

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
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

September 29, 2009

ORDER

(Denying Intervenor's Motion to Clarify)

On September 8, 2009 the Intervenor, Concerned Citizens of Honolulu filed a motion¹ requesting the Licensing Board to clarify in three respects its August 27, 2009 Initial Decision.² In the alternative, the Intervenor seeks leave to file its motion as a motion for reconsideration of the Board's ruling. The Applicant, Pa'ina Hawaii, LLC, opposes the motion but also defers to the arguments of the NRC Staff.³ The NRC Staff does not oppose the Intervenor's clarification motion stating that it believes the Board's decision is sufficiently clear but the Staff opposes the Intervenor's alternative motion.⁴ The Board notes, however, that the Staff takes a different

¹ Intervenor Concerned Citizens of Honolulu's Motion to Clarify or, in the Alternative, for Reconsideration in Part of the August 27, 2009 Initial Decision (Sept. 8, 2009) [hereinafter Motion].

² Licensing Board Initial Decision (Ruling on Concerned Citizens of Honolulu Amended Environmental Contentions #3, #4, and #5) (Aug. 27, 2009) (unpublished) [hereinafter Initial Decision].

³ Licensee Pa'ina Hawaii, LLC's Opposition to Intervenor's Motion to Clarify or, in the Alternative, for Reconsideration in Part of the August 27, 2009 Initial Decision (filed September 8, 2009) (Sept. 18, 2009).

⁴ NRC Staff's Response to Intervenor's Motion for Clarification or Reconsideration of Board's Initial Decision (Sept. 21, 2009).

position from the Intervenor on the first two of the three issues on which the Intervenor seeks clarification.⁵ Both the Intervenor's motion for clarification and its alternative motion are denied.

In its Initial Decision the Board found that the Staff's final environmental assessment (EA) failed to take the NEPA mandated hard look at transportation accidents as asserted in the Intervenor's amended environmental contention 3.⁶ The Board also found that the Staff, contrary to the mandates of section 102(2)(E) of NEPA and applicable Ninth Circuit precedent, failed to consider the alternative of the electron beam irradiator⁷ and any alternative site for the Applicant's proposed irradiator.⁸ The Board, therefore, returned the EA to the Staff "for all appropriate and required actions consistent with this decision."⁹

The Intervenor's motion first seeks to have the Board clarify that its decision requires the Staff to allow public comment on the Staff's forthcoming transportation accident analysis.¹⁰ In addressing what actions needed to be taken with respect to transportation accidents, the Board specifically referred to Part V of the decision (i.e., "as is fully explained in Part V").¹¹ That portion of the decision includes Part V.A.2.c., entitled "Remedy," detailing the necessary steps for complying with NEPA, the prior stipulated settlement, and Ninth Circuit precedent.¹² Although the Board did not explicitly mention public comment on the Staff's transportation accident analysis, the Initial Decision, in context, is clear and no further clarification is necessary.

Second, the Intervenor's motion asks that the Board clarify that its decision requires the Staff to revoke the license granted to the Applicant.¹³ The Board's decision no less than four

⁵ Id. at 3-6.

⁶ Initial Decision at 51-52.

⁷ Id. at 101.

⁸ Id. at 105.

⁹ Id. at 109.

¹⁰ Motion at 3-5.

¹¹ Initial Decision at 51.

¹² Id. at 100-103.

¹³ Motion at 5-8.

times¹⁴ and impliedly at least one additional time in quoting a Ninth Circuit precedent¹⁵ stated the applicable law regarding this second request; no clarification is necessary.

Finally, the Intervenor requests that the Board clarify that its dismissal of the Intervenor's amended environmental contention 5 was without prejudice.¹⁶ As the Intervenor recognizes in its motion,¹⁷ the Board stated in its decision that "in the event the Intervenor should seek to challenge the Staff's issuance of its Final EA as appropriately amended, the Intervenor must fully comply with the requirements of 10 C.F.R. § 2.309."¹⁸ This language addresses the issue the Intervenor raises. Had the Board not meant what it said, it would not have included the quoted language. The Board's Order is clear on its face. Accordingly, the Intervenor's motion to clarify is denied. Similarly, the Intervenor's alternative motion fails to meet the standard for a reconsideration motion in 10 C.F.R. § 2.323(e). For the foregoing reason, its alternative motion is denied.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD*

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 29, 2009

¹⁴ Initial Decision at 10 and n.45, 11, and 13 and n.66.

¹⁵ Id. at 57-58.

¹⁶ Motion at 8-10.

¹⁷ Id. at 9.

¹⁸ Initial Decision at 109 n.484.

* Copies of this 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)
)
PA'INA HAWAII, LLC) Docket No. 30-36974-ML
)
(Honolulu, Hawaii Irradiator Facility))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER (DENYING INTERVENOR'S MOTION TO CLARIFY) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Thomas S. Moore, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Paul B. Abramson
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Anthony J. Baratta
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Catherine Marco, Esq.
Michael J. Clark, Esq.
Molly Barkman, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

David L. Henkin, Esq.
D. Kapua'ala Sproat, Esq.
Earthjustice
223 South King Street, Suite 400
Honolulu, HI 96813-4501

Michael Kohn, President
Pa'ina Hawaii, LLC
P.O. Box 30542
Honolulu, HI 96820

Fred Paul Benco
Suite 3409, Century Square
1188 Bishop Street
Honolulu, HI 96813

[Original signed by Christine M. Pierpoint]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 29th day of September 2009