ADJUDICATORY ISSUE
INFORMATION

January 31, 2001 SECY-01-0014

FOR: The Commission

FROM: John F. Cordes, Jr.
Solicitor

SUBJECT: ANNUAL REPORT ON COURT LITIGATION (CALENDAR YEAR 2000)

PURPOSE: To Inform the Commission of the Status of Litigation in the Courts

DISCUSSION:

Attached is a report updating events in NRC court litigation since my last cumulative annual report dated February 8, 2000 (SECY-00-031). This report reflects the status of NRC cases in court as of January 31, 2001.

During the reporting period (calendar year 2000), the Commission or its officials were sued once in the courts of appeals,[1] three times in federal district courts,[2] twice in the United States Court of Federal Claims,[3] once in federal bankruptcy court,[4] and once in state court.[5] The Commission also participated in one court of appeals case as amicus curiae.[6] During this same

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[1] State of Maine v. NRC, No. 00-1476 (D.C. Cir.).

[2] Grand Canyon Trust v. NRC, No. 2:00CV-0288 ST (D. Utah); Patel v. Miller, No. 99-cv-3938 (E.D. Pa.); Syms v. Olin Corp., No. 00-CV-732A (W.D.N.Y.).

[3] Massachusetts Institute of Technology v. United States, No. 00-292 C (U.S. Court of Federal Claims); Sweet v. United States, No. 00-00-274 C (U.S. Court of Federal Claims).

[4] In re: Maxima Corp., No. 98-18580-pm (Chapter 11), Adversary No. 0-1371-pm (D. Md. Bankruptcy Ct.).

[5] Baxter v. State of New Jersey, No. ESX-L-3813-00 (Superior Court, N.J.).

[6] Kennedy v. Southern California Edison Co., No. 98-56157 (9th Cir.).

one-year period eleven cases were closed.[7] The nine new cases in 2000 compare to fifteen in 1999, twelve in 1998, four in 1997, ten in 1996, and sixteen in 1995.

We also handled eleven requests (so-called "Touhy" requests) for NRC testimony, depositions or other evidence for use in private litigation in 2000. The eleven Touhy requests in 2000 are a few more than what we saw in 1999 (seven), but in general continue a downward trend in such requests in recent years: there were ten in 1998, twenty in 1997, twenty-nine in 1996, and thirty-six in 1995.

Attachment: Litigation Status Report

[7] Baxter v. State of New Jersey, No. ESX-L-3813-00 (Superior Court, N.J.); Dienethal v. NRC, No. 99-1132 (D.C. Cir.); Eastern Navajo Dine v. NRC, Nos. 99-1190, 99-1194, 99-1195 & 99-1196 (D.C. Cir.); F.A.C.T.S. (For A Clean Tonawanda Site), Inc. v. NRC, No. 98-0354E(h) (W.D.N.Y.); Fields v. NRC, No. 1:98CV01714 (D.D.C.); Grand Canyon Trust v. NRC, No. 2:00CV-0288 ST (D. Utah); Natural Resources Defense Council, Inc. v. NRC, No. 99-1383 (D.C. Cir.); Patel v. Miller, No. 99-cv-3938 (E.D. Pa.).

LITIGATION STATUS REPORT
As of January 31, 2001

ACTIVE CASES [1]

Grand Canyon Trust v. NRC, No. 99-70922 (9th Cir.)

This petition for review challenges the Commission's failure to grant emergency relief on a section 2.206 petition and also the agency's issuance of a license amendment approving a reclamation plan for the former Atlas mill tailings site in Moab, Utah. Petitioners' principal claim is that the NRC licensing action violates the Endangered Species Act by not taking adequate account of endangered fish in the Colorado River.

All briefs are before the court of appeals, with an oral argument originally set for February 9, 2001. Last October, however, Congress enacted new legislation transferring responsibility for the Moab mill tailings site to the Department of Energy, effective no later than next fall. Petitioners filed a motion to postpone the oral argument and to hold the case in abeyance pending petitioners' consideration of whether their lawsuit is moot. We did not object to petitioners' motion, and the court has postponed the oral argument, and called for a report from the parties by May 15, 2001.

Petitioners also sought Endangered Species Act relief before the ASLB, before the NRC staff on an enforcement petition under 10 C.F.R. § 2.206, and before a federal district court in Utah. The ASLBP dismissed petitioners' agency claims as moot in view of the new legislation. Both the NRC staff and the federal district court are considering the mootness question.

CONTACT: Marjorie S. Nordlinger
415-1616

Grand Canyon Trust v. Babbitt, No. 2:98CV0803S (D. Utah)

This lawsuit, brought by Utah environmental groups and individuals, claims that the Secretary of the Interior and the NRC have violated the Endangered Species Act in allowing the Atlas Corporation to continue to store radioactive mill tailings near the Colorado River and in considering a reclamation plan that will leave the mill tailings in place. The NRC staff had not yet taken licensing action to permit the reclamation plan at the time the lawsuit was filed, but did so few months later.

We moved to dismiss the suit against the NRC on the ground that exclusive jurisdiction for judicial review of NRC licensing-related activities lies in the courts of appeals under the Hobbs Act. After our motion remained dormant for more than a year, the district court finally acted on it, agreed with our position, and dismissed plaintiffs' claims against the NRC.

The district court rejected plaintiffs' "attempt to evade" the Hobbs Act's exclusive jurisdiction provision by challenging "ongoing" NRC activities rather than "final" NRC orders as specified in

[1] For statistical purposes, we list as "active" any case that was pending before a court as of January 1, 2001. The narratives accompanying each listed case include post-January 1 developments.

the Act. Citing precedent, the court concluded that the courts of appeals have exclusive jurisdiction to review not only final NRC licensing orders but also NRC actions "ancillary" to licensing. Finally, the court ruled that the Endangered Species Act's own jurisdictional provisions, which call for district court lawsuits, do not override the Hobbs Act's express provision for court of appeals jurisdiction in NRC licensing matters.

Plaintiffs still could appeal the district court's jurisdictional ruling at the end of the case (plaintiffs' claims against the Secretary of the Interior remain pending), but it is unlikely that they will attempt an appeal. Recent legislation transferring authority over the Colorado site to the Department of Energy seemingly renders plaintiffs' lawsuit moot.

We are working with Department of Justice attorneys on the case.

CONTACT: Marjorie S. Nordlinger
415-1616

Kennedy v. Southern California Edison Co., No. 98-56157 (9th Cir.)

This is a private tort suit arising out of the offsite dispersion of "fuel fleas" at Southern California Edison's San Onofre nuclear power reactor in the 1980s. The wife of a former worker at the plant brought the suit against the utility on the theory that her rare leukemia had resulted from exposure to the fuel fleas. After a jury trial, the jury found for the utility, and the federal district court entered judgment for the utility.

Subsequently, on appeal, the federal court of appeals (Ninth Circuit) reinstated the lawsuit on the ground that the federal trial judge improperly had failed to instruct the jury that a small increase in risk resulting from the fuel fleas, on the order of 1 in 100,000, may suffice for legal causation under California law.

At the request of our agency and of the Department of Energy, the Department of Justice filed an amicus curiae brief supporting rehearing or rehearing en banc. We worked with DOJ and DOE on the brief. Our brief maintained that the court of appeals panel may have misconstrued California law on causation. We also argued that if the court of appeals' view of California law is correct, the California law is preempted and must give way to the federal Price-Anderson Act, which (in our view) requires actual causation, not minuscule increases in risk, as a prerequisite to a valid radiation tort claim.

The panel recently granted rehearing and called for supplemental briefs on the preemption argument.

CONTACT: John F. Cordes
415-1600

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, No. 00-274 C (U.S. Court of Federal Claims), seeks 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 the Massachusetts Institute of Technology (MIT). MIT relies on a 1959 indemnity agreement between MIT and the Atomic Energy Commission under the Price-Anderson Act -- an agreement that requires the government, according to MIT, to reimburse MIT's legal expenses exceeding $250,000. MIT says that it incurred more than one million dollars in expenses in defending the Heinrich suit.

In conjunction with the Department of Justice, we filed a motion to dismiss and for summary judgment. Our motion argues, among other things, that Price-Anderson indemnity agreements do not cover what, in essence, are medical malpractice claims. We expect a decision later this year.

CONTACT: Marjorie S. Nordlinger
415-1616

In re: Maxima Corp., No. 98-18580-pm (Chapter 11), Adversary No. 0-1371-pm (D. Md., Bankruptcy Ct.)

This lawsuit, the offshoot of an ongoing Chapter 11 bankruptcy proceeding, seeks from the NRC approximately $50,000 in allegedly overdue payments under contracts for computer services. The plaintiff is the bankruptcy trustee.

We have answered the complaint, and are working with the United States Attorney's Office and our Office of Administration on discovery and on efforts to reach a settlement.

CONTACT: Grace H. Kim
415-3605

National Whistleblower Center v. NRC, Nos. 99-1002 & 99-1043 (D.C. Cir.)

This lawsuit arose out of the Calvert Cliffs license renewal proceeding. On November 12, 2000, a split panel of the D.C. Circuit issued a decision requiring the Commission to reconsider whether to grant the sole potential intervenor in the Calvert Cliffs proceeding an extension of time to formulate and file contentions. The panel reasoned that the Commission improperly had stiffened its extension-of-time standards, moving from a "good cause" test to an "unavoidable and extreme circumstances" test, without providing advance notice and opportunity for public comment.

Ten days later, on its own motion, the court reconsidered. It vacated the panel decision and set the case for supplemental briefing and oral argument before a reconstituted panel. (One of the judges on the original panel had retired.) Chief Judge Edwards explained that the vacated panel opinion "fails to address some critical issues in this case," pointing in particular to the apparent "procedural" nature of the extension-of-time rule and to the Commission's legal flexibility to alter procedural rules without prior notice and comment. After rebriefing and reargument, the court of appeals (Edwards, C.J., Williams & Sentelle, JJ.) ruled in favor of the NRC on all issues.

The court held, "first, that the NRC was free to adopt, without resort to notice-and-comment rulemaking, the 'unavoidable and extreme circumstances' standard for application in the Calvert Cliffs proceeding." The court pointed out that the Commission had given advance notice of the new standard, both in a policy statement and in a case-specific order, and that the standard was a reasonable means to accomplish "expedited case processing." No notice and comment were necessary, said the court, because the new standard "embodies a procedural rule." Finally, commenting that "this case appears to be much ado about nothing," the court concluded that the new extension-of-time standard had not harmed petitioners, because the Commission granted petitioners one extension of time, and they never sought another.

Petitioner unsuccessfully sought review before the en banc court of appeals and before the United States Supreme Court. The Supreme Court's denial of certiorari on January 8, 2001, brings the long-running litigation to an end.

CONTACT: Marjorie Nordlinger
415-1616

State of Maine v. NRC, No. 00-1476 (D.C. Cir.)

The State of Maine filed this lawsuit to contest the NRC's amendment of Part 72 of its regulations to add the "NAC-UMS" dry cask storage system to the agency's list of approved spent fuel storage casks. Maine also filed a motion seeking to stay the effectiveness of the NAC-UMS rule. Maine's principal argument was that the NRC had not adequately consulted the Department of Energy on the NAC-UMS storage system (which is designed to be a dual-purpose cask covering both on-site dry storage and ultimate transport to a national repository). We opposed the State of Maine's stay motion. The cask manufacturer, NAC, and its potential user, Maine Yankee, intervened in the lawsuit and also opposed the stay motion.

The parties thereafter engaged in settlement talks. With the Commission's approval, we reached a settlement agreement whereby the NRC would give DOE a chance to comment on the transportation aspects of the NAC-UMS cask and the State of Maine would withdraw its lawsuit. Maine has filed a motion to dismiss its petition for review, with prejudice, but the court of appeals has not yet acted on it.

In view of the settlement agreement, the NRC staff has sent a letter to DOE giving it the opportunity to comment on using the NAC-UMS system for transport.

CONTACT: Steven F. Crockett
415-1622

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

This lawsuit arises out of medical research and treatment, known as "boron neutron capture therapy" (BNCT), conducted by Dr. William Sweet during the 1950s and 1960s. 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 lawsuits for damages against Dr. Sweet and others on the claim that the administration of BNCT caused

radiation-related injury and death to loved ones. See Heinrich v. Sweet, 62 F.Supp.2d 282 (D. Mass. 1999).

Late last year a federal district court jury in Boston entered multi-million dollar judgments against Dr. Sweet and against Massachusetts General Hospital. Those verdicts were reduced to approximately one million dollars on post-trial motions, and currently are on appeal before the United States Court of Appeals for the First Circuit.

In the Court of Federal Claims Dr. Sweet maintains that the NRC must indemnify him for the legal expenses he has incurred thus far (about $300,000) and for any actual judgments that are entered against him in this or in future similar lawsuits. According to Dr. Sweet, when the AEC licensed the MIT and Brookhaven reactors, it entered indemnity contracts agreeing, under the Price-Anderson Act, to pay any damages for "public liability" arising out of a "nuclear incident." Dr. Sweet claims that this contract covers lawsuits and potential liability against him for his medical use of the MIT and Brookhaven reactors. MIT has filed a companion suit, Massachusetts Institute of Technology v. United States, No. 00-292 C (U.S. Court of Federal Claims), seeking government indemnity for its legal costs.

We collaborated with the Department of Justice in filing a motion to dismiss and for summary judgment. Our motion argues, among other things, that Price-Anderson indemnity agreements do not cover what are, in essence, medical malpractice claims. We expect a decision later this year.

CONTACT: Marjorie S. Nordlinger
415-1616

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 seek 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 invoke both CERCLA and the Federal Tort Claims Act as the basis for their damages suit.

We are working with Department of Justice attorneys in defending this suit. The government has filed an answer to the complaint.

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 seeks monetary relief under both the contract and CERCLA.

Plaintiff has named the United States, the NRC and the Department of Energy as defendants in the case. We have informed the Department of Justice that there is a basis here for claiming NRC involvement because the Blairsville site is not an NRC-regulated site, but derives from an AEC function inherited by DOE.

CONTACT: Charles E. Mullins
415-1618

CLOSED CASES

Baxter v. State of New Jersey, No. ESX-L-3813-00 (Superior Court, N.J.)

This state-court lawsuit against the State of New Jersey, the NRC, an NRC employee and others arises out of a 1998 automobile accident in New Jersey. Plaintiffs sought money damages. After the United States Attorney's office informed plaintiffs that the exclusive remedy for torts by the federal government and its employees lies in federal court under the Federal Tort Claims Act, plaintiffs withdrew their state-court complaint.

Still pending before the NRC is an administrative claim for damages filed by the same claimants for the same accident.

CONTACT: Donald F. Hassell
415-1550

Dienethal v. NRC, No. 99-1132 (D.C. Cir.)

Petitioner in this case challenged a license amendment for Commonwealth Edison's shut-down Zion reactor. The amendment, among other things, removed a requirement that radiation protection personnel ("RPP") be present 24 hours a day. The Licensing Board dismissed the hearing request for lack of standing. On appeal to the Commission (and ultimately to the court of appeals), petitioner maintained that, as a nearby resident, he had standing because a reduction in RPP increased the risk that radiation would migrate offsite and injure him. The Commission turned down petitioner's appeal, holding that he had failed to raise his RPP argument for standing before the Board, and that his argument lacked substance given Zion's shutdown. Petitioner then brought this lawsuit.

On January 21, just ten days after oral argument, the court of appeals (Williams, Randolph & Tatel, JJ) issued a one page order denying the petition for judicial review on the ground that "[t]here is no reversible error in the procedural reasons on which the Commission relies, and they are sufficient to justify the Commission's decision."

Petitioner sought no further review.

CONTACT: John F. Cordes
415-1600

Eastern Navajo Dine v. NRC, Nos. 99-1190, 99-1194, 99-1195 & 99-1196 (D.C. Cir.)

In mid-1999, the court of appeals (Silberman, Henderson & Tatel, JJ) dismissed as premature petitioners' challenge to several interlocutory adjudicatory orders in the pending Hydro Resources administrative adjudication and ordered petitioners to show cause why they should not be assessed sanctions for bringing clearly groundless lawsuits. Petitioners had maintained that their challenge was timely, despite the ongoing administrative process that they had initiated, because the license had already taken effect.

In a subsequent order, the court in fact assessed sanctions and asked us to "submit documentation supporting [our] fees and costs within 30 days." We consulted with the Department of Justice, and prepared papers seeking $6,258.59. This figure reflected attorney salaries, overhead and printing expenses associated with our motion to dismiss (and a reply memorandum).

Petitioners did not object to our figure and in fact promptly submitted a check in the requested amount. The court of appeals' Clerk's Office informed us that the Court considers petitioners' payment the final action in the proceeding, and has closed the case.

CONTACT: John F. Cordes
415-1600

F.A.C.T.S. (For a Clean Tonawanda Site), Inc. v. NRC, No. 98-0354E(H) (W.D.N.Y.)

Plaintiff in this lawsuit sought, among other things, a judicial order requiring the NRC to exercise regulatory jurisdiction over radiological waste at DOE sites in Tonawanda, New York. Pursuant to Congressional directive, the Army Corps of Engineers is currently cleaning up the sites under the so-called "FUSRAP" program. In 1998, the district court issued an order transferring plaintiff's claim against the NRC to the court of appeals and dismissing the remainder of the suit (i.e., claims against DOE and the Corps of Engineers). Both plaintiff and the NRC sought reconsideration.

The district court (Elfin, J) did reconsider, and on June 23, 2000, issued an order dismissing the suit in its entirety. The court pointed out that the Corps was conducting the Tonawanda clean-up pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which flatly prohibits any judicial interference in ongoing CERCLA clean-ups. Because "no federal court may exercise jurisdiction over plaintiff's declaratory judgment action until the response at the Tonawanda Sites is completed," the district court found a transfer to the court of appeals "inappropriate," and accordingly dismissed the case.

Plaintiff took no appeal.

CONTACT: Susan G. Fonner
415-1629

Fields v. NRC, No. 1:98CV01714 (D.D.C.)

Plaintiff in this lawsuit was a licensed operator at the Crystal River Nuclear Plant in Florida. In 1994, after becoming frustrated by his management's inattention to an alleged safety problem at the plant, plaintiff and a colleague conducted their own "experiment" to substantiate their

safety concerns. The concerns turned out to be well-founded, and led to the NRC's imposition of a large civil penalty ($500,000) against Florida Power and Light Company. The NRC took no enforcement action against plaintiff for his unilateral experiment but in letters stated that his actions were unlawful and that the "ends do not justify the means." Plaintiff and his colleague lost their positions as licensed operators at Crystal River.

Plaintiff's initial complaint demanded correction of his NRC records under the Privacy Act. The district court (Sullivan, J.) denied Privacy Act relief on the ground that the Act does not serve as a vehicle for challenging agency action. Plaintiff then amended his complaint to allege Administrative Procedure Act (APA) and due process violations. On February 7, 2000, the district court dismissed those claims on the ground that the agency had taken no action against plaintiff giving rise to legal claims -- i.e., no "final agency action" for APA purposes and no deprivation of a "liberty" or "property" interest for due process purposes.

We worked with the U.S. Attorney's office in this case.

CONTACT: Catherine M. Holzle
415-1560

Grand Canyon Trust v. NRC, No. 2:00CV-0288 ST (D. Utah)

Plaintiff filed a Freedom of Information Act "request for documents related to the financial capability of the NRC's licensee, the Atlas Corporation, to clean up a massive radioactive waste site on the banks of the Colorado River." Plaintiff sought a waiver of FOIA search and copying fees on "public interest" grounds. The NRC denied the request for a fee waiver, both initially and on administrative appeal. The estimated FOIA fees are about $386.

After a number of motions were filed, and after consultation with the United States Attorney's office, we ultimately reached a settlement of this case whereby we agreed to waive the copying fees and pay some of plaintiff's attorney's fees in return for dismissal of the lawsuit, with prejudice.

CONTACT: Catherine M. Holzle
415-1560

Natural Resources Defense Council, Inc. v. NRC, No. 99-1383 (D.C. Cir.)

This lawsuit challenged the Commission's implementation of new Sunshine Act rules, first promulgated in 1985 but not put into effect until last summer. The new rules give the Commission more flexibility to gather as a group, and to discuss general agency business, without triggering the Sunshine Act's procedural requirements. Under the new rules, the Commission can conduct "non-Sunshine Act meetings" where the discussions are not "focused on discrete proposals or issues" and are "not likely to cause the individual participating members to form reasonably firm positions."

Petitioners attacked the new rules as inconsistent with the Sunshine Act's definition of "meeting" and as containing insufficient procedural protections against Sunshine Act violations. The court of appeals (Edwards, CJ, Garland & Randolph, JJ) rejected both arguments. The court held that the "Commission has done nothing more than adopt, verbatim, the Supreme Court's own interpretation of the meaning of 'meeting' under the Act," and that a requirement of additional Sunshine Act procedures would run afoul of the Supreme Court's "injunction against imposing non-statutory procedural requirements on agency decisionmaking." See Slip op. at 2.

Petitioners did not seek en banc or Supreme Court review.

CONTACT: Catherine M. Holzle
415-1560

Patel v. Miller & United States, No. 99-cv-3938 (E.D. Pa.)

This is a Federal Tort Claims Act suit for damages arising out of an automobile accident in Pennsylvania. The United States Attorney's office worked out a settlement whereby the a car rental company took on the liability, and the lawsuit against the government was dismissed.

CONTACT: Donald F. Hassell
415-1550