

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

February 3, 2011

ORDER

(Questions for Applicant, Staff and Intervenor)

In accordance with the Licensing Board's direction during a November 12, 2010 telephone conference, the Staff, on January 18, 2011 informed the Board of the number of public comments filed on its Draft Supplement to the Environmental Assessment (EA),¹ provided the ADAMS accession numbers for the comments, and announced the proposed date on which it proposed to file the Final Supplement to the EA.² Among the comments identified by the Staff are those filed by Earthjustice on behalf of the Intervenor, Concerned Citizens of Honolulu.³ Those comments note, inter alia, that on December 20, 2010, the Applicant, Pa'ina Hawaii, LLC, was granted a Conditional Use Permit – Major (CUP-M) from the Department of Planning and Permitting (DPP), City and County of Honolulu, for a below ground, pool-type irradiator using cobalt-60 sources (i.e., a Gray*Star Model Genesis II) located at 92-1780 Kunia Road, Kunia.⁴

¹ See Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs, Draft Supplement to the Final Environmental Assessment Related to the Proposed Pa'ina Hawaii, LLC Underwater Irradiator in Honolulu, Hawaii (Dec. 2010) [hereinafter Draft Supplement].

² Letter from Michael J. Clark, Counsel for NRC Staff, to Administrative Judges at 2 (Jan. 18, 2011).

³ Id.

⁴ Letter from David Lane Henkin, Staff Attorney, Earthjustice, to Cindy Bladey, Chief, Rules, Announcements, and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission (Jan. 6, 2011) at 2 (ADAMS Accession

That exact address is not included as one of the alternative sites in the Staff's Draft Supplement but it appears to be in close proximity to Alternative Site 2, which is located at 92-1860 Kunia Road, Kunia.⁵

The DPP decision, enclosed with the Intervenor's comments,⁶ states that the irradiator is to be built in a portion of the former Del Monte Packaging and Shipping building on a 119-acre parcel of land owned by the Hawaii Agricultural Research Center, which parcel is situated among approximately 12,000 acres of agricultural lands in the surrounding Kunia area.⁷ At the public hearing on the CUP-M application, the DPP decision indicates that, of the eighteen individuals testifying, seventeen supported the proposal.⁸ The eighteenth, an individual identified in the DPP decision as a member of Earthjustice (the entity representing the Intervenor), requested that the decision on the CUP-M application be postponed until the NRC's EA was completed.⁹

The DPP decision also indicates that the Applicant will file an application with the NRC pending the outcome of its CUP-M application.¹⁰ Similarly, the Intervenor's comments, referencing the DPP decision, state that "Pa'ina represented to DPP that, upon approval of the

No. ML110110256) [hereinafter Intervenor Comments]. The irradiator identified in the CUP-M is the identical model irradiator involved in the proceeding before the Licensing Board.

⁵ See Draft Supplement at 20.

⁶ Intervenor Comments, Enclosure, In the Matter of the Application of Paina Hawaii, LLC for a Conditional Use Permit (Findings of Fact, Conclusions of Law, and Decision and Order) (Dec. 20, 2010) [hereinafter DPP Decision].

⁷ Id. at 1-3.

⁸ Id. at 6.

⁹ Id. Although the DPP decision does not explicitly state that Earthjustice was appearing on behalf of the Intervenor at the CUP-M hearing, the context of the preceding pages of the decision appears to indicate that was the case: "Pursuant to a settlement agreement (NRC 2006a) with Concerned Citizens of Honolulu (Earth Justice), who were intervenors in the adjudicatory hearing on the license application, the NRC staff prepared an NEPA Environmental Assessment." Id. at 5.

¹⁰ Id. at 4.

permit, it would file an application with the NRC for the Kunia Road site.¹¹ In addition, the Intervenor's comments state that "the record should reflect that constructing and operating an irradiator in Kunia is not only a reasonable and feasible alternative, but one that Pa'ina is actively pursuing."¹²

The DPP's grant of a CUP-M for a Pa'ina Hawaii, LLC, irradiator at 92-1780 Kunia Road, Kunia raises a number of issues that might impact the schedule of this proceeding established in the Board's Order of July 16, 2010.¹³ Also, because of the unique circumstances under which the National Environmental Policy Act (NEPA) issues arose, the DPP's decision raises the questions of whether the current proceeding might be settled immediately and whether the parties may wish to move for the appointment of a settlement judge pursuant to 10 C.F.R. § 2.338 to expedite any possible settlement. Therefore, the Applicant, Staff and Intervenor shall answer the questions directed to them set forth below. The responses to the first set of questions posed to each party should help enable all parties to assess generally the likelihood of reaching an acceptable settlement and ending the current proceeding. The responses to the second set of questions, to be filed three days after the first, will answer the question whether the parties are interested in settling the current proceeding.

Each party's answers should be filed following the same number and letter format as the questions. With few exceptions, the parties should provide short answers. If appropriate, a yes or no answer may be sufficient and, in most other cases, a one or two sentence answer should suffice. The answers shall be filed by the date indicated at the beginning of the numbered questions. All answers shall be filed and served, as well as e-mailed to the other parties, the Licensing Board Judges, and the Board's law clerk, Katherine Tucker (Katie.Tucker@nrc.gov).

¹¹ Intervenor Comments at 2 n.1.

¹² Id. at 1.

¹³ Licensing Board Order (Requesting Scheduling Information) (July 16, 2010) at 3-5 (unpublished).

Applicant:

Answers to Questions 1 – 6 due: February 7, 2011.

1. Did Pa'ina make a representation to the DPP with respect to filing an application with the NRC?
 - a. If so, what representation did Pa'ina make to the DPP concerning the filing of an application with the NRC?
 - b. If so, what type or kind of application (e.g., license amendment to License number 53-29296-01; new materials license application) was Pa'ina referring to in its representation to the DPP?
 - c. If so, has Pa'ina filed with the NRC the application to which it referred before the DPP?
 - i. If so, on what date was the application filed?
 - d. If Pa'ina has not filed such application, when does Pa'ina intend to file the application?
2. Is the site at 92-1780 Kunia Road, Kunia for which the DPP issued a CUP-M on December 20, 2010 now Pa'ina's preferred site for building an irradiator?
3. Has any appeal to the Zoning Board of Appeals been filed concerning the CUP-M granted to Pa'ina on December 20, 2010?
4. Is Pa'ina aware of any opposition to its building the irradiator for which it received a CUP-M?
5. In accordance with the Board's previous Order, has Pa'ina secured a lease or other enforceable instrument ensuring the availability of the specific site incorporated into License number 53-29296-01?
 - a. If not, is the specific site incorporated into License number 53-29296-01 still available for lease or purchase?
 - b. If not, is the specific site incorporated into License number 53-29296-01 still Pa'ina's preferred site?

6. In order to construct an irradiator on the specific site incorporated into License number 53-29296-01, must Pa'ina obtain a use permit from the Department of Planning and Permitting for the City and County of Honolulu?
 - a. If so, has Pa'ina filed an application for a use permit?
 - b. If so, when did Pa'ina file an application for a use permit?
 - c. If so, is Pa'ina aware of any opposition to its use permit application?
 - d. If so, has Pa'ina been granted a use permit for the specific site incorporated into License number 53-29296-01?
 - i. If so, has any appeal been filed concerning the use permit application and what was the outcome of the appeal?

Answer to Question 7 due: February 10, 2011.

7. Is Pa'ina interested in ending immediately the current proceeding by joining a settlement in which Pa'ina would seek to amend License number 53-29296-01 for the site at 92-1780 Kunia Road, Kunia?
 - a. If so, does Pa'ina wish to file jointly a motion for the immediate appointment of a settlement judge pursuant to 10 C.F.R. § 2.338 to seek an acceptable settlement concluding this proceeding?

The Staff:

Answers to Questions 1 – 2 due: February 7, 2011.

1. Has the Staff received an application to amend License number 53-29296-01 from Pa'ina to change the irradiator site to 92-1780 Kunia Road, Kunia?
 - a. If so, when was the amendment application filed?
 - b. Whether or not the Staff has received an amendment application, if the Staff has communicated with Pa'ina about such an amendment, when does it expect an amendment application to be filed?
 - c. Once an amendment application is filed, is it the Staff's view that a notice of opportunity for hearing or other public notice would have to be filed?

- i. If not, in the Staff's view, what statute, regulation or case precedent negates the need to issue a notice of opportunity for hearing or other public notice?
 - ii. If not, in the Staff's view, is a person still entitled by statute, regulation or case precedent to request a hearing?
 1. What statute, regulation or case precedent entitles a person to request a hearing on a license amendment application even if no notice is required?
 - d. Once an amendment application is filed, is it the Staff's view that the extant Final EA and the December 2010 Supplement would have to be amended throughout and, as appropriate, changed to reflect the altered location and environmental impacts?
 - i. If so, under the Staff's normal schedule, approximately how long would it take the Staff to effectuate those changes?
 - ii. If so, and the Staff expedited its schedule, approximately how long would it take the Staff to effectuate those changes?
 - e. NEPA documents aside, under the Staff's normal schedule, approximately how long would it take the Staff to review a license amendment application for a changed location and, if appropriate, to grant a license amendment?
 - f. NEPA documents aside, if the Staff expedited its schedule, approximately how long would it take the Staff to review a license amendment application for a changed location and, if appropriate, to grant a license amendment?
2. Has the Staff received an application for a materials license from Pa'ina for an irradiator to be located at 92-1780 Kunia Road, Kunia?

Answer to Question 3 due: February 10, 2011.

3. Is the Staff interested in ending immediately the current proceeding by a settlement in which Pa'ina would seek to amend License number 53-29296-01 for the site at 92-1780 Kunia Road, Kunia?
 - a. If so, does the Staff wish to file jointly a motion for the immediate appointment of a settlement judge pursuant to 10 C.F.R. § 2.338 to seek an acceptable settlement concluding this proceeding?

Intervenor:

Answers to Questions 1 – 4 due: February 7, 2011.

1. On October 11, 2010, was Earthjustice representing Concerned Citizens of Honolulu when Earthjustice dispatched the letter noted in the DDP's December 20, 2010 decision?
2. On October 12, 2010 at the public hearing on Pa'ina's CUP-M application was Earthjustice appearing as on behalf of Concerned Citizens of Honolulu in requesting the DDP to postpone its decision?
3. Because the Staff's production of the EA and Supplements stemmed from the joint stipulation of the Intervenor and the Staff, is it Intervenor's view that the same parties could amend that stipulation agreement?
4. Has Concerned Citizens of Honolulu challenged any Pa'ina application filed with the DPP for a use permit for the specific site incorporated into License number 53-29296-01?
 - a. If not and Pa'ina files such application, is it Concerned Citizens of Honolulu's current intention to consider mounting a challenge to any use permit application?

Answer to Question 5 due: February 10, 2011.

5. Is Concerned Citizens of Honolulu interested in ending immediately the current proceeding by a settlement in which Pa'ina would seek to amend license number 53-29296-01 for the site at 92-1780 Kunia Road, Kunia?
 - a. If so, does Concerned Citizens of Honolulu wish to file jointly a motion for the immediate appointment of a settlement judge pursuant to 10 C.F.R. § 2.338 to seek an acceptable settlement concluding this proceeding?

* * * * *

In the event the parties' answers on February 10, 2011 indicate all parties are interested in the appointment of a settlement judge pursuant 10 C.F.R. § 2.338, the parties should immediately confer and file and serve (as well as e-mail the Licensing Board Judges) a joint motion, preferably on February 12, 2011 or as quickly thereafter as is practicable. The Board will then immediately seek the appointment of a settlement judge, who likely will contact the parties in short order.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD*

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 3, 2011

* 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 (Questions for Applicant, Staff and Intervenor) 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 3rd day of February 2011.