

September 17, 2004

SECY-04-00167

FOR: The Commission

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

SUBJECT: LITIGATION REPORT - 2004 - 02

Bullcreek v. NRC, Nos. 03-1018 & 03-1022 (D.C. Cir., decided Feb. 24, 2003)

These consolidated lawsuits, brought by the State of Utah and a group of Goshute Indians opposed to the proposed Private Fuel Storage facility in Utah, argued that the NRC lacks authority to license an away-from-reactor spent fuel storage facility. Petitioners argued that the Nuclear Waste Policy Act, in effect, prohibits such facilities. The vehicle for the lawsuits was the NRC's rejection of Utah's rulemaking petition asking the agency to withdraw its current rules (10 C.F.R. Part 72) authorizing away-from-reactor storage.

The court of appeals (*Rogers*, Garland & Williams, JJ) agreed with our argument that the NWPA "does not repeal or supersede the NRC's authority under the Atomic Energy Act to license private away-from-reactor storage facilities" (Slip op. at 2). The court closely analyzed the key section of the NWPA, section 135(h), 42 U.S.C. 10155(h), as well as its statutory context and legislative history. Making many of the same points as our appellate brief, the court found "the NRC's interpretation ... more in conformance with the language of § 10155(h) in the context of Subtitle B than that offered by Utah" (Slip op. at 12).

Petitioners did not seek further review.

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Riverkeeper v. Collins, No. 03-4313 (2d Cir., decided Feb. 24, 2004)

In this case, petitioner Riverkeeper sought judicial review of an NRC Director's Decision under 10 C.F.R. § 2.206. The NRC decision had refused to undertake enforcement action against the Indian Point nuclear power reactors to impose more extensive security measures or to shut down the plants. The NRC decision granted 2.206 relief insofar as the agency already had enhanced security at Indian Point (and at other reactors).

In the court of appeals, Riverkeeper acknowledged that ordinarily, under the Supreme Court's decision in *Heckler v. Chaney*, 470 U.S. 821 (1985), petitioners cannot challenge in court agency decisions not to bring enforcement actions. Here, however, according to Riverkeeper, the NRC had "abdicated" its statutory responsibilities by failing to require more extensive security measures at Indian Point enabling a successful defense of the plants against terrorist attacks from the air.

The court of appeals (*Sack, Van Graafeiland & Raggi*) rejected Riverkeeper's position. The court quoted the Director's Decision extensively and noted all that the NRC *had* done to protect against the terrorist threat. While acknowledging that Riverkeeper's issues "are plainly serious and of pressing concern" (Slip op. at 27), the court concluded that the NRC was not required to guarantee "absolute protection" (Slip op. at 21).

The NRC has not "abdicated" its responsibility, the court said, "solely because it has failed to enact the specific licensing requirements requested by Riverkeeper after consulting with military and security agencies and because it has implemented various undisclosed protective measures to address the heightened concerns of terrorist attacks" (Slip op. at 24). The court agreed with our argument that holding otherwise would "devour" the *Heckler v. Chaney* non-reviewability doctrine by "permitting federal courts to assert jurisdiction whenever a specific problem is brought to an agency's attention and the agency decides not to order demanded curative steps with respect to it" (Slip op. at 24).

Riverkeeper did not seek further review.

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State of Oklahoma v. NRC, No. 04-9523 (10th Cir., filed March 5, 2004)

This petition for review challenges a Commission decision (CLI-04-1, 59 NRC 1) approving a presiding officer's denial of the State of Oklahoma's hearing request. The hearing request was on Sequoyah Fuels Corporation's application for a license amendment to possess byproduct material at its Gore, Oklahoma, site. Previously, in this same docket, the Commission had ruled that Sequoyah Fuels lawfully could characterize some of its waste as 11e(2) byproduct material. That decision, too, attracted a petition for review from Oklahoma (No. 04-9503).

We filed a motion to consolidate Oklahoma's latest lawsuit with its earlier one. The court of appeals has postponed the cases, pending settlement negotiation.

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Public Citizen v. NRC, No. 04-1059 (D.C. Cir., filed Feb. 20, 2004), *transferred* and renumbered No. 04- 1359 (1st Cir.)

This is a second lawsuit challenging the Commission's recent rule reforming its adjudicatory hearing process (10 C.F.R. Part 2). The first such case was filed in the First Circuit (*Citizens Awareness Network v. NRC*, No. 04-1145). Hence, by operation of law (28 U.S.C. 221(a)(5)), this case has been transferred to the First Circuit. We moved to consolidate the two cases, and to transfer them back to the D.C. Circuit for the convenience of parties and as a matter of efficient case management. The court of appeals consolidated the cases but declined to transfer them.

The court heard oral argument in September 13. We are awaiting a decision.

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