

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 03/27/08
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COMMISSIONERS

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons

In the Matter of)
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)
PA'INA HAWAII, LLC)
(Materials License Application))
)
)
_____)

Docket No. 30-36974-ML

CLI-08-04

MEMORANDUM AND ORDER

In this licensing proceeding for an underwater irradiator, the Atomic Safety and Licensing Board recently issued a Memorandum and Order ruling on the admissibility of intervenor Concerned Citizens of Honolulu's (Concerned Citizens) environmental contentions.¹

Among the issues the Board admitted for hearing is Concerned Citizens' claim that the NRC Staff must analyze potential health effects of consuming irradiated foods.² The hearing notice for this proceeding, however, noted that other agencies, particularly the U.S. Food and Drug Administration (FDA) and the U.S. Department of Agriculture (USDA) are responsible for "determining the food types and products used for human consumption that may be safely irradiated."³ The Environmental Assessment for the proposed Pa'ina Hawaii irradiator states that the NRC's "role in irradiation, food or otherwise, is to assure that facilities are constructed

¹ Memorandum and Order (Ruling on Admissibility of Intervenor's Amended Environmental Contentions)(12/21/07)(unpublished).

² See *Id.* at 20-23.

³ See Notice of License Request, 70 Fed. Reg. 44,396 (Aug. 2, 2005).

and operated safely.”⁴ As the Board noted, Concerned Citizen’s claim raises a “legal issue.”⁵ It does not involve factual technical questions that call for expert opinion, and nor does it involve mere routine matters of contention admissibility.

Whether NEPA requires the NRC to consider potential health effects of consuming irradiated food raises the “kind of broad legal question” appropriate for Commission interlocutory review.⁶ In our 1998 *Statement of Policy on Conduct of Adjudicatory Proceedings*, we encouraged “boards . . . to certify novel legal or policy questions related to admitted issues to the Commission as early as possible in the proceeding,” and noted that we also may exercise our supervisory authority over proceedings to direct boards to certify such questions.⁷

Given that Concerned Citizens’ claim raises a threshold legal question going to the proper scope of this proceeding, and is a matter with potential new significant NEPA implications for the NRC, the Commission finds it appropriate to take *sua sponte* review. We therefore invite the parties to submit briefs on whether NEPA requires the NRC to analyze the potential impacts on health of consuming irradiated food. We particularly seek the parties’ view on two questions: (1) whether the NRC lacks authority to reject an irradiator license for non-radiological food safety reasons and therefore need not consider food safety under NEPA;⁸ and (2) whether in light of NEPA’s “rule of reason,” FDA’s comprehensive review and regulation of

⁴ Final Environmental Assessment Related to the Proposed Pa’ina Hawaii, LLC Underwater Irradiator in Honolulu, Hawaii at C-9.

⁵ Memorandum and Order at 23.

⁶ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-21, 62 NRC 538, 540 (2005).

⁷ CLI-98-12, 48 NRC 18, 23 (1998); *see also, e.g., North Atlantic Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129, 130 (1998)(where Commission exercised inherent supervisory authority to take *sua sponte* review of novel broad legal issue).

⁸ *See, e.g. Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 767-68 and n.2, 770 (2004).

the safety of irradiated foods, including NEPA reviews, excuse NRC from considering food safety in its own NEPA reviews.⁹

Initial briefs are limited to 20 pages, exclusive of title page, table of contents or table of authorities, and shall be filed within 14 calendar days of the date of this order. Reply briefs may be filed within 7 calendar days of the initial briefs' filing, and are limited to 10 pages.

IT IS SO ORDERED.

For the Commission

/RA/

Andrew L. Bates
Acting Secretary of the Commission

Dated at Rockville, Maryland
this 27th day of March, 2008.

⁹ See generally, e.g., Final Rule, "Irradiation in the Production, Processing and Handling of Food," 51 Fed. Reg. 13,376 (April 18, 1986); Final Rule, 55 Fed. Reg. 18,538 (May 2, 1990); Final Rule, 65 Fed. Reg. 45,280 (July 21, 2000); Final Rule, 62 Fed. Reg. 64,107 (Dec. 3, 1997); Proposed Rule, 49 Fed. Reg. 5714, 5721 (Feb. 14, 1984); Federal Food, Drug, and Cosmetics Act, 21 USC §§ 321, 347(7), 348, 409; see also *North Carolina v. City of Virginia Beach*, 951 F.2d 596 (4th Cir. 1991). In this case, Concerned Citizens refers to a 2002 study by Raul et al, and claims the study suggests a "new area of toxicity" that the FDA has yet to examine. See Intervenor Concerned Citizens of Honolulu's Amended Environmental Contentions # 3 through # 5 (Sept. 4, 2007) at 29-30 (citing to affidavit by William Au). The public record indicates that the FDA has addressed the 2002 study by Dr. Rao. See Final Rule, 70 Fed. Reg. 48,057, 48,067 (Aug. 16, 2005).