

January 9, 2007 (8:53am)

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSIONOFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

## BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANT PA'INA HAWAII, LLC'S  
MOTION TO DISMISS SAFETY CONTENTION #7

## I. PROCEDURAL BACKGROUND.

By means of this Motion, Applicant Pa'ina Hawaii, LLC requests that the ASLB dismiss as "moot" the last remaining issue in this case, i.e., Intervenor's Safety Contention #7.

This case arose from the Application for a Material's License for installation of radioactive materials into a pool-type industrial irradiator. The Application was filed by Pa'ina Hawaii, LLC ("Pa'ina") 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 also stated that Pa'ina's irradiator qualified for "categorical exclusion." (Id.)

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

On October 26, 2005 Pa'ina filed its "Answer To Request for Hearing By Concerned Citizens Of Honolulu." On October 28, 2005 the NRC Staff ("Staff") filed its "Staff Response To Request For Hearing By Concerned Citizens Of Honolulu." 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 ASLB 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 ASLB found that Concerned Citizens had standing herein, and that Concerned Citizens had alleged two (2) Environmental Contentions which were admissible.<sup>1</sup> See Memorandum and Order (Ruling On Petitioner's Standing And Environmental Contentions), LBP-06-04, 63 NRC 1 (January 24, 2006)

Later, and more pertinent for purposes of this Motion to Dismiss, the ASLB issued its second Memorandum and Order dated March 24, 2006 (LBP-06-12), which addressed the Safety

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<sup>1</sup> The ASLB found that the two admissible Environmental Contentions were: (1) the Staff's failure to demonstrate why a "categorical exclusion" was appropriate where Applicant's site was near an airport, and allegedly subject to tsunamis, hurricanes and flooding; and (2) "special circumstances" are present which require an environmental assessment or an environmental impact statement. (January 24, 2006 Memorandum and Order, at Page 5.) The ASLB acknowledged that the two NEPA contentions were intertwined, raised "substantially similar" issues, and might be consolidated into one. Id., at 6.

Contentions of Concerned Citizens. In that Order, the ASLB found that Concerned Citizens' Safety Contentions #4, #6 and #7 were admissible, while the remaining safety contentions were dismissed. See Memorandum and Order (Ruling On Petitioner's Safety Contentions), LBP-06-12, 63 NRC \_\_ (March 24, 2006)

Safety Contention #4 alleged by Concerned Citizens claimed that Pa'ina's Application contained no emergency safety measures should a power loss befall Pa'ina's irradiator. Safety Contention #6 alleged that the Application contained no emergency safety measures in case of natural disasters. Safety Contention #7 alleged that the Application contained no discussion of the "likelihood and consequences of an aircraft crash involving the Applicant's proposed facility."

Subsequently, Pa'ina filed appropriate outlines of emergency safety measures which addressed both power losses (Safety Contention #4) and natural disasters (Safety Contention No. 6). Consequently, on June 22, 2006 this ASLB dismissed those two safety contentions as "moot" because the submission of the emergency procedures cured the contention.

The ASLB's June 22, 2006 Memorandum and Order left Safety Contention #7 as the only pending safety contention remaining in this matter.

Safety Contention #7 should now be dismissed because the NRC Staff (through an outside contractor) has now filed its Safety Topical Report ("STR") addressing the "likelihood and consequences of an aircraft crash involving the Applicant's proposed facility." That STR has been given ADAMS Accession Number ML063560344. The STR analyzes in technical detail the likelihood and consequences of an aircraft crash involving the Applicant's irradiator site.<sup>2</sup>

In light of the completion of the STR, Applicant Pa'ina now asks the ASLB to dismiss Safety Contention #7 on the grounds of "mootness" as the study cured the contention.

## II. THE LAW SUPPORTS DISMISSAL OF CONTENTION #7 ON THE GROUNDS OF "MOOTNESS."

Where there are no longer justiciable issues, the claims underlying those issues are generally dismissed on the grounds of "mootness." See, e.g., Nuclear Energy Inst., Inc. v. EPA, 362 U.S.App.D.C. 204, 373 F.3d 1251 (D.C.Cir. 2004); Limerick Ecology Action, Inc. v. United States Regulatory Commission, 869 F. 2d 719 (3<sup>rd</sup> Cir. 1989); In The Matter Of USEC Inc. (American Centrifuge Plant), CLI-06-09 (April 3, 2006); see generally Nevada v. Watkins, 943 F.2d 1080 (9<sup>th</sup> Cir. 1991)

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<sup>2</sup> The STR is highly technical and wide-ranging, and is in all likelihood beyond the technical expertise of Applicant. Consequently, insofar as is appropriate, Applicant incorporates the completed STR as part and parcel of its Application.

The Nuclear Regulatory Commission has recently held that where a license application was under consideration, opponents' contentions were rendered "moot" when subsequent, superseding documents or studies were filed with the NRC. The NRC declared:

"It is well-recognized that where a contention based on an applicant's environmental report is 'superseded by the issuance of licensing-related documents'-whether an environmental impact statement or an applicant's response to a request for additional information-the contention must be 'disposed of or modified.'" Thus, where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the NRC Staff in an environmental impact statement, the contention is 'moot.'" Id., at 13-14.

In accord with the above rationale of the NRC, the highly-technical and wide-ranging Safety Topical Report (STR) has now been submitted to the NRC, and it has been placed on the ADAMS Accession system. The STR concludes, conservatively, that there would be but one aircraft accident involving Applicant's site every 5,000 years. Furthermore, the STR concludes that even in the unlikely event of an aircraft accident, the loss of control of radioactive material is "negligible."

In light of the STR, its analysis and its conclusions, Safety Contention #7 ought to be dismissed as "moot."

III. CONCLUSION.

For the reasons stated herein, and also based upon the earlier filings of all the parties to this case, this ASLB ought to dismiss Safety Contention #7 on the grounds of "mootness."

DATED: Honolulu, Hawaii, January 8, 2007.

A handwritten signature in cursive script, reading "Fred Paul Benco", written in black ink.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT PA'INA HAWAII, LLC'S MOTION TO DISMISS SAFETY CONTENTION #7" in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this 8<sup>th</sup> day of January, 2007. Additional service has also been made this same day by electronic mail as shown below:

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DATED: Honolulu, Hawaii, January 8, 2007



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January 8, 2007

Office of the Secretary  
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ATTN: Rulemakings and Adjudication Staff  
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Also Via E-Mail: HEARING DOCKET@nrc.gov

Re: Docket No. 030-36974  
ASLBP No. 06-843-01-ML  
Applicant Pa'ina Hawaii, LLC's  
Motion To Dismiss Contention #7

Dear Secretary:

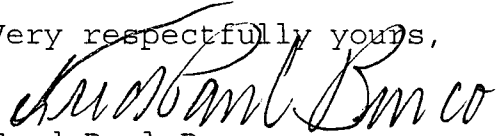
I represent the legal interests of Pa'ina Hawaii, LLC, which has applied for a Materials License.

Pursuant to your regulations, please find enclosed an original and two (2) copies of the above document.

This document was 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](mailto:fpbenco@yahoo.com). Thank you.

Very respectfully yours,

  
Fred Paul Benco

Encl.

cc: All parties on Certificate of  
Service