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# ADJUDICATORY ISSUE

January 18, 1994

(Information)

SECY-94-010

FOR: The Commission

FROM: John F. Cordes, Jr.  
Solicitor

SUBJECT: LITIGATION REPORT AS OF JANUARY 1, 1994

PURPOSE: To Inform the Commission of the Status of Litigation

DISCUSSION:

Attached is a report updating NRC court litigation since my last report dated July 16, 1993 (SECY-93-196). This report reflects the status of NRC cases in court as of January 1, 1994.

During the July 16, 1993, through December 31, 1993, reporting period, the Commission or its officials were sued three times in the courts of appeals,<sup>1</sup> four times in federal district courts,<sup>2</sup> once in the Court of Federal Claims, and twice in state courts.<sup>4</sup> The NRC also intervened as a party in a court of appeals case,<sup>3</sup> and filed one suit of its own in a federal

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<sup>1</sup>Ohio Edison Co. v. NRC, No. 93-1665 (D.C. Cir.); Cleveland Electric Illuminating Co. v. NRC, No. 93-1672 (D.C. Cir.); City of Cleveland v. NRC, No. 93-1673 (D.C. Cir.).

<sup>2</sup>Hampton v. United States, No. 93-A-798-S (M.D. Ala.); State of New Jersey v. Long Island Power Authority, No. 93-4269 (GEB) (D. N.J.); Holden v. NRC, No. 93-1628 (D.D.C.); Zolotarevsky v. Selin, No. 93-40172XX (D. Mass.).

<sup>3</sup>MLC Group, Inc. v. United States, No. 93-547-C (Ct. Fed. Claims).

<sup>4</sup>Cameo Diagnostic Centre v. Brown, No. 9323-SC-5430 (Small Claims Ct., Mass.); Purkel v. Perkins, No. 93 L 575 (Circuit Ct., 10th Cir. of Ill., Peoria County).

<sup>5</sup>National Treasury Employees Union v. FLRA, No. 93-1422 (D.C. Cir.).

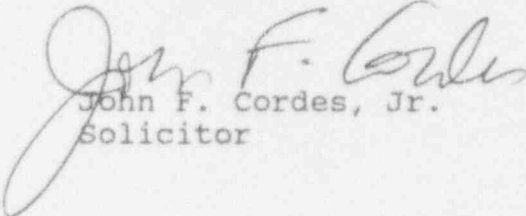
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district court.<sup>6</sup> During this same six-month period ten cases were closed.<sup>7</sup>

For the entire calendar year (i.e., 1993) thirty new lawsuits involving the NRC began, and thirty-two cases came to a close. We also handled thirty-four requests (so-called "Touhy" requests) for NRC testimony, depositions or other evidence for use in private litigation.

  
John F. Cordes, Jr.  
Solicitor

Attachment: Litigation Report

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<sup>6</sup>United States of America v. Oncology Services, Inc., No. 3: MI-93-207 (M.D. Pa.).

<sup>7</sup>Atlas Corp. v. United States, No. 92-1561 (D.C. Cir.); Environmental And Resources Conservation Organization v. NRC, No. 92-70202 (9th Cir.); State of Michigan v. United States, No. 91-2281 (6th Cir.); DeLoatch v. Selin, No. 93-0163 (D.D.C.); Government Accountability Project v. NRC, No. 86-1976 (D.D.C.); Nuclear Awareness Network v. NRC, No. 86-3201 (D.D.C.); Kansas Gas & Elec. Co. v. NRC, No. 87-2748 (D.D.C.); Hampton v. United States, No. 93-A-798-S (M.D. Ala.); Macias v. Kerr-McGee Corp., No. 92-C-3389 (N.D. Ill.); United States v. Comley, M.B.D. No. 91-11556K (D. Mass.).

LITIGATION STATUS REPORT

As of January 1, 1994

Advanced Medical Systems, Inc. v. United States, No. 93-3602 (6th Cir.)

CONTACT : L. Michael Rafky  
504-1974

This petition for review, filed June 3, 1993, attacks a Commission adjudicatory decision holding moot an agency proceeding on two related decontamination orders. Petitioner AMS, although agreeing that it had already complied with the decontamination orders, insisted before the Commission that continued litigation was necessary to resolve the legitimacy of the orders. The Commission held that no exception to the mootness doctrine permitted continued litigation over orders that had no ongoing effect.

The case was fully briefed this fall and is now awaiting oral argument and decision.

Cameo Diagnostic Centre, Inc. v. Brown, No. 9323-SC-5430 (Small Claims Court, Mass.)

CONTACT: Daryl M. Shapiro  
504-1631

Plaintiff in this suit is an NRC licensee. It brought this lawsuit in small claims court in Springfield, Massachusetts, against an NRC inspector. While the complaint says little about plaintiff's claim, it apparently arises out of official NRC actions. The suit seeks \$1650 in damages from the NRC inspector.

We are working with the United States Attorney's office in Boston on this case.

\* City of Cleveland v. NRC, Nos. 92-1532, 93-1665, 93-1672 & 93-1673 (D.C. Cir.)

CONTACT: Marjorie Nordlinger  
504-1607

In 1987-88, three utilities, the Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison

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\*Those cases considered most significant to the agency are marked with an asterisk.

Company, asked the Commission for relief from the antitrust conditions in the Perry and Davis-Besse nuclear plant licenses. The NRC Staff denied the requests, and the utilities sought administrative hearings.

The first petition for review, filed by the City of Cleveland in 1992, challenged a Commission adjudicatory decision (CLI-92-11) holding: (1) that section 189(a) of the Atomic Energy Act grants hearing rights to utilities seeking license amendments; (2) that the Commission possesses regulatory authority to amend antitrust license conditions; and (3) that the dispute properly was referred to the Licensing Board. That appeal was held in abeyance pending the Licensing Board decision.

The Licensing Board later ruled that the NRC Staff had properly denied antitrust relief to the three utilities. The Board decided, in essence, that "cost comparisons" between nuclear power and other forms of power are not enough to justify loosening antitrust conditions. The Commission denied review last summer.

The three utilities, as well as the City of Cleveland, filed petitions for review in the District of Columbia Circuit. These petitions have been consolidated with the city of Cleveland's pending 1992 petition. Briefing and oral argument are expected later in 1994.

Datta v. Selin, No. H93-1418 (D. Md.)

CONTACT : Marvin Itzkowitz  
504-1566

This is a Title VII filed in May 1993 against the NRC claiming illegal age and race discrimination in a hiring decision. The case remains pending before the federal district court in Baltimore.

Graham v. NRC, Civ. No. JFM93-1808 (D. Md.)

CONTACT: Karl Farrar  
504-1556

This is a pro se Title VII discrimination suit brought by a former NRC employee. On June 7, 1993 she brought the case in state court rather than, as required, in federal court. After notification by the United States Attorney's office, plaintiff

refiled the suit in federal district court in Baltimore, where it remains pending.

Holden v. NRC, Civ. No. 93-1628 (D.D.C.)

CONTACT: Daryl M. Shapiro  
504-1631

Plaintiff in this Freedom of Information Act suit is pursuing a whistleblowing complaint against Gulf States Utilities before the Department of Labor. He sought access under the FOIA to GSU's 62-page response to an NRC "chilling effects" letter. The NRC granted the FOIA request shortly after the suit was filed. We have sought dismissal of the lawsuit as moot, but plaintiff has sought attorney's fees. The case is awaiting decision.

\* Kelley v. Selin, Nos. 93-1646; 93-1710; 93-3613; 93-3749 (6th Cir.)

CONTACT : Peter Crane  
504-1600

This lawsuit, now pending before the Sixth Circuit, has a complicated procedural history, reflected in the four separate case numbers listed above.

On May 4, 1993, the Michigan Attorney General, several private citizens, and the Lake Michigan Federation filed suit in federal district court in Grand Rapids, Michigan, asking for an injunction that would prevent Consumers Power Company from using an NRC-approved dry storage cask, the "VSC-24," for storing spent fuel from the Palisades Nuclear Power Plant. Kelley v. Selin, No. 4:93-CV-67. Plaintiffs' central claim was that the NRC had failed to perform a site-specific NEPA analysis of the effects of using the VSC-24 cask at Palisades.

In reply, we argued that NRC had met all its NEPA responsibilities, and that in any case, the actions complained of proceeded from a recently issued rule that added the VSC-24 cask to the list of NRC-approved spent fuel casks. Since the suit was in effect a challenge to the rule, we said, only the Court of Appeals had jurisdiction over the case. The district court agreed and at plaintiffs' request, transferred the case to the Sixth Circuit Court of Appeals, where it was docketed as No. 93-1646.

The plaintiffs also appealed to the Sixth Circuit (which docketed the appeal as No. 93-1710) the district court's ruling that it

lacked jurisdiction over the case. Plaintiffs later filed two petitions for review in the Sixth Circuit, Nos. 93-3613 and 93-3749, directly attacking the NRC rule that approved the VSC-24.

The Sixth Circuit consolidated all the pending cases and established a briefing schedule. All briefs were filed this past fall and the case currently is awaiting oral argument.

\*Kerr-McGee Chemical Corp. v. NRC, No. 90-1534 (D.C. Cir.)

CONTACT: Grace Kim  
504-1634

This lawsuit challenges the Commission's decision to amend the existing agreement between the NRC and the State of Illinois to permit Illinois to assume regulatory jurisdiction over uranium and thorium mill tailings. Petitioner is the owner of a contaminated site in the City of West Chicago that now falls within the State's jurisdiction under the new agreement. Petitioner's principal argument is that the NRC ought to have held a hearing before entering into the agreement state arrangement with Illinois.

In 1991, after petitioner filed its brief in the court of appeals, and while we were preparing ours, we learned that petitioner and the State were engaged in settlement negotiations on the disposition of the contaminated West Chicago site. On June 5, 1991, the court of appeals granted the parties' joint motion to hold the proceedings in abeyance to allow settlement negotiations to proceed.

The petitioner and the State were unable to reach a settlement and the case was recently restored to the court of appeals' active docket. Fresh briefs are due to be filed this winter, with an oral argument scheduled for May.

Long v. Selin, No. 1:88-CV-263-RCF (N.D. Ga.) (appeal pending)

CONTACT: J. Bradley Fewell  
504-1569

In 1988, Anne Rebecca Long, a reactor inspector for NRC's Region II, filed an action in U.S. District Court against the NRC for purported violations of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. Section 2000e, et seq., and the Equal Pay Act, 29 U.S.C. Section 206(d), et seq. In her complaint she claimed that: (1) when she was hired by the NRC in February 1986, she was not paid a salary equal to that of certain male

employees; (2) she was not promoted in a timely manner; and (3) she was subjected to harassment and retaliation by her supervisors. The NRC has maintained throughout the litigation that plaintiff's claims are unfounded and constitute inappropriate challenges to legitimate exercises of managerial discretion.

The hearing on the Title VII claims began in March 1990, and after further discovery, ended in March 1991. The magistrate issued a decision in favor of the agency on all counts. The case then went before the U.S. District Court judge for final disposition. The judge ruled that a jury trial and compensatory damages would be available to Ms. Long under then-new Civil Rights Act of 1991, which the judge ruled to be retroactively applicable to this case. The government attempted an interlocutory appeal on the retroactivity question, but after briefing the Eleventh Circuit ultimately declined to entertain the appeal. In addition, Ms. Long's Equal Pay Act claim was transferred to the U.S. Claims Court, which dismissed it, but allowed its refiling in the district court for the proper jurisdictional amount.

The case is now awaiting further proceedings before the district court.

MLC Group, Inc. v. United States, No. 93-547-C (Court of Federal Claims)

CONTACT: Robin B. Teichman  
504-1559

Plaintiff sells computer equipment and alleges that the NRC unlawfully reneged on a contract to purchase equipment from plaintiff. After failing to obtain administrative relief from the NRC, plaintiff brought this lawsuit in the Court of Federal Claims. Plaintiff seeks about \$19,000 in damages.

We are working with Department of Justice attorneys in defending the suit.

\*National Treasury Employees Union v. FLRA, No. 93-1422 (D.C. Cir.)

CONTACT: Marvin Itzkowitz  
504-1566

In June the Federal Labor Relations Authority ruled that an NTEU proposal to negotiate wages with the NRC was not negotiable. The

FLRA found that the particular NTEU proposal in this case would interfere with the right of NRC management to determine the agency's budget. In addition, however, the FLRA rejected the NRC's broad position that the Atomic Energy Act precludes wage bargaining altogether.

The NTEU filed an immediate petition for review in the D.C. Circuit to challenge the FLRA decision against wage bargaining in this case. The NRC filed a motion to intervene, which the court of appeals granted. The case is now awaiting briefing and argument. We will work closely with Department of Justice attorneys on this case.

\* Nuclear Information and Resource Service v. NRC, No. 93-1164 (D.C. Cir.)

CONTACT : Grace Kim  
504-3605

Petitioner seeks judicial review of the Commission's revisions of Part 52, issued in December 1992, that were designed to conform the Commission's regulations to the recently-enacted Energy Policy Act. See Fed. Reg. 60975 (Dec. 23, 1992). Petitioner apparently intends to argue both that the Commission should have followed a notice-and-comment process before issuance of a revised Part 52 and that the revisions misconstrue congressional intent. Petitioner recently contacted us with a settlement proposal that we currently are considering. No briefs have yet been filed.

\* NRC v. FLRA, No. 93-1704 (4th Cir.)

CONTACT : Brad Fewell  
504-1569

In April the Federal Labor Relations Authority ruled that the NRC must enter labor negotiations over union proposals regulating Inspector General investigatory interviews. In reaching this result the FLRA overruled a prior precedent insulating IG investigatory practices from labor management negotiations. At the strong urging of the NRC's Inspector General we recommended to the Department of Justice that a petition for review be filed challenging the FLRA decision.

In early June DOJ filed a petition for review on the NRC's behalf in the United States Court of Appeals for the Fourth Circuit. The Solicitor General of the United States must authorize pursuit of the case. He currently is considering the matter. Briefs are due in court later this summer.



\*O'Conner v. Commonwealth Edison Co., No. 92-2989 (7th Cir.)

CONTACT: John F. Cordes  
504-1600

This is a private tort suit arising out of alleged radiation injury to a pipe fitter at the Commonwealth Edison nuclear power plant in Cordova, Illinois. Commonwealth Edison removed the suit from state to federal court pursuant to the Price-Anderson Act (as amended in 1988). The plaintiff challenged the removal provisions of the Price-Anderson Act as an unconstitutional expansion of federal court jurisdiction to include state-law tort claims. The United States intervened to defend the constitutionality of the Act. We worked with Department of Justice attorneys in preparing the pleadings for the government.

The district court (Mihm, J.) issued a thorough opinion upholding the constitutionality of the Price-Anderson Act removal provision. The court found that "[n]umerous federal questions will necessarily arise in the course of litigation under this Act, which questions must be resolved consistent with the pervasive federal scheme." Plaintiffs took an appeal.

The Seventh Circuit decided the case on January 7, 1994, just as we were finalizing this report. The Seventh Circuit joined the Third Circuit in upholding the constitutionality of the Price-Anderson Act jurisdictional provisions. See In re TMI Cases Consolidated II, 940 F.2d 832 (3d Cir. 1991), cert. denied, 112 S.Ct. 1262 (1992). The Seventh Circuit also indicated that a plaintiff may not seek tort damages for radiation exposures that were within NRC regulatory limits. We will describe the case at greater length in an upcoming litigation report.

Plaintiffs have ninety days to seek Supreme Court review.

Oncology Services Corp. v. NRC, No 93-0939 (W.D. Pa.)

CONTACT : L. Michael Rafky  
504-1974

This is a Freedom of Information Act lawsuit, filed June 14, 1993, seeking access to various documents relating to plaintiff and to the NRC's inspection program at medical facilities. The NRC's FOIA office had not yet finished processing the request when the suit was filed. Ultimately, though, the NRC denied access to documents, principally interview transcripts, bearing on an ongoing NRC investigation of plaintiff. The NRC has filed a summary judgment motion contending that it properly withheld the investigatory documents. Plaintiff contests the NRC's view.

We are working with the United States Attorney's office in Pittsburgh in defending this lawsuit.

Orr v. NRC, No. 93-1263 (D.C. Cir.)

CONTACT : Charles Mullins  
504-1618

This lawsuit seeks to reinstate petitioners' adjudicatory challenge to the extension of Texas Utilities Electric Company's construction permit for Comanche Peak, Unit 2. On March 30 the Commission dismissed petitioners' claims on mootness grounds. On April 6 the Commission declined to stay or reconsider its decision. On the same day the Commission also granted TUEC a full power operating license for Comanche Peak, Unit 2. Petitioners filed motions seeking (1) summary reversal of the Commission's adjudicatory decisions and (2) a stay of the operating license. The D.C. Circuit denied both motions. We are now awaiting a briefing schedule from the Court.

Purkel v. Perkins, No. 93 L 575 (Circuit Ct., 10th Cir. of Illinois, Peoria County)

CONTACT: John T. Hull  
504-1573

This is an automobile accident case that plaintiff has filed in state court against one of our employees. The accident occurred while the employee was on NRC business. We have contacted the United States Attorney's office in Illinois, which is seeking removal of the case to federal district court and ultimately its dismissal.

Under the Federal Tort Claims Act, individual government employees are not subject to personal suit for work-related common law torts; the exclusive remedy lies against the United States.

State of Nevada v. O'Leary, Civ. No. 93-399-ECR (D. Nev.)

CONTACT : Marjorie S. Nordlinger  
504-1616

On June 14, 1993 Nevada brought this suit against the Department of Energy, the NRC and the EPA, as well as the heads of those agencies. Nevada sought court authorization for depositions of

various scientists involved in a controversy over "episodic recurrence of flooding" at the proposed Yucca Mountain high-level nuclear waste repository. Nevada sought to "perpetuate" the scientists' testimony for possible use in federal court proceedings the state may bring years from now to challenge some aspect of the Yucca Mountain site. Federal Rule of Civil Procedure 27 permits lawsuits to perpetuate testimony in some circumstances.

In October the district court (Reed, J.) granted the government's motion to dismiss. The court reasoned that deposition testimony was inappropriate under Rule 27 because any future proceedings involving Yucca Mountain likely would be based on an administrative agency record, not expert testimony in court. The court suggested that the federal agencies themselves were best positioned to determine the procedures necessary to produce an adequate administrative record.

Nevada sought reconsideration, but the court denied its request in November. Nevada has sixty days to appeal. We are collaborating with DOE, EPA and DOJ attorneys on this case.

\*State of New Jersey v. Long Island Power Authority, No. 93-4269 (D. N.J.), aff'd No. 93-5613 (3d Cir.)

Contact: Marjorie S. Nordlinger  
504-1616

In September, 1993, New Jersey instituted this litigation against the NRC, the United States Coast Guard and two private utilities to halt coastal barge shipments of slightly irradiated fuel from the Shoreham nuclear plant in New York to the Limerick nuclear plant in Pennsylvania. New Jersey initially sought emergency injunctive relief halting the shipments, but the federal district court, the court of appeals and the Supreme Court each refused to grant an injunction. New Jersey claimed violations of the National Environmental Policy Act (NEPA), the Atomic Energy Act and the Coastal Zone Management Act (CZMA).

The district court (Brown, J.) not only denied New Jersey's request for an injunction but dismissed its lawsuit altogether. The United States Court of Appeals for the Third Circuit permitted New Jersey to take an expedited appeal. We collaborated with the Coast Guard and the Department of Justice in preparing and filing a full 50-page brief in just a few days. The NRC Staff greatly contributed to this effort.

On December 1, the court of appeals (Becker, Scirica & Pollack, JJ.) after lengthy oral arguments affirmed the district court judgment in an oral opinion from the bench. The court agreed

with our position that federal district courts lack jurisdiction to consider defects in NRC licensing decisions, including claimed violations of NEPA. The court also found no violations of NEPA or the Coastal Zone Management Act on the facts of this case.

The court indicated that it would issue a formal written opinion in due course. That opinion may prove a useful precedent for the future, especially on jurisdictional issues.

New Jersey has ninety days to seek Supreme Court review. We anticipate, though, that the State instead may file fresh lawsuits attacking recent NRC adjudicatory and 2.206 decisions on the Shoreham-to-Limerick shipments.

United States v. Oncology Services, Inc., No. 3: MI-93-207 (M.D. Pa.)

CONTACT: Charles E. Mullins  
504-1618

This lawsuit seeks a court order enforcing OI subpoenas for documents. For a number of months OI has been seeking information from Oncology Services on its personnel, training and other programs. Oncology Services has complied in part with the subpoenas, but failed to produce documents that OI investigators have reason to believe exist. We referred the matter to the Department of Justice for enforcement.

DOJ approved the lawsuit and filed it in federal district court in Pennsylvania in November 1993. A detailed OI declaration and appendix, prepared in collaboration with OGC, support the government's request for an enforcement order. Oncology Services recently submitted papers in opposition to enforcement. We expect a prompt decision from the district court.

United States v. Pesses, Civ. Action No. 90-0654 (W.D. Pa.)

CONTACT: Charles E. Mullins  
504-1618

The government brought this lawsuit under CERCLA against numerous defendants to recover costs incurred in cleaning up the contaminated Metcoa Radiation Site in Pulaski, Pennsylvania. A few of the defendants filed a counterclaim against the government claiming that the government itself is liable for the cleanup as a "responsible party." Among other government agencies, the NRC is named, on the ground that it improperly licensed the site.

The U.S. Magistrate, to whom this case was assigned for deciding preliminary motions, ruled (among other things) that the government can be held liable under CERCLA for failures in its regulatory mission. The government does not agree with this reading of the law and appealed the Magistrate's decision (unsuccessfully) to the district judge.

Rather than litigate the matter further the parties currently are engaged in settlement discussions. The Department of Justice is taking the lead for the government, and expects to finalize an agreement that will not involve any NRC liability.

Young v. NRC, Civ. No. JFM93-1809 (D. Md.)

CONTACT : Brad Fewell  
504-1569

This is a pro se Title VII discrimination suit initially filed in state court rather than, as required, in federal court. After the United States Attorney's office notified the plaintiff of this defect she refiled the suit in federal district court in Baltimore, where the case remains pending. We recently filed a summary judgment motion in an effort to resolve this case without a trial.

Zolotarevsky v. Selin, No. 93-40172XX (D. Mass.)

CONTACT: Karl L. Farrar  
504-1556

This is a pro se suit alleging national-origin and age discrimination in hiring. Plaintiff is an emigrant from the former Soviet Union who apparently has had difficulty finding employment in the United States. He unsuccessfully sought relief from the Equal Employment Opportunity Commission and now has filed suit in federal district court against the NRC.

We will work with the United States Attorney's office in Boston in defending this case.

INACTIVE CASES

Advanced Medical Systems, Inc. v. NRC, No. 88-2921 (D.D. .)

CONTACT: L. Michael Rafky  
504-1634

On October 11, 1988, Advanced Medical Systems, Inc. ("AMS"), and its president, Dr. Seymour Stein, filed suit against the agency and twenty-six present and former NRC employees in the United States District Court for the District of Columbia. Plaintiffs ask for approximately twelve million dollars in damages for the actions of the agency and the named agency employees who are being sued in their individual capacity. The claims relate to the October 1985 suspension of AMS's license to service cobalt teletherapy equipment and to a July 1987 order requiring AMS to decontaminate certain of its facilities in Geneva, Ohio. Plaintiffs allege various legal claims against the agency and individual employees, including abuse of process, malicious prosecution, deprivation of property and liberty without due process of law, discrimination on the basis of age and religion, and violations of the federal constitution and the Civil Rights Act, 42 U.S.C. Sections 1983 and 1985. The suit also claims damages for these actions under the Federal Tort Claim Act ("FTCA").

On March 8, 1989, in conjunction with the U.S. Attorney's Office, we filed a motion to dismiss on several Rule 12 grounds, including lack of personal jurisdiction, venue, qualified immunity, lack of exhaustion and several others. That motion was granted and the case was dismissed "as conceded" and on the entire record by Judge Penn on March 29, 1989 because AMS failed to file a timely response. In April 1989, plaintiffs moved for reconsideration. That motion remains pending before Judge Penn.

City of Holyoke Gas & Electric Dept. v. NRC, No. 92-1287 (D.C. Cir.)

CONTACT: Marjorie Nordlinger  
504-1607

Petitioner, a municipal utility in Massachusetts, has filed suit attacking the NRC's recent approval of the transfer of Seabrook's license to the Northeast Utilities Service Company. Petitioner apparently intends to argue that the agency mishandled the antitrust aspects of the transfer. In petitioner's view, the transfer of Seabrook's license required a fresh antitrust review by the NRC. After consultation with the Antitrust Division at

the Department of Justice the NRC declined to perform one. Petitioner sought a court order holding the case in abeyance in light of settlement efforts between petitioner and Northeast Utilities. The case is currently held in abeyance on petitioner's motion.

County of Suffolk and Town of Southampton v. NRC, No. 89-1184 (D.C. Cir.)

State of New York and Gov. Mario Cuomo v. NRC, No. 89-1185 (D.C. Cir.)

CONTACT: Charles Mullins  
504-1606

On March 6, 1989, two petitions for review of the Commission's dismissing the Governmental intervenors from the Shoreham proceeding were filed in the U.S. Court of Appeals for the District of Columbia Circuit. One petition was filed by New York State and Governor Mario Cuomo; the other was submitted by Suffolk County and the Town of Southampton. As is usual with petitions for review of agency decisions, the petition did not indicate what arguments would be advanced. The two petitions were subsequently consolidated, and LILCO was admitted as a party to the case. A Suffolk County motion to declare the case moot and to vacate the underlying Commission decision was denied by the D.C. Circuit in December 1989. The Court set an initial briefing schedule, but later held the case in abeyance at the request of all parties, pending possible mootness and/or settlement negotiations. The case remains held in abeyance, but a dismissal for mootness may be in the offing soon.

Homestake Mining Co. v. NRC, No. 92-2057 (D. Colo.)

CONTACT: John F. Cordes  
504-1600

Plaintiff in this lawsuit seeks monetary relief against the NRC under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Plaintiff owns a uranium milling facility in New Mexico. Plaintiff says that the old AEC's efforts "to develop a domestic uranium procurement program" led to contamination at the site. Plaintiff has sued the NRC as a successor to the AEC. Because plaintiff hopes to obtain financial support for its clean-up activities under the energy legislation enacted this past fall, plaintiff has indicated to us that it may not pursue this suit. It currently is being held in abeyance. It is highly doubtful, in any event, that plaintiff has any valid claim against the NRC.

\*In re El Paso Electric Co., Case No. 92-10148-FM (Bkrptcy Ct., W.D. Tex.)

CONTACT: Edwin J. Reis  
504-1578

The El Paso Electric Company, a partial owner of the Palo Verde nuclear power plant, is attempting to reorganize its financial affairs under the protection of Chapter 11 of the Bankruptcy Act. As part of the bankruptcy proceeding El Paso has tried to "reject" leases it entered with a bank that led to what El Paso views as onerous payment. However, under bankruptcy law, rejection of the leases also amounts to a loss of a right to possession.

On October 16, 1992, the United States, on behalf of the NRC, moved to intervene in the proceeding to protect the NRC's statutory prerogative to approve transfers of operating licenses. The bankruptcy court has granted the motion to intervene, and has indicated its intent to defer to the NRC's regulatory authority over license transfers. The matter remains pending before the bankruptcy court, but the matter likely will be resolved without further litigation.

Merklin v. U.S., No. 85-5079 (3d Cir.)

CONTACT: Pamela Urban  
504-1600

This Federal Tort Claims Act suit was brought against the government by a foreman who sustained cancer injuries allegedly contracted from working in a plant that processed radioactive monazite ore. The Atomic Energy Commission supplied the ore and retained the title to the products, although the plant was owned and operated by a private organization. The district court granted our motion for summary judgment, but the court of appeals reversed on the grounds that the AEC, as the ultimate supplier of a non-obviously dangerous chattel, "had" a duty under state law to warn employees of the ore's hazardous propensities. The court of appeals remanded the case to the district court to determine whether Merklin had been aware of the risks associated with handling monazite so as to absolve, upon a finding of such awareness, the AEC of any duty to warn. Plaintiff is pursuing an action in the state court versus the private contractors, and the federal action is being held in abeyance until the resolution of the state action.



Shannon v. NRC, No. 89-0872-Y (D. Mass.)

CONTACT: L. Michael Rafky  
504-1974

The Massachusetts Attorney General's Office has sued the NRC for not responding to a FOIA appeal for certain documents concerning the Pilgrim restart. The documents under appeal, which were withheld under Exemption 5 of the FOIA, are also subject to a subpoena issued in the Public Utility Commission's rate proceeding on Pilgrim. Only a few documents remain at issue.

We are working with the U.S. Attorney's Office in Boston to resolve the case. Our answer was filed on May 22, 1989. A response to the administrative appeal, releasing some documents and denying release of others, was sent by the FOIA branch. The Massachusetts Attorney General's office and the U.S. filed a motion to dismiss the case without prejudice. To our knowledge, the court has not yet acted on that motion.

US Ecology, Inc. v. Northwest Interstate Compact on Low-Level Radioactive Waste Management, Civ. No. 92-5091B (W.D. Wash.)

CONTACT : Susan Fonner  
504-1632

US Ecology brought suit against a number of defendants, including the NRC and the Chairman (in his official capacity), in federal district court in Tacoma, Washington. US Ecology operates a low-level radioactive waste disposal facility located at Richland, Washington, on the Hanford Federal Reservation.

US Ecology's 36 page complaint alleges that the Northwest Interstate Compact on Low-Level Radioactive Waste Management, various state officials and the NRC have illegally failed to take action to prevent a competitor of US Ecology, Envirocare, from accepting low-level radioactive waste at a site in Utah. At the request of the U.S. Attorney, we agreed to handle the case for the Government.

We filed a motion to dismiss the case on the ground that the district court lacks jurisdiction to consider those claims. We also argued that the claims should be dismissed because the plaintiff failed to exhaust administrative remedies by not first petitioning the NRC for relief. Oral argument on the motion was heard on July 2, 1992. After hearing oral argument, the district court (Bryan, J.) dismissed US Ecology's claim against the NRC for failure to exhaust. The court did not reach the exclusive jurisdiction issue. Subsequently, U.S. Ecology submitted a petition to the NRC requesting review and revocation of Utah's

agreement state program based on Utah's failure to require state or federal ownership of the Envirocare site. The petition has not yet been resolved.

USR Industries, Inc. v. U.S.A. and NRC, Nos. 89-1863 and 90-1407  
(D.C. Cir.)

CONTACT: Charles Mullins  
504-1606

USR Industries and four associated corporations have petitioned the D.C. Circuit for review of an immediately effective order issued by the NRC staff on August 21, 1989. The order directed these corporations to establish an escrow account to initiate characterization and decontamination activities at the Safety Light, Inc. facility at Bloomsburg, Pa. The Staff has asserted jurisdiction over USR because the USR corporations were split off from Safety Light evidently in an effort to separate the corporation's assets from its liabilities, and to prevent them from being required for clean-up activities. In ALAB-931, the Appeal Board affirmed a Licensing Board Order finding that the Staff has jurisdiction over some of the companies, and remanded the case for further proceedings. The Commission did not take review of ALAB-931 and the USR group has filed a challenge to that decision as well. The Court of Appeals has held both federal court proceedings in abeyance during the administrative proceedings.

CLOSED LITIGATION

Atlas Corp. v. United States of America & NRC, No. 92-1561 (D.C. Cir.)

CONTACT : L. Michael Rafky  
504-1974

This petition for review attacked an NRC decision refusing to give petitioner relief from a \$100,000 annual fee for FY 1991. Petitioner owns a defunct uranium milling operation. In 1991, however, petitioner held a license that permitted operation of the milling facility. While petitioner argued that the facility was defunct at that time, and was undergoing decommissioning, petitioner did not seek a possession-only license until FY 1992. Once petitioner obtained a POL, the NRC assessed no further annual charges but insisted on payment of the \$100,000 fee for FY 1991. Petitioner challenged the NRC decision in court.

After considerable discussion, and pursuant to the D.C. Circuit's "alternate dispute resolution" program, the NRC and petitioner reached a compromise settlement that is now being implemented. Pursuant to the settlement petitioner withdrew its lawsuit.

DeLoatch v. Selin, Civ. No. 93-0163 (D.D.C.)

CONTACT : Marvin Itzkowitz  
504-1566

This is a Title VII lawsuit, filed January 26, 1993, alleging race, gender and age discrimination. Plaintiff's effort to obtain administrative relief proved unsuccessful, and he then sought a remedy in federal district court in Washington, D.C. We have learned, however, that plaintiff has decided not to pursue the lawsuit and instead to withdraw it.

\*Environment and Resources Conservation Organization v. NRC, No. 92-70202 (9th Cir.)

CONTACT : Charles Mullins  
504-1606

This lawsuit challenges the NRC's issuance of a "possession only" license ("POL") to the owner of the Rancho Seco Nuclear Generating Station in California, the Sacramento Municipal Utilities District ("SMUD"). SMUD ceased operation of the plant in 1989 pursuant to a voter referendum. Petitioner is a group

opposing Rancho Seco's shutdown. Petitioner argues that the POL is unlawful on a number of grounds, including a NEPA violation. On April 22 a motions panel of the 9th Circuit denied petitioner's emergency motion for a stay of the POL. The Court also refused petitioner's request for expedited review. On June 30, 1993, the Court dismissed the petition in an unpublished order, citing numerous procedural deficiencies. Petitioners have 90 days to seek Supreme Court review.

GAP v. NRC, C.A. No. 86-1976 (D.D.C.)

Nuclear Awareness Network v. NRC, C.A. No. 86-3201 (D.D.C.)

Kansas Gas & Electric v. NRC, C.A. No. 87-2748 (D.D.C.)

CONTACT: L. Michael Rafky  
504-1974

On July 18, 1986, the Government Accountability Project sued the NRC under the Freedom of Information Act (FOIA). The suit challenged the agency's withholding of documents related to the Wolf Creek Generating Station. Later GAP moved to consolidate this case with Nuclear Awareness Network v. NRC, C.A. No. 86-3201 (D.D.C.), a similar case challenging the agency's withholding of Wolf Creek documents. All Commission generated documents were processed. A motion for summary judgment with declarations and a Vaughn Index of those records or portions of records which remained withholdable pursuant to Exemptions 5 and 7 of the FOIA were filed. The Court did not rule on the motion, but it did order the production of a small portion of documents withheld from GAP for an in camera inspection.

With respect to the utility-generated documents in the agency's possession, DOJ and the agency concluded that KG&E's reliance on Exemption 4 was unfounded and that the documents should be released to NAN. Attorneys for KG&E were advised of this conclusion and on October 9, 1987, KG&E filed a reverse FOIA lawsuit challenging the agency's decision to release approximately 2,000 pages of KG&E documents (provided to the agency by a confidential source) to the plaintiffs. Cross-motions for summary judgment were filed in 1988.

In June 1993 the district court (Hogan, J) issued two decisions ruling on the pending motions in both cases. The court ruled almost exclusively in favor of the NRC on all FOIA and "reverse" FOIA issues. Except for one document, a 1985 OGC memo that in the court's view fell outside the "deliberative process" privilege, the court sustained the NRC's FOIA decisions.

Hampton v. United States, Civ. No. 93-A-798-S (M.D. Alabama)

Contact: Daryl M. Shapiro  
504-1631

This lawsuit was filed by the estate of a former Navy sailor claiming he was negligently exposed to radiation from nuclear weapons tests more than forty years ago. The suit named the NRC as one of the defendants. On September 21 the district court (Albritton, J.) dismissed the suit as precluded by (1) a past unsuccessful suit on the same subject matter, and (2) the Federal Tort Claims Act's 2-year statute of limitations.

\*Macias v. Kerr-McGee Corp., No. 92-C-3389 (N.D. Ill.)

CONTACT: Grace H. Kim  
504-3605

This complex lawsuit arises out of plaintiffs' alleged exposure to thorium-containing materials on or near Kerr-McGee's property in West Chicago, Illinois. Plaintiffs brought a suit for money damages against Kerr-McGee in state court in Illinois. Kerr-McGee in turn brought third-party actions against the NRC and the EPA on the ground that regulatory failures by the two federal agencies had prevented Kerr-McGee from dealing effectively with the contamination problem at the West Chicago site.

Last year the NRC and the EPA removed the lawsuit to federal district court in Chicago, where both federal agencies filed motions to dismiss. On October 8 the district court (Moran, C.J.) issued a decision agreeing with our argument that claims against the NRC related to licensing or rulemaking could be brought only in federal appeals courts, not in state courts or in federal district courts. The district court also agreed with EPA's argument that the CERCLA statutory scheme prevented Kerr-McGee's pre-cleanup claim against the EPA.

Accordingly, the district court entered an order dismissing Kerr-McGee's claims against the NRC and the EPA.

\*State of Michigan v. United States, No. 93-2281 (6th Cir.)

CONTACT: Susan Fonner  
504-1632

Three years ago Michigan brought suit in federal district court against the United States, the NRC and several other agencies. The suit challenged as unconstitutional the 1985 Low-Level Radioactive Waste Policy Act and also demanded that the NRC

prepare a fresh NEPA analysis of the agency's Part 61 regulations on waste disposal. The Supreme Court resolved the constitutional question in New York v. United States, 112 S. Ct. 2408 (1992), where it approved the entire 1985 Act except its "take title" provision. The district court threw out Michigan's NEPA claims for lack of jurisdiction.

The United States Court of Appeals for the Sixth Circuit (Ryan, Milburn & Coffin, JJ) affirmed the district court judgment on June 2, 1993. The court ruled that Michigan's challenge to the NRC's Part 61 regulations on NEPA grounds required Michigan first to ask the agency to change its regulations, followed by judicial review directly in the court of appeals under the exclusive jurisdiction provisions of the Hobbs Act. The court also ruled that Michigan lacked standing "to police the Nuclear Regulatory Commission" by disclaiming an attack on agency regulations and seeking NEPA relief in the abstract. The court reasoned that, for standing purposes, NEPA reviews "are only significant because of their effect on regulations."

Michigan did not seek Supreme Court review.

United States v. Comley, M.B.D. No. 91-11556K (D. Mass.)

CONTACT: John F. Cordes  
504-1600

This lawsuit was the latest development in the long running NRC effort to obtain audio tape recordings in the possession of Stephen B. Comley. Mr. Comley allegedly taped telephone conversations between himself and Roger A. Fortuna, the Deputy Director of the NRC's Office of Investigations. The district court ruled in November 1990 that the original Commission subpoena no longer retained validity because the Inspector General, who has his own independent subpoena authority, had taken over responsibility for the Fortuna/Comley investigation. Subsequently, after abortive efforts to settle the matter, the Inspector General issued his own subpoena for the tapes. Mr. Comley refused to comply.

In April 1991 the United States Attorney in Boston filed suit to enforce the IG subpoena. In October the district court issued an order enforcing the subpoena. Mr. Comley failed to comply and appealed the district court's order to the First Circuit. On August 31, 1992 the First Circuit issued a brief per curiam opinion affirming the district court judgment enforcing the IG subpoena. The court of appeals rejected Mr. Comley's arguments that the NRC IG lacks the authority to issue subpoenas in support of investigations into employee misconduct and that the IG

subpoena here was part of an effort to suppress Mr. Comley's First Amendment rights of free speech and association.

Meanwhile, in July 1992 during the pendency of the appeal, the district judge (Keeton, J.) held Mr. Comley in contempt, and ordered him to pay fines of \$200 a day for the first five days of non-compliance, \$500 a day for the next ten days, and \$1000 per day thereafter. Mr. Comley neither complied nor paid the fines. The district judge took no further action. We have filed a motion for a hearing to consider further sanctions.

In the last turn of events, the district court (Keeton, J.) dismissed the government's subpoena enforcement action on the grounds that the contempt fines against Mr. Comley were serving no coercive purpose and that the government had not sought Mr. Comley's imprisonment.

After consultations among OGC, the Inspector General's office, the Department of Justice and the United States Attorney's office in Boston, the government decided against pursuing this case on appeal.