

RAS 10816

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 12/08/05

SERVED 12/08/05

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Paul B. Abramson
Dr. Anthony J. Baratta

In the Matter of

PA'INA HAWAII, LLC

(Honolulu, Hawaii Irradiator Facility)

Docket No. 30-36974-ML

ASLBP No. 06-843-01-ML

December 8, 2005

PROTECTIVE ORDER
(Regarding Disclosure and Use of Protected Information)

Pursuant to section 147(a) of the Atomic Energy Act, as amended, 42 U.S.C. § 2167 (2000), and 10 C.F.R. § 2.319(g),(q),(r), we issue this Protective Order to govern the disclosure and use of certain “protected information” included in the application of Pa’ina Hawaii, LLC (Pa’ina or Applicant) for the possession and use of byproduct material to be used in a commercial irradiator at the Honolulu International Airport in Honolulu, Hawaii. For purposes of this Protective Order, “protected information” means the information in the Pa’ina irradiator application (1) identified by the NRC Staff as the equivalent of Safeguards Information - Modified Handling (SGI-M) that meets the definition of SGI-M in the Commission’s 2003 Order imposing compensatory measures on irradiators¹ or (2) identified by the NRC Staff as protected

¹See In the Matter of All Panoramic and Underwater Irradiators Authorized to Possess Greater than 370 TerraBecquerels (10,000 Curies) of Byproduct Material in the Form of Sealed Sources; Order Imposing Compensatory Measures (Effective Immediately), 68 Fed. Reg. 35,458 (June 13, 2003). Publicly available Attachment 3 of the Commission’s Order, “Modified Handling Requirements for the Protection of Certain Safeguards Information (SGI-M),” states that “SGI-M is information the disclosure of which could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense
(continued...)

by 10 C.F.R. § 2.390(d).² Specifically, the Staff has found that the following pages of the Pa'ina irradiator application contain protected information: 28, 32, 33, 42, 44, 76, GI-204 page 4 of 5, GI-204 page 5 of 5, GI-205 page 4 of 4, GI-303 page 1 of 3, and GI-303 page 2 of 3. No other portions of the Pa'ina irradiator application are considered protected information or otherwise governed by this Protective Order.

Counsel, consultants, and others representing Pa'ina and Concerned Citizens of Honolulu ("Concerned Citizens") shall be permitted access to protected information upon the following conditions:

1. Designated representatives of Pa'ina and Concerned Citizens shall execute the attached Confidentiality and Non-Disclosure Agreement. After the Confidentiality and Non-Disclosure Agreements are executed, the originals shall be filed with the Office of the Secretary of the Commission and copies shall be served upon counsel for each party³ and to the Licensing Board.

2. Only individual counsel, consultants, and others representing a party who have executed the attached Confidentiality and Non-Disclosure Agreement and have been subject to

¹(...continued)

and security by significantly increasing the likelihood of theft, diversion, or sabotage of materials or facilities subject to NRC jurisdiction." *Id.*, Attachment 3 at 35,460. See also Protection of Safeguards Information, 70 Fed. Reg. 7196, 7211 (proposed Feb. 11, 2005)(definition of safeguards information to be codified in 10 C.F.R. § 73.2)

² In fulfillment of the requirements of 10 C.F.R. 2.323(b), the Staff's initial November 7, 2005, motion for a protective order states that the Petitioner, Concerned Citizens of Honolulu, does not agree with the Staff's assessment of the applicability of 10 C.F.R. § 2.390(d) but that it, nevertheless, does not oppose entry of the proposed draft protective order. See NRC Staff Motion for Protective Order Governing Disclosure of Information (Nov. 7, 2005) at 1.

³ For purposes of the Protective Order, the term "party" shall mean Pa'ina Hawaii, LLC and Concerned Citizens of Honolulu. The term "party" does not include the NRC staff. The provisions of this Protective Order, unless expressly stated, do not apply to NRC employees, contractors, or consultants.

a fingerprint check conducted by the NRC⁴ may have access to protected information. Access to SGI-M information shall be granted only after completion of a fingerprint verification for each individual. Protected information shall not be used except as necessary for the conduct of this proceeding, nor shall it be disclosed in any manner to any person except to the counsel, consultants or other party representatives who are engaged in the conduct of this proceeding and who need to know the information in order to carry out their responsibilities in this proceeding. Individuals with access to protected information pursuant to this Protective Order may make copies of and take notes on the protected information, but such copies and notes shall be subject to the same restrictions on disclosure and use as protected information. Such notes and copies will not be included in ADAMS.

3. Counsel, consultants, and others representing a party who receive any protected information shall maintain its confidentiality as required in the attached Confidentiality and Non-Disclosure Agreement, the terms of which are hereby incorporated in this Protective Order.

4. In addition to the requirements specified in the Confidentiality and Non-Disclosure Agreement attached to this Protective Order, all pleadings and correspondence in this proceeding (including testimony) that disclose any protected information shall:

- a. Be segregated;
- b. Be served only upon lead counsel for the Applicant, Fred Paul Benco, and the Petitioner, David Henkin; the Assistant for Rulemakings and Adjudications in the Commission's Office of the Secretary; and the individual Members of the Licensing Board (in accordance with paragraph 4.e);

⁴ For the fingerprint check, individuals should fill out Standard Form 87, available from the U.S. Nuclear Regulatory Commission, Office of Administration, Security Processing Unit, Mail Stop T-6E46 11555 Rockville Pike, Rockville, MD 20852. The completed form, along with a \$27.00 processing fee in the form of a money order or check made out to the Nuclear Regulatory Commission, should be sent to the address above.

- c. Be served only by: (i) United States first class, registered, express, or certified mail, (ii) internal NRC mail, (iii) messenger-courier or overnight delivery service (e.g., Federal Express), or (iv) personal delivery by an individual who otherwise is authorized access pursuant to 10 C.F.R. § 73.21(c) or an order issued by the Board or the Commission in this proceeding; and
- d. Be transmitted in two sealed envelopes or wrappers, including: (i) an outer mailing envelope, and (ii) a heavy, opaque inner envelope bearing the name and address of the addressee and the statement "Safeguards Information-Modified Handling." Addressees shall take all necessary precautions to ensure that they alone will open envelopes so marked. The outer envelope or wrapper will contain the intended recipient's name and address, and will bear no marking or indication that the document within contains protected information; and
- e. All protected information to be served upon the individual Members of the Licensing Board shall be addressed to the individual Member "In care of" or "c/o" the ASLBP Custodian, and include six copies of an inventory that clearly identifies each item of protected information being served. Any required certificate of service will specify that material containing protected information was filed with the Licensing Board Members "in care of" or "c/o" the ASLBP Custodian. The inventory shall have four vertical columns. Reading horizontally from left to right, the first column titled "Item," shall contain the numerical item number (starting with the number 1) of the document containing protected information. The second column, titled "Service Date," shall contain the date the document containing the protected information was served. The third column, titled "Description," shall contain a brief description of the document containing the protective information (e.g., Appendix A to NRC Staff Answer). The fourth column, titled "Signature and Date," shall contain a blank space for a signature and date. The inventory shall be a cumulative list that covers all protected information previously submitted to the Licensing Board Members as well as a listing identifying each new document containing protective information in the current transmittal. Upon receipt, the ASLBP Custodian will review the protected information and the inventory to verify that the latter accurately lists the various documents submitted to the Licensing Board Members containing protected information. If the inventory is accurate, the ASLBP Custodian will sign and date one copy of the inventory and return it to the person serving the protected information on the Licensing Board Members. If the inventory of submitted material containing protected information is not accurate, the ASLBP Custodian may reject and return the submission in its entirety, accept part of the submission and reject part of it, or accept the submission and sign, date and return the inventory to the person serving

the documents noting the discrepancies between the inventory and the documents containing protected information.

- f. Include an attached cover letter or memorandum, which also shall be served separate from any protected information on the other participants to the proceeding, that briefly describes the contents of the pleading or correspondence without disclosing any protected information such that the cover letter or memorandum can be placed in the public docket of the proceeding.

5. Counsel shall take all reasonable precautions necessary to assure that protected materials are not distributed to unauthorized persons. The parties granted access to SGI-M shall take the following steps in accordance with Attachment 3 to the Commission's 2003 Order imposing compensatory measures on irradiators (68 Fed. Reg. At 35,460-62):

- a. When not under the possessor's direct control or the direct control of another individual authorized to have access thereto, all documents containing SGI-M must be stored in a locked file drawer or container. Keys and knowledge of lock combinations safeguarding SG-MI shall be limited to persons authorized access to the SGI-M stored within the locked file drawer or container.
- b. Any administrative support work performed at the request of a possessor of SGI or under their supervision in this proceeding, or further proceedings, must be performed by personnel who have executed a Non-Disclosure Agreement.
- c. Documents containing SGI-M may be reproduced to the minimum extent necessary consistent with need. Care should be taken when using newer digital copiers which scan and retain images of documents, to ensure that SGI-M is not retained in the memory of the copier.
- d. SGI-M shall not be discussed by telephone or communicated by email or facsimile transmission unless the SGI-M is transmitted through the use of an encryption system that the National Institute of Standards and Technology has validated as conforming either to Federal Information Processing Standard 140-1 or to Federal Information Processing Standard 140-2.

- e. If SGI-M is processed on or with automated data processing, computerized word processing equipment, or a personal or laptop computer, access to such equipment shall require the use of an entry code for access to stored SGI-M. If use of an entry code is not feasible, SGI-M may be processed on, but shall not be stored in, such equipment. If any SGI-M is backed-up or stored on a computer hard drive or other device, that drive or device shall be capable of being removed and shall be stored in the security storage container referred to in paragraph 3 of this Protective Order when not in use. Additionally, any such word processing equipment, data processing equipment, or computer that is used to process or store SGI-M shall be operated as stand-alone or free-standing equipment, not connected to any other such equipment by means of a Local Area Network or Wide Area Network or other data-sharing system.

- f. Each document that has been determined to contain SGI-M shall be marked "Safeguards Information-Modified Handling" in a conspicuous manner on the top and bottom of the first page to indicate the presence of protected information. Additional pages should also be marked with the letters "SGI-M", denoting "Safeguards Information-Modified Handling", in a conspicuous manner on the top and bottom of the page.

6. The terms of this Protective Order apply to protected information notwithstanding any prior releases in which this information was treated as public. A public release of protected information before this Protective Order became effective shall not serve as grounds for subsequent distribution of protected information to unauthorized persons.

7. Protected information shall remain available to all parties until the later of the date that an order terminating this proceeding is no longer subject to judicial review, or the date that any other Commission proceeding relating to the protected information is concluded and no longer subject to judicial review. The parties shall, within fifteen (15) days of the later date described above, return the protected information (excluding notes of protected information) to the party that produced them, or shall destroy the information, except that copies of filings, official transcripts and exhibits in this proceeding that contain protected information, and notes

of protected information may be retained, if they are maintained in a secure place.⁵ Within such time period, each party shall also submit to the producing party an affidavit stating that, to the best of its knowledge, all protected information and all notes of protected information have been returned or have been destroyed or will be maintained in accordance with the above. To the extent protected information is not returned or destroyed, it shall remain subject to the provisions of this Protective Order.

8. Counsel, consultants or any other individual representing a party who has reason to suspect that protected information may have been lost or misplaced or that protected information has otherwise become available to unauthorized persons during the pendency of this proceeding shall notify this Licensing Board promptly of those suspicions and the reasons for them.

9. Any violation of the terms of this Protective Order or a Confidentiality and Non-Disclosure Agreement executed in furtherance of this Protective Order may result in the imposition of sanctions as the Presiding Officer or the Commission may deem appropriate, including but not limited to referral of the violation to appropriate bar associations and/or other disciplinary authorities such as the U.S. Department of Justice for criminal prosecution.

⁵ Counsel are responsible for determining what measures are necessary to assure that protected information is kept in a secure place such that no distribution of protected information to unauthorized individuals will occur.

10. The Licensing Board may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD****

/RA/

Thomas S. Moore, Chairman

Rockville, Maryland
December 8, 2005

**** Copies of this order were sent this date by Internet e-mail transmission to counsel for the (1) Applicant; (2) Petitioner; and (3) Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

PA'INA HAWAII, LLC

(Honolulu, Hawaii Irradiator Facility)

Docket No. 30-36974-ML

ASLBP No. 06-843-01-ML

CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

Under penalty of perjury, I hereby certify my understanding that access to protected information is provided to me pursuant to the terms and restrictions of the Atomic Safety and Licensing Board's Protective Order, dated December 8, 2005, in this proceeding, that I have been given a copy of and have read this Protective Order, and that I agree to be bound by it. I understand that the contents of the protected information, any notes or other memoranda, or any form of information that copies or discloses protected information shall not be disclosed to anyone other than in accordance with that Protective Order. I acknowledge that a violation of this declaration and Protective Order, which incorporates the terms of this declaration, constitutes a violation of an order of the Nuclear Regulatory Commission and may result in the imposition of sanctions as the Licensing Board or Commission may deem to be appropriate, including, but not limited to, referral of the violation to appropriate bar associations and other disciplinary authorities.

WHEREFORE, I do solemnly agree to protect such protected information as may be disclosed to me in this NRC proceeding, in accordance with the terms of this declaration.

Name (printed): _____

Title: _____

Representing: _____

Signature: _____

Date: _____

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB PROTECTIVE ORDER (REGARDING DISCLOSURE AND USE OF PROTECTED INFORMATION) 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
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Mail Stop - T-3 F23
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Administrative Judge
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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 8th day of December 2005