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DOCKETED
USNRC

February 24, 2010 (9:15am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

February 23, 2010

BEFORE THE COMMISSION

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 for Order/Direction That
NRC Staff Study Two Alternative
Sites For Proposed Irradiator, And/
Or For Commission To Expedite Appeal,
And/Or For Commission To Establish
Schedule For Decision"

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 six (6) copies of the above document.

This document was e-mailed to your office and to all
parties on the Certificate of Service on this date. Hard copies
were also mailed to each of the parties on this date.

If you have any questions or comments, please feel free to
contact my office. Tel: 808-523-5083; Fax: 808-523-5085; e-
mail: fpbenco@yahoo.com. Thank you.

TEMPLATE-SECY-041

DS03

Very respectfully yours,

A handwritten signature in cursive script, appearing to read "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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

APPLICANT PA'INA HAWAII, LLC'S MOTION FOR
ORDER/DIRECTION THAT NRC STAFF STUDY TWO
ALTERNATIVE SITES FOR PROPOSED IRRADIATOR,
AND/OR FOR COMMISSION TO EXPEDITE APPEAL,
AND/OR FOR COMMISSION TO ESTABLISH
SCHEDULE FOR DECISION

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Attorney for Pa'ina Hawaii,
LLC

February 23, 2010

February 23, 2010

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

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

LICENSEE PA'INA HAWAII, LLC'S MOTION FOR ORDER/DIRECTION
THAT NRC STAFF STUDY TWO ALTERNATIVE SITES FOR PROPOSED
IRRADIATOR, AND/OR FOR COMMISSION TO EXPEDITE APPEAL,
AND/OR FOR COMMISSION TO ESTABLISH
SCHEDULE FOR DECISION

Due to the excessive and prejudicial delays which have occurred through the course of the instant proceedings, Licensee PA'INA HAWAII, LLC ("Pa'ina" or "Licensee") moves this Commission as follows:

(1) to order/direct the NRC Staff to conduct suitability studies of two alternative sites for PA'INA's proposed underwater irradiator;¹ and/or

(2) to expedite its review of the two pending Petitions for Review, which were filed by Pa'ina and by the NRC Staff, respectively; and/or

(3) to establish a schedule for final decision on the two pending Petitions for Review.

¹Both proposed alternate sites are located on the Island of Oahu, within the City and County of Honolulu, State of Hawaii. See Page 8, *infra*.

This Motion is made "without prejudice" to Licensee PA'INA's pending October 6, 2009 "Petition for Review" of the ASLB's August 27, 2009 Initial Decision.² Furthermore, insofar as this Motion might impact upon it, this Motion is also made "without prejudice" to the NRC Staff's October 14, 2009 Petition for Review.

A. Brief Background And Current Procedural Posture of This Case.

Licensee PA'INA filed its standard application for a Materials License herein on June 27, 2005. (ADAMS Accession No. ML052060372)

Since then, over four years of unnecessarily protracted litigation have intervened.³ It is notable that in only four months, this matter will reach the undesirably ripe old age of five years.⁴

² Thus, for example, should this Commission issue its ruling on PA'INA's "Petition for Review" prior to taking up or deciding this Motion, then this Motion should be deemed withdrawn, and moot.

³ At the very outset of this matter, the NRC Staff classified Pa'ina Hawaii, LLC's underwater irradiator as "categorically excluded" from NEPA documentation. (70 Fed. Reg. at 44,396 (Aug. 2, 2005))

This case careened "off the track" by virtue of the ASLB's January 24, 2006 Memorandum and Order. Pa'ina Hawaii, LLC, LBP-06-04 (January 24, 2006). In that, its very first significant decision in this proceeding, the ASLB hypothesized that if Pa'ina's irradiator were placed in Kilauea Caldera (the active volcano on the Big Island of Hawaii), then surely "categorical exclusion" would not apply to the irradiator and an Environmental Assessment ("EA") would have to be accomplished. Consequently, the Staff's "categorical exclusion" determination was invalid. The ASLB obviously ignored the twin facts that the County of Hawaii, in which Kilauea lies, does not permit structures of any kind within the caldera, and further, that Pa'ina's proposed site was on another island over 220 miles from Kilauea Caldera. The ALSB's false construct has seemingly governed its logic throughout this case, with the result that this case disappeared down the proverbial rabbit hole (a la Alice in Wonderland), never to yet emerge. Pa'ina believes that the ASLB's illogical ruling prompted the NRC Staff (over Pa'ina's strong objections) to stipulate to do an EA.

⁴ The Materials License was granted by the Staff herein on August 17, 2007. (ML #53-29296-01) That grant did not hasten this proceeding because the ASLB thereafter raised the spectre of temporary injunctive relief. See ASLB Order, October 5, 2007.

Most recently, Licensee Pa'ina on October 6, 2009 filed its "Petition for Review of the August 27, 2009 Initial Decision of the Atomic Safety and Licensing Board." In response, on November 9, 2009 Intervenor CONCERNED CITIZENS filed its final opposition to Licensee's Petition for Review. The final filing before this Commission occurred on November 16, 2009, when the NRC STAFF filed its final memorandum supporting its own Petition for Review.

Since November 16, 2009 Licensee has waited for some kind of decision, some kind of determination, so that it could advance its proposed project, unfettered. However, nothing has since transpired.

B. The Excessive Delays In This Proceeding, Now Approaching Five (5) Years, Have Been Very Prejudicial To Licensee Pa'ina And To Hawaii's Fragile Environment.

As already noted above, on June 27, 2005 Pa'ina applied to build/install an underwater irradiator for a location near to Honolulu International Airport. The proposed location near to the Airport makes it central to the principal cargo shipping routes which originate or terminate at the airport.

Historically, many of Hawaii's fruits, vegetables and tropical foliage have been barred from export to California, to other Mainland markets, or to foreign

countries, due to potentially damaging Mediterranean fruit flies along with other pests, diseases and blights. Consequently, Hawaii's farmers and other agricultural producers are severely restricted in marketing their products outside of Hawaii.

At the same time, the importation of vegetables and produce, flowers and other foilage into Hawaii brings a multitude of threats (beetles, other pests, and plant diseases) which threaten the very fragile Hawaiian environment.

Licensee Pa'ina hoped to solve or partially solve these serious import and export problems by means of its proposed underwater irradiator.

However, the delays in this licensing and NEPA proceeding have been interminable⁵ and very prejudicial both to Pa'ina and also to Hawaii's sensitive environment.

C. Where Faced By Excessive And Prejudicial Delay, Federal Courts Have Adopted Novel And/Or Unusual Remedies In Order To Mitigate Or Eliminate The Effects Of The Delay.

America's federal courts have reviewed many cases involving excessive and prejudicial delay, in a variety of administrative contexts. In these "excessive delay" cases, the federal courts have fashioned novel, unusual and/or

⁵ Over six months ago, this Commission used the phrase "long-pending proceeding" in reference to this administrative case. Pa'ina Hawaii, LLC, CLI 09-17 (August 13, 2009)

creative interim or final outcomes designed to mitigate, or eliminate completely, the effects of the delays.

Thus, federal courts have recognized excessive and prejudicial administrative delay in social security benefits proceedings. Many federal courts have ordered the interim payment of social security benefits in order to mitigate, or eliminate, the prejudice caused to the applicants. Thus, an Iowa federal district court highlighted efforts by a sister court to overcome the excessive and prejudicial administrative delays:

"Specifically, the court concluded that "the court may provide a remedy for the **consequences of administrative delay** if excessive and **prejudicial** to a private party" . . . The court concluded that an award of interim benefits was a lesser intrusion upon the administrative province than a final judgment in favor of the claimant where failure to maintain the claim file left no material support for the agency's denial of benefits. DONNA HOFFMAN, Plaintiff, vs. KENNETH S. APFEL, Commissioner of Social Security, Defendant. 122 F. Supp. 2d 1001, 1011 (Iowa D.C. 2000)

Similarly, in immigration cases, prejudicial administrative delays have been creatively resolved by federal court orders designed to mitigate, or indeed overcome, the excessive administrative delays. Mitchell v. Overman, 103 U.S. 62, 26 L.Ed. 369 (1880); Application of Martini, 184 F.Supp. 395 (S.D.N.Y.1960); Frangale v. Rogers, 175 F.Supp. 958 (E.D.N.Y.1959); Matter of Vacantios, 155 F.Supp. 427 (S.D.N.Y.1957); and Lee Bang Hong v. Acheson, 110 F.Supp. 48 (D. Hawaii 1951) (where American consulate was cause of delay preventing

citizenship, Hawaii federal court decreed that applicant had, indeed, achieved status as U.S. citizen).

Similarly, the federal Equal Employment Opportunity Commission (EEOC) has experienced excessive administrative delays. A Maine federal district court criticized the interminable delays before the EEOC as follows:

"Plaintiff's retirement does not obviate the need for further concern, but rather serves to highlight the need for expeditious processing of age discrimination complaints for older citizens for whom time is of the greatest significance. The fact of Plaintiff's retirement does not serve to retroactively justify the inexcusable delay evidenced in this case. This Court will not deny relief to Plaintiff merely because the administrative agency, by its inaction, has defaulted on its responsibility to provide expeditious resolution. In enacting section 15 of the ADEA, Congress intended to encourage mediation and conciliation, not penalize those who seek that alternative. It was not Congress' intention to irrevocably lure age discrimination claimants into a bureaucratic log jam not of their own making." (Emphasis added) Donald D. Wade, Plaintiff v. Otis R. Bowen, M.D., Secretary, United States Department of Health and Human Services, Defendant, 677 F. Supp. 29, 31 (D.Me 1988); see also Brenner v. Brown, 814 F. Supp 717 (1993)

In order to overcome the excessive administrative delays before the EEOC in those age discrimination cases, the Maine federal court (as well as other federal courts) permitted the complainants to file lawsuits without first exhausting their administrative remedies.

In the case at bar, one could safely conclude that Congress did not intend applicants before the NRC (like Licensee Pa'ina) to encounter interminable bureaucratic

delays in completing administrative procedures. This is particularly true where, in the first instance, Pa'ina's proposed irradiator had been deemed "categorically excluded."

It should be emphasized: Pa'ina is not proposing a complex high-level storage area for nuclear materials, nor is Pa'ina proposing a nuclear power plant. Rather, Pa'ina is seeking final NEPA determination for its otherwise standard and "categorically excluded" underwater irradiator. Pa'ina has repeatedly noted in these proceedings that the delay has been prejudicial, but to no avail.

D. Forced By The Interminable Delay In This Case, Licensee Requests That The NRC Staff Study Two Alternative Sites For Its Proposed Irradiator In Order To Speed Up And/Or Telescope The Timing Of This Matter, Without Prejudice.

Licensee PA'INA necessarily requests that the Staff be ordered/directed to study two alternative potential sites for its underwater irradiator, even though PA'INA (and the Staff) does not believe such a study is required by NEPA.

Pa'ina's reasons for this request are to conserve time and/or telescope the timeline herein, and also to mitigate or overcome the serious prejudice which has arisen from the administrative delay of over four years.

Licensee PA'INA files this Motion without prejudice to its own prior filings (and also the Staff's prior filings) which oppose the study of alternative sites on the grounds that its proposed underwater irradiator was "categorically excluded".⁶

The NRC Staff should study the two alternative sites while the Petitions for Review are currently pending before the Commission, in order to save time and/or telescope the time factor. This would greatly mitigate the effects of past delays, and possible future delays.

The two sites proposed to be studied are as follows:

1. 3209 Ualena Street
Honolulu, Hawaii 96819
2. 92-1860 Kunia Road
Kunia, HI 96759

Intervenor CONCERNED CITIZENS should have no objections to a study of the two alternative sites. Indeed, in front of the ASLB, Intervenor itself suggested that Ualena Street sites could be studied as alternative sites for an underwater irradiator.⁷

⁶ The original "categorical exclusion" granted to Pa'ina's proposed underwater irradiator is strongly reinforced and validated by the fact that over fifty (50) safety and environmental contentions of the Intervenor have been dismissed, and Intervenor failed to petition or appeal to this Commission regarding the denial of any of those more than 50 contentions.

⁷ See "Intervenor Concerned Citizens of Honolulu's Reply In Support of Its Amended Environmental Contentions #3 Through #5" filed October 1, 2007, at Page 43. There, Intervenor argued that "alternate locations on Ualena Street" were appropriate to study because "neither land-use policy nor zoning laws would need to be altered to move the proposed irradiator away from at least some of the unique threats inherent in the airport site." (Page 43, footnote 37)

Likewise, Intervenor should have no objections to a study of proposed alternative site #2. In front of the ASLB, Intervenor's own expert recommended unspecified alternate sites for the irradiator "10 miles from the center of the runways [of Honolulu International Airport]."⁸ The Kunia Road site is at least 10 miles from the center of Honolulu International Airport's runways, and therefore the Kunia Road site satisfies Intervenor's expert's suggestion.

In sum: due to the protracted delays throughout these proceedings, and in order to save or telescope time, the NRC Staff should be ordered/directed to conduct suitability reviews of the above two alternative sites, without prejudice to PA'INA's pending Petition for Review.

E. The Commission Should Expedite Its Review Of Pa'ina's Petition For Review.

"Justice delayed is justice denied." Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co., 940 F. 2d 550, 558 (9th Cir. 1991) (Noonan, J., dissenting)

Additionally, or alternatively, Pa'ina requests that this Commission take all available and appropriate steps to expedite its decision on the pending Petitions for Review.

⁸ See M. Resnikoff Report, Feb. 7, 2007, at pp. 20-21 (attached to Intervenor's Initial Written Statement, filed herein on August 26, 2008): "If the proposed [irradiator] facility were located over 10 miles from the center of the runways, the conditional probability [of an airplane crashing into the irradiator site] would decline by a factor of 1,000 . . . The NRC should consider in its environmental review alternate locations, which would substantially reduce risks to the public associated with aviation accidents." Id.

F. The Commission Should Establish A Schedule For Decision Of Pa'ina's And The Staff's Petitions For Review.

Additionally, or alternatively, this Commission should establish a schedule for its final decisions on the Petitions for Review filed both by Pa'ina and also by the Staff.

G. Conclusion.

Licensee PA'INA respectfully moves this Commission to order/direct the NRC Staff to study the two alternative sites set forth above for possible siting of Pa'ina's underwater irradiator. Additionally and/or alternatively, Pa'ina requests that this Commission expedite its decision-making on the pending Petitions for Review. Additionally/alternatively, Pa'ina requests that this Court establish a schedule for decision so that this proceeding has a foreseeable completion date.⁹

DATED: Honolulu, Hawaii

February 23, 2010



FRED PAUL BENCO
Attorney for Applicant/
Licensee PA'INA HAWAII, LLC

⁹ On February 19, 2010 counsel for Applicant/Licensee Pa'ina Hawaii, LLC contacted counsel for Intervenor and for the Staff, respectively, regarding this Motion. Counsel for Intervenor, David Henkins, opposed both the request that the Staff be ordered to study the two alternate sites, and also the request that this Commission expedite its decision on the Petitions for Review. Henkins took no position regarding the request for a schedule for decision. Counsel for the Staff, Mike Clark, supported the request for an expedited decision and also for a schedule for decision, but opposed the request that the Staff be ordered to study the two alternate sites.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "LICENSEE PA'INA HAWAII, LLC'S MOTION FOR ORDER/DIRECTION THAT NRC STAFF STUDY TWO ALTERNATIVE SITES FOR PROPOSED IRRADIATOR, AND/OR FOR COMMISSION TO EXPEDITE APPEAL, AND/OR FOR COMMISSION TO ESTABLISH SCHEDULE FOR DECISION" dated February 23, 2010 in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this 23rd day of February, 2010. Additional service has also been made this same day by electronic mail as shown below:

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Thomas S. Moore, Chair
Atomic Safety and Licensing Board
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(e-mail: tsm2@nrc.gov)

Dr. Anthony J. Baratta
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DATED: Honolulu, Hawaii,

February 23, 2010


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