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UNITED STATES OF AMERICA

July 5, 2006 (8:47am)

NUCLEAR REGULATORY COMMISSION

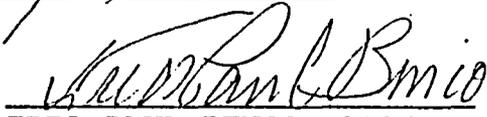
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RULEMAKINGS AND
ADJUDICATIONS STAFF

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 NOTICE OF APPEAL OF
LBP-06-04 AND LBP-06-12

Pursuant to 10 C.F.R. §2.311(a) and (c), Applicant Pa'ina Hawaii, LLC files this Notice of Appeal of the Atomic Safety and Licensing Board's January 24, 2006 Memorandum and Order and its March 24, 2006 Memorandum and Order which, among other things, admitted for litigation two (2) environmental contentions in the above-captioned proceeding, and also admitted a related safety contention. Attached with this Notice of Appeal is Applicant Pa'ina Hawaii, LLC's Brief.

DATED: Honolulu, Hawaii July 3, 2006



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TEMPLATE = SECY-021

SECY-02

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APPLICANT PA'INA HAWAII, LLC'S NOTICE OF APPEAL OF
LBP-06-04 AND LBP-06-12 AND ACCOMPANYING BRIEF

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NUCLEAR REGULATORY COMMISSION

In the Matter of)
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Pa'ina Hawaii, LLC) Docket No. 030-36974
) ASLBP No. 06-843-01-ML
Materials License Application)

APPLICANT PA'INA HAWAII, LLC'S BRIEF IN SUPPORT OF APPEAL FROM
LBP-06-04 AND LBP-06-12

INTRODUCTION

Pursuant to 10 C.F.R. §2.311(a) and (c), Applicant Pa'ina Hawaii, LLC ("Pa'ina") hereby appeals from two related decision(s) of the Atomic Safety and Licensing Board ("Board").¹ Pa'ina is seeking a Materials License in order to operate a Category III, pool-type irradiator pursuant to applicable NRC regulations.

First, Pa'ina appeals from the Board's Memorandum and Order issued January 24, 2006, and denominated as LBP 06-04, 63 NRC 99 (2006). There, the Board concluded that Petitioner Concerned Citizens of Honolulu (hereinafter "Concerned Citizens") had proffered two (2) admissible Environmental Contentions. Those

¹ This is actually the second appeal by Pa'ina from the two cited Board decisions. Pa'ina's first appeal was filed April 3, 2006, and was dismissed without prejudice on May 15, 2006 for the technical/jurisdictional reason that two (2) of Petitioner's contentions were still pending before the Board. (See Pa'ina Hawaii, LLC, CLI-06-13 (May 15, 2006)) Recently, on June 22, 2006 the Board dismissed Petitioner's those two pending contentions (Safety Contentions #4 and #6), thereby triggering this appeal.

two, closely-related contentions alleged (1) that the Staff had failed to explain "why a categorical exclusion is appropriate here and perforce why special circumstances [possible hurricanes, tsunamis, and airplane crashes] are not present", and (2) that "special circumstances are present that preclude the application of the categorical exclusion and require an 'environmental impact statement or, at minimum, an environmental assessment.'" (LBP 06-04, 63 NRC 99 (2006), slip op. at p. 16) (emphasis added)

Second, Pa'ina also appeals herein from the Board's Memorandum and Order issued on March 24, 2006, and denominated as LBP-06-12, 63 NRC ____ (2006). There, the Board concluded that Concerned Citizens had stated three admissible Safety Contentions (designated as Safety Contentions #4, #6 and #7). It should be noted that, subsequently, the Board on June 22, 2006 dismissed Safety Contentions #4 and #6 as moot, leaving only Safety Contention #7 as admissible.²

The remaining Safety Contention #7 was impermissibly vague, but the Board characterized it as contending that Pa'ina's Application for its Materials License failed "completely to

² Safety Contention #4 alleged that Pa'ina's Application omitted an outline of safety procedures should there be a prolonged power outage. Safety Contention #6 alleged that Pa'ina's Application omitted an outline of safety procedures should natural phenomena (flooding, hurricanes, or tidal waves) strike Pa'ina's facility. Both safety outlines have since been submitted to the NRC, which is why the Board ruled those two contentions "moot."

address the likelihood and consequences of an air crash involving the facility." (Mar. 24, 2006 Order, slip op. at p. 6)

The two Environmental Contentions and Safety Contention #7 are very closely related and intertwined. In essence, all three remaining contentions challenge the proposed siting of Pa'ina's irradiator on state-owned land next to Honolulu International Airport, immediately adjacent to and among other occupied commercial and industrial buildings.

The Record of this case, the historical development of NRC regulations for irradiators and the National Environmental Policy Act of 1969 ("NEPA") process suggest that licensed facilities very rarely, if ever, warrant the preparation of environmental assessments ("EAs") or environmental impact statements ("EISs"), much less a Subpart L administrative hearing. Based on this, Staff Counsel on April 26, 2006, admitted: "Because we [NRC] don't normally do EAs for irradiator licenses, we have used the generic schedule." (See Exhibit A attached hereto)

Pa'ina submits that the Board erred in admitting the two Environmental Contentions and the closely-related Safety Contention #7. Consequently, the Board's Orders admitting the two Environmental Contentions and Safety Contention #7 should be

reversed, and Concerned Citizens' requests for hearing should be denied in toto.

STATEMENT OF THE CASE

This case arose from Pa'ina's license application for an NRC Materials License for installation of radioactive materials into a Category III, pool-type industrial irradiator. Pa'ina's Application was filed on June 23, 2005. (See ML052060372)

On August 2, 2005, the NRC published a "Notice Of Opportunity For Hearing" 70 Fed. Reg. at 44,396. The Notice stated that Pa'ina's irradiator qualified for "categorical exclusion" from preparation of an EA or EIS (Id.)³ On October 3, 2005, Concerned Citizens filed its "Request For Hearing By Concerned Citizens of Honolulu ("Request for Hearing")."

On October 13, 2005 an Order was issued establishing this Board to hear this case. See "Establishment of Atomic Safety and Licensing Board" filed October 13, 2005.

On October 26, 2005 Pa'ina filed its "Answer To Request for Hearing By Concerned Citizens Of Honolulu."

³ Under the NRC's comprehensive regulations (10 C.F.R. Sec. 51.22), "categorical exclusions" have been deemed environmentally appropriate for relatively benign, or purely paper, activities including recordkeeping requirements (Subsection 51.22(c)(3)(ii)), the procurement of general equipment and supplies (Subsection 51.22(c)(4)), issuance of materials licenses for medical and veterinary purposes (Subsection 51.22(c)(14)(iv)), and issuance of materials licenses for irradiators. (Subsection 51.22(c)(14)(vii))

On October 28, 2005 the NRC Staff ("Staff") likewise filed its "Staff Response To Request For Hearing By Concerned Citizens Of Honolulu" which concluded that ALL of Petitioner's contentions should be dismissed.

After several procedural matters, Concerned Citizens on December 1, 2005 filed its "Petitioner's Reply In Support Of Its Request For Hearing."

By Order dated December 8, 2005, the Board in effect bifurcated this proceeding into two parts: (1) Concerned Citizens' standing and environmental contentions; and (2) Concerned Citizens' safety contentions.

By Memorandum and Order dated January 24, 2006, the Board found that Concerned Citizens had standing herein, and further found that Concerned Citizens had alleged two (2) admissible Environmental Contentions.⁴ See Memorandum and Order (Ruling On Petitioner's Standing And Environmental Contentions), LBP-06-04, 63 NRC 99 (January 24, 2006)

Two months later, after additional briefing, the Board issued its second Memorandum and Order dated March 24, 2006

⁴ As noted on Pages 1-2 supra, the Board 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 was allegedly subject to tsunamis, hurricanes, flooding and airplane crashes; and (2) "special circumstances" were present which require an environmental assessment or an environmental impact statement. (January 24, 2006 Memorandum and Order, at Page 5.) The Board acknowledged that the two NEPA contentions were intertwined, raised "substantially similar" issues, and might be consolidated into one. Id., at 6.

(LBP-06-12, 63 NRC ____); which addressed ten Safety Contentions of Concerned Citizens. In that Order, the Board 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 __ (Mar. 24, 2006)⁵

Pa'ina appeals from the January 24th Order which granted admissibility of the two environmental contentions raised by Concerned Citizens, and also from the March 24th Order which granted the closely-related Safety Contention #7.

STATEMENT OF THE ISSUES

The Board committed several errors in reaching its conclusion that Concerned Citizens had alleged two admissible Environmental Contentions as well as Safety Contention #7.

First, the Board erred in granting admissibility because all three remaining contentions are actually direct challenges to the NRC's regulations, and direct challenges to the regulations are not allowed in Subpart L hearings. This error was applicable to all of Petitioner's three remaining contentions.

⁵ As noted in Footnote #1 above, the Board dismissed Safety Contentions #4 and #6 as being "moot" by Order dated June 22, 2006, thus completing all issues before the Board and making this appeal "ripe."

Second, the Board further erred in admitting Petitioner's two environmental contentions which claimed that there existed "special circumstances" which disqualified Pa'ina's irradiator from "categorical exclusion," with the result that evidentiary hearings and preparation of environmental documents could be subsequently ordered.

Third, the Board erred in ruling that the Staff had failed to "explain" its decision to categorically exclude Pa'ina's irradiator, particularly because Pa'ina's irradiator met all of the provisions of 10 C.F.R. Part 36.

Fourth, the Board erred in admitting Concerned Citizens' three contentions because those contentions were not admissible under any of the six criteria contained in 10 C.F.R. Section 2.309(f).

Based upon these errors, the Board necessarily erred and abused its discretion in admitting Concerned Citizens' two Environmental Contentions and Safety Contention #7.

LEGAL STANDARDS

A. The Legal Standard For Granting A Request For A Hearing

10 C.F.R. §2.311(c) provides that an Order granting a request for hearing may be appealed by a party other than the requestor/petitioner on the question as to whether the

requestor/petitioner should have been wholly denied. Furthermore, on an appeal, the Commission may consider all of the points of error raised on appeal, rather than simply whether the request/petition should have been denied in toto. See, e.g., Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-869, 26 N.R.C. 13, 25-27 (1987); Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 N.R.C. 9, 19 (2001)

B. Legal Standards For Admission Of Contentions

For a requestor/petitioner to gain admission as a party, the requestor/petitioner must (after establishing standing) proffer at least one contention that satisfies the admissibility requirements of 10 C.F.R. §2.309(f). See 10 C.F.R. §2.309(a); see also Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 N.R.C. 328, 333 (1999). Thus, for a contention to be admissible, the requestor/petitioner must satisfy the following six requirements set forth in 10 C.F.R. §2.309(f) (1) (i) - (vi):

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate 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;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the . . . petitioner's position on the issue and on which the petitioner intends to rely at the hearing, together with references to the specific sources and documents on which the . . . petitioner intends to rely to support its position on the issue; and
 - (vi) Provide sufficient information to show that a genuine dispute exists with the . . . licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

The above six contention requirements are "strict by design." Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001). A contention that fails to comply with any of these requirements will not be admitted for litigation. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999)

The petitioner must do more than submit bald or conclusory allegations of a dispute with the applicant. Millstone, CLI-01-24, 54 NRC at 358. Furthermore, there must a specific factual and legal basis supporting the contention. Id. at 359. A contention will not be admitted if it is based only on

unsupported assertions and speculation. See Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003)

If a petitioner fails to provide the requisite support for its contentions, then a Licensing Board may neither make factual assumptions that favor the petitioner, nor supply information that is lacking. Louisiana Energy Services L.P. (National Enrichment Facility), LBP-04-14, 60 NRC 40, 56 (2004) (citing Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001))

DISCUSSION

- I. THE BOARD ERRED IN GRANTING ADMISSIBILITY TO PETITIONER'S THREE RELATED CONTENTIONS BECAUSE THOSE CONTENTIONS TOGETHER CONSTITUTED IMPERMISSIBLE, DIRECT LEGAL CHALLENGES TO THE NRC'S REGULATIONS.

Petitioner's two environmental contentions and its Safety Contention #7 are very closely related and intertwined. In essence, all three contentions directly focus upon and challenge the siting of Pa'ina's irradiator. This Section, therefore, will therefore address all three contentions as if they were identical, and this Argument I will show why the Board erred in admitting the three contentions which challenged the siting of Pai'na's irradiator.

A. The NRC Fully Evaluated The Risks Of Radiation Exposure To The Public From Tidal Waves, Flooding And Airplane Crashes, And Concluded That Its Part 36 Regulations Properly Protected The Public And The Environment Should Irradiators Be Constructed Where Other Occupied Buildings Existed Or Were Permitted.

Between 1990 and 1993, the NRC conducted a sweeping and comprehensive evaluation of irradiators and safety issues. The top-to-bottom evaluation led to the adoption of 10 C.F.R. Part 36 ("Licenses And Radiation Safety Requirements For Irradiators"). The NRC intended Part 36 to "consolidate, clarify and standardize" licensing requirements. See 58 Federal Register 7715-7716 (Feb. 9, 1993) "Category III-Underwater Irradiators" were expressly to be "covered by the rule." (Id.)

For purposes of this case, it is noteworthy that the NRC's evaluation investigated the "siting," or geographical location, of proposed irradiators. After due consideration, the NRC concluded that flooding, tidal waves,⁶ and possible airplane crashes did not affect siting an irradiator if local governments permitted other industrial or occupied buildings to be located in the same locations. The NRC concluded as follows:

"[T]he NRC believes that, in general, irradiators can be located anywhere that local governments would permit an industrial facility to be built."

"The NRC considered whether there should be siting requirements dealing with possible flooding of the irradiator or tidal waves. . . Thus, while it may be in the licensee's own

⁶ Tidal waves are called "tsunamis" in the Pacific Ocean Basin.

economic interest to avoid siting an irradiator at a location subject to flooding, flooding would not create a health and safety hazard."

"The NRC considered whether there should be a prohibition against locating irradiators near airports because of risk of radiation overexposures caused by an airplane crash. The NRC has concluded that a prohibition against placing an irradiator where other types of occupied buildings could be placed is not justified on safety grounds. The radioactive sources in an irradiator would be relatively protected by damage because they are generally contained within 6-foot thick reinforced-concrete walls and are encapsulated in steel. Even if a source were damaged as a result of an airplane crash, large quantities of radioactivity are unlikely to be spread from the immediate vicinity of the source rack because the sources are not volatile. With this protection, the radiological consequences of an airplane crash at an irradiator would not substantially increase the seriousness of the accident. Therefore, NRC will allow construction of an irradiator at any location at which local authorities would allow other occupied buildings to be built." See 58 Fed. Reg. 7725-7726 (February 9, 1993) (emphasis added)

Thus, 10 C.F.R. Part 36's regulations are designed to account for, withstand, and absolutely minimize radiation dangers to the public and the environment.

B. Petitioner's Three Remaining Contentions Challenge The Siting Of Pa'ina's Irradiator, And In So Doing Actually Constitute An Impermissible Challenge To The NRC's Part 36 Regulations.

Beginning in 1990 and for three years thereafter, the NRC published proposed rules, received public input, held public hearings, and applied its decades-old expertise in promulgating Part 36, specifically applicable to irradiators. Part 36 was a further clarification of Part 51. The NRC intentionally made

Part 36 comprehensive, detailed and rigorous as to design, operation and maintenance of irradiators.

Pursuant to its development of Part 36 in conjunction with its evaluation of sealed, non-dispersible sources, the NRC determined that irradiators were so safe that they could be sited (or located) where other occupied or industrial buildings were located, because there was no significant potential radiation exposure to the public or to the environment.⁷

Thus, Petitioner's contentions, taken together as well as taken individually, constitute direct attacks upon the comprehensive, interconnected and rigorous provisions of Part 36. Consequently, all three contentions ought to be dismissed. 10 C.F.R. Sec. 2.335(a) prohibits attacks on the NRC's regulations:

"Except as provided in paragraphs (b), (c), and (d) of this section, no rule or regulation of the Commission or any provision thereof, concerning the licensing of . . . utilization facilities . . . is subject to attack by way of discovery, proof, argument or other means in any adjudicatory proceeding subject to this part." See also Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207 218 (2003) (contentions cannot challenge NRC regulations)

Since Petitioner's three contentions challenge the siting of Pa'ina's irradiator (which is to be built next to, and among,

⁷ There is no evidence in the Record showing that Petitioner or any of its members, or anybody on their behalf, submitted comments to the NRC prior to adoption of Part 36.

other occupied buildings), then those three contentions directly attack 10 C.F.R. Part 36.

Consequently, Petitioner's three contentions should not have been admitted. 10 C.F.R. Sec. 2.335(a). The Board's January 24, 2006 and March 24, 2006 Orders should be reversed, and all three contentions ought to be dismissed.

II. THE BOARD ERRED WHEN IT ADMITTED PETITIONER'S TWO ENVIRONMENTAL CONTENTIONS WHICH ALLEGED THAT (1) THERE EXISTED "SPECIAL CIRCUMSTANCES" WHICH OVERRODE THE "CATEGORICAL EXCLUSION" DESIGNATION AFFORDED TO PA'INA'S IRRADIATOR, AND ALSO THAT (2) THE STAFF FAILED TO "EXPLAIN" ITS DESIGNATION OF "CATEGORICAL EXCLUSION."

This Argument II is more narrowly drawn to address just Petitioner's two closely-related environmental contentions, and to demonstrate further why the Board erred in admitting those two contentions.

Petitioner's two environmental contentions alleged that (1) the possibility of flooding, hurricanes, tidal waves and plane crashes overrode the Staff's designation of Pa'ina's irradiator's as being categorically excluded, and created the possibility that NEPA documents might have to be prepared; and that (2), the Staff in 2005 had failed to "explain" why it had designated Pa'ina's irradiator as being categorically excluded.

The Board set forth the two related issues as follows:

"The Petitioner has proffered two separate contentions challenging the Staff's satisfaction of the requirements of NEPA. Both NEPA contentions relate to the Staff's application of the categorical exclusion of irradiators in 10 C.F.R. Sec. 51.22(c)(14)(vii) that excuses the Staff from performing an environment [sic] impact analysis of a proposed irradiator. Specifically, the contentions challenge the procedure by which the categorical exclusion was invoked in this instance, as well as the applicability of 10 C.F.R. Sec. 51.22(b), which provides a special circumstance exception for actions in which a blanket finding is made by rule that the licensing action does not have a significant effect on the human environment." (Slip op., January 24, 2006 at 10)

However, the Board erred in granting admission to both of Petitioner's environmental contentions.

Prior to offering specific arguments regarding this issue, it is important to note NRC's purpose in conducting its assessment of industrial irradiators when evaluating whether the proposed Pa'ina irradiator was contemplated. As stated by the NRC in the Preamble to the Part 36 rulemaking:

"[T]he issue is whether to license them [irradiators] under a formal, detailed, comprehensive set of regulations as was proposed or whether to continue licensing on a case-by-case basis with relatively few specific requirements contained in formal regulations. The NRC's decision is to adopt a comprehensive, formal set of regulations." 58 Fed. Reg. at 7716 (Feb. 9, 1993) (emphasis in original)

Thus, as stated by the NRC, "[t]his rule consolidates, clarifies, and standardizes the requirements for the licensing and operation of current and future irradiators." Id. Therefore, NRC intended Part 36 to serve as a comprehensive,

all-inclusive set of regulations with supporting assessments for industrial irradiators such as the proposed Pa'ina irradiator.

- A. Since 1993, The NRC Has Deemed That Possible Floods, Tidal Waves, And Plane Crashes Are Not "Special Circumstances"; The Board's Contrary Conclusion Was Based Upon Faulty Assumptions And Erroneous Reasoning.

As noted on Pages 10-12, supra, the NRC evaluated all types of locations for siting irradiators, and the Board evaluated all manner of possible natural and man-made dangers which might expose the public to radiation exposure from sealed, non-dispersible sources. Based upon these extensive studies, the NRC determined that floods, tidal waves, and possible plane crashes were not unique or special circumstances warranting preparation of an EA or EIS.⁸

⁸ Although the Board suggested that "hurricanes" are "not specifically" disputed by Applicant Pa'ina (January 24, 2006 slip opinion at Page 15, fnt. 48) there was really nothing for Pa'ina to "dispute" because (1) the NRC determined in 1993 that irradiators would be permitted near to, and among, other industrial or occupied buildings, (2) extremely strong winds commonly accompany tidal waves and airplanes/jets passing in close proximity (called vortexes), and (3), in any event, the original Petition failed to articulate just how "hurricane velocity winds" could cause Pa'ina's sealed, non-dispersible sources locked 20' underground in a pool to impact the public and environment. (See Request for Hearing, October 3, 2005, Declaration of Marvin Resnikoff, Ph.D., para. 23) The Board obviously "assumed" that hurricane winds were more damaging than tsunami-accompanied or plane-caused vortexes, and the Board must have improperly "assumed" that, somehow, in a manner unstated, hurricane winds would cause the sealed sources to be dispersed. See Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195 (2003) (Board cannot make assumptions which fill in factual omissions of petitioner)

How did the Board unilaterally decide that possible flooding, tidal waves, hurricanes and airplane crashes do constitute "special circumstances?" In at least three ways:

1. The Board simply glossed over the NRC's extensive 1990-1993 evaluation of irradiator engineering, design, operation and maintenance which culminated in Part 36. The Board also glossed over the siting parameters reflected in 58 Reg. Reg. 7725-7726. (The Board merely mentioned, in passing, 58 Fed. Reg. 7725-7726, in its January 24, 2006 Order, in footnote 48)

2. The Board made improper legal assumptions.

The Board assumed as a matter of law that the more general NRC regulations set forth in 10 C.F.R. Sec. 51 ("Environmental Protection Regulations For Domestic Licensing And Related Regulatory Functions"), took precedence over the NRC's more specific provisions and rationale of 10 C.F.R. Part 36 ("Licenses And Radiation Safety Requirements For Irradiators"). The Board made this erroneous assumption of law in order to admit Petitioner's two environmental contentions on the basis of Part 51.

However, the Board wrongly assumed the legal relationship between Part 36 and Part 51. By law, the general provisions of Part 51 are subservient to, and are supposed to defer to the more specific provisions of Part 36. The NRC specifically

directed that Part 51's general rules were to be subservient to more special or specific rules, such as those more specific rules governing irradiators contained in Part 36:

Section 51.3 (Resolution of Conflict). In any conflict between a general rule in subpart A of this part and a special rule in another subpart of this chapter [10 C.F.R.] applicable to a particular type of proceeding, the special rule governs. (Emphasis added)

Pursuant to 10 C.F.R. Sec. 51.3, the Board should have acknowledges that the NRC's Part 36 regulations (which allowed irradiators to be placed among other occupied buildings) took precedence over the more general Part 51 NEPA provisions.

3. The Board also made several improper legal and factual assumptions which favored the Petitioner's two environmental contentions.⁹

As noted above, the Board all but ignored the 1990-1993 studies leading to the adoption of Part 36, and the Board all but ignored the NRC's stated parameters for the siting of irradiators.

Rather, the Board assumed that no siting studies had been accomplished under the auspices of Part 51. The Board further assumed as a matter of law that the NRC's studies under Part 36

⁹ The NRC's applicable rule has been stated as follows: If a petitioner fails to provide the requisite support for its contentions, then a Licensing Board may neither make factual assumptions that favor the petitioner, nor supply information that is lacking. Louisiana Energy Services L.P. (National Enrichment Facility), LBP-04-14, 60 NRC 40, 56 (2004) (citing Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001)

were mutually exclusive from any studies conducted pursuant to Part 51. Those two assumptions led the Board to admit Petitioner's two related environmental contentions, as shown by the following analysis of the Board:

"[The] history [of 10 C.F.R. Sec. 51.22, which defines "categorical exclusions"] does not support the view that the risks associated with the myriad possible locations for siting an irradiator were considered by the Commission in adopting the categorical exclusion . . . In addition, it is impossible to identify in advance the precise situations which might move the Commission in the future to determine special circumstances exist . . . Thus, the regulatory history does not even hint that the Commission considered the possible locations for proposed facilities in adopting the categorical exclusion for irradiators [contained in Part 51], while the history of the special circumstances exception indicates that the consequences of siting an irradiator on the ocean's edge at the Honolulu Airport, subject to the risks of aircraft crashes, tsunamis, and hurricanes, are precisely the kind of circumstances for which categorical exclusion might not be appropriate. . . The Staff has failed to provide any reason to conclude that the threats endemic to this proposed site have ever been considered." (LBP -06-04 at 13-14)

After assuming that the NRC never studied siting issues which had any relevance to Part 51, and after assuming that the extensive studies pursuant to Part 36 were irrelevant, the Board made yet another, rather startling assumption involving Hawaii's very-active Kilauea Volcano.¹⁰ The Board used this next (albeit startling) legal assumption to justify its admission of Petitioner's two environmental contentions:

¹⁰ Kilauea Crater is located within Volcano National Park on the Island of Hawaii. The Big Island of Hawaii is approximately two hundred miles from the Island Of Oahu where Applicant's irradiator is proposed to be installed.

"Indeed, the Staff's approach [in granting "categorical exclusion" to Pa'ina's irradiator] only begs the question whether any location would prompt the Staff to consider special circumstances associated with a proposed siting. For example, it is virtually certain that the Commission did not specifically consider the risks associated with placing an irradiator in the caldera of Kilauea" (LBP-06-04 at 14)

Thus, based upon its erroneous legal and factual assumptions, the Board reached the untenable conclusion that the Staff would allow an irradiator to be located in the live volcano, Kilauea, without triggering any "special circumstances" and NEPA review.¹¹

The Board's improper and very erroneous legal and factual assumptions led the Board to reach untenable (and even startling) conclusions. The Board admitted Petitioner's two environmental contentions based upon its erroneous legal and factual assumptions. Consequently, the Board's rulings admitting the two environmental contentions ought to be reversed, and those two environmental contentions ought to be dismissed.¹²

¹¹ Pa'ina would stipulate that if a Category III irradiator were to be proposed for Kilauea Volcano, then "special circumstances" would exist because no "occupied buildings" are allowed inside the Volcano. Further NEPA study and documents would be called for.

¹² The Board apparently granted Petitioner's environmental contentions based upon the following syllogism:

Major premise: "Special circumstances" exist where a nuclear source is proposed to be sited in violation of NRC siting standards (requiring the preparation of an EA or EIS).

Minor premise: The NRC has never established any siting standards for irradiators.

Conclusion: Pa'ina's irradiator may therefore be located in Kilauea Volcano (Caldera), and no EA or EIS need be prepared.

Unfortunately, from Pa'ina's viewpoint, the Board assumed without any factual or legal basis whatsoever that the County of Hawaii (where Kilauea is

B. The Board Also Erred In Admitting Petitioner's Legal Contention That The NRC Staff Violated The Law When It Failed To "Explain" Why Categorical Exclusion Was Granted To Pa'ina's Irradiator; There Are No "Special Circumstances" In This Case, And There Is No Legal Requirement For A Case-By-Case Explanation.

The Board admitted Petitioner's second environmental contention which alleged that as a matter of law, the NRC Staff failed to "explain" why it had granted "categorical exclusion" to Pa'ina's proposed irradiator, and this "failure to explain" resulted in an admissible legal contention by Petitioner.

The Board characterized Petitioner's legal contention as follows:

"Relying upon a series of precedents in the United States Court of Appeals for the Ninth Circuit, the federal circuit court encompassing Hawaii, the Petitioner asserts that the Staff has omitted a necessary step in its NEPA analysis, which in essence requires an explanation of the applicability of a categorical exclusion where special circumstances necessitating an environmental review have been alleged. According to the Petitioner, an explanation is required because 'the NRC cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment.'" (LBP-06-04, at Pages 10-11)

However, Petitioner's environmental contention alleging that the Staff had failed to "explain" its decision to

located) has no prohibitive zoning barring placement of "occupied buildings" in Kilauea Volcano. Indeed, the County of Hawaii prohibits placing "occupied buildings" inside Kilauea. Consequently, because the Board's minor premise is false, the Board clearly reached a false conclusion. See SDC Development Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976) (where court's minor premise is erroneous, conclusion is wrong).

The Board's reasoning may also be viewed as a "false analogy," and false analogies are generally rejected by courts. United States v. Kincaid, 345 F.3d 1095 (9th Cir. 2003)

categorically exclude Pa'ina's irradiator has no legal or factual basis whatsoever.

First, as noted above, there were no "special circumstances" for the Staff to explain as a matter of law. The NRC had already determined as far back as 1993 that possible floods, tidal waves and plane crashes did not constitute significant hazards in the siting of irradiators.

Second, the original Petition (at Pages 19-20) failed to cite any federal regulation as authority for requiring the Staff to "explain" its categorical exclusion of Pa'ina's irradiator on a case-by-case basis. Indeed, the only regulation cited by the Petitioner which even remotely used the word "explanatory" was 40 C.F.R. Section 1507.3(b)(2)(ii), and that regulation simply "encouraged" federal agencies to publicize their regulations, procedures, and identification of categorical exclusions. The citation does not require an agency (such as the NRC) to "explain" on a case-by-case basis why "special circumstances" trump "categorical exclusion" for any particular irradiator. Likewise, 40 C.F.R. Section 1508.4 has no requirement that any agency must explain, on a case-by-case basis, its application of "categorical exclusion."

Consequently, the siting of Pa'ina's irradiator raised no "special circumstances" as a matter of law, negating any need

for explanations. Furthermore, and in any event, Petitioner failed to cite any legal authority requiring the Staff to do a case-by-case "explanation" of categorical exclusion of irradiators, especially where (as here) there existed no special circumstances as a matter of law and fact; in point of fact, Part 36 was intended to avoid a case-by-case review.¹³

To summarize: the Board admitted Petitioner's two environmental contentions based upon erroneous legal and factual assumptions (as to the presence of "special circumstances"), and without any legal basis (insofar as the Staff was required to provide a written explanation justifying its "categorical exclusion"). The Board's rulings should be reversed, and the two environmental contentions ought to be dismissed.

III. THE BOARD ERRED IN ADMITTING EACH OF THE TWO ENVIRONMENTAL CONTENTIONS, ALONG WITH SAFETY CONTENTION #7, BECAUSE NONE OF THOSE CONTENTIONS WERE SUPPORTED BY A PROPER LEGAL OR FACTUAL SHOWING.

¹³The cases cited by the Petitioner and the Board in support of the alleged requirement for "explanations" all suffer from the same legal and factual deficiencies, i.e., the federal agencies in each of those decisions had never extensively evaluated, and conclusively determined, the absence of special circumstances as did the NRC herein. Alaska Center for the Environment v. U.S. Forest Service, 189 F.3d 851, 859 (9th Cir. 1999); Jones v. Gordon, 792 F.2d 821, 828 (9th Cir. 1986); Steamboaters v. FERC, 759 F.2d 1382 (9th Cir. 1985); Wilderness Watch & Public Employees for Environmental Responsibility v. Mainella, 375 F.3d 1085, 1096 (11th Cir. 2004) Thus, those cases are inapplicable to the legal circumstances in this case.

This Argument III will address on an individual basis the deficiencies in each of the three contentions admitted by the Board. The following arguments will incorporate the preceding arguments. As will be seen, each of Petitioner's three contentions, individually, should have been denied/dismissed by the Board as a matter of law.

A. Petitioner's Environmental Contention That There Existed "Special Circumstances" Taking Pa'ina's Irradiator Out Of Categorical Exclusion Is Legally And Factually Insufficient.

It is well-settled that a petitioner has the burden of showing facts and law which are sufficient to make out a discernible contention. Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

Given the comprehensive nature of NRC's Part 36 assessments and the additional reviews conducted when determining that all irradiators are categorically excluded from the NEPA process, it is difficult to conceive of a set of circumstances in the proposed Pa'ina irradiator would be considered "special" in a manner contemplated by the Commission.

According to the New Heritage Dictionary, the term "special" means "surpassing what is common or usual."¹⁴ Thus, common sense and the term's plain meaning suggests that "special circumstances" are circumstances that were beyond what the NRC Staff considered in promulgating Part 36, and outside the NRC's decades-long experience, as codified in Parts 36 and also in 10 C.F.R. Sec. 51.22.

After extensive research, and while monitoring the installation and operation in each of its non-Agreement and Agreement States (including Hawaii), the NRC determined that because of the sealed, non-dispersible sources used in irradiators, floods, tidal waves (tsunamis), potential plane crashes (and even earthquakes) were not significant threats to the public or to the environment. As a consequence, the NRC determined that floods, tidal waves, airplane crashes and even earthquakes among other things were not "special circumstances."

Although Petitioner had the burden of alleging a legal contention, Petitioner utterly failed to present any legal arguments contradicting the above. Floods, tidal waves, and plane crashes occur throughout the United States, and particularly in U.S. coastal areas. Many U.S. geographical locations are subject to one or two or all of these types of

¹⁴The American Heritage Dictionary of the English Language, 4th Ed. (2004)

natural and man-made disasters. Petitioner made no legally-discernible distinctions between Hawaii's coastline, or the rest of the U.S. coastline, and Petitioner has not even alleged that a potential flood, tidal wave or plane crash would create increased potential impacts above and beyond those contemplated in Part 36 and the Section 51.22 categorical exclusion.

Consequently, the Board's admission of Petitioner's environmental contention based upon "special circumstances" ought to be reversed because it is woefully, and legally, insufficient.

- B. Petitioner's Environmental Contention That The Staff Was Required To Draft An "Explanation" Of Its Categorical Exclusion Is Legally And Factually Insufficient.

In the preceding Argument II, Pa'ina has already addressed Petitioner's failure to sufficiently plead and support its contention that the Staff should have produced a case-by-case explanation as to the "categorical exclusion" afforded to Pa'ina. Pa'ina incorporates those preceding arguments herein.

- C. Petitioner's Safety Contention #7 Fails To Set Forth A Sufficient Legal Or Factual Basis, And Should Otherwise Be Dismissed.

Petitioner's Safety Contention #7 suffers from several additional legal inadequacies which ought to result in a reversal of the Board's admission.¹⁵

First, Safety Contention #7 is very vague. What, actually, does Petitioner claim is absent from Pa'ina's Application? Is it a written outline of procedures to be kept on site in case of a plane crash? In all likelihood, and unfortunately, such procedures would be destroyed in any such crash.

Or, does Petitioner actually allege that detailed, written procedures to train and/or contact local Emergency Response Personnel is missing? Again, and as a practical matter, any procedures would probably also be destroyed in a plane crash.

Petitioner's vague allegations do not "provide a specific statement of law or fact . . . to be controverted." Consequently, its Safety Contention #7 should not have been admitted. 10 C.F.R. Sec. 2.309(f)(1)(i).

Second, Petitioner's vague Safety Contention #7 may also be "moot" as a matter of law. Thus, Pa'ina submitted its general emergency outline for handling natural hazards on March 9, 2006. (ML060730528) Pa'ina also submitted its general emergency outline for dealing with a prolonged power outage on March 31, 2006. (ML061000640) Because these emergency outlines almost

¹⁵ Safety Contention #7 is set forth in full at Page 15, Petitioner's Request for Hearing, filed October 3, 2005. Dr. Resnikoff's Declaration, attached thereto and filed the same date, reiterates the same arguments at pages 9-10.

completely overlap and encompass emergencies normally associated with possible airplane crashes, (vague) Safety Contention #7 ought to be dismissed as "moot."

Third, Petitioner's allegations (albeit vague) are beyond the scope of this licensing proceeding, in violation of subsection (iii). Thus, insofar as Petitioner may be seeking detailed, written procedures on how Pa'ina should react in response to an airplane crash on it, such detailed, written procedures are not required at this point in the licensing procedure. The NRC has explained that "outlines," and not detailed procedures, are appropriate during the licensing process. See 58 Fed. Reg. 7717 (Feb. 9, 1993)

Petitioner also alleged in Safety Contention #7 that Pa'ina's facility should be "hardened to mitigate the consequences of an accident." (Petitioner's Request for Hearing filed October 3, 2005, at p. 15) However, that claim regarding construction is also "beyond the scope" of this licensing procedure, in violation of 10 C.F.R. Sec. 2.309(f)(1)(iii).

Thus, Safety Contention #7 is altogether vague and difficult to specifically refute, and should be dismissed as violative of subsection (i). Safety Contention #7 should also be dismissed because it completely overlaps with, and reiterates, Safety Contentions #4 and #6, both of which have

been satisfied by Pa'ina and dismissed by the Board. Finally, Safety Contention #7 alleges that detailed, written procedures to handle airplane crashes should be prepared and filed by Pa'ina at this time, and it also alleges that Pa'ina's facility should be "hardened" to better withstand an airplane crash. Both of these allegations are beyond the scope of this licensing proceeding. Safety Contention #7 should be dismissed.

IV. PA'INA'S UTILIZATION OF AND RELIANCE UPON THE FORMAL, COMPREHENSIVE, AND DETAILED PART 36, WHICH SET THE PARAMETERS FOR FUTURE IRRADIATORS, SHOULD BE ACKNOWLEDGED AS ALTOGETHER PROPER AND LAWFUL.

Pa'ina carefully utilized and sought to follow the comprehensive provisions of Part 36, which governs irradiators. Based upon its confidence in the use of sealed, non-dispersible radiation sources, the NRC rejected the notion of a case-by-case review of each and every irradiator which came down the line. Instead, the NRC intended for its Part 36 regulations to apply uniformly to all irradiators and their siting.

The Staff strictly followed the NRC's 1993 directions, and its parameters regarding the siting of Pa'ina's irradiator. In doing so, the Staff protected the public and the environment to the greatest extent possible.

The Board's admission of Petitioner's three contentions contradicts the NRC's express language and purposes of Part 36

√(and Sec. 51.22). If allowed to stand, the Board's January 24, 2006 Order and its March 24, 2006 Order would certainly fragment the NRC's formal regulatory scheme for irradiators.

As a consequence, there would be no predictable risk in undertaking an irradiator venture, and neither Pa'ina nor any other proposed irradiator owner/investor could have confidence in the NRC's regulations.

V. CONCLUSION.

10 C.F.R. §36.13 states that:

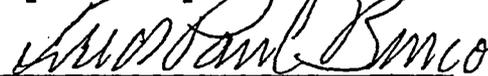
"The Commission will approve an application for a specific license for the use of licensed material in an irradiator if the applicant meets the requirements contained in this section."

Pa'ina filed its Application in reliance upon, and in fulfillment of, these Part 36 provisions.

Therefore, the Commission should reverse the Board's rulings admitting Concerned Citizens' two Environmental Contentions and its Safety Contention #7, and the Commission should deny the Petition in its entirety.

DATED: Honolulu, Hawaii July 3, 2006.

Respectfully submitted,



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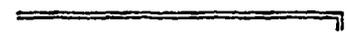
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

+ + + + +

ATOMIC SAFETY AND LICENSING BOARD
(ASLB)

+ + + + +

TELECONFERENCE



In the Matter of: ||

PA'INA HAWAII, LLC || Docket No.030-36974



Wednesday,
April 26, 2006

The above-entitled matter came on for hearing,
pursuant to notice, at 3:00 p.m.

BEFORE:

THE HONORABLE THOMAS S. MOORE, Chairman

THE HONORABLE PAUL B. ABRAMSON,

Administrative Law Judge

THE HONORABLE ANTHONY J. BARATTA,

Administrative Judge

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EXHIBIT A

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1 being clearly not the case, the expedient way is for
2 the Staff to get cracking and if the Applicant wants
3 to do something on this path, it should be in contact
4 with the Staff and work with them on it. Same thing
5 on the environmental.

6 Normally, the Applicant would do its own
7 environmental report and that would get submitted and
8 reviewed by the Staff. That not being the situation
9 here, Staff should engage the Applicant to the extent
10 it feels it has something to contribute.

11 MS. BUPP: And we certainly will do that,
12 Your Honor, and if the Applicant has any information
13 or any analyses that they had done and they would like
14 to share them with the Staff, we would certainly
15 welcome that and welcome the opportunity to evaluate
16 those.

17 JUDGE MOORE: Ms. Bupp, the schedule that
18 the Staff has committed, recognizing that the
19 unforeseen is the unforeseen, can you give us a degree
20 of confidence in how that schedule will hold?

21 MS. BUPP: We have based, as I said in the
22 cover letter transmitting the schedule, the Staff has
23 based the schedule for completion of an EA on the
24 minimal amount of time that we would -- the minimal
25 amounts of time under our generic schedule for

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1 materials and environmental analyses. Because we
2 don't normally do EAs for irradiator licenses, we have
3 used the generic schedule.

4 So we've given a schedule that we believe
5 is as certain as possible, of course, there are always
6 unforeseen circumstances, but we feel fairly confident
7 with the schedule.

8 JUDGE MOORE: I think to avoid the Board
9 having to issue multiple scheduling orders, we will
10 take the Staff schedule and we'll key things to after
11 the filing of the EA and after the Staff completes the
12 SER and that will avoid then the Board having to issue
13 multiple scheduling orders. So when we issue a
14 scheduling order, it will only contain a few dates
15 certain. The rest will all be keyed to Staff action
16 dates.

17 MS. HENKIN: Your Honor, if I might, this
18 is David Henkin. The only concern that the Intervenor
19 would have with respect to that, and I certainly think
20 that that is a very understandable and probably under
21 the circumstances a wise way to proceed because of the
22 number of safety and environmental issues, some that
23 are pretty unique to this site.

24 The one concern that we have and this is
25 also reflected in the joint submission from the Staff

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CERTIFICATE OF SERVICE

I hereby certify that copies of (1) "APPLICANT PA'INA HAWAII, LLC'S NOTICE OF APPEAL OF LBP-06-04 AND LPB-06-12" and (2) "APPLICANT PA'INA HAWAII, LLC'S BRIEF IN SUPPORT OF APPEAL" in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this 3rd day of July, 2006. Additional service has also been made this same day by electronic mail as shown below:

Administrative Judge
Thomas S. Moore, Chair
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DATED: Honolulu, Hawaii, July 3, 2006


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July 3, 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
(1) Applicant Pa'ina Hawaii, LLC's
Notice Of Appeal Of LBP-06-04
And LBP-06-12
(2) Applicant Pa'ina Hawaii, LLC's
Brief In Support Of Appeal From
LBP-06-04 and LBP-06-12

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 both of the above documents.

Both of these documents were e-mailed to your office and to all parties on the Certificate of Service on this date. Hard copies were also mailed to each of the parties on this date.

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. Thank you.

Very respectfully yours,


Fred Paul Benco

Encls.

cc: All parties on Certificate of
Service

UNITED STATES OF AMERICA

July 5, 2006 (8:47am)

NUCLEAR REGULATORY COMMISSION

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 NOTICE OF APPEAL OF
LBP-06-04 AND LBP-06-12

Pursuant to 10 C.F.R. §2.311(a) and (c), Applicant Pa'ina Hawaii, LLC files this Notice of Appeal of the Atomic Safety and Licensing Board's January 24, 2006 Memorandum and Order and its March 24, 2006 Memorandum and Order which, among other things, admitted for litigation two (2) environmental contentions in the above-captioned proceeding, and also admitted a related safety contention. Attached with this Notice of Appeal is Applicant Pa'ina Hawaii, LLC's Brief.

DATED: Honolulu, Hawaii

July 3, 2006


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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
Pa'ina Hawaii, LLC) Docket No. 030-36974
Materials License Application) ASLBP No. 06-843-01-ML

APPLICANT PA'INA HAWAII, LLC'S NOTICE OF APPEAL OF
LBP-06-04 AND LBP-06-12 AND ACCOMPANYING BRIEF

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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)

APPLICANT PA'INA HAWAII, LLC'S BRIEF IN SUPPORT OF APPEAL FROM
LBP-06-04 AND LBP-06-12

INTRODUCTION

Pursuant to 10 C.F.R. §2.311(a) and (c), Applicant Pa'ina Hawaii, LLC ("Pa'ina") hereby appeals from two related decision(s) of the Atomic Safety and Licensing Board ("Board").¹ Pa'ina is seeking a Materials License in order to operate a Category III, pool-type irradiator pursuant to applicable NRC regulations.

First, Pa'ina appeals from the Board's Memorandum and Order issued January 24, 2006, and denominated as LBP 06-04, 63 NRC 99 (2006). There, the Board concluded that Petitioner Concerned Citizens of Honolulu (hereinafter "Concerned Citizens") had proffered two (2) admissible Environmental Contentions. Those

¹ This is actually the second appeal by Pa'ina from the two cited Board decisions. Pa'ina's first appeal was filed April 3, 2006, and was dismissed without prejudice on May 15, 2006 for the technical/jurisdictional reason that two (2) of Petitioner's contentions were still pending before the Board. (See Pa'ina Hawaii, LLC, CLI-06-13 (May 15, 2006)) Recently, on June 22, 2006 the Board dismissed Petitioner's those two pending contentions (Safety Contentions #4 and #6), thereby triggering this appeal.

two, closely-related contentions alleged (1) that the Staff had failed to explain "why a categorical exclusion is appropriate here and perforce why special circumstances [possible hurricanes, tsunamis, and airplane crashes] are not present", and (2) that "special circumstances are present that preclude the application of the categorical exclusion and require an 'environmental impact statement or, at minimum, an environmental assessment.'" (LBP 06-04, 63 NRC 99 (2006), slip op. at p. 16) (emphasis added)

Second, Pa'ina also appeals herein from the Board's Memorandum and Order issued on March 24, 2006, and denominated as LBP-06-12, 63 NRC ____ (2006). There, the Board concluded that Concerned Citizens had stated three admissible Safety Contentions (designated as Safety Contentions #4, #6 and #7). It should be noted that, subsequently, the Board on June 22, 2006 dismissed Safety Contentions #4 and #6 as moot, leaving only Safety Contention #7 as admissible.²

The remaining Safety Contention #7 was impermissibly vague, but the Board characterized it as contending that Pa'ina's Application for its Materials License failed "completely to

² Safety Contention #4 alleged that Pa'ina's Application omitted an outline of safety procedures should there be a prolonged power outage. Safety Contention #6 alleged that Pa'ina's Application omitted an outline of safety procedures should natural phenomena (flooding, hurricanes, or tidal waves) strike Pa'ina's facility. Both safety outlines have since been submitted to the NRC, which is why the Board ruled those two contentions "moot."

address the likelihood and consequences of an air crash involving the facility." (Mar. 24, 2006 Order, slip op. at p. 6)

The two Environmental Contentions and Safety Contention #7 are very closely related and intertwined. In essence, all three remaining contentions challenge the proposed siting of Pa'ina's irradiator on state-owned land next to Honolulu International Airport, immediately adjacent to and among other occupied commercial and industrial buildings.

The Record of this case, the historical development of NRC regulations for irradiators and the National Environmental Policy Act of 1969 ("NEPA") process suggest that licensed facilities very rarely, if ever, warrant the preparation of environmental assessments ("EAs") or environmental impact statements ("EISs"), much less a Subpart L administrative hearing. Based on this, Staff Counsel on April 26, 2006, admitted: "Because we [NRC] don't normally do EAs for irradiator licenses, we have used the generic schedule." (See Exhibit A attached hereto).

Pa'ina submits that the Board erred in admitting the two Environmental Contentions and the closely-related Safety Contention #7. Consequently, the Board's Orders admitting the two Environmental Contentions and Safety Contention #7 should be

reversed, and Concerned Citizens' requests for hearing should be denied in toto.

STATEMENT OF THE CASE

This case arose from Pa'ina's license application for an NRC Materials License for installation of radioactive materials into a Category III, pool-type industrial irradiator. Pa'ina's Application was filed on June 23, 2005. (See ML052060372)

On August 2, 2005, the NRC published a "Notice Of Opportunity For Hearing" 70 Fed. Reg. at 44,396. The Notice stated that Pa'ina's irradiator qualified for "categorical exclusion" from preparation of an EA or EIS (Id.)³ On October 3, 2005, Concerned Citizens filed its "Request For Hearing By Concerned Citizens of Honolulu ("Request for Hearing")."

On October 13, 2005 an Order was issued establishing this Board to hear this case. See "Establishment of Atomic Safety and Licensing Board" filed October 13, 2005.

On October 26, 2005 Pa'ina filed its "Answer To Request for Hearing By Concerned Citizens Of Honolulu."

³ Under the NRC's comprehensive regulations (10 C.F.R. Sec. 51.22), "categorical exclusions" have been deemed environmentally appropriate for relatively benign, or purely paper, activities including recordkeeping requirements (Subsection 51.22(c)(3)(ii)), the procurement of general equipment and supplies (Subsection 51.22(c)(4)), issuance of materials licenses for medical and veterinary purposes (Subsection 51.22(c)(14)(iv)), and issuance of materials licenses for irradiators. (Subsection 51.22(c)(14)(vii))

On October 28, 2005 the NRC Staff ("Staff") likewise filed its "Staff Response To Request For Hearing By Concerned Citizens Of Honolulu" which concluded that ALL of Petitioner's contentions should be dismissed.

After several procedural matters, Concerned Citizens on December 1, 2005 filed its "Petitioner's Reply In Support Of Its Request For Hearing."

By Order dated December 8, 2005, the Board in effect bifurcated this proceeding into two parts: (1) Concerned Citizens' standing and environmental contentions; and (2) Concerned Citizens' safety contentions.

By Memorandum and Order dated January 24, 2006, the Board found that Concerned Citizens had standing herein, and further found that Concerned Citizens had alleged two (2) admissible Environmental Contentions.⁴ See Memorandum and Order (Ruling On Petitioner's Standing And Environmental Contentions), LBP-06-04, 63 NRC 99 (January 24, 2006)

Two months later, after additional briefing, the Board issued its second Memorandum and Order dated March 24, 2006.

⁴ As noted on Pages 1-2 supra, the Board 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 was allegedly subject to tsunamis, hurricanes, flooding and airplane crashes; and (2) "special circumstances" were present which require an environmental assessment or an environmental impact statement. (January 24, 2006 Memorandum and Order, at Page 5.) The Board acknowledged that the two NEPA contentions were intertwined, raised "substantially similar" issues, and might be consolidated into one. Id., at 6.

(LBP-06-12, 63 NRC ___), which addressed ten Safety Contentions of Concerned Citizens. In that Order, the Board 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 __ (Mar. 24, 2006)⁵

Pa'ina appeals from the January 24th Order which granted admissibility of the two environmental contentions raised by Concerned Citizens, and also from the March 24th Order which granted the closely-related Safety Contention #7.

STATEMENT OF THE ISSUES

The Board committed several errors in reaching its conclusion that Concerned Citizens had alleged two admissible Environmental Contentions as well as Safety Contention #7.

First, the Board erred in granting admissibility because all three remaining contentions are actually direct challenges to the NRC's regulations, and direct challenges to the regulations are not allowed in Subpart L hearings. This error was applicable to all of Petitioner's three remaining contentions.

⁵ As noted in Footnote #1 above, the Board dismissed Safety Contentions #4 and #6 as being "moot" by Order dated June 22, 2006, thus completing all issues before the Board and making this appeal "ripe."

Second, the Board further erred in admitting Petitioner's two environmental contentions which claimed that there existed "special circumstances" which disqualified Pa'ina's irradiator from "categorical exclusion," with the result that evidentiary hearings and preparation of environmental documents could be subsequently ordered.

Third, the Board erred in ruling that the Staff had failed to "explain" its decision to categorically exclude Pa'ina's irradiator, particularly because Pa'ina's irradiator met all of the provisions of 10 C.F.R. Part 36.

Fourth, the Board erred in admitting Concerned Citizens' three contentions because those contentions were not admissible under any of the six criteria contained in 10 C.F.R. Section 2.309(f).

Based upon these errors, the Board necessarily erred and abused its discretion in admitting Concerned Citizens' two Environmental Contentions and Safety Contention #7.

LEGAL STANDARDS

A. The Legal Standard For Granting A Request For A Hearing

10 C.F.R. §2.311(c) provides that an Order granting a request for hearing may be appealed by a party other than the requestor/petitioner on the question as to whether the

requestor/petitioner should have been wholly denied. Furthermore, on an appeal, the Commission may consider all of the points of error raised on appeal, rather than simply whether the request/petition should have been denied in toto. See, e.g., Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-869, 26 N.R.C. 13, 25-27 (1987); Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 N.R.C. 9, 19 (2001)

B. Legal Standards For Admission Of Contentions

For a requestor/petitioner to gain admission as a party, the requestor/petitioner must (after establishing standing) proffer at least one contention that satisfies the admissibility requirements of 10 C.F.R. §2.309(f). See 10 C.F.R. §2.309(a); see also Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 N.R.C. 328, 333 (1999). Thus, for a contention to be admissible, the requestor/petitioner must satisfy the following six requirements set forth in 10 C.F.R. §2.309(f) (1) (i) - (vi):

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate 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;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the . . . petitioner's position on the issue and on which the petitioner intends to rely at the hearing, together with references to the specific sources and documents on which the . . . petitioner intends to rely to support its position on the issue; and
 - (vi) Provide sufficient information to show that a genuine dispute exists with the . . . licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

The above six contention requirements are "strict by design." Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001). A contention that fails to comply with any of these requirements will not be admitted for litigation. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999)

The petitioner must do more than submit bald or conclusory allegations of a dispute with the applicant. Millstone, CLI-01-24, 54 NRC at 358. Furthermore, there must a specific factual and legal basis supporting the contention. Id. at 359. A contention will not be admitted if it is based only on

unsupported assertions and speculation. See Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003)

If a petitioner fails to provide the requisite support for its contentions, then a Licensing Board may neither make factual assumptions that favor the petitioner, nor supply information that is lacking. Louisiana Energy Services L.P. (National Enrichment Facility), LBP-04-14, 60 NRC 40, 56 (2004) (citing Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001))

DISCUSSION

- I. THE BOARD ERRED IN GRANTING ADMISSIBILITY TO PETITIONER'S THREE RELATED CONTENTIONS BECAUSE THOSE CONTENTIONS TOGETHER CONSTITUTED IMPERMISSIBLE, DIRECT LEGAL CHALLENGES TO THE NRC'S REGULATIONS.

Petitioner's two environmental contentions and its Safety Contention #7 are very closely related and intertwined. In essence, all three contentions directly focus upon and challenge the siting of Pa'ina's irradiator. This Section, therefore, will therefore address all three contentions as if they were identical, and this Argument I will show why the Board erred in admitting the three contentions which challenged the siting of Pai'na's irradiator.

A. The NRC Fully Evaluated The Risks Of Radiation Exposure To The Public From Tidal Waves, Flooding And Airplane Crashes, And Concluded That Its Part 36 Regulations Properly Protected The Public And The Environment Should Irradiators Be Constructed Where Other Occupied Buildings Existed Or Were Permitted.

Between 1990 and 1993, the NRC conducted a sweeping and comprehensive evaluation of irradiators and safety issues. The top-to-bottom evaluation led to the adoption of 10 C.F.R. Part 36 ("Licenses And Radiation Safety Requirements For Irradiators"). The NRC intended Part 36 to "consolidate, clarify and standardize" licensing requirements. See 58 Federal Register 7715-7716 (Feb. 9, 1993) "Category III-Underwater Irradiators" were expressly to be "covered by the rule." (Id.)

For purposes of this case, it is noteworthy that the NRC's evaluation investigated the "siting," or geographical location, of proposed irradiators. After due consideration, the NRC concluded that flooding, tidal waves,⁶ and possible airplane crashes did not affect siting an irradiator if local governments permitted other industrial or occupied buildings to be located in the same locations. The NRC concluded as follows:

"[T]he NRC believes that, in general, irradiators can be located anywhere that local governments would permit an industrial facility to be built."

"The NRC considered whether there should be siting requirements dealing with possible flooding of the irradiator or tidal waves. . . Thus, while it may be in the licensee's own

⁶ Tidal waves are called "tsunamis" in the Pacific Ocean Basin.

economic interest to avoid siting an irradiator at a location subject to flooding, flooding would not create a health and safety hazard."

"The NRC considered whether there should be a prohibition against locating irradiators near airports because of risk of radiation overexposures caused by an airplane crash. The NRC has concluded that a prohibition against placing an irradiator where other types of occupied buildings could be placed is not justified on safety grounds. The radioactive sources in an irradiator would be relatively protected by damage because they are generally contained within 6-foot thick reinforced-concrete walls and are encapsulated in steel. Even if a source were damaged as a result of an airplane crash, large quantities of radioactivity are unlikely to be spread from the immediate vicinity of the source rack because the sources are not volatile. With this protection, the radiological consequences of an airplane crash at an irradiator would not substantially increase the seriousness of the accident. Therefore, NRC will allow construction of an irradiator at any location at which local authorities would allow other occupied buildings to be built." See 58 Fed. Reg. 7725-7726 (February 9, 1993) (emphasis added)

Thus, 10 C.F.R. Part 36's regulations are designed to account for, withstand, and absolutely minimize radiation dangers to the public and the environment.

B. Petitioner's Three Remaining Contentions Challenge The Siting Of Pa'ina's Irradiator, And In So Doing Actually Constitute An Impermissible Challenge To The NRC's Part 36 Regulations.

Beginning in 1990 and for three years thereafter, the NRC published proposed rules, received public input, held public hearings, and applied its decades-old expertise in promulgating Part 36, specifically applicable to irradiators. Part 36 was a further clarification of Part 51. The NRC intentionally made

Part 36 comprehensive, detailed and rigorous as to design, operation and maintenance of irradiators.

Pursuant to its development of Part 36 in conjunction with its evaluation of sealed, non-dispersible sources, the NRC determined that irradiators were so safe that they could be sited (or located) where other occupied or industrial buildings were located, because there was no significant potential radiation exposure to the public or to the environment.⁷

Thus, Petitioner's contentions, taken together as well as taken individually, constitute direct attacks upon the comprehensive, interconnected and rigorous provisions of Part 36. Consequently, all three contentions ought to be dismissed. 10 C.F.R. Sec. 2.335(a) prohibits attacks on the NRC's regulations:

"Except as provided in paragraphs (b), (c), and (d) of this section, no rule or regulation of the Commission or any provision thereof, concerning the licensing of . . . utilization facilities . . . is subject to attack by way of discovery, proof, argument or other means in any adjudicatory proceeding subject to this part." See also Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207 218 (2003) (contentions cannot challenge NRC regulations)

Since Petitioner's three contentions challenge the siting of Pa'ina's irradiator (which is to be built next to, and among,

⁷ There is no evidence in the Record showing that Petitioner or any of its members, or anybody on their behalf, submitted comments to the NRC prior to adoption of Part 36.

other occupied buildings), then those three contentions directly attack 10 C.F.R. Part 36.

Consequently, Petitioner's three contentions should not have been admitted. 10 C.F.R. Sec. 2.335(a). The Board's January 24, 2006 and March 24, 2006 Orders should be reversed, and all three contentions ought to be dismissed.

II. THE BOARD ERRED WHEN IT ADMITTED PETITIONER'S TWO ENVIRONMENTAL CONTENTIONS WHICH ALLEGED THAT (1) THERE EXISTED "SPECIAL CIRCUMSTANCES" WHICH OVERRODE THE "CATEGORICAL EXCLUSION" DESIGNATION AFFORDED TO PA'INA'S IRRADIATOR, AND ALSO THAT (2) THE STAFF FAILED TO "EXPLAIN" ITS DESIGNATION OF "CATEGORICAL EXCLUSION."

This Argument II is more narrowly drawn to address just Petitioner's two closely-related environmental contentions, and to demonstrate further why the Board erred in admitting those two contentions.

Petitioner's two environmental contentions alleged that (1) the possibility of flooding, hurricanes, tidal waves and plane crashes overrode the Staff's designation of Pa'ina's irradiator's as being categorically excluded, and created the possibility that NEPA documents might have to be prepared; and that (2), the Staff in 2005 had failed to "explain" why it had designated Pa'ina's irradiator as being categorically excluded.

The Board set forth the two related issues as follows:

"The Petitioner has proffered two separate contentions challenging the Staff's satisfaction of the requirements of NEPA. Both NEPA contentions relate to the Staff's application of the categorical exclusion of irradiators in 10 C.F.R. Sec. 51.22(c)(14)(vii) that excuses the Staff from performing an environment [sic] impact analysis of a proposed irradiator. Specifically, the contentions challenge the procedure by which the categorical exclusion was invoked in this instance, as well as the applicability of 10 C.F.R. Sec. 51.22(b), which provides a special circumstance exception for actions in which a blanket finding is made by rule that the licensing action does not have a significant effect on the human environment." (Slip op., January 24, 2006 at 10)

However, the Board erred in granting admission to both of Petitioner's environmental contentions.

Prior to offering specific arguments regarding this issue, it is important to note NRC's purpose in conducting its assessment of industrial irradiators when evaluating whether the proposed Pa'ina irradiator was contemplated. As stated by the NRC in the Preamble to the Part 36 rulemaking:

"[T]he issue is whether to license them [irradiators] under a formal, detailed, comprehensive set of regulations as was proposed or whether to continue licensing on a case-by-case basis with relatively few specific requirements contained in formal regulations. The NRC's decision is to adopt a comprehensive, formal set of regulations." 58 Fed. Reg. at 7716 (Feb. 9, 1993) (emphasis in original)

Thus, as stated by the NRC, "[t]his rule consolidates, clarifies, and standardizes the requirements for the licensing and operation of current and future irradiators." Id. Therefore, NRC intended Part 36 to serve as a comprehensive,

all-inclusive set of regulations with supporting assessments for industrial irradiators such as the proposed Pa'ina irradiator.

- A. Since 1993, The NRC Has Deemed That Possible Floods, Tidal Waves, And Plane Crashes Are Not "Special Circumstances"; The Board's Contrary Conclusion Was Based Upon Faulty Assumptions And Erroneous Reasoning.

As noted on Pages 10-12, supra, the NRC evaluated all types of locations for siting irradiators, and the Board evaluated all manner of possible natural and man-made dangers which might expose the public to radiation exposure from sealed, non-dispersible sources. Based upon these extensive studies, the NRC determined that floods, tidal waves, and possible plane crashes were not unique or special circumstances warranting preparation of an EA or EIS.⁸

⁸ Although the Board suggested that "hurricanes" are "not specifically" disputed by Applicant Pa'ina (January 24, 2006 slip opinion at Page 15, fnt. 48) there was really nothing for Pa'ina to "dispute" because (1) the NRC determined in 1993 that irradiators would be permitted near to, and among, other industrial or occupied buildings, (2) extremely strong winds commonly accompany tidal waves and airplanes/jets passing in close proximity (called vortexes), and (3), in any event, the original Petition failed to articulate just how "hurricane velocity winds" could cause Pa'ina's sealed, non-dispersible sources locked 20' underground in a pool to impact the public and environment. (See Request for Hearing, October 3, 2005, Declaration of Marvin Resnikoff, Ph.D., para. 23) The Board obviously "assumed" that hurricane winds were more damaging than tsunami-accompanied or plane-caused vortexes, and the Board must have improperly "assumed" that, somehow, in a manner unstated, hurricane winds would cause the sealed sources to be dispersed. See Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195 (2003) (Board cannot make assumptions which fill in factual omissions of petitioner)

How did the Board unilaterally decide that possible flooding, tidal waves, hurricanes and airplane crashes do constitute "special circumstances?" In at least three ways:

1. The Board simply glossed over the NRC's extensive 1990-1993 evaluation of irradiator engineering, design, operation and maintenance which culminated in Part 36. The Board also glossed over the siting parameters reflected in 58 Reg. Reg. 7725-7726. (The Board merely mentioned, in passing, 58 Fed. Reg. 7725-7726, in its January 24, 2006 Order, in footnote 48)

2. The Board made improper legal assumptions.

The Board assumed as a matter of law that the more general NRC regulations set forth in 10 C.F.R. Sec. 51 ("Environmental Protection Regulations For Domestic Licensing And Related Regulatory Functions"), took precedence over the NRC's more specific provisions and rationale of 10 C.F.R. Part 36 ("Licenses And Radiation Safety Requirements For Irradiators"). The Board made this erroneous assumption of law in order to admit Petitioner's two environmental contentions on the basis of Part 51.

However, the Board wrongly assumed the legal relationship between Part 36 and Part 51. By law, the general provisions of Part 51 are subservient to, and are supposed to defer to the more specific provisions of Part 36. The NRC specifically

directed that Part 51's general rules were to be subservient to more special or specific rules, such as those more specific rules governing irradiators contained in Part 36:

Section 51.3 (Resolution of Conflict). In any conflict between a general rule in subpart A of this part and a special rule in another subpart of this chapter [10 C.F.R.] applicable to a particular type of proceeding, the special rule governs. (Emphasis added)

Pursuant to 10 C.F.R. Sec. 51.3, the Board should have acknowledges that the NRC's Part 36 regulations (which allowed irradiators to be placed among other occupied buildings) took precedence over the more general Part 51 NEPA provisions.

3. The Board also made several improper legal and factual assumptions which favored the Petitioner's two environmental contentions.⁹

As noted above, the Board all but ignored the 1990-1993 studies leading to the adoption of Part 36, and the Board all but ignored the NRC's stated parameters for the siting of irradiators.

Rather, the Board assumed that no siting studies had been accomplished under the auspices of Part 51. The Board further assumed as a matter of law that the NRC's studies under Part 36

⁹ The NRC's applicable rule has been stated as follows: If a petitioner fails to provide the requisite support for its contentions, then a Licensing Board may neither make factual assumptions that favor the petitioner, nor supply information that is lacking. Louisiana Energy Services L.P. (National Enrichment Facility), LBP-04-14, 60 NRC 40, 56 (2004)(citing Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001)

were mutually exclusive from any studies conducted pursuant to Part 51. Those two assumptions led the Board to admit Petitioner's two related environmental contentions, as shown by the following analysis of the Board:

"[The] history [of 10 C.F.R. Sec. 51.22, which defines "categorical exclusions"] does not support the view that the risks associated with the myriad possible locations for siting an irradiator were considered by the Commission in adopting the categorical exclusion . . . In addition, it is impossible to identify in advance the precise situations which might move the Commission in the future to determine special circumstances exist . . . Thus, the regulatory history does not even hint that the Commission considered the possible locations for proposed facilities in adopting the categorical exclusion for irradiators [contained in Part 51], while the history of the special circumstances exception indicates that the consequences of siting an irradiator on the ocean's edge at the Honolulu Airport, subject to the risks of aircraft crashes, tsunamis, and hurricanes, are precisely the kind of circumstances for which categorical exclusion might not be appropriate. . . The Staff has failed to provide any reason to conclude that the threats endemic to this proposed site have ever been considered." (LBP -06-04 at 13-14)

After assuming that the NRC never studied siting issues which had any relevance to Part 51, and after assuming that the extensive studies pursuant to Part 36 were irrelevant, the Board made yet another, rather startling assumption involving Hawaii's very-active Kilauea Volcano.¹⁰ The Board used this next (albeit startling) legal assumption to justify its admission of Petitioner's two environmental contentions:

¹⁰ Kilauea Crater is located within Volcano National Park on the Island of Hawaii. The Big Island of Hawaii is approximately two hundred miles from the Island Of Oahu where Applicant's irradiator is proposed to be installed.

"Indeed, the Staff's approach [in granting "categorical exclusion" to Pa'ina's irradiator] only begs the question whether any location would prompt the Staff to consider special circumstances associated with a proposed siting. For example, it is virtually certain that the Commission did not specifically consider the risks associated with placing an irradiator in the caldera of Kilauea" (LBP-06-04 at 14)

Thus, based upon its erroneous legal and factual assumptions, the Board reached the untenable conclusion that the Staff would allow an irradiator to be located in the live volcano, Kilauea, without triggering any "special circumstances" and NEPA review.¹¹

The Board's improper and very erroneous legal and factual assumptions led the Board to reach untenable (and even startling) conclusions. The Board admitted Petitioner's two environmental contentions based upon its erroneous legal and factual assumptions. Consequently, the Board's rulings admitting the two environmental contentions ought to be reversed, and those two environmental contentions ought to be dismissed.¹²

¹¹ Pa'ina would stipulate that if a Category III irradiator were to be proposed for Kilauea Volcano, then "special circumstances" would exist because no "occupied buildings" are allowed inside the Volcano. Further NEPA study and documents would be called for.

¹² The Board apparently granted Petitioner's environmental contentions based upon the following syllogism:

Major premise: "Special circumstances" exist where a nuclear source is proposed to be sited in violation of NRC siting standards (requiring the preparation of an EA or EIS).

Minor premise: The NRC has never established any siting standards for irradiators.

Conclusion: Pa'ina's irradiator may therefore be located in Kilauea Volcano (Caldera), and no EA or EIS need be prepared.

Unfortunately, from Pa'ina's viewpoint, the Board assumed without any factual or legal basis whatsoever that the County of Hawaii (where Kilauea is

- B. The Board Also Erred In Admitting Petitioner's Legal Contention That The NRC Staff Violated The Law When It Failed To "Explain" Why Categorical Exclusion Was Granted To Pa'ina's Irradiator; There Are No "Special Circumstances" In This Case, And There Is No Legal Requirement For A Case-By-Case Explanation.

The Board admitted Petitioner's second environmental contention which alleged that as a matter of law, the NRC Staff failed to "explain" why it had granted "categorical exclusion" to Pa'ina's proposed irradiator, and this "failure to explain" resulted in an admissible legal contention by Petitioner.

The Board characterized Petitioner's legal contention as follows:

"Relying upon a series of precedents in the United States Court of Appeals for the Ninth Circuit, the federal circuit court encompassing Hawaii, the Petitioner asserts that the Staff has omitted a necessary step in its NEPA analysis, which in essence requires an explanation of the applicability of a categorical exclusion where special circumstances necessitating an environmental review have been alleged. According to the Petitioner, an explanation is required because 'the NRC cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment.'" (LBP-06-04, at Pages 10-11)

However, Petitioner's environmental contention alleging that the Staff had failed to "explain" its decision to

located) has no prohibitive zoning barring placement of "occupied buildings" in Kilauea Volcano. Indeed, the County of Hawaii prohibits placing "occupied buildings" inside Kilauea. Consequently, because the Board's minor premise is false, the Board clearly reached a false conclusion. See SDC Development Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976) (where court's minor premise is erroneous, conclusion is wrong).

The Board's reasoning may also be viewed as a "false analogy," and false analogies are generally rejected by courts. United States v. Kincaid, 345 F.3d 1095 (9th Cir. 2003)

categorically exclude Pa'ina's irradiator has no legal or factual basis whatsoever.

First, as noted above, there were no "special circumstances" for the Staff to explain as a matter of law. The NRC had already determined as far back as 1993 that possible floods, tidal waves and plane crashes did not constitute significant hazards in the siting of irradiators.

Second, the original Petition (at Pages 19-20) failed to cite any federal regulation as authority for requiring the Staff to "explain" its categorical exclusion of Pa'ina's irradiator on a case-by-case basis. Indeed, the only regulation cited by the Petitioner which even remotely used the word "explanatory" was 40 C.F.R. Section 1507.3(b)(2)(ii), and that regulation simply "encouraged" federal agencies to publicize their regulations, procedures, and identification of categorical exclusions. The citation does not require an agency (such as the NRC) to "explain" on a case-by-case basis why "special circumstances" trump "categorical exclusion" for any particular irradiator. Likewise, 40 C.F.R Section 1508.4 has no requirement that any agency must explain, on a case-by-case basis, its application of "categorical exclusion."

Consequently, the siting of Pa'ina's irradiator raised no "special circumstances" as a matter of law, negating any need

for explanations. Furthermore, and in any event, Petitioner failed to cite any legal authority requiring the Staff to do a case-by-case "explanation" of categorical exclusion of irradiators, especially where (as here) there existed no special circumstances as a matter of law and fact; in point of fact, Part 36 was intended to avoid a case-by-case review.¹³

To summarize: the Board admitted Petitioner's two environmental contentions based upon erroneous legal and factual assumptions (as to the presence of "special circumstances"), and without any legal basis (insofar as the Staff was required to provide a written explanation justifying its "categorical exclusion"). The Board's rulings should be reversed, and the two environmental contentions ought to be dismissed.

III. THE BOARD ERRED IN ADMITTING EACH OF THE TWO ENVIRONMENTAL CONTENTIONS, ALONG WITH SAFETY CONTENTION #7, BECAUSE NONE OF THOSE CONTENTIONS WERE SUPPORTED BY A PROPER LEGAL OR FACTUAL SHOWING.

¹³The cases cited by the Petitioner and the Board in support of the alleged requirement for "explanations" all suffer from the same legal and factual deficiencies, i.e., the federal agencies in each of those decisions had never extensively evaluated, and conclusively determined, the absence of special circumstances as did the NRC herein. Alaska Center for the Environment v. U.S. Forest Service, 189 F.3d 851, 859 (9th Cir. 1999); Jones v. Gordon, 792 F.2d 821, 828 (9th Cir. 1986); Steamboaters v. FERC, 759 F.2d 1382 (9th Cir. 1985); Wilderness Watch & Public Employees for Environmental Responsibility v. Mainella, 375 F.3d 1085, 1096 (11th Cir. 2004) Thus, those cases are inapplicable to the legal circumstances in this case.

This Argument III will address on an individual basis the deficiencies in each of the three contentions admitted by the Board. The following arguments will incorporate the preceding arguments. As will be seen, each of Petitioner's three contentions, individually, should have been denied/dismissed by the Board as a matter of law.

A. Petitioner's Environmental Contention That There Existed "Special Circumstances" Taking Pa'ina's Irradiator Out Of Categorical Exclusion Is Legally And Factually Insufficient.

It is well-settled that a petitioner has the burden of showing facts and law which are sufficient to make out a discernible contention. Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

Given the comprehensive nature of NRC's Part 36 assessments and the additional reviews conducted when determining that all irradiators are categorically excluded from the NEPA process, it is difficult to conceive of a set of circumstances in the proposed Pa'ina irradiator would be considered "special" in a manner contemplated by the Commission.

According to the New Heritage Dictionary, the term "special" means "surpassing what is common or usual."¹⁴ Thus, common sense and the term's plain meaning suggests that "special circumstances" are circumstances that were beyond what the NRC Staff considered in promulgating Part 36, and outside the NRC's decades-long experience, as codified in Parts 36 and also in 10 C.F.R. Sec. 51.22.

After extensive research, and while monitoring the installation and operation in each of its non-Agreement and Agreement States (including Hawaii), the NRC determined that because of the sealed, non-dispersible sources used in irradiators, floods, tidal waves (tsunamis), potential plane crashes (and even earthquakes) were not significant threats to the public or to the environment. As a consequence, the NRC determined that floods, tidal waves, airplane crashes and even earthquakes among other things were not "special circumstances."

Although Petitioner had the burden of alleging a legal contention, Petitioner utterly failed to present any legal arguments contradicting the above. Floods, tidal waves, and plane crashes occur throughout the United States, and particularly in U.S. coastal areas. Many U.S. geographical locations are subject to one or two or all of these types of

¹⁴The American Heritage Dictionary of the English Language, 4th Ed. (2004)

natural and man-made disasters. Petitioner made no legally-discernible distinctions between Hawaii's coastline, or the rest of the U.S. coastline, and Petitioner has not even alleged that a potential flood, tidal wave or plane crash would create increased potential impacts above and beyond those contemplated in Part 36 and the Section 51.22 categorical exclusion.

Consequently, the Board's admission of Petitioner's environmental contention based upon "special circumstances" ought to be reversed because it is woefully, and legally, insufficient.

- B. Petitioner's Environmental Contention That The Staff Was Required To Draft An "Explanation" Of Its Categorical Exclusion Is Legally And Factually Insufficient.

In the preceding Argument II, Pa'ina has already addressed Petitioner's failure to sufficiently plead and support its contention that the Staff should have produced a case-by-case explanation as to the "categorical exclusion" afforded to Pa'ina. Pa'ina incorporates those preceding arguments herein.

- C. Petitioner's Safety Contention #7 Fails To Set Forth A Sufficient Legal Or Factual Basis, And Should Otherwise Be Dismissed.

Petitioner's Safety Contention #7 suffers from several additional legal inadequacies which ought to result in a reversal of the Board's admission.¹⁵

First, Safety Contention #7 is very vague. What, actually, does Petitioner claim is absent from Pa'ina's Application? Is it a written outline of procedures to be kept on site in case of a plane crash? In all likelihood, and unfortunately, such procedures would be destroyed in any such crash.

Or, does Petitioner actually allege that detailed, written procedures to train and/or contact local Emergency Response Personnel is missing? Again, and as a practical matter, any procedures would probably also be destroyed in a plane crash.

Petitioner's vague allegations do not "provide a specific statement of law or fact . . . to be controverted." Consequently, its Safety Contention #7 should not have been admitted. 10 C.F.R. Sec. 2.309(f)(1)(i).

Second, Petitioner's vague Safety Contention #7 may also be "moot" as a matter of law. Thus, Pa'ina submitted its general emergency outline for handling natural hazards on March 9, 2006. (ML060730528) Pa'ina also submitted its general emergency outline for dealing with a prolonged power outage on March 31, 2006. (ML061000640) Because these emergency outlines almost

¹⁵ Safety Contention #7 is set forth in full at Page 15, Petitioner's Request for Hearing, filed October 3, 2005. Dr. Resnikoff's Declaration, attached thereto and filed the same date, reiterates the same arguments at pages 9-10.

completely overlap and encompass emergencies normally associated with possible airplane crashes, (vague) Safety Contention #7 ought to be dismissed as "moot."

Third, Petitioner's allegations (albeit vague) are beyond the scope of this licensing proceeding, in violation of subsection (iii). Thus, insofar as Petitioner may be seeking detailed, written procedures on how Pa'ina should react in response to an airplane crash on it, such detailed, written procedures are not required at this point in the licensing procedure. The NRC has explained that "outlines," and not detailed procedures, are appropriate during the licensing process. See 58 Fed. Reg. 7717 (Feb. 9, 1993)

Petitioner also alleged in Safety Contention #7 that Pa'ina's facility should be "hardened to mitigate the consequences of an accident." (Petitioner's Request for Hearing filed October 3, 2005, at p. 15) However, that claim regarding construction is also "beyond the scope" of this licensing procedure, in violation of 10 C.F.R. Sec. 2.309(f)(1)(iii).

Thus, Safety Contention #7 is altogether vague and difficult to specifically refute, and should be dismissed as violative of subsection (i). Safety Contention #7 should also be dismissed because it completely overlaps with, and reiterates, Safety Contentions #4 and #6, both of which have

been satisfied by Pa'ina and dismissed by the Board. Finally, Safety Contention #7 alleges that detailed, written procedures to handle airplane crashes should be prepared and filed by Pa'ina at this time, and it also alleges that Pa'ina's facility should be "hardened" to better withstand an airplane crash. Both of these allegations are beyond the scope of this licensing proceeding. Safety Contention #7 should be dismissed.

IV. PA'INA'S UTILIZATION OF AND RELIANCE UPON THE FORMAL, COMPREHENSIVE, AND DETAILED PART 36, WHICH SET THE PARAMETERS FOR FUTURE IRRADIATORS, SHOULD BE ACKNOWLEDGED AS ALTOGETHER PROPER AND LAWFUL.

Pa'ina carefully utilized and sought to follow the comprehensive provisions of Part 36, which governs irradiators. Based upon its confidence in the use of sealed, non-dispersible radiation sources, the NRC rejected the notion of a case-by-case review of each and every irradiator which came down the line. Instead, the NRC intended for its Part 36 regulations to apply uniformly to all irradiators and their siting.

The Staff strictly followed the NRC's 1993 directions, and its parameters regarding the siting of Pa'ina's irradiator. In doing so, the Staff protected the public and the environment to the greatest extent possible.

The Board's admission of Petitioner's three contentions contradicts the NRC's express language and purposes of Part 36

√(and Sec. 51.22). If allowed to stand, the Board's January 24, 2006 Order and its March 24, 2006 Order would certainly fragment the NRC's formal regulatory scheme for irradiators.

As a consequence, there would be no predictable risk in undertaking an irradiator venture, and neither Pa'ina nor any other proposed irradiator owner/investor could have confidence in the NRC's regulations.

V. CONCLUSION.

10 C.F.R. §36.13 states that:

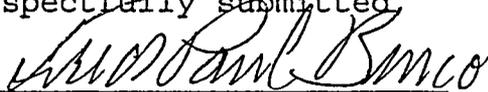
"The Commission will approve an application for a specific license for the use of licensed material in an irradiator if the applicant meets the requirements contained in this section."

Pa'ina filed its Application in reliance upon, and in fulfillment of, these Part 36 provisions.

Therefore, the Commission should reverse the Board's rulings admitting Concerned Citizens' two Environmental Contentions and its Safety Contention #7, and the Commission should deny the Petition in its entirety.

DATED: Honolulu, Hawaii July 3, 2006.

Respectfully submitted,



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

+ + + + +

ATOMIC SAFETY AND LICENSING BOARD
(ASLB)

+ + + + +

TELECONFERENCE

_____]
In the Matter of: ||

PA'INA HAWAII, LLC || Docket No.030-36974

_____]

Wednesday,

April 26, 2006

The above-entitled matter came on for hearing,
pursuant to notice, at 3:00 p.m.

BEFORE:

THE HONORABLE THOMAS S. MOORE, Chairman

THE HONORABLE PAUL B. ABRAMSON,

Administrative Law Judge

THE HONORABLE ANTHONY J. BARATTA,

Administrative Judge

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EXHIBIT A

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1 being clearly not the case, the expedient way is for
2 the Staff to get cracking and if the Applicant wants
3 to do something on this path, it should be in contact
4 with the Staff and work with them on it. Same thing
5 on the environmental.

6 Normally, the Applicant would do its own
7 environmental report and that would get submitted and
8 reviewed by the Staff. That not being the situation
9 here, Staff should engage the Applicant to the extent
10 it feels it has something to contribute.

11 MS. BUPP: And we certainly will do that,
12 Your Honor, and if the Applicant has any information
13 or any analyses that they had done and they would like
14 to share them with the Staff, we would certainly
15 welcome that and welcome the opportunity to evaluate
16 those.

17 JUDGE MOORE: Ms. Bupp, the schedule that
18 the Staff has committed, recognizing that the
19 unforeseen is the unforeseen, can you give us a degree
20 of confidence in how that schedule will hold?

21 MS. BUPP: We have based, as I said in the
22 cover letter transmitting the schedule, the Staff has
23 based the schedule for completion of an EA on the
24 minimal amount of time that we would -- the minimal
25 amounts of time under our generic schedule for

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1 materials and environmental analyses. Because we
2 don't normally do EAs for irradiator licenses, we have
3 used the generic schedule.

4 So we've given a schedule that we believe
5 is as certain as possible, of course, there are always
6 unforeseen circumstances, but we feel fairly confident
7 with the schedule.

8 JUDGE MOORE: I think to avoid the Board
9 having to issue multiple scheduling orders, we will
10 take the Staff schedule and we'll key things to after
11 the filing of the EA and after the Staff completes the
12 SER and that will avoid then the Board having to issue
13 multiple scheduling orders. So when we issue a
14 scheduling order, it will only contain a few dates
15 certain. The rest will all be keyed to Staff action
16 dates.

17 MS. HENKIN: Your Honor, if I might, this
18 is David Henkin. The only concern that the Intervenor
19 would have with respect to that, and I certainly think
20 that that is a very understandable and probably under
21 the circumstances a wise way to proceed because of the
22 number of safety and environmental issues, some that
23 are pretty unique to this site.

24 The one concern that we have and this is
25 also reflected in the joint submission from the Staff

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CERTIFICATE OF SERVICE

I hereby certify that copies of (1) "APPLICANT PA'INA HAWAII, LLC'S NOTICE OF APPEAL OF LBP-06-04 AND LPB-06-12" and (2) "APPLICANT PA'INA HAWAII, LLC'S BRIEF IN SUPPORT OF APPEAL" in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this 3rd day of July, 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
Mail Stop: T-3-F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(e-mail: tsm2@nrc.gov)

Dr. Anthony J. Baratta
Administrative Judge
Atomic Safety and Licensing Board
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Administrative Judge
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DATED: Honolulu, Hawaii, July 3, 2006


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July 3, 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
(1) Applicant Pa'ina Hawaii, LLC's
Notice Of Appeal Of LBP-06-04
And LBP-06-12
(2) Applicant Pa'ina Hawaii, LLC's
Brief In Support Of Appeal From
LBP-06-04 and LBP-06-12

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 both of the above documents.

Both of these documents were e-mailed to your office and to all parties on the Certificate of Service on this date. Hard copies were also mailed to each of the parties on this date.

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. Thank you.

Very respectfully yours,


Fred Paul Benco

Encls.

cc: All parties on Certificate of
Service