

ADJUDICATORY ISSUE INFORMATION

May 11, 2000

SECY-00-0103

FOR: The Commission

FROM: John F. Cordes, Jr. **/RA/**
Solicitor

SUBJECT: LITIGATION REPORT - 2000 - 2

National Whistleblower Center v. NRC, Nos. 99-1002 & 99-1043 (D.C. Cir., decided April 11, 2000)

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.

Petitioners have 45 days to seek rehearing in the court of appeals and 90 days to seek review in the Supreme Court.

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Grand Canyon Trust v. Babbitt, No. 2:98CV0803S (D. Utah, decided April 19, 2000)

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 first the Atlas Corporation, and now a bankruptcy trustee, to continue to store radioactive mill tailings near the Colorado River in Moab, Utah, and in considering a reclamation plan that will leave the mill tailings in place.

Working with Department of Justice attorneys, we moved to dismiss the suit against the NRC on the ground that under the Hobbs Act exclusive jurisdiction for judicial review of NRC licensing-related activities lies in the courts of appeals. The district court (Sam, J.) agreed with our view and granted our motion to dismiss. The 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 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.

The remainder of the lawsuit -- i.e., the claim against the Secretary of the Interior for an allegedly invalid "biological opinion" -- remains pending on summary judgment motions. Plaintiffs also continue to seek relief against the NRC in the United States Court of Appeals for the Ninth Circuit (where all briefs are in and the case awaits argument). In addition, plaintiffs are pursuing a hearing before the NRC's Atomic Safety and Licensing Board Panel.

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Fields v. NRC, No. 1:98CV01714 (EGS) (D.D.C., decided Feb. 7, 2000)

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 Company. The NRC took no enforcement action against plaintiff for his unilateral activity but in letters stated that his actions were unlawful and that the "ends do not justify the means."

Plaintiff and his colleagues lost their positions as licensed operators at Crystal River. Their efforts to gain reinstatement through the Department of Labor "whistleblower" process proved unsuccessful. Plaintiff then brought a pro se lawsuit against the NRC.

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. The district court's latest order

dismisses 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.

Plaintiff has taken no appeal, and presumably has decided to pursue his grievance no further.

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Grand Canyon Trust v. NRC, No. 2:00CV-0288 ST (D. Utah, filed April 3, 2000)

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. We are consulting the United States Attorney's office on how best to handle this case.

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Baxter v. State of New Jersey, No. ESX-L-3813-00 (Superior Court, N.J., filed April 14, 2000)

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 seek money damages. As the exclusive remedy for torts by the federal government and its employees lies in federal court under the Federal Tort Claims Act, we likely will remove this case to federal court and then seek dismissal of the lawsuit. We are working with the United States Attorney's office in this case.

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

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