

1 Paul H. Lamboley NV SBN 2149
1976 Villa Way South
2 Reno, NV 89509
3 Tel: (775) 762.7607
4 Fax: (775) 826.9126
5 E-mail: phLamboley@aol.com

6 Mark R. Wolfe, CSB No. 176753
7 John H. Farrow, CSB No. 209221
8 M. R. WOLFE & ASSOCIATES
9 140 Second Street, Sixth Floor
10 San Francisco, CA 94105
11 Tel: (415) 369-9400
12 Fax: (415) 369-9405
13 E-mail: mrw@mrwolfeassociates.com
14 E-mail: jfarrow@mrwolfeassociates.com

15 Attorneys for Plaintiffs

16 UNITED STATES DISTRICT COURT
17 FOR THE NORTHERN DISTRICT OF CALIFORNIA

18 NUCLEAR INFORMATION AND)
19 RESOURCE SERVICE; COMMITTEE)
20 TO BRIDGE THE GAP; PUBLIC)
21 CITIZEN, INC.; REDWOOD)
22 ALLIANCE, and SIERRA CLUB)

23 Plaintiffs,)

24 v.)

25 UNITED STATES DEPARTMENT)
26 OF TRANSPORTATION RESEARCH)
27 AND SPECIAL PROGRAMS)
28 ADMINISTRATION and NORMAN Y.)
MINETA in his official capacity as)
Secretary of the UNITED STATES)
DEPARTMENT OF)
TRANSPORTATION)

Defendants)

Case No. _____

**COMPLAINT FOR
JUDICIAL REVIEW OF
ADMINISTRATIVE AGENCY
ACTION AND FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Administrative Procedures Act Case

1 **INTRODUCTION**

2 1. This is an action under the judicial review provisions of the Federal Administrative
3 Procedure Act (“APA”), 5 U.S.C. § 702, et seq. Plaintiffs NUCLEAR INFORMATION AND
4 RESOURCE SERVICE; COMMITTEE TO BRIDGE THE GAP; PUBLIC CITIZEN, INC.;
5 REDWOOD ALLIANCE, and SIERRA CLUB (“Plaintiffs”) challenge the January 26, 2004 action by
6 the UNITED STATES DEPARTMENT OF TRANSPORTATION RESEARCH AND SPECIAL
7 PROGRAMS ADMINISTRATION (“DOT-RSPA”) and NORMAN Y. MINETA (“Defendants”),
8 adopting regulations entitled “Hazardous Materials Regulations; Compatibility With the Regulations of
9 the International Atomic Energy Agency,” as published in 69 Federal Register 3632 et seq., January 26,
10 2004, and reflected in DOT-RSPA’s Final Rule, RIN 2137-AD40, 49 CFR Parts 171, 172, et al.

11 2. The rulemaking at issue deregulates the transportation of some radioactive material so
12 that it is not subject to DOT-RSPA’s safety rules governing radiation exposure, packaging, marking,
13 labeling, placarding, preparing shipping papers, and providing emergency information. Specifically, the
14 new regulations adopt new definitions specifying what radioactive material is exempt from transport
15 regulations. The new exemption levels are based on European standards for exemption that were
16 developed without considering transportation risks.

17 3. The rulemaking at issue uses the new exemption levels to redefine a category of low
18 specific activity radioactive material, LSA-I, and also relaxes the regulations for transporting LSA-I.

19 4. Although these regulations will have major and significant environmental impacts, DOT-
20 RSPA did not prepare an Environmental Impact Statement as required by the National Environmental
21 Policy Act of 1969 (“NEPA”). The Environmental Assessment on which DOT-RSPA based its Finding
22 of No Significant Impact did not adequately evaluate public health impacts, cumulative impacts, or
23 reasonable alternatives. The complaint seeks a declaratory judgment and a mandatory injunction
24 requiring the defendant to rescind the regulations and to comply with NEPA by preparing an
25 Environmental Impact Statement, or, in the alternative, to prepare an adequate Environmental
26 Assessment.

27 5. The DOT-RSPA rulemaking at issue here was undertaken in coordination with a
28 companion rulemaking by the United States Nuclear Regulatory Commission (“NRC”), RIN 3150 –

1 AG71, 10 C.F.R. Part 71, entitled “Compatibility With IAEA Transportation Safety Standards (TS-R-1)
2 and Other Transportation Safety Amendments,” as published in 69 Federal Register 3698 et seq.,
3 January 26, 2004. On March 26, 2004, Plaintiffs NUCLEAR INFORMATION AND RESOURCE
4 SERVICE; COMMITTEE TO BRIDGE THE GAP; PUBLIC CITIZEN, INC.; and REDWOOD
5 ALLIANCE filed a Petition for Review of the NRC rulemaking in the United States Court of Appeals
6 for the Ninth Circuit, No. 04-71432, in accordance with the original jurisdiction provisions governing
7 review of NRC rulemaking under the Hobbs Act, 28 U.S.C. § 2342(4). The Court of Appeal stayed the
8 NRC review proceedings pending resolution of Plaintiffs’ administrative appeal of the DOT-RSPA
9 rulemaking. As Plaintiffs have previously advised the Court of Appeals, Plaintiffs now intend to move
10 the Court of Appeals to transfer the NRC review proceedings to this District Court for a hearing and a
11 determination as if the proceedings were originally initiated in the District Court in accordance with 28
12 U.S.C. § 2347(b)(3), and for consolidation with this case.

13 **JURISDICTION**

14 6. This Court has jurisdiction over this action under 5 U.S.C. §§ 702 and 704 (judicial
15 review of agency action) and 28 U.S.C. § 1331 (federal question).

16 7. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201
17 (declaratory judgments).

18 8. Venue is proper in the Northern District of California under 28 U.S.C. § 1391(e).
19 Assignment to the San Francisco or Oakland Division is appropriate under Local Rule 3-2(d).

20 **PARTIES**

21 9. Plaintiff NUCLEAR INFORMATION AND RESOURCE SERVICE (“NIRS”) is a non-
22 profit corporation organized under the laws of the District of Columbia with its principal office in the
23 District of Columbia. NIRS is engaged in advocacy and education concerning nuclear energy,
24 environmental issues, and radioactive waste. NIRS has approximately 6,000 members of which over
25 300 live or work in the Northern District of California. NIRS’ members use streets and highways on
26 which radioactive material may be transported and live or work in close proximity to them.

27 10. Plaintiff COMMITTEE TO BRIDGE THE GAP (“CBG”) is a non-profit corporation
28 organized under the laws of the State of California with an office in Santa Cruz, California. CBG is

1 engaged in advocacy and education regarding environmental and security issues and provides technical
2 assistance to communities near nuclear facilities. CBG has members who live and work in the Northern
3 District of California and use streets and highways on which radioactive material may be transported.

4 11. Plaintiff PUBLIC CITIZEN, INC. (“Public Citizen”) is a non-profit citizen research,
5 lobbying, and advocacy organization with 160,000 members nationwide and 10,538 members in the
6 Northern District of California. Public Citizen, Inc. has headquarters offices in Washington D.C. and a
7 California Office at 1615 Broadway, 9th Floor, Oakland CA 94612. Public Citizen, Inc.’s Critical Mass
8 Energy and Environment Program has long advocated strict regulation of the nuclear industry, strong
9 enforcement of laws and regulations that protect the public from harmful radiation and other dangers
10 associated with the nuclear industry, and government policies that promote a transition to clean, safe,
11 affordable energy sources. Public Citizen’s members use streets and highways on which radioactive
12 material may be transported and live or work in close proximity to them.

13 12. Plaintiff Redwood Environmental Education Institute, dba REDWOOD ALLIANCE, is a
14 non-profit corporation, incorporated in California, headquartered and with its principle place of business
15 in Arcata, California. Redwood Alliance is a community-based social and environmental organization
16 whose main focus is advocacy and education to promote safe and efficient energy use and development.
17 Redwood Alliance has approximately 4,500 members, many of whom live and work in the Northern
18 District of California. Redwood Alliance’s members use streets and highways on which radioactive
19 material may be transported and live or work in close proximity to them. .

20 13. Plaintiff SIERRA CLUB is a national non-profit corporation incorporated in California
21 with its headquarters in San Francisco, California. The Sierra Club has approximately 700,000 members
22 nationally and 95,000 members who live or work in the Northern District of California. The mission of
23 the Sierra Club is to further the protection and restoration of the natural environment and all forms of
24 life that inhabit it, and includes the protection of human health from radiation damage and prevention of
25 exposures to radioactive materials and wastes. The Sierra Club’s members use streets and highways on
26 which radioactive material may be transported and live or work in close proximity to them.

27 14. Plaintiffs’ members use streets and highways on which radioactive material may be
28 transported or live and work in close proximity to these streets and highways. Plaintiffs’ members also

1 include transportation and emergency response workers who may be involved in routine transportation
2 of radioactive materials and transportation accidents. Defendants' action issuing the regulations at issue
3 has harmed and will continue to harm Plaintiffs' interests in the safe transportation of radioactive
4 materials by increasing the risk of unsafe radiation doses to Plaintiffs' members. Defendants' failures to
5 comply with NEPA deny Plaintiffs information to which they are statutorily entitled, injuring their
6 ability to conduct effective research, education, and advocacy related to radiation safety. Unless the
7 Court grants the relief requested herein, Plaintiffs will continue to be adversely affected and injured by
8 Defendants' failure to comply with NEPA. Plaintiffs' interests in this action fall within the zone of
9 interests protected by the laws sought to be enforced in this action.

10 15. Defendant DEPARTMENT OF TRANSPORTATION RESEARCH AND SPECIAL
11 PROGRAMS ADMINISTRATION is a federal agency within the Department of Transportation
12 authorized and responsible to regulate transportation of hazardous materials by the Federal Hazardous
13 Materials Transportation Law, 49 U.S.C. section 5101 et seq. DOT-RSPA at all times relevant herein
14 was obligated to comply with applicable substantive and procedural requirements of the Federal
15 Hazardous Materials Transportation Law and its implementing regulations, and NEPA and its
16 implementing regulations.

17 16. Defendant NORMAN Y. MINETA is sued in his official capacity as the Secretary of the
18 Department of Transportation. NORMAN Y. MINETA at all times relevant herein was obligated to
19 ensure DOT-RSPA's compliance with applicable substantive and procedural requirements of the Federal
20 Hazardous Materials Transportation Law and its implementing regulations, and NEPA and its
21 implementing regulations.

22 **STATUTORY FRAMEWORK**

23 17. The Department of Transportation is authorized to designate material as hazardous,
24 including radioactive material, and to promulgate regulations governing the safe transportation of
25 hazardous material. 28 U.S.C. § 5103. Rulemaking must be conducted under the Administrative
26 Procedures Act, 5 U.S.C. § 553. *Id.* Rulemaking is a major federal action subject to the requirements of
27 NEPA. 40 CFR § 1508.8(a).

1 18. NEPA is our “basic national charter for protection of the environment.” 40 CFR §
2 1500.1. NEPA requires all agencies of the federal government to prepare a “detailed statement”
3 regarding all “major federal actions significantly affecting the quality of the human environment.” 42
4 U.S.C. § 4332(C). This statement, known as an Environmental Impact Statement (“EIS”), must describe
5 (1) the “environmental impact of the proposed action,” (2) any “adverse environmental effects which
6 cannot be avoided should the proposal be implemented,” (3) alternatives to the proposed action, (4) “the
7 relationship between local short-term uses of man’s environment and the maintenance and enhancement
8 of long-term productivity,” and (5) any “irreversible or ir retrievable commitment of resources which
9 would be involved in the proposed action should it be implemented.” 42 U.S.C. § 4332.

10 19. The Council on Environment Quality – an agency within the Executive Office of the
11 President created by NEPA – has promulgated regulations implementing NEPA which are “binding on
12 all federal agencies.” 40 CFR § 1500.3. These regulations require that, unless an activity is
13 “categorically excluded” from NEPA compliance, an agency must either prepare an EIS, or, at the very
14 least, an Environmental Assessment (“EA”) which is used to determine whether an EIS is necessary. *Id.*
15 § 1501.4.

16 20. Among the factors an agency must consider to determine whether a project may have
17 “significant” impacts, and therefore whether an EIS is required, are the “context” and “intensity” of the
18 action. 40 CFR § 1508.27. With regard to context, both short- and long-term effects are relevant. *Id.*
19 With regard to intensity, the regulations provide that, among other relevant factors, the severity of the
20 impact must be judged based on whether “the proposed action affects public health and safety”; “[t]he
21 degree to which the effects on the quality of the human environment are likely to be high controversial”;
22 “the degree to which the possible effects on the human environment are highly uncertain or involve
23 unique or unknown risks”; “[t]he degree to which the action may establish a precedent for future actions
24 with significant effects or represents a decision in principle about a future consideration”; and “whether
25 the action is related to other actions with . . . cumulatively significant impacts.” *Id.*

26 21. The scope of an EIS or EA must include an assessment of cumulative impacts. *Id.* §
27 1508.25(c)(3). Cumulative impacts include “the incremental impact of the action when added to other
28 past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-

1 Federal) undertakes such other actions.” *Id.* § 1508.7. Cumulative impacts may result from
2 "individually minor but collectively significant actions taking place over a period of time." *Id.*
3 “Significance cannot be avoided by . . . breaking[an action] down into small component parts." *Id.* §
4 1508.27(b)(7).

5 22. A single EIS should be prepared for “[c]umulative actions, which when viewed with
6 other proposed actions have cumulatively significant impacts.” *Id.* § 1508.25(a)(2).

7 23. Regardless whether an EIS is required, where an agency prepares an EA the regulations
8 require that the EA discuss both the need for the proposed action and alternatives to it, address the
9 environment impacts of both the proposal and the alternatives, and “provide sufficient evidence and
10 analysis for determining whether to prepare” an EIS. *Id.* § 1508.9.

11 24. If, after preparing an EA, the agency concludes that an EIS is not necessary, it must issue
12 a Finding of No Significant Impact (“FONSI”) that adequately explains why the project will “not have a
13 significant effect on the human environment” and an EIS will not be prepared. *Id.* § 1508.13.

14 25. The APA enables any person suffering legal wrong because of a final federal agency
15 action to seek judicial review thereof. 5 U.S.C. §§ 702, 704. Under the APA’s standard of review, the
16 reviewing court must hold unlawful and set aside agency action found to be arbitrary, capricious, or
17 otherwise not accordance with law; or without observance of procedure required by law. 5 U.S.C. §
18 706(2)(A), (D).

19 **FACTS**

20 **Background**

21 26. DOT-RSPA entered into a Memorandum of Understanding with the NRC on June 8,
22 1979 providing that each agency, in consultation with the other, will develop safety standards within
23 their respective subject-matter jurisdictions. The MOU provided that DOT-RSPA will be the national
24 competent authority with respect to the administrative requirements set forth in the regulations for the
25 Safe Transport of Radioactive Materials of the International Atomic Energy Agency (“IAEA”). The
26 MOU further provided that DOT-RSPA will act as the U.S. representative to the IAEA on matters
27 pertaining to the administrative and safety regulatory aspects of transportation of radioactive materials.
28 NRC will provide technical support and advice to DOT-RSPA.

1 Safety Standards for Protection Against Ionizing Radiation (BSS) and for the Safety of Radiation
2 Sources (Safety Series No. 115-I), which provided for maximum individual doses of 1 millirem under
3 normal conditions and 100 millirems for accident conditions.

4 33. IAEA contractors then analyzed various transportation scenarios (*e.g.*, exposures to truck
5 drivers, loaders, and other members of the public) for 20 of the approximately 360 regulated
6 radionuclides to determine maximum concentrations that would meet these criteria. The result was a set
7 of concentrations values that purported to limit doses to the adopted 1 millirem criterion in transport-
8 specific scenarios.

9 34. The IAEA contractors then compared these transport-specific concentrations to the
10 concentrations that IAEA had previously adopted as exemption levels for non-transport activities, the
11 so-called Basic Safety Standard or BSS exemption levels. The BSS exempt concentration levels were in
12 many instances an order of magnitude higher than the concentrations limits determined to be necessary
13 to meet the 1 millirem dose criterion in transport-specific scenarios. Nonetheless, IAEA concluded that
14 the higher BSS concentrations were acceptable for transportation.

15 35. The consequence of accepting the higher BSS exemption levels for transportation is that
16 the dose criterion of 1 millirem for normal exposure was not met. In fact, doses from normal
17 transportation activity caused by the new exemption levels range as high as 42 millirems and to average
18 23 millirems annually for a transport worker.

19 **Changes to the definition and regulation of Low Specific Activity material**

20 36. Another proposed change in the notice of proposed rulemaking was to redefine one class
21 of low specific activity material, LSA-I, by reference to the proposed nuclide-specific exemption levels.
22 LSA-I was to be defined as radioactive material in which the radioactivity is distributed throughout and
23 the average specific activity does not exceed 30 times the exempt radioactivity concentration level. This
24 proposal was adopted in the final rule by revisions in 49 CFR section 173.403.

25 37. Another proposed change was to permit the transportation of bulk LSA-I material without
26 packaging. This proposal was adopted in the final rule by revisions in 49 CFR section 173.427.

27 **The Environmental Assessment and Finding of No Significant Impact**

1 **Assessment of collective doses**

2 62. Collective doses to members of the public who receive smaller doses than transport
3 workers may result in larger numbers of cancers because these members of the public are more
4 numerous.

5 63. Evaluation of these collective doses may be based on a determination of the volumes and
6 types of shipments and the application of models that evaluate population doses from normal transport
7 and accident situations.

8 64. Volumetric and radiological data about waste shipments are available or can be obtained
9 to determine relevant shipments, including survey results, Department of Energy studies, records of
10 hazardous waste disposal sites, waste shipment manifests, and records of agency requests for proposals
11 for shipment contracts.

12 65. The EA incorrectly concluded that there were no data available for the number and
13 frequency of exempt shipments. Responses to Freedom of Information Act requests indicate that agency
14 contractors identified only two documents in a purported search for such data.

15 66. Substantial volumes of both exempt and LSA-I material have been and will be
16 transported, primarily as low-level waste destined for treatment and disposal.

17 67. The EA incorrectly concluded that the regulations altering exemption levels would not
18 affect radioactive waste shipments.

19 68. Neither the EA nor the final rule contained any analysis of collective population doses
20 based on evaluation of shipment volumes.

21 **Assessment of cumulative and precedent impacts**

22 69. Three federal agencies are currently considering proposals to deregulate recycling,
23 disposal, and release of radioactive material. These proposals would adopt dose-based criteria for
24 deregulated material that are similar or identical to the exemption criteria at issue here.

25 70. The Department of Energy is preparing a Programmatic EIS to consider a proposal for
26 unrestricted release of radioactively contaminated scrap metals for recycling based on the adoption of
27 IAEA criteria for radioactivity, the same criteria adopted in this rulemaking.

1 4. Retaining jurisdiction of this matter until DOT-RSPA has fulfilled its legal obligations
2 under NEPA :

3 5. Awarding Plaintiffs' costs in this action, including reasonable attorneys' fees and expert
4 witness fees; and

5 6. Providing such other relief as the Court deems just and proper.

6 Dated: _____

Respectfully submitted,

7
8 By _____

9 Mark R. Wolfe

10 For

11 Paul H. Lamboley (NV SBN 2149)
12 1976 Villa Way South
13 Reno, NV 89509
14 Tel: (775) 762.7607
15 Fax: (775) 826.9126
16 E-mail: phLamboley@aol.com

17 Mark R. Wolfe (Cal. Bar No. 176753)
18 John H. Farrow (Cal. Bar No. 209221)
19 M. R. WOLFE & ASSOCIATES
20 140 Second Street, Sixth Floor
21 San Francisco, CA 94105
22 (415) 369-9400; Fax:(415) 369-9405-0555
23 e-mails: mrw@mrwolfeassociates.com
24 jfarrow@mrwolfeassociates.com

25 Attorneys for Plaintiffs
26
27
28