RAS 14468

OCTOBER 1, 2007

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE SECRETARY

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 ANSWER TO
INTERVENOR CONCERNED CITIZENS OF HONOLULU'S
CONTENTIONS RE: FINAL SAFETY EVALUATION REPORT

CERTIFICATE OF SERVICE

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SECY-02

APPLICANT PA'INA HAWAII, LLC'S ANSWER TO INTERVENOR CONCERNED CITIZENS OF HONOLULU'S CONTENTIONS RE: FINAL SAFETY EVALUATION REPORT

I. PROCEDURAL BACKGROUND REGARDING SAFETY CONTENTIONS.

Pursuant to this Board's May 1, 2006 Order ("2006 Order"), Intervenor CONCERNED CITIZENS OF HONOLULU ("Intervenor") was directed to file any new or amended contentions within thirty (30) days after service of the NRC Staff's Safety Evaluation Report ("SER") upon Intervenor.

On June 21, 2007 this Board issued an Order ("2007 Order") directing Intervenor CONCERNED CITIZENS OF HONOLULU ("Intervenor") to withhold any further challenges until a Final Environmental Assessment and a final Safety Evaluation Report ("SER") were issued.

On August 17, 2007, the NRC Staff issued its final Safety Evaluation Report ("SER") regarding Pa'ina's proposed irradiator.

In accord with the two aforementioned Orders, the Intervenor on September 14, 2007 filed new and/or amended Safety Contentions #15 and #16 challenging the August 17th SER.

This filing is Pa'ina's Answer to Intervenor's September 14, 2007 new and/or amended Safety Contentions #15 and #16.[1]

Also in accord with the Board's June 21st Order, Pa'ina will address Intervenor's September 14th alleged new/amended contentions with special attention being given to the issue of "mootness."

II. THE LEGAL PRINCIPLES GOVERNING THIS BOARD'S ANALYSIS OF INTERVENOR'S NEW/AMENDED CONTENTIONS.

The NRC has laid out several sets of "ground rules" for the admission of contentions. The NRC's rules specify the requirements that must be met if a contention is to be deemed "admissible." 10 C.F.R. Sec. 2.309(f)(1)(i), (ii), (v), and (vi). An Intervenor must comply with all of the following pleading-and-proof rules if a contention is to be deemed "admissible." The Intervenor must:

(1) provide a specific statement of the legal or factual issue to be raised;
(2) briefly explain the basis of its issue;
(3) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the Petitioner's position and upon which the Petitioner intends to rely at the hearing; and

[1] Although normally Pa'ina would have twenty-five (25) days within which to answer to the new or amended contentions, in an abundance of caution Pa'ina is filing this Answer within the 15 days generally mentioned in this Board's June 21, 2007 Order.

(4) sufficient information demonstrating that a genuine dispute exists in regard to a material issue of fact or law, including references to specific portions of the Application that the Petitioner disputes, or in the case when the Application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.

Furthermore, the Intervenor must show that:

(5) the issue(s) raised by them is (are) within the scope of the proceedings, and
(6) material to the findings the NRC must make to support the action involved in the proceeding. 10 C.F.R. Sec. 2.309(f)(1)(iii)-(iv).

Here, if Intervenor's contention fails to comply with any of the above six requirements, the proposed contention is inadmissible and should be dismissed. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

At this late stage of these proceedings, a second set of "ground rules" govern the admissibility of new or amended proffered contentions. As set forth in this Board's January 25, 2007 Order, any "new contentions" proferred by Intervenor would also have to meet the requirements of 10 C.F.R. Sec. 2.309(f)(2) by showing that: (i) the information upon which the new or amended contention is based was not previously available; (ii) the information upon which the amended or new contention is based is materially different than information previously available; and (iii) the amended or new contention has been

submitted in a timely fashion based on the availability of the subsequent information.

This Board will review the Intervenor's new contentions under these "stringent pleading requirements," and the Intervenor "must articulate specific contentions with adequate bases." U.S. Army (Jefferson Proving Ground Site), CLI-05-23, 62 N.R.C. 546, 549 (2005)

As will be shown below, all of Intervenor's new or amended contentions set forth in its September 14th filing should be denied/dismissed.

III. INTERVENOR'S NEW AND/OR AMENDED SAFETY CONTENTIONS #15 AND #16 OUGHT TO BE DENIED/DISMISSED.

A. The Intervenor's New And/Or Amended Contentions Should Be Denied/Dismissed Because, And Insofar As, The New Contentions Merely Repeat Intervenor's Earlier Contentions.

On February 9, 2007 and June 1, 2007 Intervenor raised new and/or amended contentions in response to the Staff's filings. Though raised in the context of amended environmental contentions, the new and/or amended contentions could be read as safety contentions.

On March 8, 2007 and June 26, 2007 Pa'ina responded to Intervenor's new and/or amended safety contentions, arguing that all of the new and/or amended contentions ought to be denied/dismissed for various reasons.

Because, and insofar as, Intervenor's new or amended Contentions #15 and #16 repeat its same, earlier contentions from its February 9, 2007 and June 1, 2007 filings, those contentions should be denied/dismissed for the reasons Pa'ina set forth in its March 8, 2007 and June 26, 2007 filings.

B. The Intervenor's New/Amended Contention No. #15 Ought To Be Denied/Dismissed As A Matter Of Law For Any Of Several Additional Reasons.

1. Intervenor Fails To "Specifically" State A Challenge To The Sealed Sources In Its New Contention #15.

Nowhere in its September 14th filing does Intervenor "specifically" state any claim against Pa'ina's sealed sources. Intervenor states no facts, cites no calculations, and cites no pressures indicating that Pa'ina's sealed sources are "unsafe" under any conditions.

Intervenor's proferred Contention #15 should be denied/dismissed because it sets forth no specific challenge to the safety of the highly-engineered, regulation- and standards-exceeding, sealed sources.

2. Intervenor's Contention #15 Is An Impermissible Challenge To 10 C.F.R. 36.21.

The Staff's SER issued on August 17, 2007 actually highlights the Intervenor's major pleading deficiency in

this case. That is to say, while the Intervenor rehashes its earlier contentions about aircraft crashes, tsunamis and hurricanes, the only technical information in the SER is the actual description of the high engineering standards which Pa'ina's sealed sources must meet, and do meet, under Part 36, and particularly under 10 C.F.R. 36.21.[2]

The SER further describes the sealed sources as meeting the requirements of the International Organization of Standardization ("ISO"). Indeed, the SER notes that the sealed sources "exceed the requirements specified in 10 C.F.R. 36.21 and ISO-2919." Indeed, this is perhaps the central safety factor in this case--that the sealed sources exceed both the stringent NRC standards, and also the internationally-recognized ISO standards.

Shorn of its accoutrements, then, Intervenor's "new" or "amended" Safety Contention #15 is a challenge to 10 C.F.R. Part 36, and particularly, a challenge to Section 36.21. Safety Contention #15 should be denied/dismissed because challenges to regulations are impermissible in ASLB proceedings.

[2] The stringent ISO-2919 standard is being made even more rigorous on a continuous basis. See, e.g., Weekly Information Report-Week Ending 03/04/05 (ML05074034).

3. Intervenor's Contention #15 Fails To Set Forth Any New/Amended "Specific" Contention, It Has No Documentary Support, And Intervenor Fails To Demonstrate The Existence Of Any Genuine Issue Of Material Fact Warranting A Hearing.

Despite its voluminous filings and repetitive declarations, Intervenor in its September 14th filing utterly fails to challenge with any facts, figures, pressures, calculations or engineering principles the Staff's SER safety conclusion that "a license can be issued to Pa'ina Hawaii, LLC, for the possession and use of licensed material in an irradiator."

Thus, Intervenor has not pleaded a "specific" contention, and Intervenor has not created any genuine issues of material fact warranting the admission of Safety Contention #15.

Intervenor's lack of contrary facts, figures, pressures, calculations or engineering principles addressing the SER's safety analysis is striking. Dr. Marvin Resnikoff's Declaration (Exhibit 8 of the September 14th filing) is dated August 24, 2007, but contains no reference whatsoever to the SER. Indeed, none of Dr. Resnikoff's Declarations address the SER's safety analysis.[3]

[3] Dr. Resnikoff in his August 24, 2007 Declaration (attached as Exhibit 8 to Intervenor's September 14th filing) alludes to the fact (at Paragraph 10) that Pa'ina's sealed sources exceeded the NRC's standards as well as ANSI test E65646, but notes that this information was contained in the Final Topical Report issued in May 2007. However, he himself offers no calculations, pressures, or any other type of cognizable scientific evidence contradicting the safety features engineered into the sealed sources; instead, he makes

Consequently, Dr. Resnikoff's Declaration cannot support any new/amended Contention #15 challenging the August 17th SER.

Similarly, although the Declaration of George Pararas-Carayannis is dated September 12, 2007, his Declaration fails to raise or support any new/amended contention challenging the SER. For example, Pararas-Carayannis does not challenge the Staff's safety evaluation of the sealed sources. He does not offer any contrary pressure calculations, leak tests or puncture evaluations of his own.

To summarize: neither Intervenor, Marvin Resnikoff nor George Pararas-Carayannis set forth any specific factual or legal challenges to the highly engineered and oft-tested safety standards incorporated into the sealed sources. No pertinent documents are cited by Intervenor or its experts which materially challenge the safety factors engineered into the sealed sources. Finally, Intervenor fails to create a genuine issue of material fact challenging the high degree of safety of the sealed sources.

Proposed "new" or "amended" Contention #15 should be denied/dismissed.

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the vague, conclusory, and undocumented statement that the sealed sources would not be adequate to prevent dispersal of radioactivity in case of a plane crash.

4. Intervenor's Contention #15 Has Nothing To Do With, And Is Generally Inapplicable To, The Staff's SER.

It may be that the Intervenor's proposed Contention #15 was drafted prior to the issuance of the August 17th SER, because Intervenor's proposed Contention #15 is based upon aviation crashes, tsunamis and hurricanes, just as were its February 9th and June 1st filings.

However, the SER focuses on the safety engineered into the sealed sources. This is the central safety issue. Although Intervenor reiterates its aviation crash, tsunami and hurricane claims, Intervenor fails in any material way to specifically or scientifically articulate how an aviation crash, tsunami or hurricane would overcome the safety features engineered into the sealed sources.

Thus, Intervenor's Contention #15 ought to be denied because it fails to materially or scientifically address the Staff's SER.[4]

[4] Intervenor's argument regarding Contention #15 is also based upon suspect legal citations. Thus, Intervenor cites United States v. Bucher, 375 F. 3d 929, 933 (9th Cir. 2004) for the proposition that regulations are to be read so that none of their terms are rendered "redundant." However, that decision involved a criminal matter, it had nothing to do with irradiators, and it had nothing to do with any relationship or interplay between 10 C.F.R. Sec. 36 and 10 C.F.R. Sec. 30.

C. Intervenor's New/Amended Contention No. #16 Ought To Be Denied/Dismissed As A Matter Of Law For Any Of Several Additional Reasons.

Intervenor's September 14th filing also reiterates its contention that the Staff inadequately analyzed the safety risks which might be caused by earthquakes. Intervenor designates this newest claim "Safety Contention #16."

Proffered Safety Contention #16 should be denied/dismissed for many of the same reasons as Safety Contention #15:

1. This information is not "new" or "recent." For example, the blow counts questioned by Intervenor were set forth in the September 14, 2005 Geotechnical Report. It is simply too late to raise Safety Contention #16 in these proceedings.

2. Intervenor contends that the six-inch separation between the sides of the irradiator pool and the building slab is not adequate, because (among other reasons) the Staff misused the Modified Mercalli Intensity rating for the area. However, this contention reflects the fact that Intervenor's expert disagrees with the scientific methodology used by the Staff. A professional disagreement over scientific methodologies does not set forth a valid contention.

3. To support its new Contention #16, Intervenor's experts cite prior earthquakes, including an 1871 earthquake which reportedly "caused damage to every building at the Punahou School Campus."

However, Intervenor's references to old earthquakes are superficial, conclusory and meaningless as a matter of law. For example, Intervenor fails to mention or compare the building code in 1871 (if, indeed, there was any) and present building codes, a major omission. Stated another way, Intervenor fails to present any facts, figures or scientific evidence that buildings which may have been damaged in 1871 would also be damaged under current building codes by equivalent earthquakes.

Consequently, Intervenor fails to set forth a cognizable and "specific" statement of fact or law which warrants a hearing on Contention #16. Intervenor's Contention #16 also fails to create a genuine dispute of material fact regarding potential earthquake damage.

4. Finally, Intervenor's proffered Safety Contention #16 is based upon impermissible speculation regarding the effects of an earthquake, i.e., possible liquefaction of the underlying soil. As early as March 9, 2006, 18 months ago, the Staff had before it a series of Pa'ina's answers

to its technical questions. Pa'ina's Answers Nos. 5 and 6 read in full as follows:

5) The island of Oahu is located in a Uniform Building Code (UBC) seismic zone 2A, which has a specified effective peak ground acceleration of 0.15g. This acceleration corresponds to a seismic event with a magnitude of 5.5. The pool is designed as an independent rigid structure. A seismic event of this magnitude, or even one of significantly higher magnitude, would not compromise the integrity of the pool structure in any way. Any acceleration of the pool, due to a seismic event, would be experienced by the entire pool structure, thus resulting in no damage to the pool. It is not clear that liquefaction of the soil around the pool would ever occur as a result of a seismic event, but if it ever did, the only effect it would have on the pool would be to increase the soil pressure on the walls of the pool. Under normal conditions, the soil will exert an average soil pressure on the outsides of the pool walls equivalent to a fluid with a density of 64 lbs/cf. The most pressure the soil could exert on the walls of the pool would be if complete liquefaction of the soil occurred, the full depth of the pool. This would result in a soil pressure equivalent to a fluid with a density of 102 lbs/cf. The walls of the pool are designed to withstand at least the pressure equivalent to a fluid with a density of 144 lbs/cf. No damage to the pool would result from complete liquefaction of all the soil around the pool.

6) Our pool design and installation method is based on the concept that the pool is a rigid structure, completely independent from, and not connected to the floor. This is done so that any seismic event that may be experienced at this site will have no effect on the pool. To accomplish this isolation of the pool from the floor we have provided a 6" space between the pool and the floor and between the surge tank and the floor on all sides where the floor meets the pool or surge tank. For the purpose of determining how much isolation space to provide between the pool and the floor we used the scenario that would result in the maximum amount of movement between the pool and the floor. This scenario is when liquefaction of the soil under the floor occurs. It is not clear that this would ever happen, but it was assumed that it would for the purpose of this analysis. Given a seismic event with a

peak acceleration of 0.15g's, and the soil conditions at the site, and assuming that the soil under the floor experiences liquefaction, the maximum amount of movement that could be expected between the pool and the floor would be about 4.5". The 6" space we are providing insures isolation between the pool and the floor even in this worst-scenario that was assumed for the purpose of this analysis. (Emphasis added) (Letter, Buchan to Gaines, 3/9/06, found at ML061220221)

In response to the above detailed safety discussion, Intervenor's Pararas-Carayannis simply speculates that the Staff's used of historic horizontal seismic ground motions "may" not be valid because of the ground materials located at Pa'ina's site. In any event, Pararas-Carayannis ignores the fact that the Staff assumed liquefaction of all the underlying soil (the "worst-case scenario").

Notably, Pararas-Carayannis presents no hard evidence, no minimum-separation calculations satisfactory to him, and no formulas which contradict the Staff's (or Pa'ina's) detailed analysis.

Intervenor's "speculation" does not create a valid contention. Ignoring hard scientific data does not create a valid contention. A failure to present any contrary hard evidence or formulas does not create a valid contention.

Intervenor's proferred Safety Contention #16 ought to be denied/dismissed because it fails to set forth a specific statement of fact or law, and it also fails to create a genuine issue of material fact for hearing.

D. The NRC Has Already Established Its Policy That Irradiators May Be Constructed Where Other Occupied Industrial Buildings Are Permitted To Be Built, And Consequently, Safety Contentions #15 And #16 Should Be Denied/Dismissed.

The NRC Commission studied the siting of irradiators in the late 1980's and early 1990's. Upon the conclusion of that study, which saw numerous experts testify and which saw public hearings held across the country, the Commission memorialized its thinking regarding the siting of irradiators: "[A]ll irradiator experience to date indicates that irradiators do not present a threat to people outside the facility. Therefore, the NRC believes that, in general, irradiators can be located anywhere that local governments would permit an industrial facility to be built." 58 Fed. Reg. at 7726 (Feb. 9, 1993)

In light of the NRC's study and the Commission's siting considerations as set forth in 1993, Intervenor's proffered Contentions #15 and #16 fail to specifically set forth a valid contention as a matter of law. First, the zoning for Pa'ina's irradiator is proper. Second, the design of Pa'ina's pool-type irradiator meets or exceeds all regulatory requirements. Third, Pa'ina's use of highly-engineered and safe sealed sources renders safety problems very remote. Together, these three factors create a "safe" facility as a matter of law. Id.

Consequently, in light of the NRC's published siting considerations, Intervenor's proferred Contentions #15 and #16 ought to be denied/dismissed as a matter of law.

IV. CONCLUSION.

For the reasons stated above, and also for the reasons stated in Pa'ina's March 8 and June 21, 2007 filings, Intervenor's proffered Safety Contentions #15 and #16 ought to be denied/dismissed as a matter of law.

DATED: Honolulu, Hawaii October 1, 2007

FRED PAUL BENCO
Attorney for Applicant
Pa'ina Hawaii, LLC

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "APPLICANT PA'INA HAWAII, LLC'S ANSWER TO INTERVENOR CONCERNED CITIZENS OF HONOLULU'S CONTENTIONS RE: FINAL SAFETY EVALUATION REPORT" dated October 1, 2007 in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this October 1, 2007. Additional service has also been made this same day by electronic mail as shown below:

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DATED: Honolulu, Hawaii, October 1, 2007

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October 1, 2007

Office of the Secretary
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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 Answer To Intervenor Concerned Citizens Of Honolulu's Contentions Re: Final Safety Evaluation Report"

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. Thank you.

Very respectfully yours,

Fred Paul Benco

Encl.
cc: All parties on Certificate of Service