

October 1, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
U.S. ARMY INSTALLATION COMMAND	)	Docket No. 40-9083
	)	
(Depleted Uranium at Pohakuloa Training	)	
Area & Schofield Barracks, Hawai'i)	)	

NRC STAFF'S RESPONSE TO SIERRA CLUB'S
MOTION FOR EXTENSION OF TIME TO FILE COMMENTS,
A REQUEST FOR HEARING AND PETITION FOR INTERVENTION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.232(c), the NRC staff ("Staff") hereby responds to the motion for extension of time to file comments, a request for hearing and petition for intervention ("Motion") tendered by Ms. Cory Harden on behalf of the Moku Loa Group of the Sierra Club ("Sierra Club").¹ For the reasons set forth below, the Motion should be denied in so far as it requests an extension of time until 60 days after certain documents are made publicly available. The Staff, however, does not oppose a two week extension of time, until October 27, 2009, for the Sierra Club to file a request for hearing or petition for intervention.

DISCUSSION

The U.S. Army Installation Command submitted to the NRC a license application ("Application") (ADAMS Accession No. ML090070095) requesting authorization to possess depleted uranium at two sites in Hawaii, Schofield Barracks on Oahu and Pohakuloa Training

¹ The Motion is enclosed as Attachment 1. By email dated September 27, 2009 (Attachment 2), Mr. Jim Albertini requested an extension of time for the same reasons as expressed in the Motion. Mr. Albertini's request is identical to that of the Sierra Club. The Staff does not oppose a two week extension of time for Mr. Albertini to file a request for hearing or petition for intervention.

Area on the Big Island of Hawaii. On August 13, 2009, a notice of opportunity to request a hearing or petition for intervention was published in the Federal Register, setting the deadline for such as October 13, 2009.² In its Motion, the Sierra Club requests that the deadline for filing comments and for filing a request for hearing and petition for intervention be stayed until 60 days after three specified reports are made publicly-available on ADAMS.³ The reports are listed by the Sierra Club as the “Archives Search Report,” the “Pohakuloa Characterization Report” and the “Pohakuloa Human Health Risk Assessment.”⁴ According to the Sierra Club, because these reports are not publicly available in ADAMS, “the public cannot incorporate information from the reports into decisions on whether to file for hearing...”⁵

The specified reports are not part of the Application.⁶ Based on information available to the Staff, the first report, the “Archives Search Report,” exists; however, the report was not received as part of the Application, nor is it currently in the possession of the NRC.⁷ While the Staff is in possession the second report, the “Pohakuloa Characterization Report,” this report was not received by the NRC as part of the Application.⁸ The Staff understands that with respect to the third report, the “Pohakuloa Human Health Risk Assessment,” the Army Installation Command does not intend to prepare such a report and, as such, the report is

² Notice of License Application Request of U.S. Army Installation Command for Schofield Barracks, Oahu, HI and Pohakuloa Training Area, Island of Hawaii, HI; and Notice of Opportunity for Hearing, 74 Fed. Reg. 40,855 (Aug. 13, 2009).

³ Motion at 2.

⁴ *Id.*

⁵ *Id.*

⁶ Affidavit of John Hayes Executed on September 30, 2009 (Attachment 3).

⁷ *Id.*

⁸ *Id.* at 1-2.

not, nor will be, in existence.⁹

The Staff submits that the Sierra Club should not be granted an indefinite period of time to file its hearing request or petition for intervention until the documents it seeks become available to it. The Commission's adjudicatory procedures require that any person "who desires to participate as a party must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing."¹⁰ Contentions must be "based on documents or other information available at the time the petition is to be filed..."¹¹ Therefore, the fact that the Sierra Club does not have access to the specified reports does not constitute a cognizable impediment to the filing of a request for hearing or petition for intervention pursuant to the Commission's adjudicatory procedures.¹² Furthermore, as two of the specified reports are not in the possession of the NRC and one of those reports does not exist, there is no way to know how long a deadline would need to be stayed. Thus, to the extent that the Motion seeks an extension of time following the public availability of certain documents, it should be denied.¹³

The Staff, however, does not oppose a two week extension of time, until October 27, 2009, for the Sierra Club to file a request for hearing or petition for intervention.

⁹ *Id.* at 2.

¹⁰ 10 C.F.R. § 2.309(a).

¹¹ *Id.* at § 2.309(f)(2).

¹² The Sierra Club, however, could be able to demonstrate the timeliness of a request for hearing or petition for intervention after the deadline for such has passed, if the specified reports, when made available, contain new information materially different from that previously available to the public and other required showings are made. *See id.*

¹³ The Federal Register notice of an opportunity for hearing did not establish a deadline for filing comments to the NRC. *See* Notice of Opportunity for Hearing, 74 Fed. Reg. at 40,855. In fact, comments will be accepted at any time and may be addressed to John Hayes, Project Manager, at John.Hayes@nrc.gov.

Executed in Accord with 10 CFR 2.304(d)

Brett Michael Patrick Klukan
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-3629
Brett.Klukan@nrc.gov

Dated at Rockville, Maryland
this 1st day of October, 2009

Attachment 1

From: Cory (Martha) Harden [mh@interpac.net]
Sent: Tuesday, September 22, 2009 2:35 PM
To: Docket, Hearing
Subject: extend due date for docket # 40-9083

To NRC Office of the Secretary,

We are requesting extension of the due date for docket # 40-9083 . Please see messages below.

Thank you,

Cory Harden
Sierra Club, Moku Loa group
Box 1137
Hilo, Hawai'i 96721
808 968 8965
mh@interpac.net

----- Original Message -----

From: [Hayes, John](#)
To: [Cory \(Martha\) Harden](#)
Cc: [Jim Albertini](#)
Sent: Tuesday, September 22, 2009 8:53 AM
Subject: RE: request extending due date

Ms. Harden,

Thank you for your email of last week. A request for an extension to the date for filing a request for hearing needs to be submitted to the NRC's Office of the Secretary. That address is listed in the August 13, 2009 Federal Register Notice (FRN) on the proposed action involving the Army. A copy of the FRN is attached. I have no authority regarding such an extension.

Regards,

Jack

From: Cory (Martha) Harden [mailto:mh@interpac.net]
Sent: Friday, September 18, 2009 4:43 PM
To: Hayes, John
Subject: request extending due date

MEMO

TO Jack Hayes, Project Manager for Depleted Uranium (DU) in Hawai'i, Nuclear Regulatory Commission (NRC)

FROM Cory Harden, Sierra Club, Moku Loa group

Jack Hayes,

We are writing to request that you extend the October 13 due date for filing for hearing, and submitting comments, on the Army license for depleted uranium (DU) in Hawai'i.

We ask for a due date of 60 days after these reports appear on ADAMS (Agency-Wide Document Access System on NRC's website)

Archives Search Report (ASR)

Pohakuloa Characterization Report

Pohakuloa Human Health Risk Assessment, or official document stating it will not be done and why

These reports are not on ADAMS yet, so the public cannot incorporate information from the reports into decisions on whether to file for hearing, and into comments which would help ensure that all relevant issues are considered.

Earlier, you e-mailed that the ASR will be available on the Army DU website. But we feel it should be on ADAMS because-

in nine months, the Army has not fulfilled a Sierra Club Freedom of Information Act (FOIA) Request for the ASR, though we followed up several times with the Army and U.S. Representative Mazie Hirono.

the ASR seems to provides a basis for assumptions in later reports (scoping, characterization, and human health risk assessment) about when, where and how the DU spotting rounds were used

Thank you for considering our request.

Cory Harden
Sierra Club, Moku Loa group
PO Box 1137
Hilo, Hawaii 96721
808-968-8965 mh@interpac.net

Attachment 2

From: Jim Albertini [mailto:JA@interpac.net]
Sent: Sunday, September 27, 2009 3:13 PM
To: Hayes, John
Cc: Cory (Martha) Harden; Hearing.docket@NRC.Gov
Subject: Re: request extending due date

Mr. Hayes and Mr. NRC Secretary.

I am a citizen trying to protect the public health and safety of the people of Hawaii from U.S. military radiation contamination.

I am on record requesting a similar extension as Ms. Harden for the reasons she states below.

I re-read the Federal registry notice. Your legaleese is stacked against citizen involvement. I am a farmer in the rainforest of Hawaii with no access to high speed internet that is necessary to access documents (currently not available at all) and file for electronic hearings. Your system does not provide for equal access to justice under the law, yet we the citizens are paying for this ridiculous electronic system to be used against us. Shame on you for being a party to such injustice.

Jim Albertini, president

Malu 'Aina Center for Non-violent Education & Action

P.O.Box AB

Kurtistown, Hawai'i 96760

phone: 808-966-7622

email: JA@interpac.net

Visit us on the web at: www.malu-aina.org

Attachment 3

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AFFIDAVIT OF JOHN HAYES

I, John Hayes, do hereby state as follows:

1. I am employed as a Senior Project Manager in the Materials Decommissioning Branch in the Nuclear Regulatory Commission's ("NRC") Office of Federal and State Materials and Environmental Management Programs. I serve as the Project Manager responsible for the review of the U. S. Department of the Army's request for a possession-only license for depleted uranium at the Schofield Barracks and the Pohakuloa Training Area sites.
2. Archives Search Report (ASR) – I was previously told by a representative of the Army that such a document was to appear on the Army website, <http://www.imcom.pac.army.mil/du/Reports.htm>. As of October 1, 2009, this document is not on the Army's website and the NRC has not received such document. The report is not part of the license application.
3. Pohakuloa Characterization Report - noted as the Technical Memorandum for Pohakuloa Training Area (PTA) Aerial Surveys , The Big Island (Hawaii), Hawaii, July 24, 2009. This report was provided to the NRC during the week of August 24, 2009. Problems arose with placing this document in ADAMS. The Army's CD did not include any of the Appendices'

information. The staff is addressing this issue. While this report is not part of the license application, it is likely that we will utilize the information in the report in our review of the application.

4. Pohakuloa Human Health Risk Assessment– It is my understanding from the Department of the Army that no health report would be generated which would address this topic because of lack of depleted uranium data from Pohakuloa. This information was also presented during our meeting with the Army the week of August 24, 2009. The report is not part of the license application.

5. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed in Rockville, MD
this 1st day of October, 2009


John Hayes

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

Name:	Brett Michael Patrick Klukan
Address:	U.S. Nuclear Regulatory Commission Office of the General Counsel Mail Stop: O-15 D-21 Washington, D.C. 20555
Telephone Number:	(301) 415-3629
E-mail Address:	Brett.Klukan@nrc.gov
Facsimile Number:	(301) 415-3725
Admissions:	Commonwealth of Pennsylvania
Name of Party:	NRC Staff

Executed in Accord with 10 CFR 2.304(d)

Brett Michael Patrick Klukan
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-3629
Brett.Klukan@nrc.gov

Dated at Rockville, Maryland
This 1st day of October, 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO SIERRA CLUB'S MOTION FOR EXTENSION OF TIME TO FILE COMMENTS, A REQUEST FOR HEARING AND PETITION FOR INTERVENTION" in the above captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 1st day of October 2009, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above captioned proceeding.

Executed in Accord with 10 CFR 2.304(d)

Brett Michael Patrick Klukan
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U.S. Nuclear Regulatory Commission
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