

March 12, 2007

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

NRC STAFF RESPONSE TO INTERVENOR  
CONCERNED CITIZENS OF HONOLULU'S CONTENTIONS  
RE: DRAFT ENVIRONMENTAL ASSESSMENT AND DRAFT TOPICAL REPORT

INTRODUCTION

On February 9, 2007, the intervenor, Concerned Citizens of Honolulu ("Concerned Citizens" or "the Intervenor") pursuant to an Atomic Safety and Licensing Board ("Board") order<sup>1</sup> issued on January 10, 2007, filed contentions<sup>2</sup> based on a Draft Environmental Assessment (EA) prepared by the NRC staff ("Staff") in connection with an application by Pa'ina Hawaii, LLC ("Pa'ina" or "the Applicant") for a license under 10 C.F.R. Part 36, for possession and use of a sealed source in connection with the construction and operation of a commercial irradiator at the Honolulu International Airport. The Staff hereby responds to Concerned Citizens' Contentions.<sup>3</sup>

BACKGROUND

Pa'ina filed an application with the NRC on June 23, 2005, for a license for possession and use of byproduct material in connection with a proposed irradiator to be constructed and operated at the Honolulu International Airport in Honolulu, Hawaii. On October 3, 2005,

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<sup>1</sup> Order, January 10, 2007 ("January 10 Order").

<sup>2</sup> "Intervenor Concerned Citizens of Honolulu's Contentions Re: Draft Environmental Assessment and Draft Topical Report," February 9, 2007 ("Contentions").

<sup>3</sup> The Contentions were served via first class mail. Therefore, the Staff has added five days to the response date. 10 C.F.R. § 2.306

Concerned Citizens of Honolulu (“Concerned Citizens”) filed a request for a hearing. The Board determined that Concerned Citizens had standing and admitted several contentions, including Safety Contention #7<sup>4</sup>, “asserting that the application fails to analyze aircraft crash probabilities and consequences,” two additional safety contentions, Safety Contention #4 and Safety Contention #6, and two environmental contentions, Environmental Contention #1 and Environmental Contention #2. See *Pa’ina Hawaii, LLC*, LBP-06-4, 63 NRC at 112-13; *Pa’ina Hawaii, LLC*, LBP-06-12, 63 NRC at 412-15 and 416-18. Both environmental contentions were dismissed pursuant to a settlement agreement between the Staff and Concerned Citizens.<sup>5</sup> Safety Contention #4 and #6, which argued that the application did not include certain procedures required by regulation, were dismissed after the Applicant submitted the omitted procedures.<sup>6</sup>

Pursuant to a settlement agreement between the Staff and Concerned Citizens, the Staff prepared a draft environmental assessment (EA) and finding of no significant impact (FONSI).<sup>7</sup> The finding in the EA is based in part on a report prepared by the Center for Nuclear Waste Regulatory Analyses, “Draft Topical Report on the Effects of Potential Natural Phenomena and Aviation Accidents at the Proposed Pa’ina Hawaii, LLC Irradiator Facility,” December 2006 (“Safety Topical Report”). After the Draft EA was issued, the Board, in the January 10 Order, directed that any new contentions based on the Draft EA or the Safety Topical Report be filed by February 9, 2007. The Intervenor’s Contentions followed.

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<sup>4</sup> The Board has indicated that Safety Contention 7 is now moot. “Order” (Rejecting Motion to Dismiss) at 4, January 25, 2007.

<sup>5</sup> Order (Confirming Oral Ruling Granting Motion to Dismiss Contentions), April 27, 2006.

<sup>6</sup> Memorandum and Order (Ruling on Admissibility of Two Amended Contentions), June 22, 2006.

<sup>7</sup> “Draft Environmental Assessment Related to the Proposed Pa’ina Hawaii, LLC Underwater Irradiator in Honolulu, Hawaii,” December 21, 2006 (“Draft EA”).

## ANALYSIS

### I. Requirements for Admittance of Contentions

The requirements for admissible contentions are outlined in 10 C.F.R. § 2.309(f)(1). For each contention, the petitioner must provide: (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 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).

"The contention rule is strict by design." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 433 (2003). The Commission's procedures do "not permit 'the filing of a vague, unparticularized contention,' unsupported by affidavit, expert, or documentary support." *North Atlantic Energy Service Corporation* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999), quoting *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant), CLI-98-25, 48 NRC 325, 349 (1998). Likewise, Commission practice does not "permit 'notice pleading,' with details to be filled in later." *Id.* A sufficiently detailed and precise contention "focuses the hearing process on real disputes susceptible of resolution in an adjudication [and] helps to assure that . . . hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334. Precise contentions also place "other parties in the proceeding on notice of the petitioners' specific grievances and thus gives them a good idea of the claims they will be either supporting

or opposing.” *Id.* Proposed contentions also must concern matters within the scope of the proceeding. See *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 118 (1995); *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790 (1985).

II. Concerned Citizens’ Contentions

A. Safety Contention #13

Safety Contention #13 is closely related to the Intervenor’s original Safety Contention #7. Safety Contention #13 argues first that the aviation accident frequency provided by the Staff in the Draft EA and Safety Topical Report is flawed. Contentions at 5. The issue of aviation accident probability is within the scope of the proceeding and is material to the findings the Staff must make under NEPA. The Intervenor has offered a report prepared by its expert, Dr. Resnikoff, in support of its contention. Therefore, the Staff does not contest the admissibility of the portion of Safety Contention #13 related to the probability analysis.

The Intervenor’s arguments with respect to the Staff’s aviation accident consequence analysis are addressed with regard to Environmental Contention #3 below. As explained further below, in the context of the Staff’s obligations under NEPA, the Staff does not object to the admission of the portions of Contention #13 related to analysis of debris force from potential aviation accidents.

B. Safety Contention #14

The Board initially admitted the Intervenor’s Safety Contention 6, concerning the absence of *procedures* in the application for responding to events caused by natural phenomena.<sup>8</sup> Safety Contention #6, however, did not include the absence of *safety-related analysis* of events caused by natural phenomena. Thus, Safety Contention #14 is impermissibly late-filed.

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<sup>8</sup> Safety Contention #6 was dismissed as moot after the Applicant submitted the procedures to the Staff.

The Intervenor argues that Safety Contention #14 is based on entirely new information, i.e., the information provided in the Draft EA and the Safety Topical Report. Contentions at 31. However, at the outset of the proceeding, the Intervenor could have argued that the Application was flawed due to the absence of a safety analysis of events caused by natural phenomena, as it did with regard to Safety Contention #7 and the absence of an analysis of the probability and consequences of an aviation accident. Certainly the existence of natural phenomena is not something the Intervenor discovered as a result of the Draft EA and the Safety Topical Report. The need for a safety analysis of events caused by natural phenomena could and should have been raised at the outset of the proceeding. Because it was not, any contention related to such an analysis, even if utilizing new information as part of its supporting information, is not timely. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1043 (1983). In addressing the factors to be considered with respect to non-timely contentions, the Intervenor does not provide any explanation of its good cause, if any, for its failure to file on time. 10 C.F.R. § 2.309(c)(1)(i). Although there are eight factors<sup>9</sup> to be considered in admitting untimely contentions, good cause is the first and foremost of the factors. *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). The absence of good cause requires a strong showing on the remaining factors. Here, the Intervenor makes essentially no presentation on the remaining factors specific to Safety Contention #14. Further, one factor – Factor 7 – actually weighs against admission of this

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<sup>9</sup> These factors are: (1) good cause, if any, for failure to file on time; (2) the nature of the requestor's/petitioner's right under the AEA to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; (4) the possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest; (5) the availability of other means whereby the requestor's/petitioner's interest will be protected; (6) the extent to which the requestor's/petitioner's interests will be represented by existing parties; (7) the extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and (8) the extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record. 10 C.F.R. § 2.309(c)(1). As the Board has determined previously in this proceeding, because the Intervenor has already been admitted into the proceeding, factors 2 through 6 and 8 are not applicable. See "Memorandum and Order" (Ruling on Admissibility of Two Amended Contentions), at 12-13 (June 22, 2006).

contention. Here, the admission of Safety Contention #14 would add an entirely new line of inquiry, broadening the issues to be addressed in the proceeding. 10 C.F.R. § 2.309(c)(1)(vii). Thus, factor 7 also weighs against admission. The Intervenor has not made a showing of good cause nor a strong showing on the remaining factors to justify admitting this late filed contention. Thus, Safety Contention #14 should not be admitted.

C. Environmental Contention #3

Concerned Citizens' Environmental Contention #3 states that "the draft EA fails to take a 'hard look' at the potential environmental impacts of Pa'ina's proposed irradiator." Contentions at 16. In support of this contention, the Intervenor offers four bases: (1) the Draft EA contains insufficient evidence and analysis; (2) the Draft EA fails to consider potentially significant impacts; (3) the Draft EA improperly omits consideration of potential impacts from terrorism; and (4) the Draft EA improperly omits consideration of potential impacts associated with irradiating food for human consumption. As discussed further below, the Staff does not object to the admission of this contention as it pertains to inclusion of consideration of potential impacts from terrorism. The remainder of the contention is inadmissible.

1. Sufficiency of Information in the Draft EA

The Intervenor argues that the Staff's Draft EA "contains insufficient evidence and analysis to determine whether an EIS is required or to aid the NRC's compliance with NEPA. As discussed below, with the exception of those areas in which the Staff omitted any consideration of potential impacts, the EA contains sufficient information.

Pursuant to the NRC's regulations, an EA is

a concise public document . . . that serves to: (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact[;] (2) Aid the Commission's compliance with NEPA when no environmental impact statement is necessary[; and] (3) Facilitate preparation of an environmental impact statement when one is necessary.

10 C.F.R. § 51.14; *see also* 40 C.F.R. §1508.9 (Council on Environmental Quality (CEQ) Regulation on Environmental Assessment). In describing what an EA must contain, the CEQ's regulation, which are mirrored by the NRC's regulation on Environmental Assessments at 10 C.F.R. § 51.30, merely states that an EA must "include *brief* discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b). For implementing its regulations related to environmental analyses for materials licenses under NEPA, the NRC has developed guidance, NUREG-1748, "Environmental Review Guidance for Licensing Actions Associated with NMSS Programs" (2003). The NRC also looks to guidance promulgated by the CEQ, which is especially instructive on the issue of the depth and breadth of the analysis that must be undertaken in the context of an EA. The CEQ's guidance emphasizes that an EA should be a "concise" document and, therefore, "should not contain long descriptions or detailed data which the agency may have gathered." "NEPA's 40 Most Asked Questions," Question 36, 46 Fed. Reg. 18,026 (Mar. 23, 1981), *available at* <http://www.ceq.eh.doe.gov/nepa/regs/40.html>.

The Intervenor argues that the Staff's Draft EA improperly cited further detailed analyses in the Topical Report and, instead, should have included all data in the EA itself. Although the Intervenor cites to general CEQ regulations emphasizing the need to make environmental information publicly available, *see* 40 C.F.R. §§ 1500.1(b), the Intervenor identifies no requirement that all background information and underlying data be included in an EA. To the contrary, CEQ guidance specifically states that "[t]o avoid undue length, the EA may incorporate by reference background data to support its concise discussion of the proposal and relevant issues." "NEPA's 40 Most Asked Questions," Question 36; *see also* NUREG-1748, Section 1.6.4. The Topical Report was placed onto the NRC's public website along with the Draft EA in accordance with the agency's own regulation at 10 C.F.R. § 51.120, which requires that copies

of environmental documents be made available on the agency's website.<sup>10</sup> Therefore, the Staff has complied with the relevant requirements related to public availability of environmental documents, and the Intervenor has failed to show that there is a genuine dispute related to a material issue of fact or law. To the extent it relies on arguments related to the public availability of documents, Environmental Contention #3 does not comply with 10 C.F.R. § 2.309(f)(1)(vi) and, therefore, is inadmissible.

Because the Topical Report and other source documents were properly incorporated by reference, the Intervenor's other arguments related to the sufficiency of the information in the EA are invalid. The Draft EA represents the conclusions and qualitative assessments of the Staff's experts based on the available quantitative data presented in the Draft EA, the Topical Report, and other underlying documents cited and incorporated by reference in the Draft EA. While the Staff does not dispute that "NEPA documents are inadequate if they contain *only* narratives of expert opinions," of equal importance, "the conclusions of agency experts are surely entitled to deference." *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 996 (9th Cir. 2004). In the present instance, where expert opinions are based on quantitative data, the Intervenor has not shown that the Staff's Draft EA—including the Topical Report and other data properly incorporated by reference—does not comply with applicable legal requirements. Therefore, to the extent that it relies on the insufficiency of the information in the Staff's EA as a basis, Environmental Contention #3 does not show that a genuine dispute exists with regard to a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi) and is inadmissible.

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<sup>10</sup> The Topical Report is a source of background information for the EA, but is not the sole basis for the Draft FONSI. The EA also relied on information from other government agencies and the applicant. This information has been placed in the NRC's ADAMS system or is otherwise publicly available. In addition, these background documents have been included in the Staff's Hearing File Updates. Rather than, as the Intervenor claims, forcing the public to hunt down environmental documents, the Staff has created a public roadmap for understanding the bases for its conclusions in the EA.

2. Consideration of Impacts from Natural Disasters, Aviation Accidents, and Transportation of Cobalt Sources

The Intervenor argues that the Staff inappropriately omitted analysis of potential impacts from natural disasters, aviation accidents, and transportation of sources. Contentions at 18-20. As explained below, to the extent Environmental Contention #3 relies for a basis on the Staff's omission of analysis of potential general transportation impacts it is inadmissible. However, the Staff does not oppose admission of Environmental Contention #3 with regard to select potential impacts from natural disasters and aviation accidents.

Consideration of potential transportation impacts is outside the scope of the present proceeding. See *Pa'ina Hawaii, LLC*, LBP-06-12, \_\_\_ NRC \_\_\_, slip op. at 25 and 28 (2006). The Licensing Board has already determined that consideration of transportation is outside the scope of the proceeding as set out in the Notice of Opportunity for a Hearing, noting that "the transportation of licensed material such as the Co-60 sources used in an irradiator is governed by the Commission's regulations in 10 C.F.R. Part 71 and involves separate entities and licenses. *Id.* In addition, the NRC has already analyzed potential impacts from transportation of radioactive materials in a Generic Environmental Impact Statement. NUREG-0161. The Staff may rely on separate analyses of the potential impacts of related activities that are not part of the present licensed activity<sup>11</sup>. For purposes of NEPA, "an '[EA] need only furnish such information as appears to be reasonably necessary under the circumstances for evaluation' of a proposed action," *Louisiana Energy Services, LLP* (National Enrichment Facility), CLI-06-15, 63 NRC 687, 706 (quoting *Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1329 (10th Cir. 2004)). Thus, with respect to its analysis of potential transportation impacts, the Staff has met its legal requirements. To the extent Environmental Contention #3 relies on the

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<sup>11</sup> The Staff did consider the potential impacts of transportation of sources from the Port of Honolulu to the irradiator location. However, because these transportation activities will be conducted by a Part 71 licensee, the potential impacts from transportation are under the umbrella of the GEIS, and, therefore, were not required to be included in the present EA. The Staff included these potential impacts in response to public comments at the initial public meeting held on the project on August 31, 2005.

absence of consideration of potential transportation impacts, it does not comply with 10 C.F.R. § 2.309(f)(1)(iii) and (vi) and, therefore, is inadmissible.

In contrast, some issues raised by the Intervenor in relation to potential impacts from natural phenomena and aviation accidents are valid. With respect to potential impacts from aviation accidents, the Intervenor raised the same concerns set out in connection with Safety Contention #13. With respect to analysis of debris force from potential aviation accidents, the Intervenor has raised an issue that is within the scope of the present proceeding and germane to the findings the Staff must make. The claims are also supported by the Sozen/Hoffman Report<sup>12</sup>. Thus it appears the Intervenor has raised an issue on which there is a genuine dispute as to an issue of fact. For similar reasons, the Intervenor's claims with respect to hurricane frequency and strength, as supported by the Pararas-Carayannis Declaration<sup>13</sup>, raise an issue on which there is a genuine dispute as to a material issue of law or fact. With respect to these two issues, Environmental Contention #3 is admissible.

However, with respect to other allegedly insufficient analyses, including those of earthquake risks, the size of potential tsunamis, and the effects of increased buoyancy due to inundation from a hurricane storm surge or a tsunami, the contention is not admissible. In contrast to the above issues, these claims are supported only by expert assertions without any explanation of the underlying bases for these "expert" opinions. Thus, the Intervenor has not supplied the concise statement of fact or expert opinion required by 10 C.F.R. § 2.309(f)(1)(v) and the Contention, to the extent it relies on these claims for bases, is inadmissible.

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<sup>12</sup> Mete Sozen and Christoph Hoffman, "Analysis of the Effects of Impact by an Aircraft on a Steel Structure Similar to the Proposed Pa'ina Irradiator," February 1, 2007 (attached to Contentions as Exhibit 6).

<sup>13</sup> "Declaration of George Pararas-Carayannis, Ph.D. in Support of Concerned Citizens' Contentions RE: Draft Environmental Assessment and Draft Topical Report," February 9, 2007 (Attached to Contentions).

3. Consideration of Impacts from Terrorism

In its original hearing request, the Intervenor raised the argument that the NRC must include the potential environmental impacts of terrorism in its NEPA analyses. At the time, the Board dismissed the portion of the contention related to terrorism based on then-applicable NRC precedent. *Pa'ina Hawaii, LLC*, LBP-04-04 \_\_ NRC \_\_ (2006). Since that time, however, the U.S. Court of Appeals for the Ninth Circuit ruled that the NRC erred in categorically excluding consideration of the terrorism from its NEPA analyses with respect to a Diablo Canyon application for an independent spent fuel storage facility (ISFSI), and remanded for further agency action the licensing of the ISFSI at the Diablo Canyon Power Plant. *San Luis Obispo Mothers For Peace v. NRC*, 449 F.3d 1016, 1035 (9th Cir. 2006). Last month<sup>14</sup>, the Commission issued an Order in the Diablo Canyon proceeding, directing the Staff to “prepare a revised environmental assessment in accordance with the NRC’s regulations—addressing the likelihood of a terrorist attack at the Diablo Canyon ISFSI site and the potential consequences of such an attack.” *Pacific Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, CLI-07-11, 64 NRC \_\_, slip op. at 2 (February 26, 2007).

In several other cases issued the same day the Commission made clear its general disagreement with the Ninth Circuit decision and indicated it would not apply that decision in other circuits. *Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-07-08, 64 NRC \_\_ (February 26, 2007); *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-07-09, 64 NRC \_\_ (February 26, 2007); *Systems Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 64 NRC \_\_ (February 26, 2007). Absent further Commission guidance specific to the Pa’ina proceeding, and given that Pa’ina is both within the Ninth Circuit and that the Commission has issued

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<sup>14</sup> On the same day, the Commission issued several other orders related to consideration of terrorism under NEPA. The other facilities addressed on February 26 are not located in the Ninth Circuit, and the Commission declined to follow the Ninth Circuit’s ruling.

specific orders imposing additional security requirements for irradiators (as was the case with ISFSI's such as was involved in Diablo Canyon), the Staff intends, in the Final EA, to address the environmental consequences of a potential terrorist attack. In the Diablo Canyon ISFSI decision, the Commission directed the Staff, to "the extent practicable, . . . to base its revised [EA] on information already available in the public records . . . consistent with the requirements of NEPA, the Ninth Circuit's decision, and the regulations for the protection of sensitive and safeguards information." *Id.*, slip op. at 3-4. The Commission has also authorized the Staff to "rely, where appropriate on qualitative rather than quantitative considerations." *Id.*, slip op. at 4. Because NEPA is intended to be a public process, the Commission has directed the Staff to rely on public information and to make the final EA publicly available to the extent it is feasible and practicable. *Id.* In preparing the Final EA for Pa'ina, the Staff will follow these same principles to the extent practicable.

4. Consideration of Impacts from Irradiation of Food for Human Consumption

Issues related to human consumption of irradiated food are outside the scope of the present licensing action. Fruits and vegetables were generically approved for irradiation by the FDA in 1986. 51 Fed. Reg. 13,376 (April 18, 1986). In addition, as noted by the Commission in the notice of opportunity for a hearing for the proceeding, the FDA and USDA determine which foods can safely be irradiated. 70 Fed. Reg. 44, 396 (August 2, 2005). Consideration of the safety of irradiated food is outside of the jurisdiction of the NRC and is not included in the licensing action at issue, i.e., possession of a sealed source in connection with the operation of the proposed irradiator at the Honolulu International Airport. Therefore, to the extent that Environmental Contention #3 relies on arguments related to human consumption, the contention does not comply with the requirements of 10 C.F.R. § 2.309(f)(1)(iii) and is inadmissible.

D. Environmental Contention #4

The Intervenor's Environmental Contention #4 states that the Draft EA fails to consider reasonable alternatives to the proposed project. Contentions at 24. The contention further argues that the Staff's analysis of alternate technologies is inadequate and that the Staff should have included a consideration of alternate locations. As explained further below, this contention is inadmissible because it fails to raise a genuine dispute on a material issue of fact or law.

An EA must consider, at a minimum, the potential impacts of both the proposed action and the "no-action" alternative (i.e., the status quo). In addition to the no-action alternative, the Staff must consider a "reasonable range" of alternatives. 40 C.F.R. § 1502.14(a)-(c); *see also Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 868 (9th Cir. 2004). However, "The choice of alternatives is 'bounded by some notion of feasibility' and an agency is not required to consider 'remote and speculative' alternatives." *Id.*, quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978). Nor must an EA include a discussion of alternatives that are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences. *Headwaters, Inc. v. Bureau of Land Management, Medford Dist.*, 914 F.2d 1174, 1180 -1181 (9th Cir. 1990), citing *Northern Plains Resource Council v. Lujan*, 874 F.2d 661, 666 (9th Cir. 1989).

Here, the Intervenor does not show that the range of alternatives considered in the Draft EA is unreasonable. The Intervenor first argues that the Staff did not consider alternate technologies. In fact, the Staff did consider two alternate methods for controlling fruit flies, methyl bromide gas and heat treatment, and the Intervenor offers no factual or expert opinion in support of its assertion that the Staff's analysis was faulty. 10 C.F.R. § 2.309(f)(1)(v). The Intervenor also argues that the Staff should have included an analysis of the use of an electron-beam irradiator. Here, the Intervenor cites to the declaration of one of its experts. However, the expert's declaration merely states that an electron-beam irradiator is a viable

alternative in general, but offers no explanation as to the basis for his opinion that use of an electron-beam irradiator would be reasonable in the present instance.

The Intervenor also argues that the Staff should have considered alternate locations. Contentions at 26-27. In the present circumstances, there is nothing to suggest that the Staff's decision not to consider alternative locations was unreasonable. The Staff is not required to consider remote and speculative alternatives. There is no evidence to suggest that the Applicant would ever construct the proposed irradiator at any location other than the location indicated in the Application and analyzed by the Staff in the Draft EA.<sup>15</sup> Where the Applicant has given no indication of alternative locations that it would consider, and there are no specific alternative locations available from any alternative source, any determination by the Staff as to the potential impacts of the proposed facility on an unknown alternate location would be unduly remote and speculative.<sup>16</sup> Because Environmental Contention #4 fails to raise a genuine dispute on a material issue of law or fact, and because the contention does not contain the proper factual or expert opinion support, it is inadmissible.

E. Environmental Contention #5

The Intervenor's Environmental Contention #5 states that, based on NEPA's significance criteria, the Staff must prepare an EIS. As discussed further below, this contention is inadmissible because it fails to raise a genuine dispute on a material issue of fact or law.

The Intervenor claims that because the irradiator licensing is "controversial" and involves "unique or unknown risks," an EIS must be performed. Contentions at 28, *citing* 40 C.F.R.

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<sup>15</sup> The Intervenor cites to an e-mail from Michael Kohn of Pa'ina to Jack Whitten of the NRC as evidence that other sites would be feasible. However, in that same document, Mr. Kohn states that the Applicant does "not intend to move to a new location." Note to File from Roberto Torres, NRC. (ADAMS ML062770248).

<sup>16</sup> In addition, where the Applicant, as it has here, indicates that it will not carry out the proposed action at any location other than the location identified in the application, analysis of "alternate locations" at which no facility will ever be built or operated are subsumed within the analysis of the no-action alternative. The Staff need not perform analyses of potential impacts covered by other completed analyses. See 914 F.2d at 1180-1181.

§ 1508.27(b)(4)-(5). The NRC's regulations require that an EIS be completed for any action "significantly affecting the environment" or that "involves a matter which the Commission, in its discretion, has determined should be covered by an" EIS. 10 C.F.R. § 51.20(a)(1)-(2). For all actions, aside from those actions categorically excluded or on a select list of actions for which an EIS is required, the NRC's general practice, consistent with CEQ regulations in 40 C.F.R. § 1508.9(a), is to perform an EA and then to determine whether the action is significant enough to warrant an EIS based on the findings of the EA. See "*Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments*," 49 Fed. Reg. 9352, 9361-62 (Mar. 12, 1984). Here, following appropriate Commission guidance, the Staff has prepared a Draft EA, and, based on that EA, has come to a draft Finding of No Significant Impact (FONSI). Thus, in accordance with long-standing Commission policies and procedures, no EIS is required.

The Intervenor bases its claims of "controversy" on its experts' critiques of the Staff's Draft EA also offered in support of Environmental Contention #3. The Staff does not dispute that the NRC "must prepare environmental impact statements whenever [there are] "substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor," *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 -737 (9th Cir. 2001), citing *Northwest Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1539 (9th Cir. 1997). Here, however, the Intervenor has raised no such *substantial* issues. As discussed above with regard to Environmental Contention #3, with the exception of issues related to terrorism, analysis of debris force from aviation accidents, and the historical hurricane frequency and strength, has not raised any evidence of significant, dispute with regard to the analyses currently included in the Draft EA. To the extent that the Draft EA is omits discussions of potential impacts from terrorism, analysis of debris force from aviation accidents, and the historical hurricane frequency and strength, the Staff has not yet made even a draft determination as to the significance of any potential impacts. When the Final EA is

issued addressing these potential impacts, the Staff will include a significance determination for each issue. Under the NRC's long-standing policy, the Staff will determine whether to issue on EIS based on the outcome of the final EA, not the Draft EA.<sup>17</sup> Until a Final FONSI is issued incorporating significance determinations on the issues omitted from the Draft EA (assuming a Final FONSI is actually issued), there is no true controversy between the Staff and the Intervenor as to the significance of the potential impacts on the proposed facility. Therefore, Environmental Contention #5 does not raise a genuine dispute on a material issue of law or fact and is inadmissible.

#### CONCLUSION

Based on the above analysis, the Staff does not object to the admission of Safety Contention #14 and portions of Environmental Contention #3 outlined above. However, the Staff objects to the admission of the remaining proffered contentions.

Respectfully submitted,

***/RA by Margaret J. Bupp/***

Margaret J. Bupp  
Counsel for the NRC Staff

Dated at Rockville, Maryland  
this 12<sup>th</sup> day of March, 2007

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<sup>17</sup> The settlement reached between the Intervenor and the Staff specified that the Staff would prepare an EA prior to preparing an EIS, if an EIS is prepared at all. By agreeing to the settlement, the Intervenor implicitly agreed to follow the established NRC policy of completing an EA prior to completing an EIS, except as provided by 10 C.F.R. § 51.20(b).

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENOR CONCERNED CITIZENS OF HONOLULU'S CONTENTIONS RE: DRAFT ENVIRONMENTAL ASSESSMENT AND DRAFT TOPICAL REPORT" 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 12<sup>th</sup> day of March, 2007.

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***/RA by Margaret J. Bupp/***

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