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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

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

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

INTERVENOR CONCERNED CITIZENS OF HONOLULU'S OPPOSITION  
TO NRC STAFF'S PETITION FOR REVIEW OF BOARD'S INITIAL DECISION

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## I. INTRODUCTION

Intervenor Concerned Citizens of Honolulu respectfully submits the Commission should deny the Nuclear Regulatory Commission (“NRC”) Staff’s petition for review of the August 27, 2009 Initial Decision of the Atomic Safety and Licensing Board (“Board”). As discussed below, the Board properly determined that, to comply with the National Environmental Policy Act (“NEPA”), the Staff must evaluate in its environmental assessment (“EA”) the “impacts of transportation accidents” and “consider the electron-beam irradiator alternative technology and alternative sites.” 8/27/09 Initial Decision at 108-09. See infra Parts III-V. Moreover, to ensure Concerned Citizens receives the benefit of its bargain from the March 2006 Joint Stipulation and to provide the public with the opportunity for input that NEPA mandates, the Board properly ordered the Staff to provide “a period for written comment” on the Staff’s new analyses. Initial Decision at 102; see infra Part VI.

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

On October 3, 2005, Concerned Citizens timely filed a request for hearing on Pa’ina’s application for a license for possession and use of byproduct material in connection with the construction and operation of a commercial pool-type industrial irradiator using a cobalt-60 (“Co-60”) source at the Honolulu International Airport. Among other issues, Concerned Citizens’ hearing request included contentions regarding the NRC’s failure to explain its application of a categorical exclusion to Pa’ina’s proposed irradiator (Environmental Contention 1) and failure to prepare an EA or environmental impact statement (“EIS”) (Environmental Contention 2). 10/3/05 Hearing Request at 15, 19-25.

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<sup>1</sup> Concerned Citizens focuses on those aspects of the procedural history that are most relevant to the Staff’s request. The Initial Decision contains additional background information.

On January 24, 2006, the Board granted Concerned Citizens' request for hearing, finding Concerned Citizens had standing and its two environmental contentions were admissible. Pa'ina Hawaii, LLC (Material License Application), LBP-06-04, 63 NRC 99 (2006).

On April 27, 2006, the Board accepted the NRC Staff's and Concerned Citizens' joint stipulation settling Environmental Contentions 1 and 2, which the parties had lodged on March 20, 2006. 4/27/06 Board Order (Confirming Oral Ruling Granting Motion to Dismiss Contentions). The stipulation provided, among other things, that the Staff would prepare an EA for Pa'ina's proposed irradiator to determine whether to prepare an EIS or a finding of no significant impact ("FONSI") and that, prior to making any final FONSI for the proposed irradiator, the Staff would put a draft decision out for public review and comment. 3/20/06 Joint Stipulation and Order Regarding Resolution of Concerned Citizens' Environmental Contentions at ¶¶ 1-2.

In December 2006, the Staff issued the Draft EA (ML063470231). See 71 Fed. Reg. 78,231 (Dec. 28, 2006). On February 8, 2007, Concerned Citizens timely submitted comments on the Draft EA challenging, among other things, the Staff's failure "to examine the likelihood and consequences of accidents involving transportation of Co-60 sources to and from the proposed irradiator, without which the facility could not function," to consider the alternative of "using electron-beam irradiation," and "to consider alternate locations for the proposed irradiator." 2/8/07 Earthjustice Letter at 5, 8-9 (ML070470615). On February 9, 2007, Concerned Citizens filed environmental contentions relating to matters discussed in the Draft EA, including challenges to the Staff's failures to evaluate potential environmental impacts associated with transportation accidents and to consider the e-beam irradiator alternative and alternate sites. 2/9/07 Contentions re: Draft EA and Draft Topical Report at 20, 26-27.

On August 13, 2007, the Staff served its Final EA and associated FONSI (ML072250561). Four days later, the Staff issued NRC License No. 53-29296-01 to Pa'ina for possession and use of sealed sources in its proposed irradiator. ML072260171; ML072320269.

On August 27, 2007, Concerned Citizens filed a timely motion in which it asked the Board to stay the effectiveness of the NRC license. On October 5, 2007, the Board issued an order holding the stay request in abeyance, finding that Pa'ina's "failure yet to have signed a lease for the irradiator site robs the irreparable harm asserted by the Intervenor of any imminence." 10/5/07 Board Order (Temporarily Holding in Abeyance Stay Application) at 1-2. The Board ordered Pa'ina to provide on the first of each month an update on the "then current status of its lease negotiations for the proposed site." Id. at 2.

On September 4, 2007, Concerned Citizens filed timely amended environmental contentions challenging the Final EA's failure to satisfy NEPA. See 12/21/07 Board Order at 4. Among other things, Concerned Citizens reasserted its challenges to the Staff's failures to examine in its EA "the likelihood and consequences of accidents that might occur during the annual transport of Co-60 sources to and from the proposed irradiator," use of "an electron-beam instead of Co-60 sources" for irradiation, and "alternate locations for the proposed irradiator." 9/4/07 Concerned Citizens' Amended Environmental Contentions at 18, 32-33.

On December 21, 2007, the Board issued an order admitting portions of Concerned Citizens' environmental contentions, including "the part of [Concerned Citizens'] contention challenging the Staff's failure to consider transportation accidents involving the shipment of Co-60 sources to and from the proposed irradiator," "the portion of its contention asserting that the Staff failed to consider the alternative of the electron beam irradiator," and its "challenge to the Staff's failure to consider alternative locations." 12/21/07 Board Order at 17-18, 29, 31.

On July 17, 2008, the Board issued a scheduling order for the remainder of the proceeding. Pursuant to that order, on August 26, 2008, each party submitted its initial statement of position, and rebuttal statements of position were filed on September 15 and 16, 2008.

Because Concerned Citizens took the position in its Initial and Rebuttal Statements that the administrative record precludes the Staff from correcting deficiencies in the Final EA through the hearing process, Concerned Citizens did not file evidence to rebut the testimony attached to the Staff's Initial Statement. Accordingly, on December 4, 2008, the Board directed Concerned Citizens "to file a full factual and substantive written statement of position so that the Board would have the benefit of the Intervenor's rebuttal and response to the allegedly, 'post hoc,' 'improper,' and 'irrelevant' testimony submitted by the Staff and Applicant in their Initial and Rebuttal Statements of Position." Initial Decision at 7 n.36.

On February 2, 2009, Concerned Citizens filed its Supplemental Statement of Position, which argued, inter alia, that "the Staff was obliged to include in its EA adequate analysis of potential impacts associated with transporting Co-60 to and from the irradiator" since they are "reasonably foreseeable environmental impacts of a proposed action, even if they are only indirect effects." 2/2/09 Supplemental Statement at 38 (quoting Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-06-15, 63 NRC 687, 690 (2006)). Concerned Citizens had asserted this same argument throughout this proceeding. See, e.g., Concerned Citizens' Reply in Support of Its Contentions Re: Draft EA and Draft Topical Report at 16 (March 19, 2007); Concerned Citizens' Reply in Support of Its Amended Environmental Contentions #3 Through #5 at 22 (Oct. 1, 2007); Concerned Citizens' Rebuttal to Pa'ina Hawaii, LLC's Statement of Position at 9-10 (Sept. 15, 2008).

On March 5, 2009, the Staff submitted its Response to Intervenor's Supplemental Statement of Position. In that document, the Staff, for the first time, presented an analysis of the likelihood that "radiation would be released as the result of an accident occurring during the transport of cobalt-60 to Pa'ina's irradiator." 3/5/09 Staff Response to Supplemental Statement of Position at 36. That analysis was prepared by Earl Easton, an NRC employee who did not "have any role in the NRC Staff's environmental review of the license application submitted by Pa'ina Hawaii, LLC" and had not previously submitted testimony in this proceeding. Staff Exh. 70: Easton Testimony at Q.2; see also id. at A.2. Indeed, Mr. Easton had "only become familiar with this case" in February 2009. Id. at A.2.

On April 6, 2009, to raise specific challenges regarding the new information set forth in Mr. Easton's testimony, Concerned Citizens filed an Amendment to Environmental Contention 3 Re: Transportation Accidents.

On August 27, 2009, the Board issued its Initial Decision in which it held the Staff's EA inadequate in three respects: (1) the Staff failed to "take a 'hard look' and consider the environmental consequences of accidents that might occur during the annual transport of Co-60 sources to and from the proposed irradiator," Initial Decision at 51; (2) the Staff improperly failed to "study, develop, and describe the e-beam irradiator alternative and give that alternative meaningful consideration," id. at 101; and (3) the Staff failed to "consider[] reasonable alternative sites that might present less environmental impact." Id. at 105.<sup>2</sup> Based on these fatal

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<sup>2</sup> The Staff's claim that "the Board found that the Staff sufficiently considered ... two alternate technologies" is inaccurate. Staff Petition at 7. In fact, the Board gave "the Staff's treatment of the fumigation and immersion alternatives in the EA a failing grade," berating the Staff for providing "nonessential, largely worthless generalities and some information of questionable validity." Initial Decision at 69, 71. The Staff's analysis was so flawed that the Board was obliged to scour the record, eventually locating an exhibit "that is neither cited in the EA nor cited or relied upon by the Staff in its argument or witness testimony on these

deficiencies in the Staff's analysis, which were not cured during the course of this proceeding, the Board ordered the Staff to "give full and meaningful consideration to transportation accidents and alternatives in [an] amended Final EA." Initial Decision at 109 n.484. As part of that process, the Board further ordered the Staff to "allow a brief opportunity for written public comment on its draft amendment or supplement to the EA before either finalizing the draft amendment on [these topics] or reaching its final conclusion regarding the proposed irradiator." Id. at 102; see also id. at 108; 9/29/09 Board Order (Denying Intervenor's Motion to Clarify) at 2.

III. THE BOARD CORRECTLY DIRECTED THE STAFF TO ANALYZE POTENTIAL IMPACTS ASSOCIATED WITH TRANSPORTATION ACCIDENTS

A. The Board Did Not Commit Procedural Error.

The Staff's argument that, in ordering the Staff to amend the EA, the Board "committed procedural error" misreads the Initial Decision. Staff Petition at 9. The Board did not, as the Staff claims, base its order to analyze transportation accidents "on a contention the Board had not even determined was admissible." Id. Rather, the Initial Decision expressly states the Board based its order on the Staff's failure to "respond[] to the Intervenor's specific admitted contention," not on Concerned Citizens' "newly filed contention," whose admissibility the Board saw no need to address. Initial Decision at 51-52 (emphasis added). In relevant part, amended environmental contention 3, which the Board admitted in its December 21, 2007 order, challenges the Staff's failure "to examine the likelihood and consequences of accidents that might occur during the annual transport of Co-60 sources to and from the proposed irradiator."

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alternatives." Id. at 69. Only as "clarified by [the Board's] decision," the Board ultimately gave the Staff's "treatment of these two alternatives ... the lowest possible minimum passing grade." Id. at 71.

Id. at 47 (quoting 9/4/07 Amended Environmental Contentions at 18); see also id. (Final EA “omitted any consideration of impacts from transportation accidents, [which is] the subject of the Intervenor’s challenge here”) (quoting 12/21/07 Board Order at 18 n.62).

As the Board correctly observed, the Staff’s March 5, 2009 response to Concerned Citizens’ Supplemental Statement of Position “mark[ed] the first time the Staff or any of its experts ha[d] attempted to respond to the Intervenor’s contention,” other than to argue the Staff was not required to analyze transportation impacts. Id. at 51.<sup>3</sup> After thoroughly reviewing Mr. Easton’s testimony, the Board concluded it consisted of only “a few, unsupported sentences” in which “the Staff’s expert makes broad, generalized statements regarding the impacts of transportation accidents.” Initial Decision at 51. The Staff provides no basis for the Commission to question the Board’s factual finding that “Mr Easton’s testimony regarding accidents fails to respond directly or sufficiently to the [admitted] contention,” id. at 50, much

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<sup>3</sup> The Staff seeks to justify its belated submission of Mr. Easton’s testimony by claiming Concerned Citizens’ February 2, 2009 Supplemental Statement was “the first time” Concerned Citizens argued “that, regardless of whether [the operation of the irradiator and source shipments] are ‘connected,’ the Staff had to consider the environmental impacts of transportation accidents because these impacts are reasonably foreseeable effects of licensing Pa’ina’s irradiator.” Staff Petition at 5. It argues it submitted Mr. Easton’s testimony to respond to this “new argument.” Id. The Commission should reject the Staff’s characterization of these proceedings, which is completely inaccurate.

Following the draft EA’s issuance and again after the final EA came out, Concerned Citizens presented precisely the argument the Staff claims was first asserted in the Supplemental Statement, emphasizing the Commission’s holding in Louisiana Energy Services, L.P., CLI-06-15, 63 NRC at 698, that “NEPA requires ... that we consider ‘reasonably foreseeable’ indirect effects of the proposed licensing action.” Concerned Citizens’ Reply in Support of Its Contentions Re: Draft EA and Draft Topical Report at 16 (March 19, 2007); Concerned Citizens’ Reply in Support of Its Amended Environmental Contentions #3 Through #5 at 22 (Oct. 1, 2007). Concerned Citizens made the same argument in rebutting Pa’ina’s statement of position. See Concerned Citizens’ Rebuttal to Pa’ina Hawaii, LLC’s Statement of Position at 9-10 (Sept. 15, 2008). The Commission should not countenance the Staff’s decision to sandbag, waiting until “its last filing on the amended environmental contentions” to present Mr. Easton’s testimony. Initial Decision at 50.

less to conclude there is “a substantial question” the finding is “clearly erroneous,” the standard for granting the Staff’s petition for review. 10 C.F.R. § 2.341(b)(4)(i).

The Staff blows out of proportion the Board’s comment that, “[i]n its revised Final EA, the Staff must ... reconcile its expert’s findings” regarding reported transportation accidents with the testimony from Concerned Citizen’s expert, Dr. Marvin Resnikoff. Initial Decision at 51 n.262. In that footnote, the Board did nothing more than state the obvious: a proper NEPA analysis must address evidence of accidents involving shipments in Type B packages. The Board’s decision was not, however, dependent on Dr. Resnikoff’s testimony, and, accordingly, the Staff fails to present even a colorable claim of procedural error. Rather, the Board’s decision was based on the Staff’s failure to “provide[] more than conclusory assertions regarding the environmental consequences of transportation accidents.” *Id.* at 51-52. The Board’s holding is entirely consistent with controlling Ninth Circuit precedent that an agency’s “generalized conclusory statements that the effects are not significant or will be effectively mitigated” do not satisfy NEPA and that “NEPA documents are inadequate if they contain only narratives of expert opinions,” without the “underlying environmental data.” Klamath-Siskiyou Wilderness Center v. Bureau of Land Management, 387 F.3d 989, 996 (9<sup>th</sup> Cir. 2004); see also Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846, 864 (9<sup>th</sup> Cir. 2005); Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1150 (9<sup>th</sup> Cir. 1998); Foundation for N. Am. Wild Sheep v. U.S. Dep’t of Ag., 681 F.2d 1172, 1179 (9<sup>th</sup> Cir. 1982).

Moreover, even had the Board relied on Dr. Resnikoff’s declaration, the Staff suffered no prejudice from its alleged inability to “respond to specific factual assertions made in Dr. Resnikoff’s affidavit,” since nothing in the supplemental affidavit from Mr. Easton calls into question the facts Dr. Resnikoff presented. Staff Petition at 10. Citing documentary evidence

from the National Research Council and the NRC itself, Dr. Resnikoff simply refuted Mr. Easton's unsupported testimony that, "during the past 30 years, there has never been a reported case of a release of radioactive material from a Type B package during either routine transportation or for shipments involved in an accident." 4/2/09 Resnikoff Decl. ¶ 5 (ML091110423) (quoting Easton Testimony at A:6). Specifically, Dr. Resnikoff noted an incident in 1984 involving radioactive material contamination from an empty package and another incident in 1988, "when an improperly secured Type B container fell out of the back of a camper-covered pickup truck ..., releasing the 17-curie iridium-192 radiographic source." Id. ¶ 6; see also id. ¶ 5 & Exhs. A-B.

In the supplemental affidavit the Staff attached to its petition for review, Mr. Easton does not question that either of these accidents occurred. He acknowledges that, on January 27, 1984, a cask was found leaking in a transportation terminal and that, in 1988, an "iridium-192 source was in fact released ... during transportation." Easton Aff. ¶ 13; see also id. ¶ 7. He then engages in semantics, arguing the package involved in the iridium-192 source release was not properly "configured as a Type B package for transportation as required in its Certificate of Compliance" and, thus, by definition, could not be deemed a "Type B package." Id. ¶ 13; see also id. ¶¶ 14 (noting "very high likelihood that the source was not secured in a shielded position"), 15 (package must be "properly prepared as a Type B package in accordance with its Certificate" for NRC to classify "incident as a release of radioactive material from a Type B package during transportation"). Similarly, he claims that the mere fact that the cask in the 1984 accident was empty at the time its leak was discovered means that it could not be classified as "a 'Type B' package," even if it would be so classified if full, and that the happenstance that the leak was discovered while the cask was in a transportation terminal – rather than while it was

being moved to or from that “transportation terminal” – means the accident “was not involved in transportation.” Id. ¶¶ 7-9; contra Easton Aff., Exh. A at 1 (accident included on list of “incidents involving spent nuclear fuel shipments”).<sup>4</sup>

Mr. Easton’s supplemental affidavit merely reaffirms that transportation accidents resulting in releases of radioactive material do, in fact, occur. His claim that, if packages are not properly secured or prepared, they are not, by definition, “Type B” ignores that failures to follow procedures and comply with permit conditions are often key factors that lead to accidents and result in impacts on the human environment. The Board properly concluded that, to comply with its obligation under NEPA to take a “hard look” at potential impacts associated with the transportation of Co-60 sources to and from Pa’ina’s proposed irradiator, the Staff was obliged – but failed – to evaluate the potential for transportation accidents, including the potential that human error in handling the casks containing the sources will increase the risk of accidents and radiation releases. Klamath-Siskiyou, 387 F.3d at 1001.

B. Impacts From Transportation Impacts Are Reasonably Foreseeable And Must Be Analyzed.

Mr. Easton’s testimony provides no support for the Staff’s claim that transportation accidents involving shipments of Co-60 sources to and from Pa’ina’s proposed irradiator need not be considered because they allegedly are “not reasonably foreseeable.” Staff Petition at 12. As a threshold matter, while Mr. Easton speaks in terms of what is “reasonably foreseeable,” his analysis, if believed, supports at most a conclusion there is a low probability of significant

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<sup>4</sup> There is no support for Mr. Easton’s attempt to cast doubt on whether the “cask was contaminated.” Id. ¶ 10. The National Research Council study clearly classifies this incident as involving “[r]adioactive [m]aterial [c]ontamination.” 4/2/09 Resnikoff Decl., Exh. B at 121. Likewise, the Department of Energy factsheet attached to Mr. Easton’s affidavit describes the incident as involving “[r]adioactive material contamination beyond the vehicle.” Easton Aff., Exh. A at 2.

impacts from a transportation accident involving Co-60 sources. Easton Testimony at A.7. As a matter of law, NEPA deems impacts “reasonably foreseeable” – and requires their analysis and public disclosure – “even if their probability of occurrence is low.” 40 C.F.R. § 1502.22(b)(4); see also San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n, 449 F.3d 1016, 1033 (9<sup>th</sup> Cir. 2006), cert. denied sub nom, Pacific Gas & Elec. Co. v. San Luis Obispo Mothers for Peace, 549 U.S. 1166 (2007).

Moreover, Mr. Easton fails to quantify either the “frequency of accidents that would breach a Type B package used to ship cobalt-60” or the impacts that might ensue should such an accident occur. Easton Testimony at A.7. Instead, he merely asserts:

In the extremely unlikely event that a breach in a cobalt-60 shipping package should occur, it is unlikely that cobalt-60 would be widely dispersed into the environment. The impact from such an event would be very localized and, with proper recovery, short-lived.

Id. (emphasis added).

The Board’s conclusion that such “broad, generalized statements” do not satisfy NEPA, Initial Decision at 51, is supported by well-established Ninth Circuit law that “[g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.” Klamath-Siskiyou, 387 F.3d at 994 (quoting Neighbors of Cuddy Mountain v. United States Forest Service, 137 F.3d 1372, 1380 (9<sup>th</sup> Cir. 1998)). If it is possible objectively to quantify an impact, NEPA requires that the agency do so. Id. Here, the Staff has not offered any reason for the Commission to set aside the Board’s holding that the Staff violated NEPA when it failed to quantify either the likelihood a transportation accident would result in dispersal of Co-60 or the consequences should such an accident occur. See 40 C.F.R. § 1500.1(b) (“NEPA procedures must ensure that environmental information is available to public officials and citizens before

decisions are made and before actions are taken”); id. § 1500.1(c) (“The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences”).<sup>5</sup>

In addition to failing to provide the requisite quantification of impacts, the Staff violated its duty to ensure the information set forth in Mr. Easton’s testimony was “of high quality” and that his discussion and analysis had “scientific integrity.” 40 C.F.R. §§ 1500.1(b), 1502.24; cf. Western Watersheds Project v. Bureau of Land Management, 552 F. Supp. 2d 1113, 1129 (D. Nev. 2008) (40 C.F.R. § 1502.24 applies to EAs). Numerous methodological flaws and factual inaccuracies preclude Mr. Easton’s analysis from providing the requisite hard look at potential transportation accidents.

Central to Mr. Easton’s conclusion that significant impacts from transportation accidents are unlikely is his claim that, “during the past 30 years, there has never been a reported case of a release of radioactive material from a Type B package during either routine transportation or for shipments involved in an accident.” Easton Testimony at A.6; see also id. at A.7 (“In practice, there has never been a release of radioactive material from a Type B package ... for shipments involved in an accident”). This claim is factually incorrect, as discussed above. Particularly in light of these two documented accidents, there was no reason for the Board to accept Mr. Easton’s claim that an accident resulting in the release of the Co-60 that would be transported to and from Pa’ina’s proposed irradiator is not “reasonably foreseeable.” Easton Testimony at A.7.

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<sup>5</sup> Even assuming Mr. Easton were correct in concluding that a localized impact is most the likely outcome, no justification is provided for the Staff’s failure to quantify the likelihood of such an incident or the magnitude of impacts that would result. Moreover, Mr. Easton failed to justify his assumption there would be “proper recovery” of a breached Co-60 shipping package, which is key to his assumption that impacts would be “short-lived.” Easton Testimony at A.7.

In addition, the geographic scope of Mr. Easton's analysis is far too narrow to satisfy NEPA's mandate to take a hard look at the potential impacts of Co-60 shipments involving Pa'ina's proposed facility. Mr. Easton considered only the potential for truck accidents during approximately five miles of highway travel from Honolulu Harbor to Pa'ina's proposed irradiator. Id. He ignored that, as stated in Pa'ina's license application, the proposed irradiator's sources would be supplied by either Nordion, which is located in Canada, or Reviss, whose Co-60 comes from Russia. 6/20/05 Pa'ina Application for Material License at 3 (ML052060372). Thus, the sources for the proposed irradiator would travel many thousands of miles, orders of magnitude greater than the five miles of transit on which Mr. Easton based his analysis.

Moreover, Mr. Easton ignored that the sources would travel between the suppliers and the proposed irradiator by several modes of transportation, not merely by truck. To get to and from Hawai'i, the sources have to travel by ship and, possibly, by air. In addition, to get between the suppliers and the nearest port or airport, the sources might travel by train. Mr. Easton failed to analyze the potential for accidents involving these other transportation modes, as well as the accident rates in the foreign countries and high seas where the sources would spend substantial time in transit.

Given the numerous deficiencies of Mr. Easton's testimony, which was the only evidence the Staff proffered in response to Concerned Citizens' contention, the Board properly concluded the Staff had failed to satisfy its "obligation to take a 'hard look' and consider the environmental consequences of accidents that might occur during the annual transport of Co-60 sources to and from the proposed irradiator." Initial Decision at 51; see also In the Matter of Shipments of Fuel from Long Island Power Auth.'s Shoreham Nuclear Power Station to Phila. Elec. Co.'s Limerick Generating Station (Office of Nuclear Materials Safety and Safeguards), 38 NRC 365, 377

(1993) (prior to permitting facility's receipt and possession of irradiated fuel, NEPA "requires analysis of environmental effects of transporting irradiated fuel").

C. However Impacts From Transportation Accidents Are Characterized, The Board Properly Concluded The Staff's Failure To Analyze Them Violated NEPA.

NEPA mandates that the NRC take a "hard look at the effects from proceeding with" Pa'ina's proposed irradiator. Klamath-Siskiyou Wilderness Center, 387 F.3d at 1001. The Staff must consider all impacts associated with Pa'ina's proposed irradiator, whether direct, indirect, or cumulative, and must consider actions, including those carried out by others, if they are "connected actions." 40 C.F.R. § 1508.25.

Notably, "[t]he Staff does not dispute that the transportation of sources to Pa'ina's irradiator is an indirect effect of licensing the irradiator." Staff Petition at 14.<sup>6</sup> Rather, it takes issue only with the Board's finding that the transportation of cobalt-60 sources is a "connected action." Staff Petition at 14.<sup>7</sup> However transportation-related impacts are characterized, the Board correctly concluded the Staff was obliged to – but failed to – "take a 'hard look' and consider" those impacts and, consequently, "must now provide such information." Initial Decision at 51; see also U.S. Dep't of Energy (High Level Waste), LBP-09-06, 69 NRC \_\_\_\_, slip

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<sup>6</sup> As noted above, throughout this proceeding, Concerned Citizens has consistently maintained that impacts from transportation accidents can be characterized as "reasonably foreseeable" indirect effects of the proposed licensing action" that the Staff was obliged to analyze in its EA. Concerned Citizens' Reply in Support of Its Contentions Re: Draft EA and Draft Topical Report at 16 (March 19, 2007) (quoting Louisiana Energy Services, L.P., CLI-06-15, 63 NRC at 698); Concerned Citizens' Reply in Support of Its Amended Environmental Contentions #3 Through #5 at 22 (Oct. 1, 2007).

<sup>7</sup> In its opposition to Pa'ina's Petition for Review, Concerned Citizens explains why the Board correctly concluded the transportation of radioactive material to and from the proposed irradiator is "inextricably intertwined" with the operation of the facility, making those shipments "connected actions" within the meaning of [NEPA's] regulations." Thomas v. Peterson, 753 F.2d 754, 759 (9<sup>th</sup> Cir. 1985); see 10/19/09 Opposition to Pa'ina's Petition for Review at 10-11.

op. at 36-38 (May 11, 2009); Louisiana Energy Services, L.P., CLI-06-15, 63 NRC at 698; Shipments of Fuel from Long Island Power Auth.'s Shoreham Nuclear Power Station, 38 NRC at 377. Thus, even were the Commission to agree with the Staff regarding the characterization of transportation-related impacts, the Staff has failed to establish the Board's ultimate "legal conclusion is without governing precedent or is a departure from or contrary to established law." 10 C.F.R. § 2.341(b)(4)(ii). There is, accordingly, no basis for granting review.<sup>8</sup>

#### IV. THE BOARD PROPERLY HELD THE STAFF MUST CONSIDER THE E-BEAM IRRADIATOR ALTERNATIVE

The Staff's argument the Board failed to "base its ruling" regarding the e-beam irradiator "on the entire administrative record" ignores the nearly thirty pages of the Initial Decision that is devoted to painstaking review of the evidence presented by all parties. See Initial Decision at 73-100; see also id. at 73 (noting Board "freighted [its decision] with the material from the administrative record because it tellingly reveals why the Staff's conclusion and reasoning are in error"). At the conclusion of that review, the Board found that the information on which Matthew Blevins – the staff member on whose testimony the Staff relies – based his rejection of the e-beam alternative "was superficial, insubstantial, and lacking professional standards." Id. at

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<sup>8</sup> In opposing Pa'ina's Petition for Review, Concerned Citizens thoroughly addressed why the Commission should reject the Staff's claim it can rely on a prior, generic EIS to satisfy its duty to take a hard look at the impacts of licensing Pa'ina's proposed irradiator, particularly since the generic EIS in question did not consider factors unique to the urban environment where Pa'ina preferred site is located. See 10/19/09 Opposition to Pa'ina's Petition for Review at 12-13; see also Shipments of Fuel from Long Island Power Auth.'s Shoreham Nuclear Power Station, 38 NRC at 377 ("NRC must consider whether the potential consequences [from transportation accidents] are within the 'envelope' of those that have already been evaluated" in generic analysis). As for the Staff's claim "the Pa'ina EA ... discussed source shipments to the irradiator under normal operations," Staff Petition at 15 (emphasis added), the Board correctly held this discussion is irrelevant "to the Intervenor's contention regarding the impacts of a transportation accident." Initial Decision at 51 n.263 (emphasis added); see also Staff Petition at 15 n.29 (acknowledging failure to address "potential radiological consequences from transportation accidents").

99. Along the way, the Board faulted Mr. Blevins for failing “objectively [to] screen” the information he used “to determine its accuracy and validity,” *id.* at 88, and found that, “[h]ad Mr. Blevins, in fact, undertaken serious, substantial, and professionally-conducted research on the e-beam technology and industry, he could not reasonably have reached the conclusion he did.” *Id.* at 93.

The Staff provides no basis for the Commission to disturb these factual findings. The Commission “will not overturn a hearing judge’s findings simply because [it] might have reached a different result.” Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 93 (1998). The Commission is particularly reluctant to upset findings and conclusions where, as here, they involve “fact-specific issues or where the affidavits or submissions of experts must be weighed.” Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-00-12, 52 NRC 1, 3 (2000) (quoting Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 6 (1999)).

Nor does the Staff give the Commission any reason to question the Board’s conclusion that “[t]he administrative record as it currently stands does not allow this Board to fill the vacuum created by the Staff’s failure to consider the e-beam irradiator alternative in the EA.” Initial Decision at 101. The Commission should reject the Staff’s characterization of the Board’s decision as involving an “interpretation of Commission precedent;” *i.e.*, a matter of law. Staff Petition at 18.<sup>9</sup> Rather, the Board based its decision on purely factual findings: “the record is

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<sup>9</sup> The Board did not, as the Staff claims, refuse on principle to consider the evidence in the record “for the additional purpose of determining whether the Staff’s consideration of the electron-beam alternative complied with NEPA.” *Id.* at 17; *see* Initial Decision at 55 (“the testimony of the Staff’s witness or witnesses was frequently central to determining the matter before us because ... it often provided the explanation missing from the Final EA”). Rather, the Board concluded it would be improper for it to go “outside the administrative record (*i.e.*, study,

exclusively focused upon whether the Staff's justification for not considering the e-beam irradiator alternative in the EA was factually or legally valid" and, thus, "the administrative record on this portion of the Intervenor's contention was not created, nor ever intended, to fill the void created by the Staff's failure to consider the e-beam alternative." Initial Decision at 101.

There is nothing "clearly erroneous" about the Board's finding. 10 C.F.R. § 2.341(b)(4)(i). While the record "includes substantial discussion of [the e-beam] alternative," the testimony the Staff cites focuses solely on whether e-beam irradiation is a reasonable alternative the Staff was obliged to analyze, a question the majority of the Board, based on that testimony, resolved in the affirmative. Staff Petition at 16.<sup>10</sup> The record does not, however, contain the information NEPA mandates regarding how selecting the e-beam alternative "would alter the environmental impact and the cost-benefit balance." Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228 (9<sup>th</sup> Cir. 1988), cert. denied, 489 U.S. 1066 (1989) (quoting Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971)). Even if the Staff were justified in concluding "there would be no significant impacts from a cobalt-60 irradiator," Staff Petition at 16, "nonsignificant impact does not equal no impact; so if an even less harmful alternative is feasible, it ought to be considered." River Road Alliance, Inc. v. Corps of Eng'rs of U.S. Army, 764 F.2d 445, 452 (7<sup>th</sup> Cir. 1985); see also Bob Marshall Alliance, 852 F.2d at 1228-29 ("consideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process").

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develop, and describe the alternative)" to fill the void created by the Staff's failure to evaluate the e-beam alternative in both its EA and its evidentiary submittals. Id. at 102 (emphasis added).

<sup>10</sup> The dissenting judge likewise relied on this evidence solely to determine whether the Staff was justified in concluding the alternative was not reasonable due to "uncertainty with regard to the economics of electron beam irradiation." Initial Decision at 111.

The Staff's claim that Mr. Blevin's testimony adequately considered "whether an e-beam irradiator might eliminate some of the hazards potentially associated with using cobalt-60 sources," Staff Petition at 16 n.32, makes a mockery of NEPA's requirements to "insure that environmental information is available to public officials and citizens" and that the information "be of high quality." 40 C.F.R. § 1500.1(b). In the testimony the Staff cites, Mr. Blevins merely responds "Yes" to the question whether he ever "consider[ed] the possibility that electron-beam irradiation might eliminate some hazards potentially associated with irradiation using cobalt-60 sources." Blevins Supp. Testimony at Q.8, A.8. He does not set forth any of the analysis he allegedly conducted and, thus, provides no environmental information whatsoever "to help public officials make decisions that are based on understanding of environmental consequences," 40 C.F.R. § 1500.1(c), or to "facilitate public involvement in decisions which affect the quality of the human environment." *Id.* § 1500.2(d). The Board did not commit clear error when it concluded the Staff was legally obliged to provide on remand the analysis that was missing from both the final EA and the record of this proceeding.

V. THE BOARD PROPERLY ORDERED THE STAFF TO CONSIDER ALTERNATE IRRADIATOR SITES

In arguing the Board should not have required analysis of alternate irradiator sites, the Staff improperly relies on authorities from outside the Ninth Circuit that appear to condone a less extensive search for alternatives when an EA is prepared. *See, e.g.*, Staff Petition at 20 nn.42, 44. The Ninth Circuit, whose precedents are binding here, has emphasized that "consideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process." *Bob Marshall Alliance*, 852 F.2d at 1228-29. Accordingly, to pass legal muster, regardless of whether it was preparing an EA or an EIS for Pa'ina's irradiator, the Staff had "to

give full and meaningful consideration to all reasonable alternatives.” North Idaho Community Action Network v. U.S. Dep’t of Transp., 545 F.3d 1147, 1153 (9<sup>th</sup> Cir. 2008) (emphasis added); see also Morongo Band of Mission Indians v. Federal Aviation Admin., 161 F.3d 569, 575 (9<sup>th</sup> Cir. 1998) (same). While the Staff may be able to provide less in-depth analysis of the alternatives considered in an EA than in an EIS, it cannot lawfully omit from its EA at least “a brief discussion of reasonable alternatives.” North Idaho Community Action Network, 545 F.3d at 1153. The Staff’s contrary claim that, having “already considered [three] alternatives to the proposed action, it could ... forgo considering any additional alternatives” simply is not the law in this circuit. Staff Petition at 20.

The Staff is likewise incorrect as a matter of law when it argues that its conclusion Pa’ina’s proposal would not result in significant effects on the human environment gives it the discretion to ignore reasonable alternatives. See Staff Petition at 20-21.<sup>11</sup> By definition, any EA that does not trigger the preparation of an EIS involves a situation in which the agency has concluded there is no possibility of a significant impact. Blue Mountains Biodiversity Project v.

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<sup>11</sup> The Final EA does not conclude, as the Staff asserts, that “there will be no offsite impacts at the proposed site.” Id. at 21. Rather, the EA stated that releases of radiation were “unlikely,” i.e., there was “a low probability of occurrence based on staff experience and the scenarios reviewed.” Final EA at C-13 (emphasis added); see, e.g., id. at 7 (release of radioactively contaminated water “unlikely”), 10 (“unlikely that a Co-60 sealed source would be breached in the event that an aircraft crashes into the proposed facility”), B-5 (“unlikely to have an offsite release of radioactive material from radiological sabotage of the sources in the irradiator”), B-6 (“unlikely that the radioactive material contained in a dirty bomb would result in direct deaths”). Moreover, since the Staff has not yet evaluated impacts associated with transportation accidents, its claim that no significant offsite impacts are likely is premature. Finally, the Board correctly held that, having stipulated to prepare an EA, “the Staff’s reliance ... on the agency’s categorical exclusion for irradiators based on the regulatory determination that irradiators have no significant effect on the environment is inappropriate.” Initial Decision at 105 n.469; see also id. (stipulation required Staff “to prepare properly an EA in full compliance with the requirements of NEPA and applicable circuit court precedent”); Joint Stipulation at 1 (“pursuant to 10 C.F.R. § 51.21, the NRC staff is willing to prepare an environmental assessment for the Applicant’s proposed irradiator”).

Blackwood, 161 F.3d 1208, 1216 (9<sup>th</sup> Cir. 1999) (EIS required “whenever ‘substantial questions are raised was to whether a project may cause significant [environmental] degradation”). As discussed above, the Ninth Circuit has made clear that, “whether an agency is preparing an [EIS] or an [EA],” it must “give full and meaningful consideration to all reasonable alternatives.” North Idaho Community Action Network, 545 F.3d at 1153 (emphasis added).

Finally, the Board properly rejected the Staff’s argument that, “where the available resource is a particular parcel of land, constructing the facility at another site cannot be considered an alternative for the resource in question.” Initial Decision at 107; see also Staff Petition at 22. As the Board noted, “[t]he sole cited support for the Staff’s crabbed interpretation of [NEPA] section 102(2)(E) is a case outside the Ninth Circuit from the United District Court in the Northern District of Illinois, Wicker Park Historic Dist. Preservation Fund v. Pierce, 565 F. Supp. 1066 (N.D. Ill. 1982),” which has not been cited for that proposition by any court since the opinion was issued over a quarter century ago. Initial Decision at 107. Eight years after Wicker Park was decided, the same judge held that, even where an EA concludes “the impact upon the environment will not be significant, the agency nevertheless is required to consider feasible alternative sites to determine whether an alternative site might serve the agency’s purpose with even less environmental impact.” Village of Palatine v. United States Postal Service, 742 F. Supp. 1377, 1386 (N.D. Ill. 1990) (emphasis added). The Village of Palatine court further held “[t]he evaluation of alternatives mandated by section 102(2)(E) is an evaluation of alternative means to reach a general goal” and requires evaluation of “alternative sites.” Id. at 1392. Thus, Wicker Park’s holding does not even hold sway in the Northern District of Illinois.

In cases from both the Ninth Circuit and other circuits, courts routinely examine EAs to determine whether they have adequately considered a reasonable range of alternate sites. See,

e.g., Morongo Band, 161 F.3d at 575-76; Friends of Endangered Species v. Jantzen, 760 F.2d 976, 987-88 (9<sup>th</sup> Cir. 1985) (alternate sites for proposed development); Lee v. United States Air Force, 354 F.3d 1229, 1239-40 (10<sup>th</sup> Cir. 2004) (alternate locations for basing training aircraft); South Carolina v. O’Leary, 64 F.3d 892, 899-900 (4<sup>th</sup> Cir. 1995) (alternate sites for storage of spent nuclear fuel rods); North Carolina v. Federal Aviation Admin., 957 F.2d 1125, 1134-35 (4<sup>th</sup> Cir. 1992) (alternate locations for Navy targets); Monarch Chemical Works, Inc. v. Thone, 604 F.2d 1083, 1088 (8<sup>th</sup> Cir. 1979) (alternate sites for prison). Here, the Board found that the evidence in the record established that “reasonable alternative sites or locations” existed, and the Staff does not question the existence of such sites. Initial Decision at 106. Applying the “applicable circuit precedent,” the Board correctly held the Staff’s failure to consider these reasonable alternatives violated NEPA. Id. at 106.<sup>12</sup>

VI. THE BOARD PROPERLY ORDERED THE STAFF TO CIRCULATE FOR PUBLIC COMMENT ITS NEW ANALYSES OF TRANSPORTATION IMPACTS AND ALTERNATIVES

In the March 2006 Joint Stipulation, the Staff agreed, and the Board later ordered, that there would be “an opportunity for public comment on the Draft EA (or a draft finding of no significant impact, which in this case incorporated the Draft EA).” Initial Decision at 102; see also Joint Stipulation ¶ 2; 4/27/06 Board Order (Confirming Oral Ruling Granting Motion to Dismiss Contentions). Because the Staff has never put out anything other than “a few

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<sup>12</sup> The Board did not establish a rule “that an agency must always analyze alternative sites in an EA.” Staff Petition at 23. Rather, it properly focused on those alternatives that “are ‘reasonably related to the purposes of the project,’” noting that other locations could accomplish “the major purposes of the project”: “centrally located treatment for imports and exports on Oahu.” Initial Decision at 106 (quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9<sup>th</sup> Cir. 1974)). As the Board noted, even Pa’ina “was considering other locations in existing buildings that were ‘further from the active operations of the airport and further from the ocean.’” Id. (quoting 8/28/06 Email from Michael Kohn (Pa’ina) to Jack Whitten (NRC) (ML062770248)).

unsupported sentences” and “broad, generalized statements regarding the impacts of transportation accidents,” failed completely to “study, develop, and describe the e-beam irradiator alternative,” and “avoid[ed] considering reasonable alternative sites that might present less environmental impact,” the public has, to date, been deprived of any chance for input on these key elements of the EA. Initial Decision at 51, 101, 105. To ensure that Concerned Citizens would get the benefit of its bargain, the Board properly ordered the Staff to “allow a brief opportunity for written public comment on its draft amendment or supplement to the EA before finalizing the draft amendment” on these previously omitted topics “or reaching its final conclusion regarding the proposed irradiator.” *Id.* at 102; see also id. at 108; 9/29/09 Board Order (Denying Intervenor’s Motion to Clarify) at 2.

In arguing against the Board’s ruling, the Staff essentially contends that, as long as it put out for public comment a piece of paper entitled “draft EA,” it has fulfilled its obligations under the Joint Stipulation. The Staff’s interpretation elevates form over substance. The clear intent of the settlement of Concerned Citizens’ initial environmental contentions was to ensure the public would have a meaningful opportunity to offer feedback on the Staff’s NEPA analysis, including potential impacts associated with Pa’ina’s proposal as well as alternatives that might be pursued with less environmental harm. See 40 C.F.R. § 1500.1(b) (“public scrutiny ... essential to implementing NEPA”). Since the EA the Staff circulated did not include any discussion whatsoever of transportation accidents, alternate locations, or the e-beam alternative, the analyses the Staff will prepare on remand will provide entirely new information, not mere revisions to an inadequate initial effort. By failing to give the public any opportunity to review and comment on its treatment of these topics, the Staff improperly “destroy[ed] [Concerned Citizens’] reasonable expectations ... regarding the fruits of the contract.” Centex Corp. v.

United States, 395 F.3d 1283, 1304 (Fed. Cir. 2005). The Board properly recognized that an additional comment period was necessary to remedy the Staff's breach of the stipulation.

The Board also correctly interpreted Ninth Circuit precedent, which requires “[a]n agency, when preparing an EA, [to] provide the public with sufficient environmental information, considered in the totality of the circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process.” Initial Decision at 13 (quoting Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corps of Engineers, 524 F.3d 938, 953 (9<sup>th</sup> Cir. 2008)). As the Commission has recognized, “public participation form[s] a large part of NEPA’s raison d’etre.” Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 354 (2002). The Staff’s failure to provide any analysis of transportation accidents, alternate sites, or the e-beam alternative in its EA and in proceedings before the Board has deprived Concerned Citizens and the general public of their right to participate in and inform the NRC’s decision-making process. The Staff cites no authority suggesting the Board lacked the discretion to remedy this violation by ordering the Staff “to consider and permit written comment” on its new analyses. Initial Decision at 108.

## VII. CONCLUSION

For the foregoing reasons, Concerned Citizens submits the Staff has failed to raise the requisite “substantial question” regarding the Board’s factual findings and legal conclusions. 10 C.F.R. § 2.341(b)(4). Accordingly, Concerned Citizens respectfully asks the Commission to deny the Staff’s petition for review of the Board’s Initial Decision.

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Dated at Honolulu, Hawai'i, November 9, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D L Henkin", written over a horizontal line.

DAVID L. HENKIN

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on November 9, 2009, a true and correct copy of the foregoing document was duly served on the following via e-mail and first-class United States mail, postage prepaid:

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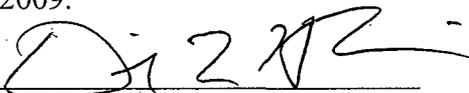
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In addition, the undersigned hereby certifies that, on November 9, 2009, a true and correct copy of the foregoing document was duly served on the following via e-mail:

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Dated at Honolulu, Hawai'i, November 9, 2009.

  
\_\_\_\_\_  
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TRANSMITTAL LETTER

TO: Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
Attention: Rulemakings and Adjudication Staff

VIA FIRST CLASS MAIL

FROM: David L. Henkin

DATE: November 9, 2009

RE: Pa`ina Hawai`i, LLC (Material License Application),  
Docket No. 30-36974-ML, ASLBP No. 06-843-01-ML

COPIES	DATE	DESCRIPTION
Original and two copies	11/9/09	INTERVENOR CONCERNED CITIZENS OF HONOLULU'S OPPOSITION TO NRC STAFF'S PETITION FOR REVIEW OF BOARD'S INITIAL DECISION; CERTIFICATE OF SERVICE

- |                                     |                          |                                     |                               |
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| <input type="checkbox"/>            | For Your Information.    | <input checked="" type="checkbox"/> | For Filing.                   |
| <input checked="" type="checkbox"/> | For Your Files.          | <input type="checkbox"/>            | For Recordation.              |
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| <input type="checkbox"/>            | For Review And Comments. | <input type="checkbox"/>            | For Signature And Forwarding. |
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REMARKS: