

ADJUDICATORY ISSUE
(Information)

February 6, 2003

SECY-03-0018

FOR: The Commission

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

SUBJECT: ANNUAL REPORT ON COURT LITIGATION (CALENDAR YEAR 2002)

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 January 30, 2002 (SECY-00-014). This report reflects the status of NRC cases in court as of February 6, 2003.

During the reporting period (calendar year 2002), the Commission or its officials were sued four times in the courts of appeals,¹ and four times in federal district courts.² During this same one-year period five cases were closed.³ The 8 new court cases in 2002 are roughly in line with what we have come to expect. There were 5 new cases in 2001, 9 in 2000, 15 in 1999, 12 in 1998, 4 in 1997, 10 in 1996, and 16 in 1995, for an average of roughly 10 per year in recent times.

We also handled 8 requests (so-called "*Touhy*" requests) for NRC testimony, depositions or other evidence for use in private litigation in 2002. The 8 *Touhy* requests in 2002 are down slightly from the 11 *Touhy* requests we handled in both 2000 and 2001, and much lower than what we saw a few years ago (e.g., 20 in 1997, 29 in 1996, and 36 in 1995).

Attachment: Litigation Status Report

LITIGATION STATUS REPORT

As of February 6, 2003

¹ *California Public Utilities Commission v. NRC*, No. 02-72735 (9th Cir.); *Ohngo Gaudadeh Devia v. NRC*, No. 02-9583 (10th Cir.); *Parents Concerned About Indian Point v. NRC*, No. 02-4243 (2d Cir.); *State of Nevada v. NRC*, No. 02-1116 (D.C. Cir.).

² *Center for Biological Diversity v. Abraham*, No. 02-0027 (N.D. Cal.); *Joosten v. Meserve*, No. 233581 (Mont. Cty. Cir. Ct.) (removed to U.S. District Court (D. Md.)); *Khoury v. Meserve*, No. 02 CV 3511 (D. Md.); *Sarrion v. NRC*, No. 02 CV 2474 (LMM) (S.D.N.Y.).

³ *Center for Biological Diversity v. Abraham*, No. 02-0027 (N.D. Cal.); *Lurie v. Meserve*, No. 01-CV-2754 (D. Md.); *Orange County, North Carolina v. NRC*, Nos. 01-1073 & 01-1246 (D.C. Cir.); *Sarrion v. NRC*, No. 02 CV 2474 (LMM) (S.D.N.Y.).

ACTIVE CASES ¹

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

This lawsuit, brought by the California Public Utility Commission and the County of San Luis Obispo, challenges a Commission adjudicatory decision that rejected petitions to intervene in the Diablo Canyon license transfer proceeding. Acting under 10 C.F.R. Part 2, Subpart M, the Commission found that CPUC's concerns were primarily economic, not justifying standing in an NRC license transfer proceeding. The Commission also ruled that CPUC had failed to set out the kind of safety contentions that the Commission considers under Subpart M. 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 on January 27, 2003. The court has not set an oral argument date.

CONTACT: Jared K. Heck
415-1623

Joosten v. Meserve, No. 233581 (Circuit Court for Montgomery County, Md) (removed to U.S. District Court for the District of Maryland)

This is a suit claiming unlawful age discrimination in employment. The NRC is working with the United State's Attorney's office in defending the case.

CONTACT: Marvin L. Izkowitz
415-1566

Khoury v. Meserve, No. 02 CV 3511 (D. Md.)

This is a Title VII lawsuit claiming gender and national origin discrimination in employment. The NRC is working with the United States Attorney's office in defending the case.

CONTACT: Karl L. Farrar, OGC
415-1556

¹For statistical purposes, we list as "active" any case that was pending before a court as of January 1, 2002. The narratives accompanying each listed case include post-January 1 developments.

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 First Circuit recently ruled that plaintiffs were not entitled to damages, but plaintiffs may seek Supreme Court review. Even if no damages ultimately are assessed, Massachusetts General claims reimbursement 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*). Last summer, the Claims Court judge (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 steps in the case have been delayed to await a possible petition for a writ of certiorari in the underlying tort case, *Heinrich v. Sweet*.

We are consulting with DOJ on the advisability of attempting an interlocutory appeal in the Price-Anderson case. If there is no appeal, that case will proceed to further motions, discovery, and trial later this year.

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*), we currently are considering whether to attempt an interlocutory appeal. MIT says that it incurred more than one million dollars in defending the *Heinrich* suit. We are collaborating with Department of Justice attorneys in defending this case.

CONTACT: Marjorie S. Nordlinger
415-1616

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

This lawsuit challenges a Commission decision, CLI-02-20, rejecting an “environmental justice” claim in the *Private Fuel Storage* licensing proceeding. Petitioner, Ohngo Gaudaheh Devia (“OGD”), is a group of Goshute Indians who oppose the proposed Private Fuel Storage facility. Because the Licensing Board and the Commission have not yet reached a final licensing decision in the *Private Fuel Storage* case, we have filed a motion in the court of appeals to hold OGD’s lawsuit in abeyance, pending a final licensing decision. The court has not yet acted on our motion.

CONTACT: Grace H. Kim
416-3605

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.”

Petitioner has until late February to seek Supreme Court review.

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 Indian tribal lands in Utah. The PFS facility would temporarily store spent fuel from nuclear power reactors. 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 recently decided that dispute against Utah (CLI-02-29), a decision that has triggered a new lawsuit in the District of Columbia Circuit, *Bullcreek v. NRC*, No. 03-1018 (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 are considering *amicus curiae* participation.

CONTACT: Grace H. Kim
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State of Nevada v. NRC, No. 02-1116 (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. Our brief is due in March, with oral argument expected in September.

The court of appeals intends to hear argument in our case in tandem with pending Yucca Mountain- related lawsuits against the Department of Energy and EPA.

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 (and for any damages that result from *Heinrich v. Sweet*).

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

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. It is not clear that the NRC is a proper defendant. The government has filed an answer to the complaint. Settlement talks are ongoing.

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 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 have cooperated with DOJ on discovery proceedings. Settlement talks are ongoing.

CONTACT: Charles E. Mullins
415-1618

CLOSED CASES

Center for Biological Diversity v. Abraham, No. 02-0027 (N.D. Cal.)

A group of environmental organizations brought this lawsuit against nearly every government agency, including the NRC. Plaintiffs sought to enforce a requirement in the Energy Policy Act of 1992 that a certain percentage of federal agency vehicles be “alternative fuel vehicles.” As a small agency, the NRC has minimal, if any, responsibilities under the Act. The district court ultimately entered an injunction against a number of agencies to remedy Energy Policy Act violations, but not the NRC. The government plans no appeal.

CONTACT: Marjorie S. Nordlinger
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Lurie v. Meserve, No. 01-CV-2754 (D. Md.)

The district court entered summary judgment for the NRC in this age discrimination case. Plaintiff took no appeal.

CONTACT: Marvin L. Itzkowitz
415-1566

Orange County, North Carolina v. NRC, Nos. 01-1073 & 01-1246 (D.C. Cir.)

This petition for review challenged an NRC adjudicatory decision approving Carolina Power & Light Company's application to expand its spent fuel storage capacity at its Shearon Harris nuclear power reactor. Petitioner claimed, among other things, that the agency should have issued an environmental impact statement analyzing the possibility of a catastrophic spent fuel pool fire. After considering petitioner's claims under the special hearing process established in 10 C.F.R. Part 2, Subpart K, the Licensing Board found their concerns too remote to warrant an EIS or a full-scale evidentiary hearing. The Commission subsequently upheld the Board ruling.

Deciding the case just two weeks after the oral argument, the court of appeals (Edwards, Rogers & Williams, JJ) issued a 2-page judgment-order (unpublished) ruling summarily in favor of the NRC. Citing the Commission's two opinions in the case, and "[f]inding no error in NRC's determinations," the court said that it was denying the petitions for review "primarily for the reasons given in the agency's orders."

Petitioner sought no further review.

CONTACT: Charles E. Mullins
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Sarrion v. NRC, No. 02 Civ. 2474 (LMM) (S.D.N.Y.)

This lawsuit sought issuance of NRC rule requiring anti-aircraft defenses at the Indian Point power reactors in New York and at other reactor sites nationwide. Plaintiffs alleged that the Department of Defense has available "electronic shield" technology that would "obliterate" aerial threats to nuclear facilities before a "destructive result" took place.

Acting through the United States Attorney's office in New York, we informed plaintiffs' lawyer that federal courts of appeals, not federal district courts, have jurisdiction to review NRC rulemaking action (or inaction). We also informed plaintiffs' lawyer that the NRC has in place a petitioning process that allows citizens to bring their concerns to the NRC's attention without going to court prematurely.

Plaintiffs subsequently withdrew their lawsuit voluntarily.

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