

July 14, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S RESPONSE TO APPLICANT PA'INA HAWAII, LLC'S BRIEF IN
SUPPORT OF APPEAL FROM LBP-06-04 AND LBP-06-12 DATED JULY 3, 2006

INTRODUCTION

On July 3, 2006,¹ the applicant, Pa'ina Hawaii, LLC ("Pa'ina" or "the Applicant") filed "Applicant Pa'ina Hawaii, LLC's Notice of Appeal of LBP-06-04 and LBP-06-12" ("Notice of Appeal") and "Applicant Pa'ina Hawaii, LLC's Brief in Support of Appeal from LBP-06-04 and LBP-06-12" ("Appeal Brief")(collectively, "Appeal"). The Appeal, filed pursuant to 10 C.F.R. § 2.311, is untimely. The NRC staff ("Staff") hereby files its opposition to Pa'ina's Appeal and respectfully requests that it be dismissed. Should the Commission determine to accept review of these issues in spite of the procedural deficiencies in the Applicant's Appeal, the Staff maintains that Safety Contention 7 (the sole remaining contention in the proceeding) was improperly admitted and that the entire proceeding should be dismissed.

BACKGROUND

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

¹ The notice of appeal and accompanying brief were served via electronic mail, which arrived after 5:00 p.m Eastern Daylight Time. For this reason, pursuant to 10 C.F.R. § 2.306, the Staff has added one business day to the response date.

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

Following designation of the Board in this proceeding on October 13, 2005,² and a series of responses from Pa'ina and the Staff, and resolution of procedural issues, the Board issued two orders regarding admission of contentions. In LBP-06-04,³ the Board found that Concerned Citizens had standing to intervene and admitted two of its proffered contentions, Environmental Contention 1, alleging that the Staff failed to consider whether there are special circumstances at the proposed location of the irradiator that would preclude the application of the categorical exclusion from NEPA analysis in 10 C.F.R. § 51.2 (c)(14)(vii), and Environmental Contention 2, alleging that there are special circumstances, namely the potential risk at the proposed location from hurricanes, tsunamis, and airplane crashes, precluding the application of the categorical exclusion. *Pa'ina Hawaii, LLC*, LBP-06-04, 63 NRC at 108-15. In LBP-06-12,⁴ the Board admitted three additional contentions, Safety Contention 4, alleging that the application did not describe emergency procedures for accidents involving a prolonged loss of electricity; Safety Contention 6, alleging that the application did not describe emergency procedures for events involving natural phenomena; and Safety Contention 7, alleging that the

² "Establishment of Atomic Safety and Licensing Board," October 13, 2005.

³ *Pa'ina Hawaii, LLC* (Material License Application), LBP-06-04, 63 NRC 99 (2006).

⁴ *Pa'ina Hawaii, LLC* (Material License Application), LBP-06-12, 63 NRC 403 (2006)

application does not address the likelihood and consequences of an airplane crash as the proposed facility. *Pa'ina Hawaii, LLC*, LBP-06-12, 63 NRC at 412-15 and 416-20.

Following issuance of LBP-06-12, Pa'ina jointly appealed both LBP-06-04 and LBP-06-12. "Applicant Pa'ina Hawaii's Notice of Appeal of LBP-06-04 and LBP-06-12 and Accompanying Brief," April 4, 2006. However, although the appeal was filed pursuant to 10 C.F.R. §2.311(c), the appeal only addressed the admission of Environmental Contentions 1 and 2 and Safety Contention 7. Therefore, the Commission dismissed the appeal as facially deficient because it failed to argue that the petition should have been wholly denied, but noted that Pa'ina may "renew its challenge to the admission of the three contentions later in this proceeding, once the Board has issued its Initial Decision." *Pa'ina Hawaii, LLC* (Material License Application), CLI-06-13, 63 NRC __ (2006).

After the Board had admitted Environmental Contentions 1 and 2, the parties entered into discussions toward a settlement of the environmental issues. Eventually, the Staff and Concerned Citizens entered a joint motion to dismiss Environmental Contentions 1 and 2 pursuant to a joint stipulation under which the NRC will complete an Environmental Assessment (EA) for the proposed irradiator and will hold an additional public meeting in Honolulu, Hawaii after publishing a draft EA. Although Pa'ina opposed both the motion to dismiss and the joint stipulation, the Board accepted the stipulation and dismissed both Environmental Contention 1 and Environmental Contention 2. "Order (Confirming Oral Ruling Granting Motion to Dismiss Contentions)," April 27, 2006.⁵

Safety Contentions 4 and 6 were also subsequently dismissed. Both contentions alleged omissions in Pa'ina's application. Specifically, Safety Contentions 4 and 6 alleged that the application lacked required emergency procedure outlines related to prolonged losses of

⁵ This Order is the subject of an appeal by Pa'ina currently pending before the Commission.

electrical power and emergencies caused by natural phenomena, respectively. After Pa'ina submitted additional information on the procedures to be followed in the event of a prolonged loss of electrical power or an emergency caused by a natural phenomenon, the Board granted a motion to dismiss filed by Pa'ina to dismiss Safety Contentions 4 and 6. "Applicant Pa'ina Hawaii, LLC's Motion to Dismiss Safety Contentions #4 and #6," April 19, 2006; "Memorandum and Order (Ruling on Admissibility of Two Amended Contentions)," June 22, 2006.

Pa'ina's Appeal followed. In its supporting brief, Pa'ina argues against the admission of Safety Contention 7, as well as Environmental Contentions 1 and 2, despite the fact that, as noted above, both environmental contentions have been dismissed. The Appeal alleges that all three contentions are closely related,⁶ and, therefore, presents arguments against their admission as a group. However, only Safety Contention 7 remains an active contention. With regard to Safety Contention 7, the Applicant argues that it is an impermissible attack on the NRC's regulations and that Concerned Citizens has not presented a sufficient legal or factual basis for the contention.⁷

DISCUSSION

The Applicant's appeal states that it is filed pursuant to 10 C.F.R. § 2.311(c), which states that a Board order granting a petition to intervene or a request for a hearing may be

⁶ In fact, the Appeal treats "all three contentions as if they were identical." This is inaccurate. While it is true that both environmental contentions concern the application of the NRC's regulations concerning categorical exclusions from NEPA analysis, there are differences between the two, as stated above. Safety Contention 7 does not concern the Staff's NEPA analysis, nor does it, as the Applicant states in the Appeal, concern the procedures to be followed in the event of an airline crash as the facility. Appeal at 27. Rather, as stated above, Safety Contention 7 alleges that the application should have included an analysis of the probability of an air crash as the facility and the likely effects of such a crash.

⁷ The Staff notes that when Safety Contention 7 was initially submitted, the Staff opposed its admission on the basis that the analysis of airplane crash probabilities and consequences allegedly missing from the application is not required by law or regulation, and is, therefore, a collateral attack on the NRC's regulations. "Staff Response to Request for Hearing by Concerned Citizens of Honolulu," at 11, October 28, 2005.

appealed “by a party other than the requestor [or] petitioner on the question as to whether the request/petition should have been wholly denied.” Such appeal must, however, be filed within 10 days after service of the order granting the petition or request. 10 C.F.R. § 2.311(a).

Pa’ina’s Appeal, filed on July 3, 2006, therefore, is inexcusably late. The timeframes for appeal were made clear to Pa’ina at each juncture of the proceeding. The Board, in LBP-06-12, specifically stated that any party could appeal both LBP-06-12 and LBP-06-04 pursuant to 10 C.F.R. § 2.311 by April 3, 2006. *Pa’ina Hawaii, LLC*, LBP-06-1, 63 NRC at 423-24. Pa’ina did, in fact, appeal LBP-06-04 and LBP-06-12 in a timely manner. The Commission, however, rejected that appeal because it only addressed the admissibility of Environmental Contentions 1 and 2 and Safety Contention 7 and neglected to discuss the admissibility of Safety Contentions 4 and 6, thus failing to argue that the petition should have been wholly denied as required by 10 C.F.R. § 2.311(c). Now that Safety Contentions 4 and 6 have been dismissed, Pa’ina has renewed its appeal of the other contentions.⁸ However, the time to appeal the admission of any contentions pursuant to 10 C.F.R. § 2.311 has expired, based on a plain reading of the regulations.

Appeal under § 2.311 is available only within 10 days of an order on a request for a hearing or a petition to intervene. The last decision on Concerned Citizens’ petition to intervene, LBP-06-12, was issued on March 24, 2006. If Pa’ina somehow misunderstood the regulatory language, the Commission’s directions in CLI-06-13 should have left no doubt as to the timing for appeals. As the Commission stated in dismissing Pa’ina’s initial appeal of LBP-06-04 and LBP-06-12, Pa’ina’s next chance to raise the issue of the admission of contentions is,

⁸ In addition to dismissing Safety Contentions 4 and 6, the Board has also dismissed Environmental Contentions 1 and 2, rendering the issue of their original admission moot. See “Order (Confirming Oral Ruling Granting Motion to Dismiss Contentions),” April 27, 2006; “Memorandum and Order (Ruling on Admissibility of Two Amended Contentions),” June 22, 2006.

pursuant to 10 C.F.R. § 2.341(b)(1), following issuance of the Board's Initial Decision, which has not yet occurred in the instant proceeding. *Pa'ina Hawaii, LLC*, CLI-06-13, 63 NRC ___, *slip op.* at 2 (2006). No Initial Decision has been issued in this proceeding, and, therefore, Pa'ina has not yet reached the point that the Commission explicitly stated is Pa'ina's next opportunity to raise these issues.

Pa'ina states that its appeal was triggered by the Board's dismissal of Contentions 4 and 6. However, the Order dismissing the two contentions is neither a decision on a hearing request or petition to intervene nor an Initial Decision on the merits. Therefore, the Order triggers neither an appeal pursuant to 10 C.F.R. § 2.311 nor an appeal pursuant to 10 C.F.R. § 2.341(b)(1). At this stage of the proceeding, the only avenue open for appeal is a request for interlocutory review pursuant to 10 C.F.R. § 2.341(f)(2), but Pa'ina has not even attempted to address the requirements for a request for interlocutory review to be accepted. Neither is it obvious on the face of the Appeal Brief how the issues Pa'ina raises could meet the requirements for an interlocutory review, namely, that the party seeking review demonstrate that the issue to be reviewed (1) threatens an immediate and irreparable adverse impact or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. Because Pa'ina's request for review pursuant to 10 C.F.R. § 2.311 is neither timely nor proper, it should not be granted.

However, the Commission may, in its discretion, grant interlocutory review, despite the fact that Pa'ina has not specifically requested interlocutory review pursuant to 10 C.F.R. § 2.341(f)(2) because a reversal of the Board's decision admitting Safety Contention 7, the sole remaining contention in the proceeding, would affect the basic structure of the proceeding. Should the Commission grant interlocutory review with respect to Safety Contention 7, the contention should be dismissed. Pa'ina argues in its Appeal that Safety Contention 7 is an

attack on the NRC's regulations. Appeal at 11-13. As the Appeal notes, the NRC, in promulgating the 10 C.F.R. Part 36 regulations applicable to irradiators, considered placing siting restrictions on irradiators. *Id.* at 11. However, the NRC ultimately determined that "in general, irradiators can be located anywhere that local governments would permit an industrial facility to be built," including near an airport. 58 Fed. Reg. 7715, 7726 (Feb. 2, 1993). The NRC has already considered the concerns raised by Safety Contention 7, and determined that such concerns do not warrant further regulation limiting the locations in which irradiators can be constructed. Because Safety Contention 7 alleges that the license application should have included an analysis of aircraft crash probabilities and consequences, a concern rejected by the NRC, the contention is an attack on the Commission's regulations and should, if the Commission takes interlocutory review, be dismissed.⁹

CONCLUSION

Pa'ina's Appeal, as filed pursuant to 10 C.F.R. § 2.311, is both impermissible and untimely. Therefore, the Applicant's Appeal should be dismissed. However, should the Commission, in its discretion, grant interlocutory review, the Commission should find that Safety Contention 7 should not have been admitted and that, as the sole remaining contention in this proceeding, the contention, and this proceeding, should be dismissed.

Respectfully submitted,

/RA/

Margaret J. Bupp
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 14th day of July, 2006

⁹ In the Staff's view, the above argument is dispositive, and so the Staff has not addressed other arguments put forth by the Applicant.

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In the Matter of

PA'INA HAWAII, LLC

(Honolulu, Hawaii Irradiator)

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Docket No. 30-36974-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO APPLICANT PA'INA HAWAII, LLC'S BRIEF IN SUPPORT OF APPEAL FROM LBP-06-04 AND LBP-06-012 DATED JULY 3, 2006" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 14th day of April, 2006.

Administrative Judge * **

Thomas S. Moore, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-Mail: tsm2@nrc.gov

Administrative Judge * **

Anthony J. Baratta
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-Mail: ajb5@nrc.gov

Administrative Judge * **

Paul Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-Mail: pba@nrc.gov

Office of Commission Appellate Adjudication*

U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555

David L. Henkin, Esq. **

D. Kapua'ala Sproat, Esq.
Earthjustice

223 South King Street, Suite 400
Honolulu, HI 96813
E-mail: dhenkin@earthjustice.org
ksproat@earthjustice.org

Office of the Secretary * **

ATTN: Rulemakings and Adjudication Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
E-mail: HEARINGDOCKET@nrc.gov

Michael Kohn, President
Pa'ina Hawaii, LLC
P.O. Box 30542
Honolulu, HI 96820

Fred Paul Benco **
The Law Offices of Fred Paul Benco
Suite 3409 Century Square
1188 Bishop Street
Honolulu, HI 96813
E-mail: fpbenco@yahoo.com

/RA/

Margaret J. Bupp
Counsel for the NRC Staff