October 28, 2005

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

STAFF RESPONSE TO REQUEST
FOR HEARING BY CONCERNED CITIZENS OF HONOLULU

INTRODUCTION

On August 2, 2005, the Nuclear Regulatory Commission ("NRC") published in the *Federal Register* a notice of opportunity for a hearing in connection with Pa'ina Hawai'i LLC's ("Pa'ina") application for the possession and use of byproduct material to be used in a commercial irradiator at the Honolulu International Airport in Honolulu, Hawai'i. 70 Fed. Reg. 44,396 (Aug. 2, 2005). On October 3, 2005, Concerned Citizens of Honolulu ("Concerned Citizens") filed a request for a hearing in accordance with 10 C.F.R. § 2.309. The NRC Staff ("Staff"), in accordance with 10 C.F.R. § 2.309(h)(1), hereby responds.

DISCUSSION

I. Standing

Under Section 189a of the Atomic Energy Act (AEA), the Commission must grant a hearing upon the request of a person "whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a). An organization may establish standing by showing that either its organizational interests have been threatened or that at least one member has standing in his or her own right and has authorized the organization to act on his or her behalf. *See Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995).

In order to determine whether an individual has demonstrated sufficient interest in the proceeding to establish individual standing, the NRC has applied judicial concepts of standing. *Id.* Thus, to establish standing, an individual must "allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision." *Id.* In the alternative, an individual may also establish standing under the "proximity-plus" theory. Under the "proximity-plus" theory, "a presumption of standing based on geographical proximity may be applied . . . when the [licensed] activity at issue involves a 'significant source of radioactivity producing an obvious potential for offsite consequences.'" *CFC Logistics, Inc.*, LPB-03-20, 58 NRC 311, 318 (2003), *citing Sequoyah Fuels Corporation* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994). Concerned Citizens bases its standing on the attributes of individual members under both the traditional judicial test of standing ("injury in fact") and under the "proximity-plus" theory of standing.

A. Proximity-Plus Standing

As discussed below, the NRC Staff believes that Concerned Citizens has failed to established standing under the "proximity-plus" standing. The Commission had occasion this week to address the "proximity-plus" standard for standing in a case involving the Peach Bottom Nuclear Power Plant. As noted in that decision, the proximity-plus standard involves a two step case-by-case inquiry considering the proximity of the potential party to the facility in question and the "obvious potential for offsite consequences."[1] The Commission reiterated in the decision that where there is no "obvious potential offsite consequences" proximity standing

[1]Exelon Generation Company & PSEG Nuclear, LLC (Peach Bottom Atomic Power Station, Units 2 and 3) CLI-05-26, Slip op. at 3-4 (October 26, 2005);citing Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, GA), CLI-95-12, 42 NRC 111, 116 (1995)

will not be permitted.[2]

In the instant case the staff readily concedes that the proximity of at least some members of Concerned Citizens would be close enough to support almost any definition of an appropriate distance requirement for this facility if the second prong of the proximity test is met. However, the staff maintains that there is no "obvious potential for offsite consequences" associated with this facility that would justify using the proximity-plus standards as a basis for granting standing for a hearing on this application, as confirmed by the categorical exclusion specifically applicable to irradiators.[3] As intervenors recognize in presenting their proposed NEPA Contentions 1 and 2, the proposed facility is subject to a categorical exclusion under 10 C.F.R. § 51.22(c)(14)(vii). 10 C.F.R. § 51.22(a) states that such categorical exclusions will be granted only when:

> "...The proposed action belongs to a category of actions which the Commission, by rule or regulation, has declared to be a categorical exclusion, after first finding that the category of actions does not **individually or cumulatively have a significant effect on the human environment**." [emphasis added]

Given the Commission's recent re-affirmation of the unavailability of the proximity test in cases where there is no obvious potential for offsite consequences, the staff believes the existence of the categorical exclusion applicable to this facility is of dispositive significance. Indeed, it may

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[2]CLI-05-26 slip op. at 7.

[3]The staff is aware that a contrary result occurred in CFC Logistics, Inc., LBP-03-20 , 58 NRC 311 (2003). In that proceeding the staff, which had not been a party to the proceeding, was specifically asked to address questions from the Board related to the existence of an "obvious potential for off-site consequences." While the staff concluded no such obvious potential off-site consequences existed, the Board reached a contrary decision. Given the Commission's reiteration of the importance of the second prong of proximity based standing and the case-by-case nature of such determinations, the staff reiterates its prior conclusions with respect the impacts of such a facility as recognized in 10 C.F.R. 51.22(c)(14)(vii). Note that there is no indication that the impact of the categorical exclusion for irradiators was considered in the context of its potential relevance to this aspect of proximity standing in the CFC case nor the cases establishing the proximity-plus framework on which the Board in CFC relied.

be considered as a direct, or at minimum an indirect, attack on the Commission's regulations contrary to 10 C.F.R. 2. 335(a) to assume "obvious" offsite potential consequences sufficient to justify standing in an irradiator case contrary to the findings that were necessarily made before the categorical exclusion was granted. By regulation the Commission has determined that irradiators do not individually or collectively have a significant effect on the human environment. This is not to say that petitioners can never establish standing in cases involving the licensing of an irradiator. Rather, it simply means that where the Commission has through a regulatory process declared a facility as not having a significant effect on the human environment, the "proximity-plus" expedited method of establishing standing should not be used. Petitioners can still establish standing using traditional judicial concepts of standing. As described below, the Petitioner does meet those standards.

B. Traditional Judicial Concepts of Standing

In accordance with judicial concepts of standing, the petitioner must allege an injury-in-fact, "a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision." *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993), *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Dellums v. NRC,* 863 F.2d 968, 971 (D.C. Cir. 1988); *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-67 (1991)). This injury must be actual or threatened, rather than abstract and conjectural. *Perry*, CLI-93-21, 38 NRC at 92; *see also Lujan*, 504 U.S. at 560. The injury-in-fact also must be "arguably within the zone of interests protected by the governing statute," in the case of the NRC, either the Atomic Energy Act or the National Environmental Policy Act. *Yankee*, CLI-98-21, 48 NRC at 195; *Perry*, CLI-93-21, 38 NRC at 92. In the instant case, the Petitioners have made the necessary showing. In its hearing request, the Petitioners allege that members of Concerned Citizens could be exposed to radiation through "mechanical

failures, power outages, airplane accidents, acts of sabotage or terrorism, hurricanes, and tsunamis."[4] Hearing Request at 7-8. This allegation of potential injury is reiterated and elaborated in affidavits filed by members of Concerned Citizens as well as experts retained by the organization. *See, e.g.,* Coulson Decl. (Oct. 2, 2005); Thompson Decl. (Oct. 2, 2005) (attached to Hearing Request). As the injury alleged is exposure to radiation, it is within the zone of interest to be protected by the Atomic Energy Act and is redressable via NRC action. Therefore, at least one member of Concerned Citizens has established standing under traditional judicial concepts of standing, and the Staff does not oppose Concerned Citizens assertion of representational standing.

II. Contentions

The NRC has a well-established standard for admitting intervenors. In addition to establishing standing, potential intervenors must offer at least one admissible contention. 10 C.F.R. § 2.309. For each contention, the intervenor must provide the following information: (1) a specific statement of the issue of law or fact to be raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue raised in the contention is within the scope of the proceeding; (4) a demonstration that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) a concise statement of the alleged facts or expert opinions which support the requestor's position; and (6) sufficient information to show that a genuine dispute exists on a material issue

[4]In addition, Concerned Citizens has put forth the argument that the NRC's failure to perform an environmental impact statement or environmental assessment of the proposed project results in a procedural injury to the requesters. Hearing Request at 8. Failure to produce an environmental impact statement in circumstances where one is required has been held to constitute injury. *Consumers Power Co.* (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 115-16 (1979), *citing Jones v. D.C. Redevelopment Land Agency*, 499 F.2d 502, 512 (D.C. Cir. 1974). Here, as the Petitioners note in NEPA Contentions 1 and 2, the instant action is subject to a categorical exclusion, and, therefore, no environmental impact statement is required. Petitioners have failed to state a procedural injury arising from the proposed action and have not established standing based on this alleged injury.

of law or fact, including references to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute or the identification of each failure to include necessary information in the application and the supporting reasons for the petitioner's belief. 10 C.F.R. § 2.309(f)(1). For the reasons discussed below, the NRC Staff submits that Concerned Citizens has failed to offer an admissible contention.

A. Safety and Related Issues Under Atomic Energy Act and Implementing Regulations

1. Safety Contention 1

Although Safety Contention 1 is entitled "Inadequate Procedures to Ensure Safe Loading and Unloading of Cobalt-60 Pencils", the basis for the contention also discusses in great detail the design of the irradiator. It is difficult to tell whether the contention objects to the design of the irradiator or to the contents of the proposed operating procedures. In regard to Safety Contention 1, Concerned Citizens, therefore, has failed to provide a specific statement of the issue of law or fact to be controverted, as required by 10 C.F.R. § 2.309(f)(I), and therefore should not be admitted.

Even assuming that Concerned Citizens intended to limit the contention to the claim indicated by the title of the contention – that the procedures for loading and unloading the Co-60 pencils are inadequate – Concerned Citizens has failed to set forth adequate bases for an admissible contention. The contention appears to argue that Pa'ina Hawaii has failed to include all the information related to Co-60 source loading and unloading required by 10 C.F.R. § 36.53 in its application. The contention specifically cites 10 C.F.R. § 36.53(b) and states that "the application has no emergency procedures for accidents that may occur during loading and unloading sources". Hearing Request at 12. However, 10 C.F.R. § 36.53(b) does not require such procedures. 10 C.F.R. § 36.53(a)(7), which Concerned Citizens does not cite, does require licensees to have in place procedures for the loading, unloading, and repositioning of

sources, but at the application stage only an outline of procedures need be included. 10 C.F.R. § 36.13(c). With respect to procedures for loading and unloading Co-60 pencils, Pa'ina Hawaii has complied with this requirement. *See* Application at 66. Thus Concerned Citizens has not identified with respect to procedural information required to be included at the application stage a failure to include legally required information in the application and, therefore, has not identified a genuine dispute on a material issue of law or fact. To the extent Petitioner is arguing that detailed procedures are required at the application stage of this proceeding, they raise an impermissible challenge to the regulations contrary to 10 C.F.R. § 2.335.

2. Safety Contention 2

Safety Contention 2, entitled "Failure to Address Risks of Overheating" should not be admitted because it fails to meet the requirements of 10 C.F.R. § 2.309(f). Specifically, the contention fails to specify the issue of fact or law to be raised or controverted, raises an issue outside the scope of the current proceeding, and fails to show a genuine dispute on a material issue of law or fact.

It is difficult to tell the precise subject of the contention. Although the title of the contention indicates that Concerned Citizens takes issue with the information regarding system overheating included or omitted from the application, the contention also argues that the application has been improperly redacted. Hearing Request at 12. As drafted, the contention is vague and confusing and does not comply with 10 C.F.R. § 2.309(f)(i).

If the contention is intended to raise the issue of whether the appropriate information was redacted from the public version of the application, the contention is outside the scope of the proceeding. The instant proceeding is limited to an evaluation of the application itself. Concerned Citizens has failed to demonstrate how the redaction of the publicly available copy of the application affects the adequacy of the application itself and thus has failed to demonstrate that Safety Contention 2 is within the scope of the proceeding and is material to

the findings that the NRC must make to support the issuance of a license, as required by 10 C.F.R. § 2.309(f)(iii-iv).

If, on the other hand, the contention is limited to the issue of whether or not the application includes adequate analysis of the risks of the system overheating, the contention is still inadmissible. Concerned Citizens claims inadequate information, but fails to cite a legal requirement to include any such information. 10 C.F.R. § 2.309(f)(vi). The lone regulation cited in support of the contention, 10 C.F.R. § 36.57(e), is purported to require that ion exchange resins remain free from contamination. To the contrary, § 36.57(e) requires only that licensees monitor resin radiation levels before releasing resins for unrestricted use, and that the resins be released only if their radiation levels are measured as below background radiation levels. The contention fails to state with particularity how the application fails to provide adequate information to demonstrate that this requirement will be met, provides no basis for intervenors concerns, and wholly fails to meet the requirement for admissible contentions.

3. Safety Contention 3

Safety Contention 3 is entitled "Inadequate Provision for Quality Assurance." Hearing Request at 13. Although not clearly stated, it appears that Concerned Citizens contends that quality assurance procedures for the Cobalt-60 to be used in the irradiator are inadequate. However, this contention raises issues outside the scope of the instant proceeding, raises issues that are not material to the findings the NRC must make in connection with the instant application, and fails to raise a genuine dispute on a material issue of law or fact. *See* 10 C.F.R. 2.309(f)(1)(iii),(iv) and (vi). The contention claims that the NRC will be unable to ensure the quality of the Co-60 to be used in the irradiator without inspecting the Canadian or Russian facilities from which the Co-60 is presumed to originate. Intervenors fail to cite any

legal requirement for the NRC to conduct such an inspection.[5] In addition, Concerned Citizens contends that the applicant has failed to include in its application a provision for carrying out source leak testing, as required by 10 C.F.R. § 36.59(b). While it is true that § 36.59(b) requires leak testing, such testing can be carried out by either the irradiator operator or the entity providing the source Co-60 to the irradiator operator (in the regulation, the transferor).[6] On page 68 of the application, Pa'ina Hawaii states that it will obtain certificates from the transferor confirming that leak testing has been performed within six months prior to the source transfer. Thus, Pa'ina Hawai'i is not required to conduct leak testing, and no legally required information has been omitted from the application. To the extent Concerned Citizens is trying to argue that a certificate confirming leak detection is not adequate, the contention is an impermissible challenge to 10 C.F.R. § 36.59(b) under 10 C.F.R. § 2.335.

4. Safety Contention 4

Safety Contention 4, entitled "Failure to Address Accidents Involving Prolonged Loss of Electricity", states that "contrary to 10 C.F.R. § 36.53(b)(6), Pa'ina Hawaii's application fails to describe emergency procedures for accidents involving a prolonged loss of electricity." Hearing Request at 13. This contention is inadmissible because it does not raise a genuine dispute on a material issue of law or fact; it argues that information is missing or incomplete, but does not cite a law or regulation requiring such information. 10 C.F.R. § 2.309(f)(vi). 10 C.F.R. § 36.53(b)(6) does require licensees to have procedures in place to address a prolonged loss of electrical power. At the application stage, however, only outlines of such procedures need be

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[5]The contention also ignores the fact that even if there were such a legal requirement, the NRC, an entity of the United States government, would have no authority to fulfill such a requirement by conducting an inspection of a facility in a foreign country.

[6]10 C.F.R. § 36.59(b) states: "For pool irradiators, sources may not be put into the pool unless the licensee tests the sources for leaks or has a certificate from a transferor that leak test has been done within six months before the transfer."

included. 10 C.F.R. § 36.13(c). Here, Pa'ina Hawaii has addressed loss of power on page 39 of the application. Petitioners have not identified any deficiency in the application's discussion of this issue. To the extent the petition seeks to require detailed procedures at the application stage, their contentions constitute a challenge to 10 C.F.R. § 36.13(c) which is impermissible under 10 C.F.R. § 2.335.

5. Safety Contention 5

Safety Contention 5 is entitled "Lack of Procedures to Address Break in Helium Line." It states that "contrary to 10 C.F.R. § 36.53, Pa'ina Hawaii has no emergency procedures for accidents involving a brake in the compressed helium line." Hearing Request at 14. However, 10 C.F.R. § 36.53 does not require such procedures, nor does any other portion of 10 C.F.R. Part 36. Thus, the contention fails to state a genuine dispute on a material issue of law or fact. In addition, other than an assertion that a break in the helium line "would allow water to enter the bells, and degrade the product", the contention contains no supporting information to demonstrate sufficient basis to support admission of the contention under 10 C.F.R. § 2.309. To the extent the petition seeks to require detailed procedures at the application stage, their contentions constitute a challenge to 10 C.F.R. § 36.13(c) which is impermissible under 10 C.F.R. § 2.335.

6. Safety Contention 6

Safety Contention 6 is entitled "Inadequate Provision for Natural Phenomena" and argues that "Pa'ina Hawaii's application has no discussion of the potential for . . . emergency events [caused by natural phenomena] and the procedures that would be implemented should they occur, in violation of 10 C.F.R. § 36.53(b)(9)." Although the contention mentions 2005 Hurricanes Katrina and Rita and the tsunami in the Indian Ocean in December 2004, the contention does not contain a concise statement of the alleged facts or expert opinion on which Concerned Citizens intends to rely. Such supporting material is required by 10 C.F.R.

§ 2.309(f)(v). In its absence, the contention should not be admitted. Further, 10 C.F.R. § 36.53 does not require such procedures in the application. To the extent the petition seeks to require detailed procedures at the application stage, their contentions constitute a challenge to 10 C.F.R. § 36.13(c) which is impermissible under 10 C.F.R. § 2.335.

7. Safety Contention 7

Safety Contention 7 is entitled "Failure to Address Risks of Aviation Accidents." The Contention alleges that "Pa'ina Hawaii's application fails completely to address the likelihood and consequences of an air crash, either on take off or landing." However, the contention does not cite to any specific regulatory requirement for such an analysis. Further, the Hearing Request does not make any showing that the emergency procedures that would be required under 10 C.F.R. § 36.53(b) would be inadequate to address these events nor does the Petitioner identify any requirement to have such procedures in the application. As noted previously, under 10 C.F.R. § 36.13(c) such detailed procedures are not required to be in the application. Therefore, the contention fails to show a genuine dispute on a material issue of law or fact. In addition, by submitting that an analysis not required by the regulations must be included in an application, the contention appears to attack the NRC's regulations themselves, in violation of 10 C.F.R. § 2.335(a).

8. Safety Contention 8

Safety Contention 8 is entitled "Failure to Address Risks Associated with Transporting Cobalt-60 to the Facility. It states that "Pa'ina Hawaii's application fails to address risks to the public and the environment associated with transporting Co-60 pencils to the proposed facility." Hearing Request at 16. However, the contention fails to cite a legal requirement that such information be included in the application. Therefore, the contention fails to show a genuine dispute on a material issue of law or fact. In addition, this issue is outside the scope of the current proceeding. The NRC has before it an application for the possession and use of

byproduct material to be used in a commercial irradiator. Issues associated with the shipment of Co-60 to the irradiator site would perhaps be relevant to an application for a transportation or import license of Co-60 pencils, but any such application, if required, would be a separate matter outside the scope of this proceeding.

9. Safety Contention 9

Safety Contention 9 is entitled "Inadequate Provision for Facility Security" and states that "Pa'ina Hawaii improperly proposes to place a major sabotage target into the local community without adequate provision to address threats to the community." Hearing Request at 16. The contention, however does not specify what law or regulation would require Pa'ina Hawaii to include such information.[7] Therefore, it fails to raise a genuine dispute on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(vi) and should not be admitted.

10. Safety Contention 10

Safety Contention 10 is entitled "Inadequate Provision for Protecting Cobalt-60 Sources in Transit". The contention does not contain a clear specific statement of the issue of fact or law to be raised or controverted, as required by 10 C.F.R. § 2.309(f)(i), but seems to claim that the application is lacking information on how the Co-60 sources will be protected during transfer from the supplier to the proposed irradiator. Hearing Request at 17. This issue is outside the

[7]In a footnote, Concern Citizens does suggest that materials licensing facilities (including commercial irradiators) are obligated to ensure adequate protection against attacks by foreign enemy governments or individuals. Hearing Request at fn. 4. This statement is based on the fact that production and utilization facilities are specifically exempted from protecting against attacks by foreign enemy governments or individuals. *See* 10 C.F.R. § 50.13. However, Concerned Citizens has taken this regulation out of context. Section 50.13 is intended to bound the requirements placed on production and utilization facilities to the limits outlined in the Design Basis Threat (DBT) for production and utilization facilities outlined at 10 C.F.R. § 73.1 and to emphasize that the DBT does not include actions by foreign enemy governments. A similar clarification statement is not required for materials licenses because there are no security requirements similar to the DBT in § 73.1 that apply to this facility. In addition, Concerned Citizens' argument, which would hold an irradiator licensee to a higher standard than a large, multi-million dollar production and utilization facility, defies logic.

scope of the current proceeding and, therefore, does not comply with the requirements of 10 C.F.R. § 2.309(f)(iii). The current proceeding concerns only the possession and use of byproduct material at an irradiator on the grounds of the Honolulu International Airport. This contention, however, concerns security during transportation of materials, a topic relevant only to a future transportation or import license.

In addition, the Petitioner fails to identify any law or regulation requiring Pa'ina Hawaii to include information on plans to protect Co-60 sources in transit in its application, thus violating 10 C.F.R. § 2.309(f)(vi). In fact, the contention states: "The NRC does not require armed escorts for Co-60 sources. Yet, potential saboteurs have significant fire power at their disposal." Hearing Request at 17. The contention contains several other statements regarding the possibility of an attack on a shipment of Co-60 sources and suggests that, although they do not currently do so, NRC regulations should contain requirements for the protection of Co-60 sources. Thus, by its own terms, this contention constitutes an attack on the NRC's regulations, and is inadmissible under 10 C.F.R. § 2.335(a).

11. Safety Contention 11

Safety Contention 11, entitled "Inadequate Liability Insurance", claims that "Pa'ina Hawaii has offered the minimum $113,000 financial assurance for decommissioning, but, as discussed above, this would clearly be inadequate if a major accident to occur." Hearing Request at 18. Although Concerned Citizens admits that Pa'ina Hawaii has complied with the applicable NRC regulations (10 C.F.R. § 30.35(d)), Concerned Citizens plans to request that the requirements of § 30.35(d) be waived in accordance with 10 C.F.R. § 2.335(b). However, waiver requests pursuant to § 2.335(b) may be filed only by parties. It is well-established that in order to obtain party status, a potential intervenor must (1) demonstrate that they have standing to intervene in the proceeding; and (2) offer one valid, admissible contention. *See Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency* (Shearon Harris

Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2070 (1982). Although, as discussed above, the Staff concedes that Concerned Citizens has established standing, Petitioner has not offered an admissible contention. Therefore, at this point, Concerned Citizens has not been admitted as a party, so the issue of the adequacy of Pa'ina Hawaii's financial assurance is premature. Further, even if Petitioners were granted party status at this juncture, Concerned Citizens' "plans" to seek a waiver are not an adequate factual basis to support admission of a contention. A hypothetical "major accident", with a vaguely stated intent to file future waiver requests, does not establish the clear issue of disputed fact or law that would justify a contention.

12. Safety Contention 12

Safety Contention 12, entitled "Improper Redacting Application," does not contain a specific statement of the issue of fact or law to be raised or controverted, as required by 10 C.F.R. § 2.309(f)(i), but appears to claim that the NRC has improperly redacted Pa'ina Hawaii's application, and, therefore, the application should be denied.[8] This contention takes issue with the NRC's administrative actions in relation to the application, not with the contents of the application itself. As discussed in connection with Safety Contention 2, above, the instant proceeding is limited to an evaluation of the application itself. Concerned Citizens has failed to demonstrate how the redaction of the publicly available copy of the application affects the adequacy of the application itself and thus has failed to demonstrate that Safety Contention 12 is within the scope of the proceeding and is material to the findings that the NRC must make to

[8]The Staff did redact portions of the document. As indicated on the cover sheet accompanying the public version of the application, the redactions were made to protect sensitive information. In a conference call on October 26, 2005, the parties and the Board discussed whether or not it would be necessary to release an unredacted version of the application to counsel for Concerned Citizens. At the close of the call, the parties and the Board agreed that release of an unredacted application is not necessary at this time and also agreed to revisit the issue if review of the unredacted application should become necessary later in the proceeding.

support the issuance of a license, as required by 10 C.F.R. § 2.309(f)(iii-iv). In addition, Safety Contention 12 fails to identify a specific portion of the application in dispute, as required by 10 C.F.R. § 2.309(f)(vi).

B. Failure to Comply With NEPA

1. NEPA Contention 1

NEPA Contention 1, entitled "Failure to Explain Application of Categorical Exclusions", claims that the NRC did not provide sufficient explanation in the Notice of Opportunity for a Hearing for the Staff's decision that an environmental assessment is not required because the licensing action at issue falls under a categorical exclusion, as defined in 10 C.F.R. § 51.22(c)(14)(vii), and that the NRC has unlawfully failed to consider whether any extraordinary circumstances preclude application of a categorical exclusion. Hearing Request at 19. This contention should not be admitted because it is an improper challenge to the regulations. 10 C.F.R. § 2.335(a). Irradiators are specifically categorically excluded from the requirement for the agency to prepare an Environmental Impact Statement (EIS) or an Environmental Assessment (EA). 10 C.F.R. § 51.22(c)(14)(vii). This exclusion was analyzed by the agency and made available for public comment at the rulemaking stage. Any challenges to the exclusion should have been brought at the rulemaking stage.

Concerned Citizens has attempted to argue that, under the provisions of 10 C.F.R. § 51.22(b), the Pa'ina Hawaii application constitutes a special circumstance in which an EA or an EIS should be prepared, regardless of whether the proposed action falls under a categorical exclusion. 10 C.F.R. § 51.22(b) grants the Commission the discretion to determine, either on its own initiative or upon the request of an interested party, whether special circumstances warranting an EA or EIS exist. In the context of a licensing hearing, the Board may also consider whether such special circumstances exist. *See Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC 273 (1991). In order to raise

this issue in a hearing, a petitioner must explain how the licensing action at issue differs from the type of action already considered by the Commission in creating the categorical exclusion. *Shoreham*, LBP-91-39, 34 NRC at 277. No such showing has been made by the Petitioners. Concerned Citizens has presented no credible basis to conclude that the types of irradiation or location of the irradiator, or specific proposals for operating the irradiator are in any way outside the envelope of characteristics that were considered in the Commission's rulemaking decision to grant the categorical exclusion. Under such circumstances, the contention cannot be found to have met 10 C.F.R. § 2.309 requirements for admission.

2. NEPA Contention 2

NEPA Contention 2, entitled "Failure to Prepare an Environmental Impact Statement, or, At Minimum, an Environmental Assessment", is substantially similar to NEPA Contention 1. Concerned Citizens argues that special circumstances warrant the preparation of an EIS or EA, despite the fact that irradiators are categorically excluded from the NRC's duties under NEPA. For the reasons discussed in connection with NEPA Contention 1, above, this contention is inadmissible.

In addition, both "special circumstances" Concerned Citizens attempts to raise are not addressable by the agency. The first is the potential for a terrorist attack at the facility. Hearing Request at 21. The Commission has clearly stated that the NRC need not consider the environmental impacts of terrorism as part of its NEPA analyses. *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-1, 57 NRC 1 (2003). Although the Petitioners note that this case is on appeal to the U.S. Court of Appeals for the Ninth Circuit, it has not been overruled by any higher court, and therefore, remains binding precedent. The second "special circumstance" alleged is that the proposed irradiator

will likely irradiate produce and other food products.[9] Petitioners claim that use of irradiators on food was not specifically discussed in the Commission's rulemaking decision to grant a categorical exclusion for irradiators, which is true. However, the Commission did consider the irradiation of medical and pharmacological supplies, which would potentially result in human ingestion and other human exposures. 49 Fed. Reg. 9352, 9378 (Mar. 12, 1984). Petitioners have failed to explain how irradiation of food differs from other possible paths of human consumption already considered or to offer any factual basis to support a contention based on such a hypothesis. Thus, the Petitioners have not made the necessary showing, discussed above in connection with NEPA Contention 1.

CONCLUSION

For the reasons discussed above, Concerned Citizens has failed to raise an admissible contention and, therefore, its hearing request should not be granted.

Respectfully Submitted,

/RA/

Margaret J. Bupp
Counsel for NRC Staff

Dated at Rockville, Maryland
this 28th day of October, 2005

[9]The Staff also notes that any arguments made about the general safety of food treated by the proposed irradiator are outside the scope of the current proceeding. The NRC does not have regulatory authority over food products. Rather, the safety of food products, including irradiated food, falls under the regulatory purview of the U.S. Food and Drug Administration. *See* "Irradiation in the Production, Processing and Handling of Food" 21 C.F.R. Part 179.

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "STAFF RESPONSE TO REQUEST FOR HEARING BY CONCERNED CITIZENS OF HONOLULU" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 28th day of October, 2005.

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