

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 12028

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COMMISSIONERS:

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Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of)
)
PA'INA HAWAII, LLC)
)
(Material License Application))
_____)

Docket No. 30-36974-ML

CLI-06-18

MEMORANDUM AND ORDER

This adjudicatory proceeding stems from Pa'ina Hawaii, LLC's ("Pa'ina") application for a materials license to construct and operate an industrial irradiator at the Honolulu International Airport. On April 27, 2006, the Atomic Safety and Licensing Board ("Board") issued an unpublished Order¹ accepting a Joint Stipulation of the NRC Staff and intervenor Concerned Citizens of Honolulu settling two environmental contentions previously admitted for adjudication.² The Joint Stipulation provided that the two environmental contentions would be

¹ Order (Confirming Oral Ruling Granting Motion to Dismiss Contentions), April 27, 2006, ADAMS Accession No. ML061170190 ("April 27th Order"). ADAMS is the acronym for the NRC's Agencywide Documents Access and Management System, which is publicly accessible through the NRC's web page at <http://www.nrc.gov>.

² See LBP-06-4, 63 NRC 99 (2006). The intervenor, in its first environmental contention, asserts that the NRC Staff failed to justify sufficiently its invocation of a categorical exclusion for Pa'ina's proposed irradiator. In the second contention, the intervenor argues that special circumstances (*i.e.*, natural phenomena (hurricanes and tsunamis) and airplane crashes) require an environmental assessment or an environmental impact statement for Pa'ina's proposed irradiator.

dismissed, that the NRC Staff would prepare an Environmental Assessment (“EA”) regarding those two contentions, and that the intervenor reserved its right to file additional contentions challenging the adequacy of the Staff’s EA if the Staff were to issue a Finding of No Significant Impact (“FONSI”).³

On May 8th, Pa’ina filed a pleading which it entitled an “Appeal” of the Board’s April 27th Order.⁴ Pa’ina’s “Appeal” asserts that the Staff should not be required to prepare an EA prior to (i) the conclusion of an evidentiary hearing on the two environmental contentions (Nos. 1 and 2) and also on a related safety contention (No. 7), and (ii) the Board’s subsequent issuance of findings of fact and conclusions of law.⁵ Pa’ina characterizes the April 27th Order as “impos[ing] the EA process on Pa’ina,”⁶ “grant[ing] summary judgment against Pa’ina on the two contentions, without notice, without any factual development, and without proper conclusions of law,”⁷ and “government by *fiat*.”⁸ Pa’ina therefore requests that the Commission vacate the Board’s approval of the settlement and also dismiss with prejudice the three contentions referenced above. Both the intervenor and the NRC Staff oppose Pa’ina’s challenge.⁹

³ NRC Staff and Concerned Citizens of Honolulu Joint Motion to Dismiss Environmental Contentions (March 20, 2006) (“Joint Motion”), and Joint Stipulation attached thereto.

⁴ Applicant Pa’ina Hawaii, LLC’s Notice of Appeal of [Board’s] April 27, 2006 Order and Accompanying Brief (“Appeal”).

⁵ Appeal at 5.

⁶ *Id.* at 5. See also *id.* at 11.

⁷ *Id.* at 12.

⁸ *Id.* at 6.

⁹ Intervenor Concerned Citizens of Honolulu’s Opposition to Applicant Pa’ina Hawaii, LLC’s Appeal of [Board’s] April 27, 2006 Order (May 18, 2006) (“Intervenor Opposition”); NRC Staff’s Opposition to Applicant Pa’ina Hawaii, LLC’s Brief in Support of Appeal from [Board] Order dated April 27, 2006 (May 19, 2006) (“Staff Opposition”).

Our procedural rules grant Pa'ina no right to appeal interlocutory orders.¹⁰ Thus, we treat Pa'ina's "Appeal" instead as a petition for discretionary interlocutory review under 10 C.F.R. § 2.341(f). Because Pa'ina's "Appeal" does not satisfy our interlocutory review standards and, in addition, lacks merit, we deny it.

DISCUSSION

A. Petition for Discretionary Interlocutory Review

Our rules allow discretionary interlocutory review only when a licensing board certifies a ruling or refers a question, or when an interlocutory board ruling creates "immediate and serious irreparable impact" or "affects the basic structure of the proceeding in a pervasive or unusual manner."¹¹ Here, Pa'ina's appeal meets none of these conditions. Pa'ina itself does not maintain otherwise.¹² The Board has not certified or referred anything; settling NEPA claims and eliminating the need for the hearing on those issues hardly amount to "immediate and serious irreparable" harm to Pa'ina; and settling some but not all contentions is a routine feature of NRC litigation -- it does not affect the proceeding in a "pervasive or unusual manner." Given this information, it is clear that Pa'ina's "Appeal" fails to satisfy the criteria for interlocutory review.

¹⁰ "[A] licensing board's [order] is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate; rulings which do neither are interlocutory." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC 1073, 1074 (1983), and cited authority. The April 27th Order does neither. See also 10 C.F.R. § 2.311.

¹¹ 10 C.F.R. § 2.341(f)(1), (f)(2)(i) & (ii).

¹² Pa'ina mistakenly believes that its "Appeal" is governed solely by 10 C.F.R. § 2.341(b)(4). See Appeal at 7-8. That rule sets forth the standards we apply when considering petitions for review of a "full or partial initial decision[s]." 10 C.F.R. § 2.341(b)(1). Section 2.341(b)(4) does *not* establish a right to petition for review of interlocutory orders such as the April 27th Order.

B. De facto Petition for Reconsideration of CLI-06-13

Pa'ina's request that we dismiss with prejudice the three contentions cited above is, in effect, an attempt to indirectly seek reconsideration of our May 15, 2006 decision, CLI-06-13, denying Pa'ina's first interlocutory appeal – where we held that we would not review contention admissibility questions at that time.¹³ We deny this *de facto* petition because it does not satisfy our procedural and substantive requirements governing requests for reconsideration.¹⁴ We see no reason to revisit our routine decision in CLI-06-13 not to entertain, prematurely, challenges to contention admissibility decisions.

C. Intervenor-NRC Staff Settlement of NEPA Contentions

Pa'ina's "Appeal" fails not only on procedural grounds but on substantive grounds as well. We disagree with Pa'ina's fundamental premise that the Board's approval of the settlement between Concerned Citizens and the NRC Staff unfairly or unlawfully "impose[s]" the EA process (or anything else) on Pa'ina.¹⁵ The burden of the settlement (and of the associated Joint Stipulation) falls on the NRC Staff,¹⁶ and thus does not compromise Pa'ina's hearing rights. It is the NRC, not Pa'ina, that has the legal duty to perform a NEPA analysis and to issue appropriate NEPA documents (such as an EA).¹⁷ Pa'ina complains about the "extra expense [and] work," the "procedural delays" and the "greater uncertainty" associated with the purported bifurcation of this proceeding into an "EA track with a public meeting many months in

¹³ CLI-06-13, 63 NRC ____ (slip op. May 15, 2006).

¹⁴ 10 C.F.R. §§ 2.323(e), 2.341(d), and 2.345(a)(2) & (b).

¹⁵ See Appeal at 5, 11.

¹⁶ See *Wetlands Action Network v. Army Corps of Engineers*, 222 F.3d 1105, 1114 (9th Cir. 2000), *cert. denied*, 534 U.S. 815 (2001).

¹⁷ See *id.* See also *USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC ____, ____ & n.144, slip op. at 32 & n.144 (April 3, 2006), citing 10 C.F.R. § 51.41.

the future” and “an evidentiary, trial-type hearing with expert opinions on the non-environmental contentions.”¹⁸ But these are normal accoutrements of any hearing process involving NEPA. License applicants at the NRC assume the risk of imposition of these additional burdens.¹⁹

Moreover, the delay about which Pa’ina complains appears to be short – at most about three months. During the settlement negotiations, the intervenor offered to modify the Joint Stipulation in such a manner as to “provide assurances against unnecessary delay and duplication of effort,”²⁰ and subsequently said it would agree to imposing a firm deadline of February 19, 2007, for completion of the Staff’s EA.²¹ Ultimately, both the intervenor and the NRC Staff presented the Board with a proposed schedule that memorialized the February 19th date.²² The NRC Staff has estimated that, even without an EA, it would still need until October 24, 2006, to complete its environmental review.²³ By agreeing to prepare an EA by February 19, the NRC Staff has extended the estimated review period by about four months (from October 24, 2006, to February 19, 2007), and delayed the hearing itself by just over three months (from May 21, 2007, to August 30, 2007). In the end, though, the settlement may result in expediting a final licensing decision because it takes two previously contested issues out of litigation. On balance, we see no reason to second guess the NRC Staff’s (and the

¹⁸ Appeal at 7. See also *id.* at 12-13.

¹⁹ See generally *Consolidated Edison Co.* (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225, 229 (2001) (observing, albeit in another context, that “litigation inevitably results in the parties’ loss of both time and money”).

²⁰ Intervenor Concerned Citizens of Honolulu’s Response to Applicant’s Objections to Joint Stipulation and Order regarding Resolution of Concerned Citizens’ Environmental Contentions, at 6 n.2 (April 20, 2006).

²¹ *Id.* at 6.

²² See Letter from Margaret J. Bupp to the Board (April 20, 2006), Attachment.

²³ See *id.*

intervenor's) judgment -- as well as the Licensing Board's -- that the settlement is sensible. Third parties -- like Pa'ina -- have no absolute right to veto settlements that the agreeing parties find to their advantage.

We disagree with Pa'ina's objection that the settlement results in an impermissible dual-track proceeding.²⁴ The Board will conduct a *single hearing* following the completion of the NRC Staff's EA -- an approach fully consistent with our Model Milestones for informal hearings.²⁵ If this somehow constitutes "dual-tracking," then we see no harm in it. In fact, all our licensing adjudications with environmental or safety issues would likewise so qualify, for each involves both the NRC Staff work -- performance of separate environmental and safety reviews -- and a Board hearing. Similarly, contested license transfer proceedings move simultaneously along both an adjudicatory and an administrative path.²⁶

Finally we must take issue with Pa'ina's complaint that the Joint Stipulation between the NRC Staff and the intervenor was "secretly negotiated"²⁷ and that the Board's action amounted to "government by *fiat*."²⁸ We cannot accept Pa'ina's implication that the negotiations between the intervenor and the NRC Staff were improper. Parties engage in negotiations all the time. Such negotiations by their very nature are almost invariably conducted in private. Moreover, parties seeking to settle all or part of an administrative proceeding often exclude other parties from the negotiations. We express no opinion on the NRC Staff's tactical decision in the negotiations to prepare an EA rather than continue to rely on a categorical exclusion provided

²⁴ Appeal at 7. See also *id.* at 12-13.

²⁵ 10 C.F.R. Part 2, Appendix B, § II.

²⁶ See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79, 82-83 (2000).

²⁷ Appeal at 4.

²⁸ *Id.* at 6.

for in our regulations. But we do observe that this kind of decision, presumably based on an analysis of litigation risk and optimum use of the NRC Staff's scarce resources, is commonplace in litigation and has, in the past, received our approval.²⁹ Our longstanding policy of encouraging settlements³⁰ adds further support to our decision to uphold the Board's acceptance of the Joint Stipulation stemming from the parties' negotiations. The settlement holds the promise of resolving two environmental issues without litigation.

As for Pa'ina's assertion regarding "government by fiat," we observe that administrative agencies and their adjudicators routinely approve stipulations and settlements to which fewer than all the parties in a case subscribe.³¹ We have done so ourselves, albeit in the enforcement context.³² Indeed, our own regulations contemplate just such a possibility -- requiring only "the consenting parties" to file the settlement with the board.³³ Settlements of this kind do not offend the rights of an excluded party (like Pa'ina) -- particularly where, as here, it has notice and an opportunity to comment on the approved stipulation.

Pa'ina had such notice and opportunity. The NRC Staff and the intervenor negotiated for two weeks with Pa'ina on this issue³⁴ and offered to modify their Joint Stipulation so as "to provide assurances against unnecessary delay and duplication of effort"³⁵ about which Pa'ina

²⁹ See, e.g., *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-97-13, 46 NRC 195, 207-11 (1997).

³⁰ See 10 C.F.R. § 2.338. See also *Sequoyah Fuels Corp.*, CLI-97-13, 46 NRC at 205.

³¹ See, e.g., *Maritimes & Northeast Pipeline, LLC*, 115 FERC P 61,176, at ¶¶ 67-81, 2006 WL 1315789 at **17 - **22 (FERC) (May 15, 2006).

³² *Sequoyah Fuels*, CLI-97-13, 46 NRC at 222-23.

³³ 10 C.F.R. § 2.338(g).

³⁴ See Staff Opposition at 3, 6 n.8; Intervenor Opposition at 6 n.2.

³⁵ Intervenor Opposition at 6 n.2.

had expressed concern. The Staff and the intervenor also provided Pa'ina advance notice of their intent to file the Joint Stipulation,³⁶ and Pa'ina has repeatedly availed itself of the opportunity to object to that Stipulation.³⁷ Based on these facts, Pa'ina cannot plausibly claim unfairness or due process violations.

CONCLUSION

The Commission *denies* both Pa'ina's "Appeal" of the Board's April 27th Order and Pa'ina's request for dismissal of the three admitted contentions.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of July, 2006.

³⁶ See Joint Motion at 1.

³⁷ Applicant Pa'ina Hawaii, LLC's Objections to (1) Joint Stipulation and Order Regarding Resolution of Concerned Citizens' Environmental Contentions, and (2) Joint Motion to Dismiss Environmental Contentions (March 29, 2006); Prehearing Teleconference (April 26, 2006), Tr. at 29-35; Appeal, *passim*.