

RAS 11601

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 05/01/06

SERVED 05/01/06

Before Administrative Judges:

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

In the Matter of

U.S. ARMY

(Jefferson Proving Ground Site)

Docket No. 40-8838-MLA

ASLBP No. 00-776-04-MLA

May 1, 2006

MEMORANDUM AND ORDER
(Scheduling Further Proceedings)

1. This proceeding involves the 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 the submittal to the NRC Staff of a decommissioning plan for Licensee's Jefferson Proving Ground (JPG) site located in Madison, Indiana. Such a plan is required because there is currently amassed on that site a considerable quantity of depleted uranium (DU) munitions, the result of the Licensee's conduct, between 1984 and 1994 and under the auspices of the NRC materials license, of accuracy testing of DU tank penetration rounds.

The extended history of the proceeding is adequately summarized in LBP-06-06, 63 NRC ___ (slip op.) (Feb. 2, 2006) and need not be rehearsed here. For present purposes, the starting point is the timely November 23, 2005 petition for intervention and request for hearing that was filed by Save the Valley, Inc. (Petitioner) in response to a Federal Register notice providing an opportunity to seek a hearing. That filing was accompanied by an unopposed motion to the effect that, should the request be granted, a hearing in the matter be deferred to

await the NRC Staff's completion of its technical review of the alternate schedule proposal.

The hearing request advanced four contentions with respect to the acceptability of the proposal, each contention being supported by a number of assigned bases. In its December 16, 2005 response, the Licensee insisted that none of the advanced contentions was admissible. For its part, the NRC Staff's December 19, 2005 response found one of them (B-1) admissible (but only as supported by three of the eighteen specific bases assigned for it). As to the balance of the contentions, the NRC Staff agreed with the Licensee on the admissibility issue.

Following receipt of the Petitioner's January 3, 2006 reply, on February 2 we issued LBP-06-06. Both the hearing request and the motion to defer a hearing were granted. On the former score, we concurred in the NRC Staff's belief that, as supported by at least one of the bases assigned for it, contention B-1 satisfied the admissibility requirements imposed by the Commission's Rules of Practice. See LBP-06-06, 63 NRC at ___ (slip op. at 21-24). Given that, standing alone, that determination was dispositive on the question of the grant or denial of the hearing request, we further decided it was not necessary to pass at that time on the acceptability of either the other bases assigned for contention B-1 or the three additional contentions and their assigned bases. Rather, it seemed to us, resolving the disagreement among the parties on those matters could readily abide the event of the NRC Staff's completion of the technical review. In that connection, we indicated that Petitioner would be then given a reasonable opportunity to review the documents associated with the review and to make changes, if so advised, in what it had presented in the hearing request. See id. at 24-26.¹

¹ We cautioned, however, that any endeavor to amend existing contentions, or to add new ones, would have to comply with the provisions of the Rules of Practice governing the submission of late contentions. See id. at 25.

2. The technical review has now been completed and the documents associated with it released to the public. Specifically, on March 14, the NRC Staff provided the Board and the parties with its Environmental Assessment (EA), which concluded with a finding that the proposed licensing action would have no significant impact on human health and the environment. See Memorandum from Thomas McLaughlin, Project Manager, Office of Nuclear Material Safety and Safeguards, to Atomic Safety and Licensing Board and All Parties (Mar. 14, 2006). Then, on April 27, the Staff made available to the Board and parties its Safety Evaluation Report (SER), together with the notification that, on the basis of its finding in that report of no undue risk from radiation to the public health and safety being posed by the alternate schedule proposal, it had issued the requested license amendment. See NRC Staff Notification of License Amendment Issuance (Apr. 27, 2006).

In light of these developments, the proceeding is hereby restored to fully active status. As contemplated in LBP-06-06, the Board will now provide Petitioner with an opportunity, following its examination of the EA and SER, to withdraw or to amend existing contentions or to add new ones. Respect must be given, however, to the provisions of the Rules of Practice concerned with the admission of late-filed contentions. See 10 C.F.R. § 2.309(c), (f)(2). Thus, any endeavor either to add bases to existing contentions or to advance new contentions must be accompanied by a demonstration that the endeavor is entirely based upon information contained in the EA or SER that was not previously available to Petitioner. In the absence of such a demonstration, the sought amendment or addition will be summarily rejected.

3. In furtherance of the foregoing, the following schedule is established:

Wednesday, May 31, 2006 – Petitioner shall file and serve its motion for leave to withdraw, to amend, or to supplement the contentions contained in its November 23, 2005 hearing request and/or the bases assigned for those contentions. Where a contention or basis is sought to be added or amended, as above indicated there must be a clear and convincing

demonstration that the addition or amendment is founded upon information in the EA or SER not previously available to Petitioner from another source. Moreover, in the case of a request to amend an existing contention, the motion should specify with particularity the continued status of each basis that was previously assigned in support of that contention. In short, upon examination of the motion, it should be clear to the Board and the other parties precisely what contentions and what supporting bases Petitioner would now like to be included in the upcoming evidentiary hearing.

Tuesday, June 20, 2006 – Licensee and NRC Staff shall file and serve their responses to Petitioner's motion. Those responses are to be strictly confined to the content of the request for leave to amend or to supplement the existing contentions or the bases assigned in support thereof. The Board will not accept any further argumentation on the part of either Licensee or Staff with regard to the admissibility of contentions or supporting bases that are not sought to be amended or supplemented.

Friday June 30, 2006 – Petitioner may, but is not required to, file a reply to the Licensee and Staff responses to its motion. Any such reply shall be strictly confined to addressing the arguments advanced in the Licensee and Staff responses and is not to exceed twenty (20) pages in length. In deciding whether to submit a reply, and if so what to include in it within the prescribed page limit, Petitioner should take into consideration that, once all the filings are in hand, the Board intends to hold a pre-hearing conference with the parties (very possibly at a location in the general vicinity of the JPG site) before determining the outer bounds of the evidentiary hearing. Thus, the written submissions will not be the final opportunity for the parties to be heard on the question of the proper scope of the hearing, a fact that the Licensee and Staff likewise might wish to factor into their decision as to the content of their responses to the motion.

Finally, we cannot exclude the possibility that, upon reviewing the EA and the SER, the Petitioner will conclude that there is no occasion either to amend or to supplement the contentions and bases presented last November. In that connection, it seems to us that, given that Petitioner has had the EA in its possession since mid-March and the just received SER is scarcely a lengthy document, it is reasonable to expect a decision in that regard to be made within two weeks. Accordingly, in the interest of expediting the further proceedings in this matter, the Board requests that it and the other parties be so advised by no later than Tuesday May 16, 2006 should Petitioner decide that the EA and SER call for, at most, the withdrawal of some existing contentions or bases. Obviously, that would enable the Board to move forward with the scheduling of the pre-hearing conference without unnecessary further delay.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD²

/RA by G.P. Bollwerk for/

Alan S. Rosenthal, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 1, 2006

² Copies of this Memorandum and Order were sent this date by Internet electronic mail transmission to the counsel for the parties.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (SCHEDULING FURTHER PROCEEDINGS) have been served upon the following persons by U.S. mail, first class, or through internal NRC distribution.

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[Original signed by Rebecca L. Giitter]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 1st day of May 2006