LITIGATION STATUS REPORT
As of January 29, 2004

ACTIVE CASES[6]

***Bullcreek v. NRC**,* Nos. 03-1018 & 03-1022 (D.C. Cir.)

These consolidated lawsuits, filed by dissident Goshute Indians and by the State of Utah, challenge the NRC's authority to license away-from-reactor ISFSIs. A nuclear industry consortium, Private Fuel Storage, seeks an NRC license for such a facility on Goshute land in Utah. Petitioners argue that the Commission, in CLI-02-29, 56 NRC 390 (2002), wrongfully turned down a petition for rulemaking. The petition asked the Commission to "make clear" that under the Nuclear Waste Policy Act the NRC lacks authority to license away-from-reactor ISFSIs. The Commission found that the NWPA did not take away the agency's authority to license such facilities.

The court heard oral argument on January 16, 2004. We are awaiting a decision.

CONTACT: Grace H. Kim
415-3605

California Public Utilities Commission v. NRC, No. 02-72735 (9th Cir.)

This lawsuit challenges a Commission adjudicatory decision that rejected petitions to intervene in the Diablo Canyon license transfer proceeding. The petitioners are the California Public Utility Commission and the County of San Luis Obispo.

The Commission found the CPUC's concerns primarily economic, not justifying standing in an NRC license transfer proceeding. The Commission also ruled that CPUC had failed to set out litigable safety contentions. As for the County, the Commission found that its contentions, like CPUC's, lacked foundation, and that the County in any event had filed its contentions too late.

We filed our brief in the court of appeals in early 2003. The court subsequently decided to hold the case in abeyance pending possible settlement of a related bankruptcy case.

CONTACT: Jared K. Heck
415-1623

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[6] For statistical purposes, we list as "active" any case that was pending before a court as of January 1, 2004. The narratives accompanying each listed case include post-January 1 developments, but this annual litigation report does not include the three new cases so far filed in 2004, *Connecticut Coalition Against Millstone v. NRC*, No. 04-0109 (2d Cir.) and *State of Oklahoma v. NRC*, No. 04-9503 (10th Cir.); *Citizens Awareness Network v. NRC,* No. 04-1145 (1st Cir.).

Cheh v. Diaz, No. 8:03-cv-02414-AW (D. Md.)

This personnel lawsuit complains of discrimination and reprisal. The government has sought summary judgment. NRC lawyers are working with the United States Attorney's office in Baltimore on this case.

CONTACT: Marvin L. Itzkowitz
415-1566

Connecticut Coalition Against Millstone v. NRC, No. 03-4372 (2d Cir.)

This lawsuit challenged a Commission adjudicatory decision, CLI-02-22, 56 NRC 213 (2002), rejecting a hearing contention based on Millstone's "loss" of spent fuel rods some years ago. Petitioner had urged the NRC to deny a license amendment expanding Millstone's spent fuel pools. We moved to dismiss the petition for review on the jurisdictional ground that the petition failed to name the Commission's final adjudicatory order, as required by the Federal Rules of Appellate Procedure and the Hobbs Act.

After oral argument, the court of appeals agreed with our position, and in a summary order dismissed the case. The court later denied a rehearing petition.

Petitioner filed a timely petition for a writ of certiorari, but the Supreme Court declined to accept it on technical grounds (not signed by member of the Supreme Court bar). Petitioner has until February to cure the defect.

CONTACT: Charles E. Mullins
415-1618

Joosten v. Meserve, No.8:02-cv-02668-PJM (D. Md.)

This is a suit claiming unlawful age discrimination in employment. It was removed from state to federal court. The NRC, working with the U.S. Attorney's office, obtained partial summary judgment, and discovery is proceeding on the rest of the case.

CONTACT: Marvin L. Iztkowitz
415-1566

Khoury v. Meserve, No. 02 CV 3511 (D. Md.), *aff'd* No. 03-1865 (4th Cir., Jan. 23, 2004)

This is a Title VII lawsuit claiming gender and national origin discrimination in employment. The district court ruled for the NRC, dismissing some claims and entering summary judgment on others. The United States Court of Appeals for the Fourth Circuit recently affirmed.

CONTACT: Maryann Grodin, OIG
415-5945

Massachusetts General Hospital v. United States, No. 01-434 C (U.S. Court of Federal Claims)

This is one of three companion Price-Anderson lawsuits seeking government reimbursement for damages, attorney's fees, and costs incurred in a private tort suit. Millions of dollars in Price-Anderson claims are at stake in the three cases.

The underlying private tort suit, *Heinrich v. Sweet*, arose out of alleged medical misuse of an NRC-licensed research reactor at MIT. The reactor was used (decades ago) for "boron neutron capture therapy," which allegedly harmed rather than helped cancer patients. The United States Court of Appeals for the First Circuit ruled last year that plaintiffs were not entitled to damages, and the Supreme Court denied *certiorari*. Massachusetts General claims reimbursement from the government for its substantial legal fees and costs under a 1959 indemnity agreement between MIT and the Atomic Energy Commission.

We are working with the Department of Justice on the defense of this lawsuit, along with two companion suits (*MIT v. United States* and *Sweet v. United States*). In 2002, the Claims Court (Firestone, J.) rejected our argument (set out in a summary judgment motion) that Price-Anderson does not cover what are, in essence, medical malpractice claims. Further progress in the case was delayed to await Supreme Court action on the petition for a writ of certiorari in the underlying tort case, *Heinrich v. Sweet.*

We now have filed a memorandum of law with the Claims Court that offers various reasons why Mass General and the other plaintiffs are not entitled to collect legal defense costs in the circumstances of this case. Ultimately, the government may appeal the Claims Court's threshold ruling that Price-Anderson applies to cases like this.

CONTACT: Marjorie S. Nordlinger
415-1616

Massachusetts Institute of Technology v. United States, No. 00-292 C (United States Court of Federal Claims)

This lawsuit, a companion to *Sweet v. United States* and *Massachusetts General Hospital v. United States*, seeks Price-Anderson reimbursement of attorney's fees and costs incurred in defending a tort suit, *Heinrich v. Sweet*, arising out of alleged medical misuse of a research reactor at MIT. The Claims Court judge rejected our argument that such claims fall outside Price-Anderson. As explained above (in the discussion of *Massachusetts General Hospital*), the Claims Court rejected our threshold argument on Price-Anderson's applicability, and we currently are pursing other defenses. We are collaborating with Department of Justice attorneys in defending this case.

CONTACT: Marjorie S. Nordlinger
415-1616

Northern California Power Agency v. NRC, Nos. 03-1038 & 03-1184 (D.C. Cir.)

These closely-related (but not yet consolidated) lawsuits challenge: (a) a Commission adjudicatory decision, CLI-03-02, 57 NRC 19 (2003), rejecting challenges to the proposed transfer of the license for the Diablo Canyon nuclear power reactor, and (b) the NRC staff order implementing the transfer. The Commission decision refused to carry over antitrust conditions to new entities that would come into existence after the license transfer. Petitioner supports retaining the conditions.

The underlying license transfer remains in limbo because of ongoing bankruptcy proceedings involving Diablo Canyon's owner, Pacific Gas & Electric Company. Hence, the court of appeals has held both of these lawsuits in abeyance.

CONTACT: Grace H. Kim
415-3605

Pacific Gas & Elec. Co. v. People of the State of Calif., No. 02-16990 (9th Cir.)

In this bankruptcy case we worked with the Justice Department on an *amicus curiae* brief arguing that federal bankruptcy law does not override state or federal laws on the environment or on health and safety. The case is an offshoot of PG&E's well-known (and still pending) bankruptcy proceeding. The court of appeals agreed with our position. The court ruled that bankruptcy law does not expressly preempt laws (federal or state) on the environment or on health and safety. The court left open the question whether there may be "implied preemption" in particular circumstances.

Usefully, the court decision referred expressly to the problem of preempting the NRC's licensing authority. A rehearing petition is pending.

CONTACT: John F. Cordes
415-1956

Riverkeeper v. Collins, No. 03-4313 (2d Cir.)

This lawsuit challenges a decision by the Director of the Office of Nuclear Reactor Regulation to reject (in part) a petition for enforcement under 10 C.F.R. § 2.206. The 2.206 petition sought, among other things, the shutdown of the Indian Point reactors because of the threat of airborne terrorism. We have argued that the courts cannot review NRC 2.206 decisions like this one on the ground that the agency is exercising enforcement discretion. We also have argued that the NRC's handling of security issues at Indian Point has been reasonable.

We filed a motion to dismiss, but a motions panel referred our motion to the merits panel. After full briefing and oral argument, the case now awaits decision.

CONTACT: Jared K. Heck
415-1623

Public Citizen v. NRC, No. 03-1181 (D.C. Cir.)

This lawsuit argues that the Commission unlawfully imposed new "design basis threat" requirements through orders issued it issued last April without prior notice and public comment. Petitioners claim that the Commission may not alter agency rules without invoking the rulemaking process. We filed a motion to dismiss on the theory that petitioners had not sought an agency hearing, as permitted by the DBT orders.

The court of appeals referred our motion to the motions panel. It will be resolved after full briefing and argument of the case. Our brief is due this spring.

CONTACT: Jared K. Heck
415-1623

San Luis Obispo Mothers for Peace v. NRC**,** No. 03-74628 (9th Cir., filed Dec. 12, 2003)

This lawsuit challenges two NRC adjudicatory decisions in the proceedings to license an ISFSI at Diablo Canyon. The first challenged decision (CLI-02-23, 56 NRC 230 (2002)) declined to suspend licensing proceedings to await security enhancements. The second decision (CLI-03-1, 57 NRC 1 (2003)) rejected contentions demanding an environmental impact statement considering the potential effects of terrorism. The NRC's brief will be due during the spring of 2004.

CONTACT: Charles E. Mullins
415-1618

Skull Valley Band of Goshute Indians v. Leavitt, No. 2:01-CV-270V (D. Utah), *appeal pending*, No. 02-4149 (10th Cir.)

This lawsuit in federal district court in Salt Lake City challenged the constitutionality of various laws enacted by the State of Utah to obstruct the proposed Private Fuel Storage facility on Goshute tribal lands in Utah. Among Utah's arguments in defending the suit was a claim that the Nuclear Waste Policy Act precluded the NRC from licensing the proposed facility. Utah thus maintained that the facility could never obtain a license lawfully. Hence, according to Utah, the Goshutes and PFS lacked standing to challenge the state's anti-PFS legislation, and the lawsuit was not ripe.

We filed an *amicus curiae* brief disputing Utah's claim. We argued that only courts of appeals, not federal district courts, had authority to review questions bearing on NRC licensing authority. We stated that the district court ought to let the Commission decide, in the first instance, whether it had licensing authority. That determination, we said, had nothing to do with ripeness or standing in the Goshute-PFS challenge to Utah's statutes.

The district court (Campbell, J.) agreed with our view, and declined to enter the licensing authority dispute. (The Commission ultimately decided that dispute against Utah (CLI-02-29), a decision that has triggered new lawsuits in the District of Columbia Circuit, *Bullcreek v. NRC*,

Nos. 03-1018 & 03-1022 (D.C. Cir.)). The district court also struck down the Utah legislation nearly in its entirety as preempted by the federal government's exclusive power to regulate the safety of nuclear reactors and high-level waste storage.

Utah has taken an appeal to the United States Court of Appeals for the Tenth Circuit (in Denver). In collaboration with the Department of Justice, we again filed an *amicus curiae* brief on the reviewability of Utah's "statutory authority" claim. The court of appeals heard oral argument last August, but has not yet issued a decision.

CONTACT: Grace H. Kim
415-3805

State of Nevada v. NRC, Nos. 02-1116 & 03-1058 (D.C. Cir.)

The State of Nevada (joined by Clark County, Nevada, and the City of Las Vegas) filed this petition for judicial review. It challenges 10 C.F.R. Part 63, a rule the NRC issued in November, 2002, that established criteria and requirements for licensing the proposed Yucca Mountain repository for high-level radioactive waste. Petitioners argue that Part 63 violates the Nuclear Waste Policy Act in various respects.

We initially filed a motion to dismiss the lawsuit as untimely. (It was filed nearly 6 months after Part 63 issued.) We argued that petitioners were required to file suit within 60 days of Part 63's issuance, as the Hobbs Act requires. Petitioners responded that they had 180 days to file suit, as the Nuclear Waste Policy Act provides. The court of appeals deferred a ruling on our jurisdictional motion until after full briefing of all issues in the case.

In the meantime, Nevada had filed a petition for rulemaking seeking changes in Part 63 to reflect the supposed "primacy" of geologic protection over engineered protection. The Commission rejected the petition, and Nevada filed a second lawsuit. The court of appeals consolidated Nevada's new lawsuit with its previous one, and also consolidated the NRC litigation with pending Yucca Mountain suits against EPA and the Department of Energy.

The court heard oral argument on all the cases in January. We are awaiting the court's decision.

CONTACT: Steven F. Crockett
415-1622

Sweet v. United States, No. 00-274 C (U.S. Court of Federal Claims)

This lawsuit, a companion to *Massachusetts General Hospital v. United States* and *MIT v. United States,* arises out of medical research and treatment, known as "boron neutron capture therapy," conducted by Dr. William Sweet decades ago. The BNCT procedure involved use of AEC-licensed research reactors at MIT and at the Brookhaven National Laboratory. The families of several of Dr. Sweet's patients filed tort suits for damages against Dr. Sweet and others on the claim that BNCT treatment caused radiation-related injury and death to loved

ones. *See Heinrich v. Sweet*, 62 F.Supp.2d 282 (D. Mass. 1999). Dr. Sweet, like MIT and Mass General, seeks from the government Price-Anderson reimbursement for his legal fees and costs.

As noted above (in the discussions of the *Massachusetts General* and *MIT* cases), the Claims Court rejected our argument that medical malpractice-type claims lie outside Price-Anderson. In consultation with DOJ, we currently are pursuing other defenses.

CONTACT: Marjorie S. Nordlinger
415-1616

Westinghouse Electric Co. v. United States, No. 4:03-CV-00861 (DDN) (E. D. Mo.)

This is a lawsuit for government contribution under CERCLA for cleanup of the Hematite site in Missouri. We are working with the Justice Department in defending the suit.

CONTACT: Charles E. Mullins
415-1616

CLOSED CASES

McGee v. NRC, No. 03-60245 (5th Cir., decided July 7, 2003)

This *pro se* petition for review presented a garbled account of alleged mistreatment by various government agencies, including the Nuclear Regulatory Commission. We filed a motion to dismiss on the ground that petitioner had not participated in an NRC proceeding and had failed to identify an NRC order that aggrieved him.

The court of appeals (Barksdale, DeMoss & Benavides, JJ.) issued a summary order dismissing the petition for review for lack of jurisdiction.

CONTACT: Charles E. Mullins
415-1616

Ohngo Gaudadeh Devia v. NRC, No. 02-9583 (10th Cir., decided June 2, 2003)

In this case, a group of dissident Goshute Indians challenged a Commission adjudicatory decision, CLI-02-20, 56 NRC 147 (2002), rejecting their “environmental justice” challenge to the Private Fuel Storage license application. We argued that the lawsuit was premature, given that the Commission had not yet made a final decision on whether to license the PFS facility. The license applicant, PFS, made the same argument. Petitioners claimed that the environmental justice decision was in fact final and had immediate consequences.

Although we had suggested that the court could avoid deciding the finality question by holding the case in abeyance to await a final licensing decision, the court (Ebel, Brorby & Henry, JJ.) issued a short order dismissing the suit outright.

CONTACT: Grace H. Kim
415-3605

Parents Concerned About Indian Point v. NRC, No. 02-4243 (2d Cir.)

This petition for review challenged a Commission refusal to reopen emergency planning hearings, terminated nearly twenty years ago, concerning emergency planning at the Indian Point nuclear power reactors. The petitioner was a citizens group who had participated in the original emergency planning hearings. The citizens group filed its lawsuit pro se. We moved to dismiss the court case on multiple grounds. The court of appeals (Leval, Calabresi & Trager, JJ.) dismissed the case summarily, pointing to our argument that a citizens group could not proceed in court "without the representation of an attorney."

CONTACT: Charles E. Mullins
415-1618

Syms v. Olin Corp., et al., No. 00-CV-732A (SR) (W.D. N.Y.)

Several property owners in upstate New York filed this lawsuit against a private corporation and a number of government agencies and officials, including the NRC. Plaintiffs sought money damages as compensation for their past and future "response costs" in cleaning up radioactive contamination at a former Manhattan Project site near Lake Ontario. Plaintiffs invoked both CERCLA and the Federal Tort Claims Act as the basis for their damages suit.

We informed DOJ that there was no basis for NRC liability because the site was not NRC regulated. The case was settled without any concession of NRC liability or responsibility.

CONTACT: Susan G. Fonner
415-1629

Westinghouse Electric Co. v. United States, No. 99-1015C (U.S. Court of Federal Claims)

This is a damages case arising out of an environmental cleanup of a contaminated industrial site in Blairsville, Pennsylvania, used in the production of fuel for the Navy's nuclear programs. The claim is that a contract between the Atomic Energy Commission and plaintiff obliges the government to foot the bill for the cleanup. Plaintiff sought monetary relief under both the contract and CERCLA.

Plaintiff named the United States, the NRC and the Department of Energy as defendants in the case. We informed the Department of Justice that there is no basis for NRC involvement

because the Blairsville site is not an NRC-regulated site, but derives from an AEC function inherited by DOE. We cooperated with DOJ on discovery proceedings. The case was settled without any concession of NRC liability or responsibility.

CONTACT: Charles E. Mullins
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