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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alan S. Rosenthal, Chairman
Dr. Paul B. Abramson
Dr. Richard F. Cole

In the Matter of	Docket No. 40-8838-MLA
U.S. ARMY	ASLBP No. 00-776-04-MLA
(Jefferson Proving Ground Site)	February 2, 2006

MEMORANDUM AND ORDER
(Granting Hearing Request and Deferring Hearing)

Before this Board is a hearing request filed by Save the Valley, Inc. (Petitioner or STV) regarding an application submitted by the Department of the Army (Licensee) for an amendment to its NRC materials license (License No. SUB-1435). The amendment would authorize an alternate schedule for submittal of a decommissioning plan for its Jefferson Proving Ground (JPG) site located in Madison, Indiana.

Requests for an alternate schedule for submittal of a decommissioning plan are governed by 10 C.F.R. § 40.42(g)(2). Licensees are required to submit decommissioning plans to the NRC "if required by license condition or if the procedures and activities necessary to carry out decommissioning of the site . . . have not been previously approved by the Commission and these procedures could increase potential health and safety impacts to workers or to the public." 10 C.F.R. § 40.42(g)(1). Section 40.42(d) dictates that decommissioning plans be submitted to the NRC within twelve months of notifying the NRC that one of the following four events has occurred:

> (1) The license has expired pursuant to paragraph (a) or (b) of this section; or
> (2) The licensee has decided to permanently cease principal activities . . . at the entire site or in any separate building or outdoor area; or
> (3) No principal activities under the license have been conducted for a period of 24 months; or
> (4) No principal activities have been conducted for a period of 24 months in any separate building or outdoor area that contains residual radioactivity such that the building or outdoor area is unsuitable for release in accordance with NRC requirements.

Section 40.42(g)(2), in turn, sets out the criteria that control:

> The Commission may approve an alternate schedule for the submittal of a decommissioning plan required pursuant to paragraph (d) of this section if the Commission determines that the alternative schedule is [(1)] necessary to the effective conduct of decommissioning operations and [(2)] presents no undue risk from radiation to the public health and safety and [(3)] is otherwise in the public interest.

For the reasons hereinafter stated, Petitioner's hearing request is granted. So, too, is Petitioner's contemporaneously filed and unopposed motion to defer a hearing in this matter to await the NRC Staff's completion of its technical review of the alternate schedule proposal.

I. BACKGROUND

The present proceeding has a long history, which has been recounted in considerable detail in LBP-05-9, 61 NRC 218, 218-21 (2005), and therefore need not be repeated at length here. The following summary should suffice.

Between 1984 and 1994, the Licensee conducted, under the auspices of its NRC materials license, accuracy testing of depleted uranium (DU) tank penetration rounds at its JPG site. Five years after testing ceased, in December 1999, the Licensee submitted to the NRC Staff its first, of many, license amendment applications for decommissioning the JPG site. The Staff accepted the license amendment application for full technical review and published a notice of opportunity to request a hearing in the Federal Register. 64 Fed. Reg. 70,294 (Dec. 16, 1999). Petitioner filed a petition to intervene and request for hearing, which was subsequently granted in LBP-00-9, 51 NRC 159 (2000) (2000 proceeding) by a Presiding

Officer.[1] At the Licensee's request, the proceeding was suspended pending further interaction with the Staff regarding the submitted decommissioning plan.

In June 2001, the Licensee submitted a new plan, referred to as the final decommissioning/license termination plan (LTP). The Staff considered the LTP to supersede the 1999 plan. It refused, however, to accept the plan for full technical review until certain perceived deficiencies were corrected. Once those deficiencies had been resolved, the Staff informed the Licensee that site-specific sampling and modeling would need to be performed as an incident of the technical review. The Licensee declined to undertake those activities, believing them too dangerous because of the on-site presence of unexploded ordinance (UXO). As a result, in mid-2003 the Licensee withdrew the LTP.

Subsequent to its withdrawal of the LTP, the Licensee submitted to the Staff a new (third) proposal for a five-year, possession only license (POLA), which would be renewable until such time as it became possible to perform the required site characterization safely. In October 2003, the Staff published in the Federal Register a notice of opportunity to request a hearing on the POLA proposal. See 68 Fed. Reg. 61,471 (Oct. 28, 2003). Two months later, the 2000 proceeding was dismissed, without prejudice to an endeavor by Petitioner to seek its reinstatement should the decommissioning of the JPG site once again receive active NRC consideration at the Licensee's behest. LBP-03-28, 58 NRC 437 (2003). The following month, Petitioner's request for a hearing on the POLA proposal was granted, along with its unopposed motion to hold further proceedings in abeyance pending the completion of the Staff's technical review of the proposal. LBP-04-1, 59 NRC 27 (2004).

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[1] Proceedings pertaining to materials license amendments instituted prior to February 13, 2004 were conducted under then-10 C.F.R. Part 2, Subpart L, which provided that such proceedings would be presided over by a single Presiding Officer. 10 C.F.R. § 2.1207(a) (2004). In January 2004, 10 C.F.R. Part 2 underwent significant revision, effective February 13, 2004. 69 Fed. Reg. 2182 (Jan. 14, 2004). One of the changes called for the employment of three-member licensing boards in materials license amendment proceedings.

Over the course of the next fourteen months, the Presiding Officer issued three separate unpublished orders (June 1, 2004, October 4, 2004, and March 3, 2005) in which he called upon the Staff to provide progress reports on its technical review of the POLA proposal. In response to the March 2005 request for a status report, the Staff stated that it was not clear "'how the Licensee intends to proceed'" and added that, pending such clarification from the Licensee, the Staff could not provide an estimated issuance date for the Safety Evaluation Report and Environmental Assessment. LBP-05-9, 61 NRC at 221 (citation omitted). It was by reason of this last communication from the Staff that, on March 31, 2005, the Presiding Officer sent a memorandum to the Commission expressing his concern regarding the then – current state of affairs. LBP-05-9, 61 NRC 218 (2005).

On June 20, 2005, the Commission issued CLI-05-13, 61 NRC 356 (2005), in which it directed the Licensee 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 357. In the same order, the Commission ordered the Staff to furnish, by July 20, 2005, a report "regarding the steps it plans to take to complete its reviews in light of the information provided by the Licensee." Ibid. In the course of the order, the Commission referenced a May 25, 2005, submission by the Licensee to the Staff, which the Staff had taken to constitute a new license amendment request superseding the POLA proposal.

Pursuant to the Commission's order, on July 7, 2005, the Licensee reported that it was abandoning the POLA proposal, 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.'" See LBP-05-25, 62 NRC 435, 438 (2005) (citation omitted). The Staff's report, filed on July 20, 2005, informed the Commission that, on June 16,

it had told the Licensee that it was discontinuing review of the 2003 POLA proposal in view of the submission of the "'superceding license amendment for an alternate schedule.'" Ibid. (citation omitted). The Staff further noted that, on June 27, it had published in the Federal Register a notice of opportunity to request a hearing on the Licensee's May 25 request for an alternate schedule for submittal of a decommissioning plan. See 70 Fed. Reg. 36,964 (June 27, 2005).

After apprising the Commission of its new proposal for decommissioning the JPG site, on July 10, 2005, the Licensee filed a motion with the Presiding Officer seeking to dismiss the then-pending POLA proceeding on the ground of mootness. The Licensee noted that it no longer was seeking a five-year renewable possession only license for the JPG site, but instead now desired Commission approval of an alternate schedule for the submittal of a decommissioning plan. On September 12, the Presiding Officer issued an order, which for the reasons stated therein, (1) sua sponte reinstated the conditionally dismissed prior proceeding concerning the decommissioning of the JPG site; (2) referred the reinstatement to the Commission for its consideration; and (3) held the motion to dismiss the present proceeding in abeyance to await the outcome of the referral. LBP-05-25, 62 NRC at 435.

On October 26, 2005, the Commission affirmed the Presiding Officer's decision to reinstate the earlier proceeding, and ordered that Petitioner's standing "shall be considered already established." CLI-05-23, 62 NRC 546, 550 (2005). The Commission also instructed that the remainder of the adjudication be conducted by a three-member Licensing Board under the Rules of Practice revised in 2004.[2] In this connection, the Commission indicated that any future hearings in this proceeding were to be conducted under the informal hearing procedures

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[2] CLI-05-23, 62 NRC at 550; see supra note 1. Because it had been instituted prior to the effective date of the Part 2 revision, but for that instruction the reinstated proceeding would have remained before a single Presiding Officer.

of the now-revised Subpart L. CLI-05-23, 62 NRC at 548-50 (discussing how the changes to Subpart L would impact the present Petitioner in any future hearings).

In light of the Commission's decision, for Petitioner to be admitted as a party in the current proceeding it must "propose[] at least one admissible contention that meets the requirements of [10 C.F.R. § 2.309(f)(1)]." 10 C.F.R. § 2.309(a). Section 2.309(f)(1) sets forth six separate requirements that contentions must satisfy in order to be admitted, and for a hearing request to be granted. Section 2.309(f)(1) states:

> A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:
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> (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
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> (ii) Provide a brief explanation of the basis for the contention;
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> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
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> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
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> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
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> (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

II. SUBMISSIONS

A. Petitioner's Contentions

On November 23, 2005, Petitioner filed its petition to intervene and request for hearing in response to the June 27 Federal Register notice regarding the Licensee's application for an

alternate schedule for submittal of a decommissioning plan.[3] In its submission, Petitioner advanced contentions concerned with the following four aspects of the Licensee's alternate schedule proposal: (1) the Environmental Radiation Monitoring Plan previously submitted by the Licensee in connection with its since-withdrawn 2003 POLA proposal (2003 ERMP); (2) the Field Sampling Plan; (3) the Health and Safety Plan; and (4) the Licensee's timeliness and financial assurance commitments. Petitioner asserts that each of these components contain "serious and glaring deficiencies which, if not corrected" will prevent the Licensee from conducting a proper site characterization pursuant to 10 C.F.R. § 40.42(g)(2). STV Petition at 13-14.

1. Environmental Radiation Monitoring Plan (ERMP) Contention

Contention A-1: "The Army's most recent Environmental Radiation Monitoring Plan is still inadequate in several material respects to meet the requirements of 10 C.F.R. § 10.42(g)(2) [sic]." STV Petition at 14.

Petitioner assigns six bases in support of Contention A-1, each of which addresses perceived inadequacies with the Licensee's 2003 ERMP. In a footnote, Petitioner explains that it is focusing on the 2003 ERMP as a result of a November 9, 2005, telephone conversation with the Army and the Staff. At that time, Petitioner was informed that the ERMP submitted with the 2003 POLA proposal was applicable to the Licensee's current request. Id. at 12 n.3.

Three of Petitioner's bases address the methods employed by the Licensee for analyzing the monitoring results received from the JPG site. Petitioner insists that greater detail should be provided regarding what future testing, assessment, and actions will occur once a specified "action level" is reached. Id. at 14 (bases (a), (b)). In addition, it maintains that the entire monitoring data history for the JPG site should be used in the ERMP's trend analysis.

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[3] Petition to Intervene and Request for Hearing of Save the Valley, Inc. (Nov. 23, 2005) [hereinafter STV Petition]. The intervention petition and request for hearing were timely because they were filed within the extended period provided by Commission orders.

That history begins in 1984 or 1985; however, most of the trending analyses in the ERMP begin in 1994, 1996, or 1998. Id. at 15 (basis (e)).

Two bases relate to the water supply underlying the JPG site. In one, Petitioner asserts the ERMP should "acknowledge and address" the existence of persons in proximity to the JPG site who receive their drinking water from a private well. Id. at 14-15 (basis (c)). A second basis states that the ERMP should "acknowledge and address [the] critical fact" that the "aquifer underlying the JPG site is not sufficiently characterized to demonstrate its extent and gradient." Id. at 15 (basis (d)).

Lastly, Petitioner claims that the ERMP wrongly "dismisses the need for air monitoring during future prescribed burns . . . [and] the need for future biota sampling." Ibid. (basis (f)). In conclusion, Petitioner states that Contention A-1 and its supporting bases are technical in character and will be supported with expert testimony.[4]

2. Field Sampling Plan (FSP) Contention

Contention B-1: "As filed, the FSP is not properly designed to obtain all of the verifiable data required for reliable dose modeling and accurate assessment of the effects on exposure pathways of meteorological, geological, hydrological, animal, and human features specific to the JPG site and its surrounding area." STV Petition at 17.

Eighteen separate bases are provided in support of this contention. The majority -- twelve of the eighteen -- focus on alleged deficiencies in section 6 of the FSP, entitled "Field Activities."[5] Petitioner questions specific aspects of the Licensee's methodology for obtaining the necessary data to characterize properly the JPG site. In particular, Petitioner would have it

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[4] STV Petition at 15-16. Petitioner represents that the expert testimony will be supplied by Charles Norris, President, GeoHydro, Inc., and Diane Henshel, Associate Professor, School of Public and Environmental Affairs, Indiana University. Both individuals' professional resumes are included with the petition.

[5] See Field Sampling Plan: Depleted Uranium Impact Area Site Characterization Jefferson Proving Ground, Madison, Indiana (attachment to Letter from Alan G. Wilson, Garrison Manager, to Dr. Tom McLaughlin, Office of Nuclear Material Safety and Safeguards (May 25, 2005)), ADAMS Accession No. ML051520319 [hereinafter Final FSP].

that FSP section 6.1 "Geophysics (Electrical Imaging)," FSP section 6.2 "Groundwater," FSP section 6.3 "Biota Sampling," FSP section 6.4 "Surface Water," FSP section 6.6 "Sediment," and FSP section 6.7 "Determining Distribution Coefficients (K_d Study)"[6] are all inadequate for proper site characterization.[7]

The remaining six bases discuss areas of concern Petitioner believes the FSP does not adequately address. In Petitioner's view, the FSP does not include a plan to analyze penetrators for transuranics, such as plutonium, americium, technetium, neptunium, or other impurities such as uranium-236. STV Petition at 19 (basis (k)). Additionally, the FSP assertedly does not provide for any air sampling analysis, even though the Health and Safety Plan acknowledges the presence of air quality concerns through its requirement of air sampling for the field workers. Id. at 20 (basis (m)). Two of the remaining bases maintain that the Licensee's sampling practices are not extensive enough, and the third urges the use of non-standard data gathering and modeling tools to assist in future risk modeling. Id. at 20-21 (bases (n), (p), (q)). Finally, Petitioner asserts that, to assure "independent technical review," the Independent Technical Review Team Leader for the HASP and the FSP should not be the same person as the Project Manager, as is currently the case. Id. at 21 (basis (r)).

Petitioner states that Contention B-1 and its eighteen assigned bases are technical in character and will be supported with expert testimony.[8]

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[6] Basis (j) mistakenly references section 2.3.4.3 as the section discussing the K_d exercise. It is in fact section 6.7. See Final FSP at 6-41 to 6-44.

[7] See STV Petition at 17-21 (bases (a)-(j), (*l*), (o)); see also Final FSP at 6-1 to 6-46.

[8] STV Petition at 21. Petitioner represents that the expert testimony will be supplied by Charles Norris and Diane Henshel, and their "analyses of the FSP . . . have been and will be guided especially but not exclusively by the criteria in NUREG-1757, Vol. 2, Section 4.2, and NUREG-1575, Section 5.3." Ibid.; see supra note 4.

3. Health and Safety Plan (HASP) Contentions

Petitioner raises two contentions with respect to the Licensee's HASP.

Contention C-1: "The HASP is very generic and not site-specific in nature, without identification of the particular UXO hazards to be addressed or the specific locations in which they are found." STV Petition at 22.

Petitioner's four bases for this contention would have it that inadequate safety precautions are in place for the Licensee personnel who might encounter UXO on the JPG site during site characterization activities. In addition, Petitioner claims that the HASP should include more site-specific information, including the type, density, and specific location of the UXO expected to be encountered, as well as disclosure of the depth of the penetration of the UXO. Id. at 22-23.

Contention C-2: "The HASP is not effectively integrated with the FSP." Id. at 23.

Six bases are assigned for Petitioner's belief that the FSP does not adequately incorporate health and safety precautions with respect to the presence of UXO on the JPG site. Petitioner cites numerous FSP sections that allegedly contain little or no information regarding the safety procedures that will be used to guard against UXO hazards. Id. at 23-24 (citing FSP §§ 4.2, 6.1, 6.2, 6.5, 6.6). In addition, Petitioner insists that it would be more efficient to have the position of FSP Field Manager separate from that of the UXO expert. Currently, the FSP Field Manager is the only UXO expert on the project. Id. at 23.

Petitioner maintains that Contentions C-1 and C-2 are technical in character and will be supported with expert testimony, as well as by a series of technical guidance documents developed by the U.S. Army Corps of Engineers for working in UXO contaminated environments.[9]

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[9] STV Petition at 24. Petitioner represents that the expert testimony on these contentions will be supplied by James Pastorick, President, UXO Pro, Inc., whose resume is attached to the petition. Petitioner also provides citations and web addresses for three U.S. Army Corps of Engineers guidance documents.

4. Timeliness and Financial Assurance Contentions

Petitioner raises two contentions with respect to the timeliness of the eventual decommissioning of the JPG site and the Licensee's financial assurances.

Contention D-1: "The alternate schedule being proposed fails to meet the requirements of 10 C.F.R. § 40.42 of a definite schedule for timely decommissioning of the JPG site." STV Petition at 25.

Petitioner asserts in its three bases for this contention that the alternate schedule being proposed by the Licensee does not meet the requirements of the "Timely Decommissioning Rule."[10] Specifically, Petitioner faults the proposed schedule for not including a limit on the time permitted to decontaminate and to decommission the JPG site. Nor, in Petitioner's view, does the proposal place any burden on the Licensee to demonstrate that a longer period of time is required to complete decommissioning.[11] Lastly, Petitioner claims that the Licensee has not demonstrated a pattern of compliance with Commission decommissioning rules so as to "instill confidence that timely decommissioning will actually occur at JPG." STV Petition at 26.

Contention D-2: "The financial assurance provided by the Army's alternate schedule for decommissioning is insufficient to meet the requirements of 10 C.F.R. §§ 40.36 and 40.42 for a complete, definite and quantified financial commitment for the decommissioning of the JPG site." Ibid.

Petitioner's two bases for this contention address, first, the asserted failure of the Licensee to provide specific budget information for the five-year site characterization period, and, second, the purported inadequacy of the Statement of Intent issued by the Licensee to the Staff with regard to the requirements of 10 C.F.R. § 40.36(e)(4). Id. at 26-27. The Statement of Intent did not include cost estimates for conducting the FSP and HASP, provided no

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[10] Id. at 25 (citing Timeliness in Decommissioning of Materials Facilities, 58 Fed. Reg. 4099-01, 4100 (Jan. 13, 1993)).

[11] Id. at 25-26. 10 C.F.R. § 40.42(h)(1) requires licensees to "complete decommissioning of the site . . . as soon as practicable but no later than 24 months following the initiation of decommissioning" except where the Commission approves a request for an alternate schedule for completion of decommissioning under 10 C.F.R. § 40.42(i).

documentation proving the requisite funds will be obtained, and did not indicate the potential effects the requested delay would have on the eventual cost of decommissioning. Id. at 27. According to Petitioner, all of the above is required under NRC regulatory guidance, specifically NUREG-1757, Consolidated NMSS Decommissioning Guidance (Sept. 2003). Id. at 27.

Petitioner asserts that Contentions D-1 and D-2 raise legal and/or regulatory policy issues, rather than technical issues. As such, it proposes to support these contentions with references to applicable NRC regulations, guidance documents and precedents relevant to the Licensee's request for an alternate schedule.[12]

B. Licensee's Response to Petitioner's Contentions

On December 16, 2005, the Licensee filed its response to the petition to intervene and request for a hearing.[13] In general, Licensee asserts that none of Petitioner's stated contentions is admissible. In its view, all of them are beyond the scope of the proceeding, as defined in 10 C.F.R. § 40.42(g)(2), because they "address themselves to a decommissioning plan which is not yet before the Commission." Id. at 1. Therefore, as Licensee sees it, all of the contentions are irrelevant and immaterial insofar as they concern the findings the NRC must make.

1. Petitioner's ERMP Contention

In its response to Petitioner's ERMP contention, the Licensee clarifies the status of its monitoring plan as it applies to its current amendment request. The Licensee states that the 2003 ERMP relied upon by Petitioner was never formally approved by the Staff and, therefore, "the Army is implementing the current protocol documented in *Standard Operating Procedure*

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[12] Id. at 27-28. Petitioner provides the resume of its attorney, Michael A. Mullett, Adjunct Professor, Indiana University School of Law and Lewis & Clark School of Law.

[13] 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 (Dec. 16, 2005) [hereinafter Army Response].

(SOP) DU Sampling Program, ERMP SOP No. OHP 40-1 (March 10, 2000) [(2000 SOP)]" subject to three subsequent updates "involving the analytical procedures . . . , health and safety protocol, and quality assurance procedures."[14] In addition, the Licensee notes that the 2003 ERMP was not discussed during a September 2005 meeting with the Staff and no action items were identified by the Staff with regard to the 2003 ERMP. This being so, the Licensee asserts, Petitioner's ERMP contention is not "relevant or germane to the Army request for an alternate decommissioning schedule." Id. at 3.

The Licensee then proceeds to respond to each of Petitioner's six bases. In doing so, however, it addresses the merits of each individual basis, rather than endeavor to explain why, assuming its relevance, the basis does not meet the contention admissibility requirements imposed by 10 C.F.R. § 2.309(f)(1). Given that the sole issue now at hand is whether Petitioner has submitted an admissible contention, to the extent the Licensee's response addresses the merits of Petitioner's contentions, it need not be considered at this time. See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548 (1980) (stressing that "'in passing upon the question as to whether an intervention petition should be granted, it is not the function of a licensing board to reach the merits of any contention contained therein'") (quoting Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 (1973)).

2. Petitioner's FSP Contention

In response to Petitioner's FSP contention, the Licensee maintains that Petitioner's "comments are obviated given the Army's acknowledgment of the issues and site

[14] Army Response at 3. The 2000 SOP defines the sampling locations, number of samples, media samples, and action levels. Id. at 3.

characterization plans" as stated in two recent communications sent to the Staff.[15] Thus, the Licensee considers Petitioner's contentions "not . . . relevant or germane to the Army request for an alternate decommissioning schedule." Army Response at 11. The Licensee then responds to each of Petitioner's eighteen individual bases in much the same manner as it responded to the bases undergirding the ERMP contention. Id. at 11-32. To the extent that it focuses on the merits of Petitioner's contention, and not on whether it is admissible under 10 C.F.R. § 2.309(f)(1), the Licensee's response on this contention is similarly beyond present consideration.

3. Petitioner's HASP Contentions

The Licensee responds generally to Petitioner's HASP contentions by stating that "[a]ddenda are planned to address specific field elements of the program and are anticipated to include activity-specific hazard analyses and associated detailed health and safety procedures beyond the protocol specified in the HASP."[16] In the individual responses to each of the bases for both Contentions C-1 and C-2, the Licensee discusses how the existing HASP and future HASP addenda address the issues raised by Petitioner. Although, at the outset, the Licensee maintained broadly that all of the contentions were beyond the scope of the proceeding, the Licensee did not renew that claim in discussing the HASP contentions specifically. See id. at 32-43.

4. Petitioner's Timeliness and Financial Assurance Contentions

With respect to Contention D-1, the Licensee would have it that Petitioner's first basis --

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[15] Army Response at 11 (citing U.S. Army, Responses to the NRC May 20, 2004, Request for Additional Information Regarding the Environmental Radiation Monitoring Plan (2004); U.S. Army, Letter from Alan Wilson, Garrison Commander, U.S. Army, to Tom McLaughlin, Materials Decommissioning Branch (Jan. 31, 2005)).

[16] Id. at 32 (noting that this strategy of future addenda is discussed repeatedly within the HASP, for instance HASP sections 1 and 4).

the proposed alternate schedule fails to place a limit on the time permitted to decontaminate and decommission the JPG site -- is an attempt to broaden the scope of what the Staff may consider in approving an alternate schedule; the actual decommissioning plan is not currently before the Commission. On that premise, Petitioner's contention is said to be irrelevant and "not material to the three factors for re-scheduling set forth in [10 C.F.R.] § 40.42(g)(2)." Id. at 44-45. In response to the second and third bases, the Licensee insists first, that the time requested to complete the site characterization is necessary and reasonable. Second, the Licensee maintains that the regulatory history of these proceedings is well documented and that there has never been a suggestion that the Staff has concerns about the Army's ultimate compliance with NRC regulatory requirements. Id. at 45-47.

In response to Contention D-2, the Licensee notes that the Staff has never indicated that either the form or the content of the information provided in the Statements of Intent was unacceptable. Moreover, continues the Licensee, Petitioner is seeking "to impose non-existent or illegal requirements on the Army." Id. at 49. Specifically, the Licensee states that Petitioner's reliance on NUREG-1757 is misplaced, as it only provides guidance to the Staff and licensees and is not a substitute for regulations. Ibid.

In addition, the Licensee asserts that any Statement of Intent it submits to the Staff need not comply with 10 C.F.R. § 40.36(e)(4), and any attempt at such compliance might constitute a violation of the Anti-Deficiency Act, 31 USC § 1341(a)(1)(A), (B) (2000).[17] The Licensee believes that 10 C.F.R. § 40.36(e)(5) recognizes the contradiction between the Anti-Deficiency Act and 10 C.F.R. § 40.36(e)(4) by providing that "when a government entity is assuming

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[17] Ibid. The Anti-Deficiency Act prohibits "an officer or employee of the United States Government [from] mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in a current appropriation; and may not involve the government in a contract or obligation for the payment of money before an appropriation is made." Id. at 50.

custody and ownership of a site, the method for providing financial assurance for decommissioning is 'an arrangement that is deemed acceptable by such governmental [sic] entity.'" Id. at 50 (quoting 10 C.F.R. § 40.36(e)(5)).

C. NRC Staff's Response to Petitioner's Contentions

In its December 19, 2005 response,[18] the Staff maintains that the majority of the contentions and supporting bases contained in the hearing request are inadmissible but concludes that, Petitioner having submitted one admissible contention, the hearing request should be granted.

1. Petitioner's ERMP Contention

The Staff insists that Petitioner's ERMP contention is beyond the scope of this proceeding. Staff Response at 9-13 (citing 10 C.F.R. § 2.309(f)(1)(iii)). We are told that the ERMP is a separate obligation imposed upon the Licensee in connection with its existing license and is not part of the current alternate schedule proposal. Specifically, it is said, "[t]he Army is required to have an ERMP as a requirement of maintaining its license, independent of its preparation for decommissioning" and according to the Staff, any modifications to the ERMP are subject to its approval. Id. at 10. Proceedings for alternate schedules for submittal of decommissioning plans do not encompass, as the Staff sees it, already imposed obligations such as the ERMP. Thus, the Staff concludes, the Licensee was not required to submit a new or updated ERMP with its pending application for an alternate schedule, nor is the ERMP a document considered by the Staff in its evaluation of the Licensee's application for an alternate schedule. Id. at 12.

Although finding Contention A-1 totally flawed for this reason, the Staff goes on to

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[18] NRC Staff's Response to Petition to Intervene and Request for Hearing Filed by Save the Valley, Inc. (Dec. 19, 2005) [hereinafter Staff Response].

address each of the six bases. The Staff asserts that each one is inadmissible for failing to meet either, or both, 10 C.F.R. § 2.309(f)(1)(v) (provide concise statement of alleged facts or expert opinions which support the petitioner's position) and 10 C.F.R. § 2.309(f)(1)(vi) (provide sufficient information to show that a genuine dispute exists with the licensee on a material issue of law or fact). Id. at 13-18.

2. Petitioner's FSP Contention

The Staff acknowledges that Contention B-1 is admissible, but only as supported by bases (a), (f), and (j). Staff Response at 19, 23, 27. With respect to the remaining fifteen bases, the Staff addressed them individually, urging that each one fails to state facts to support Petitioner's position (10 C.F.R. § 2.309(f)(1)(v)) and/or fails to raise a genuine dispute with the Licensee on a material issue of law or fact (10 C.F.R. § 2.309(f)(1)(vi)). Id. at 19-36.

3. Petitioner's HASP Contentions

The Staff insists that Petitioner's Contentions C-1 and C-2 are outside the scope of this proceeding. Staff Response at 36-37 (citing 10 C.F.R. § 2.309(f)(1)(iii)). According to the Staff, the "relevant safety-specific standard for the Staff's § 40.42(g)(2) inquiry is that the alternative schedule 'presents no undue risk from radiation to the public health and safety.'" Id. at 36 (quoting 10 C.F.R. § 40.42(g)(2) (emphasis added by Staff)). Petitioner's contentions, on the other hand, are said to concern "potential risks to site personnel who may encounter UXO" but do not identify these risks as radiological. Id. at 36-37. Further, with respect to Contention C-2 -- that the HASP is not effectively integrated with the FSP -- the Staff maintains that the regulations do not require the various parts of the application to be integrated in a specific manner. Id. at 37.

The Staff similarly finds unacceptable each basis Petitioner provides for Contentions C-1 and C-2. Not only, the Staff contends, is each basis outside the scope of this proceeding,

but also each fails to state facts to support Petitioner's position (10 C.F.R. § 2.309(f)(1)(v)) and/or fails to raise a genuine dispute with the Licensee on a material issue of law or fact (10 C.F.R. § 2.309(f)(1)(vi)). Id. at 37-46.

4. Petitioner's Timeliness and Financial Assurance Contentions

The Staff asserts that both Contentions D-1 and D-2 are inadmissible. With respect to Contention D-1, and all three of its bases, the Staff would have it that 10 C.F.R. § 40.42(g)(2) "does not require the licensee to specify in advance what timetable it will eventually propose in a final decommissioning plan." Staff Response at 47. Given that an actual decommissioning plan is not before the Staff at this point, we are told, any issues related to a decommissioning timetable are necessarily outside the scope of this proceeding. Ibid. (citing 10 C.F.R. § 2.309(f)(1)(iii)). In addition, all three bases are said to fail to raise a genuine dispute with the Licensee on a material issue of law or fact. According to the Staff, Petitioner's bases (a) and (b) amount to mere speculation and do "not amount to a genuine dispute," as they provide no support for the claim that the Licensee will not complete the eventual decommissioning in a timely manner. Id. at 48, 50. With respect to Petitioner's final basis, the Staff argues that the Licensee has acknowledged its regulatory obligations, despite Petitioner's assertions to the contrary, and there has been no identification of "actual failures by the Army to comply with NRC regulations." Id. at 52.

The Staff similarly maintains that Contention D-2 is flawed. First, the contention is said to be beyond the scope of the proceeding given that 10 C.F.R. § 40.42(g)(2) "does not require the licensee to provide new cost estimates either for site characterization activities or for eventual decommissioning." Id. at 56. Although 10 C.F.R. § 40.36 requires licensees "to update periodically their cost estimate and assurances," id. at 54, the Staff considers this to be an independent obligation separate from those imposed upon licensees under section

40.42(g)(2). Thus, such financial assurances are immaterial to the Staff's section 40.42(g)(2) evaluation. Id. at 54, 56. Finally, the Staff insists that neither basis raises a genuine dispute with the Licensee about a material issue of law or fact. "STV has identified no specific grounds to doubt the Army's intent or ability to perform the activities in its proposed alternative schedule." Id. at 57.

D. Petitioner's Reply

On January 3, 2006,[19] Petitioner filed an 84-page reply to the filings of the Licensee and the Staff.[20] The first twenty pages respond to the Licensee and the Staff's arguments that the ERMP, HASP and timeliness and financial assurance contentions are outside the scope of the proceeding. In the ensuing sixty-four pages, Petitioner addresses, basis-by-basis, the assertions of the Licensee and the Staff.

Petitioner would have it that all of its contentions are within the scope of this proceeding. According to Petitioner, the relevant scope is that of the original, now reinstated 2000 proceeding, LBP-00-9, 51 NRC 159 -- which, we are told, included "the entire decommissioning process for the JPG DU site." Petitioner's Reply at 4. Petitioner notes that, in affirming the reinstatement, the Commission "expressly characterized the reinstated proceeding as 'the Army's new decommissioning proceeding,'" which "'raises substantially the same issues as the license termination proceeding [the Presiding Officer] dismissed without prejudice in 2003.'" Ibid. (quoting CLI-05-23, 62 NRC at 548). Petitioner further insists that, even if the scope of the current hearing request were not deemed to be the same as that of the 2000 proceeding, the

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[19] On December 23, 2005, the Board granted via Internet electronic-mail transmission, Petitioner's unopposed motion for extension of time to reply. See Unopposed Motion for Extension of Time by Save the Valley, Inc. to File Replies in Support of Request for Hearing (Dec. 22, 2005).

[20] Reply in Support of Petition to Intervene and Request for Hearing of Save the Valley, Inc. (Jan. 3, 2006) [hereinafter Petitioner's Reply].

Licensee's "ERMP, FSP, and decommissioning timetable, budget, and financial assurance [would still be] within the scope" pursuant to the Commission's Timely Decommissioning Rule[21] and the Staff's own Standard Review Plan.[22] Petitioner's Reply at 5.

With respect to the ERMP, Petitioner maintains that "the Army's 2003 ERMP proposal is both logically and practically intertwined with its JPG Site Characterization Project." Id. at 10. Should the Board conclude that the Licensee's 2003 ERMP had been withdrawn (as argued by the Staff), Petitioner would wish now to be accepted a restated Contention A-1. As set forth in the reply, it would assert that the Licensee's alternate schedule request is inadequate for failing to "propose a timely revision to its [ERMP] . . . as required by 10 C.F.R. § 10.42(g)(2) [sic] during the lengthy period required to implement the alternate schedule request." Id. at 10-11. Additionally in that eventuality, Petitioner would wish to reserve "any right it may subsequently have to request a hearing on any replacement ERMP" submitted by the Licensee. Id. at 10.

With respect to the Licensee's HASP, Petitioner contends that it "is not and cannot be outside the scope of this proceeding given its critical implications for the actual conduct of the FSP and the ultimate adequacy of JPG site characterization." Id. at 14. Petitioner notes that the HASP was forwarded to the Staff with the Licensee's May 25, 2005, letter requesting the alternate schedule, and that "the [Licensee] itself (correctly) considers the HASP to be an integral part of the JPG Site Characterization Project." Id. at 13.

Finally, Petitioner argues that, given the protracted delay in decommissioning the JPG site, "this is clearly the appropriate time to require the [Licensee] to provide an updated timetable, projected budget, and financial assurance for the recently reinstated

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[21] 58 Fed. Reg. 4099-01, 4100 (Jan. 13, 1993).

[22] Division of Waste Management, Standard Review Plan, Licensee Requests to Extend the Time Period Established for Initiation of Decommissioning Activities (Apr. 11, 2000), ADAMS Accession No. ML003691766.

decommissioning process at the JPG DU site in its entirety." Id. at 16. As Petitioner sees it, the Staff's Standard Review Plan contemplated that a timetable, cost estimate, and financial assurance would be required. Id. at 17. Alternatively, Petitioner requests that, should the Board determine that issues relating to timeliness and financial assurance are limited to the Licensee's JPG DU Site Characterization Project, it be given leave to restate Contentions D-1 and D-2.[23]

III. ANALYSIS

A. Admissibility of Petitioner's Contentions

As previously noted, in order for the Board to grant a request for a hearing, a petitioner must "propose[] at least one admissible contention that meets the requirements of [10 C.F.R. § 2.309(f)(1)]." 10 C.F.R. § 2.309(a). We now turn to whether there is such a contention here.

Contention B-1 states: "As filed, the FSP is not properly designed to obtain all of the verifiable data required for reliable dose modeling and accurate assessment of the effects on exposure pathways of meteorological, geological, hydrological, animal, and human features specific to the JPG site and its surrounding area." STV Petition at 17. Basis (a) for the contention asserts:

> The EI geophysical study which will follow the fracture analysis study, as described in section 6.1 of the FSP, is supposed to find all significant karst features and location of the water table. From these studies, 10 to 20 pairs of monitoring wells are proposed to attempt to tie into "conduits" of ground water flow. This study may help to site monitoring wells, but stream gauging studies should be an early and integral part of the search for likely conduits. The stream reaches of strong gain would be a very strong direct indicator of the discharge points of ground water "conduits." EI is an indirect technique and can miss conduits or identify features that are not conduits. The FSP

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[23] Petitioner's Reply at 17-19. Petitioner's restated Contention D-1 asserts that the Licensee's proposed alternate schedule "fails to meet the requirements of 10 C.F.R. § 40.42(g)(2) for a timely characterization of the JPG DU site." Id. at 17. Restated Contention D-2 asserts that "[t]he financial assurance provided . . . is insufficient to meet the requirements of 10 C.F.R. §§ 40.36 and 40.42(g)(2) for a complete, definite and quantified financial commitment for the characterization of the JPG DU site." Id. at 18.

> alludes to doing stream gauging in its discussion of well location criteria, but the time table shown indicates stream studies will follow the ground water studies by a year.

Ibid.

Upon analysis, it is clear to us, as it apparently was to the Staff, that, given this assigned basis, Contention B-1 satisfies all six of the requirements set forth at 10 C.F.R. § 2.309(f)(1).

First, the contention provides "a specific statement of the issue of law or fact to be raised or controverted," namely, calling into question the adequacy of the Licensee's FSP. 10 C.F.R. § 2.309(f)(1)(i). Second, basis (a)'s assertion regarding the inadequacy of the EI technique for detecting water conduits underlying the JPG site constitutes a "brief explanation of the basis for the contention." 10 C.F.R. § 2.309(f)(1)(ii).

The third requirement is that the "issue raised in the contention is within the scope of the proceeding." 10 C.F.R. § 2.309(f)(1)(iii). As previously discussed, a request for an alternate schedule for submittal of a decommissioning plan is governed by 10 C.F.R. § 40.42(g)(2). That section sets forth three criteria for assessing whether such a request may be granted. Section 40.42(g)(2) states:

> [t]he Commission may approve an alternate schedule for the submittal of a decommissioning plan . . . if the Commission determines that the alternative schedule is [(1)] necessary to the effective conduct of decommissioning operations and [(2)] presents no undue risk from radiation to the public health and safety and [(3)] is otherwise in the public interest.

Contention B-1 and its supporting basis (a) satisfy each of these three criteria.

Whether the FSP is "properly designed" to assess accurately "the effects on exposure pathways . . . specific to the JPG site and its surrounding area," STV Petition at 17, is relevant to the effectiveness of the Licensee's decommissioning operations. If the methods proposed in the FSP do not actually provide for the accurate identification of all potential water conduits, including any significant karst features, the Licensee will be unable to conduct effectively decommissioning operations. In that regard, if, during the five-year period proposed in the

current request, the Licensee fails to identify all potential water conduits, there will be an "undue risk" of radiation exposure to the public. Any unidentified water conduits could provide a pathway for radiation release to the area surrounding the JPG site. Clearly, preventing such an occurrence is "otherwise in the public interest." Thus, Contention B-1 and its supporting basis (a) are within the scope of this proceeding.

The fourth requirement, 10 C.F.R. § 2.309(f)(1)(iv), provides that the "issue raised in the contention is material to the findings the NRC must make." In connection with its determination as to whether the Licensee should be granted an alternate schedule (to allow five additional years to submit its decommissioning plan), the Staff presumably will have to consider whether the Licensee's FSP enables the latter to locate accurately all available pathways for radiation exposure. The adequacy of the FSP during this five-year proposed period goes to the heart of what is necessary for the effective conduct of decommissioning operations, and whether there is a potential undue risk to the public from radiation exposure.

Section 2.309(f)(1)(v), the fifth admissibility requirement, mandates that the contention provide a "concise statement of the alleged facts or expert opinions which support [its] position on the issue and on which [it] intends to rely at hearing." Petitioner states in basis (a) that stream gauging "would be a very strong direct indicator of the discharge points of ground water 'conduits'" whereas "EI is an indirect technique and can miss conduits or identify features that are not conduits." STV Petition at 17. These matters are, as Petitioner notes in Part IV.B.2 of its petition, "technical in character," and Petitioner also notes that "STV will support them at the requested hearing with the expert testimony of [specified individuals] . . . . In preparing their expert analyses of the FSP [these experts] have been and will be guided . . . by [NRC guidance documents]." Id. at 21. Taken together, these statements inform the Board that Petitioner has been advised by the named experts in preparation of this contention and that these experts will be relied upon at the hearing. We therefore find this contention to be a sufficiently concise

statement of expert opinion (together with the expected testimony of the listed experts) upon which Petitioner intends to rely at a hearing in support of its contention that the FSP is "not properly designed" to satisfy the admissibility criteria set out in 10 C.F.R. § 2.309(f)(1)(v).

The final requirement, found in section 2.309(f)(1)(vi), is that Petitioner show "a genuine dispute exists with the . . . licensee on a material issue of law or fact." The Licensee proposes EI testing for identifying water conduits with "stream studies [to] follow the ground water studies by a year." STV Petition at 17. Petitioner disputes the effectiveness of this technique, and maintains that "stream gauging studies should be an early and integral part of the search for likely conduits." Ibid. As discussed above with respect to subsection (iv), the adequacy of the Licensee's FSP for locating all possible water conduits is a material issue of fact in this proceeding. Additionally, Petitioner satisfies the subpart (vi) requirement to "include references to specific portions of the application," with its citation to section 6.1 of the FSP.

Accordingly, Contention B-1 and its supporting basis (a) are admissible, and therefore, Petitioner's hearing request is granted.

B. Deferral of Hearing

As we have seen, Petitioner's hearing request advances several contentions, each supported by numerous bases. Having found acceptable one of the contentions along with a supporting basis, it is not necessary to consider anything else for the purpose of passing upon the viability of that request. Nonetheless, if this matter were destined for immediate hearing, there would be every reason to pass at this juncture upon whether the other claims that Petitioner presents in its contentions and assigned bases likewise pass muster.

As also previously noted, additionally before us, however, is Petitioner's unopposed motion to defer a hearing in this matter to abide the event of the completion of the Staff's technical review (which the Staff has told us will be accompanied by a Safety Evaluation

Report, an Environmental Assessment and, if justified by the findings and conclusions in those documents, the issuance of the requested license amendment).[24] The fact that all three parties have agreed to a deferral of the hearing can be taken as reflecting an implicit unanimous recognition that the fruits of the technical review might have a significant impact upon what issues might require exploration at a hearing.

We concur in that view. It seems to us quite possible, if not probable, that, upon its examination of the documents issued by the Staff at the end of the technical review, the Petitioner will find reason to alter in at least some respects the tack that it has taken in the challenge to the alternate schedule proposal that is contained in the hearing request. For one thing, Petitioner might well find that some of the concerns that are set forth in the request have been fully resolved. At the same time, it might determine, on the basis of the disclosures in the technical review documents, that there is cause to seek leave to amend one or more existing contentions or to add new ones. Any such endeavor would, of course, have to comply with the provisions of the Rules of Practice governing the submission of late contentions.[25]

In the circumstances, we are granting the motion to defer and, in the interest of the economical use of our resources, are also postponing the examination of the balance of Petitioner's claims to determine whether they are in conformity with the requirements of the Rules of Practice. Once the technical review has been completed and the documents associated with it are made publically available, we will enter an order providing Petitioner with a reasonable opportunity to review those documents and to decide whether it wishes to make changes in what it now has presented to this Board. Following the receipt of the Licensee and Staff responses to any alteration that the Petitioner might seek, the Board will decide the

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[24] See NRC Staff Response to Board Order of January 9, 2006 (Jan. 17, 2006).

[25] Needless to say, however, our deferral of consideration of existing contentions would not raise timeliness issues were those contentions to remain unaltered.

appropriate scope of the proceeding, perhaps after first conducting a pre-hearing conference with the parties.

We need add on this score only that, given the extended history of the proceeding and the nature of the license amendment now sought, it can scarcely be thought that the deferral of a hearing to await the completion of the technical review might of itself adversely impact the public interest. Apart from the fact that the activity on the JPG site ceased twelve years ago without decommissioning having as yet been accomplished, if the alternate schedule proposal is ultimately accepted it most likely will be at least another five years before that objective might be realized. Although we have currently no information as to when completion of the technical review might be forthcoming, it is readily apparent that this proceeding cannot possibly be deemed to be on a critical path.

For the foregoing reasons, Petitioner's November 23, 2005, petition to intervene and request for a hearing is granted. Also granted is its contemporaneous and unopposed motion to defer a hearing in the matter to await the completion of the NRC Staff's technical review of the Licensee's alternate schedule proposal that is the subject of the hearing request. Once the Staff has released the documents reflecting the results of that review, the Board will enter a further order establishing the period within which Petitioner might seek to amend the hearing request.[26]

It is so ORDERED.

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[26] The obligation of the NRC Staff to submit a hearing file (see 10 C.F.R. § 2.1203) is likewise deferred pending further order of this Board.

THE ATOMIC SAFETY
AND LICENSING BOARD[27]

/RA/

_____
Alan S. Rosenthal, Chairman
ADMINISTRATIVE JUDGE

/RA/

_____
Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

/RA/

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 2, 2006

[27] Copies of this Memorandum and 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
	)	
	)	
	)	
(Jefferson Proving Ground)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (GRANTING HEARING REQUEST AND DEFERRING HEARING) (LBP-06-06) have been served upon the following persons by U.S. mail, first class, or through internal NRC distribution.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 2nd day of February 2006