

August 15, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

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

NRC STAFF RESPONSE TO SAVE THE VALLEY'S REPLY  
TO APPLICANT'S MOTION FOR DISMISSAL OF PROCEEDING

INTRODUCTION

Pursuant to the Presiding Officer's August 2, 2005 Order, the Nuclear Regulatory Commission Staff (Staff) hereby responds to the July 29, 2005 reply of Save the Valley (STV). See Order, slip op., at 1. As discussed below, the U.S. Army (Army) has withdrawn the license amendment application underlying this proceeding. Consequently, the proceeding is moot and should be dismissed without prejudice.

BACKGROUND

On September 22, 2003 the NRC Staff received an application from the Army for a license amendment that would create a 5-year renewable possession-only license (POLA Request). On October 28, 2003, the NRC Staff published a Notice of Consideration of Amendment Request for the Jefferson Proving Ground Site and Opportunity for a Hearing in the *Federal Register*. See 68 Fed. Reg. 61471. On November 26, 2003, STV requested a hearing on the 5-year POLA. On January 7, 2004 the Presiding Officer issued an Order granting STV's hearing request on the POLA. See *U.S. Army (Jefferson Proving Ground Site)*, LBP-04-01, 59 NRC 27 (2004). The Order held further proceedings on the hearing in abeyance pending completion of the Staff's technical review of the POLA. See *id.*, at 30.

On May 25, 2005 the Army submitted a superceding license amendment application for an alternate schedule for decommissioning (Alternate Schedule Request). On June 16, 2005 the Staff accepted the Alternate Schedule Request for review. On June 27, 2005 the Staff published a Notice of Consideration of Amendment Request for an Alternate Decommissioning Schedule and Opportunity to Request a Hearing in the *Federal Register*. See 70 Fed. Reg. 36964. On July 19, 2005 the Army formally withdrew its POLA Request and moved for dismissal of the proceeding. See “Applicant’s Motion for Dismissal of Proceeding,” (Motion to Dismiss). STV replied to the Army’s motion on July 29, 2005. “Response in Opposition to Army’s Motion to Dismiss and Request for Alternative Relief of [STV]” (STV Reply). On August 2, 2005, the Presiding Officer directed the Staff and the Applicant to respond to STV’s July 29, 2005 reply by August 15, 2005. Order, slip op., at 1.

#### DISCUSSION

In its reply opposing the Applicant’s motion to dismiss the proceeding, STV raises several points which, it argues, militate against the Presiding Officer’s dismissal of the proceeding. First, STV argues that the Army has not withdrawn its POLA Request, but rather has simply supplemented the POLA Request. STV Reply, at 2. STV next argues that the proceeding is not moot and should not be dismissed. *Id.*, at 2-3. Finally, STV argues that dismissal of the proceeding would prejudice STV since the June 27, 2005 opportunity for hearing is governed by the new rules of practice at 10 C.F.R. Part 2 (New Part 2).<sup>1</sup> *Id.*, at 3. The Staff addresses each of these arguments in turn below.

---

<sup>1</sup> The revised Part 2 (New Part 2) applies to all proceedings noticed after February 13, 2004 unless otherwise directed by the Commission. 69 Fed. Reg. 2182 (Jan. 14, 2004). Because this proceeding commenced prior to the effective date of the revision, the former Part 2 rules (Old Part 2) still apply.

An adjudicatory proceeding is limited to the scope of issues outlined in the notice of opportunity for hearing. See *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979). The October 28, 2003 opportunity to request a hearing was issued with respect to the Staff's review of the Army's September 22, 2003 license amendment application. See 68 Fed. Reg. 61471. The Army has now voluntarily withdrawn that amendment application, the POLA Request. Motion to Dismiss, at 1. However, STV argues that the Army's withdrawal and subsequent submission of a second, different amendment application should be characterized as a "supplement" rather than a "new" amendment request since, in STV's view, the changes amount to a mere narrowing of the issues. STV Reply, at 2. However, the Staff determined that the differences between the September 23, 2003 application and the May 25, 2005 application were so significant as to require the Staff to re-notice the opportunity for hearing.

Although not directly applicable, the Staff finds somewhat analogous the "logical outgrowth" test used in the context of administrative rulemaking. Where a final regulation is a logical outgrowth of the proposed rule originally noticed in the *Federal Register*, the notice provisions of the Administrative Procedure Act are satisfied, and challenges related to the adequacy of the notice must fail. *Shell Oil Co. v. EPA*, 950 F.2d 741, 759 (D.C. Cir. 1992); see also, *Entergy Nuclear Vermont Yankee* (Vermont Yankee Power Station), LBP-04-33, 60 NRC 749, 754 n. 5 (2004). Here, the Alternate Schedule Request provides much more than a mere clarification of the POLA application. Instead, the Alternate Schedule Request is different in both nature and scope from the prior POLA Request and therefore cannot be considered a logical outgrowth of that amendment application. For example, the POLA Request would have deferred decommissioning indefinitely and reduced the frequency of environmental sampling, but the Alternate Schedule Request anticipates actual decommissioning and calls for enhanced environmental monitoring. See e.g., "Department of

Army Response to [Commission] Order Dated June 20, 2005" at 7-10 (July 8, 2005). Indeed, STV "recognizes and appreciates that the Army's most recent POLA request differs materially from its prior requests for which STV has sought hearings." "Comments by Save the Valley, Inc. Re Request for Alternative Decommissioning Schedule," at 10 (July 27, 2005) (emphasis added). Further, not publishing a new Notice of Opportunity to Request a Hearing would deprive members of the public other than STV of fair notice and opportunity to participate with respect to the Alternate Schedule Request. For these reasons, the Staff properly published a new and different opportunity to request a hearing in the *Federal Register*.

Since this proceeding is based on the Army's POLA Request and that amendment application has been withdrawn, the proceeding is moot. In light of the withdrawal, there is nothing left for the Board to consider. See *Niagara Mohawk Power Corporation, et. al.* (Nine Mile Point Nuclear Station, Units 1 & 2), CLI-00-9, 51 NRC 293, 294 (2000) ("The withdrawal of the application moots this proceeding, which is, accordingly, dismissed"). As the Presiding Officer stated previously,

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.

*U.S. Army* (Jefferson Proving Ground Site), LBP-01-32, 54 NRC 283, 287 (2001). Here, the Presiding Officer is faced with a situation similar to the one posited in LBP-01-32. Since the Army has elected to withdraw its POLA Request rather than complete the licensing review process, there is no "live" controversy before the Presiding Officer. See *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993). The relief sought by STV in its request for a hearing cannot be granted because there is no amendment application to challenge. See *id.* (dismissing an appeal as moot since no effective relief could be granted). Moreover, the Alternate Schedule Request is not pending before the

Presiding Officer and thus, the Presiding Officer is without jurisdiction to consider it.

Accordingly, the proceeding is moot and should be dismissed.

The Intervenors contend that dismissing the proceeding would cause prejudice to STV since “[i]t has already committed the time, expertise, and resources necessary to obtain a hearing on the Army’s request” and because the Commission’s new rules of practice would impose requirements for additional, supporting details with respect to future requests for hearings. STV Reply, at 3-4. Here, there is no prejudice to STV. The admitted areas of concern were focused on alleged deficiencies and inadequacies of the withdrawn POLA Request. STV will be in precisely the same position in any subsequent proceeding as if it had prevailed on any merits portion of this proceeding, *i.e.*, STV will be faced with the Army returning to the Commission with a second, different amendment application which STV may oppose if it wishes. Further, STV’s expenditures cannot form the “basis for departing from the usual rule that a dismissal should be without prejudice” since “the possibility of future litigation with its expenses and uncertainties ... is precisely the consequence of any dismissal without prejudice.” *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 223 fn.3 (1999) (citations omitted).

Similarly, application of the new rules of practice to any future proceeding will not prejudice STV. See 69 Fed. Reg. at 2182. Even if a hearing has begun under one set of procedures, the parties have no vested interest in the continued use of those procedures; the Commission may change its rules of practice so long as there is adequate notice and no prejudice. *National Whistleblower Center v. NRC*, 208 F.3d 256, 262 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001). Here, STV has failed to establish how it will not be fully able to represent its views using the full range of adjudicatory procedures set forth in the New Part 2 in any future proceeding. Essentially, STV seeks to avoid the well-supported, specific contention requirements of 10 C.F.R. § 2.309(f) necessary to obtain a hearing on the Army’s May 25, 2005

Alternate Schedule Request. However, the Commission has determined that those contention requirements improve NRC hearings, limit unproductive litigation, and ease the burden of hearing preparation and participation for all participants. See 69 Fed. Reg. at 2188 (emphasis added). STV has simply not shown how application of New Part 2 to future hearing requests will result in interruption, unwarranted delay, added burden, or unfairness. Accordingly, the Presiding Officer should refuse to sanction STV's attempts to avoid the Commission's rules of practice.

#### CONCLUSION

For the foregoing reasons, the Staff requests that the Presiding Officer grant the Army's motion and dismiss the proceeding without prejudice.

Respectfully submitted,

**/RA/**

Tyson R. Smith  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 15<sup>th</sup> day of August, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of	)	
	)	Docket No. 40-8838-MLA-2
UNITED STATES ARMY	)	
	)	ASLBP No. 04-819-04-MLA
(Jefferson Proving Ground Site)	)	
	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

Name:	Tyson R. Smith
Address:	U.S. Nuclear Regulatory Commission Office of the General Counsel Mail Stop: O-15 D21 Washington, D.C. 20555
Telephone:	301-415-4073
Facsimile:	301-415-3725
E-Mail Address:	<a href="mailto:trs1@nrc.gov">trs1@nrc.gov</a>
Admissions:	State of California
Name of Party:	NRC Staff

Respectfully submitted,

**/RA/**

Tyson R. Smith  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 15<sup>th</sup> day of August, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO SAVE THE VALLEY'S REPLY TO APPLICANT'S MOTION FOR DISMISSAL OF PROCEEDING" and "NOTICE OF APPEARANCE" of Tyson R. Smith in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal Mail system (as indicated by a single asterisk) or by U.S. Mail, first class, and (as indicated by a double asterisk) by e-mail, this 15<sup>th</sup> day of August, 2005.

Alan S. Rosenthal, Esq., Presiding Officer \* \*\*  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3F23  
Washington, D.C. 20555  
E-mail: [rsnthl@comcast.net](mailto:rsnthl@comcast.net)  
[src2@nrc.gov](mailto:src2@nrc.gov)

Atomic Safety and Licensing Board Panel \*  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3F23  
Washington, D.C. 20555

Richard Hill, President \*\*  
Save the Valley, Inc.  
P.O. Box 813  
Madison, IN 47250  
E-mail: [phill@venus.net](mailto:phill@venus.net)

Paul B. Abramson, Esq., Special Assistant\* \*\*  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3F23  
Washington, D.C. 20555  
E-mail: [pba@nrc.gov](mailto:pba@nrc.gov)

Office of Commission Appellate Adjudication \*  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16C1  
Washington, D.C. 20555

Office of the Secretary \* \*\*  
Attn: Rulemaking and Adjudications Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16C1  
Washington, D.C. 20555  
E-mail: [HEARINGDOCKET@nrc.gov](mailto:HEARINGDOCKET@nrc.gov)



John J. Welling, Esq. \*\*  
Commander  
Larry D. Manecke, Esq. \*\*  
Commander  
Frederick P. Kopp, Esq. \*\*  
U.S. Army Garrison  
Rock Island Arsenal  
ATTN: AMSTA-RI-GC  
(J. WELLING, L. MANECKE, AND  
F. KOPP)  
1 Rock Island Arsenal Place  
Rock Island, IL 61299-5000  
E-Mail: [wellingj@ria.army.mil](mailto:wellingj@ria.army.mil)  
[maneckel@ria.army.mil](mailto:maneckel@ria.army.mil)  
[koppf@ria.army.mil](mailto:koppf@ria.army.mil)

Michael A. Mullett, Esq. \*\*  
Jerome E. Polk, Esq. \*\*  
Mullett, Polk & Associates, LLC  
309 West Washington Street  
Suite 233  
Indianapolis, IN 46204-2721  
E-mail: [mmullett@mullettlaw.com](mailto:mmullett@mullettlaw.com)  
[jpolk@mullettlaw.com](mailto:jpolk@mullettlaw.com)

**/RA/**

---

Tyson R. Smith  
Counsel for NRC Staff