

June 6, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

June 7, 2006 (8:00am)

In the Matter of)
Pa'ina Hawaii, LLC)
Materials License Application)

Docket No. 30-36974-ML
ASLBP No. 06-843-01-ML

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

INTERVENOR CONCERNED CITIZENS OF HONOLULU'S
REPLY TO STAFF RESPONSE TO INTERVENOR'S MOTION
FOR LEAVE TO AMEND SAFETY CONTENTIONS #4 AND #6

Pursuant to 10 C.F.R. § 2.309(h)(2), intervenor Concerned Citizens of Honolulu replies to the NRC staff's May 30, 2006 response to Concerned Citizens' motion for leave to amend those portions of Safety Contentions #4 and #6 that challenge applicant Pa'ina Hawaii, LLC's failure to include in its application outlines of emergency procedures for situations involving loss of electricity and natural disasters.¹

I. CONCERNED CITIZENS' AMENDMENT TO SAFETY CONTENTION #4 PROPERLY CHALLENGES PA'INA'S FAILURE TO DESCRIBE IMPORTANT RADIATION SAFETY ASPECTS OF ITS PROPOSED EMERGENCY PROCEDURE

In its amendment to Safety Contention #4, Concerned Citizens challenges Pa'ina's failure to outline emergency procedures that would be adequate to address situations in which prolonged

¹ Concerned Citizens disagrees with the Staff's assessment that the Board admitted Safety Contentions #4 and #6 as only contentions of omission. Staff Response at 4 n.6. Since the Board did not expressly reject those portions of the contentions challenging Pa'ina's lack of analysis of threats from power loss and natural disasters and the deficiencies of Pa'ina's irradiator design, Concerned Citizens' understanding is that the Board admitted the contentions in their entirety. See 5/1/06 Concerned Citizens' Opposition to Applicant's Motion to Dismiss Safety Contentions #4 and #6 at 4-6.

power loss compromises the proper functioning of the Area Radiation Monitor (“ARM”) and/or Water Radiation Monitoring (“WRM”), leaving the public and environment vulnerable to radiation releases. See Concerned Citizens’ Motion at 6-7. Pa’ina’s procedures call for the Radiation Safety Officer or Irradiator Operator merely to note whether “the ARM and WRM are functioning properly;” there is no provision for situations where the inspection reveals a malfunction. Exh. 2: 3/31/06 Pa’ina Letter. Concerned Citizens contends that, in such situations, “Pa’ina’s emergency procedures must ensure that irradiator operations will immediately cease and that replacement monitors that function properly will be immediately installed.” Concerned Citizens’ Motion at 7.² There can be no serious dispute that the amended contention raises questions about Pa’ina’s failure to address “important radiation safety aspects of the procedures,” as the Commission’s regulations require. 58 Fed. Reg. 7,715, 7,717 (Feb. 9, 1993); see also 10 C.F.R. § 36.13(c).³

To make up for the deficiencies in Pa’ina’s outline, the Staff essentially re-writes it, asserting the use of handheld survey meters would substitute for a disabled ARM or WRM. Staff Response at 6. Nothing in the outline Pa’ina submitted even remotely suggests the applicant intended the survey meters would serve that function. Rather, the outline states that handheld survey meters would be used only when irradiator personnel are in the Restricted Area.

² In support of this contention, Concerned Citizens relies on the expert opinions of Dr. Marvin Resnikoff, whose declaration was attached to Concerned Citizens’ moving papers. In that declaration, Dr. Resnikoff explains how the lack of adequate procedures to address situations in which the ARM and/or WRM no longer function properly would result in violations of Commission regulations that were promulgated to protect the public and environment from radiation releases. See 3/28/06 Resnikoff Dec. at ¶¶ 4-8. Concerned Citizens’ statement of the alleged facts and expert opinions underlying its amended Safety Contention #4 fully satisfies 10 C.F.R. § 2.309(f)(1)(v).

³ This is not a dispute about whether Pa’ina has provided adequate detail in its emergency procedure outline, as the Staff alleges. See Staff Response at 6. Rather, Concerned Citizens challenges Pa’ina’s complete failure to address an important radiation safety issue related to power outages. See 5/17/06 Concerned Citizens’ Reply to Pa’ina’s Opposition at 5.

See 3/31/06 Pa'ina Letter. At all other times, in the absence of a functioning ARM and WRM, there would be no monitoring of potential radiation leaks, while irradiator operations would continue unabated. As discussed in Concerned Citizens' moving papers, Pa'ina's failure to require immediate cessation of irradiator operations violates a host of regulatory requirements, including the fundamental mandate "to protect health and minimize danger to life and property." 10 C.F.R. § 30.33(a)(2); see also Concerned Citizens' Motion at 6-8.

Even were it proper for the Board to re-write Pa'ina's emergency procedure outline to require Pa'ina personnel to stand by the irradiator pool, monitoring continuously with handheld meters in the event of a prolonged power outage that disabled the ARM or WRM, the Staff provides no explanation how such survey instruments could allay the safety concerns Concerned Citizens raises.⁴ Unlike the ARM and WRM, handheld survey meters would not trigger automatic shut-off of product conveyance, as required by 10 C.F.R. § 36.29(a). See Pa'ina's Application at 25; see also NUREG-1556, Vol. 6, at 8-35 (describing requirements for radiation monitors). Nor can handheld survey meters continuously monitor the pool circulating system, as 10 C.F.R. § 36.59(b) requires. See Exh. 1: 3/9/06 Pa'ina Letter at 7-8 (relying exclusively on continuous monitoring by the WRM for leak testing); see also NUREG-1556, Vol. 6, at 8-35.

While the Staff apparently disagrees with the merits of Concerned Citizens' claims regarding the inadequacy of Pa'ina's emergency procedure outline for prolonged power loss, resolving the parties' disputes "is not the appropriate subject of [the Board's] inquiry at the contention admission stage of the proceeding." Pa'ina Hawaii, LLC (Material License Application), LBP-06-04, 63 NRC 99, slip op. at 16 (2006) ("1/24/06 Order"). Since Concerned

⁴ Because Pa'ina's proposed procedures do not call for handheld survey meters to substitute for the ARM and WRM, Concerned Citizens did not previously address the inadequacy of survey meters to perform vital radiation safety tasks.

Citizens raises important questions about Pa'ina's compliance with mandatory safety requirements for irradiators, the Board should grant leave to amend Safety Contention #4.

II. THE BOARD SHOULD ADMIT CONCERNED CITIZENS' AMENDMENT TO SAFETY CONTENTION #6

A. The Amended Contention Is Timely.

The Staff acknowledges "[t]here is no standard for 'timeliness' set forth in [10 C.F.R.] § 2.309(f)(2)(iii)." Staff Response at 3. Despite this concession, the Staff still faults Concerned Citizens for filing its proposed amendment to Safety Contention #6 forty-eight days after the Staff first posted on ADAMS Pa'ina's outline of procedures for natural disasters. *Id.* at 8. The Staff's reliance on the Board's observations during the April 26, 2006 telephone conference is unreasonable, since the Board's statements were themselves made more than thirty days after the natural disaster procedure outline appeared on ADAMS. Even if, upon hearing the Board's views, Concerned Citizens had immediately filed its amended contention, the Staff apparently still would have this Board find it untimely. Such a result would be fundamentally unfair.

Assessing the facts of this case makes clear that Concerned Citizens filed its proposed amendment to Contention #6 in a timely fashion or, in the alternative, that it had good cause for failing to file on time. See 10 C.F.R. § 2.309(c)(1), (f)(2)(iii). It is undisputed that, when Pa'ina submitted its outline of procedures for natural disasters, it knew Concerned Citizens' only attorney of record was about to leave on travel, without internet access, for several weeks. See 3/8/06 Henkin Letter to the Secretary, available on ADAMS at ML061110444. Despite this, Pa'ina decided not to serve Concerned Citizens with a copy of its outline, leaving ADAMS,

which Pa'ina knew Concerned Citizens' counsel could not access, as the only means by which Concerned Citizens might "stumble across it." 4/26/06 Transcript at 47.⁵

Upon his return to the office, Concerned Citizens' counsel was greeted by Pa'ina's appeal from LBP-06-4 and LBP-06-12, which required an immediate response. Shortly thereafter, this Board ordered Concerned Citizens to file a written response to Pa'ina's objection to the joint motion to dismiss Concerned Citizens' two environmental contentions and also to negotiate proposed schedules for the remainder of this proceeding. Despite the press of this, and other, business, Concerned Citizens diligently worked with Dr. Resnikoff to review and critique Pa'ina's emergency procedure outline for natural disasters, filing its amendment to Safety Contention #6 less than a month after first learning of this submittal and only three business days after the Board first made known its views on timeliness.

Admitting the amendment to Safety Contention #6 is particularly appropriate here, where no party has claimed there would be any delay or other prejudice. The Staff's safety review is ongoing, and the hearing on Pa'ina's application is more than a year away. See 4/20/06 Staff and Concerned Citizens' Proposed Hearing Schedules at 2 (SER projected to be completed in March 2007, with hearing likely to begin in late August 2007), available on ADAMS at ML061320091. Admitting the amended contention would not affect this proceedings' schedule in any way.

⁵ While Concerned Citizens' lawyer's support staff monitored incoming pleadings and correspondence during his absence, it would be unreasonable to require, as the Staff implicitly urges, that they be well-versed enough in all aspects of the case to recognize the significance of Pa'ina's March 9, 2006 submittal, had they checked ADAMS. See Staff Response at 9 n.8. Concerned Citizens should not be punished because Pa'ina – knowing that the lack of emergency procedure outlines for natural disasters was in dispute and that Concerned Citizens' counsel could not access ADAMS – did not serve Concerned Citizens with its late-submitted outlines.

B. The Amended Contention Properly Challenges The Adequacy Of Pa'ina's Proposed Emergency Procedures For Natural Disasters.

The Board should reject the Staff's suggestion that, as long as Pa'ina has submitted something related to natural disasters, no matter how inadequate, it has satisfied 10 C.F.R. § 36.53(b)(9). While Pa'ina need not provide complete emergency procedures at the application stage, it is obliged to "include specific radiation safety aspects." Pa'ina Hawaii, LLC (Material License Application), LBP-06-12, 63 NRC ___, slip op. at 17 n.54 (2006). Here, Pa'ina has failed to provide any hint as to how it would prevent harm to the public or environment if, due to natural disaster, the facility were destroyed, the pool's lining cracked, and/or the radiation monitors, handheld survey meters, heat exchangers, and tanks washed away. See Concerned Citizens' Motion at 8-9.⁶ Pa'ina's outline also omits information for which the Commission's guidance expressly calls, failing to address how emergency responders would be notified and/or trained "regarding the unique concerns and hazards associated with emergencies at the irradiator facility." NUREG-1556, Vol. 6, at 8-50.⁷ Concerned Citizens' amendment to Safety Contention #6 properly challenges Pa'ina's complete failure to address in its outline these important "radiation safety aspects of the [natural disaster] procedures." 58 Fed. Reg. at 7,717; see also 10 C.F.R. § 2.309(f)(1)(vi).

⁶ Concerned Citizens is not, as the Staff claims, seeking "detailed repair and maintenance procedures for every potential type of damage that could result from natural phenomena." Staff Response at 10. Rather, it challenges Pa'ina's failure to outline the steps it would take immediately to protect the public and environment in the event that foreseeable emergencies arise. Pa'ina's failure to outline such responses is directly relevant to the Board's evaluation whether Pa'ina's application – which, by regulation, must contain descriptions of such measures – is deficient. See 10 C.F.R. § 36.53(b)(9).

⁷ While the Staff dismissively notes NUREG-1556 does not impose regulatory requirements, the Commission has instructed it "should be used in preparing Part 36 Irradiator License Applications," and the Staff "will use [it] in reviewing these applications." Id. at iii; see also Staff Response at 10 n.9.

C. The Amended Contention Satisfies 10 C.F.R. § 2.309(f)(1)(v).

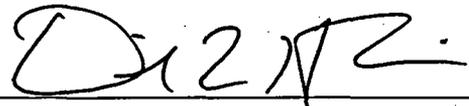
Concerned Citizens' amended contention fully satisfies 10 C.F.R. § 2.309(f)(1)(v) since it provides the requisite "concise statement of the ... expert opinions which support [its] position on the issue and on which [it] intends to rely at hearing." Those opinions are set forth in Dr. Resnikoff's declaration, which details the potentially harmful scenarios associated with natural disasters that Pa'ina's outline improperly fails to address. 3/28/06 Resnikoff Dec. at ¶¶ 9-13; cf. 1/24/06 Order at 14 (finding Resnikoff affidavit provides required factual support for environmental contentions regarding natural disasters). In support of its claim that the lack of provisions for training and notification of outside emergency responders renders Pa'ina's outline deficient, Concerned Citizens relies on both Dr. Resnikoff's testimony and NUREG-1556. See 3/28/06 Resnikoff Dec. at ¶ 14.

III. CONCLUSION

For the reasons set forth in its moving papers and herein, Concerned Citizens respectfully asks the Board to grant leave to file the amendments to Safety Contentions #4 and #6.

Dated at Honolulu, Hawai'i, June 6, 2006.

Respectfully submitted,



DAVID L. HENKIN
Earthjustice
223 South King Street, Suite 400
Honolulu, Hawai'i 96813
Tel. No.: (808) 599-2436
Fax No. (808) 521-6841
Email: dhenkin@earthjustice.org
Attorney for Intervenor
Concerned Citizens of Honolulu

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on June 6, 2006, a true and correct copy of the foregoing document was duly served on the following via e-mail and first-class United States mail, postage prepaid:

Fred Paul Benco
Suite 3409, Century Square
1188 Bishop Street
Honolulu, Hawai'i 96813
E-Mail: fpbenco@yahoo.com
Attorney for Pa'ina Hawaii, LLC

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attn: Rulemakings & Adjudications Staff
E-Mail: HEARINGDOCKET@nrc.gov

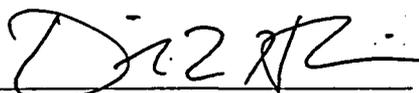
Margaret J. Bupp
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop - O-15 D21
Washington, DC 20555-0001
E-mail: mjb5@nrc.gov

Administrative Judge
Paul B. Abramson
Atomic Safety & Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: pba@nrc.gov

Administrative Judge
Thomas S. Moore, Chair
Atomic Safety & Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-Mail: tsm2@nrc.gov

Administrative Judge
Anthony J. Baratta
Atomic Safety & Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-Mail: ajb5@nrc.gov

Dated at Honolulu, Hawai'i, June 6, 2006.



DAVID L. HENKIN
Attorney for Intervenor
Concerned Citizens of Honolulu



EARTHJUSTICE

Because the earth needs a good lawyer

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
INTERNATIONAL JUNEAU, ALASKA OAKLAND, CALIFORNIA
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.

TRANSMITTAL LETTER

TO: Office of the Secretary VIA FIRST CLASS MAIL
 U.S. Nuclear Regulatory Commission
 Washington, DC 20555-0001
 Attention: Rulemakings and Adjudications Staff

FROM: David L. Henkin *DH/EL*

DATE: June 6, 2006

RE: Pa'ina Hawaii, LLC (Materials License Application), Docket No. 030-36974-ML,
 ASLBP No. 06-843-01-ML

ENCLOSURES	DATE	DESCRIPTION
Original and two copies:	6/6/06	INTERVENOR CONCERNED CITIZENS OF HONOLULU'S REPLY TO STAFF RESPONSE TO INTERVENOR'S MOTION FOR LEAVE TO AMEND SAFETY CONTENTIONS #4 AND #6; CERTIFICATE OF SERVICE

- | | |
|---|--|
| <input type="checkbox"/> For Your Information. | <input checked="" type="checkbox"/> For Filing. |
| <input checked="" type="checkbox"/> For Your Files. | <input type="checkbox"/> For Recordation. |
| <input type="checkbox"/> Per Our Conversation. | <input type="checkbox"/> For Signature & Return. |
| <input type="checkbox"/> Per Your Request. | <input type="checkbox"/> For Necessary Action. |
| <input type="checkbox"/> For Review and Comments. | <input type="checkbox"/> For Signature & Forwarding. |
| <input type="checkbox"/> See Remarks Below. | |

REMARKS: