

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of

U.S.ARMY

(Jefferson Proving Ground Site)

Docket No. 40-8838-MLA
(ASLBP 04-819-04)
SUB-1435

July 29, 2005

**RESPONSE IN OPPOSITION TO ARMY'S MOTION TO DISMISS
AND REQUEST FOR ALTERNATIVE RELIEF
OF SAVE THE VALLEY, INC.**

On July 19, 2005, the Department of the Army (Army) moved to dismiss this proceeding as moot. According to the Army, it submitted a new Possession Only License Amendment (POLA) on May 25, 2005, incorporated here by reference, which the NRC Staff has determined supersedes its September 22, 2003 request for a POLA. Thereafter, the Army withdrew its September 22, 2003 request in a July 19, 2005 letter, which is incorporated here by reference. Thus, according to the Army, there is no longer a need for the hearing previously granted to Save the Valley, Inc (STV), and this proceeding should be dismissed as moot.

However, the Army's motion elevates form over substance to the prejudice of STV and should be denied. Instead, this proceeding should continue, with its previously authorized hearing held in abeyance pending conclusion of the Staff's ongoing technical review and circulation of the complete hearing file. STV should be authorized to file its detailed statement of issues, contentions, and supporting evidence and argument at a time subsequent to circulation of the complete hearing file in lieu of filing an entirely new request for hearing.

In the first place, the Army has not truly “withdrawn” its September 22, 2003 POLA request. It has simply “modified” or “supplemented” its prior request in predictable respects to respond to some of the valid concerns raised by STV in its November 26, 2003 Comments and Request for Hearing, which are incorporated here by reference. Specifically, in its May 25, 2005 POLA request, the Army still seeks approval pursuant to 10 CFR 40.42(g)(2) for an alternate schedule for decommissioning and decontamination at the Depleted Uranium (DU) test site at the Jefferson Proving Ground (JPG). It still seeks a POLA with a five-year term. To address legal and regulatory policy objections expressly raised by STV, the Army has dropped that part of its prior request that the approved POLA include an express provision for renewal for successive five-year periods. But, of course, this change is of scant significance at this point since the Army retains the right to request such renewals at subsequent times should it elect to do so. Additionally, the Army has now conceded as previously contended by STV in its November 26, 2003 hearing request that additional site characterization activities are both necessary and feasible notwithstanding the presence of UXO at the JPG DU site. Accordingly, it has now submitted both a Field Sampling Plan (FSP) and a Health and Safety Plan (HASP), which are incorporated here by reference, directed to the performance of those site characterization activities. These developments are no more than the narrowing of the issues for adjudication contemplated during the Staff’s technical review when the parties agreed to and the Presiding Officer approved deferral of STV’s requested hearing. *See* LBP-04-01, 59 NRC 27, 30 (Jan. 7, 2004) (“[T]he Petitioner’s motion to hold the proceeding in abeyance is granted. Among other things, the conclusions reached on that [technical] review might have the effect of narrowing considerably the issues requiring adjudication.”).

In the second place, this proceeding is decidedly *not* moot. The Army has narrowed the issues

for adjudication by modifying and supplementing its September 22, 2003 POLA request, but has certainly *not* ended the case or controversy raised by the request. As shown conclusively by the STV Comments filed on July 27, 2005, which are incorporated here by reference, the FSP and HASP submitted by the Army on May 25, 2005 do *not* resolve STV's previously stated concerns regarding adequate site characterization. Instead, the FSP and HASP simply raise additional, more specific concerns as to whether the plans are adequate means to the necessary end of proper site characterization. *See* STV July 27, 2005 Comments, at 11-20.

Moreover, the Army's May 25, 2005 submissions do not and cannot resolve the overarching issues regarding its intentions and performance with respect to its JPG site characterization, decommissioning, and decontamination obligations raised by the Presiding Officer's March 31, 2005 Memorandum and Order. *See* LBP-05-09, 61 NRC _____. By Memorandum and Order of June 20, 2005, the Commission itself has assumed jurisdiction of those issues. *See* CLI-05-13, 61 NRC _____. Further, contemporaneous with the filing of this Response, STV (at the Commission's invitation) has filed a separate Response (incorporated here by reference) expressing its views with regard to those issues, views which differ clearly and decidedly from those of the Army as well as the Staff.

Finally, dismissal of this proceeding at this time would cause prejudice to STV. It is not a stranger to these or other prior proceedings relating to JPG DU site characterization, decommissioning and decontamination. It has already committed the time, expertise and resources necessary to obtain a hearing on the Army's request for an alternate decommissioning schedule pursuant to 10 CFR § 40.42(g)(2) for the JPG DU site. It sought and obtained approval to defer that hearing precisely for the reason now manifest – the virtual certainty of modifications and supplementation of the Army's

proposal in the course of the Staff's technical review. Having taken those prior actions, with what has proven to be prescience, STV should not now be required to seek another hearing as if it were a stranger to the record here.

In particular, STV should not be required to seek another hearing under new Commission rules which would require a threshold showing on its part on or before August 26, 2005, essentially equivalent to the pre-hearing showing contemplated under the prior Commission rules for the time the hearing record becomes complete. *Compare* 10 CFR § 2.309(f) *with* 10 CFR § 2.1205 (2003) (superseded). As the Presiding Officer in Sequoyah Fuels Corp. explained the prior rule:

As set forth in the Statement of Considerations for 10 C.F.R. Part 2, Subpart L, the statement of concerns need not be extensive but must be sufficient to establish that the issues a petitioner seeks to raise fall "generally" within the range of matters that are properly subject to challenge in the proceeding. 52 Fed. Reg. 8269, 8272 (Feb. 28, 1989). . . .

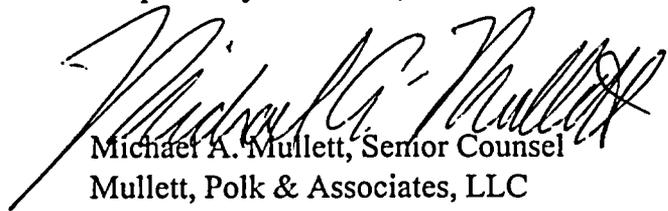
Nor must the areas of concern be set forth at this stage of the proceeding with the degree of detail or specificity that might be appropriate for an issue that will be litigated. Babcock and Wilcox Co. (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 N.R.C. 149, 153-54 (1992). In fact, they are more like the "aspects" requirement in formal litigation, setting the stage for formal contentions in those proceedings and definitive issues for litigation in informal adjudications. Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 N.R.C. 140, 147 (1989).

Memorandum and Order, at 16-17, Docket No. 40-8027-MLA-4, ASLB No. 99-70-09-MLA (December 16, 1999). Consequently, rather than filing a new hearing request with the supporting detail required under the new Commission rules at this time, it would be entirely appropriate under the prior rules governing STV's participation in this proceeding for STV to articulate its specific issues, contentions and supporting evidence and argument within its previously expressed areas of concern

once the Staff's technical review has been concluded and the hearing file is complete. Id. at 21. ("The specific issues in an area of concern that are to be litigated must be particularized at a later date, following distribution of the hearing file.")

WHEREFORE, Petitioner STV respectfully requests that the Presiding Officer enter an order (1) denying the Army's motion to dismiss this proceeding, (2) holding the hearing in this proceeding in continued abeyance pending conclusion of the Staff's technical review of the Army's pending POLA request, and (3) authorizing STV, pursuant to the Commission's prior rules, to file its detailed statement of issues, contentions, and supporting evidence and argument regarding the Army's pending POLA request at a time subsequent to completion and circulation of the hearing file in lieu of STV filing a new request for hearing, pursuant to the Commission's new rules. STV also requests that the Presiding Officer enter the requested order at the earliest practicable time so that the relief requested is not rendered moot, in whole or substantial part, by the passage of time between now and August 26, 2005.

Respectfully submitted,



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NUCLEAR REGULATORY COMMISSION

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Docket No. 40-8838-MLA
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July 29, 2005

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response have been served this 29th day of July, 2005, upon the following persons by electronic mail (where indicated) and by U.S. Mail, first class postage prepaid:

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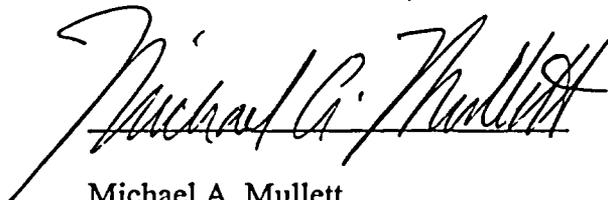
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July 29, 2005

Secretary
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ATTN: Rulemakings and Adjudications Staff

Re: Response in Opposition to Army's Motion to Dismiss and Request for Alternative Relief of Save the Valley, Inc. - In the Matter of the U.S. Army (Jefferson Proving Ground Site), Docket No. 40-8838-MLA (ASLBP-04-819-04)

Dear Secretary:

Enclosed please find for filing in the above-referenced docket the original and two conformed copies of the Response in Opposition to Army's Motion to Dismiss and Request for Alternative Relief of Save the Valley, Inc..

Thank you for your assistance in this matter.

Respectfully submitted,


Michael A. Mullett
Attorney for Save the Valley, Inc.

cc: Service List - Docket No. 40-8838-MLA