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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

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

APPLICANT PA'INA HAWAII, LLC'S BRIEF IN RESPONSE TO OCTOBER
24, 2007 MEMORANDUM AND ORDER OF NUCLEAR REGULATORY COMMISSION

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

APPLICANT PA'INA HAWAII, LLC'S BRIEF IN RESPONSE TO OCTOBER 24,
2007 MEMORANDUM AND ORDER OF NUCLEAR REGULATORY COMMISSION

I. INTRODUCTION

Applicant PA'INA HAWAII, LLC ("Pa'ina") submits herein its Response to the Nuclear Regulatory Commission's October 24, 2007 "Memorandum and Order" denominated CLI-07-26 ("Order"), wherein the NRC invited input from the parties to this case on two Certified Questions raised by the Atomic Safety and Licensing Board ("Board") on August 31, 2007.

On June 27, 2005 Pa'ina applied for a materials license to construct a Category III, pool-type irradiator near (but certainly outside the boundaries of) Honolulu International Airport. (See ML052060372)

The NRC Staff is necessarily a party to this case, and Intervenor Concerned Citizens of Honolulu became a party to this case by virtue of its initial "Request for Hearing" filed October 5, 2005.

The two Certified Questions presented to the NRC by the Board were as follows:

1. Whether, in the circumstances presented, 10 C.F.R. Sec. 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 site at the Honolulu International Airport?

2. What is the appropriate threshold (i.e., probability of an event for which consequences exceed regulatory limits) beyond which a site-related safety analysis is required?

In this Response, Pa'ina will speak primarily to the first Certified Question posited by the Board.

I. THE ANSWER TO THE BOARD'S FIRST CERTIFIED QUESTION SHOULD BE "NO," BECAUSE THE DETAILED PROVISIONS SET FORTH IN 10 C.F.R. PART 36 SERVE TO IMPLEMENT THE VERY GENERALIZED LANGUAGE CONTAINED IN 10 C.F.R. SEC. 30.33.

A. 10 C.F.R. Part 36 Details And Implements The Generalized Language In Sec. 30.33(a)(2).

Pa'ina submits that the answer to the first Certified Question should be "no" or in the negative.

The Board's first Certified Question implies that Part 36 and Sec. 30.33(a)(2) are mutually exclusive, contradictory, or, at the least, not in harmony. However, in truth, Part 36 fleshes out in detail and implements in a more comprehensive fashion the very generalized aspirations of Sec. 30.33(a)(2).

The NRC expressly noted that Part 36 was intended to implement the more generalized language of Section 30.33. Thus,

at the very outset of its "1993 Considerations," the NRC explained:

"Before the adoption of part 36, irradiators were licensed primarily under: (1) The general provisions of 10 C.F.R. 30.33, which requires that 'equipment and facilities are adequate' and that the "applicant is qualified by training and experience"; (2) the general requirements of Part 20; for example, dose limits and the need for "adequate" surveys; and (3) the specific requirements in 10 C.F.R. 20.203(c)(6) and (7) (or the new 10 C.F.R. 20.1603) that deal with access control" (Emphasis added) 58 Fed. Reg. at 7716 (Feb. 9, 1993)

Clearly, the terminology used in 10 C.F.R. 30.33, such as "adequate" and "qualified," is vague and generalized. Consequently, the NRC decided to promulgate Part 36 in order to establish a "formal, detailed, comprehensive . . . set of regulations." Id., at 7716.

Viewed in this light, then, it seems clear that the answer to the first Certified Question must be "no." Part 36 fleshes out in detail and implements the very generalized safety aspirations set forth in Section 30.33. Pa'ina's compliance with Part 36 therefore constitutes compliance with Section 30.33.¹

B. The NRC's "1993 Considerations" Which Accompanied Its Adoption Of 10 C.F.R. Part 36 Strongly Reinforce The Conclusion That The First Certified Question Should Be Answered "No."

¹ 10 C.F.R. Sec. 36.13 affirms the conclusion that fulfillment of Part 36 fulfills Sec. 30.33: "The Commission will approve an application for a specific license for the use of licensed material in an irradiator if the applicant meets the requirements contained in this section."

The NRC's "1993 Considerations" which accompanied the adoption of Part 36 further reinforce the conclusion that the answer to Certified Question No. 1 should be "no."

The "1993 Considerations" specifically analyzed a wide variety of hazards and situations which could threaten an irradiator's safety, including hurricanes, flooding, tidal waves, earthquakes, tornadoes² and plane crashes. The NRC's "1993 Considerations" concluded that irradiators could be built wherever a local government would allow industrial facilities to be built:

"The NRC believes that an irradiator meeting the requirements in the new Part 36 would present no greater hazard or nuisance to its neighbors than other industrial facilities, because there is little likelihood of such an irradiator causing radiation exposures offsite in excess of NRC's part 20 limits for unrestricted areas. All 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)

The NRC repeated the same rationale where, in its "1993 Considerations," it specifically rejected the argument that irradiators should not be built near airports:

² "Tornadoes" are discussed at Pages 7720 and 7721 of the 1993 Considerations. Although Intervenor has not alleged that Pa'ina is or will be subject to tornadoes, neither has Intervenor alleged that Pa'ina's site is threatened by other common natural or man-made disasters "endemic" to the Mainland such as landslides and mudflows, sinkholes, avalanches, sub-zero and severe blizzards or ice storms, unchecked wildfires, or rail-related crashes resulting in poisonous chemical clouds or spills.

"The NRC considered whether there should be a prohibition against locating irradiators near airports because of risk of radiation overexposures caused by an airplane crash. The NRC has concluded that a prohibition against placing an irradiator where other types of occupied buildings could be placed is not justified on safety grounds. The radioactive sources in an irradiator would be relatively protected from damage because they are generally contained within 6-foot thick reinforced concrete walls and are encapsulated in steel. Even if a source were damaged as a result of an airplane crash, large quantities of radioactivity are unlikely to be spread from the immediately vicinity of the source rack because the sources are not volatile. With this protection, the radiological consequences of an airplane crash at an irradiator would not substantially increase the seriousness of the accident. Therefore, NRC will allow the construction of an irradiator at any location at which local authorities would allow other occupied buildings to be built." Id., at 7726.

Thus, after public hearings, its own expert analysis and input from outside experts, the NRC in 1993 concluded that irradiators were safe, and that the sealed sources added a further, redundant safety factor. Consequently, the NRC adopted Part 36. Intentionally, Part 36 did not bar construction of irradiators where earthquakes, tidal waves, hurricanes, floods and airplanes occurred or were found.³

The 1993 Considerations constituted the basis and rationale for Part 36, and the 1993 Considerations strongly reinforce the conclusion that the answer to the first Certified Question ought to be "no."

³ The NRC could easily have inserted in Part 36 and/or its 1993 Considerations, "Category III irradiators cannot be built near airports." It did not do so.

C. This Litigation Has Stretched Out More Than Two Years After Pa'ina's Original Application, Because The Board Misapprehended Or Ignored The 1993 Safety Considerations.

By way of background: Pa'ina believes that the safety aspects of this case originally "went off the track" primarily as a result of the Board's January 24, 2006 Memorandum and Order filed herein. Consequently, this litigation has stretched out for 2 and ½ expensive years.

In its January 24, 2006 Memorandum and Order, the Board misapprehended the purpose and language of 10 C.F.R. Sec. 51.22(c)(14)(vii) which granted "categorical exclusion" status to "irradiators," i.e., exclusion from NEPA procedures. The Board denied "categorical exclusion" status to Pa'ina's irradiator because (according to the Board) Pa'ina's proposed irradiator situs suffered from "special" or "unique" circumstances. The Board reasoned as follows:

"The proposed location of the Pa'ina Hawaii irradiator is not immune from the hazards posed by natural disasters and potential aircraft crashes that the Petitioner posits as special circumstances, and the Staff has failed to provide any reason to conclude that the threats endemic to this proposed site have even been considered. The Staff's glib answer that there is nothing to suggest location was not considered in the rulemaking casts the issue entirely incorrectly implying that, in every instance of rulemaking in which, as here, there is no indication a matter was considered, we must assume it was, in fact, considered. Indeed, the Staff's approach only begs the question whether any location would prompt the Staff to consider special circumstances associated with a proposed siting. For example, it is virtually certain that the Commission did not specifically consider the risks associated with placing an irradiator in the

caldera of Kilauea; however, the Staff would have us believe that the risks associated with the unique location of this irradiator were necessarily considered in the generic forum for establishing the rule providing for the categorical exclusion--a wholly unsupported proposition. (Emphasis added) LBP-06-04, 63 NRC 99 (Jan. 24, 2006) (slip op. at p. 14)

However, the Board's above reasoning clearly conflicted with the NRC's "1993 Considerations." As set forth in Subpart B (supra), the "1993 Considerations" expressly concluded that irradiators are so inherently safe, the sealed sources are so reliable, and the Cobalt-60 is so insoluble, that irradiators would be permitted "anywhere that local governments would permit an industrial facility to be built," and also at "any location at which local authorities would allow other occupied buildings to be built."

The Board misapprehended or ignored the NRC's siting conclusions. The Board compared Pa'ina's proposed construction site to building an irradiator inside Kilauea Cauldera, the live, lava-spewing volcanic crater located in Volcano National Park on the Big Island of Hawaii. In doing so, the Board ignored that fact that the County of Hawaii does not allow any industrial or occupied buildings to be built in Kilauea Cauldera.⁴

⁴ Stated another way, the Board factually assumed that the County of Hawaii permitted industrial or occupied buildings in Kilauea Cauldera, but a Board cannot make such factual assumptions nor supply information that is lacking during the pleading portion of a case. See, e.g., Louisiana Energy Services L.P. (National Enrichment Facility), LBP-04-14, 60 NRC 40, 56 (2004) (citing

As a result of the Board's false analogy (comparing Pa'ina's proposed irradiator situs located in the midst of industrial and other occupied buildings, over against a situs in lava-spewing Kilauea Caldera), Pa'ina believes that the safety analysis veered off track. First, Pa'ina's irradiator was deprived of "categorical exclusion" status; second, Intervenor advocated that further, unspecified, higher regulations than those in Part 36 govern Pa'ina's irradiator, based upon the vague language of Sec. 30.33; third, the Board accepted Intervenor's claim that Sec. 30.33 creates additional (unspecified) regulatory hurdles beyond Part 36; fourth, the Intervenor and the Board were and are still searching for the (unspecified) safety regulations advocated by the Intervenor, unnecessarily stretching the litigation out to 2½ years; and fifth, the Board has finally raised Certified Question No. 1 to the NRC, albeit very belatedly, and in apparent contradiction to its earlier January 24, 2006 Memorandum and Order.⁵

To summarize: The answer to Certified Question No. 1 should be "no" for several compelling reasons:

Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001); Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

⁵ If an irradiator were indeed proposed for Kilauea Caldera, that would be a "special" or "unique" circumstance which would unquestionably require full NEPA study.

First, 10 C.F.R. Part 36 implements in detail 10 C.F.R. Sec. 30.33, and Part 36 therefore constitutes the safety regulations contemplated by Sec. 30.33. This is made indubitably clear by 10 C.F.R. Sec. 36.13.

Second, the answer to Certified Question No. 1 should also be "no" because the NRC's "1993 Considerations" clearly addressed, and then rejected, prohibitions upon the siting of irradiators where local zoning laws "would permit an industrial facility to be built," or where "local authorities would allow other occupied buildings to be built."

Third, the answer to Certified Question No. 1 should be "no" because the only reason this issue arose in the first place was the Board's January 24th Memorandum and Order. That decision misapprehended or ignored the "1993 Considerations" which accompanied the adoption of 10 C.F.R. Part 36. The Board's January 24th decision compared Pa'ina's proposed site near Honolulu International Airport, with a site inside of Kilauea Cauldera (Volcano), a comparison that was clearly false and invalid. The false analogy took the Board (to be sure, at Intervenor's behest) down an uncharted, dark alleyway searching for additional, unspecified regulations and standards which supposedly existed somewhere within 10 C.F.R. Sec. 30.33.

II. SINCE THE ANSWER TO CERTIFIED QUESTION NO. 1 SHOULD BE "NO," THE SECOND QUESTION NEED NOT BE REACHED, OR SHOULD REFLECT THE CURRENT, OFT-ANALYZED STANDARDS SET FORTH BY THE STAFF IN THIS CASE.

Since 10 C.F.R. Part 36 is the full, comprehensive and detailed safety regulation contemplated by Sec. 30.33, no further "probability thresholds" need be created by the NRC for Pa'ina's irradiator.

Alternately, if the NRC decides to select standards for Pa'ina's much-analyzed site, it would do well to adopt the Staff's findings and calculations herein as the proper standards.

III. CONCLUSION.

The NRC's answer to Certified Question No. 1 should be "no" for the compelling reasons set forth above, and as reflected in the records and files of this extended litigation.

Certified Question No. 2 need not be considered, because it is irrelevant or moot in light of the negative answer to Certified Question No. 1. Alternatively, the NRC would do well to adopt the Staff's standards and calculation for the much-analyzed proposed site.

DATED: Honolulu, Hawaii

Nov. 7, 2007

Fred Paul Benco

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 BRIEF IN RESPONSE TO OCTOBER 24, 2007 MEMORANDUM AND ORDER OF NUCLEAR REGULATORY COMMISSION" dated November 7, 2007 in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this November 7, 2007. Additional service has also been made this same day by electronic mail as shown below:

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DATED: Honolulu, Hawaii, November 7, 2007

A handwritten signature in black ink, appearing to read "Fred Paul Benco", written over a horizontal line.

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November 7, 2007

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Re: Docket No. 030-36974-ML
Re: Applicant Pa'ina Hawaii, LLC's
Brief In Response To October
24, 2007 Memorandum And Order
Of Nuclear Regulatory Commission

Dear Office:

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

On October 24, 2007 the Commission by Memorandum and Order invited the parties to brief two certified questions.

Pursuant to your regulations, please find enclosed an original and two (2) copies of Applicant's Brief in Response.

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

Encls.

cc: All parties on Certificate of
Service