RAS. 14.116

September 6, 2007

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE SECRETARY

DOCKETED
USNRC

September 7, 2007 (8:47am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

APPLICANT PA'INA HAWAII, LLC'S OPPOSITION TO INTERVENOR CONCERNED CITIZENS OF HONOLULU'S APPLICATION FOR STAY OF NRC STAFF'S ISSUANCE OF LICENSE FOR POSSESSION AND USE OF BYPRODUCT MATERIAL

DECLARATION OF MICHAEL KOHN

DECLARATION OF FRED PAUL BENCO

EXHIBITS A & B

CERTIFICATE OF SERVICE

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SECY-02

I. INTERVENOR'S REQUEST FOR STAY IS "MOOT" BECAUSE THE LICENSE HAS ALREADY BEEN ISSUED.

A claim is "moot" where the agency action has already occurred. See, e.g., Aluminum Company of America v. Administrator, Bonneville Power Administration, 175 F. 3d 1156 (9th Cir. 1999)

Here, Intervenor on August 27, 2007 filed its Request for Stay specifically seeking to enjoin "the Staff's issuance to Pa'ina Hawaii, LLC on August 17, 2007 of NRC License No. 53-29296-01 . . . ." However, the license had been issued ten (10) days before Intervenor sought its stay. Consequently, the requested stay was MOA, or "moot on arrival." The requested stay ought to be denied.

II. INTERVENOR HAS FAILED TO CARRY ITS "BURDEN OF PERSUASION" SHOWING THAT A STAY IS APPROPRIATE OR NECESSARY IN THIS CASE.

As noted above, the license has already been issued to Pa'ina Hawaii, LLC and therefore the sought-for stay is "moot."

Furthermore, and in any event, Intervenor has failed to make even a minimal showing satisfying the four required elements justifying the issuance of a stay. 10 C.F.R. Sec. 2.1213(d) provides that injunctive relief will be denied or granted based upon the following four considerations:

(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.

The NRC has determined that the showing on, or weight of, each factor required for the granting of a stay varies.

Public Service Co. of N.H. (Seabrook Station, Units 1 and 2), 4 N.R.C. 10, 14 (1976)

In the 9th Circuit and, indeed, in all U.S. courts, a preliminary injunction is deemed a "drastic and extraordinary remedy that is not to be routinely granted." RastrOps v. Radius, Inc., 861 F. Supp. 1479, 1482 (N.D. Cal. 1994); Mazurek v. Armstrong, 520 U.S. 968, 972 (1997).

Because injunctive relief is a "drastic remedy," the movant carries the "burden of persuasion" on all four elements, and the movant must make a "clear showing" of entitlement to relief. Mattel, Inc. v. Greiner and Hausser GmbH, 354 F.3d 857, 867 (9th Cir. 2003); Bernhardt v. County of Los Angeles, 339 F.3d 920, 932 (9th Cir. 2003)

Intervenors have not made any showing, much less a "clear showing," that a stay should enter herein.[1]

A. Intervenor Has Failed To Make Any Showing That It Would Be "Irreparably Harmed" If A Stay Is Not Granted.

1. There Are No Affidavits Or Sworn Statements From Members Of Intervenor Testifying To Individualized "Irreparable Harm."

Conspicuously missing from Intervenor's Request for Stay are any affidavits or declarations from its actual members (a mere six members, based upon its initial Petition) asserting any individualized facts that they will personally suffer "irreparable harm" justifying a stay.

[1]Applicant Pa'ina pointed out in its March 8, 2007 "Answer" filed herein that Intervenor must show that a FONSI is the result of "arbitrary" or "capricious" or an "abuse of discretion" rationale. See, Environmental Protection Information Center v. U.S. Forest Service, 451 F. 3rd 1005 (9th Cir. 2006) Notably, and again, Intervenor's August 27, 2007 Request for Stay fails to challenge the FONSI on the grounds that the FONSI was the result of an "arbitrary, capricious, or abuse of discretion" process. Indeed, Intervenor never mentions the proper standards of review, i. e., "arbitrary," "capricious," or "abuse of discretion." Intervenor does not wish to acknowledge these high standards of review which it must surmount, presumably in order not to weaken further its Request for Stay.

The absence of any affidavits or declarations of the persons actually involved has been found persuasive where courts deny requests for injunctive relief. See Ross-Whitney Corp., et al. v. Smith Kline & French Laboratories, 207 F.2d 190 (9th Cir. 1953); Hadix v. Johnson, 871 F.2d 1087 (6th Cir. 1989); Medico Security Locks, Inc. v. Swiderek, 680 F. 2d 37, 38 (7th Cir. 1981); see also Concerned Members for a Free Election v. Coia, 1999 LEXIS 9291 (WD NY 1999)(plaintiffs' application for a preliminary injunction "fatally flawed" where no members' affidavits filed stating any facts supporting "irreparable harm;" rather, only attorneys affidavits were filed)

Here, with no sworn affidavits showing "irreparable harm" to its members, Intervenor's request for stay ought to be denied.[2]

2. Intervenor's Own Attorney Has Contradicted His Implied Claim Of "Imminent Harm."

Where there is no "imminent harm," a stay or injunctive relief will be denied. See, e.g., Sierra Club v. Hathaway, 579 F.2d 1162 (9th Cir. 1978)(movants failed to establish that immediate casual use of land would significantly affect environment, and injunction denied); Protect Our Water v. Flowers, 377 F. Supp. 2d 844, 880-81 (ED Cal. 2004)(pre-construction surveys showed no protected species near dredge site, therefore no immediate harm and injunction denied)

Here, Pa'ina has not yet entered into a final lease with the State of Hawaii, there is no Cobalt-60 at the

[2] Taken in conjunction with Intervenor's statement (at Page 2 of its Request for Stay) that this Board need not "resolve conflicting expert testimony," the fact that no individual member of Intervenor has provided any affidavit leaves this Board with virtually no sworn, individualized facts upon which to base a finding of actual "irreparable harm."

proposed lease site, and, indeed, there is no Cobalt-60 in transit to Pa'ina. Clearly, there is no "imminent harm" warranting the granting of a stay.

Indeed, Intervenor's own attorney agrees with and has reinforced this conclusion that there is no "imminent harm." On the very same day that Intervenor's attorney filed the instant Request for Stay before this Board, his "Letter to the Editor" was printed in the Honolulu Advertiser morning newspaper.[3] His letter declared and inferred that there is no imminent danger from any Pa'ina's proposed irradiator because (1) Pa'ina does not yet have any lease for its facility, (2) Pa'ina has no cobalt, and (3) Intervenor's attorney even implied possible further legal proceedings against Pa'ina based upon shoreline laws.

Clearly, the "Letter to Editor" from Intervenor's own attorney constitutes an "admission" that there is no "great and imminent harm" if Pa'ina receives its license. Intervenor's requested stay ought to be denied.[4]

B. Intervenor Fails To Make Any Showing That It Will Be Able To "Prevail On The Merits" Of This Case.

The second requirement for a stay under 10 C.F.R. Sec. 2.1213(d) is that the moving party must make a "strong showing" that it is "likely to prevail on the merits of its case." See generally, Inland Empire Public Land v. Schultz, 992 F. 2d 977 (9th Cir. 1993). However, where a movant makes at best only a "minimal showing" that it will prevail on the merits, the requested injunctive relief will

[3] See Exhibit A, a letter to the editor of the Honolulu Star-BulletinHonolulu Star-Bulletin published August 27, 2007, authored by Intervenor's attorney.

[4] An attorney's statements or admissions can bind his client. Thus, for example, where an attorney for a party seeking injunctive relief under NEPA made factual admissions which "undercut" his "protestations of great and imminent irreparable injury," injunctive relief was denied. Lake Wylie Water Resources Protective Association v. Rodgers Builders, Inc., 621 F. Supp. 305, 307 (DC SC 1985)

be denied. Sierra Club v. Hathaway, 579 F.2d 1162 (9th Cir. 1978)

Here, the August 17, 2007 FONSI suggests that Intervenor will not prevail on the merits of this case. The Staff (after much expert analysis) concluded that the proposed irradiator will cause "no significant impact." The FONSI seriously undermines Intervenor's claim that it will or can prevail "on the merits." See, e.g., Half Moon Bay Fishermans' Marketing Association v. Carlucci, 857 F. 2d 505, 507 (9th Cir. 1988)(even minimal compliance with NEPA and other laws diminishes likelihood of success on merits; injunction denied)

Intervenor raises (at pp. 5-7) other arguments "on the merits" but these other arguments are simply "red herrings."[5] For example, Intervenor glibly throws out the phrase "e-beam irradiator" as an alternative technology that the Staff should have evaluated, but Intervenor's mere mention of an "e-beam irradiator" is utterly unsupported by any meaningful manufacturing, scientific or economic testimony whatsoever. See, e.g., Kelley v. Selin, 42 F. 3d 1501, 1521 (6th Cir. 1995)(NRC did not consider alternatives, since alternatives neither sufficiently demonstrated nor practicable for use; EA nevertheless approved)[6]

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[5] "Red herring" arguments are generally deemed wholly "irrelevant" and may be "disregarded." See United States v. Choate, 576 F. 2d 165 (1978); United States v. McLennan, 563 F. 2d 943 (9th Cir. 1977) Texas Power and Light Co. v. FCC, 784 F. 2d 1265, 1272 (5th Cir. 1986)(court decided to "ignore the red herring dragged into the case" by one party)

[6] The regulations of the Council of Environmental Quality (CEQ) did not require the Staff to consider "e-beam irradiation" as an alternative technology. Intervenor (at p. 5) cites one sentence from 46 Fed. Reg. 18,026, 18,027 (March 23, 1981) but omits the very next sentence, which is the definition of "reasonable alternatives": "Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense . . . ." In light of the CEQ's definition, it is noteworthy that Intervenor's mere mention of "e-beam technology" is unsupported by any expert testimony that e-beam/x-ray technology is "practical" or "feasible" or makes "common sense."

Similarly, Intervenor once again repeats its earlier contention (first raised in its February 9, 2007 filing) that the EA fails to discuss "alternative sites" for the irradiator. However, for over two years Intervenor has failed to itself identify even one specific site on Oahu--or in the State of Hawaii, for that matter--which is currently suitable for Pa'ina's irradiator. Intervenor's own failure to specifically identify even one suitable alternative site--suitable under current zoning and land use laws--leads irrefragably to the conclusion that there is no significant impact on the environment resulting from Pa'ina's chosen site. Morongo Band of Mission Indians v. FAA, 161 F. 3rd 569, 576 (9th Cir. 1998)("[T]he Morongo Band has failed to point to a specific feasible alternative that would have bypassed the Reservation"); Goodman Group, Inc. v. Dishroom, 679 F. 2d 182, 186 (9th Cir. 1982)(compliance with current land-use laws points towards conclusion of no significant impact on environment)[7]

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On the other hand, during the public comment period, the NRC Staff received the following unrebutted facts about so-called "electron-beam irradiation technology": (1) the e-beam/x-ray manufacturer, Surebeam, filed for bankruptcy a year before Pa'ina's June 2005 Application herein; (2) the Big Island e-beam/x-ray facility had to financially reorganize under new ownership; (3) 93% of Hawaii's very expensive, oil-based electricity is lost in heat during conversion from electron beam to X-ray, raising the cost per pound of treated product to a prohibitive 4 cents; (4) the Big Island e-beam/X-ray technology has frequently broken down, and has caused massive losses of product and monies and raised serious questions about facility reliability; (5) e-beam/x-ray technology has only one fixed production capacity, and its inflexibility causes waste; (6) the cost of constructing this type of unreliable facility is estimated at $6.5 million, or about double the cost of Pa'ina's proposed cobalt-60 facility; and (7) e-beam is not used anywhere in the world for irradiating fruit and products the size and variety set forth by Pa'ina. (See Exhibit B, found at ML070600583)

These strikingly negative facts, taken in conjunction with Intervenor's own failure to present any expert reports supporting the "electron-beam irradiator," clearly justified the NRC Staff in disregarding the supposed alternative. It would defy "common sense" to force the Staff, Pa'ina, or any proposed irradiator operator for that matter, to consider an inefficient, unreliable and inappropriate technology which would likely force the operator into bankruptcy. Consequently, when the Staff disregarded Intervenor's unsupported suggestion of a failing technology, the Staff was fully complying with the CEQ's definition of "reasonable alternatives" as set forth in 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981).

[7] Intervenor's refusal to identify any suitable alternative geographic site, with appropriate current zoning and land use laws in place, presumably arises out of its desire to preserve to itself the right to later challenge any and all sites which Pa'ina or even another irradiator operator might select. Thus, its refusal

In summary, Intervenor has failed to make any showing that it will "likely prevail on the merits" of this case, and its request for a stay ought to be denied.

III. THE "PUBLIC INTEREST" STRONGLY FAVORS PA'INA BECAUSE (1) PA'INA HAS FULLY ABIDED BY AND WITH THE APPLICABLE LAWS AND REGULATIONS; (2) INTERVENOR'S REQUEST FOR A FULL-BLOWN EIS HAS "UPPED THE ANTE" AND REVEALED ITS TRUE AGENDA TO COMPLETELY STOP ANY USE OF RADIATION IN HAWAII AND THE U.S.; BUT (3) THE PROPER FORUM TO CHANGE THE LAWS IS CONGRESS, WHICH CURRENTLY AUTHORIZES AND APPROVE CONSTRUCTION OF CIVILIAN IRRADIATORS.

When on June 23, 2005 Pa'ina applied for its irradiator license, all irradiators were "categorically excluded" from NEPA. See 10 C.F.R. Sec. 51.22(c)(14)(vii). Later, on April 27, 2006 the Staff stipulated with Intervenor to accomplish an Environmental Assessment ("EA") for the irradiator. Pa'ina opposed the Stipulation because (among other reasons) it believed that Intervenor's true "agenda" was not a desire to finely study the impacts of Pa'ina's irradiator, but rather to stop any and all civilian use of radiation in Hawaii (and the U.S.).

Now, and not surprising to Pa'ina, Intervenor in its Request for Stay has "upped the ante" by seeking a full-blown EIS, for an irradiator which is supposed to be "categorically excluded" under existing regulations.

The proper forum for Intervenor to present its "anti-nuke agenda" and to raise its head-on challenge to the

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to identify any specific alternative site in this litigation constitutes a transparent effort to "hedge its bet" on the outcome of this or later threatened litigation. (See, e.g., Exhibit A) However, in the 9th Circuit as well as in other courts, one who seeks to "hedge his bet" on the merits of a case risks waiving or forfeiting its entire case. See generally Adibi v. California State Board of Pharmacy, 461 F. Supp. 2b 1103, 1111 (DC Cal. 2006) Here, among many other reasons, Intervenor is "unlikely to prevail on the merits" because its own refusal to identify any other specific, suitable alternative site for study/comment clearly constitutes a waiver of its argument.

construction and use of irradiators in Hawaii, is before Congress. Congress has promulgated statutes which created the NRC and its general policies, and the NRC makes specific policy choices such as set forth in 10 C.F.R. Part 36.

In other cases involving challenges to the use of nuclear energy, federal courts have specifically noted that policy arguments over radiation should be made in Congress (or else before the NRC). See, e.g., Kelley v. Selin, 42 F. 3d 1501 (6th Cir. 1995) There, in rebuffing the petitioner's efforts to invalidate the NRC's approval of VSC-24 concrete casks for storage, the Court wrote:

"[P]etitioner's argument is essentially an attack on the policy choice made by Congress . . . to have the NRC consider, to the extent practicable, the licensing of onsite spent nuclear fuel storage at civilian nuclear power facilities through rulemaking. If petitioners are to obtain such relief, it must come from Congress . . . and not from the courts.

. . . [P]etitioners have made no pretense of their desire to use their attack on the NRC's approval of VSC cask design to force the NRC to decide to cease production of irradiated fuel at Palisades by halting the operation of the nuclear power generating reactor. See Affidavit of Marvin Resnikoff[8] . . . Because no federal repository is as yet available for the permanent disposal of spent irradiated fuel from nuclear power plants . . . civilian nuclear power generating facilities could be forced to shut down if no additional storage space for spent nuclear fuel is available. . . They [petitioners] must seek such relief from the Congress, as opposed to the NRC or the courts." (Emphasis added) 42 F. 3rd at 1521.

In a similar manner, here the Intervenor created a lawsuit, ultimately to further its true agenda which is to

[8] Apparently, this expert Marvin Resnikoff, whose Affidavit "made no pretense" of his side's true anti-nuke agenda before the 6th Circuit, is the very same Marvin Resnikoff whose testimony Intervenor has sought to utilize in the instant case. Interestingly, in other nuclear-based litigation before the Mississippi Supreme Court, Dr. Resnikoff's expert testimony has been rejected in favor of proponents' expert testimony, the proponents' expert testimony being deemed the "only" credible testimony. Boyles v. Mississippi State Oil and Gas Board, 794 So. 2d 149, 155 (Miss. 1995)

ban all civilian irradiators from the U.S. Intervenor should have pursued its wished-for ban on irradiators from Congress, or else it should have sought an NRC repeal or modification to the "categorical exclusion" of irradiators from NEPA. Subsequently, Intervenor convinced the NRC Staff to accomplish an EA, despite the fact that the Commission had not anticipated that an EA would ever be required due to "categorical exclusion." Predictably unhappy with the EA and in accord with its true anti-nuke agenda, Intervenor has now called for a full-blown EIS on what is, in reality, a very small project.

Clearly, the public interest strongly favors Pa'ina, because Pa'ina has fully abided by and with Congress' statutes and the NRC's regulations promulgated thereunder. Congress, it will be remembered, represents the "will of the people." The requested stay should be denied.[9]

## IV. INTERVENOR SHOULD BE REQUIRED TO POST A BOND IN THE AMOUNT OF $5.25 MILLION.

Both in the context of a NEPA case and otherwise, where injunctive relief is to be granted in the 9th Circuit, an appropriate monetary bond must be posted by the party requesting relief. See, e.g., Sylvester v. U.S. Army Corps of Engineers, 884 F. 2d 394 (9th Cir. 1989)($100,000 bond amount to be reconsidered upon remand); see also FTC v. World Wide Factors, Ltd., 882 F. 2d 344 (9th Cir. 1989).

Intervenor has failed to "make its case" for a stay. Notwithstanding its failure, if for any reason the Board

[9] There are many other reasons why the "public interest" clearly favors Pa'ina. Two are: (1) the Atomic Energy Act of 1954, which extolled atomic energy's benefits for "the general welfare" (42 U.S.C. Sec. 2011); and (2), at the February 1, 2007 public hearing in Honolulu, there were alone more fruit and vegetable farmers present in support of Pa'ina's irradiator than the total number of opponents to the project. The total count was approximately 41 proponents to 10 opponents. See Transcripts of Hearing at ML070590710.

decides to issue a stay, then Intervenor ought to be required to post a $5.25 million bond. (Kohn Declaration)

V. CONCLUSION.

Intervenor's request for a stay is already "moot."

In any event, Intervenor has failed to make any showing warranting the issuance of a stay. Among other failings, Intervenor's members have conspicuously failed to provide any sworn testimony of individualized "irreparable" or "imminent" harm, surely a fundamental omission where Intervenor is protesting great harm.

Furthermore, Intervenor has itself refused to provide the NRC Staff any "specific," "reasonable," or "common sense" geographic or technological alternatives to Pa'ina's irradiator or situs for the NRC Staff to study, a flaw which must be considered fatal to Intervenor's chances to "prevail on the merits."

The "public interest" also strongly favors Pa'ina, since Pa'ina has complied with all relevant statutory and regulatory laws. Intervenor has chosen an improper forum; its true, anti-nuke and anti-irradiator agenda should be taken up with Congress and/or the NRC's regulatory policies.

Finally, and alternatively, a bond of $5.25 million ought to be required of Intervenor if for any reason injunctive relief is granted.

DATED: Honolulu, Hawaii September 6, 2007.

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

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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

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DECLARATION OF MICHAEL KOHN IN OPPOSITION TO INTERVENOR'S REQUEST FOR STAY

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Under penalty of perjury, I, Michael Kohn, do hereby state and declare:

1. That I am a resident of the State of Hawaii, that I have been actively involved in growing and selling fruits, vegetables and other foods for the past 18 years, and I have been involved in investigating and developing a civilian irradiator in Hawaii for approximately the past 18 years. I am currently the President of Pa'ina Hawaii, LLC and I am also actively involved in other business entities. My education includes a BBA degree from the University of Hawaii.

2. Attached hereto as Exhibit B is a true and correct copy of my letter dated February 28, 2007 which I sent to the NRC during the comment period following the Draft Environmental Assessment. The NRC designated it ML070600583. At the time I wrote the letter, the facts contained therein were true and correct, to the best of my knowledge and belief.

3. The estimated cost for the architectural planning, engineering, preparation of land, drilling and excavation,

construction, and irradiator purchase and installation is $3.5 million. The purchase cost of the irradiator is approximately $1.4 million to $1.6 million. Since this litigation began in October 2005, all of the costs have risen, due largely to the substantial appreciation in Hawaii real estate prices.

4. I understand that in the State of Hawaii, a court bond is generally set at 1.5 times the amount of the cost of the halted project, and also in order to encompass all costs and other losses suffered by the project. Should for any reason the Board grant any type of injunctive relief, Pa'ina would request that a bond of $5.25 million be posted, in order to pay all damages awards, attorney's fees, costs and lost interest.

DATED: Honolulu, Hawaii, September 6, 2007.

MICHAEL KOHN

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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| In the Matter of | ) | |
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| Pa'ina Hawaii, LLC | ) | Docket No. 030-36974 |
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DECLARATION OF FRED PAUL BENCO IN OPPOSITION TO INTERVENOR'S REQUEST FOR STAY

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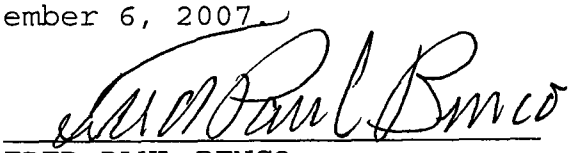
Under penalty of perjury, I, FRED PAUL BENCO, do hereby state and declare:

1. That I am a resident of the State of Hawaii, that I am a lawyer licensed to practice in the Hawaii state and federal courts, and I have been Respondent Pa'ina Hawaii, LLC's attorney since the inception of this litigation.

2. Attached hereto as Exhibit A is a true and correct copy of a letter published in the morning Honolulu Advertiser newspaper on August 27, 2007. The author identifies himself as David L. Henkin, as staff attorney for Earthjustice.

DATED: Honolulu, Hawaii, September 6, 2007.



FRED PAUL BENCO

**FRUIT FLIES**

**IRRADIATOR IS NOT IN PUBLIC'S BEST INTEREST**

Your article on Pa'ina Hawai'i's proposed fruit irradiator ("Fruit fly irradiator approved," Aug. 21) leaves your readers with the inaccurate impression the irradiator is a done deal. It is not.

Review of the project is not at an end, as the article claims.

On behalf of Concerned Citizens of Honolulu, Earthjustice is pursuing the challenge before the Atomic Safety and Licensing Board that it brought in 2005, with a hearing scheduled for early 2008. Should the board conclude Pa'ina failed to demonstrate the safety of its irradiator to Hawai'i's people and environment and/or that the environmental review was inadequate, the board will pull the license.

Moreover, Pa'ina cannot begin to build its facility, much less receive radioactive cobalt, until it secures a lease from the airport and an SMA permit. Those processes provide additional opportunities to hold the responsible agencies accountable for protecting our health and safety.

By quoting only project boosters, your article inaccurately suggests the irradiator would be a boon to Hawai'i's agriculture.

The Nuclear Regulatory Commission reached the contrary conclusion, finding the irradiator would confer only small economic benefits.

Given the risk of radioactive releases in the event of a natural disaster, airplane crash or terrorist attack, this irradiator is hardly in the public's interest.

*David L. Henkin*
*Staff attorney, Earthjustice*



**EXHIBIT A**

Dear Mr. Blevin,

To best answer your question I'd like to explain to you what impact alternatives such as e-beam (x-ray) and heat treatment mean to us and many other small shippers in Hawaii. As you will see this letter will also look at alternative sites.

Pa'ina Hawaii seeks to help develop agriculture on all islands by opening the US market. Many farmers and small shippers sell produce to the local market and Vancouver, Canada, which does not require any treatment. Some 3 million people live in both markets combined. This compares to a population of 300 million people in the US. The US of course requires treatment. Existing E-beam and heat treatment facilities are not viable alternatives because they are 1) outright monopolized, 2) geographically not accessible, 3) limited in product quality control, 4) limited in application, 5) decrease produce quality, 6) use fossil fuels (converted to electricity) or are 7) unreliable technologies.

We (Hawaii Fruit Company) are a small company that packs and ships papayas and other tropical fruits. Our company has been exporting papayas since 1988. Our main markets have been the EU countries that don't require treatment. In order to justify the high cost of production in Hawaii and the high cost of flying papayas half around the world, we specialize in shipping treeripened, high quality fruits. We first tried to package fruit on the Big Island, then ship them to Honolulu and then on to Europe. We quickly stopped packing on the Big Island because we lost control over the quality in Honolulu. The biggest problem was to maintain a low temperature to stop the tree-ripened fruits from turning overripe. To this day we have a packing house at Honolulu airport for that reason. Four nights a week we fly in papayas from the Big Island, process and chill them and ship them to Germany. It is an elaborate undertaking, but is the only way to ensure high quality, tree-ripened fruits. To maintain a high standard of quality, fruits transshipped through Honolulu International Airport must undergo final preparation at the airport.

Since the early 90's we have been looking at building a treatment facility so that we can export to the US mainland. Back then, heat treatment was the only available technology. We quickly realized the drawbacks of heat treatment. Heat treatment requires a chamber holding many tons of fruit at a time. Treating less than a full chamber is not economical. Treating more than one type of produce at a time is generally not allowed (e.g. papaya and lychee).

Papayas must reach a core temperature of 47 C. Mixing large fruits with small fruits will overheat smaller fruits. Since tree-ripened fruits (50 to 100% bright yellow) can not withstand temperatures of 47 C, farmers now must pick a ripeness range from grass green to perhaps 50% yellow. A 50 to 100% ripe fruit is considered tree-ripe, and commands a premium price. Fruits ranging from solid green to 50% yellow will mature at different times; with less bright shell color and less sugar content and consequently command a lower price. (Irradiation can treat any sized fruit of any maturity, mixed or not; without having an adverse effect on the quality of the fruit.)

Some heat treated fruits turn ripe within 24 hours. Some take days, requiring resorting by color. Often disease or bruising is not apparent when the fruit is green and hard. Again, resorting for bruised and diseased fruits is required as the fruit matures (maybe not at the packing house but certainly somewhere down the distribution line, which adds even further costs). Treatment, sorting and packing must take place in a fruit fly-free environment; usually a large building accommodating the many steps needed to pack thedesired quality fruit in its final shipping container. In other words, enough warehouse space needs to be paid for to treat, pack, re-sort and store fruits.

Since heat treatment and subsequent sorting and packing are contracted out to the heat treatment facility, it is very difficult for shippers to maintain direct control over the quality of fruit packed out. This is because heat treatment must be done prior to packaging, while irradiation is done after packaging. The degree of ripeness is very important. Mainland markets often complain about fruit that is too green.

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Because partial culling occurs after heat treatment, facilities are located close to production areas to avoid unnecessary transportation cost of discarded fruits. Shipping unsorted fruits over long distances to a heat treatment facility would incur additional transportation costs for culled fruits. The increased cost would be especially high if a heat treatment facility were to be located at Honolulu airport.

Heat treatment is approved for only a small number of fruits and vegetables that are grown in Hawaii. The primary purpose of this treatment for papaya is to kill the larvae of the four species of fruit flies present in Hawaii. Recently it has been

**EXHIBIT 8**

determined that the Malaysian fruit fly can survive a temperature of 47 C. As of Feb 23, 2007 the USDA amended its list of approved products for heat treatment and removed tomato, squash, pepper and eggplant due to the Malaysian fruit fly. Should a Malaysian fruit fly be discovered in a commercial shipment of papayas, irradiation will be the only treatment left to ship to the US mainland.

While heat treatment has been successfully used it is limited to only a small array of approved fruits, it needs large batches to treat, it needs to be close to production areas, it reduces fruit quality and at a location like Honolulu airport would require high lease costs for a large building.

In contrast, irradiation can treat virtually all produce to be exported and can treat virtually all infested produce or other infested products (e.g. wood products) when imported. That is true for x-ray as well as cobalt-60 technology. Either technology can also irradiate fruit fly pupae for USDA for their preventive release program on the mainland.

The most valuable function an irradiator can perform is treatment after final packaging, while in transit and without applying heat. Irradiation can be done anywhere in Hawaii before it is sent off to the mainland. If the purpose of the irradiator is to service the agriculture community on all islands, it is logical to build one close to the State's most important distribution center, which is Honolulu airport and Honolulu harbor. Transportation cost and delays to the farmers and shippers

are held to a minimum as shipments must pass through Honolulu. Placing it on an outer island would only benefit that particular island. Placing the irradiator on Oahu, but away from the airport

has no. benefit. Given Oahu's traffic situation, it would greatly delay transportation to the facility, resulting in missing scheduled outbound flights. It takes only about 10 minutes to travel from one end of the airport to the other. Driving 10 miles to and from the airport could take one hour or more, and increase truck traffic on roads that are already suffering from congestion. The cost of a refrigerated truck would be necessary, adding as much as 37% to the treatment cost of papayas. In this day and age it would be irresponsible to burn additional fossil fuels for useless and unnecessary transportation.

There are however, some significant differences between x-ray technology and cobalt-60. The following comparison is limited to the only x-ray food irradiator in the US, which is located on the Big Island of Hawaii.

Electron beam works very well and efficiently for product that is thin and uniform. Papayas and other fruit are not. Product that is thicker than 3 inches can not be treated by an electron beam. Electron beam needs to be converted to x-ray in order to have enough penetration to treat entire produce boxes. During the conversion 93% of the energy is lost. The cost of electricity here in Hawaii is very high. The per pound cost for electricity alone is estimated at over 4 cents, a significant factor.

X-ray technology is not new. It is very sophisticated and requires constant upkeep by highly

qualified personnel. Frequent breakdowns have occurred, some lasting two weeks before the x-ray machine was functional again. Those breakdowns have lead to tremendous losses for

shippers. They were forced to "dump" their product on the local market or destroy it. This has an adverse economic effect on the entire Hawaiian agricultural system. During peak seasons like Christmas, mainland customers were left without product, and scrambling to obtain product from

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competing sources like Latin America. This has left the impression that Hawaii is not a reliable source for agricultural products.

An x-ray facility would cost some 6.5 million dollars to build near Honolulu airport. Since the power of the e-beam generator determines output, it has a fixed production capacity. Capacity can not be gradually increased to match growing demand for Hawaii products.

The economic future of x-ray technology was put on hold when Sure Beam, the vendor, went bankrupt, leaving investors

with losses in excess of $100 million. Even the Big Island X-ray facility had to reorganize under new ownership. It would make little sense for Paina Hawaii to invest in a failed company and a technology that does not suit Hawaii's needs.

Category **III** irradiators have been around for over 50 years. They have a proven safety record, they have not impacted the environment and they are very reliable. Safety has been our foremost concern. No accident has ever occurred in a category **III** irradiator. The International Atomic Energy Agency in Vienna calls this type of equipment "inherently safe". The safety for both workers and the public is designed into the equipment. The cobalt remains passive and securely shielded. A hoist system is the only moving part to place product in front of the source. No downtime is expected other than routine maintenance, and the rare occasion of reloading cobalt- 60.

Unlike x-ray technology, capacity can be increased to match rising demand by installing additional cobalt. At a total cost of less than $3 million, the proposed cobalt-60 facility costs less than half of an x-ray facility, while maximum annual capacity is more than double.

X-ray requires a large amount of electrical energy. The on-demand electricity is mostly generated by fossil fuel burning generators, such as coal and oil. Hawaii imports most of those needed fossil fuels from Indonesia, a country that is not regarded as a reliable trading partner or noted for being politically stable. The Genesis irradiator using Cobalt-60 requires comparatively little electric power, and has no negative impact on our environment. Cobalt-60 will come from qualified suppliers located in either Canada or England. Both countries have proven to be reliable partners of the US.

Cold and methyl bromide treatment (fumigation) or just visual inspection (non-host status) are approved for a very few products. These alternatives are of little help to diversify Hawaii agriculture. The table below depicts the various approved products for export to the mainland from Hawaii. The table was adjusted to reflect the very recent, Feb 23, 2007 decision by USDA to take off tomato, Italian squash, pepper and eggplant from the approved list for commodity quarantine treatment.

Summary: Commodity quarantine treatments for Hawaii's fruits and vegetables

Abiu Longan I, H
Atemoya Lychee I, H
Avocado C Mango **I**
Banana I, N Papaya I, H
Bell pepper **I** Pineapple I, N, H
Carambola I, **C.** Rambutan **I**
Citrus H oSapodilla **I**
Durian N Sweet potato I, F
Eggplant I Tomatoes
Italian squash **I**

**I** = irradiation, C = cold, N = non-host status, H = heat (hot water immersion or vapor heat), F = fumigation

compiled by:
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The percentage distribution of approved treatments for all 19 approved products is as follows:

Irradiation 84%
Heat 26%
.Cold 10%
Fumigation 5%
Non-host status 5%

Based on the above facts it is clear that there is no alternative technology or location that will meet the goal of providing shippers on all islands the opportunity to ship treated agriculture products to the mainland. The cobalt-60 irradiator could also play a very important role in disinfestation of imported products, aimed at preventing the introduction of additional

invasive species. Again alternative locations to Honolulu airport or alternative technologies to a cobalt-60 make no sense.

Honolulu airport, and at close proximity Honolulu harbor, are the most important terminals for imported food products to the State. Locating treatment or destruction facilities away from the airport or harbor will only add cost, and provide an opportunity for the alien species to escape before treatment or destruction. This is particularly true for locations on the outer islands.

Hawaii is the capital of invasive species, which are a serious threat to its people, ecology and agriculture. Recent examples are the nettle caterpillar, causing severe welts by using very sharp spindles. Another very recent example is the little red fire ant. While most ants bite, the little red ant has a stinger like a bee. The red fire ant is expected to eventually enter into the coffee growing areas, making it difficult for workers to harvest the beans. The organic growers will have very little options to control the ant. The list goes on and on.

Some 2500 alien species have been introduced to Hawaii. 98% of those are considered pests. Many of those invasive species are also the very reason why Hawaii agriculture products can not be freely exported. Instead pests like fruit flies require Hawaii shippers to treat its products. The Hawaii Department of Agriculture (HDOA) is significantly increasing its inspection program for imported products to protect Hawaii's environment. The Hawaii Legislature has approved funding to double the inspectors to tighten down on the introduction of further alien species: The purpose is to intercept alien species and find the most economical and sensible solution to deal with the potential pest.

Shipping back to sender is a possibility but very expensive. Destruction of the product and the hitchhiking alien specie will mean total loss of the product, and additional destruction costs will be required. At the discretion of the HDOA, treatment to salvage the product is possible. Depending on the type of treatment, some underlying data will be needed to justify a specific commodity treatment. In the past methyl bromide had been used for its effectiveness to kill pests and specific data is often available. But fumigation companies are reluctant to provide this service any longer due to liability issues. Methyl bromide is being phased out, under the international Montreal Protocol because it is known to deplete the earth's ozone layer. Methyl bromide also diminishes the quality of specific fruits. Cold and hot treatments could be used, but data is often not available for specific commodities using cold or heat treatment. Generally speaking, small batches of infested product are often costly to treat as the entire chamber needs to be used.

Irradiation is not commodity specific, it is rather pest specific. The recently approved generic dose by the USDA (APHIS) of 400 gray would be sufficient to treat any alien species other than pupae or adult moths. Irradiation can be used cost effectively on small batches and has virtually no impact on the product quality.

Again irradiation technology is more suitable than any other alternative treatment. For the same reasons mentioned above it would make no sense to choose X-ray technology over proven cobalt-60 technology.

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If Pa'ina Hawaii were limited to x-ray technology, and/or had to place the facility 10 miles away from the submitted location, I would not be able to justify an investment in this private business venture. It is unclear how using x-ray technology or using a different location would have a different impact on the environment, but only on the economics of the process. One might conclude that the criticisms of the "Finding of No Significant Impact" by the NRC are merely an effort to make the entire project not economically feasible. The alternative of not building the Pa'ina irradiator, as submitted, would have a significant negative impact on the future of Hawaii agriculture, integrity of Hawaii's fragile ecosystem and unique quality of life.

Sincerely,

Michael Kohn
Pa'ina Hawaii

CERTIFICATE OF SERVICE

I hereby certify that true copies of "APPLICANT PA'INA HAWAII, LLC'S OPPOSITION TO INTERVENOR CONCERNED CITIZENS' OF HONOLULU'S APPLICATION FOR STAY OF NRC STAFF'S ISSUANCE OF LICENSE FOR POSSESSION AND USE OF BYPRODUCT MATERIAL" in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this 6th day of September, 2007. Additional service has also been made this same day by electronic mail as shown below:

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Atomic Safety and Licensing Board
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Administrative Judge
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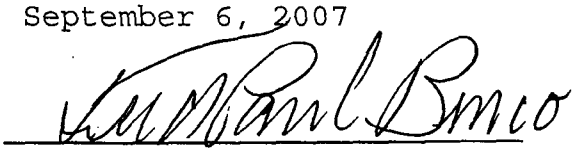
DATED: Honolulu, Hawaii, September 6, 2007



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September 6, 2007

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

Re: Docket No. 030-36974
ASLBP No. 06-843-01-ML
"Applicant Pa'ina Hawaii, LLC's Opposition To Intervenor Concerned Citizens Of Honolulu's Application For Stay Of NRC Staff's Issuance Of License For Possession And Use Of Byproduct Material"

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 document.

This document was e-mailed to your office and to all parties on the Certificate of Service on this date. Hard copies were also mailed to each of the parties on this date.

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. Thank you.

Very respectfully yours,

Fred Paul Benco

Encl.
cc: All parties on Certificate of Service