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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED 12/20/06

## ATOMIC SAFETY AND LICENSING BOARD

SERVED 12/20/06

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

December 20, 2006

MEMORANDUM AND ORDER  
(Determining Scope of Evidentiary Hearing)

On February 2, 2006, this Board granted the petition to intervene and request for hearing of Save the Valley, Inc. (Intervenor 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). LBP-06-06, 63 NRC 167 (2006). Between 1984 and 1994, under the auspices of that license the Licensee conducted accuracy testing of depleted uranium (DU) tank penetration rounds at its Jefferson Proving Ground (JPG) site located in Madison, Indiana. It now seeks a license amendment that would provide an additional five-year period for submittal of a decommissioning plan for that site. Such a plan is required because there is currently amassed on the JPG site approximately 70,000 kilograms of DU munitions.

In granting Intervenor's petition to intervene, this Board found that at least one of Intervenor's contentions, Contention B-1, satisfied the admissibility requirements imposed by 10 C.F.R. § 2.309(f)(1). We deferred ruling on the remainder of Intervenor's contentions and assigned bases until completion of the NRC Staff's technical review, at which time Intervenor would be provided the opportunity to withdraw, to amend, and/or to supplement the contentions

it filed with its original petition to intervene. Pending before this Board is a motion of Intervenor in which it sets forth the contentions it would now have admitted.

For the reasons set forth below, we find these contentions inadmissible, except to the extent addressed to the adequacy of the Licensee's proposed site characterization activities.

## I. BACKGROUND

The extended history of this proceeding is adequately summarized in LBP-06-06 and need not be rehearsed here. For present purposes, the starting point is the November 23, 2005 petition for intervention and request for hearing filed by Intervenor in response to a June 27, 2005 Federal Register notice.<sup>1</sup> That notice provided an opportunity to seek a hearing on the Licensee's May 25, 2005 proposal submitted to the NRC Staff, in which it sought authorization for an alternate schedule in which to submit its decommissioning plan for the JPG site.<sup>2</sup> Specifically, the Licensee desires to characterize the JPG site over a five-year period, at the end of which it will present the NRC with a decommissioning plan. LBP-06-06, 63 NRC at 170.

The petition to intervene advanced six contentions – each supported by a number of bases – concerned with the following aspects of the Licensee's alternate schedule proposal: (1) the Environmental Radiation Monitoring Plan (ERMP) previously submitted by the Licensee in connection with its since-withdrawn 2003 application for a possession-only license (POL);<sup>3</sup>

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<sup>1</sup> 70 Fed. Reg. 36,964 (June 27, 2005); Petition to Intervene and Request for Hearing of Save the Valley, Inc. (Nov. 23, 2005).

<sup>2</sup> Letter from Alan G. Wilson, Department of the Army, to Tom McLaughlin, Office of Nuclear Material Safety and Safeguards (May 25, 2005) [hereinafter May 25 Letter].

<sup>3</sup> Environmental Radiation Monitoring Program for License SUB-1435 Jefferson Proving Ground (Sept. 2003), Encl. to Letter from John Ferriter, Department of the Army, to Tom McLaughlin, Office of Nuclear Material Safety and Safeguards (Sept. 30, 2003) [hereinafter ERMP].

(2) the Field Sampling Plan (FSP);<sup>4</sup> (3) the Health and Safety Plan (HASP);<sup>5</sup> and (4) the Licensee's timeliness and financial assurance commitments. Id. at 172-76. Intervenor's filing was accompanied by an unopposed motion to the effect that, should its 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 Licensee filed a response to Intervenor's petition to intervene<sup>6</sup> and asserted that none of the stated contentions is admissible. Id. at 176-79. The NRC Staff also filed a response,<sup>7</sup> in which it maintained that one of Intervenor's stated contentions, as supplemented by three bases, was admissible and, therefore, the hearing request should be granted. Id. at 179-81.

On February 2, 2006, we issued LBP-06-06, granting both the hearing request and the motion to defer a hearing. On the former score, we found that, as supported by at least one of the bases assigned for it, Contention B-1 satisfied the admissibility requirements imposed by 10 C.F.R. § 2.309(f)(1). Id. at 183-85. That contention asserted (id. at 183):

As filed, the FSP is not properly designed to obtain all 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.

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<sup>4</sup> Field Sampling Plan: Depleted Uranium Impact Area Site Characterization Jefferson Proving Ground, Madison, Indiana (May 2005), Encl. to May 25 Letter [hereinafter FSP].

<sup>5</sup> Health and Safety Plan: Depleted Uranium Impact Area Site Characterization Jefferson Proving Ground, Madison, Indiana (May 2005), Encl. to May 25 Letter [hereinafter HASP].

<sup>6</sup> 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].

<sup>7</sup> NRC Staff's Response to Petition to Intervene and Request for Hearing Filed by Save the Valley, Inc. (Dec. 19, 2005) [hereinafter NRC Staff Response].

The specific basis to which the Board pointed in admitting Contention B-1 – basis (a)<sup>8</sup> – stated:

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 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.

Id. at 183.

Having found acceptable one of Intervenor’s contentions along with a supporting basis, the Board deemed it unnecessary to pass at that time on the adequacy of either the other bases assigned for Contention B-1 or the five additional contentions and their assigned bases. Rather, given our decision to grant Intervenor’s motion to defer the hearing, it seemed that resolving the disagreement among the parties on the remaining contentions could readily abide the event of the NRC Staff’s completion of its technical review of the alternate schedule proposal. In that connection, we indicated that Intervenor would then be given a reasonable opportunity to review the documents associated with the technical review and to make changes, if so advised, in what it had presented in the hearing request. Id. at 185-86.

On March 15, the NRC Staff published in the Federal Register notice of its completion of the Environmental Assessment (EA) prepared in support of the Licensee’s proposed license amendment.<sup>9</sup> The EA concluded that a “Finding of No Significant Impact” (FONSI) was appropriate, with the result that an Environmental Impact Statement (EIS) would not be

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<sup>8</sup> The NRC Staff had acknowledged in its response to Intervenor’s petition to intervene that Contention B-1 as supported by basis (a) was admissible. LBP-06-06, 63 NRC at 180.

<sup>9</sup> 71 Fed. Reg. 13,435 (Mar. 15, 2006).

prepared.<sup>10</sup>

More specifically, the NRC Staff concluded that the Licensee's proposed activities associated with site characterization "should not produce significant radiological or nonradiological impacts to the environment, workers or members of the public," and any radiation exposure to workers or the public would be within the limits of 10 C.F.R. Part 20. EA at 2-3. Although acknowledging that the presence of unexploded ordnance (UXO) on the JPG site "could potentially have nonradiological environmental impacts," the Staff did not anticipate it being a source of "significant environmental impact," given the Licensee's assurance that precautions would be taken to mitigate the risks from UXO in its planning and implementation of site characterization activities. Id. at 3. The Staff considered a "no-action alternative" to the Licensee's proposal – i.e. denial of the alternate schedule request. It concluded that, while the environmental impacts would be slightly less, "without the requested time to conduct additional site characterization, . . . the [Licensee] would not have information adequate to produce a viable [decommissioning plan and, therefore,] the no-action alternative would not serve the objective of effective decommissioning." Id. at 3-4.

On April 27, the NRC Staff notified the Board<sup>11</sup> that it had issued the following materials license amendment (License Amendment Number 13):

The Army shall submit a decommissioning plan for NRC review and approval under an alternate schedule identified in its May 25, 2005, Field Sampling Plan, its responses to action items from a September 8, 2005, public meeting by letter dated October 26, 2005, its Field Sampling Plan addendum dated November 2005, and its responses to NRC's request for additional information by letter dated February 9, 2006, by the end of 2011 or earlier. The Army will also submit

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<sup>10</sup> Ibid.; see also Environmental Assessment Related to Issuance of a License Amendment to [NRC] Materials License No. SUB-1435 Department of Army (Mar. 6, 2006), Encl. to Memorandum from Thomas McLaughlin, Office of Nuclear Material Safety and Safeguards, to Atomic Safety and Licensing Board and All Parties (Mar. 14, 2006) [hereinafter EA].

<sup>11</sup> NRC Staff Notification of License Amendment Issuance (Apr. 27, 2006).

an Environmental Report using the guidance in NUREG-1748 for NRC to use in preparing an Environmental Impact Statement.<sup>12</sup>

The amendment was accompanied by issuance of the Staff's Safety Evaluation Report (SER).<sup>13</sup>

As reflected therein, in performing its safety evaluation of the Licensee's alternate schedule proposal, the Staff reviewed the proposed FSP to determine whether it satisfied the three criteria governing the grant of an alternate schedule request (10 C.F.R. § 40.42(g)(2)):<sup>14</sup>

The Commission may approve an alternate schedule for 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.

More particularly, the NRC Staff examined the Licensee's proposed site characterization activities – groundwater and surface water monitoring; biota, soil, and sediment sampling; determination of distribution coefficients, penetrator corrosion and dissolution rate – and found that each of the planned approaches was adequate. SER at 4-8. It concluded that “there is reasonable assurance that the health and safety of the public will not be endangered by the proposed site characterization activities and alternate schedule for submittal of a

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<sup>12</sup> Materials License No. SUB-1435 Amendment No. 13, at 2, Encl. 1 to Letter from Daniel M. Gillen, Office of Nuclear Material Safety and Safeguards, to Alan G. Wilson, Department of the Army (Apr. 26, 2006).

<sup>13</sup> Safety Evaluation for Issuance of Amendment No. 13 to Materials License No. SUB-1435, Department of the Army, Jefferson Proving Ground, Encl. 2 to Letter from Daniel M. Gillen, Office of Nuclear Material Safety and Safeguards, to Alan G. Wilson, Department of the Army (Apr. 26, 2006) [hereinafter SER].

<sup>14</sup> The Staff noted in the SER that it also reviewed the Licensee's HASP; however, given that the HASP deals “solely with worker protection in the DU impact area” no findings were made with respect to the plan nor was it relied upon in reaching conclusions regarding the proposed license amendment. SER at 4. Likewise, although not providing a basis for the conclusions reached in the SER, the Staff noted that during its review it considered that the Licensee's current ERMP, established in 1999, obligates the Licensee to collect semi-annual samples throughout the five-year period. According to the Staff, if any of the groundwater, surface water or sediment samples exceed the pre-established action levels, “the Army is required to contact NRC and take corrective measures to reduce the uranium concentration (natural uranium plus DU) below the action level.” Ibid.

[decommissioning plan],” that “such activities will be conducted in compliance with NRC regulations,” and finally, that “it is in the public interest to take the additional time to adequately address monitoring deficiencies and allow for more specific information to be gathered from the site.” Id. at 8-9.<sup>15</sup>

In light of the NRC Staff’s completion of its technical review, on May 1 the Board issued an order restoring this proceeding to fully active status.<sup>16</sup> In that order, the Board established a schedule allowing Intervenor to amend, to withdraw, and/or to supplement its original petition to intervene. It cautioned the Intervenor that any attempt to add bases to existing contentions or to advance new contentions must be entirely based upon information contained in the EA or SER and the information must not have been previously available.<sup>17</sup> In addition, Intervenor was instructed to make clear to the Board and the other parties precisely what contentions and what supporting bases it sought to be included in an evidentiary hearing. The Licensee and the Staff were likewise instructed that any response filed was to be strictly confined to the content of the request for leave to amend and/or to supplement the original petition to intervene. It was made clear that any further augmentation on either party’s part with regard to admissibility of contentions or adequacy of supporting bases not sought to be amended or supplemented would not be accepted. May 1 Order at 4.

Pursuant to our May 1 Order, on May 31, Intervenor timely filed a motion for leave to withdraw, to amend, and/or to supplement contentions contained in its November 23, 2005

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<sup>15</sup> With respect to the potential risk to “human health and safety from UXO in placing the wells and gathering the site-specific data in the areas with UXO,” the SER states that the Licensee has acknowledged such risk and has “indicated . . . it will take precautions in its planning and implementation of site characterization to mitigate the risks from UXO.” SER at 8.

<sup>16</sup> Licensing Board Memorandum and Order (Scheduling Further Proceedings) (May 1, 2006) (unpublished) [hereinafter May 1 Order].

<sup>17</sup> May 1 Order at 3; see also 10 C.F.R. § 2.309(c), (f)(2).

hearing request.<sup>18</sup> In a separate document, it set forth the nine contentions and supporting bases it would have included in the evidentiary hearing.<sup>19</sup> Although amending selected bases for Contention B-1 and adding three new contentions, Intervenor remained steadfast in its belief that the Licensee's May 25 alternate schedule proposal contained "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 Final Contentions at 3. With respect to its three new contentions, Intervenor maintained that being based on either the Staff's SER or the EA, neither of which was available at the time it filed its initial contention, each contention complied with the Board's May 1 Order. In its contentions addressing the SER, Intervenor asserted the Staff's review was inadequate because it "does not sufficiently address or resolve relevant significant deficiencies" in the Licensee's FSP or that plan's interrelationship with the HASP. STV Motion to Amend at 3. As for the Staff's EA, Intervenor insisted that its "reasoning and assumptions . . . are faulty in significant respects." Ibid.

On June 19, the Licensee timely submitted its response to Intervenor's Motion to Amend, in which it conceded that Intervenor's Motion to supplement Contention B-1, bases (m) and (q), should be granted, but nonetheless maintained that all of Intervenor's remaining requests to supplement, to clarify, or to add new contentions should be denied.<sup>20</sup> It is the Licensee's position that the remaining supplemented and/or clarified bases and the three new contentions do not meet the requirements under 10 C.F.R. § 2.309(f)(2) for submission of new

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<sup>18</sup> Motion for Leave to Withdraw, Amend, and Supplement Contentions of Save the Valley, Inc. (May 31, 2006) [hereinafter STV Motion to Amend].

<sup>19</sup> Final Contentions of Save the Valley, Inc. (May 31, 2006) [hereinafter STV Final Contentions].

<sup>20</sup> 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 (June 19, 2006) [hereinafter Army Response to STV Motion].

or amended contentions, nor do they satisfy the contention admissibility requirements imposed by 10 C.F.R. § 2.309(f)(1).

On June 20, the NRC Staff timely submitted its response to Intervenor's Motion to Amend.<sup>21</sup> It urged the Board to deny Intervenor's request to clarify and to supplement selected bases assigned in support of Contention B-1, as well as to deny its request to admit two new contentions. It is the Staff's position that Contention E-1 and E-2 should not be admitted for the reason that they constitute impermissible attacks on the SER. With respect to Intervenor's new Contention F-1, the Staff asserted that it should be rejected for failing to raise a genuine dispute of law or fact with the Staff's FONSI determination.

On June 30, Intervenor timely submitted its reply to the Licensee and the NRC Staff's filings.<sup>22</sup> In it, Intervenor maintained that, contrary to the assertions of the Licensee and the Staff, its requests to supplement, to clarify, and to add new contentions complied with the Board's May 1 Order, as well as with the applicable Commission regulations governing submission of amended or new contentions. In addition, it asserted that its new bases and contentions satisfied the contention admissibility requirements imposed by 10 C.F.R. § 2.309(f)(1).

After receipt of all the parties' pleadings, this Board convened a prehearing conference on July 19 in Madison, Indiana. Its purpose was to address those matters pertaining to the scope of the forthcoming evidentiary hearing that were left open in LBP-06-06. In the course of the conference, it became evident that the details of the Licensee's site characterization plans remained in a state of flux and, thus, it would be fruitful for the Licensee and Intervenor to

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<sup>21</sup> NRC Staff Response to Motion for Leave to Withdraw, Amend and Supplement Contentions by Save the Valley, Inc. (June 20, 2006) [hereinafter NRC Staff Response to STV Motion].

<sup>22</sup> Reply in Support of Motion for Leave to Withdraw, Amend and Supplement Contentions of Save the Valley, Inc. (June 30, 2006) [hereinafter STV June 30 Reply].

consult regarding the issues of concern to Intervenor. Accordingly, the Board concluded, with the agreement of all parties, that no useful purpose would be served by proceeding to hold an evidentiary hearing in advance of such consultation.

Giving effect to this conclusion, the Board provided the Licensee and Intervenor an opportunity to bring together their technical consultants to explore the accommodation of the Intervenor's concerns and to discuss future procedures for updating and revising the Licensee's site characterization plans. The parties were directed to submit to the Board a joint status report on their progress, which they did on September 29.<sup>23</sup> The report detailed the negotiations to date, which included four meetings between the Licensee and the Intervenor and two additional meetings between their counsel (in all of which meetings the NRC Staff and/or its counsel were also participants). Although no agreement had been reached on any of the matters of concern to the Intervenor, the parties requested time for additional negotiations. The Board granted the request and directed that a second status report be submitted no later than November 9.

The second status report was timely submitted. It indicated that, after two teleconferences, the Licensee and Intervenor "were unable to reach agreement on any issues" and "have no plans for future meetings and collaboration regarding development of the site characterization."<sup>24</sup> As a result, "[a]ll matters remain unresolved and the parties' respective positions remain unchanged."<sup>25</sup>

Given this apparent impasse in negotiations, we deem it necessary to move forward with the evidentiary hearing in this proceeding. To this end, we now turn to consider the

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<sup>23</sup> Joint Status Report on Settlement Negotiations (Sept. 29, 2006).

<sup>24</sup> Second Joint Status Report on Settlement Negotiations at 2 (Nov. 9, 2006).

<sup>25</sup> Ibid.

admissibility of Intervenor's contentions not addressed in LBP-06-06, supra.

## II. ANALYSIS

### A. Legal Standards Governing the Admissibility of Intervenor's Contentions

As provided in 10 C.F.R. § 2.309(f)(1), in order to be admitted for evidentiary consideration, a contention must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (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;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the . . . 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 . . . petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the . . . 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.

A contention that fails to comply with each of these requirements must be rejected. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004).

As previously noted, in LBP-06-06 the Board found that Intervenor's Contention B-1, as supported by at least one of its bases, satisfied the admissibility requirements of 10 C.F.R. § 2.309(f)(1). 63 NRC at 183-85. In that circumstance, we need not address further that

contention at this time. Neither the Rules of Practice nor Commission precedent mandates the consideration at the threshold of every basis assigned for every contention advanced by the hearing requestor. That does not mean that each of the sixteen bases assigned by Intervenor in support of Contention B-1 will merit exploration at the evidentiary hearing. Upon receipt of Intervenor's written testimony, the Licensee and the NRC Staff will have the opportunity to object to any part of it they deem to be outside the permissible scope of the proceeding.<sup>26</sup>

**B. Scope of This Proceeding**

As seen, what the Licensee is here seeking is simply a five-year period in which to characterize the JPG site, with the expectation that at the end of such time it will submit to the NRC Staff a viable decommissioning plan. During those five years it will be permitted only to conduct site characterization activities; no decommissioning operations may begin until such time as the Licensee submits, and the Staff approves, a decommissioning plan. Thus, contrary to Intervenor's assertions, this proceeding does not encompass "the entire JPG DU site decommissioning process." STV Final Contentions at 24. Rather, the scope of this proceeding is limited to whether the Licensee's proposal for characterizing the JPG site during the alternate schedule period – i.e. the next five years – is: (1) "necessary to the effective conduct of decommissioning operations"; (2) will "present[] no undue risk from radiation to the public health and safety"; and (3) "is otherwise in the public interest." 10 C.F.R. § 40.42(g)(2).<sup>27</sup> In order for

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<sup>26</sup> Similarly, with respect to those bases assigned to support Contention B-1 that Intervenor sought to add or to amend in light of the Staff's issuance of the SER and EA, we need not address at this juncture whether they satisfy the timeliness requirements under 10 C.F.R. § 2.309(f)(2).

<sup>27</sup> To be clear, if it so chooses, Intervenor will have an opportunity to challenge the adequacy of the Licensee's decommissioning plan once it is formally docketed with the NRC Staff; presumably in 2011. At that time, a notice of opportunity to request a hearing will be published in the Federal Register and Intervenor, or any other member of the public, will be able to file a petition to intervene and request for a hearing challenging specific components of that decommissioning plan.

a contention to be considered “within the scope of th[is] proceeding” (10 C.F.R. § 2.309(f)(1)(iii)), it must challenge one of these three criteria. Intervenor’s Contention B-1 was admitted by the Board because it challenged the adequacy of the Licensee’s FSP, by which the Licensee will ultimately characterize the site and eventually produce an effective decommissioning plan. Any other contention submitted by Intervenor that is not similarly addressed to one of the three factors in 10 C.F.R. § 40.42(g)(2) will be deemed inadmissible.

**C. Contention Admissibility**

With the foregoing in mind, we now turn to a consideration of Intervenor’s final contentions not previously addressed.

**1. Intervenor’s Contention Regarding the Licensee’s Environmental Radiation Monitoring Plan**

Intervenor’s Contention A-1 asserts that “[t]he Army’s most recent Environmental Radiation Monitoring Plan (2003) is still inadequate in several respects to meet the requirements of [10 C.F.R. § 40.42(g)(2)].” STV Final Contentions at 5. Six bases are assigned in support of Contention A-1. Each one addresses perceived inadequacies with the Licensee’s 2003 ERMP, which was previously submitted by the Licensee in conjunction with its now-superseded 2003 application for a five-year POL. Intervenor would have it that the Licensee’s 2003 ERMP is “both logically and practically intertwined with the JPG Site Characterization Project contemplated in the [Licensee’s May 25 proposal],” and as such is “within the scope of the current hearing opportunity.” *Id.* at 4 n.3.

The first two bases assigned for Contention A-1 are concerned with the adequacy of the ERMP with regard to the Licensee’s response to certain environmental conditions detected during monitoring. *Id.* at 5. The next two bases address the water supply underlying the JPG site. First, Intervenor asserts that the Licensee’s statement in the ERMP, that “[d]irect exposure of humans to drinking water is unlikely given that the aquifer is not a drinking water

source and is of poor quality,” is erroneous because it wrongly denies the existence of individuals who live in proximity to the JPG site and who receive their drinking water from private wells. Id. at 6 (quoting ERMP at 3-4). Second, Intervenor maintains that the ERMP needs to “acknowledge and address th[e] critical fact” that the “aquifer underlying the JPG site is not sufficiently characterized to demonstrate its extent and gradient.” Ibid. In its fifth basis, Intervenor contends that the ERMP fails to utilize the entire monitoring data history and actual historic data trends for the JPG site in its trending analysis, which “would provide a more complete picture for analysis purposes.” Id. at 6-7. Lastly, Intervenor alleges that the ERMP wrongly “dismisses the need for air monitoring during future prescribed burns . . . [and] denies the need for future biota sampling.” Id. at 7.

The Licensee and the NRC Staff each assert that Contention A-1 is inadmissible because the challenge to the ERMP is beyond the scope of this proceeding. According to both parties, the ERMP is a separate obligation placed upon the Licensee as part of its existing materials license, and is not encompassed in this proceeding for an alternate schedule for submittal of a decommissioning plan. Army Response at 3; NRC Staff Response at 10-13.

We agree that Contention A-1 is inadmissible to the extent that it is not addressed to the site characterization issues that are the focal point of this proceeding. Stated otherwise, the proceeding does not provide a vehicle for challenges to the adequacy of the ERMP, which is the fulfillment of an independent monitoring obligation imposed upon the Licensee as part of its existing materials license. Because the ERMP is subject to ongoing NRC Staff review and approval, the Licensee was not required to – and did not – submit a new or updated ERMP. Although the ERMP was relevant during the 2003 POL proceeding – in which the Army was seeking only to modify its environmental monitoring obligations – the Licensee is here seeking approval of an “alternate schedule for active site characterization and submission of a decommissioning plan. The proposed alternate schedule . . . does not require any change, or

reference, to the existing ERMP.” NRC Staff Response at 12. The Licensee’s obligation to maintain its ERMP during the requested five-year period will continue “in parallel with” the FSP. Ibid. As such, any challenge to the ERMP is beyond the scope of this proceeding and, therefore, inadmissible. 10 C.F.R. § 2.309(f)(1)(iii).<sup>28</sup>

A portion of Contention A-1 appears, however, to be concerned with site characterization and, therefore, is subsumed under Contention B-1 – namely, the claim that the “aquifer underlying the JPG site is not sufficiently characterized to demonstrate its extent and gradient.” STV Final Contentions at 6. Without proper characterization of the aquifers, the Licensee will have insufficient knowledge of the direction and gradient of potential contaminants traveling through the aquifers in the area. This presents a significant problem in that all parties acknowledge the possible existence of individuals near the JPG site who use private wells for drinking water. See *ibid.*; NRC Staff Response at 16; Army Response at 6. Given this fact, proper aquifer characterization is “necessary to the effective conduct of decommissioning operations.” 10 C.F.R. § 40.42(g)(2).<sup>29</sup> Thus, while the challenge to the ERMP is inadmissible, a specific and adequately supported challenge to the characterization of the aquifer is admitted for litigation in the context of Contention B-1.

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<sup>28</sup> If Intervenor wishes to raise concerns with respect to the Licensee’s ERMP or the Staff’s review of that plan, it may exercise its rights under 10 C.F.R. § 2.206 to petition for a rulemaking or to seek an enforcement action. It may not, however, raise such matters within the context of this hearing.

<sup>29</sup> We find unavailing the NRC Staff’s claim that Intervenor fails to state facts to support its position regarding the adequacy of the Licensee’s aquifer characterization. See NRC Staff Response at 17 (citing 10 C.F.R. § 2.309(f)(1)(v)). Intervenor states clearly that a recent study conducted by the Army concluded that “wells near and within the Delta Impact Area south of Big Creek are too widely spaced to construct a meaningful ground-water elevation contour map.” STV Final Contentions at 6 (emphasis added).

**2. Intervenor's Contentions Regarding the Licensee's Health and Safety Plan**

Intervenor raises two contentions addressing the Licensee's HASP. It asserts, first, that "[t]he 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 Final Contentions at 19 (Contention C-1)), and second, that "[t]he HASP is not effectively integrated with the FSP" (*id.* at 20-22 (Contention C-2)). Both contentions are supported by a number of bases, all of which contend that the HASP and the FSP fail adequately to include site specific information about the location of UXO on the JPG site, and fail to include necessary health and safety precautions for Licensee personnel who might encounter UXO during site characterization activities. According to Intervenor, FSP sampling procedures that involve driving electrodes or drilling wells into the ground – such as will occur with the electrical imaging, groundwater, soil, and sediment sampling – necessitate the inclusion in the FSP and HASP of detailed UXO safety procedures. *Id.* at 19-22.

Because Intervenor fails to provide any basis for believing that the potential risk to Licensee personnel from UXO on the JPG site might pose a radiological risk to members of the public, we agree with the NRC Staff that Intervenor's contentions are beyond the scope of this proceeding. 10 C.F.R. § 2.309(f)(1)(iii); see also NRC Staff Response at 35-36.<sup>30</sup> Section 40.42(g)(2) makes clear that, in its review of that proposal, the only health-related concern the Staff must evaluate is whether the alternate schedule will "present[] . . . undue risk from radiation to the public health and safety"; it is not required to evaluate the potential for non-

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<sup>30</sup> In its response to Intervenor's petition to intervene, the Licensee did not take a position on whether Intervenor's Contention C-1 or C-2 satisfied the admissibility requirements under 10 C.F.R. § 2.309(f)(1). Instead, it explained that the HASP is intended to address the health and safety aspects of site characterization "comprehensively," while specific aspects of the program will be addressed with future addenda that are referenced in the HASP. Army Response at 32. These addenda are "anticipated to include activity-specific hazard analyses and associated detailed health and safety procedures beyond the protocol specified in the HASP." *Ibid.*

radiological hazards to Licensee personnel as well. 10 C.F.R. § 40.42(g)(2) (emphasis added). The Staff correctly states that “[w]hile the presence of UXO at JPG most certainly is a safety issue,” it is not within the scope of the Staff’s regulatory review in this proceeding. NRC Staff Response at 36-37.

To the extent it also endeavors to assert that the Licensee’s failure to include detailed safety precautions in its HASP and/or FSP renders its alternate schedule not “effective [for the] conduct of decommissioning operations,” Intervenor fails to provide any support for such a claim. Intervenor supplies no facts or expert opinion to demonstrate that the lack of detailed safety plans in the Licensee’s application means that the Licensee will not follow appropriate UXO safety practices during site characterization operations or that it will otherwise not be able to successfully conduct site characterization activities. To the contrary, the HASP states that onsite personnel will be trained to recognize the types of UXO that may be present on the JPG site, and that only qualified UXO specialists will be allowed to conduct intrusive operations in areas where there is suspected UXO. See HASP at 8-6 to 8-7. Intervenor’s contentions are, therefore, inadmissible on the additional ground that they fail to demonstrate that a genuine dispute exists with the Licensee on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(vi); see also NRC Staff Response at 37-45.

**3. Intervenor’s Contentions Regarding the Licensee’s Timeliness and Financial Assurances for Decommissioning Operations**

Intervenor’s Contention D-1 and D-2 challenge the Licensee’s timeliness and financial assurances for its eventual decommissioning of the JPG site. First, in Contention D-1, Intervenor asserts that “[t]he 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 Final Contentions at 28. Two of the three bases assigned in support of the contention maintain that the Licensee’s alternate schedule proposal does not satisfy the Commission’s “Timely

Decommissioning Rule.”<sup>31</sup> Intervenor asserts, first, that the proposal does not include a limit on the time permitted to decontaminate and decommission the JPG site, and, second, that the Licensee does not demonstrate that the longer period of time requested is necessary to complete decommissioning. Id. at 29. In Intervenor’s mind, the Timely Decommissioning Rule was adopted in order to prevent this sort of “indefinite postponement of the decommissioning and decontamination of licensed sites.” Ibid. Third, Intervenor 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.” Id. at 30. Intervenor maintains that such a showing is “contemplated by Commission guidance,” particularly NUREG-1757.<sup>32</sup>

In its second contention, Contention D-2, Intervenor states that “[t]he financial assurance provided for 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. Intervenor’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 Licensee’s Statement of Intent submitted to the NRC Staff. Id. at 30-32.<sup>33</sup> With respect

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<sup>31</sup> Timeliness in Decommissioning of Materials Facilities, 59 Fed. Reg. 36,026 (July 15, 1994).

<sup>32</sup> STV Final Contentions at 30 (citing NUREG-1757, vol. 3, Consolidated NMSS Decommissioning Guidance - Financial Assurance, Recordkeeping, and Timeliness at 2-13 (Sept. 2003) [hereinafter NUREG-1757, vol. 3] (“To demonstrate that delaying the start of decommissioning will not be detrimental to public health and safety, a licensee should submit . . . [a] discussion of its record of regulatory compliance, particularly its compliance with NRC regulations.”)).

<sup>33</sup> 10 C.F.R. § 40.36(e)(4) requires federal, state or local government licensees to submit a “statement of intent containing a cost estimate for decommissioning . . . and indicati[on] that funds for decommissioning will be obtained when necessary.” STV Final

(continued...)

to the Statement of Intent, Intervenor asserts that the Statement did not include cost estimates for conducting and implementing the FSP and the HASP; that it provided inadequate documentation to prove that the requisite funds for decommissioning will be obtained or that the signator of the May 25 Letter has the authority to request and to approve disbursement of the necessary funds; and that it did not indicate the potential effects the requested delay would have on the eventual cost of decommissioning. Id. at 31-32. According to Intervenor, all of the above is required under NRC regulatory guidance.<sup>34</sup>

Intervenor would have it that these contentions are within the scope of the present proceeding and hearing request, which it sees as encompassing “the entire JPG DU site decommissioning process.” STV Final Contentions at 24 (citing LBP-05-09, 61 NRC 218, 221-22 (2005)). Moreover, Intervenor insists that, because the Licensee has failed – since submitting its original proposal for decommissioning in 1993 – to provide updated cost estimates for decommissioning, “this is clearly the appropriate time to require the Army to provide an updated timetable, projected budget, and financial assurance for the recently reinstated decommissioning process at the JPG DU site in its entirety.” Id. at 26. Intervenor asserts that the circumstances at issue in this proceeding, “are essentially comparable to those contemplated in the [Standard Review Plan]”<sup>35</sup> for licensee requests to extend the time allowed for initiating decommissioning activities, which requires that a timetable, cost estimate, and

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<sup>33</sup>(...continued)  
Contentions at 31.

<sup>34</sup> STV Final Contentions at 31-32 (citing NUREG-1757, vol. 3, secs. 4.3.1, 4.3.2.13, app. A.16).

<sup>35</sup> Standard Review Plan for Licensee Requests to Extend the Time Periods Established for Initiation of Decommissioning Activities, RIS-00-009 (June 26, 2000) [hereinafter SRP RIS-00-009].

financial assurance be presented at this time. STV Final Contentions at 26-27.<sup>36</sup>

The Licensee and NRC Staff insist that Contention D-1 and D-2 should be rejected by the Board. They assert that both contentions are beyond the scope of this proceeding and fail to raise an issue material to the Staff's findings. Army Response at 43-49; NRC Staff Response at 46-57.

As stated above, this proceeding involves only the Licensee's request for a five-year period in which to characterize the JPG site so that at the end of such time it will be able to submit to the NRC Staff a viable decommissioning plan. Contrary to the Intervenor's assertions, the Staff – at this stage in the decommissioning process – is not required to make any determination regarding the timeliness of ultimate decommissioning, nor need it pass upon the Licensee's financial assurances for the conduct of decommissioning. Such considerations, rather, constitute separate regulatory obligations not relevant to the Licensee's present request for an alternate schedule for submitting a decommissioning plan.<sup>37</sup> For instance, 10 C.F.R. § 40.42(g)(4)(v) requires licensees to include in their decommissioning plan an "updated detailed cost estimate for decommissioning, comparison of that estimate with present funds set aside

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<sup>36</sup> Intervenor requests that, if the Board decides that issues relating to timeliness and financial assurance "are limited during this hearing opportunity to those related to the Army's JPG DU Site Characterization Project," then it be granted leave to restate Contentions D-1 and D-2. Reply in Support of Petition to Intervene and Request for Hearing of Save the Valley, Inc. at 17 (Jan. 3, 2006) [hereinafter STV January 3 Reply]. Intervenor'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 for the Army's alternate schedule 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.

<sup>37</sup> Similarly, Intervenor's reliance on SRP RIS-00-009 and NUREG-1757 as support for its position that issues of timeliness and financial assurance are included within the scope of this proceeding is misplaced. Both of these documents provide guidance for licensees who seek to delay the "initiation" of decommissioning activities under 10 C.F.R. § 40.42(f), and not requests under 10 C.F.R. § 40.42(g)(2). See NRC Staff Response at 56.

for decommissioning, and a plan for assuring the availability of adequate funds for completion of decommissioning.” This requirement is in addition to 10 C.F.R. § 40.36(d) and (e), which obligate licensees – even prior to submitting a decommissioning plan – to maintain funding assurances for decommissioning and periodically to provide cost estimates for the decommissioning activities. See Staff Answer at 53.<sup>38</sup>

With respect to the timeliness of the Licensee’s actual decommissioning of the JPG site, the regulations require that, when it submits its decommissioning plan – presumably in 2011 –, it will be required, at that time, to include a time estimate for the completion of decommissioning operations. 10 C.F.R. § 40.42(g)(4). At this juncture, the Licensee need not provide and the NRC Staff need not consider any estimates for how long decommissioning the site will take.<sup>39</sup>

In the final analysis, Contentions D-1 and D-2 seek to broaden the requirements the Licensee must meet beyond that which is required under 10 C.F.R. § 40.42(g)(2). As such, they are outside the scope of this proceeding. 10 C.F.R. § 2.309(f)(1)(iii).<sup>40</sup>

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<sup>38</sup> According to the Staff, contrary to Intervenor’s claim, the Licensee provided a cost estimate for the JPG site in its 1998 statement of intent, and will be required to submit an updated cost estimate, and associated statement of intent, in this month. See NRC Staff Response at 54 (citing Letter from Thomas L. Roller, Department of the Army, to Clayton L. Pittiglio (June 8, 1998)).

<sup>39</sup> To the extent Intervenor alleges that the Licensee will fail to submit its decommissioning plan within the five years proposed, or will fail to meet its funding obligations, based on the information submitted in support of its contention, it is mere speculation without any offered factual support. See 10 C.F.R. § 2.309(f)(1)(v), (vi); see also NRC Staff Response at 47-57. Intervenor references no instance in which the Licensee failed to comply with NRC regulations, nor does it state any facts to contradict the Licensee’s stated intention – which has been accepted by the Staff – to submit to the Staff a decommissioning plan within five years. “Absent such support, this agency has declined to assume that licensees will contravene our regulations.” GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 197 (2000).

<sup>40</sup> For similar reasons we reject Intervenor’s “alternative” Contentions D-1 and D-2. See supra note 36. No where in 10 C.F.R. § 40.42(g)(2) does it require “timely characterization” or “definite and quantified financial commitment for . . . characterization” as Intervenor alleges. See STV January 3 Reply at 17-19.

**4. Intervenor's Contentions Regarding the NRC Staff's Safety Evaluation Report**

Intervenor raises two contentions challenging perceived inadequacies with the NRC Staff's SER. First, in Contention E-1, it states that "[t]he SER is clearly inadequate because it does not sufficiently address or resolve the Contentions and supporting Bases submitted by STV, as clarified or supplemented herein, to identify and describe relevant and significant deficiencies in the Army's FSP." STV Final Contentions at 33. Intervenor's twelve bases take issue with the Licensee's responses to Staff Requests for Additional Information (RAI).<sup>41</sup> Specifically, Intervenor would have it that the Licensee's responses inadequately address or resolve the fundamental deficiencies in the FSP that were identified and described by Intervenor in its submitted Contention B-1. Id. at 33-39. Because, according to Intervenor, the SER "is premised on the assumption that the Army's responses to the Staff's . . . [RAIs] have addressed and resolved the deficiencies in the FSP identified and described by Intervenor, and to some extent, the Staff as well," the SER itself is inadequate. Id. at 33.

Intervenor's second contention, Contention E-2, insists that "[t]he SER is clearly inadequate because it does not sufficiently address or resolve the Contentions and supporting Bases submitted by STV to identify and describe relevant and significant deficiencies in the Army's [HASP] and their critical interrelationship to implementation of the Army's FSP." Id. at 39. Each of the six bases provided in support of Contention E-2 reiterate assertions previously made by Intervenor with respect to the adequacy of the HASP.

Both the Licensee and the NRC Staff object to the admission of Contentions E-1 and E-2 on the ground that, with respect to safety-related matters, "the adequacy of the application,

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<sup>41</sup> Letter from Alan G. Wilson, Department of the Army, to Tom McLaughlin, Office of Nuclear Material Safety and Safeguards (Feb. 9, 2006) (Responses to the Nuclear Regulatory Commission January 18, 2006, Request for Additional Information Regarding the Proposed Field Sampling Plan for Jefferson Proving Ground (License SUB-1435)).

not the adequacy of the staff's review or evaluation, e.g., its SER, is the focus for a proper [safety] contention." NRC Staff Response to STV Motion at 12 (quoting Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-03, 53 NRC 84, 97 (2001)); see also Army Response to STV Motion at 5-6. In response, Intervenor asserts that the Licensee and Staff are taking the ruling in Private Fuel Storage out of context. STV June 30 Reply at 6. According to Intervenor, its contentions challenge "the extent to which the SER . . . materially mischaracterizes significant elements of the FSP . . . 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." Id. at 6-7 (emphasis omitted).

We are unpersuaded by Intervenor's claim. First, the plain language of its contentions clearly constitute an impermissible attack on the adequacy of the NRC Staff's safety evaluation review of the Licensee's application. See STV Final Contentions at 33 (Contention E-1: "[t]he SER is clearly inadequate . . ."); id. at 39 (Contention E-2: "[t]he SER is clearly inadequate . . ."). To be sure, the SER can, and often does, play an important part in passing upon the viability of an applicant's proposal that is under challenge in an adjudicatory proceeding. Its content might disclose, for example, that serious problems inhere in one aspect or another of the proposal. Thus, this Intervenor is free to refer to any portion of the SER in question that might lend support to any cognizable claim it might advance (perhaps taking the form of a new contention) with respect to the sufficiency of the Licensee's proposed site characterization activities. It does not perforce follow, however, that it is equally free to put into issue the quality of the Staff's safety review as reflected by what is found in the SER. To the contrary, the Commission has made it clear that "[t]he adequacy of the applicant's license application, not the NRC staff's safety evaluation, is the safety issue in any licensing proceeding, and under longstanding decisions of the agency, contentions on the adequacy of the [content of the] SER are not cognizable in a proceeding." 69 Fed. Reg. at 2202 (emphasis added).

Second, given the bases assigned for them, it is apparent that these contentions are nothing more than a restatement of other submitted contentions, including the previously admitted Contention B-1. LBP-06-06, 63 NRC at 183-85. This is seen from the fact that the claimed deficiencies in the SER relate to its asserted failure to address the shortcomings that assertedly are to be found in the FSP – the subject of Contention B-1.

Contentions E-1 and E-2 are, therefore, inadmissible.<sup>42</sup>

**5. Intervenor’s Contention Regarding the Staff’s Environmental Assessment**

The National Environmental Policy Act requires the preparation of an EIS for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (2000). Council on Environmental Quality regulations state that, in determining whether to prepare an EIS, the Federal agency shall prepare an EA, which will “briefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a [FONSI].” 40 C.F.R. § 1508.9(a)(1). As noted above, the NRC Staff prepared the requisite EA and concluded that the “activities associated with site characterization should not produce significant radiological or nonradiological impacts to the environment, workers or members of the public.” EA at 2. On the basis of this finding, the NRC Staff determined that an EIS was not necessary. Id. at 4.

Intervenor’s Contention F-1 charges that “[t]he reasoning and assumptions supporting the EA’s FONSI are faulty in significant respects.” STV Final Contentions at 41. The majority of the seventeen bases Intervenor assigns in support of the contention assert that the NRC Staff relied upon faulty logic in reaching its conclusion that there will be minimal radiological and

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<sup>42</sup> Although Intervenor is prohibited from launching an attack on the NRC Staff’s safety evaluation review of the Licensee’s FSP, the basic concern underlying Contention E-1 – that the FSP is fundamentally deficient – is assuaged by the admission of Contention B-1, the adjudication of which will resolve whether the FSP is adequate to provide the Licensee with sufficient information to develop an effective decommissioning plan.

nonradiological impacts as a result of the five-year delay in decommissioning.

First, according to Intervenor, the NRC Staff incorrectly hypothesizes that there will be no radiological impact “from wells installed inside the DU impact area because earlier wells installed outside of the DU impact area did not have radiological impacts.” Id. at 42. This reasoning is said to be faulty because the first installation was in an area that did not contain any DU contamination, whereas future installations will occur in areas containing DU contamination. Ibid. Second, Intervenor maintains, the Staff offers no supporting data or quantification for its assertion that “the risk from radiological impacts from exploding UXO is ‘insignificant.’” Ibid. Third, Intervenor believes the Staff’s declaration in the EA, that “the existing monitoring program has found ‘no DU,’” to be faulty because it “rel[ies] on the supposition that the monitoring program of the [ERMP] is adequate to identify migrating DU from the DU impact area.” Id. at 42-43. Fourth, Intervenor devotes nine bases to discussing why the Staff’s application of NUREG/CR-6705, “Historical Case Analysis of Uranium Plume Attenuation,” was inappropriate with respect to the JPG Site. Id. at 43-47.

In its final four bases, Intervenor would have it that the NRC Staff’s conclusion in the EA that “no DU has been detected in the samples collected” (id. at 47 (quoting EA at 3)) is “inaccurate and misleading,” because radiation was in fact detected in the vegetation and vegetation root wash. Ibid. Additionally, Intervenor asserts that “better estimates of whether DU is or has been present in surface water comes from the aquatic bioaccumulators,” as opposed to the aqueous sampling proposed by the Licensee. Id. at 48.

The Licensee and the NRC Staff each counter that Contention F-1 is inadmissible for failing (1) to provide facts or expert opinion to support Intervenor’s position, and (2) to raise a genuine dispute on a material issue of law or fact with respect to the Staff’s FONSI.<sup>43</sup> As the

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<sup>43</sup> See Army Response to STV Motion at 6-7; NRC Staff Response to STV Motion at (continued...)

Staff sees it, while Intervenor asserts that the JPG site is not directly analogous to the sites discussed in NUREG/CR-6705, it does nothing to explain why these alleged differences may be significant to the Staff's FONSI.<sup>44</sup> In the alternative, if the Board finds that Intervenor has raised a genuine issue of law or fact, it is the Staff's position that Contention F-1 is admissible, but only as supported by two of Intervenor's bases. Id. at 30, 33.<sup>45</sup>

We agree with the appraisal of the Licensee and NRC Staff. It might well be that, in order for a petitioner to raise an admissible contention with respect to a Staff finding of no significant impact, it need not demonstrate that there will in fact be a significant environmental impact as a consequence of the proposed action; however, it must "allege[] facts which, if true, show that the proposed project may significantly degrade some human environmental factor."<sup>46</sup> Intervenor fails to make such a showing. At no point in Contention F-1 does Intervenor state – let alone provide supporting facts or expert opinion – that the Licensee's proposed site characterization activities might of themselves have a significant effect on the environment.

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<sup>43</sup>(...continued)

25-37. In response to the charge that the bases assigned in support of Contention F-1 fail to state a genuine issue of law or fact, Intervenor asserts that the plain language of the contention – "[t]he reasoning and the assumptions supporting the EA's FONSI are faulty in significant respects" – "is a direct challenge to the legal and factual basis to the EA's 'bottom line,'" the FONSI. STV June 30 Reply at 12.

<sup>44</sup> NRC Staff Response to STV Motion at 26 (citing Louisiana Energy Servs., L.P. (National Enrichment Facility), LBP-04-14, 60 NRC 40, 56 (2004) ("providing any material or document as a basis for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention"))).

<sup>45</sup> The Staff does not provide any explanation as to why it believes Intervenor's bases (g) – sites analyzed in NUREG/CR-6705 for plume interpretation are not analogous to the JPG site – and (k) – sites analyzed in NUREG/CR-6705 for the ready transfer of dissolved uranium from matrix groundwater flow to free-flowing body of water are not analogous to the JPG site – to be admissible. See NRC Staff Response to STV Motion at 30, 33.

<sup>46</sup> Steamboaters v. FERC, 759 F.2d 1382, 1392 (9th Cir. 1985) (internal quotation marks omitted).

This failure renders this contention inadmissible. 10 C.F.R. § 2.309(f)(1)(vi).<sup>47</sup>

### III. ADMINISTRATIVE MATTERS

The hearing in this proceeding shall be conducted in accordance with the informal adjudicatory procedures prescribed in Subpart L of 10 C.F.R. Part 2. In an order dated May 2, 2006,<sup>48</sup> the Board deferred a number of the parties' obligations pending our determination as to the bounds of the evidentiary hearing. Having now made such determination, the following obligations are now in effect: (1) the Licensee and Intervenor shall make its mandatory disclosures no later than January 24, 2007 (10 C.F.R. § 2.336); (2) if there is unanimous agreement among the parties that the upcoming evidentiary hearing should consist only of written submissions they shall file a joint motion to that effect no later than January 9, 2007 (10 C.F.R. § 2.1206); and (3) the NRC Staff shall file in the docket, present to the Licensing Board, and make available to the parties a hearing file no later than January 24, 2007 (10 C.F.R. § 2.1203).

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<sup>47</sup> It seems to us, rather, that Intervenor's Contention F-1 is a reiteration of its overarching concern that the Licensee's proposed site characterization activities are inadequate for purposes of producing a viable decommissioning plan. Intervenor's concerns should be assuaged by the admission of Contention B-1, whose adjudication will resolve whether the FSP is adequate to provide the Licensee with sufficient information to develop an effective decommissioning plan.

<sup>48</sup> Licensing Board Order (Deferring Mandatory Disclosure) (May 2, 2006) (unpublished).

This Memorandum and Order is subject to appeal in accordance with the provisions in 10 C.F.R. § 2.311. Any petitions for review meeting the requirements set forth in section 2.311 must be filed within ten (10) days of service of this Memorandum and Order.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>49</sup>

**/RA/**

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Alan S. Rosenthal, Chairman  
ADMINISTRATIVE JUDGE

**/RA/**

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Dr. Paul B. Abramson  
ADMINISTRATIVE JUDGE

**/RA/**

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Dr. Richard F. Cole  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
December 20, 2006

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<sup>49</sup> Copies of this Memorandum and Order were sent this date by Internet electronic mail transmission to counsel for (1) the Licensee, (2) the NRC Staff, and (3) Intervenor.

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 (DETERMINING SCOPE OF EVIDENTIARY HEARING) (LBP-06-27) have been served upon the following persons by U.S. mail, first class, or through internal NRC distribution.

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Docket No. 40-8838-MLA  
LB MEMORANDUM AND ORDER (DETERMINING SCOPE OF  
EVIDENTIARY HEARING) (LBP-06-27)

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[Original signed by Evangeline S. Ngbea]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 20<sup>th</sup> day of December 2006