

January 19, 2007

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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

INTRODUCTION

On January 8, 2007 the applicant, Pa'ina Hawaii, LLC ("Pa'ina") filed "Applicant Pa'ina Hawaii, LLC's Motion to Dismiss Safety Contention #7" ("Motion to Dismiss").<sup>1</sup> Although, as discussed below, there are procedural irregularities with the Motion to Dismiss, because Safety Contention #7 is now moot, the Staff agrees that the Motion to Dismiss should be granted.

PROCEDURAL BACKGROUND

Pa'ina filed an application with the NRC on June 23, 2005, for a license for possession and use of byproduct material in connection with a proposed irradiator to be constructed and operated at the Honolulu International Airport in Honolulu, Hawaii. On October 3, 2005, Concerned Citizens of Honolulu ("Concerned Citizens") filed a request for a hearing. The Atomic Safety and Licensing Board ("Board") determined that Concerned Citizens has standing and admitted several contentions, including Safety Contention #7, "asserting that the application fails to analyze aircraft crash probabilities and consequences."<sup>2</sup>

<sup>1</sup> The Motion to Dismiss was served on the parties via electronic mail on January 8, 2007, and counsel for the NRC Staff ("Staff") received the Motion to Dismiss at 9:51 p.m. Eastern Standard Time. Pursuant to 10 C.F.R. § 2.306, one additional business day has been added to the response date.

<sup>2</sup> The Board also admitted two additional safety contentions, Safety Contention #4 and Safety Contention #6, and two environmental contentions, Environmental Contention #1 and Environmental Contention #2. See *Pa'ina Hawaii, LLC*, LBP-06-4, 63 NRC at 112-13; *Pa'ina Hawaii, LLC*, LBP-06-12, 63 NRC at 412-15 and 416-18. Both environmental contentions were dismissed pursuant to a settlement continued on next page

*Pa'ina Hawaii, LLC* (Material License Application), LBP-06-4, 63 NRC 99 (2006) (ruling on standing); *Pa'ina Hawaii, LLC* (Material License Application), LBP-06-12, 63 NRC 403, 420 (2006) (admitting Safety Contention #7).

Pursuant to a settlement agreement between the Staff and Concerned Citizens, the Staff prepared a draft environmental assessment (EA) and finding of no significant impact (FONSI). The EA includes a discussion of the probability of an aircraft crash into the proposed facility,  $2.1 \times 10^{-4}$  or once every 5,000 years, and evaluates the potential impacts of an aircraft crash, finding that a crash will have no significant impact on the public health and safety.

“Draft Environmental Assessment Related to the Proposed Pa'ina Hawaii, LLC Underwater Irradiator in Honolulu, Hawaii,” December 21, 2006. The finding in the EA is based on a report prepared by the Center for Nuclear Waste Regulatory Analyses, “Draft Topical Report on the Effects of Potential Natural Phenomena and Aviation Accidents at the Proposed Pa'ina Hawaii, LLC Irradiator Facility,” December 2006 (“Safety Topical Report”). Based on the information contained in the Safety Topical Report, Pa'ina filed its Motion to Dismiss on January 8, 2007.

#### DISCUSSION

The Motion to Dismiss is based on information contained in the Safety Topical Report, which was disclosed to counsel for Pa'ina and Concerned Citizens on January 4, 2007.<sup>3</sup>

See “Letter from Margaret J. Bupp to Administrative Judges Enclosing an Update to the Hearing File Index and the Affidavit of B. Jennifer Davis,” January 4, 2007. Thus, pursuant to 10 C.F.R. § 2.323(a), which provides that a “motion must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises”, the Motion to Dismiss is timely.

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agreement between the Staff and Concerned Citizens. Order (Confirming Oral Ruling Granting Motion to Dismiss Contentions), April 27, 2006. Safety Contention #4 and #6, which argued that the application did not include certain procedures required by regulation, were dismissed after the Applicant submitted the omitted procedures. Memorandum and Order (Ruling on Admissibility of Two Amended Contentions), June 22, 2006.

<sup>3</sup> The Safety Topical Report was first placed on ADAMS on December 22, 2006. See Order, January 10, 2007 (establishing time limits for filing late-filed contentions based on the EA or Safety Topical Report). However, it was not released to the public until January 1, 2006, and the ADAMS accession number for the document was provided to counsel for Pa'ina and counsel for Concerned continued on next page

However, pursuant to 10 C.F.R. § 2.323(b), a “motion must be rejected if it does not include a certification by the attorney [for] the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion.”

The Motion to Dismiss includes no such certification<sup>4</sup>, and, therefore, does not comply with the requirement of 10 C.F.R. § 2.323(b).

However, regardless of any procedural defects in the Motion to Dismiss, Safety Contention #7 is now moot. Safety Contention #7, as admitted is a contention of omission. *Pa’ina Hawaii, LLC*, LBP-06-12, 63 NRC at 418. It argues that the application omits a necessary analysis, namely, an analysis of the likelihood and consequences of an aircraft crash at the proposed irradiator facility. *Id.* The EA and Safety Topical Report include an analysis of the probability of an aircraft crash at the proposed facility and discuss expected impacts from an aircraft crash. EA at 8-9; Safety Topical Report at 2-5 to 2-13. When “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 Staff . . . the contention is moot.” *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002); *see also* Memorandum and Order (Ruling on Admissibility of Two Amended Contentions) at 15, June 22, 2006. Here, because the EA and Safety Topical Report provide the information allegedly omitted from the application, Safety Contention #7 no longer states any issue in controversy and is, therefore, moot.

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Citizens through a hearing file update submitted the next business day, January 4, 2006.

<sup>4</sup> Counsel for Pa’ina did contact counsel for the Staff and raised the possibility that Pa’ina might file a motion to dismiss Safety Contention #7 based on the EA, but did not contact counsel for the Staff after determining to file such a motion and never discussed the substance of the ultimate Motion to Dismiss with counsel for the Staff.

Thus, Pa'ina's Motion to Dismiss should be granted. In addition, because Safety Contention #7 was the only remaining contention at issue, the above-captioned proceeding should also be dismissed.<sup>5</sup>

CONCLUSION

Because Safety Contention #7 is now moot, the Staff respectfully requests that the Motion to Dismiss be granted and that the above-captioned proceeding be dismissed.

Respectfully Submitted,

***/RA by Margaret J. Bupp/***

Margaret J. Bupp  
Counsel for the NRC Staff

Dated at Rockville, Maryland  
this 19<sup>th</sup> day of January, 2007

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<sup>5</sup> As provided in the settlement agreement, the Staff is holding a public meeting in Honolulu on February 1, 2006 to solicit public comments on the EA, which will complete actions under the settlement agreement. Dismissing the current proceeding will not prevent Concerned Citizens, should they so choose, from attempting meet the criteria for admission of a late-filed contention based on the sufficiency and accuracy of new information in the EA or the Safety Topical Report. See *McGuire and Catawba*, CLI-02-28, 56 NRC at 383; Order, January 10, 2007 (establishing time limits for filing late-filed contentions based on the EA or Safety Topical Report).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO APPLICANT PA'INA HAWAII, LLC'S MOTION TO DISMISS SAFETY CONTENTION #7" 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 19<sup>th</sup> day of January, 2007.

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