

RAS I-197

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March 8, 2010 (8:30am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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 RESPONSE
TO APPLICANT PA'INA HAWAII, LLC'S FEBRUARY 23, 2010 MOTION

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Counsel for Intervenor Concerned Citizens of Honolulu

March 5, 2010

TEMPLATE = SECY 041

DS 63

INTERVENOR CONCERNED CITIZENS OF HONOLULU'S RESPONSE
TO APPLICANT PA'INA HAWAII, LLC'S FEBRUARY 23, 2010 MOTION

On February 23, 2010, Pa'ina Hawaii, LLC filed a "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." Intervenor Concerned Citizens of Honolulu strongly disagrees with Pa'ina's characterization of both the facts of this case and the applicable law.¹ Concerned Citizens takes no position, however, regarding whether the Commission should grant any of the specific relief Pa'ina requests.²

Concerned Citizens notes that Pa'ina appears to concede there are at least two "reasonable alternative sites or locations that would accomplish the project's purposes," but were not evaluated in the Staff's EA. 8/27/09 Initial Decision at 106. Of particular interest is the alternate irradiator site in Kunia, which is located: (1) far from Honolulu International Airport's runways, substantially reducing the threat of an airplane accident; (2) in the middle of the island, eliminating threats from tsunami runup and hurricane storm surges; and (3) out of urban Honolulu, away from strategic military bases, and far from Hawai'i's transportation and financial hubs, reducing the risks of terrorist attack. The Staff's failure to consider such sites in its EA deprived the Nuclear Regulatory Commission and the public of vital information about "choices

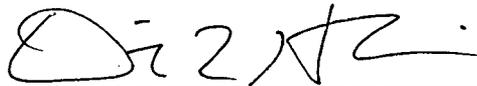
¹ For example, Pa'ina's unsupported claim that the lack of a final decision on its license application has been "very prejudicial ... to ... Hawaii's sensitive environment," Pa'ina Motion at 4, cannot be squared with the environmental assessment's ("EA's") conclusion that the proposed irradiator would have only "small beneficial impacts to ecology in regard to controlling invasive species." Final EA at 9 (ML071150121). Likewise, Pa'ina has never presented any evidence to back up its claims that it has been prejudiced as a result of alleged delay.

² Prior to receiving a copy of the motion, Concerned Citizens was unable to state whether or not it opposed Pa'ina's requests, since Pa'ina refused to provide adequate information in response to Concerned Citizens' inquiries regarding the nature of the relief Pa'ina was seeking. See Exchange of emails between Pa'ina and Concerned Citizens (Attachment A); see also 10 C.F.R. 2.323(b) (mandating "a sincere effort to ... resolve the issue(s) raised in the motion").

or alternatives that might be pursued with less environmental harm,” in violation of the National Environmental Policy Act (“NEPA”). Lands Council v. Powell, 395 F.3d 1019, 1027 (9th Cir. 2005); see also Soda Mountain Wilderness Council v. Norton, 424 F. Supp. 2d 1241, 1263 (E.D. Cal. 2006) (EA’s discussion of alternatives “enables an agency, and the public it serves, to evaluate whether the government has other options it could take that might be less damaging to the natural environment”); 40 C.F.R. § 1500.2(e) (commanding federal agencies to use NEPA process “to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment”).

Dated at Honolulu, Hawai‘i, March 5, 2010.

Respectfully submitted,



DAVID L. HENKIN
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Dear David,

We are, precisely, asking for the Staff to study two alternative sites.

Also, since the client's underwater irradiator is "categorically excluded" from NEPA documentation, we don't believe that any other studies are necessary.

In any event, we'll deem your response as a negative answer on the two issues, and we'll deem your position as a "no position" regarding our request that the Commission establish a schedule.

Thank you.

Fred Paul Benco
1188 Bishop Street
Suite 3409
Honolulu, HI 96813
Tel: (808) 523-5083
Fax: (808) 523-5085

--- On Fri, 2/19/10, David Henkin <dhenkin@earthjustice.org> wrote:

From: David Henkin <dhenkin@earthjustice.org>
Subject: RE: Pa'ina Hawaii, LLC
To: "Fred Benco" <fpbenco@yahoo.com>
Cc: "m clark" <mjcl@nrc.gov>
Date: Friday, February 19, 2010, 11:54 AM

Fred,

We're unclear on what, exactly, you are asking. Specifically, to whom would you be making the requested "expedited appeal"? Right now, you have a petition to the Commission to review the Board's action. What other appeal do you have in mind?

With respect to the request for the Staff to review the two specified alternate sites, on what basis are you suggesting these two sites? Would the requested analysis include transportation-related impacts and the non-nuclear, x-ray technology?

We take no position regarding your request that the Commission issue a schedule for its decisions on the pending petitions for review.

Aloha, David

David Henkin
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ATTACHMENT A

3/4/2010

The information contained in this email message may be privileged, confidential and protected from disclosure. If you are not the intended recipient, any dissemination, distribution or copying is strictly prohibited. If you think that you have received this email message in error, please notify the sender by reply email and delete the message and any attachments.

From: Fred Benco [mailto: fpbenco@yahoo.com]
Sent: Thursday, February 18, 2010 5:16 PM
To: m clark ; David Henkin
Cc: Michael Kohn
Subject: Pa'ina Hawaii , LLC

Dear Counsel,

My client seeks your concurrence to file a motion before the NRC requesting:

1. An expedited appeal, or additionally/alternatively,
 2. A schedule for decision on Pa'ina's and the Staff's Petitions for Review, or additionally/alternatively,
 3. Without prejudice to the pending Petitions for Review, an order/direction from the Commission to the Staff for the Staff to immediately review two alternative sites, whose addresses are: 3209 Ualena Street , Honolulu , Hawaii 96819 , and also 92-1860 Kunia Road , Kunia , Hawaii 96759 .
- Please let me know your responses by Friday, February 19, 2009 if possible.

Thank you.

Fred Paul Benco
1188 Bishop Street
Suite 3409
Honolulu , HI 96813
Tel: (808) 523-5083
Fax: (808) 523-5085

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on March 5, 2010, 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:

Fred Paul Benco
Suite 3409, Century Square
1188 Bishop Street
Honolulu, Hawai'i 96813
E-Mail: fpbenco@yahoo.com

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attn: Rulemakings & Adjudications Staff
E-Mail: Hearing.Docket@nrc.gov

Molly L. Barkman
Michael J. Clark
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop – O-15 D21
Washington, DC 20555-0001
E-mail: Michael.Clark@nrc.gov
Molly.Barkman@nrc.gov

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: ocaamail@nrc.gov

Administrative Judge
Paul B. Abramson
Atomic Safety & Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Paul.Abramson@nrc.gov

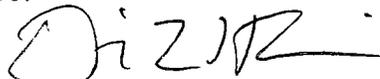
Administrative Judge
Thomas S. Moore, Chair
Atomic Safety & Licensing Board Panel
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U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-Mail: Thomas.Moore@nrc.gov

Administrative Judge
Anthony J. Baratta
Atomic Safety & Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-Mail: Anthony.Baratta@nrc.gov

In addition, the undersigned hereby certifies that, on March 5, 2010, a true and correct copy of the foregoing document was duly served on the following via e-mail:

Anthony Eitrem
E-mail: anthony.eitrem@nrc.gov

Dated at Honolulu, Hawai'i, March 5, 2010.



DAVID L. HENKIN
Attorney for Intervenor
Concerned Citizens of Honolulu



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: March 5, 2010

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	3/5/10	INTERVENOR CONCERNED CITIZENS OF HONOLULU'S RESPONSE TO APPLICANT PA'INA HAWAII, LLC'S FEBRUARY 23, 2010 MOTION; ATTACHMENT A; 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. |
| <input type="checkbox"/> | Per Our Conversation. | <input type="checkbox"/> | For Signature And Return. |
| <input type="checkbox"/> | Per Your Request. | <input type="checkbox"/> | Per Necessary Action. |
| <input type="checkbox"/> | For Review And Comments. | <input type="checkbox"/> | For Signature And Forwarding. |
| <input type="checkbox"/> | See Remarks Below. | | |

REMARKS: