

July 10, 2006

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)	
)	
(Jefferson Proving Ground Site))	

NRC STAFF RESPONSE TO MOTION FOR LEAVE TO FURTHER SUPPLEMENT
CONTENTIONS OF SAVE THE VALLEY, INC., WITHIN SIXTY DAYS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, the Staff of the Nuclear Regulatory Commission (Staff) hereby files its response to the “Motion for Leave to Further Supplement Contentions of Save the Valley, Inc. Within Sixty (60) Days” (Motion) filed by “Save the Valley, Inc.” (STV). As discussed below, the Motion should be denied.

BACKGROUND

On May 25, 2005, the U.S. Army submitted a license amendment application requesting an alternate schedule for submitting a decommissioning plan for its facility at Jefferson Proving Ground (“JPG”) in Madison, Indiana, pursuant to 10 C.F.R. § 40.42(g)(2). See Letter and Attachments from Alan G. Wilson to Dr. Tom McLaughlin, dated May 25, 2005, ADAMS No. ML051520319. On February 2, 2006, the Atomic Safety and Licensing Board granted STV’s request for a hearing with respect to the Army’s application, but deferred the hearing pending completion of the Staff’s technical review of the alternate schedule proposal. *U.S. Army* (Jefferson Proving Ground Site), LBP-06-06, 63 NRC 167, 185 (2006). On March 15, 2006, the Staff published in the *Federal Register* “Notice of Availability of Environmental Assessment and Finding of No Significant Impact for License Amendment for the Department of the Army’s Facility at Jefferson Proving Ground,” 71 Fed. Reg. 13435 (2006). This was followed with the

completion of the Safety Evaluation Report and issuance of the license amendment on April 26, 2006. Letter to A.G. Wilson from D. M. Gillen, dated April 26, 2006 (ADAMS Accession Number ML053320014). On May 1, 2006, the Licensing Board issued "Memorandum and Order (Scheduling Further Proceedings)" (May 1 Order), in which the Licensing Board permitted STV to file a motion for leave to withdraw, to amend, or to supplement the contentions contained in its November 23, 2005 hearing request and/or the bases assigned for those contentions based on any new information that may have arisen out of the Staff's review documents.

On May 31, 2006, STV filed "Motion For Leave to Withdraw, Amend, and Supplement Contentions of Save the Valley, Inc." The Army and the Staff filed their respective responses to STV's Motion on June 19, 2006 and June 20, 2006, respectively. "Army's Response to the Motion for Leave to Withdraw, Amend, and Supplement Contentions of Save the Valley, Inc. filed Herein on May 31, 2006;" "NRC Staff Response to Motion for Leave to Withdraw, Amend, and Supplement Contentions by Save the Valley, Inc." On June 30, 2006, STV filed its Motion, as well as its reply to the Army's and Staff's responses. "Reply in Support of Motion for Leave to Withdraw, Amend and Supplement Contentions of Save the Valley, Inc."

DISCUSSION

Pursuant to 10 C.F.R. § 2.309(f)(2), new or amended contentions may only be filed with leave of the presiding officer upon a showing that

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2).¹ See also *Changes to Adjudicatory Process*, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004) (“[t]he new or amended contention [must] be filed promptly after the new information purportedly forming the basis for the new or amended contention become available.”). These rules are rooted in longstanding Commission precedent that intervenors are “expected to raise issues as early as possible” and must “diligently uncover and apply all publicly available information to the prompt formulation of contentions.” *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048, 1050 (1983).

In its Motion, STV requests, pursuant to 10 C.F.R. § 2.309(f), leave to further supplement its contentions or bases within 60 days of June 30, 2006. Motion at 1. Specifically, STV is seeking a prior determination by the Licensing Board that 60 days beyond June 30, 2006 is an appropriate amount of time to file additional contentions or bases based on three new sources of information. See *id.* at 1, 4-5. STV is not, at this time, proffering any new contentions/bases, but is rather “simply seek[ing] to establish with certainty the time available to it to formulate and file the additional contentions and/or bases and thereby avoid a late controversy as to whether its filing is timely.” *Id.* at 5. In support of its Motion, STV references two documents submitted by the Army to the NRC; an environmental monitoring report, dated May 19, 2006 and a fracture trace analysis report dated June 13, 2006. STV also references a research paper that it claims to have received notice of on June 4, 2006. *Id.* at 1, 2. STV goes on to make the assertion that the information in these documents will

impact the understanding of the JPG facility with respect to the risks to human health and the environment related to depleted uranium on the JPG site, the migration of uranium from the site, and the biological risks associated with the migrating uranium. They also impact the ability of the [Field Sampling Plan], as it is designed and being implemented, to accomplish its objectives with respect to the migrating uranium and the biological risks associated with the migrating uranium.

¹ See also 10 C.F.R. § 2.309(c) (requiring, among other things, good cause for the failure to file on time.).

Id. at 3. STV asserts that it will need “at least” sixty days beyond June 30, 2006 for it to retain and consult with an additional expert, assess the implications of the allegedly new information and to formulate contentions and bases to satisfy the NRC’s requirements. *Id.* at 4. In support of its assertion, STV provides the statement of one of its experts who simply states that it is his opinion that 60 days is necessary. *Id.* at 4 citing Verified Statement of Charles H. Norris, attached to STV Motion at ¶ 23.

Sixty additional days from June 30, 2006 is not a reasonable amount of time to file new or amended contentions based on allegedly new information.² Even if the documents referenced by STV do, in fact, contain information which was not previously available and is materially different from information previously available, there is no reason why STV cannot retain an expert and formulate new or amended contentions sooner than 60 days. In fact, the attached statement from Mr. Norris indicates that he has already reviewed and analyzed the information in the referenced documents. See Norris Statement at ¶¶ 5-22. Moreover, with respect to the research article mentioned by STV, this article is not new. According to the Molecular Carcinogenesis’ website, <http://www3.interscience.wiley.com/cgi-bin/jissue/112211695>, this article was published online on November 20, 2005 and was in Volume 45, Issue 1 published in January 2006. STV’s failure to find out about this article until June 5, 2006 is no excuse for filing late. See *Duke Power*, CLI-83-19, 17 NRC at 1048, 1050. Thus, there is no basis to find that STV needs an additional sixty days to submit new or amended contentions.

Further, STV’s request is well beyond what licensing boards have found reasonable in the past. In one proceeding, the licensing board gave the general guidance that “45 days

² By only addressing the timeliness prong of the late-filed contentions regulation (section 2.309(f)(2)(iii)), the Staff does not waive any objections it may have with respect to the other criteria for late-filed contentions or whether the contentions, when proposed, meet the substantive requirements of 10 C.F.R. § 2.309(f).

approaches the outer boundary of timeliness.” See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC 226, 235 (2000).³ See also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-3, 49 NRC 40, 47 (1999) *aff’d on other grounds*, CLI-99-10, 49 NRC 318 (1999). In this proceeding, the Licensing Board only provided STV 30 days to file new or amended contentions based on the issuance of the Staff’s review documents. May 1 Order at 3. The Licensing Board’s Order is consistent with the model milestones for a subpart L proceeding which only provide 30 days after issuance of the Staff’s safety evaluation report and environmental documents to file late-filed contentions based on new information arising out of those documents. 10 C.F.R. Part 2, appendix B. In addition, 60 days is the same of amount time provided for a potential intervenor to file its *initial* intervention petition. 10 C.F.R. § 2.309(b). Such initial intervention petitions require a review of an entire application. STV’s request for sixty days to address the referenced documents is, therefore, unreasonable. Accordingly, STV’s request should be denied.

³ In this case, the licensing board found that the intervenor failed to establish good cause for filing an amended contention based on major staff issuances 6 days after the filing deadline set by the licensing board for filing such contentions. *Id.* at 237-38. The licensing board had directed that the Staff give at least 15 days advanced notice of the issuance of major review documents and then set a 30-day deadline for the filing of amended contentions based on those documents. *Id.* at 237. The licensing board rejected the contention, even though it would have found the part of the contention otherwise admissible. *Id.* at 239 n. 3. The licensing board’s decision rejecting the contention was upheld by the Commission. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 48 (2004).

CONCLUSION

For the reasons discussed above, STV's request for 60 days from June 30, 2006 to file new or amended contentions based on new information is unreasonable. STV's request should, therefore, be denied.

Respectfully submitted,

/RA/

Marian L. Zabler
Counsel for NRC Staff

Dated at Rockville, MD
this 10th day of July, 2006

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO MOTION FOR LEAVE TO FURTHER SUPPLEMENT CONTENTIONS OF SAVE THE VALLEY INC., WITHIN SIXTY DAYS," in the above captioned proceeding have been served on the following by electronic mail with copies deposited in the Nuclear Regulatory Commission's internal mail system as indicated by a single asterisk or by U.S. Mail, first class, as indicated by a double asterisk by e-mail, this 10th day of July, 2006.

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