

Official Transcript of Proceedings
NUCLEAR REGULATORY COMMISSION

Title: Hearing ITMO Jefferson Proving Ground

Docket Number: 40-8838-MLA

Location: (telephone conference)

Date: Monday, May 14, 2007

DOCKETED
USNRC

May 17, 2007 (10:06am)

OFFICE OF THE SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Work Order No.: NRC-1585

Pages 37-73

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1 UNITED STATES OF AMERICA

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3 NUCLEAR REGULATORY COMMISSION

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5 ATOMIC SAFETY AND LICENSING BOARD PANEL

6 + + + + +

7 TELEPHONE CONFERENCE

8
9 In the Matter of: ||

10 U.S. ARMY ||

Docket No. 40-8838-MLA

11 (Jefferson Proving Ground) ||

12
13 Monday, May 14, 2007

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

16 BEFORE:

17 ALAN S. ROSENTHAL, Chair, Administrative Judge

18 RICHARD F. COLE, Administrative Judge

19 PAUL B. ABRAMSON, Administrative Judge

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1 APPEARANCES:

2 On Behalf of the United States Army:

3 FREDERICK P. KOPP, ESQ.

4 On Behalf of Save the Valley:

5 MICHAEL A. MULLETT, ESQ.

6 On Behalf of the Nuclear Regulatory Commission:

7 DAVID ROTH, ESQ.

8 JANICE MOORE, ESQ.

9 ASLBP STAFF PRESENT:

10 DEBRA WOLF, Law Clerk

11 ALSO PRESENT:

12 PAUL CLOUD

13 RICHARD HILL

14 TOM McLAUGHLIN

15 JOHN WELLING

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P-R-O-C-E-E-D-I-N-G-S

(10:00 a.m.)

CHAIRMAN ROSENTHAL: Good morning, ladies and gentlemen. This is Judge Rosenthal. I have with me this morning Judge Abramson, Judge Cole, and our law clerk assigned to this case, Debra Wolf.

This conference is being conducted pursuant to the Board's order of May 1, 2007 in the matter of U.S. Army, Jefferson Proving Ground site. As indicated in that order, the purpose of the call is to discuss matters relating to case scheduling and management.

I will at this point ask each participating counsel to identify himself for the record. I might add that since the reporter is not physically present with us and you are not physically present with us either, it is important that each time one of the counsel speaks, he identify himself for the record so that the reporter is clear as to precisely who it is that is speaking at the given time.

So, with that, I will ask counsel to identify themselves for the record. And I will start with Mr. Mullett.

MR. MULLETT: Thank you, Your Honor.

THE REPORTER: Excuse me, Your Honor.

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1 This is the court reporter. I would also ask that
2 when people identify themselves, that they would
3 please spell their names so that the record is clear.

4 CHAIRMAN ROSENTHAL: All right. As you
5 are identifying yourself for the record, would each
6 counsel please for the benefit of the reporter spell
7 his last name?

8 MR. MULLETT: Thank you, Your Honor. This
9 is Michael A. Mullett, M-u-l-l-e-t-t, counsel for Save
10 the Valley. I am joined today on the same line by
11 Richard Hill, President of Save the Valley.

12 CHAIRMAN ROSENTHAL: Thank you, Mr.
13 Mullett.

14 Mr. Kopp?

15 MR. KOPP: Your Honor, this is Frederick
16 P. Kopp, K-o-p, as in Paul, p as in Paul, for the
17 Army. And I am joined today by Mr. Welling and on
18 another line by Paul Cloud.

19 CHAIRMAN ROSENTHAL: Thank you, Mr. Kopp.

20 And now Mr. Roth?

21 MR. ROTH: This is David Roth, R-o-t-h,
22 for the staff. And I should be joined on the line by
23 Tom McLaughlin if he's phoned in.

24 CHAIRMAN ROSENTHAL: Yes, he did.

25 MR. ROTH: And also present is Janice

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1 Moore.

2 CHAIRMAN ROSENTHAL: All right. Thank
3 you, Mr. Roth. Attached to our May 1 order was a list
4 of the various events that are yet to occur in this
5 proceeding with a proposed due date for most of them.
6 This morning at my request, Ms. Wolf sent to you an
7 attachment B, which was different from attachment A in
8 only one material respect. Namely it provides for
9 staggered submissions of the initial written testimony
10 and any associated motions in limine.

11 Attachment A accompanied the order
12 provided for simultaneous filings of the initial
13 written presentations. Now, even under attachment B,
14 the rebuttal testimony would be filed
15 contemporaneously. So that the alteration was simply
16 with respect to the original written statements of
17 position, written testimony, and motions in limine.

18 Now, with respect to attachment B, do you
19 all have copies of that attachment before you?

20 MR. KOPP: This is Mr. Kopp. Yes, I do,
21 Your Honor.

22 CHAIRMAN ROSENTHAL: Mr. Mullett?

23 MR. MULLETT: I do, Your Honor.

24 CHAIRMAN ROSENTHAL: Mr. Roth?

25 MR. ROTH: Yes, Your Honor.

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1 CHAIRMAN ROSENTHAL: All right. Well, if
2 you'll go down on that attachment B, beginning with
3 line 8, while the dates from line 8 through 11 are
4 correct, the 10 days in the case of 8 should have read
5 10 days from number 7. In the case of 9, it should
6 have read 10 days from number 8. In the case of 10,
7 it should have read 20 days from number 7. And in the
8 case of 11, it should have read 4 weeks from number 7
9 and one week from number 10.

10 Now, the actual dates that were in there
11 were all correct. It was just the matter of 10 days
12 or 20 days from. So if you will make those
13 corrections?

14 We now can I think turn to the items that
15 were listed in the May 1 order. All right. The first
16 item was the status of the mandatory disclosure
17 process. And maybe I'll start with Mr. Mullett.
18 What's your concept of its current status?

19 MR. MULLETT: Your Honor, I believe that
20 as far as the bulk of the disclosures by all the
21 parties, those were maybe I think that there had been,
22 you know, a couple of updates of the hearing files by
23 the staff. And just this past week, there was an
24 update as far as the Army was concerned with regard to
25 a couple of additional items.

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1 We are going to have a conference call
2 later this week with our witnesses to see whether or
3 not there is anything additional that they -- Save the
4 Valley would have I know of one news article. I want
5 to go back and check. I'm not sure news articles are
6 subject to the disclosures in any event, but I wanted
7 to check on that.

8 CHAIRMAN ROSENTHAL: Okay.

9 MR. MULLETT: I think that they're
10 virtually complete.

11 CHAIRMAN ROSENTHAL: Okay. Mr. Kopp?

12 MR. KOPP: I'm of the same opinion, Your
13 Honor. I think we have disclosed everything we have,
14 and I think that Mr. Mullett has disclosed everything
15 that he has.

16 CHAIRMAN ROSENTHAL: Okay. Mr. Roth?

17 MR. ROTH: Likewise, Your Honor.

18 CHAIRMAN ROSENTHAL: Okay. Well, I think
19 that's proceeding apace.

20 Let's go, if we might, to what plans, if
21 any, at this juncture the parties might have for the
22 filing of motions or other pleadings, such as motions
23 for summary disposition or motions to request
24 cross-examination.

25 Now, of course, motions to request

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1 cross-examination would not be due until far down the
2 road. And, in addition, motions for summary
3 disposition can be filed at any point down the road.
4 But the Board was just interested in ascertaining
5 whether at this point the parties might have in mind
6 the filing, particularly of motions for summary
7 disposition, in the near term.

8 Now, understand that this is no commitment
9 either to file them or not to file them at some
10 subsequent point. So let me start again with Mr.
11 Mullett.

12 MR. MULLETT: Your Honor, with respect to
13 motions as far as summary disposition are concerned,
14 Save the Valley has no present plans.

15 With respect to the motions in limine,
16 obviously those turn on the filing of the testimony.

17 With respect to any requests for
18 cross-examination, I would expect that to be the same,
19 Your Honor.

20 CHAIRMAN ROSENTHAL: Right.

21 MR. MULLETT: It would depend on the
22 filings of the testimony.

23 CHAIRMAN ROSENTHAL: Well, if you noted on
24 the attachments, those would not be due until, under
25 at least the schedule that is called for by those

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1 attachments, it wouldn't be due until, the latter part
2 of September.

3 All right. Mr. Kopp?

4 MR. KOPP: Your Honor, as far as the
5 motions for summary disposition might go, I have
6 looked at probably about six or seven of the STV bases
7 that support their contentions. And they may have
8 been overtaken or superseded by subsequent events.
9 And we may be filing in regard to those bases if it's
10 appropriate, but I haven't really come to a definitive
11 determination yet.

12 CHAIRMAN ROSENTHAL: Okay. Thank you.

13 Mr. Roth?

14 MR. ROTH: Your Honor, the staff has no
15 plans at this point for any particular filing.

16 CHAIRMAN ROSENTHAL: Okay. All right. We
17 can move on to 3, which was alterations to the
18 proposed schedule set forth in attachment A. And, as
19 I previously noted, the Board itself has advanced for
20 your consideration an amendment or alteration to the
21 schedule that you were provided along with the order.

22 As I also noted, the amendment or proposed
23 amendment only goes to the matter of the filing of
24 staggered initial written presentations, rather than
25 contemporaneous ones. So let me focus first, before

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1 we get into talking about specific dates, let me first
2 see how the parties react to the staggered ones.

3 I must say that it does seem to me offhand
4 -- and I think my colleagues are joined in that --
5 there are advantages to having staggered initial
6 presentations. This way the staff and the Army are
7 able to determine precisely what it is that they are
8 confronting. And it seems to me that it provides a
9 better, shall we say, confrontation on the specific
10 issues than is provided if they are contemporaneous
11 filings.

12 Before I call for responses, do either
13 Judge Abramson or Judge Cole want to add anything to
14 that?

15 JUDGE ABRAMSON: Yes. Judge Abramson.
16 Can you hear me, folks? This is Judge Abramson. Can
17 you hear me?

18 MR. KOPP: Yes. This is Kopp.

19 MR. MULLETT: Yes, Your Honor.

20 JUDGE ABRAMSON: I have a loud voice, even
21 though I'm far from the mike. Let me just point out
22 that what I think is universally the view of the Board
23 -- and I'm sure my colleagues will speak up if I get
24 this wrong -- is that what's at issue here is whether
25 or not this plan, as I mentioned in my concurring

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1 opinion of this order, is eventually going to evolve
2 into a plan that provides an adequate site
3 characterization.

4 And if Save the Valley is focused in its
5 contentions along that line, it will enable us, it
6 will enable the parties and us, to focus the
7 litigation.

8 So the purpose of proposing a staggered
9 submission of initial testimony is to let Save the
10 Valley lay out its reasoning for why it believes other
11 testing is necessary and whether or not that testing
12 will turn up as part of the evolution of this plan or
13 not and then enable the parties to reply to that, as
14 opposed to having the staff and the applicant or the
15 staff and the licensee need to provide a kind of
16 generic initial pleading.

17 So that's where we're going with this.
18 And so we would appreciate it if you would think about
19 that as you are replying to this proposal.

20 CHAIRMAN ROSENTHAL: Do you want to add
21 anything, Judge Cole?

22 JUDGE COLE: This is Judge Cole. No. I
23 agree with that. My concern was that with
24 simultaneous filings, you might be like ships passing
25 in the night. This way it would provide for much more

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1 focused activity.

2 CHAIRMAN ROSENTHAL: All right. Having
3 heard what prompted the attachment B this morning, I
4 will ask now for the reaction. Now, at this point, we
5 are not going to talk about specific dates. I'm now
6 just asking for your opinion on the staggered versus
7 contemporaneous filing. And again I'll start with Mr.
8 Mullett.

9 MR. MULLETT: Thank you, Your Honor.

10 We have mixed feelings, Your Honor, about
11 the alternative for two reasons. First, while I have
12 limited experience with the NRC, the prior proceedings
13 in this case, I have extensive experience in other
14 administrative forums.

15 And typically if you have the staggered
16 filings, you would not see the Army and the staff
17 contemporaneously filing rebuttal testimony, the idea
18 being that by staggering the initial filings, that
19 their answer is responsive to the STV initial filing.
20 And then STV would have the opportunity for rebuttal
21 with there being some sort of motion for leave to the
22 extent that any surrebuttal would be indicated as far
23 as the other parties are concerned.

24 It appeared -- and, again, it's a little
25 vague. We got it very late, just what is

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1 contemplated. But it looked like there was
2 simultaneous filing of rebuttal, and it's not clear
3 what the Army and the staff would be rebutting. Are
4 they rebutting one another? Is it cross-rebuttal at
5 that point but not to STV or just what? I thought
6 that, you know, that ought to be clearly clarified.

7 CHAIRMAN ROSENTHAL: Okay. I see your
8 point. Would you hold on a second?

9 MR. MULLETT: And we have a second
10 concern, but I will leave that one for the moment.

11 (Pause.)

12 MS. WOLF: The Board's back.

13 CHAIRMAN ROSENTHAL: We're back. I think
14 that your point, your first point, is well-taken. I
15 think let's hear what your second point was, Mr.
16 Mullett. And then I'll indicate what we're thinking
17 of revising attachment B to provide before we get to
18 the other parties. You had a second point?

19 MR. MULLETT: Yes. Yes, I did, Your
20 Honor. And this one is related but somewhat
21 different. I would analogize use recognizing that we
22 wouldn't be at the hearings dealing with motions for
23 summary judgment but analogizing to a situation where
24 you have cross-motions for summary judgment, the
25 extent to which you have what I would characterize as

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1 alternative theories of the case. You know, that
2 based on the experience that we have had thus far
3 would certainly seem to be the situation here.

4 So the extent to which the Army, I don't
5 know if potentially the staff would, in fact, be
6 making what I would characterize as affirmative cases,
7 there seems to be a good bit of that that has taken
8 place heretofore.

9 And so the extent to which you end up in
10 a situation where they are per force going to want
11 surrebuttal, the extent to which we are going to end
12 up with a staggered situation, the extent to which we
13 are then going to end up in a situation where we will
14 have to entertain a question of sur-surrebuttal, I
15 would just throw that out.

16 It's obviously hard to know specifically,
17 but, again, having done a lot of administrative
18 proceedings in a lot of different forums over the
19 years, in this type of situation, that possibility
20 already always presents, particularly in terms of some
21 of these situations that we've got with regard to the
22 SSP and the particular types of testing or sampling
23 programs and protocols that might be involved here.

24 CHAIRMAN ROSENTHAL: All right. Well,
25 before I get to the other parties, you're quite right,

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1 of course, that under the schedule B, that, as
2 presented, there would be nothing for the Army or the
3 staff to rebut, having already presented its response
4 to the Save the Valley's opening presentation.

5 So supposing that this were amended -- and
6 then we'll get to provide that, first, there is the
7 filing of the Save the Valley. That's their initial
8 filing. The staff and the Army respond to that
9 filing.

10 Then Save the Valley has a rebuttal to the
11 staff and Army filings, whereupon the Army and staff
12 would have a surrebuttal. And then if it comes to
13 that, then Save the Valley could then seek leave to
14 file a surrebuttal to the Army's/staff's surrebuttal.

15 I mean, it seems to me, Mr. Mullett, that
16 while I understand your point that there still is some
17 advantage to the staggered presentations and so long
18 as it seems to me each party has an opportunity to
19 respond to what has been put forth by the other
20 parties, that the staggered system works. We will
21 give you a rebuttal on this, but before we do that, I
22 would like to find and see how the other parties react
23 to that.

24 Mr. Kopp, do you understand what I have
25 just suggested?

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1 MR. KOPP: Yes, Your Honor. I don't think
2 we have any trouble with that. I think that would be
3 a most economical way to proceed.

4 CHAIRMAN ROSENTHAL: All right. Mr. Roth?

5 MR. ROTH: I agree, Your Honor. It does
6 seem more efficient that way.

7 CHAIRMAN ROSENTHAL: All right. Well, we
8 are going to mute again for a moment.

9 (Pause.)

10 CHAIRMAN ROSENTHAL: Mr. Mullett, we are
11 back to you. You have heard what I've just proposed.
12 And what is your reaction to it?

13 MR. MULLETT: Your Honor, in terms of the
14 modification you have proposed, that would certainly
15 conform to our experience with regard to that
16 alternative approach.

17 The one thing I am still a little bit
18 unclear about is whether or not there is structured
19 into that process some sort of opportunity for
20 cross-rebuttal as far as the Army and the staff are
21 concerned and when that would be sequenced in
22 relationship to Save the Valley's rebuttal to their
23 respective filings.

24 CHAIRMAN ROSENTHAL: Yes. Judge Abramson?

25 JUDGE ABRAMSON: Yes. This is Judge

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1 Abramson. Let me speak to this just for a minute, Mr.
2 Mullett.

3 It seems to me that as we have all been
4 focusing here, the question is whether this plan is
5 going to work. And your concern is whether it is
6 going to ultimately result in inadequate site
7 characterization.

8 And your focus has been, it seems to me,
9 that there are certain tests that must be done and we
10 don't see any plan to get them done. And your initial
11 case, therefore, I would expect, will focus on this
12 plan is never going to evolve to include those kinds
13 of things.

14 And I would expect that the licensee and
15 the staff are going to reply, "Of course, it will
16 respond to include those things if we need them. And
17 here is why our testing program will determine whether
18 we need them or not." So that is the kind of thing I
19 expect to see in filings.

20 Now, given that, Save the Valley makes its
21 initial filing, saying, "Here are the things that we
22 think need to be done. And here is why we think this
23 plan isn't going to get them in there."

24 And the staff and the applicant will then
25 focus on how they think the plan would or would not

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1 incorporate them as needed. Clearly at that point
2 Save the Valley needs an opportunity to say, "We don't
3 think that is going to work, and here is why."

4 And our objective is to get as much of
5 this in writing as possible before we go to actual
6 hearings so we can focus our inquiry on whether or not
7 this plan is going to evolve to a plan that works.

8 So it seems to me you need rebuttal, you
9 need an opportunity to rebut, the staff and the
10 applicant need an opportunity to rebut what you said,
11 at least to get that much of the record there.

12 And if, in fact, they say something that
13 warrants further rebuttal by Save the Valley, then
14 that needs to come in, too. And then we have as much
15 as we can get on paper. And the rest will have to
16 carry out to the oral argument part.

17 MR. MULLETT: I don't disagree with that,
18 Your Honor. My question related to whether or not
19 there was going to be provision for rebuttal of the
20 Army by the staff and staff by the Army.

21 JUDGE ABRAMSON: Well, I don't know.
22 Let's hear from staff and Army whether they think that
23 is part of what they need to be doing here. Judge
24 Rosenthal, do you want to mechanize this?

25 CHAIRMAN ROSENTHAL: All right. Well, how

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1 about that? I'll ask Mr. Roth at this point. Do you
2 anticipate that there might be an occasion in which
3 you would want to be rebutting the, putting forth some
4 kind of rebuttal to the, licensee's written testimony?

5 MR. ROTH: Your Honor, this is Mr. Roth.

6 If that need arises, we request leave to
7 file in cases not built into the schedule.

8 CHAIRMAN ROSENTHAL: I would think that
9 that is the best way to handle that. And if that
10 comes up, nothing in this schedule is going to be set
11 in the proverbial stone.

12 I mean, if there are circumstances that
13 arise whereby there has to be some kind of
14 modification to schedule, the Board will certainly e
15 prepared to do that.

16 So I think we will proceed at this
17 juncture on the assumption that there will not be a
18 need seen by either the Army or the staff to rebut the
19 other. If it is there, that will be brought to our
20 attention I'm certain by either Mr. Kopp or Mr. Roth
21 or whoever the staff lawyer is handling that matter at
22 that time to deal with it.

23 JUDGE ABRAMSON: And, by the way, Judge
24 Abramson, again, we're all very sure. And I'm sure
25 also you are all pretty sure that if you see such a

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1 need arising, you will know exactly what it is you
2 want to rebut. And you will have a reason for wanting
3 to rebut it. And so it won't take you too long to get
4 together your testimony that you want to file on that
5 point. So it would happen without distorting the
6 schedule too much.

7 CHAIRMAN ROSENTHAL: Okay. Maybe at this
8 point we can move on to look at the specific dates.
9 Now, under attachment B, the first date would be the
10 initial written statement of position, written
11 testimony of Save the Valley, which would be due on
12 Friday, July 13. The next --

13 MS. WOLF: No, Judge.

14 CHAIRMAN ROSENTHAL: Do we need to change
15 it?

16 MS. WOLF: We need to change everything
17 after that.

18 CHAIRMAN ROSENTHAL: All right. After
19 that, Ms. Wolf tells me we have to change everything
20 after that. I assume that she has been keeping notes
21 here. Would you like to propose --

22 MR. MULLETT: Is there something she could
23 e-mail by chance?

24 MS. WOLF: This is Debra Wolf speaking.
25 Given the change in considering staff rebuttal and

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1 then it would be Save the Valley's surrebuttal, going
2 back and forth differently, it didn't seem fair to
3 only allow ten days, as proposed, for the staff and
4 the Army. So a proposal would be to provide more
5 time. For instance, Save the Valley's filing on July
6 13th, as proposed, and then the staff/Army rebuttal
7 due three weeks later, on August 3rd.

8 CHAIRMAN ROSENTHAL: So the question is,
9 do the staff and Army -- obviously you would have
10 thought about what your initial position is. The
11 question is, how long do you think you would
12 reasonably need to reply to the Save the Valley's
13 initial filing?

14 And you will have had all the time up
15 until the time they file to figure out what your basic
16 view is. And then your view should be focused.

17 So the question is, how much time do you
18 think you would need? What would be sufficient to get
19 your initial filings, initial rebuttal filings, in?
20 Start with the applicant or the licensee.

21 MR. KOPP: Your Honor, this is Mr. Kopp.

22 I am inclined to agree with Ms. Wolf. I
23 think that three weeks would probably be appropriate
24 from our perspective because we do have a bit of a
25 logistics problem. Our witnesses are scattered out in

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1 several locations. And to get them to sign onto an
2 affidavit or something may take a little bit more time
3 than if they were all here at the same location.

4 JUDGE ABRAMSON: So three weeks seems
5 sufficient to you for that?

6 MR. KOPP: I think so, yes.

7 JUDGE ABRAMSON: How about the staff?

8 MR. ROTH: Your Honor, this is Dave Roth.
9 Three weeks is sufficient for the staff.

10 CHAIRMAN ROSENTHAL: All right. So we're
11 talking August 3. Now --

12 MS. WOLF: Okay. Just intermixed in that
13 would be keeping in tune with CFR 2.323 with motions
14 in limine. My suggestion -- and I shouldn't speak for
15 the Board -- is the staff and Army motion in limine to
16 Save the Valley's initial testimony would be due ten
17 days later, on July 23rd. So that would be in advance
18 of your written testimony.

19 And then Save the Valley's answers would
20 be due, as prescribed in the regulations, ten days
21 after that, on August 2nd. I don't know.

22 JUDGE ABRAMSON: This is Judge Abramson.
23 And hopefully if, Mr. Mullett, you are your client are
24 able to focus on why you think this plan won't work
25 and what you think needs to be done to make a plan

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1 that will work, we can eliminate, we can dispense with
2 motions in limine. It's a question of focus.

3 MS. WOLF: Do you want me to finish?

4 CHAIRMAN ROSENTHAL: Yes.

5 MS. WOLF: Okay. This is Ms. Wolf again,
6 Debra Wolf again. So after the staff and Army
7 rebuttal on August 3rd, again, hopefully, I mean, just
8 accounting for it in the schedule, hopefully, as Judge
9 Abramson said, it won't be necessary. Any motions in
10 limine filed by Save the Valley would be due ten days
11 later, on August 13th, filed by answers to ten days
12 after that August 23rd. Save the Valley's rebuttal to
13 the staff's and Army's filing of August 3rd would be
14 due three weeks later, on August 24th.

15 Staff's and Army's rebuttal testimony
16 August 3rd; Save the Valley's rebuttal to that on
17 August 24th; staff's and Army's surrebuttal on
18 September 7th, which is 2 weeks later; and Save the
19 Valley's sur-surrebuttal, I suppose, would be due if
20 wanted on September 21st.

21 JUDGE ABRAMSON: So three weeks for the
22 first set of rebuttal and --

23 MS. WOLF: Two.

24 JUDGE ABRAMSON: -- two weeks for the
25 second set.

1 MS. WOLF: Does anyone need me to repeat
2 any of those proposed dates?

3 (No response.)

4 MS. WOLF: Okay. I guess that's no.

5 CHAIRMAN ROSENTHAL: Okay..

6 MS. WOLF: And then that takes us back to
7 the regular schedule.

8 CHAIRMAN ROSENTHAL: Now, that brings us
9 back to the regular schedule, where the next one is
10 number 11. Is that --

11 MS. WOLF: We're going to go on hold for
12 a second.

13 (Pause.)

14 CHAIRMAN ROSENTHAL: We are on. The next
15 item I think is 11, which would be the proposed
16 questions for the Board regarding the initial and
17 rebuttal testimony, would be on the 24th of September;
18 on that same date, the requests, if any, to conduct
19 cross-examination and submission of cross-examination
20 plans.

21 Now, the final witness list or any
22 addition to the list submitted pursuant to section
23 2.336, it's indicated here that would be to be
24 determined at a later point.

25 MS. WOLF: Yes.

1 CHAIRMAN ROSENTHAL: Yes, at a later
2 point. And then the next item is the hearing itself,
3 which we would contemplate taking place sometime in
4 the month of October. I take it that the snows
5 generally have not hit Madison, Indiana by that time.
6 That's our assumption.

7 MR. MULLETT: October's a beautiful time
8 to be in Madison, Indiana, Your Honor. I'll tell you
9 it is.

10 CHAIRMAN ROSENTHAL: Who is offering that
11 opinion?

12 MR. MULLETT: This is Mr. Mullett, Your
13 Honor.

14 CHAIRMAN ROSENTHAL: Oh, Mr. Mullett. I
15 see. And that is not undue Hoosier adoration, I
16 assume.

17 MR. MULLETT: Not at all. If you like
18 fall color, definitely it is the --

19 CHAIRMAN ROSENTHAL: Okay. Well, that
20 reinforces our conclusion or determination on October.

21 MR. MULLETT: Your Honor, I do have one
22 question, though, in terms of maybe I misunderstood
23 here, but there had been a week between items 10 and
24 11. Did we get lost in --

25 CHAIRMAN ROSENTHAL: No.

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1 MS. WOLF: It did.

2 CHAIRMAN ROSENTHAL: Oh, it did?

3 MS. WOLF: It got lost between Save the
4 Valley's surrebuttal.

5 CHAIRMAN ROSENTHAL: Okay. So how do we
6 revise this?

7 MS. WOLF: Are you speaking because now
8 your sur-surrebuttal is due on September 21st?
9 Because you are correct. It got lost.

10 MR. MULLETT: Well, that's what I'm trying
11 to do in terms of what the original logic was. There
12 was a complex interrelationship here between the
13 motions in limine, the answers, and so on, the
14 presumption being that you were going to get some sort
15 of a ruling on the motions before the testimony got
16 filed. And then in terms of what you were going to be
17 proposing with regard to the proposed questions,
18 presumably that would have an effect as well.

19 MS. WOLF: Okay. Can you hold on one
20 second?

21 (Pause.)

22 MS. WOLF: This is Debra Wolf again. So
23 item number 11, so to keep the week from when
24 surrebuttal, final sur-surrebuttal is submitted,
25 proposed questions would now be due on September 28th,

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1 which is one week. So that should alleviate any
2 concerns with respect to that missing time.

3 MR. MULLETT: And then we would do the
4 same thing with item 12, then?

5 MS. WOLF: Yes. Item 11 and item 12,
6 everyone's proposed questions would be due on
7 September 28th. It would be contemporaneously for all
8 parties.

9 MR. MULLETT: Now, am I correct that the
10 Army's and the staff's rebuttal is the 7th? Is that
11 correct?

12 MS. WOLF: Yes.

13 MR. MULLETT: Okay.

14 CHAIRMAN ROSENTHAL: Okay? All right.
15 Now, again, this is not set in concrete. If there are
16 reasons why a party as this schedule progresses
17 believes that there should be some alterations, that
18 could be put before the Board.

19 I think that our objective, however, is to
20 have the hearing in October. I'm certainly reinforced
21 in that desire considering the report that we have
22 just had as to conditions in Madison during that
23 month.

24 So let us come out with a schedule. We
25 will do this in an order memorializing the telephone

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1 conference this morning. And then we'll just see how
2 things go.

3 Now, let's get on. Do any of the parties
4 -- we'll start again with Mr. Mullett -- have
5 particular dates that they would wish to suggest for
6 the hearing? I'm assuming, I hope correctly, that
7 this will not require more than a week, but I --

8 JUDGE ABRAMSON: How can it take more than
9 a day?

10 CHAIRMAN ROSENTHAL: Well, I have learned
11 from experience sometimes, Judge Abramson, that things
12 -- but, in any case, is there a particular week in
13 October that is either particularly good or
14 particularly bad for the specific parties? And I will
15 start again with Mr. Mullett.

16 MR. MULLETT: Yes, Your Honor. The week
17 of October 8th to 12th is bad for Save the Valley.
18 Excuse me. October 8th to 19th, that 2-week period in
19 the middle there, is bad for Save the Valley.

20 In addition, by moving into the fall, both
21 Professor Henschel and myself have teaching
22 commitments this fall. That doesn't pose a problem as
23 far as weeks are concerned, but in terms of scheduling
24 her testimony and whichever week it is, the Wednesday
25 afternoon is a problem for me, Your Honor, in terms of

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1 a prior teaching commitment.

2 CHAIRMAN ROSENTHAL: All right. So you
3 are saying --

4 MR. MULLETT: Your Honor, the problem we
5 would have would be with one of our witnesses. That's
6 the schedule. The 8th through the 12th, we're
7 conflicted there totally. As far as that second week
8 is concerned, we've got a problem with one witness
9 that second week.

10 CHAIRMAN ROSENTHAL: We ought to be able
11 to work around that, I would think.

12 Mr. Kopp?

13 MR. KOPP: Your Honor, we have a problem
14 with a witness for the week of the 1st through the
15 5th. And the garrison manager here, who is the
16 nominal person in charge of JPG, has a national
17 garrison managers' conference that he will be going to
18 the last week of October.

19 So based on what Mr. Mullett says, it
20 looks like the week of the 22nd is best for us.

21 CHAIRMAN ROSENTHAL: All right. Let's
22 hear from Mr. Roth.

23 MR. ROTH: Your Honor, Dave Roth. The
24 only conflict is October 8th, which is a holiday.

25 CHAIRMAN ROSENTHAL: You don't work on

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1 holidays? Oh, that's right. You work for the federal
2 government.

3 Well, so it seems that the consensus there
4 is the week of the 22nd. All right. Well, let's at
5 least tentatively look at it as being the week of the
6 22nd. That will certainly give the Board ample time
7 after all of the testimony is in to consider it.

8 All right. Well, let me just ask. Judge
9 Abramson had expressed the view that this probably
10 should not take more than a day. I don't know whether
11 he was serious about that, but --

12 JUDGE ABRAMSON: Quite serious.

13 CHAIRMAN ROSENTHAL: He was, he tells me.
14 But let me ask the parties. At this point it may be
15 too early to form an opinion that is based upon
16 anything other than conjecture. And so was Judge
17 Abramson's guess.

18 But let me just go around. Again, there's
19 no obvious commitment being made here. But I would
20 just be curious as to whether at this juncture without
21 any of the written testimony being on the table but I
22 think all of the parties having some idea as to what
23 is involved.

24 At the moment, do you have any feeling as
25 to how long this might go?

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1 MR. MULLETT: Your Honor, Save the Valley,
2 we had discussion when we had this last go-around.
3 And going off the discussions that the parties had at
4 that particular time, Save the Valley would anticipate
5 having either two or three direct witnesses, either
6 three or four rebuttal witnesses with there being
7 substantial overlap.

8 And our original estimate was until we saw
9 the number of witnesses that the Army planned, that it
10 would take three days. But with the number of
11 witnesses that the Army had planned, we thought that
12 five days would be more prudent. But we'll let the
13 Army speak for itself at this point with regard to how
14 the number of witnesses it had planned --

15 JUDGE ABRAMSON: Now, this is Judge
16 Abramson. When you say you have got these witnesses
17 planned and you're estimating days from it, are you
18 assuming, then, that this Board is going to have hours
19 of questioning for each of these witnesses? After we
20 have seen the rebuttal and the prefiled testimony and
21 the rebuttal, do you really not believe this will
22 focus down to a few simple questions?

23 MR. MULLETT: Your Honor, I do doubt it in
24 terms of the level of technical detail here and the
25 scope of the studies that are involved, but, as I

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1 said, I thought that in terms of getting it done in
2 two and a half to three days, I thought that was going
3 to be, you know, doable.

4 But, again, I'll let the Army speak to the
5 number of witnesses that it plans to sponsor. I think
6 that you're going to be surprised at the amount of
7 testimony that the Army at least before planned to
8 file in response to Save the Valley and then the
9 amount of detail that Save the Valley will have to
10 come back to respond to the Army's response to
11 testimony, but --

12 JUDGE ABRAMSON: This is Judge Abramson
13 again. Let's remember, folks, that the purpose of
14 this hearing is to let us clear up what isn't clear on
15 the papers. It's not to let you put your witnesses on
16 and examine them for four hours.

17 MR. MULLETT: I understand that, Your
18 Honor.

19 JUDGE ABRAMSON: Okay.

20 CHAIRMAN ROSENTHAL: Mr. Kopp, what do you
21 have to say on the subject?

22 MR. KOPP: Your Honor, I really don't have
23 any feel for it, but I am inclined to believe that the
24 questioning would be rather short by that point in
25 time because everything is going to be on paper. And

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1 it's more a question of clarification.

2 So I'm thinking maybe two days. Even
3 though we may have six witnesses on paper, there may
4 not be anything to ask of any particular one of them.

5 CHAIRMAN ROSENTHAL: Okay. Mr. Roth?

6 MR. ROTH: Your Honor, Dave Roth here. We
7 believe two to three days is sufficient.

8 CHAIRMAN ROSENTHAL: Okay.

9 MS. WOLF: Mr. Mullett?

10 MR. MULLETT: Yes?

11 MS. WOLF: Debra Wolf. Just so the Board
12 in thinking ahead, what time does your conflict on
13 Wednesday begin? When would you need a hearing to end
14 on Wednesday?

15 MR. MULLETT: Practically speaking, at
16 noon. The class I teach is in Indianapolis. It
17 starts at 3:00 o'clock. It's about a two-hour drive
18 from Madison.

19 MS. WOLF: So that day, even if it were to
20 continue on Thursday, you would need the hearing to
21 wrap up at noon for that day?

22 MR. MULLETT: Yes.

23 MS. WOLF: Okay. I just wanted to check.

24 CHAIRMAN ROSENTHAL: Let me pursue that
25 question of scheduling one more time. Did I

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1 understand correctly? Do you have a witness who is
2 not available at all the second week, that week of
3 whatever it was, the 12th?

4 MR. MULLETT: That's correct, Your Honor.
5 It's got a prior commitment, the 12th through the
6 19th. But if we go the 22nd, then that's not a
7 problem.

8 CHAIRMAN ROSENTHAL: All right.

9 MR. MULLETT: The other, Dr. Henschel, she
10 doesn't have her schedule yet, but she would
11 anticipate if we're going Monday, Tuesday, and
12 Wednesday, that she would not be available on Tuesday.
13 She is anticipating she will be teaching Tuesdays and
14 Thursdays this fall.

15 MS. WOLF: We're going to go on mute for
16 one moment.

17 (Pause.)

18 CHAIRMAN ROSENTHAL: We're back with you
19 again. I think at this point, we can move on to item
20 number 5 on the order, which was whether the parties
21 were aware of any other matter that might impact the
22 scheduling order. Does anybody have any such matter?

23 MR. KOPP: Your Honor, this is Mr. Kopp
24 for the Army. We have nothing.

25 CHAIRMAN ROSENTHAL: Okay. Well, hearing

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1 nothing from either of the other parties, I will
2 assume they don't either.

3 And, sixth and finally, are there any
4 other matters that counsel may wish to bring to the
5 Board's attention? I'll start again with Mr. Mullett.

6 MR. MULLETT: Your Honor, other than the
7 items that we have discussed, Save the Valley has
8 nothing additional at this time.

9 CHAIRMAN ROSENTHAL: Okay. Mr. Kopp?

10 MR. KOPP: We have nothing, Your Honor.

11 CHAIRMAN ROSENTHAL: Mr. Roth?

12 MR. ROTH: Dave Roth, Your Honor. Nothing
13 more.

14 CHAIRMAN ROSENTHAL: I think Judge
15 Abramson has something.

16 JUDGE ABRAMSON: Yes. I would like to
17 just ask Mr. Mullett that while I understand you have
18 intensive technical information available to you, that
19 you focus your pleadings not on what specifically the
20 technical information is but on why that technical
21 information is necessary and why you believe that this
22 plan will not evolve to include the types of
23 measurements that you think are necessary.

24 CHAIRMAN ROSENTHAL: Do you understand
25 Judge Abramson's --

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1 MR. MULLETT: I do, Your Honor. And that
2 is where in terms of my earlier response in terms of
3 that evolution back and forth between the Army's
4 witnesses, SAIC's witnesses, and SAIC's technical
5 witnesses, that is where I anticipate that dynamism
6 that I referenced earlier.

7 I will certainly do my best here from a
8 legal standpoint, but these are technical
9 considerations. And in terms of some of the profound
10 methodological differences that have been disclosed
11 heretofore, I don't think it's going to be a lawyer
12 that's going to address them, Your Honor.

13 JUDGE ABRAMSON: Now, we understand that.
14 You've got to guide your witnesses. And, similarly,
15 we would expect the Army and staff to guide their
16 witnesses so that we can understand.

17 What is really troublesome here is that we
18 have a plan to make a plan. And it is very
19 intangible. And what we need to understand is and
20 what I am concerned about and I think the Board is all
21 concerned about is, how are we going to get to
22 understanding whether this plan will or will not or
23 can or cannot and what is the proper legal threshold
24 for making this determination at this point?

25 CHAIRMAN ROSENTHAL: Okay. If there's

1 nothing further, the Board will issue an order within
2 the next few days memorializing the conclusions that
3 have been reached this morning.

4 Once again, I would wish to stress that
5 the schedule is not set in stone. It is subject to
6 revision if necessary, although I would be hopeful --
7 I'm sure my colleagues join me in this -- that if, at
8 all possible, the schedule be adhered to in the
9 interest of getting the hearing on at the currently
10 contemplated time in October.

11 With that --

12 JUDGE ABRAMSON: This is Judge Abramson.
13 Just one more thought. I'm like Columbo here. The
14 parties should be prepared to have all their experts
15 there for the entire hearing because it would not
16 surprise me if the technical members of this Board
17 don't want to have -- where we have questions of one
18 expert from one party may very well want to ask the
19 other experts for the other parties what their view is
20 on the responses we're getting. We could quite likely
21 have a dialogue among experts here.

22 CHAIRMAN ROSENTHAL: Okay. With that, the
23 conference is concluded.

24 (Whereupon, the foregoing matter was
25 concluded at 10:57 a.m.)

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Jefferson Proving Ground

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