

RAS 10439

LBP-05-25
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

SERVED 09/12/05

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

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

In the Matter of

U.S. ARMY

(Jefferson Proving Ground Site)

Docket No. 40-8838-MLA-2

ASLBP No. 04-819-04-MLA

September 12, 2005

MEMORANDUM AND ORDER

(Referring to Commission Reinstatement of Prior Proceeding)

Before us is the July 19, 2005 motion of the Department of the Army (Licensee) to dismiss as moot this materials license proceeding involving its Jefferson Proving Ground (JPG) site located in Madison, Indiana. As appears from their filings and the discussion at an August 24 telephone conference, the motion is supported by the NRC Staff and opposed by the intervenor, Save the Valley, Inc. (Petitioner).

For the reasons that follow, we are: (1) sua sponte reinstating a conditionally dismissed prior proceeding concerned with the decommissioning of this site; (2) referring the reinstatement to the Commission for its consideration; and (3) holding the motion to dismiss the present proceeding in abeyance to await the outcome of the referral.¹

¹This proceeding was instituted prior to the February 13, 2004 effective date of the substantial revision of the Commission's Rules of Practice codified in 10 C.F.R. Part 2. See 69 Fed. Reg. 2,182 (Jan. 14, 2004). The Commission not having directed otherwise, the proceeding thus remains subject to the provisions of the now-superseded Subpart L governing the adjudication of materials licensing matters. Accordingly, it continues to be before Judge Abramson and this presiding officer for determination.

BACKGROUND

This proceeding has had a long and tortured history. Except for the most recent developments, that history has been recounted in considerable detail in LBP-05-09, 61 NRC 218 (2005). For present purposes, the following summary should suffice.

1. Between 1984 and 1994, the Licensee conducted, under the auspices of an NRC materials license, accuracy testing of depleted uranium (DU) tank penetration rounds at its JPG site. Insofar as appears from the record before us, for some five years after the cession of testing the Licensee put nothing formally before the NRC Staff by way of a plan for the decommissioning of the site, on which a substantial quantity of DU munitions had accumulated as a result of the testing activities. Beginning in December 1999 – now almost six years ago – there was this sequence of events:

December 1999 – NRC Staff published a Federal Register notice of opportunity for hearing on the Licensee's recently presented application for a license amendment. The sought amendment called for the decommissioning of the JPG site in accordance with a plan that had been submitted to the Staff and accepted by it for full technical review.

March 2000 – Hearing request of Petitioner granted in LBP-00-09, 51 NRC 159. At the Licensee's request, proceeding placed in state of suspension pending Licensee's anticipated further interaction with the Staff with regard to the submitted decommissioning plan.

June 2001 – Licensee submitted an entirely new plan (denominated its "final decommissioning/license termination plan" (LTP)). Although regarding this plan as superceding the previously submitted one, the Staff refused to accept it for technical review until certain perceived deficiencies were corrected.²

June 2001 to October 2003 – LTP apparently was eventually accepted for technical review. In the course of that review, the Staff called upon the Licensee to perform certain additional site-specific sampling and modeling. Believing such an undertaking too dangerous because of the

²For a recitation of some of the procedural problems that the initial rejection of the LTP presented, see LBP-01-32, 54 NRC 283 (2001). As a consequence of that order, the proceeding was continued in a state of suspension to await the LTP being developed to a level that would permit its adjudication.

presence on site of unexploded ordinance, in mid-2003 the Licensee withdrew the LTP. It then put before the Staff a new proposal calling for 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. Accordingly, in October 2003 the Staff published a new Federal Register notice directed to the POLA request. The notice stated that the POLA proposal had already been accepted for technical review.

December 2003 – Proceeding on the LTP dismissed without prejudice to its revival should the decommissioning of the site once again receive active NRC consideration at the Licensee’s behest. LBP-03-28, 58 NRC 437.

January 2004 – Petitioner’s timely hearing request with regard to the POLA proposal granted, along with that party’s unopposed motion to hold further proceedings in abeyance pending the completion of the technical review of the proposal. LBP-04-01, 59 NRC 27.

June 2004 – In response to our inquiry, the Staff advised that Licensee had been given until August 2004 to furnish additional information. The report added that, if it proved adequate, the information should enable the completion of the technical review and issuance of the safety evaluation report (SER) and environmental assessment (EA) on the POLA proposal by early March 2005.

October 2004 – Responding to a second request for a progress report, the Staff revealed that it was still in need of additional information to enable the completion of the technical review and the issuance of the SER and EA on the POLA proposal.

March 2005 – For a third time in a nine-month period, the Staff was called upon to provide information as to the status of the technical review of the POLA proposal. This time, we were told that, it not being clear to the Staff “how the Licensee intends to proceed,” pending clarification on that score the Staff could not provide “an estimated issuance date for the SER and EA.”

2. Our dissatisfaction with this state of affairs prompted the issuance on March 31, 2005 of LBP-05-09, supra, in which we brought the Commission’s attention to the foregoing history in the hope that, if in agreement with us that the then posture of the proceeding was unacceptable, some remedial action on its part might be forthcoming. On June 20, the Commission responded in CLI-05-13, 61 NRC 356. The Licensee was directed to provide a

report to the Commission by July 11, 2005 “detailing its past and planned efforts to gather the information necessary for the staff to complete its technical and environmental reviews.” Id. at 356. For its part, the Staff was to furnish the Commission by July 20, 2005 a report “regarding the steps it plans to take to complete its review in light of the information provided by the licensee.” Ibid. If so inclined, the Petitioner could present its views on these matters in a filing to be received by July 30, 2005. Id. at 358.

In the course of providing these directions, the Commission noted its understanding that, on May 25, 2005, the Licensee had submitted to the Staff several hundred pages of new information related to the license, which the Staff had taken to constitute a new license amendment request superseding the earlier application for a POLA. The Staff was instructed to include in its report a discussion regarding whether the newly submitted material would “allow it to proceed with its evaluations related to this new license amendment application.” Id. at 357.

The Licensee’s July 7 report confirmed (at 10) that it was abandoning its POLA application and was now seeking instead “NRC approval of an alternate schedule for submittal of a decommissioning plan . . . and one 5 year period for the execution of appropriate site characterization, with the Licensee presenting the NRC a definitive license termination plan at the end of that period.” In that connection, the report alluded (ibid.) to the fact that the Licensee was now prepared to assume the safety risks associated with site characterization and also referred to a Field Sampling Plan that had accompanied the May 25 letter that had been sent to the Staff.

In its report, filed on July 20, the Staff told the Commission (at 2) that, on June 16, it had informed the Licensee that it was discontinuing review of the POLA proposal in view of the submittal of the “superceding license amendment for an alternate schedule.” The Staff further noted (ibid.) that, on June 27, it had published a notice in the Federal Register in which it had

provided an opportunity to seek a hearing on the alternate schedule for decommissioning request that had been submitted on May 25.

3. It was in this setting that the Licensee filed its July 19 motion to dismiss the current proceeding on grounds of mootness. Both the motion and the Staff's support of it rest entirely on the fact that the POLA proposal has been withdrawn and yet another proposal put before the Staff for its approval. Given the marked difference between the sought POLA and what the Licensee now has in mind, Staff counsel maintained at the August 24 telephone conference (Tr.17-18) that it had no alternative but to provide a fresh opportunity to seek a hearing to which the Petitioner must now respond if it wishes to continue to be heard with regard to the decommissioning of the JPG site. For its part, the Petitioner insists, inter alia, that the Licensee's motion elevates form over substance and that there is no good reason why it should not be able to continue its participation on decommissioning issues on the basis of its current party status.

ANALYSIS

1. It is readily apparent that a grant of the motion to dismiss would have an impact upon just one entity – the Petitioner now before us. The time for seeking a hearing in response to the opportunity provided in the June 27, 2005 Federal Register has now expired without any other organization or person being heard from.³ (This silence is scarcely surprising. From the very inception of NRC adjudicatory proceedings concerned with the JPG site, this Petitioner has seemingly been regarded as adequately representing the interests of the Madison community in ensuring that the amassed DU munitions on the site do not pose an undue safety risk to its residents). As a consequence, as the Staff sees it, the single practical effect of a dismissal of

³Over the Staff's inexplicable objection, on August 22 the Commission extended to September 26, 2005 the time for Petitioner's response to the Federal Register notice. The Petitioner had requested the extension to that date because of the uncertainty of the future of the current proceeding.

this proceeding will be to put the Petitioner to the trouble and expense of filing yet another hearing request, this one under the more stringent requirements imposed by the new Rules of Practice that took effect in February 2004. See n.1, supra.

Although the Staff would also have it that the imposition of this new obligation should not be found unduly burdensome by Petitioner, it cannot be gainsaid that at least some additional time and expense would be involved in the preparation of (and possibly the need to defend) yet another hearing request – whether it be under the old or the new Rules of Practice. In our view, given what it has been called upon to endure over the course of the past five and one half years, there is every reason to avoid imposing any additional unnecessary burden upon this Petitioner, whether large or small.

Because eleven years have now elapsed since the testing activities terminated, one might reasonably have expected that, at this juncture, the persons represented by this Petitioner would have some clear indication as to precisely how the Licensee proposed to decommission the JPG site in their backyard. Indeed, we would think that such was the contemplation of the Commission regulations regarding decommissioning of sites on which activities were conducted under the aegis of NRC licenses of the stripe possessed by this Licensee. That, in this instance, such an indication has as yet not been forthcoming might not be attributable to fault on the Licensee's part. At the same time, however, what the Petitioner has experienced to this point appears to us plainly unacceptable and not to be compounded if such is avoidable.

On that score, we need not repeat all that was said last March in LBP-05-09, supra, in the context of the then apparent inability of the Staff to get information about the now-abandoned POLA proposal that it deemed necessary in order to complete its technical review of that proposal. As the brief historical review set forth above makes clear, before the

development that now confronts it Petitioner had to come to grips with and respond to in sequence: the Licensee's first initial decommissioning plan; a revised and assertedly final such plan (LTP); and, because the Licensee concluded that it was unable safely to conduct the site characterization required by the Staff in its review of the LTP, the POLA. Now, the Licensee and Staff would have it that none of this history is of any present significance; that, irrespective of what might have transpired in the past, Petitioner has no choice but to file yet another hearing request. Moreover, neither the Licensee nor the Staff is able to provide assurance that the Licensee will not abandon at some future date the proposal currently on the table in favor of a materially different fourth one. Given its present stance, there seems little room for doubt that, were this to occur, the Staff would both publish a new Federal Register notice and insist that Petitioner respond to it. This notwithstanding the fact that the ultimate issue would not have changed since the day the very first such notice was published with regard to the JPG site: i.e. precisely what is to be done by way of decommissioning that site so that the health and safety of the members of the public in its vicinity is adequately protected.

2. At the August 24 conference, Staff counsel justified (Tr. 17-18) the publication of a new Federal Register notice on the obvious substantial difference between the POLA proposal and what is now contemplated by the Licensee. As he pointed out (Tr. 25), under the former for "an indefinite period of time" there would be no activities looking to decommissioning of the site. In contrast, as the Licensee's counsel observed (Tr. 8), the current proposal represented "about [an] 180 degree turnaround" in that it contemplated "much more extensive testing, field sampling" for the purpose of bringing "this matter to closure with a restricted release to the [Licensee]."

It is equally apparent that the same marked difference does not exist between the new proposal and what was on the table in the form of decommissioning plans before the Licensee

reached the conclusion, now rescinded, that further site sampling could not be done with an acceptable degree of safety. To be sure, the course of action that the Licensee now would follow does not conform precisely to what was provided in the LTP, just as the LTP did not conform precisely to the decommissioning plan that it replaced in June 2001. The fact remains, however, that once again affirmative measures are being taken looking to the decommissioning of the site in a reasonably finite time period.

As earlier noted, the December 2003 dismissal of the proceeding on the LTP in LBP-03-28, supra, was not unconditional but, rather, permitted revival should the decommissioning of the JPG site once again receive active NRC consideration at the Licensee's request. In our view, that is exactly what has now transpired. While LBP-03-28 left it to the Petitioner to seek a reinstatement of the dismissed proceeding, we construe the grounds assigned in its opposition to the motion now before us to represent an implicit request for such relief. Be that as it may, we surely have the authority to take such action sua sponte in circumstances where, as here, we find that course to be mandated in the interest of ensuring that all parties to an NRC adjudicatory proceeding are treated fairly.

3. For the reasons just assigned, we are reinstating the proceeding (Docket No. 40-8838-MLA) previously conditionally dismissed in LBP-03-28. Although confident that this is an appropriate outcome given the totality of the unusual circumstances presented in this matter, we are nonetheless mindful that the Commission also continues to have those circumstances before it in the form of the filings of the parties submitted in response to CLI-05-13, supra. It thus seems prudent to provide the Commission with an opportunity to determine whether our conclusion as to the appropriate course of action comports with its own. We are therefore

referring our reinstatement ruling to it for its consideration.⁴ Pending the outcome of that consideration, further action in the reinstated proceeding (including the calling upon the Petitioner to determine whether it wishes to modify the statement of areas of concern previously filed in the context of the LTP) will be held in abeyance. So, too, will be the pending motion to dismiss the present proceeding.

The proceeding (Docket No. 40-8838-MLA) that was conditionally dismissed in LBP-03-28, 58 NRC 437 ((2003) is hereby reinstated and this action referred to the Commission for its consideration. Pending the outcome of that consideration, further action both in the reinstated proceeding and on the motion to dismiss the proceeding in Docket No. 40-8838-MLA-2 will be held in abeyance.⁵

It is so ORDERED.

BY THE PRESIDING OFFICER⁶

/RA/

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 12, 2005

⁴The Commission might wish also to take this opportunity to consider a broader question: whether what the Licensee has and has not done since the licensed activity terminated in 1994 can be regarded as conforming to both the letter and the spirit of the regulations governing the decommissioning of sites such as that here - involved.

⁵We assume that, either sua sponte or on Petitioner's motion, the Commission will further extend the time for Petitioner's response to the June 27 Federal Register notice to await the outcome of the referral.

⁶Copies 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 AND ORDER (REFERRING TO COMMISSION REINSTATEMENT OF PRIOR PROCEEDING) (LBP-05-25) have been served upon the following persons by U.S. mail, first class, or through internal NRC distribution.

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Docket No. 40-8838-MLA-2
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COMMISSION REINSTATEMENT OF PRIOR
PROCEEDING) (LBP-05-25)

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Dated at Rockville, Maryland,
this 12th day of September 2005