

August 26, 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 MOTION FOR CLARIFICATION, OR,
IN THE ALTERNATIVE, REQUEST FOR RECONSIDERATION

INTRODUCTION

Pursuant to the pre-hearing conference held on August 24, 2005, the Presiding Officer requested briefing from the Staff regarding the security of the Jefferson Proving Ground Site. The Staff hereby moves for clarification of the Presiding Officer's question. To the extent the Presiding Officer was requesting briefing on security, the Staff moves for reconsideration. The Staff also moves for an extension of time to reply to the Presiding Officer's question.

BACKGROUND

On September 22, 2003, the NRC Staff received a request from the Army for a license amendment that would create a 5-year renewable possession-only license (5-year POLA). 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, Save the Valley requested a hearing on the 5-year POLA. On January 7, 2004, the Presiding Officer issued an Order granting Save the Valley's hearing request on the POLA.¹ At the request of Save the Valley, the Order held further proceedings on the hearing in abeyance pending completion of

¹ See *U.S. Army* (Jefferson Proving Ground Site), LBP-04-01, 59 NRC 27 (2004).

the Staff's technical review of the 5-year POLA. See *Id.* at 5. On July 19, 2005 the Army withdrew its 5-year POLA and moved to dismiss the proceeding. See Applicant's Motion for Dismissal of Proceeding, dated July 19, 2005. A pre-hearing conference was held on August 24, 2005 to discuss the Army's Motion. During the pre-hearing conference the Presiding Officer asked the Staff to file, by August 30, 2005, a brief explanation regarding security at the Jefferson Proving Ground site. As discussed below, the Staff moves for clarification or, in the alternative, reconsideration of the Presiding Officer's request.

DISCUSSION

1. Request for Clarification

During a colloquy between the Special Assistant and Counsel for the NRC Staff, the Special Assistant alluded to questions regarding the security at the JPG site. See Transcript of Prehearing Conference, August 24, 2005, at 26-27. The Staff understanding of the Special Assistant to the Presiding Officer's question is as follows; the Staff should "consult with the Applicant and provide us a brief, two pages, discussion of the similarity of the safeguards and security at the JPG as compared to those that would be required of a licensee of a power reactor in Safe Store mode. All we want to know is are they essentially comparable or are those at JPG greater? We're trying to get a handle on access." See Tr. at 43. Several aspects of this inquiry are unclear to the Staff. The Staff seeks clarification due to the sensitivity of the information requested.

It is unclear to the Staff whether the Presiding Officer in actuality seeks information regarding the security arrangements at JPG and the security arrangements at reactors or if the Presiding Officer simply wishes to analogize the decommissioning process at a reactor to the

decommissioning of a Part 40 licensee, such as JPG?² Furthermore, regarding the first part of the question, suggesting Staff consult with the applicant and provide an explanation of the security and safeguards at the Jefferson Proving Ground Site, the Staff is unclear on whether the Presiding Officer seeks information regarding the NRC requirements for the Jefferson Proving Ground site, or the security requirements that exist because it is a military installation? Clearly, if it is the latter, the Army and not the Staff is best able to respond. The Staff therefore seeks clarification of the Presiding Officer's question.

2. Request for Reconsideration

To the extent that the Presiding Officer is in fact seeking information regarding the security provisions at Jefferson Proving Ground and at reactor sites, the Staff requests reconsideration of the Presiding Officer's question. First, a comparison of security at the JPG site to security at reactor sites, which may have spent fuel pools with highly radioactive materials, would, it seems evident, be comparing apples and oranges. Moreover, such comparison could involve the discussion of potentially sensitive information, including Safeguards Information that cannot be publicly disclosed. Moreover, a Presiding Officer only has the jurisdiction granted by the Commission. See *Fansteel Inc.* (Muskogee, Oklahoma

² To the extent the Presiding Officer was attempting to draw this analogy because it was concerned with whether Save the Valley was being asked to take on an extra burden, it is true that the instant proceeding and the new alternate schedule request relate in a general sense to the underlying issue of the decommissioning of Jefferson Proving Ground. In fact, one possible interpretation of the Presiding Officer's question on security issues is simply that the Presiding Officer was attempting to demonstrate that both proposals by the Army address the decommissioning of the site. That being the case, in the event that Save the Valley was to request a hearing on the alternate schedule request (ASR), the Staff does not view the burden on Save the Valley as onerous. Save the Valley has previously been granted standing for matters concerning Jefferson Proving Ground, and, from the Staff's perspective, need only note that fact in response to the ASR notice to establish standing for that proceeding. However, even, assuming *arguendo* that the Staff had treated the alternate schedule request as an amendment to the previous 5 year possession only request, Save the Valley would still need to address the new proposal by filing new contentions and basis. The Staff does not view the "burden" of putting those new contentions in the form of a request for hearing as raising a substantial burden it would in any event have, particularly when balanced against the Staff obligation to notice new license amendment requests and allow other members of the public an opportunity to request a hearing.

Facility), LBP-03-13, 58 NRC 96, 100 (2003). The Commission has specifically requested that legal questions concerning security be referred to the Commission. *See Duke Energy Corporation* (Catawba Nuclear Station, Units 1 and 2), CLI-05-14, (2005)(“In future cases, any legal questions about the interpretation of the DBT regulatory requirements which arise in the course of considering the admission of contentions or later in the adjudication should be referred to the Commission for appropriate guidance in lieu of needless speculation and misinterpretation.”)

Also significant, in addition to the engaging in an inquiry of potentially sensitive information, as the Staff understands it, the inquiry does not appear relevant to the admitted issues in the instant case. The areas of concern identified by Save the Valley and admitted to this proceeding are as follows:

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.

See U.S. Army (Jefferson Proving Ground Site), LBP-04-01, 59 NRC 27 at 29 (2004).

Issues of security were not identified as an area of concern. Furthermore, the issue currently before the Presiding Officer is whether the proceeding should be terminated in light of the Army’s withdrawal of the license amendment request at issue in the proceeding. It is unclear to the Staff how issues of the security of the site could influence the Presiding Officer’s determination on whether to terminate this proceeding, particularly when the subject matter of the inquiry was never part of the admitted areas of concern in the proceeding. *See* 10 C.F.R.

§ 2.1251(d) (“Matters not put into controversy by the parties may not be examined and decided by the presiding officer. If the presiding officer believes that a serious safety, environmental, or common defense and security matter exists that has not been placed in controversy, the presiding officer shall advise the Commission promptly of the basis for that view, and the Commission may take appropriate action.”) Therefore, to the extent the Presiding Officer is seeking information regarding the security of the Jefferson Proving Ground site, the Staff moves for reconsideration.

3. Request for an Extension of Time to Reply

The Staff also moves for an extension of time to reply to the Presiding Officer’s Question. The Staff requests that it be given ten days after the Presiding Officer has ruled on the Staff’s motion to respond to the Presiding Officer inquiry.

CONCLUSION

Therefore, for the reasons described above, the Staff seeks clarification and requests reconsideration of the Presiding Officer’s question regarding the security of the Jefferson Proving Ground Site. Also, the Staff moves for an extension of time to reply to the Presiding Officer’s question.

Respectfully Submitted,

/RA/

Sara E. Brock
Counsel to NRC Staff

Dated at Rockville, Maryland
this 26th day of August, 2005

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NOTICE OF WITHDRAWAL

Notice is hereby given that, effective August 26, 2005, I will withdraw my appearance in the above-captioned matter. All mail and service lists in this proceeding should be amended to delete my name after that date.

Respectfully Submitted,

/RA/

Shelly D. Cole
Counsel for NRC Staff

Dated at Rockville, Maryland
this 26th day of August, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MOTION FOR CLARIFICATION, OR, IN THE ALTERNATIVE, REQUEST FOR RECONSIDERATION" and "NOTICE OF WITHDRAWAL" of Shelly D. Cole 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 26th day of August, 2005.

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