RAS I-171

September 8, 2009

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-ML
	)	ASLBP No. 06-843-01-ML
Material License Application	)	
	)	

INTERVENOR CONCERNED CITIZENS OF HONOLULU'S
MOTION TO CLARIFY OR, IN THE ALTERNATIVE, FOR
RECONSIDERATION IN PART OF THE AUGUST 27, 2009 INITIAL DECISION

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, intervenor Concerned Citizens of Honolulu respectfully requests the Board to clarify that its August 27, 2009 Initial Decision (Ruling on Concerned Citizens of Honolulu Amended Environmental Contentions #3, #4, and #5): (1) requires the Nuclear Regulatory Commission ("NRC") Staff to allow public comment on its forthcoming analysis of transportation accidents, (2) requires the Staff to revoke applicant Pa'ina Hawaii, LLC's license for possession and use of byproduct material pending compliance with the National Environmental Policy Act ("NEPA"), and (3) dismisses amended environmental contention 5 without prejudice.[1] As discussed below, based on other statements in the Initial Decision, Concerned Citizens believes the omission of these express holdings was inadvertent.

[1] Since the last day of the ten-period to file this motion fell on Sunday, September 6, 2009, Concerned Citizens' time to file this amended motion was extended until Tuesday, September 8, 2009, "the next day which is neither a Saturday, Sunday, nor holiday." 10 C.F.R. § 2.306 (2007); see also 72 Fed. Reg. 49,139, 49,139 (Aug. 28, 2007) (amendments to, inter alia, 10 C.F.R. § 2.306 "apply only to new proceedings noticed on or after" October 15, 2007)

In the alternative, if the Board did not intend its Initial Decision to include these holdings, Concerned Citizens respectfully seeks leave to file this motion as a motion for reconsideration since there are "compelling circumstances," including "clear and material error[s]" in the Initial Decision, that "could not have been reasonably anticipated" and, if uncorrected, would "render[] the decision invalid." 10 C.F.R. § 2.323(e).[2]

II. BACKGROUND[3]

On August 27, 2009, the Board issued its Initial Decision in which it held the Staff's environmental assessment ("EA") inadequate in three respects: (1) the Staff failed to "take a 'hard look' and consider the environmental consequences of accidents that might occur during the annual transport of Co-60 sources to and from the proposed irradiator," Initial Decision at 51; (2) the Staff improperly failed to "study, develop, and describe the e-beam irradiator alternative and give that alternative meaningful consideration," id. at 101; and (3) the Staff failed to "consider[] reasonable alternative sites that might present less environmental impact." Id. at 105. Based on these fatal deficiencies in the Staff's analysis, which were not cured during the course of this proceeding, the Board returned the EA "to the Staff for all appropriate and required actions consistent with this decision." Id. at 109.

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[2] In accordance with 10 C.F.R. § 2.323(b), on August 31, 2009, Concerned Citizens' counsel contacted counsel for the Staff and Pa'ina to confer regarding the points Concerned Citizens wished to be clarified or reconsidered. Henkin Decl. ¶ 3. The Staff responded that it did not oppose clarification that the dismissal of amended environmental contention 5 is without prejudice to a late-filed contention that transportation impacts necessitate preparation of an environmental impact statement ("EIS"). Id. ¶ 4. The Staff indicated it would oppose all other relief sought in this motion, while Pa'ina indicated it would oppose this motion in all respects. Id. ¶¶ 4-5.

[3] The facts of this case have been set forth in detail several times. Accordingly, Concerned Citizens will focus here on only those facts most relevant to this motion.

III. THE STAFF MUST PERMIT PUBLIC COMMENT ON ITS TRANSPORTATION ACCIDENT IMPACTS ANALYSIS

In its Initial Decision, the Board noted that, "[n]ormally, the adjudicatory process and the evidence presented, as well as the licensing board decision resolving the admitted NEPA contentions, can be used to clarify and augment the Staff's environmental documents and become, in effect, part of the agency's environmental documents and record of decision." Id. at 100. The Board emphasized, however, that "the hearing record and [the Board's] decision cannot modify, clarify, or augment something that does not exist." Id. at 101. Thus, where an administrative record with respect to a contested issue is never "created, or ever intended, to fill the void created by the Staff's failure to consider" a necessary element of its NEPA analysis, "only the Staff" can "fill the vacuum" by performing the requisite analysis on remand. Id.; see also id. at 102 (Board cannot "properly undertake this task, ab initio, which ... would take it outside the administrative record ... and its adjudicatory function"). Accordingly, the Board remanded to the Staff to "amend the final EA" to provide heretofore missing analyses regarding three topics: transportation accidents, the electron-beam irradiator alternative and alternate locations. Id. at 51; see also id. at 102, 108.

Pursuant to both the March 20, 2006 Joint Stipulation and Ninth Circuit precedent, the Board directed the Staff on remand to allow an opportunity for public comment on its new analysis of the electron-beam irradiator alternative, explaining:

> [B]ecause the Staff has not previously discussed the e-beam irradiator alternative in either its Draft or Final EA, it must allow a brief opportunity for written public comment on its draft amendment or supplement to the EA before either finalizing the draft amendment on the e-beam irradiator alternative or reaching its final conclusion regarding the proposed irradiator.

Id. at 102. The Board likewise ordered the Staff on remand to "consider and permit written comment on alternative sites." Id. at 108.

The Initial Decision is silent, however, on whether the Staff must allow public comment on its forthcoming transportation accidents analysis, and the Staff has interpreted that silence as meaning it can withhold that analysis from public review. Henkin Decl. ¶ 4. Because the circumstances are identical (i.e., the Staff failed to include any analysis of transportation accident impacts in the draft or final EA), Concerned Citizens believes the Board's silence was inadvertent. See Initial Decision at 47, 51-52. We therefore request clarification that the Initial Decision requires the Staff to allow public comment on its draft analysis of potential impacts from transportation accidents involving cobalt-60 shipments.

If, on the other hand, the Board did not intend to require public comment, Concerned Citizens respectfully submits the decision is clearly and materially erroneous and asks the Board to reconsider. In the Joint Stipulation, the Staff agreed, and the Board ordered, that there would be "an opportunity for public comment on the Draft EA (or a draft finding of no significant impact, which in this case incorporated the Draft EA)." Id. at 102. Because the Staff never put out anything other than "a few unsupported sentences" and "broad, generalized statements regarding the impacts of transportation accidents," the public has, to date, been deprived of any chance for input on this key element of the EA, contravening the parties' intent in entering into the stipulation. Id. at 51; see also id. at 102.

Moreover, Ninth Circuit precedent requires "[a]n agency, when preparing an EA, [to] provide the public with sufficient environmental information, considered in the totality of the circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process." Id. at 13 (quoting Bering Strait Citizens for Responsible

Resource Development v. U.S. Army Corps of Engineers, 524 F.3d 938, 953 (9th Cir. 2008)). As the Commission has recognized, "public participation form[s] a large part of NEPA's raison d'etre." Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 354 (2002). The Staff's failure to provide any analysis of transportation accident impacts in its draft and final EA and in proceedings before the Board has deprived Concerned Citizens and the general public of their right to participate in and inform the decision-making process. Failure to provide an opportunity for public comment on this analysis is clearly and materially erroneous because it conflicts with both the Joint Stipulation and Ninth Circuit law.[4]

IV. THE STAFF MUST REVOKE PA'INA'S LICENSE PENDING COMPLIANCE WITH NEPA

On August 20, 2007, pursuant to 10 C.F.R. § 2.1202(a), the Staff notified the Board and the parties that, based on its EA, it had issued a license to Pa'ina for possession and use of byproduct material. See 8/20/07 Memorandum from Jack E. Whitten. In its Initial Decision, the Board held that the EA on which the Staff relied was invalid since it violated NEPA's commands to "take a 'hard look'" at transportation accidents, Initial Decision at 51, and to evaluate "choices or alternatives that might be pursued with less environmental harm." Id. at 12 (quoting Lands Council v. Powell, 395 F.3d 1019, 1027 (9th Cir. 2005)). NEPA requires that this information be "available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added); see also Initial Decision at 10. The Board's holding that the EA failed to provide statutorily mandated information is, therefore, inherently inconsistent with the Staff's approval of Pa'ina's license, which was based on the deficient EA.

[4] Concerned Citizens could not have reasonably anticipated the Board might preclude public comment on transportation impacts because the parties agreed in 2006, and the Board ordered, that the Staff would circulate a draft EA for public review and comment before finalization. See Initial Decision at 102.

Indeed, the Board recognized as much when it ordered the Staff to put its analysis out for public comment "before ... reaching its final conclusion regarding the proposed irradiator." Initial Decision at 102 (emphasis added).

Pursuant to 10 C.F.R. § 2.1210(c)(3), the Board must specify in its Initial Decision the action the Staff must take "if the initial decision is inconsistent with the NRC staff action as described in the notice required by § 2.1202(a)." While the Initial Decision suggests what is required in this case, it does not expressly spell out "[t]he action the NRC staff shall take," as 10 C.F.R. § 2.1210(c)(3) requires. Thus, the Board cites Ninth Circuit precedent that "proposed actions will be 'set aside' if the agency has not taken into account the 'possible approaches to a particular project . . . which would alter the environmental impact and cost-benefit balance,'" Initial Decision at 12-13 (quoting Soda Mountain Wilderness Council v. Norton, 424 F. Supp. 2d 1241, 1246 (E.D. Cal. 2006) and Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228 (9th Cir. 1988) (emphasis added; ellipses in Initial Decision)). Moreover, it emphasized that NEPA "requires Federal agencies to assess the environmental consequences of their actions before those actions are undertaken." Id. at 10 (quoting Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 993 (9th Cir. 2004)). In light of the Board's finding that the Staff's EA failed to evaluate impacts from transportation accidents and did not consider reasonable alternatives, including the use of an alternate technology and alternate sites that "might present less environmental impact," the Initial Decision suggests, but does not expressly state, that the Staff must withdraw its license approval pending compliance with NEPA. Id. at 105; see also id. at 108-109.

Given the controlling Ninth Circuit law and the Board's invalidation of the Final EA, Concerned Citizens believes the Board's silence about the fate of the license approval was

inadvertent. Accordingly, we request clarification that, because "the initial decision is inconsistent with the NRC staff action" granting Pa'ina a license, upon transmittal of a final decision to the Staff, the Staff must revoke Pa'ina's license pending compliance with NEPA. 10 C.F.R. § 2.1210(c)(3).

In the event the Board purposefully did not require the Staff to revoke Pa'ina's license, despite the inconsistency between the Staff's action and the Initial Decision, Concerned Citizens respectfully asks the Board to reconsider.[5] The Board has already recognized that controlling case law requires the NRC to hold off on granting a license to Pa'ina until the Staff complies with NEPA's mandates. See Initial Decision at 12-13. As the Initial Decision notes, "NEPA requires, regardless of whether an EIS or an EA is involved, that Federal agencies must take a 'hard look' at the environmental consequences of proposed actions before taking them." Initial Decision at 11 (emphasis added); see also id. at 10 (quoting Klamath-Siskiyou Wilderness Center, 387 F.3d at 993); National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 733 (9th Cir. 2001) ("the 'hard look' must be taken before, not after, the environmentally threatening actions are put into effect").

Failure to comply with NEPA prior to issuance of Pa'ina's license irreparably harms Concerned Citizens and the public at large because "the harm that NEPA intends to prevent is imposed when a decision to which NEPA obligations attach is made without the informed environmental considerations that NEPA requires." National Parks & Conservation Ass'n, 241 F.3d at 737 n.18 (citing Sierra Club v. Marsh, 872 F. 2d 497, 500 (1st Cir. 1989) (Breyer, J.)). In

[5] Since the NRC's regulations expressly require the Board to address inconsistencies between a decision finding the EA violated NEPA and the Staff's issuance of a material license based on that deficient EA, Concerned Citizens could not have reasonably anticipated the Board would not require the Staff to revoke Pa'ina's license in the event it found the Final EA unlawful. See 10 C.F.R. § 2.1210(c)(3).

contrast, Pa'ina would not be prejudiced in any way by temporary revocation of its license, as it has neither secured a lease for its proposed irradiator site nor begun construction. See Lease Update in Response to ASLB's October 5, 2007 Order (Sept. 4, 2009).

V. AMENDED ENVIRONMENTAL CONTENTION 5 SHOULD BE DISMISSED WITHOUT PREJUDICE

In its December 21, 2007 Memorandum and Order (Ruling on Admissibility of Intervenor's Amended Environmental Contentions), the Board expressly declined to "address the admissibility of amended environmental contention 5," which asserted "the Staff was obligated under NEPA to prepare an EIS for the proposed irradiator because the final EA raised substantial questions as to whether [Pa'ina's] project 'may cause significant degradation of some human environmental factor.'" 12/21/07 Board Order at 33. The Board explained that, "[g]iven that contentions 3 and 4 are admissible and question whether the Staff correctly prepared the final EA, the contention is premature." Id. According to the Board:

> Upon reaching the merits of contentions 3 and 4, should we find that the final EA is adequate, we will then be in a position to determine whether the proposed irradiator might cause significant degradation of some human environmental factor, and thus require the Staff to prepare an EIS. On the other hand, should we find that the final EA is inadequate, the EA will need to be supplemented or amended before it can be determined whether an EIS is required.

Id. at 33-34 (emphasis added).

In its Initial Decision, the Board found the Staff's Final EA was inadequate because it failed to "take a 'hard look' and consider the environmental consequences of accidents that might occur during the annual transport of Co-60 sources to and from the proposed irradiator." Initial Decision at 51. Despite concluding the Staff ignored potentially significant impacts associated with Pa'ina's proposal, the Board nevertheless went on to find that the Staff "has no obligation to prepare an EIS, and therefore dismiss[ed] amended environmental contention 5."

Id. at 109. In a footnote to that finding, the Board acknowledged that Concerned Citizens retains the right to "challenge the Staff's issuance of its Final EA as appropriately amended" pursuant to 10 C.F.R. § 2.309. Id. at 109 n.484. Concerned Citizens therefore assumes the Board intended the dismissal of amended environmental contention 5 to be without prejudice, and that we may again raise a contention claiming an EIS is required should the Staff's analysis of transportation accidents in the amended EA indicate "the agency's action 'may have a significant effect upon the ... environment.'" National Parks & Conservation Ass'n, 241 F.3d at 730 (quoting Foundation for N. Am. Wild Sheep v. U.S. Dep't of Ag., 681 F.2d 1172, 1178 (9th Cir. 1982)). In an abundance of caution, however, Concerned Citizens respectfully requests that the Board clarify this matter.

To the extent the Board intended to dismiss amended environmental contention 5 with prejudice, thereby precluding Concerned Citizens from challenging the Staff's failure to prepare an EIS, regardless of what the transportation impact analysis reveals, we respectfully request the Board to reconsider.[6] The Staff's forthcoming analysis of transportation accidents could raise substantial questions as to whether the project may cause significant degradation of some human environmental factor, triggering the Staff's obligation to prepare an EIS. See Save the Yaak Comm. v. Block, 840 F.2d 714, 720 (9th Cir. 1988) (agency must analyze "'connected actions' ... in deciding whether to prepare an EIS or only an EA"). As the Board correctly observed in its

[6] Concerned Citizens could not have reasonably anticipated this result since the Board took the position in its December 21, 2007 Order that it could not rule on the necessity of an EIS until the Staff produces a legally adequate EA. See 12/21/07 Order at 33-34. Indeed, the Board did not even rule on the admissibility of environmental contention 5, so the parties never had occasion to brief the issue. See 7/17/09 Board Order (Scheduling Order) at 2 (instructing parties to submit initial written statements of position with respect to only "admitted segments of amended environmental contentions 3 and 4").

December 21, 2007 order, in the absence of an adequate analysis of all potential impacts, the Board has no basis to "determine[] whether an EIS is required." 12/21/07 Board Order at 34.

VI. CONCLUSION

For the foregoing reasons, Concerned Citizens respectfully asks the Board to clarify or reconsider its Initial Decision as follows:

(1) Before finalizing the amended EA, the Staff must allow an opportunity for public comment on its analysis of potential transportation accident impacts;

(2) Upon transmittal of the decision to the Staff under 10 C.F.R. § 2.1210(e), the Staff must revoke Pa'ina's license pending compliance with NEPA; and

(3) Amended environmental contention 5 is dismissed without prejudice.

Dated at Honolulu, Hawai'i, September 8, 2009.

Respectfully submitted,

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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-ML
	)	ASLBP No. 06-843-01-ML
Material License Application	)	
	)	

DECLARATION OF DAVID L. HENKIN

I, David L. Henkin, declare:

1. I am an attorney at law, duly licensed to practice before all courts of the State of Hawai'i, the U.S. District Court for the District of Hawai'i, the U.S. Court of Appeals for the Ninth Circuit, and the U.S. Supreme Court. I am represent intervenor Concerned Citizens of Honolulu in this proceeding.

2. I make this declaration in support of Intervenor Concerned Citizens of Honolulu's Motion to Clarify or, in the Alternative, for Reconsideration In Part of the August 27, 2009 Initial Decision. This declaration is based on my personal knowledge, and I am competent to testify about the matters contained herein.

3. On August 31, 2009, I contacted Fred Paul Benco, counsel for Pa'ina Hawaii, LLC, and Michael Clark, counsel for the Nuclear Regulatory Commission Staff, to discuss Concerned Citizens' intent to seek clarification or reconsideration of the Board's August 27, 2009 Initial Decision as set forth in the motion filed herewith.

4. Mr. Clark responded that the Staff would not oppose clarification that the dismissal of amended environmental contention 5 is without prejudice to a late-filed contention that transportation impacts necessitate preparation of an environmental impact statement. Mr.

Clark stated the Staff would oppose any motion to clarify or reconsider on the remaining points. In particular, he stated that the Staff believes the Board did not intend to require the Staff to seek public comment on any amendments to the environmental assessment relating to transportation accidents.

5. Mr. Benco responded that Pa'ina would oppose all aspects of Concerned Citizens' motion to clarify or reconsider.

I declare under penalty of perjury that I have read the foregoing declaration and know the contents thereof to be true of my own knowledge.

Dated at Honolulu, Hawai'i, September 8, 2009.

DAVID L. HENKIN

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 8, 2009, a true and correct copy of the foregoing document was duly served on the following via e-mail and first-class United States mail, postage prepaid:

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In addition, the undersigned herby certifies that, on September 8, 2009, a true and correct copy of the foregoing document was duly served on the following via e-mail:

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E-mail: anthony.eitreim@nrc.gov

Dated at Honolulu, Hawai'i, September 8, 2009.

DAVID L. HENKIN
Attorney for Intervenor
Concerned Citizens of Honolulu

EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

TRANSMITTAL LETTER

TO: Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attention: Rulemakings and Adjudication Staff

VIA FIRST CLASS MAIL

FROM: David L. Henkin

DATE: September 8, 2009

RE: Pa`ina Hawai`i, LLC (Material License Application),
Docket No. 30-36974-ML, ASLBP No. 06-843-01-ML

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