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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

UNITED STATES DEPARTMENT)
OF TRANSPORTATION RESEARCH)
AND SPECIAL PROGRAMS)
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

INTRODUCTION

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

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

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

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

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

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

JURISDICTION

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

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

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

PARTIES

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

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

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

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

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

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

14. Plaintiffs’ members use streets and highways on which radioactive material may be 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 irretrievable 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 27. Between 1999 and 2004, DOT-RSPA and NRC engaged in the joint rulemaking at issue
2 here, in which DOT-RSPA made a number of changes to its Hazardous Materials Regulations (“HMR”),
3 49 CFR Parts 171 through 178, and NRC made a number of changes to its regulations at 10 CFR Part
4 71. The HMR regulates shipping activities to ensure safe transport of hazardous materials, including
5 radioactive materials, by specifying requirements for such matters as packaging, radiation exposure,
6 marking, labeling, placarding, shipping papers, and provision of emergency information. NRC’s
7 regulations at 10 CFR Part 71 govern packaging and transportation of radioactive material by NRC
8 licensees.

9 28. All of the changes in the joint rulemaking pertained to shipments of radioactive material.
10 The overarching rationale for the rulemaking was to harmonize United States regulations governing
11 domestic radioactive shipments with IAEA regulations.

12 29. In coordination with NRC, DOT-RSPA published an advance notice of proposed
13 rulemaking on December 28, 1999 and published a notice of proposed rulemaking on April 30, 2002
14 identifying proposed changes in the HMR.

15 **Changes to the definition of exempt material**

16 30. One change proposed in the notice of proposed rulemaking was to alter the basis on
17 which radioactive material is exempted from the provisions of the HMR by adopting the nuclide-specific
18 exemption levels. The particular exemption levels to be adopted were those set out in the 1996 IAEA
19 Regulations for the Safe Transport of Radioactive Material. This proposal was adopted in the final rule
20 by revisions in 49 CFR sections 173.403, 173.436, and 173.433.

21 31. Adoption of nuclide-specific exemption values was intended to replace the uniform
22 exemption threshold of 70 becquerels per gram (70 Bq/g) previously applicable to all nuclides. The
23 previous uniform exempt concentration did not take into account their different physical and chemical
24 properties, which determine different exposure pathways and dose risks. The change in the exemption
25 rule was intended to ensure that exempt concentrations were based on a uniform dosage criterion rather
26 the previous uniform radiation criterion.

27 32. In developing the new exempt concentration levels, IAEA contractors had first
28 determined that the acceptable dose criteria would be the basic dose criteria of the International Basis

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**

28

1 38. The NRC prepared a draft EA purporting to address the environmental impacts of the
2 joint rulemaking, which DOT-RSPA's entered into its docket on May 9, 2002. The NRC prepared a
3 final EA, which DOT-RSPA entered into its docket on February 19, 2004.

4 39. On January 30, 2004, DOT-RSPA adopted a final rule that included the proposed
5 changes to exemption levels and to the definition and regulation of LSA-I. In its final rule, DOT-RSPA
6 issued a FONSI that purported to be based on a final EA prepared by NRC that was dated March 2002.

7 40. The EA did not discuss or evaluate the environmental or human health impacts from the
8 changes to the definition and regulation of LSA-I materials. These changes were simply omitted from
9 the list of topics evaluated in the EA.

10 **Public health impact of acknowledged occupational doses**

11 41. The acknowledged occupational doses to transport workers – averaging 23 millirems per
12 year and ranging up to 42 millirems – exceed the European Union's Basic Safety Standard 1 millirem
13 radiation dose criterion for public exposure from exempt activities, the standard that was adopted by
14 IAEA in determining the BSS exemption levels.

15 42. The acknowledged doses also exceed the 1 millirem individual dose standard identified
16 by the National Academy of Science for release or conditional release of radioactive solid material, by
17 the American National Standards Institute and Health Physics Society for clearance of materials from
18 regulatory control, and by the European Commission Working Group of Experts for clearance or
19 conditional clearance of radioactive matter.

20 43. The acknowledged doses also exceed most current radiation protection standards for
21 public exposure promulgated by federal agencies, including the U.S. Environmental Protection Agency
22 (EPA) standards of 4 millirems for groundwater exposures, 10 millirems for air exposures, 15 millirems
23 for disposal of spent nuclear fuel and high level waste, 15 millirems for Yucca Mountain exposures, and
24 25 millirems for nuclear fuel cycle facility operations, and the NRC standards of 25 millirems for land
25 disposal of radioactive waste and 25 millirems for decommissioning nuclear facilities.

26 44. Cancer incidences from the acknowledged average dose, based on federal dose-response
27 guidance, exceed the EPA acceptable risk goal of 1 excess cancer in 1 million persons by a factor of 800
28 and exceed the EPA maximum acceptable risk of 1 excess cancer in 10,000 persons by a factor of eight.

1 45. Doses of only 10 millirems to pregnant women, less than half the acknowledged average
2 dose, may increase childhood cancers by 6 in 10,000.

3 46. The EA provided no discussion of any criteria of significance with respect to radiation
4 doses from exempt shipments in support of DOT-RSPA's FONSI. The EA simply asserted that the
5 IAEA has judged that the change would not significantly increase the risk to individuals.

6 47. The text of the final rule dismissed comments objecting to the failure to meet the IAEA 1
7 millirem standard by observing that the 23 millirem average exposure would be less than an unrelated
8 100 millirem exposure standard applicable to NRC licensees and less than unpreventable background
9 radiation levels. Neither the EA nor the final rule put the 23 millirem exposure in the context of other
10 standards for public radiation doses or determined cancer incidences in relation to any standards.

11 48. Allowable doses from the transport of LSA-I material may be up to 30 times higher than
12 doses from exempt material. Neither the EA nor the final rule contained *any* analysis or discussion of
13 the significance of doses attributable to the transport of LSA-I material.

14 **Uncertainty and controversy about the radiation dose effects**

15 49. There is uncertainty and controversy in radiation dose-response model with respect to
16 cancers. Recent studies indicate that the actual number of cancers may be ten times higher than the
17 federal dose-response guidance.

18 50. There is an evolving understanding that low radiation doses cause non-cancer biological
19 impacts including heritable mutation, birth defects, genomic instability, bystander effects, and low birth
20 weight.

21 51. Controversy and uncertainty about radiation standards are evident in a lack of interagency
22 consensus on acceptable radiation risks to the public and the multiplicity of radiation standards.

23 52. Controversy and uncertainty about radiation standards are evident from the fact that
24 Congress overruled the NRC's 1990 Below Regulatory Concern Policy Statement establishing a generic
25 exemption level because the level was insufficiently protective. The NRC's policy statement had
26 adopted a 10 millirem standard for an average individual dose from each exempted practice, less than
27 half the average dose to transport workers under the new exemption levels.
28

1 53. Comments on the proposed rulemaking identified a substantial controversy and
2 uncertainty regarding the radiation dose-response relationship and non-cancer effects of low level
3 radiation.

4 54. Neither the EA nor the final rule contained any discussion of this controversy or
5 uncertainty.

6 **Assessment of occupational doses to individuals**

7 55. Because LSA-I material is permitted to be 30 times as radioactive as exempt material,
8 occupational radiation doses may therefore be 30 times higher – up to 2000 millirems in a 400-hour
9 work year. Even if external radiation protection standards were applicable, allowable doses could still
10 range up to 800 millirems.

11 56. The EA did not assess radiation doses from LSA-I; in fact, it contained no assessment of
12 any potential impacts from the changes to the definition of LSA-I material.

13 57. The assessment of occupational doses from exempt material made by IAEA contractors
14 understated potential doses because it made unreasonable assumptions about exposure durations and
15 shipping geometry. The EA relied on the IAEA assessment.

16 **Assessment of accidental doses**

17 58. The IAEA assessment of exposures from transportation accidents was based on a model
18 containing assumptions clearly inapplicable bulk shipments of exempt material not necessarily known to
19 be radioactive, including the assumptions that workers and the public would know to limit exposures to
20 30 minutes, that dispersion of materials would be limited by packaging, that dust would settle as quickly
21 as it does indoors, and that clean-up would be supervised by a health physicist and completed without
22 residual contamination.

23 59. Neither the EA nor the final rule discussed exposures from transportation accidents
24 involving exempt material.

25 60. The elimination of the packaging requirement for LSA-I material may increase radiation
26 exposure to the public because material may be substantially more dispersed in the event of accidents.

27 61. Neither the EA nor the final rule contained any analysis of accidents involving LSA-I
28 materials.

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.
28

71. The EPA has begun a rulemaking for disposal of low-activity radioactive waste, which includes a proposal to adopt a dose-based radioactivity limits below which waste could be disposed of in landfills, the same regulatory approach as was taken in this rulemaking.

72. The NRC has begun a rulemaking and is preparing an EIS to consider a proposal for the unrestricted release or disposal of radioactively contaminated solid materials based on dosage criterion, the same regulatory approach as was taken in this rulemaking.

73. Each of these reasonably foreseeable proposals would affect the same members of the public affected by the rulemaking at issue here, including transportation workers, those traveling on roads and highways, and those living or working proximate to roads and highways.

74. Members of the public affected by this rulemaking are currently exposed to other permitted sources of radiation, including medical radiation, radiation from land disposal of waste, and radiation from nuclear fuel cycle operations.

75. Neither the EA nor the final rule contained any analysis or discussion of cumulative impacts.

76. Neither the EA nor the final rule evaluated the degree to which the adoption of BSS exemption values for transportation may establish a precedent for future regulatory actions with significant effects.

Alternatives analysis

77. The EA considered only the no-action alternative to the proposed change in the exemption levels. The EA did not consider an alternative that would not raise any exemption levels, *e.g.*, an alternative that would simply lower the exemption levels for those radionuclides for which the IAEA exemption level is less than the previous 70 Bq/g exemption level. The EA did not consider an alternative that would lower exemption levels to the level necessary to meet the IAEA's radiation dose criterion of 1 millirem per year. The EA did not consider any alternative to the changes in the definition of LSA-I materials or to the relaxation of LSA-I packaging requirements.

Exhaustion of Remedies

78. On February 25, 2004, Plaintiffs and others filed an administrative appeal of its final rule to DOT-RSPA.

1 79. On August 19, 2004, DOT-RSPA denied Plaintiff's administrative appeal.

2 **FIRST CAUSE OF ACTION**
3 **(Failure to prepare an EIS)**

4 80. Because the promulgation of Hazardous Material Regulations is a major federal action
5 that may have significant, uncertain, highly controversial, and cumulative impacts on public health and
6 the environment, DOT-RSPA violated NEPA and its implementing regulations and acted in a manner
7 that is arbitrary and capricious and contrary to law in violation of the APA by failing to prepare an EIS
8 prior to adopting its final rule and by improperly segmenting its consideration of environmental impacts.
9 42 U.S.C. § 4332; 5 U.S.C. § 706.

10 **SECOND CAUSE OF ACTION**
11 **(Inadequate alternatives analysis)**

12 81. Because the promulgation of Hazardous Material Regulations is a major federal action,
13 by failing to consider reasonable alternatives in an EIS or an EA, DOT-RSPA violated NEPA and its
14 implementing regulations and acted in a manner that is arbitrary and capricious and contrary to law in
15 violation of the APA. 42 U.S.C. § 4332; 5 U.S.C. § 706.

16 **THIRD CAUSE OF ACTION**
17 **(Inadequate Environmental Assessment)**

18 82. Because the promulgation of Hazardous Material Regulations is a major federal action,
19 by preparing an EA which failed to adequately consider the impacts of the regulations on public health
20 and the environment, and by issuing a FONSI based on that EA, DOT-RSPA violated NEPA and its
21 implementing regulations and acted in a manner that is arbitrary and capricious and contrary to law in
22 violation of the APA. 40 CFR § 1501.4.; 5 U.S.C. § 706.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiffs respectfully request the Court to enter judgment:

- 25 1. Declaring that DOT-RSPA unlawfully promulgated the regulations with respect to
26 exempt and LSA-I materials in violation of the requirements of NEPA and its implementing regulations;
27 2. Setting aside the FONSI with respect to exempt and LSA-I materials;
28 3. Ordering DOT-RSPA, through a permanent injunction, to rescind the regulations with
respect to exempt and LSA-I materials unless and until it fully complies with the requirements NEPA
and its implementing regulations;

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: _____
7

Respectfully submitted,

8 By _____
9

10 Mark R. Wolfe

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