

RAS 11918

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USNRC

UNITED STATES OF AMERICA

June 30, 2006 (4:53pm)

NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

_____)	
In the Matter of)	Docket No. 40-8838-MLA
)	
U.S.ARMY)	ASLBP No. 00-776-04-MLA
)	
(Jefferson Proving Ground Site))	June 30, 2006

**REPLY IN SUPPORT OF MOTION
FOR LEAVE TO WITHDRAW, AMEND AND SUPPLEMENT
CONTENTIONS OF SAVE THE VALLEY, INC.**

Pursuant to the Board's Memorandum and Order, issued May 1, 2006, and the Notice of Election of Save the Valley, Inc., filed May 4, 2006, Petitioner Save the Valley, Inc. ("STV") moved on May 31, 2006, for leave to withdraw, amend and supplement its Contentions for hearing initially filed in this matter on November 23, 2005 ("Initial Contentions"). The Army filed its Response to STV's Motion on June 19, 2006, and the Staff filed its Response on June 20, 2006. STV respectfully submits this Reply in Support of its Motion for Leave to address the issues raised by the Army's and Staff's Responses, as follows:

1. **Contention B-1, Basis 1.** In its Motion for Leave, STV withdrew Contention B-1, Basis 1, with the express understanding that the Army's representation in its Response that background sampling will take place in locations uncontaminated by DU replaces the basic assumption in the FSP that areas within JPG site boundaries but away from the hot spots could be considered sufficiently uncontaminated to use in a composite "background" determination. In particular, STV withdrew this basis with the understanding that the evidence from JJ Whicker, *et al.*, *From Dust to Dose: Effects of Forest Disturbance on Increased Inhalation Exposure*, Science of the Total Environment (2006), indicates that because of the controlled burns at the

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JPG site, probably no area within the JPG boundaries would be unaffected and uncontaminated by the DU that oxidized off the projectiles, as the air contamination during the burns is likely to have spread the U to the edges of the base and beyond. The Army's Response expressly acknowledged and made no objection to STV's withdrawal statement. The Staff did not object to STV's withdrawal, but objected to STV's withdrawal statement to the extent it represented a new contention. Because STV considers this basis withdrawn, subject to its shared understanding with the Army, the Staff's objection is irrelevant and moot – there is no new basis to which to object.

2. **Contention B-1, Basis m.** This basis was supplemented to support STV's position that air sampling should be included in the FSP by reference to the results of a study performed at the Los Alamos National Laboratory which were published after STV submitted its Initial Contentions and were therefore unavailable to STV at that time. *See JJ Whicker, et al., from Dust to Dose: Effects of Forest Disturbance on Increased Inhalation Exposure, Science of the Total Environment (2006).*

In its Response, the Army does not object to STV's supplementation of this basis, expressly acknowledging that "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." Army Response, at 3-4. The Staff objects to STV's supplementation on two grounds. First, it claims that the Board's May 1, 2006 Order restricts the "new information" on which STV may rely to supplement its prior contentions/basis **only** to "new information" included in the SER and EA. Staff Response, at 8. This simply misreads the Board's order and does so in a manner which conflicts with the Commission's regulations by

excluding categorically “new information” included in recently published research reports like the Whicker report. This, of course, would defeat one of the principal purposes of the Commission rule (and the Board’s Order), i.e., allowing a petitioner to amend and supplement its contentions and bases based on research results which was not previously available to it and which appear to be materially different than the research results previously available to it. Second, the Staff claims that either the research results cited by STV are not new or, if new, raise a new issue beyond the scope of the current proceeding, namely stopping controlled burns at JPG. Both of these claims do no more than demonstrate that the Staff has not carefully read either STV’s supplemented basis or the Whicker report. With this basis, STV is patently not trying to stop controlled burns at JPG; instead, STV is clearly trying to have air sampling included in the Army’s Field Sampling Program. As STV explains in its supplemented basis and the Army acknowledges in its Response, the Whicker report is “new information” regarding the potential of controlled burns to disperse ground-level DU contamination beyond the JPG site boundaries. As such, its citation is clearly proper in support of this basis.

3. Contention B-1, Basis n. This basis is clarified by addition of a citation to the specific source for the standard field sampling practices STV asserted should be followed in the FSP in its Initial Contentions. *See G.W. Suter II, et al., Ecological Risk Assessment for Contaminated Sites, CRC Press [Lewis Publishers], Boca Raton, FL (2000).*

Both the Army and the Staff object to the addition of a citation to the Suter treatise to this basis on the grounds that it was published in 2000. In seeking to clarify this basis, STV did not state or imply that the Suter treatise was published in 2006 or otherwise unavailable to STV in November, 2005. Indeed, in filing its Initial Contentions, as the Staff acknowledges, STV cited

the Suter treatise by name in another, preceding basis supporting Contention B-1 (Basis l) as the illustrative source of its “standard field sampling practices.” Furthermore, the prior basis is part of a logical sequence with this basis, with the complete sequence expressly supported by the same expert witness (Professor Diane Henshel). So, this addition should clearly be considered an editorial clarification rather than a substantive change to this basis.

4. Contention B-1, Basis o. Basis o is clarified by addition of citations to the FSP and to the Suter treatise which were inadvertently omitted from STV’s Initial Contentions. *See* Tables 2-1 and 2-2 on page 2-9 of the FSP and G.W. Suter II, *et al.*, *Ecological Risk Assessment for Contaminated Sites*, CRC Press [Lewis Publishers], Boca Raton, FL (2000).

Both the Army and the Staff object to the addition of another citation to the Suter treatise as well as the citation to specific pages of the FSP on the grounds that they were previously available to STV. In seeking to clarify this basis, STV did not state or imply that either of the cited sources was unavailable to STV in November, 2005. Indeed, in filing its Initial Contentions, as the Staff acknowledges, STV cited the Suter treatise by name in another, preceding basis supporting Contention B-1 (Basis l) as the illustrative source of its “standard field sampling practices.” Obviously, *every* basis cited in support of Contention B-1 is related to the FSP, so the only additional information provided in the clarified basis are the page and table numbers. Furthermore, this basis is part of a logical sequence with the other bases relying on Suter, with the complete sequence expressly supported by the same expert witness (Professor Diane Henshel). So, this addition should also be considered no more than an editorial clarification rather than a substantive change to this basis.

5. Contention B-1, Basis p. This basis was withdrawn in STV’s motion withdrawn and

neither the Army nor the Staff has any objection or response to its withdrawal.

6. **Contention B-1, Basis q.** This basis was partially withdrawn by STV on the basis of the Army's representation that DU dissolution rates would be calculated in multiple soil types. However, the remainder of Basis q asserting STV's position that DU dissolution rates should also be calculated under different site-specific wetness and temperature regimes in order to measure accurately DU dissolution at JPG was retained and supplemented to cite the recently published results of a study of DU samples taken at Aberdeen Proving Ground, which were not available to STV at the time it filed its Initial Contentions. *See W. Dong, et al., Sorption and Bioreduction of Hexavalent Uranium at a Military Facility by the Chesapeake Bay, Environmental Pollution* (2006), 132-142, esp. at 142.

The Army does not object to STV's supplementation of this basis, stating "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." Army Response, at 4. Once again, however, the Staff objects to STV's supplementation by misreading the Board's May 1, 2006 Order to say that the only sources of the new information on which supplementation can be properly based are the SER and EA. Staff Response, at 11. Additionally, the Staff simply ignores that specific pages of the Dong article are expressly cited by STV to support the proposition that DU dissolution rates should be calculated *not only* under different site specific soil conditions, *but also* under different wetness and temperature regimes as well. Staff Response, at 12. Finally, it is simply not the basis for an objection that the Staff either does not understand or chooses to ignore the clear import of Table 4-1 and the related text. Staff Response, at 12.

7. **Contention E-1, with supporting Bases a through l.** This contention and supporting bases were added to address what STV considered to be “new information” in the Staff’s Safety Evaluation Report (“SER”), issued April 28, 2006 and thus unavailable to STV when it filed its Initial Contentions. In particular, they were formulated to show how the SER did not sufficiently address or resolve relevant and significant deficiencies in the Army’s FSP which were identified and described in STV’s Final Contention C-1 and its supporting Bases because the SER mischaracterized the FSP, particularly by misinterpreting the Army’s responses to several of the Staff’s RAIs.

Both the Army and the Staff object to these new contentions and bases on the grounds that they attack the SER and not the FSP and simply restate contentions and bases which STV previously asserted against the FSP. Army Response, at 4-5; Staff Response, at 12-20. The foundation for the objections of both the Army and the Staff is the Commission’s ruling in Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 97 (2001) (“PFS”). To quote the Army, “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.” Army Response, at 5.

But, the Army and the Staff take the ruling in PFS out of context to apply it here in an effort to obscure the relationship between the FSP and the SER which STV challenges with Contention E-1 and its supporting Bases a through l. In particular, STV challenges the extent to which the SER rewrites and thereby materially mischaracterizes significant elements of the FSP in order to sidestep STV’s prior contentions and bases asserted against the FSP,

especially but not exclusively by mistakenly reading the Army's responses to selected Staff RAIs to address issues and solve problems that they simply do not address or solve.

A simple hypothetical sequence will hopefully illustrate what STV sees taking place with the FSP and the SER:

1. The Army claims in the FSP that the earth is flat; thus, there is no need to look "beyond the horizon" because there is nothing there to see.
2. STV objects to the Army's claim, citing its own expert and a learned treatise for the contention that the earth is spherical; thus, there is undoubtedly something to see "beyond the horizon" but the Army will never see it if it does not look.
3. Through a request for additional information, the Staff seeks clarification from the Army regarding its claim that the earth is flat. The Army responds that, when mapped using a Mercator projection, the earth is, indeed, flat.
4. Based on the Army's response to its request for additional information, the Staff concludes in the SER that the Army is *really* saying that the earth is spherical, and the Army has found no evidence that there is anything to see "beyond the horizon," so STV has not really raised an issue which should concern the Commission.
5. STV replies, no, the Army is *really* saying that the earth is flat and not spherical because it has confused the shape of the earth with the shape of a particular type of map of the earth; that's why the Army has not looked for or found anything "beyond the horizon." This state of affairs should *really* concern the Commission, because not only did the Army claim the earth is flat, but the Staff is saying that the Army did not really make the claim.
6. The Army and the Staff jointly tell the Board not to listen to STV. According to the

Army and the Staff, STV is prohibited by the Commission's rules from challenging the Staff's conclusion that the Army is really saying the earth is spherical because both the Army and the Staff have addressed the shape of the earth. Thus, the Staff's re-interpretation of the Army's claim regarding the shape of the earth is not "new information" subject to challenge by STV.

Having taken the *PFS* ruling out of context to argue that STV's challenges to the Staff's conclusions in the SER reinterpreting key elements of the FSP are impermissible because the SER cannot be used as a substitute target for the FSP, the Army turns right around and argues that STV cannot target the SER's conclusions reinterpreting the FSP because STV has previously attacked the FSP on essentially the same grounds. According to the Army, "STV's motion fails to clearly and convincingly demonstrate that this material is materially different from the information previously available," and thus violates 10 C.F.R. § 2.309(f)(2). Army Response, at 5. What's new and different information in the SER, of course, is *not* what the Army itself postulated in the FSP, but it is what the Staff concludes, mistakenly and misleadingly, the Army postulated in the FSP.

It is sequences of sophistry like the one advanced here by the Army and the Staff, of course, which give rise to bad names for government bureaucrats in the mouths and minds of both the taxpaying public generally and local groups trying to protect their communities, like STV specifically. In STV's hypothetical, the Staff's conclusion is materially different from the Army's claim regarding the shape of the earth, and STV's challenge to the Army's earlier claim that the earth is flat would not preclude its critique of the Staff's later (erroneous) conclusion that the Army is *really* saying that the earth is spherical. Here in the JPG case, of course, the claims and proposals initially advanced by the Army and subsequently reinterpreted by the Staff involve

JPG's hydrogeology and not the earth's topology, but the point is the same as in STV's hypothetical.

8. Contention E-2, with supporting Bases a through f. This contention and supporting bases were added to address what STV considered to be "new information" in the SER. In particular, they were formulated to address the SER's failure to acknowledge the critical interrelationships between the Army's Health and Safety Plan ("HASP") and the implementation of the Army's FSP, which were identified and described in STV's Final Contention C-2 and its supporting Bases.

Both the Army and the Staff once again object to these new contentions and bases on the grounds that they attack the SER and not the FSP and simply restate contentions and bases which STV previously asserted against the FSP. Army Response, at 5-6; Staff Response, at 21-25. The foundation for the objections of both the Army and the Staff is the Commission's ruling in Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 97 (2001) ("PFS"). To quote the Army, "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." Army Response, at 5-6.

But, the Army and the Staff take the ruling in PFS out of context to apply it here in an effort to avoid Board scrutiny of the failure of the SER to acknowledge the critical inter-relationship between the HASP and the FSP. In particular, STV challenges the extent to which the SER ignores the crucial role of the HASP in implementing the FSP and thereby argues that addressing STV's prior contentions and bases regarding the Army's complete lack of

integration of the HASP and FSP is beyond the scope of this proceeding.

The SER expressly states, “The H[A]SP dealt solely with worker protection in the DU impact area. As such, the staff made no findings regarding the H[A]SP and did not rely on it to reach conclusions regarding the proposed license amendment.” SER, at 4. The Staff’s express conclusion in the SER that the HASP deals solely with worker protection and has no implications for the Commission’s review of the Army’s POLA is “new information” not available to STV prior to issuance of the SER. By reaching this conclusion, the SER is attempting to define the issue of the inter-relationship between the HASP and the FSP out of the case by saying that the HASP has only implications for worker safety and not for site characterization. Thus, this Staff conclusion is not only new but also material. Accordingly, STV should not be foreclosed by its earlier challenge to the Army’s failure to integrate the HSP and the FSP from now challenging the Staff’s attempt to define that important issue out of the case.

Having taken the *PFS* ruling out of context to argue that STV’s challenge to the Staff’s conclusion in the SER regarding the limited worker safety role of the HASP is impermissible because the SER cannot be used as a substitute target for the HASP, the Army and the Staff turn right around and argue that STV cannot target the SER’s conclusions circumscribing the role of the HASP because STV has previously attacked the HASP on essentially the same grounds. According to the Army, “STV’s motion fails to clearly and convincingly demonstrate that this material is materially different from the information previously available,” and thus violates 10 C.F.R. § 2.309(f)(2). Army Response, at 6. *See also* Staff Response, at 21. What is new, and materially different information in the SER, of course, is *not* what the Army itself proposed in the HASP and how it affects implementation of the FSP, but the Staff’s mistaken and misleading

conclusion that what the Army proposed in the HASP has no effect on appropriate implementation of the FSP and is thus beyond the scope of this proceeding. STV should not be precluded from challenging the basic premise of this materially mistaken and misleading conclusion in the SER solely because it earlier delineated the critical relationship between the HASP and the implementation of the FSP in challenging the Army's failure to intergrate the HASP and the FSP.

The Staff also challenges the individual bases for Contention E-2 on various technical pleading grounds, e.g., that a basis is "speculative" or "hypothetical." Staff Response, at 21-25. STV's bases in support of Contention E-2 are a logical sequence which must be read together, with earlier bases serving as predicates for later ones and later bases providing examples of earlier ones. In addition, the Army has failed to date to integrate the HASP and FSP into a coherent and detailed plan for JPG's site characterization, supposedly leaving that task to future addenda. As a result, STV must fill the gap left by the Army by projecting into the future and identifying key FSP implementation issues that will inevitably arise and necessarily implicate the HASP. This is not mere speculation by STV; this is sophisticated issue identification and analysis by STV's experts in site characterization and UXO detection and avoidance based on their extensive professional training and past experience with projects like JPG.

9. Contention F-1, with supporting Bases a through q. This contention and supporting bases were added to address the Staff's Environmental Assessment, which was issued on March 6, 2006 and thus unavailable to STV when it filed its Initial Contentions on November 23, 2005. This Contention had two principal purposes: to challenge the theoretical framework for the EA and to contradict the factual premise of the EA that DU had never been detected

outside of the DU impact area by any of the Army's previous sampling activities at the JPG site.

The Army lodges essentially every objection imaginable against Contention F-1 and all of its supporting bases, apparently in the hope that, if it fires enough legal munitions in enough different directions, some of them will hit STV's contention and bases. Army Response, at 6-7. The Staff approach is somewhat more measured and targeted, although supporting the same ultimate result as the Army. The Staff argues that Contention F-1 is inadmissible because it does not raise a material issue of law or fact. Specifically, the Staff claims that STV's critique of the EA's underlying premises and theoretical structure do not affect its ultimate finding of no significant impact ("FONSI"). However, should the Board conclude that STV's express contention that the EA does not support the FONSI raises a material issue of law or fact, the Staff asserts that only two of STV's asserted bases, Bases g and k, are admissible in support of Contention F-1. The Staff objects to the remaining bases because "they fail to meet 10 C.F.R. Part 2 pleading requirements, are not based on new information, and do not comport with the Licensing Board's directive that added contentions must focus on information in the EA and SER." Staff Response, at 25-26.

From STV's perspective, it is hard to imagine a contention which more clearly raises a legal and factual issue regarding the Staff's EA than the one STV has made: "The reasoning and the assumptions supporting the EA's FONSI are faulty in significant respects." Obviously, the FONSI is the "bottom line" to the EA, and a contention which says that the reasoning and assumptions supporting it are "faulty in significant respects" is a direct challenge to the legal and factual basis to the EA's "bottom line." If there is any ambiguity at all in STV's contention, it is completely eliminated by the first sentence of STV's concluding Basis q: "Thus, the logic and

data underlying the EA will simply not support its FONSI.”

Perhaps, STV would have been better advised, from a formatting standpoint, to group multiple paragraphs into fewer bases to support its EA contention. But, it should be obvious to any fair-minded reader that STV’s bases should be read together and in sequence to create a coherent narrative critique of the EA. Bases a through d clearly lay out STV’s view of the four-part analytical framework underlying the EA and, contrary to the Staff, expressly recognize that the FONSI is only for a five year and not an indefinite license extension. Basis c summarizes STV’s issues with the first three “threads” of the EA analysis, while Basis d summarizes the fourth. The fourth issue, the EA’s essentially exclusive but almost entirely unwarranted reliance on NUREG/CR-6705 to predict the fate and transport of DU at JPG, is the most significant. As a result, STV devotes Bases e through l to a detailed explanation of why the EA’s essentially exclusive reliance on NUREG/CR-6705 is almost entirely unwarranted. Basis m then expressly challenges the EA’s factual assertion that “no DU has been detected in the samples collected” to date at JPG and Bases n through p cite the samples which have detected DU and explain why those results are significant with respect to the prediction and evaluation of the migration over time of DU contamination away from the DU impact area.¹

In this coherent narrative critique of the EA, the bases found admissible by the Staff (g and k) are no doubt relevant and significant, but the other bases both preceding and succeeding

¹In support of a motion filed concurrently with this Reply for leave to further supplement its contentions within 60 days, STV offers the Verified Statement of Charles H. Norris, which states that the Army’s latest sampling results (samples collected in October 2005, but results only recently available to STV) report DU detected in two media at the JPG site boundary. These results show that STV’s concerns regarding DU migration over time are not “speculative” or “hypothetical,” even within the time horizon of the five-year license extension sought by the Army.

them are also important to place those two bases in their overall context. Accordingly, STV submits that, when read fairly, all of its bases, and not just Bases g and k, are admissible in support of Contention F-1.

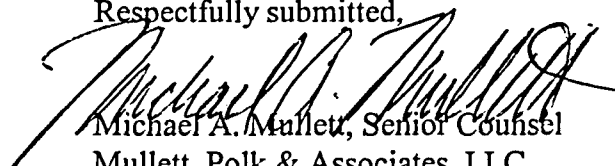
10. Alternate Contentions D-1 and D-2. In footnote 4 of its Final Contentions filed on May 31, 2006, STV included its alternate contentions D-1 and D-2 regarding the issues of timeliness and financial assurance relating to JPG site characterization. Both the Staff and the Army challenge the inclusion of these alternate contentions, on the grounds that STV should not be permitted to offer alternate contentions in any event, but these are not timely because they do not rely on “new information” within the meaning of the Board’s May 31, 2006 Order. Army Response, at 7; Staff Response, at 12.

Neither the Army nor the Staff cite any authority for the proposition that STV may not offer alternate contentions, and STV is aware of none. Moreover, alternate contentions are commonplace in proceedings in all forums; the Army and the Staff make no showing why the NRC should be different. Here, the alternate contentions are especially warranted because there is considerable uncertainty and dispute about the scope of the current proceeding and the current hearing opportunity. From STV’s perspective, it seems clear from the reinstatement of the current ASLB docket that this is a decommissioning proceeding in which the Commission’s timeliness and financial assurance requirements for decommissioning are applicable and issues regarding the Army’s compliance with them would be relevant and material. However, it also seems clear to STV that the current hearing opportunity is only one phase of the larger decommissioning proceeding. While it seems to STV that this would be the logical and appropriate time for the Army to be required to update its timetable and budget for the eventual

decommissioning of the JPG DU site, STV also recognizes that this is a Commission decision and the Commission could determine that issues relating to the ultimate decommissioning of site are premature and not part of the current hearing opportunity, as the Army and Staff contend. In that event, however, STV asserts that there are relevant and material issues of timeliness and financial assurance relating to the site characterization phase of JPG decommissioning which should be considered part of the current hearing opportunity.

With respect to the timeliness of STV's alternate contentions, STV would note that these contentions were not offered for the first time in footnote 4 of STV's Final Contentions as filed on May 31, 2006, as suggested by the Army and the Staff. Instead, they were submitted initially as an integral part of STV's Reply in Support of Petition to Intervene and Request for Hearing of Save the Valley, Inc., filed on January 3, 2006. Further, STV expressly sought leave at that time to submit its alternate contentions on the basis of new and materially different information which had come to STV's attention since submission of its Initial Contentions on November 23, 2005. *See* STV Reply, esp. at 2-6, 17-20. Accordingly, STV submits that its alternate contentions regarding timeliness and financial assurance were timely filed.

Respectfully submitted,



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of)	Docket No. 40-8838-MLA
U.S.ARMY)	ASLBP No. 00-776-04-MLA
(Jefferson Proving Ground Site))	June 30, 2006
_____)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Reply in Support of Motion for Leave to Withdraw, Amend, and Supplement Contentions of Save the Valley, Inc." have been served this 30th day of June, 2006, upon the following persons by electronic mail and by U.S. Mail, first class postage prepaid.

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June 30, 2006

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
ATTN: Rulemakings and Adjudications Staff

Re: Reply in Support of Motion for Leave to Withdraw, Amend and Supplement Contentions and Final Contentions of Save the Valley, Inc.

Motion for Leave to Further Supplement Contentions within Sixty (60) Days of Save the Valley, Inc.

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

Dear Secretary:

Enclosed please find for filing in the above-referenced docket the original and two conformed copies of the (1) Reply in Support of Motion for Leave to Withdraw, Amend and Supplement Contentions and Final Contentions of Save the Valley, Inc. and the related Certificate of Service, and (2) Motion for Leave to Further Supplement Contentions within Sixty (60) Days of Save the Valley, Inc., with attachments and the related Certificate of Service.

Thank you for your assistance in this matter.

Respectfully submitted,



Michael A. Mullett
Attorney for Save the Valley, Inc.

cc: Service List – Docket No. 40-8838, ASLBP 00-776-04