the immediate vicinity of the JPG site, sought a hearing. On a determination that it fulfilled the requirements of the then – provisions of Subpart L of the Rules of Practice, this presiding officer granted the hearing request in March 2000. See LBP-00-9, 51 NRC 159.

It is now five years later and there has yet to be a single filing by any party addressed to

the Petitioner's quite legitimate concerns regarding what disposition is to be made of the amassed DU munitions on the JPG site. And, perhaps of still greater significance, more than a decade has now passed since the testing activities were brought to an end.

As is evident from the discussion below, the responsibility for this state of affairs cannot be laid at the doorstep of the Petitioner. Rather, it has been brought about by the conduct of the Licensee over the course of the past five years, conduct that has received to a significant extent the seeming indulgence of the Staff.

For reasons that will also be detailed, it is the belief of both Judge Abramson and this presiding officer that remedial measures might be called for that are beyond our power to put into effect. Accordingly, we are placing the matter before the Commission to enable it to determine what, if any, action on its part is warranted in the totality of the present circumstances.

A.1. The March 2000 order granting the Petitioner's hearing request observed that the Licensee had noted the existence of "a distinct possibility that the [then] current decommissioning plan will undergo revision in material respects." LBP-00-9, 51 NRC at 161. In fact, the Licensee's response to the Petitioner's hearing request had specifically 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." Ibid. In accordance with that unopposed request, the proceeding was placed in a state of suspension. The Licensee was required, however, to submit quarterly status reports.

In June 2001, well over a year later and with the proceeding remaining in suspension, the Licensee submitted to the NRC Staff an entirely new plan, which it denominated its "final decommissioning/license termination plan" (LTP). Although the original plan that had been provided to 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 newly furnished LTP

to contain several deficiencies that required correction before it could be accepted for full review. The Staff did note, however, that it considered the LTP to supercede the earlier submitted plan, with the result that the Staff would not consider the latter any further.

In the circumstances, on the Petitioner's motion, the proceeding was continued in a state of suspension to await the LTP being developed to a level fit for adjudication. See LBP-01-32, 54 NRC 283 (2001). That day, however, never arrived.

In the course of its technical review of the LTP, the Staff apparently advised the Licensee that certain additional site-specific sampling and modeling on its part would be required. The Licensee concluded, however, that such an undertaking would pose a safety threat to Licensee and contractor personnel because of the presence on site of unexploded ordinance. Accordingly, in mid-2003 the Licensee withdrew the LTP and 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. See 68 Fed. Reg. 61, 471.

After consultation with the parties, I entered an order on December 10, 2003 dismissing the proceeding on the LTP, without prejudice to Petitioner seeking to revive it should the decommissioning of the site once again receive active NRC consideration at the Licensee's behest. See LBP-03-28, 58 NRC 437. A month later, on January 7, 2004, the Petitioner's timely hearing request regarding the proposed POLA was granted, along with that party's unopposed motion to hold further proceedings in abeyance pending the completion of the Staff's technical review of the POLA. With respect to the motion, I observed that "[a]mong other things, the conclusions reached on that review might have the effect of narrowing

considerably the issues requiring adjudication." LBP-04-01, 59 NRC 27, 30.[1]

2. According to the October 28, 2003 Federal Register notice, the Staff had accepted the POLA proposal for technical review a week earlier. See 68 Fed. Reg. at 61,471. In that circumstance, after waiting some seven months, on June 1, 2004 I issued an unpublished order in which I called upon the NRC Staff to submit a report "setting forth with particularity the present state of the technical review and furnishing the Staff's best current estimate as to when the review will be completed." In a June 8 response, the Staff stated that it had informed the Licensee in a May 20, 2004 letter that it required further information to complete its evaluation of the Environmental Radiation Monitoring (ERM) Program Plan that had been submitted in support of the amendment application. The Licensee had been given until August 30, 2004 to supply the sought information and, assuming that it proved adequate, the Staff advised us that it thought it could complete the technical review and issue an environmental assessment (EA) and safety evaluation report (SER) "between early January and early March 2005."

In an October 4 order (unpublished), I took note of the August 30 deadline for the Licensee's submission of the additional information and asked the Staff to advise me whether it had been received and, if so, whether it was deemed sufficient to enable the issuance of an EA and SER no later than this March. In an October 14 response, the Staff reported that it was still in need of additional information to enable it to have "sufficient data to complete its evaluation of the ERM Program Plan and issue an EA and SER." We were also advised that the Staff thus no longer believed that the technical review might be completed by March 2005. Rather, it

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[1] Effective February 13, 2004, the Rules of Practice codified in 10 C.F.R. Part 2 underwent substantial revision. See 69 Fed. Reg. 2,182 (Jan. 14, 2004). The hearing request addressed to the POLA having been submitted and acted upon prior to that date, and the Commission not having directed otherwise, this proceeding remains subject to the provisions of the now-superceded Subpart L governing the adjudication of materials licensing matters. As such, it will continue to be before Judge Abramson and this presiding officer until ultimate adjudication.

anticipated "a delay of approximately two months in preparing its analyses commensurate with the additional time required for the Licensee to furnish the necessary information." The Staff added that it "would be able to provide a more precise estimate for completion of its technical review following actual receipt of the requested information."

Finally, in a March 3, 2005 order (unpublished), I once again endeavored to determine where matters stood. In its March 18 response to that order, Judge Abramson and I were advised by the Staff that the information the Licensee had supplied in November 2004 and January 2005 was "not sufficient to allow the Staff to proceed with preparation of an EA or SER." The Staff went on to note that, based upon a January 31, 2005 letter that it had received from the Licensee, it was not clear "how the Licensee intends to proceed." At the Staff's request, however, the Licensee "has agreed to provide a letter clarifying its planned path forward with regard to the pending license amendment request." Pending that clarification, we were told, the Staff "is not in a position to provide an estimated issuance date for the EA and SER."[2]

B. As the foregoing recitation reflects, some eleven years have now elapsed since the Licensee terminated testing activities on its JPG site that left behind an accumulation of DU munitions. Perhaps more to the point, this past March 23 was the fifth anniversary of the grant of the hearing request of Petitioner, an organization with members who live in proximity to that site and who profess concern about the site's condition – a concern scarcely unreasonable given that, according to what the Licensee apparently represented to the Staff, the site cannot now be even characterized without subjecting its personnel and that of contractors to an unacceptable safety risk.

Over the course of the past five and a half years, the Staff has been favored with one

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[2] The March 18 Staff filing, as well as its submission last October, had appended documents pertaining to the representations contained therein.

proposed decommissioning plan; then a second one that was so deficient as submitted that the Staff would not commence a technical review of it; and, lastly, a proposal that the Licensee be granted a POLA, to be renewable until such time, if ever, that the Licensee should conclude that a site characterization can be safely accomplished. Close to eighteen months have elapsed since the POLA proposal was accepted for technical review. Nonetheless, not only has the Staff not completed its technical review and issued the required EA and SER, but also, we are now informed that it is unable to provide at this time any estimate as to when that might be accomplished. This is said to be because of its endeavor to obtain information from the Licensee that is deemed necessary to complete the review but has not as yet been produced.

We find it difficult to believe that what is involved in passing judgment on a POLA proposal is so complex that it should take years to obtain from the Licensee required information. We have not, however, endeavored to explore that matter further. As we understand it, our jurisdiction in proceedings such as this does not extend to superintending the Staff's discharge of its review functions. See Duke Energy Corporation (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC 62, 74 (2004). Apparently, the Staff is satisfied with allowing the technical review to remain in limbo while it continues its efforts – to this point far from totally successful – to get from the Licensee the information it considers necessary in order to complete the technical review. Although we might have our doubts as to the warrant for such an approach, as we see it we are foreclosed from either calling upon the Staff to justify it or directing the Licensee to furnish a full explanation regarding its default in furnishing to the Staff the information sought from it.

At the same time, this much is readily apparent. As a result of its failure over an extended period – justified or unjustified – to provide the information the Staff requested, the Licensee has, in effect, possessed the very POLA that is the subject of the present proceeding. Indeed, it might be reasonably said that it has had the equivalent of such a license for the entire

eleven years or so since it ceased the testing of the DU munitions. It seems highly unlikely that such was the contemplation of the Staff or the Commission at the time of the grant of the materials license under which the testing was performed – to the contrary, we think it most probable that the expectation was that, upon cessation of operations at the JPG site, a decommissioning plan would be forthcoming in relatively short order.[3]

Beyond that, the existing situation appears to us both to work an injustice upon the Petitioner and its members and to be inconsistent with the Commission's expectation – indeed insistence – that NRC adjudicatory proceedings move forward to conclusion with reasonable expedition. On the first score, surely those persons located in the vicinity of the JPG site were entitled to have a final determination made long ago on just what the Licensee would be required to do to ensure that the accumulated materials did not pose a threat to their health and safety. That they have not been heard to complain does not obscure the fact that, eleven years after the licensed activity ceased, the NRC Staff not only still finds itself unable to make such a determination, but also, has no current idea when one will be possible. For all that we have been told at this point, additional years might pass before the Staff considers that it has been provided sufficient information by the Licensee to enable it to make an informed judgment of the acceptability of a proposal that has now been before it for evaluation for almost a year and a half.

We have not overlooked that at issue in a license amendment adjudication is the acceptability of the Licensee's proposal under consideration and not (other than with respect to compliance with the dictates of the National Environmental Policy Act (NEPA)) the Staff's

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[3] That said, we have not undertaken to examine the license to determine whether the Licensee might be in violation of some condition contained therein pertaining to site decommissioning once the activities authorized by the license came to an end. Any inquiry along those lines would be, of course, for the NRC Office of Enforcement (OE) to undertake in the first instance. Apparently, the Staff office responsible for the oversight of the licensed activities has seen no reason to call for OE involvement.

review of it. Theoretically at least, the Petitioner therefore might have been called upon to proceed with its challenge to the POLA proposal without waiting for the completion of the Staff's review. As a realistic matter, however, that party hardly could have been expected to address the acceptability or non-acceptability of a proposal that, because of an asserted need for information that the proposal sponsor has not as yet provided, to this day the agency's Staff remains unable to assess. Moreover, until it has completed its environmental appraisal and issued its EA, the question of the Staff's compliance with NEPA requirements will not become ripe for adjudication. All things considered, it is beyond cavil that the Petitioner was fully justified in requesting that further proceedings await the completion of the technical review and the issuance of the EA and SER. This was implicitly recognized by the Licensee and Staff, both of whom acquiesced in the grant of that request.

Based upon the foregoing considerations, Judge Abramson and this presiding officer regard the present posture of this proceeding as unacceptable. Nonetheless, we do not believe that we are empowered to endeavor to rectify the situation by injecting ourselves into the Staff's technical review process. Consequently, we are pursuing the only course available to us by calling the Commission's attention to the extended history of this proceeding and to the fact that, as a matter totally beyond our control, there is no current assurance that it will move forward in the near term.

BY THE PRESIDING OFFICER[4]

/RA/

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Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 31, 2005

[4] Copies of this 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	)	Docket No. 40-8838-MLA-2
Jefferson Proving Ground Site	)	
Madison, Indiana	)	
	)	
(Materials License Agreement)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM (BRINGING MATTER OF CONCERN TO COMMISSION'S ATTENTION) (LBP-05-09) have been served upon the following persons by U.S. mail, first class, or through internal NRC distribution.

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[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 31st day of March 2005