

May 19, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S OPPOSITION TO APPLICANT PA'INA HAWAII, LLC'S
BRIEF IN SUPPORT OF APPEAL FROM ASLB ORDER DATED APRIL 27, 2006

INTRODUCTION

On April 27, 2006, the Atomic Safety and Licensing Board ("Board") in the above-captioned proceeding issued an order dismissing the environmental contentions and implementing a joint stipulation entered into by the NRC Staff ("Staff") and the intervenors, Concerned Citizens of Honolulu ("Concerned Citizens" or "the intervenors"), under which the Staff will prepare an environmental assessment (EA) for the license application. "Order (Confirming Oral Ruling Granting Motion to Dismiss Contentions)," (April 27, 2006). On May 8, 2006,¹ Pa'ina Hawaii, LLC ("Pa'ina" or "the Applicant") petitioned for review of the Board's Order, contending that the Board erred in dismissing the environmental contentions and accepting the joint stipulation. As shown below, the Board did not err in its April 27, 2006 ruling, and Pa'ina's petition for review should be denied.

BACKGROUND

On June 23, 2005, Pa'ina submitted its application for a license for possession and use of byproduct material in connection with the construction and operation of a commercial pool-

¹ Applicant's Petition for Review was served by electronic mail after 5:00 p.m. on May 8, 2006. Pursuant to 10 C.F.R. § 2.306, the Staff has added one business day to the response time.

type industrial irradiator using a cobalt-60 source at the Honolulu International Airport in Honolulu, Hawaii. See Letter from Michael Kohn, President, Pa'ina Hawaii, LLC to Jack Whitten, Region IV, U.S. Nuclear Regulatory Commission, June 23, 2005. The Staff published a notice of opportunity for a hearing in connection with Pa'ina's application in the *Federal Register* on August 2, 2005. 70 Fed. Reg. 44,396 (Aug. 2, 2005). On October 3, 2005, Concerned Citizens filed a request for a hearing in accordance with 10 C.F.R. § 2.309.

The Board in this proceeding was designated on October 13, 2005. "Establishment of Atomic Safety and Licensing Board," October 13, 2005. Following responses from the Applicant and Staff, the Board, on January 24, 2006, issued an order addressing Concerned Citizens' standing and its proffered environmental contentions.² The Board found that Concerned Citizens has standing to intervene and had proffered two admissible environmental contentions: first, that the NRC failed to consider whether the presence of "special circumstances" related to the proposed site of the irradiator precludes the use of the categorical exclusion provision of 10 C.F.R. § 51.22; and second, that the risks from tsunamis, hurricanes and airplane crashes associated with the proposed location constitute special, rebutting the Categorical Exclusion.³

Following the January 24, 2006 order, Concerned Citizens initiated settlement discussions with the Staff. After negotiating over a period of weeks, the Staff and Concerned Citizens agreed to a proposed stipulation under which the Staff agreed to 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 a FONSI, provided that Concerned Citizens agreed to join in a motion to dismiss

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

³ The Board issued an additional decision on March 24, 2006, finding that Concerned Citizens had proffered three admissible safety contentions. *Pa'ina Hawaii, LLC* (Material License Application), LBP-06-12, 63 NRC __ (2006). The Applicant's petition for review, however, focuses on matters not directly related to this decision.

the environmental contentions. Upon reaching a tentative agreement between the Staff and Concerned Citizens, counsel for the Staff and Concerned Citizens contacted the Applicant, providing a copy of the agreement for Applicant comment and to determine whether Pa'ina would join in the proposed stipulation. At this time, Pa'ina was afforded the opportunity to propose changes to the proposed settlement. However, after the parties negotiated for two weeks, it became apparent that an agreement satisfying all three parties would not be reached, and, on March 20, 2006, the Staff and Concerned Citizens filed a "Joint Stipulation and Order Regarding Resolution of Concerned Citizens' Environmental Contentions" ("Joint Stipulation") and a "Joint Motion to Dismiss Environmental Contentions" ("Motion to Dismiss").

Pa'ina objected to both the Joint Stipulation and the Motion to Dismiss.⁴ After requesting responses to the Pa'ina Objection from both the Staff⁵ and Concerned Citizens⁶, the Board convened a pre-hearing conference for the purpose of discussing the Stipulation and the Motion to dismiss. See "Order (Scheduling a Telephone Conference)," April 11, 2006; see *also* Tr. at 29-50. After affording Pa'ina an opportunity to reply orally to the Staff and intervenor Responses, the Board accepted the Joint Stipulation and granted the Motion to Dismiss. Tr. at 30. The Board confirmed the oral ruling on April 27, 2006. Pa'ina's petition for review followed.⁷

⁴ "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) ("Pa'ina Objection").

⁵ "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" (April 20, 2006) ("Staff Response").

⁶ "Intervenor Concerned Citizens of Honolulu's Response to Applicant's Objections to Joint Stipulation and Order Regarding Resolution of Concerned Citizens' Environmental Contentions" (April 20, 2006) ("Concerned Citizens Response").

⁷ "Applicant Pa'ina Hawaii, LLC's Brief in Support of Appeal from ASLB Order Dated April 27, 2006," (May 8, 2006) ("Petition for Review").

Pa'ina contends that the Board erred and abused its discretion in granting the Motion to Dismiss and accepting the Joint Stipulation for four reasons: (1) no evidentiary hearing has been held on the merits of the dismissed contentions; (2) Pa'ina did not agree to the Joint Stipulation and did not have a meaningful opportunity to negotiate its terms; (3) implementing the Joint Stipulation will result in "splitting" the instant proceeding, delaying the licensing and resulting in increased costs for Pa'ina; and (4) the April 27, 2006 Order is not in the best interests of the public. Each of the above arguments was addressed by the Board in its oral ruling on April 26, 2006, as confirmed by the April 27, 2006 Order. As discussed below, the Board did not err in its rulings.

DISCUSSION

I. LEGAL STANDARDS

Pa'ina has petitioned for review under 10 C.F.R. § 2.341(b)(4), which provides for review of final Board orders by the Commission. Review may be granted in the Commission's discretion upon a weighing of the following considerations: (i) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (iii) a substantial and important question of law, policy, or discretion has been raised; (iv) the conduct of the proceeding involved a prejudicial procedural error; or (v) any other consideration which the commission may deem to be in the public interest.

However, absent a final order by the Board, any appeal must meet the standards for an interlocutory appeal under 10 C.F.R. § 2.341(f)(2). The Applicant's brief fails to address these standards. A Board 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 Company of New Hampshire (Seabrook Station, Units 1 and 2)*, ALAB-731, 17 NRC 1073, 1074 (1983). The Board's April 27, 2006 Order does neither.

Under the standards of either 10 C.F.R. § 2.341(b)(4) or (f)(2), as discussed below, the Applicant's Petition for Review should be denied, and the April 27, 2006 Order affirmed.

II. Failure to Hold an Evidentiary Hearing Does not Constitute an Abuse of Discretion

Pa'ina argued below that the Motion to Dismiss and Joint Stipulation jeopardize the Applicant's rights to a hearing on the admitted environmental contentions and, thus, violates the Applicant's due process rights. Pa'ina Objection at 4-5. The Applicant argued that it is entitled to a hearing in order to rebut the admitted environmental contentions. *Id.* In its decision, the Board correctly stated that, because compliance with "the National Environmental Policy Act is a uniquely Federal Government obligation," Pa'ina does not have any legally-protected hearing right with regard to the admitted environmental contentions. Tr. at 31; *see also Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), CLI-78-14, 7 NRC 952, 961 (1978) (Staff has burden of proof regarding NEPA compliance); *Boston Edison Co.* (Pilgrim Nuclear Generating Station, Unit 2), ALAB-479, 7 NRC 774, 794 (1978) (NEPA compliance is Staff responsibility) . Thus, the stipulation does not violate Pa'ina's due process rights.

In its Petition for Review, Pa'ina restates its arguments from its Objection, and concludes that the Board's determination violates 10 C.F.R. § 2.341(b)(4)(iii) and (iv). However, the Applicant cites to no facts or provisions of law that contradict the Board's determination, which is based on long-standing precedent. Therefore, the Applicant has not shown that the Board's decision amounts to a prejudicial error nor does the appeal raise a substantial and important question of law, policy, or discretion warranting the Commission's intercession at this time.

III. Although the Applicant Did Not Sign the Joint Stipulation, Acceptance of the Joint Stipulation was Proper

The Applicant also argues that it was not afforded a meaningful opportunity to negotiate the terms of the settlement, allegedly violating its due process rights. Petition for Review

at 11-12. The Board, in response to this argument below, found that the manner in which the Joint Stipulation was negotiated did not violate the Applicant's due process rights.⁸ The Board concluded that, since the Joint Stipulation and Motion to Dismiss concern the intervenor's environmental contentions and the Staff's obligations under NEPA, it is not illogical that the Motion to Dismiss and Joint Stipulation were initiated by and involve the Staff and the intervenor. See Tr. at 32.

The Board's logic is consistent with the proposition that compliance with NEPA is a uniquely federal function. However, without offering any support in fact or law, the Applicant argues that the Board's decision was in error because there were no findings of fact made prior to the Order, the decision raises a substantial question of law and policy regarding fundamental fairness, and the decision constitutes a prejudicial procedural error. The Applicant has identified no legal requirement that findings of material fact be made prior to entering a settlement agreement. The Applicant has also failed to identify any statute, regulation, or legal precedent contradicting the Board's reasoning in granting the Motion to Dismiss and accepting the Joint Stipulation.⁹ Therefore, the Applicant has not established that the Board's decision to grant the Motion to Dismiss and accept the Joint Stipulation amounts to prejudicial error nor has

⁸ Further, the Applicant's factual representation concerning its participation in the negotiations is not consistent with Staff counsel's recollection of the negotiation process. More than two weeks were spent in discussions with the Applicant on the settlement language to try to enable them to join with the stipulation. While the specific proposals of the Applicant were not found appropriate by either the intervenors or the Staff, it is inaccurate to say that the Applicant had no opportunity to meaningfully participate in the discussions.

⁹ The Applicant cites 10 C.F.R. § 2.330, which states that stipulations will be accepted on the motion of all parties. However, this regulation applies to stipulations as to relevant facts, the contents or authenticity of documents, and the procedures to be followed in a given proceeding. Settlements are not within the scope of this regulation.

The Applicant also cites *Embrace Systems Corp.*, 174 B.R. 240 (1994), which holds that, in a bankruptcy proceeding, the debtor cannot enter into a stipulation for relief with one creditor without giving "notice, and an opportunity to be heard, to other parties in interest regarding the stipulation." Here, the Applicant received notice of the Joint Stipulation and an opportunity to negotiate its terms before it was filed, and the Board afforded the Applicant an opportunity to be heard before accepting it.

the Applicant established that the decision raises a substantial question of law and policy.

IV. Proceeding under the Joint Stipulation Will Result in Neither
“Splitting” the Instant Case Nor in a Prejudicial Delay

The Applicant argues that accepting the settlement will result in “splitting” the cause of action by dividing the licensing proceeding into an EA track for the environmental contentions and a separate hearing track for the safety contentions, resulting in additional delays and expenses for the Applicant. Petition for Review at 13-14. These arguments were specifically raised and rejected below. In response, the Board noted that in “NRC administrative practice, there are no causes of action, only contentions, and contentions are not analogous to causes of action.” Tr. at 30-31. Therefore, the Applicant’s concerns about “splitting” the proceeding are unfounded. In addition, the Board found there would be no improper delay as a result of carrying out the Joint Stipulation. This determination is supported by the current schedule for the remainder of the proceeding, which is based on the joint schedule submitted by the Staff and Concerned Citizens on April 20, 2006. “Order,” May 1, 2006; see *also* “NRC Staff and Concerned Citizens of Honolulu’s Proposed Hearing Schedules,” April 20, 2006. The Staff and Concerned Citizens proposed two schedules for the proceeding: one schedule should the Joint Stipulation be entered, and a second schedule should the Board decline to enter the Joint Stipulation. The two schedules show that preparation of an EA under the Joint Stipulation will result in a maximum of three additional months as compared to the schedule without preparation of an EA. The Board did not find this potential delay unreasonable, and the Applicant has offered no showing to the contrary. In its Petition for Review, the Applicant alleges that the Board’s determinations regarding splitting and potential delay raise a substantial and important question of law, policy, or discretion and constitute a prejudicial procedural error, but has offered no support for these claims. Thus, the Applicant’s petition these grounds should be denied.

V. The Board's April 27, 2006 Order Is in the Public Interest

Finally, the Applicant claims that the Board's April 27, 2006 Order is not in the public interest. This claim appears to be based upon the Applicant's concerns regarding its due process rights, which, as discussed in section III above, are unfounded. In addition, there are very strong public interest reasons for pursuing settlement. As the Board stated in its oral ruling, it cannot "reasonably be concluded that having the Staff fulfill its obligations under the National Environmental Policy Act is not in the public interest." There is also a long-standing NRC policy in favor of reasonable settlements. 10 C.F.R. § 2.338; *see also Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 455-56 (1981); *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998); *Sequoyah Fuels Corporation and General Atomics (Gore, OK, site)*, CLI-97-13, 46 NRC 195, 208 (1997) (The Commission is willing to presume that the Staff acts in the agency's best interest in agreeing to a settlement and will only undo the settlement if its opponents show some "substantial" public-interest reason to overcome that presumption.); *Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Unit 3)*, ALAB-532, 9 NRC 279, 283 (1979). Pa'ina has offered no rebuttal of this policy nor facts to demonstrate that the public interest dictates overturning what the Staff has concluded is an agreement in the agency's best interests.

VI. The Petition for Review Does Not Meet the Requirements of 10 C.F.R. § 2.341(f)(2)

As discussed earlier, the Applicant's petition for review ought to have been filed pursuant to 10 C.F.R. § 2.341(f)(2), which provides that the Commission may grant discretionary interlocutory review if the party seeking review demonstrates that the issue to be reviewed: (1) threatens the party with an immediate and serious irreparable adverse impact, which, as a practical matter could not be alleviated through a petition for review of the presiding officer's final decision; or (2) affects the basic structure of the proceeding in a pervasive and unusual manner. But based on the facts discussed above, the Applicant has not met these

standards either. For the same reasons that neither completion of an EA prior to concluding the adjudicatory proceeding nor the manner in which the Joint Settlement was negotiated constitutes a prejudicial error or an injury to the Applicant's due process rights, the acceptance of the agreement by the Board also does not constitute an immediate and irreparable adverse impact on the Applicant. Further, the Applicant presents no basis to support an assertion that completion of an EA prior to concluding the adjudicatory proceeding, which is consistent with agency practice in other non-categorically excluded licensing actions, affects the basic structure of the proceeding in a pervasive or unusual manner. Therefore, the Applicant has not satisfied the requirements of 10 C.F.R. § 2.341(f)(2).

CONCLUSION

For the reasons discussed above, the Applicant has not met the requirements of 10 C.F.R. § 2.341(b)(4) or 10 C.F.R. § 2.341(f)(2). There is no significant factual, procedural or legal error, substantial question of law or policy, or other public interest that would justify the interlocutory review of the Board's decision as requested by the Applicant. Having failed to meet the requirements for an interlocutory review, the Applicant's petition for review should be denied.

Respectfully Submitted,

/RA/

Margaret J. Bupp
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of May, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S OPPOSITION TO APPLICANT PA'INA HAWAII, LLC'S BRIEF IN SUPPORT OF APPEAL FROM ASLB ORDER DATED APRIL 27, 2006" in the above-captioned proceeding 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 19th day of May, 2006.

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