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, Hawaii)	)	

US ARMY INSTALLATION COMMAND'S ANSWER TO MS. BARBARA MOORE, MS. CORY HARDEN, MALU AINA CENTER FOR NON-VIOLENT EDUCATION & ACTION (MR. JIM ALBERTINI), LUWELLA K. LEONARDI AND MR. ISAAC D. HARP'S ("PETITIONERS") REQUEST FOR HEARING

Pursuant to 10 C.F.R. § 2.309(h)(1), the U.S. Army Installation Command ("Army") hereby responds to the Petitioners' requests for hearing, regarding the Army's possession-only depleted uranium (DU) license application. For the reasons set forth below, the request for hearing should be denied as Petitioners have neither met the requirements for standing nor contention, pursuant to 10 C.F.R. § 2.309 (d) and (f), respectively.

BACKGROUND

The Army's request for a DU possession-only license, pursuant to 10 C.F.R. § 40, Domestic Licensing of Source Material, stems from past use of the M101 "Spotting Round" which contained DU. These "spotting rounds" were used on Schofield Barracks and at Pohakuloa Training Area in training scenarios in the 1960s. In 2005, the Army discovered tail assemblies from the M101 Spotting Round on Schofield Barracks while clearing former range areas of munitions. As a result, an Archive Search Report was completed which showed that M101 Spotting Rounds were used both on Schofield Barracks and Pohakuloa Training Area ranges. Consequently, on November 8, 2008, the Army applied to the NRC for a possession-

only DU license, and on August 13, 2009, notice of the proposed action was placed in the Federal Register.[1]

Petitioners Moore and Leonardi request a "public hearing" and "meeting for my community" respectively.[2] The only type of hearing authorized at this point, pursuant to 10 C.F.R. § 2.309, is an adjudicatory hearing. The Army will treat Petitioner Moore and Leonardi's requests as an adjudicatory hearing request.

To the extent that Petitioners Moore and Leonardi request public type hearings, the Army notes that Nuclear Regulatory Commission (NRC) held public hearings regarding the Army's request for a DU possession-only license in Hawaii, as follows: August 25, 2009, in Wahiawa, Hawaii; August 26, 2009, in Kailua-Kona, Hawaii; and August 27, 2009, at Hilo, Hawaii. In addition, the NRC discussed with the Army, at a public meeting on August 24, 2009, the Army's proposed radiation monitoring program overview for both the Schofield and Pohakuloa sites.[3]

DISCUSSION & ANALYSIS

a. Standing

In accordance with the Commission's Rules of Practice, "[a]ny person whose interest may be affected by a proceeding and 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."[4] The regulations further provide that the Licensing Board "will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of [10 C.F.R. § 2.309(d)] and has proposed at least one admissible contention that meets the requirements of [10 C.F.R. § 2.309(f)]."[5]

---

[1] 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).

[2] Ms. Barbara Moore's motion is enclosed as Attachment 1; Ms. Leonardi's motion is enclosed as Attachment 2; Ms. Harden's motion is enclosed as Attachment 3; Mr. Albertini's motion is enclosed as Attachment 4; and Mr. Harp's motion is enclosed as Attachment 5.

[3] All public hearing transcripts and the notice of the radiation monitoring overview meeting may be accessed on the NRC's Agencywide Documents Access and Management System (ADAMS) at http://www.nrc.gov/reading-rm/adams/web-based.html.

[4] 10 C.F.R. § 2.309(a).

[5] *Id*.

Requirements for standing are found at 10 C.F.R. § 2.309(d). A request for a hearing must state: the name, address and telephone number of the requestor; the nature of the requestor's right to be made a party to the proceeding; the nature and extent of the requestor's property, financial, or other interest in the proceeding; and the possible effect of any decision or order that may be issued in the proceeding on the requestor's interest. The board requires these elements to be pled with specificity.[6] In materials license cases, the Commission has held that proximity alone is not sufficient to establish standing.[7] Also, in cases involving source materials licensing, "a petitioner must independently establish the requisite elements of standing, i.e., injury in fact, causation, and redressibility."[8] In this case, Petitioners have failed to establish standing because none have satisfied the requirements of 10 C.F.R. § 2.309. To demonstrate standing, a petitioner must allege "(1) an actual or threatened, concrete and particularized injury, that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the Atomic Energy Act ... and (4) is likely to be redressed by a favorable decision."[9]

Petitioner Moore Lacks Standing

In this case, Petitioner Moore has failed to establish standing. She did not state the nature of her right under the Act to be made a party to the proceeding. In addition, her claim of harm from DU is speculative and she provides no other affidavit or facts for the Board to consider in evaluating her request. Petitioner simply states that "cancer has increased for us 'down winders' so that I am not the only victim suspected of suffering from the effects of DU on this island." Petitioner does not state how, if at all, a decision to grant this license to the Army will affect her interest. In addition, Petitioner fails to allege an "actual or threatened" injury that is "traceable to the challenged action," *e.g.*, how granting a DU possession-only license under the provisions of 10 C.F.R. Part 40 will place her at an increased risk of harm.[10] Because Petitioner has failed to establish standing, her request should be denied.

---

[6] *In the Matter if Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services*, LLC, 2009 WL 3297553 (NRC).
[7] *Consumers Energy Co.,* 65 NRC. 423, 426 (2007).
[8] *In the Matter of Crow Butte Resources, Inc.,* (In Situ Leach Facility), 68 NRC 691, 704 (2008).
[9] *Sequoyah Fuels Corp*. (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9, 13 (2001).
[10] *Id*. at 13.

Petitioner Leonardi Lacks Standing

Petitioner Leonardi has failed to establish standing in that she has not articulated her right under the Act to be made a party to this proceeding. She alleges that "contaminated soil" is being dumped in the back of her house. However, aside from this statement, there is nothing to support this contention. In addition, she does not state how granting the Army's DU possession-only license would "injure her personally."[11]

Petitioner Harden Lacks Standing

Petitioner Harden states that her right to be made a party under the act is "Residency on the island, where some of the depleted uranium (DU) spotting rounds were used."[12] As stated above, in materials license cases, proximity alone will not grant standing to Petitioner. Petitioner also asserts that her mere presence on the island satisfied her obligation to explain her property, financial or other interest in the proceeding. Apparently, Petitioner Harden requests a hearing to get more information about the M101 spotting rounds and their use in Hawaii. However, a request for hearing to satisfy Petitioner's desire to acquire more information on the M101 DU Spotting Round is not "an interest arguably within the zone of interests protected by the statutes governing NRC proceedings, the Atomic Energy Act and the National Environmental Policy Act of 1969."[13] Petitioner has not met the burden to establish standing under 10 C.F.R. § 2.309 and also has not stated how she would be effected if the Army were to be granted a license in this case and has not stated an "injury in fact" that could occur from the Army's receipt of the proposed license.

Petitioner Malu Aina Center for Non-Violent Education & Action (Mr. Jim Albertini) Lacks Standing

Petitioner Albertini, for Malu Aina Center for Non-Violent Education & Action, has neither established standing in his filing nor stated his right to be made a party under 10 C.F.R § 2.309(d)(ii). Additionally, there is no statement as to what property, financial or other interest

[11] *In the Matter of International Uranium (USA) Corporation*, (Source Material License Amendment License No. SUA-1358), 54 NRC 27, 30 (2001).
[12] Attachment 3, page 1.
[13] *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI–98–11, 48 NRC 1, 6 (1998). Also, 42 USC § 2013, Purpose, Atomic Energy Act of 1954, does not state that the act is to be used as a means to satisfy information requests.

he has in the proceeding or the possible effect a decision may have on his interests. There is no allegation of an alleged or threatened injury that can be traced to the proposed action – granting a DU possession-only license to the Army. Consequently, Petitioner Albertini's request for a hearing should be denied.

Petitioner Harp Lacks Standing

Petitioner Harp has not met the criteria identified at 10 C.F.R. § 2.309(d)(ii)-(iv) to have standing. Petitioner Harp states that he is "native Hawaii," however, simply being Hawaiian or living in Hawaii, as stated, does not confer standing in this case. There is no statement as to how granting this license will injure Petitioner or possibly affect any recognized interest he may have in this matter. Since he has not established standing, his request for a hearing should be denied.

None of the Petitioners have established standing. However, even if they had, none have articulated a valid "contention" pursuant to 10 C.F.R. § 2.309(f) and should also be denied a hearing on that basis.

b. Contention

In addition to establishing standing, a hearing request must also include at least one admissible contention.[14] The legal requirements for contention admissibility are well established and require that petitioners must "set forth with particularity,[15]" the contentions sought to be raised. For each contention, the petition must:

(1) Provide a specific statement of the issue of law or fact to be raised or controverter;

(2) Provide a brief explanation of the basis for the contention;

(3) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(4) Demonstrate the issued raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(5) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at

[14] 10 C.F.R. § 2.309(a).
[15] 10 C.F.R. § 2.309(f)(1).

hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and

(6) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. [16]

10 C.F.R. § 2.309(f)(2) further requires that contentions "be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant . . . ."

The requirements are inclusive and "failure of a contention to comply with any one of these requirements is grounds for dismissing the contention."[17] Further, "the initial burden of showing whether the contention meets [the board's] admissibility standards" lies with the Petitioners.[18] In NRC practice, "[m]ere 'notice pleading' does not suffice."[19] Petitioners have not met their burden to establish at least one contention.

Petitioner Moore Has Not Stated an Admissible Contention

Petitioner requests that a "public hearing" be held and that an "Environmental Impact Study" be done.[20] Because Petitioner has failed to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(i-vi), her contentions are not admissible. There is no specific statement of the issue of law or fact to be raised in Petitioner's request. In addition, the reasons stated are conclusory and not supported by any substantive facts or evidence. Petitioner states she was at PTA (Pohakuloa Training Area) in 2007 when a "dirt devil"

[16] 10 C.F.R. § 2.309(f)(1).
[17] *In the Matter of Duke Energy Corporation* (Catawba Nuclear Station, Units 1 and 2), 59 NRC 296, 307 (2004) (footnotes omitted).
[18] *In the Matter of Progress Energy Carolina, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), 2009 WL 1393857 (2009).
[19] *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP site), 62 NRC 801, 808 (2005).
[20] Petitioner Moore is referring to an Environment Impact Statement under the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C).

enveloped her and concludes that she must have been sickened by depleted uranium. Petitioner states that "I won't bother going into detail" but this is exactly what the rules require in order to determine if there is an admissible contention. Further, the issues raised are not within the scope of this license request or material to the findings the NRC must make regarding this license request. Lastly, there are no facts alleged or expert opinions to support the Petitioner's request, or sufficient information to show that a genuine dispute exists with the Army on a material issue of law or fact.

As to Petitioner's request that an Environment Impact Statement be conducted, the Army asserts that such a claim is not now cognizable to serve as the basis for a hearing.[21] As part of the licensing process, the Nuclear Regulatory Agency staff will determine what NEPA requirements must be met to satisfy licensing.[22] The analysis and applicable NEPA level of review is determined after a thorough review of the applicant's request and supporting documents submitted by the Army in support of its application. As such, Petitioner's request for an Environmental Impact Statement is not a valid contention and should be denied. In addition, on issues arising under "the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report." 10 C.F.R. § 2.309(f)(2). Petitioner has failed to do this. Based on the foregoing, Petitioner's request for hearing should be denied since she has failed to make an admissible contention.

Petitioner Leonardi Has Not Stated an Admissible Contention

Petitioner Leonardi states that "[t]o keep military family (sic) safe from these toxic chemical (sic) is to scoop and send these contaminated soil to my community on the Waianae Coast."[23] She also alleges that "bombing plume dust" containing DU affects her as well. However, these contentions are not within the scope of this license proceeding or material to the findings the NRC must make to support the Army's license request pursuant to 10 C.F.R. § 2.309(f). There are no additional facts or expert opinion to show that the alleged soil dumping

[21] While Petitioner Moore's email motion (Attachment 1) does not request that an EIS be conducted, a separate email received from Petitioner Harp, enclosed as Attachment 6, in which he included Petitioner Moore's email motion, does request that an EIS be done. Due to the discrepancy between the two emails, the Army will address the request for an EIS.

[22] Requirements to satisfy NEPA, as part of the NRC license process, are described at 10 C.F.R. Part 51.

[23] Attachment 2, paragraph 2.

is occurring, or that the soil is contaminated. Finally, there is insufficient "information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact."[24] A petitioner must "read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant's position and the petitioner's opposing view," and explain why it disagrees.[25] Petitioner Leonardi also requests a hearing to discuss "possibility of a clean-up, contamination of my community, and a shorter life span."[26] Because these contentions do not satisfy 10 C.F.R. § 2.309(f), Petitioner Leonardi's claim for hearing should be denied.

Petitioner Harden Has Not Stated an Admissible Contention

Petitioner Harden does not state an "admissible contention."[27] In her request, she states "I request that the 60-day deadline to file a request for hearing and petition for intervention be reset after two documents are made publically available on ADAMS (Agency-Wide Document Access and Management System on NRC's website.)"[28] Petitioner Harden contends that the completed "ASR" (Archives Search Report) which included information on the number and use of the M101 Spotting Round in Hawaii should be released prior to any further action being taken on the Army's license application.[29] In fact, the ASR is publically available for Petitioner Harden's review.[30] She also requests "an official Army document stating the decision not to do a Human Health Risk Assessment (HHRA) for Pokakuloa, and giving the scientific basis for this decision."[31]

Any person who requests a hearing and "who desires to participate as a party must file a written request for hearing and specifications of the contentions which the person seeks to have litigated in the hearing."[32] Further, contentions must be "based on documents or other information available at the time the petition is to be filed . . . ."[33] In this case, Petitioner is

[24] 10 C.F.R. § 2.309(f)(1)(vi).
[25] *In the Matter of Crow Butte Resources, Inc.,* (North Trend Expansion Project), 67 NRC 241, 292 (2008).
[26] Attachment 2, paragraph 4.
[27] 10 C.F.R. § 2.309(a).
[28] Attachment 3, page 2.
[29] *Id*.
[30] http://www.imcom.pac.army.mil/du/ASR_Davey_Crockett_Hawaii.pdf
[31] Attachment 3, page 2.
[32] 10 C.F.R. § 2.309(a).
[33] 10 C.F.R. § 2.309(f)(2).

basing her hearing request on information that the Army did not file with its application, and it is thus outside the "scope of the proceeding."[34] With regard to both the ASR and HHRA, there is no requirement that either document be completed or submitted with this license request and Petitioner cites no authority for these positions. Petitioner must "directly controvert a position taken by the applicant in the application and 'explain why the application is deficient'."[35] She has failed to do this. For the reasons stated above, Petitioner Harden's request for hearing and petition for intervention should be denied. The remainder of Petitioner Harden's various claims do not meet the 10 C.F.R. § 2.309(f) contention standard. With respect to the additional information submitted by Petitioner Harden on November 1, 2009, via email, it was not timely filed and should therefore not be considered as part of her motion for hearing.[36]

Petitioner also requests to be exempted from the electronic filing requirements of the NRC found at 10 C.F.R. § 2.302. The Army does not object to the granting of such an exemption.

Petitioner Malu Aina Center for Non-Violent Education & Action (Mr. Jim Albertini) Has Not Stated an Admissible Contention

Petitioner Albertini asserts that "less than 1% of PTA has been surveyed for DU contamination" and that "there needs to be a thorough and complete search of record archives" for evidence of any other DU munitions used "at PTA and other sites in Hawaii."[37] However, Petitioner Albertini has not satisfied the rule that requires "a clear statement as to the basis for the contentions and submission of . . . supporting information and references to specific documents and sources that establish the validity of the contention."[38] "Contentions must fall within the scope of the proceeding . . . in which intervention is sought."[39] The scope of the proceeding in this case pertains to the Army's license application and documents filed in support of the application. Again, in Petitioner's motion, he does not object to what the Army

[34] 10 C.F.R. § 2.309(f)(1)(iii).
[35] *In the Matter of Crow Butte Resources, Inc.,* 67 NRC 241, 292.
[36] *See* NRC Order dated October 8, 2009, granting Petitioners Harden and Albertini an extension until October 27, 2009 to file a request for a hearing on the Army's source material application.
[37] Attachment 4, page 1, paragraph 2 & 3.
[38] *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station, Units 2 and 3), 64 NRC 111, 118-119 (2006).
[39] *Id*.

submitted (generic and site specific security and radiation monitoring plans) and the NRC staff reviewed in its source material license application, but to documents that were neither required nor included in the license application. In this regard, Petitioner Albertini has not satisfied the requirement to "include references to specific portions of the application . . . that petitioner disputes and the supporting reasons for each dispute . . . ." 10 C.F.R. § 2.309(f)(1)(vi) or 10 C.F.R § 2.309(f)(2). Neither do these contentions satisfy the requirement that they be material to the findings that the NRC must make to grant or deny the Army's license request.[40] Further, there is no "alleged facts or expert opinion which supports" Petitioner Albertini's motion pursuant to 10 C.F.R. § 2.309(f)(1)(v). The remaining contentions (e.g., Hawaii County Council Resolution 638-08 or "PTA is Hawaiian Kingdom Sacred Land that is under illegal U.S. occupation") in Petitioner Albertini's motion are not relevant to this proceeding and do not meet the 10 C.F.R. § 2.309(f) requirements.

Petitioner Harp further requests to be exempted from the electronic filing requirements of the NRC found at 10 C.F.R. § 2.302. The Army does not object to the granting of such an exemption. Petitioner Albertini also asks to "join" Petitioner Harden in her motion, but has not complied with 10 C.F.R. § 2.309(f)(3) pertaining to the co-sponsoring/adopting of contentions.

Petitioner Harp Has Not Stated an Admissible Contention

Petitioner Harp requests a hearing on the Army's DU license application. However, he does not satisfy any of the requirements of 10 C.F.R. § 2.309(f)(1)(i-vi). Petitioner Harp states that "I have a suspicion" that DU may have been used in other places on the island and by other weapon systems, and because of the DU "threat to the health and well-being of Hawaii's lands and Hawaii's residents . . . " he requests a hearing.[41] The rules bar contentions where a petitioner has only "what amounts to generalized suspicions, hoping to substantiate them later."[42] Suspicion and belief are not enough to create and admissible contention under 10 C.F.R. § 2.309(f)(1)(v). A petitioner's contentions "will be ruled inadmissible if the petitioner 'has offered no tangible information, no experts, no substantive affidavits,' but instead only

[40] 10 C.F.R. § 2.309(f)(1)(iv).
[41] Attachment 5, page 1.
[42] *In the Matter of Crow Butte Resources, Inc*., 67 NRC 241, 292.

'bare assertions and speculation."'[43] "And if a petitioner neglects to provide the requisite support for [his] contentions, the Board may not make assumptions of fact that favor the petitioner or supply information that is lacking."[44] Petitioner Harp does not address any of the information contained in the Army's license application, and further, "does not demonstrate that the issue[s] raised in the contention[s] [are] within the scope of the proceeding." 10 C.F.R. § 2.309(f)(1)(iii).

Petitioner Harp also requests that "other interested parties be provided the opportunity of joining me at some later date should they wish to participate in the hearing process." As noted in the Federal Register, anyone requesting a hearing had until October 13, 2009 to make their request.[45] Because the time to file a request for hearing has expired, Petitioner Harp's request should be denied, and any other petitioner be required to satisfy the "Nontimely filings" rule pursuant to 10 C.F.R. § 2.309(c).

Finally, the Army is aware of multiple late filings made via email after the October 13, 2009, deadline by: Mr. Jasper Moore, Ms. Angela Rosa, Ms. Amelia Gora, Mr. Tek Nickerson, Ms. Stephanie Laxton, "mshooltz@aol.com", Leslie Ann Laing, mimeone@aol.com, Ms. Shannon Rudolph, Mr. Mike Swerdlow, Ms. Elaine Durbin, Mr. Michael Freigang, Ms. April Lee, Ms. Lisa Raphael, Mr. David Schlesinger, Mr. Jeff Sacher, Ms. Andrea Cronrod, Mr. Jonathan Cole, Mr. Pash Galbavy, Ms. Lisa Andrews, and Mr. Joel Levey. All of these filings, to the extent that these communications ask for a hearing, are filed late pursuant to the Federal Register notice deadline of October 13, 2009. None of these requestors were granted an extension to file late and, as late filings, none complied with 10 C.F.R. § 2.309(c). Because these requests are late they should not be considered by the Board.

In summary, Petitioners have failed to establish that they have standing in order for this Board to entertain a hearing on the Army's DU possession-only license request. In the event that any Petitioner is deemed to have standing, as described above, no Petitioner has satisfied

[43] *In the Matter of Northern States Power Company* (Formerly Nuclear Management Company, LLC) (Prairie Island Nuclear Generating Units 1 and 2), 68 NRC 905, 917 (2008) (footnotes omitted).
[44] *Id*.
[45] 74 Fed. Reg. 40,855 (Aug. 13, 2009).

the Board's contention rules, which are "strict by design."[46] Consequently, Petitioners' requests for hearing should be denied.

[46] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24. 54 NRC 349, 358 (2001). R*econsideration denied*, CLI-02-1, 55 NRC 1 (2002).