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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

_____)	
In the Matter of)	Docket No. 40-8838-MLA
)	
U.S. ARMY)	ASLBP No. 00-776-04-MLA
)	
(Jefferson Proving Ground Site))	July 13, 2007

RESPONSE OF INTERVENER SAVE THE VALLEY, INC., IN OPPOSITION TO THE ARMY'S MOTION TO STRIKE REBUTTAL TESTIMONY OF WITNESS PASTORICK

Intervener Save the Valley, Inc. ("STV"), by counsel, respectfully submits its response as opposition to the Army's September 25, 2007 Objection and Motion to Strike ("Motion") the Rebuttal Testimony of STV witness James Pastorick, as follows:

A. Legitimate Rebuttal Testimony

1. In its Motion, the Army asserts several grounds for an assertion that either all or most of the substantive parts of the Rebuttal Testimony of STV witness James Pastorick should be stricken because they "exceed the scope of legitimate rebuttal testimony and seek to introduce new issues or to reintroduce via rebuttal testimony issues which this Board specifically rejected in holding STV's proposed Contentions C-1 and C-2 inadmissible and beyond the scope of this hearing." See Motion, at 3. None of the grounds cited by the Army to strike Mr. Pastorick's testimony have merit.

2. First, the Army fails to cite and totally ignores the applicable Commission rule regarding the proper scope of a party's rebuttal testimony. 10 CFR § 2.1207(a)(2) expressly provides that STV has the right to submit "[w]ritten responses and rebuttal testimony with supporting affidavits *directed to the initial statements and testimony of other participants.*" (Emphasis supplied).

TEMPLATE = SECY-041

SECY-02

3. Each of the challenged parts of Mr. Pastorick's rebuttal testimony is expressly and specifically "directed to the initial statements and testimony" of the Army and/or the Staff. Specifically, in his Answer 11 on page 8 of his Rebuttal Testimony, Mr. Pastorick expressly states:

I will discuss in detail statements from Mssrs. Skibinski and Mr. Peckenpaugh as examples for my rebuttal and only cite a few statements from Mssrs. Eaby and Snyder. However, the following testimony concerning the statements of Mssrs. Skibinski and Peckenpaugh also applies to the statements of Mr. Eaby in replies to Q27 (page 20), Q29 (page 22), Q30 (page 24), and Q35 (page 29) and the statements of Mr. Snyder in Q25 (page 16), Q38 (page 24), Q42 (page 26), Q46 (page 29), Q48 (page 31), Q58 (page 45) and Q60 (page 48).

In his subsequent testimony, he then consistently identifies and quotes or paraphrases the specific passages of the initial testimony of Army witness Skibinski or Staff witness Peckenpaugh which he is rebutting. For example, on pages 8 and 9 of his Rebuttal Testimony, Mr. Pastorick rebuts a quoted passage expressly identified as being excerpted from page 5, Answer 7 of Mr. Skibinski's testimony on behalf of the Army.

4. In his rebuttal of specific passages on Army and Staff testimony, Mr. Pastorick does *not* exceed the scope of that testimony to introduce new issues, particularly issues ruled beyond the scope of the proceeding by the Board. It is the Army and the Staff witnesses who introduced in their testimony the presence of UXO on the Jefferson Proving Ground ("JPG") Depleted Uranium ("DU") Site as an important reason that various conclusions of STV witness Norris are purportedly without merit or that several of his recommendations could allegedly not be implemented. For example, the testimony of Army Witness Skibinski which Mr. Pastorick rebuts on pages 8 and 9 of his testimony expressly claims "the additional characterization recommended by STV (through the testimonies of Ms. Henshel and Mr. Norris) may result in 'net public or environmental hard' as described in 10 CFR § 20.1403(a) *due to the significant safety hazards posed by numerous unexploded ordnance (UXO) remaining throughout*

the DU Impact Area. (Emphasis added.) Similarly, the passage in Staff Witness Peckenpaugh's testimony rejecting Mr. Norris' criticism of the Army's Electronic Imaging ("EI") Survey, which Mr. Pastorick rebuts on pages 11 and 12 of his testimony, specifically states, "The Army's actual EI patterns and instrumentation were limited to the existing roads *because of the risk of unexploded ordnance in the areas off of the roads.*" (Emphasis added). It is entirely legitimate and proper rebuttal to that Army and Staff testimony for Mr. Pastorick to testify that:

a. The presence of UXO is *not* a valid reason to reject Mr. Norris' conclusions and recommendations because there are procedures established by the Army Corps of Engineers for performing environmental sampling in areas contaminated by UXO, such as the JPG DU site;

b. Those established procedures are detailed in the Corps' Engineering Pamphlet (EP) 75-1-2, *Unexploded Ordnance (UXO) Support During Hazardous, Toxic, and Radioactive Waste (HTRW) and Construction Activities* (August 1, 2004); and

c. The Army and Staff witnesses citing the presence of UXO as an important reason for rejecting Mr. Norris' conclusions and recommendations do not explain in their testimony why these established procedures may not be employed at the JPG DU site to address the presence of UXO in a manner consistent with Mr. Norris' conclusions and recommendations.

5. Second, contrary to the Army's Motion at p. 3, the Field Sampling Plan ("FSP") is unquestionably within the scope of this proceeding pursuant to the Board's decision to admit STV Contention B-1. The Board's decision not to admit STV Contentions C-1 and C-2 ruled that the Army's *Health and Safety Plan* was beyond the scope of this proceeding, *not* that Army and Staff witnesses could claim that the risks associated with the presence of UXO are an important justification for challenged

inadequacies in the FSP without rebuttal by STV.

6. Third, contrary to the Army's Motion at page 3, Mr. Pastorick does *not* rely on STV's inadmissible Contentions C-1 and C-2 as the basis for his rebuttal testimony. Instead, he expressly states in Answer 7 on pages 6 and 7 of his testimony that he is relying on Engineering Pamphlet (EP) 75-1-2, *Unexploded Ordnance (UXO) Support During Hazardous, Toxic, and Radioactive Waste (HTRW) and Construction Activities* (August 1, 2004). The mere fact that this same document was initially filed by STV in support of inadmissible Contentions C-1 and C-2 does not make impermissible Mr. Pastorick's reliance on it to support his entirely proper rebuttal testimony. As Mr. Pastorick states in his testimony, EP 75-1-2 is "the 'bible' for conducting environmental sampling in areas contaminated with MEC" (where MEC mean Munitions and Explosives of Concern, a standard Department of Defense term for explosively hazardous ordnance waste which includes UXO). It is thus entirely unremarkable that such an authoritative and comprehensive document would be appropriately referenced and relied upon in two different contexts, one within the scope of this proceeding and the other not.

7. Fourth, contrary to the Army's Motion at pages 4 and 5, Mr. Pastorick's testimony is *not* unreliable because it based on mere speculation. Instead, it is expressly based on the testimony of the Army and Staff witnesses regarding the FSP and specific claims they have made as to the presence of UXO being a purported reason for rejecting specific conclusions and recommendations of STV witness Norris regarding additions and changes to the FSP. Mr. Pastorick is *not* challenging in any way that UXO is present on the JPG DU Site or that precautions are required to assure the safety of Army and SAIC personnel in conducting the FSP in the presence of UXO. Instead, Mr. Pastorick, based on his unchallenged expertise and the established procedures specified in EP 75-1-2, is testifying that the Army's

and the Staff's witnesses have *not* demonstrated that the inadequacies in the FSP challenged by Mr. Norris are necessary and unavoidable because of the presence of UXO at the JPG DU Site. The following passage from Mr. Pastorick's testimony (Answer 12, page 13) is illustrative in this regard:

Mr. Peckenpaugh uses the monthly servicing of stream gauging stations as a reason to compromise the placement of the stations to areas near roads and culverts to avoid exposing field technicians to MEC hazards. He reasons that since technicians are required to visit the stations on a monthly basis that this repeated exposure to MEC hazards is unacceptable.

Again, I disagree with his reasoning for subordinating the optimization of the field sampling plan to his perceived analysis of the risk of MEC at the site. In this case, the MEC safety procedures that should be implemented in accordance with EP 75-1-2 involve finding and marking a path from the nearest road departure point to the sampling station location. This path should be permanently marked on both sides with stakes or posts connected by lines. Once this pathway is established as "free of MEC hazards" and adequately marked, the field technicians will be able to return to the station using the established and marked path without additional UXO support and with no exposure to UXO hazards. Therefore, his claim of repeated monthly exposure to UXO hazards is not supportable.

8. Fifth, the *Louisiana Energy Services* ruling cited in the Army Motion (pp. 2-3) is not applicable on the facts here. Mr. Pastorick's rebuttal testimony is *not* an effort by STV to introduce in rebuttal new issues of its own stricken from its direct testimony "to cure pleading deficiencies in its contentions." *Compare* ML050380120, at 2-3. Instead, Mr. Pastorick's rebuttal testimony is a direct response to reasons advanced by Army and Staff witnesses in their initial testimony as to why Mr. Norris' conclusions and recommendations regarding additional and/or modified field sampling procedures could not be incorporated in the FSP due to the presence of UXO.

B. Advance Disclosure of STV Intent to File Pastorick Rebuttal Testimony and to Cite Reference

1. The Army claims in its Motion (p. 4) to be unfairly surprised by Mr. Pastorick's rebuttal

testimony. But, this claim is simply not credible on the record here. First, the Army cannot be unfairly surprised by rebuttal testimony which is directly responsive to the testimony of its own witnesses. Second, STV provided the Army with advance notice of Mr. Pastorick's rebuttal testimony, as contemplated by the agreed and approved disclosure procedures in this case.

2. On January 16, 2007, the Board approved a stipulation among the Parties regarding the protocol for mandatory disclosures in this case which included the following provision:

(8) Supplemental disclosures required by 10 C.F.R. § 2.336(d) will be provided within thirty (30) days, rather than fourteen (14) days provided that any study, report, analysis, data compilation, or other information cited, referenced or otherwise relied upon in . . . written responses and rebuttal testimony shall be disclosed in its entirety no later than five (5) business days prior to the date the written statements and testimony are filed, if not already disclosed.

3. In accordance with this provision, on September 11, 2007, seven days prior to the filing of Mr. Pastorick's rebuttal testimony, STV filed and served Additional Disclosures in which Mr. Pastorick was expressly identified as an additional rebuttal witness (page 1, item 1), a copy of Mr. Pastorick's resume was provided to the other parties (p. 6, item f), and EP 75-1-2 was specifically added to the list of documents on which STV planned to rely in its rebuttal testimony (page 5, item v).

C. Self-Imposed Limitations on Army's Initial and Surrebuttal Testimony

1. As a corollary or predicate to its claim of unfair surprise, the Army claims (p.8) that it has been limited by the Board's rulings with respect to the witnesses and testimony offered in its initial and surrebuttal testimony regarding the UXO issue. However, any limitation on the Army's testimony has been self-imposed.

2. Clearly, no Board ruling prevented the Army from offering Mr. Stephenson as a witness in its initial testimony to support the claims made instead in other Army witnesses' testimony that Mr. Norris'

conclusions and recommendations regarding challenged FSP inadequacies should be rejected because of their purported UXO risks. That decision was the Army's choice entirely. Furthermore, the Board's rulings limit the Army's Reply *not* the Army's rebuttal testimony to ten pages – which a phone call to the Board's Law Clerk would have quickly confirmed. As a result, the Army could have filed Mr. Stephenson's testimony as surrebuttal to Mr. Pastorick's rebuttal testimony had it so chosen.

3. Thus, the Army has in no way been unfairly prejudiced by the Board's rulings any more than it has been unfairly surprised by Mr. Pastorick's rebuttal testimony.

WHEREFORE, STV respectfully requests the Board to overrule the Army's Objection and deny the Army's Motion to Strike Mr. Pastorick's testimony, in whole or in part. STV also submits that there is no credible basis for the Army's claims of surprise and prejudice to support the significant change in the procedural schedule (necessarily including rescheduling the hearing now set to commence on October 22nd) which would be required to accommodate the filing of additional surrebuttal testimony by Mr. Stephenson. In the event, however, that the Board would grant the Army this alternative relief, STV would request an equal amount of time to file its own surrebuttal to Mr. Stephenson's additional testimony.

Respectfully submitted,



Michael A. Mullett, Senior Counsel
Mullett & Associates
309 West Washington Street, Suite 233
Indianapolis, IN 46204
Phone: (317) 636-0025
Fax: (317) 636-5435
E-mail: mmullett@mullettlaw.com

Attorney for Save the Valley, Inc.

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket No. 40-8838-MLA
)	
U.S.ARMY)	ASLBP No. 00-776-04-MLA
)	
(Jefferson Proving Ground Site))	September 18, 2007

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Response of Save the Valley, Inc. in Opposition to the Army's Motion to Strike" was filed this 28th day of September, 2007, upon the following persons by electronic mail and by U.S. Mail, first class postage prepaid.

Administrative Judge Alan S. Rosenthal Chair,
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3-F-23
Washington, D.C. 20555-0001

Meg Parrish
Emily Krause
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3-F-23
Washington, D.C. 20555

Administrative Judge Paul B. Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3-F-23
Washington, D.C. 20555

Adjudicatory File
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3-F-23
Washington, D.C. 20555

Administrative Judge Richard F. Cole
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3-F-23
Washington, D.C. 20555

Larry D. Manecke, Commander
Rock Island Arsenal
ATTN: AMSTA-RI-GC (L.MANECKE)
One Rock Island Arsenal
Rock Island, IL 61299-5000

Frederick P. Kopp, Counsel
U.S. Army Garrison - Rock Island Arsenal
Office of Counsel (AMSTA-RI-GC)
One Rock Island Arsenal
Rock Island, IL 61299-5000

Office of the Secretary
ATTN: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16-G-15
Washington, D.C. 20555-0001

David E. Roth
James B. Biggins
Andrea L. Silvia
Susan L. Uttal
Office of the General Counsel
U.S. Nuclear Regulatory Commission 0-15D21
Washington, DC 20555-0001

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16-G-15
Washington, D.C. 20555-0001

Tom McLaughlin, Decommissioning Branch
Division of Waste Management
Office of Nuclear Materials and Safeguards
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Richard Hill, President
Save The Valley
P.O. Box 813
Madison, IN 47250



Michael A. Mullett
Mullett & Associates
309 West Washington Street, Suite 233
Indianapolis, IN 46204
Phone: (317) 636-0025
Fax: (317) 636-5435
E-mail: mmullett@mullettlaw.com

Attorney for Save the Valley, Inc.

MULLETT & ASSOCIATES

COUNSELORS AT LAW

Old Trails Building, Suite 233
309 West Washington Street
Indianapolis, IN 46204

Phone: (317) 636-0025

Fax: (317) 636-5435

September 28, 2007

Secretary

U.S. Nuclear Regulatory Commission

Washington, D.C. 20555-0001

ATTN: Rulemakings and Adjudications Staff

Re: Response of Save the Valley, Inc. in Opposition to Army Motion to Strike

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

Dear Secretary:

Enclosed please find for filing in the above-referenced docket the original and two conformed copies of the above-referenced filing, along with the related Certificate of Service.

Thank you for your assistance in this matter.

Respectfully submitted,



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

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

From: <MullettGEN@aol.com>
To: <HearingDocket@nrc.gov>
Date: Wed, Oct 10, 2007 1:02 PM
Subject: Re: Filing of Save the Valley, Inc. - Docket No. 40-8838, ALBP No. 00-776-04-...

Dear Secretary:

My apologies for the overlooked incorrect date on the STV pleading in question.

The correct filing date for the RESPONSE OF INTERVENER SAVE THE VALLEY, INC., IN OPPOSITION TO THE ARMY'S MOTION TO STRIKE REBUTTAL TESTIMONY OF WITNESS PASTORICK is September 28, 2007.

Thanks for making this correction.

Mike Mullett

Michael A. Mullett, Senior Counsel
Mullett & Associates
309 West Washington Street, Suite 233
Indianapolis, IN 46204
Phone: (317) 636-0025
Fax: (317) 636-5435
E-mail: MullettGEN@aol.com

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