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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

May 9, 2006 (8:50am)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of	)	
	)	
Pa'ina Hawaii, LLC	)	Docket No. 030-36974
	)	ASLBP No. 06-843-01-ML
Materials License Application	)	

APPLICANT PA'INA HAWAII, LLC'S NOTICE OF APPEAL OF  
ASLB'S APRIL 27, 2006 ORDER AND ACCOMPANYING BRIEF

Pursuant to 10 C.F.R. § 2.341(a) and (b), and (if applicable) pursuant to §2.311(a) and (c), Applicant Pa'ina Hawaii, LLC files this Notice of Appeal of the Atomic Safety and Licensing Board's Order dated April 27, 2006 which, among other things, ordered the preparation of an Environmental Assessment ("EA") as to Petitioner's Environmental Contentions 1 and 2, and also as to the closely-related Safety Contention #7, without an evidentiary hearing. Attached with this Notice of Appeal is Applicant Pa'ina Hawaii, LLC's Brief.

DATED: Honolulu, Hawaii May 8, 2006.



FRED PAUL BENCO 2126  
3409 Century Square  
1188 Bishop Street  
Honolulu, HI 96813  
Tel: (808) 523-5083  
Fax: (808) 523-5085

TEMPLATE = SECY-021

SECY-02

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NUCLEAR REGULATORY COMMISSION

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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 ) ASLBP No. 06-843-01-ML  
Materials License Application )

APPLICANT PA'INA HAWAII, LLC'S BRIEF IN SUPPORT OF APPEAL  
FROM ASLB ORDER DATED APRIL 27, 2006

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(a) and (b), and also pursuant to 10 C.F.R. §2.311(a) and (c)), if applicable, Applicant PA'INA HAWAII, LLC ("Pa'ina") hereby appeals the April 27, 2006 "Order (Confirming Oral Ruling Granting Motion To Dismiss Contentions)" (hereinafter "April 27<sup>th</sup> Order") rendered by the Atomic Safety and Licensing Board ("ASLB").

By means of its April 27<sup>th</sup> Order, the ASLB arbitrarily ordered the preparation of an Environmental Assessment ("EA") without first affording Pa'ina an evidentiary hearing regarding the validity of two related environmental contentions and a

related Safety Contention #7 alleged by Petitioner CONCERNED CITIZENS OF HONOLULU ("Concerned Citizens").<sup>1</sup>

Pa'ina hereby appeals from the ASLB's April 27<sup>th</sup> Order. Specifically, Pa'ina requests that the April 27<sup>th</sup> Order be reversed insofar as an EA was ordered to be prepared;<sup>2</sup> and further, Pa'ina requests that the two related environmental contentions and Safety Contention #7 be dismissed with prejudice.<sup>3</sup>

In the alternative, Pa'ina requests that the ASLB be ordered to proceed to an evidentiary proceeding regarding Concerned Citizens' two contentions pursuant to 10 C.F.R. §2.300 et seq.

#### STATEMENT OF THE CASE

On June 27, 2005 Applicant PA'INA HAWAII, LLC ("Pa'ina") filed an Application to possess and use radioactive materials in order to operate a pool-type industrial irradiator in Hawaii. (See ML052060372)

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<sup>1</sup> For convenience' sake, the two environmental contentions and Safety Contention #7 will hereinafter be referred to together as the "two contentions."

<sup>2</sup> Consonant with its first appeal filed April 3, 2006 herein, Pa'ina does not appeal from or challenge the dismissal of the two environmental contentions. Those contentions ought to be dismissed.

<sup>3</sup> Pa'ina earlier appealed from the admission of the two environmental contentions as well as from the admission of the closely-related Safety Contention #7. (See Notice of Appeal and Supporting Brief filed herein on April 3, 2006, ML0610900842) The ASLB has now ordered (without any evidentiary hearing, and over Pa'ina's objections) that an EA be developed, which is the subject matter of this appeal.

Thereafter, the NRC Staff evaluated Pa'ina's Application, and supplemental information was required to be provided by Pa'ina.

On August 2, 2005, the Nuclear Regulatory Commission ("NRC") published notice of a hearing on Pa'ina's Application to possess and use the radioactive materials. 70 Fed. Reg. at 44,396.

Significantly, the published notice indicated that after review, the NRC Staff had determined that Pa'ina's pool irradiator had qualified for "categorical exclusion." (Id.) Of equal significance was the fact that the NRC Staff determined that there were no "special circumstances" surrounding Pa'ina's proposed pool irradiator.<sup>4</sup>

On October 3, 2005, Petitioner CONCERNED CITIZENS OF HONOLULU ("Concerned Citizens"), apparently consisting of but four members, filed its "Request For Hearing By Concerned Citizens Of Honolulu ("Request for Hearing")." (ML052970026)

On October 13, 2005 an Order issued which established the Atomic Safety and Licensing Board ("ASLB").

After several filings and other proceedings, the ASLB filed a "Memorandum and Order" on January 24, 2006 admitting two

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<sup>4</sup> The NRC Staff determined that there were no "special circumstances" at Page 15 of its October 28, 2005 "Staff Response To Request For Hearing By Concerned Citizens Of Honolulu." (ML0530040280)

intertwined environmental contentions of Concerned Citizens.<sup>5</sup>

Pa'ina Hawaii, LLC, LBP-06-4, 63 NRC 99 (Jan. 24, 2006)

Subsequently, in March 2006, Pa'ina was suddenly presented with a proposed "Joint Stipulation And Order Regarding Resolution Of Concerned Citizens' Environmental Contentions" and a related "Joint Motion To Dismiss Environmental Contentions."<sup>6</sup> These two documents had already been secretly negotiated and agreed to by the NRC Staff and Concerned Citizens. By means of these related documents, the NRC Staff agreed to dispense with an evidentiary hearing on Concerned Citizens' two alleged environmental contentions, and agreed to prepare an extensive Environmental Assessment ("EA").

Pa'ina was not permitted to negotiate or make any material changes whatsoever to the proposed Stipulation, and consequently, Pa'ina objected to the proposed Stipulation.

The Staff and Concerned Citizens moved to have the ASLB convert its so-called Stipulation into an Order. (ML060820592)

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<sup>5</sup> The ASLB's January 24, 2006 Memorandum and Order, which admitted two closely-related environmental contentions, is the primary focus of Applicant's prior appeal filed herein on April 3, 2006. That prior appeal is tentatively scheduled to be discussed and/or decided by the NRC on May 15, 2006.

This appeal, from the ASLB's April 27th Order, challenges the ASLB's next (unwarranted) step which ordered the actual preparation of an Environmental Assessment ("EA") against Applicant Pa'ina Hawaii, LLC, without the benefit of any evidentiary hearing on the validity of the two contentions.

<sup>6</sup> For ease of reference, both the Joint Stipulation and the Joint Motion will be referred to together as the "Stipulation."

Pa'ina timely objected to the motion, and among its objections Pa'ina raised serious due process concerns. (ML061000063) In particular, Pa'ina challenged the imposition of the EA process upon it without any prior evidentiary hearing on the validity of Concerned Citizen's two contentions. (Id.)

On March 24, 2006, the ASLB issued a second Memorandum and Order. LBP-06-12, 63 NRC \_\_ (March 24, 2006) In that Order, the ASLB found that Concerned Citizens' Safety Contentions #4, #6 and #7 were admissible, while the remaining safety contentions were dismissed.<sup>7</sup>

By means of the instant appeal, Pa'ina challenges the ASLB's April 27, 2006 Order which imposed the EA process upon Pa'ina, particularly where there has been no prior evidentiary hearing, factual findings, or legal conclusions that Concerned Citizens' two environmental contentions and the related Safety Contention #7 are valid.

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<sup>7</sup> Of the three safety contentions admitted, Safety Contention #7 (mitigation measures for possible plane crashes) constitutes a portion of Pa'ina's April 3, 2006 appeal.

With regards to the two remaining Safety Contentions, #4 and #6, Pa'ina submitted the paperwork to satisfy those contentions. On April 18, 2006 Pa'ina moved to dismiss Safety Contentions #4 and #6 on the basis of mootness. (ML061160017) On May 1, 2006 the NRC Staff joined in Pa'ina's Motion to Dismiss. (No ML accession number yet designated) Concerned Citizens sought to retain Contentions #4 and #6, albeit modified. (No ML accession number yet designated)

## STATEMENT OF THE ISSUES

The ASLB committed several errors in reaching its conclusion that the preparation of an extensive EA should be imposed upon Pa'ina for its typical, garden-variety pool irradiator.

First, the ASLB ignored and/or violated Pa'ina's Fifth Amendment right to procedural due process, by ordering the preparation of an EA and all of its lengthy, unduly expensive procedures for Pa'ina's typical pool irradiator without first determining whether Concerned Citizens' two contentions are valid or meritorious. Pa'ina has never been afforded the opportunity to prove that there are no "special circumstances" surrounding its situs.<sup>8</sup> Instead, the ASLB ordered the EA preparation without any evidentiary hearing whatsoever. From Pa'ina's point of view, this is government by fiat.

Second, and closely related to the above, there was no "Stipulation" in this case. Pa'ina had absolutely no say about the terms of the supposed "Stipulation" between the NRC Staff and Concerned Citizens. Instead, the "Stipulation" was

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<sup>8</sup> The ASLB brushed aside Pa'ina's obvious right to challenge the validity of Concerned Citizens' environmental contentions by stating in full: "[T]he Applicant's assertion that the motion and stipulation jeopardize the Applicant's rights to a hearing on environmental contentions is without merit. Fulfillment of the requirements of the National Environmental Policy Act is a uniquely Federal Government obligation. The Applicant does not have any legally-protected hearing right that would be affected by the Joint Stipulation and the Motion to Dismiss." (Transcripts from April 26, 2006, at Page 31; found at ML061210010)

presented to Pa'ina as a "take it or leave it" proposition. Pa'ina was afforded no chance to substantively bargain or negotiate. The ASLB's imposition of the so-called "Stipulation" upon Pa'ina exacerbated the lack of due process resulting from the ASLB's April 27<sup>th</sup> Order (or fiat).

Third, the ASLB Order potentially splits this case into two or more parts. The ASLB Order establishes two separate (and therefore much more expensive) tracks down which Pa'ina must now proceed, an EA track with a public meeting many months in the future, and also an evidentiary, trial-type hearing with expert opinions on the non-environmental contentions. Not only will there be substantial extra expenses, but the extra work, procedural delays and greater uncertainty will not serve the interests of justice.

Fourth, the April 27<sup>th</sup> Order was not in the "best interest of the public" as arbitrarily concluded by the ASLB (without a factual or evidentiary hearing). Assuming arguendo that the NRC has expended over 50 years of intensively analyzing and regulating irradiators, then in this case the ASLB's arbitrary Order that Pa'ina's quite typical, inherently-safe pool irradiator undergo (in effect) a redundant, time-consuming and

expensive EA is very prejudicial, erroneous and not in the public interest.<sup>9</sup>

Based upon these four significant errors, the ASLB erred and/or abused its discretion in arbitrarily ordering Pa'ina's pool irradiator to go through the EA process.<sup>10</sup>

#### LEGAL STANDARDS

10 C.F.R. §2.341(b)(4) sets forth the legal standards regarding an Order from an ASLB other than granting or denying contentions. That regulation provides as follows:

(4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.

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<sup>9</sup> The NRC Staff admitted that irradiators are very rarely subjected to EA review: "[T]he Staff has based the schedule for completion of an EA on the minimal amount of time that we would--the minimal amounts of time under our generic schedule for materials and environmental analyses. Because we don't normally do EAs for irradiator licenses, we have used the generic schedule." (April 26, 2006 Tr., ML061210010)

<sup>10</sup> If deemed appropriate and reasonable, Pa'ina requests that this appeal be consolidated or joined with its earlier April 3, 2006 appeal, since both appeals involve the identical parties as well as closely-related, logically-connected subject matter.

Based upon the above legal standards, this Commission ought to reverse the April 27<sup>th</sup> Order and grant to Pa'ina the relief which it seeks herein.

#### DISCUSSION

A. The ASLB Erred And Abused Its Discretion In Ordering That A Full EA Be Accomplished For Pa'ina's Typical Irradiator, Where No Evidentiary Hearing As To The Validity Or Merits Of Concerned Citizens' Contentions Has Been Held.

The Fifth Amendment to the United States Constitution has been repeatedly interpreted to guaranty procedural due process, in that a party is entitled to a fair hearing or trial, at a meaningful time, to prove or disprove the case or allegations. See Goldberg v. Kelly, 397 U.S. 254 (1970); Lightfoot v. District of Columbia, 355 F.Supp.2d 414 (D.C.D.C., 2005) (stakeholders, especially, have a right to timely and meaningful due process); Union of Concerned Scientists v. United States Nuclear Regulatory Commission, 237 U.S.App.D.C. 1, 735 F.2d 1437 (App. D.C. 1984) (licensing is an adjudication requiring hearings); cf., Union of Concerned Scientists v. Atomic Energy Commission, 163 U.S.App.D.C. 64, 499 F. 2d 1069 (1974); see generally, In Re Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-35 (Dec. 8, 2004) (the

Commission noting that under the Administrative Procedure Act, 5 U.S.C. 557(c), a party must be afforded the opportunity to present evidence and arguments before a tribunal prior to a decision)

In this case, Pa'ina is the Applicant for a materials license, and is clearly the "stakeholder" undertaking the legal and financial responsibility for the pool irradiator. As the major stakeholder in this affair, Pa'ina is clearly entitled to a timely, meaningful hearing on its defense to Concerned Citizen's environmental contentions, i.e., that the two contentions cannot be not valid or meritorious, on the grounds that the NRC expressly determined in 1993 that irradiators may be sited adjacent to other occupied commercial and industrial buildings.

Instead, the ASLB brushed aside Pa'ina's obvious financial and legal stake in these proceedings by declaring:

"Because the stipulation and motion deal with the Intervenor's contentions and the Staff's obligations under the National Environmental Policy Act, logically, the motion and stipulation only involve the Staff and the Intervenor." (April 26, 2006 Tr. at Page 32, ML061210010)

Fundamental due process was ignored by the ASLB in this matter, where on April 27<sup>th</sup> it ordered an extensive EA to be done without any prior evidentiary hearing as to the validity of the two contentions. From Pa'ina's viewpoint, this order was a

"prejudicial procedural error" in violation of 10 C.F.R. §2.341(b)(4)(iv); moreover, the April 27<sup>th</sup> Order or fiat raises a substantial and important procedural question of law, policy or discretion pursuant to the terms of 10 C.F.R. §2.341(b)(4)(iii).

In sum, Pa'ina was entitled to a proper evidentiary hearing to challenge/rebut the two contentions of Concerned Citizens. The ASLB's arbitrary denial of that procedural right, in conjunction with its fiat that an EA be done, constituted reversible errors.

B. The "Joint Stipulation" Upon Which The April 27<sup>th</sup> Order Was Based Was Never Agreed To By Pa'ina, Pa'ina Was Never Permitted To Meaningfully Bargain About Any Substantive Terms, And Therefore The Resulting April 27<sup>th</sup> Order Was Arbitrary And Violated Due Process.

Closely related to the foregoing violations of Pa'ina's 5<sup>th</sup> Amendment's rights to due process was the very unjust manner by which the Order arose. That is to say, where a stipulation is signed by less than all of the parties in interest, the stipulation is null and void because it is deemed a violation of due process. See generally 10 C.F.R. Sec. 2.330 ("all parties" must agree to stipulations); see generally, In Re Embrace Systems Corporation, 174 B.R. 240 (1994)

In March 2006, the proposed "Joint Stipulation" was presented to Pa'ina as a fait accompli. Pa'ina was never

afforded an opportunity to provide input before the Joint Stipulation was presented to it. Thereafter, neither the Staff nor Concerned Citizens would allow any material changes to the Stipulation.<sup>11</sup>

Thereafter, by means of its April 27<sup>th</sup> Order, the ASLB nevertheless imposed the terms of the Joint Stipulation upon Pa'ina, and most importantly, ordered that an EA be performed.

In effect, what happened on April 27<sup>th</sup> was that the ASLB granted a "summary judgment" against Pa'ina on the two contentions, without notice, without any factual development, and without any proper conclusions of law.

Thus, from Pa'ina's point of view, when the proposed Joint Stipulation was converted into the April 27<sup>th</sup> Order, Pa'ina's right to a fair and timely evidentiary hearing as to the validity of Concerned Citizen's two contentions was violated. The ASLB's arbitrary conduct violated 10 C.F.R. §2.341(b)(4)(iv) (prejudicial procedural error), violated subsection (i) (no prior findings of any material fact), and violated subsection (ii) (no governing precedent for this type of arbitrary ruling).

Furthermore, the ASLB's arbitrary conduct implicated subsection (iii) (raised a substantial question of law and policy regarding fundamental fairness).

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<sup>11</sup> The only change permitted by the Staff and Concerned Citizens was that the wording in the Joint Motion to Dismiss noted that Pa'ina might "object" to the Stipulation.

C. The ASLB Erred And Abused Its Discretion In Ordering That A Full EA Be Accomplished, Which Will Result In A "Splitting" Of The Instant Case Into Two Or Even More Procedures, And Which Will Cause Prejudicial Delays And Increased Costs For Pa'ina.

The practical effect of the ASLB's April 27<sup>th</sup> Order is to "split" this case into at least two parts, which will cause substantial additional delays and expense to Pa'ina. The first part will consist of the lengthy EA process, while the second part will consist of an evidentiary hearing on all other admitted contentions.

The U.S. Supreme Court has a long-established policy against "splitting" a cause of action between two courts or two different forums. See, e.g., Alexander, et al. v. Hillman, et al., 296 U.S. 222, 242-43 (1935) There, in rejecting a "splitting" of causes of action between two courts, the Supreme Court reasoned that splitting a cause of action results in potentially incomplete relief, additional uncertainty, unnecessary delays, work and expense for the defending party.

(Id.)<sup>12</sup>

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<sup>12</sup> Corpus Juris Secundum notes that splitting causes of action generally results in harassment to the defending party (such as Pa'ina herein), and often constitutes "vexatious litigation" against the defending party. 1 C.J.S. Actions, Sec. 102(b)(c). Certainly, where the NRC Staff determined that Pa'ina's irradiator was "categorically excluded," and where the NRC Staff also determined that there were no "special circumstances" surrounding Pa'ina's irradiator, then the April 27<sup>th</sup> Order imposing the terms of the proposed Stipulation upon Pa'ina may be viewed as redundant and unnecessarily costly to Pa'ina.

In this case, Applicant Pa'ina appeals from the April 27<sup>th</sup> Order on the grounds that "splitting" Concerned Citizens' challenge to Pa'ina's Application for a Materials License into two procedures will inevitably result in greater uncertainty, unnecessary delay, and much greater expense to Pa'ina.

Thus, the first track of this case, or the "environmental track," is headed for an Environmental Assessment ("EA"), which will necessarily include built-in delays of at least 18 months, a comment period, a public hearing in Honolulu, and a probable appeal by Concerned Citizens, which will in all likelihood seek preparation of an Environmental Impact Statement ("EIS").

The second track of this case, which can be termed the "other contention" track, is headed for a trial-like proceeding with the presentation of evidence in Honolulu.

Substantial extra work, multiple expenses and procedural delays clearly cloud Pa'ina's future.

Based upon the lengthy, unduly expensive and uncertain two-track procedures imposed upon Pa'ina by the April 27<sup>th</sup> Order, that Order is inconsistent with, and otherwise violates both subsections (iii) and (iv) of 10 C.F.R. §2.341(b)(4).

D. The ASLB's April 27<sup>th</sup> Order Was Not In The "Best Interests Of The Public" Where The Order So Egregiously Violated Due Process.

The ASLB also violated 10 C.F.R. Sec. 2.341(b)(4)(i), (ii), (iii) and (v) where it sought to justify its April 27<sup>th</sup> Order by essentially concluding that its Order was "in the public interest." (Tr. at Page 32, ML061210010)

Pa'ina finds it difficult to understand the ASLB's declaration that ordering an EA process without any evidentiary hearing or trial by which Pa'ina could challenge that validity of the two contentions was, somehow, in the "public interest." See generally, e.g., Union of Concerned Scientists v. United States Nuclear Regulatory Commission, 237 U.S.App.D.C. 1, 735 F.2d 1437 (App. D.C. 1984).

Without any evidentiary hearing on the validity of Concerned Citizen's two contentions, the ASLB's conclusion that its decision was "in the public interest" was also arbitrary, erroneous and an abuse of discretion in violation of 10 C.F.R. §2.341(b)(4).

#### CONCLUSION

Based upon the above facts and arguments, and also based upon the record of this case, Pa'ina requests that the April 27<sup>th</sup> Order be reversed insofar that an EA was ordered to be prepared;

and further, Pa'ina requests that the two related environmental contentions (as well as Safety Contention #7) be dismissed with prejudice.

In the alternative, Pa'ina requests that the ASLB be ordered to proceed to an evidentiary proceeding on Concerned Citizens' two contentions (as well as Safety Contention #7) pursuant to 10 C.F.R. §2.300 et seq.

DATED: Honolulu, Hawaii

May 8, 2006

Respectfully submitted



FRED PAUL BENCO 2126  
3409 Century Square  
1188 Bishop Street  
Honolulu, HI 96813  
Tel: (808) 523-5083  
Fax: (808) 523-5085

Attorney for Applicant  
Pa'ina Hawaii, LLC

CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT PA'INA HAWAII, LLC'S NOTICE OF APPEAL OF ASLB'S APRIL 27, 2006 ORDER AND ACCOMPANYING BRIEF" in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this 8th day of May, 2006. Additional service has also been made this same day by electronic mail as shown below:

Administrative Judge  
Thomas S. Moore, Chair  
Atomic Safety and Licensing Board  
Mail Stop: T-3-F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(e-mail: [tsm2@nrc.gov](mailto:tsm2@nrc.gov))

Dr. Anthony J. Baratta  
Administrative Judge  
Atomic Safety and Licensing Board  
Mail Stop-T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(e-mail: [AJB5@nrc.gov](mailto:AJB5@nrc.gov))

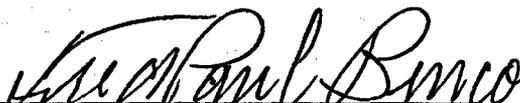
Margaret J. Bupp  
U.S. Nuclear Regulatory Commission  
Office of the General Counsel  
Mail Stop - O-15 D21  
Washington D.C. 20555-0001  
E-Mail: [mjb5@nrc.gov](mailto:mjb5@nrc.gov)

Administrative Judge  
Dr. Paul B. Abramson  
Atomic Safety and  
Licensing Board  
Mail Stop: T-3F23  
U.S. Nuclear Regulatory  
Commission  
Washington, DC 20555-  
0001  
(e-mail: [pba@nrc.gov](mailto:pba@nrc.gov))

Office of the Secretary  
U.S. Nuclear Regulatory  
Commission  
ATTN:  
Rulemakings and  
Adjudication Staff  
Washington, DC 20555-  
(e-mail: [hearingdocket@nrc.gov](mailto:hearingdocket@nrc.gov))

David L. Henkin, Esq.  
Earthjustice  
223 S. King St., #400  
Honolulu, HI 96813  
E-Mail: [dhenkin@earthjustice.org](mailto:dhenkin@earthjustice.org)

DATED: Honolulu, Hawaii, May 8, 2006

  
FRED PAUL BENCO  
Attorney for Applicant  
Pa'ina Hawaii, LLC

**THE LAW OFFICES OF FRED PAUL BENCO**  
ATTORNEYS AT LAW  
SUITE 3409, CENTURY SQUARE  
1188 BISHOP STREET  
HONOLULU, HI 96813

TEL: (808) 523-5083 FAX: (808) 523-5085  
e-mail: [fpbenco@yahoo.com](mailto:fpbenco@yahoo.com)

May 8, 2006

Office of the Secretary  
U.S. Nuclear Regulatory Commission  
ATTN: Rulemakings and Adjudication Staff  
Washington, DC 20555-0001  
Also Via E-Mail: [HEARING DOCKET@nrc.gov](mailto:HEARING DOCKET@nrc.gov)

Re: Docket No. 030-36974  
ASLBP No. 06-843-01-ML  
"Applicant Pa'ina Hawaii, LLC's  
Notice Of Appeal Of ASLB's April  
27, 2006 Order And Accompanying  
Brief

Dear Secretary:

I represent the legal interests of Pa'ina Hawaii, LLC,  
which has applied for a Materials License.

Pursuant to your regulations, please find enclosed an  
original and two (2) copies of the above attached filings.

The above-named filings were e-mailed to your office and  
all parties on the Certificate of Service on May 8, 2006.

If you have any questions or comments, please feel free to  
contact my office. Tel: 808-523-5083; Fax: 808-523-5085; e-  
mail: [fpbenco@yahoo.com](mailto:fpbenco@yahoo.com). Thank you.

Very respectfully yours,



FRED PAUL BENCO

Encls.

cc: All parties on Certificate of  
Service