

February 26, 1996

For: The Commission
 From: John F. Cordes, Jr. /s/ Solicitor
 Subject: LITIGATION REPORT - 1996 - 1

General Atomics v. NRC, No. 95-55520 (9th Cir., decided Jan. 30, 1996)

In this case General Atomics (GA) is trying to persuade the federal courts to halt an ongoing NRC enforcement proceeding. A GA subsidiary, Sequoyah Fuels Corporation, owns a contaminated site in Gore, Oklahoma. The NRC enforcement staff has alleged that given prior GA commitments and given GA's relationship with Sequoyah Fuels, GA may be held jointly responsible for cleanup of the Gore site. GA is participating in a Commission adjudicatory proceeding on this question, but also filed suit in federal court on the ground that the Commission lacks all regulatory jurisdiction over a non-licensee like GA.

The federal district court dismissed GA's suit for lack of jurisdiction, and GA appealed to the United States Court of Appeals for the Ninth Circuit.

In January the court of appeals (Hug, Alarcon & Leavy, JJ.) issued a decision entirely favorable to the NRC. The court first held that NRC orders are reviewable only on petitions for review filed directly in the courts of appeals, not in lawsuits filed in federal district courts. The court next held that litigants in NRC administrative adjudications may not go to court in the middle of the administrative process to challenge the NRC's underlying enforcement jurisdiction. The court stated that "[j]udicial review of an agency's jurisdiction should rarely be exercised before a final decision from the agency" (Slip op. at 643). This ruling allows the NRC adjudicatory process to run its course without premature judicial oversight.

GA has 45 days to seek rehearing in the court of appeals and 90 days to seek certiorari in the Supreme Court.

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United States v. Construction Products Research, Inc., No. 95-6067 (2d Cir., decided Jan. 2, 1996)

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, the court of appeals (McLaughlin, Newman & Altamari) issued a thorough opinion upholding the NRC's position on all points. 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" (Slip op., at 8). 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" (Slip op. at 19).

The manufacturer has filed a petition for rehearing and suggestion of rehearing en banc.

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