

April 20, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
PA'INA HAWAII, LLC)	Docket No. 30-36974
)	
Material License Application)	ASLBP No. 06-843-01
)	

STAFF RESPONSE TO 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

INTRODUCTION

On March 20, 2006, the NRC Staff ("Staff") and the intervenors, Concerned Citizens of Honolulu (Concerned Citizens), filed "NRC Staff and Concerned Citizens of Honolulu Joint Motion to Dismiss Environmental Contentions" ("Motion to Dismiss") and "Joint Stipulation and Order Regarding Resolution of Concerned Citizens' Environmental Contentions" ("Joint Stipulation"). Subsequently, the applicant, Pa'ina Hawaii, LLC ("Pa'ina"), objected to both the Motion to Dismiss and the Joint Stipulation¹. Pursuant to the Order issued by the Atomic Safety and Licensing Board ("Board") on April 11, 2006, the Staff herein files its response to Pa'ina's objections. For the reasons discussed below, the stipulation should be accepted and the environmental contentions in the above-captioned proceeding should be dismissed.

BACKGROUND

On January 24, 2006, the Board issued a memorandum and order² in which the Board

¹ "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) ("Objection").

² *Pa'ina Hawaii, LLC* (Material License Application), LBP-06-04, 63 NRC __ (2006).

found that Concerned Citizens had established standing and had presented two admissible environmental contentions. After the January 24, 2006 memorandum and order was issued, counsel for Concerned Citizens approached counsel for the Staff regarding the possibility of reaching an agreement to settle the environmental contentions. Counsel for Concerned Citizens and counsel for the Staff negotiated an agreement under which the Staff would prepare an environmental assessment (EA) for the proposed irradiator and hold an additional public meeting in Honolulu prior to publishing the final Finding of No Significant Impact (FONSI), if the EA results in the Staff reaching a FONSI provided that Concerned Citizens agreed to join in a motion to dismiss the environmental contentions. After reaching this agreement, counsel for Concerned Citizens and the Staff approached counsel for Pa'ina to determine whether Pa'ina would enter into the agreement. Attempts to negotiate language acceptable to all three parties were unsuccessful, the Staff and Concerned Citizens filed the Motion to Dismiss and Joint Order. Pa'ina's Objection followed. The Board's April 11, 2006 Order scheduled a telephone conference to discuss, among other matters, the Objection, and requested written responses to the objection from both the Staff and Concerned Citizens.

DISCUSSION

Pa'ina has offered several objections to the Motion to Dismiss and Joint Stipulation: (1) accepting the motion and stipulation will impermissibly split the proceeding, resulting in prejudicial delays and increased costs to Pa'ina; (2) Pa'ina's right to a hearing on the environmental contentions and its due process rights have been jeopardized; (3) the stipulation is inadequate because it does not specifically include plans to address tsunamis, hurricanes, flooding and airplane crashes and does not include a time limit; (4) the Joint Stipulation was improperly negotiated; and (5) the Joint Stipulation is not in the best interests of the public. The Staff addresses each of these objections below.

First, contrary to Pa'ina's stated concerns, carrying out the Joint Stipulation will not result in prejudicial delays and increased costs for Pa'ina. While it is true that the Staff estimates that it will take at least nine months to complete the process envisioned in the Joint Stipulation, proceeding under the Joint Stipulation will still result in a faster resolution of the environmental issues than taking the environmental contentions through the hearing process.

The environmental contentions allege that there are special circumstances for the proposed irradiator so that it is not categorically excluded from environmental review under the National Environmental Policy Act (NEPA). 10 C.F.R. § 51.22(b). Concerned Citizens has raised several alleged special circumstances: hurricanes, tsunamis, and airplane crashes. Implicit in the allegation that the possibility of these events at the proposed facility constitute special circumstances is an allegation that the occurrence of any of these events at the proposed irradiator would result in a significant impact on the human environment, negating the categorical exclusion. See 10 C.F.R. § 51.22(a). In order to prove that there would be no significant impact on the human environment, and, therefore, that the categorical exclusion is properly applied to the proposed facility, the Staff will have to undertake some environmental review of the proposed facility. Whether this takes the form of an environmental assessment or is done in the course of preparing testimony or other evidence related to litigating the admitted contentions, a significant amount of time will be needed. At this point, the Staff estimates that this basic analysis that includes specific issues raised in the contentions will take about six months (the time period needed to complete the EA under the Joint Stipulation less the time needed for the public meeting and public review and comment). With the additional time needed to prepare for a hearing, convene the hearing, and for the Board to reach its decision after the hearing, it will be more than a year before the environmental contentions can be resolved through the hearing process. Thus, the process set forth in the Joint Stipulation will take no longer, and could be several months faster, than full litigation of the environmental

contentions. Therefore, Pa'ina is not correct in its assertion that the Joint Stipulation will cause unnecessary delay.

Second, Pa'ina's argument that the Joint Stipulation interferes with its right to a hearing on the environmental contentions ignores the fact that Section 102(2) of NEPA imposes burdens on agencies of the federal government, including the NRC, not on private individuals. The NRC carries out these responsibilities by acting in accordance with its regulations under 10 C.F.R. Part 50. The environmental contentions in the instant proceeding allege that the Staff misapplied the categorical exclusion for irradiators, not that Pa'ina's application or actions have been inadequate. A balance must be struck between the rights of all the parties. The Staff contends that the Joint Stipulation will allow the Staff to fully and adequately defend its reliance on the categorical exclusion through the preparation of an EA while retaining the rights of *both* Concerned Citizens and Pa'ina to challenge the adequacy of the EA. While it is true that Pa'ina would have the opportunity to be heard on the admitted contentions, it is not at all clear what harm is suffered by Pa'ina under the settlement.

Third, Pa'ina suggests that because the stipulation does not specifically mention the events put forth as special circumstances, the EA will not consider these events³. This argument does not succeed for two reasons. First, fundamentally, the EA is intended to answer the environmental contentions as well as looking generally at environmental issues associated with the proposed project.. Therefore, it follows that the EA will include all of the concerns raised in the contentions and admitted by the Board. Second, the stipulation allows for Concerned Citizens to file late-filed contentions challenging the adequacy of the EA, consistent with the Commission's regulations. If the Staff were to fail to analyze any issue raised in the

³ Pa'ina also objects to the fact the stipulation does not include time limits. However, as all three parties are now entering into discussions with the Board to establish a schedule for the proceeding, it seems that this concern will be rectified.

admitted environmental contentions, Concerned Citizens would almost certainly challenge the adequacy of the EA, derailing the Joint Stipulation's goal of eliminating the environmental contentions from the hearing process. Therefore, it is unlikely that the Staff, under the agreement crafted, will omit any issue previously admitted to the proceeding.

Fourth, Pa'ina alleges that the Joint Stipulation was improperly negotiated. However, as stated above, Pa'ina was consulted before the Joint Stipulation and Motion to Dismiss were filed. The changes to the Joint Stipulation requested by Pa'ina, however, were not acceptable to all parties, and the Staff and Concerned Citizens moved ahead with an agreement settling contentions raised by Concerned Citizens alleging an inadequacy on the part of the Staff. Pa'ina has not offered any explanation as to why this history of negotiations between the parties should by itself require the Board to refuse to accept an otherwise proper settlement, particularly in light of the predisposition toward settlement, where possible, reflected in the regulations. 10 C.F.R. § 2.338. The fact that Pa'ina did not agree to the settlement does not render the agreement as being improperly negotiated.

Finally, Pa'ina argues that settlement in this instance is not in the best interests of the public. The Staff respectfully disagrees. As discussed above, the path forward envisioned by the Joint Stipulation will be faster and more efficient than moving forward with a hearing while still allowing for input from the public, including the entities cited by Pa'ina. Since either litigating the contentions or issuing the EA would require that the Staff conduct very similar evaluations, there is no clear basis for finding that the public interest favors litigation of contentions over a settlement that includes the very proponent of the contentions. When coupled with the regulatory pre-disposition toward settlement, this argues in favor of the Board approving the Joint Stipulation and granting the Motion to Dismiss.

CONCLUSION

For the reasons discussed above, the Board should approve the Joint Stipulation and grant the Motion to Dismiss.

Respectfully Submitted,

/RA/

Margaret J. Bupp
Counsel for NRC Staff

Dated at Rockville, Maryland
this 20th day of April, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
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(Honolulu, Hawaii Irradiator))
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CERTIFICATE OF SERVICE

I hereby certify that copies of "STAFF RESPONSE TO 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 CONTENTION" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 20th day of April, 2006.

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