LITIGATION STATUS REPORT
(As of Feb. 4, 2009)

ACTIVE CASES[1]

Brodsky v. NRC, No. 08-1454 ag (2d Cir.)

Petitioners in this case, a New York assemblyman and citizen groups, challenge an exemption from fire protection requirements that the NRC Staff granted to Indian Point. Petitioners argue that the exemption should have triggered an NRC hearing and was in any event unreasonable and unlawful. NRC's brief is due in March.

CONTACT: Robert M. Rader
415-1955

Crane v. NRC, No. 08-72973 (9th Cir.)

Petitioner in this case, formerly a lawyer at NRC, is challenging the agency's denial of his rulemaking petition. The rulemaking petition asked NRC to roll back a 1997 rule allowing doctors to release radiation-treated patients from the hospital if the potential dose to other persons did not exceed 500 millirem. Petitioner sought a more protective rule. After reviewing the petition and the comments it triggered, NRC refused to alter the 1997 rule.

The case is fully briefed and is awaiting argument and decision.

CONTACT: Robert M. Rader
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Dey v. NRC, No. 08-3299 (Fed. Cir.)

This petition for review challenged a Merit Systems Protection Board (MSPB) decision sustaining an NRC decision to remove an employee from his position. On January 9, 2009, the court of appeals (Newman, Schall & Gajarsa, JJ) upheld the MSPB decision as supported by substantial evidence. The court decision is not reported.

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[1] For statistical purposes, we count as "active" any case pending before a court, or still subject to further judicial review, as of January 1, 2009. The narratives accompanying each listed case include post-January 1 developments, however.

Dey v. Klein, No. 08-cv-02400 (D. Md.)

This is an employment discrimination suit. NRC lawyers are collaborating with the United States Attorney's office. They expect to file a motion to dismiss the complaint.

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Eastern Navajo Dine Against Uranium Mining v. NRC, No. 07-9505 (10th Cir.)

Petitioners in this case challenge a series of Commission adjudicatory rulings culminating in the approval of an *in situ* uranium mining license for Hydro Resources, Inc. Hydro Resources sought the license to mine uranium in Crownpoint and Church Rock, New Mexico. Petitioners argue that granting the license was unreasonable and unlawful under the AEA and NEPA. Petitioners focus on dose calculation and financial assurance issues.

All briefs were filed in 2007, and the case was orally argued in May, 2008. The case is awaiting decision.

CONTACT: Charles E. Mullins
415-1618

Epstein v. United States, No. 08-3963 (3d Cir.)

In this case, petitioner seeks to overturn an NRC denial of a rulemaking petition. The rulemaking petition asked NRC to expand its license renewal reviews to include emergency planning. We filed the record, but petitioner failed to file a brief on its due date. The court of appeals dismissed the suit for non-prosecution. Petitioner has until February 12 to seek rehearing and try to reinstate his suit.

CONTACT: Grace H. Kim
415-1607

Kandel v. United States, No. 1:06-cv- 872 (Court of Federal Claims)

This is a class action suit brought against the United States by federal retirees seeking additional retirement benefits on account of alleged mishandling of annual leave at the time of retirement. The complaint, originally captioned *Solow v. United States,* but now renamed, includes the NRC and other federal agencies. The government is seeking dismissal on statute of limitations grounds.

CONTACT: Mark Maxin
415-1554

McCracken v. Brookhaven Science Associates, LLC, No. 08-cv-2642 (E.D.N.Y.)

Plaintiff seeks millions of dollars in damages from the government, including the NRC, and from private and national laboratories for alleged radiation injuries. The United States Attorney's office in Brooklyn (NY) is representing the government and has sought dismissal on jurisdictional grounds. Plaintiff filed, but then voluntarily dismissed, a similar suit in Pennsylvania (*McCracken v. Brookhaven Science Associates, LLC,* No. 08-cv-2934 (E.D. Pa.)).

CONTACT: Maxwell C. Smith
415-1246

Miles v. Klein, No. 08-cv-01822 (RMC) (D.D.C..)

This is an employment discrimination suit where we are collaborating with the United States Attorney's office on the defense. The government plans to file an answer to the complaint in February.

CONTACT: Sara McAndrew
415-1562

New Jersey Dept. of Environmental Protection v. NRC, No. 07-2271 (3d Cir.)

This lawsuits attacks an NRC adjudicatory decision in the *Oyster Creek* license renewal proceeding. The Licensing Board and the Commission rejected New Jersey's sole contention – that NEPA required a study of the consequences of a terrorist attack. New Jersey, relying on the Ninth Circuit's decision in *San Luis Obispo Mothers for Peace v. NRC,* 449 F.3d 1016 (9th Cir. 2006), *cert denied*, 127 S.Ct. 1124 (2007), seeks to reinstate its "NEPA-terrorism" contention. NRC has filed a brief maintaining that NEPA-proximate cause principles preclude such terrorism claims. NRC's brief also argues that the Generic Environmental Impact Statement for license renewal already analyzes the consequences of a terrorist attack adequately by comparing them to accident consequences.

The court heard oral argument in December, and the case is awaiting decision.

CONTACT: Charles E. Mullins
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New York v. NRC, Nos. 08-3903-ag, 08-4833-ag, 08-5571-ag (consolidated) (2d Cir.)

These consolidated lawsuits challenge an NRC denial of rulemaking petitions seeking changes in NRC's generic environmental findings for license renewal. The three states who have brought suit – New York, Connecticut and Massachusetts – believe that NRC has not taken sufficient account of "new and significant" information on the risk of fires in spent fuel pools, including terrorist-caused fires.

The case has been slow to get off the ground because the states are disputing the proper venue for the suit. Massachusetts argues that the case should be heard in the First Circuit, because it is an outgrowth of a prior case there, *Massachusetts v. NRC,* 522 F.3d 115 (1st Cir. 2008), whereas New York and Connecticut argue for keeping the case in the Second Circuit, because the first petition for review (New York's) was filed there. The court has not yet resolved the matter.

The case likely will be briefed this spring.

CONTACT: James E. Adler
415-1656

Ohngo Gaudadeh Devia v. NRC, Nos. 05-1419, 05-1420, 06-1087 (D.C. Cir.)

These consolidated lawsuits challenge a series of Commission adjudicatory decisions resulting in an authorization to the NRC staff to license the proposed Private Fuel Storage ISFSI in Utah. OGD's brief argued that the NRC did not properly handle an "environmental justice" claim and that the NRC license should be vacated as moot (because other federal agencies have taken action making PFS's use of the NRC license problematic). Utah's brief argued that the NRC did not properly consider the probability and consequences of an air crash into the PFS facility, that the NRC did not take adequate account of the Department of Energy's changing plans for shipping spent fuel to the proposed Yucca Mountain facility, and that the NRC wrongly failed to examine, under NEPA, the consequences of a terrorist attack.

We filed an answering brief arguing that NRC had reasonably resolved all safety and environmental issues. But no merits decision will issue for quite some time, if ever. The court of appeals (*Garland*, Tatel, Rogers, JJ) removed the case form the oral argument calendar and issued a decision finding the NRC case "prudentially" unripe. The court reasoned that the NRC license was currently unusable due to Department of the Interior rulings prohibiting use of the proposed site. The court thus held the lawsuits against NRC in abeyance, pending PFS's effort to overturn the Department of the Interior's adverse rulings. The court directed the parties to file periodic status reports.

Several status reports have been filed. They indicate that PFS has challenged the Interior Department's rulings in a federal district court lawsuit (D. Utah), but that the lawsuit has not yet reached final decision.

CONTACT: Grace H. Kim
415-1607

***Public Citizen v. NRC*,** Nos. 07-71868 & 07-72555 (9th Cir.)

This lawsuit, filed by citizens groups, challenges the NRC's new Design Basis Threat Rule. Under 28 U.S.C. § 2112, a similar suit, filed by the State of New York in the Second Circuit was transferred to the Ninth Circuit and consolidated with this one. Petitioners argue, in essence, that NRC's new rule doesn't take adequate account of the threat of air attack and gives too much weight to licensees' cost-based defense capabilities. We have filed a brief indicating that the new rule is fully in accord with AEA requirements to provide adequate protection and to provide for the common defense and security.

The case was orally argued in November, but has not yet been decided.

CONTACT: Steven Crockett
415-2871

***Salsman v. NRC**,* No. 08-74043 (9th Cir.)

Petitioner, an individual citizen with great interest in the hazards of uranium, filed an unsuccessful rulemaking petition with NRC arguing that uranium's hazards (non-radiological) are worse than NRC has thought and warrants changes in 10 C.F.R. Part 20. He has challenged the rulemaking denial in court.

The case is fully briefed and is awaiting oral argument and decision. Our brief maintains that Mr. Salsman is suffering no personal harm from the current Part 20, and therefore lacks standing to sue. We also argue that NRC's denial of the rulemaking petition was reasonable given current scientific knowledge and the information petitioner presented.

CONTACT: Maxwell C. Smith
415-1246

***San Luis Obispo Mothers for Peace v. NRC**,* 08-75058 (9th Cir.)

Petitioner in this lawsuit, a citizens group, challenges the Commission's decision, after a hearing, to uphold the NRC Staff's environmental assessment of the consequences of a terrorist attack on the proposed ISFSI at Diablo Canyon. Petitioner maintains that, to adequately address the terrorism issue, the Commission ought to have provided access to non-public security information and conducted a closed-door hearing. The Commission hearing in this case was pursuant to a court directive in earlier litigation, *San Luis Obispo Mothers for Peace v. NRC,* 449 F.3d 1016 (9th Cir. 2006), *cert denied*, 127 S.Ct. 1124 (2007),

Petitioner's brief is due in February and the NRC's in March.

CONTACT: Charles E. Mullins
415-1618

United States v. Science Applications International Corp.**,** No. 04-CV-1543 (RWR) (D.D.C.)

The government sued SAIC for damages and other relief arising out of SAIC's contract to provide unbiased advice to the NRC. The NRC hired SAIC to support the agency's rulemaking effort to develop standards applicable to the release of radioactive materials into the environment. After a trial where the United States was represented by Department of Justice and NRC lawyers, the government won a $6.5 million judgment.

SAIC has filed a post-trial motion seeking to set the judgment aside. The post-trial motion is awaiting decision.

CONTACT: Daniel Fruchter
415-1575

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. The United States successfully intervened in a companion suit, *Missouri v. Westinghouse Electric Co.,* involving the State of Missouri's effort to halt the State of Missouri's effort to "settle" with Westinghouse in a way that would compromise the federal government's interests. The government has filed a counterclaim and crossclaims against various parties seeking contribution should the government be held financially liable under CERCLA.

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CLOSED CASES

BASF Catalysts LLC (formerly Engelhard Corp.) v. United States, No. 1:05-cv-11241-JLT (D. Mass.)

This lawsuit sought money damages from the United States (the NRC and other federal agencies were also named defendants). The suit arises out of the clean-up of a former nuclear fuels facility in Plainville, Massachusetts. BASF argued that the United States (*i.e.,* the AEC) exercised sufficient "control" over the nuclear manufacturing operation that the United States may be held liable as an "operator" under CERCLA. BASF also invoked RCRA, "federal common law," and the Declaratory Judgment Act.

The government (represented by the Justice Department) and BASF settled the case, with some funds paid out of the Judgment Fund. No action or payment was required of the NRC.

CONTACT: Susan G. Fonner
415-1629

Curtiss-Wright Electro-Mechanical Corp. v. United States, No. 2:05-cv-0813-NBE (W.D. Pa.).

In this case, a subsidiary of Westinghouse sued the government under CERCLA in an attempt to recover clean-up and decommissioning costs at the Cheswick site in Pennsylvania. Westinghouse contends that the U.S. is liable for some of the costs because (1) the AEC contracted with the site for fuel for the Navy and some of the contamination results from those contracts, and (2) the AEC allegedly allowed the owners to bury wastes at the site.

NRC participated in pre-trial discovery, but the case ultimately settled, with no remedy against the NRC. The government agreed to pay some decontamination costs out of the Judgment Fund.

CONTACT: Charles E. Mullins
415-1618

Missouri v. Westinghouse Electric, L.LC., No. 4:05-cv-00315 SNL (E.D. Mo.)

The State of Missouri sued Westinghouse under state and federal law (CERCLA) to clean up the contaminated Hematite site (the location of a former nuclear fuels manufacturing facility). Missouri and Westinghouse lodged a proposed consent decree that ostensibly would give Missouri regulatory jurisdiction over nuclear materials.

On behalf of the NRC and the Department of Energy, the United States filed a motion to intervene to protect federal responsibilities against state encroachment and to protect federal financial interests. NRC lawyers collaboratied with Justice Department lawyers on the case. In early 2007, the district court (Limbaugh, J) agreed with our argument that portions of the proposed consent decree preempted by the NRC's exclusive authority over nuclear materials under the Atomic Energy Act and issued a published opinion to that effect. 487 F. Supp. 1076 (E.D. Mo. 2007).

Ultimately Missouri withdrew this lawsuit, although the Hematite clean-up controversy continues in a still-pending lawsuit, *Westinghouse Elec. Co. v. United States,* No. 4:03-CV-00861 (DDN) (E.D. Mo.).

CONTACT: Charles E. Mullins
415-1618

Massachusetts v. United States, Nos. 07-1482 & 07-1483 (1st Cir.)

In these consolidated lawsuits the Commonwealth of Massachusetts challenged adjudicatory decisions in the *Vermont Yankee* and *Pilgrim* license renewal proceedings. In each of these cases Massachusetts submitted a NEPA contention claiming that NRC had not adequately examined the consequences of fires in spent fuel pools. The Licensing Board and the Commission rejected the contention as, in effect, a collateral attack on NRC's generic environmental regulations. Massachusetts followed up its contention with a petition for rulemaking to change the regulations.

The First Circuit (*Lynch,* Torruella & Stahl, JJ) ruled that the Commission properly excluded Massachusetts's generic contention from the license renewal adjudications and properly required Massachusetts to pursue its grievance in a rulemaking petition. The court indicated that Massachusetts could, as we had agreed, participate in the license renewal proceedings as in "interested state" and use that status to seek a stay of license renewal pending a decision on the rulemaking petition. (The rulemaking petition was subsequently decided, giving rise to new, still-pending litigation (*New York v. NRC,* No. 08-3903-ag & consolidated cases (2d Cir.)).

Petitioner sought no further review in this case. The First Circuit's decision is reported at 522 F.3d 115 (1st Cir. 2008).

CONTACT: John F. Cordes
415-1956

***New Jersey v. NRC*,** Nos. 06-5140, 07-1559, 07-1756 (3d Cir.)

The State of New Jersey brought this series of lawsuits to challenge revisions in an NRC guidance document on decommissioning, NUREG-1757, that purportedly authorizes a new form of decommissioning - - a so-called "long-term control" license. New Jersey is concerned that NUREG-1757 will be invoked to justify an inadequate (in New Jersey's view) clean-up of the contaminated Shieldalloy industrial site in southern New Jersey.

The court of appeals (*Sloviter,* Jordan & Alarcon, JJ) agreed with our arguments that New Jersey's lawsuits are premature and improper, given that New Jersey is free to raise its concerns about NUREG-1757 in an ongoing NRC administrative adjudication over the Shieldalloy decommissioning. New Jersey unsuccessfully sought rehearing. The court of appeals decision is reported at 526 F.3d 98 (3d Cir. 2008).

CONTACT: Charles E. Mullins
415-1618

Nuclear Information and Resource Service v. NRC, Nos. 06-1301 & 06-1310 (D.C. Cir.)

These consolidated lawsuits challenged a series of adjudicatory decisions culminating in granting a license to LES for a uranium enrichment facility in New Mexico. Petitioners raised an array of safety and environmental issues. In late 2007, the court of appeals (*Kavanaugh,* Rogers, JJ., Ginsburg, CJ) found that petitioner-public interest groups had standing to challenge the LES license, but the court ruled for NRC on all substantive issues. Among other things, the court held that NRC had properly prepared an EIS before the agency hearing, that NRC's analysis of the impacts and costs of depleted uranium disposal was reasonable, and that the late Commissioner McGaffigan did not abuse his discretion in declining to disqualify himself from the adjudication due to certain non-adjudicatory remarks.

Petitioners did not seek further review. The court of appeals decision is reported at 509 F.3d 562 (D.C. Cir. 2007).

CONTACT: John F. Cordes
415-1956

Spano v. NRC**,** Nos. 07-0324 & 07-1276 (2d Cir.)

These consolidated lawsuits, filed by the County Executive for Westchester County, New York, and by the County itself in the Second Circuit and by a New Jersey citizens group in the Third Circuit, challenged an NRC decision rejecting petitions for rulemaking seeking changes in the

license renewal rule (10 C.F.R. Part 54). The rulemaking petitions asked the NRC to expand the scope of issues considered at the license renewal stage to focus on questions in addition to aging. The cases were consolidated in the Second Circuit.

After oral argument, the court of appeals (Cabranes, Katzmann & Korman, JJ) issued a short decision agreeing with NRC's position that the agency had acted reasonably in treating everyday (non-aging) operational issues within its regular regulatory program rather than as license renewal matters.

Petitioners sought no further review. The court of appeals decision is available at 293 Fed. APPX. 91 (2d Cir. 2008).

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