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FROM: DUE: 10/24/05 EDO CONTROL: G20050687
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FINAL REPLY:

E. Williaml Colglazier
National Academy of Sciences (NAS)

TO:

Chairman Diaz

FOR SIGNATURE OF : ** PRI ** CRC NO: 05-0494

Chairman Diaz

DESC: ROUTING:

National Academy of Sciences/Research Council
(NAS) Project Entitled, "Radiation Source Use and
Replacement"

Reyes
Virgilio
Kane
Silber
Dean
Burns
Hagan, ADM
Cyr, OGC

DATE: 10/06/05

ASSIGNED TO: CONTACT:
RES Paperiello

SPECIAL INSTRUCTIONS OR REMARKS:

Ref. WITS 200500320.

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CORRESPONDENCE CONTROL TICKET

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PAPER NUMBER: LTR-05-0494 **LOGGING DATE:** 10/05/2005
ACTION OFFICE: EDO

AUTHOR: E. Williams Colglazier
AFFILIATION: DC
ADDRESSEE: Nils Diaz
SUBJECT: National Academy of Sciences Research Council (NAS) project entitled Radiation Source Use and Replacement, mandated in the Energy Policy Act of 2005

ACTION: Signature of Chairman
DISTRIBUTION: RF, SECY to Ack

LETTER DATE: 10/03/2005
ACKNOWLEDGED: No
SPECIAL HANDLING: OCM #7841
NOTES: Commission Correspondence
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2005

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NATIONAL ACADEMY OF SCIENCES

THE NATIONAL ACADEMIES

October 3, 2005

Honorable Nils J. Diaz, Ph.D.
Chairman
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, Maryland 20852-2738

Re: National Academy of Sciences/Research Council (NAS) project entitled
Radiation Source Use and Replacement, mandated in the Energy Policy Act of
2005

Dear Chairman Diaz:

I am writing in connection with the Nuclear Regulatory Commission's (USNRC's) grant award for the Congressionally-mandated study entitled *Radiation Source Use and Replacement*. See Section 170H(e) of the Energy Policy Act (Attachment A). The NAS cannot accept this award as written by the USNRC because it contains terms that undermine our independence and violate Section 15 of the Federal Advisory Committee Act, 5 U.S.C. App. Section 15 (FACA), as described below.

On September 30, 2005, the USNRC unilaterally issued this grant with terms and conditions that were clearly unacceptable to the NAS. USNRC first submitted a draft set of terms and conditions on September 20, 2005, and asked NAS to provide any "specific concerns or exceptions" in anticipation of a grant document to support the referenced study. NAS provided suggested revisions to the Review of Reports Clause (Clause A.1) to ensure that the clause did not violate Section 15 of FACA or NAS's institutional policies intended to preserve its independence from sponsoring agencies. USNRC did not respond to the comments, but simply issued a unilateral grant on September 30, 2005, asserting its authority to issue a grant over our objections and without our concurrence.

The *Review of Reports Clause*, as written, provides the USNRC with absolute control over the NAS report process. Under the clause, USNRC reserves the right to approve the NAS study report, including the authority to require changes and order redactions, deletions, and revisions to the report at USNRC's sole discretion. Such authority is at odds with the very intent of the independent review mandated by Congress, and would amount to management and control of the study process in contravention of Section 15 of FACA. That section provides that an agency may not use any advice or recommendation provided by NAS that was developed by use of a committee created by NAS under an agreement with an agency unless "the committee was not subject to any actual management or control by an agency or an officer of the Federal Government."

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Honorable Nils J. Diaz, Ph.D.
October 3, 2005
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NAS's suggested modification to the Review of Reports Clause (see Attachment B) ensures that all data subject to Section 15 of FACA (which incorporates the exemptions to the Freedom of Information Act) will be protected in accordance with applicable statutes and regulations. The proposed revision also ensures that NAS is able to satisfy the requirement under Section 15 to release a public report.

For the reasons described above, we cannot agree to compromise our established policies and procedures intended to preserve our independence and ensure compliance with Section 15 of FACA. USNRC's unilateral approach is not an appropriate way to execute this important mandate by Congress. We are willing to work with the USNRC to establish a mutually satisfactory agreement that preserves NAS's independence while ensuring the appropriate handling of data consistent with Section 15 of FACA and other applicable laws.

Sincerely,



E. William Colglazier
Executive Officer
National Academy of Sciences
Chief Operating Officer
National Research Council

cc: Stephen M. Pool, Contracting Officer
Robert Meck
Richard Meserve
Kevin Crowley

Attachment A

Title of Law: Energy Policy Act of 2005
Law #: Public Law 109- 58
Passed by Congress: 109th Congress (1st Session)

SEC. 170H. RADIATION SOURCE PROTECTION.

* * * *

e. National Academy of Sciences Study.—(1) Not later than 60 days after the date of enactment of this section, the Commission shall enter into an arrangement with the National Academy of Sciences under which the National Academy of Sciences shall conduct a study of industrial, research, and commercial uses for radiation sources.

(2) The study under paragraph (1) shall include a review of uses of radiation sources in existence on the date on which the study is conducted, including an identification of any industrial or other process that—

(A) uses a radiation source that could be replaced with an economically and technically equivalent (or improved) process that does not require the use of a radiation source; or

(B) may be used with a radiation source that would pose a lower risk to public health and safety in the event of an accident or attack involving the radiation source.

(3) Not later than 2 years after the date of enactment of this section, the Commission shall submit to Congress the results of the study under paragraph (1).

Attachment B

(Draft – Proposed by NAS 9/29/05)

A.1 REVIEW AND APPROVAL OF REPORTS

Publication of Results. The contractor/ grantee agrees and grants a royalty-free, nonexclusive, irrevocable world-wide license to the government to use, reproduce, modify, distribute, prepare derivative works, release, display or disclose the articles, reports, summaries, data and related documents developed under the contract/ grant, for any governmental purpose and to have or authorize others to do so.

Identification/ Marking of Safeguards Information. The decision, determination or direction by the NRC that information possessed, formulated or produced by the grantee constitutes Safeguards Information within the meaning of 10 USC § 73.21 is solely within the authority and discretion of the NRC. NRC shall only mark or designate information as Safeguards information to the extent consistent with the provisions of Section 147 of the Atomic Energy Act of 1954 as amended, and its implementing regulations (10 CFR 73.21). In performing the contract/ grant, the grantee shall clearly mark Safeguards Information in accordance with 10 USC § 73.21 on any reports, documents, designs, data, materials and written information. In addition to marking the information as directed by the NRC, the contractor shall use the applicable NRC cover sheet forms (e.g., NRC Form 461 "Safeguards Information") in maintaining these records and documents. The grantee shall ensure that safeguards information is handled, maintained and protected from unauthorized disclosure, consistent with 10 USC § 73.21. The grantee shall comply with the requirements to mark, maintain and protect all information including documents, summaries, reports, data, designs, and materials in accordance with the provisions of Section 147 of the Atomic Energy Act of 1954 as amended, its implementing regulations (10 CFR 73.21). Grantee shall also protect from disclosure information provided by NRC that the Grantee determines, in accordance with its policies implementing Section 15 of the Federal Advisory Committee Act, 5 App. U.S.C. § 15 (1997)("FACA"), is described in one or more of the exemptions to the Freedom of Information Act, 5 U.S.C. § 552(b). Grantee shall cooperate with NRC in determining the status of all documents provided by NRC, and shall return any document(s) to NRC where agreement between NRC and Grantee on the applicability of 10 CFR 73.21 or other FOIA exemption under 5 U.S.C. § 552(b) is not reached.

Remedies. In addition to any civil, criminal and contractual remedies available under the applicable laws and regulations, failure to comply with the above provisions and or NRC directions may result in suspension, withholding or offsetting of any payments invoiced or claimed by the contractor/ grantee. If the contractor/ grantee intends to entered into any subcontracts or other agreements to perform this contract/ grant, the contractor/ grantee shall include all of the above provisions in any subcontract or agreements.