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DOCKETED
USNRC

UNITED STATES OF AMERICA

April 19, 2006 (8:45am)

NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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
MOTION TO DISMISS SAFETY CONTENTIONS #4 AND #6

I. PROCEDURAL BACKGROUND.

This case arose from the Application for a Material's License for installation of radioactive materials into a pool-type industrial irradiator. The Application was filed by Pa'ina Hawaii, LLC ("Pa'ina") on June 23, 2005. (See ML052060372) On August 2, 2005, the NRC published a "Notice Of Opportunity For Hearing" 70 Fed. Reg. at 44,396. The Notice stated that Pa'ina's irradiator qualified for "categorical exclusion." (Id.)

On October 3, 2005, Petitioner Concerned Citizens of Honolulu ("Concerned Citizens") filed its "Request For Hearing By Concerned Citizens of Honolulu ("Request for Hearing")."

On October 26, 2005 Pa'ina filed its "Answer To Request for Hearing By Concerned Citizens Of Honolulu." On October 28, 2005 the NRC Staff ("Staff") filed its "Staff Response To Request For Hearing By Concerned Citizens Of Honolulu." After several

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procedural matters, Concerned Citizens on December 1, 2005 filed its "Petitioner's Reply In Support Of Its Request For Hearing."

By Order dated December 8, 2005, the ASLB in effect bifurcated this proceeding into two parts: (1) Concerned Citizens' standing and environmental contentions; and (2) Concerned Citizens' safety contentions.

By Memorandum and Order dated January 24, 2006, the ASLB found that Concerned Citizens had standing herein, and that Concerned Citizens had alleged two (2) Environmental Contentions which were admissible.¹ See Memorandum and Order (Ruling On Petitioner's Standing And Environmental Contentions), LBP-06-04, 63 NRC 1 (January 24, 2006)

Later, and most pertinent for purposes of this Motion to Dismiss, the ASLB issued its second Memorandum and Order dated March 24, 2006 (LBP-06-12), which addressed the Safety Contentions of Concerned Citizens. In that Order, the ASLB found that Concerned Citizens' Safety Contentions #4, #6 and #7 were admissible, while the remaining safety contentions were

¹ The ASLB found that the two admissible Environmental Contentions were: (1) the Staff's failure to demonstrate why a "categorical exclusion" was appropriate where Applicant's site was near an airport, and allegedly subject to tsunamis, hurricanes and flooding; and (2) "special circumstances" are present which require an environmental assessment or an environmental impact statement. (January 24, 2006 Memorandum and Order, at Page 5.) The ASLB acknowledged that the two NEPA contentions were intertwined, raised "substantially similar" issues, and might be consolidated into one. Id., at 6.

dismissed. See Memorandum and Order (Ruling On Petitioner's Safety Contentions), LBP-06-12, 63 NRC __ (March 24, 2006)

Safety Contention #4 alleged by Concerned Citizens claimed that Pa'ina's Application contained no emergency safety measures should a power loss befall Pa'ina's irradiator. Safety Contention #6 alleged that the Application contained no emergency safety measures in case of natural disasters.

Pa'ina has now filed the outlines for both types of emergencies:

Contention #4, which alleged no emergency safety procedures in case of a power loss, has been resolved. Pa'ina submitted its outline for procedures for power loss, which was received by the NRC on March 31, 2006. See ML 061000640.²

Contention #6, which alleged no emergency safety procedures in case of natural disasters, has been resolved. The Staff requested the outline of emergency procedures on January 25, 2006 as part of its concurrent review, and Pa'ina submitted its outline of emergency safety procedures on March 9, 2006. See ML 060730528.

² Pa'ina does not believe that an outline of emergency procedures for power loss is required for Category III irradiators, but Pa'ina has nevertheless submitted such an outline. 10 C.F.R. 36.53(b) states: "The licensee shall have and follow emergency or abnormal event procedures, appropriate for the irradiator type" Due to the inherent nature of underwater irradiators, both the Applicant and the NRC have determined that "power loss" emergency procedures are not appropriate for underwater irradiators.

Pa'ina has now filed the outlines for both types of emergencies relating to both power loss and natural phenomena. Consequently, those two contentions ought to be dismissed on the grounds of mootness.

II. THE LAW SUPPORTS DISMISSAL OF CONTENTIONS #4 AND #6 ON THE GROUNDS OF MOOTNESS.

Where there are no longer justiciable issues, the claims underlying those issues are generally dismissed on the grounds of mootness. See, e.g., Nuclear Energy Inst., Inc. v. EPA, 362 U.S.App.D.C. 204, 373 F.3d 1251 (D.C.Cir. 2004); Limerick Ecology Action, Inc. v. United States Regulatory Commission, 869 F. 2d 719 (1989); In The Matter Of USEC Inc. (American Centrifuge Plant), CLI-06-09 (April 3, 2006)

The Nuclear Regulatory Commission has recently held that where a license application was under consideration, opponents' contentions were rendered "moot" when subsequent, superseding documents were filed with the NRC. The NRC declared:

"It is well-recognized that where a contention based on an applicant's environmental report is 'superseded by the issuance of licensing-related documents'-whether an environmental impact statement or an applicant's response to a request for additional information-the contention must be 'disposed of or modified.'" Thus, where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the NRC

Staff in an environmental impact statement, the contention is 'moot.'" Id., at 13-14.

In a similar vein, Pa'ina has now submitted its two (2) outlines of emergency procedures relating to power loss and natural disasters, thus addressing Contentions #4 and #6 of the Petition.

Consequently, both of those Contentions ought to be dismissed on the basis of "mootness."

III. CONCLUSION.

For the reasons stated herein, and also based upon the earlier filings of all the parties to this case, this ASLB ought to dismiss both Safety Contentions # 4 and #6 on the grounds of mootness.

DATED: Honolulu, Hawaii, April 18, 2006.



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

AFFIDAVIT OF FRED PAUL BENCO RE CERTIFICATION

STATE OF HAWAII)	
)	ss.
CITY AND COUNTY OF HONOLULU)	

FRED PAUL BENCO, having first been duly sworn on oath,
states and declares as follows:

1. Affiant is an attorney licensed to practice law in the State of Hawaii, and makes the following statements on personal knowledge unless otherwise indicated;

2. Affiant represents Applicant Pa'ina Hawaii, LLC in its efforts to secure a materials license in this proceeding;

3. Pursuant to 10 C.F.R. Sec. 2.323(b), Affiant has made a sincere effort to obtain the dismissal of Safety Contentions #4 and #6 by way of stipulation with counsel for Concerned Citizens. Thus, on or about April 3, 2006 (upon the return from vacation of counsel for Concerned Citizens) and following the posting at ADAMS of ML 060730528 on March 9, 2006 (outline of safety procedures for natural disasters), Affiant contacted counsel for Concerned Citizens and inquired whether or not

counsel would stipulate to the dismissal of Safety Contention #6. Counsel responded that he had had not time to review the ADAMS material, but that he would so review the material and get back to Affiant.

4. Subsequently, on or about April 7, 2006 Affiant once again inquired of counsel whether or not Concerned Citizens would be willing to Stipulate to Dismiss Safety Contention #6. Opposing counsel for Concerned Citizens responded by e-mail that because he was "swamped" he had been unable to consult with his "clients" but would get back to me with a response.

5. Approximately one week ago, I requested of counsel for Concerned Citizens whether his clients would be willing to Stipulate to Dismiss Safety Contention #4 (Loss of Power), since Pa'ina's filing of an outline was by March 31, 2006 also posted on ADAMS at ML 061000640. Affiant received no response.

6. On April 17, 2006 Affiant sent an e-mail to counsel for Concerned Citizens, once again requesting that said counsel respond as to whether Concerned Citizens would stipulate to dismiss Safety Contentions #4 and #6.

7. Later on April 17, 2006, counsel for Concerned Citizens responded by indicating that he had had his "hands full" and had not obtained input from his "clients" with regards to the contentions.

8. April 18, 2006, during a conference call which included Attorney Margaret J. Bupp, Affiant again inquired as to whether Concerned Citizens was willing to stipulate to dismiss Safety Contentions #4 and #6, but counsel for Concerned Citizens said he was not yet prepared to respond.

9. At no time has Attorney Margaret J. Bupp indicated any opposition to, objection to, or agreement with, the proposed Stipulation to Dismiss both Safety Contentions #4 and #6.

9. Based upon the above chronology, Affiant and Pa'ina Hawaii, LLC have made a sincere effort to resolve Safety Contentions #4 and #6. Having been unsuccessful, Affiant believes that the accompanying Motion to Dismiss is warranted.

FURTHER AFFIANT SAYETH NAUGHT.


FRED PAUL BENCO

Subscribed and sworn to before me
this 18th day of April, 2006.

L.S.


Carolyn L. Ishikawa

Notary Public, State of Hawaii

My commission expires: July 7, 2008.

CERTIFICATE OF SERVICE

I hereby certify that copies of (1) "APPLICANT PA'INA HAWAII, LLC'S MOTION TO DISMISS SAFETY CONTENTIONS #4 AND #6" and (2) "AFFIDAVIT OF FRED PAUL BENCO RE CERTIFICATION" in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this 18th day of April, 2006. Additional service has also been made this same day by electronic mail as shown below:

Administrative Judge
Thomas S. Moore, Chair
Atomic Safety and Licensing Board
Mail Stop: T-3-F23
U.S. Nuclear Regulatory Commission
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Dr. Anthony J. Baratta
Administrative Judge
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Margaret J. Bupp
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DATED: Honolulu, Hawaii, April 18, 2006


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April 18, 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

Re: Docket No. 030-36974
ASLBP No. 06-843-01-ML
"Applicant Pa'ina Hawaii, LLC's Motion
To Dismiss Safety Contentions #4 And
#6; Affidavit Of Fred Paul Benco Re
Certification; Certificate Of Service.

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 attached filings.

The above-named filings were e-mailed to your office and
all parties on the Certificate of Service on April 18, 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. Thank you.

Very respectfully yours,



Fred Paul Benco

Encls.

cc: All parties on Certificate of
Service