

ADJUDICATORY ISSUE INFORMATION

January 29, 2013

SECY-13-0013

FOR: The Commissioners

FROM: Andrew P. Averbach /RA/
Solicitor

SUBJECT: ANNUAL REPORT ON COURT LITIGATION (CALENDAR YEAR 2012)

PURPOSE:

To inform the Commission of the status of litigation in the courts.

DISCUSSION:

Enclosed is a report updating court litigation since the last annual report dated January 27, 2012 (SECY-12-0015), prepared by my predecessor, John F. Cordes, Jr. This report reflects the status of NRC cases in court as of January 28, 2012.

During the reporting period (Calendar Year 2012), the Commission or NRC officials were sued four times in the courts of appeals¹ and once in federal district court.² During this same one-year period, three cases were closed.³ The number of new filings in 2012 is somewhat smaller than the number of new filings over the past decade. There were 11 new lawsuits in 2011, 9

new lawsuits in 2010, 8 in 2009, 13 in 2008, 11 in 2007, 8 in 2006, 11 in 2005, 13 in 2004, 14 in 2003, and 8 in 2002, for an average of 10.6 new lawsuits a year.

¹ *Beyond Nuclear v. NRC*, No. 12-1561 (1st Cir.); *Blue Ridge Environmental Defense League v. NRC*, No. 12-1106 (D.C. Cir.); *Massachusetts v. NRC* (1st Cir.), Nos. 12-1404, 12-1772; *Nye County et al. v. NRC*, No. 12-1136 (D.C. Cir.).

² *Budzynski v. Macfarlane*, No. 12-3174 (D. Md.).

³ *Blue Ridge Environmental Defense League v. NRC*, Nos. 09-1112, 10-1058 (D.C. Cir.); *New York v. NRC*, Nos. 11-1045, 11-1051, 11-1056, 11-1057 (D.C. Cir.); *Vermont Department of Public Service v. NRC*, Nos. 11-1168, 11-1177 (D.C. Cir.).

During this reporting period we also handled nine so-called "Touhy" requests for NRC testimony, depositions, or other evidence for use in private litigation. See 10 C.F.R. § 9.200 *et seq.* In addition, we 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.

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Litigation Status Report

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LITIGATION STATUS REPORT

(As of Jan. 28, 2013)

ACTIVE CASES¹

In re Aiken County, No. 11-1271 (D.C. Cir.)

This lawsuit, filed by several parties from South Carolina and Washington, seeks mandamus relief against NRC for allegedly unlawful inaction and delay in the Yucca Mountain licensing proceeding. NRC's brief maintains that Congress's cut-off of appropriated funds for the Yucca proceeding prevents the agency from continuing with the proceeding and from deciding whether to approve or disapprove the DOE license application. Subsequent to oral argument, the Department of Justice filed an amicus brief on behalf of the United States, at the court's direction, and NRC and petitioners filed supplemental briefs responding to the brief of the United States. The court then entered an order holding the case in abeyance pending potential Congressional direction concerning the disposition of funds previously appropriated from the Nuclear Waste Fund for Yucca Mountain-related activities. We advised the Court on January 4, 2013, that Congress had not issued any specific directive concerning the disposition of these funds, but that its apparent decision not to fund additional activities, together with the maintenance of the balance of power as a result of the 2012 election, suggested that mandamus relief was not warranted. We await a decision from the D.C. Circuit.

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Anderson v. Jaczko, No. 11-cv-1370 (D. Md.)

Plaintiff filed a lawsuit complaining that she was a victim of harassment and race discrimination while working at NRC. The district court dismissed her suit for lack of jurisdiction and for failure to state a claim. Plaintiff appealed the district court decision to the United States Court of Appeals for the Fourth Circuit, which remanded the case back to the district court to reconsider its conclusion in light of allegedly new evidence. The district court issued an order on January 13, 2013, denying reconsideration of its previous conclusion.

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¹ For statistical purposes, we count as "active" any case pending before a court, or still subject to further judicial review, as of January 28, 2013. However, narratives accompanying each listed case include any post-January 1 developments.

Baig v. NRC, No. 10-cv-842 (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 filed a motion to dismiss or for summary judgment. The court dismissed the lawsuit, but permitted plaintiff to file an amended complaint with respect to two of the eight dismissed counts. Plaintiff filed an amended complaint and, following discovery, defendant filed a motion for summary judgment. Plaintiff has filed several motions for extensions of time to respond to the motion for summary judgment. The court ordered plaintiff to file his response by January 28, 2013, and has stated that no further extensions will be granted.

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Beyond Nuclear v. NRC, No. 12-1561 (1st Cir.)

Petitioners in this case argue that they were wrongly dismissed from the Seabrook license-renewal proceeding. They advanced a NEPA-alternatives contention, premised on the future availability of offshore wind farms to provide baseload power, which the Commission rejected as too speculative and not adequately supported. The Court of Appeals denied the petition for review on January 4, 2013, holding that the Commission's decision correctly interpreted NEPA and was adequately supported by the record. Petitioners have until February 18, 2013, to seek rehearing at the Court of Appeals. Alternatively, petitioners have until April 4, 2013, if they choose to file a petition seeking Supreme Court review.

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Blue Ridge Environmental Defense League v. NRC, No. 12-1106 (D.C. Cir.)

In this case, petitioners (several citizens' groups) challenge NRC's issuance of a COL for two new reactors at the Vogtle site in Georgia. Petitioners argue that NRC's environmental review was deficient for failure to take adequate account of the Fukushima accident in Japan. Petitioners' original suit was filed prematurely, and they withdrew it. Subsequently, they filed a fresh, timely suit. They also sought a judicial stay pending appellate review. The court denied the stay. The case was consolidated with a companion suit challenging the rule approving the AP1000 certified design (the design used at Vogtle). We filed our merits brief in late June. The case was orally argued on November 19. There is as yet no decision.

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Brodsky v. NRC, No. 09-cv-10594 (S.D.N.Y.), *appeal pending*, No. 11-2016 (2d Cir.)

This lawsuit challenges fire-protection exemptions that NRC granted to Indian Point. The case was originally brought in the Court of Appeals for the Second Circuit, but that court found that it lacked jurisdiction. Petitioners (now plaintiffs) then re-filed their case in federal district court, which held that (1) plaintiffs were not entitled to an adjudicatory hearing on the exemptions at issue; and (2) the exemptions were reasonably rooted in sound record evidence. Plaintiffs appealed and, on January 7, 2013, the Court of Appeals for the Second Circuit issued a decision that upheld the district court's conclusion concerning the validity of the exemption. However, the court remanded the case back to the district court, with instruction that it remand the case back to the Commission, so that the Commission may either articulate why public participation was not required prior to the issuance of an environmental assessment and a finding of no significant environmental impact, or for other appropriate action.

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Budzynski v. Macfarlane, No. 12-cv-3174 (D. Md.)

Plaintiff, an NRC employee, claims that he was a victim of age discrimination when he was not selected for a position advertised in an NRC vacancy announcement. NRC assisted the United States Attorney's office in filing a motion for summary judgment. The motion for summary judgment is currently pending before the court.

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El Paso Natural Gas Company, v. United States, No. 07-cv-905 (D.D.C.), *appeal pending*, Nos. 12-5156, 12-5157 (D.C. Cir.):

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 affirmed the district court's dismissal order. *El Paso Natural Gas Co. v. United States*, 632 F.3d 1271 (D.C. Cir. 2011). The United States then moved for dismissal of the remaining claims and the district court granted that motion as well. Both plaintiffs have appealed and the court of appeals has consolidated the cases; the appeal has now been briefed but is not yet scheduled for oral argument. NRC is a named defendant in the lawsuit, along with other federal agencies and the United States.

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Kandel v. United States, No. 06-cv-872 (Fed. Cl.)

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 continue to dispute various issues before the trial judge. No significant activity has occurred since the court certified the class on April 19, 2012.

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Massachusetts v. NRC, Nos. 12-1404, 12-1772 (1st Cir.)

In this case, the Commonwealth of Massachusetts is challenging an NRC adjudicatory decision in the Pilgrim license renewal case. Massachusetts claims that NRC did not adequately consider, for NEPA purposes, the Fukushima accident and, specifically, the conclusions of the Fukushima task force, when it determined that the Commonwealth's late-filed contentions were inadmissible. Our brief was filed in October, the case was argued on December 5, and no decision has been issued yet.

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Navajo Nation v. United States, No. 06-cv-945 (Fed. Cl.)

The Navajo Nation alleges that the United States has mishandled the royalties due the Nation from the exploitation of oil, gas, coal, uranium and other natural resources that accrue to the benefit of the Navajo Nation and its members. The case was filed in 2006 and was forwarded to the NRC for discovery in 2007. Shortly after we initiated discovery, the case was referred to alternative dispute resolution (ADR) and discovery was stayed.

The case has now been removed from ADR and discovery has been re-initiated. OGC will be reviewing agency files to determine if the NRC has any documents relevant to the case.

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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. Given the suspension of proceedings related to Yucca Mountain, the case has been held in abeyance, subject to periodic status reports.

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New Jersey v. NRC, No. 11-3228 (3d Cir.)

In this lawsuit, New Jersey challenges NRC's Decommissioning Planning Rule insofar as that rule assumes a 1% real rate of return on decommissioning funds. At New Jersey's request the case has been held in abeyance to await the outcome of *Shieldalloy v. NRC*, No. 11-1449 (D.C. Cir.).

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Nye County et al. v. NRC, No. 12-1136 (D.C. Cir.)

This is a companion case to *In re Aiken County*, No. 11-1271 (D.C. Cir.) the mandamus case. In this case, the same parties who filed the mandamus case challenge the Commission's decision in CLI-11-07 (Sept. 9, 2011) directing the Atomic Safety and Licensing Board to close down the licensing board proceeding reviewing the application to construct the Yucca Mountain geologic repository.

Petitioners filed an unopposed motion to hold the case in abeyance pending resolution of the mandamus case. The Court issued an order holding the case in abeyance and directing the parties to file status reports within 30 days after the decision in the *Aiken County* case advising the Court whether any portion of this case remains for judicial consideration.

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Ohngo Gaudadeh Devia v. NRC, Nos. 05-1419, 05-1420, 06-1087 (D.C. Cir.)

This is the caption for three consolidated lawsuits filed by OGD (dissident Goshutes) and the State of Utah challenging a series of Commission adjudicatory decisions authorizing issuance of a license for the proposed Private Fuel Storage spent fuel storage facility. The case is fully briefed, but the court of appeals decided to hold the case in abeyance, as not currently "ripe," because PFS has failed to obtain necessary approvals from Department of the Interior (DOI) sub-agencies. PFS went to federal district court to challenge the other agencies' decisions. PFS prevailed in 2010, obtaining a remand to DOI. Ever since, the parties have filed a series of

joint status reports in the D.C. Circuit agreeing that the case should remain in abeyance pending further developments at DOI. PFS has moved to terminate its license, and the parties are currently discussing how to resolve the litigation in light of PFS's request.

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Pueblo of Laguna v. United States, No. 02-24 (Fed. Cl.); ***Jicarilla Apache Nation v. United States***, No. 02-25 (Fed. Cl.)

In both cases the plaintiffs (Indian tribes) seek an accounting of the federal government's alleged mismanagement of the tribe's trust funds and other properties. Plaintiffs also seek recovery for monetary loss and damages. The Court issued discovery and document preservation orders in both cases.

The *Laguna* case is currently in active litigation. Phase 1 of the trial focuses on the tribe's investment claims, *i.e.*, whether funds were timely deposited, properly withdrawn, and prudently invested. The United States has proposed a global settlement agreement, which is under review by the plaintiff. The *Jicarilla* case was tried on the Tribe's investment claims for the 1972 to 1992 time period in the spring of 2012. The parties are awaiting a ruling.

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Shieldalloy, Inc. v. NRC, No. 11-1449 (D.C. Cir.)

This is the second time around for Shieldalloy's attempt to force NRC to retain regulatory authority over a contaminated site in New Jersey (owned by Shieldalloy), notwithstanding NRC's entering into an agreement with New Jersey transferring regulatory authority to the state. Last year the court on appeals held that NRC had not adequately explained why it was not retaining authority over the New Jersey site. On remand, the Commission issued a lengthy formal opinion justifying its position. Shieldalloy has gone back to the court to try to set aside the Commission decision. Oral argument was heard on October 9. There is as yet no decision.

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Texas Instruments v. United States, No. 09-701C (Fed. Cl.)

Over the last 20 years, the Corps of Engineers has removed a certain amount of radioactive contamination from the Shpack Superfund site in Norton and Attleboro, Massachusetts. This contamination was identified by the NRC in the early 1970s. After removal of the material, the Corps initiated procedures to file a claim against Texas Instruments (TI) under CERCLA, having concluded that the material most likely came from TI and was the result of TI's work under certain AEC naval reactor contracts in the 1950s and 1960s. In response, TI filed the instant

lawsuit in the Court of Federal Claims, claiming that it was not the responsible party and that, alternatively, if it was the responsible party it was indemnified under the AEC contracts involved. The parties conducted discovery to test TI's claim that it was not responsible for the contamination. The NRC provided background materials and several current and former NRC employees were deposed as witnesses. The parties have now negotiated a settlement and have filed a proposed consent decree which, *inter alia*, requires TI to dismiss the Claims Court case with prejudice.

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

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 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.

The case remains pending before the district court on remand.

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CLOSED CASES

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

These lawsuits challenged 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. NRC filed its brief, on both jurisdiction and the merits last March, and the court heard oral argument in

October. The Court denied both petitions for lack of jurisdiction on February 7, 2012. Blue Ridge Environmental Defense League declined to seek further review.

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New York et al. v. NRC, Nos. 11-1045, 11-1051, 11-1056, 11-1057 (D.C. Cir.)

This consolidated lawsuit challenged NRC's Waste Confidence Decision and Temporary Storage Rule. Petitioners argued that NRC lacked sufficient factual support for its finding that spent-fuel storage onsite for at least 60 years can be accomplished in a safe and environmentally acceptable manner, and that it should have prepared an environmental impact statement before reaching this conclusion. In addition, petitioners challenged the Rule's expression of confidence that a permanent repository will be available "when necessary." On June 8, the court struck down NRC's waste confidence decision and rule. The Court found NRC's NEPA analysis inadequate for failing to analyze the consequences of not building a repository. The court also found NRC's examination of the risk of leaks and fires in spent fuel pools insufficient. NRC sought no further review, but some of the petitioners sought attorney's fees. At our request, the court placed the fee claim in the court's mediation program, and the parties reached an agreement to settle the fees claim.

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Sustainable Energy & Economic Develop. Coalition v. NRC. No. 11-1457 (D.C. Cir.)

This lawsuit challenged an NRC adjudicatory decision in the ongoing Comanche Peak COL proceeding. The Board rejected a contention on mitigative strategies, and the Commission upheld the Board ruling. Petitioners disagreed with the contention-admissibility ruling. We filed a motion to dismiss the lawsuit as premature, given that the COL decision was not scheduled to be reached for several years and that petitioners themselves were still before the Board and the Commission, raising Fukushima-driven claims for reopening. Petitioners moved to withdraw their lawsuit, and the motion for voluntary dismissal was granted.

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Vermont Department of Public Service v. NRC, Nos. 11-1168, 11-1177 (D.C. Cir.)

These consolidated cases (one brought by Vermont and the other by the New England Coalition) claimed that NRC unlawfully renewed Vermont Yankee's operating license without requiring Vermont Yankee to have in place a state water-quality certification under section 401 of the Clean Water Act. In response, we argued that the petitioners failed to exhaust their NRC remedies before bringing the lawsuit, because they never properly raised the issue before the Board and never appealed at all to the Commission. We also argued that the petitioners

suffered no harm from the agency's actions because Vermont's section 402 NPDES permit was sufficient to prevent any harms to water quality that might occur from relicensing Vermont Yankee. Following oral argument, the court of appeals unanimously agreed with our exhaustion argument and upheld the agency's decision to relicense Vermont Yankee without a fresh section 401 certificate.

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