September 7, 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'S OPPOSITION TO APPLICATION FOR A STAY

INTRODUCTION

On August 27, 2007, the Intervenor, Concerned Citizens of Honolulu, filed an application asking the Board to stay the effectiveness of License No. 53-29296-01, which the NRC staff ("Staff") issued to Pa'ina Hawaii, LLC, ("Pa'ina") on August 17, 2007. The Board should reject this application because the Intervenor fails to meet the regulatory criteria for granting a stay. In particular, the Intervenor fails to demonstrate it will be irreparably harmed if a stay is not granted. Further, the Intervenor fails to make a strong showing it will prevail on the merits at any administrative hearing.[1]

BACKGROUND

On March 20, 2006, the Intervenor and the Staff entered into a joint stipulation resolving all issues associated with the Intervenor's environmental contentions 1 and 2. Pursuant to that stipulation, the Staff agreed to complete an Environmental Assessment (EA) concerning

[1] "An application for a stay of the NRC Staff's action may not be longer than ten (10) pages, exclusive of affidavits[.]" 10 C.F.R. § 2.1213(b). Here, the Intervenor submitted a ten-page application for a stay and two exhibits--declarations from experts—that could arguably be considered "affidavits" under § 2.1213(b). The Intervenor also submitted four other exhibits—one of which the Intervenor's attorney e-mailed in three parts due to its large size—that clearly are not permissible filings under § 2.1213(b). The Staff respectfully asks that the Board not consider these additional and voluminous filings in ruling on the Intervenor's application.

Pa'ina's application for an irradiator license. The Staff also agreed that, before it issued any final finding of no significant impact (FONSI), the Staff would issue a draft FONSI for public review and comment and hold at least one public meeting in Honolulu, Hawaii. The Intervenor reserved its right pursuant to 10 C.F.R. § 2.309(c) to file additional contentions challenging the adequacy of the Staff's review under the National Environmental Protection Act (NEPA) after the Staff published a final FONSI.

On December 28, 2007, the Staff published a draft FONSI and notice of availability in the *Federal Register*. The Staff held a public meeting on the Draft EA in Honolulu on February 1, 2006. On August 13, 2007, the Staff issued its final EA, and on August 17, 2007 the Staff issued a license to Pa'ina. The Intervenor's stay request followed.

ANALYSIS

I. Standard For Granting Or Denying An Application For A Stay

10 C.F.R. § 2.1213 sets forth the pertinent standard for determining whether to grant or deny an application for a stay of the Staff's licensing action. Under section 2.1213(d), the Board considers the following:

> (1) Whether the requestor will be irreparably injured unless a stay is granted;
> (2) Whether the requestor has made a strong showing that it is likely to prevail on the merits;
> (3) Whether the granting of a stay would harm other participants; and
> (4) Where the public interest lies.

No single factor is dispositive, and the greater the showing an applicant makes on one of the factors, the less it may have to demonstrate on others. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985). However, the factors are not weighted equally—the most important factor is irreparable injury. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258 (1990). "[I]t reasonably follows that one who establishes no amount of irreparable injury is not entitled to a stay in the absence of a showing that a reversal of the decision under attack is not merely

likely, *but a virtual certainty*." *Cleveland Electric,* ALAB-820, 22 NRC at 746 n.8 (italics added). Further, the applicant must show that a stay is required to avoid "concrete harm," not merely a change in the *status quo ante* that, in the applicant's view, renders harm more imminent. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985).

II. The Intervenor Fails To Show It Will Be Irreparably Harmed If A Stay Is Not Granted

Arguing from the assumption that the final EA prepared by the Staff does not meet NEPA requirements, the Intervenor claims that allowing Pa'ina's license to remain in effect would cause harm in the sense that the license issuance was not the product of informed consideration under NEPA. The Intervenor relies almost exclusively on *Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989), in which the court held that "to set aside the agency's action at a later date will not necessarily undo the harm" resulting from inadequate analysis under NEPA, in part because the agency action might become a "link in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues." 872 F.2d at 500, *quoting Commonwealth of Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983).

The difficulty for the Intervenor is *Marsh* does not hold that an injury resulting from inadequate NEPA analysis is *necessarily* irreparable. In fact, the Supreme Court has expressly rejected that view, reversing a Ninth Circuit ruling that "[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action" and "only in a rare circumstance may a court refuse to issue an injunction when it finds a NEPA violation." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987), *rev'g* 774 F.2d 1414, 1423 (9th Cir. 1985). The Commission has also weighed in on this issue, citing with approval "[n]umerous other [circuit court] cases hold[ing] that a plaintiff seeking injunctive relief must prove irreparable harm, and that mere violation of NEPA or other environmental statutes is

insufficient to merit an injunction." *Hydro Resources, Inc.*, CLI-98-8, 47 NRC 314, 323 n.13 (1998).

Here, the Intervenor has failed to prove it will suffer concrete harm if the license issuance is not stayed. The Intervenor suggests that without a stay the Staff will be somewhat less likely to take into account any new information that casts doubt on the conclusions in the EA. This is mere speculation that could be raised in any case where the intervenor sets forth NEPA-based contentions. The Intervenor fails to even explain why such a result is likely under the specific facts of the present case. The Intervenor also argues that the NRC would be "less likely to require Pa'ina to tear down a nearly completed project than a barely started project." Application at 9. However, the Intervenor provides no support for its argument and exaggerates the corrective action the Staff would take if, upon further analysis, it were to determine Pa'ina's license should have been issued with different conditions, or not at all.

Nor has the Intervenor shown why any alleged harm would be "irreparable." The Intervenor's arguments fail to take into account the Board's role in the licensing process. Even if the Staff were somehow beholden to its NEPA analysis, as the Intervenor suggests, the Board surely cannot be considered a "link in a chain of bureaucratic commitment that will become progressively harder to undo. . . ." *Cf. Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1634–35 (1984) ("There is simply no basis for the assertion that the outcome of [the intervenors'] appeals might be unduly influenced were Unit 1 to operate *pendente lite*.") To the contrary, the Board's role makes such harm *reparable*. In *Marsh*, upon which the Intervenor relies, the court explained that "the kinds of 'harms' that are relevant, and that may be 'irreparable,' will be different according to each statute's structure and purpose." 872 F.2d at 502–03. The court contrasted the potential harm resulting from a violation of NEPA, a "purely procedural statute," with that flowing from a violation of the Alaska National Interest

Lands Conservation Act (ANILCA), a statute that contains both procedural and substantive provisions:

> Insofar as a procedural failure leads to an improper choice, a court, under ANILCA but not under NEPA, may require the decisionmaker to choose a new action; and this fact may make the ANILCA failure "reparable harm."

Id. at 503. In the present case, this Board has much broader authority than that vested in a court reviewing an agency's NEPA determination. That is because the Staff's NEPA review is part of a broader review of Pa'ina's license application under the Atomic Energy Act (AEA). *See Tennessee Valley Authority* (Phipps Bend Nuclear Plant, Units 1 & 2), ALAB-506, 8 NRC 533, 539 (1978) ("[T]he Commission is under a dual obligation: to pursue the objectives of the Atomic Energy Act *and* those of the National Environmental Protection Act. The two statutes and the regulations promulgated under each must be viewed in *pari materia*") (emphasis in original). Pursuant to the AEA and NRC regulations, the Board has the authority to impose conditions on Pa'ina's license; it also has the authority to revoke the license. This authority makes any harm resulting from the Staff's licensing action *reparable*.

Further, in arguing that the Staff's action will cause irreparable harm unless the Board grants a stay, the Intervenor neglects to mention its own role in this licensing action. As a party to this proceeding, the Intervenor was expressly allowed, as provided in the settlement agreement approved by this Board, to file contentions on the final EA in accordance with 10 C.F.R. § 2.309(c). The Intervenor took advantage of that opportunity, filing such contentions on September 5, 2007. Thus, the Intervenor is well aware that, as an *intervenor*, it has an opportunity to help ensure that any perceived harm resulting from the Staff's consideration of the application is reparable.

III. The Intervenor Is Unable To Show It Will Prevail On The Merits

Given that the Intervenor has failed to demonstrate irreparable harm related to the EA, it must show that a reversal of the Staff's licensing decision is "not merely likely, but *a virtual certainty*." *Cleveland Electric Illuminating Co.,* ALAB-820, 22 NRC at 746 n.8 (emphasis added).[2] This is a showing the Intervenor cannot make.

A. The Staff Carefully Considered The Impacts Of The Licensing Action

The Intervenor argues that the final EA does not show the Staff took a "hard look" at the environmental consequences of Pa'ina's irradiator. Application for Stay at p. 2. Specifically, the Intervenor alleges that the Staff failed to respond to public comments submitted on the draft EA. That charge is false. Appendix C to the EA contains a summary of the public comments and the Staff's responses to those comments. The Intervenor errs to the extent it is arguing that the Staff was required to respond specifically to each of what the Intervenor acknowledges were "voluminous" comments. Even in the case of an EIS, Council on Environmental Quality (CEQ) guidance states that "[c]omments may be summarized if they are especially voluminous." Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 FR 18026, 18035 (March 23, 1981).

Nor is the Staff's analysis of potential environmental consequences "far too cursory," as the Intervenor alleges. Application for Stay at p. 3. The Intervenor builds its argument by focusing on isolated statements in the EA, ignoring cited references and even pertinent statements in the EA itself. For example, the Intervenor argues that the EA fails to justify its claim that "[t]he likelihood of accidents involving exposure of workers to lethal doses . . . is

[2] The Intervenor needs to show more than that it will succeed in having a contention admitted, *i.e.*, that it will succeed in obtaining a hearing. Rather, the Intervenor must show that it will be able to demonstrate a safety deficiency, in the irradiator itself or in Pa'ina's compliance with NRC regulations, that would lead the Board to invalidate, or at least condition, the license the Staff awarded. *See CFC Logistics, Inc.*, LBP-03-16, 58 NRC 136, 144 (2003).

expected to be low[.]" EA at p. C-13. The Intervenor presents this as an isolated statement in Appendix C, failing to mention that on page 8 of the EA the Staff specifically discusses "[p]ublic and occupational health impacts." Moreover, in its analysis on page 8 the Staff cites two different NRC references in support of its conclusion.

The Intervenor falsely implies that the Staff has "invoke[d] agency expertise to justify its failure to provide the requisite analysis." Application for Stay at p. 4. To the contrary, the expert conclusions stated in the EA are supported by extensive analysis, including the studies cited in the "References" sections on pages 14 and 15, B-8, and C-17 and C-18. Where, as here, expert opinions are based on quantitative data and extensive analysis, "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).

B. The Staff Fully Considered Reasonable Alternatives

The Intervenor argues that the licensing decision should be reversed because the Staff failed to consider reasonable alternatives in the EA. Specifically, the Intervenor claims the Staff should have more thoroughly investigated three alternative methods of treating fruit—methyl bromide gas, heat treatment, and electron-beam irradiation—as well as alternate locations for Pa'ina's irradiator. Application for Stay at pp. 5–7.

NRC regulations pertaining to Environmental Assessments merely state that an EA must include a "*brief discussion* of: (1) The need for the proposed action; Alternatives as required by section 102(2)(E) of NEPA; [and] [t]he environmental impacts of the proposed action and alternatives as appropriate[.]" 10 C.F.R. § 51.30(a)(1) (Emphasis added.) The EA here meets those requirements. The EA specifically discusses alternative methods of treating fruit at pages 12–13 and describes the environmental impacts of those methods. Although the EA does not

specifically address electron-beam irradiation,[3] on page C-8 the Staff explains that a discussion of alternate locations is generally reserved for an EIS because, to the extent there are no significant impacts associated with a given location, there is no need to consider alternates.

C. An Environmental Impact Statement Is Not Required

The Intervenor disagrees with the Staff's FONSI and argues that the Staff must prepare an EIS concerning the Pa'ina irradiator. Application for Stay at pp. 7–8. In the Ninth Circuit, in which Pa'ina's irradiator will be located, an agency's decision not to prepare an EIS will be overturned only if it is unreasonable. *Seattle Community Council Federation v. Federal Aviation Admin.*, 961 F.2d 829, 832 (9th Cir. 1992). In determining whether an agency's decision is reasonable, courts typically consider whether, notwithstanding the FONSI, there are substantial questions about whether the proposed action may have a significant impact upon the human environment. *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988). Courts also consider whether the EA provides "a convincing statement of reasons why potential effects are insignificant." *The Steamboaters v. FERC*, 759 F.2d 1382, 1393 (9th Cir. 1985).

Here, the EA fully supports the Staff's FONSI and the Intervenor is unable to show that it is "virtually certain" to prevail on its claim that the Staff needs to prepare an EIS. The Intervenor claims the Staff needs to prepare an EIS to gather data on natural disasters, aviation accidents, Co-60 transport, and terrorism. Application for Stay at p. 8. However, the Intervenor is only able to point to "expert critique [that] reveals substantial *disputes* with the NRC's staff and

[3] As discussed in previous Staff filings, although the Intervenor contends that an electron-beam irradiator is among the alternatives that must be analyzed in the EA, the Intervenor has not provided sufficient factual or expert opinion support for this contention. "NRC Staff Response to Intervenor Concerned Citizens of Honolulu's Contentions RE: Draft Environmental Assessment and Draft Topical Report," at 13 (March 12, 2007). The Intervenor has submitted no new factual support for its assertion that an electron-beam irradiator must be included as an alternative in the EA. It is uncertain whether the contention will even be admitted into the proceeding, let alone whether, if the contention is admitted, the Intervenor's success on the merits is a virtual certainty.

consultants over the reasonableness of the Staff's conclusion there would be no significant impacts" in these areas. *Id.* (emphasis added). These "disputes" raise only the *possibility* that the Intervenor will successfully call into question the reasonableness of the Staff's FONSI—they do not establish that success on the merits is certain, or even likely.

IV. No Other Factor Supports A Stay

Neither of the two remaining factors cited in § 2.1213(d)—whether granting the stay would harm other participants and where the public interest lies—supports granting the Intervenor's application. Indeed, if an applicant for a stay fails to show either irreparable injury or a high probability of success on the merits, "it is unnecessary to 'dwell long on whether a stay would cause serious injury to the applicant' or to 'delve deeply into public interest considerations.'" *Long Island Lighting Co.*, ALAB-810, 21 NRC at 1620, *citing Duke Power Co.*, ALAB-794, 20 NRC at 1635.[4] In any event, each factor tends to support denying a stay. A stay might force Pa'ina to incur additional construction-related and other costs, and would likely result in some loss of revenue for Pa'ina. The public interest might well be frustrated by a stay, because the irradiator, once operational, will contribute to food safety. The Staff would note that the public interest consideration identified by the Intervenor—"the interest in having public officials act in accordance with the law"—assumes the Intervenor will prevail on the merits and, for that reason, is subsumed within the Intervenor's other arguments. *See CFC Logistics, Inc.*, LBP-03-16, 58 NRC 136, 147 (2003) (noting that public interest factors cited by applicant for stay had already been considered as part of factors dealing with probability of success on the merits and irreparable injury). The Intervenor does not, for example, cite any national policy

[4] The Appeals Board in *Long Island Lighting* was addressing § 2.788(e), the predecessor to § 2.1213(d).

opposing the operation of radiation facilities. *See id*. (noting that there does not appear to be any national policy favoring or opposing the rapid deployment of irradiation facilities).

CONCLUSION

The Intervenor has failed to demonstrate it will be irreparably harmed if the Board declines to grant a stay of the Staff's licensing action. Accordingly, the Intervenor must prove to a "virtual certainty" that it will prevail on the merits at an administrative hearing. The Intervenor fails to make such a showing. A reasonable consideration of the factors relevant to ruling on a stay request, as articulated in 10 C.F.R. § 2.1213(d), does not support granting a stay. The Board should therefore deny the Intervenor's application.

Respectfully submitted,

/RA/

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Dated at Rockville, Maryland
this 7th day of September, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S OPPOSITION TO APPLICATION FOR A STAY" 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 7th day of September, 2007.

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