

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

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Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Paul Abramson
Dr. Anthony J. Baratta

In the Matter of

PA'INA HAWAII, LLC

(Material License Application)

Docket No. 30-36974-ML

ASLBP No. 06-843-01-ML

January 24, 2006

MEMORANDUM AND ORDER

(Ruling on Petitioner's Standing and Environmental Contentions)

Before us is a request by the Petitioner, Concerned Citizens of Honolulu,¹ for a hearing on the application submitted by Pa'ina Hawaii, LLC (Pa'ina Hawaii or Applicant), on June 27, 2005, to build and operate a commercial pool-type industrial irradiator at the Honolulu International Airport.² In such a facility, items to be processed are loaded into a stainless steel chamber and lowered into a water-filled pool containing a cobalt-60 source, where they are exposed to radiation.³ The Applicant plans to use the facility to irradiate fresh fruit and vegetables for shipment to the United States mainland, as well as to irradiate cosmetics and pharmaceutical products.⁴ Additionally, the Applicant intends to use the irradiator for research

¹ Request for Hearing by Concerned Citizens of Honolulu (Oct. 3, 2005) [hereinafter Hearing Request].

² See 70 Fed. Reg. 44,396 (Aug. 2, 2005).

³ See NRC Press Release, NRC Announces Opportunity for Hearing on License Application for Commercial Irradiator in Honolulu, Hawaii (July 26, 2005), ADAMS Accession No. ML052070251.

⁴ See 70 Fed. Reg. at 44,396.

and development projects and to irradiate other materials as approved by the NRC on a case-by-case basis.⁵

On August 2, 2005, the Nuclear Regulatory Commission published a notice of opportunity for a hearing on the Pa'ina Hawaii application for the possession and use of byproduct material in a commercial irradiator.⁶ Thereafter, on October 3, 2005, the Petitioner timely filed a request for a hearing.

In this decision, we address the Petitioner's standing to intervene and the admissibility of the Petitioner's proffered environmental, in contrast to safety, contentions. We bifurcated the initial steps of the proceeding in this manner because portions of the Pa'ina Hawaii application that concern non-environmental matters contain sensitive information that is not publicly available and can be made available only to Petitioner's counsel and expert under a protective order and after additional procedures that are still ongoing. For the reasons set forth below, we find that the Petitioner has established its standing to intervene and has proffered at least one admissible contention – the necessary prerequisites for the grant of a hearing request. Accordingly, we grant the Petitioner's request for a hearing.

I. Standing

A petitioner's right to participate in a licensing proceeding stems from section 189a of the Atomic Energy Act (AEA). That section provides for a hearing "upon the request of any person whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a)(1)(A). The Commission regulations implementing that section of the AEA, 10 C.F.R. § 2.309(d), require that a licensing board, in ruling on a request for a hearing, determine whether the petitioner has an interest affected by the proceeding by considering (1) the nature of the petitioner's right

⁵ See id.

⁶ See id.

under the AEA or the National Environmental Policy Act of 1969 (NEPA) to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest.

When assessing whether a petitioner has set forth a sufficient interest to intervene under 10 C.F.R. § 2.309, the Commission applies traditional judicial concepts of standing.⁷ Specifically, a petitioner must demonstrate "a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision," (i.e., (1) injury, (2) causation, and (3) redressability).⁸ Further, the petitioner must also demonstrate that its injury arguably falls within the zone of interests protected by the statutes governing NRC proceedings, such as the AEA or NEPA.⁹

When an organization petitions to intervene in a proceeding, it must either demonstrate organizational or representational standing. To demonstrate organizational standing, the petitioner must show "injury in fact" to the interests of the organization itself.¹⁰ Representational standing requires a demonstration that one or more of its members would otherwise have

⁷ See Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 612 (1976).

⁸ Georgia Tech, CLI-95-12, 42 NRC at 115; see Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988); Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-67 (1991); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993).

⁹ See Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9, 13 (2001).

¹⁰ See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998).

standing to intervene on their own, and that such a specifically-identified member has authorized the organization to request a hearing on its behalf.¹¹

To support its claim of representational standing the Petitioner's hearing request states that it is "a grassroots, unincorporated environmental organization that was created to ensure the people who live and work in Honolulu will be adequately protected from potential public health and safety and environmental impacts associated with Pa'ina Hawaii's proposed irradiator."¹² The petition includes the declarations of members who live, work, own property, or recreate near the proposed site of the Pa'ina irradiator, including declarations of members who work approximately one-half mile from the proposed site, as well as members who frequently fly in and out of the airport on runways immediately adjacent to the site.¹³ The declarations indicate that the members have authorized the Petitioner to represent them in this proceeding.

The Petitioner further alleges that the construction and operation of the proposed irradiator would "subject Concerned Citizens' members to threats of radiation exposure from incidents including, but not limited to, mechanical failures, power outages, airplane accidents, acts of sabotage or terrorism, hurricanes, and tsunamis."¹⁴ The NRC Staff concedes that the Petitioner has properly shown an injury-in-fact by alleging potential injury to its members from radiation exposure caused by the Petitioner's asserted accidents and natural disasters.¹⁵

¹¹ See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999).

¹² Hearing Request at 2.

¹³ See Hearing Request, Declaration of Brian Coulson (Oct. 2, 2005) ¶ 2; Declaration of Marie-Therese Knoll (Sept. 30, 2005) ¶¶ 2-4; Declaration of David Paulson (Oct. 3, 2005) ¶ 3; Declaration Grace Simmons (Sept. 29, 2005) ¶ 2.

¹⁴ Hearing Request at 7-8.

¹⁵ See Staff Answer at 4-5.

Similarly, the Staff concedes that the asserted injury to the Petitioner's members is within the zone of interests protected by the AEA and the injury is redressable by agency action.¹⁶ For its part, the Applicant does not address in its answer the Petitioner's standing, thereby necessarily waiving any standing challenge.

It has been well settled that the threat of injury from radiation exposure is sufficient to satisfy the "injury in fact" requirement of traditional standing.¹⁷ A threatened unwanted exposure to radiation, even a minor one, is sufficient to establish an injury.¹⁸ Further, it is axiomatic that the asserted radiation exposure is within the zone of interests protected by the AEA. Therefore, the Petitioner has demonstrated a concrete injury-in-fact.

To demonstrate causation, the Petitioner must show that the injury is fairly traceable to the proposed action.¹⁹ The proposed irradiator will not be operated without approval and a license from the NRC; therefore, the risk of radiation exposure from it is directly traceable to the challenged license application. Thus, there is no question as to whether the Petitioner has demonstrated the requisite causation.

The Petitioner has also adequately demonstrated that its injuries are likely to be redressed by a favorable decision. In order to satisfy the third element of standing "it must be 'likely,' as opposed to merely 'speculative' that the injury will be 'redressed by a favorable

¹⁶ See id. at 5.

¹⁷ See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 216 (2003); see also Duke Power Co. v. Carolina Env'tl. Study Group, Inc., 438 U.S. 59, 74 (1978).

¹⁸ See Millstone, CLI-03-14, 58 NRC at 216.

¹⁹ See Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994).

decision.’ ”²⁰ Here it is obvious, as the Petitioner argues, that a denial or substantial modification of the license application addressing the posited dangers “would help avoid or minimize the threats to public health and safety and to the environment that would otherwise harm Concerned Citizens.”²¹ Therefore, we find that the Petitioner has standing to intervene in this proceeding under traditional judicial principles of standing and 10 C.F.R. § 2.309(d) of the Commission’s regulations.

In addition to the traditional requirements for standing, the Commission has recognized that a petitioner may have standing based upon its geographical proximity to a particular facility.²² In appropriate circumstances, a petitioner’s proximity to the facility in question provides for a so-called presumption that “a petitioner has standing to intervene without the need to specifically plead injury, causation, and redressability if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm from the nuclear reactor or other source of radioactivity.”²³ Demonstrating standing in this manner requires a “determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.”²⁴ The Petitioner’s proximity to the proposed

²⁰ Id. at 76 (quoting Lujan, 504 U.S. at 561).

²¹ Hearing Request at 9.

²² See Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989).

²³ Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-06, 53 NRC 138, 146 (2001), aff’d on other grounds, CLI-01-17, 54 NRC 3 (2001).

²⁴ Georgia Tech, CLI-95-12, 42 NRC at 116; see Sequoyah Fuels Corp., CLI-94-12, 40 NRC at 75 n.22.

source of radioactivity must also be “judged on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source.”²⁵

As previously noted, the Petitioner has demonstrated its standing by establishing an injury in fact to its members traceable to the licensing of the proposed irradiator that would be redressed by the denial of the license. Thus, having already found that the Petitioner has standing, we normally would not address its geographical proximity standing. The Staff’s argument that the Petitioner has not demonstrated such standing is so wide of the mark, however, that it demands brief comment.

In effect, the Petitioner’s geographical proximity standing claim is that its members live and work in such close proximity to the proposed irradiator that placing a source of up to a million curies of radioactivity on the grounds of the Honolulu Airport, a location at ocean’s edge that is subject to unique risks of aircraft crashes and destructive wave damage from tsunamis and hurricanes, presents an obvious potential for offsite consequences to Petitioner’s members.²⁶

The Staff concedes that the Petitioner’s members are appropriately proximate to the irradiator site; therefore, the proximity of the Petitioner’s members to the facility is not at issue. The Staff claims, however, that it is impossible to have an obvious potential for offsite consequences involving an irradiator that falls within the categorical exclusion of 10 C.F.R. § 51.22(c)(14)(vii). That section exempts irradiators from the category of actions for which an environmental assessment (EA) or an environmental impact statement (EIS) must be prepared. According to the Staff, the Commission determined, in categorically excluding irradiators by

²⁵ Georgia Tech, CLI-95-12, 42 NRC at 116-17; see Sequoyah Fuels Corp., CLI-94-12, 40 NRC at 75 n.22.

²⁶ See Hearing Request at 5-7.

regulation from the requirements of NEPA, that such facilities do not individually or collectively have a significant effect on the environment.²⁷ Therefore, they argue that the Petitioner's standing cannot be based upon the assumption of a potential for offsite consequences from an irradiator.²⁸

The Staff's argument conveniently ignores that the Petitioner's proximity standing claim is based upon the exception provided in 10 C.F.R. § 51.22(b) for categorical exclusions established in section 51.22(c). The former section provides that the Staff need not prepare an EA or an EIS for any action categorically excluded "[e]xcept in special circumstances."²⁹ Here, the Petitioner claims the categorical exclusion for irradiators is inapplicable because special circumstances (i.e., aircraft crashes, tsunamis, and hurricanes) unique to the proposed location of this irradiator make the requirements of NEPA fully applicable. In the circumstances asserted, it neither strains credulity nor offends reason to conclude that placing an irradiator in a location subject to the risks of aircraft crashes, tsunamis, and hurricanes presents an obvious potential for offsite consequences from the significant source of radioactivity housed within the irradiator. Accordingly, contrary to the Staff's argument, the Petitioner also has standing under

²⁷ See Staff Answer at 2-3. In support of its position, the Staff seemingly relies upon to the Commission's recent decision in Exelon Generation Co. & PSEG Nuclear, LLC (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580-83 (2005), in which the Commission emphasized the need to meet the second step for proximity standing, requiring a obvious potential for offsite consequences. The Staff argues that the categorical exclusion of irradiators is of "dispositive significance"; however, the Commission in Peach Bottom made no determination involving categorical exclusions. Its Peach Bottom ruling involved a merger and license transfer governed by 10 C.F.R. § 50.80. Although license transfers, like irradiators, are categorically excluded from NEPA review pursuant to 10 C.F.R. § 51.22(c) except when special circumstances are present, the Commission made no mention in its Peach Bottom decision of a categorical exclusion, nor did it suggest that such a determination would be dispositive of the issue for proximity standing.

²⁸ See Staff Answer at 3-4.

²⁹ 10 C.F.R. § 51.22(b).

the geographical proximity presumption.

II. Contentions

In addition to demonstrating standing, a petitioner must also proffer at least one admissible contention to be admitted as a party to a proceeding. See 10 C.F.R. § 2.309(a). The Commission's contention pleading requirements are found at 10 C.F.R. § 2.309(f)(1)(i)-(vi), and incorporate the prior contention pleading requirements of old 10 C.F.R. § 2.714 (2003).³⁰ The regulations require that a request for hearing set forth with particularity the contentions sought to be raised. See 10 C.F.R. § 2.309(f)(1). Specifically, each contention must: (1) provide a specific statement of the issue of law or fact to be raised or controverted; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised in the contention is within the scope of the proceeding; (4) demonstrate that the issue raised in the contention 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 opinion that support the petitioner's position and on which the petitioner intends to rely at hearing, including references to specific sources and documents that will be relied upon to support its position on the issue; and (6) provide sufficient information to show that a genuine dispute on a material issue of law or fact exists with the applicant, which consists of either (a) references to specific portions of the application (including the applicant's environmental and safety reports) that are disputed and the reasons supporting the dispute, or (b) identification of each instance where the application purportedly fails to contain information on a relevant matter as required by law and the reasons supporting the allegation. See 10 C.F.R. § 2.309(f)(1)(i)-(vi).

The contention pleading requirements of 10 C.F.R. § 2.309(f) are meant to "focus

³⁰ The pleading requirements of 10 C.F.R. 2.714(b) appear in the new regulations at 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), and (vi). Section 2.309(f)(1)(iii)-(iv) additionally requires that a contention be within the scope of a proceeding and material.

litigation on concrete issues and result in a clearer and more focused record for decision.”³¹ Accordingly, contention admissibility is “strict by design,” requiring more than notice pleading.³² However, the petitioner is not required to provide an exhaustive discussion in its proffered contention, so long as it meets the Commission’s admissibility requirements. Further, contentions challenging applicable statutory requirements or Commission regulations are not admissible in agency adjudications.³³

With the standards provided in 10 C.F.R. § 2.309(f)(1) and Commission case law as guidance, we review Petitioner’s environmental contentions. The Petitioner has proffered two separate contentions challenging the Staff’s satisfaction of the requirements of NEPA.³⁴ Both NEPA contentions relate to the Staff’s application of the categorical exclusion of irradiators in 10 C.F.R. § 51.22(c)(14)(vii) that excuses the Staff from performing an environmental impact analysis of a proposed irradiator. Specifically, the contentions challenge the procedure by which the categorical exclusion was invoked in this instance, as well as the applicability of 10 C.F.R. § 51.22(b), which provides a special circumstances exception for actions in which a blanket finding is made by rule that the licensing action does not have a significant effect on the human environment.

The Petitioner’s first environmental contention states that “the NRC unlawfully failed to consider whether any extraordinary circumstances precluded application of the categorical

³¹ 69 Fed. Reg. 2,182, 2,202 (Jan. 14, 2004). See also BPI v. AEC, 502 F.2d 424, 428 (D.C. Cir. 1974).

³² Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), petition for reconsideration denied, CLI-02-1, 55 NRC 1 (2002).

³³ See 10 C.F.R. § 2.335.

³⁴ See Hearing Request at 19-20.

exclusion to Pa'ina Hawaii's license application."³⁵ Relying upon a series of precedents in the United States Court of Appeals for the Ninth Circuit, the federal circuit encompassing Hawaii, the Petitioner asserts that the Staff has omitted a necessary step in its NEPA analysis, which in essence requires an explanation of the applicability of a categorical exclusion where special circumstances necessitating an environmental review have been alleged.³⁶ According to the Petitioner, an explanation is required because "the NRC 'cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment.'"³⁷

Both the Applicant and the Staff argue that the Petitioner's contention is nothing more than a challenge to the NRC's regulation establishing the categorical exclusion for irradiators, and therefore an unlawful attack of Commission regulations prohibited by 10 C.F.R. § 2.335(a).³⁸ The thrust of the Petitioner's contention, however, is that the agency improperly

³⁵ Id. at 19.

³⁶ See id. at 19-20; Petitioner's Reply in Support of its Request for Hearing (Dec. 1, 2005) at 23-24 [hereinafter Petitioner's Reply]; see also Alaska Center for the Env'tl. v. U.S. Forest Service, 189 F.3d 851, 859 (9th Cir. 1999); Jones v. Gordon, 792 F.2d 821, 828 (9th Cir. 1986); Steamboaters v. FERC, 759 F.2d 1382 (9th Cir. 1985). Other circuit courts appear to reach the same result as the Ninth Circuit. See, e.g., Wilderness Watch & Public Employees for Env'tl. Responsibility v. Mainella, 375 F.3d 1085, 1096 (11th Cir. 2004) ("At a minimum, the agency should have recognized that these exceptions 'may' apply. Courts of Appeals have, on occasion, reversed agency invocations of categorical exclusions that failed to consider the relevant Interior Department exceptions.").

³⁷ Hearing Request at 19 (quoting Jones v. Gordon, 792 F.2d 821, 828 (9th Cir. 1986)).

³⁸ See Applicant Answer at 11; Staff Answer at 15. The Applicant also asserts, without more, that the contention is outside the scope of this proceeding "because the NRC published its explicit notice that 'categorical exclusion' had been afforded to Pa'ina." Applicant Answer at 11. In the notice of opportunity for hearing the Commission stated: "Before approving the proposed license, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended, and NRC's regulations. An environmental assessment for this licensing action is not required, since this action is categorically excluded under the provisions of 10 CFR 51.22(c)(14)(vii)." 70 Fed. Reg. at 44,396. Contrary to the Applicant's assertion, the

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invoked the categorical exclusion by not addressing what it asserts are special circumstances making such an exclusion inapplicable here – a point the Applicant and the Staff completely ignore. In their answers, neither the Staff nor the Applicant even mention the cases relied upon by the Petitioner, much less dispute the Petitioner’s reading of the Ninth Circuit case law requiring an explanation of the NRC’s use of a categorical exclusion and the presence, or absence, of special circumstances. Nor do the Staff or the Applicant point to any countervailing rulings from other circuits casting questioning the Ninth Circuit precedents (applicable to Hawaii) relied upon by the Petitioner. Instead, the Staff claims that there is “no credible basis to conclude that the types of irradiation or the location of the irradiator, or specific proposals for operating the irradiator are in any way outside the envelope of characteristics that were considered in the Commission’s rulemaking decision to grant the categorical exclusion.”³⁹ But the Staff’s argument that there is no credible basis from which to conclude that the Commission did not consider all possible locations for irradiators in adopting the categorical exclusion for such facilities does not negate the Petitioner’s contention, supported by Ninth Circuit precedents, that the agency must affirmatively provide a reasoned explanation of the applicability of the categorical exclusion in the circumstances presented.

³⁸(...continued)

Commission’s hearing notice cannot properly be read to place challenges to the agency’s use of the categorical exclusion for an irradiator outside the purview of this proceeding because 10 C.F.R. § 51.22(b) specifically bestows upon any interested person the right to challenge the use of a categorical exclusion by presenting special circumstances. Thus, to read the notice as the Applicant contends would be tantamount to ruling that the agency need not comply with its own regulations. See, e.g., Fort Stewart Schools v. Federal Labor Relations Auth., 495 U.S. 641, 654 (1990) (“It is a familiar rule of administrative law that an agency must abide by its own regulations.”).

³⁹ Staff Answer at 16.

Moreover, the Staff's argument, and a similar one by the Applicant,⁴⁰ is belied by the regulatory history of 10 C.F.R. § 51.22 – a highly relevant history that the Staff and the Applicant do not address. The regulatory history of the categorical exclusion of irradiators in 10 C.F.R. § 51.22(c)(14)(vii) is important for what it does not say. It merely provides a brief description of an irradiator and states that “personnel exposures during use of these devices are less than 5% of the limits in 10 C.F.R. Part 20.”⁴¹ Such history certainly does not support the view that the risks associated with the myriad possible locations for siting an irradiator were considered by the Commission in adopting the categorical exclusion. Conversely and more importantly, however, the regulatory history of the special circumstances exception to the categorical exclusions in 10 C.F.R. § 51.22(b) indicates that the location of an irradiator may be a circumstance in which the exclusion might not apply. In addressing “special circumstances,” the Commission made clear that it intended the term to be flexible, stating that “[a] major purpose of proposed § 51.22(b) is to preserve this necessary flexibility. In addition, it is impossible to identify in advance the precise situations which might move the Commission in the future to determine special circumstances exist. Therefore, the term ‘special circumstances’ has not been further defined.”⁴² Thus, the regulatory history does not even hint that the Commission considered the possible locations for proposed facilities in adopting the categorical exclusion for irradiators, while the history of the special circumstances exception indicates that the consequences of siting an irradiator on the ocean's edge at the Honolulu Airport, subject to the risks of aircraft crashes, tsunamis, and hurricanes, are precisely the kind of circumstances for which the categorical exclusion might not be appropriate.

⁴⁰ See Applicant Answer at 11-12.

⁴¹ 49 Fed. Reg. 9,352, 9,377 (Mar. 12, 1984).

⁴² 49 Fed. Reg. at 9,366.

The proposed location of the Pa'ina Hawaii irradiator is not immune from the hazards posed by natural disasters and potential aircraft crashes that the Petitioner posits as special circumstances, and the Staff has failed to provide any reason to conclude that the threats endemic to this proposed site have ever been considered. The Staff's glib answer that there is nothing to suggest location was not considered in the rulemaking casts the issue entirely incorrectly implying that, in every instance of rulemaking in which, as here, there is no indication a matter was considered, we must assume it was, in fact, considered. Indeed, the Staff's approach only begs the question whether any location would prompt the Staff to consider special circumstances associated with a proposed siting. For example, it is virtually certain that the Commission did not specifically consider the risks associated with placing an irradiator in the caldera of Kilauea; however, the Staff would have us believe that the risks associated with the unique location of this irradiator were necessarily considered in the generic forum for establishing the rule providing for the categorical exclusion – a wholly unsupported proposition.

Although not directly relevant to the first contention, the Applicant nevertheless challenges the Petitioner's factual foundation for its claim that the proposed irradiator site is subject to the risk of tsunamis, hurricanes, and airplane crashes. The Applicant alleges that "there are simply no facts" to support the Petitioner's claims.⁴³ The Petitioner's factual support related to its concerns of wave run-up from tsunamis and hurricanes includes the affidavit of Marvin Resnikoff, Ph.D., the O'ahu Civil Defense Agency's Tsunami Map and hurricane reference, as well as a newspaper reference discussing tsunami zones in Hawaii.⁴⁴ With

⁴³ Applicant Answer at 11.

⁴⁴ See Hearing Request at 5-6, 15; see also Declaration of Marvin Resnikoff, Ph.D. (Sept. 30, 2005) ¶¶ 10, 23 [hereinafter Resnikoff Dec.]. The facts relied on by the Petitioner to support its NEPA contentions were first introduced, and most completely described, in its standing discussion. These same supporting facts are necessarily relevant to the Petitioner's

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respect to aircraft crashes, the Petitioner cites a National Transportation Safety Board Aviation Accident Database Query and the Resnikoff Declaration for the proposition that aviation accidents occur on average more than twice a year at the Honolulu International Airport, as support for its claim that the proposed location's vulnerability constitutes a special circumstance vis-a-vis aircraft crashes.⁴⁵ While not explicitly challenging these factual premises in its response to Petitioner's environmental contentions, the Applicant does so in seeking to refute the Petitioner's factual support in its discussion of the safety contentions.⁴⁶ Specifically, the Applicant asserts that the proposed location is shielded from the threat of tsunamis by natural land formations and relies upon a letter from the Hawaii State Department of Transportation for support.⁴⁷ Additionally, the Applicant refers to the regulatory history of the design requirements of 10 C.F.R. § 36.39 that discuss a lack of siting prohibitions for a different kind of irradiator sited near airports and within tidal wave risk areas, although, as noted by the Applicant, the proposed Pa'ina Hawaii irradiator lacks the safety structures (i.e., six foot thick reinforced-concrete shielding walls encapsulated in steel) of the irradiators referenced by the Commission.⁴⁸ These references, however, address the requirements of 10 C.F.R. Part 36,

⁴⁴(...continued)

subsequent arguments pertaining to natural phenomena and airplane crashes found in the Petitioner's safety contentions and NEPA contentions. See Hearing Request at 5-6, 15, 19-21.

⁴⁵ See Hearing Request at 5; Resnikoff Dec. ¶ 24.

⁴⁶ See Applicant Answer at 11-12, 28-31.

⁴⁷ See id. at 28.

⁴⁸ See id. at 28-31; 58 Fed. Reg. 7,715, 7,726 (Feb. 9, 1993). It does not appear that the Applicant specifically disputes the Petitioner's claims related to the asserted risk of hurricanes.

not the requirements of NEPA or 10 C.F.R. Part 51 which are at issue here.⁴⁹ Moreover, the Applicant's challenges establish that factual disputes exist, but the resolution of such disputes is not the appropriate subject of our inquiry at the contention admission stage of the proceeding. Rather, they are matters going to the merits of any such factual disputes.

The Petitioner's first proffered environmental contention is squarely within the scope of this proceeding. The Staff's legal obligations under the Commission's regulations and NEPA and its satisfaction of those obligations is at issue. In a nutshell, the Petitioner's contention alleges that controlling precedent from the Ninth Circuit Court of Appeals requires an explanation by the Staff as to why a categorical exclusion is appropriate here and perforce why special circumstances are not present. This allegation provides a specific issue of law to be controverted and the legal basis for its contention.⁵⁰ Hence, the Petitioner's first NEPA contention satisfies all necessary pleading requirements of 10 C.F.R. § 2.309(f) and is admitted.

While the Petitioner's first environmental contention challenges the Staff's failure to demonstrate why a categorical exclusion is appropriate (*i.e.*, why special circumstances are not present), its second environmental contention affirmatively asserts that special circumstances are present that preclude the application of the categorical exclusion and require an "environmental impact statement or, at minimum, an environmental assessment."⁵¹ Specifically, the contention addresses three categories of special circumstances: (1) risks associated with the proposed location from hurricanes, tsunamis, and airplane crashes; (2) risks of terrorism;

⁴⁹ See Applicant Answer at 28-31.

⁵⁰ See Hearing Request at 19; Alaska Center for the Env'tl. v. U.S. Forest Service, 189 F.3d 851, 859 (9th Cir. 1999); Jones v. Gordon, 792 F.2d 821, 828 (9th Cir. 1986).

⁵¹ Hearing Request at 20.

and (3) health effects of consumption of irradiated fruit. With respect to the first category, the Petitioner argues that the irradiator's location – adjacent to an international airport on the ocean's edge – exposes it to threats of hurricanes, tsunamis, and airplane crashes, a situation that creates special circumstances.⁵² Challenging the Petitioner's contention, the Staff incorporates by reference its argument with respect to the first NEPA contention.⁵³ The Applicant does not differentiate between the first two NEPA contentions, but instead generally argues that any NEPA contention based on the risks of hurricanes, tsunamis, and airplane crashes is an impermissible attack on NRC regulations, outside the scope of this proceeding, and lacks a factual premise.⁵⁴

By asserting that the irradiator's location at ocean's edge and the threats associated with its location constitute special circumstances, the Petitioner has identified a specific omission in the Staff's analysis it plans to challenge and the basis for its allegations. By describing the hurricanes, tsunamis, and airplane crashes that could affect the site, the Petitioner has alleged the facts it intends rely on to demonstrate that special circumstances are present requiring an EA or EIS. As previously noted, the Petitioner's discussion of the dangers associated with natural phenomena and aviation accidents, and its factual support for such dangers, are set forth in the Petitioner's standing and safety contentions discussion which references its related claims under NEPA.⁵⁵ With respect to the portion of the Petitioner's second environmental contention alleging special circumstances stemming from the threats of

⁵² See id.

⁵³ See Staff Answer at 16.

⁵⁴ See Applicant Answer at 10-12.

⁵⁵ See supra at 14 and note 44.

tsunamis, hurricanes, and aviation accidents, the Petitioner again has proffered a contention meeting the necessary pleading requirements of 10 C.F.R. § 2.309(f) and it is admitted.

With respect to the second category of alleged special circumstances, the Petitioner argues that the proposed irradiator presents “significant risks associated with a terrorist attack,” thus requiring the preparation of an environmental analysis pursuant to NEPA.⁵⁶ In this portion of its contention, the Petitioner recognizes that the Commission has reached a contrary conclusion, holding that the impacts of terrorism need not be considered as part of the agency’s NEPA analysis for licensing decisions, but suggests the Commission decision was wrongly decided.⁵⁷ Both the Applicant and the Staff point to the same Commission decision, Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-1, 57 NRC 1 (2003), and argue that this portion of the contention is clearly outside the scope of this proceeding.⁵⁸ Subsequently, in its reply, the Petitioner asks us to reserve judgment on this aspect of its contention until an appeal of the Diablo Canyon decision pending in Ninth Circuit Court of Appeals is decided.⁵⁹ We see no sound reason to withhold ruling on the proffered contention. Barring any future developments overruling current controlling Commission precedent, the portion of the Petitioner’s second environmental contention, asserting that the risks associated with terrorist attacks require that the agency prepare an EA or EIS for the proposed irradiator facility, is inadmissible.

⁵⁶ Hearing Request at 21.

⁵⁷ See id. at 21 n.5; Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-1, 57 NRC 1 (2003); see also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 347 (2002) (also finding terrorism to be outside the scope of agency NEPA review).

⁵⁸ See Applicant Answer at 32-33; Staff Answer at 16.

⁵⁹ See Petitioner’s Reply at 25 n.15.

Finally, the Petitioner's contention raises a question concerning the health effects of irradiated fruit, specifically the genotoxic effects of compounds found in irradiated papayas and mangos, as a third category of special circumstances requiring NEPA review.⁶⁰ Although the Petitioner acknowledges that fruits and vegetables were generically approved for irradiation by the FDA in 1986,⁶¹ it argues that the Commission did not contemplate the irradiation of any food when it promulgated the categorical exclusion of irradiators and, therefore, the specific environmental impacts of irradiating papayas and mangos must be addressed.⁶² As support, the Petitioner relies on the declaration of its expert, Dr. William W. Au, who asserts that compounds created by the irradiation of papaya and mango may present health risks.⁶³ The Applicant contends that challenges related to irradiated foods are outside the jurisdiction of the NRC and must be addressed by either the United States Food and Drug Administration (FDA) or the United States Department of Agriculture (USDA).⁶⁴ For its part, the Staff argues that the Petitioner has "failed to explain how irradiation of food differs from any other possible paths of human consumption already considered or to offer any factual basis to support a contention."⁶⁵

Although the Petitioner argues that the irradiation of papayas and mangos causes adverse human health impacts, it presents only speculation, not facts, to support its claim. The Petitioner's own expert states that "[i]n the final analysis, the only thing certain about the

⁶⁰ See Hearing Request at 22-24.

⁶¹ See Hearing Request, Exh. M, Food Irradiation – Frequently Asked Questions; see also 51 Fed. Reg. 13,376, 13,376 (Apr. 18, 1986).

⁶² See Hearing Request at 23.

⁶³ See id., Declaration of Dr. William W. Au (Sept. 29, 2005) ¶ g [hereinafter Au Dec.].

⁶⁴ See Applicant Answer at 13-14.

⁶⁵ Staff Answer at 17.

impacts on human health associated with the consumption of irradiated food, including papayas and mangos, and other produce proposed to be processed at the Pa'ina Hawaii facility, is that it is the subject of considerable scientific debate.”⁶⁶ Further, in its hearing request, the Commission noted that it is the responsibility of the FDA and the USDA to determine the food types used for human consumption that may be safely irradiated.⁶⁷ In light of these factors, the Petitioner’s speculative claim concerning the possible health effects of irradiating papayas and mangos does not arise to the level of special circumstances necessary to invoke the exception under 10 C.F.R. § 51.22(b) for the categorical exclusion of irradiators. Accordingly, the portion of the Petitioner’s second environmental contention related to the safety of irradiated food is inadmissible.

As noted by the Staff, the Petitioner’s two NEPA contentions raise “substantially similar” issues.⁶⁸ While at this stage in the proceeding the proffered contentions individually present distinct challenges to the Staff’s actions under the Commission’s regulations and NEPA, the unique procedural considerations presented by the contentions may dictate that, after consultation with the parties, the contentions be consolidated, or that one or the other be held in abeyance because it likely will become moot.

III. Conclusion

For the foregoing reasons, we find that the Petitioner has standing to intervene. Further, we find that the Petitioner’s first environmental contention is admissible and that the

⁶⁶ Au Dec. ¶¶ h.

⁶⁷ See 70 Fed. Reg. at 44,396.

⁶⁸ Staff Answer at 16.

first portion of the Petitioner's second environmental contention is admissible. Accordingly, the Petitioner's request for a hearing is granted.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD⁶⁹

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

/RA/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 24, 2006

⁶⁹ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) Applicant Pa'ina Hawaii, LLC; (2) Intervenor Concerned Citizens of Honolulu; and (3) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
PA'INA HAWAII, LLC) Docket No. 30-36974-ML
)
)
(Honolulu, Hawaii Irradiator Facility))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON PETITIONER'S STANDING AND ENVIRONMENTAL CONTENTIONS) (LBP-06-04) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 24th day of January 2006