

February 13, 1997

SECY-97-040

For: The Commission

From: John F. Cordes, Jr. /s/
Solicitor

Subject: LITIGATION REPORT - 1997 - 1

Reytblatt v. NRC, No. 95-1578 (D.C. Cir., decided Feb. 7, 1997)

Petitioners, Dr. Zinovy V. Reytblatt and the Ohio Citizens for Responsible Energy (OCRE), brought this lawsuit to challenge 1995 changes in 10 C.F.R. Part 50, Appendix J. The revised Appendix J established a new performance-based option for containment leakage rate testing. The new rule provides for the retention of much leakage-rate test data at reactor sites. In the rulemaking, the NRC rejected a charge by Dr. Reytblatt that it had designed the rule to "conceal" information. The rule's statement of considerations pointed out that the most safety-sensitive information still must be submitted to the agency (and hence made public) and that on-site NRC inspections would ensure the integrity of the data.

Petitioners' lawsuit attacked only the information-reporting aspect of the new rule, not its merits. In early February, the court of appeals (Buckley, Wald & Edwards, JJ.) issued a decision upholding the rule.

As a threshold matter, the court ruled that petitioners had "standing" to sue because their suit could lead to a meaningful remedy, *i.e.*, a new rulemaking. The court discounted petitioners' failure to challenge an earlier NRC rule reducing public access to leakage-rate test data for Appendix J's "prescriptive" option. On the merits, however, the court rejected petitioners' case in its entirety. The court found the NRC's brief discussion of the information issue "entirely adequate," in light of the "general" and "abusive" nature of the only public comment the agency received on information-reporting and in light of the rule's "primary focus" on the new performance-based approach rather than on reporting requirements.

The court also held that the NRC was under no obligation to respond to Dr. Reytblatt's out-of-

time comment that a lack of access to leakage-rate test results would prevent effective enforcement petitions under 10 C.F.R. § 2.206. The court stated that petitioners, if they wish, could petition for a fresh rulemaking to increase reporting of leakage-rate test results. The court also noted that the NRC already was considering a general petition for rulemaking, filed by OCRE, seeking greater public access to licensee-held documents.

Petitioners have 45 days from February 7 to seek rehearing and 90 days to seek certiorari.

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