

January 17, 1997

SECY-97-016

FOR: The Commission

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

SUBJECT: LITIGATION REPORT AS OF JANUARY 17, 1997

PURPOSE: To Inform the Commission of the Status of Litigation in the Courts

DISCUSSION:

Attached is a report updating NRC court litigation since my last report dated July 11, 1996 (SECY-96-158). This report reflects the status of NRC cases in court as of January 17, 1997.

During the July 1, 1996, through December 31, 1996, reporting period, the Commission or its officials were sued once in the courts of appeals,<sup>1</sup> three times in federal district courts,<sup>2</sup> once in state court,<sup>3</sup> and once in a tribal court.<sup>4</sup> During this same six-month period four cases were closed.<sup>5</sup> For the full calendar year (1996), ten new cases involving the NRC began, and eighteen cases were closed.

We also handled eighteen requests (so-called "Touhy" requests) for NRC testimony, depositions or other evidence for use in private litigation in the last six months of 1996. For the full calendar year (1996) we handled twenty-nine Touhy requests.

John F. Cordes, Jr.  
Solicitor

Attachment: Litigation Report

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Morris v. NRC, No. 96-3067 (Fed. Cir.).

Nejfelt v. Jackson, Nos. 96C-3081 & 96C-629 (N.D. Ill.); Thermal Science Incorporated v. NRC, No. 4:96CV02282-CAS (E.D. Mo.).

Fuhrmeister v. NRC, No. CV-0000481-96 (State District Court, Montgomery County, Pa.).

Farley v. Kerr-McGee, No. SR-CV-04-95 (Navajo Nation District Court, Shiprock District).

American Mining Congress v. NRC, No. 94-1619 (D.C. Cir.); Bauman v. State of Ohio, No. 95-CV-242 (Common Pleas Court, Guernsey County, Ohio); In re: Perfection Service, Inc., No. 96-60311 (Bkrptcy Ct., N.D. Ohio); United States v. Pesses, No. 90-0654 (W.D. Pa.).

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LITIGATION STATUS REPORT  
As of January 16, 1997

ACTIVE CASES

American College of Nuclear Physicians v. NRC, No. 94-1787 (D.C. Cir., filed December 30, 1994)

CONTACT: Steve Crockett  
415-1620

On December 2, 1994, the NRC published a final rule on radiopharmaceuticals that is "intended to provide greater flexibility by allowing properly qualified nuclear physicians greater discretion to prepare radioactive drugs containing byproduct material for medical use." 59 Fed. Reg. 61767 (1994). Several weeks later the American College of Nuclear Physicians and the Society of Nuclear Medicine filed a petition for review in the District of Columbia Circuit.

The petition simply challenges the rule, without specifying the ground for the challenge. Petitioners apparently intend to focus on the compatibility determinations accompanying the rule. The case currently is being held in abeyance, at petitioners' request, pending finalization of the NRC's regulatory guides. The parties are filing periodic status reports with the Court.

Farley v. Kerr-McGee, No. SR-CV-04-95 (Navajo Nation District Court, Shiprock District, 3d party complaint filed July 10, 1996)

CONTACT: Marjorie S. Nordlinger  
415-1616

This suit, filed in a Navajo Nation court, seeks damages from several corporations for injury and death allegedly resulting from radiation at a uranium milling facility near Shiprock, New Mexico. The corporations, in turn, have filed a third-party complaint impleading the federal government, including the NRC, in an effort to obtain indemnification for any damages that are assessed.

The third-party complaint rests on the argument that the Shiprock mill operated as part of an Atomic Energy Commission procurement program. It is not clear why the third-party complaint names the NRC as a party, because DOE, not the NRC, succeeded the now-defunct AEC in areas like uranium procurement. It also is not clear that a Navajo Nation court possesses jurisdiction to adjudicate claims against the federal government.

We will cooperate with the United States Attorney's office in New Mexico in defending this case. The United States Attorney's office has submitted a letter to the tribal court denying any tribal court jurisdiction over the United States government.

Fuhrmeister v. NRC, No. CV-0000481-96 (State District Court, Montgomery County, Pa., filed Nov. 26, 1996, removed to U.S. District Court, E.D. Pa., December 23, 1996)

CONTACT: Grace H. Kim  
415-3605

An NRC employee brought this lawsuit to claim about \$300 lost when his work assignments prevented him from taking annual leave. The lawsuit was filed in state court. At the request of the United States Attorney's office, we drafted papers to remove the case from state to federal court and to seek dismissal on sovereign immunity grounds. The motion to dismiss remains pending in the federal district court in Philadelphia.

General Atomics v. NRC, No. 95-70170 (9th Cir., filed September 15, 1995)

CONTACT: Steve Crockett  
415-1620

This petition for review, like a similar petition filed by the Sequoyah Fuels Corporation in the Tenth Circuit, challenges a rule that the Commission issued in July, 1995, to clarify decommissioning funding obligations of nonreactor licensees. Petitioner, the subject of an NRC enforcement action arising out of a contaminated site in Gore, Oklahoma, apparently intends to argue that the Commission's new rule unlawfully imposes "new financial assurance requirements" retroactively.

This case has been consolidated with the Sequoyah Fuels case (which on our motion was transferred to the Ninth Circuit). The case currently is being held in abeyance pending NRC consideration of a settlement of the NRC's enforcement action against GA.

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

CONTACT: John F. Cordes  
415-1600

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.

Ibrahim v. Jackson, Civil Action No. PJM-95-3737 (D. Md., filed December 7, 1995)

CONTACT: Karl L. Farrar  
415-1556

This lawsuit claims that plaintiff failed to win selection to an NRC position because of unlawful sex, age, and national-origin discrimination. We are working with the United States Attorney's office in Maryland in defending this suit. The case currently is before the district court on the government's summary judgment motion. If summary judgment is denied, the case will proceed to trial. We are working with the United States Attorney's office on this case.

Little v. United States, No. L-94-2824 (D. Md., filed Oct. 12, 1994)

CONTACT: Joseph Rutberg  
415-1578

This is a Federal Tort Claims Act suit filed by a person claiming injuries resulting from the NRC's "failing to properly place and maintain . . . concrete furniture [at its White Flint facility] such that it was safe to use and . . . failing to warn of the hazard in using said furniture." Plaintiff seeks \$500,000 in damages from the government. The case against the government is awaiting the outcome of a parallel suit brought by plaintiffs against the furniture manufacturer in which the NRC has provided deposition testimony under our "Touhy" program.

We are cooperating with the United States Attorney's office in this case.

Mabey v. NRC, Nos. 95-1399, 95-1400 & 95-1402 (D.C. Cir., filed Aug. 4 and Aug. 7, 1995)

CONTACT: Grace H. Kim  
415-3605

These lawsuits were filed by Cajun Electric Power Cooperative and by a group of municipal utilities in Arkansas. Mr. Mabey, the current named petitioner, is the bankruptcy trustee for Cajun. The petitions for review challenge two NRC orders that allowed consummation of a merger between Gulf States Utilities and Entergy. NRC approval was necessary because of GSU's ownership and operation of the River Bend nuclear power reactor.

Cajun owns 30% of the River Bend reactor and challenges the merger on antitrust and contractual grounds. All parties, including the NRC, filed their appellate briefs last winter. However, on the eve of a scheduled May 14 oral argument, the court issued an order removing the case from the argument calendar and holding the case in abeyance "pending further order of the court." The parties jointly had requested this action on the ground that Cajun appeared on the verge of a successful resolution of its dispute with GSU. (Cajun is in bankruptcy and the bankruptcy trustee has developed a plan that would eliminate Cajun's 30% share in River Bend, thus removing any ongoing Cajun interest in the GSU-Entergy merger; the settlement of the bankruptcy action also would require Cajun to drop all pending litigation involving River Bend).

Whether the Arkansas utilities continue to pursue the case in the absence of Cajun may depend on their assessment of the effect of FERC's recent "open access" tariff, which may ameliorate some or all of their antitrust concerns. The court of appeals has ordered the parties to file periodic status reports.

Morris v. NRC, No. 97-3067 (Fed. Cir., filed Nov. 12, 1996)

CONTACT: Karl Farrar  
415-1569

This lawsuit was brought by the widow of a deceased former NRC employee and challenges an agency personnel action. The suit apparently will argue that the NRC violated whistleblowing protection laws in terminating the former employee. The lawsuit challenges a decision by the Merit Systems Protection Board, which upheld the NRC personnel action in full.

We will work with the Department of Justice in defending this suit.

Nejfelt v. Jackson, Nos. 96C-3081 & 96C-629 (N.D. Ill., filed May 23 and September 22, 1996)

CONTACT: Sandy Vora  
415-1562

These two lawsuits by an NRC employee allege agency violations of the Americans with Disabilities Act and the Rehabilitation Act in conditions of employment. We are working with the United States Attorney's office in defending both suits. A pre-trial conference in one case is scheduled for early March, 1997. The answer in the other case is due in late January, 1997. We likely will seek consolidation of the two lawsuits.

People of the State of Illinois v. NRC, No. 96-1125 (D.C. Cir., filed April 22, 1996)

CONTACT: Grace H. Kim  
415-3605

This lawsuit, brought by the State of Illinois and the City of West Chicago, challenges a Commission decision (CLI-96-02) that terminated an adjudicatory proceeding as moot and vacated underlying Licensing Board and Appeal Board decisions. Petitioners apparently intend to argue that after finding mootness, the Commission ought to have left the underlying decisions intact.

This case has been held in abeyance pending settlement negotiations between Illinois and Kerr-McGee.

Reytblatt v. NRC, No. 95-1578 (D.C. Cir., filed Nov. 17, 1995)

CONTACT: Grace H. Kim  
415-3605

Petitioners, Dr. Zinovy V. Reytblatt and Ohio Citizens for Responsible Energy, brought this lawsuit to challenge the NRC's recently-issued Containment Leakage Testing Rule. The new rule provides a performance-based option for leakage-rate testing of containments of light-water-cooled nuclear power plants. Petitioners have not yet specified their precise complaints against the rule. Their comments during the rulemaking process raised concerns, among others, about an alleged reduction in the margin of safety resulting from the new rule and the accuracy of current leakage-testing methodology.

In the court of appeals petitioners have focused exclusively on the public availability (or lack

thereof) of leakage testing data from the NRC and its licensees. All parties, including the Nuclear Energy Institute (which intervened in the case) have filed briefs. The court heard oral argument in September, 1996, and the case is awaiting decision.

Sequoyah Fuels Corporation v. NRC, No. 95-9542 (10th Cir., filed September 18, 1995)

CONTACT: Steve Crockett  
415-1620

This petition for review, like a similar petition filed by General Atomics in the Ninth Circuit, challenges a rule that the Commission issued in July, 1995, to clarify decommissioning funding obligations of nonreactor licensees. Petitioner, the subject of an NRC enforcement action arising out of a contaminated site in Gore, Oklahoma, apparently intends to argue that the Commission's new rule unlawfully imposes "new financial assurance requirements" retroactively.

The Tenth Circuit transferred this case to the Ninth Circuit, on our motion, where it has been consolidated with the GA lawsuit and held in abeyance pending NRC consideration of a settlement of the NRC staff's enforcement action against Sequoyah Fuels.

Thermal Science Inc. v. NRC, No. 4:96CV02282-CAS (E.D. Mo., filed November 20, 1996)

CONTACT: Charles E. Mullins  
415-1618

This lawsuit seeks to halt further NRC consideration of a proposed \$900,000 civil penalty against Thermal Science, Incorporated (TSI), a company that produces and sells to the nuclear industry a fire barrier product known as Thermo-Lag. The proposed penalty rests on alleged misrepresentations about the testing of Thermo-Lag. The complaint points to TSI's acquittal last year on related criminal charges and argues that NRC pursuit of a civil penalty violates the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. The complaint also argues that the NRC lacks statutory jurisdiction to assess civil penalties against non-licensees like TSI. Finally, the complaint contends that the basis for the proposed penalty here, the "wrongdoer rule" (10 C.F.R. § 50.5), also lies outside the NRC's statutory authority.

TSI seeks a stay of the deadline (currently January 31) to respond to the proposed civil penalty and a preliminary injunction halting further NRC penalty proceedings. We have drafted a 60-page opposition to TSI's motions for injunctive relief, which we filed (in conjunction with the United States Attorney's office in St. Louis) on December 24, 1996. The case is awaiting decision.

Toledo Coalition for Safe Energy v. NRC, No. 95-1590 (D.C. Cir., decided Nov. 26, 1996)

CONTACT: Peter G. Crane  
415-1622

This lawsuit challenged use of the NUHOMS dry storage cask at the Davis-Besse nuclear power reactor in Ohio and at the Calvert Cliffs reactor in Maryland. The NRC approved use of that cask

in an earlier rulemaking. The lawsuit alleged, among other things, that the users of the cask had made alterations without seeking amendment of their certificate of compliance.

We moved to dismiss the lawsuit as premature. Petitioners had not brought their claims first to the NRC, as required by the NRC's judicial review provisions. The court of appeals (Silberman, Randolph & Rogers, JJ.) has issued a short order dismissing the case in its entirety. The court ruled that the Ohio petitioners' claim was not ripe because their grievance still was before the NRC (via a petition under 10 C.F.R. § 2.206). The court dismissed the Maryland petitioners' claim for lack of standing because the only agency action identified in the petition related to the Davis-Besse petition. Petitioners have ninety days to seek Supreme Court review.

NRC action on the pending § 2.206 petition could lead to renewed litigation on the NUHOMS cask.

United States v. Construction Products Research, Misc. No. 394M-112AHN (D. Conn, decided Apr. 3, 1995), aff'd, No. 95-6067 (2d Cir., decided Jan. 2, 1996), cert. filed, No. 95-2007 (June 13, 1996), decided on contempt motion (D. Conn. Oct. 11, 1996)

CONTACT: Charles E. Mullins  
415-1618

This is a long-running subpoena enforcement dispute between the NRC and a Connecticut manufacturer of cement and grout used in NRC-licensed nuclear power reactors. The NRC sought employment records by subpoena to aid an investigation whether the grout manufacturer had retaliated against employees for raising safety concerns about the company's products. The manufacturer has vigorously contested enforcement of the subpoena for about two years, arguing at every turn that the NRC lacked jurisdiction over non-licensees and that many of its employment records were covered by the attorney-client privilege.

The district court rejected the manufacturer's arguments and issued an order enforcing the subpoena. The manufacturer took an appeal and unsuccessfully sought a stay pending appeal from the district court, from the court of appeals and the from Supreme Court. Despite its failure to obtain a stay, the manufacturer did not comply in full with the subpoena, and continued to withhold documents it considered privileged.

In January, 1996, the court of appeals (McLaughlin, Newman & Altimari) issued a thorough opinion upholding the NRC's position on all points. See 73 F.3d 464 (2d Cir. 1996). The court rejected the manufacturer's contention that the NRC lacked authority to subpoena the records of "mere suppliers," and concluded that "[i]n light of the historically expansive interpretation of an agency's power to investigate, . . . this subpoena lay well within the NRC's authority because it is the primary body responsible for nuclear safety." The court held that the NRC's enforcement jurisdiction over suppliers could be decided later, "[i]f and when the NRC decides to use the information obtained by the subpoena" (Slip op. at 16). Finally, the court rejected the manufacturer's attorney-client privilege claim as "not supported by the information provided." On October 15, 1996, the Supreme Court refused to review the Second Circuit decision.

Even so, the cement manufacturer has refused to comply fully with the NRC subpoena, and has continued to invoke the attorney-client privilege. Working closely with the Department of Justice,



we moved for a contempt order and for a writ of assistance to enforce the court of appeals decision. The district court denied our motion and subsequently refused to reconsider its denial. The district court instead ordered the government to seek in camera judicial review of the disputed documents. The court intends to undertake a document-by-document privilege review.

As we view the court's document-by-document approach as incompatible with the prior court of appeals decision rejecting the attorney-client privilege, we have filed an appeal and a petition for mandamus in the court of appeals seeking enforcement of the appeals court's 1996 decision. That appeal and mandamus petition remains pending.

### CLOSED CASES

American Mining Congress v. NRC, No. 94-1619 (D.C. Cir., dismissed July 30, 1996)

CONTACT: Steven F. Crockett  
415-1620

This lawsuit, recaptioned National Mining Association v. NRC, challenged a 1994 NRC rule entitled "Timeliness in Decommissioning of Materials Facilities." See 59 Fed. Reg. 36026 (1994). Petitioner, an organization of owners of uranium mines, were prepared to argue, among other things, that the new rule gave the Commission too much authority to assess the economic viability of uranium mines.

At the parties' request, the court of appeals held the case in abeyance while petitioner and the NRC staff (along with OGC) discussed the rule's implementation. After completion of those discussions, petitioner decided to drop its lawsuit and the D.C. Circuit recently issued an order dismissing the case.

Bauman v. State of Ohio, No. 95-CV-242 (Common Pleas Court, Guernsey County, Ohio, order entered July 22, 1996)

CONTACT: Susan G. Fonner  
415-1629

In this state-court lawsuit involving the contaminated Shieldalloy site in Ohio, Mr. Bauman attempted to join the NRC as an indispensable party, apparently because of the agency's preparation of an EIS concerning the site. The court (Ellwood, J.) rejected Mr. Bauman's claims because of the pendency of a related bankruptcy action in New York involving Shieldalloy. The court also pointed out, as we had argued, that it lacked jurisdiction over the NRC, whose actions lie "in the exclusive jurisdiction of the United States Court of Appeals pursuant to 28 U.S.C. 2341-2351." Mr. Bauman took no appeal.

In re: Perfection Service, Inc., No. 96-60311 (Bkrptcy Ct., N.D. Ohio, order issued Aug. 20, 1996)

CONTACT: Susan G. Fonner  
415-1629

This bankruptcy proceeding involved a bankrupt well-logging operation. In early July, we filed a pleading protesting against the bankruptcy trustee's planned abandonment of equipment belonging to the bankrupted company, because we were concerned that this could include sealed sources owned by the company. We then worked out an agreement with the court and the parties for the sale of the sealed sources to another business.

The settlement did not work out as planned, however, because two of the sealed sources proved to have a leak and because the site of the bankrupt's defunct business proved to contain some residual contamination. We then returned to the bankruptcy court, and after lengthy negotiations with the bankruptcy trustee and with the bankrupt's principal creditor, a local bank, we reached a fresh settlement agreement.

The bankruptcy court embodied the new agreement in a court order. The agreement required, inter alia, that the creditor bank and the owners of the real property where the bankrupt's business operated contribute money that would enable the trustee to dispose of the leaking sealed sources. The court order also provided that no property could be removed from the building without NRC approval. The NRC agreed to facilitate the removal of any leaking sealed sources. And an outside buyer agreed to purchase the remaining sources. This court order should wind up this unusual case.

United States v. Pesses, Civ. Action No. 90-0654 (W.D. Pa., settled August, 1996)

CONTACT: Charles E. Mullins  
415-1618

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 was 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 did not agree with this reading of the law and appealed the Magistrate's decision (unsuccessfully) to the district judge.

In August 1996, the case was settled on terms that did not affect the NRC. The Department of Justice negotiated the settlement on behalf of the government.