POLICY ISSUE
(INFORMATION)

February 28, 2008 SECY-08-0026

FOR: The Commission

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

SUBJECT: ANNUAL REPORT ON COURT LITIGATION (CALENDAR YEAR 2007)

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 16, 2007 (SECY-06-0035). This report reflects the status of NRC cases in court as of February 28, 2008.

During the reporting period (calendar year 2007), the Commission was sued eleven (11) times in the courts of appeals,[1] but not in any other court. During this same one-year period eight (8) cases were closed.[4] The 11 new court cases in 2007 are roughly in line with what we have come to expect over the past decade. There were 8 new cases in 2006, 11 in 2005, 13 in 2004, 14 in 2003, 8 in 2002, 5 in 2001, 9 in 2000, 15 in 1999, and 12 in 1998, for an average of roughly 10.5 new cases per year.

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[1] *Eastern Navajo Dine Against Uranium Mining v. NRC*, No. 07-9505 (10th Cir.); *Massachusetts v. United States*, Nos. 07-1482 & 07-1483 (1st Cir.) ; *New Jersey v. NRC*, Nos. 07-1559 & 07-1756 (3d Cir); *New Jersey Dept. of Environmental Protection v. NRC*, No. 07-2271 (3d Cir.); *Nuclear Information and Resource Service v. NRC*, No. 07-1212 (D.C. Cir.); *Public Citizen v. NRC*, Nos. 07-71868 & 07-72555 (9th Cir.); *Spano v. NRC*, Nos. 07-0324 & 07-1276 (2d Cir.).

[4] *CBS (formerly Viacom Inc.) v. United States*, No. 1:05-cv-00468 ESH (D.D.C.); *Environmental Law and Policy Center v. NRC*, No. 06-1442 (7th Cir.); *Ernst v. Rombaugh,* No. 06-CV-167-J (D. Wyoming); *Nuclear Information and Resource Service v. NRC*, No. 07-1212 (D.C. Cir.);*Nuclear Information and Resource Service v. NRC*, No. 04-71432 (9th Cir.); *Public Citizen v. NRC*, No. 03-1181 (D.C. Cir.); *Salsman v. Federline,* No. 5:06-cv-07173-JW (N.D. Cal.); *San Luis Obispo Mothers for Peace v. NRC*, No. 03-74628 (9th Cir.).

During this reporting period (CY 2006), we also handled five requests (so-called "*Touhy*" requests) for NRC testimony, depositions or other evidence for use in private litigation, as well a number of resource-intensive discovery demands in lawsuits against the United States not involving the NRC, chiefly in a series of cases brought in the U.S. Court of Federal Claims seeking money damages against the government for not bringing on-line a spent fuel disposal facility by 1998, as directed in the Nuclear Waste Policy Act.

Attachment: Litigation Status Report

LITIGATION STATUS REPORT

(As of Feb. 28, 2007)

ACTIVE CASES[6]

BASF Catalysts LLC (formerly Engelhard Corp.) v. United States, No. 1:05-cv-11241-JLT (D. Mass.)

This lawsuit seeks money damages from the United States (the NRC and other federal agencies are also named defendants). The suit arises out of the clean-up of a former nuclear fuels facility in Plainville, Massachusetts. BASF 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. BASF also has invoked RCRA, "federal common law," and the Declaratory Judgment Act.

The government and BASF are engaged in settlement negotiations. 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. 2:05-cv-0813-NBE (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 at the Cheswick site in Pennsylvania. 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 parties are discussing settlement. NRC has participated in discovery. NRC lawyers are working with Justice Department lawyers in this case.

CONTACT: Charles E. Mullins
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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

[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, 2007. The narratives accompanying each listed case include post-January 1 developments, however.

argue that granting the license was unreasonable and unlawful under the AEA and NEPA. Petitioners focus on dose calculation and financial assurance issues.

All briefs were filed during the summer and fall of 2007. The court has not yet set a date for oral argument.

CONTACT: Charles E. Mullins
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Kandel v. United States, No. 1:06-cv- 872 (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, originally captioned *Solow v. United States,* but now renamed, includes the NRC and other federal agencies. The government is seeking dismissal on statute of limitations grounds.

CONTACT: Marvin L. Itzkowitz
415-1550

Massachusetts v. United States, Nos. 07-1482 & 07-1483 (1st Cir.)

In these consolidated lawsuits the Commonwealth of Massachusetts challenges adjudicatory decisions in the *Vermont Yankee* and *Pilgrim* license renewal proceedings. In each of these cases Massachusetts submitted a NEPA contention claiming that NRC had not adequately examined the consequences of fires in spent fuel pools. The Licensing Board and the Commission rejected the contention as, in effect, a collateral attack on NRC's generic environmental regulations. Massachusetts followed up its contention with a petition for rulemaking to change the regulations.

In the court of appeals, Massachusetts demands a guaranty that NRC will act on the rulemaking petition before deciding the license renewal applications. We have argued that Massachusetts's claim is inappropriate and premature in that there is no indication that NRC won't handle the rulemaking and license renewal proceedings appropriately.

The case has been orally argued and is awaiting decision.

CONTACT: Steven C. Hamrick
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Missouri v. Westinghouse Electric, L.LC.*,* 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 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. In early 2007, the district court (Limbaugh, J) agreed with our argument that portions of the proposed consent decree preempted by the NRC's exclusive authority over nuclear materials under the Atomic Energy Act.

The parties are now discussing a new consent decree.

CONTACT: Charles E. Mullins
415-1618

***New Jersey v. NRC*,** Nos. 06-5140, 07-1559, 07-1756 (3d Cir.)

The State of New Jersey brought this series of lawsuits to challenge revisions in an NRC guidance document on decommissioning, NUREG-1757, that purportedly authorizes a new form of decommissioning - - a so-called "long-term control" license. 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.

All parties have filed briefs, and the case is set for oral argument in April. Our position is that New Jersey's lawsuits are premature and improper, given that New Jersey is free to raise its concerns about NUREG-1757 in an ongoing NRC administrative adjudication over the Shieldalloy decommissioning.

CONTACT: Charles E. Mullins
415-1618

New Jersey Dept. of Environmental Protection v. NRC, No. 07-2271 (3d Cir.)

This lawsuits attacks an NRC adjudicatory decision in the *Oyster Creek* license renewal proceeding. The Licensing Board and the Commission rejected New Jersey's sole contention – that NEPA required a study of the consequences of a terrorist attack. New Jersey, relying on the Ninth Circuit's decision in *San Luis Obispo Mothers for Peace v. NRC,* 449 F.3d 1016 (9th Cir. 2006), *cert denied*, 127 S.Ct. 1124 (2007), is asking the court of appeals to reinstate its "NEPA-terrorism" contention. NRC has filed a brief maintaining that NEPA-proximate cause principles preclude such terrorism claims.

The case is not yet set for oral argument.

CONTACT: Charles E. Mullins
415-1618

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

These consolidated lawsuits challenged a series of adjudicatory decisions culminating in granting a license to LES for a uranium enrichment facility in New Mexico. Petitioners raised an

array of safety and environmental issues. On December 11, 2007, the court of appeals (*Kavanaugh,* Rogers, JJ., Ginsburg, CJ) found that petitioner-public interest groups had standing to challenge the LES license, but the court ruled for NRC on all substantive issues. Among other things, the court ruled that NRC had properly prepared an EIS before the agency hearing, that NRC's analysis of the impacts and costs of depleted uranium disposal was reasonable, and that the late Commissioner McGaffigan did not abuse his discretion in declining to disqualify himself from the adjudication due to certain non-adjudicatory remarks.

Petitioners did not seek rehearing or rehearing *en banc.* The deadline for a certiorari petition in the Supreme Court is March 10.

CONTACT: Darani M. Reddick
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Ohngo Gaudadeh Devia v. NRC, Nos. 05-1419, 05-1420, 06-1087 (D.C. Cir.)

These consolidated lawsuits challenge a series of Commission adjudicatory decisions resulting in an authorization to the NRC staff to license the proposed Private Fuel Storage ISFSI in Utah. OGD's brief argued that the NRC did not properly handle an "environmental justice" claim and 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). Utah's brief argued 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.

We filed an answering brief arguing that NRC had reasonably resolved all safety and environmental issues. But no merits decision will issue for quite some time, if ever. The court of appeals (*Garland*, Tatel, Rogers, JJ) removed the case form the oral argument calendar and issued a decision finding the NRC case "prudentially" unripe. The court reasoned that the NRC license was currently unusable due to Department of the Interior rulings prohibiting use of the proposed site. The court thus held the lawsuits against NRC in abeyance, pending PFS's effort to overturn the Department of the Interior's adverse rulings. The court directed the parties to file periodic status reports.

The first two status reports have been filed. They indicate that PFS has challenged the Interior Department's rulings in a federal district court lawsuit (D. Utah), but that the lawsuit is in its early stages.

CONTACT: Grace H. Kim
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***Public Citizen v. NRC*,** Nos. 07-71868 & 07-72555 (9th Cir.)

This lawsuit, filed by citizens groups, challenges the NRC's new Design Basis Threat Rule. Under 28 U.S.C. § 2112, a similar suit, filed by the State of New York in the Second Circuit (*New York v. NRC*, No. 07- (2d Cir.), was transferred to the Ninth Circuit and consolidated

with this one. Petitioners argue, in essence, that NRC's new rule doesn't take adequate account of the threat of air attack and gives too much weight to licensees' cost-based defense capabilities. We have filed a brief indicating that the new rule is fully in accord with AEA requirements to provide adequate protection and to provide for the common defense and security.

The case has not yet been set for oral argument.

CONTACT: Steven Crockett
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***Spano v. NRC*,** Nos. 07-0324 & 07-1276 (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 was consolidated with a similar suit originally filed in the Third Circuit, *New Jersey Environmental Foundation v. NRC*, No. 07-1304 (3d Cir.).

The case is fully briefed. NRC's position is that it carefully considered the scope of license renewal in its initial rulemaking and no changed circumstances call for altering its approach. The court of appeals has not yet set an oral argument date.

CONTACT: Grace H. Kim
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***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 awaiting trial.

CONTACT: Marvin L. Itzkowitz
415-1550

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. The United States successfully intervened in a companion suit, *Missouri v. Westinghouse Electric Co.,* involving the State of Missouri's effort to halt the State of Missouri's effort to "settle" with Westinghouse in a way that would compromise the federal government's interests. The government has filed a

counterclaim and crossclaims against various parties seeking contribution should the government be held financially liable under CERCLA.

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CLOSED CASES

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

This lawsuit sought 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 (AEC) was satisfied with the work as of 1973, when it terminated the Viacom license. The case has now been "administratively terminated," in anticipation of a settlement agreement being reached.

CONTACT: John F. Cordes
415-1956

***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, 2006, 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: John F. Cordes
415-1956

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

This was 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 worked with the United States Attorney's office on the case and filed a successful motion to dismiss. In early 2007 the district court (Johnson, J.) issued a short, unpublished order finding that the court lacked jurisdiction because plaintiff had not properly served NRC.

CONTACT: Darani M. Reddick
415-3841

Nuclear Information and Resource Service v. NRC, No. 07-1212 (D.C. Cir.)

This lawsuit challenged NRC's denial of a 2.206 petition claiming that the Palisades ISFSI was vulnerable to earthquakes. The court of appeals (Henderson, Tatel & Kavanaugh, JJ) granted our motion to dismiss the petition for review. The court agreed with our position that NRC's 2.206 decision reflected an unreviewable exercise of enforcement discretion. The court also agreed with our position that NRC had not "abdicated its responsibilities" here. Petitioners did not seek further review on rehearing or at the Supreme Court.

CONTACT: John F. Cordes
415-1956

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, 2006, 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.

CONTACT: Grace H. Kim
415-1607

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

This lawsuit argued 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. After the Commission approved the new DBT rule, the parties agreed upon a motion to dismiss the lawsuit as moot, which the court of appeals granted.

CONTACT: John F. Cordes
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Salsman v. Federline*,* No. 5:06-cv-07173-JW (N.D. Cal.)

The plaintiff in this federal district court lawsuit challenged 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 filed a motion to dismiss the suit for lack of jurisdiction. Among other things, we argued that plaintiff filed suit in the wrong court, given that courts of appeals have exclusive jurisdiction over NRC licensing decisions, including decisions (like 2.206 denials) preliminary or ancillary to licensing.

On April 25, 2007, the district court (Ware, J) issued a decision agreeing with our "wrong court" argument and dismissed the lawsuit.

CONTACT: John F. Cordes
415-1956

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.

In 2006 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 apporpriate 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 then asked the court of appeals to award them approximately $167,000 in attorney's fees under the Equal Access to Justice Act. We ultimately settled the fee claim for a smaller amount.

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