

June 27, 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 INTERVENOR CONCERNED
CITIZENS OF HONOLULU'S AMENDED SAFETY CONTENTIONS #13 AND #14

INTRODUCTION

On June 1, 2007, the intervenor, Concerned Citizens of Honolulu ("Concerned Citizens" or "Intervenor"), submitted amendments to previously filed Safety Contentions #13 and #14 based on the "Final Topical Report on the Effects of Potential Aviation Accidents and Natural Phenomena at the Proposed Pa'ina Hawaii, LLC, Irradiator Facility" ("Final Topical Report").¹ The Final Topical Report was prepared by the Center for Nuclear Waste Regulatory Analysis (CNWRA) for the Staff's environmental review of Pa'ina Hawaii, LLC's ("Applicant") application for a license under 10 C.F.R. Part 36 for possession and use of a sealed source in connection with the construction and operation of a commercial irradiator at the Honolulu International Airport. As explained further below, the Staff does not oppose the admission of the portion of Safety Contention #13 related to the calculation of the probability of an airplane crash at the proposed irradiator. However, neither the remainder of amended Safety Contention #13 nor amended Safety Contention #14 is admissible.

¹ "Intervenor Concerned Citizens of Honolulu's Amended Safety Contentions #13 and #14," June 1, 2007 ("Amended Contentions"). The Amended Contentions were served via electronic mail and were received after 5:00 p.m. Eastern Daylight Time. Thus, the NRC staff ("Staff") added one day to the response date. 10 C.F.R. § 2.305.

BACKGROUND

The Amended Contentions were filed after the Staff made available the Final Topical Report. Both the Final Topical Report and an earlier Draft Topical Report² were prepared in support of the Staff's preparation of an environmental assessment (EA) of the irradiator application. Pursuant to 10 C.F.R. § 51.22(c)(14)(vii), irradiators are categorically excluded from the Staff's obligations under the National Environmental Policy Act (NEPA). However, as part of a settlement agreement between the Staff and Concerned Citizens, the Staff agreed to prepare an EA for the proposed irradiator. A draft EA was issued for public comment on December 21, 2006, and Concerned Citizens filed contentions based on the draft EA on February 9, 2007.³ The Staff released the Final Topical Report on May 8, 2007. Based on the information contained in the Final Topical Report, Concerned Citizens filed amendments to two of its February 9 Contentions, Safety Contention #13 and Safety Contention #14. Although the Staff does not object to the admission of the portion of Safety Contention #13 related to the calculation of the probability of an airplane crash at the planned irradiator, as explained below, the remainder of amended Safety Contention #13 and amended Safety Contention #14 are inadmissible.

DISCUSSION

The requirements for an admissible contention are set out at 10 C.F.R. § 2.309(f)(1) and have been discussed at length in prior filings by all parties in the instant proceeding. Each contention must include: (1) a specific statement of the issue of law or fact to be raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue raised in the contention is within the scope of the proceeding; (4) a demonstration that the issue raised

² "Draft Topical Report on the Effects of Potential Natural Phenomena and Aviation Accidents at the Proposed Pa'ina Hawaii, LLC Irradiator Facility," December 2006.

³ "Intervenor Concerned Citizens of Honolulu's Contentions Re: Draft Environmental Assessment and Draft Topical Report," February 9, 2007 ("February 9 Contentions").

in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) a concise statement of the alleged facts or expert opinions which support the requestor's position; and (6) sufficient information to show that a genuine dispute exists on a material issue of law or fact, including references to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute or the identification of each failure to include necessary information in the application and the supporting reasons for the petitioner's belief. 10 C.F.R. § 2.309(f)(1).

There are additional admissibility factors for late-filed contentions. These are: (1) good cause, if any, for failure to file on time; (2) the nature of the requestor's right under the Atomic Energy Act of 1954, as amended to be made a party to the proceeding; (3) the nature and extent of the requestor's property, financial or other interest in the proceeding; (4) the possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest; (5) the availability of other means whereby the requestor's/petitioner's interest will be protected; (6) the extent to which the requestor's/petitioner's interests will be represented by existing parties; (7) the extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and (8) the extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record. 10 C.F.R. § 2.309(c)(1). Although all eight factors are to be considered in admitting untimely contentions, good cause is the first and foremost of the factors. *Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2)*, CLI-86-8, 23 NRC 241, 244 (1986). The absence of good cause requires a strong showing on the remaining factors.

I. Amended Safety Contention #13

Concerned Citizens' original Safety Contention #13 concerned both the Staff's calculation of the probability and analysis of the consequences of an airplane crash at the proposed irradiator presented in the Draft Topical Report. The Staff did not oppose the admission of the portion of original Safety Contention #13 related to the crash probability

calculation, but only because the probability calculation was, as a practical matter, already at issue in the proceeding from an environmental context. See “NRC Staff Response to Intervenor Concerned Citizens of Honolulu’s Contentions Re: Draft Environmental Assessment and Draft Topical Report” at 4, March 12, 2007 (“Staff Draft EA Contention Response”). In amended Safety Contention #13, Concerned Citizens merely restates its objections to the crash probability calculation from the original contention and offers no new information and no new arguments based on the information in the Final Topical Report. Nevertheless, as the Staff did not object to the admission of the portion of original Safety Contention #13 related to the probability calculation, the Staff does not object to the admission of the portion of amended Safety Contention #13 related to the probability calculation.

In amended Safety Contention #13, Concerned Citizens also alleges that the analysis in the Final Topical Report of the consequences of an aircraft crash at the proposed irradiator is inadequate. Amended Contentions at 6. The issues raised with regard to the consequence analysis in original Safety Contention #13 were also raised as part of Environmental Contention #3, and the Staff did not object to the admission of these issues as an environmental contention.⁴ February 9 Contentions at 6-9, 20; Staff Draft EA Contention Response at 4. Here, however, Concerned Citizens has presented its concerns only as a safety issue, and, as a solely safety contention, the portion of amended Safety Contention #13 related to the aircraft crash consequence analysis is inadmissible.

⁴ However, the Staff did object to admitting these issues as a safety contention. Staff Draft EA Contention Response at 4. Because there are different regulatory standards for environmental and safety reviews, an analysis of the consequences of a potential aircraft crashes completed for the Staff’s safety review would differ from the present analysis, which was completed solely for the Staff’s environmental review as a condition of the settlement agreement between the Staff and Concerned Citizens. “NRC Staff Response to Licensing Board’s Jun 6, 2007 Order” at 6 (June 13, 2007) (“June 13 Staff Response”); *see also* “NRC Staff Second Response to the Licensing Board’s April 30, 2007 Order” (May 21, 2007) (“May 21 Staff Response”).

The Staff has maintained that no analysis of the consequences of an aircraft crash is required to be undertaken pursuant to the Staff's review of the safety aspects of the irradiator application. See "Staff Response to Request for Hearing by Concerned Citizens of Honolulu" at 11 (Oct. 29, 2005); see *also* May 21 Staff Response at 3. In contrast to the licensing framework for other types of facilities, the existing regulatory framework for irradiators at 10 C.F.R. Part 36 does not address accidents, natural events, or terrorism. See 10 C.F.R. Part 72, Subpart E (siting evaluation factors for independent spent fuel storage facilities); 10 C.F.R. Part 50, App. A (general design criteria for nuclear power plants). In fact, the Commission specifically considered imposing siting criteria for irradiators, but declined to do so, stating "that, in general, irradiators can be located anywhere that local governments would permit an industrial facility to be built," and, with respect to airplane crashes in particular, "the radiological consequences of an airplane crash at an irradiator would not substantially increase the seriousness of the" crash. 58 Fed. Reg. 7715, 7725-26 (Feb. 9, 1993). Based on the clear intent of the regulation, no analysis of the consequences of an aircraft crash is required pursuant to the regulations in 10 C.F.R. Part 36. Nor is any such analysis required in this instance to comply with 10 C.F.R. § 30.33(a)(2), which requires that the Staff find that an "applicant's proposed equipment and facilities are adequate to protect health and minimize danger to life or property" prior to issuing a license. As explained in the Staff's previous filings, except in the most unusual circumstances, compliance with the specific requirements of 10 C.F.R. Part 36 is sufficient to demonstrate compliance with the more general requirement in 10 C.F.R. § 30.33(a)(2). See May 21 Staff Response at 7-8; see *also* June 13 Staff Response at 1-4. This view is consistent with the guidance the Staff follows in evaluating whether irradiator applications comply with regulations, NUREG-1556, "Consolidated Guidance About Materials Licenses," Vol. 6, "Program Specific Guidance About 10 CFR Part 36 Irradiator Licenses" (1999), which does not include separate criteria for determining compliance with 10 C.F.R. § 30.33(a)(2). Although Concerned Citizens alleges that the consequence analysis in

the Final Topical Report is “too deficient to carry Pa’ina’s burden of demonstrating the safety of its proposed irradiator,” Amended Contentions at 6, the analysis is not necessary to demonstrate the safety of the proposed irradiator because the Commission determined that no siting restrictions are necessary for irradiators, even when located near airports. See 58 Fed. Reg. 7725-26. Because the aircraft consequence analysis at issue in amended Safety Contention #13 is not required by law or regulation, the part of amended Safety Contention #13 concerning that analysis fails to raise a genuine dispute on a material issue of law or fact and, therefore, is inadmissible.

II. Amended Safety Contention #14

Amended Safety Contention #14 is nearly identical to original Safety Contention #14. The Staff opposed admission of original Safety Contention #14 and opposes admission of amended Safety Contention #14 on the same grounds. Both original and amended Safety Contention #14 allege that the Draft Topical Report inadequately analyzes safety risks from natural phenomena. As explained in the Staff Contention Response, original Safety Contention #14 is untimely and, consequently, amended Safety Contention #14 is also untimely and should not be admitted.

Concerned Citizens’ original contentions filed on October 3, 2005,⁵ included Safety Contention #6 regarding the absence from the irradiator application of *procedures* for responding to events caused by natural phenomena.⁶ Hearing Request at 15. Environmental Contention #2 discussed the range of natural phenomena that might affect the proposed irradiator. *Id.* at 20-21. However, neither of these contentions nor any other timely contention

⁵ “Request for Hearing by Concerned Citizens of Honolulu” (October 3, 2005) (“Hearing Request”).

⁶ Safety Contention #6 was dismissed as moot after the Applicant submitted the procedures to the Staff.

addressed the absence of *safety-related analysis* of events caused by natural phenomena.⁷ Although both original and amended Safety Contention #14 are based on the “new” information in the Draft EA and Draft and Final Topical Reports, based on Concerned Citizens’ other contentions, it appears that Concerned Citizens was aware that natural phenomena could affect the proposed irradiator, and the need for a safety analysis of events caused by natural phenomena could and should have been raised at the outset of the proceeding. As also stated in the Staff Draft EA Contention Response, because Concerned Citizens could have raised the need for an analysis of the safety consequences of events caused by natural phenomena in its original Hearing Request but did not, any contention related to such an analysis, even if utilizing new information as part of its supporting information, is not timely. *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-83-19, 17 NRC 1041, 1043 (1983). Although Concerned Citizens addresses the factors at 10 C.F.R. § 2.309(c)(1) to be considered in determining whether late-filed contentions are admissible, it does not provide any good cause for failing to raise any issue related to the need to analyze safety risks from natural phenomena at the outset of the proceeding, as required by 10 C.F.R. § 2.309(c)(1)(i). In addition, admitting Safety Contention #14 will add an entirely new line of inquiry, specifically, the need for and adequacy of the analysis of safety risks from natural phenomena, thus significantly broadening the scope of the proceeding. Concerned Citizens has not made a showing of good cause nor a strong showing on the remaining late-filed contention factors⁸ that justifies admitting Safety Contention #14. Because both original and amended Safety Contention #14 are untimely, neither is admissible.

⁷ In contrast, Concerned Citizens raised issues related to the alleged need for an analysis of the safety-related consequences of an aircraft crash in Safety Contention #7, long before the Staff performed its analysis of the environmental consequences of an aircraft crash documented in the Draft EA and Draft and Final Topical Reports. *Id.* at 15.

⁸ Because Concerned Citizens has already been admitted into the proceeding as a party, the Board earlier determined that factors 2 through 6 and 8 are not applicable. See “Memorandum and Order” (Ruling on Admissibility of Two Amended Contentions), at 12-13 (June 22, 2006).

CONCLUSION

The Staff does not oppose the admission of the portion of Safety Contention #13 related to the calculation of the probability of an airplane crash at the proposed irradiator. However, for the reasons stated above, neither the remainder of amended Safety Contention #13 nor amended Safety Contention #14 is admissible.

Respectfully submitted,

/RA by Margaret J. Bupp/

Margaret J. Bupp
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 27th day of June, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENOR CONCERNED CITIZENS OF HONOLULU'S AMENDED SAFETY CONTENTIONS #13 AND #14" 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 27th day of June, 2007.

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