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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)

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

Material License Application)
_____)

INTERVENOR CONCERNED CITIZENS OF HONOLULU'S
OPPOSITION TO PA'INA HAWAII, LLC'S MOTION TO REINSTATE
"CATEGORICAL EXCLUSION" STATUS FOR PA'INA HAWAII, LLC'S IRRADIATOR

I. INTRODUCTION

Pa'ina Hawaii, LLC's Motion to Reinstate asks the Board to turn back the clock nearly two and one-half years, so Pa'ina can litigate claims about the Nuclear Regulatory Commission ("NRC") staff's invocation of a categorical exclusion for Pa'ina's proposed irradiation that were long ago resolved by this Board's order entering the March 20, 2006 Joint Stipulation and Order Regarding Resolution of Concerned Citizens' Environmental Contentions ("3/20/06 Joint Stipulation") (ML060820592). See 4/27/06 Board Order (Confirming Oral Ruling Granting Motion to Dismiss Contentions). In bringing its motion, Pa'ina ignores that, at the time the Board entered the settlement, it expressly held Pa'ina had no "legally-protected hearing right" to present precisely the types of arguments in opposition to Concerned Citizens' environmental contentions 1 and 2 that Pa'ina now seeks to introduce. 4/26/06 Transcript at 32:14 (ML061210010). Because "[f]ulfillment of the requirements of the National Environmental Policy Act [(“NEPA”)] is a uniquely Federal Government obligation,” Pa'ina has no greater interest today than in 2006 to present arguments in defense of the categorical exclusion decision.

TEMPLATE=SECY-041

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Id.; see also CLI-06-18, 64 NRC 1, 5 (2006) (3/26/06 Joint Stipulation “does not compromise Pa‘ina’s hearing rights”).

Now that the Staff has voluntarily prepared an environmental assessment (“EA”) pursuant to the settlement, the only issues before the Board involve whether the EA passes legal muster. Deciding whether the Staff could have stood behind its initial categorical exclusion decision, had it not stipulated to prepare the EA, is irrelevant. Pa‘ina provides no good reason to undermine the Commission’s “longstanding policy of encouraging settlements” by disturbing the 2006 stipulation to reach questions that have long since become moot. CLI-06-18, 64 NRC at 7 (citing 10 C.F.R. § 2.338).

The Board should also deny Pa‘ina’s request for the Board to act on – by denying – Concerned Citizens’ application for stay of Pa‘ina’s license. Pa‘ina’s filed its request more than ten months after the Board issued its October 5, 2007 order holding Concerned Citizens’ “stay request temporarily in abeyance until the question of [Pa‘ina’s] lease for the proposed irradiator site is resolved.” 10/5/07 Board Order (Temporarily Holding in Abeyance Stay Application) at 2. If Pa‘ina believed the Board’s order caused prejudice by placing a “cloud ... over Pa‘ina’s irradiator,” it was obliged to file its motion within ten days of the Board’s order. Motion to Reinstate at 20; see also 10 C.F.R. § 2.323(a). Moreover, even if timely, the request should be denied since Pa‘ina has failed to present any evidence the Board’s chosen course of action has, in fact, caused any prejudice.

II. PROCEDURAL BACKGROUND

On October 3, 2005, Concerned Citizens timely filed a request for hearing on Pa‘ina’s application for a license for possession and use of byproduct material in connection with the

construction and operation of a commercial pool-type industrial irradiator using a cobalt-60 (“Co-60”) source at the Honolulu International Airport.

On January 24, 2006, the Board granted Concerned Citizens’ request for hearing, finding Concerned Citizens has standing and its two environmental contentions – both related to failures to comply with NEPA – are admissible. LBP-06-04, 63 NRC 99 (2006). Concerned Citizens’ environmental contention 1 challenged the Staff’s failure to explain its decision to invoke a categorical exclusion from the requirement to prepare a NEPA analysis for Pa‘ina’s proposed irradiator and to consider whether any extraordinary circumstances precluded application of the categorical exclusion. *Id.*, 63 NRC at 108-12. The admitted portion of environmental contention 2 claimed the irradiator’s proposed location adjacent to an international airport on the ocean’s edge would expose it to threats of natural disasters and airplane crashes, creating special circumstances that precluded application of the categorical exclusion and mandated preparation of at least an EA. *Id.* at 112-13.¹

On March 24, 2006, the Board issued an order admitting three additional contentions, all related to safety. LBP-06-12, 63 NRC 403 (2006). Specifically, the Board admitted Concerned Citizens’ contentions that Pa‘ina’s application lacked required outlines of emergency procedures for prolonged loss of electricity (safety contention 4) and for natural disasters including tsunamis and hurricanes (safety contention 6), and failed to assess the likelihood and consequences of aviation accidents at the proposed irradiator site (safety contention 7). *Id.*, 63 NRC at 412-20.

On April 3, 2006, Pa‘ina filed an appeal from LBP-06-04 and LBP-06-12, alleging the Board erred in admitting Concerned Citizens’ two environmental contentions and safety

¹ Pa‘ina inaccurately claims the Board admitted the portions of environmental contention 2 alleging special circumstances due to threats from terrorism and health risks from consuming irradiated food. Pa‘ina Motion to Reinstate at 9-11 (claiming Board admitted all “Three Special Circumstances”). It did not. LBP-06-04, 63 NRC at 113-15.

contention 7. Because Pa'ina's appeal challenged only three of the five contentions admitted for hearing and, thus, did not claim Concerned Citizens' petition should have been wholly denied, the Commission dismissed it as "facially deficient" under 10 C.F.R. § 2.311(c). CLI-06-13, 63 N.R.C. 508, 509 (2006).

After the Board admitted Concerned Citizens' two environmental contentions, the parties entered into negotiations to resolve these contentions by agreement. Concerned Citizens and the Staff ultimately filed a joint motion to dismiss the environmental contentions pursuant to a joint stipulation that required preparation of an EA for Pa'ina's proposed irradiator, with opportunities for public review and comment. See 3/26/06 Joint Stipulation. Over Pa'ina's objection, during a telephonic hearing on April 26, 2006, the Board orally approved the joint stipulation and dismissed the two environmental contentions. 4/26/06 Transcript at 32:22-25. The next day, the Board issued a written order confirming its oral ruling. See 4/27/06 Board Order.

On May 8, 2006, Pa'ina appealed from the April 27, 2006 order, arguing "the Staff should not be required to prepare an EA prior to (i) the conclusion of an evidentiary hearing on the two environmental contentions (Nos. 1 and 2) and also on a related safety contention (No. 7), and (ii) the Board's subsequent issuance of findings of fact and conclusions of law." CLI-06-18, 64 NRC at 3. The Commission denied Pa'ina's appeal as procedurally defective, because it did not satisfy interlocutory review standards, and also on substantive grounds. Id. at 4. With respect to the latter, the Commission held, inter alia, that requiring preparation of an EA did not "compromise Pa'ina's hearing rights" and "'procedural delays' ... are the normal accoutrements of any hearing process involving NEPA." Id. at 5 (emphasis omitted). The Commission stressed that "[o]ur longstanding policy of encouraging settlements adds further support to our decision to

uphold the Board's acceptance of the Joint Stipulation stemming from the parties' negotiations." Id. at 7 (footnote omitted).

On July 3, 2006, Pa'ina filed another appeal from LBP-06-04 and LBP-06-12. The Commission rejected the appeal as untimely and emphasized "Pa'ina's grievance must abide the Board's merits decision." CLI-06-13, 64 NRC 128, 129 (2006).

On August 13, 2007, the Staff served its Final EA and associated finding of no significant impact ("FONSI"). Final Environmental Assessment Related to the Proposed Pa'ina Hawaii, LLC Underwater Irradiator in Honolulu, Hawaii (ML071150121). Four days later, the Staff issued NRC License No. 53-29296-01 to Pa'ina for possession and use of sealed sources in its proposed irradiator. See Pa'ina License (Aug. 17, 2007) (ML072320269).

On August 27, 2007, Concerned Citizens timely requested the Board to stay the Staff's issuance of Pa'ina's license. In opposing Concerned Citizens' motion, Pa'ina argued there was "no imminent danger from any [sic] Pa'ina's irradiator" and, thus, no need for a stay because, inter alia, "Pa'ina does not yet have any lease for its facility." 9/6/07 Pa'ina Opposition to Application for Stay at 4. On October 5, 2007, the Board issued an order holding Concerned Citizens' "stay request temporarily in abeyance until the question of [Pa'ina's] lease for the proposed irradiator site is resolved." 10/5/07 Board Order at 2.

On December 21, 2007, the Board issued an order admitting portions of Concerned Citizens' amended environmental contentions 3 and 4, which challenged, respectively, the Staff's failure in the final EA to take a "hard look" at potential impacts associated with Pa'ina's proposed irradiator and to examine alternative technologies and locations. See 12/21/07 Board Order. The Board deferred a decision on the portion of amended environmental contention 3 challenging the Staff's analysis of terrorist threats "until [it had] the benefit of the Commission's

guidance from its treatment of the analogous contention in the Diablo Canyon proceeding.” Id. at 20.

On March 4, 2008, following the Commission’s decision in Diablo Canyon, the Board admitted the segment of Concerned Citizens’ amended environmental contention 3 “to the extent it alleges that the Staff failed ‘to disclose data underlying [its] terrorism analysis’ of the proposed irradiator in the final EA and its Appendices and thereby failed to meet the NEPA-mandated ‘hard look’ standard.” 3/4/08 Board Order (Ruling on Admissibility of Intervenor’s Terrorism-Related Challenges) at 5 (citations omitted).

On April 2, 2008, following the Commission’s issuance of “newly prescribed and rigorous safety contention admissibility standards with respect to irradiator siting,” the Board dismissed all of Concerned Citizens’ outstanding safety contentions and gave Concerned Citizens “the opportunity to file new safety contentions in accordance with” the Commission’s new standards. 4/2/08 Board Memorandum and Order (Dismissing Outstanding Safety Contentions and Permitting Submission of New Safety Contentions) at 5. On June 19, 2008, the Board concluded Concerned Citizens had not satisfied the Commission’s newly announced safety contention admissibility standards and, accordingly, did not admit amended safety contention 7 regarding potential aviation accidents. See 6/19/08 Board Memorandum and Order (Ruling on Admissibility of Amended Safety Contention 7).

On March 27, 2008, the Commission decided to take sua sponte review of the “threshold legal question” in the Board’s December 21, 2007 order whether “NEPA requires the NRC to consider potential health effects of consuming irradiated food.” CLI-08-04, slip op. at 2 (Mar. 27, 2008). On August 13, 2008, the Commission held the NRC was not required to consider such impacts. CLI-08-16, slip op. at 2-3 (Aug. 13, 2008).

Pursuant to the Board's July 17, 2008 scheduling order, the parties have completed briefing on the admitted portions of amended environmental contentions 3 and 4.

III. PA'INA FAILS TO CITE ANY AUTHORITY THAT WOULD JUSTIFY SETTING ASIDE THE JOINT SETTLEMENT TO REACH ISSUES THAT ISSUANCE OF THE EA HAVE RENDERED MOOT

In seeking once again to argue for categorical exclusion of its proposed irradiator, Pa'ina ignores the well-settled law that it lacks standing to pursue this defense. The Ninth Circuit has repeatedly held that "the federal government is the only proper defendant in an action to compel compliance with NEPA." Wetlands Action Network v. U.S. Army Corps of Engineers, 222 F.3d 1105, 1114 (9th Cir. 2000) (quoting Churchill County v. Babbitt, 150 F.3d 1072, 1082, as amended by 158 F.3d 491 (9th Cir. 1998)). "Because a private party can not violate NEPA," Pa'ina lacks "a legally protectable interest that relates to [Concerned Citizens'] NEPA claims." Id. Consistent with this binding precedent, both this Board and the Commission have previously held Pa'ina has no legally protected interest to present arguments in defense of the categorical exclusion decision. See 4/26/06 Transcript at 31:8-16; CLI-06-18, 64 NRC at 5 (2006).

Even if Pa'ina were the proper party to advance the claims set forth in its Motion to Reinstate, it has provided no valid reason for the Board to undermine the Commission's "longstanding policy of encouraging settlements" by disturbing the 2006 agreement requiring preparation of an EA for the proposed irradiator. CLI-06-18, 64 NRC at 7 (citing 10 C.F.R. § 2.338). Pa'ina has failed to cite any NRC precedent supporting its request. As for the federal cases it invokes, while all contain phrases like "come full circle," reading the cases makes clear the phrase is only a rhetorical flourish. None of the cases ascribe any legal significance to the fact intervening events have returned the case to its original posture, much less suggest an adjudicatory body should undo a settlement on that ground.

In any event, it simply is not accurate to say the procedural posture of the case is the same today as it was in 2005. 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 at ¶ 1; see also 4/27/06 Board Order. 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 at ¶ 6. The disputes currently before the Board focus solely on the adequacy of the EA to satisfy the Staff's obligations under NEPA. Whether, prior to preparing the EA, the Staff could have justified a categorical exclusion for Pa'ina's proposed irradiator – the question Pa'ina seeks to litigate – is moot.

IV. RECENT DECISIONS HAVE NOT REJECTED CONCERNED CITIZENS' AMENDED CONTENTIONS AS A MATTER OF LAW

Concerned Citizens respectfully submits the Board should flatly reject Pa'ina's motion on the ground it violates the Commission's policy of encouraging "[t]he fair and reasonable settlement and resolution of issues proposed for litigation." 10 C.F.R. § 2.338. Should the Board decide, however, to address the merits of Pa'ina's claims, it should conclude Pa'ina's allegation that "all Three Amended Contentions raised by Intervenor in 2007 have been denied admission as a matter of law" is unsubstantiated. Pa'ina Motion to Reinstate at 13.

As a threshold matter, the Board should note that Pa'ina's characterization of the currently admitted environmental contentions as "virtually identical to" what it calls "the Three Special Circumstances" is inaccurate. Id. at 12 (emphasis omitted). When the Board admitted the environmental contentions that were subsequently resolved through the Joint Stipulation, the Board expressly rejected the portions of environmental contention 2 alleging special

circumstances due to threats from terrorism and health risks from consuming irradiated food. See LBP-06-04, 63 NRC at 113-15. Thus, the only arguable overlap between the originally admitted environmental contentions and the amended contentions before the Board relates to potential impacts from natural disasters and aviation accidents. See id., 63 NRC at 112-13.

With respect to potential terrorism-related impacts, the Board's denial of aspects of amended environmental contention 3 challenging the adequacy of the EA's analysis does not, as Pa'ina claims, mean the Board has determined as a matter of law there are "no significant terrorism-related risks" associated with Pa'ina's proposed irradiator that might constitute "special circumstances." Pa'ina Motion to Reinstate at 13-14. The Board's decision reflects nothing more than a recognition that, because of the "sensitive security nature" of the assessment of terrorist threats, much of that information can and should be withheld from the public. 3/4/08 Board Order at 4. Both the Supreme Court and the Commission have emphasized that "an inability to adjudicate or publicize NEPA information does not justify an agency's failure to perform a NEPA analysis." Pacific Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-01, 67 NRC ___, slip. op. at 25 n.98 (Jan. 15, 2008) (citing Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 146 (1981)). Accordingly, the Board – and, ultimately, the Commission – still have to review the adequacy of the Staff's terrorism analysis. Id.

Pa'ina is also incorrect when it states the Board's recent rulings on Concerned Citizens' safety contentions constitute holdings "Pa'ina's irradiator posed no significant risks because of natural phenomena ... and possible airplane crashes." Pa'ina Motion to Reinstate at 14. In its decisions on 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 Order at 1 (emphasis added). Because the decisions focused on the standards for admitting safety contentions, they merely reflect the Board’s conclusion Concerned Citizens had not presented adequate evidence 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). The decisions say nothing about whether, for purposes of NEPA, special circumstances warranting preparation of an EA may exist.

Likewise, the Commission’s recent decision the Staff need not examine the potential health effects of consuming irradiated food did not constitute a finding irradiating food is not harmful to humans. Pa’ina Motion to Reinstate at 17. The Commission merely concluded the Staff has no legal duty “to undertake its own analysis [of such health effects] or otherwise second guess the [Food and Drug Administration’s] regulations and their underlying safety determinations on what is, at bottom, a non-environmental food processing and consumer food safety issue.” CLI-08-16, slip op. at 2-3.

Even if the Board were to agree with Pa’ina that the decisions it cites conclusively determined there were no “special circumstances” present in 2005 that would have obliged the Staff to prepare an EA, the Board should still reject Pa’ina’s motion. While the NRC’s NEPA regulations do not require an EA unless the Commission finds special circumstances, they do not prohibit the preparation of an EA in the absence of such circumstances. 10 C.F.R. § 51.22(b). The statement of considerations accompanying promulgation of the NRC’s NEPA regulations establish the Staff is free to prepare an EA if it thinks it would be helpful. See 49 Fed. Reg. 9,352, 9,362 (Mar. 12, 1984) (regulations give discretion to prepare EA or environmental impact statement (“EIS”), “when the Commission determines, in the exercise of its discretion, that it is

advisable to do so”). When the Staff entered into the Joint Stipulation, it lawfully exercised its discretion to address its NEPA obligations through preparation of an EA.²

Having committed to prepare an EA, the Staff was obliged to take a “hard look” at the potential impacts associated with construction and operation of a nuclear irradiator at Pa’ina’s proposed location, even if it ultimately concluded there would be no significant impacts.

Klamath-Siskiyou Wilderness Center v. Bureau of Land Management, 387 F.3d 989, 1001 (9th Cir. 2004); see also 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) (“In the end, it is the NRC Staff that ‘bears the ultimate burden of demonstrating that environmental issues have been adequately considered’”) (quoting Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998)); 3/20/06 Joint Stipulation at ¶ 6 (reserving Concerned Citizens’ right to “challeng[e] the adequacy of any NEPA document that the NRC prepares regarding the Applicant’s proposed irradiator”). To be adequate, the Staff’s EA must “[a]id an agency’s compliance with [NEPA],” even “when no [EIS] is necessary.” 40 C.F.R. § 1508.9(a)(2). Moreover, since “consideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process,” the Staff had to consider a reasonable range of alternatives to Pa’ina’s proposal to locate a Co-60 irradiator adjacent to

² Notably, the Council on Environmental Quality’s (“CEQ’s”) NEPA regulations require agencies’ categorical exclusion rules to “provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect,” in which case an EIS or an EA would be required. 40 C.F.R. § 1508.4 (emphasis added); cf. Private Fuels Storage, LLC (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348 n.22 (2002) (NRC gives “CEQ regulations ... ‘substantial deference’”). Whether the preparation of an EA subsequently results in a conclusion Pa’ina’s irradiator would not have a significant environmental impact is irrelevant to the question whether, at the time the Staff invoked the categorical exclusion in 2005, the available information indicated it might have such an effect, warranting preparation of an EA. Under Pa’ina’s logic, every time an agency issues a FONSI, it should turn back the clock and determine it should not have prepared the EA in the first place, an absurd result.

active runways and the ocean. Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989). To determine whether the Staff violated its statutory duties, the Board must address and resolve the parties' disputes over the EA, not be distracted by a decision the Staff made years ago, which has long since been superseded.

V. THE STAFF HAS FAILED TO PROVIDE THE REQUIRED STATEMENT OF REASONS WHY POTENTIAL IMPACTS ARE INSIGNIFICANT

Pa'ina's argument that, over the past three years, the Staff has adequately explained its initial categorical exclusion decision ignores that the Staff has never claimed any of the documents to which Pa'ina refers – the EA, the final topical report, or the 1993 Statement of Considerations (“SOC”) – justifies invoking a categorical exclusion for Pa'ina's proposed irradiator. See Pa'ina Motion to Reinstate at 19. It is well-settled that “an agency's action must be upheld, if at all, on the basis articulated by the agency itself,” not post hoc arguments made by Pa'ina. Motor Vehicle Manuf. Ass'n v. State Farm Mut. Auto. Insur. Co., 463 U.S. 29, 50 (1983); cf. 12/21/07 Board Order at 30 n.106 (“the adequacy of the [Staff's NEPA compliance] cannot rest upon a rationale now supplied by the Applicant”). At the time it invoked the categorical exclusion, the Staff failed to provide the requisite “convincing statement of reasons why potential effects are insignificant.” Steamboaters v. FERC, 759 F.2d 1382, 1393 (9th Cir.1985). Since then, it has never attempted to cure that omission.³

Even if the Board were to agree with Pa'ina that documents on which the Staff never relied are relevant to review of its categorical exclusion decision, the mere existence of such documents would not establish compliance with NEPA. In reviewing a statement of reasons for

³ The Staff's failure to explain its initial categorical exclusion decision is understandable since, with entry of the stipulation requiring the Staff to prepare an EA, the question whether the Staff was justified in invoking a categorical exclusion for Pa'ina's irradiator became moot.

a categorical exclusion, the Board must determine if the Staff's conclusion that impacts would be insignificant "was based on a consideration of the relevant factors and whether there has been clear error of judgment." Alaska Center for the Environment v. U.S. Forest Service, 189 F.3d 851, 859 (9th Cir. 1999) (quoting Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989)). As detailed in its initial and rebuttal statements of position, Concerned Citizens contends that, in performing its review of Pa'ina's proposed irradiator, the Staff failed to consider many relevant factors, including, but not limited to, the potential exposure of facility workers and emergency responders to excessive radiation doses following an aviation accident or natural disaster, the potential for Co-60 sources to be pulverized and dispersed through ruptures in the irradiator pool lining, and accidents while transporting sources to and from the irradiator. Regardless of whether a categorical exclusion decision or the final EA is at issue, the Board will have to resolve the parties' disputes over the Staff's failure to take "a 'hard look' at the potential environment impacts of the project." Steamboaters v. FERC, 759 F.2d 1382, 1393 (9th Cir.1985).

VI. THE BOARD SHOULD DENY PA'INA'S REQUEST TO ALTER ITS OCTOBER 5, 2007 DECISION TO HOLD CONCERNED CITIZENS' REQUEST FOR STAY IN ABEYANCE

The Board should reject as untimely Pa'ina's motion for the Board to rule immediately on Concerned Citizens' request for stay of Pa'ina's license. The Commission's hearing regulations expressly require motions to be made "no later than ten (10) days after the occurrence or circumstance from which the motion arises." 10 C.F.R. § 2.323(a). In this case, the occurrence which gave rise to Pa'ina's alleged injury – "the cloud hanging over Pa'ina's irradiator," Pa'ina Motion to Reinstate at 20 – occurred when the Board issued its October 5, 2007 order holding Concerned Citizens' "stay request temporarily in abeyance until the question

of [Pa'ina's] lease for the proposed irradiator site is resolved." 10/5/07 Board Order at 2. Only a week after the Board issued its order, Pa'ina complained the order created "a 'chicken and egg' situation where the State declines to proceed to finalize a lease until the Temporary Stay is resolved, but where the Board does not resolve the Temporary Stay issue until the lease is finalized." 10/12/07 Pa'ina Letter Response to ASLB's October 5, 2007 Order. If Pa'ina truly believed the Board's order was causing prejudice, it was obliged to file its motion by October 15, 2007. Its failure to comply with the mandatory deadlines in the NRC hearing regulations is fatal. See CLI-06-13, 64 NRC at 129 (strictly enforcing 10 C.F.R. § 2.311(a)'s 10-day filing period for appealing from Board orders).

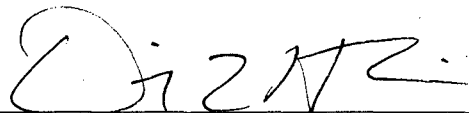
Even if the Board were to reach the merits of Pa'ina's motion, it should deny it. Pa'ina has failed to present any evidence that the pendency of Concerned Citizens' request for stay is having any effect on its lease negotiations.

VII. CONCLUSION

For the foregoing reasons, Concerned Citizens respectfully asks the Board to deny Pa'ina's Motion to Reinstate "Categorical Exclusion" Status for Pa'ina's Irradiator.

Dated at Honolulu, Hawai'i, September 22, 2008.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 22, 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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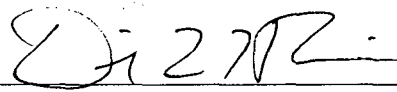
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Dated at Honolulu, Hawai'i, September 22, 2008.



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EARTHJUSTICE

Because the earth needs a good lawyer

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
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SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.

TRANSMITTAL LETTER

TO: Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attention: Rulemakings and Adjudications Staff

VIA FIRST CLASS MAIL

FROM: David L. Henkin

DATE: September 16, 2008

RE: Pa`ina Hawaii, LLC (Materials License Application),
Docket No. 30-36974-ML, ASLBP No. 06-843-01-ML

ENCLOSURES	DATE	DESCRIPTION
Original and two copies	9/16/08	INTERVENOR CONCERNED CITIZENS OF HONOLULU'S REBUTTAL TO NRC STAFF'S STATEMENT OF POSITION

☐ For Your Information.
☒ For Your Files.
☐ Per Our Conversation.
☐ Per Your Request.
☐ For Review and Comments.
☐ See Remarks Below.

☒ For Filing.
☐ For Recordation.
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REMARKS: