

RAS 11506

MARCH 29, 2006

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

DOCKETED  
USNRC

April 6, 2006 (4:02pm)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of )  
Pa'ina Hawaii, LLC ) Docket No. 030-36974  
 ) ASLBP No. 06-843-01-ML  
Materials License Application )

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

I. BRIEF PROCEDURAL BACKGROUND.

By way of background, on June 27, 2005 Applicant PA'INA HAWAII, LLC ("Pa'ina") filed an Application to possess and use radioactive materials in order to operate an irradiator.

Thereafter, the NRC Staff evaluated Pa'ina's Application, and supplemental information was required to be provided by Pa'ina.

On August 2, 2005, the Nuclear Regulatory Commission ("NRC") published notice of a hearing on Pa'ina's Application to possess and use the radioactive materials. 70 Fed. Reg. at 44,396.

TEMPLATE = SECY-037

SECY-02-

The published notice indicated that after review, the NRC had determined that Pa'ina's irradiator had qualified for "categorical exclusion."

On October 3, 2005, Petitioner CONCERNED CITIZENS OF HONOLULU ("Concerned Citizens"), apparently consisting of but four members, filed a request for a hearing.

After procedural proceedings, the Atomic Safety and Licensing Board ("ASLB") filed an Order on January 24, 2006 granting two environmental contentions of Concerned Citizens.

Subsequently, in March 2006, Pa'ina was suddenly presented with a proposed "Joint Stipulation And Order Regarding Resolution Of Concerned Citizens' Environmental Contentions" and a related "Joint Motion To Dismiss Environmental Contentions" which had already been agreed to by the NRC Staff and Concerned Citizens.<sup>1</sup> By means of these two documents, the NRC Staff agreed to dispense with a hearing on Concerned Citizens' two environmental contentions, and to prepare an Environmental Assessment ("EA"). Pa'ina was not permitted to negotiate any material changes to the proposed Stipulation.

By means of this document, Pa'ina presents its Objections to the proposed Stipulation.

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<sup>1</sup> For ease of reference, both the Joint Stipulation and the Joint Motion will be referred to together as the "Stipulation."

## II. LEGAL ARGUMENTS.

### A. Pa'ina Objects To "Splitting" Petitioner's Causes Of Action, Which Will Result In Prejudicial Delays And Increased Costs To Pa'ina.

The practical effect of the Stipulation is to "split" this case into two parts, one part a hearing on Concerned Citizens' safety contentions, and a second part involving an EA and all of its procedures.

The U.S. Supreme Court has a long-established policy against "splitting" a cause of action between two courts or two different forums. See, e.g., Alexander, et al. v. Hillman, et al., 296 U.S. 222, 242-43 (1935) There, in rejecting a "splitting" of causes of action between two courts, the Supreme Court explained that splitting a cause of action results in potentially incomplete relief, additional uncertainty, unnecessary delays, work and expense. (Id.)<sup>2</sup>

In this case, Applicant Pa'ina Hawaii, LLC challenges and objects to the Stipulation on the grounds that "splitting" Petitioner's challenge to Pa'ina's Application for a Materials License will inevitably result in greater uncertainty, unnecessary delay, work and expense to Pa'ina.

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<sup>2</sup> Corpus Juris Secundum notes that splitting causes of action usually ends up harassing the defending party (such as Pa'ina here), and results in "vexatious litigation" for the defending party. 1 C.J.S. Actions, Sec. 102(b)(c).

Thus, the first track of this case, or the "environmental track," will be procedurally headed for an Environmental Assessment ("EA"), which will necessarily include built-in delays, a comment period, a public hearing in Honolulu, and a probable appeal by Petitioner (who will in all likelihood seek and litigate for preparation of an Environmental Impact Statement).

The second track of this case, which can be termed the "safety contention" track, will include a trial-like proceeding with the presentation of evidence in Honolulu.

The extra work, multiple expenses and procedural delays on Pa'ina's horizon are clear.<sup>3</sup>

Consequently, to avoid these very real negative consequences, Pa'ina objects to the proposed Stipulation.

**B. With Regards To Petitioner's Environmental Contentions, The Proposed Stipulation (And Dismissal) Jeopardize Pa'ina's Right To A Hearing On The Environmental Contentions, And Consequently, Jeopardize Pa'ina's Rights To Fundamental Due Process.**

A basic notion of due process is that a party be entitled to a fair hearing or trial, at a meaningful time, to prove or disprove the case or allegations. See Goldberg v. Kelly, 397

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<sup>3</sup> The proposed Stipulation reserves significant rights to the Petitioner. These reservations strongly suggest and infer that further proceedings and appeals are probable.

U.S. 254 (1970); cf. Union of Concerned Scientists v. Atomic Energy Commission, 163 U.S.App.D.C. 64, 499 F. 2d 1069 (1974)

In this case, Pa'ina strongly adheres to, and is entitled to a meaningful hearing on, its original argument in response to Petitioner's environmental contentions.

Pa'ina continues to hold to its argument that there are no "special circumstances" surrounding its Application inconsistent with its classification for "categorical exclusion." Or, stated another way, there is no logical reason that the Commission's "categorical exclusion" for Pa'ina should be overridden by the ASLB.<sup>4</sup>

Thus, under law, Pa'ina is entitled to a proper hearing to rebut the environmental contentions of Concerned Citizens.

**C. The Stipulation Fails To Address, Or Even Mention, The ASLB's Prime Concerns Of Tsunamis, Hurricanes, Flooding And/Or Airports Crashes, And Therefore The Stipulation Is Inadequate.**

In light of the ASLB's findings that Petitioner states a cause of action with regards to its environmental contentions, and most particularly its contentions about tsunamis, hurricanes, flooding and Pa'ina's near-airport location, it seems remarkable that the Stipulation fails to mention any of

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<sup>4</sup>10 C.F.R. Sec. 51.22(b) expressly states: "Except in special circumstances as determined by the Commission upon its own initiative or upon request of any interested person, an assessment or an environmental impact statement is not

these topics for EA evaluation. Rather than limiting the scope of the EA in any manner, it would have seemed prudent to at least mention these particular areas in the Stipulation in order to assure that the Staff actually address the topics noted by the ASLB.

Thus, Pa'ina believes that the Stipulation is inadequate because it raises a spectre that the EA may not discuss, or may inadequately discuss, the particular environmental contentions noted by the ASLB.

**D. There Is No Time Limitation Or Duration Stated In The Stipulation, Which Omission Will Result In Current And Future Delay Damages To Applicant Pa'ina.**

The Stipulation also suffers from the fact that it contains no outside deadline dates, and does not limit in any way continuances or delays. Where it may be in one party's interest (Petitioner's) to delay matters herein, the lack of any time limitations seems to be an obvious deficiency from Pa'ina's point of view.

Pa'ina believes that the lack of any deadlines in the proposed Stipulation is a significant flaw.

**E. The Stipulation Was Negotiated By And Between Only The Staff And The Petitioner; Significantly, The Stipulation Was Sought To Be Imposed Upon The**

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required for any action within a category of actions included in the list of categorical exclusions set out in paragraph (c) of this section."

**Applicant Only After It Had Already Been Negotiated By  
The Petitioner And Staff.**

The proposed Stipulation was presented to Pa'ina as a fait accompli. Neither the Staff nor Petitioner would allow any material changes to the Stipulation.<sup>5</sup>

Thus, from Pa'ina's point of view, the proposed Stipulation was an unwanted imposition on its many rights, including its right to a fair hearing.

**F. The Stipulation Is Not In The "Best Interests" Of The  
Public As Presumptuously Stated In The Stipulation.**

Generally, a conclusion such as that contained in the Stipulation, that the Stipulation is in the "best interest of the public," should be supported by a "particularized finding" based upon facts.

In the proposed Stipulation, the parties without any reference to a factual basis (or the NRC's 50-plus years of exhaustive development of its regulations) simply conclude that it would be in the "best interest of the public" to do an EA.<sup>6</sup>

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<sup>5</sup> The only, immaterial change made was the wording in the Joint Motion to Dismiss to the effect that Pa'ina might "object" to the Stipulation; thus, these objections follow.

<sup>6</sup> Far from being insensitive to environmental concerns, Pa'ina believed that the NRC's comprehensive regulations which were exhaustively developed over the past 50 years constituted (particularly in regards to irradiators) the equivalent of an EA. Thus, from Pa'ina's viewpoint, when its Application had been scrutinized by the Staff under the detailed regulations, and thereafter approved under the regulations for "categorical exclusion," this process constituted the equivalent of an EA. Thus, from Pa'ina's point of view, the proposed Stipulation represents a redundant and costly (to Pa'ina) repetition of the Staff's original evaluation.

There is no factual showing whatsoever in the Stipulation that any person or entity in Hawaii would benefit from the Stipulation or EA. The Stipulation makes a bare, conclusory claim.

Indeed, Pa'ina believes that none of the following persons or entities will benefit from the Stipulation or an EA: the Applicant and its employees; Oahu's papaya and other produce farmers; Hawaii's shipping and transportation industries; Hawaii's importers of produce and flower products which may contain infestations; Hawaii's Department of Agriculture; the University of Hawaii and its researchers awaiting the installation of the irradiator; Hawaii's residents and also its tourists who enjoy Hawaii's scenery and fauna free of invasive insects and diseases; and many other people and businesses too numerous to mention.

Pa'ina therefore believes that the proposed Stipulation does not serve the "best interest of the public."

For the above significant reasons, Pa'ina Hawaii LLC objects to the proposed Stipulation because its interests will not be advanced thereby; indeed, its interest in obtaining a Materials License would in all likelihood be much delayed and made much more costly. Ultimately, the public interest would not be best served by the Stipulation.

DATED: Honolulu, Hawaii March 29, 2006.



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CERTIFICATE OF SERVICE

I hereby certify that copies of "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" in the captioned proceeding have been served as shown below this 29th day of March, 2006 by electronic mail as shown below:

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Atomic Safety and Licensing Board  
Mail Stop: T-3-F23  
U.S. Nuclear Regulatory Commission  
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Dr. Anthony J. Baratta  
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DATED: Honolulu, Hawaii, March 29, 2006



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March 30, 2006

Office of the Secretary  
U.S. Nuclear Regulatory Commission  
ATTN: Rulemakings and Adjudication Staff  
Washington, DC 20555-0001  
Also Via E-Mail: [HEARING DOCKET@nrc.gov](mailto:HEARING DOCKET@nrc.gov)

Re: Docket No. 030-36974  
ASLBP No. 06-843-01-ML  
"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 Envi-  
ronmental Contentions

Dear Secretary:

I represent the legal interests of Pa'ina Hawaii, LLC,  
which has applied for a Materials License.

Pursuant to your regulations, please find enclosed an  
original and two (2) copies of the above Objections.

These Objections were e-mailed to all parties on the  
Certificate of Service on the evening of March 29, 2006.

If you have any questions or comments, please feel free to  
contact my office. Tel: 808-523-5083; Fax: 808-523-5085; e-  
mail: [fpbenco@yahoo.com](mailto:fpbenco@yahoo.com). Thank you.

Very respectfully yours,

  
Fred Paul Benco

Encls.

cc: All parties on Certificate of  
Service