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October 6, 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. 30-36974-ML
	)	ASLBP No. 06-843-01-ML
Material License Application	)	
	)	

INTERVENOR CONCERNED CITIZENS OF HONOLULU'S
OPPOSITION TO NRC STAFF'S MOTION TO DISMISS
PORTIONS OF AMENDED ENVIRONMENTAL CONTENTIONS AND STATEMENT
OF POSITION REGARDING REQUEST FOR LEAVE TO SEEK SUMMARY DISPOSITION

I. INTRODUCTION

The Nuclear Regulatory Commission ("NRC") Staff's motion to dismiss is based on a fundamental misunderstanding of the nature of amended environmental contention 3. In arguing Concerned Citizens was obliged to submit expert testimony or face dismissal, the Staff ignores the Board admitted the challenged portions of this contention as contentions of omission. The Board expressly rejected the Staff's argument these claims should not be admitted due to Concerned Citizens' alleged "fail[ure] to provide a concise statement of fact or expert opinion." 12/21/07 Board Order (Ruling on Admissibility of Intervenor's Amended Environmental Contentions) at 17. The Board explained the admitted portions of Concerned Citizens' "contention need not contain such elements because it is effectively a contention of omission." Id. (emphasis added). Where a contention of omission is involved, "the pleading requirements of 10 C.F.R. § 2.309(f)(1)(v), calling for a recitation of facts or expert opinion supporting [the]

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issue raised, are inapplicable ... beyond identifying the regulatively required missing information." Id. at 11 n.41 (quoting LBP-06-12, 63 NRC at 414) (emphasis added).

As discussed below, the Staff is simply wrong in asserting Concerned Citizens failed to introduce evidence in support of its claims. With respect to each portion of amended environmental contention 3, Concerned Citizens introduced the evidence necessary for the Board to apply the applicable legal standards to determine whether the omission violated the Staff's duties under the National Environmental Policy Act ("NEPA"). While that evidence was predominantly documentary in nature (e.g., the environmental assessment ("EA") itself or the comments on the draft EA to which the Staff failed to respond), there was no need to submit expert testimony to establish the legally relevant facts. Indeed, since the text of the EA itself "is where the [Staff's] defense of its position must be found," submission of post hoc expert testimony is generally improper. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir.1999).

Because review of the EA's adequacy is generally limited to the information presented in the EA itself, Concerned Citizens contends that the issues addressed in the parties' statements of position are properly resolved by summary disposition, rather than an evidentiary hearing. Thus, Concerned Citizens does not object to the Staff's request for leave to seek summary disposition, though for different reasons than those set forth in the Staff's motion. As the parties have already had ample opportunity to brief these issues in their opening and rebuttal statements of position, Concerned Citizens sees no point in requiring the parties to prepare – and the Board to review – yet another round of briefs.

II. CONCERNED CITIZENS SUBMITTED APPROPRIATE EVIDENCE IN SUPPORT OF ITS CONTENTIONS OF OMISSION

The Staff's claim "the Intervenor has not presented any testimony or other evidence on twelve segments in amended environmental contention 3" is baseless. Staff Motion at 1 (emphasis added). Review of its initial statement reveals Concerned Citizens submitted voluminous documents as evidence in support of its claims the Staff illegally failed to respond to comments on the draft EA (the first portion of amended environmental contention 3) and to take a hard look at potential impacts associated with aviation accidents and natural disasters (the third portion of amended environmental contention 3). See, e.g., 8/26/08 Concerned Citizens' Initial Statement at 8-9, 16-19. The Staff's narrow focus on the absence of expert testimony ignores the Board's statements in admitting the first and third portions of amended environmental contention 3 – the only portions for which the Staff seeks partial dismissal – that Concerned Citizens was not obliged to come forward with such testimony to support these claims.[1]

A. First Portion Of Amended Environmental Contention 3.

Eight of the segments the Staff alleges lack evidentiary support relate to the first portion of amended environmental contention 3, which "effectively asserts that the Staff's final EA omits any responses to the Intervenor's extensive comments on ten deficiencies in the draft EA contrary to cited case precedents that require an adequate environmental assessment to include responses to public comments." 12/21/07 Board Order at 12-13; see also Staff Motion at 6 & nn.7-9. In admitting this portion of amended environmental contention 3, the Board held:

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[1] While the Staff's decision to reorganize Concerned Citizens' claims into twelve new "segments" is somewhat confusing, the Staff's description of these "segments" make clear they come from what the Board characterized as the first and third portions of amended environmental contention 3. Staff Motion at 6; see also id. at 6 nn. 7-10.

> The contention identifies the missing information, i.e., the Staff's missing response to its ten extensive comments, and sets out the case precedents indicating that an adequate environmental assessment for a facility in Hawaii must respond to significant comments. The Intervenor thus presents all the information necessary for a contention of omission ... .

12/21/07 Board Order at 11 (emphasis added). Thus, the only evidence required to support this portion of the contention are the comments Concerned Citizens and its experts submitted on the draft EA, which, when compared with the text of the final EA itself, allow the Board to determine whether the Staff failed to respond to those comments. See 9/4/07 Amended Contentions at 7-8 (citing letters submitted by Earthjustice, with enclosed expert reports and declarations).

The Staff's argument that Concerned Citizens' counsel is not "a properly qualified witness" to get the comment letters into evidence reflects a fundamental misunderstanding of Concerned Citizens' claim. Staff Motion at 8. As the Board recognized in admitting this portion of the contention, the sole issue is whether the Staff complied with its duty under NEPA to "respond[] in the final EA to the Intervenor's comments on the listed deficiencies in the EA." 12/21/07 Board Order at 12. To establish a failure to respond, Concerned Citizens' only factual burden is to establish that the comments on the draft EA were, in fact, submitted, a matter as to which Concerned Citizens' counsel at Earthjustice – who mailed in the expert comments – is more than competent to testify. See 8/26/08 Henkin Testimony at 2.[2] Whether the Staff failed to respond to these submitted comments and violated NEPA requires reference to only the text of the EA itself, which Concerned Citizens also submitted as evidence. See Concerned Citizens' Exh. 9; see also Foundation for N. Am. Wild Sheep v. U.S. Dep't of Ag., 681 F.2d 1172, 1179 (9th Cir. 1982); Western Watersheds Project v. Bureau of Land Management, 552 F. Supp. 2d

[2] Neither the Staff nor Pa'ina disputes that the documents Concerned Citizens submitted as evidence were before the Staff when it prepared the final EA.

1113, 1129 (D. Nev. 2008); Sierra Nevada Forest Protection Campaign v. Weingardt, 376 F. Supp. 2d 984, 991 (E.D. Cal. 2005); Oregon Natural Resources Council Action v. U.S. Forest Service, 445 F. Supp. 2d 1211, 1229 (D. Or. 2006). There was no need for Concerned Citizens to proffer expert testimony since, whatever those experts might have to say about their comments is legally irrelevant to the question whether the Staff failed to respond to their comments in the EA, where the Staff's "defense of its position must be found." Blue Mountains Biodiversity Project, 161 F.3d at 1214; see also Motor Vehicle Manuf. Ass'n v. State Farm Mut. Auto. Insur. Co., 463 U.S. 29, 50 (1983) ("an agency's action must be upheld, if at all, on the basis articulated by the agency itself").

Significantly, in admitting the first portion of amended environmental contention 3, the Board squarely rejected the Staff's argument Concerned Citizens was obliged to "explain[] why any comment response is inadequate," which is precisely the type of expert testimony the Staff's motion to dismiss once again claims is missing. 12/21/07 Board Order at 12; see also Staff Motion at 8-9. Noting that the Staff "badly misapprehends the contention it opposes," the Board affirmed that, by identifying "the Staff's missing response to its ten extensive comments," Concerned Citizens met "all the requirements" for a contention of omission. 12/21/07 Board Order at 11-12. Likewise, the documentary evidence Concerned Citizens has proffered satisfies its "burden of going forward with evidence sufficient to show that there is a material issue of fact or law." 69 Fed. Reg. 2,182, 2,213 (Jan. 14, 2004).

B. Third Portion Of Amended Environmental Contention 3.

The remaining four segments the Staff alleges lack evidentiary support relate to the third portion of amended environmental contention 3, which claims, inter alia, "that, in the final EA, the Staff failed to provide more than general statements about possible risks associated with

natural disasters and aviation accidents." 12/21/07 Board Order at 16; see also Staff Motion at 6 nn.7 & 10. In admitting these claims, the Board concluded that:

> [b]y identifying the potential risks associated with the proposed irradiator that the Staff assertedly failed to address, and by citing to the Ninth Circuit case law that requires a satisfactory environmental assessment to address these potential risks, the Intervenor's contention presents, once again, a contention of omission.

Id.

The Staff objected to admission of this portion of environmental contention 3 on the ground that Concerned Citizens "cites only the assertions of its experts, without providing any explanation of the bases underlying [its] opinions" and "fails to provide a concise statement of fact or expert opinion." Id. at 17 (quoting 9/20/07 Staff Response at 9). As with the first portion of this contention, discussed above, the Board rejected the Staff's arguments, explaining that "this portion of the Intervenor's contention need not contain such elements because it is effectively a contention of omission." Id. (emphasis added).

To resolve this portion of amended environmental contention 3, the Board's inquiry focuses on whether the Staff violated NEPA's command to take "a hard look" at potential impacts by including in its EA only "[g]eneral statements about possible effects and some risk" and "generalized conclusory statements that the effects are not significant." Klamath-Siskiyou Wilderness Center v. Bureau of Land Management, 387 F.3d 989, 994, 996 (9th Cir. 2004) (quoting Neighbors of Cuddy Mountain v. United States Forest Service, 137 F.3d 1372, 1380 (9th Cir 1998)). Expert testimony from Concerned Citizens' experts simply is not relevant. Rather, the only evidence the Board need examine is the text of the EA itself, where the Staff is obliged to "put on the table, for the [NRC's] and the public's view, a sufficiently detailed statement of environmental impacts and alternatives so as to permit informed decision making" regarding Pa'ina's proposed irradiator. Lands Council v. Powell, 395 F.3d 1019, 1027 (9th Cir.

2005); see also Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998) (when agency prepares EA, "NEPA requires that the public receive the underlying environmental data from which [an agency] expert derived her opinion"); 40 C.F.R. § 1500.1(b) ("public scrutiny [is] essential" to ensuring the environmental information available to decision-makers is "of high quality").

The Staff misconstrues the reason Concerned Citizens cites various expert reports and declarations in support of its claim the Staff failed to take a hard look at potential impacts related to natural disasters and aviation accidents. It is not, as the Staff claims, because Concerned Citizens "recognized that it needed to provide support for its claims that the factors the Staff ... failed to consider were factors that, according to NEPA case law, the Staff had to consider." Staff Motion at 7-8. Rather, Concerned Citizens was merely demonstrating its compliance with its obligation to "'structure [its] participation [in the EA process] so that it ... alerts the [Staff] to [Concerned Citizens'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." Department of Transportation v. Public Citizen, 541 U.S. 752, 764 (2004) (quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 553 (1978)).

All the expert reports and declarations Concerned Citizens cites were presented to the Staff prior to or during its preparation of the EA, putting the Staff on notice that, to be adequate, its EA would have to examine these potential impacts and could not lawfully get away with "generalized conclusory statements that the effects are not significant," Klamath-Siskiyou Wilderness Center, 387 F.3d at 996. The documents Concerned Citizens proffered as evidence prove it specifically pointed out the "EA's ... flaws" and, thus, "preserve[d] its ability to

challenge" the Staff's failure adequately to examine these potential impacts. Public Citizen, 541 U.S. at 765.

III. IN ASSESSING THE EA'S ADEQUACY, THE BOARD MUST DISREGARD INFORMATION THE STAFF FAILED TO DISCLOSE IN THE EA

To justify its request for dismissal or, in the alternative, for leave to seek summary disposition, the Staff makes much of the fact Concerned Citizens did not submit expert testimony countering information the Staff disclosed for the first time in its initial statement, arguing that, "the Staff's unrebutted testimony provides a sufficient basis to dismiss the segments without the need for a hearing." Staff Motion at 13. The Staff ignores that the basis of Concerned Citizens' contentions is that required information was omitted from the EA. Since the text of the EA itself "is where the [Staff's] defense of its position must be found," the Staff's submission of post hoc testimony cannot cure the EA's defects. Blue Mountains Biodiversity Project, 161 F.3d at 1214. Concerned Citizens did not rebut the Staff's testimony for the simple reason it is irrelevant to resolution of the admitted contentions.[3]

Notably, while the Commission's regulations expressly provide for the Board to modify the Staff's environmental review "[w]hen a hearing is held on the proposed action under the regulations in subpart G" or if issuance of a manufacturing license or amendment is involved, the regulations do not similarly authorize the Board to modify the Staff's review in this subpart L irradiator licensing proceeding. 10 C.F.R. § 51.34(b) (emphasis added); see also id. § 51.31(c)(4). "Under the doctrine of 'inclusio unius est exclusio alterius' ..., '[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.'" United States v. Terrence, 132 F.3d 1291, 1294 (9th Cir. 1997); see also Longview Fibre Co. v.

[3] Since the post hoc testimony cannot cure the omissions from the EA, there likewise was no reason for Concerned Citizens to amend its contentions. See Staff Motion at 9 n.14.

Rasmussen, 980 F.2d 1307, 1313 (9th Cir. 1992) ("No sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated"). In run-of-the-mill proceedings like this, the Staff prepares the final EA and finding of no significant impact; the Board does not modify them. 10 C.F.R. §§ 51.31(a), 51.34(a).

Limiting the Board's review to the analysis presented in the EA is consistent with well-established Ninth Circuit precedent. In Blue Mountains Biodiversity Project, the Court squarely rejected the U.S. Forest Service's suggestion that supporting data in the 3,000-page administrative record could cure the "cursory and inconsistent treatment of sedimentation issues" in the EA for a timber salvage sale. 161 F.3d at 1214. Noting that "[t]he EA contains virtually no references to any material in support of or in opposition to its conclusion," the Court held that the text of the EA itself "is where the Forest Service's defense of its position must be found." Id.; see also National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 732 (9th Cir. 2001) (same).

In this case, allowing the Staff to cure defects in the EA with information that – until the Staff filed its initial statement – was hidden from the public would contravene Congress's intent in enacting NEPA "to ensure that an agency is cognizant of all the environmental trade-offs that are implicit in a decision." California v. Block, 690 F.2d 753, 771 (9th Cir. 1982). "To effectuate this aim, NEPA requires ... public participation in the evaluation of [a project's] environmental consequences." Id. Allowing the Staff to buttress its analysis with information that was unavailable during the public comment period on the EA would "insulate[] its decision-making process from public scrutiny," "render[ing] NEPA's procedures meaningless." Block,

690 F.2d at 771; see also Idaho Sporting Cong., 137 F.3d at 1150 ("NEPA requires that the public receive the underlying environmental data").

Moreover, allowing the Staff to justify its issuance of a license to Pa'ina based on previously undisclosed information would undermine one of NEPA's central purposes: to "insure that environmental information is available to ... citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added). The Staff's decision to keep its data and analysis hermetically sealed until forced to reveal them in the course of this proceeding makes a mockery of NEPA's "informational role." Public Citizen, 541 U.S. at 768. Citizens should not have to go to court to find out whether the Staff "has indeed considered environmental concerns in its decisionmaking process;" the information in the final EA itself is supposed to provide those assurances. Id. (quoting Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 97 (1983)).

Since the Staff's post hoc testimony is irrelevant to resolving the merits of Concerned Citizens' NEPA claims, Concerned Citizens intends to bring a motion in limine to exclude that evidence prior to the October 16, 2008 deadline. See 7/17/08 Board Order at 6.

IV. SUMMARY DISPOSITION IS APPROPRIATE TO RESOLVE THE ENVIRONMENTAL CONTENTIONS

As discussed above, the Staff's post hoc testimony is irrelevant to resolving amended environmental contentions 3 and 4, which require the Board to determine whether the numerous omissions from the EA violated NEPA's mandates to take the requisite "hard look at the effects from proceeding with" Pa'ina's proposed irradiator and to consider reasonable alternatives to construction and operation of a nuclear irradiator at a site subject to aviation accidents and natural disasters and that presents an attractive target for terrorist attack. Klamath-Siskiyou

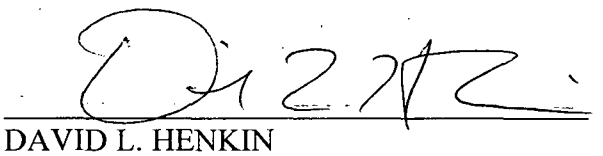
Wilderness Center, 387 F.3d at 1001. Since "the [Staff's] defense of its position must be found" in the text of the EA itself, Concerned Citizens submits there is no need for an evidentiary hearing. Blue Mountains Biodiversity Project, 161 F.3d at 1214. Instead, the Board should resolve the parties' legal disputes based on the voluminous filings already submitted.[4]

V. CONCLUSION

For the foregoing reasons, Concerned Citizens respectfully requests the Board to deny the Staff's motion to dismiss and determine, based on the arguments already on file, whether the EA falls short of fulfilling NEPA's legal requirements.

Dated at Honolulu, Hawai'i, October 6, 2008.

Respectfully submitted,



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[4] The parties have already had ample opportunity to brief the relevant legal issues. There is, accordingly, no need for yet another round of briefing, as the Staff suggests. See Staff Motion at 12.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 6, 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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