UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

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Peter B. Lyons

In the Matter of	)	
U.S. ARMY	)	Docket No. 40-8838-MLA-2
(Jefferson Proving Ground Site)	)	

CLI-05-23

MEMORANDUM AND ORDER

On September 12, 2005, the Presiding Officer referred to the Commission his order reinstating a conditionally dismissed prior proceeding concerning the U.S. Army's ("Army") plan for decommissioning the Jefferson Proving Ground site in Indiana.[1] We accept the referral, affirm the decision to reinstate the earlier proceeding, and remand with instructions to use, for the remainder of this adjudication, our recently-revised rules of procedure for adjudications.[2]

I. BACKGROUND

The Presiding Officer has described the history of the Jefferson Proving Ground site and related decommissioning proceedings in his various orders.[3] There is no point in reiterating that history at length. In short, the Army ceased testing depleted uranium munitions on the site in 1994, and since 1999, Save the Valley, Inc. ("Save the Valley") has submitted three different

[1] *U.S. Army* (Jefferson Proving Ground Site), LBP-05-25, 62 NRC __ (2005).

[2] *See* "Final Rule: Changes to Adjudicatory Process," 69 Fed. Reg. 2182 (Jan. 24, 2004).

[3] *See, e.g., U.S. Army* (Jefferson Proving Ground Site), LBP-05-9, 61 NRC 218 (2005).

hearing requests on Various Army plans to decommission the site -- one on the Army's initial decommissioning plan, another on a revised "decommissioning/license termination plan," and still another on a "possession-only license."[4]

In 2003, the Army determined that testing required to decommission the site was too dangerous because of the presence of unexploded ordnance. It therefore decided to seek a possession-only license amendment that would leave an NRC license in force indefinitely, with institutional controls, but which would require no further cleanup. At that time, the Presiding Officer dismissed without prejudice the then-pending proceeding on a "license termination plan" to decommission the site.[5] He then granted Save the Valley's request to intervene in the possession-only license proceeding.[6]

In May of this year, the Army determined that it could in fact perform testing needed to characterize, and ultimately decommission, the site without undue danger to personnel. The Army therefore asked for a license amendment for an alternate schedule for submitting a new decommissioning plan, which it said it could complete within five years. The NRC staff published a new *Federal Register* notice providing an opportunity for hearing on the Army's new license amendment request. Thereafter, on July 19, 2005, the Army withdrew its request for a possession-only license and moved to dismiss as moot the proceeding on the possession-only license.[7]

After an August 24, 2005 conference, the Presiding Officer issued a ruling, LBP-05-25, reinstating the prior adjudication on the Army's license termination plan. Pointing to our request

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[4] *See* Hearing Requests dated Feb. 2, 2000; Dec. 12, 2002, and Nov. 26, 2003. The Presiding Officer sets out this history in LBP-05-9, 61 NRC at 218-21.

[5] LBP-03-28, 58 NRC 437 (2003).

[6] LBP-04-01, 59 NRC 27 (2004).

[7] *See* Applicant's Motion for Dismissal of Proceeding, July 19, 2005.

earlier this year that the parties file status reports with us, the Presiding Officer referred its latest ruling to us to provide "an opportunity to determine whether [his] conclusion as to the appropriate course of action comports with [our] own."[8]

II. DISCUSSION

Given the lengthy, changing nature of the Army's efforts at the Jefferson Proving Ground site, we understand and defer to the Presiding Officer's reasonable inclination to spare Save the Valley undue procedural burdens. Certainly, steps such as re-establishing standing would be a needless burden to a party that has already done so three times in the last six years. In addition, rather than re-starting the proceeding from scratch, it makes sense to continue before a Presiding Officer who is familiar with the history of the site and proceedings. Further, as the Presiding Officer indicated, it is apparent that the Army's new decommissioning proceeding raises substantially the same issues as the license termination plan proceeding he dismissed without prejudice in 2003. If the 2003 proceeding could not be "revived" when the Army returns to its original plan to decommission the site, the term dismissal "without prejudice" would be meaningless.[9] In short, we see no reason to disturb the Presiding Officer's decision to revive the earlier license termination plan proceeding rather than force Save the Valley to file a fresh intervention petition.

But we do not agree with the Presiding Officer's decision that the resumed proceeding should go forward under the NRC's old rules of procedure, or with his implication that applying the NRC's revised procedural rules would impose an unnecessary burden on Save the Valley.[10] The revised hearing procedures should improve the effectiveness and efficiency of the NRC

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[8] LBP-05-25, 62 NRC at __ (slip op. at 8), *citing* CLI-05-13, 61 NRC 356 (2005).

[9] Under the revised rules of procedure as well as the old, "[w]ithdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe." *See* 10 C.F.R. §2.107(a).

[10] *See* LBP-05-25, 62 NRC at __, __ (slip op. at 1 n.1, 6)

hearing process, and better focus and utilize the limited resources of all involved parties.[11] With respect to the application of the revised procedures, the final rule expressly provided that the revisions would apply to proceedings noticed on or after February 13, 2004, the effective date of the rule, *unless directed otherwise by the Commission*.[12] Indeed, we have applied the revised Part 2 rules to proceedings noticed prior to the effective date, where circumstances have warranted.[13] Similarly, we conclude that this proceeding should continue under the revised rules.

It is well established that the Commission may customize its rules of procedure for a particular case so long as there is adequate notice and no prejudice.[14] Applying the revised procedures in this Subpart L proceeding will impose more stringent pleading requirements on Save the Valley with respect to issues raised in connection with the new license amendment request. No longer are general "areas of concern" sufficient to trigger a hearing in a Subpart L proceeding; an intervenor must articulate specific contentions with adequate bases.[15] But even under the prior rules, to effectively participate in this decommissioning proceeding, Save the Valley ultimately would be required to state its objections with sufficient particularity and factual

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[11] 69 Fed. Reg. at 2190. The U.S. Court of Appeals for the First Circuit recently held that the revised rules comply with the Administrative Procedure Act, and that the NRC furnished an adequate explanation for the changes. *See Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338 (1st Cir. 2004).

[12] *See* 69 Fed. Reg. at 2182.

[13] *See Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-04-3, 59 NRC 10, 12 n.1 (2004); *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), *System Energy Res., Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-04-8, 59 NRC 113 (2004).

[14] *See National Whistleblower Center v. NRC*, 208 F.3d 256, 262 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001); *City of W. Chicago v. NRC*, 701 F.2d 632, 647 (7th Cir. 1983), citing *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

[15] *See* 10 C.F.R. § 2.309(f).

support.[16] Indeed, the Presiding Officer indicated that he would "call [ ] upon the Petitioner to determine whether it wishes to modify the statement of areas of concern previously filed."[17] Because Save the Valley would ultimately be required to particularize its concerns under the former Part 2 provisions, we do not expect the use of the revised part 2 rules to substantially alter the proceeding or in any way render an unfairness upon Save the Valley. The fact that Save the Valley is having to again defend its hearing request is through no fault of its own.

In addition, we believe the revised Part 2 rules offer benefits to all parties that improve upon the "old" rules of practice. For example, under the "new" Part 2, Subpart L, if a hearing is granted, it would be conducted as an oral hearing,[18] whereas under the "old" Part 2, a Subpart L proceeding consisted of written presentations, with an opportunity to request oral presentations only upon the presiding officer's determination that such presentations would be "necessary to create an adequate record for decision."[19] Moreover, if a hearing is granted, then all parties are subject to a "tiered" discovery process, including the mandatory disclosure provisions in 10 C.F.R. Part 2, Subpart C, and the hearing file requirement in Subpart L. These revised requirements are intended to significantly reduce the delays and resources expended by all parties in discovery.[20]

We do not, therefore, believe that imposition of the revised Part 2 rules prejudices Save the Valley, particularly in view of its longstanding interest in the site.[21] Moreover, we conclude

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[16] *See* 10 C.F.R. § 2.1233 (2004).

[17] *See* LBP-05-25, 62 NRC at __ (slip op. at 9).

[18] *See* 10 C.F.R. §§ 2.1206, 2.1207. If the parties unanimously agree, they may file a joint motion requesting a hearing consisting of written submissions.

[19] *See* 10 C.F.R. §§ 2.1233, 2.1235 (2004).

[20] *See* 69 Fed. Reg. at 2194; 10 C.F.R. §§ 2.336, 2.1203.

[21] In its September 15, 2005 motion for further extension of time to file a request for hearing in response to the June 27, 2005 *Federal Register* notice, Save the Valley sought an

that applying the revised rules would result in no unwarranted delay, added burden or unfairness in this proceeding.

III. CONCLUSION

We therefore ORDER that:

1. The Presiding Officer's reinstatement of the earlier proceeding is *affirmed*.

2. Save the Valley's standing shall be considered already established.

3. The case shall continue under the jurisdiction of a Board composed of the two current judges and a third, to be designated by the Chief Judge of the Atomic Safety and Licensing Board Panel.[22]

4. Future proceedings shall be conducted under NRC's revised rules of procedure.

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extension of fourteen days following this ruling. Because of the unusual procedural posture of this case, we further extend the time for Save the Valley to request a hearing to 30 days from the date of this Memorandum and Order. We would note that Save the Valley has indicated its awareness of the heightened contention admissibility standards, and the effort that preparation of new or revised contentions would entail. *See* "Response in Opposition to Army's Motion to Dismiss and Request for Alternative Relief of Save the Valley, Inc.," dated July 29, 2005, at 4-5.

[22] The NRC's revised rules call for hearings before either a 3-judge board or an administrative law judge. *See* 69 Fed. Reg. at 2191 & 2194; 10 C.F.R. §2.321(a).

5. Save the Valley shall submit contentions within 30 days after issuance of this order. Insofar as feasible it may supplement its previously-filed "areas of concern." (Any further extensions of time are within the discretion of the Board).

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 26th day of October, 2005