April 9, 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. 30-36974-ML
	)	
(Materials License Application)	)	ASLBP No. 06-843-01-ML

NRC STAFF'S RESPONSE TO PA'INA'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL TESTIMONY

On April 2, 2009, the licensee submitted its "Motion for Leave to File Supplemental Written Direct Testimony of Michael Kohn, President of Pa'ina Hawaii, LLC." Along with its motion, Pa'ina submitted brief written testimony from Mr. Kohn and three supporting exhibits. Pa'ina bases its motion on a March 23, 2009 news article stating that Vietnam's dragon fruit exporters will soon be resuming exports to the United States. (Motion for Leave at 1, citing Exh. A.) The article explains that dragon fruit exports had been ceased since December 2008 due to the failure of irradiation equipment at Vietnam's sole treatment facility. According to Pa'ina, the Vietnam facility is an electron-beam irradiator manufactured by SureBeam. (Kohn Supplemental Testimony at A. 17 and A.18, citing Exhs. B and C.) This is relevant to the present case, Pa'ina asserts, where the unreliability of electron-beam irradiators was one of the reasons Mr. Kohn decided to seek an NRC license to use in connection with a cobalt-60 irradiator.

The Staff does not oppose Pa'ina's motion for leave to file supplemental testimony addressing the failure of the electron-beam irradiator in Vietnam. The reliability of electron-beam irradiators is already an issue in this proceeding. In his prior testimony dated September 15, 2009, Mr. Kohn explained that he eliminated the electron-beam irradiator as an option in part because "frequent equipment failures" associated with this type of irradiator created

"unreliability . . . [and] caused or threatened to cause substantial losses to [Pa'ina's] client base." Kohn Rebuttal Testimony at A.7, A.9, A.10.[1] In response, the Intervenor (Concerned Citizens of Honolulu) submitted supplemental testimony from Eric Weinert, vice president of Hawaii Pride, LLC, which operates an electron-beam irradiator manufactured by SureBeam. Mr. Weinert took issue with Mr. Kohn's rebuttal testimony, claiming that, based on his company's track record, "with proper maintenance, [electron-beam] x-ray irradiators are extremely reliable." Weinert Supplemental Testimony at A.8. Whether electron-beam irradiators are prone to equipment failures, as Mr. Kohn asserts, or whether they are extremely reliable, as Mr. Weinert maintains, is therefore an issue in this proceeding.

10 C.F.R. § 51.104(b) states that "in any proceeding in which a hearing is held where the NRC staff has determined that no environmental impact statement need be prepared for the proposed action . . . any party to the proceeding may take a position and offer evidence on the aspects of the proposed action within the scope of NEPA. . . ."[2] Here, Pa'ina is offering its supplemental testimony and exhibits to show why it prefers to operate a cobalt-60 irradiator rather than an electron-beam irradiator. This is an issue within the scope of NEPA. *See Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 55 (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 197 (D.C. Cir. 1991)) (holding that it is appropriate to "accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project"); *City of Grapevine v. USDOT*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) *cert. denied*, 513 U.S. 1043 (1994) (explaining that where the federal agency is not

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[1] Mr. Kohn's rebuttal testimony was not the first time he mentioned equipment failures associated with electron-beam technology. In his February 28, 2007 response to the Staff's questions regarding Pa'ina's consideration of alternative technologies, Mr. Kohn stated that electron beam irradiators use significantly more electricity than cobalt-60 irradiators, require constant upkeep, and frequently break down. Prefiled Staff Exh. 26 at 4–5.

[2] "NEPA" refers to the National Environmental Policy Act of 1969, *as amended*, 42 U.S.C. §§ 4321 *et seq*.

the sponsor of a project, the "consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project").

Also within the scope of NEPA is whether an electron-beam irradiator would allow Pa'ina to meet the goals of its proposed action. The supplemental testimony is relevant to this issue as well, because it suggests that, due to equipment failures, an electron-beam irradiator would not allow Pa'ina to meet its goal of bringing a more reliable and cost-effective method of food irradiation to Hawaii. *See Native Ecosystems Council v. United States Forest Serv.,* 428 F.3d 1233, 1247–49 (9th Cir. 2005) (finding that agency acted appropriately in not pursuing certain alternatives because they would not have advanced the purpose of the proposed project); *City of Bridgeton v. Slater*, 212 F.3d 448, 456 (8th Cir. 2000) (explaining that "[a]n alternative that does not accomplish the purpose of the project in question is unreasonable and does not require detailed attention in the [agency's NEPA document]").[3]

The Staff therefore does not object to Pa'ina's motion for leave to file supplemental testimony from Michael Kohn and three supporting exhibits.

Respectfully submitted,

/RA/mjc

Michael J. Clark
Molly L. Barkman
Counsel for NRC Staff

Dated at Rockville, Maryland
This 9th day of April, 2009

[3] The Staff would emphasize that, although the reliability of electron-beam irradiators is an issue relevant to this proceeding, it is also an issue that the Board does not necessarily have to resolve. That is because the Staff was well-justified in removing the electron-beam alternative from further consideration for another reason; namely, the significant economic uncertainty associated with this technology. Prefiled Staff Exh. 1, at A.31; Prefiled Staff Exh. 61 at A.7.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC Staff's Response to Pa'ina's Motion for Leave to File Supplemental Testimony" have been served on the recipients listed below by deposit in the United States mail, by deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 9th day of April, 2009.

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