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DOCKETED  
USNRC

August 26, 2008 (8:30am)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

August 25, 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  
Motion: To Reinstate 'Categorical  
Exclusion' Status For Pa'ina Hawaii,  
LLC's Irradiator"

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](mailto:fpbenco@yahoo.com). Thank you.

TEMPLATE = SECY 037

08 03

Very respectfully yours,

A handwritten signature in cursive script that reads "Fred Paul Benco". The signature is written in dark ink and is positioned above the printed name.

Fred Paul Benco

Encls.

cc: All parties on Certificate of  
Service

August 25, 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 MOTION: TO REINSTATE  
"CATEGORICAL EXCLUSION" STATUS FOR  
PA'INA HAWAII, LLC'S IRRADIATOR

DECLARATION OF FRED PAUL BENCO  
PURSUANT TO 10 C.F.R. Sec. 2.323

CERTIFICATE OF SERVICE

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LICENSEE PA'INA HAWAII, LLC'S MOTION: TO REINSTATE  
"CATEGORICAL EXCLUSION" STATUS FOR  
PA'INA HAWAII, LLC'S IRRADIATOR

I. INTRODUCTION.

Now comes Licensee PA'INA HAWAII, LLC ("Pa'ina") and moves this Board as follows:

1. To reinstate the original 2005 "categorical exclusion" designation granted to Pa'ina's irradiator by the NRC. The original designation was published in 70 Fed. Reg. 44,396 (Aug. 2, 2005);<sup>1</sup> and further,

2. To formally deny Intervenor's request for a stay filed herein on August 27, 2007.<sup>2</sup>

3. To grant any and all other relief deemed necessary and appropriate under the circumstances.

The requested relief is appropriate because this litigation has now come "full circle." After three years of litigation this case has, in effect, returned back to its original posture.<sup>3</sup> Stated another way, based upon recent decisions of this Board and of the Commission, there are no longer any "special circumstances" left in this

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<sup>1</sup> By reinstating the "categorical exclusion" status for Pa'ina's irradiator, the following two documents may be dissolved and extinguished: (1) that certain "Licensing Board Order" dated April 27, 2006 (Confirming Oral Ruling Granting Motion to Dismiss Contentions); and (2) the underlying "NRC Staff and Concerned Citizens of Honolulu Joint Motion to Dismiss Environmental Contentions" dated (March 20, 2006).

<sup>2</sup> This Board issued an Order on October 5, 2007 which held in abeyance any decision on Intervenor's request for stay. Insofar as that Order constitutes a cloud or potential cloud on Pa'ina's license granted August 17, 2007, this Motion also seeks removal of that Order and that cloud.

<sup>3</sup> As noted hereinafter, both the 9<sup>th</sup> Circuit Court of Appeals, and other federal appellate courts, have frequently reviewed cases where intervening decisions or legislation have brought cases "full circle" and back to their original litigation postures. See Part I, *infra*.

case. Consequently, Pa'ina's irradiator should be reinstated as to its original status as "categorically excluded" from further NEPA review.

More specifically: In June 2005, Pa'ina's filed its Application for a Materials License. The Application (and underwater irradiator) were granted "categorical exclusion" status by the NRC Staff. The "categorical exclusion" designation would have exempted the irradiator from further NEPA review.

Now, in 2008 (or three years later), this Board and the Commission have issued a series of particularly significant decisions and orders. This series of decisions and orders have effectively eliminated all three of Intervenor's original "special circumstances" from this case. The elimination of all three "special circumstances" proves that Pa'ina's irradiator was, and always has been, fully entitled to "categorical exclusion" from further NEPA review.

Consequently, through this Motion, Pa'ina requests reinstatement of the original "categorical exclusion" conferred upon it by the NRC Staff.

Reinstatement of Pa'ina's original "categorical exclusion" status would have potentially salutary impacts upon this litigation:

First and foremost, reinstatement of Pa'ina's "categorical exclusion" status would help clarify and sharpen the remaining issues in this case.

Second, this expensive and tedious litigation would move ahead more expediently to its probable next step, and appeal.

Third, the "cloud" currently hovering over Pa'ina's hoped-for lease and planned construction would be lifted, and Pa'ina would be able to freely proceed.<sup>4</sup>

This Motion is made pursuant to 10 C.F.R. Sec. 2.323(a) and is based upon the extensive records and files of this case.

II. INTERVENING JUDICIAL DECISIONS, AGENCY DECISIONS, LEGISLATION AND OTHER SUCH EVENTS OFTEN BRING A LAWSUIT "FULL CIRCLE," AND BACK TO THE LAWSUIT'S ORIGINAL LITIGATION POSTURE.

The 9<sup>th</sup> Circuit Court of Appeals, along with virtually all other federal appellate courts, have frequently recognized that intervening judicial decisions, legislative

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<sup>4</sup> Reinstating the "categorical exclusion" status for Pa'ina's irradiator might have an impact on the Intervenor's contentions still remaining in this case, but that would have to be the subject of a further motion. According to this Board's Scheduling Order issued July 17, 2008, the contentions still remaining in this case include: the "hard look" allegation/contention set forth in amended environmental contention No. 3; the Staff's alleged failure to respond to Intervenor's comments; the Staff's alleged failure to supply sufficient evidence and analysis in the final EA; the Staff's alleged failure to provide calculations, analysis or data supporting its occupational dose limit, off-site consequences, impact on transportation, and influence on tourism (Bullets 1-10, 24 and 25); the alleged impact of natural disasters and aviation accidents; alleged impacts of transportation accidents involving cobalt sources; the Staff's failure to disclose underlying data regarding terrorism; the Staff's alleged failure to consider alternate technologies; and the Staff's alleged failure to consider alternative locations.

enactments, agency actions or similar events have had the effect of returning a lawsuit to its original posture and dynamics, i.e., the original allegations have once again returned to pre-eminence in the case. See, e.g., Rush v. Obledo, 756 F.2d 713, 716 (1985); Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237, 283 (1985) (J. Brennan, dissenting); Epilepsy Foundation of Northeast Ohio v. NLRB, 268 F. 3d 1095, 1097 (D.C. App. Cir. 2001); Foster-Miller, Inc. v. Babcock & Wilcox Canada, 46 F. 3d 138, 151 (1<sup>st</sup> Cir. 1995); see also Stella v. Kelley, 63 F. 3d 71, 74 (1<sup>st</sup> Cir. 1995).

Thus, the Rush v. Obledo litigation, supra, began in 1981 when the California legislature passed legislation allowing for warrantless, unannounced inspections of family day care homes, and criminal penalties for non-compliance. The law was immediately challenged as violating the Fourth Amendment, and therefore being unconstitutional. During the next three years of legal proceedings, the California legislature amended the statute several times, even eliminating criminal penalties. These changes caused the federal district court to amend its prior decisions. In 1984, the legislature enacted yet another amended statute, which once again provided for unannounced inspections and criminal penalties. By virtue of the legislature's

action, the litigation and the differences between the respective parties had returned back to their original, 1981 legal postures. In the words of the 9<sup>th</sup> Circuit:

"Indeed, this case has come full circle, for the text of the [1984 Amendments] is identical to the language initially challenged by the plaintiffs." 756 F. 2d at 716.

The 9<sup>th</sup> Circuit proceeded to hold several portions of the legislation unconstitutional.

The Supreme Court in a 1985 decision found itself faced by an issue first raised over one hundred years earlier. Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237, 283 (1985). The issue before the Court was the right of Pueblo Indians to convey good title to their lands, a question which had first arisen in 1877. Justice Brennan, dissenting, noted that several Court decisions and Acts of Congress had intervened since 1877, which decisions and Acts had first granted, and then taken away, the Pueblos' right to convey their lands. In this 1985 decision, the majority of the Court decided, once again, that the Pueblos could convey their lands. Justice Brennan noted that under the majority's ruling, the Pueblos' right to convey had reverted back to its original 1877 status. He glumly forecast that Congressional action would later (again) overturn the majority's decision: "The Court . . . has come full circle . . . And, once again,

Congress most likely will be forced to step in and clean up after the Court's handiwork." 472 U.S. at 283.

In the Epilepsy Foundation of Northeast Ohio v. NLRB decision, supra, the D.C. Circuit reviewed a decision of the National Labor Relations Board ("NLRB"). Beginning in 1982, the NLRB had issued a series of decisions involving the very same unfair labor practice. Each successive decision (in 1982, 1985 and 1988) contradicted the prior decision. These contradictory decisions had recently been resolved by the Board consistent with its very earliest, 1982 decision. The D. C. Circuit approved and affirmed the Board's most recent decision, and concluded: "In this case, the Board has come full circle, reimposing the holding of the [earlier 1982 decision]." 268 F. 3d at 1096.

The First Circuit Court of Appeals aptly described this recurring legal situation, where intervening decisions or legislation cause a lawsuit to return to its original litigation posture: "We have come full circle, back to our beginnings." Foster-Miller, Inc. v. Babcock & Wilcox Canada, supra, at 151.

Similarly, in the instant case, the recent series of 2008 decisions by this Board and by the Commission have

brought this case "full circle." This case has now returned back to its "beginning."

III. THIS LITIGATION HAS DEMONSTRATED THAT THE NRC'S ORIGINAL "CATEGORICAL EXCLUSION" OF PA'INA'S IRRADIATOR FROM NEPA DOCUMENTATION WAS, AND IS, CORRECT.

A. Intervenor Initially Raised Three "Special Circumstances" Which, It Alleged, Created The Need For Further NEPA Review Herein.

Over three years ago, on June 23, 2005, PA'INA HAWAII, LLC (hereinafter "Pa'ina") applied for a Materials License to use Cobalt-60 for a commercial pool-type industrial irradiator which was to be built near to (but outside the boundaries of) Honolulu International Airport. The proposed site for the irradiator was in an area already properly zoned for light industrial use, and the proposed site is surrounded by warehouses and small manufacturing and transportation operations.

As part of its normal processing, the NRC evaluated Pa'ina's Application and concluded that Pa'ina's underwater irradiator qualified for "categorical exclusion." "Categorical exclusion" meant that Pa'ina's irradiator need not undergo any further review under the National Environmental Policy Act, 42 U.S.C. Sec. 4321 et seq. ("NEPA"). "Irradiators" are excluded from NEPA processing

by virtue of 10 C.F.R. Sec. 51.22(a) and Sec. 51.22(c)(14)(vii).<sup>5</sup>

In its Notice of Hearing published in the Federal Register on August 2, 2005, the NRC announced its "categorical exclusion" designation:

"Before approving the proposed license, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended, and NRC's regulations. An environmental assessment for this licensing action is not required, since this action is categorically excluded under the provisions of 10 CFR 51.22(c)(14)(vii)." 70 Fed. Reg. 44,396 (Aug. 2, 2005)

However, even before the NRC could make "the findings" as set forth in the Notice, Intervenor CONCERNED CITIZENS OF HONOLULU (hereinafter "Intervenor") on October 3, 2005 filed its original Petition requesting a hearing herein.

Intervenor's 2005 Petition alleged two interrelated environmental contentions. Intervenor's first contention alleged that the NRC Staff had failed to explain how or why Pa'ina's irradiator was "categorically excluded" from further NEPA review.<sup>6</sup> Thus, the Board noted the absence of

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<sup>5</sup> 10 C.F.R. Sec. 51.22(a) provides: "Licensing and regulatory actions eligible for categorical exclusion shall meet the following criterion: The proposed action belongs to a category of actions which the Commission, by rule or regulation, has declared to be a categorical exclusion, after first finding that the category of actions does not individually or cumulatively have a significant effect on the human environment.

Subsection 51.22(c)(14)(vii) identifies "Irradiators" as being expressly excluded.

<sup>6</sup> This Board held: "In a nutshell, the Petitioner's contention alleges that controlling precedent from the Ninth Circuit Court of Appeals requires an explanation by the Staff as to why a categorical exclusion is appropriate here and perforce why special circumstances are not present." (Emphasis added) See LBP-06-04 (January 24, 2006), slip op. at Page 16.)

any "explanation" by the Staff for its categorical exclusion of Pa'ina's irradiator.<sup>7</sup>

Intervenor's second contention was the "flip side" of its first contention. Intervenor alleged that there existed "three special circumstances" which required further NEPA review of Pa'ina's irradiator. As worded by this Board: "[Petitioner's] second environmental contention affirmatively asserts that special circumstances are present that preclude the application of the categorical exclusion and require an 'environmental impact statement or, at a minimum, an environmental assessment.'" (Emphasis added) (Id., at p. 16)

Intervenor had alleged three distinct "special circumstances" which disqualified Pa'ina's irradiator from "categorical exclusion": (1) risks associated with the proposed location from hurricanes, tsunamis, and airplane crashes; (2) risks of terrorism; and (3) risks to health arising from the consumption of irradiated fruit. (Id., at pp. 16-17)<sup>8</sup> From Intervenor's viewpoint, the alleged risks presented by hurricanes, tsunamis, airplane crashes,

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<sup>7</sup> This Board never explained what type of explanation, how long of an explanation, or how narrow or broad the explanation by the Staff should have been. Pa'ina Hawaii, LLC submits that the 45-page Environmental Assessment, the 44-page Final Topical Report, and the 1993 Statement of Considerations constitute a more than adequate "explanation."

<sup>8</sup> Intervenor did not allege "earthquakes" as a natural phenomena in its October 3, 2005 petition, and Intervenor's expert (Dr. Resnikoff) never mentioned the term "earthquake" in his Declaration attached to the petition. Thus, the possibility of earthquakes and soil liquefaction became an allegation only after October 3, 2005, and clearly should have been denied admissibility for late filing. In any event, as of April 2, 2008, risks from earthquakes have been eliminated as a valid contention herein.

terrorism and irradiated foods required further environmental study. (For brevity's sake, these three "special circumstances" (originally alleged in 2005) will hereinafter be called the "Three Special Circumstances.")

Several months later, and over opposition from both the NRC Staff and Applicant Pa'ina, this Board on January 24, 2006 admitted both of Intervenor's environmental contentions, i.e., the failure to explain why Pa'ina's irradiator warranted categorical exclusion, and also further evaluation of the risks posed by the Three Special Circumstances. (See LBP-06-04 (January 24, 2006))

Two months later, and again over opposition from both the NRC Staff and Licensee, this Board on March 24, 2006 issued a further Memorandum and Order in which it admitted (among other contentions) Intervenor's Safety Contention 7. Safety Contention 7 had alleged that Pa'ina's Application omitted emergency procedures in case of an airplane crash. See LBP-06-12 (March 24, 2006)

To summarize: by March 2006, this Board had admitted three of Intervenor's contentions which are the focus of this Motion: first, that the Staff had not properly explained its "categorical exclusion" of Pa'ina's irradiator from further NEPA review; second, that there existed Three Special Circumstances which disqualified

Pa'ina's irradiator from "categorical exclusion;" and third, that Pa'ina's irradiator was potentially unsafe because it was unsupported by an adequate emergency plan in the event of an airplane crash.

B. Over Pa'ina's Objections, The Staff And Intervenor Entered Into A Stipulation To Produce An Environmental Assessment (EA); The EA Was Produced; And The EA Provoked Yet Additional Contentions From Intervenor.

For purposes of this Motion, the next significant event in this litigation was that the Staff and the Intervenor agreed to produce an Environmental Assessment ("EA").

Thus, on March 20, 2006, the NRC Staff and the Intervenor entered into a Stipulation whereby the NRC Staff agreed to produce an Environmental Assessment ("EA"). Applicant Pa'ina objected to the Stipulation, but its objections were overruled. On April 27, 2006 this Board approved the Stipulation and dismissed the original contentions.

More than a year later, in May 2007, the NRC Staff produced its Final Topical Report. (ML0712808330) Thereafter, on August 17, 2007 the Staff produced its Final EA. (ML0711501211)

On September 4, 2007 Intervenor responded to both the Final Topical Report and the Final EA by filing yet further amended contentions.

C. In December 2007 This Board Admitted A Number Of Intervenor's Amended Contentions.

On December 21, 2007 this Board admitted a number of Intervenor's amended contentions. However, for purposes of this Motion, only three of the amended contentions are of particular interest herein.

Specifically, those three amended contentions alleged that the Final EA had the following deficiencies: (a) the Final EA failed to adequately consider potential impacts from natural disasters and aviation accidents; (b) the Final EA failed to provide a serious, scientifically-based analysis of risks and consequences of terrorist acts, and (c) the Final EA failed to discuss impacts associated with irradiating food for human consumption. (For purposes of brevity and convenience, these three, admitted 2007 amended contentions will hereinafter be called the "Three Amended Contentions.")

Notably, these Three Amended Contentions were virtually identical to the Three Special Circumstances

originally alleged by Intervenor back in 2005.<sup>9</sup> To use the current vernacular, Intervenor's original, 2005 Three Special Circumstances had "morphed" into Intervenor's 2007 Three Amended Contentions.

Thus, this case had come "full circle."

D. Recently, Intervenor's Three Amended Contentions Have Been Rejected As A Matter Of Law.

Recently, all Three Amended Contentions raised by Intervenor in 2007 have been denied admission as a matter of law.

1. Intervenor's terrorism-related amended contention has been eliminated. On March 4, 2008, this Board denied admissibility for Intervenor's terrorism-related amended contention.<sup>10</sup>

In effect, this Board's March 4, 2008 ruling also addressed and eliminated "risks from terrorism" as a "special circumstance" surrounding Pa'ina's irradiator. Projecting the Board's March 4, 2008 ruling backwards to 2005 (and the beginning of this case), there existed no valid terrorism-related "special circumstance" in 2005.

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<sup>9</sup> See Page 10, supra.

<sup>10</sup> See Memorandum and Order (Ruling on Admissibility of Intervenor's Terrorism-Related Challenges)(March 4, 2008) This Board relied upon and followed the Commission's decision and rationale in Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-01, 67 NRC \_\_ (Jan. 15, 2008)

Thus, Pa'ina's irradiator presented no significant terrorism-related risks from 2005 to the present.

2. Intervenor's contentions regarding natural phenomena and airplane crashes have been eliminated. This Board has also issued two recent rulings which held that Pa'ina's irradiator posed no significant risks because of natural phenomena (tidal waves, hurricanes, flooding and earthquakes) and possible airplane crashes. This Board found that the irradiator's location in Honolulu presented no significant risks to either the on-site or off-site environments.

First, on April 2, 2008 this Board denied admissibility of Intervenor's Safety Contention No. 7. In denying admissibility, this Board noted that there would be no significant off-site radiation risks from natural phenomena or possible airplane crashes:

"[T]he regulatory history of NRC irradiator regulations indicated that the agency purposefully refrained from adopting any site selection requirements for irradiators because it concluded that irradiators are generally unlikely to pose any significant risk of offsite harm." (Emphasis added) Memorandum and Order, April 2, 2008, at p. 1.

Thereafter, on June 19, 2008 this Board denied admissibility for Intervenor's Amended Safety Contention No. 7. This Board noted that there was no significant risk

of radiation harm either on-site or offsite from natural phenomena or possible airplane crashes:

"[T]he Intervenor has failed to link this scenario to a resulting radiation dose at the facility floor or offsite." (Emphasis added) Memorandum and Order, June 19, 2008, at pp. 4-5.

Thus, as a result of this Board's April 2 and June 19, 2008 decisions, Pa'ina's irradiator has been found to pose no significant safety risks on-site or off-site. This is the same as saying that Pa'ina's irradiator poses no significant on-site or off-site environmental risks.

Projecting this Board's April 2 and June 19, 2008 decisions backwards to 2005, it becomes clear that in 2005 there existed no valid "special circumstances" posed by natural phenomena or possible airplane crashes.

Lest it be argued that environmental risks and safety risks are distinct under NEPA, the 9<sup>th</sup> Circuit has held otherwise. In the Ninth Circuit, "environmental contentions" are usually equated with "safety" and "safety contentions." Thus, for example, in City v. Auburn v. United States, 154 F. 3d 1025, 1032 (9<sup>th</sup> Cir. 1998), the 9<sup>th</sup> Circuit denied a challenge to an Environmental Assessment (EA) therein. The Court expressly equated safety concerns with environmental concerns:

"The EA produced by the STB [Surface Transportation Board] is more than sixty pages long. It addresses

environmental concerns such as rail traffic increases, transportation safety, energy, air quality, and noise." (Emphasis added) 154 F. 3d at 1032.

Similarly, in Price Road Neighborhood Association v. United States DOT, 113 F. 3d 1505 (1997), the 9<sup>th</sup> Circuit again equated environmental concerns with safety concerns:

"The PRNA argues that the agencies failed to adequately identify and analyze at least six potentially significant impacts in the environmental reevaluation: safety (including hazardous cargo) and traffic congestion, air quality, noise, visual impact, vibration, and waste material." (Emphasis added) 113 F. 3d at 1511.

More recently, the 9<sup>th</sup> Circuit reiterated that "environmental" concerns encompassed "safety" concerns for NEPA purposes. Thus, in Gros Ventre Tribe v. United States, 469 F. 3d 801 (9<sup>th</sup> Cir. 2006), the Court noted that:

"'[the] BLM was required to consult with the Tribes and to identify, protect, and conserve trust resources, trust assets, and Tribal health and safety' in its administration of the NEPA and other environmental laws." (Emphasis added) 469 F. 3d at 810, fnt 10. See also Reed v. Pershing County, 231 F. 3d 501 (9<sup>th</sup> Cir. 2000) (NEPA comments encompassed the safety impacts of the requested permit); Western Radio Servs. Co. v. Glickman, 113 F. 3d 966 (9<sup>th</sup> Cir. 1997) (NEPA study included analysis of threats to public safety).

To summarize: Pa'ina's irradiator poses no significant on-site or off-site safety or environmental risks, and never has. Projecting this Board's April 2 and June 19, 2008 decisions backwards to 2005, one may safely conclude that in 2005 there existed no "special

circumstances" arising out of, or resulting from, natural phenomena and possible airplane crashes.

3. The Commission has recently denied admissibility of health-related contentions related to irradiated fruit.

The last of the Three Amended Contentions (which were admitted in the Board's December 21, 2007 decision) alleged that consumers might suffer adverse health effects from the irradiation of fruits. This amended contention was virtually identical to the third of Intervenor's 2005 "Three Special Circumstances," which had likewise alleged impacts upon humans from consuming irradiated foods.

Just recently, on August 13, 2008, the Commission rejected Intervenor's amended contention that irradiating foods was harmful to humans. Moreover, the Commission reversed this Board's December 21, 2007 admission of that food-related amended contention.

Again, projecting the Commission's recent August 13<sup>th</sup> ruling backwards to 2005, one may now safely conclude that in 2005 there existed no valid "special circumstance" posed by the consumption of irradiated food.

Thus, this case has come "full circle." Initially, on October 3, 2005, Intervenor alleged Three Special

Circumstances which (according to Intervenor) necessitated further NEPA review.

2005's Three Special Circumstances were identical predecessors of Intervenor's 2007 Three Amended Contentions.

The recent 2008 decisions of this Board and of the Commission (cited above) have eliminated the 2007 Three Amended Contentions as a matter of law. By eliminating the Three Amended Contentions, this Board and the Commission effectively (if belatedly) eliminated the "Three Special Circumstances" alleged by Intervenor in 2005.

We have now gone "back to the beginning" of this case. Assuming the elimination of 2005's Three Special Circumstances by virtue of the recent elimination of the Three Amended Contentions, then Pa'ina's irradiator ought to be reinstated to "categorically excluded" status.

Pa'ina respectfully requests that this Board reinstate and affirm the original designation of "categorical exclusion" for Pa'ina's irradiator.<sup>11</sup> This may be entered nunc pro tunc if deemed necessary and appropriate.

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<sup>11</sup> If deemed necessary and appropriate, this Board should vacate and dissolve the "NRC Staff and Concerned Citizens of Honolulu Joint Motion to Dismiss Environmental Contentions" (dated March 20, 2006), and this Board should also vacate and dissolve that certain "Licensing Board Order" dated April 27, 2006 (Confirming Oral Ruling Granting Motion to Dismiss Contentions).

IV. THE STAFF'S FINAL TOPICAL REPORT, ITS FINAL EA, AND THE NRC'S 1993 STATEMENT OF CONSIDERATIONS MORE THAN SUFFICE AS "EXPLANATIONS" SUPPORTING CATEGORICAL EXCLUSION FOR PA'INA'S IRRADIATOR.

The last lingering issue to be addressed by this Motion is the matter of the missing "explanation" in 2005. In 2005, this Board found that the Staff had failed to explain its reasoning for "categorical exclusion" afforded to Pa'ina's irradiator.

Over the past three years, the "explanation" has been given, in spades. The NRC Staff has produced a 47-page Environmental Assessment (EA) and also a 44-page Final Topical Report (Topical Report).

Moreover, and just as importantly, there is the detailed and comprehensive 1993 "Statement of Considerations" ("SOC") issued by the NRC itself.<sup>12</sup> The SOC succinctly summarize the Commission's explanation for its lack of unusual siting requirements. Notably, in its March 17, 2008 Memorandum and Order, the Commission frequently, approvingly and at length cited from its SOC, and held that the SOC were entitled to "special weight" in siting considerations. See CLI-08-03 (March 17, 2008).

Thus, this Board now has abundant explanations justifying "categorical exclusion" for Pa'ina's irradiator.

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<sup>12</sup> Final Rule, Licenses and Radiation Safety Requirements for Irradiators, 58 Fed. Reg. 7715, 7725 (Feb. 9, 1993)(Final Rule)

The 47-page EA, the 44-page Final Topical Report, and the NRC's own 1993 "Statement of Considerations" regarding siting of irradiators constitute the "explanation."

With these explanations now in place, this Board ought to reinstate "categorical exclusion" for Pa'ina's irradiator.

V. THIS BOARD OUGHT TO FORMALLY DENY INTERVENOR'S REQUEST FOR STAY FILED AUGUST 27, 2008.

Assuming arguendo that there are no significant on-site or off-site risks posed by Pa'ina's irradiator, Pa'ina asks this Board to formally deny Intervenor's request for a stay filed August 27, 2007. It has been noted that even the threat of an injunction can produce "undue leverage" in legal situations. See eBay v. MercExchange, 547 U. S. 388, 396 (2006) (Kennedy, J., concurring)

Pa'ina has already received its Materials License from the NRC. Indeed, Pa'ina has just paid its license renewal fee for the coming year. A formal denial of the stay request would lift the cloud hanging over Pa'ina's irradiator, and allow Pa'ina to safely secure a lease and predictably begin construction.

VI. CONCLUSION.

After three years, this litigation has recently "come full circle." That is to say, a series of recent 2008 decisions has reaffirmed and validated the NRC Staff's 2005 determination that Pa'ina's irradiator was "categorically excluded" from further NEPA review. The 2008 decisions have also reaffirmed that there are, and were, no "special circumstances" which warranted any further NEPA review.

Thus, Pa'ina requests that this Board: (1) declare that that the "categorical exclusion" status be reinstated for Pa'ina's irradiator; (2) formally deny Intervenor's request for stay filed August 27, 2007; and (3) award any and all other relief which is deemed just and appropriate.<sup>13</sup>

DATED: Honolulu, Hawaii August 25, 2008.

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

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<sup>13</sup> Pursuant to 10 C.F.R. Sec. 2.323(b), counsel for Pa'ina Hawaii, LLC hereby certifies that he made a sincere effort to contact the other parties to this case, and noted in the attached Declaration.

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

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DECLARATION OF FRED PAUL BENCO  
PURSUANT TO 10 C.F.R. Sec. 2.323

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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. Pursuant to 10 C.F.R. Sec. 2.323(b), counsel for Pa'ina Hawaii, LLC hereby certifies that he made a sincere effort to contact Michael Clark (counsel for the NRC Staff) and David Henkin (counsel for Intervenor) to resolve the issues raised in this Motion. On August 14, 2008 Michael Clark in a telephone call indicated that he had no position

on the filing of this Motion, and he had no position on the issues raised in this Motion. On August 20, 2008 David Henkin in a telephone call objected to the filing of this Motion, and he opposed the issues raised herein.

I declare under penalty of perjury that the above is true and correct to the best of my knowledge and belief.

DATED: Honolulu, Hawaii, August 25, 2008.

  
FRED PAUL BENCO

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "LICENSEE PA'INA HAWAII, LLC'S MOTION: TO REINSTATE 'CATEGORICAL EXCLUSION' STATUS FOR PA'INA HAWAII, LLC'S IRRADIATOR" dated August 25, 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 25, 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  
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Lauren Bregman  
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DATED: Honolulu, Hawaii, August 25, 2008

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