

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

_____	)	
NUCLEAR INFORMATION AND	)	
RESOURCE SERVICE, et al.	)	No. 04-71432
	)	
Petitioners,	)	MOTION TO
	)	CONSOLIDATE
v.	)	PENDING CASES
	)	
UNITED STATES NUCLEAR	)	
REGULATORY COMMISSION, et al.	)	
	)	
Respondents.	)	
_____	)	

I. Motion and Grounds for Consolidation.

Petitioners NUCLEAR INFORMATION AND RESOURCE SERVICE, et al. (NIRS) move to consolidate pending Case No. 04-71432 and pending Case No. 05-16327, on the grounds that (1) the pending cases arise out of NIRS' requests for review of two closely coordinated, companion rulemakings undertaken, pursuant to an existing July 2, 1979 Memorandum of Understanding (MOU), 44FR 38690, for joint regulation of domestic transportation of radioactive material, by the United States Nuclear Regulatory Commission (NRC) and by the United States Department of Transportation Research and Special Programs Administration (DOT-RSPA) respectively, (2) the pending cases involve NIRS' challenge to the

single environmental assessment (EA) with finding of no significant impact (FONSI), prepared by NRC, that underlies both the NRC and the DOT-RSPA responsibilities under the National Environmental Policy Act (NEPA) and the agencies' rules at issue, (3) the pending cases at their core involve essentially the same interested parties, NIRS, seeking EA/FONSI relief on review as petitioners/plaintiffs-appellants and the same government interests seeking EA/FONSI affirmance as respondents, (4) a decision on the substantive merits of NIRS' challenge that sets aside the underlying EA/FONSI, could void the rules adopted by both NRC and DOT-RSPA predicated thereon, and (5) notwithstanding the threshold jurisdictional issue regarding the appropriate forum for review in Case No. 05-16327, the efficient administration of justice can be served by the consolidation of the pending cases with a slight modification of procedures for briefing.

## II. Background for Consolidation.

### (a) Case No. 04-71432.

On March 26, 2004, NIRS filed a Petition for Review of the NRC rulemaking, RIN 3150 – AG71, 10 C.F.R. Part 71, entitled “Compatibility With IAEA Transportation Safety Standards (TS-R-1) and Other Transportation Safety Amendments,” published in 69 Federal Register 3698 et seq., January 26, 2004.

In this Court, the case is entitled *Nuclear Information and Resource Service, et al. v. United States Nuclear Regulatory Commission et al.*, assigned Case No. 04-71432. Briefing on the merits was completed on August 25, 2005. Oral argument has not yet been scheduled.

(b) Case No. 05-16327.

At the conclusion of DOT's administrative appeal process, on November 9, 2004, NIRS and the Sierra Club filed a complaint in the United States District Court for the Northern District of California seeking judicial review of the DOT-RSPA rulemaking, RIN 2137-AD40, 49 CFR Parts 171, 172, et al., entitled "Hazardous Materials Regulations; Compatibility With the Regulations of the International Atomic Energy Agency," published in 69 Federal Register 3632 et seq., January 26, 2004.

On May 31, 2005, the District Court granted DOT-RSPA's motion to dismiss for lack of appellate jurisdiction. On June 27, 2005, NIRS appealed the District Court's judgment dismissing the complaint against DOT-RSPA for want of jurisdiction.

In this Court, the case is entitled *Nuclear Information and Resource Service, et al. v. United States Department of Transportation Research and Special Programs Administration et al.*, assigned Case No. 05-16327. At the Government's request, DOT-RSPA has been granted time until January 13,

2006 to file a brief in response to NIRS' Opening Brief filed October 13, 2005.

### III. Proposed Procedural Modification for Consolidation.

The NRC and DOT-RSPA cases involve closely coordinated, companion rulemakings. Substantively, the separate review cases brought by NIRS against the NRC and the DOT-RSPA rulemakings are interrelated. The primary issue in both cases is NIRS' challenge to the adequacy of the environmental review under the National Environmental Policy Act (NEPA), which resulted in one Environmental Assessment (EA) with Findings of No Significant Impact (FONSI) being prepared by NRC that was relied upon by both NRC and RSPA and applied in each of their respective rulemakings.

As pointed out in NIRS' Opening Brief filed in Case No. 05-16327, the threshold jurisdictional issue regarding appropriate forum for review of DOT-RSPA action may be resolved by a prudential determination of "concurrent jurisdiction", and thus, facilitate a dispositive ruling by this Court on the EA/FONSI challenge in both cases.

Since disposition of NIRS' challenge to the EA/FONSI in the NRC case may be dispositive in the DOT-RSPA case, full opportunity for DOT-RSPA to be heard is crucial. Accordingly, in addition to filing a Responsive

Brief on the jurisdictional issue in the DOT-RSPA case, Case No. 05-16327, NIRS proposes that DOT-RSPA be allowed to submit additional comment on the merits of NIRS' challenge to the environmental investigation and documentation, EA/FONSI, in the NRC case, Case No. 04-71432, with NIRS allowed the opportunity to respond to any such comment.

Procedural modification on consolidation allowing additional comments in the NRC case would ensure that DOT/RSPA has full opportunity to participate on the substantive environmental issues. Procedural modification proposed should not delay the Court's administration of the cases, but should enhance presentations without prejudice to any party, and facilitate disposition that could have preclusive effect and prevent inconsistent rulings.

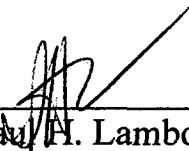
#### IV. Conclusion.

For the reasons discussed above, NIRS believes the interests and administration of justice will be served by consolidation of Case No. 04-71432 and Case No. 05-16327.

Consolidation will permit this Court to address the common substantive issue of the adequacy of the EA, resolving both cases simultaneously. Consolidation would serve judicial economy and would prevent uncertainty as to preclusive effects or inconsistent rulings.

Rule 3(b) of the Federal Rules of Appellate Procedure encourages consolidation if, in the exercise of discretion, the Court deems it appropriate and in the interests of justice. See Advisory Committee Note to Rule 3(b), 1967 Adoption, and *United States v. Washington*, 573 F.2d 1121, 1123 (9<sup>th</sup> Cir. 1978).

There are sufficient common interests, matters of record, and issues in Case No. 04-71432 and Case No. 05-16327 to warrant consolidation. Cf. *Allison v. Bank One-Denver*, 289 F.3d 1223, 1230, n.1 (10<sup>th</sup> Cir. 2002)(finding separate appeals share sufficient factors to be “companioned for disposition” under Fed.R.App.P. 3(b)).

Respectfully submitted November 12<sup>th</sup>, 2005 by  for  
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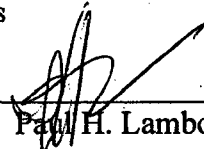
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served on Counsel of Record identified below via first class U.S. mail, postage prepaid, this 2nd day of November, 2005:

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