

ADJUDICATORY ISSUE INFORMATION

December 23, 2003

SECY-03-0220

FOR: The Commission

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

SUBJECT: LITIGATION REPORT - 2003 - 03

Public Citizen v. NRC, No. 03-1181 (D.C. Cir., order entered Dec. 19, 2003)

This lawsuit argues that the Commission unlawfully imposed new “design basis threat” requirements through orders issued 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 (Henderson, Randolph & Tatel) has referred our motion to the merits panel. It will be resolved after full briefing and argument of the case.

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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.

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Pacific Gas & Elec. Co. v. People of the State of Calif., No. 02-16990 (9th Cir., decided Nov. 19, 2003)

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 on the environment or on health and safety. The court left open the question whether there may be "implied preemption" in particular circumstances.

The court decision referred expressly to the problem of preempting the NRC's licensing authority (Slip op. at p. 16258).

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Conn. Coalition Against Millstone v. NRC, No. ____ (S. Ct., filed Dec. 10, 2003)

This petition for a writ of certiorari challenges a Second Circuit decision (see Lit. Report 03-2, SECY-03-0137) dismissing a petition for judicial review for lack of jurisdiction. The Supreme Court has thus far declined to docket the certiorari petition because petitioner's counsel is not a member of the Supreme Court bar. Petitioner's counsel has sixty days to become a member or to obtain a co-counsel who is. Otherwise, the Court's Clerk's office has informed us, the certiorari petition will not be docketed.

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