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March 4, 2009

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 Response To Intervenor Concerned Citizens Of Honolulu's Supplemental Statement of Position (filed Feb. 2, 2009)

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 037

DS03

March 4, 2009

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-ML
	)	
Materials License Application	)	ASLBP No. 06-843-01-ML
	)	

LICENSEE PA'INA HAWAII, LLC'S RESPONSE TO INTERVENOR CONCERNED CITIZENS OF HONOLULU'S SUPPLEMENTAL STATEMENT OF POSITION (filed February 2, 2009)

CERTIFICATE OF SERVICE

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LICENSEE PA'INA HAWAII, LLC'S RESPONSE TO INTERVENOR CONCERNED CITIZENS OF HONOLULU'S SUPPLEMENTAL STATEMENT OF POSITION (filed February 2, 2009)

I. INTRODUCTION.

Now comes Licensee PA'INA HAWAII, LLC ("Pa'ina") and responds to the February 2, 2009 INTERVENOR CONCERNED CITIZENS OF HONOLULU'S SUPPLEMENTAL STATEMENT OF POSITION ("Supplemental Statement").

In accord with its prior submittals, Intervenor's arguments in its Supplemental Statement are a mish-mash of confusion, contradiction and circumvention.

As such, this Board should reject Intervenor's indecipherable "Statement of Position," and the mish-mash of arguments made therein.

A. THIS BOARD'S AFFORDING TO INTERVENOR A "SECOND BITE" OR "THIRD BITE" OF THE APPLE HAS CAUSED SIGNIFICANT DELAY AND IS HIGHLY PREJUDICIAL TO LICENSEE.

The Commission held in Hydro Resources, Inc., CLI-01-04 (1/31/01) that,

> "[A]a a matter of sound case management, we cannot abide a situation where a license is issued but contested issues lie fallow without resolution for years . . . Not only our commitment to expeditious decision-making but also our commitment to treat all parties fairly causes us to set aside the Presiding Officer's abeyance decision."

Although the instant case is different in nature and procedures from the Hydro Resources case, Licensee Pa'ina Hawaii, LLC has nevertheless likewise been very prejudiced by the further, unexpected delays ordered by this Board.

Pursuant to this Board's July 17, 2008 Scheduling Order, the parties in this case were required to submit detailed "Statements of Position" regarding the Staff's August 17, 2007 Environmental Assessment, as well as testimony and other documents.

INTERVENOR filed its 30-page position statement on August 26, 2008 (with 20 attachments); INTERVENOR later filed its 13-page rebuttal to Licensee Pa'ina's position statement on September 15, 2008; and INTERVENOR filed its 32-page rebuttal to the Staff's position statement (with 5 additional attachments) on September 16, 2008.

Thus, as of September 16, 2008, INTERVENOR had already filed 75 pages explaining its "position." This, after over three (3) years of intensive writing about this otherwise

"categorically excluded" irradiator proposed to be built in a properly-zoned district characterized by industrial and commercial buildings.

Apparently, this Board believed that INTERVENOR had not yet been afforded an adequate opportunity to set forth its "position" for the hearing. INTERVENOR's position statements were supposed to be preparatory to the hearing which had been tentatively scheduled (and eagerly awaited by Licensee) for December 8-12, 2008.

Thereafter, the Board moved the hearing date to some time between January 1, 2009 to March 2009.

Thereafter, on December 4, 2008, this Board unexpectedly granted INTERVENOR yet another sixty (60) days to file yet a further "a full factual and substantive written statement of position rebutting and responding to the presentations of the Staff and the Applicant." In the same December 4th Order, this Board continued the hearing date herein to sometime between May 1, 2009 and July 31, 2009.

By means of this Board's February 2, 2009 Order, the Board "released" the hearing date, meaning that there is no longer any scheduled hearing date. The upshot of this Board's February 2, 2009 Order is to potentially extend the hearing date to begin more than 700 days after the NRC's

issuance of the EA in August 2007, or more than four times the 175-day period set forth in the NRC's Model Guidelines.

On February 2, 2009 INTERVENOR filed a 76-page Supplemental Statement of Position, not including an additional 9 attachments and 2 Declarations. The 76-page supplemental position statement brings INTERVENOR's total text submittals to 154 pages relating to Pa'ina's otherwise "categorically excluded" irradiator.

As a matter of policy and governance, this Board's December 4th Order gave the INTERVENOR an unwarranted 2nd or even 3rd "bite of the apple," the February 2, 2009 Order threatens to completely undermine the eminently reasonable Model Guidelines regarding timelines, and the February 2, 2009 Order seriously prejudices Licensee because of the further lengthy delays.

B. INTERVENOR'S LATEST LEGAL ARGUMENTS ARE CHARACTERIZED BY CIRCUMVENTION, CONTRADICTION, CONFUSION AND CIRCULAR ARGUMENTS; THE ARGUMENTS SEEK TO ADVOCATE EVERY POSITION, MAKING A RESPONSE VERY DIFFICULT; AND ALL OF THE ARGUMENTS OUGHT TO BE DISREGARDED OR STRICKEN.

The law as presented by INTERVENOR in its February 2, 2009 tome is unusually opaque. INTERVENOR's few discernible arguments are virtually meaningless. This is because INTERVENOR's legal arguments are chiefly

characterized by circumvention, contradiction, confusion and circular reasoning.

1. Circumvention Of Applicable Ninth Circuit And Commission Decisions.

The current stage of these proceedings were initiated by this Board's July 17, 2008 Scheduling Order. In that Order, this Board expressly directed the parties to draft their position statements (or trial briefs) in accord with, primarily, "Supreme Court and Ninth Circuit case law." This Board emphasized that the Ninth Circuit case law was particularly important because it governs Hawaii, where Licensee proposes to install the underwater irradiator:

> "Supreme Court and Ninth Circuit case law is authoritative in this proceeding because the Pa'ina Hawaii, LLC proposed irradiator is located in Hawaii, which is located in the Ninth Circuit." (Scheduling Order, July 17, 2008, footnote 7)

On August 26, 2008, in its Trial Brief on the Law, Licensee Pa'ina followed this Board's directive, and cited as the proper "standard of review" of an agency's review of NEPA documents (otherwise known as a "hard look") those standards established in the then-recent, en banc 9th Circuit decision of The Lands Council v. McNair, __ F. 3d __, 2008 U.S. App. LEXIS 13998, 2008 WL 264001 (9th Cir. July 2, 2008) In McNair, the Ninth Circuit held that, in the context of "hard look" reviews of NEPA documents,

federal courts should be "highly deferential" to the technical expertise and conclusions of federal agencies. Decisions of those agencies would be reviewed under the "arbitrary and capricious" standards:

"Review under the arbitrary and capricious standard 'is narrow, and [we do] not substitute [our] judgment for that of the agency.'" [Citations omitted] Rather, we will reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, 'entirely failed to consider an important aspect of the problem,' or offered an explanation 'that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.' (Citations omitted] Thus . . . whether Lands Council was likely to prevail on the merits of its NEPA and NFMA claims necessarily incorporates the APA's arbitrary and capricious standard." 531 F.3d 981 at

In the McNair decision, the en banc Ninth Circuit proceeded to overturn a number of its own prior leading environmental decisions.

Notably, however, in its so-called "Rebuttal Memorandum" filed September 15, 2008, INTERVENOR utterly failed to address, distinguish or even mention the Ninth Circuit's McNair decision, or its clearly-stated standards for reviewing an agency's NEPA documents.[1] By its

[1]Three-judge panels of the Ninth Circuit have clearly taken notice of the McNair decision. Recently, a three-judge panel in the 9th Circuit affirmed an agency action under challenge from environmentalists: "As we turn to WildWest's substantive claims, we are reminded by this court's recent en banc decision in The Lands Council v. McNair, 537 P. 3d 981 (9th Cir. 2008)(en banc), that we do not 'act as a panel of scientists . . . chooses among scientific studies . . . and orders the agency to explain every possible scientific uncertainty.'" WildWest Institute v. Bull, 547 F. 3d 1162, 1171 (9th Cir. 2008)

At least one other federal court has expressly noted that "The opinion in McNair is plainly one of the most significant environmental decisions issued by the Court of Appeals for the Ninth Circuit in recent years." Sierra Club v. Wagner, 2008 DNH 145; 2008 U.S. Dist. LEXIS 63470, at 10 (2008)

conspicuous silence, INTERVENOR apparently conceded the Ninth Circuit "standards of review" set forth in McNair.

Now, having been afforded a "second chance" to set forth the relevant Ninth Circuit standards in its Supplemental Statement, INTERVENOR again fails to respond a second time. Thus, INTERVENOR dismisses the McNair decision with the following rationale:

> "Pa'ina devotes its entire memorandum to faulting Concerned Citizens for failing to mention the Ninth Circuit's decision in The Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008)(en banc), arguing that the case 'announced a sea change' in the manner by which [the Ninth Circuit] would review agency decisions' . . . Pa'ina ignores that this proceeding involves Board review of the Staff's actions, not review of the NRC's actions by an Article III court. Commission case law, not the Ninth Circuit's, defines the standard the Board applies in reviewing the Staff's compliance with NEPA."

By its casual dismissal of the McNair decision, INTERVENOR simultaneously circumvents McNair, and also circumvents this Board's December 4, 2008 Order (which incorporated this Board's July 17, 2008 Order) requesting applicable Ninth Circuit standards of review.

In short, this Board blessed INTERVENOR with a rare second or even third chance to cite the correct "standard of review" of agency actions within the 9th Circuit by means of its Supplemental Statement. INTERVENOR failed to cite

any recent governing Ninth Circuit decision, but instead simply responded that because the Ninth Circuit is an Article III court, it (INTERVENOR) need not cite any 9th Circuit standards for reviewing agency actions.

Notably, even the two Commission decisions cited by INTERVENOR (at Supplemental Position, p. 10) do not set forth any discernible "standard of review" of Staff environmental assessments. Instead, INTERVENOR simply excerpted phrases from the two Commission decisions, none of which actually enunciate the Commission's "standards of review" of Staff EA's. A cynic could interpret INTERVENOR's citation of the two Commission decisions as additional circumvention.

Finally, INTERVENOR ignored and/or failed to cite the most recent, relevant decision discussing the Commission's standards of reviewing a Staff's environmental assessment within an adjudicatory processing such as this. On October 23, 2008, the Commission reiterated its parameters for reviewing Staff EA's:

> "Under NEPA, an environmental assessment, with its accompanying finding of no significant impact, constitutes an agency's evaluation of the environmental effects of a proposed action—unless a more detailed statement is required. A more detailed environmental impact statement is not required unless the contemplated action is a 'major Federal action significantly affecting the quality of the human environment.' Our implementing regulations provide that 'environmental assessment':

Means a concise public document for which the Commission is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid the Commission's compliance with NEPA when no environmental impact statement is necessary.

(3) Facilitate preparation of an environmental impact statement when one is necessary.

Similarly, "finding of no significant impact":

> [M]eans a concise public document for which the Commission is responsible that briefly states the reasons why an action, not otherwise excluded, will not have a significant effect on the human environment and for which therefore an environmental impact statement will not be prepared."
>
> (Emphasis in original) Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26 (Oct. 23, 2008)

After setting forth the above parameters, the Commission concluded that the intervenor therein had failed to carry its burden of proof by a "preponderance of the evidence" that the Staff's supplemental EA was inadequate. The Commission held:

"In sum, after considering the entire record, we find by a preponderance of the evidence that SLOMFP's Contention 2 lacks merit."

What is more, and particularly in light of INTERVENOR's repeated mantra that this Board cannot go

"outside the record" which existed on August 10, 2007 (the date of the Final EA), the Commission expressly acknowledged the propriety of going "outside the EA" in reaching its conclusion that SLOMFP had failed to satisfy the "preponderance of the evidence" standard:

> "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. That affidavit explains in detail how air and ground contamination would contribute to dose in the unlikely event of a significant release." CLI-08-26 (Slip op. at 15, ftnt. 65)

To summarize: INTERVENOR's 76-page Supplemental Statement fails to set forth or advocate any single Ninth Circuit "standard of review" regarding agency EA's. Moreover, INTERVENOR fails to cite or advocate any discernible Commission "standard of review" of the Staff preparation of EA's (the "preponderance of the evidence" standard). And finally, INTERVENOR's repeated mantra that this Board should have "closed the record" in this case as of August 10, 2007 (the date of the Final EA herein) is flatly contradicted by the Commission's October 23, 2008 decision in the Diablo Canyon adjudicatory decision.

Consequently, INTERVENOR has failed to respond to this Board's request for controlling 9th Circuit or Commission "standards of review," and it is therefore virtually

impossible to detect which standards INTERVENOR is advocating.

2. Contradictions

INTERVENOR's Supplemental Statement is also full of internal contradictions, adding another layer of difficulty in discerning just what INTERVENOR is advocating.

Thus, for example, as noted above, INTERVENOR first argued that the Ninth Circuit "standards of review" are inapplicable herein because "Commission case law, not the Ninth Circuit's, defines the standard the Board applies in reviewing the Staff's compliance with NEPA." (Supplemental Statement at p. 9)

However, in flat contradiction to its claim that Commission standards control this case, INTERVENOR thereafter cites no less than thirty-six (36) Ninth Circuit decisions, or decisions arising within the Ninth Circuit, to support its "hard look" arguments![2] Contradictions such as these predominate in INTERVENOR's Supplemental Statement.

INTERVENOR's contradictory arguments are magnified by the fact that virtually all of INTERVENOR's citations from the Ninth Circuit pre-date the landmark McNair decision,

[2] INTERVENOR's citation of cases in its Supplemental Statement decided by or arising within the 9th Circuit begins with Klamath-Siskiyou Wilderness Center v. Bureau of Land Management, 387 F.3d 989 (9th Cir. 2004) at Page 2, and concludes at Page 76 by citing the same case.

which re-calibrated Ninth Circuit standards of review of NEPA documents.[3]

Thus, INTERVENOR makes contradictory arguments regarding the applicable "standards of review" herein. INTERVENOR's contradictory arguments are further complicated by the fact that all of its cited 9th Circuit decisions pre-date McNair.

Even more perplexing is that fact that INTERVENOR ignores and/or utterly fails to cite (circumvents) the Commission's recent Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26 (Oct. 23, 2008) decision. This Diablo Canyon decision clearly sets forth the Commission's standard for reviewing Staff EA's in adjudicatory proceedings such as this: a party advocating a position must prove its position by a "preponderance of the evidence."

INTERVENOR's contradictory arguments predominate its Supplemental Statement. Even a careful reader cannot discern precisely which standards INTERVENOR is advocating.

[3] Prior to McNair, Ninth Circuit review of agency decisions not to prepare an EIS were generally made under the "reasonableness" standard," invoking a "more stringent" review of the agency no-EIS determination. On the other hand, the "arbitrary and capricious" test holds that the no-EIS determination is committed to the agency's discretion, and that application of this more deferential standard permits the agencies to have some leeway in applying the law to factual contexts in which they possess expertise. See Gee v. Boyd, 471 U.S. 1058, 1058-1060 (1985)(White, J., dissenting) In McNair, the Ninth Circuit unambiguously adopted the "arbitrary and capricious" standard for the Ninth Circuit, for Hawaii, and therefore for this NEPA proceeding.

Consequently, INTERVENOR's arguments should be stricken, or at the least, disregarded.

3. Confusion.

Throughout its writings herein, INTERVENOR's conspicuous methodology has been to engender "confusion" rather than enlightenment.

The confusion created by INTERVENOR permeates its entire Supplemental Statement. Thus, despite the fact that this adjudicatory proceeding revolves around the Staff's August 10, 2007 "Environmental Assessment," the vast majority of INTERVENOR's case law citations are 9th Circuit decisions dealing with environmental impact statements. INTERVENOR cites a bevy of such cases in support of its substantive arguments herein, failing to note that most of its citations dealt solely with the adequacy of EIS's, and not EA's.[4]

The confusion is compounded by INTERVENOR's "jerry-built" arguments. Thus, INTERVENOR supports its supposed EA arguments by repeatedly quoting noble-sounding short

[4] See, e.g., Lands Council v. Powell, 395 F.3d 1019 (9th Cir. 2005); California v. Block, 690 F. 2d 753 (9th Cir. 1982)(EIS inadequate, using the "rule of reason" standard of review); Center for Biological Diversity v. U.S. Forest Service, 349 F.3d 1157 (9th Cir. 2003)(EIS inadequate, using the "rule of reason" standard of agency review); Churchill County v. Norton, 276 F.3d 1060 (9th Cir. 2001)(EIS inadequate, using the "rule of reason" standard of agency review); **Foundation for North American Wild Sheep** v. United States Dept. of Agriculture, **681** F.2d 1172, 1177-1178 (CA9 1982)(EIS inadequate, using the "reasonableness" standard of agency review); Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810 (9th Cir. 1987)(EIS inadequate); Morongo Band of Mission Indians v. Fed. Aviation Administration, 161 F.3d 569 (9th Cir. 1998)(EIS deemed satisfactory) INTERVENOR's pattern of citing short, noble-sounding excerpts from these EIS cases should give a reader pause, and should raise serious doubts about the legitimacy of all of INTERVENOR's arguments.

excerpts, or actual holdings, from Ninth Circuit decisions which, however, dealt solely with Environmental Impact Statements.[5] This contrivance creates confusion instead of clarification.

Another example of sowing confusion: INTERVENOR argues on the one hand that the Commission's standard practice is to give the CEQ's 40 questions "substantial deference" (Supplemental Statement, at p. 19), after having already contended that the Commission's "case law" is binding upon INTERVENOR at this stage. (Id., at p. 9) However, INTERVENOR argues on the other hand (and in direct contradiction of its casual dismissal of the McNair decision) that in the Ninth Circuit the CEQ's 40 questions are merely "an informal statement and is not controlling authority." (Id., at p. 19)(citing the Ninth Circuit decision in Friends of the Earth v. Hintz, 800 F. 2d 822 (9th Cir. 1986)) Which standard is INTERVENOR advocating? Exactly which standard should Pa'ina respond to?

In effect, INTERVENOR's contradictory and confusing arguments pertaining to "standards of review" apparently seek to occupy all the ground at once, but the arguments

[5] Of course, it goes without saying that INTERVENOR's citation of the Ninth Circuit decisions contradicts its argument that only the Commission's standards of review are pertinent herein.

actually add nothing to this case.[6] Because INTERVENOR confusingly appears to advocate every "standard of review" at once, its Supplemental Statement should be stricken, or be disregarded.

4. Circular Arguments

In the same vein, INTERVENOR's Supplemental Memorandum contains "circular arguments" which lead to -- nothing.

One example of INTERVENOR's circular arguments: in its August 26, 2008 filing Pa'ina cited the 9th Circuit's decision in Life of the Land v. Brinegar, 485 P. 2d 460 (9th Cir. 1973) for the general proposition that, in an EIS, 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 Ninth Circuit emphasized that arguments or contentions by the challenger to an EIS require "empirical data supportive of the allegation." 485 F. 2d at 469."[7]

[6] INTERVENOR's strategy of advocating every position at the same time has some precedent. In the memorable words of the Honorable Judge Morrison C. England, Jr., "Instead of advocating one position, [appellant] blithely advocates every position, employing a strategy as vacuous as it is unsuccessful." Lebbos v. Schuette, 2008 U.S. Dist. LEXIS 97560 (ED Cal. 2008)

[7] In other words, as more recently stated by the Supreme Court, persons challenging an agency's compliance with NEPA must "structure their participation so that it . . . alerts the agency to the [parties'] position and contentions," in order to allow the agency to give the issue meaningful consideration. DOT v. Public Citizen, 541 U.S. 752, 764 (2004) Here, INTERVENOR has never provided the Staff with any supporting empirical data regarding the irradiator's impact on tourism. Rather, it seeks to shift the burden of first producing empirical data when it complained that "The Staff Unlawfully Failed To Back Up Its Speculation The Irradiator Would Not Impact Tourism." (At Page 59)

The Brinegar decision not only arose in Hawaii, but it seemed particularly relevant to the adequacy of the Staff's Environmental Assessment herein (a lesser document in the NEPA hierarchy) because INTERVENOR has never empirically supported any of its allegations about the irradiator's "impacts upon tourism." If "empirical data" is required to challenge an EIS on any grounds, common sense would seem dictate that the same rule applies to an EA.[8]

Despite INTERVENOR's utter failure to produce any empirical data supporting "impacts upon tourism," the Staff nonetheless went beyond the 9th Circuit Brinegar requirements. The Staff responded to very general comments mentioning tourism, and noted the irradiator's obvious lack of impact upon tourism as follows:

> "In terms of tourism, there is no reason to believe that the irradiator would have any effect. There are currently several other irradiators in Hawaii along with numerous medical, academic and industrial licensees. The proposed irradiator would be visually indistinguishable for other typical industrial buildings in the area." (Environmental Assessment, Appendix, C-12)

INTERVENOR makes its circular argument (Supplemental Statement at p. 29) as follows: the Staff discussed the impacts upon tourism in the EA (the conclusion stated as

[8] INTERVENOR's argument (at Page 29 of its Supplemental Statement) attempting to distinguish Life of the Land v. Brinegar misses the critical point that challengers to a NEPA document themselves carry the burden of providing the "empirical data" which would require a response from the agency: "[A]ppellants' contention that the Reef Runway project will result in expansion of the permanent population of Honolulu [due to increased tourism] is mere speculation, unsupported by the record." (Emphasis added) 485 F. 2d at 470.

the premise), so therefore the Staff must discuss in more detail the impacts upon tourism in its EA.

INTERVENOR as the "challenger" to the EA failed to provide any empirical data of any impacts upon tourism to which the Staff had to respond. Therefore, the Staff met 9th Circuit requirements by responding to very vague references to "tourism" with its analysis of "no impact."[9]

A further example of INTERVENOR's circular arguments is found in its discussion of Commission standards (at p. 10). Thus, in response to this Board's explicit request for the actual governing "standards of review," INTERVENOR responded that this Board "'must decide, based on governing regulatory standards and the evidence submitted,' whether the Staff has met its burden of proof." (Id.) Thus, instead of identifying any standard, INTERVENOR simply re-circulates the Board's question.

INTERVENOR's numerous "circular arguments" presented in its Supplemental Statement do not add anything to INTERVENOR's arguments.

In summary: INTERVENOR's Supplemental Statement is a mish-mash (albeit quite lengthy) of not properly responding

[9] INTERVENOR's argument that the Staff must do a detailed study of the irradiator's impacts upon tourism, without there being any empirical data whatsoever backing up any specific evidence showing impacts, should also be denied in light of the Commission's unfavorable view of "generalized, poorly supported scenarios of harm." Pa'ina Hawaii, LLC, CLI-08-03, 67 NRC __ (March 17, 2008)

to this Board's request for governing "standards of review;" of simultaneously claiming or implying that all standards of review apply; of mixing excerpts and holdings from many Ninth Circuit decisions which focused on the adequacy of EIS's, not EA's; of failing to acknowledge that virtually all of its Ninth Circuit decisions pre-dated the McNair decision; and of repeated circular arguments which do not move this case forward.

To which standards of review should Pa'ina respond? To which pre-McNair EIS decisions should Pa'ina respond? How can Pa'ina respond to INTERVENOR's circular arguments other than by pointing them out?

Pa'ina believes that INTERVENOR's treatise ought to be stricken in full or in part, or otherwise disregarded.

II. THE NRC STAFF PROPERLY ANALYZED ALTERNATIVES TO THE SITING AND DESIGN OF PA'INA'S IRRADIATOR, AND THE STAFF PROPERLY AFFORDED SUBSTANTIAL WEIGHT TO PA'INA'S PREFERENCES IN THE SITING AND DESIGN OF ITS IRRADIATOR.

INTERVENOR's so-called arguments regarding "alternatives" as discussed in the EA are unpersuasive.

A. THE CIRCUIT COURTS HAVE ESTABLISHED EIGHT LEGAL PRINCIPLES WHICH GOVERN AN AGENCY'S DISCUSSION OF "ALTERNATIVES" IN AN ENVIRONMENTAL ASSESSMENT ("EA").

Over the decades since the passage of NEPA, the federal circuit courts have developed at least eight significant legal principles which govern the preparation and review of "alternatives" which are discussed in an EA.

First, the agency's obligation to consider alternatives under an EA is a "lesser one" than under an EIS. North Idaho Community Action Network v. U.S. Dept. of Transportation, 545 F.3d 1147, 1153 (9th Cir. 2008) The 9th Circuit has stressed:

> "Thus, whereas with an EIS, an agency is required to '[r]igorously explore and objectively evaluate all reasonable alternatives . . . with an EA, an agency only is required to include a brief discussion of reasonable alternatives.'" See 40 C.F.R. Sec. 1508.9(b) (Emphasis added) 545 F.3d at 1153.

Thus, under this first legal principle, the Staff's discussion of alternatives in the subject EA would be narrower in range and detail under relevant decisions of the Ninth Circuit.

Second, in the Ninth Circuit and other federal circuit courts, a consideration of alternatives in EA's (or EIS's") for privately-initiated projects "may accord substantial weight to the preferences of the applicant or sponsor in the siting and design of the project." Friends of Endangered Species, Inc. v. Jantzen, 760 F. 2d 976 (9th Cir. 1985)(EA found adequate where County as "private

applicant" had previously "considered and rejected" alternative sites); Environmental Law and Policy Center v. U.S. Nuclear Regulatory Commission, 470 F. 3d 676, 684 (7th Cir. 2006), citing City of Grapevine v. Dept. of Transportation, 305 U.S. App. D.C. 149, 17 F.3d 1502 (D.C.Cir. 1994)

These circuit court holdings harmonize with the relevant decisions of the Commission, because the Commission also affords great deference to a private applicant's siting and design. Thus, in an EIS case, the Commission stated its rule as follows:

> "The intervenors entirely ignore the nature of the ISL project--it is a project proposed by a private applicant, not the NRC. 'Where the Federal government acts, not as a proprietor, but to approve--a project being sponsored by a local government or private applicant, the Federal agency is necessarily more limited.' [Citation omitted] The NRC is not in the business of crafting broad energy policy involving other agencies and non-license entities. Nor does the initiative to build a nuclear facility . . . belong to the NRC.
>
> When reviewing a discrete license application filed by a private applicant, a federal agency may appropriately "accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project.'" In the Matter of Hydro Resources, CLI-01-04 (Jan. 31, 2001).

Again, under this second legal principle, the Staff's discussion of alternatives in the EA should grant deference to Pa'ina's choice as to site and design technology.

Third, in the 9th Circuit, an EA is intended to discuss "alternatives" that are reasonable and will bring about the ends of the proposed action. City of Angoon v. Hodel, 803 F.2d 1016 (9th Cir. 1986), cert.den. 484 U.S. 870 (1987); Akiak Native Community v. U.S. Postal Service, 213 F.3d 1140 (9th Cir. 2000); Native Ecosystems Council v. U.S. Forest Service, 428 F.3d 1233 (9th Cir. 2005); North Idaho Community Action Network v. U.S. Dept. of Transportation, 545 F.3d 1147 (9th Cir. 2008) Under this legal principle, in the instant case the Staff is not obligated to study alternatives that would not serve the "reasonable purposes" of the project. (Id.)

Fourth, in the 9th Circuit, an EA need not discuss alternatives unless there exist "unresolved conflicts concerning alternative uses of available resources." North Idaho Community Action Network v. U.S. Dept. of Transportation, 545 F.3d 1147, 1153 (9th Cir. 2008); Native Ecosystems Council v. U.S. Forest Service, 428 F.3d 1233, 1245 (9th Cir. 2005). Thus, in the case at bar, unless the Staff first finds that there are "unresolved conflicts" over Pa'ina's proposed lot (the resource), or "unresolved conflicts" over Pa'ina's use of Cobalt-60 (the resource) to irradiate, then the Staff need not discuss alternatives.

Fifth, in the 9th Circuit, the challenger to an EA must allege "specific evidentiary facts" showing that alternatives are reasonable and viable. City of Angoon v. Hodel, 803 F.2d 1016 (9th Cir. 1986), cert.den. 484 U.S. 870 (1987), citing Vermont Yankee Nuclear Power Corp. v. N.R.D.C., Inc., 435 U.S. 519 (1978)(plaintiffs failed to allege specific evidentiary facts showing alternative sites were reasonable and viable) and Seacoast Anti-Pollution League v. NRC, 598 F.2d 1221 (1st Cir. 1979)(petitioners failed to present supporting evidentiary materials regarding any other sites for nuclear power plant, EIS need not discuss alternative sites). This important legal principle was also enunciated in both Friends of the Earth v. Coleman, 513 F.2d 295, 298 (9th Cir. 1975) and Life of the Land v. Brinegar, 485 F. 2d 460, 469 (1973) where the 9th Circuit ruled that the challengers/appellants therein had failed to produce any "specific evidentiary facts" supporting its NEPA allegations. Thus, unless the Staff has been presented with specific, empirical data supporting its contentions, then an EA would not need to address those contentions.

Sixth, in the 9th Circuit, alternatives (both in an EIS and in an EA) need not include "speculation." City of Angoon v. Hodel, 803 F.2d 1016 (9th Cir. 1986) There, the

Court agreed that the Army Corps of Engineer's EIS need not study or select alternative sites for a log transfer facility. The Court elaborated:

> "To require the Corps to select one or more tracts for exchange which, in its view, might induce both an offer and acceptance is to visit upon it a task that would involve almost endless speculation." 803 F.2d at 1021; see also Trout v. Morton, 509 F.2d 1276 (9th Cir. 1974)(speculative and remote alternatives and consequences need not be discussed in an EIS)

The island of Oahu consists of approximately 939,520 acres. To require the Staff (generally located in D.C.) to speculate and search for an adequate and properly zoned lot, where INTERVENORS (located in Honolulu) fail to do so would run contrary to 9th Circuit holdings.

Seventh, in the 9th Circuit, an EA generally need not discuss alternatives which depend upon the happening of legislative contingencies, such as zoning changes by a City council, redistricting by a State legislature, or an Act of Congress. City of Angoon v. Hodel, 803 F.2d 1016, 1021-1022 (9th Cir. 1986). Thus, unless the challenger to the instant EA can identify other specific sites which already comport with State of Hawaii districting and County zoning laws, the Staff need not engage in "speculating" about the infinite number of alternate locations for the irradiator.

Eighth, the Commission has held that "articulating" each and every reason to reject an alternative is not

necessary; rather, reasons why alternatives are rejected are often "implicit" from the context of NEPA documents. See, e.g., Hydro Resources, CLI-01-04 (Jan. 31, 2001) In that EIS decision, the Commission noted:

> "While the FEIS could have done a better job articulating final conclusions on the alternative chosen, it is nonetheless implicit in the FEIS that the "no action" alternative was rejected because the impacts of the project were found acceptable . . . ."

Thus, in the nearly four decades since NEPA was enacted in 1970, eight key legal principles pertaining to "alternatives" have been established which should govern the preparation and review of Environmental Assessments.

B. UNDER THE EIGHT GUIDING PRINCIPLES, THE STAFF'S TREATMENT OF "ALTERNATIVE SITES" IN THE EA CLEARLY SATISFIED NEPA REQUIREMENTS.

In its Supplemental Statement, INTERVENOR allocates approximately six (6) pages to its criticisms of the EA's treatment of "alternative locations." (Pages 69-75) However, for any number of reasons, INTERVENOR's arguments that the EA failed to satisfy NEPA are without basis.

First, one can fairly ask the following question: Did INTERVENOR in its six pages identify any specific, alternate lot site(s) already properly zoned by the County and properly districted by the State of Hawaii, to which the Staff could direct its attention without speculating

about the propriety of the specific, alternate site? The answer is "no." Consequently, the Staff was well within the law to avoid (as stated by the Commission) "gratuitous analyses based merely on generalized poorly-supported scenarios."

Second, one can fairly ask the next question: Did INTERVENOR in its six pages cite any Ninth Circuit decisions in which an EA was found insufficient because it failed to adequately discuss alternative sites? The answer is "no."[10]

Third, one can fairly ask another question: Did INTERVENOR in its six pages discuss or even mention in any meaningful way any of the (above) eight legal principles regarding "alternative sites" discussions in an EA? The answer is "no."

INTERVENOR's arguments regarding "alternate sites" are also characterized by further significant weaknesses.

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[10] Again, most of the decisions cited and relied upon by INTERVENOR (Pages 69-75) involve EIS's instead of EA's. The only EA case from the 9th Circuit cited by INTERVENOR is Friends of Endangered Species v. Jantzen, 760 F.2d 976 (9th Cir. 1985), but that decision supports the Pa'ina and Staff positions. There, the 9th Circuit simply noted that the applicant-County had "considered and rejected" the primary alternative site many years before, a fact which was placed into the EA, and the EA was affirmed. In the instant case, the 2007 EA allots several paragraphs (at Page 6) describing why locating Pa'ina's irradiator on the Big Island made no sense, i.e., product restrictions, high shipping costs, no access to and from foreign destinations, a more effective biosecurity system for the entire State, and less product degradation. Without expressly using the term "alternative location," the Staff "did effectively consider" why locating Pa'ina's irradiator on an outer island such as the Big Island did not serve the primary purposes of the project. See State of South Carolina v. O'Leary, 64 F. 3d 892, 900 (9th Cir. 1995)(EA "did effectively consider alternatives') Indeed, INTERVENOR's arguments to the contrary, the Staff's discussion and rejection of all Big Island alternate locations in the instant EA (at Page 6) appears to have far exceeded the "brief discussion" set forth and approved in Jantzen.

Fourth, the clear sole goal of INTERVENOR's "alternative location" argument is to "shift" the responsibility for seeking and finding properly-zoned and properly-districted lot sites to the Staff. The reason for INTERVENOR's "shifting" argument is a result of INTERVENOR's failure to identify any alternative, specific parcel of land on which to site Pa'ina's irradiator, and it has not provided any specific evidentiary data reflecting the appropriateness (under State and local land-use laws) of locating the irradiator elsewhere.[11]

Thus, out of a necessity created by its own failures to identify any specific, properly-zoned parcels and provide information about those lots, INTERVENOR urgently seeks to shift its burden to the Staff. INTERVENOR can cite no decisions supporting its efforts to "shift" its burden (from itself to the Staff) in this EA proceeding. Thus, there is no authority requiring the Staff to

[11] At Page 69 of its Supplemental Statement, INTERVENOR suggests (for what appears to be the first time in this entire proceeding) that Pa'ina's irradiator could be located on the Big Island of Hawaii as an alternative. Significantly, INTERVENOR still fails to identify any specific parcel upon which the irradiator could be located consistent with State of Hawaii land-use districts and Big Island zoning laws. What is more, a primary purpose of Pa'ina's irradiator is to treat incoming (from foreign nations) plants and other products for invasive pest species. (Final EA at 6) However, INTERVENOR's very belated suggestion that Pa'ina's irradiator could be located on the Big Island blithely ignores the fact that the Big Island receives very few international flights, and it would therefore be impossible for Pa'ina to treat incoming foreign plants and other products on the Big Island, without a shipper incurring truly extraordinary costs. Thus, INTERVENOR's suggestion fails for vagueness, is virtually impossible to carry out, and is as whimsical as it is belated. Additionally, INTERVENOR's attempt to expand the scope of this case at this very late hour, without formal amendment or late-filed contentions, should be condemned.

undertake the Herculean task of engaging in "almost endless speculation." City of Angoon v. Hodel, 803 F. 2d at 1021.

Fifth, INTERVENOR fails to provide any empirical data showing that there are any "unresolved conflicts concerning alternative uses of available resources." See, e.g., North Idaho Community Action Network v. U.S. Dept. of Transportation, 545 F.3d 1147, 1153 (9th Cir. 2008). There are no unresolved conflict for the proposed Pa'ina lot site off Lagoon Drive because the parcel is already zoned light industrial, and therefore no parks or convalescent homes are going to be placed on the site. In light of INTERVENOR's failure to show that there are "unresolved conflicts" over the use of the land, the Staff was not obligated to speculate about other sites in the EA.

Sixth, Pa'ina's project is privately-initiated, a fact which Intervenor basically ignores. In light of the stated purposes for its irradiator (EA at Page 6), one could safely conclude that as far as Pa'ina was concerned, the "build" or "no-build" (near the airport) alternatives were the only viable, reasonable siting alternatives. Pa'ina as the private initiator of this project is entitled to great deference, and the Staff's EA properly accorded deference. As noted by one appellate court, "Congress did not expect agencies to determine for the applicant what the

goals of the applicant's proposal should be." City of Grapevine v. DOT, 305 U.S.App.D.C. 149, 17 F.3d 1502 (DC Cir. 1994)

In sum, INTERVENOR forfeited its responsibility to identify properly zoned and properly districted alternative sites for the irradiator.[12] The Staff was not obligated to speculatively study the nearly 1,000,000 acres of Oahu's land in order to find another appropriate site. Additionally, Pa'ina's proposed site is already properly zoned, and thus there are no "unresolved conflicts" regarding that resource.

Consequently, the Staff EA's treatment of "alternative sites" for Pa'ina's irradiator should be affirmed or approved.

C. UNDER THE ABOVE EIGHT GUIDING PRINCIPLES, THE STAFF'S TREATMENT OF "ALTERNATIVE TECHNOLOGIES" IN THE EA SATISFIED THE LAW.

INTERVENOR devotes approximately five (5) pages of its Supplemental Statement (Pages 64-69) arguing that the Staff's EA failed to adequately discuss "alternate technologies."

[12] Perhaps realizing that it utterly failed to identify any properly zoned, properly districted lots for the irradiator, INTERVENOR now suggests (for the first time) that perhaps the irradiator could be located on the Big Island. See Footnote 11, supra.

First, it should be noted that in its challenge to the EA's treatment of "alternate technologies," INTERVENOR almost totally ignored all eight of the guiding legal principles set forth in Subpart A above. Its arguments are therefore necessarily suspect.

Second, INTERVENOR concedes that the Staff discussed "alternate technologies" consisting of methyl bromide fumigation, hot water immersion, the "preferred action" (Pa'ina's underwater irradiator), and "no action."

Third, although conceding that the "alternate technologies" discussions are in the EA, INTERVENORS are still unhappy with those discussions. However, the Staff properly and expressly described and rejected methyl bromide and hot water immersion as alternatives. (EA at pp. 12-13) The Staff gave its reasons for the rejections: methyl bromide is being phased out of production[13] because it destroys the ozone layer, and is becoming significantly more expensive;[14] hot water immersion has very limited applications and can be very damaging to the product treated. The Staff also properly discussed and discarded the "no action" alternative. (EA at p. 12)

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[13] Methyl bromide has been phased out in the U.S. as of January 1, 2005 under this nation's obligations under the Montreal Protocol and the Clear Air Act.

[14] Of course, there is more than a little irony in Intervenor purporting to protect the environment in this case, all the while arguing that methyl bromide (banned internationally because of its proven damage to the ozone layer) should be Pa'ina's preferred technology.

With regards to the e-beam technology, INTERVENOR fails to acknowledge that the primary purpose of any EA is to ascertain the "preferred" or best alternatives to a proposed project. See, e.g., Native Ecosystems Council v. U.S. Forest Service, 428 F.3d 1233, 1245-46 (9th Cir. 2005)(EA properly found/discussed only two alternatives, "preferred alternative" and "no action" alternative; EA found adequate); North Idaho Community Action Network v. U.S. Dept of Transportation, 545 F.3d 1147, 1153-54 (9th Cir. 2008)(EA properly found/discussed only two alternatives, "preferred alternative" and "no change" alternative; EA found adequate); Yakutat, Inc. v. Gutierrez, 407 F.3d 1054, 1061 (9th Cir. 2005)(EA properly found "preferred alternative"); see also Utah Environmental Congress v. Bosworth, 439 F.3d 1184, *Utah Envtl. Congress v. Bosworth,* 439 F.3d 1184, 1195 (10th Cir. 2006) (holding that agency did not act arbitrarily when it considered only proposed action and "no action" alternative in EA) INTERVENOR's failure to acknowledge this legal principle skews its arguments.

Because a major purpose of EA's are to find "preferred alternatives," it is significant to note that neither INTERVENOR nor any other member of the public has ever claimed (or shown) that the "e-beam irradiator" is in any

way "superior" or even "equal" to Pa'ina's underwater irradiator. INTERVENOR's failure to make these claims (and support the claims with empirical data) is, in and of itself, sufficient to excuse the Staff from reviewing e-beam as an alternative because, for example, nobody has claimed that e-beam is "more effective" or "less costly" than Pa'ina's underwater irradiator. Hells Canyon Alliance v. U.S. Forest Service, 227 F. 3d 1170, 1181 (9th Cir. 2000)(EIS not required to discuss alternatives which are infeasible, ineffective or inconsistent with purpose of project); Akiak Native Community v. United States Postal Service, 213 F.3d 1140,(9th Cir. 2000)(in EA, too-costly alternative dismissed).

Not only does the Record fail to demonstrate that e-beam technology is superior or equal to Pa'ina's proposed underwater irradiator, but the Record actually demonstrates that (1) e-beam equipment and its housing is decidedly more costly than Pa'ina's irradiator, (2) e-beam power demands much greater electrical energy than a Cobalt-60 irradiator, and (3) e-beam technology is decidedly more unreliable. These facts are expressly and implicitly admitted in the (carefully crafted) testimonies of Eric D. Weinert attached to INTERVENOR's September 16, 2008 and February 2, 2009 filings. In those filings:

(a) Eric Weinert admitted that Hawaii Pride, LLC's first choice was to purchase and install a "Cobalt-60" irradiator, based upon the advice of an expert at the time, John Masefield. Masefield had told Weinert that e-beam irradiation was technically unreliable and economically unfeasible. Weinert admits that only because of "respect" for the people of Hawaii County did Hawaii Pride, LLC select the e-beam technology. (Written Rebuttal Testimony and Declaration of Eric D. Weinert, attached to INTERVENOR's September 16, 2008 filing, at pp. 1-2)

b. Eric Weinert admitted that the manufacturer of his e-beam irradiator, SureBeam, filed for bankruptcy in 2004. (Weinert, attached to INTERVENOR's September 16, 2008 filing, at p. 3)

c. Eric Weinert admitted that the cost of the e-beam/x-ray irradiator equipment would be $4.75 million, which price apparently did not include the massive, additional amounts of concrete that would be required for its shield and housing. (Weinert, attached to INTERVENOR's February 2, 2009 filing, p. 2) This is more than three times the cost of Pa'ina's irradiator equipment of $1.4 million.

d. Eric Weinert admitted that the e-beam/x-ray irradiator loses 93% of Hawaii's very expensive energy when

converting electron beam to x-rays. (Weinert, attached to INTERVENOR's February 2, 2009 filing, p. 2)

e. Eric Weinert admitted that the e-beam/x-ray technology has suffered unexpected breakdowns. Indeed, Weinert admitted that such breakdowns "are to be expected." (Weinert, attached to INTERVENOR's February 2, 2009 filing, p. 4)

f. Eric Weinert failed to deny or even address a technological deficiency pointed out by Kohn in Kohn's September 15, 2008 Written Testimony. That is, the e-beam irradiator could not properly irradiate product that was not uniformly thin. Thus, for thick papayas, the electron beam must be converted from electrons to x-rays, which requires even more electricity as most of the electrons are turned into heat rather than effective x-rays.

Thus, in preparing the instant EA, the NRC's Staff knew that SureBeam, the e-beam manufacturer, had filed for bankruptcy in 2004, only a year before Pa'ina applied for the instant license. The Staff was also aware that e-beam technology is vastly more energy-consuming, and more unreliable, than Cobalt-60 irradiators. In light of this adverse environmental and financial evidence in the Record, the Staff properly omitted the e-beam alternative from the

EA because that alternative appeared to be "infeasible," "ineffective", and too costly.

The Staff's decision to omit the e-beam alternative from discussion has been corroborated by the Record created herein. Eric Weinert himself has admitted that even Hawaii Pride's first choice of technology had been a Cobalt-60 irradiator. Furthermore, Weinert has admitted to the huge, additional costs of purchasing and constructing (with massive shielding) an e-beam irradiator, and the substantial extra costs associated with operating an e-beam irradiator. Weinert does not deny that Kohn was approached to invest in Hawaii Pride in 2002, but that Kohn declined to invest based upon e-beam's high costs and technological problems. Finally, Weinert has failed to deny or rebut the significant additional energy required to treat thick or uneven sizes of product.

To summarize: The Staff properly and adequately discussed "alternative technologies" in the instant EA. Based upon the information at hand (and later corroborated by Eric D. Weinert), the Staff using its experience had no need to discuss the economically uncertain, unreliable, energy-demanding and overly costly `e-beam technology.

III. CONCLUSION.

Many years ago the Ninth Circuit noted that NEPA is not to "be employed as a crutch for chronic fault-finding." Life of the Land v. Brinegar, 415 F.Supp. 1298, 1302 (9th Cir. 1976). Where Pa'ina's irradiator is to be located in an industrial area in conformance with the NRC's 1993 Statement of Considerations, and where it qualifies for "categorical exclusion," it is clear that these 44-month long proceedings have been deteriorating into nothing more than "chronic fault-finding."

For the reasons stated hereinabove and as set forth in its prior Trial Brief on the Law (filed August 26, 2008) and Rebuttal Memorandum (filed September 15, 2008), Pa'ina Hawaii, LLC submits that INTERVENOR's unsupported contentions ought to be denied/dismissed, and/or in the alternative, an evidentiary hearing should be held in this matter as quickly as possible.

DATED: Honolulu, Hawaii, March 4, 2009.

FRED PAUL BENCO
Attorney for Licensee
Pa'ina Hawaii, LLC

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "APPLICANT PA'INA HAWAII, LLC'S RESPONSE TO INTEVERVENOR CONCERNED CITIZENS OF HONOLULU'S SUPPLEMENTAL STATEMENT OF POSITION (filed February 2, 2009)" in the afore-captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this March 4, 2009. Additional service has also been made this same day by electronic mail as shown below:

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