

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Beyond Nuclear, <i>et al.</i> ,)	Case No. 1:16-cv-01641
Plaintiffs,)	Judge Chutkan
-vs-)	
U.S. Department of Energy, <i>et al.</i> ,)	
Defendants.)	
)	

* * * * *

**PLAINTIFFS’ MOTION TO SUPPLEMENT THE RECORD
AND TO SUBMIT EXTRA-RECORD DOCUMENTS**

Plaintiffs, by and through their undersigned counsel, hereby move to supplement the administrative record by inclusion of an Atomic Energy Commission document, “Environmental Survey of Transportation of Radioactive Materials to and from Nuclear Power Plants” (December 1972) (“AEC Environmental Transportation Survey”), which was proposed for submission in Plaintiffs’ Memorandum of Points and Authorities In Support of Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment and Plaintiffs’ Cross-Motion for Summary Judgment, at 8 n.11 (ECF No. 16, as corrected ECF No. 19-1).¹

¹This Motion and the supporting memorandum arguments (Plaintiffs’ Reply, ECF 25) referenced herein are further meant to serve to respond to Defendants’ Motion to Strike Extra-Record Materials and Portions of Plaintiffs’ Memorandum in Support of Summary Judgment (ECF 21).

Plaintiffs further move to supplement the administrative record in this matter by adding to it the Declaration of Gordon Edwards, Ph.D. (ECF No. 16-1, as corrected ECF No. 19-2) (“Edwards Declaration”) and the Declaration of Marvin Resnikoff, Ph.D. (ECF No. 16-2) (“Resnikoff Declaration”), both of which are extra-record documents.

The AEC Environmental Transportation Survey was not included by Defendants in the record of this case. However, it is relied on in the NRC’s 1977 Final Environmental Statement on the Transportation of Radioactive Waste by Air and other Modes (NUREG-0170) (AR0000001-AR0000198) (“NRC Transportation EIS”). Further, the conclusions of the AEC Environmental Transportation Survey are incorporated into Nuclear Regulatory Commission transportation regulations. The Survey should have been included in the record for those reasons, but also because it provides valuable confirmation of the reasons for the longstanding policy, initiated with the AEC – the predecessor agency to both DOE and NRC – that spent fuel and other radioactive waste should be shipped in solid form.

The grounds for supplementing the record with the AEC Environmental Transportation Survey are set forth more fully in Plaintiffs’ Reply in Support of Their Cross-Motion for Summary Judgment, in Support of Motion to Supplement the Record and to Submit Extra-Record Documents, and in Response to Defendants’ Motion to Strike Extra-Record Materials and Portions of Plaintiffs’ Memorandum (“Plaintiffs’ Reply”), which is filed concurrently with this Motion. *See* ECF 25, Part II.

The Edwards Declaration and Resnikoff Declaration should be added to the administrative record for the purpose of demonstrating the gravity of technical issues that would be raised if Plaintiffs were permitted to submit comments on a draft Environmental Impact Statement regarding the transportation of liquid target material. They help to explain technical

information or DOE action that Plaintiffs maintain is not adequately explained in the existing record, and they further demonstrate that DOE failed to consider relevant evidence. The Federal Rules of Evidence allow expert witness testimony in circumstances where the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. With specific respect to National Environmental Policy Act ("NEPA") cases such as this one, extra-record evidence may be considered by a court when background information can assist in the determination of whether the agency considered all of the relevant factors.

The grounds for supplementing the record with the Edwards and Resnikoff Declarations are set forth more fully in Plaintiffs' Reply, which has been filed at the same time as this Motion. *See* ECF25, Part III.

In proffering the three documents referenced above and as further explained in their contemporaneous memorandum filing, Plaintiffs have overcome the presumption of regularity attached to the certified administrative record submitted by Defendants and have demonstrated that the proffered extra-record documents fall within the limited exceptions to the rule limiting judicial review to the administrative record in actions brought under the Administrative Procedure Act, 5, U.S.C. §§ 701-706.

Local Rule 7(m) Report of Conference of Counsel Prior to Motion Filing

Pursuant to Local Rule 7(m), counsel for Defendants and Plaintiffs met and conferred telephonically on December 5, 2016, but were unable to agree on a resolution that would eliminate the need to file the instant motion to supplement the record.

/s/ Diane Curran

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2016, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all parties.

/s/ Terry J. Lodge

Terry J. Lodge, Esq.
Co-Counsel for Plaintiff