UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons

DOCKETED 10/24/07
SERVED 10/24/07

In the Matter of	)	
	)	
PA'INA HAWAII, LLC	)	Docket No. 30-36974-ML
	)	
(Material License Application)	)	
	)	
	)	

CLI-07-26

MEMORANDUM AND ORDER

This proceeding concerns a license application to possess and use byproduct material in a commercial pool type irradiator to be constructed in Honolulu, Hawaii, near the Honolulu International Airport. On August 31, 2007, the Atomic Safety and Licensing Board issued a Memorandum certifying questions to the Commission. The Board states that safety contentions proffered in this proceeding raise "several fundamental and overarching issues that appear to fall squarely in the cracks of the Commission's . . . regulatory scheme for irradiators."[1]

The Intervenor in this proceeding has proffered contentions addressing safety risks related to the proposed irradiator location. These "risks asserted to be endemic" to the proposed site include "aircraft crashes and natural phenomena," such as

[1] Memorandum (Certifying Question to the Commission)(Aug. 31, 2007)(unpublished)("Memorandum") at 1, quoting Order (Posing Questions to the Parties)(Apr. 30, 2007)(unpublished) at 2.

earthquakes, hurricanes, and tsunamis.[2] At issue is the proper scope of an irradiator licensing proceeding, and whether it requires or otherwise encompasses analyses of such "endemic" site-related risks.

In an effort to clarify the intent of the regulations bearing on irradiator licensing, the Board twice posed questions to the parties in this proceeding. The Board's recent order expresses some frustration and confusion over responses received, stating that the "Staff's response did little to educate us as to how to handle the issues presented."[3]

The Board's order further notes that the NRC Staff, through a contractor, has prepared a report analyzing the likelihood and potential consequences of an aircraft crash, and the potential consequences of various natural phenomena at the proposed site.[4] Proffered safety contentions currently pending before the Board challenge that report.[5] The Board states that it earlier had the impression that this report was part of the staff's safety review of the license application, but that the Staff recently has explained that the report "was not intended to support the Staff's safety review" and that "no such [siting-related] safety analysis is required."[6] As the Staff described to the

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[2] *Id.*

[3] *Id.* at 10; *see also id.* at 13-16.

[4] *See id.* at 5-6 (referencing a "Draft" and "Final" version of the "Topical Report on the Effects of Potential Aviation Accidents and Natural Phenomena at the Proposed Pa'ina Hawaii, LLC, Irradiator Facility").

[5] The Board has yet to rule on the admissibility of the contentions challenging the Topical Report. Proffered Contention 13 challenges the aircraft crash analysis, and proffered Contention 14 challenges the natural phenomena analysis. The Board states that it will await the Commission's response to the certified questions to rule on the admissibility of these proposed contentions.

[6] Memorandum at 2.

Board, this report on aircraft crash and natural phenomena risk "was produced with only the requirements of NEPA [National Environmental Policy Act] in mind," and the Staff "has not drawn *safety* conclusions" from it.[7]

The Board's recent order seeks clarification of the intent of the regulations governing irradiator licensing, namely, whether a safety "siting analysis" of risks asserted to be endemic to the proposed irradiator site is called for and litigable in this proceeding. Given the Board's concern that relevant issues still may not have been sufficiently addressed,[8] the Commission invites the parties in this proceeding to submit initial and reply briefs addressing the following two questions presented by the Board:

> Whether, in the circumstances presented, 10 C.F.R. § 30.33(a)(2) requires a safety analysis of the risks asserted to be endemic (*i.e.* aircraft crashes and natural phenomena) to the proposed irradiator site at the Honolulu International Airport?
>
> What is the appropriate probability threshold (*i.e.*, probability of an event for which consequences exceed regulatory limits) beyond which a site-related safety analysis is required?[9]

In answering these questions, the parties may wish to address pertinent regulatory history or any other matter relevant to the Board's certified questions.[10]

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[7] *Id.* at 6 (emphasis added). The Board also has yet to rule on a motion to dismiss an admitted safety contention (Contention 7), which challenged the Pa'ina application's failure to address the likelihood and consequences of an aircraft crash. After issuance of the draft Topical Report, the applicant -- supported by the Staff -- moved to dismiss Contention 7 as moot. The Board states that given the Staff's more recent statement that the Topical Report was only part of an environmental review, the Board's resolution of the motion to dismiss "must now await the Commission's ruling on [the] certified question." *Id.*

[8] *See, e.g., Id.* at 10-13, 15-16.

[9] Obviously, as the Board indicated, the Commission need not reach the second question unless it were to answer the first question affirmatively. *See id.* at 18.

[10] The Commission notes that the NRC Staff recently completed its licensing review of the Pa'ina irradiator application. Its safety review included issues relating to potential

(continued . . .)

Initial briefs are limited to 30 pages, exclusive of title page, table of contents or table of authorities, and shall be filed within 14 calendar days of the date of this order. Reply briefs may be filed within 7 calendar days of the initial briefs' filing, and are limited to 15 pages. With good cause shown, parties may request an expansion of these page limits.

IT IS SO ORDERED.

For the Commission

/RA/

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Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 24th day of October, 2007.

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seismic events at the proposed site. *See* Pa'ina Hawaii, LLC, Safety Review of the License Application (Aug. 17, 2007) at 4 (ADAMS Accession Number ML072260186). The Staff therefore may wish to discuss the context in which this review was performed.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-07-26) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal mail.

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[Original signed by Evangeline S. Ngbea]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 24th day of October 2007