

RAS I-206

# Official Transcript of Proceedings

## NUCLEAR REGULATORY COMMISSION

Title: Hearing ITMO Pa'ina Hawaii, LLC

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November 12, 2010 (3:00p.m.)

Docket Number: 30-36974-ML

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P-R-O-C-E-E-D-I-N-G-S

(3:05 p.m.)

JUDGE MOORE: Would each of the parties please identify themselves for the court reporter?

MR. HENKIN: Yes, this is David Henkin, appearing on behalf of the Concerned Citizens of Honolulu.

MR. BENCO: Fred Benco for Pa'ina, Hawaii, LLC.

MR. CLARK: For the NRC staff, this is Michael Clark. And I also have my co-counsel on, calling in from a separate line.

JUDGE MOORE: Who is that?

MR. CLARK: That is Molly Marsh.

JUDGE MOORE: Is Ms. Marsh on?

MS. MARSH: Yes, I'm here.

JUDGE MOORE: Okay. Thank you. With me on the call -- I'm Judge Thomas Moore. With me is Judge Paul Abramson. And Judge Anthony Baratta should be joining us shortly. In order that the court reporter can accurately transcribe this conference, I would appreciate it if all speakers would identify themselves before speaking.

This conference call is being held pursuant to the Board's order of November 4th, and

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1 in accordance with the staff's earlier July 29th,  
2 2010 response to the Board's July 16th scheduling  
3 order. The staff intends to file its draft  
4 supplement to the Environmental Assessment on  
5 Monday, December 6th, 2010.

6 Speaking to staff counsel Mr. Clark,  
7 does the staff still intend to meet that filing  
8 date?

9 MR. CLARK: This is Mike Clark. Your  
10 Honor, yes. We do intend to meet the filing date of  
11 December 6th, 2010, for the draft EA supplement.

12 JUDGE MOORE: Okay.

13 JUDGE ABRAMSON: This is Judge Abramson.  
14 Do you expect to meet it, as well as intending to  
15 meet it?

16 MR. CLARK: Your Honor, we both expect  
17 and intend -- and I think at this point we commit to  
18 meeting it, so we don't believe there's any  
19 uncertainty that we will, in fact, release the draft  
20 EA supplement on that date.

21 JUDGE MOORE: All right. And you will  
22 be electronically transmitting that to all of the  
23 parties?

24 MR. CLARK: We will do that, Your Honor.

25 JUDGE MOORE: Even though I fully

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1 understand that this proceeding started before  
2 electronic filing was mandatory, and this case has  
3 not been kicked over to that, all parties should  
4 file everything, as a matter of courtesy, by email  
5 with every other party, as the Board will be doing  
6 the same.

7 So that it's clear, Mr. Clark, you will  
8 file that electronically with all of the parties and  
9 the Board by email, as well as, then, regular  
10 service.

11 MR. CLARK: That's correct, Your Honor.  
12 By filing electronically, my understanding is that  
13 we would be attaching an Adobe copy of the EA  
14 supplement to the email.

15 JUDGE MOORE: That's correct.

16 MR. CLARK: Okay. Understood.

17 JUDGE MOORE: The Board's July 16th  
18 scheduling order on pages one and two spelled out  
19 the three subjects the staff shall address in the  
20 draft supplement to the EA, and the manner the staff  
21 shall address each of those matters.

22 Mr. Clark, so there is no  
23 misunderstanding, does the staff understand the  
24 Board's July 16th order?

25 MR. CLARK: Again, this is Mike Clark.

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1 Yes, Your Honor, we do understand the order, and we  
2 believe we are addressing each area -- we are  
3 certain we are addressing each area, and, we hope,  
4 the expectations of the Board and the other parties.

5 JUDGE MOORE: And, Mr. Clark, does the  
6 staff also understand that it must update the  
7 hearing file on or before December 6th if there are  
8 any documents that must be included under the  
9 definitions in the regulation?

10 MR. CLARK: Yes, we do, Your Honor.

11 JUDGE MOORE: All right. Additionally,  
12 Mr. Clark, no later than 10 days after the close of  
13 the comment period, the staff shall file a brief  
14 statement with the Board informing us of the number  
15 of comments that were filed in response to the  
16 staff's draft supplement to the EA. Is that clear?

17 MR. CLARK: May I ask, Your Honor, I  
18 take it we will be provided a transcript of this  
19 call? I'm taking a note here, and I believe you  
20 said within ten days of the close of the comment  
21 period?

22 JUDGE MOORE: Yes.

23 MR. CLARK: We'll provide the Board, and  
24 I presume the other parties, with the --

25 JUDGE MOORE: Yes, this -- the

1 transcript, as always, will be placed on ADAMS by  
2 the Secretary's office, and it will be available as  
3 soon as it is made electronically available. So it  
4 will be available to you. The Board would also  
5 direct that the staff place all the public comments  
6 in ADAMS, as you previously did earlier in this  
7 proceeding, Mr. Clark.

8 MR. CLARK: We will do that, Your Honor.

9 JUDGE MOORE: Additionally, if only a  
10 relatively small number of comments are filed, the  
11 staff in its statement that it is to file with the  
12 Board within 10 days of the close of the comment  
13 period should also inform the Board if the staff  
14 still needs two months in which to issue the final  
15 supplement to the EA.

16 MR. CLARK: This is Mike Clark. Could I  
17 ask one clarification? By a small number of  
18 comments, do you mean the number of commenters, or  
19 the number of comments?

20 JUDGE MOORE: The number of comments.  
21 Mr. Clark, as is common in these proceedings, you  
22 may well receive three dozen postcards all saying  
23 the same thing. That is not something that should  
24 take the staff an inordinate amount of time to deal  
25 with.

1 MR. CLARK: Again, this is Mike Clark.  
2 We understand that, Your Honor. And I would also  
3 like to note that the date we gave, the estimate for  
4 the release of the final EA supplement takes into  
5 account that we may receive extensive comments, and  
6 if we do in fact get --

7 JUDGE MOORE: I understand that.

8 MR. CLARK: -- a small number of  
9 comments --

10 JUDGE MOORE: What the Board is  
11 requesting is that if you receive only a relatively  
12 small number of substantive, serious, substantial  
13 comments, that the staff immediately inform the  
14 Board whether you still are going to need to take  
15 the full 60 days that you set forth previously to  
16 file the final EA.

17 MR. CLARK: Okay. It's understood, Your  
18 Honor.

19 JUDGE BARATTA: This is Judge Baratta.  
20 I've just joined. I apologize for being late. I  
21 was detained.

22 JUDGE MOORE: Judge Baratta, we are just  
23 running down the checklist, and we'll just continue,  
24 and you'll see where we are.

25 JUDGE BARATTA: Yes, I've already

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1           figured out where you are. Thank you, Judge Moore.

2                       JUDGE MOORE: Mr. Clark, if there are  
3           only a small number of comments, the Board would  
4           also appreciate when you file your statement, that  
5           you explain why it will still take the staff 60 days  
6           to file the final.

7                       And also, in that same statment, we  
8           would direct that the staff again inform the Board  
9           of the date on which the staff will file the final  
10          supplement EA, which may change depending either on  
11          the -- you may wish to adjust that up or down, but  
12          that should give you enough time to know that.

13                      And we would appreciate it if you would  
14          tell us that immediately. Is that clear?

15                      MR. CLARK: That is clear, Your Honor.

16                      JUDGE MOORE: In the July 16th order,  
17          the Board stated that it expects the intervenor, as  
18          it did previously in this proceeding, to file timely  
19          comments on the draft supplement EA, should the  
20          intervenor conclude that the staff has not  
21          adequately addressed the electronic beam irradiator  
22          alternative, the alternative sites for the proposed  
23          irradiator, and the environmental impacts of  
24          transportation accidents involving cobalt-60  
25          sources.

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1 Mr. Henkin, so there is no  
2 misunderstanding, the Board will look with extreme  
3 disfavor upon the intervenor's actions, should it  
4 sit back and not file comments on the draft  
5 supplement EA, should the intervenor conclude the  
6 staff's draft is inadequate for admitting  
7 information or using inadequate information or  
8 analyses.

9 Indeed, in the circumstances presented,  
10 I think it's fair to say the Board does not  
11 currently believe the contentions on the final  
12 supplement EA could meet all the requirements of 10  
13 CFR 2.309(f)(2) if timely comments calling any  
14 perceived inadequacies to the staff's draft are not  
15 called to their attention timely in the period for  
16 filing public comments.

17 So that I'm clear on all of this, the  
18 possibility for legitimate contentions on the final  
19 EA cannot be ruled out depending on what is or is  
20 not included in the staff's final environmental  
21 document, but we want to emphasize to you, Mr.  
22 Henkin, that you can't sit back and do nothing and  
23 wait until the final EA is filed. Is that clear?

24 MR. HENKIN: This is David Henkin. And  
25 Your Honor, I hope that in the course of these

1 proceedings the Board has found that Concerned  
2 Citizens have, in fact, timely made comments. And  
3 we intend to continue to do so.

4 We have alerted the experts who have  
5 taken a look at these issues in the past, as to the  
6 date that the staff expected to release the draft  
7 EA, and despite the fact that it's over the holiday  
8 period, we're going to do our best to crack the whip  
9 on them and ensure that they review the draft in a  
10 timely manner.

11 And rest assured that if we do have  
12 concerns, we understand that it's time for us to  
13 speak now or forever hold our peace.

14 JUDGE MOORE: We had no expectations  
15 that you would not, but we just wanted to make sure  
16 that that was all understood and out on the table.  
17 And I thank you for stating that.

18 MR. HENKIN: This is David Henkin.  
19 Thank you, Your Honor. And yes, the Board's order  
20 was very clear in that regard, and we understand.

21 JUDGE MOORE: Turning back to Mr. Clark,  
22 the Board would like to remind the staff of what was  
23 stated in the July 16th order, in our initial  
24 decision. We expect that the staff will  
25 appropriately and adequately address in the final

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1 supplement EA all substantial, substantive public  
2 comments on the three subject matters remaining in  
3 this proceeding.

4 And the Board will look with extreme  
5 disfavor upon the staff waiting to address in its 10  
6 CFR 2.1207 written hearing filings any comments that  
7 could have and should have been addressed in the  
8 final supplemental EA. Is that clear, Mr. Clark?

9 MR. CLARK: That is clear, Judge Moore.

10 JUDGE MOORE: We do not want a repeat of  
11 what we had called to your attention in the initial  
12 decision. Much of your written testimony could have  
13 and should have been included in the final EA, in  
14 the Board's opinion. So we would appreciate you  
15 paying special attention to that.

16 Before going on to see whether the  
17 parties have any other matters they wish to raise  
18 with the Board at this time, Judge Baratta, do you  
19 have anything you wish to point out to the parties?

20 JUDGE BARATTA: My only concern is  
21 relative to the intervenor understanding the  
22 provisions that are in our regulations relative to  
23 contentions that have to be based on new and  
24 significant information.

25 So if those are not filed based on the

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1 EA, or as we discussed, at least the comments filed,  
2 then it would be questionable from a timeliness  
3 standpoint if they would be admissible once the  
4 final is issued.

5 JUDGE MOORE: Judge Baratta, is there  
6 anything else?

7 JUDGE BARATTA: No, that's all.

8 JUDGE MOORE: Judge Abramson, do you  
9 have anything that you wish to add.

10 JUDGE ABRAMSON: I think nothing.

11 JUDGE MOORE: Do any of the parties have  
12 anything they want to call to the Board's attention  
13 at this time?

14 MR. BENCO: Your Honor, this is Fred  
15 Benco for Pa'ina, Hawaii, out in Hawaii. And my one  
16 question is this. What about duplicative comments?  
17 In other words, let's say they've already made 90  
18 percent of their comments on these three remaining  
19 issues, and they make 10 percent which are new  
20 comments.

21 What is the obligation of the staff in  
22 their analysis and responses? Must they respond to  
23 all 100 percent, or just the 10 percent of the new  
24 comments?

25 JUDGE MOORE: That is a question that

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1 you should be addressing, I think, to the staff.  
2 The staff is in the position, because it is their  
3 draft document, to make the determination as to the  
4 matters that they feel they must respond to in  
5 accordance with the prior Commission decision, our  
6 initial decision, and Ninth Circuit case law.

7 And the Board is not, today, in a  
8 position to speculate on what has and hasn't been  
9 raised in the past, and what should or should not be  
10 responded to. Without many more specifics, and even  
11 with specifics, I don't think the Board wishes to  
12 get into that today.

13 Anything futher, Mr. Benco?

14 MR. BENCO: That's it, Your Honor.

15 JUDGE MOORE: What the Board will do is,  
16 after the staff has issued the draft supplement EA,  
17 and the close of the comment period, recognizing  
18 that there will be a gap because of mailing time,  
19 that's why we picked 10 days for the staff to file  
20 its statement with the Board.

21 At that time, the Board will be in a  
22 position, because the staff will have informed the  
23 Board whether there can be any speed-up in this  
24 schedule, we will then set about to try to find  
25 appropriate dates for the parties to reserve in the

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1 event we have to go forward or will be going forward  
2 with a hearing, so that we don't have any last  
3 minute conflicts that will disrupt the schedule.

4 And we should be able at that point,  
5 because the staff will be able to tell us whether  
6 there will be any change, and when they'll be filing  
7 the final EA, we can put dates certainly into an  
8 order as to when everything will be due and when the  
9 hearing will be held.

10 And as I said, we will try to stake out  
11 two potential hearing dates in the event there is a  
12 hearing, and we will consult with the parties with a  
13 telephone conference one final time, to make sure  
14 that there are no impediments to going forward,  
15 should a hearing be necessary.

16 Because this is a Subpart L proceeding,  
17 there is always the question of whether summary  
18 disposition motions make sense. That is something  
19 that we likely will want to discuss in a telephone  
20 conference, because it may make sense to have them  
21 in this case.

22 But the other side of that coin is that  
23 because Subpart L proceedings and the written  
24 filings are essentially that, it really makes --  
25 it's a waste of time to have summary disposition

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1 motions in a Subpart L proceeding.

2 So that's something that we will leave  
3 open for discussion after we have the staff's next  
4 submission to us, and we see the copies of the  
5 filings. And of course, that can't be ultimately  
6 determined until we see the final EA and the  
7 parties' contentions.

8 If no one has anything futher?

9 MR. HENKIN: Your Honor, this is David  
10 Henkin.

11 JUDGE MOORE: Yes, Mr. Henkin?

12 MR. HENKIN: And it's a little bit off  
13 topic, although it's related to this proceeding.  
14 And I just wanted to confirm the status of Concerned  
15 Citizens' motion to stay the issuance of the  
16 materials license.

17 As you may recall, pursuant to the  
18 Commission's rules, we were obliged to file within I  
19 believe it was 10 days of the issuance of the  
20 license in 2007 a request for the Board to stay,  
21 despite the fact that the applicant had not yet  
22 secured even the lease for the airport property, and  
23 therefore there was no imminent risk of cobalt-60  
24 coming to Hawaii.

25 At that point, the Board determined that

1 our request was timely, but because of the lack of a  
2 lease it held the request in abeyance. And I just  
3 wanted to confirm that that was still the status,  
4 that the license has been issued for possession of  
5 materials for the airport site, but that our motion  
6 for stay of the issuance is still pending but held  
7 in abeyance because, at least to our knowledge, the  
8 applicant has not yet secured the lease for that  
9 location.

10 JUDGE MOORE: I believe that is  
11 accurate. Mr. Benco, you've been filing your  
12 regular status reports, and my recollection is that  
13 nothing has changed. Is that correct?

14 MR. BENCO: Fred Benco. You are  
15 correct, Your Honor. We do not have the lease for  
16 the airport site.

17 MR. HENKIN: Your Honor, this is David  
18 Henkin. Just briefly, I believe that Pa'ina ceased  
19 filing its monthly status updates with respect to  
20 the lease once the Board issued its decision, the  
21 appeal of which was then petitioned to the  
22 Commission.

23 So our understanding about the status of  
24 the lease is not based on any filings that Pa'ina  
25 has made in this proceeding, but rather just our

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1 best efforts to monitor the situation remotely.

2 JUDGE MOORE: Mr. Benco, you should  
3 resume filing. Mr. Henkin, I was unaware that those  
4 had ceased to be filed because of the remand of the  
5 proceedings to the Board. Mr. Benco, you should  
6 resume filing your status reports, and we're coming  
7 up to the end of the month or the first of the next  
8 month. Please resume that on the schedule you had  
9 before.

10 And to keep the parties apprised, that  
11 stay motion stays in abeyance pending any change in  
12 circumstances. Because, as we pointed out when we  
13 ruled previously, there was no imminence. And that  
14 remains the situation.

15 MR. BENCO: Fred Benco. I will do so,  
16 Your Honor.

17 JUDGE MOORE: Thank you, Mr. Clark, do  
18 you have anything further for us?

19 MR. CLARK: I don't, Your Honor.

20 JUDGE MOORE: Mr. Benco, anything  
21 further?

22 MR. BENCO: Nothing further, Your Honor.

23 JUDGE MOORE: Mr. Henkin, anything  
24 further?

25 MR. HENKIN: No, Your Honor. Thank you

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1 for your clarification on the motion to stay.

2 JUDGE MOORE: And then we will adjourn  
3 this call, and we look forward to the staff meeting  
4 the deadlines. And it will go forward, then, as we  
5 have stated today and in the scheduling order of  
6 July 16th.

7 Thank you so much, and good day to all  
8 of you.

9 MR. HENKIN: Happy holidays.

10 (Whereupon, the above-entitled  
11 proceeding was adjourned at 3:28 p.m.)

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CERTIFICATE

This is to certify that the attached proceedings -  
before the United States Nuclear Regulatory Commission  
in the matter of: Pa'ina Hawaii, LLC

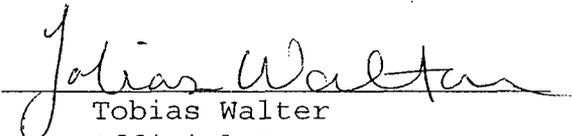
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Application

Docket Number: 30-36974-ML

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were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

  
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