

February 3, 2011

SECY-11-0015

FOR: The Commissioners
FROM: John F. Cordes, Jr. 
Solicitor
SUBJECT: ANNUAL REPORT ON COURT LITIGATION (CALENDAR YEAR 2010)

PURPOSE:

To Inform the Commission of the Status of Litigation in the Courts.

DISCUSSION:

Enclosed is a report updating events in Nuclear Regulatory Commission (NRC) court litigation since my last cumulative annual report dated January 29, 2010 (SECY-10-0012). This report reflects the status of NRC cases in court as of January 31, 2011.

During the reporting period (Calendar Year 2010), the Commission or NRC officials were sued seven (7) times in the courts of appeals¹ and twice in federal district court.² During this same one-year period thirteen (13) cases were closed.³ The nine (9) new court cases in 2010 are in

¹ *In re: Aiken County*, No. 10-1050 (D.C. Cir.); *Blue Ridge Environmental Defense League v. NRC*, No. 10-1058; *Center for a Sustainable Coast v. NRC*, No. 10-1057 (D.C. Cir.); *Honeywell International, Inc. v. NRC*, No. 10-1022 (D.C. Cir.); *Peterson v. NRC*, No. 10-1097 (D.C. Cir.); *South Carolina v. DOE*, No. 10-1069 (D.C. Cir.); *Washington v. DOE*, No. 10-1082 (D.C. Cir.).

² *Baig v. NRC*, No. 10-842 (FLW) (D.N.J.); *General Electric Co. v. U.S. Dept. of the Interior, et al.*, No. 10-404 MCA/RHS (D.N.M.)

³ *Brodsky v. NRC*, No. 08-1454 (2d Cir.); *Burton v. NRC*, No. 09-1901 (2d Cir.); *Burton v. NRC*, No. 09-0005 (2d Cir.); *Center for a Sustainable Coast v. NRC*, Nos. 09-1263 & 10-1057 (D.C. Cir.); *McCracken v. Brookhaven Science Associates, LLC*, No. 08-cv-2642 (E.D.N.Y.), *aff'd*, No. 09-2165 (2d Cir.); *Miles v. Jaczko*, No. 8:09-cv-00503 (D. Md.), *appeal dismissed*, No. 10-1283 (4th Cir.); *Morris (& Eastern Navajo Dine Against Uranium Mining) v. NRC*, No. 07-9505 (10th Cir.); *New York v. NRC*, Nos. 08-3903, 08-4833 & 08-5571 (2d Cir.); *Salsman v. NRC*, No. 08-74043 (9th Cir.); *Westinghouse Elec. Co. v. United States*, No. 4:03-CV-00861 (DDN) (E.D.N.Y.).

line with what we have come to expect over the past decade. There were 8 new cases in 2009, 13 in 2008, 11 in 2007, 8 in 2006, 11 in 2005, 13 in 2004, 14 in 2003, 8 in 2002, and 5 in 2001, for an average of 10 new cases a year.

During this reporting period (2010) we also handled four (4) requests (so-called "*Touhy*" requests) for NRC testimony, depositions or other evidence for use in private litigation – one is complete and the other three are in progress. We also continued to handle a steady stream of discovery demands in lawsuits for or against the United States but not involving the NRC as a party. The chief burden in this area again this year came in cases brought in the U.S. Court of Federal Claims seeking money damages against the government for not meeting the statutory deadline (1998) for a high-level waste disposal facility. We also handled a complex discovery request in an offshoot of the *Tronox* bankruptcy case, where the United States is attempting to recover additional assets for a clean-up, as well as requests for documents and witnesses in two pending tax lawsuits involving the nuclear industry.

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Enclosure:
Litigation Status Report

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LITIGATION STATUS REPORT
(As of Jan. 31, 2011)

ACTIVE CASES¹

In re: Aiken County (& Consolidated Cases), Nos. 10-1050, 10-1069 & 10-1082 (D.C. Cir.)

These consolidated lawsuits challenge a decision by the Department of Energy (DOE) to abandon its effort to obtain an NRC license for a high-level waste facility at Yucca Mountain and to withdraw its license application. The lead case was filed by Aiken County (SC). It has been consolidated with *Ferguson v. Obama*, No. 10-1052 (D.C. Cir.), *South Carolina v. DOE*, No. 10-1069 (D.C. Cir.), and *Washington v. DOE*, No. 10-1082 (D.C. Cir.).

Three of the consolidated suits (all but *Ferguson*) name NRC or NRC officials as respondents, but petitioners' court of appeals briefs do not argue specific claims against NRC. In addition to defending DOE's decisions on the merits, the government's brief argues that petitioners' suits are premature because an NRC licensing board has already rejected DOE's attempted withdrawal of its application and the Commission still is considering the board's ruling. The Justice Department is representing the government at the court of appeals. NRC has joined aspects of the Justice Department's prematurity defense, but has stood neutral on the merits arguments.

After being held in abeyance for some time, the cases are now set for oral argument on March 22, 2011.

CONTACT: John F. Cordes, OGC
301-415-1956

Baig v. NRC, No. 10-842 (FLW) (D.N.J.)

Plaintiff, a former NRC employee, claims that he suffered age discrimination and national-origin discrimination in employment. Working with the United States Attorney's office, NRC has filed a motion to dismiss or for summary judgment. The motion is awaiting decision.

CONTACT: John S. Farrington, OGC
301-415-2196

Blue Ridge Environmental Defense League v. NRC, No. 09-1112 & 10-1058 (D.C. Cir.)

These lawsuits challenge NRC's decision to reinstate previously-withdrawn construction permits at TVA's Bellefonte site. Because a related adjudication was pending before NRC, the court of appeals, on our motion, held the initial lawsuit in abeyance. We moved to dismiss the second suit for lack of jurisdiction, but the court directed full briefing on the issue. The Commission recently completed the adjudication – rejecting all contentions – and the lawsuits were

¹ For statistical purposes, we count as "active" any case pending before a court, or still subject to further judicial review, as of January 1, 2010. But narratives accompanying each listed case include post-January 1 developments.

ENCLOSURE

reactivated. Petitioner filed its opening brief in January, and our brief is due in March. Our brief will raise both jurisdictional and merits arguments.

CONTACT: Grace H. Kim, OGC
301-415-3605

Brodsky v. NRC, No.09-Cv-10594 (S.D.N.Y.)

This federal district court lawsuit challenges exemptions from fire protection requirements that the NRC Staff granted to Indian Point. Plaintiffs had originally challenged the exemptions on a petition for review filed in the court of appeals (Second Circuit), but that court held that it lacked jurisdiction. The complaint raises various procedural and NEPA-based challenges to the exemptions. In collaboration with our office, the U.S. Attorney has sought dismissal, or summary judgment, in the case. The case is awaiting decision.

CONTACT: Robert M. Rader, OGC
301-415-1955

El Paso Natural Gas Company, et al., v. United States of America, et al., No. 07-00905, RJL (D. D.C.):

El Paso Natural Gas filed this lawsuit to compel the United States to clean up two sites associated with the Tuba City Mill: the Tuba City Dump, and the Highway 160 site. The suit asserts a number of theories of liability including the APA, CERCLA, RCRA, and UMTRCA . The Navajo Nation has intervened as a plaintiff. The district court dismissed the APA and UMTRCA claims against the Department of Energy, and issued a Rule 54 partial judgment allowing El Paso to appeal on those issues to the D.C. Circuit. That court recently affirmed the district court's dismissal order. The government has moved to dismiss a number of the remaining claims, and is preparing a motion to dismiss still others. NRC is a named defendant in the lawsuit, along with other federal agencies and the United States.

CONTACT: Charles E. Mullins, OGC
301-415-1618

General Electric Company v. U.S. Department of Interior, et al., Civ. No. 10-404 MCA/RHS (D. N.M.)

This case is an attempt by General Electric to obtain reimbursement for clean-up activities at the mine(s) associated with the Church Rock Mill. The NRC regulates the tailings pile associated with the Mill, but not the mine. GE filed the complaint (naming NRC as a defendant, among other agencies) and then initiated settlement negotiations, which have produced a tentative agreement. The NRC is not required to do anything in conjunction with the proposed agreement, but GE may approach the NRC in an effort to get it to license a separate disposal cell to hold mine spoil and other NARM.

CONTACT: Charles E. Mullins, OGC
301-415-1618

Honeywell International, Inc. v. NRC, No. 10-1022 (D.C. Cir.)

This petition for review challenges an NRC decision not to grant a licensee, Honeywell, an exemption in 2009 from decommissioning financial-assurance requirements. NRC had twice previously (in 2007-2008) granted Honeywell an exemption – allowing self-financing in lieu of a surety – on the ground that Honeywell’s strong bond rating and corporate goodwill compensated for its failure to have “tangible net worth” at least ten times the current decommissioning cost estimate of its licensed fuel facility in Metropolis, Illinois. NRC said that Honeywell’s declining tangible net worth no longer justified the exemption.

The court of appeals (*Rogers, Brown & Griffith, JJ*) remanded the exemption-denial for further proceedings. The court held that NRC had not adequately explained why Honeywell’s bond position and corporate goodwill did not continue to justify an exemption, notwithstanding a decline in tangible net worth. The court said that the Commission had “left too much to inference” and had not indicated “how far the tangible net worth must decline and over what period.”

NRC has time to seek Supreme Court review, but is unlikely to do so, given that the court has given the agency another chance to articulate its rationale on remand.

CONTACT: Robert M. Rader, OGC
301-415-1955

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 court denied the government’s motion to dismiss on statute of limitations grounds, and the parties have engaged in settlement negotiations (so far unsuccessful) and are disputing various class-action issues.

CONTACT: Mark J. Maxin, OGC
301-415-1554

Nevada v. NRC, No, 09- 1133 (D.C. Cir.)

This petition for review challenges NRC’s “Yucca Mountain Rule,” 10 CFR Part 63, which implements an EPA rule establishing standards for reviewing the Yucca Mountain high level waste application. The case has been held in abeyance, at the joint request of all parties, subject to periodic status reports.

CONTACT: Steven F. Crockett, OGC
301-415-2871

New Jersey Environmental Federation v. NRC, No. 09- 2567 (3rd Cir.)

This petition for review challenges NRC's decision, after an extensive adjudication, to grant Oyster Creek's license renewal application. Petitioners maintain that NRC made many procedural errors during the adjudication and that NRC unlawfully referred some issues to later resolution by the NRC Staff. The court heard oral argument in early January, and the case is awaiting decision.

CONTACT: Robert M. Rader, OGC
301-415-1955

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 from 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.

Several status reports have been filed. The most recent indicates that a federal district court in Utah has remanded various Interior Department rulings back to the Department for reconsideration. The Department has not yet resolved the case on remand, and our lawsuit remains in abeyance.

CONTACT: Grace H. Kim, OGC
301-415-1607

Peterson v. NRC, No. 10-1097 (D.C. Cir.)

Petitioner, an advocate for a spent fuel disposal plan that he has developed as an alternative to Yucca Mountain, attempted to intervene in the Yucca Mountain adjudicatory proceeding. The Licensing Board and the Commission rejected his intervention petition for lack of standing and for lack of an admissible contention. Petitioner challenged the decision in court, but his brief did not explain why NRC should have allowed his entry into the adjudication but instead argued various questions of national policy. The court of appeals declined to dismiss the case on our

motion, but after full briefing the court (Ginsburg, Griffith & Kavanaugh, JJ) denied the petition for review summarily. In a short, *per curiam* order the court pointed out that petitioner had not offered any reason why NRC's decision was unlawful. Petitioner may still seek rehearing at the court of appeals or review in the Supreme Court.

CONTACT: Sean D. Croston
301-415-2585

San Luis Obispo Mothers for Peace v. NRC, 08-75058 (9th Cir.)

Petitioner in this lawsuit, a citizens group, challenges the Commission's decision, after a hearing, to uphold the NRC Staff's environmental assessment of the consequences of a terrorist attack on an ISFSI at Diablo Canyon. Petitioner maintained that, to adequately address the terrorism issue, the Commission ought to have provided access to non-public security information and conducted a closed-door hearing. The Commission hearing in this case was pursuant to a court directive in earlier litigation, *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert denied*, 127 S.Ct. 1124 (2007),

All briefs have been filed, and the case was orally argued in November. It awaits decision.

CONTACT: Charles E. Mullins, OGC
301-415-1618

Shieldalloy v. NRC, No. 09- 1268 (D.C. Cir.)

This petition for review challenges NRC's decision to make New Jersey an agreement state to the extent that the agreement covers a contaminated site that petitioner owns. Petitioner claims that New Jersey's regulatory program, as it relates to petitioner's site, is incompatible with NRC's, rendering NRC's entry into an agreement with New Jersey unlawful. The court of appeals (*Williams, Sentelle & Rogers, JJ*) held that NRC had not adequately explained why it rejected Shieldalloy's request that the agency retain NRC jurisdiction over the Shieldalloy site. The court therefore remanded the case to NRC without resolving various other arguments Shieldalloy had raised.

The time for Supreme Court review expires in February, but no certiorari petition will be filed. The NRC instead has established a procedure for reconsidering the Shieldalloy matter on remand.

CONTACT: Grace H. Kim, OGC
301-415-3605

United States v. Science Applications International Corp., No. 04-CV-1543 (RWR) (D.D.C.), *reversed*, No. 09-5385 (D.C. Cir.)

The government sued SAIC under the False Claims Act 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. SAIC at the same time was a hired consultant for entities with

an interest in the outcome of the NRC rulemaking. After a jury trial where the United States was represented by Department of Justice and NRC lawyers, the government won a \$6.5 million verdict and judgment. The district court rejected SAIC's motion to set aside the verdict.

The court of appeals (*Tatel, Sentelle & Griffith*) reversed the district court judgment because of defects in the jury instructions on calculating damages and on when corporate employees' "collective knowledge" could be imputed to the corporation. The court did, however, reject SAIC's position that only express contract conditions are actionable under the False Claims Act, and upheld the government's position that implied conditions (here, providing unbiased advice) are actionable as well.

Time remains to seek Supreme Court review, but the Solicitor General is unlikely to file a petition for certiorari, given that the government can still win a complete victory after a second trial in the district court.

CONTACT: Robin A. Baum, OGC
301-415-2202

CLOSED CASES

***Brodsky v. NRC*, No. 08-1454 ag (2d Cir.)**

Petitioners in this case, a New York assemblyman and citizen groups, challenged exemptions from fire protection requirements that the NRC Staff granted to Indian Point. Petitioners argued that the exemption should have triggered an NRC hearing and was in any event unreasonable and unlawful. The court of appeals (*Walker & Wallace, JJ*), ruled that it lacked jurisdiction to review exemptions, because they are not among the items specifically listed for hearing under the Atomic Energy Act, Section 189. We sought rehearing but the petition was denied. We did not seek Supreme Court review.

In the meantime, petitioners have re-filed their challenge to the Indian Point exemptions, this time seeking relief in federal district court (described above).

CONTACT: Robert M. Rader, OGC
301-415-1955

***Burton v. NRC*, No. 09- 1901 (2d Cir.)**

This petition for review challenged NRC's rejection of various contentions on Millstone's power uprate. Petitioner filed an opening brief, but not in proper format and lacking a proper appendix. After the court gave petitioner an opportunity to fix the defects, and petitioner did not do so, the court dismissed the case. Petitioner then filed a motion to reinstate her lawsuit. We opposed the motion, and the court ultimately denied it.

CONTACT: Robert M. Rader, OGC
301-415-1955

Burton v. NRC, No. 09-0005 (2d Cir.)

Petitioner in this case challenged a Commission decision in the Indian Point license renewal proceeding. The challenged decision rejected petitioner's contention and waiver petition attacking NRC's rules specifying permissible doses from operating reactors. After full briefing, the court set the case for oral argument, but petitioner did not show up on the prescribed date. Shortly thereafter, the court (Sack, Parker & Wesley, JJ) issued a short judgment-order denying the petition for review and upholding NRC's waiver and contention-admissibility decisions. Petitioner sought no further review.

CONTACT: James E. Adler, OGC
301-415-1656

Center for a Sustainable Coast v. NRC, No. 09-1263 & 10-1057 (D.C. Cir.)

These petitions for review challenged NRC's issuance of an early site permit (ESP) at the Vogtle site, and several of the adjudicatory decisions underlying the ESP. Petitioner's chief concern appeared to be protecting local waterways from contamination. Because the adjudicatory process at NRC was still ongoing at the time petitioners first filed suit (an administrative appeal, now decided, was still pending), we filed a motion to dismiss the first lawsuit as premature. Petitioners then filed a second lawsuit once NRC proceedings were complete. Ultimately, though, upon receiving assurance from the ESP applicant that it no longer intended to use river barges to bring heavy construction equipment and supplies to the site, petitioner withdrew both lawsuits.

CONTACT: Sean D. Croston, OGC
301-415-2585

McCracken v. Brookhaven Science Associates, LLC, No. 08-cv-2642 (E.D.N.Y.), *aff'd*, No. 09-2165 (2d Cir.)

Plaintiff seeks millions of dollars in damages from the government, including the NRC, and from private and national laboratories for alleged radiation injuries. The United States Attorney's office in Brooklyn (NY) is representing the government and has sought dismissal on jurisdictional grounds. Plaintiff filed, but then voluntarily dismissed, a similar suit in Pennsylvania (*McCracken v. Brookhaven Science Associates, LLC*, No. 08-cv-2934 (E.D. Pa.)). The district court (Gleeson, J) dismissed the suit as untimely and frivolous. Plaintiff appealed to the Second Circuit, but the appeals court rejected all of his arguments.

CONTACT: Maxwell C. Smith, OGC
301-415-1246

Miles v. Jaczko, No. 8:09-cv-00503 (D. Md.), *appeal dismissed*, No. 10-1283 (4th Cir.).

This is an employment discrimination suit where we collaborated with the United States Attorney's office on the defense. It was originally filed in the District of Columbia, but was later transferred to the District of Maryland. The government filed a motion to dismiss and for

summary judgment. The court granted the government's motion. Plaintiff took an appeal, but the court of appeals ultimately dismissed it for lack of prosecution.

CONTACT: Sara McAndrew, OGC
301-415-1562

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

Petitioners in this case challenged 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 argued that granting the license was unreasonable and unlawful under the AEA and NEPA. Petitioners focused on dose calculation and financial assurance issues.

A split panel of the Tenth Circuit (*Ebel*, Frizzell & Lucero, JJ, with Judge Lucero dissenting in part) found that NRC's interpretation of its regulations as not including radioactive residue from past mining in calculating potential doses from the new project was reasonable. The court also upheld NRC's financial-assurance and NEPA determinations.

Petitioner sought Supreme Court review, but the Court denied certiorari.

CONTACT: Charles E. Mullins, OGC
301-415-1618

New York v. NRC, Nos. 08-3903-ag, 08-4833-ag, 08-5571-ag (consolidated) (2d Cir.)

These consolidated lawsuits challenged an NRC denial of rulemaking petitions seeking changes in NRC's generic environmental findings for license renewal. The three states that brought suit – New York, Connecticut and Massachusetts – believed that NRC had not taken sufficient account under NEPA of "new and significant" information on the risk of fires in spent fuel pools, including terrorist-caused fires.

In a published, but *per curiam* opinion, the court of appeals (Jacobs, Kearse & Gardephe, JJ) ruled for NRC. The court deferred to NRC's technical judgment that petitioners' "new information" did not show an increase in fire risk in spent fuel pools, even when the threat of terrorism is taken into account. Thus, the court did not step into the conflict between the Third and Ninth Circuits on the question whether NEPA requires studying the consequences of potential terrorist attacks.

Petitioners sought not further review at the court of appeals or at the Supreme Court.

CONTACT: James E. Adler, OGC
301-415-1656

Salsman v. NRC, No. 08-74043 (9th Cir.)

Petitioner, an individual citizen with great interest in the hazards of uranium, filed an unsuccessful rulemaking petition with NRC arguing that uranium's hazards (non-radiological)

are worse than NRC had thought and warrant changes in 10 C.F.R. Part 20. He challenged NRC's rulemaking denial in court.

Our brief maintained that Mr. Salsman is an interested citizen but has not alleged that he himself is suffering personal harm from the current Part 20. Therefore, we argued, petitioner lacks standing to sue. In a short, *per curiam* order (Canby, Thomas, and W. Fletcher, JJ), the court agreed and dismissed petitioner's suit. Subsequently, the court denied petitioner's request for rehearing

CONTACT: Maxwell C. Smith, OGC
301-415-1246

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

This was 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 also filed a counterclaim and cross-claims against various parties seeking contribution should the government be held financially liable under CERCLA.

After extensive settlement negotiations, in which NRC was closely involved, an agreement favorable to the government was reached, and the lawsuit was dismissed.

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