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August 26, 2008

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
"Licensee Pa'ina Hawaii, LLC's
Trial Brief On The Law"

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

Encls.
cc: All parties on Certificate of Service

TEMPLATE = SECY 021

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August 26, 2008

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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 TRIAL BRIEF ON THE LAW

CERTIFICATE OF SERVICE

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LICENSEE PA'INA HAWAII, LLC'S
TRIAL BRIEF ON THE LAW

I. INTRODUCTION

On July 17, 2008 this Atomic Safety and Licensing Board ("Board") issued an Order which required Intervenor CONCERNED CITIZENS OF HONOLULU'S ("Intervenor"), Licensee PA'INA HAWAII, LLC ("Pa'ina") and the NRC Staff ("Staff") to submit trial briefs.

This Board requested the respective parties to address and define the "standards of review" by which the Final Environmental Assessment ("Final EA") dated August 17, 2007, and the Intervenor's challenges to that Final EA, are to be adjudged.

II. BECAUSE THIS BOARD HAS ALREADY RULED THAT THERE WILL BE NO SIGNIFICANT ON-SITE OR OFF-SITE IMPACTS CAUSED BY PA'INA'S IRRADIATOR, THERE NEED NOT BE ANY FURTHER REVIEW OF THE STAFF'S EA AND FONSI AS A MATTER OF LAW.

Where there exist no environmental impacts, there need not be any further NEPA review or NEPA documentation. See Mahler v. U.S. Forest Service, 128 F. 3d 578 (7th Cir. 1997); see also Forest Guardians v. U.S. Forest Service, 370 F. Supp. 2d 978 (2004); generally Morongo Band of Mission Indians v. FAA, 161 F. 3d 569, 582 (9th Cir. 1998).

Thus, the 7th Circuit in the Mahler v. U.S. Forest Service decision, supra, approved the "categorical exclusion" from NEPA compliance for the removal of timber from a national forest, on the grounds that the timber removal "does not have a significant effect on the quality of human life." 128 F. 3d at 583. The 7th Circuit noted:

"We also agree with our colleagues in the Ninth Circuit that the Forest Service's use of a categorical exclusion under NEPA . . . permits an exclusion from the requirement of producing an EA for 'actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect . . . ." Id., at 583

Thus, where there is no significant impact on the quality of human life, an EA need not be prepared and consequently, of course, there is no need for a "standard of review."

As a matter of law, this Board has already ruled that there will be no significant on-site or off-site impacts from Pa'ina's irradiator. First, on April 2, 2008 this Board noted that there would be no significant off-site safety risks:

"[T]he regulatory history of NRC irradiator regulations indicated that the agency purposefully refrained from adopting any site selection requirements for irradiators because it concluded that irradiators are generally unlikely to pose any significant risk of offsite harm." (Emphasis added) Memorandum and Order, April 2, 2008, at p. 1.

Thereafter, on June 19, 2008 this Board noted that there was no significant risk of harm from radiation either on-site or offsite from natural phenomena or possible airplane crashes as a matter of law:

"[T]he Intervenor has failed to link this scenario to a resulting radiation dose at the facility floor or offsite." (Emphasis added) Memorandum and Order, June 19, 2008, at pp. 4-5.

Because this Board has ruled that there are no significant on-site or off-site impacts as a matter of law, Pa'ina submits that no EA was required herein. "Categorical exclusion" from further NEPA review should have been upheld, or be reinstated. The Staff's August 17, 2007 Final EA was a satisfactory, albeit unnecessary, production because Pa'ina's irradiator posed no significant environmental impacts. Therefore, there really need not be any "standards of review" for the Staff's gratuitous act accomplished herein.

III. THE STANDARD OF REVIEW REGARDING AN AGENCY'S "HARD LOOK" IS WHETHER THE AGENCY ACTED ARBTRARILY AND CAPRICIOUSLY, OR COMMITTED A CLEAR ERROR OF JUDGMENT.

Assuming arguendo that the Final EA herein was a necessary and proper process by the NRC Staff, that Final EA was and is sufficient and adequate in light of current 9th Circuit and Supreme Court standards of review.

The Board requested that the parties to define or describe what constitutes a "hard look" under that National Environmental Policy Act of 1969 ("NEPA"). In particular, this Board asked that each party identify the criteria (the factors, standards and elements) by which the 9th Circuit Court of Appeals, or the Supreme Court, or other federal appellate courts review an agency's "hard look" at a project.

Although the 9th Circuit Court of Appeals has wavered somewhat on the standard of review for an Environmental Assessment ("EA"), a very recent decision appears to better define "hard look" within the 9th Circuit. See The Lands Council v. McNair, 2008 U.S. App. LEXIS 13998 (9th Cir. 2008). There, an en banc panel of the 9th Circuit overturned a number of its prior decisions,[1] and in so doing the 9th Circuit affirmed that the proper standard of review of an agency action is the "arbitrary and capricious" standard. Id., at 50-53, citing Marsh v. Natural Resource Council, 490 U.S. 360, 378 (1989) The 9th Circuit also

[1] In The Lands Council decision, the 9th Circuit Court of Appeals overruled and criticized a plethora of its prior decisions and rationales. The 9th Circuit admitted it had "misconstrued" the National Forest Management Act (at 14) in Ecology Center, Inc. v. Austin, 430 F. 3d 1057 (9th Cir. 2005); that it had made "three key errors" in Ecology Center (at 23); that it had failed to grant appropriate "deference" to the agency (at 28); and finally, it "overruled" its earlier Ecology Center decision (at 31-32). Furthermore, in The Lands Council, the 9th Circuit overruled its earlier decision in Sporting Congress v. Thomas, 137 F. 3d 1146 (9th Cir. 1998) regarding "habitat disturbance" (at 42-3). What is more, in The Lands Council, the 9th Circuit overruled two of its own earlier NEPA decisions: Lands Council v. McNair, 494 F. 3d 771 (9th Cir. 2007)(at) and also Seattle Audubon Society v. Espy, 998 F. 2d 699 (9th Cir. 1993)(at 54). Thus, The Lands Council seems to represent an extremely rare judicial mea culpa, or else an announcement that it (the 9th Circuit) has returned to the arena of conventional and civilized adjudication.

utilized the related "clear error of judgment" standard of review for agency decisions. Id., at 44.

Thus, assuming arguendo that the NRC Staff's EA is subject to review, the "hard look" afforded Pa'ina's irradiator is to be reviewed under the "arbitrary and capricious" and "clear error of judgment" standards.

IV. IN THE 9th CIRCUIT, AN EA IS REVIEWED UNDER A LOWER STANDARD THAN IS AN EIS; CONSEQUENTLY, AN EA NEED ONLY REVIEW AN APPROPRIATE RANGE OF ALTERNATIVES, NOT EVERY ALTERNATIVE.

Two of Intervenor's contentions remaining in this case are the claim that the Final EA did not adequately discuss alternative locations for Pa'ina's irradiator, and also a claim that the Final EA did not adequately discuss technological alternatives.

First, as to alternate locations for a project, it is the current NEPA law in the 9th Circuit that where there are no significant impacts, alternative sites need not be studied. Morongo Band of Mission Indians v. FAA, 161 F. 3d 569, 582 (9th Cir. 1998); see generally Northcoast Envt. Ctr. v. Glickman, 136 F. 3d 660 (9th Cir. 1998). As stated in the Morongo Band decision:

"[T]he noise and other studies showed that there would be no impact on any type of property in the project area. Thus, the failure to identify specific [alternative]

potential sites or properties is irrelevant." 161 F. 3d at 582.

Second, even if there are some impacts, the 9th Circuit as well as other circuit courts hold that "an agency's obligation to consider alternatives under an EA is a lesser one than under an EIS." Native Ecosystems Council v. United States Forest Service, 428 F. 3d 1233, 1246 (9th Cir. 1998); see also *North Carolina v. FAA*, 957 F.2d 1125, 1134 (4th Cir. 1992) ("In an environmental assessment, the range of alternatives an agency must consider is smaller than in an environmental impact statement.")

Thus, for example, in Native Ecosystems Council, supra, the subject EA was adjudged adequate by the 9th Circuit where the agency dismissed four alternatives without detailed consideration, and considered only two alternatives in detail, i.e., the proposed project and the no-action alternative. 428 F. 3d at 1245-46.

Third, and finally, in the 9th Circuit a discussion of alternate technologies in an EA is further circumscribed by further common-sense considerations. Thus, an EA need not contain a discussion of alternative technologies which are similar to the proposed project, or infeasible, ineffective, or inconsistent with the basic objectives of the project. Bering Strait Citizens for Responsible

Resource Development v. U. S. Army Corps of Engineers, 524 F. 3d 938, 955 (9th Cir. 2007); Northern Alaska Env'l Center v. Kempthorne, 457 F. 3d 969, 978 (9th Cir. 2005).

Furthermore, the 9th Circuit has held that alternative technologies need not be considered in an EA unless those alternate technologies are available and capable of being accomplished "after taking into consideration costs, existing technology, and logistics in light of the overall project purposes." Friends of the Payette v. Horseshoe Bend Hydroelectric Co., 988 F. 2d 989, 995 (9th Cir. 1993) Outdated technologies need not be included in NEPA documents. Churchhill County v. Norton, 276 F. 3d 1060, 1082 (9th Cir. 2001)

Finally, and importantly, in the 9th Circuit there is no minimum number of alternatives which must be studied in an EA. Native Ecosystems Council v. United States Forest Service, 428 F. 3d 1233, 1246 (9th Cir. 1998)

V. THE STANDARD OF REVIEW PERTAINING TO THE TRANSPORTATION OF SOURCE MATERIALS TO HAWAII IS WHETHER OR NOT THERE IS AN IMMEDIATE CAUSAL CONNECTION BETWEEN THE LICENSING ACTIVITY AND THE ALLEGED ENVIRONMENTAL IMPACT.

Intervenor contends that the Final EA produced by the Staff was deficient because it failed to adequately discuss or consider the impacts of transporting source material to

and from Hawaii. This Board admitted Intervenor's contention on December 21, 2007.

Intervenor's contention that transportation of sources to and from Hawaii must be dealt with in the context of this Part 36 licensing proceeding is nothing more than an attempt to stymie this proceeding, especially where the transporter is not even before this agency.[2] The 9th Circuit has ruled that an agency need not aggregate diverse actions in one proceeding. Northwest Resource Information Center, Inc. v. Oregon Natural Resources Council, Inc., 56 F. 3d 1060 (9th Cir. 1995) There, the 9th Circuit rejected a similar argument and deferred to the agency's handling of the different, albeit not unrelated, issues:

> "[W]e . . . cannot force an agency to aggregate diverse actions to the point where problems must be tackled from every angle at once. To do so risks further paralysis of agency decisionmaking." 56 F. 3d at 1069.

The instant case involves a Part 36 licensing procedure. Transporting nuclear material is a separate licensing matter, governed by 10 C.F.R. Part 71. Pa'ina neither seeks nor desires a license to transport source materials to or from Hawaii under Part 71.

Finally, it should be noted that the Supreme Court has held that where there is no causal link between the sought-

[2] Serious due process considerations would be implicated if this licensing proceeding were to incorporate the transportation of sources to and from Hawaii, without the presence of the transporting party.

for license or permit, and the action which is alleged to cause the potential environmental harm, there are no grounds to contend that an EA is inadequate and that an EIS should be performed. DOT v. Public Citizen, 541 U.S. 752 (2004), overturning Public Citizen v. DOT, 316 F. 3d 1002 (9th Cir. 2003).

VI. IN THE 9TH CIRCUIT, IMPACTS ON TOURISM ARE GENERALLY CONSIDERED "SPECULATIVE," AND IN ANY EVENT A COURT WILL DEFER TO THE AGENCY'S ANALYSIS AND FORECASTING.

Intervenor has alleged that the Final EA is inadequate because it fails to fully discuss the impacts upon tourism posed by Pa'ina's irradiator.

The 9th Circuit has established several criteria by which to review an agency's NEPA documentation regarding impacts upon tourism. First and foremost, the 9th Circuit requires more than "speculative" arguments regarding the impacts of a project upon tourism. Life of the Land v. Brinegar, 485 F. 2d 460, 469 (1973) The arguments or contentions by the challenger require "empirical data supportive of the allegation." 485 F. 2d at 469.

Furthermore, and in any event, the 9th Circuit has held that it will defer to the agency's expertise, particularly in regards to project-related impacts upon tourism. See National Parks & Conservation Association v. U.S.

Department of Transportation, 222 F. 3d 677, 682 (9th Cir. 1999)

VII. Lesser Public Participation Is Provided For In 10 C.F.R. Sec. 1501.4(b) For Environmental Assessments; Is Not Required For Categorical Exclusion; And, In Any Event, May Be "Harmless Error."

The 10th Circuit Court of Appeals has noted and held that lesser public input is generally required for preparing an EA. Colorado Wild v. U.S. Forest Service, 435 F. 3d 1204 (10th Cir. 2006); cf. 40 C.F.R. Sec. 1501(4(b) with 40 C.F.R. Sec. 1503.1(3).

Moreover, CEQ regulations do not require any public involvement in an agency's decision to employ a Categorical Exclusion. 435 F. 3d at 1219.

Finally, the Administrative Procedures Act provides for "harmless error." 5 U.S.C. Sec. 706 ("the rule of prejudicial error"); see Nevada v. DOE, 457 F. 3d 78, 90 (D.C. Cir. 2006); see generally Columbia Basin Land Protection Asso. v. Schlesinger, 643 F. 2d 585, 611 (9th Cir. 1981)(Karlton, J., dissenting)

As noted in Pa'ina's recent Motion to Reinstate filed before this Board, this case has for all intents and purposes reverted back to its 2005 litigation posture. Pa'ina's irradiator was afforded "categorical exclusion"

status in 2005. Thus, the Staff's alleged failure to address public comments in the manner wished for by Intervenor is not prejudicial, should be "moot," and in any event constitutes "harmless error."

VIII. CONCLUSION.

Based upon the law and principles stated above, Pa'ina Hawaii, LLC requests this Board to deny all remaining contentions of Intervenor.[3]

DATED: Honolulu, Hawaii, August 26, 2008.

FRED PAUL BENCO
Attorney for Pa'ina Hawaii, LLC

[3] At this time, Pa'ina is not introducing any testimony, but reserves the right to submit cross or rebuttal testimony and/or questions. The current challenges go to the Environmental Assessment, and not to Pa'ina's initial license application. Pa'ina objected to the 2006 stipulation between the Staff and Intervenor which brought the EA into play . Finally, Pa'ina believes that the Final EA, the Final Topical Report and the NRC's 1993 Statement of Considerations fully address all relevant questions and issues; any other purported questions and contentions are mere "fluff" designed to stall these proceedings in the hopes of winning this proceeding by attrition.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "LICENSEE PA'INA HAWAII, LLC'S TRIAL BRIEF ON THE LAW" dated August 26, 2008 in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this August 26, 2008. Additional service has also been made this same day by electronic mail as shown below:

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DATED: Honolulu, Hawaii, August 26, 2008.

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