

October 23, 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
	)	
(Materials License Application)	)	ASLBP No. 06-843-01-ML

NRC STAFF'S OPPOSITION TO INTERVENOR'S MOTION TO STRIKE

INTRODUCTION

The NRC Staff opposes the Intervenor's motion to strike the Staff's testimony on the admitted segments in amended environmental contentions 3 and 4.<sup>1</sup> In addition, the Staff opposes the Intervenor's motion to the extent the Intervenor asks the Board to strike the testimony of Pa'ina's sole witness, Michael Kohn, Pa'ina's managing member.

DISCUSSION

The Staff's testimony is consistent with the Board's Scheduling Order, which directed the parties to submit testimony on the admitted segments of amended environmental contentions 3 and 4;<sup>2</sup> with NRC regulations and Commission precedent, which unequivocally provide that parties may offer evidence in proceedings involving issues arising under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4437 (NEPA);<sup>3</sup> and with Ninth Circuit precedent holding that, even in litigation before the federal courts, agencies may submit

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<sup>1</sup> *Intervenor Concerned Citizens of Honolulu's Motion to Strike Testimony Submitted in Support of NRC Staff's and Pa'ina Hawaii, LLC's Statements of Position* (October 16, 2008) (Motion to Strike).

<sup>2</sup> *Pa'ina Hawaii, LLC, Order* (Scheduling Order) (July 17, 2008) (unpublished) at 2–5.

<sup>3</sup> See 10 C.F.R. 51.104(b); see also *Pacific Gas and Electric* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CL-08-26, 68 NRC \_\_ (2008).

information explaining their decisionmaking.<sup>4</sup>

I. 10 C.F.R. § 51.104(b), Rather than the Administrative Record Rule, Governs the Admissibility of Evidence in this Proceeding

In arguing that the Board should strike the Staff's testimony, the Intervenor begins with the false premise that the administrative record rule applies in this proceeding. The administrative record rule provides that, as a general matter, a court reviewing a final agency decision should define the administrative record as the record that was before the agency at the time it made its decision. *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420, (1971). In the present case, however, the administrative record is still being developed, and there is not yet any final agency decision subject to federal court review.<sup>5</sup> Although the Staff has made a *licensing* decision with respect to Pa'ina's application for an irradiator license, the NRC, as an agency, has not decided whether the Staff's licensing decision will stand. Indeed, that is the very purpose of this proceeding before the Board. The Staff notes that the Intervenor fails to cite a single case applying the administrative record rule in an ongoing administrative proceeding; the only cases cited by the Intervenor address the entirely different situation where an agency seeks to submit evidence to a district or circuit court that has not previously been made part of the administrative record.<sup>6</sup>

Rather than the administrative record rule, it is the NRC's own NEPA-implementing regulations that govern the admissibility of evidence in this proceeding. The NRC's regulations make clear that, when a hearing is held in a proceeding where the Staff has determined that no environmental impact statement (EIS) need be prepared for the proposed action, any party can

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<sup>4</sup> *ASARCO, Inc. v. U.S. EPA*, 616 F.2d 1153, 1155-61 (9<sup>th</sup> Cir. 1980).

<sup>5</sup> 28 U.S.C. § 2342(4); 42 U.S.C. § 2239(b).

<sup>6</sup> Motion to Strike at 4–9.

offer evidence on the aspects of the proposed action within the scope of NEPA:

In any proceeding in which a hearing is held where the NRC staff has determined that no environmental impact statement need be prepared for the proposed action, unless the Commission orders otherwise, any party to the proceeding may take a position and offer evidence on the aspects of the proposed action within the scope of NEPA and this subpart in accordance with the provisions of part 2 of this chapter applicable to that proceeding or in accordance with the terms of the notice of hearing. In the proceeding, the presiding officer will decide any such matters in controversy among the parties.

10 C.F.R. § 51.104(b). The Staff's testimony in the present proceeding is the very type of evidence allowed by § 51.104(b). The "aspects of the proposed action" at issue in this proceeding are framed by the thirty-four segments in amended environmental contentions 3 and 4 that the Board admitted in its December 21, 2007 order.<sup>7</sup> It is those thirty-four segments that the Staff's witnesses address in their testimony.<sup>8</sup> Accordingly, it is entirely proper for the Board to consider that testimony in this proceeding.

In calling for the exclusion of the Staff's testimony from this proceeding, the Intervenor is in effect challenging the NRC's regulations themselves. The Intervenor argues that because the Staff's testimony was not included in the EA, the Board cannot consider that testimony in determining whether the EA is adequate. This argument is directly inconsistent with § 51.104(b), which states that any party may offer evidence "in accordance with the provisions of part 2 of this chapter applicable to that proceeding or in accordance with the terms of the notice of hearing." The provisions of part 2 applicable to the present proceeding specifically state that "participants in the hearing may submit and sponsor in the hearings" both initial

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<sup>7</sup> Order (Ruling on Admissibility of Intervenor's Amended Environmental Contentions) (December 21, 2007) (unpublished).

<sup>8</sup> The Intervenor repeatedly refers to the Staff's testimony as "*post hoc* testimony." The Staff's testimony is necessarily *post hoc* since the subject of the Staff's testimony is the Intervenor's amended environmental contentions, which are themselves *post hoc* with respect to the Final EA.

written testimony and rebuttal testimony. 10 C.F.R. §§ 2.1207(a)(1), (a)(2). The Board should therefore reject the Intervenor's motion to strike the Staff's testimony in the present proceeding as an impermissible challenge to the NRC's regulations.<sup>9</sup>

By moving to strike not only the Staff's testimony but also Pa'ina's testimony, the Intervenor confirms that it is challenging the NRC's regulations themselves. The Intervenor cites federal case law holding that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself" and argues that Pa'ina's testimony is therefore irrelevant to the issues before the Board.<sup>10</sup> But the Intervenor ignores the fact that the "basis articulated by the agency itself" that is subject to federal court review will, in the present proceeding, be found in the final Board or Commission decision resolving the Intervenor's contentions. To apply the principle cited by the Intervenor to the pending administrative proceeding and strike Pa'ina's testimony would render meaningless § 51.104(b), which unequivocally states that "*any party* to the proceeding may take a position and offer evidence on the aspects of the proposed action within the scope of NEPA[.]" (Emphasis added.)<sup>11</sup>

The Intervenor also fails to address other NRC proceedings in which the Commission or Board has considered testimony addressing admitted contentions that challenge an EA's

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<sup>9</sup> See 10 C.F.R. § 2.335(a).

<sup>10</sup> Motion to Strike at 14 (citing *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)).

<sup>11</sup> The Intervenor's additional argument that the Board, under 10 C.F.R. § 2.333(b), may exclude the Staff's and Pa'ina's testimony on amended environmental contentions 3 and 4 as "irrelevant" is frivolous given the language in 10 C.F.R. §§ 51.104(b) and 2.1207(a), which reflects that, rather than being irrelevant, testimony is an indispensable part of the record in an oral hearing involving NEPA issues. The Intervenor's argument is also frivolous because, in the present case, the Board specifically directed the parties to submit testimony on the admitted segments of amended environmental contentions 3 and 4, clearly conveying to the parties that it found that testimony may be relevant to resolving the matters in dispute.

adequacy. The Board need look no further than the *Diablo Canyon* proceeding. In *Diablo Canyon*, the Commission considered testimony in the form of affidavits from the Staff, Licensee, and Intervenor relating to whether, in its supplemental EA, the Staff adequately considered land contamination and non-fatal health effects linked to a potential terrorist attack at the Diablo Canyon facility.<sup>12</sup>

Another recent example is *Nuclear Fuel Services, Inc.* (Erwin, Tennessee). In *NFS*, the Board considered written presentations submitted by the Staff, the Intervenor and the Licensee,<sup>13</sup> and the Board relied on that very evidence in upholding the Staff's issuance of a license amendment:

The short of the matter is that, *particularly when considered in the light of the substantive showings of the Licensee and Staff*, what [the Intervenor] has chosen to put before us does not come close to what was necessary to give credence to the single [Intervenor] concern that has been addressed in its written presentations. There is simply no basis in the record at hand for a determination on our part that the Staff's environmental review failed adequately to consider the possibility of the occurrence of an accident with serious environmental consequences. That being so, we have been given no reason to overturn either the Staff's conclusion that an EIS was not required or the FONSI that accompanied it.

LBP-05-8, 61 NRC 202, 217 (2005) (emphasis added). The Staff would point out that in both *Diablo Canyon* and *NFS* the Staff's evidentiary submissions postdated the EA. In neither case, however, did the Commission or Board give any indication that this evidence was irrelevant to

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<sup>12</sup> CLI-08-26, 68 NRC \_\_ (slip op. at 15 n.65) ("We do not read the Staff's supplemental environmental assessment in isolation. Rather, we consider it in conjunction with evidence presented in the adjudicatory record, including the affidavit of the Staff expert who performed the dose calculation.").

<sup>13</sup> "Legal and Evidentiary Presentation by State of Franklin Group of the Sierra Club, Friends of the Nolichucky River Valley, Oak Ridge Environmental Peace Alliance, and Tennessee Environmental Council Regarding U.S. Nuclear Regulatory Commission Staff's Failure to Comply with the National Environmental Policy Act in Licensing the Proposed BLEU Project" (ADAMS Accession No. ML043170659); "NRC Staff Response to the Legal and Evidentiary Presentation of the Sierra Club et al." (ADAMS Accession No. ML050210199); "Applicant's Written Presentation in Reponse to Intervenors' Written Legal and Evidentiary Presentation" (ADAMS Accession No. 050040331).

resolving the issues before it.

II. The Staff May Submit Evidence Explaining its Decisionmaking

Even if the Board were to apply some variant of the administrative record rule in this proceeding, that would have no bearing on the admissibility of the Staff's testimony. There are at least four widely recognized exceptions to the administrative record rule. The exceptions are where:

- (1) evidence suggests bad faith or improprieties may have influenced the decision maker;
- (2) it appears the agency has relied on documents or materials not included in the record;
- (3) the procedures utilized and factors considered by the decision maker require further explanation for effective review; and
- (4) it is necessary to explain technical terms or complex subject matter involved in the agency action.

*Miami Nation of Indians of Indiana, Inc. v. Babbitt*, 55 F. Supp. 2d 921, 923–24 (N.D. Ind. 1999) (citations and internal quotation marks omitted). In its Motion to Strike, the Intervenor neglects to mention exception (3), the exception applying most directly to the facts of the present case. This exception applies where, during the course of litigation, an agency offers information explaining the basis for its decisionmaking. The Ninth Circuit Court of Appeals in particular has emphasized the importance of allowing the parties to submit explanatory information bearing on the reasons for agency decisionmaking. Specifically, the Ninth Circuit has explained that "[a] satisfactory explanation of agency action is essential for adequate judicial review, because the focus of judicial review is . . . on whether the process employed by the agency to reach its decision took into consideration all the relevant factors." *ASARCO*, 616 F.2d at 1158-61. As a result, the Ninth Circuit has found that, in reviewing the adequacy of an agency decisionmaking, the administrative record "may be supplemented with testimony from the officials who participated in the decision explaining their action or by formal findings prepared by the agency explaining its decision." *Kunaknana v. Clark*, 742 F.2d 1145, 1152 (9th Cir. 1984). See also *Presidio Golf Club v. National Park Serv.*, 155 F.3d 1153, 1165 (9th Cir. 1998) (addressing

district court's reliance on affidavit prepared by agency during litigation and noting, "[the] affidavit explained the Park Service's prior analyses of the possibility of using the private clubhouse, and the district court found it helpful. The district court did not err in considering it." ).<sup>14</sup>

As explained below, the Staff's testimony in the present case is explanatory information intended to show how, when it was preparing the Pa'ina EA, the Staff took into account the factors identified by the Intervenor in the admitted portions of amended environmental contentions 3 and 4. The Staff's testimony comes from the same individuals who were responsible for preparing the EA. The Staff's testimony is fully consistent with Ninth Circuit precedent holding that the "record may be supplemented with testimony from the officials who participated in the decision explaining their action or by formal findings prepared by the agency explaining its decision." *Kunaknana*, 742 F.2d at 1152 (citing *ASARCO*, 616 F.2d at 1159–60). Although the Staff's testimony postdates the EA, that is only because it addresses the Intervenor's contentions, which themselves postdate the EA. The Staff is entitled to submit testimony explaining how it addressed the factors identified in the admitted portions of the Intervenor's contentions. See *Earth Island Institute v. United States Forest Serv.*, 442 F.3d

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<sup>14</sup> The Ninth Circuit's approach is based on *Overton Park*, where the Supreme Court held that "since the bare record may not disclose the factors that were considered or the Secretary [of Transportation]'s construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard." 401 U.S. at 420. The Ninth Circuit's approach is widely followed in the other circuit courts. See, e.g., *Harris v. United States*, 19 F.3d 1090, 1096 (5th Cir. 1994) (holding that "administrative officials who participated in the [agency] action may explain their actions"); *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1427–1428 (6th Cir. 1991) ("It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not."); *AT & T Information-Systems, Inc. v. General Services Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (holding that "the record may be supplemented to provide, for example, background information or evidence of whether all relevant factors were examined by an agency").

1147, 1163–64 (9<sup>th</sup> Cir. 2006) (allowing agency to introduce responsive declaration where plaintiff had introduced an extra-record declaration purportedly showing that agency failed to consider all relevant factors in making its decision).

III. The Staff's Testimony is Explanatory in Nature

In arguing that the Staff's testimony is "extra-record," the Intervenor suggests that the Staff is offering its testimony to supplement or cure defects in the EA. That is not the case. The Staff's intent in submitting this testimony is to show that the EA, in its present form, complies with NEPA and does not need to be supplemented. For example, under well-established NEPA case law, an agency need only provide "[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the proposed action; the agency need not discuss remote and highly speculative consequences. *Ground Zero Ctr. for Non-Violent Action v. United States Dep't of the Navy*, 383 F.3d 1082, 1090 (9th Cir. 2004) (citing *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974)); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026–27 (9th Cir. 1980). Here, the Staff's testimony is offered to show that numerous scenarios the Intervenor claims the Staff should have addressed in the EA—scenarios such as liquefaction, seismic focusing effects, and the pulverization of cobalt-60 sources—are not probable consequences of various accidents involving Pa'ina's irradiator; to the contrary, these scenarios are remote and speculative. There was, accordingly, no need for the Staff to address these scenarios in the Pa'ina EA. The Pa'ina EA cannot be found deficient for failing to address a factor that, under NEPA, the Staff did not have to consider. The Staff's testimony provides an explanation of why the Staff did not address such scenarios in the EA.

In the case of comment responses, the Staff's testimony likewise is not intended to cure defects in the EA, but to show why the EA is *not* defective. Even in the case of an EIS, the Staff need not formally respond in writing to each comment received on its draft document. Rather, the Staff's responses to comments can include:

- (i) Modification of alternatives, including the proposed action;
- (ii) Development and evaluation of alternatives not previously given serious consideration;
- (iii) Supplementation or modification of analyses;
- (iv) Factual corrections;
- (v) Explanation of why comments do not warrant further response, citing sources, authorities or reasons which support this conclusion.

10 C.F.R. § 51.91(a)(1). In its initial testimony, the Staff explained how it responded to comments that the Intervenor and other members of the public submitted on the Draft EA and Draft Topical Report. The Staff responded to those comments by, for example, supplementing its analyses in several parts of the Draft EA and Draft Topical Report, revising other parts of those documents, and verifying the data underlying its analyses. The Staff does not intend for its testimony to serve as belated comment responses, because it has *already responded* to the Intervenor's comments; the testimony merely explains how the Staff responded.

As a third example, the Staff's testimony regarding its evaluation of alternatives to the proposed action is not being offered to supplement the EA, but to show that the EA does not require supplementation. As explained in its testimony, the Staff evaluated four alternatives that are mentioned in the EA (the proposed action, the no-action alternative, and the alternative technologies of methyl bromide fumigation and heat immersion) and one alternative that was removed from consideration and not included in the EA (electron-beam irradiation). It is entirely appropriate for the Board to consider the Staff's testimony regarding its evaluation of alternatives because, if an alternative is not "reasonable," NEPA would not require the Staff to address that alternative in its EA.<sup>15</sup>

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<sup>15</sup> See, e.g., *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 55 (citing *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986) (per curiam), *cert. denied*, 484 U.S. 870 (1987)) (explaining that there is no need for an agency to analyze "the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective.").

IV. Even if the Staff's Testimony Included *Post Hoc* Rationalizations, There Would be No Basis for Striking this Testimony

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The Staff would reiterate that its testimony is intended to explain how the individuals preparing the Pa'ina EA took into account various factors. The Staff is not attempting to "rationalize" its conclusions in the Final EA and Topical Report, except in the sense that its witnesses point to analyses conducted *before* those documents were released; the Staff is not providing "*post hoc* rationalizations."

In any event, even if the Board were to find that the Staff's testimony amounts to *post hoc* rationalizations, there would be no basis for striking this testimony as irrelevant. One issue before the Board is whether the Staff complied with NEPA at the time it issued the Final EA for Pa'ina's irradiator. In the event the Board finds the Staff failed to comply with NEPA at the time the EA was issued, however, the Board may consider whether the Staff must supplement the EA. It would make no sense for the Board to direct the Staff to supplement the EA without considering all of the analyses the Staff has already prepared with respect to Pa'ina's irradiator.<sup>16</sup>

The Staff notes that decisions in which federal courts have declined to consider *post hoc* rationalizations for agency actions have no relevance in the present administrative proceeding. The rationale underlying the administrative record rule is that agencies are best-positioned to initially address evidentiary matters falling within their areas of expertise:

Confining the district court to the record compiled by the administrative agency

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<sup>16</sup> Rather than the administrative record rule, it is NEPA itself, as well as the Administrative Procedure Act's prohibition on arbitrary and capricious decisions, that would prevent the Board from finding the Staff's EA adequate based on *post hoc* rationalizations. It would *not* be arbitrary and capricious, however, to find that, based on analysis conducted after the Final EA and FONSI were issued, the Staff belatedly complied with NEPA. Indeed, in arguing that the Board should direct the Staff to supplement the EA or prepare an EIS, the Intervenor is arguing that the Staff should be required to belatedly comply with NEPA.

rests on practical considerations that deserve respect. Administrative agencies deal with technical questions, and it is imprudent for the generalist judges of the federal district courts and courts of appeals to consider testimonial and documentary evidence bearing on those questions unless the evidence has first been presented to and considered by the agency.

*Cronin v. United States Dep't of Agriculture*, 919 F.2d 439, 444 (7th Cir. 1990). Here, the issue of whether the Staff complied with NEPA when issuing Pa'ina's license is still before the NRC.

Unlike federal courts of general jurisdiction, the Board would have specialized expertise in evaluating the issues raised by any *post hoc* rationalizations. There is simply no basis for striking the Staff's testimony from an internal agency proceeding that was convened with the express purpose of addressing technical issues relating to the Staff's compliance with NEPA.<sup>17</sup>

V. 10 C.F.R. § 51.34 is Irrelevant to Resolving the Issues Raised by the Intervenor's Motion

Whether the Board has the authority to modify the Staff's EA and FONSI for Pa'ina's irradiator is argued at length by the Intervenor, but is completely immaterial. The Intervenor argues that, because 10 C.F.R. § 51.34(b) states that the Staff's FONSI in a Subpart G proceeding is "subject to modification" by the Commission or Board, applying the principle *inclusio unius est exclusio alterius*<sup>18</sup> leads to the conclusion that the Staff's FONSI in a non-Subpart G proceeding is *not* subject to modification by the Commission or Board. The

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<sup>17</sup> The Staff would further note that, even where an agency provides *post hoc* rationalizations for its NEPA finding during the course of litigation, the federal courts do not uniformly refuse to consider such rationalizations. Rather than considering the *post hoc* evidence as part of the record, the court may simply consider that evidence as a supplement to the record. See, e.g., *City of Waltham v. United States Postal Service*, 786 F. Supp. 105, 118 (D. Mass. 1992) ("Given the arguably *post hoc* quality of the Amended Assessment, issued after the FONSI was initially made and after [the plaintiff] filed suit, the Court ought adopt a more critical view of the Amended Assessment. . . . [W]hile the Amended Assessment will not be considered part of the administrative record, this Court, in the exercise of its discretion, will consider it, albeit critically, as a supplement to the administrative record, to evaluate better the record which led to the decision under review.").

<sup>18</sup> This principle holds that "when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v. Harris County*, 529 U.S. 576, 583 (2000).

Intervenor then argues that, because the Board cannot remedy any deficiencies in the EA, the Staff's "*post hoc* rationalizations" are irrelevant to the issues before the Board and should be stricken from the record.

The Staff submits that the Intervenor's interpretation of 10 C.F.R. § 51.34 is simply incorrect. As its title makes clear, 10 C.F.R. § 51.34 addresses the "*Preparation of [a] finding of no significant impact*" (emphasis added). This regulation says nothing about the actions the Commission or Board may take with respect to a FONSI that has already been prepared. The Staff notes that the NRC's regulations addressing "NEPA Procedure and Administrative Action" at 10 C.F.R. §§ 51.100–51.125 do not place any restrictions on the Board's ability to modify the Staff's FONSI based on evidence submitted in connection with a hearing. The Staff's position is that the Board could take such action consistent with the general authority invested in the Board by 10 C.F.R. §§ 2.319(r) and 2.321(c).

Such action would be consistent with Commission precedent holding that, in a proceeding involving issues arising under NEPA, the Board's discussion of the disputed issues "adds necessary additional details and constitutes a supplement to the [NEPA document's] review."<sup>19</sup> More definitively, today in *Diablo Canyon*, a Subpart K proceeding, the Commission affirmed longstanding NRC practice to incorporate the adjudicatory record and adjudicatory decision, along with the EA, into the record of decision, further indicating that the Intervenor's limiting interpretation of 10 C.F.R. § 51.34 is incorrect.<sup>20</sup> The Commission concluded that not just the EA, but also the adjudicatory record and its own supervisory review "are more than

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<sup>19</sup> *Dominion Nuclear North Anna, LLC* (North Anna ESP Site), CLI-07-27, 66 NRC 215, 230 (2007).

<sup>20</sup> *Diablo Canyon*, CLI-08-26, 68 NRC \_\_\_ (slip op. at 23) *Id.* (slip op. at 23) (citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 705-07 (1985); *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 53 (2001); *Allied-General Nuclear Services* (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 680 (1975).

sufficient to satisfy NEPA obligations.” *Id.* at 22-23.

CONCLUSION

For the foregoing reasons, the Board should deny the Intervenor’s motion to strike the Staff’s and Pa’ina’s testimony on the admitted segments in amended environmental contentions 3 and 4.

Respectfully submitted,

***/RA/mlb***

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Dated at Rockville, Maryland  
This 23<sup>rd</sup> day of October, 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
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Material License Application	)	ASLBP No. 06-843-01-ML

CERTIFICATE OF SERVICE

I hereby certify that the "NRC STAFF'S OPPOSITION TO INTERVENOR'S MOTION TO STRIKE" has been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal mail system, as indicated by an asterisk (\*); and by electronic mail as indicated by a double asterisk (\*\*), on this 23rd day of October, 2008.

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