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DOCKETED  
USNRC

October 17, 2008 (9:00am)

October 16, 2008

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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

INTERVENOR CONCERNED CITIZENS OF HONOLULU'S MOTION  
TO STRIKE TESTIMONY SUBMITTED IN SUPPORT OF  
NRC STAFF'S AND PA'INA HAWAII, LLC'S STATEMENTS OF POSITION

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, intervenor Concerned Citizens of Honolulu respectfully asks the Board to exercise its authority under 10 C.F.R. § 2.333(b) to strike as irrelevant testimony the Nuclear Regulatory Commission ("NRC") Staff and applicant Pa'ina Hawaii, LLC submitted in support of their statements of position. As discussed below, the Staff improperly seeks to introduce post hoc testimony from former NRC staff member Matthew Blevins and various personnel from the Center for Nuclear Waste Regulatory Analyses ("CNWRA"), which is irrelevant to resolving the parties' disputes regarding the environmental assessment ("EA") for Pa'ina's proposed irradiator. See infra Parts III & IV. The Board should also strike the testimony of Pa'ina's Michael Kohn, which both constitutes improper rebuttal testimony and is irrelevant to assessing whether the Staff violated the National Environmental Policy Act ("NEPA") when it failed to analyze in its EA the electron-beam irradiator alternative. See infra Part V.

TEMPLATE - SECY-041

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## II. BACKGROUND<sup>1</sup>

On December 21, 2007, the Board issued an order admitting portions of Concerned Citizens' amended environmental contention 3, which "asserts that the final EA fails to take the NEPA-mandated 'hard look' at the potential environmental impacts of [Pa'ina's] proposed irradiator," as well as amended environmental contention 4, which "asserts that, contrary to the requirements of section 102(2)(E) of NEPA, the Staff's final EA failed to consider a range of alternatives reasonably related to the purposes of the project and that 'might be pursued with less environmental harm.'" 12/21/07 Board Order at 6, 23 (citations and footnote omitted). On March 4, 2008, the Board issued a further order admitting an additional portion of amended environmental contention 3 regarding the Staff's failure "'to disclose data underlying [its] terrorism analysis' of the proposed irradiator in the final EA and its Appendices" in violation of "the NEPA-mandated 'hard look' standard." 3/4/08 Board Order at 5 (footnote omitted).

On July 17, 2008, the Board issued a scheduling order in which it directed the parties to submit, within forty days, "written statements of position and written testimony with supporting affidavits on the admitted segments of amended environmental contentions 3 and 4, pursuant to 10 C.F.R. § 2.1207(a)(1)." 7/17/08 Board Order at 2. The order further directed the parties to submit rebuttal statements of position no later than twenty days after service of the initial statements. *Id.* at 5.

On August 26, 2008, all parties submitted their initial statements of position. The Staff's submittal included written testimony from six witnesses, including former Office of Nuclear Materials Safety and Safeguards senior project manager Matthew Blevins and CNWRA

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<sup>1</sup> The facts of this case have been set forth in detail several times. Accordingly, Concerned Citizens will focus here on only those facts most relevant to this motion.

personnel James Durham, Amitava Ghosh, John Stamatakos and Kaushik Das. As discussed below, these witnesses' testimony consisted primarily of information and analysis not previously disclosed in the EA or otherwise made publicly available during the comment period on the EA.

On September 15, 2008, all parties submitted their rebuttal statements of position.

Pa'ina's submittal included testimony from Michael Kohn, managing member of Pa'ina. As discussed below, Mr. Kohn's testimony does not rebut any factual statements made in any other party's initial submittal. Moreover, it includes information the Staff neither cited in its EA nor has otherwise indicated it relied upon in preparing the EA.

In accordance with 10 C.F.R. § 2.323(b), on October 8, 2008, counsel for Concerned Citizens contacted counsel for the Staff and Pa'ina to explain why Concerned Citizens believed the aforementioned testimony should be stricken. Henkin Declaration ¶ 3. Counsel for both the Staff and Pa'ina stated they would not agree to strike any of the testimony they had submitted and would oppose any motion to strike that testimony. *Id.*

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

It is well-settled in the Ninth Circuit that the text of the EA itself "is where the [Staff's] defense of its position must be found." Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9<sup>th</sup> Cir.1999). In this case, the Staff seeks to defend its EA's adequacy based on testimony that presents, for the first time, information and analyses that are not only absent from the EA, but were neither referenced in the EA nor present in the hearing file at the time the Staff finalized the EA. Under binding Supreme Court precedent, such "litigation affidavits and 'post hoc' rationalizations" are generally irrelevant to review of an agency's compliance with NEPA. Presidio Golf Club v. National Park Service, 155 F.3d 1153, 1164 (9<sup>th</sup> Cir. 1998) (citing

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419 (1971)). Since the testimony the Staff submitted is irrelevant, it should be stricken. See 10 C.F.R. § 2.333(b).

A. Post-hoc Testimony Cannot Cure The Staff's Failure To Analyze In The EA Potential Impacts And Reasonable Alternatives.

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In conferring with Concerned Citizens regarding this motion, the Staff's counsel argued its post hoc testimony is proper because it explains why the analysis presented in the EA is adequate. It is true the Ninth Circuit recognizes a limited exception to the general prohibition on considering litigation affidavits where an agency seeks to explain "what the EA refers to when it uses [various] term[s]." Presidio Golf Club, 155 F.3d at 1164. Thus, in Presidio Golf Club, the court held it was permissible for the district court to consider a litigation affidavit that described what the National Park Service's EA meant when it referred to "previous analysis" that justified the Service's decision a project alternative did not warrant detailed discussion. Id. at 1161; see also id. at 1164-65.

In this case, however, much of the testimony the Staff seeks to introduce does not provide additional explanation about terms or other matters that were presented in the EA. Rather, the Staff seeks to introduce voluminous testimony addressing issues that were never mentioned in the EA in the first place. For example, Mr. Blevins' testimony describes his "research into the electron-beam irradiator" and his reasons for concluding it "would not be a feasible alternative." See Blevins Testimony at A.31. Unlike Presidio Golf Club, where the agency listed the alternative in question among the "Alternatives Considered but Rejected" and "[s]everal reasons were given [in the EA] for rejecting that alternative," the final EA for Pa'ina's irradiator nowhere mentions the Staff ever considered the electron-beam irradiator as an alternative. Presidio Golf Club, 155 F.3d at 1161. As far as the public knew, that alternative simply did not exist.

The proffered testimony addresses many other matters on which the EA is completely silent, including:

- The potential impacts associated with an eight-foot loss of shielding water from the irradiator pool (Blevins Testimony at A.21, A.27; CNWRA Testimony at A.20);
- Whether an explosion associated with an aviation accident could lead to loss of more than eight feet of vital shielding water (CNWRA Testimony at A.22, A.25);
- The potential impacts associated with “the worst case scenario of all water being removed from the pool, such that the plenum is completely exposed to the air” (id.);
- Whether the impact from an airplane accident could pulverize the Co-60 sources, contaminating the pool water (id. at A.23-A.24);
- The potential impacts to emergency responders in the event an airplane crash destroys all monitoring equipment or incapacitates irradiator personnel (id. at A.25);
- The effects on the irradiator pool of increases in buoyancy forces due to hurricane surge or tsunami inundation (id. at A.31, A.37-A.38);
- The unique features of Ke‘ehi Lagoon that might increase the potential for tsunami-related impacts (id. at A.32);
- The potential focusing effects of seismic energy on O‘ahu (id. at A.33);
- The threats posed by liquefaction (id. at A.34); and
- The potential impacts associated with major flooding (id. at A.37).

The Staff’s post hoc testimony regarding these matters does not seek to “explain[] the [Staff’s] prior analyses.” Presidio Golf Club, 155 F.3d at 1165. Rather, it seeks to introduce entirely new information and analyses to make up for the EA’s complete failure to address these topics. Since “the [Staff’s] defense of its position must be found” in the text of the EA itself, the proffered post hoc testimony is irrelevant to resolving the pending environmental contentions. Blue Mountains Biodiversity Project, 161 F.3d at 1214.

In considering Concerned Citizens’ motion, the Board should bear in mind that allowing the Staff to attempt to cure the EA’s defects 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 (9<sup>th</sup> 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. v. Thomas, 137 F.3d 1146, 1150 (9<sup>th</sup> Cir. 1998) (“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 analyses hermetically sealed until forced to reveal them in the course of this proceeding makes a mockery of NEPA’s “informational role.” Department of Transportation v. Public Citizen, 541 U.S. 752, 768 (2004). 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)).

B. Post-hoc Testimony Cannot Cure The Staff's Failure To Disclose During The Public Comment Period The Bases For The EA's Conclusions.

Other portions of the proffered testimony address topics the EA mentions, but only briefly, with no data or analysis to back up the Staff's "generalized conclusory statements that the effects are not significant." Klamath-Siskiyou Wilderness Center v. Bureau of Land Management, 387 F.3d 989, 996 (9<sup>th</sup> Cir. 2004). Implicitly recognizing that its failure to give "the public ... the underlying environmental data from which [its experts] derived [their] opinion[s]" renders its EA inadequate, the Staff tries to remedy the deficiency by belatedly providing that information in the form of its hearing testimony. Idaho Sporting Cong., 137 F.3d at 1150. Thus, Mr. Blevins' testimony presents, for the first time, discussion and analysis to explain how the Staff arrived at the conclusory statements in the EA regarding:

- Occupational exposure under normal operating conditions (Blevins Testimony at A.12 to A.13);
- Expected dose rate outside the irradiator under normal operating conditions (id. at A.14);
- The likelihood a member of the public could receive more than the public limit (id. at A.15);
- Transportation impacts from normal operations (id. at A.16);<sup>2</sup>
- The increased dose rate from a loss of six feet of shielding water and the likelihood that such a loss of shielding water would have a significant environmental effect on the area around the proposed facility (Blevins Testimony at A.19-A.20);
- Worker doses in the event of a loss of shielding water (id. at A.22 to A.23);

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<sup>2</sup> Notably, Mr. Blevins states the Staff looked at only "the dose rate from normal operations on a route between the Port of Honolulu and Pa'ina's facility" (a distance of only a few miles), a significant fact the EA failed to disclose. Id.; see also id. at A.29; EA at 8. A concerned member of the public reading the EA would have no way to know the Staff's conclusory statement that "the proposed irradiator would have no significant impacts from transportation," EA at 8, was "not intend[ed] to comprehensively address issues relating to the transportation of sources to Pa'ina's irradiator." Blevins Testimony at A.16.

- Debris around the irradiator pool preventing inadvertent access to areas of elevated radiation following a natural disaster or aviation accident (id. at A.24);
- The likelihood of accidents involving exposure of workers to lethal doses (id. at A.25); and
- Potential impacts on tourism (id. at A.26).<sup>3</sup>

The Staff similarly submitted testimony from various CNWRA staff who prepared the topical report that formed the basis for many of the EA's conclusions. See, e.g., EA at 9-11. As with Mr. Blevins' testimony, the testimony from CNWRA staff includes discussions and analyses that were not disclosed in the EA or otherwise made available to the public during the NEPA process, including:

- Calculations comparing the crash rates using both the Department of Energy methodology and NUREG-0800 (CNWRA Testimony at A.15);
- Examination of National Transportation Safety Board data regarding aviation-related fatalities involving Honolulu International Airport (id.);
- Analysis of the variation of operations (takeoffs and landings) at Honolulu International Airport using information provided by the State of Hawai'i Department of Transportation (id.);
- Critiques of analyses performed by Concerned Citizens' expert Marvin Resnikoff regarding the likelihood of an aviation accident involving the proposed irradiator (id. at A.15-A.16);
- Discussion of the assumptions underlying the CNWRA staff's conclusion that sources would not be damaged in the event of an aviation accident (id. at A.19);<sup>4</sup> and
- Calculations supporting the CNWRA staff's conclusion that a tsunami could not lift a source assembly from the irradiator pool (id. at A.36).

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<sup>3</sup> Should the Board decline to strike as irrelevant Mr. Blevins' testimony regarding tourism-related impacts, Concerned Citizens reserves its right to challenge Mr. Blevins' competence to testify regarding such matters.

<sup>4</sup> The testimony compounds the EA's flaws, failing to provide any calculations to back up the CNWRA staff's conclusory statements regarding the likelihood a source would be breached.



The Staff submitted the foregoing testimony to demonstrate that, in preparing the EA, it considered comments from Concerned Citizens' experts and performed analyses that purportedly support the EA's conclusory statements that significant impacts are unlikely. See, generally 8/26/08 Staff Initial Statement. Whether the Staff performed the work described in the testimony is, however, irrelevant to resolving the pending environmental contentions, which challenge the Staff's failure to disclose this information during the public comment period and in the final EA. Ninth Circuit case law is clear the Staff was obliged to respond to comments, including "adverse opinions held by respected scientists" like the experts Concerned Citizens retained, in the final EA itself, not in internal analyses hidden from public view. Western Watersheds Project v. Bureau of Land Management, 552 F. Supp. 2d 1113, 1129 (D. Nev. 2008); see also Foundation for N. Am. Wild Sheep v. U.S. Dep't of Ag., 681 F.2d 1172, 1179 (9<sup>th</sup> Cir. 1982); Oregon Natural Resources Council Action v. U.S. Forest Service, 445 F. Supp. 2d 1211, 1229 (D. Or. 2006); Sierra Nevada Forest Protection Campaign v. Weingardt, 376 F. Supp. 2d 984, 991 (E.D. Cal. 2005). Moreover, because "public scrutiny [is] essential" to achieving NEPA's goals, "NEPA requires that the public receive the underlying environmental data" that allegedly supports the Staff's conclusions. Klamath-Siskiyou Wilderness Center, 387 F.3d at 996 (quoting 40 C.F.R. § 1500.1(b) and Idaho Sporting Cong., 137 F.3d at 1150).

The Staff cannot cure the defects alleged in Concerned Citizens' amended environmental contentions by disclosing information long after the public comment period is closed and the EA finalized. Since testimony regarding analyses the Staff and CNWRA allegedly performed behind closed doors is irrelevant to resolving the pending disputes about the EA's deficiencies, it should be stricken. See 10 C.F.R. § 2:333(b).

#### IV. THE BOARD LACKS AUTHORITY TO MODIFY THE EA TO REMEDY ITS DEFICIENCIES

In conferring with Concerned Citizens regarding this motion, the Staff's counsel suggested the Board might not be obliged to apply Ninth Circuit case law limiting the scope of review since questions regarding the EA's adequacy remain within the NRC until the Board and, if appealed, the Commission render their decisions. The Staff's argument recalls the claim in its initial statement that:

the reviewing Board may look beyond the face of the NEPA document at issue to the administrative record to determine whether the "Staff's underlying review was sufficiently detailed to qualify as 'reasonable' and a 'hard look,' under NEPA – even if the Staff's description of that review in the [NEPA document] was not."

8/26/08 Staff Initial Statement at 21 (quoting Dominion Nuclear North Anna, LLC (North Anna ESP Site), CLI-07-27, 66 NRC 215, 230 (2007)). The Staff's reliance on North Anna to argue that "[t]he Board's discussion of the disputed issues" can "add[] necessary additional details" to cure defects in the EA is misplaced. Id. (quoting North Anna, CLI-07-27, 66 NRC at 230).

Initially, even if the Board were otherwise justified in looking beyond the EA to determine whether the Staff took the requisite "hard look" at potential impacts and reasonable alternatives, North Anna states that the scope of the Board's review is limited to "the administrative record." CLI-07-27, 66 NRC at 230. Here, the Staff seeks to introduce testimony that presents information and analyses found nowhere in the record that was before the Staff at the time it finalized the EA.

Furthermore, the Staff ignores that, while the Commission's regulations empower the Board and Commission to determine whether the Staff complied with NEPA, they do not grant either reviewing body the authority to modify the EA the Staff prepared for Pa'ina's proposed irradiator upon a finding the Staff violated NEPA. Unlike this proceeding, which is being

conducted pursuant to the subpart L hearing regulations, North Anna involved a subpart G proceeding. See 68 Fed. Reg. 67,489, 67,489 (Dec. 2, 2003) (“The Board will conduct the hearing in accordance with subpart G of 10 CFR part 2”). The Commission’s regulations expressly provide for the Board to modify the Staff’s environmental review – whether an EA or an environmental impact statement – “[w]hen a hearing is held on the proposed action under the regulations in subpart G.” 10 C.F.R. § 51.102(c) (emphasis added); see also id. § 51.34(b) (finding of no significant impact (“FONSI”) “subject to modification” when hearing held “under the regulations in subpart G”).<sup>5</sup> In contrast, in this subpart L proceeding, the regulations expressly task the Staff – and only the Staff – with finalizing the EA and preparing the FONSI. See id. §§ 51.31(a), 51.34(a).

The fact the Commission’s regulations expressly provide for modification of the Staff’s NEPA analysis following hearings in other types of proceedings shows the Commission knows how to authorize the Board to modify the Staff’s environmental review when the Commission deems it appropriate and desirable, confirming that Board modification of the Pa’ina EA based on post hoc testimony would be improper. “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 (9<sup>th</sup> Cir. 1997); see also Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1313 (9<sup>th</sup> 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 subpart L proceedings like this, the regulations provide for the Staff to prepare

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<sup>5</sup> The regulations also authorize the Board to modify the Staff’s environmental analysis in proceedings involving the proposed issuance of a manufacturing license or amendment and “when the action can only be taken by the Commissioners acting as a collegial body,” neither of which is the case here. Id. §§ 51.34(b), 51.102(c); see also id. § 51.31(c)(4).

the final EA and FONSI; the Board does not modify them. 10 C.F.R. §§ 51.31(a), 51.34(a).

Rather, should the Board conclude the EA fails to satisfy NEPA, the proper remedy would be to instruct the Staff to prepare a revised document that resolves the deficiencies, precisely the remedy a reviewing court would provide. See, e.g., Blue Mountains Biodiversity Project, 161 F.3d at 1216 (remanding to agency “for further proceedings consistent with this opinion”); National Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722, 739-40 (9<sup>th</sup> Cir. 2001) (same).

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, 241 F.3d at 732 (same). As discussed above, requiring the Staff fully to disclose its analyses in the EA and to make the underlying data available to the public is vital to carrying out Congress’s intent in enacting NEPA. See Klamath-Siskiyou Wilderness Center, 387 F.3d at 996.

In response to the foregoing arguments, the Staff’s counsel asserted that, since 10 C.F.R. § 51.104(b) authorizes parties in proceedings challenging EAs to “offer evidence on the aspects of the proposed action within the scope of NEPA,” it is free to submit its post hoc testimony. The Staff ignores that 10 C.F.R. § 51.104(b) applies to all proceedings in which an EA’s adequacy is at issue, including subpart G proceedings, where the Board has the express authority to modify the Staff’s environmental analysis, and this subpart L proceeding, where it does not.

Far from opening the door to whatever evidence the Staff chooses to introduce, 10 C.F.R. § 51.104(b) specifies that a party submitting evidence must do so “in accordance with the provisions of part 2 of this chapter applicable to that proceeding.” (Emphasis added). As discussed above, in this subpart L proceeding, the Board cannot remedy deficiencies in the EA, and, accordingly, the scope of admissible evidence is generally limited to the EA and the record in existence at the time the Staff finalized the EA.

Nothing in 10 C.F.R. § 51.104(b) trumps 10 C.F.R. § 2.333(b), which authorizes the Board to determine whether proffered evidence is relevant to resolving the disputes in the proceeding before it and to “strike ... irrelevant evidence.” Since the testimony the Staff submitted has no bearing on the parties’ disputes regarding the EA’s defects, Concerned Citizens respectfully submits it should be stricken.

#### V. THE BOARD SHOULD STRIKE MICHAEL KOHN’S TESTIMONY

In the first paragraph of his testimony, Pa‘ina “managing member” Michael Kohn asserts he is “responding to the NRC Staff’s review and analysis of e-beam technology as set forth in its Final Environmental Assessment for the Pa‘ina Hawaii, LLC Irradiator ... and the NRC Staff’s testimony transmitted to Pa‘ina Hawaii, LLC on August 26, 2008.” Kohn Testimony at Answer.1. Concerned Citizens is perplexed by Mr. Kohn’s claim he is responding to the EA’s analysis of electron-beam irradiation since, as this Board previously observed, “the Staff in the final EA neither mentioned the electron beam technology nor explained why it did not consider that alternative.” 12/21/07 Board Order at 30 n.106. As for responding to the Staff’s testimony, at no point does Mr. Kohn identify a single statement made by Mr. Blevins (the only Staff witness offering testimony on electron-beam technology) with which Mr. Kohn takes issue.

Rather, the sole purpose for Mr. Kohn's testimony is to bolster the Staff's argument the electron-beam technology is not a feasible alternative.

Pa'ina's submittal of testimony in support of the Staff's analysis at the rebuttal stage of briefing is improper. In its July 17, 2008 scheduling order, the Board specified that rebuttals must "identif[y] the legal and factual faults in the other parties' positions." 7/17/08 Board Order at 5 (emphasis added). Rather than criticize Mr. Blevins' analysis, Mr. Kohn offers only a hearty "amen." The Board should strike Mr. Kohn's testimony as an untimely attempt to "advance ... new affirmative claims or arguments that were not included in the party's initial written statement." Id.<sup>6</sup>

Even if were proper to submit Mr. Kohn's testimony in Pa'ina's rebuttal, the Board should still strike it as irrelevant. When it admitted amended environmental contention 4, the Board held "the adequacy of the final EA cannot rest upon a rationale now supplied by the Applicant." 12/21/07 Board Order at 30 n.106. The Board's prior holding is consistent with well-established, binding precedent that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983). Since the final EA does not mention or incorporate by reference any of the information set forth in Mr. Kohn's testimony, that testimony cannot be used to compensate for the deficiencies in the Staff's alternatives analysis.

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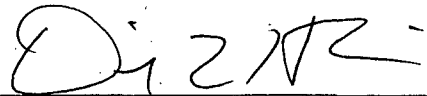
<sup>6</sup> Perhaps subconsciously conceding this point, Pa'ina titled Mr. Kohn's testimony "Written Direct Testimony."

VI. CONCLUSION

For the foregoing reasons, Concerned Citizens respectfully asks the Board to strike the testimony of Matthew Blevins, James Durham, Amitava Ghosh, John Stamatakos, Kaushik Das and Michael Kohn.

Dated at Honolulu, Hawai'i, October 16, 2008.

Respectfully submitted,



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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	)	
_____	)	

DECLARATION OF DAVID L. HENKIN

I, David L. Henkin, declare:

1. I am an attorney at law, duly licensed to practice before all courts of the State of Hawai'i, the U.S. District Court for the District of Hawai'i, the U.S. Court of Appeals for the 9<sup>th</sup> Circuit, and the U.S. Supreme Court. I am currently the sole attorney representing intervenor Concerned Citizens of Honolulu.

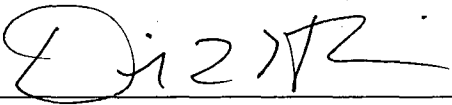
2. I make this declaration in support of Concerned Citizens' Motion to Strike Testimony Submitted in Support of NRC Staff's and Pa'ina Hawaii, LLC's Statements of Position. This declaration is based on my personal knowledge, and I am competent to testify about the matters contained herein.

3. On October 8, 2008, I contacted Fred Paul Benco, counsel for Pa'ina Hawaii, LLC, and Michael Clark, counsel for the Staff, to discuss Concerned Citizens' objections to the post hoc testimony the Staff and Pa'ina had submitted in support of their statements of position and to seek their agreement to have that testimony stricken. Both Mr. Benco and Mr. Clark stated they would not agree to strike any of the testimony they had submitted and would oppose any motion to strike that testimony.



I declare under penalty of perjury that I have read the foregoing declaration and know the contents thereof to be true of my own knowledge.

Dated at Honolulu, Hawai'i, October 16, 2008.

  
\_\_\_\_\_  
DAVID L. HENKIN

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 16, 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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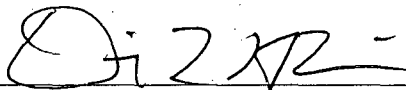
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Dated at Honolulu, Hawai'i, October 16, 2008.



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**EARTHJUSTICE**

*Because the earth needs a good lawyer*

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII  
INTERNATIONAL JUNEAU, ALASKA NEW YORK, NEW YORK OAKLAND, CALIFORNIA  
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: October 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	10/16/08	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

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

- For Filing.
- For Recordation.
- For Signature & Return.
- For Necessary Action.
- For Signature & Forwarding.

REMARKS: