

ADJUDICATORY ISSUE
(Information)

SECY-07-0035

February 16, 2007

FOR: The Commission

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

SUBJECT: ANNUAL REPORT ON COURT LITIGATION (CALENDAR YEAR 2006)

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 9, 2006 (SECY-06-0031). This report reflects the status of NRC cases in court as of February 16, 2007.

During the reporting period (calendar year 2006), the Commission, its officials, or the United States were sued five times in the courts of appeals,¹ twice in federal district court,² and once in federal claims court.³ During this same one-year period seven cases were closed.⁴ The 8 new court cases in 2006 are roughly in line with what we have come to expect over the past decade. There were 11 new cases in 2005, 13 in 2004, 14 in 2003, 8 in 2002, 5 in 2001, 9 in 2000, 15 in 1999, 12 in 1998, and 4 in 1997, for an average of roughly 10 new cases per year. There have been three new court of appeals lawsuits filed thus far in 2007.⁵

¹ *Environmental Law and Policy Ctr. v. NRC*, No. 06-1442 (7th Cir.); *New Jersey v. NRC*, No. 06-5140 (3d Cir.); *Nuclear Information & Resource Service v. NRC*, Nos. 06-1301 & 06-1310 (D.C. Cir.); *Utah v. NRC*, No. 06-1087 (D.C. Cir.)

² *Ernst v. Rombaugh*, No. 06-CV-167-J (D. Wyo.); *Salsman v. Federline*, No. C 06-07173 JW (RS) (N.D. Cal.)

³ *Solow v. United States*, 06-872C (Court of Federal Claims).

⁴ *Cheh v. Diaz*, No. 8:03-cv-02414-AW (D. Md.); *County of Suffolk v. NRC*, No. 05-6684-ag (2d Cir.); *Farmer v. NRC*, No. 05-70718 (9th Cir.); *Massachusetts General Hospital v. United States*, No. 01-434 C (Court of Federal Claims); *Massachusetts Institute of Technology v. United States*, No. 00-292 C (Court of Federal Claims); *Nevada v. NRC*, No. 05-1350 (D.C. Cir.); *Sweet v. United States*, No. 00-274 C (Court of Federal Claims).

⁵ *Eastern Navajo Dine Against Uranium Mining v. NRC*, No. 07-9505 (10th Cir.); *New Jersey Environ. Foundation v. NRC*, No. 07-1304 (3d Cir.); *Spano v. NRC*, No. 07-0324 (2d Cir.)

During this reporting period (CY 2006), we also handled two requests (so-called "*Touhy*" requests) for NRC testimony, depositions or other evidence for use in private litigation, as well as a request for significant information in an arbitration proceeding, and a number of resource-intensive discovery demands in lawsuits against the United States not involving the NRC. The two *Touhy* requests are the fewest we've seen in many years.

Attachment: Litigation Status Report

LITIGATION STATUS REPORT
(As of Feb. 16, 2007)

ACTIVE CASES⁶

BASF Catalysts LLC (formerly Engelhard Corp.) v. United States, No. 05-11241-JLT (D. Mass.)

This lawsuit seeks money damages from the United States arising out of the clean-up of a former nuclear fuels facility in Plainville, Massachusetts. Engelhard argues that the United States (*i.e.*, the AEC) exercised sufficient “control” over the nuclear manufacturing operation that the United States may be held liable as an “operator” under CERCLA. Engelhard also invokes RCRA, “federal common law,” and the Declaratory Judgment Act.

The government has filed a still-undecided motion to dismiss large portions of the lawsuit. The Justice Department is taking the lead on this lawsuit, with support from NRC lawyers.

CONTACT: Susan G. Fonner
415-1629

Curtiss-Wright Electro-Mechanical Corp. v. United States, No. 05-CV-0813 (W.D. Pa.).

In this case, a subsidiary of Westinghouse is suing the government under CERCLA in an attempt to recover clean-up and decommissioning costs. Westinghouse contends that the U.S. is liable for some of the costs because (1) the AEC contracted with the site for fuel for the Navy and some of the contamination results from those contracts, and (2) the AEC allegedly allowed the owners to bury wastes at the site.

The case is in discovery. NRC has contributed documents and NRC lawyers are working with Justice Department lawyers in preparing pleadings.

CONTACT: Charles E. Mullins
415-1618

Eastern Navajo Dine Against Uranium Mining v. NRC, No. 07-9505 (10th Cir.)

Petitioners in this case challenge a series of Commission adjudicatory rulings culminating in the approval of an *in situ* uranium mining license for Hydro Resources, Inc. Hydro Resources sought the license to mine uranium in Crownpoint and Church Rock, New Mexico. Petitioners apparently intend to argue that granting the license was unreasonable and unlawful under the Atomic Energy Act and under the National Environmental Policy Act.

⁶ For statistical purposes, we count as “active” any case pending before a court, or still subject to further judicial review, as of January 1, 2006. The narratives accompanying each listed case include post-January 1 developments, however. And our report includes narratives on new cases filed in early 2007.

The court has not yet set a briefing or argument schedule.

CONTACT: Charles E. Mullins
415-1618

Environmental Law and Policy Center v. NRC, No. 06-1442 (7th Cir.)

Petitioners brought this lawsuit to challenge some of the NRC's environmental findings in the *Clinton* early site permit proceeding. Petitioners maintained that the NRC ought to have considered energy conservation as an alternative to a new nuclear power plant at the Clinton site. Petitioners also argued that the NRC had not adequately considered the possibility of "combination" wind-solar power. The Licensing Board and (on administrative appeal) the Commission rejected petitioners' claims.

On December 6, the court of appeals (*Flaum*, Evans & Williams, JJ) rejected the NRC's threshold jurisdictional argument that petitioners' lawsuit was premature, given that they had been permitted to intervene in the NRC proceeding and the early site permit had not yet been granted (or denied). The court agreed with petitioners that the NRC's adjudicatory decision was "final as to them," as it had the effect of terminating their participation in the early site permit proceeding.

But on the merits the court upheld the NRC adjudicatory decisions in their entirety. The court ruled, as we had argued, that: (1) energy conservation need not be considered as an alternative to a nuclear power plant at the early site permit stage, in particular where the license applicant intends to sell power on the wholesale market, and (2) ample consideration had been given to alternative power sources, such as wind-solar combination, thereby justifying the Licensing Board's grant of summary disposition on that claim.

CONTACT: Jared K. Heck
415-1623

Ernst v. Rombaugh, No. 06-CV-167-J (D. Wyoming)

This is a *pro se* money damages lawsuit against individuals and organizations, including the NRC. According to the complaint the NRC negligently awarded a contract to a person whose consulting company is (allegedly) operating illegally. We are working with the United States Attorney's office on the case.

CONTACT: Darani M. Reddick
415-3841

Missouri v. Westinghouse Electric, L.L.C., No. 4:05-CV-00315 SNL (E.D. Mo.)

The State of Missouri sued Westinghouse under state and federal law (CERCLA) to clean up the contaminated Hematite site (the location of a former nuclear fuels manufacturing facility).

Missouri and Westinghouse have lodged a proposed consent decree that ostensibly would give Missouri regulatory jurisdiction over nuclear materials.

On behalf of the NRC and the Department of Energy, the United States filed a motion to intervene to protect federal responsibilities against state encroachment and to protect federal financial interests. NRC lawyers are collaborating with Justice Department lawyers on the case. On January 22, 2007, the district court (Limbaugh, J) found portions of the proposed consent decree preempted by the NRC's exclusive authority over nuclear materials under the Atomic Energy Act.

CONTACT: Charles E. Mullins
415-1618

New Jersey v. NRC, No. 06-5140 (3d Cir.)

The State of New Jersey brought this lawsuit to challenge revisions in an NRC guidance document on decommissioning, NUREG-1757. New Jersey is concerned that NUREG-1757 will be invoked to justify an inadequate (in New Jersey's view) clean-up of the contaminated Shieldalloy industrial site in southern New Jersey. We have filed a motion to dismiss New Jersey's suit as premature. Our motion stresses that New Jersey is free to contest the applicability and lawfulness of NUREG-1757 in the ongoing NRC proceeding to decommission the Shieldalloy site.

CONTACT: Charles E. Mullins
415-1618

New Jersey Environmental Foundation v. NRC, No. 07-1304 (3d Cir.)

This lawsuit, filed by environmental groups in New Jersey, challenges the Commission's denial of rulemaking petitions seeking to expand the scope of the Commission's license renewal rule (10 C.F.R. Part 54) beyond its current focus on aging. Under 28 U.S.C. § 2112 (which governs multiple lawsuits attacking the same agency decision), the suit likely will be transferred to the Second Circuit and consolidated with a similar lawsuit pending there, *Spano v. NRC*, No. 07-0324 (2d Cir.).

The case is in its early stages, and the court has not yet considered the transfer question of set any briefing or argument schedule.

CONTACT: Grace H. Kim
415-3605

Nuclear Information and Resource Service v. NRC, No. 04-71432 (9th Cir.)

Petitioners in this case sought review of NRC amendments to its transportation safety rules (10 C.F.R. Part 71). The amendments brought NRC rules into conformity with international

standards. Petitioners argued that the NRC failed to do an adequate NEPA analysis in connection with the rule amendments.

On July 22 the court of appeals (*Rymer, Wardlaw & Selna, JJ*) ruled for the NRC. The court did not reach the merits of petitioners' NEPA claim because the court agreed with our argument that petitioners lacked standing to bring the case. The court held that the new NRC rule was more protective than the old one, that petitioners' affidavits and other submissions did not show how their members would suffer individualized harm from the new rule, and that a Department of Transportation rule replicated the NRC rule, rendering effective relief against the NRC problematic. In a companion decision the court affirmed a district court ruling dismissing petitioners' lawsuit against DOT for lack of jurisdiction.

Petitioners unsuccessfully sought rehearing *en banc* in the NRC case. The 90-day period to seek Supreme Court review has not yet expired.

CONTACT: Grace H. Kim
415-1607

Nuclear Information and Resource Service v. NRC, Nos. 06-1301 & 06-1310 (D.C. Cir.)

This lawsuit challenges a series of adjudicatory decisions culminating in granting a license to LES for a uranium enrichment facility in New Mexico. Petitioners plan to raise an array of safety and environmental issues. LES has intervened in the lawsuit in support of the NRC's licensing decision.

The NRC's brief is due on May 2. There is no oral argument date.

CONTACT: Darani M. Reddick
415-3841

Ohngo Gaudadeh Devia v. NRC, No. 05-1419 (D.C. Cir.)

This lawsuit challenges a series of Commission adjudicatory decisions resulting in an authorization to the NRC staff to license the proposed Private Fuel Storage ISFSI in Utah. The court of appeals has consolidated Ohngo Gaudadeh Devia's suit with companion suits filed by the State of Utah (No. 05-1420 & 06-1087). OGD's appellate brief argues that the NRC did not properly handle an "environmental justice" claim and also maintains that the NRC license should be vacated as moot (because other federal agencies have taken action making PFS's use of the NRC license problematic). We have filed an answering brief.

There is as yet no oral argument date.

CONTACT: Grace H. Kim
415-1607

Public Citizen v. NRC, No. 03-1181 (D.C. Cir.)

This lawsuit argues that the Commission unlawfully imposed new “design basis threat” requirements through orders it issued in 2003 without prior notice and public comment. Petitioners claim that the Commission may not alter agency rules without invoking the rulemaking process. After briefing and oral argument, the court of appeals held this case in abeyance pending the NRC’s “design basis threat” (DBT) rulemaking. By court order, we periodically report to the court on the progress of the DBT rulemaking. With the recent Commission approval of a new DBT rule, we expect that this lawsuit will ultimately be dismissed (or withdrawn) as moot.

CONTACT: Jared K. Heck
415-1623

Salsman v. Federline, No. C 06-07173 JW (RS) (N.D. Cal.)

The plaintiff in this lawsuit challenges an NRC refusal to consider his 2.206 petition on the risks of “weaponized” depleted uranium. Working with the United States Attorney’s office in San Francisco, we have filed a motion to dismiss the suit for lack of jurisdiction. Among other things, we argue that plaintiff has filed suit in the wrong court. The courts of appeals have exclusive jurisdiction over NRC licensing decisions, including decisions (like 2.206 denials) preliminary or ancillary to licensing.

The district court is expected to hear oral argument later this year.

CONTACT: Geraldine R. Fehst
415-1614

San Luis Obispo Mothers for Peace v. NRC, No. 03-74628 (9th Cir.)

This lawsuit challenged two Commission adjudicatory decisions in a proceeding to license an ISFSI at Diablo Canyon. The first decision declined to suspend ISFSI licensing proceedings to await NRC security enhancements, and the second rejected NEPA-based contentions demanding an inquiry into the potential effects of a terrorist attack.

On June 4, the court of appeals (*Thomas*, Reinhardt & Restani, JJ) held that it was unreasonable for the NRC to refuse to consider the environmental effects of a terrorist attack on a “categorical” basis. The court remanded the case for further NEPA proceedings on the terrorist issue. The court did uphold the NRC decision not to suspend its licensing proceeding and agreed with the NRC that a licensing proceeding was not an appropriate forum to revisit the validity of NRC security regulations.

The ISFSI applicant, Pacific Gas & Electric Company, sought certiorari in the Supreme Court (No. 06-434). The government, while agreeing with PG&E that the Ninth Circuit decision on the

NEPA-terrorism issue was incorrect, did not support Supreme Court review at this time. On January 12, 2007, the Court denied certiorari.

Petitioners recently asked the court of appeals to award them approximately \$162,000 in attorney's fees under the Equal Access to Justice Act. We will work with the Justice Department in responding to that claim,

CONTACT: Charles E. Mullins
415-1618

Solow v. United States, No. 06-872C (Court of Federal Claims)

This is a class action suit brought against the United States by federal retirees seeking additional retirement benefits on account of alleged mishandling of annual leave at the time of retirement. The complaint includes the NRC and other federal agencies.

CONTACT: Marvin L. Itzkowitz
415-1550

Spano v. NRC, No. 07-0324 (2d Cir.)

This lawsuit, filed by the County Executive for Westchester County, New York, and by the County itself, challenges an NRC decision rejecting petitions for rulemaking seeking changes in the license renewal rule (10 C.F.R. Part 54). The rulemaking petitions asked the NRC to expand the scope of issues considered at the license renewal stage to focus on questions in addition to aging. Under 28 U.S.C. § 2112 (which governs multiple lawsuits attacking the same agency decision), this lawsuit likely will be consolidated with a similar suit filed in the Third Circuit, *New Jersey Environmental Foundation v. NRC*, No. 07-1304 (3d Cir.).

The court has not yet set a briefing or argument schedule.

CONTACT: Grace H. Kim
415-3605

United States v. Science Applications International Corp., No. 04-CV-1543 (RWR) (D.D.C.)

The government sued SAIC for damages and other relief arising out of SAIC's contract to provide unbiased advice to the NRC. The NRC hired SAIC to support the agency's rulemaking effort to develop standards applicable to the release of radioactive materials into the environment. Department of Justice lawyers are taking the lead in this case, with support from NRC lawyers. The case currently is in mediation.

CONTACT: Marvin L. Itzkowitz
415-1550

Utah v. NRC, No. 05-1420 & 06-1087 (D. C. Cir.)

This suit, like *Ohngo Devia Gaudadeh v. NRC*, No. 05-1419 (D.C. Cir.), attacks the Commission adjudicatory decisions authorizing the licensing of the proposed Private Fuel Storage ISFSI. The court of appeals has consolidated the cases. Utah's brief argues that the NRC did not properly consider the probability and consequences of an air crash into the PFS facility, that the NRC did not take adequate account of the Department of Energy's changing plans for shipping spent fuel to the proposed Yucca Mountain facility, and that the NRC wrongly failed to examine, under NEPA, the consequences of a terrorist attack.

The court has not yet set an oral argument date.

CONTACT: Grace H. Kim
415-13605

Viacom Inc. v. United States, No. 1:05-cv-00468 ESH (D.D.C.)

This lawsuit seeks CERCLA seeks reimbursement of response costs under CERCLA. The case arises out of the clean-up of a former Westinghouse facility in Bloomfield, New Jersey. Plaintiff says that much of the remediation of the facility was done under the supervision of the NRC and that the NRC was satisfied with the work as of 1973, when it terminated the Viacom license. The case is now in discovery.

CONTACT: Jared K. Heck
415-1623

Westinghouse Electric Co. v. United States, No. 4:03-CV-00861 (DDN) (E. D. Mo.)

This is a lawsuit for government contribution under CERCLA for cleanup of the Hematite site in Missouri. We are working with the Justice Department in defending the suit. Discovery is ongoing. The United States intervened in a companion suit, *Missouri v. Westinghouse Electric Co.*, involving the State of Missouri's effort to "settle" with Westinghouse in a way that compromises the federal government's interests.

CONTACT: Charles E. Mullins
415-1618

CLOSED CASES

Cheh v. Diaz, No. 8:03-cv-02414-AW (D. Md.), *appeal pending*, No. 04-2086 (4th Cir.)

This personnel lawsuit complains of discrimination and reprisal. The district court entered summary judgment for the NRC. Plaintiff appealed to the Fourth Circuit. On September 15 the

court of appeals (Williams, Traxler & King, JJ) issued a short order affirming the district court's judgment.

CONTACT: Marvin L. Itzkowitz
415-1550

County of Suffolk v. NRC, No. 05-6684-ag (2d Cir.)

Petitioner, a county in New York, challenged a Commission adjudicatory decision turning down a request for a hearing on emergency planning issues in connection with Millstone's license renewal application. The Commission stressed that its regulations expressly exclude emergency planning from the license renewal inquiry. Petitioner withdrew its lawsuit before any briefs were filed.

CONTACT: Jared K. Heck
415-1623

Farmer v. NRC, No. 05-70718 (9th Cir.)

This lawsuit challenged a Commission adjudicatory decision refusing to allow a state employee-“whistleblower” to obtain a hearing to demand more stringent enforcement relief than the NRC staff ordered. After a court of appeals mediator made an extensive but unsuccessful effort to broker a settlement of the case, petitioner's lawyer withdrew and petitioner was left to seek a judicial remedy *pro se*. He never filed a brief, and after granting an extension of time to permit him to do so, the court ultimately dismissed the appeal for lack of prosecution.

CONTACT: Jared K. Heck
415-1623

Massachusetts General Hospital v. United States, No. 01-434 C (U.S. Court of Federal Claims)

This was 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 United States Court of Appeals for the First Circuit ruled in 2003 that plaintiffs were not entitled to damages, and the Supreme Court denied *certiorari*. Invoking a 1959 Price-Anderson indemnity agreement between MIT and the Atomic Energy Commission, Massachusetts General Hospital claimed reimbursement from the government for the substantial legal fees and costs it incurred in defending the *Heinrich* lawsuit.

We worked with the Department of Justice on the defense of the hospital's Price-Anderson lawsuit, along with two companion suits (*MIT v. United States* and *Sweet v. United States*). In 2002, the Claims Court (Firestone, J.) rejected our threshold argument, in a summary judgment motion, that Price-Anderson does not cover what are, in essence, medical malpractice claims. Subsequently (after discovery), the government settled all of plaintiffs' claims for an amount the Justice Department considered reasonable. The claims were paid out of the Judgment Fund, not out of NRC money. On our motion, the Claims Court then vacated its original liability ruling as moot.

This result cleans the slate for future litigation, if necessary, on Price-Anderson liability for medical malpractice-type claims.

CONTACT: John F. Cordes
415-1956

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*, sought 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*), the government recently settled the case and obtained a court order vacating the original liability ruling.

CONTACT: John F. Cordes
415-1956

Nevada v. NRC, No. 05-1350 (D.C. Cir.)

In this case, Nevada challenged the Commission's denial of a petition for rulemaking seeking changes in the NRC's "Waste Confidence Rule." Nevada maintained that the rule – which (among other things) envisions a permanent high-level waste repository by 2025 – places the NRC under inappropriate pressure to approve DOE's expected license application for the proposed Yucca Mountain HLW facility.

On September 22, just a couple of weeks after oral argument, the court of appeals (Randolph, Brown & Edwards, JJ) issued a short judgment-order holding that Nevada lacked standing to challenge the Waste Confidence Rule. The court agreed with our argument that the Yucca Mountain licensing proceeding (depending on its outcome) "may have a legal effect on the Rule, but not vice versa." Thus, held the court, Nevada had not shown any current harm from the Rule, and lacked standing.

CONTACT: Steven F. Crockett
415-2871

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*, arose out of medical research and treatment, known as “boron neutron capture therapy,” conducted by Dr. William Sweet decades ago. Dr. Sweet, like MIT and Mass General, sought from the government Price-Anderson reimbursement for his legal fees and costs. As noted above (in the discussions of the *Massachusetts General* and *MIT* cases), the Claims Court rejected our argument that medical malpractice-type claims lie outside Price-Anderson. The government recently settled the case and obtained a court order vacating the original liability ruling as moot.

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