POLICY ISSUE
(Information)

January 22, 2018 SECY-18-0009

FOR: The Commissioners

FROM: Andrew P. Averbach /RA/
Solicitor

SUBJECT: ANNUAL REPORT ON COURT LITIGATION (CALENDAR YEAR 2017)

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 26, 2017 (SECY-17-0012). It includes cases filed through the end of 2017 but reflects the status of NRC cases in court as of January 22, 2018.

During the reporting period (Calendar Year 2017), the Commission or NRC officials were sued two times in the courts of appeals.[1] One lawsuit was commenced in federal district court.[2] During this same period, one case was closed.[3] The number of new filings in 2017 is somewhat smaller than recent years. There were 4 new lawsuits (including cases filed in federal district court) in 2016, 10 in 2015, 6 in 2014, 3 in 2013, 5 in 2012, 11 in 2011, 9 in 2010, 8 in 2009, 13 in 2008, and 11 in 2007, for an average of 8 new lawsuits per year over the prior ten years.

We have also continued to manage incoming discovery demands and/or subpoenas in lawsuits brought by or against the United States or in which the United States and/or its agencies have been named as a third-party defendant. Much of this work has involved responding to requests

CONTACT: Andrew P. Averbach, OGC
(301) 415-1956

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[1] *Oglala Sioux Tribe v. NRC*, No. 17-1059 (D.C. Cir.); *In re State of Texas*, No. 17-60191 (5th Cir.).

[2] *Berka v. NRC*, No. 1:17-cv-02836-APM (D.D.C).

[3] *Sustainable Energy & Economic Development Coalition v. NRC*, No. 16-1108 (D.C. Cir.).

for documents related to the activities of the Atomic Energy Commission (AEC) and/or its licensees, and working with the Department of Justice to review pleadings and implementing litigation holds for materials that may be relevant to ongoing litigation. The enclosed report includes a section cataloguing cases of this type in which the agency has located potentially responsive materials. Cases in which no responsive materials were located are not included.

Finally, during this reporting period we handled 5 new "Touhy" requests for NRC testimony, depositions, or other evidence for use in private litigation. *See* 10 C.F.R. § 9.200 *et seq.*

Enclosure:
1. Litigation Status Report

cc: SECY
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REGIONS

LITIGATION STATUS REPORT
(As of January 22, 2018)

ACTIVE CASES[1]

Berka v. NRC, No. 1:17-cv-02836-APM (D.D.C)
On December 14, 2017, George Berka commenced a lawsuit in the U.S. District Court for the District of Columbia seeking to require the NRC to amend its rules so as lift restrictions on the process by which power plants that have ceased operations may restart. Mr. Berka had previously sought such an amendment to the NRC's rules via a petition for rulemaking filed in 2015, but the petition was not docketed as a result of Mr. Berka's failure to satisfy the agency's filing criteria. NRC is represented by the U.S. Department of Justice in the matter. No action has yet been taken on the complaint.

CONTACT: Jennifer Scro, OGC
301-287-9081

Beyond Nuclear, Inc. v. NRC, No. 15-1173 (D.C. Cir.)
This petition for review challenges two orders associated with NRC's issuance of a combined license to DTE Electric Company for Fermi Nuclear Power Plant, Unit 3. In the first order (CLI-15-13), the Commission upheld the Board's dismissal on timeliness grounds of Beyond Nuclear's contention challenging NRC's NEPA compliance with respect to consideration of the environmental impacts of the anticipated transmission corridor for Fermi Unit 3. The Commission also declined in that order to permit the Board to consider, on a *sua sponte* basis in a contested proceeding, NEPA issues related to the transmission corridor. In the second order (CLI-14-3), the Commission denied Beyond Nuclear's petition to review the Board's ruling in favor of the license applicant on its challenge to the adequacy of the applicant's quality assurance program.

On November 27, 2017, the court issued a brief order denying the petition for review, finding that (1) the Commission neither plainly erred nor abused its discretion in deeming Beyond Nuclear's transmission corridor contention untimely and declining to consider the contention on a *sua sponte* basis, as the ASLBP had proposed; and (2) the Commission reasonably upheld the Board's determination with respect to DTE's quality assurance program, given that its factual findings were supported by the record and its interpretation of the relevant regulations was correct. Beyond Nuclear has until February 26, 2018, to seek Supreme Court review.

CONTACT: Michelle D. Albert, OGC
301-287-9259

[1] For statistical purposes, we counted as "active" any case pending before a court, or still subject to further judicial review, as of January 1, 2016. However, the narratives accompanying the cases listed in this report include any post-January 1 developments.

Enclosure

Friends of the Earth v. NRC, No. 16-1004 (D.C. Cir.)
Friends of the Earth (FOE) seeks review of a Commission decision (CLI-15-21) that denied FOE's attempt to intervene in NRC proceedings related to the renewal of the Diablo Canyon operating licenses. FOE argued before the Commission that the operating licenses for Diablo Canyon Units 1 and 2 may not be renewed until the agency explores, in an evidentiary hearing, the impact of the certain seismic information on the safe operation of the plant; the Commission affirmed the dismissal of its contentions and denial of its related waiver request. On June 20, 2016, FOE and Pacific Gas and Electric Company (PG&E), along with other parties, submitted a joint settlement proposal to the California Public Utilities Commission (CPUC), under the terms of which PG&E agreed to, *inter alia*, retire Diablo Canyon at the expiration of its current operating licenses. On June 29, 2016, PG&E and FOE jointly requested that the court suspend briefing in this matter pending action by the CPUC. On July 21, 2016, the court entered an order holding the case in abeyance and directing the parties to file status reports at 120-day intervals.

CONTACT: James E. Adler, OGC
301-287-9173

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 the mishandling of annual leave at the time of retirement. The parties prepared a stipulation with respect to certain agencies, including NRC, for which sufficient information concerning the calculation of damages has been provided, and a partial settlement agreement has been reached. The parties have not been notified yet about the final disposition.

CONTACT: Mark J. Maxin, OGC
301-287-3424

Natural Resources Defense Council v. NRC, No. 16-1298 (D.C. Cir.)
Natural Resources Defense Council and Powder River Basin Resource Council have filed a petition for review of CLI-16-13, the Commission's decision upholding the issuance of a license to Strata Energy to build and operate an *in situ* uranium recovery facility in Wyoming. Petitioners assert that, where the NRC Staff prepares a final environmental impact statement and issues a license prior to an adjudicatory hearing, the agency violates NEPA when the presiding officer of that hearing considers supplemental information that was not included in the EIS. Petitioners also challenge several of the agency's findings on the merits with respect to environmental risks and impacts to groundwater associated with the license, as well as the rejection or dismissal of contentions prior to the adjudicatory hearing based on failure to comply with NRC rules of procedure. Oral argument was held on October 10, 2017 before Judges Kavanaugh, Williams, and Ginsburg. On January 22, 2018, the court issued a decision deeming the NRC's augmentation of the environmental record through its adjudicatory process to be permissible and rejecting petitioners' remaining arguments. Petitioners have 45 days to seek rehearing and, if no rehearing is sought, 90 days to seek Supreme Court review.

CONTACT: Eric V. Michel, OGC
301-287-3704

Oglala Sioux Tribe v. NRC, No. 17-1059 (D.C. Cir.)
This petition for review by the Oglala Sioux Tribe challenges the issuance of a license to Powertech (USA), Inc. for the Dewey-Burdock in situ recovery project, including the Commission's decision in CLI-16-20. Among other things, that decision affirmed the licensing board's direction that the staff submit monthly status reports concerning efforts to resolve certain deficiencies that the board had identified related to the treatment of cultural and historic resources and tribal consultation. The Tribe asserts that issuance of the license violates NEPA, the NHPA, and the Atomic Energy Act. NRC moved to dismiss the petition, asserting that the decision under review does not constitute final agency action because of the ongoing consideration by the licensing board of NEPA and NHPA issues. The court declined to rule on the motion and directed the parties to include the jurisdictional arguments in their briefs. The tribe filed its brief on June 27, 2017; the NRC filed its brief on August 10, raising its jurisdictional arguments and asserting that the Board and Commission acted appropriately in declining to vacate the license while the deficiencies identified in the adjudicatory proceedings are resolved and in resolving the Tribe's other contentions; Powertech filed its brief on August 30; and petitioner filed its reply on September 21. Oral argument is scheduled for March 20, 2018.

CONTACT: James E. Adler, OGC
301-287-9173

Nevada v. NRC, No. 09-1133 (D.C. Cir.)
This petition for review challenges NRC's "Yucca Mountain Rule," 10 C.F.R. Part 63, which implements an EPA rule establishing standards for reviewing the Yucca Mountain repository application. Given the suspension of adjudicatory proceedings before the Commission related to Yucca Mountain and the uncertainty surrounding the Yucca Mountain project (including the lack of new appropriations from Congress from the Nuclear Waste Fund), the case has been held in abeyance, subject to periodic status reports. In these reports, the parties have advised the court of the resumption of the licensing process following the issuance of a writ of mandamus in *In re Aiken County.* The case remains in abeyance.

CONTACT: Jeremy M. Suttenberg, OGC
301-287-9154

In re State of Texas, No. 17-60191 (5th Cir.)
The State of Texas filed a petition for a writ of mandamus and related relief under the Nuclear Waste Policy Act, asserting that the NRC has violated its obligations under the Act and under the writ of mandamus issued by the D.C. Circuit in *In re Aiken County* by keeping the adjudicatory proceedings associated with the Yucca Mountain repository in suspension. Texas also seeks relief against the Departments of Energy and Treasury, and it has asked the court, among other things, to require the resumption of the adjudication and to require the NRC to request additional funds from Congress for purposes of issuing a final decision on the license application. Texas also filed a motion for a preliminary injunction against DOE, seeking to stop DOE's consent-based siting activities; and Nevada, as intervenor, moved to dismiss the case, asserting a variety of jurisdictional arguments. NRC filed a response to the petition on June 29, 2017, asserting that the relief sought against the agency was untimely, moot, and filed in the wrong court, and that, on the merits, the petition should be denied because the NRC had acted in accordance with its obligations both under the Nuclear Waste Policy Act and the D.C. Circuit's mandamus order in *Aiken County*. DOE and Treasury filed a response on June 30, 2017, raising both procedural and substantive defenses; the responses of NEI and Nevada were filed on July 31, 2017. No further briefing has been directed by the court.

CONTACT: Charles E. Mullins, OGC
301-287-9156

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 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 (PFS) spent fuel storage facility. The case is fully briefed, but the court of appeals decided to hold the case in abeyance because PFS had failed to obtain necessary approvals from Department of the Interior (DOI) sub-agencies and the case was therefore not ripe for review. 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.

CONTACT: Grace H. Kim, OGC
301-287-9153

CLOSED CASES

Sustainable Energy & Economic Development Coalition v. NRC, No. 16-1108 (D.C. Cir.) This case involves petitioners' contention that a foreign, minority owner (Toshiba America Nuclear Energy Corporation) of the South Texas Project Units 3 and 4, effectively took control of the project through financing arrangements with the license applicant (Nuclear Innovation North America, LLC) such that issuance of a license would violate the prohibition against foreign ownership, control, or domination (FOCD) of nuclear reactors under the Atomic Energy Act. The Licensing Board resolved the FOCD contention against petitioners, finding that issuance of a license for the units would not violate the FOCD prohibition. The Commission denied review in CLI-15-07. On April 11, 2016, the Sustainable Energy and Economic Development Coalition (SEED) and two other petitioners filed a petition for review of the issuance of COLs for South Texas Project Units 3 and 4. Petitioners challenged the decision in CLI-15-07 that the licensee was not subject to foreign ownership, control, or domination. SEED subsequently amended its petition to add a challenge to the denial of SEED's motion to reopen the record so as to admit its "placeholder" contention challenging the Commission's reliance on the Continued Storage Rule when it issued the COLs and moved to hold the case in abeyance pending the court's resolution of *New York v. NRC*. Following resolution of that case and after the court issued a briefing schedule, SEED announced that it no longer sought to pursue the petition for review. On March 31, 2017, the parties entered a joint stipulation dismissing the case voluntarily.

CONTACT: Grace H. Kim, OGC
301-287-9153

CASES IN WHICH NRC HAS PARTICIPATED OR IS PARTICIPATING IN DISCOVERY ON BEHALF OF UNITED STATES

105 Mount Kisco Associates, LLC v. Paul Carozza, No.7:15-cv-05346-NSR-JCM (S.D.N.Y.)
This is a defensive case under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) alleging that the United States is liable (as an operator, arranger, and transporter) for radiological contamination at a site in Westchester County, New York. The plaintiffs allege that the business at the site processed ore for the Manhattan Project. From 1942 into the mid-1960s, the Canadian Radium plant in Mount Kisco, New York, processed uranium ore and other radioactive materials. During some portion of this period, the plant apparently provided refined uranium to the Government for the Manhattan Project. It also sold the other radioactive elements it extracted from this ore (for example, radium) to other non-governmental clients. The facility stopped production by 1966.

At the request of the Department of Justice, the NRC provided materials related to the site's AEC license. The Court has stayed discovery while it considers a motion to dismiss by the non-federal defendants.

CONTACT: Charles E. Mullins, OGC
301-287-9156

Atlantic Richfield Co. v United States and the Pueblo of Laguna, No. 1:15-cv-00056 (D.N.M.)
This is a lawsuit under CERCLA seeking recovery for cleanup efforts at the Jackpile mine site in New Mexico. All defendants moved to dismiss the case, and the court stayed discovery while it considered the motions. On February 9, 2016, the court dismissed the United States as a party, but the case is still proceeding with respect to other parties. NRC was asked to locate and retain relevant documents.

Atlantic Richfield has now negotiated an administrative order on consent with the Environmental Protection Agency and has entered into settlement negotiations with the United States.

CONTACT: Charles E. Mullins, OGC
301-287-9156

Commonwealth of Pennsylvania v. Lockheed Martin Corp., No. 09-cv-00821 (M.D. Pa.)
In 2009, Pennsylvania filed a CERCLA case against Lockheed Martin over the cleanup of the Quehanna site in central Pennsylvania. Lockheed Martin, in turn, sued the United States for contribution, alleging that the waste left at the site was due to activities performed pursuant to government contracts, including contracts that involve the activities of the Atomic Energy Commission. The parties completed settlement negotiations, reached an agreement, and filed a joint motion for a consent decree, which has been entered by the Court. The decree dismissed both the current case as well as all reimbursement claims against the United States, though the dismissal was without prejudice to Lockheed's right to file a breach of contact claim against the Department of Energy in the Court of Federal Claims. No further participation by the NRC is contemplated.

CONTACT: Charles E. Mullins, OGC
301-287-9156

El Paso Natural Gas Company v. United States, No. 07-cv-905 (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. NRC is a named defendant in the lawsuit, along with other federal agencies and the United States. All defendants are represented by the Department of Justice.

The suit asserts a number of theories of liability including the Administrative Procedure Act (APA), CERCLA, the Resource Conservation Recovery Act (RCRA), and the Uranium Mill Tailings Radiation Control Act (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 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 12721 (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 appealed and the D.C. Circuit affirmed the dismissal of most of the claims with two exceptions. *El Paso Natural Gas Co. v. United States*, 750 F.3d 863 (D.C. Cir. 2014). First, the court of appeals agreed that one of the plaintiffs' claims should have been dismissed "without prejudice" instead of "with prejudice." Second, the court re-instated the plaintiffs' RCRA claims relating to groundwater contamination at the Highway 160 site and remanded them to the district court for further proceedings.

The district court held the case in abeyance to allow the parties to engage in settlement negotiations. The parties reached a settlement agreement that resolved the claims of the Navajo Nation. The agreement provides, *inter alia*, for the drilling of additional monitoring wells and the possibility of further legal action based on any new data observed. The Court entered an order dismissing the case but retaining jurisdiction to the extent that it allows the Navajo Nation to re-file a lawsuit depending on the data obtained from the monitoring wells. No further participation by the NRC is contemplated.

CONTACT: Charles E. Mullins, OGC
301-287-9156

EPEC Polymers, Inc. v. NL Industries, Inc., No. 3:12-cv-03842 (D.N.J.)
The United States is defending against a third-party complaint alleging that the Army Corps of Engineers is responsible for environmental response costs under CERCLA because it dredged thorium-containing materials from the Raritan River in New Jersey and disposed of them on a site now owned by the plaintiff. The plaintiff alleges that the thorium was discharged from a facility owned by defendant NL Industries, Inc., in Sayreville, New Jersey. NL in turn alleges that the thorium is traceable to the activities of Tenneco Chemicals, Inc., the holder an AEC license, and that NRC performed a field team investigation and approved the decommissioning of plaintiff's site in the late 1990s or early 2000s. NRC has worked with the Department of Justice to obtain documents related to the AEC license and the field team investigation.

The United States has completed its document production, but additional production may occur as the site clean-up continues. The case is now in mediation.

CONTACT: Charles E. Mullins, OGC
301-287-9156

Jeremy M. Suttenberg, OGC
301-287-9154

United States v. Energy Solutions, Inc. No. 1:16-cv-01056-GMS (D. Del).
In late 2016, the United States commenced an action seeking to block the merger between Energy Solutions, Inc. and Waste Control Specialists, Inc., on the ground that the merger would have anticompetitive effects on the market for low-level radioactive waste disposal. NRC responded to a subpoena issued by the defendants (which it processed in accordance with its "Touhy" regulations) and produced responsive materials. On June 21, 2017, following a trial, the district court issued an order enjoining the merger.

CONTACT: Andrew P. Averbach, OGC
(301) 415-1956

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