

November 9, 2006 (3:11pm)

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of	)
U.S.ARMY	)
(Jefferson Proving Ground Site)	)

Docket No. 40-8838-MLA

ASLBP No. 00-776-04-MLA

November 9, 2006

**SECOND JOINT STATUS REPORT ON SETTLEMENT NEGOTIATIONS**

BACKGROUND

On July 26, 2006, the Board issued an Order deferring the hearing and directing the U.S. Army (Army or Licensee) and Save the Valley, Inc. (STV or Intervenor) (with NRC Staff participation if it so elected) to meet and discuss issues of concern to the Intervenor. See Order (Deferring Evidentiary Hearing) (July 26, 2006).

In accordance with the Board's Order, the parties submitted a joint status report on September 29, 2006, and requested permission to continue discussions and submit a second report. The Board granted the request and directed that the second report be submitted no later than November 9, 2006, and that the report should detail any agreements the parties were able to reach regarding the Intervenor's concerns, their plans for future meetings and collaboration regarding development of the site characterization, and any resultant changes that have been made to the current site characterization plans. In the event that material matters remain unaddressed or unresolved, the Licensee and Intervenor were to indicate, in the joint report, the matter(s) at issue and their respective positions.

## CURRENT REPORT

Pursuant to the Board's Memorandum and Order (Further Deferring Evidentiary Hearing) dated October 4, 2006, the Army, STV, and the Staff (collectively Parties) hereby file a joint status report on the settlement discussions for the Jefferson Proving Ground Site.

On October 12, 2006, a public meeting was held pertaining to well siting. Thereafter, the parties resumed their negotiations. The parties held a teleconference on October 23 and again on October 30. During the first conference, the Intervenor offered to draft a settlement outline, which was then circulated and discussed in the second conference. No agreement was reached on the settlement outline.

While the Army and STV made progress in communicating and clarifying their respective positions, they were unable to reach agreement on any issues. The parties have no plans for future meetings and collaboration regarding development of the site characterization. No changes have been made to the current site characterization plans as a result of the negotiations. All matters remain unresolved and the parties' respective positions remain unchanged.

The Army, STV the Staff jointly report to the Board that their settlement negotiations have reached an apparent impasse and that they each believe additional decision and additional direction from the Board is required at this time to make any future negotiations worthwhile. STV submits its individual narrative report as Appendix A to this report. Army and Staff do not join in this narrative.

## CONCLUSION

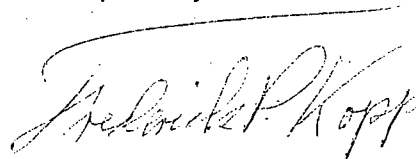
The Army believes that the Board should rule on the admissibility of STV's current contentions and bases. Because such a Board order would not resolve the current proceeding and would likely precipitate additional litigation, STV would prefer that the decision and direction from the Board be in the form of an interim order providing additional guidance to the Parties

regarding the Board's perspective on the appropriate framework for negotiations in view of the record of this proceeding and the information provided in STV Appendix to this Second Joint Status Report.

The Staff believes that, to the extent possible, the Board should rule on the remaining contentions. The Staff also believes that such ruling at this juncture would increase the effectiveness of future discussions among the parties and likelihood that agreement (in the form of settlement) might be reached, by fixing the scope of issues or contentions that would be subject to a hearing. Staff further believes that it is possible that settlement negotiations could resume after the Board's order defines the admissible contentions and bases.

All parties have reviewed this report and each has authorized the undersigned to file this report on their behalf.

Respectfully submitted,



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## APPENDIX A

### SAVE THE VALLEY'S STATEMENT OF POSITION ON REPORTED IMPASSE

Save the Valley (STV) is surprised and disappointed that the Parties' negotiations have reached an apparent impasse at this time. However, STV believes that, in its July 26 Memorandum and Order, the Board requested that the Parties provide an explanation in the event their negotiations reached an impasse rather than a settlement. Accordingly, STV offers this additional statement to provide its perspective on the reported impasse, while respecting the confidentiality of the positions and statements of the other Parties during the negotiations process.

In the first round of negotiations that concluded at the end of September, no agreement was reached regarding any of the matters raised by STV. However, according to the initial Joint Status Report, the Parties all concurred that sufficient progress had been made in framing the negotiation process and discussing the first of the substantive issues to warrant the continuation of the negotiations for at least another thirty days, on the same terms previously established, with another joint status report to be submitted not later than November 9, 2006. See September 29, 2006 Joint Status Report, pp. 2-3.

The principal difficulty which the Parties reported in reaching agreement during the first round of negotiations was the necessarily iterative and open-ended nature of the five-year JPG site characterization process. As a result, the Parties attempted to identify the issues requiring near-term resolution and also to define a process for further consultation and negotiation at key future decision points relating to other issues, including a practical procedure for timely dispute resolution at those future decision points. See September 29, 2006 Joint Status Report, p. 3.

By agreement of the Parties, the first set of substantive issues addressed related to hydrogeologic sampling. Of particular importance in those discussions was the siting of additional sampling wells. While the Field Sampling Plan contemplates the need for the additional wells, the Army and STV were unable to agree to all of the information needed to properly site those additional wells. Specifically, the Army and STV were unable to agree on the need for stream gain/loss data prior to siting the additional wells. However, STV advanced a proposal to resolve this dispute which the Army agreed to consider, subject to STV's agreement to certain limiting conditions and agreement of the Parties on a complete package of proposals that would constitute a settlement of all issues between STV and the Army. See September 29,

2006 Joint Status Report, pp. 3-4.

On October 12, 2006, the Staff had scheduled a public meeting with the Army (in which STV would have the opportunity to observe and ask questions at the end) in which the Army would present its updated plans regarding the siting of the monitoring wells. STV anticipated that this public meeting would provide additional information and perspective to assist in reaching agreement on the specific terms of the proposal for siting the new wells that could then be included in a complete package of proposals that would constitute a settlement of all issues between STV and the Army. So, from STV's perspective, agreement certainly seemed achievable at the end of September on the issue which the Army and STV had agreed was first in time.

As previously reported by the Parties, the second set of substantive issues addressed in the first round of negotiations related to the reporting and analysis of radiologic sampling results as part of assessing site hydrogeology. Of particular importance to STV in these discussions were the protocols and criteria for identifying, quantifying, and evaluating the migration (if any) of DU introduced to the JPG site by the Army's D U munitions testing program. While the Army and STV made considerable progress in communicating and clarifying their respective positions on these matters, they were unable to reach agreement on even the broad parameters for such protocols and criteria. Indeed, at the conclusion of the first round of negotiations, the Army and STV discussed to what extent this matter must be addressed now and to what extent it should be deferred to the future (projected to be late 2007) following the Army's submission of a formal Addendum planned at that time. See September 29, 2006 Joint Status Report, p. 4. So, as STV saw it on September 30, this issue might well be deferred to the future and not preclude an agreement on other more immediate issues or on a dispute resolution mechanism for all of the less immediate issues.

These were the only matters on which substantive discussions occurred in the first round of negotiations. However, any discussion of the following additional issue sets was deferred: additional biota and aerial sampling (if any); the protocols and criteria for identifying, quantifying, and evaluating the aerial and biological migration (if any) of DU introduced to the JPG site by the Army's Depleted Uranium (DU) munitions testing program; conceptual site modeling; and the modification of the Army's Environmental Radiation Monitoring (ERM) Program to incorporate sampling locations and reflect sampling results from the implementation of the Field Sampling Plan. See September 29, 2006 Joint Status Report, p. 5.

Additionally, at the conclusion of the first round of negotiations, counsel for the Parties

discussed the parameters of the framework needed to address the future evolution of the JPG site characterization process over the next five years. While the details had not been worked out, the Parties recognized that this framework should include the following principal elements:

a. As provided in the April 26, 2006 letter approving the Army's alternate schedule for the submission of a decommissioning plan (ADAMS accession no. ML053320014), the NRC Staff anticipates having annual (or more frequent) meetings to discuss the Army's progress in completing the site characterization and new decommissioning plan. These meetings should occur prior to the initiation of significant planned field activities.

b. The Army would provide STV in advance of the public meetings with the same materials provided to the Staff;

c. The Army would obligate itself to respond in writing to STV's questions and proposals associated with the planned field activities that are the subject of the public meetings; and

d. The possibility of the development of a process to resolve any disputes between STV and the Army that arise out of the planned field activities, with the details of such a process to be explored by the Parties in further negotiations.

See September 29, 2006 Joint Status Report, pp. 5-6.

In view of the progress made in the first round of negotiations, the Army and STV jointly requested that the Board authorize and direct that their consultations and negotiations continue for at least another thirty (30) days. On October 4, 2006, the Board approved this request and extended the negotiations. In approving the request, the Board stated:

We are satisfied from the recitations in the September 29 status report that, notwithstanding the understandable difficulties that have been encountered in the endeavor to resolve the Intervenor's concerns, the negotiations have commendably been conducted in good faith and responsibly. Moreover, in the final analysis, the objective of all of the parties to this proceeding is the same: to ensure that, at the end of the five year period, the Licensee will be in a position to present to the NRC Staff a site decommissioning plan that will be found satisfactory because, among other things, it is based upon an adequate site characterization. That being so, it is equally apparent that it is much preferable that, if at all possible, the matters of concern to the Intervenor receive resolution through the informal negotiation process now in progress rather than in an adversarial setting. It is

heartening that the parties to the proceeding appear to share that view. See October 4, 2006 Memorandum & Order, pp.2-3.

Prior to resumption of the negotiations, the Staff conducted the October 12 public meeting by teleconference as scheduled, with the Army and its consultant, SAIC, presenting a well sampling plan for Staff review and comment. STV participated actively in the public meeting. Generally, the Army proposed installing nine pairs of sampling wells along the roads immediately to the west, south and east of the DU impact area at locations chosen based on SAIC's fracture analysis and electronic imaging survey. The Staff indicated during the public meeting that it would like to see additional data from the SAIC field work prior to signing off on the Army's plan. STV indicated that, along with the additional data sought by the Staff, it would want to see the results of a gain-loss study conducted in late fall or winter for Big Creek, a study which the Army had not proposed to perform.

The Army and STV resumed their negotiations with a joint teleconference on October 23. At this negotiating session, the Army and STV discussed additional details of the Big Creek gain/loss study sought by STV. They also discussed a possible overall framework for a settlement, with particular reference to the framework adopted in an approved settlement in *In re Sequoyah Fuels Corporation* (Gore, Oklahoma Site), LBP-04-30, 60 N.R.C. 665 (Dec. 14, 2004). Discussion was also devoted to the alternative dispute resolution mechanism proposed by STV to complete the overall settlement framework, namely a three-member Technical Advisory Panel. At the conclusion of this discussion, STV agreed to prepare an outline of a comprehensive settlement proposal reflecting the proposals advanced by STV in the discussions to date, as well as addressing the full scope of issues previously identified but not resolved or, in some cases, even addressed to date.

STV prepared and circulated the comprehensive settlement outline as agreed and the Parties convened by teleconference to discuss it on October 30. However, to STV's surprise and disappointment, its outline did not serve as a basis for further negotiations or even as a catalyst for a counter proposal. Instead, the Army and STV reached an apparent impasse.

From STV's perspective, there are two key issue sets regarding FSP implementation and modification: first and foremost, hydrogeology sampling, analysis and modeling, and secondarily but still importantly, biota sampling, analysis and modeling. STV's position is that it has raised those two key issue sets sufficiently in its currently filed contentions and bases to warrant them being admissible for hearing on most of the bases it has claimed, assuming that the Board chose to set a hearing in the near term. Additionally, STV's position is that, even if



the Board set certain issues for hearing in the near term, that decision would not preclude additional issues being set for hearing in the future in response to supplemental STV filings as the Army implements and modifies the FSP in significant ways. Finally, from STV's perspective, the basic premise of the negotiations has been that STV would forego its previously authorized but incompletely delineated opportunity for a hearing in the near term (as well as any opportunity it might have for future hearings) on its issues with the Army in exchange for an agreed consultative role in FSP implementation and modification that would be more meaningful with respect to influencing the FSP than the very limited role available to those members of the public at large who have not been afforded intervener status or granted hearing opportunities in the pending JPG license amendment process as STV has been.

In that context, STV believes that the settlement framework outlined in the comprehensive proposal it presented on October 30 is an appropriate response to the Board's July 26 Memorandum and Order and a logical continuation of the Parties' prior settlement discussions. Thus, STV is surprised and disappointed that the negotiations have apparently reached an impasse rather than progressing toward settlement.

STV recognizes and agrees that this apparent impasse requires the Army and STV to return to the Board at this time for further direction and decision. However, it is STV's position that the nature of that direction and decision is a matter for the Board, not the Parties to determine, and that it might well be that the Board would still prefer to continue the approach to settlement contemplated in its July 26 Memorandum and Order rather than to issue a formal, appealable order setting for hearing in the near future the issues raised by the admissible contentions and bases filed previously or to be filed shortly by STV.

Even assuming that the Board would choose to set certain issues for hearing in the near future, it is STV's position that the Board's July 26 Memorandum and Order expressly contemplates that STV would have the right to further supplement its previous contentions and bases as a result of new information which has only become reasonably available to STV since it last supplemented its filings. Additionally, it is STV's position that there would be additional, mandatory disclosures of information regarding recent SAIC field work which the Army would need to make prior to STV supplementing its current filings in preparation for any near-term hearing which might be scheduled by the Board.

Respectfully submitted by:

Save the Valley, Inc.

November 9, 2006

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

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In the Matter of	)	
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	)	
(Jefferson Proving Ground Site)	)	November 9, 2006
_____	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the SECOND JOINT STATUS REPORT ON SETTLEMENT NEGOTIATIONS filed on November 9, 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 9<sup>th</sup> day of November, 2006:

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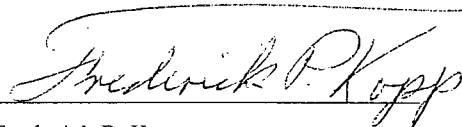
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Dated November 9, 2006



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