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NUCLEAR REGULATORY COMMISSION

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Pre-Hearing Conference

January 26, 2007 (10:51am)

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RULEMAKINGS AND
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Date: Wednesday, January 24, 2007

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1 UNITED STATES NUCLEAR REGULATORY COMMISSION

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3 ATOMIC SAFETY AND LICENSING BOARD

4 + + + + +

5 PRE-HEARING TELECONFERENCE

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8 IN THE MATTER OF: ||

9 UNITED STATES ARMY ||

10 (JEFFERSON PROVING GROUND SITE) ||

11 Docket No: 40-8838-MLA ||

12

13 Wednesday,

14 January 24, 2007

15
16 The above-entitled matter came on for
17 hearing, pursuant to notice at 10:00 a.m.

18
19 BEFORE:

20 THE HONORABLE ALAN ROSENTHAL, Chairman

21 THE HONORABLE PAUL ABRAMSON

22 THE HONORABLE RICHARD COLE

23
24
25

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P R O C E E D I N G S

10:02 A.M.

1
2
3 JUDGE ROSENTHAL: This is Judge Rosenthal,
4 this morning. Are the two other members of this
5 Board, Judge Cole, Judge Abramson, as well as law
6 clerk. Also, you've been in contact with or she's been
7 in contact with you from time to time.

8 This telephone conference which is being
9 recorded is being conducted pursuant to the Board's
10 January 4, 2007 order. Its purpose is to discuss with
11 the parties the scheduling of further events in this
12 proceeding, leading up to an evidentiary hearing which
13 the Board currently considers be held in mid-May.
14 That seems to work well for the Board's Members own
15 schedules as well as for what we think should be the
16 time required for the various activities that must
17 precede the holding of the evidentiary hearing.

18 Now one housekeeping request, for the
19 benefit of the reporter, I will request all
20 participants to identify themselves when they speak so
21 that the reporter knows precisely who it is that's
22 speaking at the particular time.

23 Now before going into the various
24 milestones that are set forth in the regulations, I
25 would wish to note that the Board has in hand the

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1 motion that was filed on January 19 by Save The Valley
2 seeking the admission of an additional contention.

3 Now do I assume correctly that this is
4 being treated by the licensee and the NRC staff as a
5 motion and as such the Board can expect responses to
6 the motion to be filed next Monday, the 29th?

7 MS. ZOBLER: Your Honor, this is Marian
8 Zabler from the NRC staff. This was an issue I was
9 going to ask you to raise, if you didn't already. The
10 staff would request additional time to respond to the
11 additional contention. I note that in the prior
12 ruling the Board had given the Army and the staff 20
13 days to respond to any new contentions that STV had
14 filed in response to the issuance of the safety
15 evaluation. And I would request that the Army and the
16 staff be given 20 days to respond.

17 JUDGE ROSENTHAL: Twenty days to respond.
18 Save The Valley, do you have a problem with that?

19 MR. MULLET: Your Honor, we don't. We
20 would note --

21 JUDGE ABRAMSON: Is this Mr. Mullet?

22 JUDGE ROSENTHAL: Mr. Mullet, please
23 identify yourself.

24 MR. MULLET: I'm sorry, Your Honor. This
25 is Mr. Mullet, Mike Mullet on behalf of Save The

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1 Valley.

2 Your Honor, we do not have a problem with
3 that. We would note, however, that the Army just over
4 the last few days, the staff posting up until the
5 morning, there's an additional significant addendum
6 that's been filed, addendum 4 and related materials.
7 And our expectation would be that we would be filing
8 a further supplementation based on that addendum 4.
9 Essentially, this is all of the detail with respect to
10 the hydrogeology: soil, groundwater, surface water,
11 some of which was discussed during the settlement, but
12 had not been documented in detail until here just
13 within the last two or three days. It's been filed in
14 pieces or at least on ADAMS it's been posted in
15 pieces.

16 JUDGE ABRAMSON: Mr. Mullet, this is Judge
17 Abramson. Does any of the information in that
18 supplement address or affect things that you've raised
19 in your January 19 motion?

20 MR. MULLET: We have not had an
21 opportunity to assess that as of yet. The key
22 document, some of them weren't actually available on
23 ADAMS until this morning, so we have not had an
24 opportunity to do that. It would not -- well, I doubt
25 that it would affect what we had to say about the deer

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1 tissue sampling, but it could conceivably affect at
2 the margin some of the things that we said on the
3 other three points, Your Honor.

4 JUDGE ROSENTHAL: This is Judge Rosenthal.

5 Mr. Mullet, isn't it very likely that from
6 time to time there is going to be further disclosures
7 coming out of either the licensee or the staff that
8 have some impact upon the manner in which this field
9 sampling plan is going to be implemented? In other
10 words, this is an evolving process, isn't it? And is
11 it your expectation that every time that you see a new
12 disclosure that you're going to want to come in with
13 a new contention or an amended contention?

14 MR. MULLET: Your Honor, I think it
15 depends on the magnitude. I would say that the nature
16 of this process is such that when you have a filing of
17 the magnitude of addendum 4 and the related materials,
18 that the answer from Save The Valley's standpoint
19 would be yes. Obviously, there have been other things
20 that have been updates to the hearing file that would
21 not involve that.

22 In terms of what the Army filed, this is
23 sort of a follow-on to the October 12 public meeting
24 and in terms of the Army expressly stating that with
25 respect to the well sampling and data analysis

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1 protocols that they have not filed that at this time,
2 but want to wait until such time as the wells have
3 been installed and the first round of sample tests
4 have been taken in order to assess that information
5 prior to filing the addendum that describes the
6 protocols that are going to be used.

7 I would certainly anticipate from the
8 discussions that Save The Valley has had that when and
9 if that filing takes place from what we've been told
10 before would be maybe late 2007, potentially even
11 early 2008, that there would be a further filing at
12 that time.

13 Other than the filings that were made over
14 the last few days and that predicted filing, those are
15 the only two that I'm aware of at this time, Your
16 Honor. They would have to be significant. They'd
17 have to be new. They'd have to constitute a
18 significant addition and definition to the plan for
19 Save The Valley to attempt to supplement or amend its
20 contentions or bases.

21 JUDGE ROSENTHAL: The one contention that
22 was admitted related, did it not, to the field
23 sampling plan. So I suppose one of the issues that
24 the Board may have to confront is the extent to which
25 what you're now advancing is already under the

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1 umbrella of the contention that's been admitted.

2 In any event, we can address that after we
3 see what responses, see the responses that the staff
4 and the licensee put forth to the motion that is
5 currently on the table.

6 I'll ask my colleagues, do you have any
7 objection to 20 days?

8 JUDGE ABRAMSON: This is Judge Abramson.
9 I have no objection to the 20 days, but I wonder if
10 we're not creating extra work here. If, in fact,
11 what's going to happen Save The Valley is now going to
12 have a different view of material parts of this
13 January 19 motion on the basis of its review of the
14 new filings from the Army, why should we duplicate
15 work for everybody by having the parties reply to this
16 January 19 motion. Perhaps we should put this all in
17 abeyance until Save The Valley files its new motion on
18 the basis of its new information and we can then
19 consider the whole thing as a package.

20 I mean Save The Valley that's why I asked
21 you Mr. Mullet, how much of your January 19 motion is
22 affected. And you say the deer sampling stuff isn't,
23 but the other may very well be. If that's the case,
24 why iterate? Why have people spin wheels?

25 MR. MULLET: Well, Your Honor, this is --

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1 yes, I'm sorry. This is Mr. Mullet again.

2 Your Honor, I very much agree with you.
3 Our concern was timeliness and we had this issue arise
4 just before the pre-hearing conference that we had
5 previously and the reason that we filed, even though
6 we knew this information was coming was because we
7 were concerned about timeliness.

8 JUDGE ROSENTHAL: Yes, and we're very
9 conscious of that and I'm sure as are the Applicant
10 and the staff, and I'm sure we're going to see
11 arguments about timeliness. But -- and we appreciate
12 your effort to try to deal with that issue. But I
13 think from the perspective of just efficient use of
14 resources, I would certainly be in favor of deferring
15 the need for a reply from the Applicant and the staff
16 until Save The Valley files its amended amended
17 contentions on the basis of the new filing, which I
18 assume you're going to try to do in some sort of 30-
19 day window.

20 MR. MULLET: That as going to be our
21 proposal, Your Honor.

22 Technically, it was posted on the 23rd,
23 but it's not available until the 24th. That would
24 take until Friday, the 23rd of February as we
25 calculated it. That was going to be our proposal.

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1 Now the extent to which the staff knows of
2 additional information associated with that filing
3 that has not been posted as of today, might be useful
4 to know where we stand on that before we nail that
5 date down. But that was going to be our proposal,
6 assuming that the filing was complete or the postings
7 were of the filing.

8 JUDGE ROSENTHAL: All right, licensee,
9 what's your response to all of this?

10 MR. KOPP: Your Honor, this is Mr. Kopp
11 for the Army. We would have no objections in the
12 first instance to the 20 days, but I tend to agree
13 that if there's going to be further filings, we may as
14 well handle it all at once instead of reduplicating
15 the effort.

16 JUDGE ROSENTHAL: All right. Ms. Zobler?

17 MS. ZOBLER: This is Marian Zobler. First
18 to address Mr. Mullet's question. My understanding is
19 that everything that we got from the Army should be
20 available on ADAMS, so --

21 JUDGE ROSENTHAL: Currently available?

22 MS. ZOBLER: Currently available. If
23 you're having any trouble, you could call me directly
24 and I can see if what we can work out with our Office
25 of the Secretary.

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1 I have no objection either to waiting for
2 Mr. Mullet's second filing. What I'm concerned about
3 is sort of the continuous filing of new contentions
4 and getting some finality in this proceeding. And so
5 that would be my concern with respect to future Army
6 submissions.

7 JUDGE ABRAMSON: This is Judge Abramson.
8 Let me speak to this because this has been a problem
9 for me since the outset of this proceeding.

10 We have an evolving plan and there's going
11 to be new information developed on this plan until the
12 end of the site testing. It seems to me that what
13 Save The Valley is saying is the principal issues they
14 want to address are the manner in which data is going
15 to be gathered.

16 Is that correct, Mr. Mullet?

17 MR. MULLET: Yes, Your Honor.

18 JUDGE ABRAMSON: It's the specific manner
19 in which data is going to be gathered.

20 MR. MULLET: And analyzed.

21 JUDGE ABRAMSON: Okay, I agree. I
22 understand. And analyzed.

23 Now if that -- if those things are going
24 to continue to evolve materially throughout the five
25 years of the delay, then we are creating a situation

1 that it's going to be litigated every step of the way
2 which was why, of course, we asked you all to try to
3 work together to see if you couldn't resolve these
4 matters.

5 I mean come back to us now and told us
6 that you cannot resolve them seems to us there's no
7 alternative but to -- it seems to me, there's no
8 alternative but to permit litigation. And what I'm
9 worried about is what's the most efficient way to
10 litigate this and we ought to litigate in big chunks.
11 And the chunks ought to be on large pieces of the plan
12 related to data gathering or data analysis and I
13 think, am I correct, Mr. Mullet, in reading, in
14 hearing what you're saying now to say that this new
15 information that's recently been filed will constitute
16 a large piece of the data sampling?

17 MR. MULLET: Your Honor, we would read it,
18 as we would understand it, that would be the case. As
19 we understand it, at this point, in terms of this mid-
20 May hearing, if we supplement it as we have proposed,
21 we think you would have at that point a meaningful
22 chunk here. And we would have preferred that the Army
23 would have come forward with the well sampling
24 protocol and data analysis scheme associated with this
25 particular portion of the FSP, but them not having

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1 done that and not proposing to do that for six to nine
2 months or more, you're going to delay the process if
3 we don't get some finality on some of this, although
4 we're having a hard time understanding why we're not
5 looking at the sampling protocol and the data analysis
6 protocol associated with it before the initial
7 sampling gets done. But that's a decision the Army
8 has made.

9 JUDGE ABRAMSON: Will there be -- this is
10 Judge Abramson again. Will there be meaningful
11 results obtainable by having a hearing on what's
12 available at this point or do we need to wait until
13 the well sampling plan is put in front of all of the
14 parties in six to nine months?

15 MR. MULLET: That's the way we felt about
16 it, Your Honor. My understanding, this is Mr. Mullet
17 again, my understanding is that the staff is planning
18 some sort of public meeting at some point, whether
19 it's going to be with what's been filed now or whether
20 the staff wants to wait for this additional
21 information with regard to the well samplings and data
22 analysis protocols, I don't know. Perhaps Marian
23 does. But there has been, my understanding is that
24 there was talk of a meeting. It was my understanding
25 it was going to be some time this spring originally,

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1 but I don't know myself where that stands at this
2 point from what's been --

3 JUDGE ABRAMSON: I'm not sure I understand
4 what the relevance is of a public meeting. But I'd
5 like to hear from the staff and the Applicant of what
6 portion of the plan this represents today and how much
7 it would be finalized by waiting until the data is
8 going to be released or information is going to be
9 released in six to nine months.

10 JUDGE ROSENTHAL: In responding, this is
11 Judge Rosenthal. In responding to Judge Abramson's
12 question, I would like the views of first the staff
13 and then the licensee and then Mr. Mullet can respond
14 as to whether there is any useful purpose in going
15 forward with a hearing in the middle of May which was
16 what, as I indicated at the very outset of this
17 conference, the Board had in mind, because if we're
18 now going to be waiting for additional possible
19 contentions that I would think would impact
20 considerably the schedule for the filing of testimony
21 and rebuttal testimony and all of that.

22 So I mean I am certainly amenable to
23 deferring a hearing if there is some useful purpose to
24 be served in doing that. But I'm frank to state that
25 I now sort of am at a loss as to whether it is

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1 advisable given what we're now being told to move
2 forward in May or whether we should at this juncture
3 do no more than put the schedule for further events
4 into another state of suspended animation waiting for
5 to see what eventuates in the next month or two.

6 I have to say as a personal note, unlike
7 my two colleagues, I've been living with the Jefferson
8 Proving Ground site since I returned to the NRC in
9 late 1999. And it looks like this is going to be a
10 lifetime venture for me. I'm not too enthusiastic
11 about it, but so be it. I think what I'm hearing now
12 really raises substantial questions as to whether what
13 I was about to do which was go down the schedule of
14 milestones and see how they fitted in, looking to this
15 mid-May hearing and whether that makes any sense at
16 this point, given what I've heard in the last 20, 25
17 minutes.

18 So let's start with Ms. Zobler and we'll
19 go to Mr. Kopp and then we can hear from Mr. Mullet in
20 response.

21 JUDGE ABRAMSON: And then Judge Abramson
22 in response.

23 JUDGE ROSENTHAL: And then Judge Abramson
24 will doubtless have something to say himself.

25 (Laughter.)

1 JUDGE ABRAMSON: Ms. Zabler?

2 MS. ZOBLER: Yes, this is Marian Zabler.
3 First of all, the documents that were just provided,
4 the staff hasn't had an opportunity to fully evaluate,
5 so we can't really comment on those yet. I would just
6 like to kind of step back and note again that the
7 staff has approved the alternative request and it was
8 for the -- the request for alternative schedule and
9 that was based on a plan that based on what the Army
10 was proposing to do would actually lead to an
11 acceptable decommissioning plan in about five years.

12 So our view now is that the issues are
13 ripe for resolution with the understanding that our
14 regulations always provide an opportunity for a
15 reopening of the record or based on new information
16 which if Save The Valley can make that showing,
17 certainly that would warrant a reopening of the
18 record. But we believe that what the staff would not
19 want is to have a proceeding open for five years with
20 it periodically sort of heating up and then cooling
21 down and heating up and cooling down again. It's not,
22 in our view, the most efficient use of resources.

23 JUDGE ROSENTHAL: Well, is it -- let's not
24 talk about -- this is Judge Rosenthal again. Let's
25 not talk, Ms. Zabler, of five years. But let's talk

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1 about perhaps several months, given what's now about
2 to apparently be put on the table.

3 I would certainly agree with you that
4 waiting five years is not very palatable, although it
5 might have an advantage for me personally because I
6 probably will be gone before that time.

7 (Laughter.)

8 JUDGE ABRAMSON: Ms. Zobler, this is Judge
9 Abramson. Let me ask you a question.

10 We have a situation where the method for
11 the gathering and analysis of data is not yet
12 finalized. That being the case, is it not reasonable
13 to expect that every time the Applicant develops some
14 material new sampling or analysis methodologies that
15 the intervenors will have the right to raise new
16 contentions.

17 MS. ZOBLER: Your Honor, the way we view
18 the field sampling plan is a phased approach. It's
19 not so much a question of methodology, but the Army is
20 going to collect data and then based on that data,
21 collect more data, less data, different data. And so
22 the plan itself was something that we approved and
23 certainly Save The Valley is entitled to question the
24 plan. It's the question regarding the implementation
25 of the plan that in the absence of new and significant

1 information, we think is not subject to hearing.

2 JUDGE ABRAMSON: Let me make sure I
3 understand this. As the staff views what they have
4 approved is simply the concept of phased plan and none
5 of the details of how data will be gathered or
6 analyzed, is that correct?

7 MS. ZOBLER: Not quite, Your Honor. There
8 are some details in the plan and there are some
9 methodologies in the plan that the staff did approve
10 after review.

11 JUDGE ABRAMSON: And are those
12 methodologies or details continuing to evolve as the
13 Army addressed and maybe I should ask the Army.

14 Mr. Kopp, are these details and
15 methodologies that are in the plan evolving and are
16 you providing new information to the staff
17 periodically, as they evolve?

18 MR. KOPP: Your Honor, this is Mr. Kopp.
19 Yes, I think that's an adequate characterization. We
20 are evolving with our plan. We're probably adding
21 things that we did not foresee that we want to pursue
22 and in that case, we have these yearly or at least
23 once a year consultations with the NRC to discuss what
24 we plan to do and where we plan to go. So it's an
25 evolving process.

1 JUDGE ABRAMSON: Now I want to ask staff
2 and Mr. Kopp. The way the process would work if we
3 litigated it is every time there's new information,
4 the intervenors would have a chance to file new
5 contentions. If we let the intervenor file those
6 contentions or the intervenor did file those
7 contentions, the Applicant and the Army would respond
8 to them. They might respond by changing what they're
9 doing and they might respond by saying we don't have
10 to change what we're doing, it's adequate. But there
11 would be a continuing interaction in the litigation
12 environment between the Applicant and the intervenors
13 with the staff kibitzing.

14 As we go forward, as the plan develops, we
15 can either litigate them or we can wait until the plan
16 is more finalized and then litigate them. In any
17 case, the result and effect on the plans is going to
18 be the same. Eventually, all the challenges to the
19 plan will have to be heard and the question that I'd
20 like you to think about and address is does it make
21 any sense to start litigating that now or should we
22 wait until there is a plan, rather than an outline of
23 what you're going to do.

24 I'll start with Ms. Zobler again.

25 MS. ZOBLER: Your Honors, I believe that

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1 there is some benefit to litigating or at least have
2 some finality on some of the issues that Save The
3 Valley has raised. And I wouldn't, staff would not
4 object to deferring the hearing pending the submission
5 of additional contentions that Mr. Mullet may provide
6 in light of the new information from the Army.

7 I guess my concern again is having an open
8 hearing process that has no finality until a few years
9 from now. I agree with Judge Rosenthal. I don't at
10 year four and a half we're going to still be changing
11 the plan. But it is an iterative process and it's a
12 phased approach of which it will be a public process
13 in which STV has already been involved with and
14 certainly they would continue to be involved with.

15 And then, of course, at the end of the
16 day, we hope to have an acceptable decommissioning
17 plan which will be based on all these activities that
18 the Army has been performing over these five years.

19 JUDGE ROSENTHAL: Let me ask you this, at
20 this point is there available to Save The Valley the
21 information which might or might not lead Save The
22 Valley to file yet another contention? Is that
23 currently available?

24 I gather that, Mr. Mullet, you were
25 holding out the possibility of filing or seeking the

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1 admission of yet an additional contention beyond the
2 one that was covered in your January 19 motion.

3 Is that true?

4 MR. MULLET: Your Honor, it is. Whether
5 it will be an additional contention or whether it
6 would be additional bases or additional and modified
7 bases, that's what would remain to be seen.

8 JUDGE ROSENTHAL: Do you have the
9 information now, in hand, on which that would be
10 based?

11 MR. MULLET: We're operating on the
12 premise that when something significantly new gets
13 filed, we only have 30 days to respond. We consider
14 addendum 4 and the associated material to follow up to
15 the staff's request for additional information from
16 the October 12th meeting to be significantly new
17 additional information. So we are certain that we
18 will file based on that. There's no doubt.

19 Now what the precise form of that will be
20 will remain to be seen. If you want to ask the Army
21 if this was just an interlude, I'd explain what our
22 thinking about this overall issue is.

23 JUDGE ROSENTHAL: I'm looking at the
24 timing issue at this point.

25 MR. MULLET: Yes, and that's what I was

1 going to address, Your Honor.

2 JUDGE ROSENTHAL: Because what I'm trying
3 to get a handle on is whether if we were to put off
4 setting up the schedule on these other events for a
5 period of time, it would be a time when you would have
6 everything before us at this juncture that you intend
7 to put before us. The staff and the licensee could
8 respond and then we could move forward after
9 considering the responses to setting up, holding up
10 perhaps another scheduling conference and setting up
11 the schedule at that time.

12 I'm trying to get some feel for what we're
13 talking about insofar as the time period before
14 everything that you have, you think you might be
15 putting on the table at this time would be on the
16 table.

17 JUDGE ABRAMSON: This is Judge Abramson.
18 Let me pick this up for a moment. I think what we
19 have heard from Mr. Mullet is and from -- and maybe
20 from the Army, that there is expected to be filed
21 additional material information in something like six
22 to nine months. Is that accurate?

23 MR. KOPP: Your Honor, this is Mr. Kopp
24 for the Army. Yes, that's accurate, but I also
25 believe and Paul Cloud may have to correct me on that,

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1 but there will be further information following that
2 on other aspects of the site characterization.

3 JUDGE ABRAMSON: So it is possible that we
4 could take the information that's in front of us now
5 or in front of the parties now, including this latest
6 filing by the Army and address any specific issues
7 that that raises for Save The Valley now and then when
8 the next material filing is made six months from now,
9 Save The Valley can raise whatever issues it wants
10 then and we can deal with those at that point. Is
11 that what the staff would like to see happen?

12 MS. ZOBLER: Your Honor, this is Marian
13 Zabler. I guess I'm a little confused, Judge Abramson
14 on what it was that you were proposing.

15 JUDGE ABRAMSON: What I'm asking, Ms.
16 Zabler, is you have said you'd like to have some
17 finality to something. And of course, everybody would
18 like to have some finality to some of this. But what
19 we are all faced with, as you have said, and as
20 everybody has acknowledged, is an iterative process
21 that will eventually lead to a decommissioning plan.

22 What I'm asking is you have said you want
23 some finality. You think there is something discrete
24 in front of the parties that can now be resolved and
25 it sounds to me like what is in front of the parties

1 includes information recently filed by the Applicant,
2 which would lead the intervenors to modify the filing
3 they made on January 19th, and that there will be no
4 additional material information put forward by the
5 Applicant for another six to nine months after that,
6 so that there will be a pocket, a packet, if you will,
7 of information that could be dealt with, challenged
8 and litigated now and that the next step would be on
9 the next filing of material information which would be
10 six or nine months from now.

11 And I'm asking you is that what the staff
12 wants to see happen? Do you want us to try to
13 litigate what's available now?

14 MS. ZOBLER: Your Honor, in light of the
15 timing that you've outlined which I believe is our
16 understanding what the Army is planning on doing, it
17 does make sense that you could, in fact, save
18 everything for a hearing at the end of the six to nine
19 month period because it's a discrete period of time
20 that we actually can point to and for planning and
21 scheduling purposes.

22 JUDGE ABRAMSON: So your thought would be
23 that we would let Save The Valley file timely its
24 challenge to the information that comes in, that's
25 just come in so they file that say in 30 days and

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1 you'd file a reply and we would not go to hearing on
2 that until the next file, until after the next
3 material filing by the Army which is six to nine
4 months which would then trigger a filing by Save The
5 Valley and replies and then we go to hearing on that
6 package of information.

7 Now I thought I heard the Army say that
8 that's not the end of it. There are going to be
9 material filings thereafter.

10 Is that right?

11 MR. KOPP: Your Honor, this is Mr. Kopp.
12 I believe that is correct.

13 JUDGE ABRAMSON: So the question that's in
14 front of you is do we do this piecemeal or do we wait?
15 It's in front of all of you.

16 JUDGE ROSENTHAL: Mr. Mullet, what is your
17 view on that?

18 MR. MULLET: Let me just briefly outline
19 the framework. We've struggled with this, obviously,
20 the way everyone else has. We see there being issues
21 with regard to the components of the plan, the overall
22 plan. Then we see there being issues with regard to
23 the subcomponents of each of the components and then
24 we see issues with regard to the implementation of the
25 various subcomponents. And the problem we see from a

1 practical standpoint of waiting is we don't want to be
2 in a situation where the delay is such that some of
3 these things would be arguably too late and we're
4 getting to that point.

5 Let me just give you some concrete
6 examples. One of the things that we've alleged, for
7 example, is that with regard to the biology side that
8 there should be an air sampling component to the plan
9 that's not there, that there ought to be an additional
10 biota component, particularly crayfish, for example.
11 Now that, in terms of the overall concept of the plan
12 obviously if those components aren't there, then there
13 isn't going to be any component development. There
14 isn't going to be any component implementation. Now
15 with respect to a particular component, looking at the
16 hydrogeology, the well sampling, particularly, there's
17 been a significant dispute with regard to a stream
18 gauging or study, for example.

19 So to the extent that you get into --
20 there's an agreement that the well sampling plan ought
21 to be there. There is general agreement with regard
22 to what the well sampling plan needs to look like, but
23 there's disagreement with regard to a subcomponent of
24 that.

25 Then there's this huge disagreement with

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1 regard to the sampling and data analysis protocol in
2 terms of whether or not we're using an ERM protocol or
3 whether we're using a different protocol that's
4 appropriate for bait and transport purposes, rather
5 than for public health and safety purposes.

6 JUDGE ROSENTHAL: Let me tell you, I
7 haven't obviously discussed this with my colleagues,
8 but I'll tell you where I come out at this point and
9 they may or may not agree with me and that is having
10 listened to all of this, recognizing that this is a
11 process that's going to go on forever, or hopefully
12 not forever, but only for --

13 MR. MULLET: In our terms, it's starting
14 to look like forever.

15 (Laughter.)

16 JUDGE ABRAMSON: And that there are going
17 to be all kinds of possible changes down the road.
18 Where I, at the moment, come out, is that we go ahead
19 in May on those issues that are presented by what we
20 agreed was the scope of the hearing in our order on
21 the prior contentions and that we include in that
22 whatever we decide after getting the staff and
23 licensee responses should be included out of what was
24 filed on January 19th. And we go ahead on that basis
25 with those things and perhaps include addendum 4 to it

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1 and that we not worry, that we deal subsequently, if
2 we have to with whatever else comes up.

3 So I would --

4 JUDGE ABRAMSON: Now the question is
5 whether May works. Let's think about the time for a
6 moment.

7 JUDGE ROSENTHAL: Right.

8 JUDGE ABRAMSON: Because we've got
9 addendum 4 which came in and the intervenor's filings
10 would be what, end of February, did I hear?

11 MR. MULLET: February 23rd.

12 JUDGE ROSENTHAL: May might not work any
13 longer, but what I was thinking about was we wait
14 until we get those filings at the end of February and
15 that we then would hold another scheduling conference
16 in light of that to set up the milestones.

17 How does that strike the parties? I
18 don't want to wait, I don't think, for six to nine
19 months before setting it up again, but it seems to me
20 that we wait to get in the product of addendum 4,
21 describe it that way. And we then hold a scheduling
22 conference after we decide what out of this new
23 material gets included under the umbrella on the FSP
24 litigation. And then we hold another scheduling
25 conference and we'll deal with the milestones.

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1 JUDGE ABRAMSON: With a little
2 housekeeping on that, Judge Rosenthal, this is Judge
3 Abramson again. I think that it would make sense then
4 not to require staff and Applicant to reply to the
5 January 19 motion.

6 JUDGE ROSENTHAL: Correct.

7 JUDGE ABRAMSON: But to let the Applicant,
8 let the intervenor, Save The Valley, file their new
9 amendments to this proposed -- to the January 19th and
10 then have the Applicant and staff reply to the
11 combined effect of those two filings and I would
12 propose we grant the staff's request that they have 20
13 days to reply to that combined effect, 20 days after
14 receipt of the filing by the Save The Valley on
15 addendum 4.

16 Does that work for the rest of you?

17 JUDGE COLE: This is Judge Cole. It might
18 even be helpful if Save The Valley were to modify its
19 January 19th filing to include whatever it wants to
20 add because of addendum 4, and have that one filing.

21 JUDGE ABRAMSON: Just file an amended
22 January 19th, based on addendum 4.

23 JUDGE ROSENTHAL: So the proposal is that
24 Save The Valley will come forth with an amendment to
25 its January 19 motion -- or revision, as it were,

1 factoring in the addendum 4. When that is filed, the
2 staff and the licensee would have 20 days to respond
3 to the revised motion or amended motion, call it what
4 you will, whereupon, the Board would then consider the
5 revised motion and the responses thereto expeditiously
6 and after ruling on that, there would be another
7 scheduling conference to set forth the milestones
8 looking to a hearing.

9 Now obviously, the hearing will not be in
10 May. Well, it might be in May, but anyway, that will
11 abide the event of our acting on the revised motion.

12 Well, starting with Mr. Mullet, how does
13 that sit with you?

14 MR. MULLET: Your Honor, can you hear me
15 okay?

16 JUDGE ROSENTHAL: Yes.

17 MR. MULLET: This is Mr. Mullet. I think
18 that, I heard mention in the background we'd be
19 interested in the opportunity for a reply. We'd also
20 be interested in trying to reserve a May hearing date
21 so that we're protecting those days on our calendar,
22 if that's going to be an option. So I would hope we
23 would leave, if we were going to have a provisional or
24 contingent May hearing date, that we would have those
25 dates set so we can protect our calendars.

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1 JUDGE ROSENTHAL: Well, I can't really at
2 this juncture set a May hearing date in concrete.

3 MR. MULLET: No, I understand that.

4 JUDGE ROSENTHAL: And given the -- the May
5 hearing date was based upon the assumption that we
6 were going to move forward now with these various pre-
7 hearing filings submissions and obviously that's not
8 the case.

9 MR. MULLET: I'm not suggesting that you
10 actually set the hearing, Your Honor. I was just
11 saying that you had said earlier that maybe the
12 hearing date would still work. We wouldn't be able to
13 tell that until later, but a lot of water in other
14 areas goes under the bridge in the interim and our
15 schedules, if we haven't protected those dates, are
16 going to be changing.

17 JUDGE ROSENTHAL: Well, I'm not clear as
18 to what your asking us to do. We had indicated mid-
19 May. If mid-May still works, that would be fine, but
20 I have some doubt that that's going to be possible.

21 JUDGE ABRAMSON: What Ms. Wolf's rough
22 estimates of times indicates that the filings from the
23 Applicant and staff in response to Save The Valley's
24 filing would be -- staff and Applicant filings would
25 be due somewhere in the middle of March.

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1 And that means that we would then have a
2 window as a Board to rule on those which might be
3 something like 30 days to rule on them, which means
4 mid-April before we'd issue a ruling on what was dealt
5 with and at that point, mid-May might be a little
6 tight for a hearing. It's possible, but it might be
7 a little tight.

8 JUDGE ROSENTHAL: It has to be the period
9 for the issuance of the initial written statements.
10 Then there's a period of time provided for written
11 responses and rebuttal testimony, as well as possible
12 requests for -- if we allow cross examination, there
13 are all of these things. So that I think May looks
14 very unlikely, Mr. Mullet. I think we're probably
15 talking about July would be my guess. I'm not too
16 enthusiastic about the heat in Indiana at that time,
17 but we've been out there before in Madison.

18 So I just really can't say at this point.
19 I think that the most that can be said is that in the
20 totality of circumstances, May seems very unlikely.

21 JUDGE ABRAMSON: So we don't need to hang
22 on to a May date is what we're saying?

23 JUDGE ROSENTHAL: Right.

24 MR. MULLET: Thank you for that.

25 JUDGE ROSENTHAL: Now how does --

1 MR. MULLET: We would need another pre-
2 hearing date then?

3 JUDGE ROSENTHAL: Oh, absolutely.

4 MR. MULLET: Pre-hearing conference, sure.

5 JUDGE ROSENTHAL: No, again, the
6 contemplation is that once we get in the Save The
7 Valley's revised motion; responses to it; perhaps if
8 we authorize it, rebuttal to the responses; and then
9 rule so that we at that point will know precisely what
10 the scope of this evidentiary hearing will be. We
11 would then hold another scheduling conference and go
12 over the various milestones leading up to and
13 including the scheduling of the evidentiary hearing.

14 Staff, Ms. Zabler, how does that stand
15 with you?

16 Ms. Zabler, are you with us?

17 MS. ZABLER: I'm sorry, Your Honor. The
18 schedule you set out is acceptable to the staff, Your
19 Honor. May would have been hard for the staff because
20 one of our principal reviewers wasn't going to be
21 available early May in any event.

22 JUDGE ROSENTHAL: Well, this may benefit
23 the staff.

24 MS. ZABLER: Yes.

25 JUDGE ROSENTHAL: Now was that individual

1 going to be available June, July?

2 MS. ZOBLER: I will have to check his
3 schedule, given that I was looking more in the April,
4 May time frame.

5 JUDGE ROSENTHAL: Okay.

6 JUDGE ABRAMSON: I think we should be
7 contemplating something like late June, somewhere late
8 June to the end of July. Oh joy.

9 JUDGE ROSENTHAL: All right, Mr. Kopp, how
10 does it sit with you?

11 MR. KOPP: Your Honor, I would have no
12 objection. I'm looking here and I see that two of our
13 contemplated witnesses probably would not be available
14 until after July 9th, but that we can work out.

15 JUDGE ROSENTHAL: All right, well, I guess
16 that's where we now stand and there's clearly no
17 necessity to go through the various milestones which
18 was the initial purpose of this conference. We'll
19 issue an order which will memorialize what we have
20 determined and we'll then await for the --

21 JUDGE ABRAMSON: The next round.

22 JUDGE ROSENTHAL: The next round as Judge
23 Abramson said, the revised motion on the part of Save
24 The Valley which will factor in this addendum 4 and
25 the responses thereto. Again, the order will give the

1 staff and the licensee 20 days to respond to what
2 comes in in the form of a revised motion.

3 So if there's nothing further, the
4 telephone conference is adjourned.

5 Thank you all.

6 MS. ZOBLER: Thank you.

7 MR. KOPP: Thank you.

8 MR. MULLET: Thank you.

9 (Whereupon at 10:53 a.m., the telephone
10 conference was concluded.)

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Name of Proceeding: Jefferson Proving Ground
Pre-Hearing Conference

Docket Number: 40-8838-MLA

Location: (Teleconference)

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