

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Gary S. Arnold
Dr. Sue H. Abreu

In the Matter of

U.S. ARMY INSTALLATION COMMAND

(Source Materials License No. SUC-1593,
Amendment 2, Davy Crockett Depleted
Uranium at Various United States Army
Installations)

Docket No. 40-9083

ASLBP No. 17-952-01-MLA-BD01

June 13, 2017

MEMORANDUM AND ORDER

(Denying Requests for Hearing and Dismissing Petitions to Intervene)

Before the Board are four separate hearing requests and petitions to intervene filed by pro se petitioners—James V. Albertini, Cory Harden, Hāwane Priscilla Marie Kalikokaumakaikealaulaomana Rios, and Ruth-Rebeccalynne Tyana Lokelani Aloua (collectively Petitioners).¹ Petitioners seek a hearing on the second license amendment request submitted by the U.S. Army Installation Command (the Army) regarding a 10 C.F.R. Part 40

¹ James V. Albertini Request for Hearing and Petition for Leave to Intervene (Apr. 6, 2017) [hereinafter Albertini Petition]; Cory Harden Request for Hearing and Petition for Leave to Intervene (Apr. 7, 2017) [hereinafter Harden Petition]; Hāwane Priscilla Marie Kalikokaumakaikealaulaomana Rios Request for Hearing and Petition for Leave to Intervene (Apr. 10, 2017) [hereinafter Rios Petition]; Ruth-Rebeccalynne Tyana Lokelani Aloua Request for Hearing and Petition for Leave to Intervene (Apr. 10, 2017) [hereinafter Aloua Petition]. This Board was established to preside over this proceeding on April 13, 2017. U.S. Army Installation Command; Establishment of Atomic Safety and Licensing Board, 82 Fed. Reg. 18,486 (Apr. 19, 2017).

source materials license for possession of depleted uranium (DU)² at various Army installations, including the Pohakuloa Training Area (Pohakuloa). The second license amendment request addresses licensing conditions requiring the submission of site-specific Environmental Radiation Monitoring Plans (ERMPs) and site-specific dose calculations that are consistent with the programmatic ERMP and dose modeling methodology approved by the first licensing amendment to the source materials license.³

Because all Petitioners lack standing we deny each request for a hearing and dismiss each petition. Further, no contention put forward by any Petitioner satisfies the requirements for an admissible contention.

I. PROCEDURAL HISTORY

The Army's application for a source materials license for DU at Pohakuloa was previously litigated before a licensing board of the Atomic Safety and Licensing Board Panel and the Commission in 2010.⁴ The original licensing proceeding's record indicates that DU originated from the use of M101 "spotting rounds" in conjunction with the Davy Crockett nuclear

² Uranium is a naturally occurring radioactive element. See U.S. Nuclear Reg. Comm'n (NRC), Glossary: Uranium, <https://www.nrc.gov/reading-rm/basic-ref/glossary/uranium.html> (last visited June 7, 2017). Uranium in natural ores contains two principal isotopes: uranium-238 (99.28 percent by weight) and uranium-235 (0.72 percent by weight). See Int'l Atomic Energy Agency, Depleted Uranium, <https://www.iaea.org/topics/spent-fuel-management/depleted-uranium> (last visited June 7, 2017) [hereinafter IAEA Depleted Uranium]. By regulation, DU is source material uranium in which uranium-235 is less than 0.711 percent by weight of the total uranium present. See 10 C.F.R. § 40.4. DU typically contains 99.8 percent by weight U-238 and 0.2 percent by weight U-235. See IAEA Depleted Uranium. In general, the levels of radioactive emissions of natural uranium isotopes are inversely related to the atomic weight of a specific isotope. Id. Therefore, uranium-238 produces less alpha, beta, and gamma radiation than uranium-235, and DU, with a relatively higher percentage of U-238, is much less radioactive than natural uranium. Id.

³ Source Materials License No. SUC-1593, Amendment 2, Davy Crockett Depleted Uranium at Various United States Army Installations, 82 Fed. Reg. 10,031, 10,031 (Feb. 9, 2017).

⁴ U.S. Army Installation Command (Schofield Barracks, Oahu, Haw., and Pohakuloa Training Area, Island of Haw., Haw.), LBP-10-4, 71 NRC 216, aff'd, CLI-10-20, 72 NRC 185 (2010).

weapon system at Schofield Barracks (Schofield) and Pohakuloa during the 1960s.⁵ The heavy weight of DU enabled the spotting rounds to simulate—for targeting purposes only—the trajectory of non-nuclear practice projectiles.⁶ The DU fragments are located in highly-controlled, unoccupied impact areas, which, due to the presence of unexploded munitions, are accessed only by specially trained personnel.⁷

DU fragments from the spotting rounds “remained on the firing ranges, undetected, until the Army discovered the fragments at Schofield and Pohakuloa in 2005 and 2008, respectively.”⁸ Army records were insufficient to determine the exact number of spotting rounds used at these locations.⁹

In 2008, the Army submitted an application “to possess and manage DU at Schofield and Pohakuloa, in order to perform radiological surveys to fully characterize the nature and extent of contamination, and, as appropriate, to obtain information necessary to support development of decommissioning plans.”¹⁰ The Army’s application conservatively presumed, for purposes of calculating potential radiation exposure, that 560 kilograms (1,232 pounds) of

⁵ U.S. Army, LBP-10-4, 71 NRC at 220; U.S. Army, CLI-10-20, 72 NRC at 187.

⁶ U.S. Army, LBP-10-4, 71 NRC at 220; U.S. Army, CLI-10-20, 72 NRC at 187. If processed, DU has some commercial applications, including use as counterweights, armor shielding, and military penetrators. NRC, Frequently Asked Questions About Depleted Uranium Deconversion Facilities, <https://www.nrc.gov/materials/fuel-cycle-fac/ur-deconversion/faq-depleted-ur-decon.html> (last visited June 7, 2017) [hereinafter NRC Frequently Asked Questions About Depleted Uranium].

⁷ U.S. Army, LBP-10-4, 71 NRC at 222.

⁸ U.S. Army, CLI-10-20, 72 NRC at 187.

⁹ Id.

¹⁰ Id.

DU were distributed in the surface soils of each firing range at Schofield and Pohakuloa.¹¹

Four pro se petitioners, including Petitioners Harden and Albertini, who are also before this Board, requested a hearing on the Army's source materials license application.¹² Three of those petitioners, including Petitioners Harden and Albertini, were similarly situated in that they all lived at least 19 miles away from Pohakuloa.¹³ The fourth petitioner lived within two miles of Schofield.¹⁴ The original licensing board rejected all four hearing requests because each petitioner failed to establish standing under traditional or proximity-based standing principles.¹⁵ Regarding the one petitioner who presented the strongest standing claim—due to closer proximity¹⁶—the original licensing board additionally concluded that the petitioner did not proffer an admissible contention.¹⁷

The original licensing board concluded that none of the petitioners had established proximity-based standing because no petitioner had shown that the DU spotting rounds at Pohakuloa presented a significant source of radiation with an obvious potential for offsite consequences.¹⁸ Regarding source significance, the original licensing board noted that the Army's conservative DU concentration assumptions resulted in a concentration of radioactivity

¹¹ U.S. Army, LBP-10-4, 71 NRC at 222. In contrast, the Army's radiation modeling associated with the ERMPs that accompanied its initial license application assumed that 135 kilograms (298 pounds) of DU were deposited at both Schofield and Pohakuloa. Id. at 222 n.7.

¹² Id. at 219.

¹³ Id. at 227.

¹⁴ Id.

¹⁵ Id. at 230–40.

¹⁶ Id. at 227.

¹⁷ Id. at 241–43.

¹⁸ See U.S. Army, CLI-10-20, 72 NRC at 190 (citing U.S. Army, LBP-10-4, 71 NRC at 231–34, 236–37).

significantly lower than the decommissioning screening values for uranium.¹⁹ Regarding offsite consequences, the original licensing board concluded that there was no apparent means for the DU to spread beyond its current location,²⁰ including consideration of alleged pathways associated with groundwater, wind, munitions use, controlled grass fires, and offsite soil disposal.²¹ Similarly, none of the petitioners established traditional standing because each failed to demonstrate a possible mechanism by which offsite DU migration could cause injury traceable to the licensing action.²² One petitioner appealed the original licensing board's decision. The Commission affirmed the licensing board's decision in all respects.²³

On October 23, 2013, the NRC Staff issued Source Materials License No. SUC-1593 to the Army for the DU spotting rounds at Schofield and Pohakuloa.²⁴ The source materials license authorized the possession of 125 kilograms (276 pounds) of DU and approved radiological environmental monitoring, but generally prohibited DU removal.²⁵

Prior to license issuance, the NRC Staff concluded that the Army's license application generally complied with the standards and requirements of the Atomic Energy Act and NRC

¹⁹ Id. at 190–91 (citing U.S. Army, LBP-10-4, 71 NRC at 231). Decommissioning screening values are “surface soil concentrations of individual radionuclides that would be deemed in compliance with the 25 mrem/y (0.25 mSv/y) unrestricted release dose limit in 10 CFR 20.1402.” Office of Nuclear Material Safety and Safeguards, Consolidated NMSS Decommissioning Guidance, Final Report, NUREG-1757, at B-3 tbl.B.2 (Vol. 1 Sept. 2002) (ADAMS Accession No. ML022620303).

²⁰ U.S. Army, CLI-10-20, 72 NRC at 191 (citing U.S. Army, LBP-10-4, 71 NRC at 232–34).

²¹ See U.S. Army, LBP-10-4, 71 NRC at 232–34, 236, 239–40.

²² See id. at 234, 237–38, 240.

²³ U.S. Army, CLI-10-20, 72 NRC at 187.

²⁴ Materials License SUC-1593 (Oct. 23, 2013) at 1 (ADAMS Accession No. ML13259A062) [hereinafter Source Materials License].

²⁵ See id.

regulations.²⁶ The Staff found, however, that license conditions were required to ensure that the Army conducted its radiation safety program in compliance with applicable regulations.²⁷ Therefore, the source materials license included license conditions requiring the Army to perform specific air and plant monitoring to confirm that additional monitoring was not warranted to protect facilities personnel and the public.²⁸

In June 2015, the Army submitted an application to amend its source materials license.²⁹ Under this first license amendment application, DU spotting rounds at 16 installations, including Schofield and Pohakuloa, would be licensed using a programmatic approach, including a programmatic Radiation Safety Plan, Physical Security Plan, and ERMP.³⁰ The programmatic ERMP contained general commitments regarding environmental monitoring of potentially significant DU pathways out of the radiation control areas that enclose the DU.³¹ The Army also proposed developing site-specific ERMPs for submission to the NRC,³² to include describing general sampling requirements for individual DU sites.³³ The programmatic ERMP concluded

²⁶ Safety Evaluation Report for the U.S. Army's Possession License for Depleted Uranium from the M101 Spotting Round (Oct. 2013) at 5 (ADAMS Accession No. ML13259A081) [hereinafter License SER].

²⁷ Id.

²⁸ Source Materials License at 3; License SER at 29–31.

²⁹ U.S. Dept. of the Army - Transmittal of Application for Amendment to License No. SUC-1593 (June 10, 2015) (ADAMS Accession No. ML15161A454).

³⁰ Safety Evaluation Report for the U.S. Army's Possession License for Depleted Uranium from Davy Crockett M101 Spotting Rounds – Amendment to Add Remaining Sites (Mar. 2016) at 1 (ADAMS Accession No. ML16039A230) [hereinafter LA1 SER].

³¹ Id. at 42.

³² Id.

³³ See U.S. Dept. of the Army - Application for Amendment to License No. SUC-1593, Including Attachments 4 through 9 (June 1, 2015) attach. 4, at 3 (ADAMS Accession No. ML15161A459).

that no air sampling would be required at any installation.³⁴ Moreover, groundwater monitoring would only be required if there were existing wells potentially influenced by DU in a radiation control area.³⁵

The NRC Staff approved the Army's programmatic approach, but imposed a licensing condition requiring the submission to the NRC of site-specific ERMPs.³⁶ The Staff agreed with the Army's analysis that the air exposure pathway, including from high explosive ordinance aerosolization of DU, was highly unlikely to result in a dose greater than 1.0 millirem (10 microSieverts) per year outside any radiation control area.³⁷ In comparison, natural background radiation in the United States averages about 310 millirem (3,100 microSieverts) per year.³⁸ The Staff also concluded that there was a low likelihood of groundwater contamination, because DU metal or oxide is insoluble.³⁹ As a result, the Staff concluded that air monitoring would not be required and groundwater would only be analyzed for DU when an existing well in the area of the DU was sampled for any purpose.⁴⁰

The Staff also evaluated the Army's dose assessment and concluded that it was unnecessary to require environmental monitoring of soil, sediment, surface water, and

³⁴ LA1 SER at 45–46.

³⁵ See id. at 47.

³⁶ See id. at 51; Amendment No. 1 Materials License SUC-1593 (Mar. 21, 2016) at 4 (ADAMS Accession No. ML16039A234) [hereinafter Amended Source Materials License].

³⁷ LA1 SER at 49.

³⁸ NRC, Backgrounder on Biological Effects of Radiation, <https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/bio-effects-radiation.html> (last visited June 7, 2017).

³⁹ LA1 SER at 50.

⁴⁰ Id. at 49–50.

groundwater on a regular basis.⁴¹ The Staff accepted the Army's calculation of the maximum possible radiation exposure, but imposed a licensing condition to submit site-specific dose modeling parameters, including a showing that the calculated site-specific all-pathway dose for each radiation control area did not exceed an annual total effective dose equivalent of 1.0 millirem (10 microSieverts).⁴² As a result, the Staff issued the amended license, which was not challenged by any petitioner.⁴³

In September 2016, the Army submitted a second license amendment application containing site-specific ERMPs for each DU licensed facility, including Pohakuloa.⁴⁴ Each site-specific ERMP also contains site-specific dose calculations for each radiation control area.⁴⁵ The Army's submission addresses the previously described licensing conditions imposed by the first license amendment.⁴⁶

The site-specific ERMP for Pohakuloa addresses the environmental pathways recommended for sampling in the programmatic ERMP, including surface water and sediment, groundwater, and soil.⁴⁷ The site-specific ERMP relies almost exclusively on sediment

⁴¹ Id. at 40–41.

⁴² Id. at 41.

⁴³ See Amended Source Materials License.

⁴⁴ Programmatic Approach for Preparation of Site-Specific Environmental Radiation Monitoring Plans (Sept. 21, 2016) (ADAMS Accession No. ML16265A221); see also Safety Evaluation Report for the U.S. Army's Possession License for Depleted Uranium from Davy Crockett M101 Spotting Rounds – Amendment to Address License Conditions Nos. 18 and 19 (Jan. 2017) at 10 (ADAMS Accession No. ML16343A163) [hereinafter LA2 SER].

⁴⁵ LA2 SER at 17.

⁴⁶ Id. at 11, 24.

⁴⁷ Final Site-Specific Environmental Radiation Monitoring Plan Pohakuloa Training Area (Sept. 2016) at 2-1 to 2-2 (ADAMS Accession No. ML16265A231) [hereinafter Site-Specific ERMP].

sampling.⁴⁸ The sediment sampling location is described as a point located at an intermittent stream, downstream from the radiation control areas.⁴⁹ After submitting the second license amendment application, however, the Army notified the NRC that it intends to relocate the sampling location further upstream, but within the same stream channel, and at the boundary of the radiation control area.⁵⁰ The site-specific ERMP also commits to soil sampling when soil erosion exceeds 25 square meters in a radiation control area.⁵¹

The site-specific ERMP does not include surface water sampling because Pohakuloa has only intermittent surface water features.⁵² No groundwater sampling is planned at Pohakuloa because no groundwater wells are currently located at or near radiation control areas,⁵³ which is a prerequisite for groundwater sampling under the programmatic ERMP.⁵⁴ Furthermore, the programmatic ERMP does not require air sampling at Pohakuloa.⁵⁵

The site-specific ERMP also assesses and concludes that the all-pathway dose for each Pohakuloa radiation control area does not exceed an annual total effective dose equivalent of 1.0 millirem (10 microSieverts).⁵⁶ The Army's dose assessment is based on the licensed

⁴⁸ See id.

⁴⁹ Id. at 2-1.

⁵⁰ NRC Staff's Answer to Requests for Hearing and Petitions to Intervene Filed by Cory Harden, James Albertini, Ruth Aloua, and Hāwane Rios (May 1, 2017) at 10 n.48 [hereinafter NRC Staff Answer].

⁵¹ Site-Specific ERMP at 2-1 to 2-2.

⁵² Id. at 2-1.

⁵³ Id.

⁵⁴ See LA1 SER at 47.

⁵⁵ Id. at 45–46.

⁵⁶ Site-Specific ERMP at 4-4.

amount of DU and a conservative model of a hypothetical residential farmer living in the radiation control area.⁵⁷

The NRC Staff reviewed the Army's second license amendment application and concluded that the site-specific ERMPs, including Pohakuloa, were consistent with the programmatic ERMP and prior licensing conditions.⁵⁸ The Staff also verified that the site-specific dose assessments demonstrated that radiation doses would not exceed an annual total effective dose equivalent of 1.0 millirem (10 microSieverts) for radiation control areas.⁵⁹

In response to a Federal Register notice of an opportunity to request a hearing regarding the second license amendment application,⁶⁰ Petitioners each filed a timely pro se petition.⁶¹ The NRC Staff and the Army oppose each petition, arguing that Petitioners lack standing and fail to proffer any admissible contentions.⁶² Petitioners did not exercise their right to reply to the Staff and the Army answers.⁶³

II. DISCUSSION

To obtain a hearing, a petitioner must establish standing and propose at least one admissible contention.⁶⁴ We conclude that each Petitioner fails to establish standing; therefore,

⁵⁷ See id. at 4-1; LA2 SER at 14.

⁵⁸ LA2 SER at 5.

⁵⁹ Id.

⁶⁰ 82 Fed. Reg. at 10,031.

⁶¹ See supra note 1.

⁶² NRC Staff Answer; US Army Installation Command's Answer to Requests for Hearing by Mr. Cory Harden, Mr. Jim Albertini, Ms. Hawane Rios, and Ms. Ruth Aloua ("Petitioners") (May 1, 2017).

⁶³ 10 C.F.R. § 2.309(i)(2).

⁶⁴ Id. § 2.309(a); see also id. § 2.309(d) (listing standing requirements); id. § 2.309(f)(1) (listing contention admissibility requirements).

we deny all four hearing requests on this basis. Furthermore, we conclude that Petitioners fail to provide an admissible contention; therefore, we also deny their hearing requests on this additional basis.

A. Standing Requirements

Pursuant to section 189a of the Atomic Energy Act, the NRC “shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.”⁶⁵ The NRC will grant a hearing request if the petitioner meets the standing requirements of 10 C.F.R. § 2.309(d) and submits at least one admissible contention according to 10 C.F.R. § 2.309(f).⁶⁶ Under section 2.309(d), regarding standing, the petitioner’s hearing request must contain:

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor’s/petitioner’s right under the [Atomic Energy Act or National Environmental Policy Act] to be made a party to the proceeding;
- (iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor’s/petitioner’s interest.⁶⁷

When assessing whether an individual has set forth a sufficient interest in the proceeding to intervene, the Commission has applied contemporaneous judicial concepts of standing—requiring injury, causation, and redressability.⁶⁸ To establish traditional standing in a

⁶⁵ 42 U.S.C. § 2239(a)(1)(A).

⁶⁶ 10 C.F.R. § 2.309(a).

⁶⁷ *Id.* § 2.309(d)(1).

⁶⁸ Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-15-25, 82 NRC 389, 394 (2015); Ga. Inst. of Tech. (Ga. Tech Research Reactor, Atlanta, Ga.), CLI-95-12, 42 NRC 111, 115 (1995).

materials license proceeding, 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 (or other applicable statute, such as the National Environmental Policy Act), and (4) is likely to be redressed by a favorable decision.”⁶⁹

The alleged injury must not be “conjectural” or “hypothetical.”⁷⁰ Additionally, in the case of a license amendment, the petitioner must also demonstrate that the amendment will cause “a distinct new harm or threat’ apart from the activities already licensed.”⁷¹ Lastly, the petitioner must show that “its actual or threatened injuries can be cured by some action of the tribunal.”⁷²

In certain circumstances, the Commission has adopted a proximity presumption that allows a petitioner living,⁷³ having frequent contacts,⁷⁴ or having a significant property interest⁷⁵ within 50 miles of a nuclear power reactor to establish standing without the need to make an individualized showing of injury, causation, and redressability.⁷⁶ The automatic proximity presumption, however, does not apply in materials licensing proceedings.⁷⁷ Instead, “[w]hether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-

⁶⁹ Sequoyah Fuels Corp. (Gore, Okla. Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001).

⁷⁰ Sequoyah Fuels Corp. (Gore, Okla. Site), CLI-94-12, 40 NRC 64, 72 (1994).

⁷¹ Int’l Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 251 (2001) (citations omitted).

⁷² Sequoyah Fuels Corp., CLI-01-2, 53 NRC at 14.

⁷³ Fla. Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 & 2), CLI-89-21, 30 NRC 325, 329 (1989).

⁷⁴ Sequoyah Fuels Corp., CLI-94-12, 40 NRC at 75.

⁷⁵ USEC, Inc. (Am. Centrifuge Plant), CLI-05-11, 61 NRC 309, 314 (2005).

⁷⁶ St. Lucie, CLI-89-21, 30 NRC at 329.

⁷⁷ Nuclear Fuel Servs., Inc. (Erwin, Tenn.), CLI-04-13, 59 NRC 244, 248 (2004).

case basis, taking into account the nature of the proposed action and the significance of the radioactive source.”⁷⁸ Under this “proximity-plus” approach, a petitioner must demonstrate that “the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.”⁷⁹

More generally, when analyzing a petitioner’s standing, a licensing board must apply the following principles. First, the “petitioner bears the burden to provide facts sufficient to establish standing.”⁸⁰ It is generally sufficient if the petitioner provides plausible factual allegations that satisfy each element of standing.⁸¹ Second, a licensing board is to construe the petition in favor of the petitioner for purposes of standing.⁸² Third, “pro se petitioners are held to less rigid pleading standards, so that parties with a clear—but imperfectly stated—interest in the proceeding are not excluded.”⁸³

B. Petitioners’ Standing

Petitioners premise their claims to standing on grounds that are similar to those rejected by the earlier licensing board. For the following reasons, we conclude that all four pro se Petitioners fail to establish standing here as well.

1. Petitioners Albertini and Harden

Petitioners Albertini and Harden are similarly situated for purposes of standing. Both individuals live approximately 30 miles from Pohakuloa and both describe some closer, limited

⁷⁸ Ga. Tech, CLI-95-12, 42 NRC at 116–17.

⁷⁹ Id. at 116.

⁸⁰ PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 139 (2010).

⁸¹ U.S. Army, LBP-10-4, 71 NRC at 229 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)).

⁸² Ga. Tech, CLI-95-12, 42 NRC at 115.

⁸³ U.S. Army, CLI-10-20, 72 NRC at 192.

contacts with the facility.⁸⁴ Petitioner Albertini states that he has been on the grounds of Pohakuloa for community meetings and to conduct Hawaiian ceremonies.⁸⁵ He also asserts that he has spent countless hours protesting and conducting religious ceremonies outside the perimeter of Pohakuloa.⁸⁶ He states that he has used Mauna Kea Park facilities within 1.5 miles of Pohakuloa.⁸⁷ Petitioner Harden states that she attended summer camp about one mile from the Pohakuloa boundary between 1957 and 1962.⁸⁸ She also states that she has spent one to two hours on the Pohakuloa grounds or within 100 feet of the boundary several times in the last ten years and drives past Pohakuloa several times a year.⁸⁹ Both Petitioners state that they are concerned about the health effects of DU on themselves and other island residents.⁹⁰

To establish proximity-plus standing, Petitioners Albertini and Harden are required to show, in part, that the licensing action involves a significant source of radioactivity that produces an obvious potential for offsite consequences.⁹¹ Neither Petitioner establishes that the DU spotting rounds satisfy this requirement.⁹²

⁸⁴ Albertini Petition at 1; Harden Petition at 1.

⁸⁵ Albertini Petition at 1.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Harden Petition at 1.

⁸⁹ Id.

⁹⁰ Albertini Petition at 1–2; Harden Petition at 1. A petitioner cannot establish individual standing based on the interest of another person or represent them without express authorization. See St. Lucie, CLI-89-21, 30 NRC at 329. As a result, the Petitioners cannot establish standing based on another’s interest.

⁹¹ Ga. Tech, CLI-95-12, 42 NRC at 116.

⁹² See U.S. Army, LBP-10-4, 71 NRC at 231–34, 236–37. For reasons identical to those stated in the original source materials licensing proceeding, Petitioners have failed to establish that the

First, Petitioners Albertini and Harden fail to demonstrate that the DU at Pohakuloa constitutes a significant source of radioactivity. In the initial licensing proceeding, Petitioner Harden asserted that 2,000 spotting rounds may have been fired at Pohakuloa, depositing approximately 838 pounds (380 kilograms) of DU.⁹³ In addressing this claim, the prior licensing board noted that the Army's application, for calculations of potential radiation exposure, presumed a higher amount of DU, which nonetheless resulted in a concentration of radioactivity that was significantly lower than decommissioning screening values for uranium.⁹⁴

In this proceeding, Petitioners Albertini and Harden again reference 2,000 DU spotting rounds,⁹⁵ without addressing how this amount of DU represents a significant source of radioactivity. Under the amended license, the Army may possess 140 kilograms, or approximately 309 pounds, of DU at Pohakuloa,⁹⁶ an amount less than that referenced by the Petitioners or addressed in the prior licensing proceeding. As the Commission previously concluded, the licensed concentrations of DU do not constitute a significant source of radioactivity, because there remains no indication that the DU concentrations at Pohakuloa even exceed the decommissioning screening values for uranium.⁹⁷

Second, Petitioners Albertini and Harden fail to demonstrate that onsite radioactivity produces an obvious potential for offsite consequences. In this proceeding, the Petitioners

DU spotting rounds involve a significant source of radioactivity that produces an obvious potential for offsite consequences. See supra note 18.

⁹³ U.S. Army, LBP-10-4, 71 NRC at 231.

⁹⁴ Id. at 231–32.

⁹⁵ Albertini Petition at 3; Harden Petition at 2.

⁹⁶ Amended Source Materials License at 1.

⁹⁷ U.S. Army, CLI-10-20, 72 NRC at 190–91; see also U.S. Army, LBP-10-4, 71 NRC at 231. As previously discussed, see supra note 2, DU is less radioactive than natural uranium by mass. See IAEA Depleted Uranium; NRC Frequently Asked Questions About Depleted Uranium.

generally reference air and water as potential DU pathways with offsite consequences.⁹⁸ More specifically, Petitioner Albertini references the “possibility of DU oxide dust particles blowing in the wind,” with the potential to be transferred even further by vehicles traveling near Pohakuloa.⁹⁹ He notes that “resuspension” of DU is a risk associated with high wind conditions, brush fires, and “live-fire.”¹⁰⁰ He further states that “DU burned by high explosives forms DU oxide particles that can be carried long distances by the wind.”¹⁰¹ He asserts that water wells have been drilled at Pohakuloa and its vicinity and water has been found at depths “much shallower” than anticipated.¹⁰² He claims that Pohakuloa is subject to flash flooding that can introduce “toxins” into the groundwater, resulting in toxins being “flushed” down to the ocean.¹⁰³

Similarly, Petitioner Harden references resuspension of DU from high winds, live-fire training, wildfires, and controlled burns.¹⁰⁴ She also asserts that the NRC Staff’s Safety Evaluation Report “does not account for fire tornadoes, dust storms, and other high-wind events.”¹⁰⁵ She contends that groundwater in the vicinity of Pohakuloa has been found at 500 feet—a shallower depth than that identified in the site-specific ERMP.¹⁰⁶ Without further

⁹⁸ See Albertini Petition at 1–3; Harden Petition at 1–3.

⁹⁹ Albertini Petition at 2.

¹⁰⁰ Id. at 3.

¹⁰¹ Id. at 11.

¹⁰² Id. at 2.

¹⁰³ Id. at 4.

¹⁰⁴ Harden Petition at 1.

¹⁰⁵ Id. at 3.

¹⁰⁶ Id. at 12.

explanation, she also states that the possibility of animals carrying DU out of radiation control areas should be evaluated.¹⁰⁷

We may not consider the potential for offsite air and groundwater pathways at Pohakuloa as a basis for standing in this proceeding because the possibility that these will serve as pathways was resolved by the first license amendment.¹⁰⁸ As previously stated, the Army's amended license does not require air monitoring and limits groundwater monitoring to wells in or near radiation control areas,¹⁰⁹ of which there are currently none at Pohakuloa.¹¹⁰ Air monitoring was found unnecessary and groundwater monitoring was limited by the first license amendment, because the risks associated with these pathways were evaluated by the NRC Staff and found to be unlikely sources of radiation exposure.¹¹¹ For this reason and the reasons elaborated in the preceding paragraphs, Petitioners Albertini and Harden fail to establish proximity-plus standing.

Petitioners Albertini and Harden also fail to satisfy traditional standing criteria. To establish traditional standing the Petitioners must show, in part, a concrete and particularized injury, actual or threatened, that is fairly traceable to the Army's licensing action.¹¹² Petitioners likewise fail to satisfy this burden. At a minimum, Petitioners fail to articulate a plausible chain

¹⁰⁷ Id. at 2.

¹⁰⁸ Regarding the obvious potential for offsite consequences, we note that the prior licensing board addressed similar theories regarding air and water pathways. That licensing board concluded that there was no apparent means for the DU to spread beyond its current location, including consideration of alleged pathways associated with groundwater, wind, munitions use, and controlled grass fires. U.S. Army, CLI-10-20, 72 NRC at 191; see also U.S. Army, LBP-10-4, 71 NRC at 232–34, 236, 239.

¹⁰⁹ LA1 SER at 49–50.

¹¹⁰ Site-Specific ERMP at 2-1.

¹¹¹ LA1 SER at 49–50.

¹¹² Sequoiah Fuels Corp., CLI-01-2, 53 NRC at 13.

of causation or, in this context, a plausible DU exposure pathway. As previously discussed, Petitioners assert air and water pathways, but these pathways were addressed in the prior licensing proceedings and are outside the scope of this proceeding.

Finally, Petitioners Albertini and Harden lack standing because they have failed to show how the site-specific monitoring plan creates “a distinct new harm or threat’ apart from the activities already licensed,” a requirement to raise a license amendment challenge.¹¹³

2. Petitioners Rios and Aloua

Petitioners Rios and Aloua are similarly situated for purposes of standing. Both individuals reside in Waiki’i Ranch, about five miles from Pohakuloa.¹¹⁴ Both Petitioners state that they are concerned about the personal health effects of DU.¹¹⁵ Petitioner Rios also states that she is concerned about potential air, water, and food source contamination and describes a personal increase in respiratory, liver, and digestive health problems during the two years she has lived in Waiki’i Ranch.¹¹⁶ Petitioner Aloua also states that she is concerned about the effects of DU on farm crops and animals at Waiki’i Ranch, soldiers at Pohakuloa, and “our born and unborn children.”¹¹⁷

To establish proximity-plus standing, Petitioners Rios and Aloua are required to show, in part, that the licensing action involves a significant source of radioactivity that produces an

¹¹³ See White Mesa Uranium Mill, CLI-01-21, 54 NRC at 251 (citations omitted).

¹¹⁴ See Rios Petition at 2; Aloua Petition at 2.

¹¹⁵ Rios Petition at 2; Aloua Petition at 2.

¹¹⁶ Rios Petition at 2.

¹¹⁷ Aloua Petition at 2. As previously stated, Petitioners cannot establish individual standing based on another’s interest. See St. Lucie, CLI-89-21, 30 NRC at 329.

obvious potential for offsite consequences.¹¹⁸ Both Petitioners fail to establish that the DU in radiation control areas satisfy this requirement.

First, Petitioners Rios and Aloua do not directly assert that the DU spotting rounds at Pohakuloa are a significant source of radioactivity. Any potential argument they may have regarding this issue is implicit in their more general concern that radiation contamination is occurring and should be monitored.¹¹⁹ Without more, however, Petitioners Rios and Aloua fail to provide any factual allegations to establish that the DU spotting rounds are a significant source of radioactivity.

Second, Petitioners Rios and Aloua assert general claims regarding air and water contamination, which may affect them personally as well as their food sources.¹²⁰ For example, Petitioner Rios states generally that her “water source is fed by Mauna Kea and our food sources are fed by the same water.”¹²¹ Similarly, Petitioner Aloua states generally that she, living “on the western flanks of Hualālai, along with the ‘āina that guides [her], Kaloko-

¹¹⁸ Ga. Tech, CLI-95-12, 42 NRC at 116.

¹¹⁹ See Rios Petition at 1–3; Aloua Petition at 1–3.

¹²⁰ Rios Petition at 1–2; Aloua Petition at 1–2. Uranium is generally introduced into the body through the ingestion of food and water and the inhalation of air. See NRC, Background Information on Depleted Uranium, <https://www.nrc.gov/waste/llw-disposal/llw-pa/uw-streams/bg-info-du.html> (last visited June 7, 2017). If inhaled, the size of the uranium aerosols and the solubility of the uranium compounds in the lungs and gut influence their effect on the body. Id. Coarse particles are captured in the upper respiratory system and are exhaled or transferred to the throat and swallowed. Id. Fine particles reach the lower part of the lungs, and if not easily soluble, tend to remain in the lungs for relatively long periods of time before being transported to the blood stream. Id. Most uranium in the blood stream will be excreted through urine in a few days, but a small fraction remains in the kidneys, bones, and other soft tissue. Id. If ingested, most uranium is excreted in feces within a few days and never reaches the blood stream. Id. If uranium is ingested or inhaled in sufficient amounts, it can be harmful primarily because of its chemical toxicity. Id. Similar to mercury, cadmium, and other heavy-metal ions, uranium can depress renal function and, in high concentrations, uranium can cause kidney damage or, in extreme cases, renal failure. Id. Because uranium is mildly radioactive, once inside the body it does irradiate organs, but its primary health effect is toxicological, not radiological. Id.

¹²¹ Rios Petition at 2.

Honokōhau, may be at threat due to DU being carried on the winds.”¹²² The Board interprets the Petitioners’ pleadings as describing possible air or groundwater pathways for offsite consequences. Similar to Petitioners Albertini and Harden, Petitioners Rios and Aloua fail to describe as a basis for their standing a DU pathway that provides a potential exposure risk that has not already been resolved in the prior licensing proceeding and therefore do not establish standing under a proximity presumption.

Petitioners Rios and Aloua also fail to satisfy traditional standing criteria. To establish traditional standing Petitioners must show, in part, a concrete and particularized injury, actual or threatened, that is fairly traceable to the Army’s licensing action.¹²³ Petitioners fail to satisfy this burden. Like Petitioners Albertini and Harden, Petitioners Rios and Aloua fail to articulate a plausible chain of causation or, in this context, a plausible DU transport mechanism. Petitioners briefly describe potential air and water pathways,¹²⁴ but similar pathways were resolved in the prior licensing proceeding and reconsideration is precluded by the air and groundwater monitoring requirements set forth in the amended licensing basis.

Finally, Petitioners Rios and Aloua lack standing because they have failed to show how the site-specific monitoring plan creates “‘a distinct new harm or threat’ apart from the activities already licensed,” a requirement for a license amendment challenge.¹²⁵

For these reasons, Petitioners Rios and Aloua fail to establish standing; therefore, we are compelled to deny their hearing requests.

¹²² Aloua Petition at 2.

¹²³ Sequoiah Fuels Corp., CLI-01-02, 53 NRC at 13.

¹²⁴ Rios Petition at 1–2; Aloua Petition at 1–2.

¹²⁵ See White Mesa Uranium Mill, CLI-01-21, 54 NRC at 251 (citations omitted).

C. Contention Admissibility

An admissible contention must (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised 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 that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute exists in regard to a material issue of law or fact.¹²⁶ Failure to satisfy any of these requirements is sufficient to render a contention inadmissible.¹²⁷

Contentions must be limited to issues that are relevant to the pending application.¹²⁸ Contentions are not admissible unless they are within the scope of the proceeding for which the licensing board has been delegated jurisdiction.¹²⁹ The scope of this license amendment proceeding is limited. As previously stated, the second license amendment request addresses licensing conditions requiring the submission of site-specific ERMPs and site-specific dose calculations that are consistent with the programmatic ERMP and dose modeling methodology approved by the first licensing amendment to the source materials license.¹³⁰

¹²⁶ 10 C.F.R. § 2.309(f)(1)(i)-(vi).

¹²⁷ Priv. Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

¹²⁸ See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 204 & n.7 (1998).

¹²⁹ Nuclear Mgmt. Co., LLC (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 338 (2006), aff'd, CLI-06-17, 63 NRC 727 (2006).

¹³⁰ 82 Fed. Reg. at 10,031.

1. Contentions Proposed by Petitioners Albertini and Harden

Petitioner Albertini submitted 13 contentions, Petitioner Harden submitted five contentions, and each submitted a number of general comments.¹³¹ Petitioner Albertini's contentions and concerns appear to criticize the U.S. military's historic activities at Pohakuloa, to assert that more DU is present on the site than has been identified, and to advocate more extensive and "independent" DU surveys and monitoring, particularly air sampling.¹³² Mr. Albertini also expresses his concerns with the Pohakuloa ERMP and urges additional DU testing and groundwater sampling.¹³³ Petitioner Harden contends that the NRC should require the Army to "remove all DU" and "correct shortcomings in studies the license is based on," listing several factors that studies should account for or require.¹³⁴ Ms. Harden asks that the Staff reconsider the license application "or have a more appropriate agency address the DU."¹³⁵ She also expresses concern over (1) the amount, location, and possible aerial migration of DU at Pohakuloa; (2) the extent, adequacy, and impartiality of surveys conducted at Pohakuloa for DU; and (3) the risks from DU used for purposes other than spotting rounds, which may be "subjected to impacts and explosions from activities such as target practice."¹³⁶ Lastly, she also challenges the adequacy of the Staff's Safety Evaluation Report.¹³⁷

¹³¹ See Albertini Petition at 2–13; Harden Petition at 1–17.

¹³² See Albertini Petition at 2–3.

¹³³ See id. at 1–3.

¹³⁴ See Harden Petition at 2.

¹³⁵ Id.

¹³⁶ See id.

¹³⁷ Id. at 2–3.

The contentions posed by Petitioners Albertini and Harden are either outside the scope of this proceeding or are not material to the findings that the Staff must make with respect to the second license amendment. In a license amendment proceeding, a petitioner's contentions must focus on the subject matter identified in the hearing notice, the amendment application, and the Staff's environmental responsibilities relating to the application.¹³⁸ As stated in the hearing notice for the second license amendment, this proceeding concerns the approval and incorporation into License No. SUC-1593 of site-specific ERMPs for the Pohakuloa Training Area and the other licensed sites, and the approval of site-specific dose calculations.¹³⁹ The contentions proposed by Petitioners Albertini and Harden are outside the narrow scope of this proceeding or not material to the findings the Staff must make regarding the second license amendment, because they challenge matters already resolved in a prior licensing action.¹⁴⁰

2. Contentions Proposed by Petitioners Rios and Aloua

Petitioners Rios and Aloua assert identical contentions. First, Petitioners Rios and Aloua contend that Pohakuloa is located on illegally seized and occupied lands belonging to the Hawaiian Kingdom.¹⁴¹ Second, they assert that a lease from the State of Hawaii to the Army requires removal of "waste materials" resulting from the use of the leased property, including the removal of DU.¹⁴² Third, Petitioners Rios and Aloua contend that "[c]omprehensive, independent, testing and monitoring" has not been done to determine the full extent of radiation

¹³⁸ Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC 273, 282 (1991).

¹³⁹ See 82 Fed. Reg. at 10,031.

¹⁴⁰ 10 C.F.R. § 2.309(f)(1)(iii)–(iv).

¹⁴¹ Rios Petition at 2; Aloua Petition at 3.

¹⁴² Rios Petition at 2; Aloua Petition at 3.

contamination and should be conducted.¹⁴³ Fourth, they assert that the Army should be required to comply with requests in a 2008 local government resolution urging the Army to address the hazards of DU at Pohakuloa.¹⁴⁴ Fifth, Petitioners Rios and Aloua contend that the Army should be required to do air monitoring for DU at Waiki'i Ranch.¹⁴⁵ Lastly, they both seek to incorporate contentions submitted by others, including Petitioners Albertini and Harden.¹⁴⁶

Petitioners' claims that the Army is illegally occupying or failing to satisfy lease obligations associated with Pohakuloa are property claims that do not address environmental monitoring or dose modeling and, therefore, do not fall within the scope of the second license amendment. Similarly, Petitioners' assertions that the Army must comply with requests contained in a local government resolution are legal concerns that do not address environmental monitoring or dose modeling.

Petitioners' contentions that "[c]omprehensive, independent, testing and monitoring" for radiation contamination has not been conducted and should be completed fails to address the licensing record associated with this proceeding. In applying for the original source materials license and the first license amendment, the Army described and the NRC Staff reviewed the process for identifying radiation control areas where DU spotting rounds were located—the source of any radiation contamination.¹⁴⁷ In turn, for both the first and second license amendments, the Army developed and the NRC Staff reviewed the process for monitoring DU

¹⁴³ Rios Petition at 3; Aloua Petition at 3.

¹⁴⁴ Rios Petition at 3; Aloua Petition at 3.

¹⁴⁵ Rios Petition at 3; Aloua Petition at 3.

¹⁴⁶ Rios Petition at 3; Aloua Petition at 3. Petitioners Rios and Aloua also "concur with contentions submitted by . . . Dr. Lorrin Pang, and Dr. Michael Reimer." Rios Petition at 3; Aloua Petition at 3. Drs. Pang and Reimer, however, are not participants in this proceeding and have not proffered contentions.

¹⁴⁷ See License SER at 16; LA1 SER at 25.

pathways associated with these areas.¹⁴⁸ Moreover, as previously stated, Petitioners Rios and Aloua only reference air and groundwater pathways as areas of concern, and these pathways were previously resolved and cannot be challenged here. In sum, Petitioners Rios and Aloua identify “testing and monitoring” concerns that are outside of the limited scope of the second license amendment proceeding. Because air monitoring requirements were resolved in the previous proceeding, Petitioners’ specific claims that air monitoring at Waiki’i Ranch should be required are also outside the scope of this proceeding.¹⁴⁹

Lastly, because Petitioners Rios and Aloua fail to submit at least one admissible contention of their own, they are prohibited by Commission precedent from seeking to incorporate by reference the proposed contentions of others.¹⁵⁰ Therefore, Petitioners Rios and Aloua could not incorporate by reference any contentions proposed by Petitioners Albertini and Harden even if they were admissible.

III. CONCLUSION

We deny the hearing requests and dismiss the petitions of Petitioners Albertini, Harden, Rios, and Aloua for lack of standing and failure to proffer an admissible contention.

¹⁴⁸ See LA1 SER at 42–50; LA2 SER at 9–11; Site-Specific ERMP at 2-1 to 2-2.

¹⁴⁹ Alternatively, the Board concludes that Petitioners’ proffered contentions are not material to this proceeding pursuant to 10 C.F.R. § 2.309(f)(1)(iv). “[T]he Commission has defined a ‘material’ issue as meaning one in which ‘resolution of the dispute would make a difference in the outcome of the licensing proceeding.’” Palisades, LBP-06-10, 63 NRC at 338–39 (quoting Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989)); see also So. Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 254 (2007) (“[T]he subject matter of the contention must impact the grant or denial of a pending license application.”). Issues regarding property rights and previously addressed licensing determinations are not material to this proceeding.

¹⁵⁰ Consol. Edison Co. of N.Y. (Indian Point, Units 1 & 2), CLI-01-19, 54 NRC 109, 133 (2001).

Any Petitioner may appeal this decision to the Commission, pursuant to 10 C.F.R. § 2.311, within 25 days of service of this Memorandum and Order.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

/RA/

Dr. Sue H. Abreu
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 13, 2017

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
U.S. ARMY INSTALLATION COMMAND) Docket No. 40-9083-MLA
)
)
(Source Materials License No. SUC-1593,)
Amendment 2, Davy Crockett Depleted Uranium)
at Various United States Army Installations))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Requests for Hearing and Dismissing Petitions to Intervene) – LBP-17-04** have been served upon the following persons by Electronic Information Exchange.

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Docket No. 40-9083-MLA-2

MEMORANDUM AND ORDER (Denying Requests for Hearing and Dismissing Petitions to Intervene) – LBP-17-04

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[Original signed by Herald M. Speiser ____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 13th day of June, 2017