

RAS I-149

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September 2, 2008 (8:30am)

THE LAW OFFICES OF FRED PAUL BENCO

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OFFICE OF SECRETARY
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August 29, 2008

Office of the Secretary
U.S. Nuclear Regulatory Commission
ATTN: Rulemakings and Adjudication Staff
Washington, DC 20555-0001
Also Via E-Mail: HEARING DOCKET@nrc.gov

Re: Docket No. 030-36974
ASLBP No. 06-843-01-ML
"Licensee Pa'ina Hawaii, LLC's
Memorandum In Opposition"

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 LICENSEE PA'INA HAWAII, LLC'S MEMORANDUM IN OPPOSITION TO AUGUST 28, 2008 INTERVENOR CONCERNED CITIZENS OF HONOLULU'S MOTION FOR EXTENSION OF TIME TO FILE OPPOSITION TO PA'INA HAWAII, LLC'S MOTION TO REINSTATE "CATEGORICAL EXCLUSION" STATUS FOR PA'INA HAWAII, LLC'S IRRADIATOR.

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

August 29, 2008

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
Pa'ina Hawaii, LLC) Docket No. 030-36974
)
Materials License Application) ASLBP No. 06-843-01-ML
)

LICENSEE PA'INA HAWAII, LLC'S MEMORANDUM IN OPPOSITION TO
AUGUST 28, 2008 INTERVENOR CONCERNED CITIZENS OF HONOLULU'S
MOTION FOR EXTENSION OF TIME TO FILE OPPOSITION
TO PA'INA HAWAII, LLC'S MOTION TO REINSTATE
"CATEGORICAL EXCLUSION" STATUS FOR
PA'INA HAWAII, LLC'S IRRADIATOR

DECLARATION OF FRED PAUL BENCO

EXHIBITS A-B

CERTIFICATE OF SERVICE

FRED PAUL BENCO, Esq. (2126)
3409 Century Square
1188 Bishop Street
Honolulu, Hawaii 96813
Tel: (808) 523-5083
Fax: (808) 523-5085

Attorney for Licensee
Pa'ina Hawaii, LLC

No Significant Impact" ("FONSI"). This Board did not deny the request by means of its October 5, 2007 Order.

It is well-recognized that stays and injunctions and the possibilities of those extraordinary remedies create "clouds" on the rights of the restrained. Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 336 (1985); Ayres v. City of Chicago, 125 F. 3d 1010, 1012 (7th Cir. 1997)

This is particularly inequitable where the stay or threat thereof runs for a "lengthy period of time." See Banana Distributors v. United Fruit Company, 19 F.R.D. 11, 13 (DCNY 1955)

Intervenor's de facto stay has run for almost a year. Intervenor has failed and refused to withdraw its request. (Exhibit A attached hereto) It would be patently inequitable and unfair to permit stay request to continue on for any further time, especially the further 20 days requested by Intervenor.

B. Intervenor's Continuance Request Threatens To Take This Case Into 2009, To Pa'ina's Serious Prejudice.

This case has already consumed over three (3) years, quite extraordinary for a garden-variety, "inherently safe"

irradiator.¹ Clearly, one effect or impact of Intervenor's request for continuance is to move or delay the outcome of the Motion to Reinstate to October or November, 2008, and this entire case to well into 2009. This is not fair to Pa'ina.

Consequently, any further delay is prejudicial to Licensee Pa'ina Hawaii, LLC.

C. Intervenor's Own Motion Reflects No Need For A Continuance.

Intervenor's own Motion for Extension undermines its need for an additional 20 days.

First, Pa'ina's "Motion to Reinstate" rests on legal arguments alone, and an intimate factual knowledge of the case is not essential to respond. Intervenor's response will in all likelihood be made up of legal arguments.

Second, Intervenor has more than adequate legal assistance to perform the task within the normal time limits. Indeed, during this litigation, at least three (3) other Earthjustice attorneys (in addition to Mr. Henkin) have been designated on the certificate of service mailing. These other Earthjustice attorneys have been routinely receiving copies of Orders and other pleadings during this

¹ The International Atomic Energy Agency has deemed underwater irradiators to be "inherently safe."

entire proceeding.² Thus, Earthjustice is more than adequately staffed to respond to what is essentially a legal argument.

Finally, Earthjustice admits that it would need only "four business days" to complete its opposition. Because its arguments would be primarily legal arguments, and because it is more than adequately staffed with attorneys, there would be no problem with completing the opposition to the Motion to Reinstate by September 4, 2008.

D. An Earlier Decision On Pa'ina's Motion To Reinstate Would Probably Obviate Many Subsequent Proceedings Herein.

Just as importantly, an earlier decision on Pa'ina's Motion to Reinstate would probably obviate many of the proceedings to be undertaken herein.

This case could be brought to a quicker conclusion without cutting down yet more trees. Indeed, and not being sarcastic, the amount of resources consumed in this case will probably end up having a far greater environmental impact than the irradiator, which will have no onsite or offsite impacts.

Intervenor's Motion For Extension ought to be denied.

² For example, there are a number of Earthjustice attorneys who have typically received copies of Orders and other pleadings throughout this case. (See Exhibit B attached hereto, a copy of the Monday, March 17, 2008 acknowledgment of receipt of notice from Attorney Henkin to the NRC Secretary.)

E. CONCLUSION.

For the reasons stated hereinabove, Pa'ina Hawaii, LLC submits that the Motion for Extension ought to be denied.

DATED: Honolulu, Hawaii August 29, 2008.

A handwritten signature in cursive script that reads "Fred Paul Benco". The signature is written in black ink and is positioned above a horizontal line.

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

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
Pa'ina Hawaii, LLC) Docket No. 030-36974
) ASLBP No. 06-843-01-ML
Materials License Application)

DECLARATION OF FRED PAUL BENCO

Under penalty of perjury, I, FRED PAUL BENCO, do hereby state and declare:

1. That I am a resident of the State of Hawaii, that I am a lawyer licensed to practice in the Hawaii state and federal courts, and I have been Respondent Pa'ina Hawaii, LLC's attorney since the inception of this litigation.

2. Attached hereto as Exhibit A is a true and correct copy of my e-mail message to Attorney Henkin, in response to his request for an extension of time in which to respond to Pa'ina's Motion to Reinstate. As of this date, the motion or request for stay has not been withdrawn by Intervenor.

3. Attached hereto as Exhibit B is a true and correct copy of the distribution list from Earthjustice, this one received on March 17, 2008 from Attorney Henkin. There are at least three (3) Honolulu Earthjustice attorneys on the list (Ching, Ramos and Sproat), all three of whom have been listed on the Certificate of Service in this case at various times.

DATED: Honolulu, Hawaii, August 29, 2008.



FRED PAUL BENCO

Request for Continuance

Thursday, August 28, 2008 10:32 AM

From: "Fred Benco" <fpbenco@yahoo.com>

To: "David Henkin" <dhenkin@earthjustice.org>

Cc: "m clark" <mjc1@nrc.gov>, "Michael Kohn" <hawaiiexport@aol.com>

Bcc: "andrew buchan" <abuchan@painahawaii.com>, "russell stein" <graystargenesis@aol.com>

Dear Mr. Henkin,

My client has considered your request for a continuance to respond to Pa'ina Hawaii, LLC's Motion to Reinstate. My client believes that as long as you have the request for stay before the Board, he will decline your request for a continuance. Time is still of the essence for my client. Thank you.

Fred Paul Benco

1188 Bishop Street

Suite 3409

Honolulu, HI 96813

Tel: (808) 523-5083

Fax: (808) 523-5085

EXHIBIT A

From: Hearing Docket <Hearing.Docket@nrc.gov>

To: Paul Abramson <Paul.Abramson@nrc.gov>, Catherine Marco <Catherine.Marco@nrc.gov>, Michael Clark <Michael.Clark@nrc.gov>, Tison Campbell <Tison.Campbell@nrc.gov>, Thomas Moore <Thomas.Moore@nrc.gov>, Anthony Baratta <Anthony.Baratta@nrc.gov>, mkohn@painahawaii.com, dhenkin@earthjustice.org, eching@earthjustice.org, kramos@earthjustice.org, jbrown@earthjustice.org, rfigueroa@earthjustice.org, fpbenco@yahoo.com, NRC_Issuances Resource <NRC_Issuances.Resource@nrc.gov>, ksproat@earthjustice.org, Adria Byrdsong <Adria.Byrdsong@nrc.gov>, Amy Powell <Amy.Powell@nrc.gov>, Andrea Silvia <Andrea.Silvia@nrc.gov>, Angela Coggins <Angela.Coggins@nrc.gov>, Annette Vietti-Cook <Annette.Vietti-Cook@nrc.gov>, Bernice Ammon <Bernice.Ammon@nrc.gov>, Beth Mizuno <Beth.Mizuno@nrc.gov>, Betsy Keeling <Betsy.Keeling@nrc.gov>, Brooke Poole <Brooke.Poole@nrc.gov>, Cecilia Carson <Cecilia.Carson@nrc.gov>, Christine Pierpoint <Christine.Pierpoint@nrc.gov>, Christopher Chandler <Christopher.Chandler@nrc.gov>, Daniel Lenehan <Daniel.Lenehan@nrc.gov>, Darani Reddick <Darani.Reddick@nrc.gov>, David McIntyre <David.McIntyre@nrc.gov>, David Roth <David.Roth@nrc.gov>, Diane Screnci <Diane.Screnci@nrc.gov>, Roy Hawkens <Roy.Hawkens@nrc.gov>, Eliot Brenner <Eliot.Brenner@nrc.gov>, Elizabeth Hayden <Elizabeth.Hayden@nrc.gov>, Emile Julian <Emile.Julian@nrc.gov>, Eugene Dacus <Eugene.Dacus@nrc.gov>, Evangeline Ngbea <Evangeline.Ngbea@nrc.gov>, Paul Bollwerk <Paul.Bollwerk@nrc.gov>, JAC TEMP <JAC.TEMP@nrc.gov>, Jan Strasma <Jan.Strasma@nrc.gov>, Janice Moore <Janice.Moore@nrc.gov>, Jessica Bielecki <Jessica.Bielecki@nrc.gov>, John Cordes <John.Cordes@nrc.gov>, Joseph Gray <Joseph.Gray@nrc.gov>, Karen Cyr <Karen.Cyr@nrc.gov>, Karl Farrar <Karl.Farrar@nrc.gov>, Kathryn Winsberg <Kathryn.Winsberg@nrc.gov>, Kaye Lathrop <Kaye.Lathrop@nrc.gov>, Kia Jackson <Kia.Jackson@nrc.gov>, Leslie Vincent <Leslie.Vincent@nrc.gov>, Lyons Tmp <Lyons.Tmp@nrc.gov>, Margaret Bupp <Margaret.Bupp@nrc.gov>, Maria Schwartz <Maria.Schwartz@nrc.gov>, MaryAnn Warner <MaryAnn.Warner@nrc.gov>, Mike Farrar <Mike.Farrar@nrc.gov>, Mitzi Young <Mitzi.Young@nrc.gov>, Nancy Belmore <Nancy.Belmore@nrc.gov>, Nancy Greathead <Nancy.Greathead@nrc.gov>, Neil Sheehan <Neil.Sheehan@nrc.gov>, Raeann Shane <Raeann.Shane@nrc.gov>, Rebecca Giitter <Rebecca.Giitter@nrc.gov>, Richard Wardwell <Richard.Wardwell@nrc.gov>, RidsAslbpMailCenter Resource <RidsAslbpMailCenter.Resource@nrc.gov>, RidsEdoMailCenter Resource <RidsEdoMailCenter.Resource@nrc.gov>, RidsOgcMailCenter Resource <RidsOgcMailCenter.Resource@nrc.gov>, RidsOpaMail Resource <RidsOpaMail.Resource@nrc.gov>, RidsRgn1MailCenter <RidsRgn1MailCenter@nrc.gov>, RidsRgn2MailCenter <RidsRgn2MailCenter@nrc.gov>, RidsRgn3MailCenter Resource <RidsRgn3MailCenter.Resource@nrc.gov>, RidsRgn4MailCenter <RidsRgn4MailCenter@nrc.gov>, Roger Davis <Roger.Davis@nrc.gov>, Roger Hannah <Roger.Hannah@nrc.gov>, Roland Frye <Roland.Frye@nrc.gov>, Sara Sahm <Sara.Sahm@nrc.gov>, Scott Burnell <Scott.Burnell@nrc.gov>, Spiros Droggitis <Spiros.Droggitis@nrc.gov>, Stephen Burns <Stephen.Burns@nrc.gov>, Susan Spicer <Susan.Spicer@nrc.gov>, Trip Rothschild <Trip.Rothschild@nrc.gov>, Victor Dricks <Victor.Dricks@nrc.gov>, Viktoria Mitlyng <Viktoria.Mitlyng@nrc.gov>

Cc:

Date: Monday, March 17, 2008 09:32 am

Subject: 2008/03/17-COMMISSION MEMORANDUM AND ORDER (CLI-08-03) - PA'INA HAWAII, LLC

EXHIBIT B

Attached is a Commission Memorandum and Order (CLI-08-03), Dated March 17, 2008, regarding the Pa'ina Hawaii, LLC proceeding (Docket No. 30-36974-ML).

Please acknowledge receipt. Thank you.

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Rulemakings and Adjudications Staff

Attachments:  CLI-08-03.pdf (1MB)

COMMISSION MEMORANDUM AND ORDER (CLI-08-... http://mail.painahawaii.com/cgi-bin/viewmail.exe?id=014bfc033aa828f...

From: Hearing Docket <Hearing.Docket@nrc.gov>

To: Paul Abramson <Paul.Abramson@nrc.gov>, Catherine Marco <Catherine.Marco@nrc.gov>, Michael Clark <Michael.Clark@nrc.gov>, Tison Campbell <Tison.Campbell@nrc.gov>, Thomas Moore <Thomas.Moore@nrc.gov>, Anthony Baratta <Anthony.Baratta@nrc.gov>, mkohn@painahawaii.com, dhenkin@earthjustice.org, eching@earthjustice.org, kramos@earthjustice.org, jbrown@earthjustice.org, rfigueroa@earthjustice.org, fpbenco@yahoo.com, NRC_Issuances Resource <NRC_Issuances.Resource@nrc.gov>, ksproat@earthjustice.org, Adria Byrdsong <Adria.Byrdsong@nrc.gov>, Amy Powell <Amy.Powell@nrc.gov>, Andrea Silvia <Andrea.Silvia@nrc.gov>, Angela Coggins <Angela.Coggins@nrc.gov>, Annette Vietti-Cook <Annette.Vietti-Cook@nrc.gov>, Bernice Ammon <Bernice.Ammon@nrc.gov>, Beth Mizuno <Beth.Mizuno@nrc.gov>, Betsy Keeling <Betsy.Keeling@nrc.gov>, Brooke Poole <Brooke.Poole@nrc.gov>, Cecilia Carson <Cecilia.Carson@nrc.gov>, Christine Pierpoint <Christine.Pierpoint@nrc.gov>, Christopher Chandler <Christopher.Chandler@nrc.gov>, Daniel Lenehan <Daniel.Lenehan@nrc.gov>, Darani Reddick <Darani.Reddick@nrc.gov>, David McIntyre <David.McIntyre@nrc.gov>, David Roth <David.Roth@nrc.gov>, Diane Screnci <Diane.Screnci@nrc.gov>, Roy Hawkens <Roy.Hawkens@nrc.gov>, Eliot Brenner <Eliot.Brenner@nrc.gov>, Elizabeth Hayden <Elizabeth.Hayden@nrc.gov>, Emile Julian <Emile.Julian@nrc.gov>, Eugene Dacus <Eugene.Dacus@nrc.gov>, Evangeline Ngbea <Evangeline.Ngbea@nrc.gov>, Paul Bollwerk <Paul.Bollwerk@nrc.gov>, JAC TEMP <JAC.TEMP@nrc.gov>, Jan Strasma <Jan.Strasma@nrc.gov>, Janice Moore <Janice.Moore@nrc.gov>, Jessica Bielecki <Jessica.Bielecki@nrc.gov>, John Cordes <John.Cordes@nrc.gov>, Joseph Gray <Joseph.Gray@nrc.gov>, Karen Cyr <Karen.Cyr@nrc.gov>, Karl Farrar <Karl.Farrar@nrc.gov>, Kathryn Winsberg <Kathryn.Winsberg@nrc.gov>, Kaye Lathrop <Kaye.Lathrop@nrc.gov>, Kia Jackson <Kia.Jackson@nrc.gov>, Leslie Vincent <Leslie.Vincent@nrc.gov>, Lyons Tmp <Lyons.Tmp@nrc.gov>, Margaret Bupp <Margaret.Bupp@nrc.gov>, Maria Schwartz <Maria.Schwartz@nrc.gov>, MaryAnn Warner <MaryAnn.Warner@nrc.gov>, Mike Farrar <Mike.Farrar@nrc.gov>, Mitzi Young <Mitzi.Young@nrc.gov>, Nancy Belmore <Nancy.Belmore@nrc.gov>, Nancy Greathead <Nancy.Greathead@nrc.gov>, Neil Sheehan <Neil.Sheehan@nrc.gov>, Raeann Shane <Raeann.Shane@nrc.gov>, Rebecca Giitter <Rebecca.Giitter@nrc.gov>, Richard Wardwell <Richard.Wardwell@nrc.gov>, RidsAslbpMailCenter Resource <RidsAslbpMailCenter.Resource@nrc.gov>, RidsEdoMailCenter Resource <RidsEdoMailCenter.Resource@nrc.gov>, RidsOgcMailCenter Resource <RidsOgcMailCenter.Resource@nrc.gov>, RidsOpaMail Resource <RidsOpaMail.Resource@nrc.gov>, RidsRgn1MailCenter <RidsRgn1MailCenter@nrc.gov>, RidsRgn2MailCenter <RidsRgn2MailCenter@nrc.gov>, RidsRgn3MailCenter Resource <RidsRgn3MailCenter.Resource@nrc.gov>, RidsRgn4MailCenter <RidsRgn4MailCenter@nrc.gov>, Roger Davis <Roger.Davis@nrc.gov>, Roger Hannah <Roger.Hannah@nrc.gov>, Roland Frye <Roland.Frye@nrc.gov>, Sara Sahm <Sara.Sahm@nrc.gov>, Scott Burnell <Scott.Burnell@nrc.gov>, Spiros Droggitis <Spiros.Droggitis@nrc.gov>, Stephen Burns <Stephen.Burns@nrc.gov>, Susan Spicer <Susan.Spicer@nrc.gov>, Trip Rothschild <Trip.Rothschild@nrc.gov>, Victor Dricks <Victor.Dricks@nrc.gov>, Viktoria Mitlyng <Viktoria.Mitlyng@nrc.gov>

Cc:

Date: Monday, March 17, 2008 09:32 am

Subject: 2008/03/17-COMMISSION MEMORANDUM AND ORDER (CLI-08-03) - PA'INA HAWAII, LLC

EXHIBIT B

COMMISSION MEMORANDUM AND ORDER (CLI-08-... http://mail.painahawaii.com/cgi-bin/viewmail.exe?id=014bfc033aa828f...
Attached is a Commission Memorandum and Order (CLI-08-03), Dated March 17, 2008, regarding the Pa'ina Hawaii, LLC proceeding (Docket No. 30-36974-ML).

Please acknowledge receipt. Thank you.

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Rulemakings and Adjudications Staff

Attachments:  CLI-08-03.pdf (1MB)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "LICENSEE PA'INA HAWAII, LLC'S MEMORANDUM IN OPPOSITION TO AUGUST 28, 2008 INTEVENOR CONCERNED CITIZENS OF HONOLULU'S MOTION FOR EXTENSION OF TIME TO FILE OPPOSITION TO PA'INA HAWAII, LLC'S MOTION TO REINSTATE 'CATEGORICAL EXCLUSION' STATUS FOR PA'INA HAWAII, LLC'S IRRADIATOR" dated August 29, 2008 in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this August 29, 2008. Additional service has also been made this same day by electronic mail as shown below:

Administrative Judge
Thomas S. Moore, Chair
Atomic Safety and Licensing Board
Mail Stop: T-3-F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(e-mail: tsm2@nrc.gov)

Dr. Anthony J. Baratta
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3-F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(e-mail: AJB5@nrc.gov)

Michael J. Clark
U.S. Nuclear Regulatory Commission
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Lauren Bregman
Johanna Thibault
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington D.C. 20555-0001

Administrative Judge
Dr. Paul B. Abramson
Atomic Safety and
Licensing Board
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0001
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Office of the Secretary
U.S. Nuclear Regulatory
Commission
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0001

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E-mail: ocaamail@nrc.gov

Molly Barkman
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Mail Stop: O-15 D21
E-mail: Molly.Barkman@nrc.gov

DATED: Honolulu, Hawaii, August 29, 2008.

A handwritten signature in black ink, reading "Fred Paul Benco". The signature is written in a cursive style and is positioned above a horizontal line.

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