UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

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NOTE TO: The Files

The attached Memorandum on Pending Litigation was hand-delivered to the Transition Team by Stephen Eilperin, NRC Solicitor, this date.

Peter Crane for James A. Fitzgerald

James A. Fitzgerald
Assistant General Counsel

cc: W. Dircks
T. Combs

MEMORANDUM ON PENDING LITIGATION

There are forty-three cases involving the Nuclear Regulatory Commission now pending in court of which ten cases are of particularly significant interest. A full listing of the pending cases as well as cases concluded in the last year is attached to this memorandum. The most signifciant cases are discussed below:

1. Sholly v. NRC (D.C. Cir., Nos. 80-1691, 80-1783 and 80-1784). On November 19 the D.C. Circuit declared illegal the Commission's refusal to hold hearings in connection with its approval of venting the Three Mile Island containment of krypton early last summer. The D.C. Circuit held that even where a license amendment involves no significant hazards consideration any interested person who requests a hearing is entitled by Section 189(a) of the Atomic Energy Act to a hearing before the amendment becomes effective. The court also held that the TMI-2 accident had essentially negated any authority in the TMI-2 operating license so that any action not authorized by the Commission's February 11 order establishing post-accident conditions for TMI-2 is a license amendment subject to Section 189(a) hearing requirements.

The D.C. Circuit's decision on the no significant hazards issue threatens immediate and severe impacts on the nuclear industry. Some 20 nuclear power plants, primarily those engaged in fuel reloading, require license amendments before they can either

resume operation or resume operation at full power. The court's decision may provide any interested person the leverage to keep the plant down simply by requesting a hearing. So too the court's holding that the TMI-2 license was negated by the accident has the potential of exacerbating the delay associated with the TMI-2 cleanup by requiring more frequent license amendment hearings before specific cleanup actions can be taken. This latter problem may in part be alleviated by the Commission's powers to take immediate action where public health and safety warrant.

The Commission is considering pursuing the Sholly case further either through Supreme Court review or corrective legislation. Additionally, the Commission is considering filing a motion for stay of mandate with the D.C. Circuit in order to obtain interim relief pending a decision on whether to seek Supreme Court review.

2. Union of Concerned Scientists v. NRC (D.C. Cir. No. 80-1962)

This case challenges the Commission's June 20, 1980 policy statement that gives guidance to its adjudicatory boards for handling the additional requirements flowing from the Commission's TMI action plan. The policy statement has been challenged on the ground that it unlawfully discriminates between parties to NRC adjudications by permitting applicants for operating licenses to challenge in each adjudication the necessity for the additional licensing requirements contained in NUREG-0694, while prohibiting

intervenors from challenging their sufficiency. An adverse court decision could seriously complicate the Commission's power to impose its action plan requirements and could lead to reopening of any licensing case that had excluded TMI-related issues based on the policy statement.

3. Citizens Action for Safe Energy v. NRC (D.C. Cir. No. 80-1566)

This lawsuit, filed May 27, 1980, challenges the Appeal Board's decision in ALAB-587 which deferred for the present further consideration of Class 9 accidents at Black Fox. Petitioners contend that NEPA requires the Commission to prepare a supplemental environmental impact statement to consider the consequences of Class 9 accidents. An adverse decision by the court could require supplemental NEPA impact statements to be prepared examining the probabilities and environmental consequences of serious nuclear accidents. Potentially 15 power plants would be affected if a court interprets the Commission's NEPA obligations along the lines suggested by CEQ. Additionally, there is a possibility that the court might require dererral of licensing or further construction in each case until the supplemental EIS is completed.

4. Natural Resources Defense Council v. NRC (D.C. Cir. No. 80-1477)

This lawsuit challenges the Commission's approval of export licenses to the Westinghouse Electric Corporation for the export of a nuclear reactor and certain components to the Philippines.

The lawsuit challenges the Commission's position that it will only consider those health, safety, and environmental impacts that affect the territory of the United States or the global commons, and not impacts affecting a foreign nation. We do not expect an adverse decision; however, an adverse decision could bring to a halt the export of U.S. nuclear reactors and their components.

5. Natural Resources Defense Council v. NRC (D.C. Cir. No. 80-1328)

This lawsuit challenges the Commission's rule excluding from the Part 21 requirement to report defects in safety related components, items that are available in general commerce and which have no unique design requirements imposed for nuclear application. The Commission's clarifying rule was adopted without notice and comment and may be overturned on procedural grounds. Should the court overturn the Commission's rule on the merits -- that the Commission has imposed too limited a scope on its reporting requirements -- then such a decision could have a serious impact on the ability of nuclear power plant operators to obtain necessary parts for construction or operation of their power plants.

6. People of the State of Illinois v. NRC (D.C. Cir. No. 80-1163)

This lawsuit challenges the Commission's refusal to conduct an adjudicatory hearing with regard to NIPSCO's plans for installing short pilings for the Bailly nuclear facility. The case involves

the fundamental question of the standard by which the Commission decides whether a construction change or a matter left open for later resolution rises to the level of an amendment. A court holding that a construction permit amendment was required in the circumstances of this case would seriously complicate the construction of nuclear power plants. When coupled with the D.C. Circuit's Sholly decision, an expansive reading here would mean that even insignificant construction permit amendments could not be accomplished without a prior hearing should an interested person request one. The potential for constant interruption in power plant construction could be endless.

7. Natural Resources Defense Council v. NRC (D.C. Cir. Nos. 80-1863 and 80-1864)

These lawsuits challenge the Commission's decision to hold something less than an adjudicatory hearing with respect to the ongoing license amendment proceeding for the NFS Erwin facility. Since petitioners have not sought to enjoin operation of NFS Frwin, the case should pose no threat to the Navy's continued supply of fuel for its nuclear-powered war ships. However, the lawsuits do raise the significant issue whether the Commission is entitled to hold something less than an adjudicatory hearing when a license proceeding is focused on the operation of a facility essential to national defense. The cases also involve the procedural powers of the Commission to apply by immediate effective

rule in on-going proceedings, restricitons on adjudicatory rights. Additionally, the lawsuits could potentially raise the question whether the Commission is entitled to withhold from a participant in the licensing proceeding classified information which the Commission has relied upon in reaching its decision. An adverse ruling from the court could deprive the Commission of flexibility it thinks is important when establishing the hearing format for cases that bear upon national defense matters.

8. Kerr-McGee Nuclear Corp. v. NRC (10th Cir. No. 80-2043); United Nuclear Corp. v. NRC (10th Cir. No. 80-2229)

These cases challenge the Commission's licensing requirements for uranium mills. The complaint alleges in general terms that the Commission's regulations imposed a substantial and unreasonable burden upon uranium processing operations. Since petitioners have not yet filed their brief their complaint with the rule remains general. An adverse court decision could potentially have a significant impact on the Commission's long-term plans for uranium mill tailings management.

9. Potomac Alliance v. NRC (D.C. Cir. No. 80-1862)

This case challenges an Appeal Board decision granting VEPCO an operating license amendment to expand the capacity of its North Anna Unit 1 spent fuel pool. Petitioner claims that the Commission illegally failed to consider the environmental effects of

storing spent fuel at the site after the plant's operating license has expired. An adverse court decision could mean that the Commission would be obliged, before approving any spent fuel pool expansion or re-racking, to conduct for each case an adjudicatory hearing on its confidence that nuclear waste will be disposed of safely, and when that is expected to occur. Twelve spent fuel pool expansion requests are presently pending and some 9 other power plants are projected to lose full core reserve by 1985.

10. Natural Resources Defense Council v. NRC (D.C. Cir. Nos. 74-1586, 77-1448 and 79-2131) and State of New York v. NRC (D.C. Cir. No. 79-2110)

These consolidated cases challenge three related versions of the Commission's uranium fuel cycle rule. An adverse court decision could require the Commission in all licensing actions to discuss the environmental impact of the back end of the fuel cycle rather than handling the matter by generic rule. It might also lead to requests for further hearings on completed licensing actions which had been issued based upon the rules which have been in effect. This would cover all plants whose environmental report was submitted since mid-1974.

Pending Cases

Sholly v. NRC (D.C. Cir., Nos. 80-1691, 80-1783 and 80-1784)

This lawsuit sought an injunction against the venting of Krypton-85 from the TMI-2 reactor building. In orders dated June 26, June 27 and June 28, the D.C. Circuit denied the requests for injunctive relief. In a companion case seeking essentially the same relief, PANE v. NRC (3d Cir. Nos. 80-1994 and 80-1995), the Third Circuit on July 10 transferred the cases to the D.C. Circuit for disposition. The cases were argued on the merits in September 1980, and are awaiting decision.

Susquehanna Valley Alliance v. Three Mile Island, 485 F. Supp. 81 (M.D. Pa.), rev'd in part, 619 F.2d 231 (3d Cir.), Cert. pet. Pending sub nom. General Public Utilities Corp. v. Susquehanna Valley Alliance (S.Ct. No. 80-382) (TMI)

The Susquehanna Valley Alliance brought this lawsuit on May 25, 1979, alleging that the Commission had approved the construction and operation of EPICOR-II, a demineralizing and filtration system designed to decontaminate intermediate-level radioactive waste water resulting from the TMI accident, and intended to allow discharge of the treated water into the Susquehanna River in violation of the Atomic Energy Act, the National Environmental Policy Act, the Clean Water Act and various provisions of the United States Constitution. On that same day (and in response to a lawsuit raising virtually the same issues, City of Lancaster v. NRC (D.D.C., No. 79-1368)) the Commission issued a statement pro-

hibiting the treatment or discharge of contaminated water, except for certain routine operational releases, until completion of an environmental assessment. On October 12, 1979, while the Commission was still considering EPICOR-II operation, the district court dismissed the complaint for lack of subject matter jurisdiction on the ground of SVA's failure to exhaust its administrative remedies. Thereafter, the Third Circuit reversed the dismissal of SVA's claims under NEPA, the Clean Water Act and the Constitution, but affirmed the dismissal of the Atomic Energy Act claim. A petition for writ of certiorari, filed by the utility, is pending.

Union of Concerned Scientists v. NRC (D.C. Cir. No. 80-1962)

On August 14, 1980, the Union of Concerned Scientists and five other organizations sought review in the D.C. Circuit of the Commission's Statement of Policy entitled "Further Commission Guidance for Power Reactor Operating License", 45 Fed. Reg. 41738 (June 20, 1980). Petitioners contend that the policy statement unlawfully discriminates between parties to NRC adjudications by permitting applicants for operating licenses to challenge in each adjudication the necessity for the additional licensing requirements contained in NUREG-0694, while prohibiting intervenors from challenging their sufficiency.

Citizens Action for Safe Energy v. NRC (D.C. Cir. No. 80-1566)

This lawsuit, filed May 27, 1980, challenges the Appeal Board's decision in ALAB-587 which deferred for the present further consideration of Class 9 accidents at Black Fox. Petitioners contend that NEPA requires the Commission to prepare a supplemental environmental impact statement to consider the consequences of Class 9 accidents. Briefing is expected to be completed by December, 1980.

Natural Resources Defense Council v. NRC (D.C. Cir. No. 80-1477) (Philippines)

On May 6, 1980, a number of environmental groups sued to set aside two Commission orders, the first of which had found that the export of a nuclear reactor and certain components to the Republic of the Philippines met all the applicable licensing criteria in the Atomic Energy Act of 1954, as amended by the Nuclear Non-Proliferation Act of 1978, and directed issuance of export licenses to the Westinghouse Electric Corporation. In the second order the Commission declared that it would adhere to the policy reflected in its earlier licensing decisions and only consider those health, safety, and environmental impacts arising from exports of nuclear reactors that affect the territory of the United States or the global commons. The case was argued before the D.C. Circuit in September, 1980, and is awaiting decision.

Natural Resources Defense Council v. NRC (D.C. Cir. No. 80-1328) (Part 21)

On March 24, 1980, the Natural Resources Defense Council sought review of a January 23, 1980 letter from the Chairman of the Nuclear Regulatory Commission denying its request that the Commission rescind certain amendments to 10 CFR Part 21. The Commission had adopted the amendments on October 19, 1978, without notice and comment, through the issuance of an immediately effective rule clarifying that items that are available in general commerce and which have no unique design requirements imposed for nuclear application, are not within the scope of the Commission's rule pertaining to the reporting of defects in safety-related components. Briefing was completed in October, 1980.

People of the State of Illinois v. NRC (D.C. Cir. No. 80-1163) (Bailly)

On February 7, 1980, the State of Illinois filed a lawsuit challenging the Commission's determination that the plan of the Northern Indiana Public Service Company for installing foundation piles for the Bailly nuclear facility was not a design change requiring a construction permit amendment and a hearing as of right, and was not of such safety significance as to warrant a discretionary hearing. The Commission's decision noted that pilings issues had appropriately been left for later resolution, and that the Advisory Committee on Reactor Safeguards had advised that the use of shorter

pilings was not a significant design change from the standpoint of engineering. Briefing was completed in October, 1980.

Natural Resources Defense Council v. NRC (D.C. Cir. Nos. 80-1863 and 80-1864) (NFS Erwin)

These lawsuits, filed July 28, 1980, seek review of two Commission orders involving the NFS Erwin facility. In No. 80-1863, NRDC challenges an interlocutory Commission order that granted NRDC a hearing on a proposed license amendment for the NFS Erwin facility which was less adversary than petitioners sought. In No. 80-1864 NRDC challenges an immediately effective rule issued June 26, 1980 which amended the Commission's rules of procedures to incorporate the military function exception of the Administrative Procedure Act, and applied that adjudicatory exception to the ongoing license amendment proceeding for NFS Erwin. On September 29, 1980 the D.C. Circuit denied the Commission's motion to dismiss the rule challenge, stayed the rule pending appeal, and held the hearing case in abeyance.

San Luis Obispo Mothers for Peace, et al. v. Hendrie (D.D.C., No. 80-2356)

Plaintiffs filed this lawsuit on September 16, 1980, seeking the disqualification of Commissioner Joseph M. Hendrie from any further participation in the proceedings on the pending operating license application for the Diablo Canyon Nuclear Plant. The basis for

their claim is both allegedly improper ex parte contacts between the Commissioner and utility company officials and his purported involvement in the review of the Diablo Canyon license application during his tenure as a staff employee of the Atomic Energy Commission. The parties have filed dispositive motions and the case is awaiting oral argument.

Prairie Alliance v. NRC (C.D. Ill. No. 80-2095
General Electric Co. v. NRC (D.D.C. No. 80-2659)

On May 7, 1980, the Prairie Alliance sued the NRC under the Freedom of Information Act to compel disclosure of the General Electric Nuclear Reactor Study known as the Reed Report for its principal author. While that lawsuit was pending, on October 9, 1980, the Commission on a 2-2 vote was unable to muster a majority to claim any FOIA exemption for the report, and hence ordered its release. The General Electric Company thereupon filed a complaint and a request for a temporary restraining order to enjoin release of the report and require its return to General Electric. Judge Aubrey Robinson ordered that GE's case be transferred to federal district court in Illinois where the Prairie Alliance case had been filed, and enjoined the Commission from releasing the Reed Report pending disposition of the case by that court. A decision is expected in the first quarter of 1981.

Simmons v. Arkansas Power and Light Company and NRC (E.D. Ark., LR-80-C-263, on appeal, 8th Cir., No. 80-1633)

On May 30, 1980, plaintiffs Simmons, et al. sued Arkansas Power and Light Company, the NRC, the State of Arkansas, and various State agencies seeking an injunction against operation of Arknasas Power and Light Unit 1 alleging that the emergency planning and preparedness program for the facility is inadequate. A hearing on the motion for preliminary injunction was held on June 17-18. At the conclusion of plaintiffs' testimony and after argument on the motions to dismiss the lawsuit, Circuit Judge Arnold, sitting by designation, ruled from the bench that the constitutional claims were insubstantial, that there was no subject matter jurisdiction over the federal statutory claims for plaintiffs' admitted failure to exhaust remedies under 10 CFR 2.206 and because exclusive judicial review over NRC actions is in the U.S. Courts of Appeals, and that the court lacked pendant jurisdiction over the state law claims. Plaintiffs have appealed that ruling to the Eighth Circuit, where briefing was completed in October.

Duke Power Co. v. NRC (D.C. Cir. No. 80-2253)

On October 10, 1980, Duke Power Co. filed a lawsuit challenging the Commission's final rule on radiological emergency planning issued August 11, 1980. 45 Fed. Reg. 55402. The utility indicated that it would also ask for Commission re-consideration of

the rule and would defer pressing the lawsuit pending Commission disposition of the petition for reconsideration.

Kerr-McGee Nuclear Corp. v. NRC (10th Cir. No. 80-2043)

On October 3, 1980, Kerr-McGee petitioned the Tenth Circuit to review the Commission's Uranium Mill Licensing Requirements which were issued that day. 45 Fed. Reg. 65521-38. The compalint contends that the Commission's regulations imposed a substantial and unreasonable burden upon Kerr-McGee's uranium-processing operations.

Ft. Pierce Utilities Authority v. NRC (D.C. Cir. No. 80-1099)

On January 21, 1980, the Ft. Pierce Utilities Authority filed a lawsuit challenging the Commission's decision not to initiate at this time a Section 105a antitrust proceeding against the Florida and Power Light Company. The request had been prompted by a Fifth Circuit decision ruling that the Commission licensee had conspired with Florida Power Company to divide the wholesale power market in Florida. The Commission reasoned that Section 105a was designed to supplement court ordered relief and that until the federal district court issued its decision it was unclear what supplementary relief from the Commission might be necessary. Briefing was completed in July, 1980.

Potomac Alliance v. NRC (D.C. Cir. No. 80-1862)

On August 28, 1980, the Potomac Alliance sought review of the Appeal Board's decision granting VEPCO an operating license amendment to expand the capacity of its North Anna Unit 1 spent fuel pool. Petitioner claims that the Commission illegally failed to consider the environmental effects of storing spent fuel at the site after the plant's operating license has expired. The Commission's motion to dismiss the petition as untimely was denied on September 29, 1980.

Potomac Alliance v. NRC (D.C. Cir. No. 80-2122)

On September 18, 1980 the Potomac Alliance filed this lawsuit seeking to enjoin the repair of the Surry Nuclear Power Station Unit 1 steam generators pending a more complete environmental impact statement. On October 3, 1980, the D.C. Circuit denied petitioner's request for an injunction. Repairs on the steam generators were begun on October 5.

Eason v. NRC (D.C. Cir. No. 80-1382)

This is an appeal from the February 6, 1980 decision of Judge Penn which dismissed plaintiff's Freedom of Information Act request for a subscription to Media Monitor. Judge Penn ruled that the FOIA did not encompass documents not yet in existence and that the Commission had not withheld any copies of the

publication The D.C. Circuit heard argument in the case on December 12, 1980.

Virginia Sunshine Alliance v. NRC (D.D.C. No. 80-2099)

On August 18, 1980, three groups brought suit to compel the Commission to release agency records concerning the details about routes for spent fuel shipments. The administrative request had pre-dated enactment on June 30, 1980 of a new section 147 to the Atomic Energy Act. Consequently, the request was re-evaluated in light of the new criteria when the lawsuit was brought. On October 24 the Commission disclosed a number of documents to plaintiffs and filed an affidavit in court supporting the continued withholding of information covering communication dead zones, safe havens, and law enforcement response capabilities.

U.S. Nuclear Regulatory Commission v. Radiation Technology, Inc. (D.N.J. No. 80-2187)

On July 15, 1980, the Commission sued Radiation Technology, Inc. to collect civil penalties imposed by the NRC under Section 234 of the Atomic Energy Act, for a series of infractions and deficiencies at defendant's Rockaway, New Jersey facility. A motion for summary judgment is in preparation.

Frisby, Kaiser and Clary v. IRS, NRC and MSPB (D.C. Cir. No. 80-1442)

This lawsuit was brought on April 18, 1980 by employees of two federal agencies who had been dismissed from government service. The Merit Systems Protection Board re-opened the cases in light of the Board's decision in Wells v. Harris (MSPB No. RR-80-3) for hearing officers to determine whether dismissal would have been proper under the standards for adverse actions of 5 U.S.C. Chapter 75 rather than under the Civil Service Reform Act of 1978 where an OPM-approved performance system had not yet been properly implemented. On re-consideration the hearing officer upheld the removal of the NRC employee. Court proceedings have been held in abeyance pending completion of the administrative proceedings for the other two former employees.

International Verbatim Reporters v. United States (Ct. Cl. No. 458-80)

On August 27, 1980 IVRI sued the United States claiming that the NRC illegally breached plaintiff's contract to provide stenographic reporting services. The Commission will counterclaim for excess reprocurement costs. Its position is that the reporting company failed to provide adequate reporting services.

People of the State of Illinois v. General Electric (N.D. Ill. No. 79-C-1427, appeal pending 8th Cir. No. 80-1962)

On April 11, 1979, the State of Illinois sued General Electric, the Commission, and the Department of Energy over the G.E. Morris spent fuel storage facility. Illinois claimed that its Radioactive Waste Act violates the Illinois Constitution, is preempted by the Atomic Energy Act, and hence voids its perpetual care contract with GE, and that the Department of Energy violated NEPA in not preparing an EIS to accompany proposed legislation on the use of G.E. Morris as an away from reactor storage site. On December 18, 1979, Judge Will dismissed all but the EIS claim involving the Department of Energy; that latter claim was dismissed as moot on May 8, 1980 based on DOE's expressed intention to prepare a site-specific EIS before acquistion of Morris or any other facility once congressional authorization was obtained. On June 27, 1980 Illinois appealed. Briefing was completed in October, 1980.

Woliver v. NRC (D.D.C. No. 80-2627)

On October 15, 1980 this Freedom of Information Act lawsuit was filed seeking a copy of a 1969 Sargent & Lundy Engineers' report to the Cincinnati Gas & Electric Company "An Economic Evaluation of Alternatives". The Commission had denied the request for the report under Exemption 4 as proprietary.

Common Cause v. NRC (D.D.C. No. 80-2347)

On September 15, 1980, Common Cause filed a Sunshine Act lawsuit against the NRC claiming that the Commission's July 18, 1980 budget meeting was improperly closed to the public. Common Cause seeks a copy of the transcript of the meeting and an injunction requiring that like meetings in the future be held in open session. The Commission answered the complaint in November, 1980.

Three Mile Island Litigation (M.D. Pa. No. 79-0432)

This is a consolidated complaint seeking money damages for personal injuries, property losses, and business losses alleged to have resulted from the Three Mile Island accident. On July 10, 1980, Judge Rambo ruled that the federal district court properly had jurisdiction over the TMI litigation despite the fact that the Commission had determined that the accident did not constitute an extraordinary nuclear occurrence because the lawsuit in any event arises under federal law; second, that the lawsuit could properly proceed as a class action as to the "economic harm" classes; and third, that insofar as personal injury claims were involved that class action treatment was proper only as to the alleged need for medical monitoring services. Judge Rambo specifically decided that claims of emotional distress flowing from the TMI accident were too diverse and personal to be adjudicated by the vehicle of a class action. The Commission is participating as a friend of the court in this lawsuit.

Friends of the Earth v. NRC (9th Cir. No. 79-7311)

This lawsuit sought review of the Commission's June 22, 1979 decision to re-start Rancho Seco after it had completed various TMI-related modifications. On July 5, 1979, the Ninth Circuit denied emergency relief, and on September 10, 1980, entered an order deferring action on the merits until completion of the ongoing Licensing Board hearing.

State of New York and People of the State of Illinois v. NRC (S.D.N.Y. 79 Civ. 4568)

This lawsuit follows similar suits by the State of New York which sought to stop the air shipment of plutonium pending preparation of an environmental impact statement. Those earlier requests for injunctive relief were rejected. See State of New York v. NRC, 550 F.2d 745 (2d Cir. 1977). The current lawsuit challenges the adequacy of the NRC's environmental impact statement on the transportation of radioactive material (NUREG-0170) and is still in the early stages.

Upper Skagit Indian Tribe, Suak-Suiattle Indian Tribe and Swinomish Tribal Community v. NRC (D.C. Cir. No. 79-2277)

On October 26, 1979, three American Indian tribes petitioned the D.C. Circuit to review an appeal board decision denying their 3-1/2 year late petition to intervene in the Skagit construction permit proceeding. The court has held the petition in abeyance pending the outcome of the administrative proceedings. The case should

soon be dismissed as moot since the utility no longer plans to build the plant at the Skagit site.

Peshlakai v. Duncan (D.D.C. No. 78-2416)

This lawsuit was brought December 22, 1978 against a number of federal agencies, primarily the Department of the Interior but also including NRC, claimed that government actions affecting the mining and milling of uranium violated NEPA because national, regional, and individual environmental impact statements had not been prepared on a multitudinous set of actions. The case is essentially the nuclear analogue of the Kleppe case which dealt with similar claims regarding coal exploration. Judge Harold H. Greene of the federal district court saw it as such in a September 5, 1979 opinion which denied plaintiff's motion for a preliminary injunction to halt work at Mobil's pilot in situ plant project at Crown Point, New Mexico. Thereafter, on August 29, 1980, Judge Greene denied plaintiff's motion for partial summary judgment ruling that the regional EIS issue presented disputed material issues of fact and hence was inappropriate for summary disposition.

John Abbotts v. NRC (D.D.C. No. 77-624)

On April 11, 1977, John Abbotts, the Public Interest Research Group, and the Natural Resources Defense Council, brought a Freedom of Information Act suit challenging the NRC decision to withhold certain safeguard documents. The dispute has since been

narrowed to two small portions of two documents specifically contesting the proper classification of "baseline threat level" information. The court must now decide whether to review the documents in camera and whether there is a valid exemption 1 claim by NRC.

Coalition for the Environment v. NRC (D.C. Cir. No. 77-1905) (Callaway)
Lloyd Harbor Study Group v. NRC (D.C. Cir. No. 73-2266) (Shoreham)
Nelson Aeschliman v. NRC (D.C. Cir. Nos. 73-1776 and 73-1867) (Midland)
Natural Resources Defense Council v. NRC (D.C. Cir. No. 74-1385) (Vermont Yankee)

These lawsuits challenge on uranium fuel cycle grounds ("Table S-3") the construction permits for Callaway, Shoreham, and Midland, and the Vermont Yankee operating license. Briefing in these cases is being held in abeyance pending the D.C. Circuit's decision in the fuel cycle rulemaking cases where the court heard argument in September, 1980. See Natural Resources Defense Council v. NRC (D.C. Cir. Nos. 74-1586, 77-1448 and 79-2131) and State of New York v. NRC (D.C. Cir. No. 79-2110).

Natural Resources Defense Council v. NRC (D.C. Cir. Nos. 74-1586, 77-1448 and 79-2131) and
State of New York v. NRC (D.C. Cir. No. 79-2110)

These consolidated cases challenge three related versions of the Commission's uranium fuel cycle rule. The rule speaks to the fact that the environmental impact of operating a nuclear power reactor necessarily includes the impacts of off-site fuel

cycle activities which support the plant. The rule sets out a table of values ("Table S-3") to be used in individual licensing proceedings as a starting point for evaluating the contribution of fuel cycle activities to the environmental impact of light water power reactors. The D.C. Circuit's consideration of these cases follows the Supreme Court's remand in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978). Oral argument was heard in September, 1980. The D.C. Circuit has held in abeyance a series of cases involving application of the S-3 rule to individual facilties pending its decision in the rulemaking cases. See Lloyd Harbor Study Group v. NRC (D.C. Cir. No. 73-2266) (Shoreham); Nelson Aeschliman v. NRC (D.C. Cir. No. 73-1776 and 73-1867) (Midland); Natural Resources Defense Council v. NRC (D.C. Cir. No. 74-1385) (Vermont Yankee); Coalition for the Environment v. NRC (D.C. Cir. No. 77-1905) (Callaway).

United States v. New York City (S.D.N.Y. No. 76 Civ. 273)

On January 15, 1976, the NRC, DOE, and DOT sought a judgment declaring a New York City Health Code provision dealing with the transportation of nuclear materials through the city to be inconsistent with the federal statutory scheme governing the transportation of hazardous materials. The government's request for a preliminary injunction against enforcement of the Health Code provision was denied on January 30, 1976 in view of the absence of DOT regulations under the Hazardous Materials Transportation Act prohibiting such local ordinances. On April 4,

1978, DOT ruled that the New York City ordinance was not inconsistent with DOT's then existing statutory scheme and regulatory policy but that a rulemaking would be held to consider what restrictions should be placed on local regulation of the routing of nuclear materials. The rulemaking has not yet been completed and the lawsuit is still pending.

State of New York v. NRC (2d Cir. No. 75-4278)
Natural Resources Defense Council v. NRC (2d Cir. No. 75-4276)
Allied General Nuclear Services v. NRDC (S.Ct. No. 76-653)
Commonwealth Edison Co. v. NRDC (S.Ct. No. 76-762)
Baltimore Gas & Electric Co. v. NRDC (S.Ct. No. 76-774)
Westinghouse Electric Corp. v. NRDC (S.Ct. No. 76-769)

These GESMO lawsuits have been pending before the Second Circuit ever since the Supreme Court on January 16, 1978, vacated the court of appeals decision in Natural Resources Defense Council v. NRC, 539 F.2d 824 (1976), and remanded the case to the Second Circuit "to consider the question of mootness". The court of appeals has not yet acted on our request to dismiss the cases as moot.

West Michigan Environmental Action Council v. AEC (W.D. Mich. No. G-58-53)

Plaintiffs sought an injunction against the increased use of mixed-oxide fuel in Consumer Power's Big Rock Point power reactor. In June 1974 the court placed the case in abeyance pending the outcome of the GESMO proceeding. The utility has not pressed its application nor prepared the environmental

report preliminary to pressing its application. Settlement attempts to have the lawsuit voluntarily dismissed without prejudice to bringing a new lawsuit should the utility activate its application have thus far been unsuccessful, and the case remains inactive on the court's docket.

Minnesota Environmental Control Citizen's Association, et al. v. AEC (D. Minn. No. 4-72-109)

Plaintiff, a citizen's association, sought to enjoin further development and operation of Northern States Power Company's Monticello and Prairie Island facilities on the ground that the Prairie Island construction permit and the Monticello provisional operating license were issued without preparation of an environmental impact statement. On June 28, 1972, the District Court issued an opinion refusing to enjoin the construction or provisional operation, but holding that before full operating permits for these faciltiies could be granted, a full NEPA review was required. The court retained jurisdiction over the matter to ensure that such a review was performed. During the past eight years, the Commission has undertaken this environmental review, and both licensing proceedings are nearing completion. When the administrative proceedings are completed, we will move to dismiss this lawsuit.

Rosanna Kelly v. Hendrie, et al. (D.D.C. No. 79-1550)

On June 14, 1979 plaintiff filed a lawsuit alleging that she has suffered age and sex discrimination in her efforts to be promoted and has been retaliated against as a result of initiating EEO proceedings. Plaintiff seeks retroactive promotion and an injunction against discrimination. NRC's answer, filed in September 1979 denies the substantive allegations of her complaint. The court has deferred consideration of this case pending resolution at the administrative level. An E.E.O.C. hearing has been held, but the E.E.O.C. hearing examiner has not yet rendered an opinion.

Thot-Thompson v. McVeagh (D. Md. No. B-79-1703)

On August 16, 1979 plaintiff sued for damages alleged to be the result of certain statements defendant made. The NRC position is that the defendant was acting within the scope of his employment with NRC when he made the statements. The lawsuit was removed to federal district court on September 13, 1979 and on August 18, 1980, the government's motion to dismiss was denied. The case is being handled through the Department of Justice and is at the discovery stage.

Kertis v. United States (W.D. Pa. No. 77-1259)

On November 4, 1977 plaintiff sued the United States to recover damages for the death of her husband who contracted leukemia after having been a worker in the Westinghouse Cheswick facility engaged in repair of Navy submarine pumps. Westinghouse held a byproduct license permitting it to possess a small amount of radioactive material incident to maintenance of Navy reactor components. A similar lawsuit was dismissed in 1976 as plaintiff was limited to workmen's compensation against Westinguouse under State law. The lawsuit is being handled by the Department of Justice.

Gentry v. United States (N.D. Ala. No. CA 79-L-5181-NE)

This is a Federal Tort Claims Act lawsuit brought on September 14, 1979 by a former employee of Thiokol Corporation seeking money damages for exposure to radiation while working as a radiographer on government projects. On March 5, 1980 the court dismissed all defendants except the United States. A motion for summary judgment based on statute of limitations grounds was filed October 24, 1980 and is presently pending. The lawsuit is being defended by the Department of Justice.

Broudy v. United States (C.D. Calif. No. 79-02626 LEW (GX))
Punnett v. Carter (E.D. Pa. No. 79-29)
Skinner v. United States (N.D. Calif. No. CA-79-1231-WAI)
Hinkie v. United States (E.D. Pa. No. 79-2340)
Runnels v. United States (D. Hawaii No. 79-0385)

These are a series of cases seeking money damages for injuries suffered as a result of the atomic weapons testing program. The principal defendant in the suits is the United States and the cases are being defended by the Department of Justice. In Skinner, Hinkie and Runnels the government has motions to dismiss pending. Broudy was dismissed on January 3, 1980 on the ground that no action will lie under the Federal Tort Claims Act for an injury which arises out of activity incident to military service. The case is now on appeal. In Punnett plaintiff's motion for a preliminary injunction to compel the government to notify all soldiers formerly involved in the atomic testing program of potential risks of genetic damage was denied on March 30, 1979; the denial was later upheld by the Third Circuit.

Won-Door Corp. v. United States (Ct. Claims No. 109-79L)

Won-Door sued the United States on March 20, 1979 for compensation for an alleged taking of its property by virtue of radon contamination from the adjoining Vitro uranium mill tailing site. The government answered denying a taking on June 11, 1979. On August 20, 1979 Judge Harkens stayed the proceeding at the request of the

Department of Justice which is handling the defense of this action to allow for settlement negotiations. Negotiations are continuing.

Kepford v. NRC (D.C. Cir. Nos. 78-1160 and 78-2170)

In No. 78-1160 petitioner brought suit on Feburary 27, 1978, to stay operation of the Three Mile Island Unit 2 facility, primarily because of claimed unacceptable health impacts from radon-222 releases attributable to the mining and milling of uranium to fuel the plant. On March 8, 1978 the D.C. Circuit denied the motion for a stay, and on March 22 the court held further review in abeyance pending completion of administrative proceedings. In No. 78-2170 petitioner brought suit on November 13, 1978 to review a September 15, 1978 Commission order affirming the Appeal Board's decision, ALAB-486, which authorized an operating license for TMI-2, but called for further hearings on the probability of a very heavy aircraft crash into the TMI-2 containment building. On May 11, 1979, the D.C. Circuit ordered the case held in abeyance pending completion of administrative proceedings.

Closed Cases

United States v. McGovern (M.D. Pa. No. 80-0560; on appeal 3rd Cir. No. 80-2182)

On June 2, 1980, the United States on behalf of NRC brought a subpoena enforcement action against five Metropolitan Edison employees as part of the Commission's ongoing investigation of the transfer of information from Met-Ed to the NRC on the first day of the Three Mile Island accident. Following two evidentiary hearings Judge Rambo granted the Commission's motion to enforce the subpoenas on August 13, 1980. An appeal to the Third Circuit was dismissed on October 8, 1980 after the Third Circuit and Mr. Justice Brennan refused to stay enforcement of the subpoenas.

United States v. Henry (S D. Ala. Misc. No. 80-0319-H)

On May 12, 1980 the United States on behalf of NRC brought a subpoena enforcement action against a former employee at the Marble Hill nuclear power plant as part of the Commission's investigation into the procedures followed in testing concrete used to construct the power plant. The case was withdrawn on June 23, 1980 when the employee agreed to respond to the subpoena.

Desrosiers v. NRC (E.D. Tenn. Civ. Action No. 1-80-36)

On February 12, 1980, Jim Desrosiers, individually and as Chairman of the Chattanoogans for Safe Energy, brought suit to enjoin the NRC from issuing a low-power operating license for the Sequoyah nuclear power plant. On April 3 the district court dismissed the lawsuit for lack of jurisdiction.

Westinghouse Electric Corp. v. Hendrie (D.D.C., No. 79-2060, on appeal, D.C. Cir. No. 79-2069)
Westinghouse Electric Corp. v. Vance (D.D.C. No. 79-2110, on appeal, D.C. Cir. No. 79-2070)

Westinghouse sued the NRC and the Department of State, alleging unreasonable delay in the processing of its licenses to export a reactor and components to the Philippines. On August 30, Judge June Green denied the Westinghouse motion for injunction, and found that the NRC delay was not unreasonable given the important health and safety considerations implied by the application. Westinghouse appealed to the D.C. Circuit, but then withdrew its appeal.

Mississippi Power and Light Company, et al. v. NRC, et al. (5th Cir. No. 78-1565)
Nuclear Engineering Company v. NRC, et al. (5th Cir. No. 78-1871)
Chem-Nuclear Systems v. NRC, et al. (5th Cir. No. 78-2200)

A number of utilities sued the NRC on its February 9, 1978 license fee rule. The utilities alleged that NRC exceeded its statutory

authority in setting the fees. They sought a declaration in the interim, and a refund of all fees collected under the rule and its 1973 predecessor. The Fifth Circuit affirmed the NRC schedule generally and as against each specific challenge on August 24, 1979. 601 F.2d 223. The Supreme Court denied certiorari on February 19, 1980. 100 S.Ct. 1066.

A.R. Martin-Trigona v. Department of Justice, et al. (S.D. Ill. No. 78-4006)

On January 30, 1978, plaintiff sued the Justice Department, Commonwealth Edison, and the NRC concerning the withholding under the FOIA of documents pertaining to the Quad Cities power station. NRC is asserting Exemption 7 as grounds for withholding the documents. The court granted the motion to dismiss.

Detroit Edison Company v. NRC (6th Cir. No. 78-3187 and No. 78-3196)

On September 5, 1980, the Sixth Circuit affirmed the Commission's denial of Detroit Edison's petition for rulemaking to exclude transmission lines and other off-site construction from regulation by the Commission. The Court, following the reasoning in Public Service Company of New Hampshire v. United States Nuclear Regulatory Commission, 582 F.2d 77 (1st Cir.) cert. denied, 439 U.S. 1046 (1978), found that because the Atomic Energy Act provides the Commission jurisdiction over transmission lines, licenses can be conditioned to mitigate the environmental impacts of the routes of

such lines. The Court did not decide whether NEPA provides the Commission an independent source of substantive jurisdiction. On October 22, 1980 the court denied petitioners' motion for rehearing.

Akron, Canton & Youngstown R.R. v. ICC (6th Cir. No. 78-3425), petition for cert. pending (S.Ct. No. 79-1833)

On August 3, 1978 the eastern railroads sought review of an ICC decision ordering the railroads to publish tariffs for the carriage of spent fuel. On December 20, 1979 the Sixth Circuit affirmed the ICC, ruling that the railroads had a common carrier obligation to carry spent fuel. The court also decided that the ICC should defer to NRC and DOT for setting industry wide safety standards for the carriage of radioactive materials, but the ICC may allow individual cariers to make more stringent rules. 611 F.2d 1162. The railroads filed a petition for writ of certiorari on May 19, 1980 which is presently pending with the Supreme Court.

Radiation Technology v. NRC (D.N.J. No. 79-753)

Plaintiff sought money damages under the Federal Tort Claims Act for costs flowing from the suspension of his materials license. NRC's response alleged that counts 1 and 2 of the complaint were time-barred under the Tort Claims Act, and disputed the facts of the remaining claim. Judge Stern granted NRC's motion to dismiss counts 1 and 2 on statute of limitations grounds; the remaining

claim was settled and subsequently dismissed by the court on February 25, 1980.

Ecology Action of Oswego, N.Y. v. NRC (D.C. Cir. No. 78-1855)

On March 12, 1980, the D.C. Circuit affirmed the Appeal Board's refusal to stay the Sterling nuclear power plant construction permit and refusal to enjoin Rochester Gas & Electric Company from contracting for uranium to fuel the proposed plant pending Commission re-evaluation of the enviornmental impacts of the mining and milling of uranium. The petition for review of the Appeal Board's decision was filed August 25, 1978. The court agreed with our argument that Ecology Action's assertion of irreparable injury from radon releases was contrary to the Congressional judgment contained in the Uranium Mill Tailing Radiation Control Act of 1978 that the risk from radon emissions can be limited to acceptable levels without stopping uranium mining and milling.

City of Lancaster v. NRC (D.D.C. No. 79-1368)

This lawsuit was brought May 21, 1979, seeking to enjoin use of the EPICOR-II demineralizer system and to enjoin discharge of accident generated water from Three Mile Island Unit 2 into the Susquehanna River pending completion of an environmental impact statement and license amendment proceedings. The case was settled

and dismissed with prejudice on February 28, 1980, the Commission having terated its intent to prepare a programmatic environmental impact statement and having agreed that no accident generated wastewater will be discharged into the Susquehanna River until completion of that statement or such other environmental review as is contemplated by the Commission's November 21, 1979 policy statement, or until December 31, 1981, whichever is earlier.

Commonwealth of Kentucky v. NRC (D.C. Cir. No. 78-1369)

On April 24, 1978 the Commonwealth of Kentucky sought review of ALAB-459, an Appeal Board decision which held that the Kentucky/Indiana border was the 1792 low water mark on the northwestern or Indiana side of the Ohio River. The issue arose when Kentucky claimed that the discharge pipe of the Marble Hill facility would be in Kentucky territory, and consequently that the Section 401(a)(1) Federal Water Pollution Control Act permit necessary for construction of the plant should have been obtained from Kentucky rather than Indiana. On April 18, 1980 the D.C. Circuit affirmed the Appeal Board finding conclusive a March 24, 1980 Supreme Court decision in the related case of Kentucky v. Indiana (S.Ct. No. 81 Original) which fixed the border as of the 1792 low water mark.

Friends of the Earth v. NRC, et al. (D.C. Calif., Div. No. C-80-0234-SW)

On January 30, 1980, Friends of the Earth sued the NRC and PG&E to compel the NRC to prepare a supplemental environmental statement to discuss the consequences of Class 9 accidents at Diablo Canyon. FOE argued that the TMI accident, various reports and recent analyses of accident probabilities such as the Lewis Report, GAO reports, etc. mean that the NRC can no longer categorically exclude detailed discussions of Class 9 events as "unforeseeable" for purposes of NEPA environmental analysis. NRC's motion to dismiss the lawsuit for lack of subject matter jurisdiction was granted September 26, 1980, on the ground that the licensing proceeding, when the identical issue is pending for decision, was still ongoing.

Honicker v. Hendrie (M.D. Tenn. Civ. No. 78-3371-NA-CV; on appeal 6th Cir. No. 79-1132, on petition for writ of certiorari S.Ct. No. 79-710)

Plaintiff sued the NRC for injunctive relief, alleging that the NRC had permitted nuclear power reactors and fuel cycle facilities to operate while underestimating the magnitude of adverse health consequences from the nuclear fuel cycle. Plaintiff sought revocation of all licenses and dismantling of all fuel cycle facilities. On February 19, 1980 the Supreme Court denied Ms. Honicker's petition for a writ of certiorari from the 6th Circuit decision which had affirmed the district court's dismissal of the case for

lack of subject matter jurisdiction. See 465 F. Supp. 414 (M.D. Tenn.), aff'd 605 F.2d 556 (6th Cir.), cert. denied 100 S.Ct. 10015 (1980).

Virginia Sunshine Alliance v. NRC, et al. (D.D.C. No. 79-1989, on appeal, D.C. Cir. No. 79-2060)

On July 31, 1979, plaintiff sued to block the shipment of spent fuel from foreign research reactors through Portsmouth, Virginia, based on a claimed threat of sabotage, and alleging that the route approval was given contrary to NEPA and NRC regulations. On August 3, District Court Judge Penn denied plaintiff's request to preliminarily enjoin spent fuel shipments through Norfolk, Virginia, finding that the Commission's new safeguards rule provided adequate protection against sabotage threats and that the Commission had taken a "hard look" at the sabotage issue in compliance with NEPA. An appeal from the denial of the injunction was voluntarily dismissed on October 14, 1980, and the district court case too was dropped on October 18, 1980.

Life of the Land v. Adams (D. Hawaii No. 79-0249)

Plaintiffs challenged the transport of two shipments of spent fuel from Japan through Hawaiian waters and the port of Honolulu, seeking preparation of an environmental impact statement and compliance with the Ports and Waterways Safety Act. The application for injunction on the first of these shipments was denied on June 7,

1979, and upheld by the Ninth Circuit on June 8, 1979. The governor closed the port to both shipments. One was permitted to refuel at Pearl Harbor on an emergency basis; the other refueled in non-Hawaiian waters. Because no more shipments were scheduled, the Justice Department filed a motion to dismiss on grounds the case was moot. On December 19, 1979, a voluntary dismissal was approved by the court.

Southern California Edison v. NRC (9th Cir. No. 79-7529)

On October 15, 1979, Southern California Edison petitioned the Ninth Circuit to review the Appeal Board's June 15, 1979 decision, ALAB-550, which denied the company's motion to quash a subpoena the Licensing Board had issued in connection with antitrust proceedings on the Stanislaus nuclear power plant. The case was settled administratively and the lawsuit was voluntarily dismissed on May 14, 1980.

Duquesne Light Company v. NRC (3d Cir.Nos. 80-1295 and 80-1307)
Pennsylvania Power Company v. NRC (3d Cir. Nos. 80-1296 and 80-1310)

These petitions for review were filed on February 29, 1980 to review the Appeal Board's Davis Besse antitrust decision, ALAB-560, which had affirmed the Licensing Board ruling that construction and operation of the five nuclear power plants involved in this case would create and maintain a situation inconsistent with the antitrust laws. Specific license conditions were imposed to correct

that situation. The utilities voluntarily withdrew their appeal and on October 8, 1980, the case was dismissed.

Hunt v. NRC (10th Cir. No. 79-1647)

On November 23, 1979 the U.S. Court of Appeals for the Tenth Circuit affirmed a lower court decision that the Sunshine Act does not apply to hearings conducted by Atomic Safety and Licensing Boards. The court's opinion follows the reasoning of the district court quite closely and resolves the question of whether the Sunshine Act applies to subdivisions of the Commission or to similar subdivisions of other agencies.

Township of Lower Alloways Creek v. NRC, (D.N.J. No. 1129)

On December 10, 1979 Judge Brotman of the federal district court in New Jersey granted our motion to dismiss a complaint challenging the proposed expansion of the spent fuel pools at Salem Units 1 and 2. He found that plaintiffs had not exhausted their administrative remedies since the utility's request for an operating license amendment to expand the Salem Unit 1 spent fuel pool was before a Licensing Board and the Salem Unit 2 expansion request was being considered in the review of the utility's operating license application. 481 F. Supp. 443 (D.N.J. 1979).

County of Ocean v. NRC (D.N.J. No. 79-1800)

On June 11, 1979 a complaint was filed in federal district court challenging the expansion of the spent fuel pools at Oyster Creek and Forked River. On December 20, 1979 Judge Brotman dismissed the complaint with respect to Forked River. Since construction of the plant had been halted and no application had been made to expand the spent fuel pool, there was no case or controversy. As to Oyster Creek plaintiffs failed to exhaust available 10 CFR 2.206 administrative remedies.