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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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

LICENSEE PA'INA HAWAII, LLC'S RESPONSE TO ASLB'S  
JANUARY 24, 2008 ORDER REQUIRING PARTIES TO  
FILE RESPONSIVE PLEADINGS

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I. BRIEF PROCEDURAL BACKGROUND.

By Order dated January 24, 2008, the Atomic Safety Licensing Board ("ASLB") invited the parties in this matter to address the impacts upon this case of a recent decision of the Nuclear Regulatory Commission ("NRC"), Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-01, 67 NRC \_\_\_\_ (slip op.) (Jan. 15, 2008)

By way of procedural background, Pa'ina Hawaii, LLC ("Pa'ina") applied for a Materials License in order to construct and operate a typical, robust Category III irradiator on the Island of Oahu on June 23, 2005, more than two and one-half years ago. The NRC Staff determined that the Pa'ina irradiator is "categorically excluded" from various laws, including the National Environmental Policy Act ("NEPA"), and that there were no "special circumstances."

On October 3, 2005, Intervenor Concerned Citizens of Honolulu ("Intervenor") filed challenges to the Application. As a result of Intervenor's challenges to its Application, and more specifically its challenge based upon

"special circumstances," Pa'ina was denied "categorical exclusion."

Thereafter, on March 20, 2006 the NRC Staff and Intervenor Concerned Citizens of Honolulu entered into a Stipulation whereby the Staff was to prepare an Environmental Assessment ("EA") for Pa'ina's irradiator. In return, Intervenor agreed to the dismissal of all of its original environmental contentions.

Pa'ina, which believes that the irradiator is categorically excluded from performing an EA, did not agree to the Stipulation.<sup>1</sup>

On August 13, 2007 the NRC Staff completed a wide-ranging, concise EA, consisting of no less than 89 pages including appendices. In Appendix B to the EA, the Staff specifically addressed "Consideration Of Terrorist Attacks On The Proposed Pa'ina Irradiator" in fulfillment of the 9<sup>th</sup> Circuit Court of Appeals' decision in San Luis Obispo Mothers For Peace v. NRC, 449 F.3d 1016, 1028 (9<sup>th</sup> Cir. 2006)

The Staff's August 13<sup>th</sup> EA concluded with a Finding of No Significant Impact ("FONSI").

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<sup>1</sup>The Staff made no admission of law or fact in the Stipulation.

Shortly thereafter, on August 17, 2007 Pa'ina was issued License No. 53-29296-01. Consequently, Pa'ina will hereinafter be referred to as either "Pa'ina" or "the Licensee."

On September 4, 2007, Intervenor filed new and amended contentions which challenged the Staff's EA and FONSI. Intervenor's Contention No. 3 included several different segments. The fourth (4<sup>th</sup>) segment of Contention No. 3 (hereinafter referred to as "4<sup>th</sup> Segment") directly challenged the sufficiency of the Staff's analysis of terrorist threats which were set forth in Appendix B attached to the August 13, 2007 EA.

As noted above, the ASLB has now invited the parties to address the impact upon Intervenor's 4<sup>th</sup> Segment ("terrorism threats") of the recent decision of the Nuclear Regulatory Commission ("NRC") in Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-01, 67 NRC \_\_\_\_ (slip op.) (Jan. 15, 2008).<sup>2</sup>

In its January 15, 2008 Diablo Canyon decision, the NRC denied challenges to most of the NRC Staff's

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<sup>2</sup> In its Diablo Canyon decision, the NRC followed the holding and language of Weinberger v. Catholic Action of Hawaii, 454 U.S. 139 (1981), a unanimous 9-0 decision of the U.S. Supreme Court. That Court held that the protection of national security overrides most NEPA disclosure requirements. The Supreme Court referred to the 9<sup>th</sup> Circuit's requirement of a "hypothetical environmental impact statement" as being the creation of "judicial cloth, not legislative cloth." 454 U.S. at 141.

supplemental environmental assessment regarding terrorism threats in that case. The NRC admitted just two limited portions of the challengers' contentions.<sup>3</sup>

Based upon the rationale set forth in the January 15<sup>th</sup> Diablo Canyon decision, Intervenor's 4<sup>th</sup> Segment should be denied admissibility.

II. Intervenor's 4<sup>th</sup> Segment Appears To Ask The NRC To Prepare And Disclose A Blueprint For Potential Terrorists To Follow In An Attack Upon Pa'ina's Facility.

In order to fully understand the impact of the Diablo Canyon decision upon the 4<sup>th</sup> Segment advocated by Intervenor, it is instructive to first review the allegations in that 4<sup>th</sup> Segment.

a. First, Intervenor alleges generally that the NRC Staff must "provide a serious, scientifically-based analysis . . . of all reasonably foreseeable impacts of such [terrorist] acts" and to disclose that analysis in Appendix B. (P. 18)

b. Intervenor also alleges that the NRC Staff must "provide . . . [a] quantitative analysis of the likelihood of [a terrorist attack upon] Pa'ina's proposed irradiator"

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<sup>3</sup> The two portions of the challenger's contentions which were admitted in Diablo Canyon were: (1) an omission by the NRC Staff to fully identify the documentary support underpinning its analysis; and (2) an omission by the Staff to discuss of the possibility of land contamination, and non-fatal health effects, caused by a possible terrorist attack.

and to disclose that analysis in Appendix B to the EA. (P. 19) As support for its allegation, Intervenor cites language from a Bureau of Land Management case involving timber sales in Oregon,<sup>4</sup> inferring that the analysis and disclosure of the possibilities of terrorist attacks upon Pa'ina's nuclear source material is comparable to mere timber sales statistics.

c. Intervenor alleges that the NRC Staff must "assess likely modes of attack, weapons, and vulnerabilities of the facility, and the possible impact of each of these on the physical environment, including the assessment of various release scenarios," and to disclose those vulnerabilities in Appendix B. (Pp. 19-20)

d. Intervenor alleges that the NRC Staff must analyze the "ability of various weapons systems to penetrate irradiator pool" (P. 20) and to disclose its analysis in the EA. Significantly, Intervenor fails to specify which of hundreds, or even thousands, of weapons systems must be analyzed by the Staff.

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<sup>4</sup> Klamath-Siskiyou Wilderness Center v. Bureau of Land Management, 387 F. 3d 989 (9<sup>th</sup> Cir. 2004) Intervenor also cited and relied upon a second, similar timber sale case to support its proposition that more definitive numerical information regarding the possibilities of a terrorist attack should have been provided by the Staff in Appendix B. Neighbors of Cuddy Mountain v. United States Forest Service, 137 F. 3d 1372 (9<sup>th</sup> Cir. 1998)

e. Intervenor alleges that the Staff must analyze and disclose in Appendix B Pa'ina's proximity to certain geographical features, such as Honolulu International Airport, Pearl Harbor, etc., which it contends might make Pa'ina's irradiator a more attractive target for terrorists. (P. 21)

f. Intervenor alleges that the NRC Staff must analyze and disclose in Exhibit B all "threat scenarios" and to discuss how the scenarios were "screened" for threat "plausibility." (P. 22, fn 5) Intervenor then cites and relies upon a quote from the same timber-sales case, once again equating possible terrorist attacks with mere timber sales.<sup>5</sup>

g. Intervenor contends that the Staff should have provided "either a quantitative or a qualitative risk analysis" revealing (1) "hard data regarding the physical vulnerability of the proposed irradiator, (2) analysis of the specific features that make the irradiator and its environs susceptible to attack, and (3) an assessment of the likely modes of attack on the Pa'ina irradiator." (P. 22) Intervenor fails to cite any specific, relevant law

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<sup>5</sup> The excerpted quote from Klamath-Siskiyou Wilderness Center is: "NEPA documents are inadequate if they contain only narratives of expert opinions," excerpted from 387 F. 3d at 996.

supporting its contention that this security related information must be disclosed.

h. Intervenor contends that the EA must "discuss and disclose terrorism-related impacts which have catastrophic consequences, even if their probability of occurrence is low.'" (P. 23) Intervenor cites 40 C.F.R. Sec. 1502.22(b)(3) to support its contention, but not surprisingly, Intervenor fails to cite or acknowledge the security-related nature of the disclosures sought.

i. As noted in the above subsections, Intervenor contends that all of the above analyses must be "disclosed" in the EA (P. 23) This contention demands "information . . . of high quality," "any methodologies used" and the EA must state "why objective data cannot be provided." Once again, Intervenor cites the non-nuclear, non-threatening Klamath-Siskiyou timber-sale case as the legal basis for its amended contention challenging Pa'ina's proposed use of nuclear materials.

j. Intervenor contends that the Staff must "disclose the methodologies, standards, and calculations it used to assess the vulnerability of the proposed irradiator to terrorist attack." (P. 24) Intervenor cites 40 C.F.R. Sec. 1502.24 as its authority, but that regulation actually never mentions the terms "standards" or "calculations."

k. Intervenor contends that the Appendix B to the EA improperly refers to and incorporates "generic security assessments," and that the public was not permitted to "review them and assess the manner in which the Staff used them to analyze threats to Pa'ina's proposed irradiator." (P. 24) Intervenor cites 40 C.F.R. Sec. 1502.21 and NUREG-1748 Sec. 1.6.4 to support its claim that there should be "inspection by interested persons" without any apparent limitations.

l. Intervenor alleges that Appendix B to the EA is deficient in that it "improperly provides only a cursory analysis of [the irradiator's] significance . . . [and] nowhere does Appendix B discuss the significance of the environmental impacts in the allegedly 'low risk' scenario in which radioactive material escapes the pool." (P. 25) Intervenor again cites and relies upon the CEQ's regulation, 40 C.F.R. Sec. 1502.22(b)(3), which by its very title is applicable to "environmental impact statements." Here, it should be noted, Intervenor stipulated to the preparation of an EA and that is what the Staff prepared.

m. Intervenor contends that the Staff should have assessed "the size of the area that would likely be contaminated, as well as the extent of the contamination" and that its failure to "determine the significance of a

terrorist attack" renders the EA insufficient. (P. 27)  
Intervenor cites no applicable law to support its contention.

n. Intervenor alleges that Appendix B failed to "consider all reasonably foreseeable impacts," including an "analysis of the potential for a terrorist attack on the nuclear material while in transit." (Pp. 27-28) This allegation is based upon Intervenor's claim that "Sources in transit from Canada or Russia to the Pa'ina irradiator would not be well-protected from a terrorist attack . . . ." (P. 27-28)

o. Without citing any expert opinions, Intervenor would completely dismiss the NRC's security efforts and the many security orders which have been issued since 9/11. The NRC's security efforts and orders have been designed to "mitigate" the effects of possible terrorist attacks. Instead, Intervenor contends that the EA must provide and disclose "any analytic data to support its conclusions [re mitigation]." (P. 29)<sup>6</sup>

p. Intervenor, apparently demanding guarantees, concludes that because Appendix B cannot "eliminate the potential for a terrorist attack with catastrophic

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<sup>6</sup> Intervenor contended that "analytic data" must be disclosed which supports the Staff's conclusion that mitigation measures would be "adequate and effective" by citing National Parks & Conservation Ass'n. v. Babbitt, 241 F. 3d 722 (9<sup>th</sup> Cir. 2001). However, the National Parks decision revolved around an increase of permits for vessels to enter Glacier Bay in Alaska, and that case did not implicate national security.

consequences," the Final EA cannot "lawfully" issue a FONSI. (Id.)

Pa'ina is, of course, relatively new to this type of NRC agency proceeding. Nevertheless, Pa'ina's fair reading of Intervenor's allegations suggests that Intervenor apparently doesn't take seriously the potential for security-related information to fall into the wrong hands.

III. Intervenor's Amended Or New 4<sup>th</sup> Segment Ought To Be Denied Admission As A Matter Of Law.

Aside from the fact that Intervenor's stated allegations in its new/amended 4<sup>th</sup> Segment appear to Pa'ina to advocate disclosure to terrorists how to carry out an attack on Pa'ina's facility, those allegations constituting the 4<sup>th</sup> Segment should nevertheless be denied admission and/or dismissed.

It is clear that the NRC's recent decision in Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-01, 67 NRC \_\_\_ (slip op.) (Jan, 15, 2008) (hereinafter "Diablo Canyon") governs the admissibility of the 4<sup>th</sup> Segment.

In addition to the Diablo Canyon decision, and in any event, there are restrictive, security-related laws which

apply to this NEPA proceeding, and these laws also mandate that Intervenor's 4<sup>th</sup> Segment be dismissed.<sup>7</sup>

A. The NRC's January 15, 2008 Decision Should Preclude Admission Of Intervenor's 4<sup>th</sup> Segment.

Based upon the NRC's recent Diablo Canyon decision, Intervenor's allegations as contained in its 4<sup>th</sup> Segment should be denied admission in toto.

In Diablo Canyon, the NRC unambiguously concluded that contentions which seek to disclose security related information must be denied admission as contentions:

"The NRC has a statutory obligation to protect national security information. We have never disclosed such information in NEPA-based proceedings, notwithstanding the theoretical possibility, raised by SLOMFP, of security clearances and closed-door hearings. Weinberger and other 'state secrets' cases indicate that no such disclosure is warranted. In practical terms, this leaves the matter of threat assessment under NEPA in the hands of the NRC, without judicial oversight or agency hearings. . . [t]hat is exactly the result Weinberger calls for." (Slip op. at 24-25)

In light of the NRC's clear and unambiguous ruling, Intervenor's 4<sup>th</sup> Segment allegations (subsections a-p above) should be denied admissibility. Without exception, Subsections a-p involve and deal with security related information and analyses; consequently, the materials cannot be disclosed. To reiterate the NRC's phraseology, nondisclosure of security related information is exactly

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<sup>7</sup> Intervenor failed to cite or even mention any applicable, security-related statutes, rules or NUREGs in its 4<sup>th</sup> Segment.

what the Supreme Court's decision in Weinberger "calls for."

B. All Pertinent, NEPA-Related Legal Authority Absolutely Prohibits The Dissemination Of Security Related Information.

Despite its voluminous September 4<sup>th</sup> filing, Intervenor was conspicuously unable to cite any legal authority for its repeated proposition that the NRC Staff was required to "analyze" or "disclose" security related information in Appendix B or in the EA.

Truth be told, there is no requirement anywhere in the law that "requires" the NRC to give away security related information in any NEPA document. Indeed, "national security" is given the highest priority under the law, ranging from the U.S. Supreme Court's holdings down to NUREGs authored by the NRC Staff.

First, the U.S. Supreme Court has ruled that the "state secrets" privilege is absolute. United States v. Reynolds, 345 U.S. 1 (1953).

Second, the NRC is obligated by Congressional statute to "assure . . . security" and "prohibit the unauthorized disclosure" of security measures. 42 U.S.C. Sec. 2161 and 42 U.S.C. Sec. 2167.

Third, the Council on Environmental Quality's regulations which govern EIS's and EA's expressly prohibit the "public dissemination" of security related information and proposals. Although Intervenor cited several CEQ provisions, it passed over 40 C.F.R. Sec. 1507.3(c), which bars the public dissemination of security related information:

"Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. . . ."

Fourth, Intervenor ignored the relevant security provision in the Staff's NUREG-1748, even though Intervenor cited from the very same NUREG-1748 (at Page 24 of its September 4, 2007 filing). Section 1.8 of NUREG-1748 expressly prohibits the Project Manager preparing an EA from disclosing security related information:

#### 1.8 Sensitive Information

In preparing environmental review documents, the PM [Project Manager] should be aware of certain types of information that may be restricted for national security reasons or eligible for withholding under other specific statutory provisions. . . .

There may also be occasions where an EA or EIS is required for a proposed action that is classified. These documents must be restricted from public dissemination for national security reasons. These documents should be organized so that classified information is included in an appendix that is not made publically available while unclassified portions can be made available to the public (40 CFR1507.3(c)).

In light of the above law, it is clear that Intervenor's 4<sup>th</sup> Segment ("terrorism") should be denied admission in this case. Intervenor's 4<sup>th</sup> Segment ignored the overarching laws which absolutely prohibit the dissemination of security-related nuclear information. Consequently, the allegations set forth in the 4<sup>th</sup> Segment ought to be denied admission, because those allegations seek to violate those restrictive federal laws.

IV. Conclusion.

For the reasons stated hereinabove, all of the allegations contained in the 4<sup>th</sup> Segment of the Third Contention in Intervenor's September 4, 2007 filing (which allegations are found at pp. 18-29) should be denied admission as a matter of law.

DATED: Honolulu, Hawaii

January 31, 2008

Fred Paul Benco

FRED PAUL BENCO  
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Pa'ina Hawaii, LLC

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "LICENSEE PA'INA HAWAII, LLC'S RESPONSE TO ASLB'S JANUARY 24, 2008 ORDER REQUIRING PARTIES TO FILE RESPONSIVE PLEADINGS" dated January 31, 2008 in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this January 31, 2008. Additional service has also been made this same day by electronic mail as shown below:

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DATED: Honolulu, Hawaii, January 31, 2008

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