

January 22, 1996

FOR: The Commission
 FROM: John F. Cordes, Jr. /s/ Solicitor
 SUBJECT: LITIGATION REPORT AS OF JANUARY 22, 1996
 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 24, 1995 (SECY-95-191). This report reflects the status of NRC cases in court as of January 22, 1995.

During the July 1, 1995, through December 31, 1995, reporting period, the Commission or its officials were sued nine times in the courts of appeals⁽¹⁾ and once in federal district court.⁽²⁾ The NRC participated in one bankruptcy case.⁽³⁾ During this same six-month period thirteen cases were closed.⁽⁴⁾ For the full calendar year (1995) sixteen new cases involving the NRC began, and twenty-five cases were closed.

We also handled fifteen requests (so-called "Touhy" requests) for NRC testimony, depositions or other evidence for use in private litigation during the last six months of 1995. For the full calendar year (1995) we handled thirty-six Touhy requests

John F. Cordes, Jr.
 Solicitor

Attachment: [Litigation Report](#)

ATTACHMENT

LITIGATION STATUS REPORT

As of January 22, 1996

- [ACTIVE CASES](#)
- [INACTIVE CASES](#)
- [CLOSED CASES](#)

* Cases of unusual significance are marked with an asterisk

ACTIVE CASES

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

CONTACT: Roger K. Davis
 415-1615

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.

American Mining Congress v. NRC, No. 94-1619 (D.C. Cir., filed Sept. 9, 1994)

CONTACT: Steven F. Crockett
 415-1620

This lawsuit challenges the NRC's recent rule on "Timeliness in Decommissioning of Materials Facilities." See 59 Fed. Reg. 36026 et seq. (1994). Petitioner apparently is concerned with provisions in the new rule requiring shut-down uranium recovery operations to begin decommissioning on a prescribed time schedule.

We do not expect a briefing schedule or an oral argument in this case in the near future. Petitioner has engaged in a series of discussions about the rule's implementation with the NRC staff, and is considering whether to continue to pursue the case.

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

CONTACT: Daryl M. Shapiro
 415-1631

These three petitions for review, two filed by Cajun Electric and one by several cities and cooperatives in Arkansas, challenge the NRC's decision to re-issue license amendments facilitating the merger between Gulf States Utilities and Entergy. Prior to the merger Gulf States was the principal owner and operator of the River Bend power reactor in Louisiana. Earlier this year the court of appeals had issued an order vacating the original license amendments and requiring the NRC to reconsider supporting antitrust findings in light of a separate court decision in a FERC case.

See Litigation Report 1995-2, SECY-95-68.

On remand the NRC staff found, as it had originally, that the merger created no significant antitrust changes and required no fresh antitrust review. The Commission allowed the staff findings to stand and the amendments then were re-issued. In addition to these lawsuits, Cajun is pursuing safety contentions in a pending Licensing Board proceeding.

The court of appeals has issued an order consolidating the three lawsuits. The case is currently being briefed, and the court will hear oral argument this spring.

* **City of Cleveland v. NRC**, Nos. 92-1532, 93-1665, 93-1672 & 93-1673 (D.C. Cir., decided October 27, 1995)

CONTACT: Grace Kim
415-3605

These consolidated lawsuits sought judicial review of two NRC adjudicatory decisions. One, issued by the Commission itself, held that the NRC had authority to entertain requests by utilities to relax previously-imposed antitrust conditions. The other, issued by an NRC Licensing Board, rejected a "bedrock" argument made by three Ohio utilities that an NRC reactor licensee ought not remain subject to antitrust conditions when the cost of power generated by an NRC-licensed plant is higher than the cost of power from available alternative sources.

The court of appeals (Wald, Silberman & Rogers, JJ.) denied the petitions for review. On the bedrock issue the court found reasonable the NRC's view that antitrust conditions served purposes other than remediation of a cost-based competitive advantage (Slip op., at 12-16). The court pointed to various non-cost ways that nuclear plants might add to a utility's market dominance, including "entry barriers," "[e]xpanded transmission facilities," and "increased total capacity and greater reliability" (Id., at 15). While acknowledging that Congress may have made "mistaken assumptions about the costs of nuclear power" when it granted the NRC antitrust authority, the court found "no indication in text or committee reports" that low cost was the "touchstone" of the NRC's authority (Id., at 16).

Given its ruling on the bedrock issue, the court declined to reach the more general question whether the Commission even had authority to relax antitrust conditions (Slip op., at 17-18). The court ruled that the City of Cleveland, which had raised the authority question, lacked standing to do so because the City had prevailed on the bedrock question and therefore was not "aggrieved" and could not appeal (Id., at 17). The court found no reason to depart from "the general rule that a party may not appeal from a disposition in its favor" (Id. (omitting internal quotation)).

Petitioners have 90 days from October 27 to seek certiorari.

Connelly v. NRC, No. 95-3432 (Fed. Cir., filed April 13, 1995)

CONTACT: John F. Cordes
415-1600

This petition for review challenges a Merit Systems Protection Board decision that rejected a whistleblowing retaliation claim brought by an NRC employee. We are working with the Department of Justice in defending this case. Briefs were filed in the court of appeals last summer, and the court heard oral argument in early January, 1996. We are awaiting a decision.

* **General Atomics v. NRC**, Civ. no. 94-1734K (LSP) (S.D. Cal., decided Mar. 2, 1995) (appeal pending)

CONTACT: Daryl M. Shapiro
415-1631

General Atomics (GA) brought this lawsuit in federal district court in San Diego seeking to halt an ongoing NRC Licensing Board proceeding. In that proceeding the NRC staff seeks to establish the agency's right to hold GA financially accountable for the clean-up of a facility owned by a GA subsidiary, the Sequoyah Fuels Corporation. GA's suit claimed that the NRC has no authority to hold a corporate parent liable for its subsidiaries' actions. We filed a motion to dismiss arguing that the district court lacked jurisdiction. GA opposed that motion and asked the district court to enter a preliminary injunction halting further NRC proceedings.

In a thorough opinion, the district court (Keep, C.J.) agreed with our position in full. The court found that federal district court was not the proper forum for GA's suit because the Hobbs Act vests exclusive jurisdiction in the courts of appeals over licensing-related suits like GA's. The court also ruled, in the alternative, that GA was not free to go to court to challenge a Licensing Board proceeding in the middle of the proceeding. The court held GA to the usual doctrine that only final agency decisions are reviewable in court.

GA has taken an appeal to the Ninth Circuit, and the court of appeals heard oral argument in October, 1995. We are awaiting a decision.

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

CONTACT: Daryl M. Shapiro
415-1631

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 settlement talks between GA and the NRC staff.

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

CONTACT: Daryl M. Shapiro
415-1631

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.

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 will work with the United States Attorney's office in Maryland in defending this suit, and are providing that office a litigation report.

In re: Applied Health Physics, Inc., No. 95-20801 MBM (U.S. Bankruptcy Court, W.D. Pa., Objection filed Dec. 5, 1995)

CONTACT: L. Michael Rafky
415-1974

An NRC licensee, Applied Health Physics, is the subject of a bankruptcy proceeding pending in Pittsburgh, Pennsylvania. Because of concerns expressed by the NRC staff about the safe disposal of radioactive material possessed by Applied Health, the Department of Justice at our request filed a pleading before the bankruptcy court, and appeared (with NRC lawyers) at two hearings, to state the NRC's concerns. The NRC also has filed a "proof of claim" for unpaid license fees and FOIA fees.

We will continue to appear in the bankruptcy proceeding, as necessary, to protect the agency's interests. We are particularly concerned that Applied Health keep the NRC apprised of its activities and that its financial difficulties not lead to a violation of NRC financial assurance or transfer of license requirements.

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. Discovery proceedings are going forward, as is a parallel suit brought by plaintiffs against the furniture manufacturer in which the NRC is providing deposition testimony under our "Touhy" program.

We are cooperating with the United States Attorney's office in this case and have submitted a status report.

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

CONTACT: Roger K. Davis
415-1615

Petitioners, Dr. Zinovy V. Reyblatt 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.

The court of appeals as yet has issued no briefing or oral argument schedule. Petitioners' docketing statement indicates that they plan to focus on the public availability (or lack thereof) of leakage testing data from the NRC and its licensees.

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

CONTACT: Daryl M. Shapiro
415-1631

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 settlement talks with the NRC staff.

***Toledo Coalition for Safe Energy v. NRC**, No. 95-1161 (D.C. Cir., decided November 15, 1995)

CONTACT: Peter G. Crane
415-1622

This lawsuit attacked the Commission's decision in late 1994 to issue a rule approving the NUHOMS dry storage cask for spent nuclear fuel. Petitioners filed their suit after the statutory 60-day period for challenges to agency rules had expired. Petitioners argued that their late challenge was permissible because it came within 60 days of the signing of the certificate of compliance allowing VECTRA Technologies, Inc., to manufacture the NUHOMS cask.

In a 2-page order, the court of appeals (Buckley, Ginsburg & Henderson, JJ) rejected petitioners' certificate of compliance argument. The court agreed with our position that the signing of the already-issued certificate was a mere "ministerial act" that did not trigger a fresh period for judicial review.

Petitioners have 90 days from November 15 to seek certiorari in the Supreme Court.

***Toledo Coalition for Safe Energy v. NRC**, No. 95-1590 (D.C. Cir., filed Nov. 30, 1995)

CONTACT: Peter G. Crane
415-1622

The same petitioners whose suit against the Commission's NUHOMS dry storage cask rule recently was dismissed as untimely have filed a new suit alleging (among other things) that the NRC improperly has allowed the NUHOMS cask manufacturer, VECTRA Technologies, Inc., to alter safety-sensitive thickness requirements. These petitioners, this time joined by the Maryland Safe Energy Coalition, seek to prevent use of VECTRA-manufactured NUHOMS casks at the Davis-Besse nuclear power plant in Ohio and the Calvert Cliffs plant in Maryland.

We are studying whether petitioners have raised their concerns with the NRC and have exhausted agency remedies, a prerequisite to seeking judicial relief. The court of appeals has not yet established a briefing or oral argument schedule.

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)

CONTACT: Charles E. Mullins
415-1618

At our request the Department of Justice filed this lawsuit seeking enforcement of an Office of Investigations subpoena. The subpoena seeks records from two related companies, Five Star Products and Construction Products Research, that sold and tested grout and structural concrete products for use by NRC licensees. OI is looking into the circumstances surrounding the dismissal of a Construction Products employee who had brought safety allegations to the NRC's attention.

On April 3, the federal district court in Bridgeport, Connecticut (Alan H. Nevas, J.), "approved, adopted and ratified" a recommended ruling by a U.S. Magistrate enforcing the NRC subpoena. The district court also rejected summarily a motion for reconsideration filed by the target of the subpoena.

The Magistrate's recommended ruling found the NRC subpoena enforceable because it sought documents relevant to a lawful agency inquiry "into the safety implications of respondents' alleged retaliatory discharge" of an employee "for engaging in protected activity" (i.e., making safety allegations to the NRC). The Magistrate's ruling also rejected respondents' arguments that the NRC subpoena was overbroad and sought some documents that fall within the attorney-client privilege.

Respondents took an appeal to the United States Court of Appeals for the Second Circuit and unsuccessfully sought a stay pending appeal from the district court, the court of appeals and the Supreme Court. Respondents then complied with the subpoena in part, but continued to withhold documents they consider privileged. We have sought to hold respondents in contempt (thus far unsuccessfully).

In the meantime, the Second Circuit just recently (on January 2, 1996) decided the appeal in favor of the government and agreed with the Magistrate's ruling on all points in dispute. The court of appeals (Newman, C.J., McLaughlin & Alitmani, JJ.) rejected respondents' arguments that the subpoena sought information outside the NRC's jurisdiction and sought privileged information. Respondents now have 45 days to seek rehearing or rehearing en banc by the court or appeals and 90 days to seek certiorari in the Supreme Court.

We have collaborated closely with Department of Justice attorneys on this case.

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

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 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.

The NRC is cooperating with Department of Justice attorneys in ongoing discovery proceedings.

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

CONTACT: Karl L. Farrar
415-1556

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 are working with the United States Attorney's office in Boston in defending this case. A United States Magistrate recently recommended granting summary judgment to the government, and the district court currently is considering the matter.

INACTIVE CASES

Advanced Medical Systems, Inc. v. NRC, No. 88-2924 (D.D.C.)

CONTACT: L. Michael Rafky
415-1634

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. §§0 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.

Sawyer v. Commonwealth Edison Co., Civ. no. 93-C-5888 (N.D. Ill.)

CONTACT: John F. Cordes
415-1600

Plaintiff filed this suit in state court in Illinois. He claims that, while doing work at a Commonwealth Edison nuclear facility, he was exposed to ionizing radiation at level sufficient to cause chronic myelogenous leukemia. He seeks \$5,000,000 in damages. Commonwealth Edison removed the case to federal court.

A complicated dispute arose over whether the case properly was removed under the Price-Anderson Act. The United States (with input from the NRC and the Department of Energy) filed an amicus curiae brief supporting the case's removal and indicating that it was prepared to intervene as a party, if necessary, to defend the constitutionality of the Price-Anderson Act removal provisions (as the government did in two prior Price-Anderson Act cases, *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) and *In re TMI Cases Consolidated II*, 940 F.2d 832 (3d Cir. 1991)).

The court (Nordberg, J.) ruled that the lawsuit was properly removed to federal court (but transferred the case from the Northern to the Middle District of Illinois). The court held, *inter alia*, that the statutory terms "public liability" and "nuclear incident" (which trigger a right to removal) do not cover simply "an isolated nuclear event or occurrence," but also "routine on-going exposure to radiation."

We will continue to monitor this case and take further action if any challenge to the Price-Anderson Act's removal provisions develops.

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

CONTACT: Charles Mullins
415-1606

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.

For several years the court of appeals held both federal court suits in abeyance during the administrative proceedings. Recently, the court dismissed the suits subject to reinstatement (an alternate form of holding the case in abeyance). The administrative proceeding recently was settled, and may lead to dismissal of the court of appeals cases.

CLOSED CASES

Advanced Medical Systems, Inc. v. NRC, No. 94-3818 (6th Cir., decided July 26, 1995)

CONTACT: L. Michael Rafky
415-1974

Petitioner challenged a 1986 decision by the NRC staff to issue an immediately effective order suspending petitioner's activities (petitioner assembles, installs and services teletherapy equipment). The staff order rested on various license violations by petitioner. In 1987 the NRC staff lifted the suspension order after petitioner took corrective measures. Petitioner nonetheless sought a hearing on the ground that the order raised important recurring questions that otherwise would avoid review.

The Licensing Board granted summary disposition to the NRC staff, and the Commission affirmed the Board decision. Petitioner then filed suit in the Sixth Circuit and argued that material fact disputes bearing on immediate effectiveness required a trial-type hearing. The court disagreed. Its unpublished decision found that petitioner had raised fact disputes on "collateral" matters only. The court pointed to six NRC findings that "independently constitute a violation of [petitioner's] license."

Bauer v. United States & U.S. Nuclear Regulatory Commission, No. 95-3310 (3d Cir., dismissed Aug. 8, 1995)

CONTACT: Peter G. Crane
415-1622

Petitioner in this case challenged a Commission adjudicatory decision that refused to entertain an interlocutory appeal. See Dr. James E. Bauer (Order Prohibiting Involvement in NRC-licensed Activities), CLI-95-3, 41 NRC 245 (1995). Petitioner argued that the Commission should have resolved the question whether the Licensing Board properly refused to dismiss NRC Staff enforcement claims based on prior incidents that had never been adjudicated. The Commission had rejected petitioners' arguments as premature, on the ground that they could be raised after the final Licensing Board decision in the case.

We filed a motion to dismiss the lawsuit, and argued that the Commission decision was not final and that petitioner's lawsuit amounted to an impermissible effort to obtain piecemeal judicial review of an ongoing NRC proceeding. The court of appeals agreed with our arguments, and dismissed the lawsuit in a 1-page order.

***Citizens Awareness Network, Inc. v. NRC**, No. 94-1562 (1st Cir., decided July 20, 1995)

CONTACT: Charles E. Mullins
415-1618

Petitioner brought this lawsuit to challenge the Commission's rejection of a request for a hearing on the "component removal project" ("CRP") implemented by the Yankee Atomic Electric Company in decommissioning its nuclear power reactor at Rowe, Massachusetts. After protracted settlement talks proved unsuccessful, the parties filed briefs, and the court heard oral argument in January 1995. On July 20 the court (Torruella, C.J., Cyr & Aldrich, JJ.) issued a decision setting aside the NRC's rejection of petitioner's hearing request.

Using strong rhetoric, the court said that the NRC's "abrupt" shift in decommissioning policy in 1993 "appears utterly irrational" and is "inconsistent" with the Commission's statutory obligation to provide "notice and hearing" when modifying rules (Slip op. at 14-17). The court also found that the NRC staff's various "grants of permission" to Yankee Atomic, especially the NRC's "approval" of CRP expenditures from the decommissioning trust fund, required an environmental review under NEPA (Slip op., at 17-19). Finally, after brushing aside petitioner's claims under the Fifth Amendment's Takings and Due Process Clauses as too "bare" and "vague" (Slip op. at 19-21), the court held that the staff "approval" of the CRP, as well as the agency's shift in decommissioning policy, amounted to granting a license amendment and triggered a right to a hearing under § 189a of the Atomic Energy Act (Slip op., at 21-25).

After consultation with DOJ and after full Commission consideration, we decided against seeking further review of the court of appeals decision and reached a settlement agreement with petitioners on an attorney's fee claim that they filed. In response to the court decision and because the Yankee component removal project essentially had been completed, the Commission decided to offer an adjudicatory hearing on Yankee's decommissioning plan. That hearing process is currently going forward.

Datta v. Selin, No. 94-2272 (4th Cir., decided Aug. 15, 1995)

CONTACT : Marvin Itzkowitz
415-1566

This is a Title VII suit filed in May 1993 against the NRC claiming illegal age and race discrimination in a hiring decision. The NRC prevailed before the federal district court in Baltimore, but the plaintiff took an appeal to the Fourth Circuit. In August, 1995, the court of appeals affirmed the district court judgment in a 1-page per curiam decision. The U. S. Attorney's office in Baltimore took the lead on this case.

***Don't Waste Oregon Council v. NRC**, No. 95-70776 (9th Cir.) (petition for review filed Oct. 16, 1995; injunction denied Oct. 20, 1995; case dismissed Oct. 26, 1995)

CONTACT: Charles E. Mullins
415-1606

This fast-moving lawsuit took just ten days, from beginning to end. The petition for review challenged an October 12 decision by the Commission, issued in the wake of *Citizens Awareness Network v. NRC*, 59 F.3d 284 (1st Cir. 1995), to halt further major decommissioning at the Trojan reactor in Oregon, but to allow completion of Trojan's "early component removal project." Petitioners, an Oregon citizens group and individual citizens opposed to Trojan's chosen means of decommissioning, sought an emergency injunction against completion of the component removal project.

We opposed the injunction, and pointed out that there was no immediate safety hazard posed by Trojan's component removal work. We also suggested that the Commission's decision to permit completion of Trojan's project amounted to an exercise of NRC enforcement discretion not reviewable in the courts. The Ninth Circuit (Beezer, Thompson & B.G. Nelson, JJ.) issued two separate orders, one denying the injunction request and one dismissing the lawsuit altogether on the authority of *Heckler v. Chaney*, 470 U.S. 821 (1985) -- the landmark Supreme Court decision declaring exercises of agency enforcement discretion not subject to judicial review.

The Trojan component removal project ended on or about October 30. This presumably means that petitioners will pursue no further appeals or judicial remedies to stop that project. Petitioners, however, may continue to challenge other aspects of Trojan's decommissioning. Pursuant to the Commission's October 12 decision, any further major activity at Trojan must await final NRC approval of a decommissioning plan, after an opportunity for a hearing.

Don't Waste Oregon Council v. NRC, No. 95-70682 (9th Cir., decided Sept. 22, 1995)

CONTACT: Charles E. Mullins
415-1606

This was petitioners' original lawsuit seeking an injunction against the early component removal project at the Trojan reactor. The court initially issued a temporary stay against further activity at Trojan. Two days later, however, after hearing oral argument in an unusual conference call arrangement, the court (Browning, Goodwin & O'Scannlain, JJ.) vacated the stay and dismissed the lawsuit for lack of jurisdiction. The court cited a statute and a case that allowed judicial review only of "final" agency decisions. Petitioners had filed suit prior to filing a grievance with the NRC and without awaiting an NRC determination whether the Trojan project required a halt.

Petitioners sought no further review of this decision, and instead unsuccessfully pursued a new Ninth Circuit lawsuit, No. 95-70766, filed after the Commission's October 12 decision to permit completion of the Trojan component removal project.

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

CONTACT: John F. Cordes
415-1600

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 in 1992, plaintiff originally indicated to us that it may not pursue this suit. As plaintiff in fact has taken no action in the case, we are now closing it on our books.

Kerr-McGee Chemical Corp. v. NRC, No. 90-1534 (D.C. Cir., dismissed Aug. 29, 1995)

CONTACT: Grace Kim
415-1634

In this longstanding lawsuit petitioner challenged the NRC'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 owned a contaminated site in West Chicago, Illinois, which came under the state's jurisdiction under the terms of the state's amended agreement with the NRC. The principal issue on appeal was whether the NRC should have held a hearing prior to entering into the agreement state arrangement with Illinois.

In May 1994, after the case was fully briefed, petitioner and the state announced a settlement agreement. The court of appeals then canceled the already-scheduled oral argument and held the case in abeyance pending implementation of the settlement agreement. In August of 1995, upon a motion by Kerr-McGee to withdraw its petition for review, the court of appeals issued an order dismissing the case.

National Whistleblower Center v. NRC, No. 1:95CV00548 (D.D.C., dismissed, December 13, 1995)

Contact: Susan G. Fonner
415-1629

This Freedom of Information Act suit sought access to transcripts of depositions that were taken in connection with an ongoing Licensing Board adjudication (the Vogtle license amendment proceeding). The NRC withheld the transcripts under FOIA exemption 4 on the ground of their "intrinsic commercial value." The agency took this position after consulting with the Department of Justice and after receiving letters from court reporting companies asserting that a government release of the transcripts would undercut the ability of the companies to sell the transcripts at market prices.

We drafted summary judgment papers seeking dismissal of plaintiff's case. Recently, however, plaintiff decided to drop its lawsuit and filed a stipulation of dismissal, which the district court (Sporkin, J.) approved. We worked with the United States Attorney's office in the District of Columbia in defending this case.

Panicucci v. United States, Civ. No. 2:94CV0200JM (N.D. Ind., filed July 20, 1994)

CONTACT: Joseph Rutberg
415-1578

This lawsuit arises under the Federal Tort Claims Act and seeks damages for injuries suffered in an auto accident in Indiana involving an NRC employee. In late December the lawsuit was settled for \$10,000. We worked with the United State Attorney's office in defending the suit.

State of Nevada v. O'Leary, No. 93-17367 (9th Cir., decided Aug. 25, 1995)

CONTACT: Marjorie S. Nordlinger
415-1616

In this case the State of Nevada sought a district court order to depose more than two dozen scientists under Rule 27 of the Federal Rules of Civil Procedure. The scientists participated in studies of an alleged flooding problem at the proposed Yucca Mountain repository for spent nuclear fuel. Rule 27 authorizes district courts to issue orders perpetuating testimony for use in later court proceedings. Nevada's Rule 27 lawsuit named DOE, EPA and NRC as defendants, on the ground that all three agencies would be taking future actions on the proposed Yucca Mountain site.

The district court in Nevada dismissed the state's lawsuit. The court reasoned that any future judicial review actions involving Yucca Mountain were likely to be in the court of appeals, which hears legal arguments, not testimony by witnesses. Accordingly, because the testimony was not being sought for use in a future district court proceeding, the district court found Rule 27 inapplicable.

In August, 1995, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's judgment. The court essentially agreed with the district court's reasons, and added the point that Rule 27 was designed to elicit factual-type information in the control of a potential litigation adversary, not "the thoughts and thought processes of scientists."

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

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415-1974

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 never on that motion. Even so, the case now seems dead and we are closing it

on our books.

United States v. Oncology Services Corp., No. 94-7741 (3d Cir., decided July 21, 1995)

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415-1618

This is a longstanding subpoena enforcement suit that a district court in Pennsylvania threw out as moot in late 1994. The subpoena was issued during an Office of Investigations inquiry into the activities of a medical licensee. It sought documents bearing on the licensee's compliance with NRC regulations.

The district court initially took enforcement of the subpoena under advisement, and indicated that it would review the subpoenaed materials in camera. Ultimately, because OI later "closed" its investigation and issued its report, the court found enforcement of the subpoena moot, despite a pleading filed by the NRC indicating its continued interest in the subpoenaed materials. The district court indicated that it would regard any appeal by the government "frivolous." We nonetheless obtained authorization from the Solicitor General for an appeal.

The court of appeals (Mansmann, Greenberg & Sarokin, JJ.) in July, 1995, reversed the district court decision. The court of appeals held, as we had argued, that the "mere possibility of a new or continued investigation from the NRC's review of the disputed documents provided a sufficient basis to seek judicial enforcement of the NRC's subpoena" (Slip op., at 7). The court saw no significance in OI's administrative "closing" of its investigation in view of the agency's continued interest in the documents and its ongoing right "to assure that there were no violations of NRC regulations" (Slip op., at 8).

The court therefore remanded the case to the district court and advised that court to enforce the NRC subpoena unless it were found plainly "irrelevant to any lawful purpose of the NRC" (Slip op., at 9). The court also stated that the "NRC is best able to determine what is relevant," and expressed considerable skepticism about the district court's in camera review approach (Slip op., at 9-10).

The decision should prove a very useful precedent in future subpoena enforcement disputes. Unfortunately, on remand, it turned out that the district court had misplaced the in camera documents. The court ordered Oncology to research its records for duplicates and to file affidavits documenting its search, but this process turned up only one missing document.

1. **Cajun Electric Power Cooperative v. NRC**, Nos. 95-1399, 95-1400 & 95-1402 (D.C. Cir.); **Don't Waste Oregon Council v. NRC**, Nos. 95-70682 & 95-70776 (9th Cir.); **General Atomics v. NRC**, No. 95-70170 (9th Cir.); **Reytblatt v. NRC**, No. 95-1578 (D.C. Cir.); **Sequoyah Fuels Corp. v. NRC**, No. 95-9542 (10th Cir.); **Toledo Coalition for Safe Energy v. NRC**, No. 95-1590 (D.C. Cir.).

2. **Ibrahim v. Jackson**, Civil Action No. PJM-95-3737 (D. Md.).

3. **In re: Applied Health Physics, Inc.**, No. 95-20801 MBM (U.S. Bankruptcy Court, W.D. Pa.).

4. **Advanced Medical Systems, Inc. v. NRC**, No. 94-3818 (6th Cir.); **Bauer v. United States & NRC**, No. 95-3310 (3d Cir.); **Citizens Awareness Network v. NRC**, No. 94-1562 (1st Cir.); **Datta v. Selin**, No. 94-2272 (4th Cir.); **Don't Waste Oregon Council v. NRC**, Nos. 95-70682 & 95-70776 (9th Cir.); **Homestake Mining Co. v. NRC**, No. 92-2057 (D. Colo.); **Kerr-McGee Chemical Corp. v. NRC**, No. 90-1534 (D.C. Cir.); **National Whistleblower Center v. NRC**, No. 1:95CV00548 (D.D.C.); **Panicucci v. United States**, Civ. no. 2:94CV0200JM (N.D. Ind.); **State of Nevada v. O'Leary**, No. 93-17367 (9th Cir.); **Shannon v. NRC**, No. 89-0872-Y (D. Mass.); **United States v. Oncology Services Corp.**, No. 94-7741 (3d Cir.).