UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
U.S. ARMY INSTALLATION COMMAND	)	Docket No. 40-9083
	)	
(Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii Hawaii)	)	ASLBP No. 10-895-01-ML-BD01

US ARMY INSTALLATION COMMAND'S BRIEF IN OPPOSITION TO THE APPEAL OF ISAAC D. HARP FROM ASLBP MEMORANDUM AND ORDER DENYING REQUEST FOR HEARING

INTRODUCTION

On October 26, 2009, Mr. Isaac D. Harp ("Petitioner") filed a request for a hearing on the US Army Installation Command's November 6, 2008, possession-only depleted uranium (DU) license application pertaining to Schofield Barracks and Pohakuloa Training Area, Hawaii. In a Memorandum and Order issued on February 24, 2010, and following oral argument on January 13, 2010, the Atomic Safety and Licensing Board ("Board") denied Petitioner's hearing request. On March 4, 2010, Petitioner filed a "Supporting Briefing" in which he appealed the decision to deny his request for hearing. For the reasons stated below, the US Army ("Army") Installation Command respectfully requests that the Commission deny Petitioner's appeal.

BACKGROUND

On November 6, 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] 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

[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).

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.

Petitioner requested a hearing, pursuant to 10 CFR § 2.309, on the Army's possession-only license application in a submission dated October 26, 2009, and made several contentions therein related to alleged DU caused "cancers and other mysterious illnesses" and stated that disturbing the DU with high explosives from military ordinance was a health hazard to residents of Hawaii. On January 13, 2010, oral argument was held and Petitioner was able to elaborate upon his previously provided request for hearing and also answer questions the Board asked Petitioner in an Order Identifying Issues for Oral Argument, dated December 17, 2009 . On February 24, 2010, the Board denied Petitioner's hearing request, concluding that he failed to satisfy both proximity-plus and traditional standing requirements. Memorandum and Order at 23-24.

Petitioner filed a timely brief pursuant to 10 CFR § 2.311, on March 4, 2010.[2] In his appeal, Petitioner primarily takes issue with various findings made by the Board during its oral argument and re-emphasizes points made during oral argument. Petitioner also apparently does not believe the Board gave enough weight to his statements and representations made during oral argument.

For the reasons that follow, the Commission should reject the Petitioner's appeal because, as the Board correctly determined, he has failed to satisfy the requirements for standing.

DISCUSSION & ANALYSIS

On appeal, the Commission has stated that it will defer to the Board's rulings on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion.[3] The Commission has also stated that it gives "substantial deference" to Board

[2] Petitioner is required to file a notice of appeal and accompanying supporting brief. 10 CFR § 2.311(b). In this case, Petitioner filed only a document entitled "Supporting Briefing of Petitioner Isaac Harp".

[3] *In the Matter of South Carolina Electric and Gas Company and South Carolina Public Service Authority* (Santee Cooper), 2010 WL 87736 (2010).

decisions on threshold matters such as standing and contention admissibility.[4] In his filing, Petitioner does not point to any specific error of law or abuse of discretion allegedly made by the Board. He largely restates claims already made before the Board and essentially argues that they should carry more weight. In fact, throughout Petitioner's appeal, he merely cites portions of the Board's Order he disagrees with, and then makes a "response." However, as the Commission has stated, "[i]t is the Licensing Board's proper role to weigh and consider all the record evidence."[5] The Commission has stated that, "'Our standard of 'clear error' for overturning a Board's factual finding is quite high,'" and we defer to our boards' findings unless "clearly erroneous" — that is, "not even plausible in light of the record viewed in its entirety."[6]

On appeal, a Petitioner must point out to the Commission any claim of error in the Board's decision-making.[7] Moreover, based on Petitioner's pleadings and arguments made before the Board, the Army believes that the Board properly denied Petitioner's motion for hearing based on the standing rules of 10 CFR § 2.309. The Petitioner bears the burden to establish facts sufficient to show standing and failed to do so.[8]

Petitioner cut and pasted numerous pieces of information in his appeal that he asserts supports his claim that "DU could exit the firing ranges and migrate from Pohakuloa to affect him." This information was not submitted with Petitioner's motion for hearing, and consists of six differing sources related to DU – but not to the Army's specific license application – for which Petitioner failed to state any specific deficiency. Petitioner claims that this information shows that "DU could exit the firing ranges and migrate from Pohakuloa to threaten injury to residents and visitors of Hawaii island as well as myself." Petition at 1-3. The Board properly found, after considering Petitioner's submission and oral argument, that he failed to establish standing and did not offer factual support for his assertions or articulate a plausible chain of

[4] *In the Matter of Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station) 64 N.R.C. 111, Nuclear Reg. Rep. P 31517, 2006 WL 2584713 (N.R.C.).
[5] *In the Matter of Carolina Power & Light Company and North Carolina Eastern Municipal* (Shearon Harris Nuclear Power Plant), 24 NRC 532, 537 (1986).
[6] *In the Matter of Amergen Energy Company, LLC* (License Renewal for Oyster Creek Nuclear Generating Station), 69 N.R.C. 235, 259 (2009) (citing *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 189 (2004).
[7] *Carolina Power & Light Co*. (Shearon Harris Nuclear Power Plant), CLI-01, 53 NRC 370, 383 (2001).
[8] *U.S. Enrichment Corp.* (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272 (2001) (citing *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000)).

causation as to how DU at Pohakuloa could migrate and harm him. His allegations do not show an injury-in-fact and are merely conjectural or hypothetical statements that lack factual support sufficient to establish a plausible chain of causation for his alleged harms.[9]

In addition, it is Petitioner's burden to "clearly identify the matters on which [he] intend[s] to rely with reference to a specific point."[10] On this point, Petitioner's appeal aggregated various quotes relating to DU and other topics, none of which undermined the Army's license application or otherwise supports Petitioner's standing claim.

Petitioner also claims that the rates of cancer in Hawaii are high and it is "extremely unlikely" that these statistics are coincidental. However, Petitioner again shows no factual basis or plausible chain of causation that it is, in fact, DU that is impacting Hawaii cancer rates. Petitioner further states that the Army did not provide evidence "that depleted uranium at Pohakuloa does not threaten injury to me and other residents of the island of Hawaii." In fact, the Army's license application did provide information sufficient to conclude that there is, in fact, no harm presented to Petitioner by the DU located at Pohakuloa. Petitioner, again, takes no issue with any factual assertion or conclusion in the Army's license application but only makes "broad and conclusory statements" of harm that are insufficient to establish standing.[11] Similarly, the remainder of Petitioner's claims also cover subject matter presented to, and rejected by, the Board. Because there is no error of law or abuse of discretion as it pertains to Petitioner's, his appeal should be rejected.

CONCLUSION

Because Petitioner merely reargues points already made before the Board, while failing to specify any error of law, or abuse of discretion made by the Board, his appeal should be denied. In light of the foregoing, the Army respectfully requests that the Commission deny Petitioner's appeal of LBP-10-04.

[9] *Sequoyah Fuels Corp*. (Gore Oklahoma Site Decommissioning) CLI-01-02, 53 NRC 9 (2001).
[10] *Public Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2) CLI-89-03, 29 NRC 234, 241 (1989).
[11] *Zion Nuclear Power Station* (Units 1 and 2), CLI-00-05, 51 NRC 90 (2000).

Respectfully submitted,

Executed in Accord with 10 CFR § 2.304(d)
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