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December 2, 2005

Via Federal Express

Ms. Cathy Catterson, Clerk  
U.S. Court of Appeals for the Ninth Circuit  
95 Seventh & Mission Streets  
San Francisco, CA 94103-1526

Re: Nuclear Information and Resource Service v. U.S. Department of Transportation  
Research and Special Programs Administration,  
9<sup>th</sup> Cir. No. 05-16327

Nuclear Information and Resource Service v. U.S. Nuclear Regulatory  
Commission, 9<sup>th</sup> Cir. No. 04-71432

Dear Ms. Catterson:

Enclosed for filing with the Court, in Ninth Circuit Case No. **05-16327**, are the original and four copies of Federal Appellees' Response In Opposition to Motion to Consolidate and Motion to Hold Appeal in Abeyance.

Enclosed for filing with the Court, in Ninth Circuit Case No. **04-71432**, are the original and four copies of Federal Respondents' Response In Opposition to Motion to Consolidate.

As indicated by the certificate of service, a copy of the same has also been served upon counsel of record, together with a copy of this letter.

Sincerely,

John Smeltzer  
Attorney, Appellate Section  
Environment & Natural Resources Division  
Department of Justice  
P.O. Box 23795  
Washington, D.C. 20026  
(202) 305-0343

Enclosure

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NUCLEAR INFORMATION AND  
RESOURCE SERVICE, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF  
TRANSPORTATION RESEARCH AND  
SPECIAL PROGRAMS  
ADMINISTRATION, et al.,

Defendants-Appellees.

No. 05-16327

D.C. No. CV-04-04740-MHP  
Northern District of California,  
San Francisco

**FEDERAL APPELLEES' RESPONSE  
IN OPPOSITION TO MOTION TO CONSOLIDATE  
AND  
MOTION TO HOLD APPEAL IN ABEYANCE**

Defendants-Appellees the United States Department of Transportation  
Research and Special Programs Administration et al. (hereinafter "DOT"),<sup>1/</sup>  
respectfully submits this response in opposition to the motion (dated November  
23, 2005) by Plaintiffs-Appellants Nuclear Information and Resource Service et

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<sup>1/</sup>In a recent department reorganization, RSPA was eliminated and its responsibilities over pipeline and hazardous materials transportation safety were transferred to the newly-created Pipeline and Hazardous Materials Safety Administration ("PHMSA"). See Pub. L. No. 108-426, § 2, 118 Stat. 2423 (2005); 70 Fed. Reg. 8299 (Feb. 18, 2005). For expedience, we will refer to both agencies generically as "DOT."

al., (“NIRS”) to consolidate the present appeal with Ninth Circuit Case No. 04-71432, a petition for review brought by NIRS against the United States Nuclear Regulatory Commission (“NRC”). As explained below, although the two cases involve challenges to essentially the same regulatory action – viz., the coordinated actions of DOT and NRC to adopt identical standards<sup>2/</sup> for the transportation of radioactive material – consolidation is not appropriate given the very different issues on review and the different procedural postures of the two cases. On the other hand, as further explained below, coordinated review is appropriate given the strong possibility that a ruling in the NRC case (No. 04-71432) will render the present appeal (05-16327) moot, in practical if not legal effect. Accordingly, as an alternative to consolidation, DOT respectfully asks this Court to hold the present case in abeyance, pending resolution of the NRC case (No. 04-71432).

NIRS filed an identical motion to consolidate in the NRC case (No. 04-71432). NRC is filing a response in opposition to that motion concurrently with the filing of the present response and motion by DOT.

A. Background

The present case involves a rule issued by DOT on January 26, 2004, which establishes the exemption levels at which materials will be deemed non-

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<sup>2/</sup>The rules differ (but are consistent) in areas where the agencies have different responsibilities and are identical in areas of substantive overlap.

radioactive for purposes of regulations governing the transport of nuclear materials. See 69 Fed. Reg. 3632 (January 26, 2004). On the same day, NRC issued a rule with identical exemption levels. See 69 Fed. Reg. 3698 (January 26, 2004). DOT and NRC co-regulate the domestic transport of nuclear material under a memorandum of understanding between the agencies. See 69 Fed. Reg. 3632, 69 Fed. Reg. 3699. Per their historical practice, DOT and NRC coordinated their rulemakings in this case to ensure uniformity in federal standards. Id. DOT and NRC relied on a common Environmental Assessment and Finding of No Significant Impact (“EA/FONSI”) under the National Environmental Policy Act (“NEPA”). NIRS filed judicial challenges of both rules, arguing in both cases that the EA/FONSI was deficient.

NIRS filed its challenges in different forums. For the NRC rule, NIRS filed a petition for review in this Court (Ninth Cir. Case No. 04-71432). The parties completed briefing on the merits on August 25, 2005. This Court has not yet scheduled oral argument.

For the DOT rule, NIRS filed an action in United States District Court for the Northern District of California (D.C. No. CV-04-04740-MHP). On May 31, 2005, the district court granted summary judgment for DOT, on the grounds that the Hobbs Act (28 U.S.C. § 2342(7)) and transportation statutes (49 U.S.C. §

20114(c)) give the courts of appeals exclusive jurisdiction to review the agency action in question. NIRS brought the present appeal (Ninth Cir. No. 05-16327) from that judgment. NIRS filed its opening brief on October 13, 2005. DOT sought and obtained an extension until January 13, 2006 to file its answering brief.

B. Opposition to Consolidation

NIRS argues that the NRC case (No. 04-71432) and the DOT case (No. 05-16327) should be consolidated “to serve judicial economy,” to “prevent uncertainty as to preclusive effects or inconsistent rulings,” and to give DOT “full opportunity to participate on the substantive environmental issues.” See NIRS’ Motion to Consolidate Pending Cases at 5. These concerns are misplaced.

First, consolidation for joint resolution on the merits is impossible as a matter of law. If NIRS is correct in the present appeal that the district court had jurisdiction in this case, this Court’s jurisdiction over the merits of NIRS’s challenge would be limited to appellate jurisdiction in review of the district court’s eventual judgment following remand. Conversely, if NIRS is incorrect in the present appeal and the district court did not have jurisdiction, this Court would be compelled to affirm the district court’s ruling dismissing the case. This Court cannot somehow convert its appellate jurisdiction to original jurisdiction by consolidating the present cases. Rather, even if the cases were consolidated for

decision, this Court's present jurisdiction to review the DOT rulemaking would be limited to the question whether the district court had jurisdiction to review the rule on the merits.

To invoke the original jurisdiction of this Court over the DOT rule, NIRS was required to file its action within the 60-day period designated in the Hobbs Act. See 28 U.S.C. § 2344. Because NIRS does not and cannot claim compliance with that requirement, NIRS cannot assert the right to transfer, under 28 U.S.C. § 1631, in the event the district court lacks jurisdiction. See Rodriguez-Roman v. INS, 98 F.3d 416, 424 (9th Cir. 1996) (transfer appropriate only if the transferee court would have been able to assert jurisdiction at the time of the filing of the action). In short, NIRS's motion requests relief – consolidation for joint adjudication on the *merits* – that is not jurisdictionally permitted.

Second, NIRS's request for consolidation is untimely. Briefing in the NRC case (No. 04-71432) has already been completed and NIRS has already filed its opening brief in the present appeal (No. 05-16327).

Third, consolidation would not serve judicial economy. Because briefing is already complete in the NRC case, consolidation would only delay resolution of that case, by adding procedural complexity and new issues (*viz.*, the jurisdictional issues from the present case).

Fourth, consolidation is not necessary to protect NIRS's interests. If NIRS is ultimately precluded from re-litigating, on remand in the present case, issues resolved by this Court's ruling in the NRC case, such preclusion will not be unfair to NIRS. As the Petitioner in the NRC case, NIRS has had (and through argument and decision will continue to have) full and fair opportunity to present all claims relevant to that case. To the extent there are issues unique to the DOT case that are not or cannot be litigated in the NRC case, preclusion will not apply.

Fifth and finally, contrary to NIRS's suggestion, DOT has not complained about its lack of formal participation in the NRC case. Counsel for DOT and NRC (both agencies of the federal government) have coordinated their filings in both cases. And any confusion that might arise as to the preclusive effect of this Court's ruling in the NRC case (because DOT is not a party to the NRC case) will be insignificant. While DOT might not be formally bound, under judicial rules of preclusion, by an order of this Court setting aside all or portions of the NRC rule, DOT likely would need to reconsider pertinent aspects of its rule, to "ensure," per the stated goal of the rulemaking, "that consistent regulatory standards are maintained for radioactive material transportation regulations." See 69 Fed. Reg. 3632. In other words, if NRC makes changes to its rule as a result of a judicial

remand, DOT likely would need to make conforming changes to retain uniformity in federal regulations.

C. Motion to Hold Case in Abeyance

Although NIRS's motion for *consolidation* should not be granted for the reasons stated, NIRS's request for *coordinated* resolution is well taken. In particular, there is no reason for the parties or the Court to expend additional resources on the jurisdictional issue in the present appeal, given the strong possibility that this Court's ruling on the merits in the NRC case (04-71432) will render the jurisdictional issue moot in practical, if not legal, effect. In particular, as already stated, if this Court agrees with NIRS in that case, and determines that the EA/FONSI was defective and that NRC must undertake additional environmental review which could result in a rule change, DOT would need to coordinate with NRC on any interim relief or rule change, to retain uniformity and consistency among federal regulations. Any such voluntary action taken by DOT to conform to the relief ordered or regulatory action taken in the NRC case could render unnecessary the present challenge to DOT's rule.

Conversely, if this Court rejects NIRS's legal challenges to the EA/FONSI and upholds NRC's rule, NIRS would be foreclosed, under the rules of preclusion and *stare decisis* from pressing the same objections on remand of the present case.

To litigate and resolve the jurisdictional issue in this case to enable such a remand would be a wasted exercise.

In short, even if a ruling by this Court in the NRC case (No. 04-71432) does not legally deprive this Court of jurisdiction to resolve the present appeal (in the formal sense of mootness), such a ruling will substantially alter the motivations of the parties to continue to prosecute the present case and substantially improve the prospects of a negotiated settlement. To expend further resources on the present appeal prior to this Court's decision in Case No. 04-71432 is not warranted.<sup>3/</sup>

Rather, this Court should suspend the briefing schedule in the present case and hold the case in abeyance pending decision in the NRC case.

Such relief will have no prejudicial effect on NIRS. Rather, following such a course, instead of consolidation, would enable NIRS to obtain a quicker

---

<sup>3/</sup>This is especially true in light of the fact that, after the present action was filed, Congress amended the judicial review provisions that govern review of DOT actions like those in this case. See Pub. L. 109-59, § 7123, 119 Stat. 1907 (2005) (adding new § 5127 to Chapter 49). The amendment makes it clear that, in the future, the courts of appeals have exclusive jurisdiction over challenges like those here. Although the significance of the amendment to the present case is disputed – DOT disagrees with NIRS's argument that the amendment demonstrates the existence of district-court jurisdiction pre-amendment, see NIRS October 25, 2005 letter under Rule 28(j) – there is no dispute that the amendment renders the present case irrelevant (in terms of precedential value) to future cases. Id.

resolution of its substantive claims and quicker injunctive relief if any is warranted, without losing any of its rights in the present appeal.

D. Conclusion

For the foregoing reasons, DOT respectfully asks this Court: (1) to deny the motion by NIRS to consolidate the present case (Case No. 05-16327) with the Petition for Review in Case No. 04-71432; and (2) to hold the present case in abeyance pending decision in Case No. 04-71432.

Respectfully submitted,



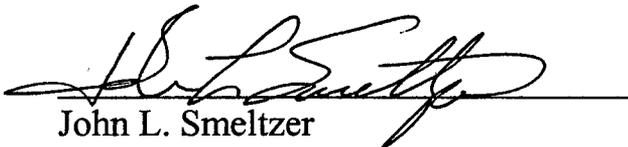
JOHN L. SMELTZER  
Attorney, Department of Justice  
Environment & Natural Resources Division  
Washington, D.C. 20530  
(202) 305-0343

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Federal Appellees' Response  
In Opposition to Motion to Consolidate And Motion to Hold Appeal in Abeyance,  
has been sent, by United States mail, this 2nd day of December, 2005, to the  
following counsel of record:

Paul H. Lamboley, Esq.  
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Mark R. Wolfe, Esq.  
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John L. Smeltzer  
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UNITED STATES COURT OF APPEALS  
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NUCLEAR INFORMATION AND  
RESOURCE SERVICE, et al.,

No. 04-71432

Petitioners,

v.

UNITED STATES NUCLEAR  
REGULATORY COMMISSION, et al.,

Respondents.

**FEDERAL RESPONDENTS' RESPONSE  
IN OPPOSITION TO MOTION TO CONSOLIDATE**

Respondents United States Nuclear Regulatory Commission, et al. (hereinafter "NRC"), respectfully submits this response in opposition to the motion (dated November 23, 2005) by Petitioners Nuclear Information and Resource Service et al., ("NIRS") to consolidate the present petition for review with Ninth Circuit Case No. 05-16327. That case is an appeal by NIRS from a district-court judgment dismissing NIRS's challenge to a rule issued by the United States Department of Transportation Research and Special Programs Administration ("DOT"). NIRS also filed a motion in Case No. 05-16327 to consolidate that case with the present case. Concurrent with the filing of this response, DOT is filing a response in Case No. 05-16327 in opposition to the

motion to consolidate, as well as a motion to stay that appeal pending decision in the present case (Case No. 04-71432). For the reasons stated in DOT's response and motion (attached), NRC concurs that consolidation is inappropriate. NRC agrees with DOT that it would be neither efficient nor practical to consolidate a merits-based petition for review with a jurisdiction-based appeal. NRC likewise concurs that a stay of the DOT case pending resolution of the present appeal is warranted.

Respectfully submitted,



GRACE H. KIM  
Office of the General Counsel  
United States Nuclear Regulatory Comm'n  
Washington, DC 20555-0001  
(301) 415-3605



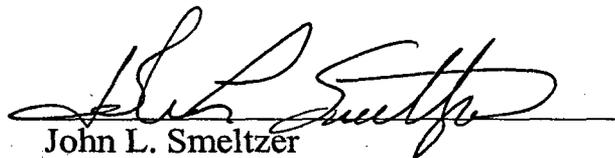
JOHN L. SMELTZER  
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Paul H. Lambole, Esq.  
Bank of America Plaza  
50 West Liberty Street  
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No. 05-16327

D.C. No. CV-04-04740-MHP  
Northern District of California,  
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First, consolidation for joint resolution on the merits is impossible as a matter of law. If NIRS is correct in the present appeal that the district court had jurisdiction in this case, this Court’s jurisdiction over the merits of NIRS’s challenge would be limited to appellate jurisdiction in review of the district court’s eventual judgment following remand. Conversely, if NIRS is incorrect in the present appeal and the district court did not have jurisdiction, this Court would be compelled to affirm the district court’s ruling dismissing the case. This Court cannot somehow convert its appellate jurisdiction to original jurisdiction by consolidating the present cases. Rather, even if the cases were consolidated for

decision, this Court's present jurisdiction to review the DOT rulemaking would be limited to the question whether the district court had jurisdiction to review the rule on the merits.

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Second, NIRS's request for consolidation is untimely. Briefing in the NRC case (No. 04-71432) has already been completed and NIRS has already filed its opening brief in the present appeal (No. 05-16327).

Third, consolidation would not serve judicial economy. Because briefing is already complete in the NRC case, consolidation would only delay resolution of that case, by adding procedural complexity and new issues (*viz.*, the jurisdictional issues from the present case).

Fourth, consolidation is not necessary to protect NIRS's interests. If NIRS is ultimately precluded from re-litigating, on remand in the present case, issues resolved by this Court's ruling in the NRC case, such preclusion will not be unfair to NIRS. As the Petitioner in the NRC case, NIRS has had (and through argument and decision will continue to have) full and fair opportunity to present all claims relevant to that case. To the extent there are issues unique to the DOT case that are not or cannot be litigated in the NRC case, preclusion will not apply.

Fifth and finally, contrary to NIRS's suggestion, DOT has not complained about its lack of formal participation in the NRC case. Counsel for DOT and NRC (both agencies of the federal government) have coordinated their filings in both cases. And any confusion that might arise as to the preclusive effect of this Court's ruling in the NRC case (because DOT is not a party to the NRC case) will be insignificant. While DOT might not be formally bound, under judicial rules of preclusion, by an order of this Court setting aside all or portions of the NRC rule, DOT likely would need to reconsider pertinent aspects of its rule, to "ensure," per the stated goal of the rulemaking, "that consistent regulatory standards are maintained for radioactive material transportation regulations." See 69 Fed. Reg. 3632. In other words, if NRC makes changes to its rule as a result of a judicial

remand, DOT likely would need to make conforming changes to retain uniformity in federal regulations.

C. Motion to Hold Case in Abeyance

Although NIRS's motion for *consolidation* should not be granted for the reasons stated, NIRS's request for *coordinated* resolution is well taken. In particular, there is no reason for the parties or the Court to expend additional resources on the jurisdictional issue in the present appeal, given the strong possibility that this Court's ruling on the merits in the NRC case (04-71432) will render the jurisdictional issue moot in practical, if not legal, effect. In particular, as already stated, if this Court agrees with NIRS in that case, and determines that the EA/FONSI was defective and that NRC must undertake additional environmental review which could result in a rule change, DOT would need to coordinate with NRC on any interim relief or rule change, to retain uniformity and consistency among federal regulations. Any such voluntary action taken by DOT to conform to the relief ordered or regulatory action taken in the NRC case could render unnecessary the present challenge to DOT's rule.

Conversely, if this Court rejects NIRS's legal challenges to the EA/FONSI and upholds NRC's rule, NIRS would be foreclosed, under the rules of preclusion and *stare decisis* from pressing the same objections on remand of the present case.

To litigate and resolve the jurisdictional issue in this case to enable such a remand would be a wasted exercise.

In short, even if a ruling by this Court in the NRC case (No. 04-71432) does not legally deprive this Court of jurisdiction to resolve the present appeal (in the formal sense of mootness), such a ruling will substantially alter the motivations of the parties to continue to prosecute the present case and substantially improve the prospects of a negotiated settlement. To expend further resources on the present appeal prior to this Court's decision in Case No. 04-71432 is not warranted.<sup>3/</sup> Rather, this Court should suspend the briefing schedule in the present case and hold the case in abeyance pending decision in the NRC case.

Such relief will have no prejudicial effect on NIRS. Rather, following such a course, instead of consolidation, would enable NIRS to obtain a quicker

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<sup>3/</sup>This is especially true in light of the fact that, after the present action was filed, Congress amended the judicial review provisions that govern review of DOT actions like those in this case. See Pub. L. 109-59, § 7123, 119 Stat. 1907 (2005) (adding new § 5127 to Chapter 49). The amendment makes it clear that, in the future, the courts of appeals have exclusive jurisdiction over challenges like those here. Although the significance of the amendment to the present case is disputed – DOT disagrees with NIRS's argument that the amendment demonstrates the existence of district-court jurisdiction pre-amendment, see NIRS October 25, 2005 letter under Rule 28(j) – there is no dispute that the amendment renders the present case irrelevant (in terms of precedential value) to future cases. Id.

resolution of its substantive claims and quicker injunctive relief if any is warranted, without losing any of its rights in the present appeal.

D. Conclusion

For the foregoing reasons, DOT respectfully asks this Court: (1) to deny the motion by NIRS to consolidate the present case (Case No. 05-16327) with the Petition for Review in Case No. 04-71432; and (2) to hold the present case in abeyance pending decision in Case No. 04-71432.

Respectfully submitted,



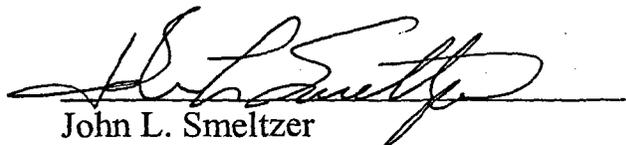
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