

November 7, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
PA'INA HAWAII, LLC)	Docket No. 30-36974
)	
Material License Application)	ASLBP No. 06-843-01
)	

NRC STAFF MOTION FOR PROTECTIVE ORDER
GOVERNING DISCLOSURE OF INFORMATION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, the NRC Staff ("Staff") files this motion requesting that the Atomic Safety and Licensing Board ("Board") issue a protective order governing access to and disclosure of information in the above captioned proceeding. The Staff requests that the Board adopt the attached draft protective order (with the attached Confidentiality and Non-Disclosure Agreement). In accordance with 10 C.F.R. § 2.323(b), counsel for Applicant, Pa'ina Hawaii LLC's ("Pa'ina"), and Petitioners, Concerned Citizens of Honolulu ("Concerned Citizens"), were provided a copy of a draft of this motion and protective order, and were given an opportunity to comment. Counsel for Pa'ina indicated that they support the Staff's motion and the draft protective order. Counsel for Concerned Citizens indicated that they do not agree with the Staff's assessment regarding the applicability of 10 C.F.R. § 2.390(d), but do not oppose entry of the draft protective order.

DISCUSSION

On August 2, 2005, the Nuclear Regulatory Commission ("NRC") published in the *Federal Register* a notice of opportunity for a hearing in connection with Pa'ina's application for the possession and use of byproduct material to be used in a commercial irradiator at the

Honolulu International Airport in Honolulu, Hawaii. 70 Fed. Reg. 44,396 (Aug. 2, 2005). On October 3, 2005, Concerned Citizens filed a request for a hearing in accordance with 10 C.F.R. § 2.309 ("Hearing Request"). In the context of its Hearing Request, Concerned Citizens raised the issue of redactions made to the application by the Staff. In a conference call on October 26, 2005, the parties and the Board discussed whether or not it would be necessary to release an unredacted version of the application to counsel for Concerned Citizens. At the close of the call, the parties and the Board agreed that release of an unredacted application is not necessary at this time and also agreed to revisit the issue if review of the unredacted application should become necessary later in the proceeding. On November 2, 2005, the parties and the Board discussed the issue again, and the Board directed the Staff to promptly issue an unredacted copy of the license application to counsel for Concerned Citizens, under a protective order, if necessary.

Upon reviewing the application, the Staff determined that portions of the application contain Safeguards Information (SGI). This information is associated with the Irradiator Security Order Compensatory Measures (CMs), and therefore should be considered SGI. The Staff has also identified other certain information protected under 10 C.F.R. § 2.390(d), which limits the release of "[c]orrespondence and reports to or from the NRC which contain information or records concerning a licensee's or applicant's *physical protection*, classified matter protection, or material control and accounting program for special nuclear material not otherwise designated as [SGI] or classified as National Security Information or Restricted Data." 10 C.F.R. § 2.390(d)(1) (emphasis added). In addition, the information protected under 10 C.F.R. § 2.390(d), while not currently defined as SGI, as outlined in 10 C.F.R. § 73.21, would

be considered SGI if proposed changes to 10 C.F.R. § 73.21 become a final rule.¹ Wide public release of such information at this time would make it nearly impossible to protect this information under a revised 10 C.F.R. § 73.21. The total amount of information the Staff seeks to have protected is minimal. Out of 113 pages in the application, the Staff seeks to protect portions of 11 pages. This includes five diagrams that constitute SGI, five additional paragraphs of SGI, and five paragraphs of information currently protected under 10 C.F.R. § 2.390(d) which will become SGI if proposed changes to 10 C.F.R. § 73.21 become a final rule⁰⁹. Based on the above, the Staff requests that the Board issue a protective order in the form attached.

CONCLUSION

For the foregoing reasons, the Staff respectfully requests that, due to the time constraints in the present proceeding, the Board issue a protective order in the form attached as soon as possible.

Respectfully submitted,

/RA/

Margaret J. Bupp
Steven C. Hamrick
Counsel for NRC Staff

Dated at Rockville, Maryland
this 7th day of November, 2005

¹The proposed changes to 10 C.F.R. § 73.21 were published in the Federal Register on February 11, 2005. 70 Fed. Reg. 7196 (Feb. 11, 2005). The proposed rule is currently under Commission review before being issued as a final rule.

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

PA'INA HAWAII, LLC

(Honolulu, Hawaii Irradiator)

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Docket No. 30-36974-ML

ASLBP No. 06-843-01

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MOTION FOR A PROTECTIVE ORDER GOVERNING DISCLOSURE OF INFORMATION" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 7th day of November, 2005.

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Margaret J. Bupp
Counsel for NRC Staff

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Paul Abramson
Dr. Anthony J. Baratta

In the Matter of)

PA'INA HAWAII, LLC)

Material License Application)

Docket No. 30-36974

ASLBP No. 06-843-01

MEMORANDUM AND ORDER
(Protective Order)

This Protective Order governs the disclosure and use of certain protected information² included in the application of Pa'ina Hawaii, LLC ("Pa'ina") for the possession and use of byproduct material to be used in a commercial irradiator at the Honolulu International Airport in Honolulu, Hawaii.

Specifically, counsel and consultants for Pa'ina and Concerned Citizens of Honolulu ("Concerned Citizens") shall be permitted access to protected information upon the following conditions:

² "Protected information" is defined as information identified by the Staff as Safeguards Information (SGI) and information protected by 10 C.F.R. § 2.390(d) on the following pages of the application: 28, 32, 33, 42, 44, 76, GI-204 page 4 of 5, GI-204 page 5 of 5, GI-205 page 4 of 4, GI-303 page 1 of 3, and GI-303 page 2 of 3. No other portions of the application are considered protected information or otherwise governed by the terms of this Protective Order.

1. Designated representatives of Pa'ina and Concerned Citizens shall execute the attached Confidentiality and Non-Disclosure Agreement. After the Confidentiality and Non-Disclosure Agreements are executed, the originals shall be sent to the Office of the Secretary of the Commission and copies shall be sent to counsel for each party and to the Board.

2. Only individual counsel, consultants, and others representing a party³ who have executed the attached Confidentiality and Non-Disclosure Agreement may have access to protected information. Protected information shall not be used except as necessary for the conduct of this proceeding, nor shall it be disclosed in any manner to any person except to the counsel, consultants or other party representatives who are engaged in the conduct of this proceeding and who need to know the information in order to carry out their responsibilities in this proceeding. Individuals with access to protected information pursuant to this Order may make copies of and take notes on the protected information, but such copies and notes shall be subject to the same restrictions on disclosure and use as Protected Information. Such notes and copies will not be included in ADAMS.

3. Counsel, consultants, and others representing a party who receive any protected information shall maintain its confidentiality as required in the attached Confidentiality and Non-Disclosure Agreement, the terms of which are hereby incorporated in this Protective Order.

4. In addition to the requirements specified in the Confidentiality and Non-Disclosure Agreement appended to this Protective Order, all pleadings and correspondence in this proceeding (including testimony) that disclose any Protected Information shall:

- a. Be segregated;

³ The term "party" shall mean Pa'ina Hawaii, LLC and Concerned Citizens of Honolulu. For the purposes of this protective order, the term "party" does not include the NRC staff. The provisions of this Protective Order, unless expressly stated, do not apply to NRC employees, contractors, or consultants.

b. Be served only on lead counsel⁴, the Assistant for Rulemakings and Adjudications in the Commission's Office of the Secretary, and the individual members of the Licensing Board;

c. Be served only by: (i) United States first class, registered, express, or certified mail, (ii) internal NRC mail, (iii) messenger-courier or overnight delivery service (e.g., Federal Express), or (iv) personal delivery by an individual who otherwise is authorized access pursuant to 10 C.F.R. § 73.21(c) or an order issued by the Board or the Commission in this proceeding; and

d. Be transmitted in two sealed envelopes or wrappers, including: (i) an outer mailing envelope, and (ii) a heavy, opaque inner envelope bearing the name and address of the addressee and the statement "PRIVATE. TO BE OPENED BY ADDRESSEE ONLY." Addressees shall take all necessary precautions to ensure that they alone will open envelopes so marked. The outer envelope or wrapper will contain the intended recipient's name and address, and will bear no marking or indication that the document within contains Protected Information; and

e. Include an attached cover letter or memorandum, which also shall be served separate from any Protected Information on the other participants to the proceeding, that briefly describes the contents of the pleading or correspondence without disclosing any Protected Information such that the cover letter or memorandum can be placed in the public docket of the proceeding.

5. Counsel shall take all reasonable precautions necessary to assure that protected materials are not distributed to unauthorized persons. Counsel are responsible for ensuring that persons under their supervision or control comply with this Protective Order.

⁴ "Lead counsel" is defined as Fred Paul Benco for the applicant and David Henkin for the petitioners.

6. The terms of this Protective Order apply to protected information notwithstanding any prior releases in which this information was treated as public. A public release of protected information before this Order became effective shall not serve as grounds for subsequent distribution of protected information to unauthorized persons.

7. Protected information shall remain available to all parties until the later of the date that an order terminating this proceeding is no longer subject to judicial review, or the date that any other Commission proceeding relating to the protected information is concluded and no longer subject to judicial review. The parties shall, within fifteen (15) days of the later date described above, return the protected information (excluding notes of protected information) to the party that produced them, or shall destroy the information, except that copies of filings, official transcripts and exhibits in this proceeding that contain protected information, and notes of protected information may be retained, if they are maintained in a secure place.⁵ Within such time period, each party shall also submit to the producing party an affidavit stating that, to the best of its knowledge, all protected information and all notes of protected information have been returned or have been destroyed or will be maintained in accordance with the above. To the extent protected information is not returned or destroyed, it shall remain subject to the provisions of this Protective Order.

8. Counsel, consultants or any other individual representing a party who has reason to suspect that protected information may have been lost or misplaced or that protected information has otherwise become available to unauthorized persons during the pendency of this proceeding shall notify this Licensing Board promptly of those suspicions and the reasons for them.

⁵ Counsel are responsible for determining what measures are necessary to assure that protected information is kept in a secure place such that no distribution of protected information to unauthorized individuals will occur.

9. Any violation of the terms of this Protective Order or a Confidentiality and Non-Disclosure Agreement executed in furtherance of this Protective Order may result in the imposition of sanctions as the Presiding Officer or the Commission may deem appropriate, including but not limited to referral of the violation to appropriate bar associations and/or other disciplinary authorities.

10. The Licensing Board may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

It is so ORDERED.

For the Licensing Board

Dated at Rockville, Maryland
this ____ day of November, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

Under penalty of perjury, I hereby certify my understanding that access to the protected information is provided to me pursuant to the terms and restrictions of the Atomic Safety and Licensing Board's protective order, dated November __, 2005, in this proceeding, that I have been given a copy of and have read this protective order, and that I agree to be bound by it. I understand that the contents of the protected information, any notes or other memoranda, or any form of information that copies or discloses protected information shall not be disclosed to anyone other than in accordance with that protective order. I acknowledge that a violation of this declaration and protective order, which incorporates the terms of this declaration, constitutes a violation of an order of the Nuclear Regulatory Commission and may result in the imposition of sanctions as the Licensing Board or Commission may deem to be appropriate, including, but not limited to, referral of the violation to appropriate bar associations and other disciplinary authorities.

WHEREFORE, I do solemnly agree to protect such protected information as may be disclosed to me in this NRC proceeding, in accordance with the terms of this declaration.

Name (printed): _____

Title: _____

Representing: _____

Signature: _____

Date: _____