

May 30, 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 INTERVENOR CONCERNED CITIZENS OF HONOLULU'S
MOTION FOR LEAVE TO AMEND SAFETY CONTENTIONS #4 AND #6

INTRODUCTION

On May 1, 2006, the intervenor, Concerned Citizens of Honolulu ("Concerned Citizens" or "Intervenor"), under 10 C.F.R. § 2.309(c) and (f)(2), filed proposed amendments to previously admitted safety contentions 4 and 6.¹ Pursuant to 10 C.F.R. § 2.309(h), the NRC staff ("Staff") hereby responds.

BACKGROUND

On June 23, 2005, Pa'ina Hawaii, LLC ("Pa'ina" or "Applicant") submitted an application for possession and use of byproduct material in connection with the construction and operation of an underwater panoramic irradiator at the Honolulu International Airport. See Letter from Michael Kohn, President, Pa'ina Hawaii, LLC to Jack Whitten, Region IV, U.S. Nuclear Regulatory Commission, June 23, 2005. In connection with the application, the Staff published a notice of opportunity for a hearing 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.

¹ "Intervenor Concerned Citizens of Honolulu's Motion for Leave to Amend Safety Contentions #4 and #6," May 1, 2006 ("Amended Contentions"). Concerned Citizens served its request via e-mail, which arrived at the NRC on May 2, 2006.

On January 24, 2006, the Atomic Safety and Licensing Board (“Board”) issued a memorandum and order finding that Concerned Citizens has standing to intervene and had proffered two admissible environmental contentions. *Pa’ina Hawaii, LLC* (Materials License Application), LBP-06-04, 63 NRC __ (2006) Subsequently, on March 24, 2006 the Board issued an additional memorandum and order admitting safety contentions 4, 6, and 7. *Pa’ina Hawaii, LLC* (Materials License Application), LBP-06-12, 63 NRC __ (2006). Safety Contentions 4 and 6, the focus of this response, allege that the Applicant’s emergency procedures are inadequate for a prolonged loss of electricity or an accident caused by natural phenomena, respectively.

A letter outlining several areas of deficiency in the application was sent from the Staff to the Applicant on January 25, 2006. The Applicant submitted a response on March 9, 2006.² The response included a revised outline of the Applicant’s emergency procedures in the event of a natural disaster. In addition, on March 31, 2006³, the Applicant also submitted an outline of its emergency plans in the event of a loss of electricity. Based on these filings, on May 1, 2006, the Intervenor filed a motion for leave to amend Safety Contentions 4 and 6.⁴

² The response was made publicly available on the agency’s ADAMS system on March 14, 2006.

³ This document was made publicly available on the agency’s ADAMS system on April 10, 2006.

⁴ On May 10, 2006, the Applicant filed an early response to the Amended Contentions, “Applicant Pa’ina Hawaii, LLC’s Opposition to Intervenor Concerned Citizens of Honolulu’s Motion for Leave to Amend Safety Contentions #4 and #6” (“Pa’ina Response”). Concerned Citizens responded. “Intervenor Concerned Citizens of Honolulu’s Reply to Applicant Pa’ina Hawaii, LLC’s Opposition to Motion for Leave to Amend Safety Contentions #4 and #6,” May 17, 2006 (“Concerned Citizens Response”). On May 26, 2006, the Applicant filed a “Request to Strike ‘Intervenor Concerned Citizens of Honolulu’s Reply to Applicant Pa’ina Hawaii, LLC’s Opposition to Motion for Leave to Amend Safety Contentions #4 and #6’ Filed May 17, 2006” (“Request to Strike”), claiming that the Concerned Citizens Response should be stricken because it was not accompanied by a request for leave to file a response as required for motions filed under 10 C.F.R. § 2.323. The same day, Concerned Citizens file “Intervenor Concerned Citizens of Honolulu’s Opposition to Applicant Pa’ina Hawaii, LLC’s Request to Strike Intervenor’s Reply to Applicant’s Opposition to Motion for Leave to Amend Safety Contentions #4 and #6” (“Request to Strike Reply”). The requirements of 10 C.F.R. § 2.323 are not applicable in the instant case because the Concerned Citizens Response was properly filed in accordance with 10 C.F.R. § 2.309(h)(2). In addition, it should be noted that the Applicant did not comply with the provision in 10 C.F.R. § 2.323(b) requiring the
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DISCUSSION

I. Legal Standards

All contentions, no matter when submitted, must meet the requirements outlined at 10 C.F.R. § 2.309(f)(1). For each contention, the intervenor must provide: (1) a specific statement of the issue of law or fact to be raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue raised in the contention is within the scope of the proceeding; (4) a demonstration that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) a concise statement of the alleged facts or expert opinions which support the requestor's position; and (6) sufficient information to show that a genuine dispute exists on a material issue of law or fact, including references to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute or the identification of each failure to include necessary information in the application and the supporting reasons for the petitioner's belief. 10 C.F.R. § 2.309(f)(1). After the filing of the initial petition to intervene, contentions may be amended or new petitions filed after a showing that: (1) the information upon which the amended or new contention is based was not previously available; (2) the information upon which the amended or new petition is based is material different that information previously available; and (3) the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information. 10 C.F.R. § 2.309(f)(2). There is no standard for "timeliness" set forth in § 2.309(f)(2)(iii); however, the Board, in the April 26, 2006 pre-hearing conference, stated:

Late-filed contentions shall be filed within 30 days of the initiating action, event or document underlying the late-filed contention. For example, in circumstances where the filing of an applicant

⁴(...continued)
moving party to contact other parties in the proceeding prior to filing a motion.

document legitimately undergirds a late-filed contention, we will consider a contention filed within 30 days of the issuance of that document as presumptively meeting the good cause requirement of § 2.309(c)(1). Absent extraordinary circumstances, a late-filed contention filed beyond the 30-day period will be found to lack good cause for the untimely filing.

Tr. at 46.⁵

In the event that the amended or new contention is not submitted in a timely fashion, the petition must meet the requirements of 10 C.F.R. § 2.309(c)(1). In order to determine whether or not a late petition should be entertained, the Board will balance the following factors to the extent that they apply to the particular nontimely filing: (1) good cause, if any, for the failure to file on time; (2) the nature of the requestor's/petitioner's right under the Atomic Energy Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; (4) the possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest; (5) the availability of other means whereby the requestor's/petitioner's interest will be protected; (6) the extent to which the requester's/petitioner's interests will be represented by existing parties; (7) the extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and (8) the extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record. Because Concerned Citizens is already a party, factors 2, 3, 4, 5, 6, and 8 are not relevant.

II. Amendment to Safety Contention 4

The proposed amendment to Safety Contention 4 was prompted by a document filed by the Applicant on March 31, 2006. As admitted, Safety Contention 4 is a contention of omission⁶,

⁵ This 30-day time limit is also consistent with the Commission's "Model Milestones for Hearings Conducted Under 10 C.F.R. Part 2, Subpart L." 10 C.F.R. Part 2, App. A.

⁶ In its May 17, 2006 Concerned Citizens Response, the intervenor states that its original contentions "challenged not only the omission of necessary emergency procedure outlines, but also the
(continued...)"

alleging that the application failed to include an outline of its planned procedures in the event of a prolonged loss of electrical power at the facility, as required by 10 C.F.R. §§ 36.13(c) and 36.37. Since the Applicant has now presented an outline of its proposed procedures, the amended contention alleges that the outline is likewise insufficient.

Although the Applicant's outline of its planned procedures for a prolonged loss of electricity was filed on March 31, 2006, the document was first published on the NRC's ADAMS system on April 10, 2006.⁷ The Intervenor filed its Motion twenty-one days later, on May 1, 2006. Based on this chronology, and pursuant to 10 C.F.R. § 2.309(f)(2)(iii) and the Board's guidance, the Staff does not dispute the timeliness of the proposed amendment to Safety Contention 4. Therefore, the amendment to Safety Contention 4 is properly judged against the criteria outlined in 10 C.F.R. § 2.309(f)(1)-(2), and the criteria of 10 C.F.R. § 2.309(c) are not relevant.

It appears that the amendment to Safety Contention 4 meets all requirements of 10 C.F.R. § 2.309(f)(2). As discussed above, it is timely. It is based on a document not filed by the Applicant until March 31, information that was not previously available, and that differs materially from the information originally submitted in the application. However, the amended contention fails to meet the requirements of 10 C.F.R. § 2.309(f)(1). Here, the Intervenor has

⁶(...continued)

inadequacy of Pa'ina's proposed irradiator design" while clarifying that "Concerned Citizens seeks leave to amend only those portions of Safety Contentions #4 and #6 that challenged the omission in Pa'ina's application of emergency procedure outlines." Concerned Citizens Response at 4. The Board, in its ruling on the original safety contentions, was clear that both Safety Contention 4 and Safety Contention 6 are contentions of omission, focused on the emergency procedures for loss of electric power and natural phenomena, respectively, but not encompassing the design of the proposed facility. LBP-06-12, 63 NRC ___, *slip op.* at 17, 21.

⁷ Although the document was publicly available on April 10, 2006, it was not filed in ADAMS under the docket number for the instant proceeding, so that an individual searching for new items in the docket would not have been able to locate the document by searching for documents associated with the docket number. The results of a search for items with "Pa'ina" in the title do include this document. Regardless of how the document was located, it appears that the Intervenor has responded to the document in a timely fashion.

not shown that a genuine dispute exists on a material issue of fact or law, as required by 10 C.F.R. § 2.309(f)(1)(vi), nor has the Intervenor provided sufficient facts and expert opinion to support the Intervenor's position, as required by 10 C.F.R. § 2.309(f)(1)(v).

10 C.F.R. § 36.13(c) states that an "application must include an outline of the written operation and emergency procedures listed in § 36.53 that describes the radiation safety aspects of the procedures." Further guidance on the requirement is included in the Statement of Consideration for the regulation, in which the Commission specifically rejected the suggestion that applicants be required to submit full procedures. 58 Fed. Reg. 7715, 7717 (Feb. 9, 1993). Rather, the full procedures, developed at the operation stage, will be available for NRC inspection throughout the operation of the facility. *Id.* In addition, the Staff's review of procedural outlines included in applications associated with irradiators is guided by NUREG-1556, Volume 6, "Consolidated Guidance About Materials Licenses: Program-Specific Guidance About 10 CFR Part 36 Irradiator Licenses." While not binding on license applicants, NUREG-1556 also provides guidance to licensees in developing acceptable license applications. NUREG-1556 states that applications should include "an outline that specifically states the radiation safety aspects of the emergency procedures" required by 10 C.F.R. § 36.53(b). NUREG-1556 at 8-51.

Here, the Intervenor has not identified the absence of radiation safety provisions from the procedure outline. Rather, the Intervenor goes into great detail concerning alleged shortcomings of the function of the Area Radiation Monitor (ARM) and Water Radiation Monitor (WRM) in the event of a loss of electric power, but ignores the crucial radiation safety portion of the outline that specifically addresses the loss of power event of concern to the Intervenor. In fact, that portion of the outline indicates the response to a loss of power will not rely on the ARM or WRM, but instead will rely on the use of handheld survey monitors during the loss of power event. Issues concerning maintenance and repair, if necessary, of the ARM and WRM during

and immediately following a loss of electric power, or any other interruption in their function, will be addressed in the complete procedures which will be available for NRC inspection during operations. The procedural outlines, as required by the regulations, explain how the Applicant intends to fulfill the essential radiation safety function of monitoring radiation levels in the Restricted Area during a loss of power event, in this case, by use of handheld survey monitors while needed. The Intervenor offers no argument rebutting the use of handheld battery-powered survey monitors to monitor radiation levels if the ARM and WRM are off-line due to loss of power. Therefore, the Intervenor has not shown that a genuine dispute exists with the Applicant on a material issue of law or fact.

In addition, the Intervenor has not provided sufficient facts or expert opinion to support its amended contention regarding the sufficiency of the loss of electrical power procedure outline. The Intervenor relies entirely on the opinion of its expert, Dr. Marvin Resnikoff, to support the allegation that the procedure outline is inadequate. However, in neither the motion to amend the contentions nor in Dr. Resnikoff's supporting declaration does either the Intervenor or Dr. Resnikoff provide any factual or documentary support for the assertion that the emergency procedure outline for loss of electric power is insufficient. Both the motion and the declaration contain several unsupported conclusory statements regarding the necessity of backup power for the ARM and WRM, but neither addresses any factual support for an allegation that handheld, battery-powered survey monitors will be inadequate to satisfy requirements associated with the ARM and WRM in the event of a prolonged power loss. Therefore, the amendment to Safety Contention 4 does not satisfy 10 C.F.R. § 2.309(f) and should be denied admission into this proceeding.

III. Amended Safety Contention 6

In contrast to Amended Safety Contention 4, as discussed above, Amended Safety Contention 6 does not meet all the requirements of 10 C.F.R. § 2.309(f)(2). It seems clear that the information on which the amended contention is based, the Applicant's March 9, 2006 response to the Staff's deficiency letter, was not available prior to the time that the letter was submitted, as required by 10 C.F.R. § 2.309(f)(2)(i). Similarly, the information in the response, as related to the emergency procedure outline for emergencies resulting from natural disasters, is materially different from the material submitted on the same topic with the initial application, as required by 10 C.F.R. § 2.309(f)(2)(ii). However, the Intervenor has not complied with the requirement in 10 C.F.R. § 2.309(f)(2)(iii) that the amended contention be submitted in a timely fashion. The Applicant's response was submitted on March 9, 2006. The response was posted on the NRC's ADAMS system and indexed under the docket number for the instant proceeding on March 14, 2006, but the Intervenor did not file its amended contention until 48 days later, on May 1, 2006. Therefore, the proposed amendment to Safety Contention 6 is not presumptively timely under the Board's standard.

Because the amendment cannot be presumed timely, the Intervenor's request must be balanced under the applicable factors of 10 C.F.R. § 2.309(c). Here, because Concerned Citizens has already been made a party to the proceeding and will fully participate in the proceeding, the only applicable factor is § 2.309(c)(1)(i), whether Concerned Citizens has offered good cause for its failure to file on time. While the Intervenor has offered some details regarding its difficulty in obtaining Pa'ina's March 31, 2006 document, it has not offered explanation for its failure to obtain the March 9, 2006 document in a timely fashion following the posting of the document indexed under the docket number for the proceeding on

March 13, 2006.⁸ In the absence of a showing of good cause for the delay in filing, the balance of the factors under 10 C.F.R. § 2.309(c)(1) weighs against admitting the amendment to Safety Contention 6.

Even if Concerned Citizens had shown good cause for its delay in filing the proposed amendment to Safety Contention 6, the amendment does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1). As admitted, Safety Contention 6 is a contention of omission. It alleges that Pa'ina's original application did not include the outline of the abnormal event procedures for natural phenomena, as required by 10 C.F.R. § 36.13(c) and 36.53(b)(9). The Applicant submitted such outlines on March 9, 2006. The proposed amendment to Safety Contention 6 appears to argue that the outlines are insufficient to protect public health and safety. However, the proposed amendment does not provide sufficient information to show that a genuine dispute exists on a material issue of law or fact nor does it provide a sufficient statement of the alleged facts or expert opinion supporting the amended contention.

As discussed in connection with Safety Contention 4, above, at the application stage, only outlines of emergency procedures describing the radiation safety aspects of the procedures need to be provided, rather than the full procedures which must be in place during operation. Pa'ina's outline includes the following steps crucial to radiation safety: (1) shutting down and securing the irradiator; (2) protecting irradiator personnel; (3) post-event, inspecting the facility for damage and radiation leaks; and (4) based on those inspections, taking appropriate remedial actions, either based on existing procedures or based on the

⁸ According to Concerned Citizen's request to amend the contention, lead counsel for Concerned Citizens was on vacation at the time the March 9, 2006 filing was made publicly available on ADAMS, but the request does not offer an explanation as to why the filing was also overlooked by counsel for Concerned Citizen's colleagues covering the case in his absence. See Amended Contentions at 4. Concerned Citizens also "submits that flexibility in determining timeliness is appropriate here, since the Board provided its guidance [on late-filed contentions] three business days before Concerned Citizens filed the amended contentions." Concerned Citizens Response at 4. While this argument is more persuasive, it was not raised in the original request to amend the contentions.

recommendation of the radiation safety committee. Thus, the March 9, 2006 outlines include provisions for protecting both the public and workers from radiation. The amended contention goes beyond the requirement for procedure outlines, alleging that the Applicant must include post-event repair and maintenance procedures that “address situations that include, but are not limited to: cracking of the pool lining that allows shielding water to escape, loss of on-site radiation monitors and survey meters, and/or breaks in helium and compressed air lines.” Amended Contentions at 9. The requirement for procedural outlines does not include detailed repair and maintenance procedures for every potential type of damage that could result from natural phenomena. Rather, such situations, and all other potential damage will be dealt with after the evaluation of the radiation safety committee contemplated by the outline by utilizing either existing repair and maintenance procedures that will be developed prior to operation or by development, if necessary, of new or revised procedures specific to the situation at hand. The Intervenor has not identified a regulatory requirement⁹ for the detailed procedures contemplated by the amended Safety Contention 6, and, therefore, has not shown that a genuine dispute exists on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi).

In addition, as discussed in connection with amended Safety Contention 4 above, the Intervenor has not provided sufficient facts or expert opinion to support amended Safety Contention 6. The Intervenor relies on the opinion of Dr. Marvin Resnikoff. However, neither the amended contention nor Dr. Resnikoff’s supporting declaration includes any factual or documentary support for Dr. Resnikoff’s conclusory assertion that the current procedural outline is “wholly inadequate to protect public safety or the environment.” *Id.* at 9. Although Dr. Resnikoff also claims that several additional procedures are needed at the application stage,

⁹ The sole “requirement” identified by the Intervenor, that the Applicant “must address how outside emergency responders will be notified and/or trained ‘regarding the unique concerns and hazards associated with emergencies at the irradiator facility,’” cites to NUREG-1556, a Staff guidance document. As a guidance document, NUREG-1556 does not impose regulatory requirements on applicants or licensees.

there is no explanation of the basis underlying his opinion in either the amended contention or the declaration. Thus, the amended contention does not conform to 10 C.F.R. § 2.309(f)(1)(v).

CONCLUSION

As discussed above, neither amended Safety Contention 4 nor amended Safety Contention 6 complies with the requirements of 10 C.F.R. § 2.309(f)(1)(v-vi). In addition, amended Safety Contention 6 was not timely filed, and there has been no good cause shown for the late filing. Therefore, neither amended contention should be admitted.

Respectfully Submitted,

/RA/

Margaret J. Bupp
Counsel for NRC Staff

Dated at Rockville, Maryland
this 30th day of May, 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-ML
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(Honolulu, Hawaii Irradiator))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of "STAFF RESPONSE TO INTERVENOR CONCERNED CITIZENS OF HONOLULU'S MOTION FOR LEAVE TO AMEND SAFETY CONTENTIONS #4 AND #6" 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 30th day of May, 2006.

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