

February 4, 1998

FOR: The Commission
 FROM: John F. Cordes, Jr. /s/
 Solicitor
 SUBJECT: ANNUAL REPORT ON COURT LITIGATION (CALENDAR YEAR 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 January 17, 1997 (SECY-97-016). This report reflects the status of NRC cases in court as of February 3, 1998. As I informed the Commission offices earlier this year, we now are reporting on court litigation annually rather than semi-annually.

During the reporting period (calendar year 1997), the Commission or its officials were sued once in the courts of appeals,⁽¹⁾ and three times in federal district courts.⁽²⁾ During this same one-year period ten cases were closed.⁽³⁾

We also handled twenty requests (so-called "Touhy" requests) for NRC testimony, depositions or other evidence for use in private litigation in 1997.

John F. Cordes, Jr.
 Solicitor

Attachment: Litigation Report

LITIGATION STATUS REPORT
 As of February 4, 1998

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 has been held in abeyance for several years, at petitioners' request, pending finalization of the NRC's regulatory guides. The parties are filing periodic status reports with the Court.

Cities of Benton v. NRC, No 95-1400 (D.C. Cir., filed Aug. 7, 1995)

CONTACT: Grace H. Kim
 415-3605

This lawsuit, originally consolidated with two other lawsuits under the caption of Cajun Electric Power Cooperative v. NRC, was filed by a group of municipal utilities in Arkansas. The Cajun suits (by this time known as Mabey, Cajun's bankruptcy trustee) ultimately were withdrawn as a result of a bankruptcy settlement. The remaining petition for review challenges 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.

The parties originally filed briefs in 1996, when Cajun and bankruptcy trustee Mabey still were pursuing relief. After they withdrew their challenge to the NRC merger-approval orders, the Arkansas utilities decided to continue with an independent challenge to the NRC orders. Last fall, the court of appeals ordered the parties to file fresh briefs. All parties did so, and the case now awaits decision. The principal issues are whether the NRC complied with a remand order of the court of appeals in a previous Cajun lawsuit and whether the NRC adequately considered the antitrust implications of the Entergy-Gulf States merger.

Citizens Awareness Network v. NRC, No. 97-4368 (2d Cir., filed Dec. 24, 1997)

CONTACT: Peter Crane
415-1622

Last fall the Citizens Awareness Network (CAN) and the Nuclear Information and Resource Service (NIRS) filed a petition with the Commission demanding an adjudicatory hearing and an environmental review in connection with the decommissioning of the Haddam Neck nuclear power reactor. CAN and NIRS asked for immediate rescission of the NRC's 1996 decommissioning rule on the ground that it illegally deprives citizens groups of a hearing opportunity on decommissioning and avoids the NRC's obligations under the National Environmental Policy Act. Petitioners expressly asked that their petition not be treated as a petition for rulemaking or as a petition for relief under 10 C.F.R. 2.206.

At the Commission's direction, the NRC's General Counsel, Karen Cyr, sent a letter to counsel for petitioners pointing out that the agency could not lawfully rescind a duly-promulgated rule without undertaking a fresh rulemaking proceeding. Ms. Cyr's letter directed petitioners' attention to 10 C.F.R. 2.802, which allows members of the public to file a petition for rulemaking seeking revocation of NRC rules. Ms. Cyr's letter informed petitioners that the NRC would hold their petition in abeyance pending their decision whether to pursue a petition for rulemaking.

Rather than seek further relief from the NRC, petitioners brought this lawsuit in the Second Circuit. We filed a motion to dismiss, arguing that the time had long since expired for a direct challenge to the NRC's 1996 decommissioning rule and that Ms. Cyr's letter holding the petition to rescind the rule in abeyance was in no sense final agency action that a court may review. Faced with our motion to dismiss, petitioners apparently intend now to withdraw their lawsuit and file a petition for rulemaking. We have not yet received their withdrawal motion or their petition for rulemaking.

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.

The United States Attorney's office has submitted a letter to the tribal court denying any tribal court jurisdiction over the United States government. As yet, however, the case has reached no final resolution.

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 has been held in abeyance for several years because of the pendency at the NRC of administrative enforcement proceedings. Now that those proceedings have been settled, it is likely that this lawsuit will be withdrawn.

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

CONTACT: Sandy Vora
415-1562

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 district court granted summary judgment to the NRC, and the case now has been appealed to the Fourth Circuit, where it was recently argued and is awaiting decision.

Jones v. Jackson, No. 97-C-3087 (N.D. Ill., filed April 29, 1997)

CONTACT: Ramon Suris-Fernandez
415-1555

This complaint was filed by an NRC employee for alleged violations of the Age Discrimination in Employment Act and the Rehabilitation Act in a promotion decision. We are working with the U.S. Attorney's office on this lawsuit. We expect to file a motion for summary judgment.

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 government has sought summary judgment, but the district court has not yet ruled on the motion.

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

Ma v. Jackson, No. 96-3850-PJM (D. Md., filed December 10, 1996)

CONTACT: Sandy Vora
415-1562

Two NRC employees bypassed for promotion filed this lawsuit seeking damages and injunctive relief for alleged age and race discrimination. We are working with the United States Attorney's office on the case and expect eventually to file a motion for summary judgment.

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. The government likely will seek summary judgment in the near future.

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. Now that the enforcement case has been settled, and all time for further review of it has expired, we anticipate that petitioners will withdraw this lawsuit.

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.

This case has moved slowly in the district court, largely because it was held in abeyance to await a Supreme Court decision in a double jeopardy case, *Hudson v. United States*. In December *Hudson* was decided, on terms largely favorable to the government. We now have moved to dismiss the lawsuit. TSI has renewed its motion for injunctive relief. The district court is holding an oral argument on February 5, 1998, and we anticipate a decision shortly thereafter.

CLOSED CASES

Ferm v. Atlas Corporation, No. CV-97-00589-HDM (D. Nev., filed May 14, 1997)

CONTACT: Charles E. Mullins
415-1618

Plaintiff brought this lawsuit to challenge defendant Atlas's allegedly illegal storage of radioactive waste on the shore of the Colorado River. The lawsuit

arises under RCRA and the Clean Water Act, among other statutes. The original suit named the NRC as a "real party in interest." We consulted with the U.S. Attorney's office on how to proceed. Subsequently, that office arranged for an exchange of correspondence making clear that the NRC was not considered a defendant in the suit. Accordingly, we are closing the case administratively.

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 case was removed to federal court, but plaintiff apparently has failed to prosecute it further. We therefore are closing the case administratively.

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 sought dismissal of the lawsuit as moot, but plaintiff sought attorney's fees. The court has never acted on the attorney's fee request, and plaintiff appears not to be pressing the matter. We therefore are closing the case administratively.

Mabey v. NRC, Nos. 95-1399 & 95-1402 (D.C. Cir., dismissed in May 1997)

CONTACT: Grace Kim
415-3605

These lawsuits, originally brought in the name of Cajun Electric Power Cooperative and later taken over by Ralph Mabey, Cajun's trustee in bankruptcy, challenged NRC orders allowing a merger between Gulf States Utilities and Entergy. Cajun, along with GSU, owned a share of the River Bend nuclear power reactor. Cajun ultimately went into bankruptcy, and as part of its bankruptcy settlement, it agreed to terminate all pending lawsuits challenging the GSU-Entergy merger. Hence, Mr. Mabey withdrew these lawsuits. A challenge to the NRC approval of the merger remains pending, however, under the caption of *Cities of Benton v. NRC*, No. 95-1400 (D.C. Cir.).

Morris v. NRC, No. 97-3067 (Fed. Cir., decided October 15, 1997)

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 widow argued that the NRC violated whistleblowing protection laws in terminating the former employee. The lawsuit challenged a decision by the Merit Systems Protection Board, which upheld the NRC personnel action in full. On October 15, 1997, The Federal Circuit (Newman, Plager & Schall, JJ.) affirmed the MSPB decision in a one-sentence order.

People of the State of Illinois v. NRC, No. 96-1125 (D.C. Cir., dismissed May 16, 1997)

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 planned to argue that after finding mootness, the Commission ought to have left the underlying decisions intact. Petitioners ultimately entered into a settlement agreement with an NRC licensee, Kerr-McGee, and dropped this lawsuit.

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

CONTACT: Grace H. Kim
415-3605

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 1997, 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 unsuccessfully sought rehearing..

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 sought no further review.

United States v. Construction Products Research, Misc. No. 394M-112AHN (D. Conn.)

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." Finally, the court rejected the manufacturer's attorney-client privilege claim as "not supported by the information provided." The Supreme Court subsequently refused to review the Second Circuit decision.

Even so, the cement manufacturer refused to comply fully with the NRC subpoena, and 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. We unsuccessfully sought review of this decision in the Second Circuit, which turned down our mandamus petition without issuing an opinion. The district court, after its in camera review, subsequently found that the NRC was entitled to no additional documents, because all remaining documents were indeed privileged. We sought no further review.

1 Citizens Awareness Network v. NRC, No. 97-4368 (2d Cir.).

2 Ma v. Jackson, No. PJM-96-3850 (D. Md.); Jones v. Jackson, No. 97-C-3087 (N.D. Ill.); Ferm v. Atlas Corp., No. CV-8-97-00589-HDM (S.D. Nev.).

3 Mabey v. NRC, Nos. 95-1399 & 95-1402 (D.C. Cir.); Morris v. NRC, No. 97-3067 (Fed. Cir.); People of the State of Illinois v. NRC, No. 96-1125 (D.C. Cir.); Reytblatt v. NRC, No. 95-1578 (D.C. Cir.); Toledo Coalition for Safe Energy v. NRC, No. 95-1590 (D.C. Cir.); Ferm v. Atlas Corp., No. CV-8-

97-00589-HDM (S.D. Nev.); Fuhrmeister v. NRC, No. CV-000048196 (State District Court, Montgomery County, Pa.) (removed to federal district court); Holden v. NRC, No. 93-1628 (D.D.C.); United States v. Construction Products Research, Misc. No. 394M-112AHN (D. Conn.).