

RAS 11876

June 19, 2006

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

June 19, 2006 (11:53am)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)	
)	Docket No. 40-8838-MLA
U.S. ARMY)	
)	ASLBP No. 04-819-04-MLA
(Jefferson Proving Ground Site))	
)	

**ARMY'S RESPONSE TO THE MOTION FOR LEAVE TO WITHDRAW,
AMEND, AND SUPPLEMENT CONTENTIONS OF SAVE THE VALLEY, INC.
FILED HEREIN ON MAY 31, 2006**

INTRODUCTION

Pursuant to the Board's Memorandum and Order of 1 May 2006, the Army hereby files its response to the "Motion for Leave to Withdraw, Amend, And Supplement Contentions of Save the Valley, Inc." For the reasons set forth herein, the Army submits that Save The Valley's ("STV") motion should be denied.

BACKGROUND

On 26 April 2006, the U. S. Department of the Army ("Army or Licensee") was notified of NRC approval of its application for the submission of an alternate schedule for the submission of a decommissioning plan for the Jefferson Proving Ground (JPG) facility pursuant to 10 C.F.R. § 40.42(g)(2).

By Memorandum and Order of 1 May, 2006, the Board provided STV with an opportunity to withdraw or to amend its existing contentions or to add new ones, in

TEMPLATE = SELV - 037

SELV - 02

conformity to the requirements of 10 C.F.R. §2.309 (c) and (f)(2). On 31 May 2006, STV filed its "Motion for Leave to Withdraw, Amend, and Supplement Contentions" along with the proposed amendment entitled "Final Contentions Of Save the Valley, Inc.". The Army's response first describes the requirements for amendment or addition to contentions and then addresses the merits of STV's motion.

DISCUSSION

I. REGULATORY FRAMEWORK

Licensee's application is for NRC approval of an alternate decommissioning schedule pursuant to 10 C.F.R. §40.42(g)(2). In both its "Motion" and its "Final Contentions," STV continues to confuse Licensee's application for an alternate decommissioning schedule with a Possession Only License Amendment (POLA). The implication is that, should its current application be granted, Licensee will inevitably request further extensions. When the commission was faced with a similar contention pertaining to the possibility of extending a storage period beyond its expiration date due to the uncertainties surrounding the length of time high level nuclear waste would need to be stored at Diablo Canyon, the hearing board stated:

This Board has no authority to look beyond the license amendment application that is before us. We cannot speculate on events that might occur in the future. We note that if Licensee were to request any extension of the storage time that is authorized by this application, the license would have to be amended and, under the present regime, a hearing would be offered.

See Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 N.R.C. 849, 854 (June 27, 1986).

As noted in the NRC Staff's Response to STV's original contentions, filed 19 December 2005, section 40.42(g)(2) creates a three-part inquiry for approval of an alternate decommissioning schedule. An alternate schedule must: 1) be necessary to the

effective conduct of decommissioning; 2) present no undue risk from radiation to the public health; 3) be otherwise in the public interest.

A petitioner seeking to add to or amend its contentions must demonstrate that such supplementation is timely in accordance with the factors enumerated at 10 C.F.R. §2.309(c).

Further, as the Board noted in its order, the petitioner is also required to demonstrate clearly and convincingly that the addition or amendment is founded upon information not previously available to the petitioner. 10 C.F.R. §2.309(f)(2). The inquiry here is also three-fold: the information upon which the amended or new contention is based:

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

STV's motion fails to demonstrate that its amended or added contentions conform to the § 2.309(f)(2) requirements.

II. STV'S MOTION TO AMEND AND ADD CONTENTIONS

The Licensee will respond to each allegation of STV's motion. Licensee will comment on the Contentions found at pages 11 through 49 of STV's "Final Contentions of Save the Valley, Inc." only insofar as they might be deemed by the Board as a supplementation of the grounds for STV's motion.

1. Contention B-1, Basis l: The Licensee makes no objection and has no response as this basis is being withdrawn.

2. Contention B-1, Basis m: STV correctly identifies a study released in 2006 which was not previously available to it and which appears to be materially different than

information previously available to it as grounds for supplementation. Licensee has no objection to STV's supplementation of this basis, but reserves the right to object to the relevance, materiality and admissibility of the study itself.

3. Contention B-1, Basis n: Licensee objects to STV's motion to supplement Basis n. The motion shows on its face that the citation of authority sought to be added was released in year 2000. STV does not demonstrate why that study would not have been unavailable to it in November of 2005. Thus, STV's motion to supplement Basis n fails to comply with the requirements of 10 C.F.R. §2.309(f)(2) and must be denied.

4. Contention B-1, Basis o: Licensee objects to STV's motion to supplement Basis o. The motion shows on its face that the citation of authority sought to be added was released in year 2000. STV fails to demonstrate why that study would not have been unavailable to it in November of 2005. Thus, STV's motion to supplement Basis o fails to comply with the requirements of 10 C.F.R. §2.309(f)(2) and must be denied.

5. Contention B-1, Basis p: The Licensee makes no objection and has no response as this basis is being withdrawn.

6. Contention B-1, Basis q: STV correctly identifies a study released in 2006 which was not previously available to it and which appears to be materially different than information previously available to it as grounds for supplementation. Licensee has no objection to STV's supplementation of this basis, but reserves the right to object to relevance, materiality and admissibility of the study itself.

7. Contention E-1, with supporting Bases a through l: Licensee objects to STV's motion to supplement its contentions by adding Contention E-1 and its supporting Bases a through l. To summarize, this Contention alleges that the NRC Staff's Safety

Evaluation Report (SER) is inadequate as a matter of fact or law because the NRC Staff has failed to address or resolve previously raised Contentions A-1 through D-2 in a manner acceptable to STV.

Each of the supporting bases is replete with conclusions and reiterations of STV's previously stated Contentions. None state the alleged facts or expert opinions which support STV's position, as required by 10 C.F.R. § 2.309(f)(1)(v).

STV cannot rely on the recent issuance of the SER to provide good cause for its amendment if the relevant information was available before issuance of the SER. Adequacy of the application, not the staff's SER, is the proper focus of a safety-related contention based upon information appearing in both. See *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-01-3, 53 NRC 84, 97 (2001).

STV's motion fails to clearly and convincingly demonstrate that this contention is materially different from the information previously available. 10 C.F.R. § 2.309(f)(2).

8. Contention E-2, with supporting Bases a through f: Licensee objects to STV's motion to supplement its contentions by adding Contention E-2 and its supporting Bases a through f. To summarize, this Contention alleges that the NRC Staff's Safety Evaluation Report does not sufficiently address Contentions previously made by STV as Contentions C-1 and C-2.

Each of the supporting bases is replete with conclusions and reiterations of STV's previously stated Contentions. None state the alleged facts or expert opinions which support STV's position, as required by 10 C.F.R. § 2.309(f)(1)(v).

STV cannot rely on the recent issuance of the SER to provide good cause for its amendment if the relevant information was available before issuance of the SER.

Adequacy of the application, not the staff's SER, is the proper focus of a safety-related contention based upon information appearing in both. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 97 (2001).

STV's motion fails to clearly and convincingly demonstrate that this material is materially different from the information previously available. 10 C.F.R. § 2.309(f)(2).

9. Contention F-1, with supporting Bases a through q: Licensee objects to STV's motion to supplement its contentions by adding Contention F-1 and its supporting Bases a through q. To summarize, this Contention alleges that the NRC Staff's Environmental Assessment with its finding of no significant impact is faulty.

Although the Environmental Assessment clearly post dates the filing of STV's original contentions, the information upon which the proposed new contention is based does not materially differ from Contentions A-1 through D-2. Thus, STV's proposed Contention F-1 fails to meet the requirements of 10 C.F.R. § 2.309(f)(2).

Proposed Contention F-1 fails to provide a specific statement of the issue of law or fact to be raised or controverted, contrary to the requirement of specificity found in 10 C.F.R. § 2.309(f)(1)(i).

STV fails to demonstrate that the issue raised in the contention is within the scope of the proceeding or 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, as required by 10 C.F.R. § 2.309(f)(1) (iii) and (iv). In granting an application for an alternate decommissioning schedule, the Commission need not find absolutely no risk to public health and safety. Instead, it must find only that the approval presents no undue risk from radiation to public health and safety. 10 C.F.R. § 40.42(g)(2).

The National Environmental Protection Act (NEPA) does not require NRC consideration (in an EIS or elsewhere) of highly improbable -- i.e., remote and speculative -- events. It is thus not enough for STV to point to the Staff's Environmental assessment as the sole basis for a new contention. Rather, it is incumbent upon the intervener to provide at least some reason to think that, at JPG, the possibility of undue radiation risk to the public health and safety was sufficiently great to remove STV's concerns from the realm of the remote and speculative. See Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-877, 26 N.R.C. 287, 291 (October 8, 1987).

Neither proposed Contention F-1 nor its supporting Bases clearly and convincingly demonstrate that the NRC Staff's conduct pertaining to the Environmental Assessment has violated the scope of inquiry mandated by § 40.42(g)(2).

Each of the supporting bases is replete with conclusions and reiterations of STV's previously stated Contentions. None state the alleged facts or expert opinions which support STV's position, as required by 10 C.F.R. § 2.309(f)(1)(v).

STV's motion fails to clearly and convincingly demonstrate that this contention is materially different from the information previously available. 10 C.F.R. § 2.309(f)(2).

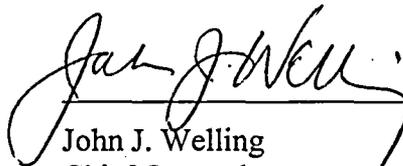
10. Contention D-1, D-2, Alternate D-1 and Alternate D-2, with supporting Bases. Licensee objects to STV's motion to amend Contentions D-1 and D-2 [from STV's "Petition to Intervene and Request for Hearing," filed herein on 23 November 2005] with all of the proposed Contentions and Bases found in Section D (pages 23-32) of STV's "Motion For Leave To Withdraw, Amend, And Supplement Contentions". The proposed Contentions and supporting Bases add substantial additional argument and redefinition of issues without STV having made the showing required by 10 C.F.R. § 2.309(f)(2) that the information contained therein was not previously available or materially different from information previously available.

CONCLUSION

For the aforementioned reasons, Licensee submits that STV's "Motion For Leave To Withdraw, Amend, And Supplement Contentions" should be granted with respect to Contention B-1, Bases l, m, p and q, and denied as to all other matters contained therein.

Dated this Monday, June 19, 2006.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "John J. Welling", is written over a horizontal line.

John J. Welling
Chief Counsel
U. S. Army Garrison - Rock Island Arsenal
Office of Counsel (AMSTA-RI-GC)
One Rock Island Arsenal Place
Rock Island, IL 61299-5000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

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

_____)	Docket No. 40-8838-MLA
)	
U.S. ARMY)	ASLBP No. 00-776-04-MLA
)	
(Jefferson Proving Ground Site))	June 19, 2006
_____)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the U. S. Army's "Response To The Motion For Leave To Withdraw, Amend, And Supplement Contentions Of Save The Valley, Inc., Filed Herein On May 31, 2006" in the above-captioned proceeding have been served on the following persons by U. S. Mail, first class, and (as indicated by asterisk) by e-mail this 19th day of June, 2006:

Administrative Judge Alan S. Rosenthal, Chair*
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555-0001
E-mail: rsnthl@comcast.net

Administrative Judge Richard F. Cole*
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, DC 20555-0001
E-mail: rfc1@nrc.gov

Debra Wolf*
Atomic Safety and Licensing Board
U.S Nuclear Regulatory Commission
Mail Stop: T-3F23.
Washington, DC 20555-0001
E-mail: daw1@nrc.gov

Administrative Judge Paul B. Abramson,*
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555-0001
E-mail: pba@nrc.gov

Adjudicatory File
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, DC 20555-0001

Office of Commission Appellate Adjudication
U.S Nuclear Regulatory Commission
Mail Stop: O-16-O-15
Washington, DC 20555-0001

Richard Hill, President *
Save the Valley, Inc.
P. O. Box 813
Madison, IN 47250
E-mail: phill@venus.net

Office of the Secretary *
Attn: Rulemaking & Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

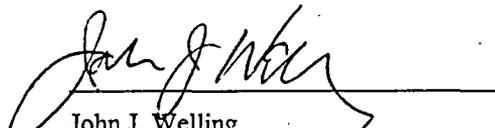
Harry Wedewer, Esq.*
Marian Zobler, Esq. *
Patrick Moulding, Esq. *
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: HEW@nrc.gov
MLZ@nrc.gov
PAM3@nrc.gov

Michael A. Mullett, Esq.*
Jerome E. Polk, Esq. *
Mullett, Polk & Associates, LLC.
309 West Washington Street
Suite 233
Indianapolis, IN 46204-2721
E-mail: mmullett@mullettlaw.com
jep@mullettlaw.com

SherVerne R. Clloyd *
Atomic Safety And Licensing Board Panel
Mail Stop: T-3F23
U. S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: src2@nrc.gov

Tom McLaughlin, Decommissioning Branch*
Division of Waste Management
Office of Nuclear Materials & Safeguards
U. S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: tgm@nrc.gov

Dated June 19, 2006



John J. Welling
Chief Counsel
U. S. Army Garrison - Rock Island Arsenal
Office of Counsel (AMSTA-RI-GC)
One Rock Island Arsenal Place
Rock Island, IL 61299-5000
Phone: (309) 782- 8433
FAX: (309) 782-782-4942
E-mail: john.j.welling@ria.army.mil