

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NUCLEAR INFORMATION AND)	
RESOURCE SERVICE; COMMITTEE)	
TO BRIDGE THE GAP; PUBLIC)	
CITIZEN, INC.; AND REDWOOD)	
ALLIANCE,)	
)	No. 04-71432
Petitioners,)	
)	
v.)	
)	
UNITED STATES NUCLEAR)	
REGULATORY COMMISSION and the)	
UNITED STATES OF AMERICA,)	
)	
Respondents)	

**STATUS REPORT AND MOTION TO EXTEND STAY OF
PROCEEDINGS**

The present petition for review under FRAP Rule 15 challenges final agency action in a rulemaking proceeding by the Respondents UNITED STATES NUCLEAR REGULATORY COMMISSION (NRC). The challenged rulemaking was one of two companion rulemakings separately undertaken by NRC and the UNITED STATES DEPARTMENT OF TRANSPORTATION RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION (DOT-RSPA).

PETITIONERS NIRS, et al. STATUS REPORT AND MOTION TO EXTEND
STAY OF PROCEEDINGS

Following Petitioners' August 10, 2004 Status Report and Motion To Extend Stay of Proceedings, this Court granted a stay of its review of the NRC rulemaking until October 12, 2004. The Court granted the stay on grounds that a request to DOT-RSPA for administrative review of the companion rulemaking, the outcome of which could moot or otherwise materially influence the outcome of the present case, was still pending before that agency. The Court required that on or before expiration of that stay Petitioners shall file either the opening brief or a status report and appropriate motion.

On August 19, 2004 DOT-RSPA denied the requested administrative appeal. The DOT-RSPA rulemaking and denial of appeal are subject to judicial review in the United States District Court, which review the Petitioners intend to timely pursue in the U.S. District Court for the Northern District of California by filing an appropriate Petition within 30 days.

As discussed below, with the denial of the DOT-RSPA administrative appeal, this case and the DOT-RSPA case are now ripe for judicial review, albeit by different courts. Accordingly, pursuant to F.R.A.P. Rule 27 and Local Rule 27-1, Petitioners Nuclear Information and Resource Service, et

PETITIONERS NIRS, et al. STATUS REPORT AND MOTION TO EXTEND
STAY OF PROCEEDINGS

al. move the Court to extend its stay of review proceedings to allow Petitioners to file Petition for Review of the DOT-RSPA rulemaking in the U. S. District Court for the Northern District of California, and, by appropriate motion in this Court based on that Petition, to transfer this case to the District Court for consolidation with the DOT-RSPA case for the following reasons:

First, the present petition for review is based on a final decision in one of two companion rulemakings separately undertaken by two Federal agencies: (a) the Respondents UNITED STATES NUCLEAR REGULATORY COMMISSION (NRC), et al., RIN 3150-AG71 published January 26, 2004 at 69 F.R. 3698, and (b) the UNITED STATES DEPARTMENT OF TRANSPORTATION RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION (DOT-RSPA), RIN 2137-AD40 published January 26, 2004 at 69 F.R. 3632;

Second, the decision in the DOT-RSPA rulemaking has been denied administrative review under 49 C.F.R. Part 106, and is now ripe for judicial review in a United States District Court;

Third, the Memorandum of Understanding (MOU) between NRC and DOT-RSPA dated June 8, 1979 provides that each agency, in consultation

PETITIONERS NIRS, et al. STATUS REPORT AND MOTION TO EXTEND
STAY OF PROCEEDINGS

with the other, will develop safety standards within their respective subject-matter jurisdictions, but that DOT will be the national competent authority with respect to the administrative requirements set forth in the regulations for the Safe Transport of Radioactive Materials of the International Atomic Energy Agency (IAEA) and will act as the U.S. representative to the IAEA on matters pertaining to the administrative and safety regulatory aspects of transportation of radioactive materials, and the NRC will provide technical support and advise to DOT – the MOU was published at 44 F.R. 38690;

Fourth, the NRC rulemaking at issue in this appeal is directly related to the DOT rulemaking since the companion rulemakings at their core ultimately concern the safe transportation of radioactive materials, an activity over which the MOU effectively establishes DOT as the “lead agency;”

Fifth, extension of stay of the review of the NRC rulemaking before this Court to allow filing a Petition for Review of the DOT-RSPA rulemaking in the District Court and, by appropriate motion in this Court based on that Petition, to allow transfer of this case to the District Court for purposes of consolidation with the DOT-RSPA case would appropriately accommodate the process and time necessary to efficiently and prudentially

complete judicial review of the companion rulemakings by NRC and DOT-RSPA, and do so without disadvantage or prejudice to any party since the proposed stay does not affect implementation at this time and review is not possible on the record developed by the agencies, which necessitates extra-record evidence, permissible under *National Audubon Society v. U.S. Forest Service*, 46 F.3d 1437 (9th. Cir. 1993), to establish that the agencies' analyses were clearly inadequate under the National Environmental Protection Act with regard to (1) the significant effect relative to radiation doses involved and volumes of transport waste affected, (2) the substantial controversy regarding the significance of doses, (3) the failure to prepare an EIS, (4) the inadequacy of the agencies' alternatives analysis in the Environmental Assessment, and (5) the failure of the agencies to meet disclosure and discussion obligations with respect to public health effects, particularly effects from LSA-1(low specific activity material);

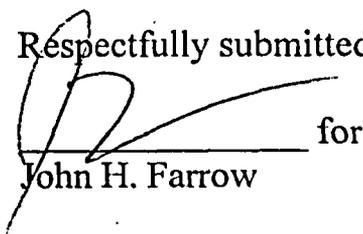
Sixth, transfer to the District Court for purposes of determining issues of material fact, including issues of the adequacy of agencies' analyses as may be informed by extra-record evidence, is permissible under 28 USC 2347(b)(3), *Gallo-Alvarez v. Ashcroft*, 266 F.3d 1123 (9th. Cir. 2001), and *Lake Carriers Association v. United States*, 414 F.2d 567 (6th. Cir. 1969);

PETITIONERS NIRS, et al. STATUS REPORT AND MOTION TO EXTEND
STAY OF PROCEEDINGS

Seventh, the analytical factors applied by the Court in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), to avoid duplication of judicial review under the Hobbs Act, favor transfer here to avoid (a) two layers of review, one in the District Court and another in the Circuit Court, (b) bifurcation of review orders in parallel rulemakings, and (c) the possibility of inconsistent determinations. *Id.* at 742-743.

Wherefore, Petitioners NUCLEAR INFORMATION AND RESOURCE SERVICE, et al. request the Court to grant this motion to extend the stay of its review proceedings to allow Petition for Review of the DOT-RSPA rulemaking to be filed in the U.S. District Court for the Northern District of California, and, upon appropriate motion in this Court based on the filed Petition, to transfer this case to the U.S. District Court for consolidation with the DOT-RSPA case so that judicial review of two final agency decisions in companion proceedings of DOT and NRC and development of extra-record evidence may be undertaken in coordinated fashion.

Respectfully submitted, this 12 day of October, 2004 by


for
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PETITIONERS NIRS, et al. STATUS REPORT AND MOTION TO EXTEND
STAY OF PROCEEDINGS

I HEREBY CERTIFY that a true and correct copy of the forgoing document was mailed to the Respondent indicated below via first class mail, postage prepaid this 12th day of October, 2004:

- (1) Clerk
United States Nuclear Regulatory Commission
Washington, DC 20555-0001

and

- (2) Grace H. Kim, Esq.
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