

From: [Kalman, Kenneth](#)
To: [Achten, Sarah](#)
Cc: [Orlando, Dominick](#)
Subject: FW: Issuance of Notice of Violation to the U.S. Army
Date: Tuesday, September 06, 2011 4:01:23 PM
Attachments: [SUB-459 Renewed 5-68.pdf](#)
[SUB-459 11-1-61.pdf](#)
[SUB-459 Amended 8-63.pdf](#)
[SUB-459 Amended 10-62.pdf](#)
[SUB-459 Renewed 4-65.pdf](#)
[Comments on Proposed Director's Decision and Notice of Violation.pdf](#)

Please put this in adams

From: Orlando, Dominick
Sent: Tuesday, September 06, 2011 2:54 PM
To: Kalman, Kenneth
Subject: FW: Issuance of Notice of Violation to the U.S. Army

Hi Ken

Did you put this in ADAMs

Thanks
NickO

From: Isaac Harp [mailto:imua-hawaii@hawaii.rr.com]
Sent: Sunday, August 21, 2011 9:09 PM
To: Kalman, Kenneth
Cc: EPA Region 9 Hawaii; EPA Region 9 PIO Manager; OHA Trustee, Bob Lindsey; russell.takata@doh.hawaii.gov; Clements, John; DeCicco, Joseph; Hayes, John; Kalman, Kenneth; Klukan, Brett; McConnell, Keith; Michalak, Paul; Orlando, Dominick; Robert Summers; Sexton, Kimberly; Zimmerman, Roy; Bob Cherry; Gregory Komp; Michael Kent Herring; Cory Harden; Dr. Lorin Pang; Dr. Mike Reimer; Jim Albertini; Lanny Sinkin; Representative, Cindy Evans; Congresswoman Mazie K. Hirono; Gary Gill, DoH
Subject: Re: Issuance of Notice of Violation to the U.S. Army

Aloha Mr. Kalman/Ken,

I received the hard copy of the Request for Comments on the Proposed Director's Decision dated August 8, 2011 from Acting Director, Cynthia Carpenter of the Office of Federal and State Materials and Environmental Management Programs. Mahalo (Thank You).

Please accept my comments on the Proposed Director's Decision and comments on the Notice of Violation to the Army, as well as the attached commentary by Michael Reimer, PhD (retired).

VIOLATION DATE DISCREPANCY:

While reviewing the NRC's Notice of Violation (NOV) to the Army (ADAMS at ML111680087), I discovered a significant discrepancy on the time period that NRC License SUB-459 provided for manufacture, distribution, use, and possession of Davy Crocket spotting rounds. My conclusion, after review of the original and several revised and renewed versions of license SUB-459, is that two (2) versions of SUB-459 did in fact provide for Davy Crocket spotting rounds, in addition both versions expired on October 31, 1964. This

contradicts the NRC's statement contained in the Notice of Violation on the period that the date that the Army's violations began. The NRC states that the violations began April, 1978 after the last version of SUB-459 expired. It appears the specific allowances provided for under each of the several revisions and renewals of NRC license SUB-459 have not been considered by the NRC. I have attached five (5) versions of SUB-459 for review by the NRC. Please note that if the NRC requires later versions of SUB-459 to confirm that they also do not provide for Davy Crocket spotting rounds beyond October 31, 1964 later versions are available on ADAMS.

- 1) SUB-459 11-1-61 (*provides for spotting rounds*) - Expired October 31, 1964.
- 2) SUB-459 Amended 10-62 (*provides for spotting rounds and artillery rounds*) - Expired October 31, 1964.
- 3) SUB-459 Amended 8-63 (*provides for small arms ammunition and artillery rounds*) - Expired October 31, 1964.
- 4) SUB-459 Renewed 4-65 (*provides for explosive devices*) - Expired April 30, 1968.
- 5) SUB-459 Renewed 5-68 (*provides for explosive devices*) - Expired April 30, 1973.

AUTHORIZATION:

I note that the several versions of license SUB-459 that I have reviewed and attached appear to be scanned copies that do not include authorizing signatures. Many documents include type written names and titles under the signature lines, while the original version does not include even a type written name. I would like to know if AEC/NRC licenses lacking authorized signatures are actually authorized licenses. I am of the opinion that in order for a federal license involving source material to be duly authorized, that the license must include the signature of the agency representative providing authorization. If the NRC is of the opinion that authorizing signatures are not required on such documents, please point me to the regulation/code/rule that provides exemption. Thank you in advance.

RECORD KEEPING:

All those involved in this matter now realize that the Army failed to maintain accurate and complete records on the amount of source material that they shipped and released into the environment of the several states noted in the NOV, including Hawaii. We also understand that the Army failed to maintain records on the specific locations where source material was released, both with, and as I have pointed out, without a license after October 31, 1964. At 10 CFR § 74.19 Recordkeeping, we find that recordkeeping by licensees is required yet there is no mention of this in the NOV to the Army or the Proposed Director's Decision. Particular attention should be given to 10 CFR § 74.19 (a)(3), which states: *Each record of receipt, acquisition, or physical inventory of special nuclear material that must be maintained pursuant to paragraph (a)(1) of this section must be retained as long as the licensee retains possession of the material and for 3 years following transfer or disposal of the material.* (emphasis added) If this regulation was not in effect in the 1960s, it is in effect now and should be considered.

AMOUNT OF SOURCE MATERIAL DISCREPANCY:

The Army made very few records available to the NRC prior to and during the investigation. Unfortunately, it appears that the NRC has very limited records as well. Although the Army and NRC records are clearly far from complete, it appears that the NRC has concluded that the one record on the shipment of Davy Crockett spotting rounds to Hawaii (714 rounds) is

sufficient to conclude that this is a full account of the number of spotting rounds shipped to Hawaii regardless of other evidence such as the number of firing pistons observed at Hawaii sites. Information compiled in reports by government agencies such as the Army Corps of Engineers, citizen research, and reports by independent consultants suggest that the number of spotting rounds shipped to Hawaii exceeds the single record recovered by the Army. Mr. Peter Strauss, independent environmental consultant estimated that there may be as many as 2,000 depleted uranium rounds at the Pohakuloa Training Area (PTA) alone. Mr. Strauss' analysis was based on government reports estimating that between 120 and 400 Davy Crockett firing pistons are scattered around impact ranges at PTA, and that each piston would have fired up to five spotting rounds. In addition, Army Colonel, Howard Killian presented to the Hawaii County Council and the local media that it would require at least 2000 spotting rounds to qualify soldiers on a Davy Crockett Weapons System.

SURFACE SOURCE MATERIAL DUMPSITE:

The NRC is not requiring removal or cleanup of source materials from known contaminated sites, which constitutes unwritten NRC approval to the Army for open surface source material dumpsites. No version of SUB-459 provides for establishing source material dumpsites in areas contaminated with Davy Crockett spotting rounds. 10 CFR PART 61 provides the licensing requirements for land disposal of radioactive waste. Like Record Keeping above, if this regulation was in effect in the 1960s, it is in effect now and should be considered. The Army did not apply for a license for land disposal and the NRC did not grant a land disposal license to the Army. The NRC did not provide the Army with an exemption to 10 CFR Part 61. Exemptions must meet the following requirements: *The exemption is authorized by law, will not endanger life or property or the common defense and security, and is otherwise in the public interest.* Surface source material dumpsites will endanger life, is clearly not in the public interest, and it is questionable if the NRC has the lawful authority to provide an exemption for a source material dumpsites when the NRC and the Army remain uncertain on where specifically the source material is located.

FORGOTTEN SITES:

The NRC failed to cite the Makua Military Training Area on Oahu as a location of potential source material contamination. The potential that this area may be contaminated is evidenced by the Army's own admissions that they may have used Davy Crockett weapons system spotting rounds at the Makua Military Training Area, in addition to other sources such as the Army Corps of Engineers report. The Army remains uncertain about this area due to their lack of records, the heavy brush overgrowth that prevented them from conducting a thorough aerial survey, and unexploded ordinance making a thorough ground survey of the Makua Military Training Area potentially hazardous. The Army's application for an after-the-fact license to possess depleted uranium spotting rounds states, *"Installations currently subject to further investigation include: Aberdeen Proving Ground, MD; Fort Dix, NJ; and Makua Military Reservation, HI."* The NRC should requiring monitoring for depleted uranium on the island of Kaho'olawe. The US military and their allies used the island of Kaho'olawe for training between 1941 and 1990. This is a potential site where secret weapons such as Davy Crockett may have been used. More information is available here: <http://www.globalsecurity.org/military/facility/kahoolawe.htm>

SHARED RESPONSIBILITIES:

Both the Army and the NRC, as user and regulatory agency respectively, share responsibility for not keeping track and maintaining records of source material use and disposition licensed under SUB-459.

UNNECESSARY EXPOSURE:

The NRC is exposing military personnel and the public health and safety to unnecessary risk. The NRC is not requiring a cleanup of source material or a halt to military training activities at contaminated sites. The NRC is not pursuing removal of source material contaminated sites from the Department of Defense inventory of active military training areas. Fine particles of source material are easily ingested through inhalation when liberated by live-fire and other military training, civilian contractor activities, and high winds. Pohakuloa Training Area is currently in use as a live-fire training area for small arms, artillery, etc, and an aircraft missile, rocket, and inert bombing impact area.

NO SITE DECOMMISSIONING:

The NRC is not requiring measures for future decommissioning of source material contaminated sites as provided for under § 40.36 Financial assurance and recordkeeping for decommissioning. § 40.36 (f) Each person licensed under this part shall keep records of information important to the decommissioning of a facility in an identified location until the site is released for unrestricted use. Before licensed activities are transferred or assigned in accordance with § 40.41 (b) licensees shall transfer all records described in this paragraph to the new licensee. In this case, the new licensee will be responsible for maintaining these records until the license is terminated. If records important to the decommissioning of a facility are kept for other purposes, reference to these records and their locations may be used. § 40.41 (f) (3) Except for areas containing depleted uranium used only for shielding or as penetrators in unused munitions, a list contained in a single document and updated every 2 years, of the following: (i) All areas designated and formerly designated as restricted areas as defined under 10 CFR 20.1003; (ii) All areas outside of restricted areas that require documentation under § 40.36(f)(1); (iii) All areas outside of restricted areas where current and previous wastes have been buried as documented under 10 CFR 20.2108; and (iv) All areas outside of restricted areas that contain material such that, if the license expired, the licensee would be required to either decontaminate the area to meet the criteria for decommissioning in 10 CFR part 20, subpart E, or apply for approval for disposal under 10 CFR 20.2002.

UNAUTHORIZED DECOMMISSIONING ACTIVITIES AT SCHOFIELD BARRACKS:

The NRC is already aware of this issue but apparently failed to consider it in the proposed no-action decision.

UNDUE NOTIFICATION DELAY:

From my research effort, it appears that the Army did not report formally notifying the NRC of their unlicensed possession of source material for over a year after a civilian contractor discovered it. Perhaps the Army and NRC held informal discussion on this matter? Details at: <http://pbadupws.nrc.gov/docs/ML0706/ML070650224.pdf> Citizens

informed the public of the source material discovery before the Army. More details provided by Kyle Kajihiro, American Friends Service Committee can be viewed here:

<http://pbadupws.nrc.gov/docs/ML0930/ML093070738.pdf>

UNACCEPTABLE DETECTION AND MONITORING:

Details at: <http://pbadupws.nrc.gov/docs/ML0929/ML092940675.pdf>

POTENTIAL CONFLICT OF INTEREST:

A potential conflict of interest revealed itself following the recent discovery of a declassified Secret U.S. Army Weapons Command document titled: *Project Management of the Davy Crockett Weapons System 1958 – 1962 (U)*. This declassified document reveals that in late 1957, the U.S. Atomic Energy Commission announced that they had successfully developed a light, sub-kiloton warhead. This warhead became the primary component in the Battle Group Atomic Delivery System, which was renamed *Davy Crockett Weapons System* in August 1958. The Energy Reorganization Act of 1974 divided the functions of the Atomic Energy Commission to its offspring, the Energy Research and Development Administration (now the United States Department of Energy), and the Nuclear Regulatory Commission.

IMPROPER ADMINISTRATIVE PROCEDURES:

It is clear that the NRC failed to conduct a comprehensive review of all available information and laws resulting in the NRC decision that their enforcement investigation was sufficient to warrant no enforcement action beyond the issuance of a written NOV to the Army. There is clearly an absence of a rational connection between the facts found and the information and decision documented in the NOV. There has been an error of judgment on behalf of the NRC; an action not based upon consideration of relevant factors and so is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. The Administrative Procedure Act provides for relief under such circumstances. I refer you to review the Administrative Procedure Act, 5 U.S.C., Section 706. - Scope of review, (2)(A), which reads: *To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall - (2) hold unlawful and set aside agency action, findings, and conclusions found to be - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.*

REQUEST:

I request the NRC establish of a Special Task Force to work cooperatively to resolve this matter. I request the Special Task Force include representatives of:

- 1) NRC,
- 2) Department of Defense,
- 3) State Department,
- 4) Office of the U.S. Attorney General,
- 5) Environmental Protection Agency, Region 9,
- 6) State of Hawaii Department of Land and Natural Resources,
- 7) State of Hawaii Office of Hawaiian Affairs,

- 8) State of Hawaii Department of Health,
- 9) Six (6) citizen representatives from Hawaii to be selected by myself as the requestor of NRC enforcement action against the Army, and
- 10) At least one (1) citizen representative of each affected state, other than Hawaii, listed in the NOV if interested citizen representatives of those states so desire to participate.

Establishment of a Special Task Force is provided for under Chapter 1, Section 1.13 of the Nuclear Regulatory Commission Enforcement Manual, Revision 7 dated October 1, 2010. For the sake of transparency, all Special Task Force representatives should be involved in developing the charter or tasking memorandum of the Special Task Force. The charter or tasking memorandum of the Task Force might include a process of arbitration with the intent of achieving a reasonable and satisfactory resolve. The Army has greatly contaminated Hawaii's environment with over 800 chemical, biological, radiological, and unexploded munitions sites. Citizen involvement and oversight of source material detection, monitoring, and cleanup is long overdue.

REQUEST:

Army and NRC records concerning source material from the Davy Crockett Weapons System are clearly incomplete. Therefore, I request that the NRC require Comprehensive and Independent Testing and Monitoring, WITH citizen oversight. This is necessary to determine the full extent of radiation contamination at PTA, Schofield, and other suspected Hawaii sites, as well as other sites listed in the NOV. Without the citizen oversight provision, public trust in testing and monitoring will remain absent.

URGENT REQUEST:

While the NRC considers the above comments, request to establish a Special Task Force to bring resolve to this matter, and request for independent testing and monitoring with citizen oversight, I have a request of a more immediate nature. I request that the NRC open an immediate investigation to determine if the Army or any other branches of the U.S. Department of Defense imported depleted uranium 1) small arms ammunition, 2) artillery rounds, 3) hand grenades, 4) mines, 5) warheads, and 6) other explosive devices to Hawaii, as well as to other sites specified in the NRC's NOV to the Army. Like the Davy Crockett spotting rounds, there may be other sources that are unaccounted for. This request is made due to the fact that revisions and renewals to NRC license SUB-459 provided for these depleted uranium weapons.

REMINDER:

In conclusion, I remind everyone again that Hawaii is not a lawful state of the United States. Hawaii remains an independent nation under prolonged belligerent United States military occupation, which began on January 16, 1893 with the unlawful landing of United States military troops in Hawaii. This can be confirmed through review of U.S. Public Law 103-150. A thorough explanation of the historical relationship between the United States and Hawaii is provided by Dr. David "Keanu" Sai, Political Professor at this website:
<http://www2.hawaii.edu/~anu/>

Geneva Conventions of 12 August 1949, signed 08 December 1949 by United States Minister

Vincent, Ratified by the United States of America 08 February 1955: Section III. Occupied territories

Art. 53. *Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.* (emphasis added) The United States had several alternative sites for Davy Crockett and other depleted uranium experiments as presented by the long list of sites contained in the NOV to the Army.

Thank you very much.

Sincerely,

Isaac Harp

Attachment:
Commentary by Michael Reimer

Attachment:

Commentary by Michael Reimer, PhD.
756-6081 Ali'i Drive
Kailua-Kona, HI 96740
GeoMike5@att.net

I have read the Notice of Violation (NOV) prepared by the Nuclear Regulatory Commission (NRC) against the U.S. Army for illegal possession of radioactive materials in Hawaii (EA-10-49, August 1, 2011).

While I am pleased that the NRC recognizes the possession without license as a violation, I find it disturbing that a proper discussion and meaningful assigned penalty has not been assessed. Here, I am not referring to a less than hand-slap fine of \$3,500. In fact, I would not doubt that it would take more to process such a fine between two large government agencies than the amount assessed.

The accuracy of the various issues can be addressed separately. As examples of some that need attention are: How was the use of depleted uranium (DU) discovered at PTA? How many rounds were actually fired? When did the initial radioactive material possession license for DU really expire?

A general concern is that from the late 1960s through today, it appears that there was inadequate (more likely none at all) processes addressing the identification, potential hazard, distribution, and remediation of the existing materials. In short, there is great uncertainty on where the radioactive material is and what might have been its transport fate during the intervening 40 years. Even if there is a claim that subsequent licenses not specifically addressing DU were adequate to cover the possession, there are no records to indicate proper procedures were followed in its handling.

I would have hoped that the NRC would have strongly addressed this issue requiring proper handling. DU was ignored for those 40 years!

I believe it is necessary to require several efforts to establish empirical, not speculative, information on the location and form of DU and that it should be part of the NOV.

First, there must be adequate on-site search. At one time, the U.S. Army had announced that they, through their contractor Cabrera, were going to place a very sensitive detector on a helicopter and fly a few feet above the terrain in hopes of detecting the low energy radiation from DU. As far as I know, this was not done. Some sort of wide-area search must be implemented. There is an effort at Schofield Barracks, Oahu for locating and removal of DU in the active training areas. No less an effort should be undertaken at Pohakuloa, Hawaii. I believe one report issued by the U.S. Army noted a few DU spotting rounds or fragments were located at Pohakuloa and they were buried at the site, in effect a decommissioning activity that also should be subject to possible violation review under 10 CFR 40.3.

Second, there must be a comprehensive and rigorous monitoring program. What has been done to date is woefully inadequate both for airborne materials and for ground searching. For this monitoring, particularly the airborne portion, I would not hesitate to recommend that it be turned over completely to a citizens' watch group and funded by the U.S. Army.

Recognizing the possibility that the first two suggestions will be summarily rejected by the U.S. Army, there is another alternative to be considered.

Third, the notice of violation should state clearly that the use of the radiation suspect areas be totally off limits to any type of trespass. It should not be used for any type of training exercise, whether just personnel and light vehicles or as a firing impact range. Another explanation is that it might be converted in form to being unrecognizable or even buried after 40 years of training exercises in those suspect areas. It does not really matter. If the material cannot be found and removed, the area must be declared off limits to any type of activity. Proposed monitoring, as in the draft radiation protection plan, is inadequate. It is not enough to monitor boots, tires, or tracks for suspected radiation, but there should be active air sampling monitors on those persons and vehicles, including rotary wing aircraft. The best solution is to sequester the area from all types of use. Of course, there is the possibility that if the DU material cannot be found where it is suspected, then it is likely someplace else.

These actions should be included in this NOV. The lack of oversight when not covered by a license has created unknown conditions that may have or could be conducive to distributing the radioactive material off site. If not included in the NOV, then these conditions must be addressed in any future license. Yet, it seems somewhat ludicrous to issue a license for possession of a material that no one seems to know where it is.

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

From: [Kalman, Kenneth](#)

To: [Isaac Harp](#)

Cc: [Clements, John](#) ; [DeCicco, Joseph](#) ; [Hayes, John](#) ; [Kalman, Kenneth](#) ; [Klukan, Brett](#) ; [McConnell, Keith](#) ; [Michalak, Paul](#) ; [Orlando, Dominick](#) ; [Robert Summers](#) ; [Sexton, Kimberly](#) ; [Zimmerman, Roy](#) ; [Bob Cherry](#) ; [Gregory Komp](#) ; [Michael Kent Herring](#) ; [Cory Harden](#) ; [Dr. Lorin Pang](#) ; [Dr. Mike Reimer](#) ; [Isaac Harp](#) ; [Jim Albertini](#) ; [Lanny Sinkin](#)

Sent: Wednesday, August 03, 2011 10:10 AM

Subject: Issuance of Notice of Violation to the U.S. Army

Mr. Harp,

I am writing to inform you that the U.S. Nuclear Regulatory Commission (NRC) has issued a Notice of Violation (NOV) to the Army for violation of NRC regulations at 10 CFR 40.3 – possession of depleted uranium without an NRC license.

The NOV can be accessed through the NRC's Agencywide Document Access and Management System (ADAMS) at ML111680087. Please note that the document currently in ADAMS does not include the final updated concurrence page. This is being corrected and the corrected version will be available in ADAMS tomorrow. There will be no change in the NOV findings or enforcement action, only the concurrence page will change.

Thank you for your interest in this matter,

Ken Kalman