

January 11, 2006

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO MOTION FOR LEAVE BY SAVE THE VALLEY, INC. TO  
AMEND/SUPPLEMENT CONTENTIONS/BASES AT SUBSEQUENT TIME

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, the Staff of the Nuclear Regulatory Commission (“Staff”) hereby files its response to the “Motion for Leave by Save the Valley, Inc. to Amend/Supplement Contentions/Bases at Subsequent Time” (“Motion”) filed by “Save the Valley” (“STV”). As discussed below, the Staff objects to the Motion.

BACKGROUND

On May 25, 2005, the U.S. Army (“Licensee” or “Army”) submitted a license amendment request to the NRC for an alternate schedule for submitting a decommissioning plan for its facility at Jefferson Proving Ground (“JPG”) in Madison, Indiana, pursuant to 10 C.F.R. § 40.42(g)(2). See Letter and Attachments from Alan G. Wilson to Dr. Tom McLaughlin, dated May 25, 2005, ADAMS No. ML051520319. The May 25 application included a Field Sampling Plan (“FSP”) and a Health and Safety Plan (“HASP”) concerning site characterization activities. *Id.* On June 27, 2005, the NRC published a *Federal Register* Notice advising that the Commission was considering issuing a license amendment to the Army pursuant to 10 C.F.R. § 40.42(g)(2). See *Notice of Consideration of Amendment Request for an Alternate*

*Decommissioning Schedule for the Department of the Army, U.S. Army Garrison, Rock Island Arsenal, Rock Island, IL, and Opportunity to Request a Hearing*, 70 Fed. Reg. 36964 (June 27, 2005). On November 16, 2005, the Army submitted Addenda to its May 25 application, consisting of a Field Sampling Plan Addendum and a Health and Safety Plan Addendum. See Letter and Attachments from Corinne Shia to Tom McLaughlin, dated November 16, 2005, ADAMS No. ML053350356 (hereinafter November 2005 Addenda).

On November 23, 2005, STV filed a petition to intervene and request a hearing. See "Petition to Intervene and Request for Hearing of Save the Valley, Inc.," November 23, 2005. The Army responded to STV's petition on December 16, 2005, as did the Staff on December 19, 2005. See "Army's Response to Save the Valley, Inc.'s Concerns and Contentions As Set Forth in its Petition to Intervene Filed Herein on November 23, 2005" ("Army Response"), December 16, 2005; "NRC Staff's Response to Petition to Intervene and Request for Hearing Filed by Save the Valley, Inc.," December 19, 2005. In its Response, the Army indicated that it may submit future Addenda to the Field Sampling Plan (FSP) and Health and Safety Plan (HASP) to provide additional detail on the protocols and procedures involved. See, e.g., Army Response, at 14, 17, 32-37, 39, 41-42. On January 3, 2006, STV filed the present Motion as well as its Reply to the Army and Staff Responses. See "Reply in Support of Petition to Intervene and Request for Hearing of Save the Valley, Inc.," January 3, 2006.

#### DISCUSSION

In its Motion, STV requests "leave to amend and/or supplement" its present contentions at a later date, based on information that may be included in Addenda concerning the Army's proposed JPG site characterization.<sup>1</sup> Motion at 3. STV seeks to postpone the filing of any such

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<sup>1</sup> It is unclear whether STV seeks to postpone only its response to potential future addenda or whether it intends its request also to apply to the November 2005 Addenda (which are referenced in STV's motion). Motion at 2. STV expresses a preference for responding "to *all* Addenda filed prior to the conclusion of the Staff's technical review," see Motion at 2 & 3, but elsewhere STV refers to Addenda that the Army "has represented it intends to file." Motion at 1 & 3.

amendments until “a subsequent time...corresponding to the time when STV would otherwise amend and/or supplement its Contentions/Bases to address the Staff’s Environmental and Safety Reports.” *Id.* In effect, STV wishes to defer any Addenda-related amendments to its contentions until some time after the Staff issues its Environmental Assessment and its Safety Evaluation Report. However, as explained below, such a postponement is inconsistent with Commission regulations and precedent.

The Commission’s well-established process for both the amendment of contentions and the filing of new contentions based on new information was codified most recently in the updating of 10 C.F.R. Part 2. See 10 C.F.R. § 2.309(f)(2); *Changes to Adjudicatory Process*, 69 Fed. Reg. 2182, 2220-2221 (Jan. 14, 2004). These rules are rooted in longstanding Commission precedent that intervenors are “expected to raise issues as early as possible” and must “diligently uncover and apply all publicly available information to the prompt formulation of contentions.” *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-83-19, 17 NRC 1041, 1048, 1050 (1983). Under current Part 2, and except when the newly-available information prompting the new or amended contention comes from data or conclusions in certain NRC Staff documents,

contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that--

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2).<sup>2</sup> Consequently, STV may file new or amended contentions in response to information contained in an Addendum that was not available at the time of STV’s initial filing.

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<sup>2</sup> See also 10 C.F.R. § 2.309(c).

However, such new or amended contentions must satisfy the requirements of § 2.309(f)(2). STV's Motion impermissibly seeks to circumvent this required analysis.

The Commission's regulations require a specific determination with respect to whether a new or amended contention has been timely filed based on the availability of the subsequent new information. 10 C.F.R. § 2.309(f)(2)(iii). This provision reflects an expectation that new or amended contentions based on previously unavailable information should be raised as soon as possible.<sup>3</sup> As the Commission explained in its Statements of Consideration, the rule "requires that the new or amended contention be filed promptly after the new information purportedly forming the basis for the new or amended contention becomes available." See 69 Fed. Reg. at 2221. In contrast, STV would like the Board to hold that any *Addenda-related* contention filed at the time STV addresses the *Staff's* evaluation will be *per se* timely, regardless of when the relevant information became available. For the Board to make such a determination would, in effect, supplant the process established in the regulation.

First, because STV's contentions are independent of the Staff's findings, *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338-39 (1999), it is unclear why the timeliness of STV's amended contentions concerning new information *issued by the Army* should be contingent on when the *Staff* issues *its* review documents.<sup>4</sup> Moreover, the regulation contemplates an analysis that is dependent on the facts and timeliness of a specific contention and on the particular information on which that contention is based. 10 C.F.R. § 2.309(f)(2). Here, STV seeks a timeliness determination before any new or amended contention is submitted, before the potential Addenda at issue become available, and

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<sup>3</sup> STV appears to acknowledge as much in its Motion. See Motion, at 2 ¶ 6.

<sup>4</sup> To the extent STV's Motion implies that STV has an automatic right to file new or amended contentions based on the Staff's review documents, the Staff notes that such contentions still must satisfy the applicable analysis set forth in the Commission's regulations (for either new/amended or late-filed contentions). The Commission has stated that the filing of contentions based on information available in an application should not be deferred simply on the grounds that the Staff might subsequently provide a different analysis in its review. See, e.g., *Catawba*, CLI-83-19, 17 NRC at 1049, 1050.

without regard to whether the potential Addenda include “previously unavailable” or “materially different” information or would otherwise provide factual grounds for admissible contentions in this proceeding.

Finally, STV also notes that if the Army files multiple Addenda, some of the Addenda (particularly if long and complex) could be subject to further modification, and it suggests that reserving its amended contentions until a later date may be more economical. However, implicit in the Commission’s insistence that intervenors raise issues “as early as possible,” *Catawba*, CLI-83-19, 17 NRC at 1050, as well as its emphasis on filing new or amended contentions promptly, is the determination that claims proper for hearing are best identified and resolved expeditiously. See *Oconee*, CLI-99-11, 49 NRC at 338-39 (NRC’s procedural rules are informed by “a substantial public interest in efficient and expeditious administrative proceedings”); *Catawba*, CLI-83-19, 17 NRC at 1048.<sup>5</sup> It is inconsistent with that purpose to authorize STV in advance to accumulate its concerns about available Addenda-related information, rather than bring those concerns promptly to the attention of the Board and the parties.

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<sup>5</sup> STV’s “mootness” argument—that postponed filing is proper because changes made in future documents may resolve the basis for some of a petitioner’s contentions—has already been addressed by Commission precedent. Where a contention is superseded by new licensing-related documents, including an applicant’s response to Staff requests for additional information, that contention must be “disposed of or modified.” See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382 (2002); see also *Catawba*, CLI-83-19, 17 NRC at 1050. Such changes are still informed by the Commission’s baseline expectation of promptness in formulating contentions. See *McGuire*, CLI-02-28, 56 NRC at 382 n.42.

CONCLUSION

STV's ability to amend or supplement its contentions, if and when new and relevant Addenda arise, is fully provided for by the Commission's § 2.309(f)(2) procedure for filing new and amended contentions. However, the "timely per se" determination STV now requests for responding to potential Addenda is incompatible with both the structure and the intent of the regulation. Therefore, the Board should deny the Motion.

Respectfully submitted,

*/RA/*

Patrick A. Moulding  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 11<sup>th</sup> day of January, 2006







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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO MOTION FOR LEAVE BY SAVE THE VALLEY, INC. TO AMEND/SUPPLEMENT CONTENTIONS/BASES AT SUBSEQUENT TIME" and "NOTICE OF WITHDRAWAL" of Sara E. Brock and Margaret J. Bupp in the above captioned proceeding have been served on the following by electronic mail, with copies deposited in the Nuclear Regulatory Commission's internal mail system, as indicated by a single asterisk, or sent by U.S. Mail, first class, as indicated by a double asterisk, this 11<sup>th</sup> day of January, 2006.

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