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OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
Pa'ina Hawaii, LLC )  
Material License Application )  
\_\_\_\_\_ )

Docket No. 30-36974-ML  
ASLBP No. 06-843-01-ML

INTERVENOR CONCERNED CITIZENS OF HONOLULU'S  
REBUTTAL TO PA'INA HAWAII, LLC'S STATEMENT OF POSITION

Pursuant to 10 C.F.R. § 2.1207(a)(2) and the Atomic Safety and Licensing Board's ("Board's") July 17, 2008 order, intervenor Concerned Citizens of Honolulu hereby submits its rebuttal to Pa'ina Hawaii, LLC's initial written statement of position on the admitted segments of amended environmental contentions 3 and 4.

I. THE BOARD'S DECISION NOT TO ADMIT CONCERNED CITIZENS' SAFETY CONTENTIONS DOES NOT RELIEVE THE STAFF OF ITS OBLIGATION TO DEMONSTRATE COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT

Pa'ina's argument that this Board's decision not to admit various safety contentions means there is no longer any need to address the merits of Concerned Citizens' environmental contentions mixes apples and oranges. See Pa'ina Statement at 2-4. In the case of the safety contentions, the Board concluded Concerned Citizens had not satisfied the Commission's "newly prescribed and rigorous safety contention admissibility standard with respect to irradiator siting." 6/19/08 Board Memorandum and Order (Ruling on Admissibility of Amended Safety Contention 7) at 1. Because the Board determined Concerned Citizens had not carried its heavy burden of

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identifying “the specific manner by which ... offsite consequence will occur, as a result of a specified phenomenon, so as to create a unique threat scenario outside the parameters for irradiators already generically approved in the promulgation of 10 C.F.R. Part 36,” it declined to admit the safety contentions. 4/2/08 Board Memorandum and Order (Dismissing Outstanding Safety Contentions and Permitting Submission of New Safety Contentions) at 4 (emphasis omitted); see also 6/19/08 Board Order at 4-5.<sup>1</sup>

In contrast, to resolve the admitted environmental contentions, the Board focuses on whether the Staff, not Concerned Citizens, has satisfied its duty under the National Environmental Policy Act (“NEPA”) to take a “hard look” at the potential impacts associated with construction and operation of a nuclear irradiator at Pa‘ina’s proposed location. Klamath-Siskiyou Wilderness Center v. Bureau of Land Management, 387 F.3d 989, 1001 (9<sup>th</sup> Cir. 2004). “It is ... settled that the NRC has the burden of complying with NEPA.” Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983). Thus, “[i]n the end, it is the NRC Staff that ‘bears the ultimate burden of demonstrating that environmental issues have been adequately considered.’” Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 385 (2002) (quoting Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998)). That the Board concluded Concerned Citizens came up short in supporting its safety

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<sup>1</sup> The Board’s rulings on the admissibility of Concerned Citizens’ safety contentions did not constitute affirmative findings “there will be no significant ... impacts from Pa‘ina’s irradiator,” as Pa‘ina asserts. Pa‘ina Statement at 3. Rather, they merely reflect the Board’s conclusion Concerned Citizens had not presented adequate evidence of such impacts to overcome the “general expectation ... that the NRC would not need to conduct a special safety review of facility siting” for irradiators. Commission Memorandum and Order, CLI-08-03, 67 NRC \_\_\_, slip op. at 18 (Mar. 17, 2008).

contentions does not relieve the Staff of its burden to demonstrate it fully discharged its obligations under NEPA.

To determine whether the Staff took the requisite “‘hard look’ at the potential environmental impact” of Pa’ina’s proposed irradiator, the Board must evaluate whether the Staff “suppl[ied] a ‘convincing statement of reasons’ to explain why [the] project’s impacts are insignificant.” Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9<sup>th</sup> Cir. 1998) (quoting Save the Yaak Comm. v. Block, 840 F.2d 714, 717 (9<sup>th</sup> Cir. 1988)). It is well-established in the Ninth Circuit that the Staff cannot discharge its NEPA obligations by offering only “generalized conclusory statements that the effects are not significant.” Klamath-Siskiyou Wilderness Center, 387 F.3d at 996. Moreover, the Staff was obliged to “respond to public comments concerning the project.” Sierra Nevada Forest Protection Campaign v. Weingardt, 376 F.Supp.2d 984, 991 (E.D. Cal. 2005); see also Foundation for N. Am. Wild Sheep v. U.S. Dep’t of Ag., 681 F.2d 1172, 1179 (9<sup>th</sup> Cir. 1982). The important questions about the Staff’s compliance with NEPA contained in the admitted portions of amended environmental contentions 3 and 4 do not disappear merely because the Board rejected Concerned Citizens’ safety contentions.

Moreover, even assuming for the sake of argument the Board had concluded Pa’ina’s irradiator would not result in significant environmental impacts, the Staff still could not get away with a deficient analysis in its environmental assessment (“EA”), as Pa’ina suggests. To resolve Concerned Citizens’ environmental contentions 1 and 2, the Staff stipulated to “prepare an environmental assessment for the Applicant’s proposed irradiator,” a commitment the Board then entered as an order. 3/20/06 Joint Stipulation and Order Regarding Resolution of Concerned Citizens’ Environmental Contentions at ¶ 1; see also 4/27/06 Board Order (Confirming Oral

Ruling Granting Motion to Dismiss Contentions). The order expressly reserves Concerned Citizens' right to "challeng[e] the adequacy of any NEPA document that the NRC prepares regarding the Applicant's proposed irradiator." 3/20/06 Joint Stipulation and Order at ¶ 6.

To be adequate, the Staff's EA must "[a]id an agency's compliance with [NEPA] when no environmental impact statement [(EIS)] is necessary." 40 C.F.R. § 1508.9(a)(2). Since NEPA demands that "high quality" environmental information – not unsubstantiated assertions – be "available to public officials and citizens before decisions are made and before actions are taken," the Board would still have to ensure the Staff's analysis was thorough and sound, even in the absence of any potential for significant impacts. *Id.* § 1500.1(b); see also Blue Mountains Biodiversity Project, 161 F.3d at 1216 (EIS required "whenever 'substantial questions are raised was to whether a project may cause significant [environmental] degradation"). Likewise, since "consideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process," the Board would still have to review the adequacy of the EA's discussion of alternatives. Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9<sup>th</sup> Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989); see also Highway J Citizens Group v. Mineta, 349 F.3d 938, 960 (7<sup>th</sup> Cir. 2003) ("inquiry into consideration of reasonable alternatives is 'independent of the question of environmental impact statements, and operative even if the agency finds no significant environmental impact'").

## II. THE FINAL EA IMPROPERLY FAILED TO DISCUSS ALTERNATE LOCATIONS AND NON-NUCLEAR IRRADIATOR TECHNOLOGIES

While "an agency's obligation to consider alternatives under an EA" may be "a lesser one than under an EIS," that does not mean that, in preparing the EA for Pa'ina's proposed irradiator, the Staff was free to ignore reasonable alternatives or to present a deficient analysis of

the alternatives it did consider. Native Ecosystems Council v. United States Forest Service, 428 F.3d 1233, 1246 (9<sup>th</sup> Cir. 2005). As noted above, “consideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process,” and the Ninth Circuit has held agencies must consider in their EAs “all possible approaches to a particular project ... which would alter the environmental impact and the cost-benefit balance.” Bob Marshall Alliance, 852 F.2d at 1228-29. “[W]hether an agency is preparing an EIS or an EA, ... NEPA ‘requires that alternatives ... be given full and meaningful consideration.’” Native Ecosystems Council, 428 F.3d at 1245 (quoting Bob Marshall Alliance, 852 F.2d at 1229).

Pa’ina’s reliance on Morongo Band of Mission Indians v. Federal Aviation Admin., 161 F.3d 569 (9<sup>th</sup> Cir. 1998), to justify the Staff’s failure to evaluate alternate locations for the proposed irradiator is misplaced. See Pa’ina Statement at 6-7. The portion of the decision Pa’ina cites has nothing to do with the Staff’s obligation to discuss alternatives in an EA, the only issue in dispute here, or, for that matter, any other duty arising under NEPA. The text Pa’ina cites involves a National Historic Preservation Act (“NHPA”) claim that the Federal Aviation Administration (“FAA”) “did not make a reasonable effort to identify property eligible for the National Register” that might be adversely affected by a flight path over an Indian reservation. Morongo Band, 161 F.3d at 582. Based on “the FAA’s noise, land use, and visual impact studies,” the Court upheld the agency’s finding that flights occurring 16,000 feet above ground level could not possibly cause adverse impacts to historic sites and, accordingly, the FAA was not obliged to “identify specific potential sites or properties” that might be eligible for the National Register. Id. The cited portion of the opinion did not address analysis of alternative sites under NEPA, as Pa’ina’s alteration of the quote from the opinion misleadingly suggests, but, rather, identification of potentially eligible sites under the NHPA.

While the portion of Morongo Band that Pa'ina cites is irrelevant, an earlier portion of the opinion is germane and refutes Pa'ina's claim "it is the current NEPA law in the 9<sup>th</sup> Circuit that where there are no significant impacts, alternative sites need not be studied." Pa'ina Statement at 6. The plaintiff Indian tribe in that case contended the FAA had violated NEPA "by failing to evaluate or develop alternative routes" for airplanes flying into Los Angeles International Airport that would avoid flying over the tribe's reservation. Morongo Band, 161 F.3d at 575. Had the Court agreed with Pa'ina that EAs need not examine alternate sites for proposed activities, it would have summarily dismissed the plaintiff's claims on that ground. Instead, the Court stressed that, under NEPA, it is the agency that "has the responsibility to 'study, develop, and describe appropriate alternatives.'" Id. at 576 (quoting 42 U.S.C. § 4332(2)(E)). The Court then found the FAA had "fulfilled that requirement" precisely because it had "develop[ed] and discuss[ed] a number of alternatives," including alternate routes "that would have bypassed the Reservation" altogether. Id.<sup>2</sup>

Unlike Morongo Band, where "[t]he FAA thoroughly discussed alternatives that would have bypassed the Reservation, but found them unsuitable for accomplishing the primary purpose of the project," the Staff failed to consider any alternate locations for Pa'ina's proposed irradiator. Id. It is not as if the Staff was unaware such alternatives existed. The record shows the Staff knew potential locations "further from an active runway and further from the ocean"

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<sup>2</sup> In numerous other cases, the Ninth Circuit and other circuit courts have examined EAs to determine whether they adequately considered a reasonable range of alternate sites. See, e.g., Friends of Endangered Species v. Jantzen, 760 F.2d 976, 987-88 (9<sup>th</sup> Cir. 1985) (alternate sites for proposed development); Lee v. United States Air Force, 354 F.3d 1229, 1239-40 (10<sup>th</sup> Cir. 2004) (alternate locations for basing training aircraft); South Carolina v. O'Leary, 64 F.3d 892, 899-900 (4<sup>th</sup> Cir. 1995) (alternate sites for storage of spent nuclear fuel rods); North Carolina v. Federal Aviation Admin., 957 F.2d 1125, 1134-35 (4<sup>th</sup> Cir. 1992) (alternate locations for Navy targets); Monarch Chemical Works, Inc. v. Thone, 604 F.2d 1083, 1088 (8<sup>th</sup> Cir. 1979) (alternate sites for prison). None of these cases suggests an agency can refuse to consider alternate sites merely because an EA, rather than an EIS, is being prepared.

were feasible, but it still refused to consider any of them. Concerned Citizens Exh. 20: 8/28/06 Email from Michael Kohn (Pa'ina) to Jack Whitten (NRC) at 1 (ML062770248). On these facts, the Board cannot find the Staff "fulfilled its obligation under NEPA to '[r]igorously explore and objectively evaluate all reasonable alternatives.'" Morongo Band, 161 F.3d at 576 (quoting 40 C.F.R. § 1502.14).

Pa'ina's brief discussion of alternate technologies generally restates the relevant legal principles accurately, but does not offer any justification for the Staff's complete failure to mention, much less evaluate, the alternative of using an electron-beam irradiator. See Pa'ina Statement at 7-8. The EA's acknowledgement that an electron-beam irradiator on the island of Hawai'i has been successfully performing identical tasks to the ones Pa'ina proposes for its nuclear facility undermines any argument Pa'ina might concoct that the technology is infeasible or inconsistent with the project goals. See Concerned Citizens Exh. 11: Final Environmental Assessment Related to the Proposed Pa'ina Hawaii, LLC Underwater Irradiator in Honolulu, Hawaii at 6 (ML071150121). In any event, "[b]ecause the Staff in the final EA neither mentioned the electron beam technology nor explained why it did not consider that alternative, the adequacy of the final EA cannot rest upon a rationale now supplied by the Applicant." 12/21/07 Board Order (Ruling on Admissibility of Intervenor's Amended Environmental Contentions) at 30 n.106.

Finally, while the Ninth Circuit may not demand that an EA consider any minimum number of alternatives, it has held that NEPA requires "an appropriate explanation ... as to why an alternative was eliminated." Native Ecosystems Council, 428 F.3d at 1246. In this case, the EA failed even to mention alternate locations for Pa'ina's proposed irradiator or the use of a non-

nuclear, electron-beam irradiator, much less justify why the Staff refused to consider these alternatives. The Staff's total silence regarding these alternatives violates NEPA.

### III. THE TRANSPORTATION OF COBALT-60 SOURCES TO AND FROM THE PROPOSED IRRADIATOR IS A "CONNECTED ACTION" WHOSE IMPACTS MUST BE ADDRESSED IN THE EA

NEPA requires the Staff to include within the scope of its environmental review all actions "connected" to the activity for which Pa'ina seeks a license. 40 C.F.R. § 1508.25(a)(1). In this case, Pa'ina's "proposed facility cannot operate without regular shipments of Co-60 sources." 12/21/07 Board Order at 18; see also Final EA at 8. Those Co-60 shipments would not occur if there were no irradiator to receive them, and, likewise, the irradiator "would not be built but for the contemplated [shipments of Co-60 sources]." Thomas v. Peterson, 753 F.2d 754, 758 (9<sup>th</sup> Cir. 1985). The transportation of radioactive material to and from the proposed irradiator is "inextricably intertwined" with the operation of the facility, making them "'connected actions' within the meaning of [NEPA's] regulations," whose potential impacts the Staff was obliged to, but failed to, examine in the Final EA. Id. at 759.

Pa'ina's argument that the transportation of Co-60 sources to the irradiator is "a separate licensing matter" whose impacts need not be analyzed before allowing Pa'ina's irradiator to proceed, Pa'ina Statement at 9, ignores "that it would be irrational, or at least unwise, to undertake the first phase" – construction of the irradiator – "if subsequent phases" – transportation of fresh sources to the facility and removal of depleted sources – "were not also undertaken." Northwest Resources Information Center v. Oregon Natural Resources Council, 56 F.3d 1060 (9<sup>th</sup> Cir. 1995) (quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1285 (9<sup>th</sup> Cir. 1974)). The construction and operation of the irradiator and the transportation of Co-60 sources

“present a ‘links in the same bit of chain’ scenario” that obliged the Staff to consider all impacts in the EA. Id.

That other parties would have to seek coverage under a separate license to transport sources to and from Pa’ina’s irradiator does not alter the analysis.<sup>3</sup> The Commission resolved a similar question in Louisiana Energy Services, LLP (National Enrichment Facility), CLI-06-15, 63 NRC 687 (2006), which involved claims the Staff was obliged to examine impacts associated with the disposal of depleted uranium before deciding whether to license a uranium enrichment facility. The Commission emphasized the pending proceeding was “to license a uranium enrichment facility, not a proceeding to license a near-surface waste disposal facility.” Id. at 690. The Commission nonetheless recognized NEPA required the Staff “to consider the reasonably foreseeable environmental impacts of a proposed action, even if they are only indirect effects” and concluded that “[d]epleted uranium disposal from the proposed National Enrichment Facility would be an indirect effect.” Id.

There was no question in Louisiana Energy Services that the Staff needed to discuss depleted uranium disposal in its NEPA analysis, even though licensing of a disposal facility was not involved. Id. at 698 (“NEPA requires ... that we consider ‘reasonably foreseeable’ indirect effects of the proposed licensing action”). Likewise, in this case, the Staff was obliged to

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<sup>3</sup> There is no support for Pa’ina’s bald assertion there would be “[s]erious due process considerations” if the Board were to require the Staff to evaluate transportation-related impacts “without the presence of the transporting party.” Pa’ina Statement at 9 n.2. It is well-established in the Ninth Circuit that “the federal government is the only proper defendant in an action to compel compliance with NEPA.” Churchill County v. Babbitt, 150 F.3d 1072, 1082, as amended by 158 F.3d 491 (9<sup>th</sup> Cir. 1998). The transporting party has no “significantly protectable” interest in [the Staff’s] compliance or noncompliance with NEPA,” and, thus, there are no conceivable due process concerns from determining whether the Staff must consider transportation-related impacts in its EA without the participation of whoever would transport the Co-60 sources should Pa’ina be permitted to proceed with its irradiator. Id.

include in its EA an adequate analysis of potential impacts associated with transporting Co-60 to and from the irradiator.

Finally, Pa'ina's reliance on Department of Transportation v. Public Citizen, 541 U.S. 752 (2004), is misplaced. See Pa'ina Statement at 9-10. In that case, the Court affirmed the Federal Motor Carrier Safety Administration ("FMCSA") was obliged to evaluate "the impact on the environment which results from the incremental impact" of implementing its regulations governing safety-monitoring of Mexican motor carriers (such as increases in emissions and noise "from the increase in the number of roadside inspections ... due to the proposed regulations"), even though the Court recognized FMCSA "has no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety." Public Citizen, 541 U.S. at 759, 761, 769 (quoting 40 C.F.R. § 1508.7). Likewise, in this case, the Staff was obliged to evaluate the incremental impact of the additional shipments of Co-60 to and from Pa'ina's proposed irradiator, an incremental change resulting from a decision to grant Pa'ina's license application. Indeed, the case for requiring the Staff to evaluate transportation-related impacts is even stronger than in Public Citizen since the NRC has regulatory authority over licenses to transport Co-60 sources, and, thus, there are no potential issues related to "limited statutory authority over the relevant actions." Id. at 770; see also 10 C.F.R. pt. 71.

#### IV. THE STAFF WAS OBLIGED TO BACK UP ITS CONCLUSORY STATEMENTS REGARDING IMPACTS ON TOURISM WITH DATA AND ANALYSIS

Life of the Land v. Brinegar, 485 F.2d 460 (9<sup>th</sup> Cir. 1973), the case on which Pa'ina relies to defend the Staff's analysis of tourism-related impacts, is easily distinguished from the facts of this proceeding. In Life of the Land, the EIS was completely silent regarding "the effect of the Reef Runway project upon the population of Honolulu and Hawaii." Id. at 469. Noting the lack

of any “empirical data in the record” that “an increase in Honolulu’s tourism” – a primary goal of the project – “will result in an increase in that city’s permanent population,” the Court held the EIS did not need to address those potential impacts. Id.

Here, in contrast, the Final EA is not silent regarding potential impacts on tourism associated with Pa’ina’s proposed irradiator. Rather, the EA affirmatively states “there is no reason to believe the irradiator would have any effect” on tourism. Final EA at C-12. Unlike Life of the Land, where the issue was whether NEPA required that a potential impact be addressed, the question here is whether, having acknowledged the need to address potential impacts on tourism, the Staff can get away with “making conclusory assertions that an activity will have only an insignificant impact on the environment.” Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846, 864 (2005).<sup>4</sup>

The answer in the Ninth Circuit is clear: “NEPA documents are inadequate if they contain only narratives of expert opinions.” Klamath-Siskiyou Wildlands Center, 387 F.3d at 996. Thus, even if the Staff possessed the necessary expertise to analyze the impacts of a disruption to tourism due to a release from Pa’ina’s irradiator (and it does not),<sup>5</sup> allowing a federal agency “to rely on expert opinion without hard data either vitiates a plaintiff’s ability to challenge an agency action or results in the courts second guessing an agency’s scientific

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<sup>4</sup> Since Pa’ina’s proposed facility would be immediately adjacent to active runways at Honolulu International Airport, the prime gateway for tourists to Hawai’i, it goes without saying that a release of radiation from the facility “could reasonably be projected to have an effect upon” tourism, requiring such impacts to be addressed in the EA. Id. at 470.

<sup>5</sup> The Staff’s Initial Statement indicates that the analysis of impacts on tourism was conducted by former Office of Nuclear Materials Safety and Safeguards Senior Project Manager Matthew Blevins. See Staff Statement at 56; Staff Exh. 1: Blevins Testimony at A.1. Mr. Blevins’ resume makes clear he has no background or other expertise in analyzing impacts on tourism. See Staff Exh.4. There is no “agency expertise” regarding this topic to which heightened deference would be due. National Parks & Conservation Ass’n v. United States Dep’t of Trans., 222 F.3d 677, 682 (9<sup>th</sup> Cir. 2000) (deferring to Federal Aviation Administration’s expertise in aviation forecasting).

conclusions,” both of which the Ninth Circuit have held to be unacceptable. Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1150 (9<sup>th</sup> Cir. 1998). Because public scrutiny of an agency’s analysis is vital to accomplishing NEPA’s goals, “NEPA requires that the public receive the underlying environmental data from which [the Staff’s experts] derived [their] opinion[s].” Id.; see also 40 C.F.R. §§ 1500.1(b), 1500.2(d). The Final EA’s cursory mention of tourism-related impacts fails to comply with this mandate.

#### V. THE STAFF’S FAILURE TO RESPONSE TO COMMENTS ON THE DRAFT EA VIOLATED NEPA

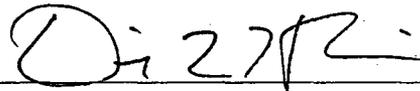
Rather than offer any substantiated argument the Staff responded adequately to the comments Earthjustice and its experts submitted regarding the draft EA’s deficiencies, Pa’ina instead asserts broadly that “lesser public input is generally required for preparing an EA.” Pa’ina Statement at 11. Pa’ina ignores that the stipulation to prepare the EA for its irradiator, which the Board entered as an order, expressly mandated substantial opportunities for the public to provide input. The stipulation provides, “[p]ursuant to 10 C.F.R. § 51.33,” that, “prior to making any final finding of no significant impact for the Applicant’s proposed irradiator, the NRC staff shall prepare and issue a draft finding of no significant impact for public review and comment.” 3/20/06 Joint Stipulation and Order at ¶ 2. The stipulation further obliged the Staff to “hold at least one public meeting in Honolulu, Hawai‘i” regarding its draft finding, “at which the public will have the opportunity to offer comment on the record.” Id. at ¶ 3.

Ninth Circuit case law is clear that, having received public comments on the draft EA, the Staff was obliged to “respond to [them]” for the Final EA “[t]o be adequate.” Sierra Nevada Forest Protection Campaign v. Weingardt, 376 F.Supp.2d 984, 991 (E.D. Cal. 2005). The Staff’s failure to do so contravened “the paramount Congressional desire to internalize opposing

viewpoints into the decision-making process to ensure that [the NRC] is cognizant of all the environmental trade-offs that are implicit in a decision” to license Pa‘ina’s proposed irradiator. California v. Block, 690 F.2d 753, 771 (9<sup>th</sup> Cir. 1982). Moreover, the Final EA’s “omission of any meaningful consideration of [the] fundamental factors [raised in the comments of Concerned Citizens and its experts] precludes the type of informed decision-making mandated by NEPA.” Foundation for N. Am. Wild Sheep v. U.S. Dep’t of Ag., 681 F.2d 1172, 1178 (9<sup>th</sup> Cir. 1982). The “failure to address public comments” was far from “harmless.” Pa‘ina Statement at 12.<sup>6</sup>

Dated at Honolulu, Hawai‘i, September 15, 2008.

Respectfully submitted,



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<sup>6</sup> Concerned Citizens will respond to Pa‘ina’s motion to reinstate in due course. See 9/3/08 Order (Granting Intervenor Request for Extension of Time) (extending Concerned Citizens’ deadline to respond until September 22, 2008).

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 15, 2008, a true and correct copy of the foregoing document was duly served on the following via e-mail and first-class United States mail, postage prepaid:

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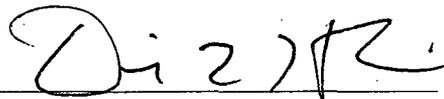
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