

March 11, 2010

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 ISSAC HARP'S PETITION FOR REVIEW OF LBP-10-04

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), the staff of the Nuclear Regulatory Commission ("Staff") hereby responds to Isaac Harp's March 4, 2010 petition for review of LBP-10-04 ("Appeal"). As discussed below, the Appeal should be denied because Mr. Harp does not identify any legal error or abuse of discretion in the Board's standing determination in LBP-10-04.

BACKGROUND

On November 6, 2008, the U.S. Army Installation Command submitted a license application ("Application") (ADAMS Accession No. ML090070095) requesting authorization to possess depleted uranium ("DU") at two sites in Hawaii: Schofield Barracks on Oahu and Pohakuloa Training 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.<sup>1</sup>

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<sup>1</sup> 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).

On October 9, 2009, the Secretary of the Commission granted, in part, two petitioners' requests for an extension of time to file a request for hearing and petition to intervene by extending the due date until October 27, 2009. On October 14, 2009, Isaac Harp e-mailed a request for the same extension as granted to the other two petitioners, and on October 16, 2009, the Secretary of the Commission granted his request.

On October 26, 2009, Isaac Harp e-mailed Staff counsel, NRC Senior Project Manager John Hayes, and others what appeared to be both comments and a request for hearing.<sup>2</sup> Mr. Harp then sent an e-mail to Emile Julian, Assistant for Rulemakings and Adjudications, in the Office of the Secretary, requesting to join a request for an exemption from e-filing, an extension of time for the public, and a hearing filed by another petitioner.<sup>3</sup> In his e-mail, Mr. Harp also submitted his own contention.

On November 24, 2009, a Board was established to preside over the proceeding. On January 13, 2010, the Board held oral argument on standing and contention admissibility in Rockville, Maryland, with the petitioners participating by videoconference from the Hilo Campus of the University of Hawaii on the island of Hawaii. On February 24, 2010, the Board issued an order denying Corey Harden, Jim Albertini, and Isaac Harp's hearing requests for failure to establish standing.<sup>4</sup> The Board also denied Luwella Leonardi's hearing request for failure to establish standing and also failure to proffer an admissible contention. On March 4, 2010, Mr. Harp filed his Appeal.

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<sup>2</sup> E-mail from Isaac D. Harp to Kimberly Sexton et. al, "Re: comment deadline" (Oct. 26, 2009).

<sup>3</sup> E-mail from Isaac D. Harp to Emile Julian, "Army Request for a Depleted Uranium Possession-only Permit" (Oct. 26, 2009) For the purpose of Staff's response herein, Staff treats the two requests as one petition.

<sup>4</sup> *U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), LBP-10-04, 71 NRC \_\_ (2010) (slip op.).

## DISCUSSION

### I. Standards Governing Petitions for Review of a Board Order Denying a Petition to Intervene

Pursuant to 10 C.F.R. § 2.311(c), “An order denying a petition to intervene, and/or request for hearing, . . . is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted.” Because Mr. Harp’s request for hearing was wholly denied, this is an appeal as of right pursuant to 10 C.F.R. § 2.311(c).

The Commission defers to a Board’s rulings on standing and contention admissibility in the absence of clear error or abuse of discretion.<sup>5</sup> A petitioner appealing a Board’s denial of intervention “bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant’s claims.”<sup>6</sup>

### II. The Board Correctly Found that Mr. Harp Failed to Establish Standing

The Board correctly concluded that Mr. Harp failed to demonstrate standing. In its February 24, 2010, decision, the Board held that, applying relaxed pleading standards for pro se petitioners, Mr. Harp failed to establish either proximity-plus standing or satisfy the traditional standing requirements.<sup>7</sup> The Board denied his hearing request on those grounds.<sup>8</sup>

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<sup>5</sup> *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 69 NRC 319, 324 (2009); *Crow Butte Resources, Inc.* (License Renewal for In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 336 (2009) (citing, *inter alia*, *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit No. 3), CLI-08-17, 68 NRC 231, 234 (2008)); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006).

<sup>6</sup> *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Stations, Units 2 and 3), CLI-04-36, 60 NRC 631, 639 n.25 (2004) (quoting *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994)).

<sup>7</sup> *Schofield Barracks*, LBP-10-04, 71 NRC at (slip op. at 23-25).

(continued. . .)

On appeal, Mr. Harp appears to raise one overarching issue with the Board's decision—that the Board failed to apply relaxed pleading standards to his standing claims—and then contests the Board's analysis of Mr. Harp's five proffered rationales for standing.<sup>9</sup> As the Board noted, while a *pro se* petitioner is not held to the same standards as a litigant represented by counsel, the Board was "not empowered wholly to exempt a *pro se* petitioner from the procedural rules that govern our adjudications."<sup>10</sup>

In addition, Mr. Harp appears to take issue with what he believes were the bases of the Board's decision:

- (1) The NRC's faith that the Army's statements are true and factual despite limited and incomplete records;
- (2) Information provided by Mr. Peter Strauss, energy and environmental consultant with PM Strauss & Associates;<sup>11</sup>
- (3) Technicalities raised by NRC staff in regards to *pro se* petitioners' inability to meet strict NRC guidelines on establishing standing;
- (4) NRC failure to confirm the accuracy of the Army's statements; and
- (5) NRC failure to confirm the accuracy of petitioners' statements.<sup>12</sup>

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(. . .continued)

<sup>8</sup> *Id.* at (slip op. at 25).

<sup>9</sup> See Appeal at 1-5.

<sup>10</sup> *Schofield Barracks*, LBP-10-04, 71 NRC at (slip op. at 21 n.22) (citing *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 201 (1998) ("[*pro se* petitioners are] expected to comply with our basic procedural rules . . . [including] those establishing filing deadlines")).

<sup>11</sup> Mr. Strauss was an environmental consultant relied upon by another petitioner in her standing and contention admissibility arguments. Any quoting of, or citations to, Mr. Strauss by the Board was merely to show that the other petitioner's own expert failed to support any claims that DU at Pohakuloa had an obvious potential for offsite consequence or that "she will suffer a concrete and particularized injury that is fairly traceable by a plausible chain of causation to the Army's licensing action." *Id.* at (slip op. at 16-17).

<sup>12</sup> Appeal at 6.

Mr. Harp, however, does not address the Board's thorough explanations of why he failed to demonstrate standing; instead, he simply repeats or adds to his previous claims.

First, Mr. Harp appears to believe that the Board did not accept that his residence was 19 miles from the Pohakuloa Training Area.<sup>13</sup> The Board, rather, took that as fact, but still found that Mr. Harp failed “to show that (1) the licensing action involves a significant source of radioactivity, (2) the radioactivity produces an obvious potential for offsite consequences, and (3) [he] is sufficiently close to the site to be presumptively affected by an offsite consequence.”<sup>14</sup> Thus, the Board correctly found that Mr. Harp’s proximity to the Pohakuloa Training Area alone was not sufficient to establish proximity-plus standing.

Second, Mr. Harp states that it was not possible to provide documentation at oral argument to support his claim that “DU has been pointed to as the probable cause of various cancers and other mysterious illnesses that many military veterans suffer from” and that “DU could exit the firing ranges and migrate from Pohakuloa to threaten injury to residents and visitor of Hawaii islands as well as myself.”<sup>15</sup> Mr. Harp enumerates the information he provided to support his claim at oral argument, which he believes the Board<sup>16</sup> missed or ignored.<sup>17</sup> He states that he was unable to share the documentation due to time constraints and the nature of videoconferencing.<sup>18</sup> None of Mr. Harp’s six citations provides any support

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<sup>13</sup> *Id.* at 1.

<sup>14</sup> *U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), LBP-10-04, 71 NRC \_\_ (2010) (slip op. at 16, see *also* at 23, 24).

<sup>15</sup> Appeal at 1-2.

<sup>16</sup> Mr. Harp actually states that the “NRC staff” missed or ignored the information, but the staff believes this was likely a mistaken understanding of the relationship of the staff to the Board.

<sup>17</sup> Appeal at 2-3.

<sup>18</sup> *Id.* at 1-2.

or plausible showing that the DU located on the Pohakuloa Training Area could exit the firing ranges and migrate from Pohakuloa to affect him. Further, even if Mr. Harp had attempted to present the documents during oral argument, they likely would have been rejected due to the Board's January 7, 2010, "Memorandum and Order (Setting Oral Argument)," which stated that "Participants will not be permitted to present new or materially different arguments, supporting documentation, or other information at the argument." Therefore, Mr. Harp's second argument fails to demonstrate an error of fact or law.

Third, Mr. Harp believes that the Board should have verified that high-explosive munitions are not, and will not be, used in the DU areas or buffer areas at Pohakuloa.<sup>19</sup> As the Board stated at the beginning of its decision, the "petitioner bears the burden to provide facts sufficient to establish standing."<sup>20</sup> In meeting this burden, it is generally sufficient if the petitioner provides plausible factual allegations that satisfy each element of standing.<sup>21</sup> However, as the Board stated in a footnote, "in proceedings where a petitioner's factual assertions in support of standing are challenged, untenable, conjectural, or conclusory, a Board need not uncritically accept such assertions."<sup>22</sup> Thus, because Mr. Harp then and now is unable to show "an injury or threat of injury [that] is concrete and particularized," but instead only points to conjectural and hypothetical injury,<sup>23</sup> his third argument also fails to demonstrate an error of fact or law.

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<sup>19</sup> *Id.* at 3-4.

<sup>20</sup> *Bell Bend Nuclear Power Plant*, CLI-10-07, 71 NRC at \_\_\_ (slip op. at 7); *accord Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2)*, CLI-00-05, 51 NRC 90, 98 (2000).

<sup>21</sup> *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

<sup>22</sup> *Schofield Barracks*, LBP-10-04, 71 NRC at (slip op. at 14 n.14) (citing *Palisades Nuclear Power Plant*, CLI-07-18, 65 NRC at 410; *Zion Nuclear Power Stations*, CLI-00-05, 51 NRC at 98).

<sup>23</sup> *Sequoyah Fuels Corp. (Gore, Oklahoma Site)*, CLI-94-12, 40 NRC 64, 72 (1994) (quoting (continued. . .))

Fourth, Mr. Harp argues that in the face of his cancer statistics for the island of Hawaii, the Army and NRC staff should have the burden to provide evidence that DU “at Pohakuloa does not threaten injury to [himself] or other residents of the island of Hawaii.” Just as in the response to Mr. Harp’s third argument, it is the *petitioner’s* “burden to provide facts sufficient to establish standing.”<sup>24</sup> Cancer statistics alone, without more, however, “fail to provide a plausible chain of causation between such cancers and the DU at Pokakuloa.”<sup>25</sup> Thus, Mr. Harp’s fourth argument also fails to demonstrate an error of fact or law.

Lastly, Mr. Harp provides three justifications for his argument that DU poses a “never-ending threat to the health and well-being of Hawaii’s lands and Hawaii’s residents”:

- (1) The oral statements and quotes I presented during oral arguments;
- (2) The fact that radioactivity of depleted uranium increases over time, and;
- (3) The fact that the half-life of depleted uranium radioactivity is measured in billions of years.<sup>26</sup>

None of those three statements, however, addresses the Board’s issue that Mr. Harp failed “either to specify a concrete and particularized harm or to articulate a plausible chain of causation as to how the DU at Pohakuloa would cause such harm.”<sup>27</sup>

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*O’Shea v. Littleton*, 414 U.S. 488, 494 (1974)).

<sup>24</sup> *Bell Bend Nuclear Power Plant*, CLI-10-07, 71 NRC at \_\_\_ (slip op. at 7); *accord Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-05, 51 NRC 90, 98 (2000).

<sup>25</sup> *Schofield Barracks*, LBP-10-04, 71 NRC at (slip op. at 24).

<sup>26</sup> Appeal at 4-5.

<sup>27</sup> *Schofield Barracks*, LBP-10-04, 71 NRC at (slip op. at 24-25) (citing *Zion Nuclear Power Station*, CLI-00-05, 51 NRC at 98 (“broad and conclusory statements [by petitioners] . . . that they (continued. . .)

Following his five arguments on appeal, Mr. Harp offers “Additional Statements.”<sup>28</sup> He first takes issue with the Board’s failure to adequately address the claims that the Army’s presence on Hawaii is illegal and that Hawaii is not lawfully one of the 50 states of the United States of America.<sup>29</sup> Mr. Harp fails to describe how this issue is material to his claim of standing and he does not establish why the Board must resolve such issue to adjudicate his claim of standing. Absent such explanation, Mr. Harp does not reveal an error of fact or law on the part of the Board.

Mr. Harp is also of the view that if the Application were to be amended in the future, the public should be provided an opportunity to review and comment upon the changes to the Application.<sup>30</sup> In that event, Mr. Harp could avail himself of 10 C.F.R. § 2.309(f)(2) which provides that new contentions may be filed after the initial filing date regarding information materially different from that previously available.

Finally, Mr. Harp seeks enforcement action against the Army. The NRC staff has forwarded this request to the proper staff office for consideration.

#### CONCLUSION

Mr. Harp does not identify any legal error or abuse of discretion in the Board’s standing determination in LBP-10-04. Therefore, Mr. Harp’s Appeal should be denied, and the Board’s decision in LBP-10-04 should be affirmed.

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(. . .continued)

have ‘direct information concerning the threat to health and safety posed by [the license applicant]’ . . . are insufficient to establish standing”).

<sup>28</sup> Appeal at 5-7.

<sup>29</sup> *Id.* at 5.

<sup>30</sup> *Id.* at 6.



**Executed in Accord with 10 CFR 2.304(d)**

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Dated at Rockville, Maryland  
this 11th day of March, 2010

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO ISSAC HARP'S PETITION FOR REVIEW OF LBP-10-04" in the above captioned proceeding has been served via the Electronic Information Exchange ("EIE") this 11th day of March 2010, 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)**

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