

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 07/17/08
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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Paul Abramson
Dr. Anthony J. Baratta

In the Matter of

PA'INA HAWAII, LLC

(Material License Application)

Docket No. 30-36974-ML

ASLBP No. 06-843-01-ML

July 17, 2008

ORDER
(Scheduling Order)

The Board previously issued an Order¹ directing the Counsel for Pa'ina Hawaii, LLC, Concerned Citizens of Honolulu, and the NRC Staff to submit a joint proposed schedule for concluding this proceeding in accordance with the filing deadlines specified in the NRC's rules for informal hearings in Subpart L of 10 C.F.R. Part 2. Thereafter, the parties filed their joint proposed schedule.²

The Board hereby establishes the following schedule for the remainder of the proceeding:³

¹ Licensing Board Order (Submission of a Joint Proposed Schedule) (Apr. 29, 2008) (unpublished).

² Joint Proposed Schedule for the Remainder of the Proceeding (May 12, 2008).

³ The schedule described by the Board does not apply to the submission of documents for the fifth segment of amended environmental contention 3, see Intervenor Concerned Citizens of Honolulu's Amended Environmental Contentions #3 Through #5 (Sept. 4, 2007) at 29-30 [hereinafter Amended Environmental Contentions], which deals with food safety issues. The admissibility of this segment is currently pending before the Commission. See CLI-08-04, 67 NRC 171 (2008). Once the Commission has issued an Order on this segment of amended environmental contention 3, the Board will issue an expedited schedule for the submission of documents with regard to this particular segment.

1. Index, Mandatory Disclosures, and Additional Updates. Within fourteen days of the issuance of this Order, the Staff shall submit an Index in connection with the fourth segment of amended environmental contention 3;⁴ all parties shall update their mandatory disclosures as required by 10 C.F.R. § 2.336(d); and the Staff shall provide any additional updates to the hearing file in accordance with 10 C.F.R. § 2.1203(c). Within forty days of the issuance of this Order, all mandatory disclosures shall be complete and all updates to the hearing file shall be finalized.

2. Motions for Summary Disposition. Pursuant to 10 C.F.R. § 2.1205(a), and in the interest of efficiency, the Board will not entertain motions for summary disposition. Because this proceeding is being conducted pursuant to 10 C.F.R. Part 2, Subpart L, which requires the parties to present their case in written statements, affidavits, and exhibits, motions for summary disposition, which necessarily closely parallel the parties' Subpart L written presentations, will not materially shorten the proceeding or otherwise save time in resolving the admitted contentions.

3. Initial Written Statements of Position, Written Testimony, Affidavits, and Exhibits. Forty days from the issuance of this Order, the parties shall submit initial written statements of position and written testimony with supporting affidavits on the admitted segments of amended environmental contentions 3 and 4,⁵ pursuant to 10 C.F.R. § 2.1207(a)(1). Initial written statements should be in the nature of trial briefs that provide a precise road map of the party's case, setting out applicable legal standards and affirmative arguments, as outlined below in paragraphs i. through iv., identifying witnesses and evidence, and specifying the purpose of witnesses and evidence (i.e., stating with particularity how the witness, exhibit, or evidence

⁴ See Licensing Board Memorandum and Order (Ruling on Admissibility of Intervenor's Terrorism-Related Challenges) (Mar. 4, 2008) at 5. See also Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-01, 67 NRC 1 (2008); Vaughn v. Rosen, 484 F.2d 820, 823-25 (D.C. Cir. 1973).

⁵ See Amended Environmental Contentions at 6-18, 23-25, 30-34.

supports a factual or legal position). The written testimony shall be in question-and-answer format, under oath or by an affidavit, so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents the party or its witnesses refer to, use, or are relying upon for their statements or position. The parties shall file written presentations on the following matters:

i. As stated in amended environmental contention 3, the National Environmental Policy Act of 1969 (NEPA)⁶ requires the NRC to take a “hard look” at the environmental consequences of licensing a particular nuclear facility when preparing an environmental assessment. Utilizing Supreme Court and Ninth Circuit case law,⁷ and, to the extent it is not inconsistent with Ninth Circuit case law, case law from other Circuit courts and Commission issuances, the parties shall file written briefs that identify the criteria (i.e., the factors, standards, and elements on which the “hard look” determination is based), eluded to by the Intervenor in its contention, by which to measure whether an environmental assessment has satisfied the NEPA-required “hard look” standard.

ii. In the Board’s December 21, 2007 Order,⁸ we admitted particular sections of amended environmental contention 3.⁹ The parties shall file written presentations that

⁶ 42 U.S.C. § 4321 et seq. (2005).

⁷ Supreme Court and Ninth Circuit case law is authoritative in this proceeding because the Pa’ina Hawaii, LLC proposed irradiator is located in Hawaii, which is located in the Ninth Circuit.

⁸ Licensing Board Order and Memorandum (Ruling on Admissibility of Intervenor’s Amended Environmental Contentions) (Dec. 21, 2007) [hereinafter Board Order].

⁹ See id. at 6-23. The first major deficiency the Intervenor asserted in amended environmental contention 3 states that the Staff’s final Environmental Assessment (EA) failed to respond to the Intervenor’s comments regarding the draft EA’s deficiencies. See Amended Environmental Contentions at 7-8. We determined that this first asserted major deficiency met all requirements of a contention of omission and was therefore admissible. See Board Order at 12-13. The second major deficiency the Intervenor asserted in amended environmental contention 3 states that the Staff failed to supply sufficient evidence and analysis in the final EA with regard to the potential impacts of the proposed irradiator. See Amended Environmental Contentions at 8-14. The Intervenor provided a list of twenty-five illustrative deficits in “bullet” form, twelve of which we stated we would consider. See Board Order at 13 nn.48-52. Assigning a number to each of

address the adequacy of each of the portions of the final EA that are challenged by the admitted segments of amended environmental contention 3 in light of each of the criteria used to measure whether an environmental assessment has satisfied the NEPA-required “hard look” standard, as provided in response to paragraph i.

iii. As stated in amended environmental contention 4,¹⁰ section 102(2)(E) of NEPA requires the Staff to conduct an alternatives analysis when preparing an environmental analysis. Therefore, utilizing Supreme Court and Ninth Circuit case law, eluded to by the Intervenor in its contention, and, to the extent it is not inconsistent with Ninth Circuit case law, case law from other Circuit courts and Commission issuances, the parties shall file written briefs that:

the twenty-five bulleted omissions in the order they are listed in the Intervenor’s second claim, we stated we would consider deficits numbered 1-10, 24, and 25. See id. at 13-14. These deficits are “the Staff’s alleged failure to provide any calculations, analysis, or data substantiating its generalized conclusory statements about the proposed irradiator’s occupational dose limit, off-site consequences, impact on transportation, and influence on tourism.” Id. We remind the parties that in the Board’s March 4, 2008 Order, we dismissed deficits numbered 22 and 23, which relate to the Staff’s consideration of the potential impacts of terrorism on the proposed Pa’ina irradiator. See Licensing Board Order and Memorandum (Ruling on Admissibility of Intervenor’s Terrorism-Related Challenges) (Mar. 4, 2008) at 3 [hereinafter Terrorism-Related Board Order]. The third major deficiency the Intervenor asserted in amended environmental contention 3 states that the Staff failed to consider adequately the environmental impact of natural disasters and aviation accidents on the proposed irradiator, as well as transportation accidents involving the irradiator’s cobalt sources. See Amended Environmental Contentions at 14-18. We determined that this third asserted major deficiency in the final EA met all requirements of a contention of omission and was therefore admissible. See Board Order at 17. The fourth major deficiency, which states that the Staff failed to furnish a complete analysis of potential terrorist acts involving the proposed irradiator, see Amended Environmental Contentions at 18-29, was admitted only “to the extent it allege[d] that the Staff ‘failed to disclose data underlying its terrorism analysis’ of the proposed irradiator in the final EA and its Appendices and thereby failed to meet the NEPA-mandated ‘hard look’ standard.” See Terrorism-Related Board Order at 5. As stated in footnote 3 of this Memorandum and Order, the admissibility of the fifth major deficiency alleged by the Intervenor is pending before the Commission.

¹⁰ Amended environmental contention 4 includes two challenges to the alternatives analysis conducted by the Staff in the final EA for the proposed Pa’ina irradiator. See Amended Environmental Contentions at 30-34. The contention challenges the Staff’s failure to consider alternate technologies, see id. at 31-32, and the Staff’s failure to consider alternate locations, see id. at 33-34. The Board found that the contention met all the requirements for contention admissibility, and therefore, admitted amended environmental contention 4. See Board Order at 25.

a. identify the legal requirements and elements that apply to an adequate alternatives analysis of alternative technologies; and

b. identify the legal requirements and elements, if any, that apply to an adequate alternatives analysis of alternative locations.

iv. In the Board's December 21, 2007 Order, we admitted amended environmental contention 4. The parties shall file written presentations that address the adequacy of the Staff's analysis of alternative technologies and locations in the final EA in light of each of the required criteria of an alternatives analysis, provided in response to paragraph iii.

4. Rebuttal Statements of Position, Testimony, Affidavits, and Exhibits. No later than twenty days after service of the materials submitted under paragraph 3, each party shall file its written response, reply testimony with supporting affidavits, and exhibits, pursuant to 10 C.F.R. § 2.1207(a)(2). The written response should be in the nature of a rebuttal that identifies the legal and factual faults in the other parties' positions, identifies reply witnesses and evidence, and specifies the precise purpose of reply witnesses and evidence. The rebuttal testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that each party or its witnesses refer to, use, or are relying upon for their statements of position. The rebuttal, testimony, and exhibits are not to advance any new affirmative claims or arguments that were not included in the party's initial written statement.

5. Proposed Questions for Board to Ask. No later than twenty days after service of the materials submitted under paragraph 4, all parties shall file a proposed plan for questions on the facts for the Board to consider propounding to the direct or rebuttal witnesses, pursuant to 10 C.F.R. § 2.1207(a)(3)(i) and (ii). The proposed plan for questions on the facts should contain a brief description of the issue or issues the party contends need further examination, the objective of the examination, and the proposed line of questioning (including specific questions)

that may logically lead to achieving the objective. The proposed questions on the facts shall be filed with the Board and shall not be filed with any other party, pursuant to 10 C.F.R. § 2.1207(a)(3)(iii).

6. Motions to Strike. The parties should be aware that the Board looks with disfavor upon motions to strike. Nevertheless, not later than ten days after service of the materials submitted under paragraph 5, parties may file any motions to strike factual material submitted under paragraphs 3 and 4. Answers shall be filed no later than seven days after service of any such motions. A party should ensure that any motion to strike has a high likelihood of success before filing such motion.

7. Oral Hearing. Due to Board conflicts, we will not set a date at this time for the Oral Hearing. After conferring with the parties, a subsequent Order will be issued that sets the date of the Oral Hearing.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD*
/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 17, 2008

* Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) Applicant Pa'ina Hawaii, LLC.; (2) Intervenor Concerned Citizens of Honolulu; and (3) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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PA'INA HAWAII, LLC) Docket No. 30-36974-ML
)
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(Honolulu, Hawaii Irradiator Facility))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (SCHEDULING ORDER) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Christine M. Pierpoint]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 17th day of July 2008