

RAS 1166p

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC  
May 11, 2006 (8:55am)  
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 MOTION TO CONSOLIDATE  
APPLICANT PA'INA HAWAII, LLC'S APPEALS FILED APRIL 3, 2006  
AND MAY 8, 2006

I. INTRODUCTION.

This Motion To Consolidate is filed pursuant to 10 C.F.R. §2.323, 10 C.F.R. § 2.316 and 10 C.F.R. § 2.317(b).

Applicant PA'INA HAWAII, LLC ("Pa'ina") seeks a Material's License for installation of radioactive materials into a typical, pool-type industrial irradiator. The Application was filed by Pa'ina on June 27, 2005. (See ML052060372)

On August 2, 2005, the NRC published a "Notice Of Opportunity For Hearing" 70 Fed. Reg. at 44,396. The Notice noted that that NRC Staff had designated Pa'ina's irradiator for "categorical exclusion." (Id.) (052070071)

On October 3, 2005, Petitioner Concerned Citizens of Honolulu ("Concerned Citizens") filed its "Request For Hearing By Concerned Citizens of Honolulu ("Request for Hearing")." (ML052970026)

TEMPLATE = SECY-037

SECY-02

After numerous procedural matters, the designated Atomic Safety and Licensing Board ("ASLB") issued two decisions in 2006:

First, by Memorandum and Order dated January 24, 2006, the ASLB found that Petitioner CONCERNED CITIZENS OF HONOLULU had standing herein, and that Concerned Citizens had alleged two (2) Environmental Contentions which were admissible.<sup>1</sup> See "Memorandum and Order (Ruling On Petitioner's Standing And Environmental Contentions)," LBP-06-04, 63 NRC 1 (January 24, 2006)

Second, the ASLB issued a 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 dismissed. See "Memorandum and Order (Ruling On Petitioner's Safety Contentions)," LBP-06-12, 63 NRC \_\_\_ (March 24, 2006)

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<sup>1</sup> 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.

Together, those two Orders (dated January 24, 2006 and March 24, 2006) were appealed to this Commission by Pa'ina on April 3, 2006 (hereinafter called "First Appeal").

Meanwhile, the NRC Staff and Concerned Citizens jointly moved before the ASLB to force the preparation of an Environmental Assessment ("EA"), without any initial evidentiary hearing whatsoever on the validity of the admitted contentions. (ML060820592) Pa'ina opposed the motion on due process as well as other grounds. (ML061000063) On April 26, 2006 the ASLB heard oral argument on the joint motion. (Tran. At ML061210010)

On April 27, 2006, the ASLB issued its Order mandating the preparation of an EA without the benefit of any evidentiary hearing. For convenience' sake, this will be called the "April 27th Order," and it formed the basis for the "Second Appeal" which Pa'ina filed herein on May 8, 2006.

By means of this Motion, Pa'ina requests that this Commission consolidate the First Appeal and the Second Appeal because (1) the parties to both appeals are identical, (2) the issues are closely related, and (3) substantial resources and time will be saved.

## II. ARGUMENT

Motions to consolidate will be granted where such a consolidation would be "conducive to the proper dispatch" of the NRC's business, and would also tend to lead to "justice." 10 C.F.R. § 2.317(b)

In this case, the parties are identical in both appeals, so consolidation would clearly affect all parties with appropriate impact.

Furthermore, the issues are closely, and even intimately, connected. Thus, if the First Appeal is granted in favor of Pa'ina (a finding that Concerned Citizens' three related, admitted contentions should be dismissed), then such a ruling would cause the Second Appeal (ordering the preparation of an EA without an evidentiary hearing) would be "moot."<sup>2</sup>

Conversely, even if the First Appeal is affirmed in favor of Concerned Citizens, this Commission ought to "apply the brakes" upon the ASLB's arbitrary and summary order that an EA be accomplished even without a prior evidentiary hearing on the validity of the contentions. Much time and substantial resources would be saved.

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<sup>2</sup> Indeed, on April 28, 2006, Concerned Citizens' counsel transmitted an e-mail to counsel for Pa'ina arguing that the First Appeal was "moot" because of the ASLB's April 27, 2006 Order mandating that an EA be performed.

III. CONCLUSION

For the above-stated reasons; based upon the record of this matter; and in the interests of a proper and timely dispatch to the ends of justice, Pa'ina requests that this Commission will consolidate for hearing/decision its two pending appeals filed April 3, 2006 and May 8, 2006.

DATED: Honolulu, Hawaii May 10, 2006.

  
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Pa'ina Hawaii, LLC

CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT PA'INA HAWAII, LLC'S MOTION TO CONSOLIDATE APPLICANT PA'INA HAWAII, LLC'S APPEALS FILED APRIL 3, 2006 AND MAY 8, 2006" and "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 10th day of May, 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  
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Dr. Anthony J. Baratta  
Administrative Judge  
Atomic Safety and Licensing Board  
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U.S. Nuclear Regulatory Commission  
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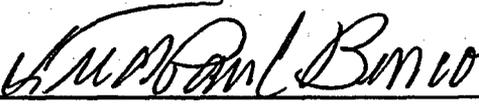
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U.S. Nuclear Regulatory  
Commission  
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Adjudication Staff  
Washington, DC 20555-  
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DATED: Honolulu, Hawaii, May 10, 2006

  
FRED PAUL BENCO  
Attorney for Applicant  
Pa'ina Hawaii, LLC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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  
conferred with Attorney Margaret Bupp (for the NRC Staff) and  
David L. Henkin (for Petitioner) regarding their response to the  
Motion to Consolidate the two pending appeals. Ms. Bupp  
indicated that she was inclined to oppose the Motion to  
Consolidate, while Mr. Henkin indicated that he would wait until  
he saw the Motion to Consolidate before he would take a  
position.

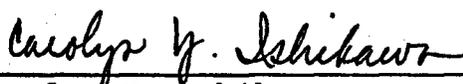
4. I hereby certify that the foregoing is true and complete to the best of my knowledge and belief.

FURTHER AFFIANT SAYETH NAUGHT.

  
FRED PAUL BENCO

Subscribed and sworn to before me  
this 10<sup>th</sup> day of May, 2006.

L.S.

  
Carolyn Y. Ishikawa

Notary Public, State of Hawaii

My commission expires: July 7, 2008.

**THE LAW OFFICES OF FRED PAUL BENCO**  
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May 10, 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 Consolidate Applicant Pa'ina Hawaii,  
LLC's Appeals Filed April 3, 2006 and  
May 8, 2006"; Certification of Fred  
Paul Benco;" and "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 each of the above three  
documents.

These three documents were e-mailed to your office and to  
all parties named on the Certificate of Service on May 10, 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