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Oral Arguments

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

ORAL ARGUMENTS

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In the Matter of:

U.S. ARMY, JPG SITE     Docket No.:    40-8838-MLA

ASLBP No.:    00-776-04 MLA  
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Madison City Hall

101 West Main Street

Madison, Indiana 47250

Wednesday,

July 19, 2006

PANEL:

ALAN S. ROSENTHAL, Chairman

PAUL B. ABRAMSON, Member

RICHARD F. COLE, Member

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

(9:01 a.m.)

JUDGE ROSENTHAL: Good morning, ladies and gentlemen. I am Alan S. Rosenthal. With me this morning, on my right, is Paul B. Abramson. On my left, Richard F. Cole. We are the administrative judges of the Nuclear Regulatory Commission's Atomic Safety and Licensing Board Panel who are assigned to the licensing board for this proceeding involving the Department of the Army's Jefferson Proving Ground site.

Specifically, the Board has before it a proposal by the Army that it be given a five year period to conduct the tests required to formulate an adequate decommissioning plan for the depleted uranium munitions that are now accumulated on that site as a result of the testing of tank penetration rounds some years ago.

Last February, the Board granted the request of a local organization, Save the Valley, Inc., for a hearing on it's challenge to the sufficiency of the proposal to accomplish it's intended objective. This morning, we are holding a conference with counsel for the respective parties, Save the Valley, the Army, and the Commission's staff,

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1 for the purpose of determining the scope of the  
2 evidentiary hearing that will be later held here in  
3 Madison.

4 The conference is governed by the terms of  
5 the Board's June 28 order. At the outset, Save the  
6 Valley will be given 15 minutes, and the other  
7 parties, 10 minutes each, to provide an overview of  
8 that party's views and logic respecting the  
9 appropriate scope of the evidentiary hearing. The  
10 balance of the conference will be devoted to eliciting  
11 responses from counsel to questions that the Board  
12 might have based upon it's examination of the  
13 voluminous written submissions.

14 In that regard, the Board will expect a  
15 concise response to each Board question that is  
16 directed exclusively to that particular question and  
17 does not endeavor to present information that the  
18 question does not specifically seek. In order that  
19 the conference be conducted expeditiously and  
20 concluded seasonably, full compliance with that  
21 expectation will be imperative.

22 I might say that the Board is fully  
23 familiar with the written submissions. It believes  
24 that the parties, through those written submissions,  
25 have had a full opportunity to present it's views, and

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1 therefore, following these brief initial statements,  
2 the balance of this conference will be devoted to  
3 responses to questions that this Board has with regard  
4 to what has been presented to it in writing. In  
5 short, this is not an opportunity for any of the  
6 parties to elaborate upon their positions which should  
7 have been fully developed in the written submissions.

8 I will now call upon counsel to identify  
9 themselves formally for the record, and we'll start  
10 with counsel for Save the Valley.

11 MR. MULLETT: Your Honor, Michael A.  
12 Mullett, Mullett and Associates, 309 West Washington  
13 Street, Suite 233, Indianapolis, Indiana, 46204.

14 JUDGE ROSENTHAL: Thank you, Mr. Mullett.  
15 Counsel for the Army?

16 MR. KOPP: Your Honor, Frederick P. Kopp,  
17 of the Rock Island Arsenal.

18 JUDGE ROSENTHAL: Thank you, Mr. Kopp.  
19 And, for the NRC staff?

20 MR. WEDEWER: Your Honors, Harry E.  
21 Wedewer, Office of the General Counsel.

22 JUDGE ROSENTHAL: Thank you, Mr. Wedewer.  
23 All right. We'll start with Mr. Mullett. You'll have  
24 15 minutes. There's no constitutional obligation to  
25 take the full 15 minutes.

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1 JUDGE ABRAMSON: And, the balance will not  
2 be allocated to the other parties.

3 JUDGE ROSENTHAL: That's right. And, Ms.  
4 Wolf, on the end, here, will give you a one-minute  
5 warning, should you get to that point. You may  
6 proceed.

7 MR. MULLETT: Thank you, Chairman  
8 Rosenthal, Drs. Abramson and Cole. It's a pleasure  
9 for us to have this opportunity and we thank you for  
10 it.

11 I just want to make four overall points.  
12 First, this is a very unusual, perhaps unique,  
13 proceeding, even in the annals of the Nuclear  
14 Regulatory Commission, which has cases which, compared  
15 to other organizations, are generally somewhat  
16 unusual. It's Save the Valley's view that the scope  
17 of this proceeding and the admissibility of  
18 contentions depends crucially on an understanding of  
19 the history of this particular proceeding, which I am  
20 not going to recount. The presiding officers have  
21 certainly recounted that history themselves on  
22 numerous occasions. I'm sure they're as familiar as  
23 I am with that history, but we think it's crucial. We  
24 think the extent to which Save the Valley had  
25 previously been granted two hearing opportunities with

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1 respect to decommissioning, the extent to which the  
2 reinstatement of the decommissioning proceeding by the  
3 Board, with affirmation by the Commission has crucial  
4 significance with regard to understanding the proper  
5 scope of this proceeding.

6 Secondly, it's quite clear and well-  
7 established that the Board has broad discretion to  
8 manage it's proceedings within it's jurisdiction.  
9 Certainly, as the filings have made clear, here,  
10 certain aspects of this proceeding may indeed test or  
11 challenge the Board's jurisdiction. Certainly, that  
12 seemed to be one of the considerations with regard to  
13 the Board seeking guidance from the Commission with  
14 regard to certain issues, here. We're, of course,  
15 very sensitive to that. Parties propose, tribunals  
16 dispose, particular when it comes to matters of their  
17 own jurisdiction. We would hope that the Board would  
18 exercise it's broad discretion within it's  
19 jurisdiction to recognize the unique character of this  
20 particular proceeding and the lessons that it's  
21 histories teaches.

22 The third point that I would make is that  
23 there does seem, to Save the Valley, to be some  
24 tension, but not irreconcilable tension, between the  
25 ultimate scope of this proceeding as a decommissioning

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1 proceeding and the particular hearing opportunity that  
2 was noticed on June 27 with respect to the alternate  
3 schedule proposed by the Army. In the first place, in  
4 terms of the areas of concern that were previously  
5 developed by Save the Valley during the  
6 decommissioning, the early phases when we were dealing  
7 with the decommissioning plan or the so-called license  
8 termination plan, there are certainly continuity  
9 between those areas of concern and what has been  
10 expressed by Save the Valley here as it's final  
11 contentions.

12 Secondly, as we made clear in our written  
13 filings, in terms of what the staff, itself, has had  
14 to say in the past with respect to the interpretation  
15 of the criteria for approval of an alternate schedule  
16 of particular criteria, not necessarily alternate  
17 schedule for submission of decommissioning plans, but  
18 the criteria that govern that, we certainly think that  
19 the intentions that we've advanced, all of them, fall  
20 within that particular scope.

21 Now, the fourth point, and I'll just  
22 address this very quickly, in terms of the specific  
23 areas, we do have to confess and concede that we have  
24 struggled some, both from a technical standpoint and  
25 from a legal standpoint, with the switch in format

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1 from areas of concern to contentions and bases.  
2 There's no two ways about that, and we apologize for  
3 it, but frankly, we're not quite sure what we could  
4 have done differently about it. It's just been a  
5 struggle for us. There's no two ways about that. I  
6 noticed that we've got a Chairman and two people with  
7 Doctorates before their names. Obviously, one of the  
8 struggles is that interface between the legal and the  
9 technical, and being able to merge them.

10 The other is -- how do I want to say this?  
11 Lawyers and bureaucrats are different from real  
12 people. I think everybody understands that and the  
13 extent to which they have different language that's  
14 not necessarily comprehensible, the extent to which  
15 you have to kind-of go to Berlitz and then wonder  
16 whether or not it was worth the effort when you're  
17 finished. So, that's a problem, and I think we're  
18 justifiably criticized for, you know, if we got a C-  
19 minus at Berlitz, you know, that's probably generous.  
20 So, we definitely struggle with that.

21 But, what we tried to do was look at the  
22 various underlying documents, ask ourselves whether or  
23 not those documents were within the scope, and then  
24 address the particular issues that we had with those  
25 documents in as much detail as we had time and

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1 resources to do. From our perspective, it appears  
2 that everybody agrees that contentions addressed to  
3 FSP -- the FSP would be within the scope. The extent  
4 to which there may be other problems with them, I  
5 won't get into that detail-wise here, to the extent  
6 we'll leave that at the questions, but that seems to  
7 be undoubted.

8 As far as the HASP is concerned, we're  
9 just dumbfounded that anybody would not see issues  
10 with regard to the HASP, and particularly, integration  
11 of the HASP and the FSP. Given the history of this  
12 proceeding, given the documentation in this  
13 proceeding, the inextricable interrelationship between  
14 what you need to do to properly characterize this site  
15 and what you need to do to protect the safety of the  
16 personnel who are doing the characterization seems to  
17 us to be so manifest, again, that we're simply  
18 dumbfounded that that interrelationship would be  
19 something that anyone who is approaching this  
20 proceeding from a fair-minded standpoint would not see  
21 within the scope.

22 The same thing's true with regard to the  
23 ERMP. Frankly, I think everybody is a little bit  
24 confused with respect to the situation with regard to  
25 the ERMP. Most recently, when SAIC submitted the May,

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1 2000 -- excuse me, Fall 2005 sampling results, they  
2 presented a very detailed appendix explaining just  
3 exactly how they had relied on the 2003 ERMP as  
4 slightly modified in May, 2004, to conduct those  
5 results, and then, the Army files an errata sheet  
6 saying that's not right, there is something else  
7 that's right, and it's in the attached two pages, but  
8 the attached two pages aren't attached and they still  
9 haven't been filed. So, there is obviously  
10 considerable confusion, but when you look at the  
11 history of this proceeding, it's quite clear that the  
12 FSP evolved out of a necessary and important attempt  
13 to improve the ERMP for purposes of the prior  
14 application, and it's our submission that the length  
15 of time that's involved here, and we're talking  
16 probably 12, 13 years before we actually get to  
17 decommissioning here, that the ERMP remains crucial  
18 and that in terms of looking at this particular  
19 proposal in terms of the adequacy of the ERMP to  
20 protect the public during the period of time that this  
21 lengthy process continues remains quite critical. We  
22 think that in terms of what the Army understood  
23 initially, in terms of what the staff said initially,  
24 if you go back and look, particularly, at the  
25 transcript of the August 25 teleconference, you'll see

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1 that that particular point in time, everybody had that  
2 understanding. So, from our standpoint, there really  
3 shouldn't be any dispute about FSP, HASP, and ERMP.

4 As far as budget and timetable contentions  
5 are concerned, this is where you get into that  
6 interface between decommissioning and alternate  
7 schedule, but in terms of, again, what the staff,  
8 itself, has said in the past with regard to the  
9 criteria that apply, with respect to the alternate  
10 schedule, even if you look at this hearing opportunity  
11 as restricted to alternate schedule, we think that the  
12 budget and timetable contentions that we have made are  
13 admissible.

14 As far as the EA and SER are concerned,  
15 this is a place where we have struggled. We do  
16 understand that the EA is different from the SER. If  
17 we could go back, in terms of phrasing some of our SER  
18 contentions slightly differently, the problem -- we  
19 recognize that we're dealing with what's new here, and  
20 that we're not, essentially, engaged in a critique of  
21 the staff, but in terms of addressing what's new when,  
22 from our perspective, what's happening is that based  
23 on the RAIs, the staff is recharacterizing and, from  
24 our perspective, mischaracterizing the FSP or the  
25 HASP, then that makes it very difficult in terms of,

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1 "Okay, what's new here is the recharacterization, the  
2 mischaracterization." If we had to do it over, we  
3 wouldn't say, you know, "Contrary to staff," or  
4 something like that, just to eliminate that  
5 preparatory language and try to focus on the  
6 recharacterization and the particular RAI responses.  
7 So, we would concede that there's phrasing or framing  
8 issues with what we had to say, particularly, about  
9 the SER, that that could be easily misunderstood as an  
10 attack on the staff and it's role there, and I won't  
11 say that there isn't some, perhaps, frustration on our  
12 part that seeps through there, but I would hope that  
13 the Board would look beyond that aspect of it and look  
14 at the substantive issue, the extent to which the  
15 staff has essentially tried to say that the RAIs,  
16 which are new, have addressed or solved some of the  
17 issues that's previously -- that Save the Valley had  
18 previously raised, and that what we're trying to say  
19 is, "No, that's not the case."

20 So, from that particular perspective, we  
21 would submit that all the contentions that we've  
22 raised with respect to the FSP, the HASP, the ERMP,  
23 budget and timetables, the EA, and the SER, that all  
24 of them would be admissible as within the scope of the  
25 proceeding. Obviously, there are certain ones that we

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1 had originally filed that we withdrew, and that should  
2 be manifest from what we had to say.

3 With that, I am finished, and I believe  
4 I've gotten it in in about 12 minutes, Your Honor, so  
5 I hope I've been consistent with --

6 JUDGE ROSENTHAL: Thank you, Mr. Mullett.  
7 Mr. Kopp?

8 MR. KOPP: Thank you, Your Honor.

9 Your Honors, ultimately, what the Army is  
10 seeking is a restricted release. It's my  
11 understanding that that is a new creature that has  
12 never been granted by the NRC before. The overriding  
13 concern that the Army has, here, is that the site is  
14 unsafe, and the Army is not able to tell you, today,  
15 that it will ever be safe, and that's not because of  
16 the radiation threat, it's because of the unexploded  
17 ordinales. Even if the DU were to be scooped out of  
18 the middle of the Jefferson Proving Ground, it would  
19 still be surrounded by millions of unexploded shells  
20 and other explosive threats that are beyond the  
21 jurisdiction of the NRC, and it would never be open to  
22 the public, so the question is -- in fact, it would  
23 never be open to anybody. The question is, how do we  
24 proceed to decommission, given that situation? And,  
25 we have been struggling with that and working with the

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1 NRC staff for many, many years, as you're well-aware.

2 The way we look at the current situation  
3 with the alternative decommissioning schedule is that  
4 really, the contention should be addressed to two  
5 issues. First of all, did the NRC staff have  
6 sufficient information to find that the Army had  
7 satisfied the requirements for granting an alternate  
8 decommissioning schedule, and then secondly, as Judge  
9 Rosenthal alluded to yesterday, is the Army going in  
10 the right direction? Is the field sampling plan, as  
11 presented, sufficient to assure the NRC that we are  
12 headed in that right direction?

13 And, as we review the contentions, I think  
14 we need to bear in mind that the way we plan to  
15 proceed under the field sampling plan is an outline.  
16 It's a statement of what we intend to do, but it's  
17 also a statement that as we take certain tests, as we  
18 get certain data, we're going to have branches of  
19 decisions to go forward and decide what needs to be  
20 done then, and that, of course, will be evaluated in  
21 the context that -- is it safe to do that? It would  
22 be maybe nice to do that, but do we want to send  
23 somebody into a field of unexploded shells to do that  
24 kind of testing? Is it necessary?

25 For that reason, we feel that with regard

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1 to the field sampling plan, especially, that the  
2 contentions are -- and I've said "irrelevant," in the  
3 pleadings, and maybe irrelevant is the wrong  
4 characterization, but it addresses the wrong issues,  
5 I guess, is what we're really trying to say. In other  
6 words, as I look at Save the Valley's contentions,  
7 they want the NRC staff, and they want you as the  
8 panel, to basically write in stone what tests will be  
9 done as of today, based on the knowledge of today, and  
10 the Army is saying, "Well, let us go step by step.  
11 Let us take these initial samplings and see where that  
12 leads us, see, in reliance upon the NRC staff, what  
13 more testing and what kinds of testing need to be  
14 done," and to that extent, I don't think that we're  
15 really at the level of a dispute with Save the Valley  
16 on that issue, that they, of course, want, to some  
17 degree, micromanage right now what tests we are to  
18 take and they want to have us committed to taking a  
19 test which, six months from now, we may find is not  
20 relevant, it's not necessary, but it would still be  
21 part of the condition of a license amendment that we  
22 take that test, and we want to avoid that because it  
23 would be an unnecessary expense, it would be an  
24 unnecessary hazard for the people that are taking the  
25 samplings.

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1           As far as the issue involving the  
2           environmental radiation monitoring plan, that plan is  
3           currently in effect. It's part of the possession  
4           license that was already granted to the Army some  
5           years ago, and it's continuing. They have not amended  
6           that as part of this license amendment application,  
7           except insofar as the field sampling plan, itself,  
8           supersedes that environmental monitoring plan. To  
9           that extent, I think that the environmental monitoring  
10          plan is irrelevant to these proceedings, first of all  
11          because it's outside of the scope of the proceedings,  
12          and second of all because it's been superseded by what  
13          the field sampling plan will reveal as far as the data  
14          is concerned. We have listened to some of the things  
15          that Save the Valley has said and we have made  
16          modifications already in the field sampling plan. For  
17          instance, I'm informed that in mid-September, we will  
18          start stream-gauging. One of their contentions  
19          alleges that we aren't doing stream-gauging. By the  
20          time this comes to hearing, we're likely to have  
21          completed that stream-gauging. So, to a certain  
22          extent, the field sampling plan is a moving target.  
23          As it garners more information, we are refining what  
24          needs to be done in conference with the NRC staff.

25               As far as the HASP contentions go, that

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1 document pertains to the Army and it's personnel and  
2 it's contractors only. Other than a general concern  
3 by the NRC staff that we're aware of the problem of  
4 the unexploded ordnates, it really is beyond the  
5 scope of their investigation and that of their --  
6 basically, their jurisdiction to decide how we are  
7 going to go in and what we are going to do when we  
8 encounter UXO, but the bottom line of it is that the  
9 HASP is not a document which is necessary for the  
10 staff to grant us an amended alternate decommissioning  
11 schedule, an amended license. It doesn't pertain to  
12 public safety and therefore, we don't, I think, need  
13 to get into a argument in the contention stage about  
14 exactly how we're going to go in and take those  
15 samples. The fact that we have committed to take  
16 those samples and that we're going to do so in the  
17 safest way possible, I think, is all, in general, that  
18 needs to be discussed as far as the alternate  
19 decommissioning schedule goes.

20 As for the timeliness and the financial  
21 contentions that were raised by Save the Valley, we  
22 have a situation here where Save the Valley is  
23 basically saying to us, "You need to specify exactly  
24 how you are going to decommission," and we think  
25 that's beyond the scope of this proceeding also,

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1 because the very nature of the alternate schedule that  
2 we've asked for is to determine what we are going to  
3 do to decommission the site, and if we knew what we  
4 were going to do, going into it, there wouldn't be any  
5 need for an amended and alternate schedule.

6 As far as the financial concerns are con -  
7 - the financial contention are concerned, the NRC  
8 staff, itself, I believe, said in an earlier  
9 proceeding, the Army's an enduring institution. We're  
10 not a private corporation which is likely to go  
11 bankrupt, and we are also, because we are a government  
12 agency, we are not able to guarantee that congress  
13 will give us the money to do anything. The most we  
14 can do is tell you that we intend to do it, we intend  
15 to do it right, and the law forbids us from going any  
16 further and making any binding commitment on the Army.  
17 And, for that reason, we feel that it's inappropriate  
18 to go any farther with the contentions regarding the  
19 financial aspects at this point in time. There's  
20 nothing we can do to ensure that congress will give us  
21 the money other than to say we intend to press the  
22 point and get the money to decommission.

23 As far as the new contentions go, I  
24 believe those have been adequately addressed by the  
25 NRC in it's reply. We feel that ultimately, the logic

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1 there is that these -- the environmental assessment  
2 and the SER are inadequate, as the contention alleges,  
3 because they didn't do what Save the Valley asked them  
4 to do in the first four contentions, and I think that  
5 -- in a way, that that's just duplicative and  
6 redundant of where we've been before, so I would ask  
7 the panel to look at the issues in light of what the  
8 Board, the staff is required to do to grant us an  
9 alternative schedule, and to look at our field  
10 sampling plan not as a final document in which it  
11 would be appropriate to argue whether we have 10 wells  
12 or 20 wells or 15 wells, or whatever, but to look at  
13 it as an ongoing process, are we headed in the right  
14 direction today? Are we likely to get there in five  
15 years? And, I think that once you approach it in that  
16 aspect, there's really not a lot in contention, here.  
17 Thank you.

18 JUDGE ROSENTHAL: Thank you. Mr. Wedewer?

19 MR. WEDEWER: Good morning, Your Honors.  
20 I will provide a brief overview of the staff's  
21 position while not repeating all of the points in the  
22 staff's earlier filings.

23 The staff's overall position is that the  
24 scope of the hearing should reflect the second stage  
25 of the decommissioning process that we are currently

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1 in and that solely involves an alternate schedule  
2 providing a decommissioning plan. This position, and  
3 the related 2.309 criteria, has led us to conclude  
4 that STV's contentions and associates bases are in  
5 many respects not focused on the correct stage of the  
6 process and are otherwise inadmissible. At the same  
7 time, we do have a different position than the Army in  
8 some respects. To elaborate, I'll briefly review  
9 individual contentions.

10 Proposed contention A, ERMP: This  
11 contention and the 2003 draft ERMP, are not within the  
12 scope of this proceeding because, as previously noted  
13 in our pleading, the 2003 draft ERMP was superseded by  
14 the present license request and was not considered by  
15 staff in it's review of this present amendment. The  
16 inapplicability of the 2003 draft ERMP was most  
17 recently confirmed by the Army in it's letter to the  
18 staff dated May 26, 2006, noting that the 2003 draft  
19 ERMP had been withdrawn. What is currently operative,  
20 with respect to monitoring at the JPG site, is the  
21 1999 ERMP which is a preexisting license obligation  
22 and is unaffected by the license amendment before you.  
23 Therefore, consideration of the 2003 draft ERMP under  
24 proposed contention A is not, in the staff's view,  
25 within the scope of this proceeding.

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1 Proposed contention B, FSP: The staff's  
2 position remains that the FSP contention is admissible  
3 on a narrower ground than that proffered by STV.  
4 Specifically, the staff's concluded that bases A, F,  
5 and J do meet 2.309 admissibility criteria. The other  
6 bases submitted by STV do not, for reasons stated in  
7 the staff's pleadings.

8 Proposed contention C, HASP: The staff's  
9 position is that the two proposed HASP-related  
10 contentions are not within the scope of this  
11 proceeding. First, it is important to note that the  
12 Army has assumed the risk associated with gathering  
13 site data in proximity to UXO in order to fill the  
14 gaps in information necessary to ensure the  
15 development of an effective decommissioning plan.  
16 Further, the staff has concluded that UXO does not  
17 pose a radiological risk to workers or the public.  
18 Based on this, the staff's position is that inquiry  
19 into the HASP, as proposed by STV, is not within the  
20 scope of this proceeding.

21 Proposed contention D, timeliness and  
22 financial assurance: With respect to timeliness and  
23 financial assurance, the staff's position remains that  
24 both contentions and the alternatives submitted by STV  
25 are not within the scope of this proceeding. STV

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1       prematurely seeks a level of guarantee relative to  
2       decommission schedule and, alternative, in terms of a  
3       site characterization schedule, that is not within the  
4       text of the regulations. Similarly, STV requests a  
5       level of financial assurance that exceeds that  
6       required by the regulations and already provided by  
7       the Army. In part, STV relies on suspicions regarding  
8       the Army's future behavior, as well as a contrasting  
9       expression that a schedule acceleration is desirable,  
10      and not the regulations as a basis for this proposed  
11      contention. It is, however, the regulations that  
12      control.

13               Finally, while there is inarguably  
14      continuity between this and the 2002 proceeding, the  
15      elements that are the subject of the staff's review  
16      are different and apply only to a narrower review of  
17      the alternate schedule, and not the decommissioning  
18      plan. Therefore, STV can not rely on the  
19      reinstatement of this proceeding to litigate a  
20      decommissioning plan that is not being considered by  
21      the staff.

22               Proposed contention E, safety evaluation  
23      report: The staff's position is that the two proposed  
24      SER related contentions as submitted by STV are not  
25      within the scope of this proceeding. While addressing

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1 the Army's RAI responses would be within the scope of  
2 this proceeding, STV's attack on the staff's analysis  
3 of those responses is not. To the extent that the  
4 matters addressed by the Army's RAI responses are  
5 contained within the FSP contention bases A and F,  
6 they will be addressed in considering the FSP  
7 contention assuming that is found admissible on the  
8 basis recommended by the staff.

9 Finally, STV misconstrues the SER as being  
10 a litigation-related document that is intended to  
11 respond to their pleadings. The SER is not this form  
12 of document. Therefore, for the reasons further  
13 discussed in the staff's pleading, consideration of it  
14 is not within the scope of this proceeding.

15 Proposed contention F, environmental  
16 assessment: The staff, as noted in our last pleading,  
17 contends that proposed contention F is not properly  
18 focused on the five-year period governed by this  
19 license amendment and was the subject of the  
20 environmental assessment. If admitted, the bases  
21 under contention F should be those that directly  
22 relate to the staff's finding of no significant  
23 impact, which in this context, relied upon two  
24 factors, one, a limited application of the historic  
25 case analysis of uranium plume continuation, or new

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1 reg CR-6705, to understanding DU behavior in the next  
2 five years, and two, that there are sufficient  
3 monitoring mechanisms currently in place to ensure  
4 that if DU does behave unexpectedly, that will be  
5 readily discovered. In this narrower context, bases  
6 G and K focus on the JPG site specifically, and the  
7 potential behavior of the DU over the next five years,  
8 and those reasons, we believe, are admissible.

9 This is in contrast to contention F as  
10 submitted by STV which, as they, themselves, seem to  
11 recognize, was too broadly pled in our view, would  
12 lead to open-ended academic discussion of the merits  
13 of new reg CR-6705, and DU behavior for a period that  
14 goes well beyond the immediate five year period that  
15 was the focus of the staff's conclusion. Based on  
16 this, the staff contends that if that -- if proposed  
17 contention F is found admissible and is within the  
18 scope of this hearing, it should not be done so to the  
19 extent submitted by STV. This concludes the staff's  
20 overview, Your Honors.

21 JUDGE ROSENTHAL: Thank you.

22 JUDGE ABRAMSON: Thank you all for keeping  
23 within the time limits.

24 JUDGE ROSENTHAL: I think, again, with --  
25 as obvious from the statements of the respective

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1 counsel, there is a serious issue with respect to the  
2 nexus between some of the contentions and what's at  
3 hand. Now, the issue before the Board, as we  
4 understand it, is whether the Army's proposed site  
5 characterization activities for the next five years  
6 will enable it to come up with a satisfactory  
7 decommissioning plan at the end of that five year  
8 period, in other words, in 2011. Now, given that, Mr.  
9 Mullett, the Board has some difficulty in  
10 understanding the precise nexus between that activity,  
11 or those activities -- we're not dealing, here, with  
12 the decommissioning plan -- those activities and  
13 first, the environmental radiation monitoring plan,  
14 the ERMP, second, the health and safety plan, the  
15 HASP, and third, the timeliness, financial assurance  
16 issues. Now, I would -- the Board would appreciate it  
17 if, with particularity, you would explain to us how --  
18 let's start with the ERMP -- how that relates, or the  
19 contentions with regard to that, relate to this issue  
20 which is before us, which is the adequacy of a site  
21 characterization activity. That's all that we have  
22 before us. We do not have a decommissioning plan  
23 before us, as we did at one time. So, I would like --  
24 the Board would like you to address that with  
25 specificity. Just how does the environmental

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1 radiation monitoring plan fit into the limited issue  
2 that is presented to this Board as a result of this  
3 alternate schedule proposal?

4 MR. MULLETT: Well, Your Honor, as far as  
5 the ERMP is concerned, we think we fully elaborated  
6 our position in the reply document.

7 JUDGE ROSENTHAL: Well, all right.  
8 Restate it briefly and concisely.

9 JUDGE ROSENTHAL: Okay, all right. The  
10 criteria that are applied as far as the submission of  
11 the alternative decommissioning schedule is concerned,  
12 two of those criteria are identical to the staff's own  
13 discussion in the standard review plan entitled,  
14 "Licensee Requests to Extend the Time Period  
15 Established for Initiation of Decommission  
16 Activities," which is Adams ML-003691766.

17 JUDGE ROSENTHAL: How does that plan fit  
18 into the site characterization activities? Let's  
19 focus on that, just in --

20 MR. MULLETT: Okay, the --

21 JUDGE ROSENTHAL: -- what respect does it  
22 influence, one way or the other, the conduct of the  
23 site characterization issues which, down the road,  
24 will lead to the formulation of a decommissioning  
25 plan?

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1 MR. MULLETT: There are two specific ways,  
2 Your Honor. Number one, you have this issue of  
3 assuring the health and safety of the public during  
4 the pendency of this particular process.

5 JUDGE ROSENTHAL: That's a separate matter  
6 from site characterization, isn't it? Obviously, the  
7 public health and safety has to be protected, but what  
8 --

9 MR. MULLETT: But, it isn't --

10 JUDGE ROSENTHAL: -- your adversaries are  
11 claiming is that this has nothing to do with the issue  
12 that is specifically posed by the alternate site --  
13 the alternate schedule proposal. The alternate  
14 schedule proposal is addressed to characterizing this  
15 site.

16 JUDGE ABRAMSON: Let me pick this up for  
17 a minute, Judge Rosenthal.

18 JUDGE ROSENTHAL: Certainly.

19 JUDGE ABRAMSON: Mr. Mullett, what seems  
20 to me to be proposed here is that they get five years  
21 to try to figure out what's on the site and how  
22 they're going to decommission it, and the  
23 environmental radiation monitoring plan describes how  
24 you're monitoring the radiation coming off the site as  
25 it might affect the health and safety of the public.

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1 Can you describe a nexus between the activities they  
2 might have to conduct to characterize the site and how  
3 those activities might affect the radiation coming off  
4 the site, which I think would help us understand if  
5 there is a nexus?

6 MR. MULLETT: Well, I think that from our  
7 perspective, the nexus relates to the detection of the  
8 radiation coming off the site, the extent to which the  
9 Army and the staff have recognized, themselves, quite  
10 clearly in the documents, that there are deficiencies  
11 in that. That's what gave rise to this whole --

12 JUDGE ABRAMSON: So, you're addressing the  
13 existing -- I think it's 1999, did I hear correctly  
14 from the staff? -- the existing 1999 ERMP.

15 MR. MULLETT: Well, there is confusion  
16 about that in the record, Your Honor, and in terms of  
17 what SAIC said as recently as this --

18 JUDGE ABRAMSON: Okay. We understood  
19 that, but --

20 MR. MULLETT: Okay.

21 JUDGE ABRAMSON: -- what my -- what we're  
22 hearing from the staff now, and I think we can work on  
23 this premise going forward, what we're hearing from  
24 the staff is that the ERMP that is in existence, and  
25 this is a foundational for all of these -- all of our

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1 discussions, the ERMP that's in effect now is the '99  
2 plan, except to the extent it may be amended by what  
3 is being proposed to be adopted as a site  
4 characterization plan, field sampling plan. So, if  
5 the field sampling plan will propose -- will  
6 eventually include or currently proposed, currently  
7 including additional testing that gives additional  
8 information on radiation, then that information will  
9 also be available to assess the public health and  
10 safety for offsite releases.

11 MR. MULLETT: Well, Your Honor, again, as  
12 we said, SAIC said in a document they submitted that  
13 the last sampling they did was done pursuant to the  
14 2003 ERMP. That's in the record.

15 JUDGE ABRAMSON: I understand that.

16 MR. MULLETT: Okay. Now, the second point  
17 is that when you review in detail the FSP, what you  
18 see is that the modification of the 2003 ERMP, by  
19 name, is an integral component of the FSP. It's laid  
20 out there. It's a major work project within the FSP.

21 JUDGE ABRAMSON: Let's address that to Mr.  
22 Kopp. Mr. Kopp, in your application, why is there a  
23 reference to the 2003 ERMP as being modified, instead  
24 of to the '99, or is there some confusion between  
25 applicant and staff as to where we are?

1 MR. KOPP: I think there was confusion  
2 between the applicant and the staff as to where we  
3 were, and it was called to our attention that the  
4 staff that the 2003 environmental radiation monitoring  
5 plan had never really been adopted as an amendment to  
6 our license. They identified some deficiencies in it  
7 and we basically withdrew it and said, "Let's --"

8 JUDGE ABRAMSON: So, is this the reason  
9 that the appendix that was described has been  
10 admitted? I mean, I'm trying to understand what's --  
11 so, what is that -- let me put it another way. What's  
12 the applicant's response to the fact that the '03 plan  
13 doesn't exist and that what you should have been  
14 referencing in your application is the '99 plan? Is -  
15 - are you going to amend the application, or has it  
16 already been done, or what's the --

17 MR. KOPP: Only -- no, we're not going to  
18 amend the application, other than the fact that we  
19 have stated to the staff, and we state to you that  
20 we're going to proceed with additional sampling,  
21 additional site characterization, broaden the scope of  
22 the samples and the information we gather, as part of  
23 the field sampling plan, and that's why --

24 JUDGE ABRAMSON: What, if any, is the  
25 relationship of that to the ERMP?

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1 MR. KOPP: Well, it really has none,  
2 because 2003 was never implemented.

3 JUDGE ABRAMSON: And, how about the '99  
4 ERMP?

5 MR. KOPP: The '99 one is now in effect.  
6 It continues on.

7 JUDGE ABRAMSON: I understand that. But  
8 are -- does the FSP include any elements which  
9 supplement the -- let's take it in two pieces. Does  
10 the FSP include any elements which would supplement  
11 the information in the ERMP -- the information derived  
12 out of the ERMP so that we -- so that you can better  
13 assess what's being released offsite?

14 MR. KOPP: Yes. It will add the stream-  
15 gauging, it will add the characterization and  
16 monitoring of the water flow, and it adds the biota  
17 sampling. We've taken deer samples already and are --

18 JUDGE ABRAMSON: So, to that extent,  
19 you're going to have additional information which will  
20 supplement what you are already doing under your  
21 existing '99 plan.

22 MR. KOPP: Yes.

23 JUDGE ABRAMSON: And, are there any  
24 elements of the field sampling plan which would alter  
25 the testing being done by the ERMP?

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1 MR. KOPP: Well, all I can say, I guess,  
2 is that it could ultimately alter that, because as we  
3 carry on this process and discuss it with the staff,  
4 they may say, based on the new information we have, we  
5 think you ought to do this, and so --

6 JUDGE ABRAMSON: So, what I'm hearing, Mr.  
7 Mullett, from the applicant, is that the field  
8 sampling plan will provide additional data and may  
9 actually, in the end, modify the testing program that  
10 provides the information or that's the existing '99  
11 ERMP. Does that make sense to you? Is that  
12 consistent with what your view is, or are you arguing  
13 somehow that the ERMP, itself, as in existence, is  
14 flawed?

15 MR. MULLETT: Yes, abs --

16 JUDGE ABRAMSON: You're arguing the '99  
17 ERMP is flawed?

18 MR. MULLETT: Well, Your Honor, in terms  
19 of what's in the record at this point, and we had to  
20 respond to what's in the record, the sampling that the  
21 Army has been doing pursuant to the ERMP has been done  
22 pursuant to the 2003 ERMP, whether it was adopted or  
23 not. Secondly, everything that the Army has filed  
24 said that what they were going to be modifying was not  
25 the 1999 ERMP but the 2003 ERMP, and I can cite the --

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1 JUDGE ABRAMSON: We understand that. We  
2 can find that ourselves, thank you.

3 MR. MULLETT: Okay.

4 JUDGE COLE: Mr. Mullett, you're  
5 suggesting there are some deficiencies in the  
6 environmental radiation monitoring plan, whether it's  
7 '99 or 2003?

8 MR. MULLETT: That's correct, which are  
9 admitted by the Army and the staff at this point, Your  
10 Honor.

11 JUDGE COLE: Are you then suggesting that  
12 when those deficiencies, and if they exist, if they're  
13 corrected, that that would have a modification on the  
14 field sampling plan?

15 MR. MULLETT: Indeed, it would, Your  
16 Honor, and the field sampling plan precisely  
17 contemplates that. It expressly acknowledges that.  
18 It expressly acknowledges that and they've got this  
19 WBS, their so-called work breakdown structure, and one  
20 of the stated objectives of the JPG site  
21 characterization project is, "To provide the basis for  
22 modifying the current monitoring program within the  
23 next two to three years." The entirety of WBS section  
24 3.0 is ERM sampling with WBS tasks 3.1 to 3.10 being  
25 the semiannual ERM sampling to be performed in FY 2005

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1 and 2009.

2 JUDGE ABRAMSON: And so, to that extent --  
3 sorry, Dick. To that extent, your challenge, really,  
4 is focused on the FSP, not the ERM. The FSP -- ERM is  
5 a sort-of a secondary -- it's affected by the FSP.

6 MR. MULLETT: They're interactive, as  
7 they're described, and they should be. The problem is  
8 that, in terms of the 40.42(g)(2) filing, that what's  
9 being proposed will present no undue risk from  
10 radiation to the public health and safety. The  
11 concern that our experts have is that the ERMP is not  
12 being modified quickly enough or completely enough to  
13 address those risks, and, you know, the last set of  
14 results shows DU at the site boundary, which is  
15 something that the Army said couldn't happen.

16 JUDGE ABRAMSON: Fine, let's follow this  
17 up, because --

18 MR. MULLETT: Okay.

19 JUDGE ABRAMSON: -- you've got a '99 plan  
20 that's in existence. Let's forget the '03 plan for a  
21 moment, because we're hearing from everybody -- from  
22 the staff and the applicant that that's not in effect.  
23 The '99 plan is in existence. If you want to  
24 challenge the '99 plan, this is not the proper forum  
25 for that. What they're proposing is doing additional

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1 testing which will supplement what they're doing and  
2 result in an improved plan, and certainly, when that  
3 improved plan is submitted, there'll be an opportunity  
4 for you to challenge that. But, this is the wrong  
5 forum for you to challenge the existing plan. You can  
6 challenge the FSP, which is going to propose how to  
7 make changes to that. Is that correct, Judge  
8 Rosenthal?

9 JUDGE ROSENTHAL: Well, it seems to me,  
10 offhand, that again, looking at what's before us,  
11 which is not a decommissioning plan, it's simply a  
12 five year period during which site characterization  
13 activities will be conducted, which one hopes will  
14 produce a decommissioning plan that's adequate, in  
15 contrast to the decommissioning plans that surfaced  
16 some time ago. That being so, I have great difficulty  
17 in understanding why anything other than the field  
18 sampling plan, is of current relevance. I don't  
19 understand. Is the field sampling plan that is going  
20 to -- is designed to determine just what is the  
21 situation on that site so that, again, one hopes, a  
22 satisfactory decommissioning plan will surface in  
23 2011. To me, I don't understand how any of these,  
24 either the ERMP or the HASP, have any relevance to  
25 that. Now, if the environment -- if the ERMP has some

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1 kind of impact on the field sampling plan, if it makes  
2 it, in some way, defective, then you can attack the  
3 adequacy of the field sampling plan and refer to  
4 anything that you believe affects it's sufficiency,  
5 but independently, I'm frank to state that to this  
6 point, I remain unpersuaded that either of these other  
7 two plans have the requisite nexus, but I'm prepared  
8 to hear you further that.

9 MR. MULLETT: Okay. Well, let me outline  
10 it just briefly for you. You all are much more  
11 knowledgeable and experienced with this than we are,  
12 for sure. We are assuming that the findings required  
13 by 10 CFR 40.42(g)(2) are what ultimately control  
14 here, and that in particular, the issue with respect  
15 to the extent to which the plan presents no undue risk  
16 from radiation to the public health and safety, the  
17 extent to which it's otherwise in the public interest,  
18 that those two requirements do apply here. Now, from  
19 our perspective, the time frame that's involved here  
20 with respect to the interim monitoring that's being  
21 done, and whether or not that is adequate to assure  
22 that the public is being protected while this long  
23 process is taking place is quite relevant and  
24 material. When we read what the staff, itself, said  
25 in the SRP that I've cited from extensively with

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1 regard to how it interprets those two criteria, we  
2 believe that the staff has said in the past that --

3 JUDGE ROSENTHAL: Well, --

4 MR. MULLETT: -- that's relevant.

5 JUDGE ROSENTHAL: -- there's a reason for  
6 concern, obviously, as to whether during this five  
7 year period, the public health and safety is being  
8 protected, but I don't understand that to be the issue  
9 that we have before us at this point. The issue I  
10 thought that we had before us was simply whether the  
11 licensee, the Army, has come up with a satisfactory  
12 proposal for conducting the site characterization over  
13 the five years. Now, you may have a remedy apart from  
14 this proceeding if you have some question as to  
15 whether the staff is carrying out appropriately it's  
16 responsibility to ensure that while all of this is  
17 going on, the public health and safety is being  
18 protected, but I'm not clear, in my own mind, that  
19 that's within the bounds of this proceeding, given  
20 what we're dealing with, here, which is a proposal for  
21 an alternate schedule to allow five years to  
22 characterize this site sufficiently so that a  
23 decommissioning plan can be developed.

24 MR. MULLETT: Well, Your Honor, I --  
25 again, I don't want to belabor it. We don't want to

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1 criticize the staff from the standpoint -- the staff  
2 is -- has demonstrated it's sensitivity to the  
3 deficiencies as far as the ERMP is concerned. The  
4 extent to which there is this integral interplay  
5 between the evolution of the FSP and the evolution of  
6 the ERMP is eloquent evidence of that sensitivity.

7 JUDGE ROSENTHAL: Let me ask Mr. Wedewer  
8 a question, if I might. If Save the Valley has  
9 concerns with respect to how the public health and  
10 safety is being protected during this five year period  
11 while the Army's engaged in this site  
12 characterization, how do they -- how can they present  
13 that concern?

14 MR. WEDEWER: Well really, two ways come  
15 to mind, Your Honor, and not to be flippant, the first  
16 is, they just pick up the phone and call us and send  
17 us some -- and correspond with us to tell them that  
18 they have real concerns about how site monitoring is  
19 going on right now, and the people to call are sitting  
20 right behind me. That's why I brought them out here.  
21 And then, the second, more formal way, as Your Honors  
22 no doubt knows, the 2.206 petition, which can be  
23 filed, as well.

24 JUDGE ROSENTHAL: The famous 2.206.

25 MR. WEDEWER: Yes, sir.

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1 JUDGE ROSENTHAL: Would you like to tell  
2 me, Mr. Wedewer, how many of those petitions over the  
3 years have obtained any kind of relief? If there are  
4 more than I can count on the fingers of one hand, I  
5 would be very surprised.

6 MR. WEDEWER: I won't dispute that, Your  
7 Honor. Fair enough.

8 JUDGE ABRAMSON: Let me ask -- let me pick  
9 this up for a second. Mr. Kopp, I was -- did I hear  
10 you to say that -- well, I heard you to say you're  
11 looking for a restricted release.

12 MR. KOPP: Yes.

13 JUDGE ABRAMSON: And, does that mean that  
14 there will always be DU on this site?

15 MR. KOPP: If we can satisfy the NRC that  
16 it's safe to do so, we intend to leave it there.

17 JUDGE ABRAMSON: That's your intent. So,  
18 now -- that's the first question. The second question  
19 is, does any of the UXO -- is any of the UXO inside DU  
20 shells so that if they explode, DU would be dispersed?

21 MR. KOPP: The DU shells are not  
22 explosive, Your Honor. They are -- they're hard  
23 projectiles and their damage is done because they go  
24 through armor plating. They don't explode in and of  
25 themselves.

1 JUDGE ABRAMSON: So, what we're looking  
2 at, if I think about this site, is that we're looking  
3 at a site that has some unexploded ordnates that's  
4 totally unrelated to uranium.

5 MR. KOPP: Yes.

6 JUDGE ABRAMSON: And, there are some lumps  
7 of depleted uranium scattered through the whole site,  
8 or are they localized into an area that you can --

9 MR. KOPP: They're generally --

10 JUDGE ABRAMSON: -- put a fence around?

11 MR. KOPP: Well, they're localized, but  
12 it's a 2,000 area -- 2,000 acre localization.

13 JUDGE ABRAMSON: Two thousand acres out of  
14 --

15 MR. KOPP: Out of 51,000 acres.

16 JUDGE ABRAMSON: Okay. So, there's a  
17 finite area where the DU -- you're confident that the  
18 DU is confined.

19 MR. KOPP: Yes.

20 JUDGE ABRAMSON: So, when you talk about  
21 restricted release, you would be concerned in your  
22 restrictions about the UXO, right -- largely with the  
23 UXO, and you -- from our perspective, you need to  
24 monitor radiation all -- at the boundaries of the site  
25 to make sure that there's no undue radiation that were

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1 within the limits -- the boundaries for release of  
2 radiation from the DU.

3 MR. KOPP: If there was any indication  
4 that that should be done, yes, that would have to be  
5 done.

6 JUDGE ABRAMSON: But, that's the -- and,  
7 that would all be a result of the -- what those  
8 testing and radiation monitoring would be would be a  
9 result -- will result from the site characterization  
10 plan.

11 MR. KOPP: Yes.

12 JUDGE ABRAMSON: Have you and your  
13 technical people ever had a face-to-face discussion  
14 with the interveners and their -- with Save the Valley  
15 and their technical people about the plan?

16 MR. KOPP: I have not, but Mr. Cloud,  
17 here, informs me that there was a discussion several  
18 years ago.

19 JUDGE ABRAMSON: Is there any reason why  
20 you could not have such a discussion and report back  
21 to us about -- it seems to me, there's a failure of  
22 communication here between Save the Valley and what  
23 they think should happen in the testing plan and the  
24 way you're going about the plan. Is there any reason  
25 you could not have a discussion with them?

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1 MR. KOPP: We could discuss it, certainly.

2 JUDGE ABRAMSON: All right. That's all I  
3 have.

4 JUDGE COLE: Mr. Kopp, how long has SAC  
5 been working on the site?

6 MR. KOPP: Eleven years.

7 JUDGE COLE: Eleven years. And, is it the  
8 case that their activity has increased significantly  
9 in the recent past?

10 MR. KOPP: In the recent past, it has, and  
11 it results from the fact that I believe it was an Army  
12 geological survey team that came on the site and did  
13 some testing for other purposes and it caused us to  
14 rethink the possibility of doing a specific -- a site-  
15 specific characterization. If they could get on there  
16 and be careful and do some things, we could get on  
17 there and be careful and do some things. So, the  
18 activities with SAIC have increased as a result of the  
19 last -- of that over the last couple of years.

20 JUDGE COLE: Does SIC get involved in  
21 making recommendations to modify the environmental  
22 radiation monitoring plan?

23 MR. KOPP: Oh, yes.

24 JUDGE COLE: And, have they had increased  
25 activity in that area recently?

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1 MR. KOPP: Well, yes, in accordance with  
2 that field sampling plan. That was a joint effort of  
3 the Army and SAIC in conversation with NRC staff as to  
4 what they thought was necessary, which, to a certain  
5 extent, we are relying on the NRC's expertise in this  
6 matter, too.

7 JUDGE COLE: Okay. Will SIC be doing most  
8 of the work on the field characterization -- or, the  
9 site characterization?

10 MR. KOPP: We believe so. That's our  
11 intent, yes. They're under contract to do it through,  
12 I think, the end of this year. Obviously, because of  
13 the government restraints, we can't enter into a  
14 binding contract beyond a certain point, but we intend  
15 to keep hiring them as long as they're in business.

16 JUDGE COLE: All contractors like to have  
17 long contracts.

18 MR. KOPP: Right.

19 JUDGE ABRAMSON: Subject to the annual  
20 budget allocations.

21 MR. KOPP: Yes.

22 JUDGE ROSENTHAL: All right. On the  
23 matter --

24 MR. MULLETT: Your Honor?

25 JUDGE ROSENTHAL: Yes?

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1 MR. MULLETT: I had a second point with  
2 regard to nexus, as far as the ERMP was concerned. As  
3 you know, we offered, you know, with this confusion,  
4 as to the extent to which the 2003 ERMP was an  
5 unapproved amendment to the 1999, we offered an  
6 alternate set of contentions, pages 10 and 11 of our  
7 reply, because, certainly, we had the understanding  
8 that the Army was proceeding on 2003. At the point  
9 and time that the staff brought up this '99, we  
10 offered these alternate contentions, so I bring that  
11 to your attention.

12 The second thing I'd say is that from our  
13 perspective, the only basis for the EA is the results  
14 that are periodically reported as far as the ERMP is  
15 concerned, and in terms of the extent to which the --  
16 there are uncorrected deficiencies with respect to the  
17 ERMP as being implemented goes directly to the  
18 underlying basis for the EA.

19 JUDGE ROSENTHAL: Okay, thank you. Would  
20 you address briefly the point that Mr. Kopp made with  
21 respect to the financial qualifications? A point --  
22 he notes that this is the Army, it's a governmental  
23 institution, and that on the one hand, it can be  
24 generally assumed that a governmental institution will  
25 be provided with the funds necessary to carry out

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1 responsibilities that have been imposed upon it, but  
2 in any event, the way that budgets are formulated and  
3 approved, that the Army is in no position, now, to be  
4 dealing specifically with what monies will be at hand  
5 in a later point.

6 MR. MULLETT: Well, --

7 JUDGE ROSENTHAL: So, what is your  
8 response to that?

9 MR. MULLETT: The Army has created a straw  
10 man to knock it down. That's not what we allege. We  
11 are relying on the regulations. We're relying on what  
12 we understood the staff's prior interpretation to be  
13 with regard to the 40.42(g)(2) criteria. We're not  
14 asking them to do something that they can't do by law.  
15 We're not asking them to do more than what the  
16 regulations do. But, we do think that under the  
17 regulations, in terms of having a cost estimate,  
18 having a current cost estimate, that they have that  
19 obligation, and in terms of having a statement of  
20 intent on file that's fully compliant with the  
21 regulations, that they have that obligation.

22 JUDGE ABRAMSON: And, when would that  
23 obligation mature?

24 MR. MULLETT: Well --

25 JUDGE ABRAMSON: At the time they develop

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1 a plan, or while they're developing it?

2 MR. MULLETT: Well, it seems to us, Your  
3 Honor, that in terms of what the staff said in SRP  
4 that it is material with regard to making the  
5 40.42(g)(2) findings, that it would have to be  
6 satisfied at the point in time that the 40.42 (g)(2)  
7 findings were made.

8 JUDGE ROSENTHAL: Mr. Wedewer, what's your  
9 response to that?

10 MR. WEDEWER: Your Honor, it's the  
11 regulations that control, and I think the regulations  
12 clearly say that the statement of intent, or update to  
13 financial or decommissioning funding plan is due at  
14 the time the plan is produced, and it's the  
15 regulations that control.

16 JUDGE COLE: Well, how can the Army comply  
17 with that?

18 MR. WEDEWER: What the Army has done  
19 already, Your Honor, they provided, and just to refer  
20 back to our pleading in '98, when the decommissioning  
21 plan that was first proposed, they provided a  
22 statement of intent.

23 JUDGE COLE: Statement of intent?

24 MR. WEDEWER: That's correct.

25 JUDGE COLE: Okay.

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1 MR. WEDEWER: And then, that would become  
2 due to be updated when they submit the plan.

3 MR. MULLETT: Well, the Army submitted one  
4 -- another one on September 14, 2005, in response to  
5 a request from the staff, and again, if they -- if  
6 it's not relevant, why did they ask for it? The fact  
7 that the one got submitted doesn't comply. We think,  
8 you know, it's still relevant, here. We're not asking  
9 them to violate the statutes, the efficiency acts,  
10 we're not asking them to do anything other than comply  
11 with the rules, as the staff has previously explained.

12 JUDGE ABRAMSON: We understand.

13 MR. MULLETT: Okay.

14 JUDGE ABRAMSON: Mr. Mullett, I asked Mr.  
15 Kopp, earlier, whether he and his team would have any  
16 objection to meeting with your technical experts to  
17 discuss the field sampling plan. Is that something  
18 that you'd be willing to do?

19 MR. MULLETT: Sure.

20 JUDGE ABRAMSON: It seems to me that we've  
21 got an evolving plan, and I know we can't tell the  
22 staff how to do their job, but we certainly have  
23 authority to tell the parties, other than the staff,  
24 that it makes sense for them to meet and see if they  
25 can't resolve these issues and deal with the technical

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1 matters. It seems to me that most of what I saw in  
2 your complaint was technical matters about how the  
3 FSP's going to be conducted, and it would make sense  
4 for -- and, the Army's saying they've already adopted  
5 some of your suggestions. It would make some sense  
6 for the two parties, and if the staff wants to  
7 participate, that's at their election, but it makes  
8 some sense for the two parties to discuss that and see  
9 if they can't address some of these concerns rather  
10 than leave them for litigation before us.

11 JUDGE ROSENTHAL: Which brings us to the  
12 second area that we wanted to explore with the parties  
13 this morning, and that is the matter of the scheduling  
14 of further proceedings. Given the fact that the Army  
15 and, to some extent, the staff, has represented that  
16 the plans as included in the May 25 letter would be  
17 continuously updated throughout the course of the five  
18 year period, and this is something that I think has  
19 been stressed this morning, is there any utility in  
20 having an evidentiary hearing at this point in time?  
21 I'll break down a couple of questions, and then we'll  
22 go around and get the views of the respective counsel.

23 Would it be more efficient, for example,  
24 to have an evidentiary hearing at a future point in  
25 time, and if so, what time might that be? Has the

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1 Army or staff established any sort of milestone for  
2 the Army's submission of addenda or revisions to the  
3 existing plans? How will the staff be monitoring the  
4 Army's evolving plans? And, how will STV be kept  
5 informed of any plan revisions or addenda?

6 I might start with you, Mr. Wedewer, as  
7 the representative of the staff, as to what your  
8 thoughts are with respect to the scheduling with these  
9 specific questions at bottom.

10 MR. WEDEWER: Yes, Your Honor. I'm going  
11 to start with the last and kind of work my way back.  
12 First was on the addenda that the Army periodically  
13 submits. I'm not sure that STV has been getting all  
14 of that information, so what we propose to do and will  
15 do will just be to provide copies of all the addenda  
16 that the Army submits. We don't have their schedule  
17 for doing so, nor do we have a set of established  
18 milestones when they will submit those addenda, but  
19 when we do get them, we will provide those to STV.  
20 What we do have upcoming without a firm fixed date  
21 yet, but will be upcoming, will be a public meeting  
22 akin to the one we did in 2005, and that will be held  
23 at the headquarters, and I'm not sure of the date of  
24 that yet, simply because we haven't provided one.

25 JUDGE COLE: And, what's the purpose of

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1 that meeting, sir?

2 MR. WEDEWER: That is just for the Army,  
3 essentially, just to give us, the public, kind-of an  
4 update of where it is.

5 JUDGE ROSENTHAL: Oh, this is a meeting  
6 between the Army and the staff?

7 MR. WEDEWER: And, open to the public.  
8 Yes, Your Honor.

9 JUDGE ROSENTHAL: But, conducted, I  
10 assume, in Rockville?

11 MR. WEDEWER: Yes, Your Honor.

12 JUDGE ROSENTHAL: Uh-huh.

13 MR. WEDEWER: And then, to your last --  
14 excuse me, your first point which was about the  
15 evidentiary hearing, I think at this point, Your  
16 Honor, it would be probably best to do a tech  
17 exchange, first, perhaps to kind-of refine the issues  
18 before -- and hold an evidentiary hearing in advance  
19 to see if we can -- I say "we," really, the parties  
20 can narrow some of those issues --

21 JUDGE ROSENTHAL: So it's less a moving  
22 target.

23 MR. WEDEWER: Right, it's just less a  
24 moving target, because I think we have to -- it sounds  
25 to me that some of this has to be cut through, first,

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1 and then hold that in advance and decide on a later  
2 date.

3 JUDGE ROSENTHAL: Well, that's the way it  
4 really seemed to us. It didn't seem to us to make a  
5 lot of sense, let's say, in October, to hold an  
6 evidentiary hearing based upon the, let's say, field  
7 sampling plan as it then existed, to be told at the  
8 hearing, "Well, what you have before you now and what  
9 you are adjudicating is -- a month from now may look  
10 entirely different."

11 JUDGE COLE: Particularly, in view of the  
12 fact that the recent filings from the Army indicate  
13 that they're responding to a lot of the concerns of  
14 Save the Valley.

15 MR. WEDEWER: I think that the staff would  
16 agree with those comments, Your Honors.

17 JUDGE ROSENTHAL: Mr. Mullett, what's your  
18 thoughts on that?

19 MR. MULLETT: Your Honor, the dilemma that  
20 you've identified is one that we have discussed, and  
21 we would tend to subscribe to what's been said. We  
22 would probably add one caveat to that without,  
23 hopefully, giving too much offense, the extent to  
24 which the hearing is out there as an accountability  
25 mechanism, the extent to which Save the Valley does,

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1 in fact, have the opportunity to have these issues, at  
2 some point, adjudicated, we feel, has been crucial to  
3 the progress that has been made. The second thing,  
4 from a standpoint of irretrievable commitment of  
5 resources and that type of thing, you have the issue  
6 of their implementing this on the fly, if you will.  
7 It's not simply a planning process, it is an  
8 implementation process. So, the extent to which they  
9 are implementing on the fly what their latest plan is  
10 when some of those aspects are still subject to  
11 dispute, you then get into a situation where,  
12 conceivably, if you wait too long, then there is  
13 additional cost and expense, if there were some  
14 subsequent adjustment to be made in the process, but  
15 we don't have any Aladdin's lamp that we can rub and  
16 say, "Boom, put the hearing, you know, that month,"  
17 Your Honor.

18 JUDGE ABRAMSON: Well, let me ask you  
19 this, Mr. Mullett. Suppose that you meet with the  
20 applicant and the staff, if they feel inclined to join  
21 you, and discuss the technical issues that you've  
22 raised, which strike me as interesting and, perhaps,  
23 legitimate technical issues, and I think the Army has  
24 order to respond to some. You meet with them, report  
25 back to us, and tell us where you are, if you can

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1 jointly agree on what to say, fine, if you need to  
2 separate -- submit separate reports, or if you  
3 disagree on matters, maybe you can at least jointly  
4 tell us you disagree, and why you disagree. And, out  
5 of that will come some understanding of where the Army  
6 intends to go and what your problem is with where the  
7 Army intends to go, instead of focusing on a very  
8 preliminary plan. And, perhaps, that will lead to  
9 some periodic meetings over the -- or, some schedule  
10 of periodic meetings of how you're going to address  
11 things as they go forward, so you can be kept apprised  
12 of what's going on, staff's in the loop automatically,  
13 and maybe we can address some of this stuff so that  
14 things are not done on the fly, or obviously, things  
15 will need to be done on the fly, because as new  
16 information is developed, the plan will have to  
17 evolve. If you are in the loop as to what's being  
18 done -- and, the hearing, in my mind, isn't dismissed,  
19 you're simply reporting to us what's going on, as this  
20 evolves, the -- all parties will have an opportunity  
21 to deal with the evolution, which, I think, is what  
22 strikes me as what you'd like to see and I think it's  
23 in the interest of the agency to see that happen.

24 JUDGE ROSENTHAL: Mr. Kopp, do you have  
25 anything to say --

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1 MR. KOPP: I have nothing.

2 JUDGE ROSENTHAL: -- on this basic  
3 subject?

4 MR. KOPP: I agree. I think that there is  
5 a need for discussion. I think there are probably  
6 some grounds on which we can agree. I don't know how  
7 we can avoid, as Mr. Mullett characterized it,  
8 implementing this on the fly because new information's  
9 coming in and it's going to change, based on the new  
10 information.

11 JUDGE ABRAMSON: And, I think the question  
12 is going to be, at that point, do you simply submit an  
13 amendment to the staff and the staff says, "Fine," or,  
14 "Not fine," without Save the Valley having a look?  
15 Or, is it better to have Save the Valley in the loop  
16 as you're trying to figure out what to do? Save the  
17 Valley's technical people seem to have some useful  
18 insights into this, and I would encourage you to try  
19 to work on it.

20 JUDGE ROSENTHAL: I would just add, sort-  
21 of as a personal note, I've been living with the  
22 Jefferson Proving Ground site since I came back to the  
23 Nuclear Regulatory Commission in late 1999 and I went  
24 through the first decommissioning plan, then the  
25 revised decommissioning plan, and then the proposal

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1 for the possession-only license, and at this juncture,  
2 I mean, I'm speaking simply for myself, my hope is  
3 that when we get to 2011, there will be a  
4 decommissioning plan that will satisfy the staff and  
5 will satisfy the community here with the consequence  
6 that this long, drawn-out proceeding can come to an  
7 end, and I'm sure that that's a sentiment which is  
8 shared by everyone in this room. So, I mean, from my  
9 standpoint, I mean, I heartily endorse the suggestion  
10 of my colleague, Judge Abramson, that, to the extent  
11 possible, that people get together and that this be --  
12 still may have an adjudication down the road, there  
13 still may be disputed issues, we still may have  
14 witnesses before us, and we still may have to render  
15 a decision, but I think we all have the same objective  
16 here, and to the extent that this can be worked out  
17 through collaboration, all to the better.

18 We have one remaining issue, which is  
19 this: As you know, under the Commission's rules of  
20 practice, with respect to any contention, the ticket  
21 of admission is one basis that complies with the  
22 requirements of the rules of practice, and in our  
23 decision last February, in granting Save the Valley's  
24 hearing request, we found on the contention addressed  
25 to the field sampling plan, at least one basis that

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1 provided the ticket of admission of that contention.  
2 Now, without getting into, at this point, what  
3 contentions -- other contentions we might or might not  
4 ultimately find admissible, because, supported by at  
5 least the one basis, under the Commission's  
6 regulations is sufficient for admission, the question  
7 that we have is whether it is necessary at this stage  
8 to determine, with regard to a contention that has  
9 been admitted, whether other bases are or are not  
10 admissible as relevant, et cetera, or whether that can  
11 be left to the ultimate adjudication of the  
12 contention. For example, we might have a contention  
13 where we have found one basis is clearly admissible.  
14 There are a number of other bases that have been  
15 assigned, and there is a dispute between the parties  
16 as to whether those bases are germane -- might go to  
17 whether they are in or out of the scope of the  
18 proceeding or otherwise.

19 Is that something that has to be  
20 determined in advance of the hearing, or  
21 alternatively, can those other bases assumed --  
22 assuming that they're still in the picture, be  
23 evaluated at the time of the evidentiary hearing? In  
24 other words, if Save the Valley, for example, came up  
25 with a witness that wanted to address a particular

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1 bases, would it then be time for the Army and/or the  
2 staff to say, "Wait a minute, we object to that  
3 witness' testimony on the ground that we do not think  
4 for reason A or reason B that it's relevant to the  
5 proceeding."

6 JUDGE ABRAMSON: And, how much will all of  
7 that be affected by the fact that it's an evolving  
8 plan and that the parties are going to sit down,  
9 initially, and hopefully, periodically, and figure out  
10 what's going on, bearing in mind that as the plan  
11 evolves and new information comes available every time  
12 that happens, the Save the Valley has an opportunity  
13 to enter new contentions on the basis of the new  
14 information. So, do you want to keep -- do we want to  
15 litigate now or do we want to let this develop and see  
16 where it's going before we ultimately get to  
17 litigation?

18 MR. KOPP: Your Honors, I think it would  
19 make more sense to do as you suggested, let it develop  
20 more. The only drawback I would see to that would be  
21 possibly having a witness appear that didn't need to  
22 appear because the objection would be granted. I  
23 don't know how you can do away with that. I mean,  
24 that's a risk every lawyer runs that brings a witness  
25 to court.

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1 JUDGE ROSENTHAL: That frequently is the  
2 case. I mean, if you look at most forms of  
3 adjudication, there isn't a determination in advance  
4 as to what's admissible and what isn't admissible. A  
5 witness gets on the stand and opposing counsel says,  
6 "Wait a minute, I don't think his or her testimony is  
7 relevant for X, Y, and Z reasons," and then the -- on  
8 the spot, the adjudicators rule.

9 MR. KOPP: I agree.

10 JUDGE ROSENTHAL: But this is, again, it  
11 seems to me, somebody, and it may have been Mr.  
12 Mullett, suggested in his opening remarks, that this  
13 is a rather sui generis proceeding and I would have to  
14 endorse that. I mean, I've been, as has Judge Cole,  
15 been around this agency for a long time. His has been  
16 unbroken service, mine was broken for a few years, but  
17 I've never encountered, and I think Judge Cole hasn't  
18 either, --

19 JUDGE COLE: Thirty-three years.

20 JUDGE ROSENTHAL: -- anything that has  
21 resembled this, and so that many of the rules -- I  
22 mean, this is a quite different proceeding, where a  
23 plant is being licensed for operation, and right  
24 there, I mean, here you've got something completely  
25 different, you've got something -- a five year period

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1 is being sought to -- at the end of which, something  
2 is going to be produced, and everybody has agreed that  
3 this is an evolving process.

4 JUDGE ABRAMSON: Mr. Mullett, any  
5 thoughts?

6 MR. MULLETT: Your Honor, I think that in  
7 terms of the process that you're outlining, I think  
8 that would be a type of process that STV would be very  
9 much interested in. I think the concern that we would  
10 have would be this issue of, you know, to what extent  
11 are you involved in this technical process, this  
12 quasi-settlement process? to what extent is the  
13 litigation process also going on simultaneously? To  
14 what extent do we then, you know, have a continuing  
15 obligation to deal with each of these addenda in terms  
16 of updating the contentions in order to be timely with  
17 regard to 2.309 and the extent to which that involves  
18 substantial resources on our time.

19 JUDGE ROSENTHAL: Well, let me put up a  
20 concrete proposal -- I guess we haven't heard from you  
21 Mr. Wedewer, but -- on this, but let me put up and see  
22 how this -- supposing that this Board were, at this  
23 point, to determine which of your contentions were in,  
24 in other words, we would be deciding these nexus  
25 issues and saying these are the plans -- these are the

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1 issues that are in, letting it go at that, then you  
2 know, at least, what we determine to be within the  
3 scope of the proceeding, hold off, then, doing  
4 anything further for a while to see how things evolve,  
5 receiving periodic status reports from Save the  
6 Valley, the Army, and the staff if it wishes to submit  
7 them, as to where things stand in terms of the  
8 evolution of the site characterization activity  
9 planning and what's going on between the parties. So,  
10 what you would be told at this point would simply be  
11 a -- what contentions the Board decides falls within  
12 the scope of the proceeding. Now, I offer that as a  
13 possibility. I'd like to get -- we'll start with Mr.  
14 Wedewer.

15 JUDGE ABRAMSON: You don't want reaction  
16 from your colleagues, do you?

17 JUDGE ROSENTHAL: No, I don't -- my  
18 colleagues, I know, are delighted with this. Well, I  
19 can assure you that if my colleagues have a problem  
20 with that, they will speak up. There's no blushing  
21 violets on this Board. So, how would that -- Mr.  
22 Wedewer, how would that strike you?

23 MR. WEDEWER: Your Honor, staff would  
24 agree with that approach, and we would also just throw  
25 out that at some point, we would also have to decide

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1 our mandatory disclosure obligations. I'm not sure  
2 where that fits into this mix, but I just make note of  
3 that for the board.

4 JUDGE ROSENTHAL: Okay. Now, you know, in  
5 this negotiations that are going on, or the  
6 discussions, again, as we are -- has been stressed, we  
7 can't tell the staff how to do it's business, so it's  
8 up to the staff to decide to the extent to which it  
9 wants to involve itself. I mean, I think the staff  
10 would find this helpful, but that's your call, not  
11 ours.

12 MR. WEDEWER: Yes, sir.

13 JUDGE ROSENTHAL: Mr. Mullett, how does  
14 that strike you?

15 MR. MULLETT: If this would a suitable  
16 opportunity for a brief break, give us an opportunity  
17 to hit the bathroom and also, perhaps, for Mr. Bill  
18 (phonetic spelling) and I to confer a little bit, I  
19 would be interested in that. If not, I can --

20 JUDGE ROSENTHAL: No, if you'd like a  
21 recess, we can take a 10 minute recess.

22 JUDGE ABRAMSON: Let me just, before we  
23 take a recess, make one suggestion or supplement to  
24 what Judge Rosenthal is suggesting, and that is that  
25 we would like to see -- I would like to see, and I

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1 will talk with my colleagues about the proposition,  
2 that the two parties, Save the Valley and the Army,  
3 meet soon, discuss technical merits, level -- the  
4 issues that Save the Valley is raising and the issues  
5 that the Army's -- and the Army's response to them,  
6 report back to us how you see the issues, and see if,  
7 between the two of you, you could develop some plan  
8 for periodic meeting and update, and how you're going  
9 to continue to inform each other -- how the Army's  
10 going to inform you of what it's suggesting or what  
11 it's learning, and how you're going to -- what your  
12 reaction is to that and whether or not you can go  
13 along with it or not, and out of that process may, in  
14 fact, come some irreconcilable differences that would  
15 have to be dealt with, and that those might be dealt  
16 with at the time they arise or -- and, that's  
17 something else I'd like you to think about.

18 MR. MULLETT: And, the one question that's  
19 in my mind that's not 100 percent clear from what  
20 you've said, I'm not sure even that you necessarily  
21 have the authority to the extent of which you would  
22 make certain determinations at this point, which STV  
23 would have to then evaluate whether or not, you know,  
24 is it prepared to accept those determinations or --

25 JUDGE ABRAMSON: Or appeal?

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1 MR. MULLETT: -- the extent to which  
2 there's then that appeal process, the extent to which  
3 there are timelines and all of that.

4 JUDGE ROSENTHAL: Well, that -- anything  
5 we decide at this point, I think, is an interlocutory  
6 order. I'm not sure -- I haven't studied the recent  
7 revision of the Commission's rules, so I don't know  
8 whether you would have any appellant rights, but  
9 certainly, any appellant rights that you would have at  
10 any point would be preserved. So, --

11 MR. MULLETT: That would be the question,  
12 whether or not we'd have to exercise them --

13 JUDGE ROSENTHAL: Yeah, but I think that  
14 there would be no problem on that.

15 MR. MULLETT: And, I think, again, we'll  
16 have to talk about this, but from our perspective, in  
17 terms, I understand the questions and concerns about  
18 nexus, but in terms of the ERMP and the HASP, you  
19 know, from our perspective, those are really, you  
20 know, pretty gut-level issues.

21 JUDGE ABRAMSON: Well, you may find --

22 JUDGE ROSENTHAL: I understand that, but  
23 even if we were to determine -- I don't know whether  
24 we'll do so -- that the ERMP is outside the scope of  
25 this proceeding, you have concerns about that plan

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1 from the standpoint, as you indicated, of the  
2 protection of the public health and safety. I'm sure  
3 that whether or not that ends up in litigation, the  
4 Army is a responsible body, the staff is also a  
5 responsible body with concerns about, obviously -- I  
6 mean, the protection of the public health and safety  
7 is what the staff is about, and I think Mr. Wedewer  
8 indicated that the staff would be happy at any point  
9 to discuss with Save the Valley any concerns that it  
10 might have about the adequacy of that plan, whether  
11 that plan is determined by us to be in or out of this  
12 particular proceeding.

13 JUDGE ABRAMSON: And, in fact, it might  
14 make sense for us not to issue any ruling until after  
15 you've all had your first meeting and reported back to  
16 us.

17 JUDGE ROSENTHAL: I think that's possible.  
18 We might hold that off.

19 JUDGE ABRAMSON: So, you can report back  
20 to us and tell us where you are on these things, and  
21 these are things you could discuss, what elements of  
22 which plan really should be thought about and what  
23 should not. So, --

24 JUDGE ROSENTHAL: If you feel the need to  
25 discuss this with --

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1 MR. MULLETT: I would like the  
2 opportunity. I would also like the opportunity to hit  
3 the restrooms.

4 JUDGE ROSENTHAL: Okay. Well, lets take  
5 a 10 minute recess and be back then.

6 (Off the record.)

7 JUDGE ROSENTHAL: Mr. Mullett, have you  
8 consulted with your client?

9 MR. MULLETT: I have, Your Honor, and I  
10 think that if I can generically characterize what's  
11 being proposed as a technical conference process, in  
12 lieu of litigation, at least for the time being, in  
13 terms of that general approach, I think that's  
14 something that my client would very much endorse. I  
15 think that from STV's perspective, in certain  
16 respects, you know, there are -- there is the  
17 possibility of the devil lurking in certain details.  
18 I think that from our perspective, given our  
19 experience with similar processes and other for --  
20 that certainly, in terms of maintaining the status quo  
21 ante as far as, you know, litigation rights and so on,  
22 that's key so that the technical conference process  
23 doesn't foreclose or prejudice one party or another  
24 with regard to their litigation rights. I think  
25 that's a consideration.

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1 I think, secondly, in terms of sort-of  
2 avoiding resource depletion, as far as litigation  
3 during the pendency of the process, that's important.  
4 In terms of having some sort of agenda and schedule,  
5 you know, we see that being important, particularly as  
6 it would relate to these periodic updates, addenda, or  
7 whatever.

8 JUDGE ROSENTHAL: Well, we would  
9 certainly, in that score, monitor this. I mean,  
10 obviously, unless we are persuaded that progress is  
11 being made in terms of endeavoring to obtain agreement  
12 on these matters by narrowing the issues, we are  
13 certainly not going to allow this proceeding to go on  
14 indefinitely. As I indicated before, I have lived  
15 with this, now, for six and a half years and I'm not  
16 particularly interested in being with it any longer  
17 than I have to, and now what I think we have in mind  
18 would be to issue an order at this point calling upon  
19 the Army and Save the Valley, 60 days to render either  
20 a joint report or separate reports, depending upon how  
21 things go. The staff can either do nothing, buy on to  
22 that report, or furnish a report of it's own.

23 JUDGE ABRAMSON: And, you could sit in on  
24 the meetings or --

25 JUDGE ROSENTHAL: Well, again, it's -- as

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1 I said before, the staff's involvement in all of this  
2 is going to be the staff's call. When we get that  
3 report in 60 days, so that we would be talking about  
4 the middle of September, we'll then see how things  
5 stand and -- I mean, as far as we're concerned, this  
6 is a fluid process. It's a fluid process for us in  
7 terms of how things move forward. Our objective,  
8 obviously, is the same as the objective of everybody  
9 else, and that is to -- when 2011 arrives, there is a  
10 --

11 JUDGE COLE: Or, before.

12 JUDGE ROSENTHAL: -- Or, before, there is  
13 a decommissioning plan on the table that, in the  
14 vernacular, will cut the mustard and our additional  
15 objective is to keep to the -- reduce to a minimum,  
16 the amount of litigation that has to go on. There may  
17 well have to be some, but we're hopeful that to a  
18 large extent, through this process of meetings, a  
19 recognition of the fluidity of the site  
20 characterization activities, that it be kept to a low  
21 amount.

22 MR. MULLETT: If I could just add two  
23 specific points that are of particular concern to Save  
24 the Valley, Your Honor, the first is, could we  
25 understand "meeting" to include teleconference?

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1 Certainly, in terms of logistics, having the ability  
2 to do that will save a lot in travel and provide --

3 JUDGE ROSENTHAL: Well, you work that out  
4 --

5 MR. MULLETT: Okay, and then --

6 JUDGE ROSENTHAL: -- with the parties.

7 MR. MULLETT: -- secondly, --

8 JUDGE ROSENTHAL: I mean, that's -- that  
9 kind of micromanaging, I don't think we'll do, but I'm  
10 sure that that can be worked out.

11 JUDGE ABRAMSON: Let me just add one  
12 caveat to that. I -- before I came to work for the  
13 government, I was in private practice for many years.  
14 My practice was doing deals, as you can tell from the  
15 suggestions I've been making, and what I would suggest  
16 is that, at least initially, you guys try your best to  
17 meet face to face. Things get much more easily  
18 resolved if you're sitting in the same room with  
19 folks. After that, it's up to you, but my suggestion,  
20 my strong suggestion, would be that you try to meet  
21 face to face initially and from there, you can see how  
22 it works.

23 JUDGE ROSENTHAL: I might note that I  
24 think there was -- it may have been Mr. Mullett who  
25 made reference to the two members of the -- this Board

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1 that have "Doctor" before their names. Well, as you  
2 just heard, Judge Abramson is a hybrid.

3 JUDGE ABRAMSON: Half-breed.

4 JUDGE ROSENTHAL: He's both a lawyer who  
5 practiced and also has a doctorate in a technical  
6 discipline. So, he sort-of is on both sides of that -  
7 -

8 MR. MULLETT: The second point, if I may,  
9 --

10 JUDGE ROSENTHAL: Sure.

11 MR. MULLETT: -- is on this -- again,  
12 technical conference processes that I participate in  
13 other forums, in terms of essentially having what's  
14 known as informal discovery, informal exchange of  
15 information, where the technicians just go back and  
16 forth, then, with the understanding that anything  
17 that's provided in that process that would not be  
18 subsequently, if you did go back to litigation, that  
19 wasn't subsequently provided, you know, through the  
20 mandatory disclosure or the formal discovery process,  
21 would not be admissible or usable or whatever. That's  
22 typically what we've been involved with in the past.  
23 So, you wouldn't have to make, you know, the formal,  
24 mandatory disclosures, define the scope of the  
25 mandatory disclosures, in order to permit the process

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1 to go forward, at least for some period of time.

2 JUDGE ROSENTHAL: Well, --

3 JUDGE ABRAMSON: I know my reaction is  
4 that our process, the agency's process, and maybe  
5 counsel for staff can speak to this better than I, you  
6 have a lot more experience with it, but we have a --  
7 under our new regulations, mandatory disclosure, so I  
8 don't think you are in a position where you can not  
9 disclose something, but at the same time, we're  
10 talking about having your tech folks, who make  
11 rational technical suggestions about what -- how this  
12 ought to proceed, sit down with SAIC and the Army, and  
13 talk about technical matters, and I'm not sure I  
14 understand what's at issue on the disclosure side,  
15 there.

16 MR. MULLETT: Well, I think the issue is  
17 simply one of the extent to which the mandatory  
18 disclosure obligation has been deferred, if you will,  
19 and the extent to which, if it continued to be  
20 deferred, then you would just have that informal  
21 exchange, whereas, if you're going to have mandatory  
22 disclosure, then presumably, you're going to have some  
23 litigated determination with regard to the scope of  
24 the proceeding and so on.

25 JUDGE ROSENTHAL: Well, we have, in

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1 suspension, do we not, the --

2 MS. WOLF: We suspended mandatory  
3 disclosure in our first order, in 06/06, we --

4 JUDGE ROSENTHAL: Mr. Wedewer, do you have  
5 any thoughts on what Mr. Mullett just --

6 MR. WEDEWER: I don't have much to add at  
7 this point, Your Honor, other than, you know, our  
8 concern would be just that agency positions, or things  
9 that we said in the process, in these technical  
10 exchanges, which we would participate in, would be  
11 later on used against us.

12 JUDGE ROSENTHAL: Okay, I think we  
13 understand that concern. Is there anything further?

14 JUDGE ABRAMSON: I mean, if you wanted to  
15 view these as settlement discussions, you know, you  
16 can treat everything as confidential, in settlement.  
17 I mean, that's a question of how you want to proceed.  
18 For example, if you come back to us and say you'd like  
19 us to appoint somebody to -- a settlement judge to sit  
20 with you, we'd be happy to do that, in which case you  
21 could view everything as confidential settlement  
22 discussions. That's up to you.

23 MR. WEDEWER: Your Honors, if I may, I  
24 have just one final brief point on behalf of the  
25 staff, it's that just while, as I mentioned, we do

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1 think these discussions will be valuable and we will  
2 participate in -- to the extent that the Board can  
3 rule on some of the contentions right now, we think  
4 would make, perhaps, this process more efficient and  
5 would help narrow the issues in front of the parties.

6 JUDGE ABRAMSON: Well, we'll wait to see  
7 what the first report --

8 JUDGE ROSENTHAL: Yeah, I think we'll wait  
9 until the first report, and then, at that point, we'll  
10 see where things stand, and we might well decide for  
11 the reasons that you've just suggested that that's the  
12 time to then rule on the contentions, but I think it  
13 would be desirable for this first 60 day period to  
14 leave everything open and then we'll see where things  
15 stand once we get the status reports, which I say will  
16 be mid-September. So, we'll enter a -- within the  
17 next couple of days, a very brief order which will not  
18 go through all that's been discussed this morning but  
19 will just indicate that the parties are being called  
20 upon to engage in informal discussions over the course  
21 of the next 60 days and that at the end of which we  
22 will expect the status report or reports, as the case  
23 may be.

24 JUDGE ABRAMSON: And, you might have a  
25 preliminary discussion among yourselves, lawyer to

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1 lawyer, about whether you want to treat this as a  
2 settlement process so that you'd get the benefit of  
3 confidentiality of discussions and non-use against  
4 you, whatever the right phrase of that is. I don't  
5 know whether that can happen in discussions without  
6 treating it as a settlement discussion, but you could  
7 certainly notify us that you're treating in a  
8 settlement discussions and you've agreed among  
9 yourselves as to that effect without a -- us having to  
10 appoint a formal settlement judge to sit with you.

11 JUDGE ROSENTHAL: Okay. Anything further?

12 MR. KOPP: No, Your Honor.

13 MR. MULLETT: No.

14 MR. WEDEWER: No, Your Honor.

15 JUDGE ROSENTHAL: Well, on behalf of the  
16 entire Board, I would like to express my -- our  
17 appreciation to all participating counsel. I think  
18 that this has been a worthwhile discussion and we  
19 certainly hope that it produces fruitful results. So,  
20 with that, the conference is concluded.

21 (Whereupon, at 11:00 o'clock a.m., the  
22 c o n f e r e n c e w a s c o n c l u d e d . )  
23  
24  
25

CERTIFICATE

This is to certify that the attached proceedings  
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in the matter of:

Name of Proceeding: U.S. Army JPG Site


Oral Arguments

Docket Number: 40-8838-MLA;

ASLBP No. 00-776-04 MLA

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