

May 9, 2005

By Facsimile and U.S. Mail

Grace Kim
Office of the General Counsel
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

**Re: Nuclear Information and Resource Service et al. v. Nuclear Regulatory
Commission, No. 04-71432**

Dear Ms. Kim:

We want to reiterate our request that NRC include in its designation of the Record all comments made by members of the public, whether the comments were addressed to NRC, NRC and DOT, or DOT alone. We also reiterate our request that NRC include in its designation of the Record DOT's Federal Register Notices in connection with its parallel rulemaking.

You advised me in our May 6, 2005 conversation that NRC would not include in the Index of the Record those comment letters that were not specifically addressed to NRC, even if the comments clearly pertained to matters of concern to both agencies in their coordinated rulemaking. You also advised me that NRC would not include DOT's rulemaking notices.

As you know, NRC and DOT closely coordinated their parallel rulemakings, which both addressed 11 common issues raised by the proposed adoption of IAEA standards for transport of radioactive materials. NRC's Notice of Proposed Rule explains the basis of that coordination, and expressly directs the public to refer to DOT's rule and notices for additional background:

"Historically, the NRC coordinated its Part 71 revisions with DOT, because DOT is the U.S. Competent Authority for transportation of hazardous materials. 'Radioactive Materials' is a subset of 'Hazardous Materials' in Title 49 regulations under DOT authority. Currently, DOT and NRC co-regulate transport of nuclear material in the United States. NRC is continuing with its coordinating effort with the DOT in this rulemaking process. *Refer to the DOT's corresponding rule for additional background on the positions proposed in this notice.* The Part 71 rulemaking is being coordinated with DOT to ensure that consistent regulatory standards are

maintained between NRC and DOT radioactive material transportation regulations, and to ensure coordinated publication of the final rules by both agencies. *On December 28, 1999 (64 FR 72633), DOT published an advance notice of proposed rulemaking regarding adoption of TS-R-1 in its regulations.*” NRC, 10 CFR Part 71, “Compatibility With IAEA Transportation Safety Standards (TS-R-1) and Other Transportation Safety Amendments; Proposed Rule,” 67 Fed. Reg. 21391, Apr. 30, 2002.

NRC’s Final Rule also emphasizes NRC’s coordination with DOT, again refers the public to “DOT’s corresponding rule for additional background information,” and expressly references DOT’s proposed rule of April 30, 2002 at 67 Fed. Reg. 21328. NRC, 10 CFR Part 71, “Compatibility With IAEA Transportation Safety Standards (TS-R-1) and Other Transportation Safety Amendments; Final Rule,” 69 Fed. Reg. 3698-3699, Jan. 26, 2004.

NRC’s “Rulemaking Rule Forum” website for this rulemaking actually *contains* the DOT Final Rule of January 26, 2004. We believe that NRC has clearly incorporated all three of DOT’s notices into the Record by express reference and by virtue of the coordinated rulemaking process addressing common issues.

As part of that process of coordination, both DOT and NRC published notices of their proposed rulemakings on the same date with the same comment period. NRC, Transcript of June 24, 2002 Public Meeting, pp. 27-28. NRC published a draft Environmental Assessment at the same time and asked the public for comments on it. NRC, Transcript of June 4, 2002 Public Meeting, p. 11.

As it solicited public comments, NRC repeatedly assured the public that it would coordinate its rulemaking with DOT. NRC, Transcript of Sept. 20, 2000 Townhall Meeting, pp. 9-10; NRC, Transcript of Sept. 26, 2000 Public Meeting, pp. 16-17, 34. DOT also stated that it intended to coordinate with NRC, and specifically stated that it intended to evaluate all pertinent comments directed to NRC, *even written comments that were directed only to NRC*. NRC, Transcript of Aug. 10, 2000 Public Workshop, pp. 37-38, 49; NRC, Transcript of Townhall Meeting, Sep. 20, 2000, p.22; NRC, Transcript of Sep. 26, 2000 Public Meeting, p. 21. When NRC was asked in turn whether it would “go through some kind of a joint reconciliation process with the comments” with DOT in order to ensure a coordinated response, NRC responded “the short answer would be yes.” NRC, Transcript of Sept. 26, 2000 Public Meeting, pp. 31-32.

We believe that in coordinating its rulemaking with DOT, NRC expressly committed itself to consider all comments on the common issues relating to the adoption of IAEA standards, even if those comments happened to be addressed only to DOT. Accordingly, all comments on the common issues should be included in this Record.

Furthermore, NRC is obliged to provide technical support to DOT with regard to the matters pertaining to IAEA safety regulations for transportation of radioactive

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materials. DOT and NRC, "Transportation of Radioactive Materials; Memorandum of Understanding," 44 Fed. Reg. 38690-38691, Jul. 2, 1979. Consistent with this obligation, NRC assumed responsibility to prepare the Environmental Assessment under NEPA, on the basis of which both agencies made Findings of No Significant Impact. NRC could not have complied with its obligation to take a hard look at the environmental effects of the common issues without considering all of the public comments addressed to these issues. Accordingly, all public comments directed to the common IAEA issues are properly part of the Record in this matter, regardless how they happened to be addressed. NRC's failure to include all comments in the Record constitutes an admission that it did not meet its obligation under NEPA.

In order to facilitate NRC's completion of the Index of the Record by the agreed May 24 deadline, we are willing to identify a subset of the public comments addressed to DOT that we would find sufficient for the purpose of preparing our brief. Please advise me as soon as possible if you agree to this approach and I will furnish a list of the comments.

Yours sincerely,

M. R. WOLFE & ASSOCIATES

A handwritten signature in black ink, appearing to read "John H. Farrow". The signature is stylized with a large loop at the beginning and a long horizontal stroke extending to the right.

John H. Farrow

JHF: hs