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Subject: Concerned Citizen's Opposition to Pa'ina Hawaii, LLC's Petition for Review of the August 27, 2009 Initial Decision of the ASLB
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To Whom It May Concern:

Attached is "Intervenor Concerned Citizens of Honolulu's Opposition to Applicant Pa'ina Hawaii, LLC's Petition for Review of the August 27, 2009 Initial Decision of the Atomic Safety and Licensing Board"

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
Pa'ina Hawaii, LLC	)	Docket No. 30-36974-ML
	)	ASLBP No. 06-843-01-ML
Materials License Application	)	
	)	

INTERVENOR CONCERNED CITIZENS OF HONOLULU'S OPPOSITION TO APPLICANT PA'INA HAWAII, LLC'S PETITION FOR REVIEW OF THE AUGUST 27, 2009 INITIAL DECISION OF THE ATOMIC SAFETY AND LICENSING BOARD

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October 19, 2009

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I. INTRODUCTION

Intervenor Concerned Citizens of Honolulu respectfully submits the Commission should deny applicant Pa'ina Hawaii, LLC'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 Nuclear Regulatory Commission ("NRC") 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.

II. STANDARD FOR GRANTING PETITION FOR REVIEW

Under the Commission's rules, the granting of a petition for review is discretionary and requires "giving due weight to the existence of a substantial question with respect to the following considerations":

> (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
>
> (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
>
> (iii) A substantial question of law, policy, or discretion has been raised;
>
> (iv) The conduct of the proceeding involved a prejudicial procedural error; or
>
> (v) Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. § 2.341(b)(4).

The Commission's "standard of 'clear error' for overturning a Board's factual finding is quite high." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 26 (2003). Accordingly, the Commission defers to the Board's findings unless

"clearly erroneous" – that is, "not even plausible in light of the record viewed in its entirety." Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2 and 3), CLI-04-24, 60 NRC 160, 189 (2004) (internal quotation marks omitted). 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's standard of review for conclusions of law "is more searching." Watts Bar, CLI-04-24, 60 NRC at 190. The Commission reviews legal questions de novo and "will reverse a licensing board's legal rulings if they are 'a departure from or contrary to established law.'" Id.

III. THE BOARD PROPERLY DIRECTED THE STAFF TO CONSIDER ALTERNATE SITES FOR PA'INA'S PROPOSED IRRADIATOR

Pa'ina argues the Board erred in requiring the Staff to consider alternate sites for Pa'ina's proposed irradiator because, allegedly, "Intervenor's experts have failed to identify any specific, alternate parcel of land on Oahu for the irradiator." Pa'ina Petition for Review at 4. As a threshold matter, Pa'ina's suggestion that Concerned Citizens bears the burden to identify specific, reasonable alternative sites ignores that "it is the agency's obligation to comply with NEPA." Initial Decision at 14; see also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983) (same); 'Ilio'ulaokalani Coalition v. Rumsfeld, 464 F.3d 1083, 1092 (9th Cir. 2006) ("the agency bears the primary responsibility to ensure that it complies with NEPA, and an EA's ... flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action") (quoting Dep't of Transp. v. Public Citizen, 541 U.S. 752, 765 (2004)). In this

case, the EA's purpose is "broadly framed in terms of service to the public benefit" and "is not, by its own terms, tied to a specific parcel of land." Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 815 (9th Cir. 1987), rev'd on other grounds, 490 U.S. 332, aff'd on remand, 879 F.2d 705, 706 (9th Cir. 1989). Thus, there was "no tenable reason for [the Staff] to be wedded exclusively" to locating the proposed irradiator at only Pa'ina's preferred airport location, and, even had Concerned Citizens not emphasized the need to consider other locations, "it should have been obvious that investigation was warranted to determine whether the [irradiator] could be pursued at alternative sites." Id.; see also City of Alexandria, Va. v. Slater, 198 F.3d 862, 868 (D.C. Cir. 1999) ("When the proposed action is an integral part of a coordinated plan to deal with a broad problem, the range of alternatives that must be evaluated is broadened"). To allow the NRC and the public to consider "all possible approaches to a particular project ... which would alter the environmental impact and the cost-benefit balance," the EA was obliged to consider alternate sites. Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989) (quoting Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971)); 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").[1]

[1] 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., Friends of Endangered Species v. Jantzen, 760 F.2d 976, 987-88 (9th Cir. 1985) (alternate sites for proposed development); Lee v. United States Air Force, 354 F.3d 1229, 1239-40 (10th Cir. 2004) (alternate locations for basing training aircraft); South Carolina v. O'Leary, 64 F.3d 892, 899-900 (4th Cir. 1995) (alternate sites for storage of spent nuclear fuel rods); North Carolina v. Federal Aviation Admin., 957 F.2d 1125, 1134-35 (4th Cir. 1992) (alternate locations

In any event, Pa'ina is factually incorrect in asserting that, during this proceeding, Concerned Citizens did not identify any specific alternate site the Staff should have evaluated in its EA. As discussed below, the Board properly relied on the evidence that Concerned Citizens introduced regarding alternate locations to conclude there were "reasonable alternative sites or locations that would accomplish the project's purposes" and should have been evaluated in the EA. Initial Decision at 106.

On February 9, 2007, Concerned Citizens filed contentions challenging the adequacy of the Staff's then recently released draft EA. Among other things, those contentions challenged the Staff's failure to consider alternate sites for Pa'ina's proposed irradiator and attached as an exhibit an August 28, 2006 email from Pa'ina's principal, Michael Kohn, to the NRC Staff that discussed various alternate sites Pa'ina was investigating that were "further from an active runway and further from the ocean" and might even have "commercial advantages" over the currently proposed site at Honolulu International Airport. Intervenor Concerned Citizens of Honolulu's Contentions re: Draft EA and Draft Topical Report at 27 n.8 (Feb. 9, 2007) (quoting 8/28/06 Email from Michael Kohn (Pa'ina) to Jack Whitten (NRC) at 1 (ML062770248)). Concerned Citizens argued that this document "makes clear that alternate locations ... would be feasible." Id.

In its reply in support of its contentions challenging the draft EA, Concerned Citizens explained that "[t]he fact that Pa'ina has 'entertain[ed] the idea of changing the proposed location from that listed in the license application' disproves the Staff's and Pa'ina's assertions that the proposed site is the only feasible one." Intervenor Concerned Citizens of Honolulu's Reply In Support Of Its Contentions re: Draft EA and Draft Topical Report at 26 (Mar. 19, 2007)

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for Navy targets); Monarch Chemical Works, Inc. v. Thone, 604 F.2d 1083, 1088 (8th Cir. 1979) (alternate sites for prison).

(quoting 8/28/06 Kohn email at 1). Accordingly, Concerned Citizens urged that, "[a]t a minimum, ... the Draft EA should have analyzed the alternative of siting the irradiator on Ualena Street, which has 'several commercial buildings that would be acceptable to Pa'ina.'" Id. (quoting 8/28/06 Kohn email at 1). Concerned Citizens presented nearly identical arguments regarding the Staff's failure to consider the Ualena Street sites in its amended contentions challenging the final EA. See Intervenor Concerned Citizens of Honolulu's Amended Environmental Contentions #3 Through #5 at 34 n.11 (Sept. 4, 2007); Intervenor Concerned Citizens of Honolulu's Reply In Support Of Its Amended Environmental Contentions #3 Through #5 at 41-42 (Oct. 1, 2007).

In issuing its Initial Decision, the Board relied on the evidence Concerned Citizens presented – Mr. Kohn's August 28, 2006 email – to conclude there were reasonable alternate sites that are "reasonably related to the purposes of the project" and, thus, should have been considered in the EA. Initial Decision at 106 (quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974)). As the Board noted:

> Here, the major purposes of the project are centrally located treatment for imports and exports on Oahu, the central hub for air and sea transportation. Accordingly, the consideration of reasonable alternative sites or locations that would accomplish the project's purposes with less significant impacts ought to be considered. In this regard, Mr. Kohn, the managing member of Pa'ina Hawaii, recognized this possibility himself. He indicated in an email to the Staff, after the Pa'ina application had been filed, that "Pa'ina has not yet been able to lease the existing proposed location" and it was considering other locations in existing buildings that were "further from the active operations of the airport and further from the ocean."

Id. There was nothing erroneous about the Board relying on Pa'ina's own statements – which Concerned Citizens introduced as evidence – to conclude that sites other than Pa'ina's preferred

location at Honolulu International Airport could accomplish the project purposes, and, thus, should have been evaluated.[2]

IV. THE BOARD PROPERLY DIRECTED THE STAFF TO CONSIDER THE ALTERNATE OF USING E-BEAM IRRADIATION TECHNOLOGY

Pa'ina's challenge to the Board's decision that the Staff was obliged to evaluate the e-beam irradiation technology as a reasonable alternative consists of nothing more than a plea for the Commission to second-guess the Board's reliance "upon [Hawai'i Pride Vice-President Eric] Weinert's testimony about matters involving the e-beam irradiator industry and technology and the Hawaii Pride facility in particular" rather than on Pa'ina's principal, Mr. Kohn. Initial Decision at 85; see also id. (noting Mr. Kohn "has no actual experience purchasing or operating an e-beam facility," "his letter and testimony are not completely consistent or always clear," and "his information does not appear to be based upon intimate, insider, first-hand knowledge of either the history of the Hawaii Pride facility or its operations"). Pa'ina's request is contrary to the Commission's standards for review of factual findings, pursuant to which 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 at 93. As the Commission emphasized in Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-00-12, 52 NRC 1 (2000), it is particularly reluctant to upset findings and conclusions where, as here, they involve "fact-specific issues or where the affidavits or

[2] The Commission should reject Pa'ina's claim the Board violated "10 C.F.R. Sec. 2.341(b)(4)(iv) and fundamental notions of Due Process" when it allegedly "did not specifically address Licensee Pa'ina's arguments." Pa'ina Petition for Review at 4 n.2. As the Board noted, "any significant arguments made by the Applicant [were] generally encompassed by the Staff's arguments," which the Board addressed. Initial Decision at 8 n.37. With respect to the Staff's obligation to consider alternative sites in its EA, the Board clearly considered Pa'ina's argument about whether Concerned Citizens had identified alternate sites, citing the very evidence Concerned Citizens proffered to conclude reasonable alternative sites exist.

submissions of experts must be weighed." Id., 52 NRC at 3 (quoting Hydro Resources. Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 6 (1999)).

In this case, the Board reviewed all the evidence submitted, including testimony from both Mr. Kohn and Mr. Weinert regarding Hawaii Pride's financial difficulties in its early days. See Initial Decision at 77-78 (noting Kohn's testimony), 83 (Weinert testified Hawaii Pride's financial difficulties were "unrelated to the economic viability of operating an x-ray irradiator in Hawai'i"). Based on that evidence, the Board ultimately concluded that Mr. Weinert's testimony, which "is based upon years of first-hand knowledge of the vendor from whom the irradiator was purchased, and the history and operation of the Hawaii Pride e-beam facility – both its ups and downs – gained as the vice president of the company in charge of day-to-day operations," was more probative. Id. at 85; see also id. at 93 ("Any doubt about the erroneous nature of [the Staff's] economic uncertainty conclusion is erased by Mr. Weinert's testimony"). Pa'ina provides no basis for the Commission to disturb that factual finding.

V. THE BOARD CORRECTLY CONCLUDED THAT THE MERE FACT PA'INA'S IRRADIATOR IS A PRIVATE PROJECT DOES NOT RELIEVE THE STAFF OF ITS OBLIGATION TO EVALUATE REASONABLE ALTERNATIVES

The Commission should reject as baseless Pa'ina's claim the Board "totally ignored" its argument that, because its irradiator is a "privately-initiated project," the Staff need not evaluate alternate technologies and sites in its EA. Pa'ina Petition for Review at 9 (emphasis omitted). In its discussion of both alternate technologies and alternate sites, the Board expressly considered, and rejected, this claim. See Initial Decision at 98-99, 105-106 & n.479.

As the Board explained, "Ninth Circuit precedent ... makes clear that the range of alternatives that must be considered are those that are 'reasonably related to the purposes of the project.'" Id. at 98 (quoting Trout Unlimited, 509 F.2d at 1286); see also Muckleshoot Indian

Tribe v. U.S. Forest Serv., 177 F.3d 800, 812 (9th Cir. 1990) (quoting City of Carmel-by-the-Sea v. U.S. Dep't of Trans., 123 F.3d 1142, 1155 (9th Cir. 1997)) ("the stated goal of a project necessarily dictates the range of reasonable alternatives"); Hydro Resources, Inc., CLI-01-04, 53 NRC 31, 55 (2001) (reasonable alternatives are ones that "satisfy the goals of the project").[3] The scope of alternatives is defined by "what is 'reasonable' rather than on whether the proponent or applicant likes or is itself capable of carrying out the particular alternative." 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981). Thus, while Pa'ina may prefer to operate a nuclear irradiator and locate it at the airport, the Board properly concluded the EA's analysis of alternatives must focus on the general goal of the undertaking: to treat "fresh fruit and vegetables bound for the mainland from the Hawaiian Islands and similar products being imported to the Hawaiian Islands." 71 Fed. Reg. 78,231, 78,231 (Dec. 28, 2006); see also Initial Decision at 98-99 (quoting EA at 6).

The Board properly rejected the Staff's decision to "go[] well beyond its own listing of the reasonable purposes and needs of the proposed action and create[] a list of the Applicant[']s 'wants' to justify its action in not considering [reasonable] alternative[s]." Initial Decision at 99. As the Board recognized, NEPA does not permit the Staff to "creat[e] fanciful Applicant 'wants' that would effectively reduce the consideration of alternatives to a binary choice of granting or denying the sought license." Id.; see also Save Our Cumberland Mountains v. Kempthorne, 453

[3] The Board properly distinguished this case from Hydro Resources, in which the Commission found it was proper, in identifying reasonable alternatives for a proposed in situ leach mining project, to take into account the locations where the applicant "owns land" and "the ore body is located." CLI-01-04, 53 NRC at 55; see also Initial Decision at 106 n.479. Pa'ina not only does not own the land where it proposes to locate its irradiator, but, even now, has not yet secured a lease for the property. See 10/6/09 Pa'ina Lease Update. Moreover, the record makes clear there are alternate sites where Pa'ina could locate its irradiator, including ones that might have "commercial advantages" over the currently proposed site. See Initial Decision at 106 (quoting 8/28/06 Kohn Email).

F.3d 334, 345 (6th Cir. 2006) (NEPA "prevents federal agencies from effectively reducing the discussion of environmentally sound alternatives to a binary choice between granting or denying an application").

VI. THE BOARD PROPERLY DIRECTED THE STAFF TO EVALUATE POTENTIAL IMPACTS ASSOCIATED WITH TRANSPORTATION OF COBALT-60 SOURCES TO AND FROM THE PROPOSED IRRADIATOR

Pa'ina's claim the Board should not have "ordered the Staff to analyze 'environmental consequences of transportation accidents', i.e., delivering Co-60 to and from Hawaii and to Pa'ina's site near the airport" reflects a fundamental misunderstanding of the NRC's duties under NEPA. Pa'ina Petition for Review at 11. Initially, Pa'ina mixes apples and oranges when it argues that, merely because the Board refused to admit safety contentions related to transportation accidents, "logically there could be no relevant environmental impacts attributable to, or the responsibility of, Pa'ina." Id. This proceeding's scope for purposes of demonstrating safety is not co-extensive with the scope of environmental review required to comply with NEPA. See U.S. Dep't of Energy (High Level Waste), LBP-09-06, 69 NRC ___, slip op. at 36 (May 11, 2009) ("the NRC is obligated under NEPA to analyze and to disclose all environmental effects of the proposed repository, not just the effects of those portions of the repository over which the NRC has direct regulatory control").[4]

[4] U.S. Dep't of Energy cannot properly be limited to whether the NRC must analyze potential impacts of "new construction of roads, railways, airports or any other offsite projects," as Pa'ina argues. Pa'ina Petition for Review at 12. Rather, the decision addresses more generally the NRC's duty under NEPA to examine potential impacts of the transportation of radioactive material to a proposed facility like Pa'ina's irradiator, since, without such transportation, "construction of the [facility] would be irrational." U.S. Dep't of Energy, LBP-09-06, slip op. at 38; see also id. (rejecting argument that "the Supreme Court's decision in Department of Transportation v. Public Citizen renders transportation impacts outside the scope of the NRC's NEPA responsibilities").

NEPA mandates that the NRC take a "hard look at the effects from proceeding with" Pa'ina's proposed irradiator. Klamath-Siskiyou Wilderness Center v. Bureau of Land Management, 387 F.3d 989, 1001 (9th Cir. 2004). 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" (e.g., if they "[c]annot or will not proceed unless other actions are taken previously"). 40 C.F.R. § 1508.25(a)(1)(ii); see generally id. § 1508.25.

As the Board correctly concluded, "the operation of the proposed irradiator and the impacts of the transportation of Co-60 are connected actions" since "the operation of the proposed irradiator cannot proceed unless Co-60 is regularly transported to and from the facility." Initial Decision at 49-50. Regular Co-60 shipments would not occur if there were no irradiator to receive them, and, likewise, the irradiator "would not be built but for the contemplated [shipments of Co-60 sources]." Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985). 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," whose potential impacts the Staff was obliged to, but failed to, examine in the EA. Id. at 759.

Pa'ina's argument that "the Co-60 will be delivered by a separate, specialized licensee under Part 71," whose impacts need not be analyzed before allowing Pa'ina's irradiator to proceed, Pa'ina Petition for Review at 11, ignores "that it would be irrational, or at least unwise, to undertake the first phase" – construction of the irradiator – "if subsequent phases" – transportation of fresh sources to the facility and removal of depleted sources – "were not also undertaken." Northwest Resources Information Center v. Oregon Natural Resources Council, 56

F.3d 1060, 1068 (9th Cir. 1995) (quoting Trout Unlimited, 509 F.2d at 1285). The construction and operation of the irradiator and the transportation of Co-60 sources "present a 'links in the same bit of chain' scenario" that obliged the Staff to consider all impacts in the EA. Id.

Moreover, that other parties would have to seek coverage under a separate license to transport sources to and from Pa'ina's irradiator does not alter the analysis.[5] The Commission resolved a similar question in Louisiana Energy Services, LLP (National Enrichment Facility), CLI-06-15, 63 NRC 687 (2006), which involved claims the Staff was obliged to examine impacts associated with the disposal of depleted uranium before deciding whether to license a uranium enrichment facility. The Commission emphasized the pending proceeding was "to license a uranium enrichment facility, not a proceeding to license a near-surface waste disposal facility." Id. at 690. The Commission nonetheless recognized NEPA required the Staff "to consider the reasonably foreseeable environmental impacts of a proposed action, even if they are only indirect effects" and concluded that "[d]epleted uranium disposal from the proposed National Enrichment Facility would be an indirect effect." Id.

There was no question in Louisiana Energy Services that the Staff needed to discuss depleted uranium disposal in its NEPA analysis, even though licensing of a disposal facility was not involved. Id. at 698 ("NEPA requires ... that we consider 'reasonably foreseeable' indirect effects of the proposed licensing action"). Likewise, in this case, the Board properly concluded

[5] There is no support for Pa'ina's bald assertion that the absence of the Part 71 licensee from this proceeding "makes impossible any responses to Intervenor's claims." Pa'ina Petition for Review at 12. It is well-established in the Ninth Circuit that "the federal government is the only proper defendant in an action to compel compliance with NEPA." Churchill County v. Babbitt, 150 F.3d 1072, 1082, as amended by 158 F.3d 491 (9th Cir. 1998). While the Staff may not know what specific "route the Part 71 licensee will use to deliver the Co-60," Pa'ina Petition for Review at 12, it still must evaluate "reasonably foreseeable potential environmental impacts" from "plausible option[s]" for transporting Co-60 sources to and from Pa'ina's proposed irradiator. Louisiana Energy Services, LLP (National Enrichment Facility), CLI-06-15, 63 NRC 687, 700 (2006).

the Staff was obliged to include in its EA an adequate analysis of potential impacts associated with transporting Co-60 to and from the irradiator.

Finally, the Board correctly held that the mere existence of a generic environmental impact statement ("GEIS") discussing transportation accidents involving radioactive materials would not, as Pa'ina asserts, excuse the Staff's failure to address such impacts in the EA. See Pa'ina Petition for Review at 12. Pa'ina is mistaken when it claims the GEIS the Staff invoked in this proceeding was "on the transportation for radioactive material in urban areas." Pa'ina Petition for Review at 12. As the Board noted:

> the document to which the Staff cites, NUREG-0170, does not, by its own admission, "specifically consider facets unique to the urban environment," the environment in which the proposed irradiator is located. Rather, NUREG-0170 states that "[a] separate study specific to such considerations is being conducted and will result in a separate environmental statement specific to such an urban environment." To date, the Staff has not filed or cited the allegedly forthcoming and relevant environmental study on the transportation of radioactive material in urban environments.

Initial Decision at 49 n.255 (citations omitted). Thus, there was no relevant GEIS that the Board could have "ordered ... to be incorporated in the EA." Pa'ina Petition for Review at 12.

Moreover, even if such a GEIS existed, it was not "available for public comment," as NEPA requires. Id. To comply with NEPA's tiering regulations, the EA would have had to "summarize the issues discussed in the broader statement and incorporate statements from the broader statement by reference," concentrating on the transportation-related issues specific to Pa'ina's proposed irradiator. 40 C.F.R. § 1502.20; see also id. § 1508.28. The EA did not do this. It made no mention of the GEIS Pa'ina now invokes (not even in the references) and included no discussion of potential impacts from transportation accidents.

The draft EA likewise was silent regarding the GEIS Pa'ina now claims is relevant, which means that, during the public comment period, the public, including Concerned Citizens,

was unaware of its existence and alleged relevance to evaluating Pa'ina's proposal. See Draft EA at 8. Consequently, no one was in a position to comment on whether the GEIS adequately analyzes issues related to transporting Co-60 to and from Hawai'i. Because NEPA recognizes the vital role the public plays in ensuring agencies do not sweep important considerations under the rug, if the Staff had intended to rely on a GEIS, it was required to state, in the draft EA, "where the earlier document is available." 40 C.F.R. § 1502.20. Likewise, the NRC's guidance for preparing EAs provides that "[t]he new environmental document must identify the document from which it is tiered and both documents must be available for public review." NUREG-1748, § 1.6.2. The Staff failed to comply with any of these requirements. Accordingly, the Board would have had no basis to order incorporation of the GEIS, as Pa'ina urges, even assuming it existed.

VII. THE DENIAL OF VARIOUS CONTENTIONS DOES NOT ESTABLISH PA'INA'S PROPOSED IRRADIATOR IS CATEGORICALLY EXCLUDED FROM NEPA

Pa'ina's argument that this Board's decision not to admit various contentions means that "Pa'ina's irradiator is and should be 'categorically excluded' from NEPA documentation," Pa'ina Petition for Review at 14, "misapprehends the procedural and substantive history of this proceeding." 10/15/08 Board Order at 3 (Ruling on Pa'ina Hawaii, LLC Motion to Reinstate "Categorical Exclusion"). As the Board noted in rejecting a similar argument from Pa'ina last year, "[o]n April 27, 2006, the Board issued an Order in which it accepted the stipulation ... of the Staff and the Intervenor" that required preparation of an EA for Pa'ina's proposed irradiator. Id. at 4. The Board then correctly held:

> Once the Staff prepared the environmental assessment, the issue of whether the "categorical exclusion" status under NEPA applied to the proposed Pa'ina irradiator became moot and totally irrelevant. Thus, in general, the current NEPA-based questions in this proceeding all concern whether the Staff's

> Environmental Assessment for the proposed Pa'ina irradiator adequately complies with the Act's standards for an environmental assessment. Accordingly, contrary to the mistaken premise of the Applicant's motion, the proceeding has not come full circle and there is no question, and there cannot be any question, in the current proceeding of whether the "categorical exclusion" status should apply to the proposed Pa'ina irradiator.

Id. (emphasis added); see also Initial Decision at 3 n.14 ("the Staff, in effect, waived the categorical exclusion in the joint stipulation and thus was obligated to prepare an environmental assessment in full compliance with NEPA and applicable precedent"); Pa'ina Hawaii, LLC (Materials License), CLI-06-18, 64 NRC 1, 5 (2006) (denying Pa'ina's challenge to settlement "on substantive grounds" and noting "[i]t is the NRC, not Pa'ina, that has the legal duty to perform a NEPA analysis and to issue appropriate NEPA documents (such as an EA)").[6]

The Board further noted that, Pa'ina's "motion evidences a serious misapprehension of the various procedural rulings in the proceeding on the Intervenor's amended environmental and safety contentions." 10/15/08 Board Order at 4. As the Board explained, "[w]hen the Board and the Commission did not admit proffered contentions or portions of the Intervenor's amended

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[6] The order expressly reserves Concerned Citizens' right to "challeng[e] the adequacy of any NEPA document that the NRC prepares regarding the Applicant's proposed irradiator." 3/20/06 Joint Stipulation and Order at ¶ 6. To be adequate, the Staff's EA must "[a]id the Commission's compliance with [NEPA] when no environmental impact statement [('EIS')] is necessary." 10 C.F.R. § 51.14(a); see also 40 C.F.R. § 1508.9(a)(2) (same). Since NEPA demands that "high quality" environmental information – not unsubstantiated assertions – be "available to public officials and citizens before decisions are made and before actions are taken," the Board was obliged to ensure the Staff's analysis was thorough and sound, even in the absence of any potential for significant impacts. 40 C.F.R. § 1500.1(b); see also Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1216 (9th Cir. 1999) (EIS required "whenever 'substantial questions are raised was to whether a project may cause significant [environmental] degradation"). Likewise, since "consideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process," the Board still had to review the adequacy of the EA's discussion of alternatives. Bob Marshall Alliance, 852 F.2d at 1228-29; see also Highway J Citizens Group v. Mineta, 349 F.3d 938, 960 (7th Cir. 2003) ("inquiry into consideration of reasonable alternatives is 'independent of the question of environmental impact statements, and operative even if the agency finds no significant environmental impact'").

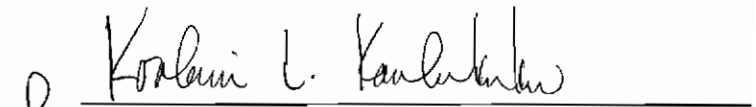
environmental contention 3 and amended safety contention 7, the Board and the Commission did not rule on the merits of the issues raised in these contentions." Id.; see, e.g., 6/19/08 Board Memorandum and Order (Ruling on Admissibility of Amended Safety Contention 7) at 1 (concluding Concerned Citizens had not satisfied the Commission's "newly prescribed and rigorous safety contention admissibility standard with respect to irradiator siting"). Since the denial of those contentions "is not an affirmative factual finding of the converse of the assertions in the challenged contentions," 10/15/08 Board Order at 4, Pa'ina improperly relies on those rulings to argue Concerned Citizens "has effectively ... proved" that the proposed irradiator is categorically excluded from NEPA. Pa'ina Petition for Review at 13.

VIII. CONCLUSION

For the foregoing reasons, Concerned Citizens respectfully asks the Commission to deny Pa'ina's petition for review of the Board's Initial Decision.

Dated at Honolulu, Hawai'i, October 19, 2009.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 19, 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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