

UNITED STATES OF AMERICA
U.S. NUCLEAR REGULATORY COMMISSION
OFFICE OF FEDERAL AND STATE MATERIALS AND ENVIRONMENTAL MANAGEMENT
PROGRAMS

Cynthia A. Carpenter, Acting Director

In the Matter of:) Docket No.: 040-09083
)
U.S. ARMY - INSTALLATION)
MANAGEMENT COMMAND)

PROPOSED DIRECTOR'S DECISION UNDER 10 CFR 2.206

I. INTRODUCTION

By email dated March 4, 2010, Isaac D. Harp (the Petitioner) filed a petition (the Petition) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML100640665) pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR), Section 2.206, "Requests for action under this subpart," with the U.S. Nuclear Regulatory Commission (NRC or the Commission).

Copies of the Petition and other publicly available records are available for inspection at the Commission's Public Document Room (PDR) at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and from the NRC's ADAMS Electronic Reading Room on the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the reference staff in the NRC Public Document Room by telephone at 1-800-397-4209 or 301-415-4737, or by e-mail to PDR.Resource@nrc.gov.

Action Requested

The Petitioner requested that the NRC investigate whether, counter to applicable law and regulations, the United States Army (the Army) possessed or released into the environment depleted uranium (DU) from spent spotting rounds after the expiration of NRC License SUB-459 and, were the NRC to determine that such a violation had occurred, to assess against the Army the maximum penalty permitted by law. The Petitioner requested that any assessed monetary penalties be applied to the environmental remediation of DU contamination at the Schofield Barracks and Pohakuloa Training Area installations in Hawaii.

Petitioner's Basis for the Requested Action

The basis for the Petitioner's requests was that the U.S. Army's NRC License SUB-459 expired on October 31, 1964 and, consequently, if any DU was possessed or released into the environment by the Army after the license expiration date, such action was unlawful and subject to enforcement action by the NRC.

Determination for NRC Review under 10 CFR 2.206

The Petition was assigned to the NRC's Office of Federal and State Materials and Environmental Management Programs (FSME) for review. FSME's Petition Review Board (PRB) met with the Petitioner by teleconference on April 14, 2010, and the Petitioner provided additional information in support of the Petition. The transcript of this meeting was treated as a supplement to the petition and is available in ADAMS at ML111240096. On April 14, 2010, the PRB made an initial recommendation that the Petition met the acceptance criteria for review. On April 22, 2010, the Petition Manager informed the Petitioner that the PRB had recommended that the Petition be accepted for review and the Petition Manager offered the Petitioner a second opportunity to address the PRB. This opportunity was declined. By letter dated April 26, 2010 (ML101100139), the NRC formally communicated to the Petitioner the PRB's recommendation to accept the petition for review under 10 CFR 2.206. On April 26, 2010, the

NRC provided notice that NRC would treat the petition pursuant to 10 CFR 2.206 (ML101100139).

After full consideration of the Petition, including the additional information supplied by the Petitioner at the April 14, 2010 teleconference, FSME grants, in part, and denials, in part, the Petition, as explained below.

II. BACKGROUND

Between 1962 and 1968, the Army received and used DU (which the NRC licenses as source material) at test firing ranges located at two installations in Hawaii: Schofield Barracks and Pohakuloa Training Area. DU was incorporated into the body of spotting rounds used in connection with the Davy Crockett weapons system. As a result of the testing of the Davy Crockett weapon system, DU was likely scattered throughout the firing ranges at the Hawaiian installations. The Army has indicated to the NRC staff that it believes that it discontinued testing of the Davy Crockett weapon system in Hawaii in 1968. NRC license SUB-459 authorized the Army to manufacture the spotting rounds containing DU and to transfer those rounds to field units for military use from 1961 through 1973. At the request of the Army, NRC License SUB-459 was allowed by the NRC to expire in April 1978 (ML111080529 and ML111080531).

In November 2006, the Army notified the NRC of the discovery of DU at the Army's Schofield Barracks installation on the island of Oahu, Hawaii (ML070650224). Specifically, an Army contractor visually discovered spotting round fragments while performing "range clearing" exercises for unexploded ordnance. From November 2006 through February 2007, the NRC and Army staffs discussed the presence of the DU at Schofield Barracks (ML070650224). In February 2007, the Army sent a letter to the NRC outlining its investigation of the DU found at Schofield Barracks and indicated that it might need a license to possess the quantity of DU it believed to be present (ML070650679). The Army also suggested in the letter that before submitting such a license application, it would determine the total number of installations that

might contain DU from spent spotting rounds used in connection with the Davy Crockett weapon system. In March 2007, the NRC staff sent a letter to the Army stating that the approach suggested by the Army was reasonable (ML070710239). In August 2007, the Army verbally notified the NRC that it had discovered DU contamination at the Pohakuloa Training Area installation. On November 6, 2008, the Army submitted a license application to the NRC for a license to possess the quantities of DU believed by the Army to be present at various Army installations, including, in addition to the two Hawaiian installations, Forts Benning (Georgia), Campbell (Kentucky), Carson (Colorado), Hood (Texas), Knox (Kentucky), Lewis (Washington), and Riley (Kansas) (ML090070095). On November 16, 2010, the NRC held a license application meeting with the Army at NRC headquarters. At that meeting, the Army informed the NRC staff of the current status of its investigation of the extent of DU contamination at Army installations and indicated that DU contamination may be present at 17 installations (ML103360437).

In addition, on October 29, 2010, technical and project management staff from the Army met with NRC staff at NRC headquarters to discuss planned construction activities in areas known to contain DU at the Schofield Barracks installation. At the meeting, the Army reported that it had removed DU (utilizing the services of Cabrera Services, Inc., an NRC-licensed remediation contractor) from a portion of the Schofield Barracks installation as part of a project to construct a Battle Area Complex (BAX) at Schofield Barracks (ML103130409). On November 24, 2010, the NRC staff issued a letter to the Army outlining what decommissioning activities could and could not be undertaken by Cabrera Services in support of the Army's plan to construct a BAX at the Schofield Barracks installation (ML103160174). In that letter, the NRC staff communicated to the Army that any maintenance activities that might occur within areas believed to be contaminated with DU at the identified installations would need to be conducted in accordance with a radiation safety program approved by the NRC via an NRC-issued license.

Accordingly, such maintenance activities would need to be suspended until a radiation safety program was approved via an NRC-issued license.

On April 5, 2011, the NRC requested a predecisional enforcement conference (PEC) with the Army to discuss an apparent violation of the NRC's regulations at 10 CFR 40.3, in that the Army apparently possessed DU at multiple installations without an NRC license and, consequent to that, may have performed decommissioning at the Schofield Barracks installation without proper NRC authorization (ML110660245). The purpose of the PEC was to obtain information to assist the NRC in making an informed enforcement decision. In addition, the PEC provided the Army with the opportunity to present its perspective on the apparent violation and any other information that the Army believed the NRC should take into consideration in making an enforcement decision. The PEC was held on May 10, 2011. A summary of the results of the PEC is available in ADAMS at ML111590184.

III. DISCUSSION

The Petition requested that the NRC investigate whether, contrary to applicable law and regulations, the Army possessed or released into the environment DU from spent spotting rounds after the expiration of NRC License SUB-459. As noted, NRC License SUB-459 permitted the Army to distribute spotting rounds containing DU from 1961 through 1973. NRC License SUB-459 was allowed to expire, at the Army's request, in 1978. In light of this, the Petition raises a valid concern about the continued possession of licensable quantities of DU at various installations by the Army without an NRC license to do so. Title 10 of the *Code of Federal Regulations*, Section 40.3 states, in part, that persons may not receive title to, own, receive, possess, use, transfer, or dispose of source material unless authorized in a specific or general license issued by the Commission. Contrary to 10 CFR 40.3, the U.S. Army is in possession of DU, a source material, in the form of spent spotting rounds (expended prior to 1968) at firing ranges located at Schofield Barracks and Pohakuloa Training Area, in excess of

the exempt and general use limits, without authorization in a specific or general license issued by the NRC. In addition to the two installations in Hawaii, the Army has identified the presence of DU spotting rounds in licensable quantities of source material at Forts Benning and Gordon (Georgia), Campbell (Kentucky), Carson (Colorado), Hood (Texas), Knox (Kentucky), Lewis and Yakima Training Center (Washington), Bragg (North Carolina), Polk (Louisiana) Sill (Oklahoma), Jackson (South Carolina), Hunter-Liggett (California), Greeley (Alaska), Dix (New Jersey) and Riley (Kansas) without authorization via a specific license issued by the Commission.

Based upon this information, and in accordance with the NRC's Enforcement Policy, the NRC has issued a Severity Level III Notice of Violation to the Army (ML111680087). Therefore, insofar as the NRC has undertaken certain activities requested by the Petition, that being the initiation of an investigation to determine whether the Army possesses DU in licensable quantities without authorization from the NRC to do so and the issuance of an enforcement action based on that investigation, the NRC grants that portion of the Petition concerned with such activities.

In addition, the Petition requests that, if the NRC determines that a violation has occurred, to assess against the Army the maximum penalty permitted by law, and asks that any assessed monetary fines be applied to the environmental remediation of DU contamination at the Schofield Barracks and Pohakuloa Training Area installations in Hawaii, if the law provides for such action. Consistent with the NRC Enforcement Policy (www.nrc.gov/about-nrc/regulatory/enforcement/enfore-pol.html), the NRC chose not to impose any civil penalty against the Army for the noticed violation because: (1) the Army installations in Hawaii have not been previously the subject of escalated enforcement action; (2) the Army identified and notified the NRC of the presence of radioactive material and, finally; (3) the Army implemented corrective actions in response to the discovery of the presence of the DU. Further, even if the NRC were to have chosen to impose a civil penalty, it is the position of the NRC that the law

does not provide for the application of that assessed civil penalty to the environmental remediation of DU contamination as requested by the Petitioner because fines assessed for violations of NRC requirements are sent to the U.S. Treasury. Therefore, this portion of the Petition has been denied.

IV. CONCLUSION

Based on the information summarized above, the NRC staff concludes that the activities requested by the Petitioner have been granted in part and denied in part, in that the NRC staff initiated an investigation into the apparent violation of the NRC's regulations at 10 CFR 40.3 and took enforcement action against the Army. The portion of the Petition relating to the assessment of the maximum penalty permitted by law and the use of assessed monetary penalties for environmental remediation, for the reasons discussed, is denied.

As provided in 10 CFR 2.206(c), a copy of this Director's Decision will be filed with the Secretary of the Commission for the Commission to review. As provided for by this regulation, the Decision will constitute the final action of the Commission 25 days after the date of the Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

Dated at Rockville, Maryland, this day of August, 2011

FOR THE NUCLEAR REGULATORY COMMISSION

Cynthia A. Carpenter, Acting Director
Office of Federal and State Materials
and Environmental Management Programs