

POLICY ISSUE (Information)

January 29, 2010

SECY-10-0012

FOR: The Commissioners

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

SUBJECT: ANNUAL REPORT ON COURT LITIGATION (CALENDAR YEAR 2009)

PURPOSE:

To Inform the Commission of the Status of Litigation in the Courts.

DISCUSSION:

Enclosed is a report updating events in the Nuclear Regulatory Commission (NRC) court litigation since my last cumulative annual report dated February 4, 2008 (SECY-08-0020). This report reflects the status of NRC cases in court as of January 29, 2010.

During the reporting period (Calendar Year 2008), the Commission was sued seven (7) times in the courts of appeals¹ and once in federal district court.² During this same one-year period six (6) cases were closed.³ The eight (8) new court cases in 2008 are slightly fewer than what we

¹ *Blue Ridge Environmental Defense League v. NRC*, No. 09-1112 (D.C. Cir.); *Burton v. NRC*, No. 09-0005 (2d Cir.); *Burton v. NRC*, No. 09-1901 (2d Cir.); *Center for a Sustainable Coast v. NRC*, No. 09-1263 (D.C. Cir.); *Nevada v. NRC*, No. 09-1133 (D.C. Cir.); *New Jersey Environmental Federation v. NRC*, No. 09- 2567 (3rd Cir.); *Shieldalloy v. NRC*, No. 09-1268 (D.C. Cir.)

² *Brodsky v. NRC*, No.09-Cv-10594 (SCR) (S.D.N.Y.)

³ *Crane v. NRC*, No. 08-72973 (9th Cir.); *Dey v. NRC*, No. 08-3299 (Fed. Cir.); *Dey v. Klein*, No. 08-cv-02400 (D. Md.); *Epstein v. United States*, No. 08-3963 (3d Cir.); *New Jersey Dept. of Environmental Protection v. NRC*, No. 07-2271 (3d Cir.); *Public Citizen v. NRC*, Nos. 07-71868 & 07-72555 (9th Cir.)

have come to expect over the past decade. There were 13 new cases in 2008, 11 in 2007, 8 in 2006, 11 in 2005, 13 in 2004, 14 in 2003, 8 in 2002, 5 in 2001, and 9 in 2000, for an average of 10 new cases per year.

During this reporting period (Calendar Year 2009), we also handled seven (7) requests (so-called "*Touhy*" requests) for NRC testimony, depositions or other evidence for use in private litigation, as well a number of discovery demands in lawsuits against the United States not involving the NRC. These discovery demands came chiefly in cases brought in the U.S. Court of Federal Claims seeking money damages against the government for not bringing on-line a spent fuel disposal facility by 1998, as directed in the Nuclear Waste Policy Act, and in clean-up cases under the Comprehensive Environmental Response, Compensation, and Liability Act.

Enclosure:

Litigation Status Report

LITIGATION STATUS REPORT
(As of Jan. 29, 2010)

ACTIVE CASES¹

***Blue Ridge Environmental Defense League v. NRC*, No. 09-1112 (D.C. Cir.)**

This lawsuit challenges NRC's decision to reinstate previously-withdrawn construction permits at TVA's Bellefonte site. Because a related adjudication is pending before NRC, the court of appeals, on our motion, has held the lawsuit in abeyance. We are filing periodic status reports with the court of appeals. The Commission recently decided in the affirmative the bedrock legal question whether NRC has authority to reinstate withdrawn permits, but several other contentions by petitioners remain pending before the Licensing Board.

CONTACT: Grace H. Kim, OGC
301-415-3605

***Brodsky v. NRC*, No. 08-1454 ag (2d Cir.)**

Petitioners in this case, a New York assemblyman and citizen groups, challenged exemptions from fire protection requirements that the NRC Staff granted to Indian Point. Petitioners argued that the exemption should have triggered an NRC hearing and was in any event unreasonable and unlawful. The court of appeals (*Walker & Wallace, JJ*), ruled that it lacked jurisdiction to review exemptions, because they are not among the items specifically listed for hearing under the Atomic Energy Act, Section 189. We sought rehearing but the petition was denied. The time period to seek certiorari in the Supreme Court has not yet expired.

In the meantime, petitioners have re-filed their challenge to the Indian Point exemptions, this time seeking relief in federal district court (described below).

CONTACT: Robert M. Rader, OGC
301-415-1955

***Brodsky v. NRC*, No. 09-Cv-10594 (SC\$R) (S.D.N.Y.)**

This federal district court lawsuit challenges exemptions from fire protection requirements that the NRC Staff granted to Indian Point. Plaintiffs had originally challenged the exemptions on a petition for review filed in the court of appeals (Second Circuit), but that court held that it lacked jurisdiction. The complaint raises various procedural and NEPA-based challenges to the exemptions. We will work with the U.S. Attorney's office in defending the case.

CONTACT: Robert M. Rader, OGC
301-415-1955

¹ For statistical purposes, we count as "active" any case pending before a court, or still subject to further judicial review, as of January 1, 2010. The narratives accompanying each listed case include post-January 1 developments, however.

Burton v. NRC, No. 09- 1901 (2d Cir.)

This petition for review challenges NRC's rejection of various contentions on Millstone's power uprate. Petitioner filed a brief in October, but not in proper format and lacking a proper appendix. After the court gave petitioner an opportunity to fix the defects, and petitioner did not do so, the court dismissed the case. Petitioner has filed a motion to reinstate her lawsuit. That motion remains pending.

CONTACT: Robert M. Rader, OGC
301-415-1955

Burton v. NRC, No. 09-0005 (2d Cir.)

Petitioner in this case challenged a Commission decision in the Indian Point license renewal proceeding. The challenged decision rejected petitioner's contention and waiver petition attacking NRC's rules specifying permissible doses from operating reactors. After full briefing, the court set the case for oral argument, but petitioner did not show up on the prescribed date. Shortly thereafter, the court issued a short judgment-order denying the petition for review and upholding NRC's waiver and contention-admissibility decisions. The time for Supreme Court review has not yet expired.

CONTACT: James E. Adler, OGC
301-415-1656

Center for a Sustainable Coast v. NRC, No. 09-1263 (D.C. Cir.)

This petition for review challenges NRC's issuance of an early site permit (ESP) at the Vogtle site, and several of the adjudicatory decisions underlying the ESP. Because the adjudicatory process at NRC was still ongoing at NRC at the time petitioners filed suit (an administrative appeal, now decided, was still pending), we filed a motion to dismiss the lawsuit as premature. That motion remains pending.

CONTACT: Sean D. Croston, OGC
301-415-2585

Eastern Navajo Dine Against Uranium Mining v. NRC, No. 07-9505 (10th Cir.)

Petitioners in this case challenge a series of Commission adjudicatory rulings culminating in the approval of an *in situ* uranium mining license for Hydro Resources, Inc. Hydro Resources sought the license to mine uranium in Crownpoint and Church Rock, New Mexico. Petitioners argue that granting the license was unreasonable and unlawful under the AEA and NEPA. Petitioners focus on dose calculation and financial assurance issues.

All briefs were filed in 2007, and the case was orally argued in May, 2008. The case is awaiting decision. A related EPA case involving the same site was recently reheard *en banc*, which perhaps is the reason why our case has remained undecided for so long.

CONTACT: Charles E. Mullins, OGC
301-415-1618

***Kandel v. United States*, No. 1:06-cv- 872 (Court of Federal Claims)**

This is a class action suit brought against the United States by federal retirees seeking additional retirement benefits on account of alleged mishandling of annual leave at the time of retirement. The complaint, originally captioned *Solow v. United States*, but now renamed, includes the NRC and other federal agencies. The court denied the government's motion to dismiss on statute of limitations grounds, and the parties are currently engaged in settlement negotiations.

CONTACT: Mark J. Maxin, OGC
301-415-1554

***McCracken v. Brookhaven Science Associates, LLC*, No. 08-cv-2642 (E.D.N.Y.) (appeal pending)**

Plaintiff seeks millions of dollars in damages from the government, including the NRC, and from private and national laboratories for alleged radiation injuries. The United States Attorney's office in Brooklyn (NY) is representing the government and has sought dismissal on jurisdictional grounds. Plaintiff filed, but then voluntarily dismissed, a similar suit in Pennsylvania (*McCracken v. Brookhaven Science Associates, LLC*, No. 08-cv-2934 (E.D. Pa.)). The district court (Gleeson, J) dismissed the suit as untimely and frivolous. Plaintiff has taken an appeal to the Second Circuit.

CONTACT: Maxwell C. Smith, OGC
301-415-1246

***Miles v. Jaczko*, No. 8:09-cv-00503 (D. Md.)**

This is an employment discrimination suit where we are collaborating with the United States Attorney's office on the defense. It was originally filed in the District of Columbia, but this year it was transferred to the District of Maryland. The government has filed a motion to dismiss and/or for summary judgment.

CONTACT: Sara McAndrew, OGC
301-415-1562

Nevada v. NRC, No. 09- 1133 (D.C. Cir.)

This petition for review challenges NRC's "Yucca Mountain Rule," 10 CFR Part 63. The case is set for briefing on a slow schedule, with our brief not due until August.

CONTACT: Steven F. Crockett, OGC
301-415-2871

New Jersey Environmental Federation v. NRC, No. 09- 2567 (3rd Cir.)

This petition for review challenges NRC's decision, after an extensive adjudication, to grant Oyster Creek's license renewal application. Petitioners' opening brief maintains that NRC made many procedural errors during the adjudication and that NRC unlawfully referred some issues to later resolution by the NRC Staff. Our brief is due in late February.

CONTACT: Robert M. Rader, OGC
301-415-1955

New York v. NRC, Nos. 08-3903-ag, 08-4833-ag, 08-5571-ag (consolidated) (2d Cir.)

These consolidated lawsuits challenged an NRC denial of rulemaking petitions seeking changes in NRC's generic environmental findings for license renewal. The three states that brought suit – New York, Connecticut and Massachusetts – believed that NRC had not taken sufficient account under NEPA of "new and significant" information on the risk of fires in spent fuel pools, including terrorist-caused fires.

In a published, but *per curiam* opinion, the court of appeals (Jacobs, Kearse & Gardephe, JJ) ruled for NRC. The court deferred to NRC's technical judgment that petitioners' "new information" did not show an increase in fire risk in spent fuel pools, even when the threat of terrorism is taken into account. Thus, the court did not step into the conflict between the Third and Ninth Circuits on the question whether NEPA requires studying the consequences of potential terrorist attacks.

Petitioners have not yet indicated whether they plan to seek further review before the *en banc* court of appeals or before the Supreme Court.

CONTACT: James E. Adler, OGC
301-415-1656

Ohngo Gaudadeh Devia v. NRC, Nos. 05-1419, 05-1420, 06-1087 (D.C. Cir.)

These consolidated lawsuits challenge a series of Commission adjudicatory decisions resulting in an authorization to the NRC staff to license the proposed Private Fuel Storage ISFSI in Utah. OGD's brief argued that the NRC did not properly handle an "environmental justice" claim and

that the NRC license should be vacated as moot (because other federal agencies have taken action making PFS's use of the NRC license problematic). Utah's brief argued that the NRC did not properly consider the probability and consequences of an air crash into the PFS facility, that the NRC did not take adequate account of the Department of Energy's changing plans for shipping spent fuel to the proposed Yucca Mountain facility, and that the NRC wrongly failed to examine, under NEPA, the consequences of a terrorist attack.

We filed an answering brief arguing that NRC had reasonably resolved all safety and environmental issues. But no merits decision will issue for quite some time, if ever. The court of appeals (*Garland*, Tatel, Rogers, JJ) removed the case from the oral argument calendar and issued a decision finding the NRC case "prudentially" unripe. The court reasoned that the NRC license was currently unusable due to Department of the Interior rulings prohibiting use of the proposed site. The court thus held the lawsuits against NRC in abeyance, pending PFS's effort to overturn the Department of the Interior's adverse rulings. The court directed the parties to file periodic status reports.

Several status reports have been filed. They indicate that PFS has challenged the Interior Department's rulings in a federal district court lawsuit (D. Utah), but that the lawsuit has not yet reached final decision.

CONTACT: Grace H. Kim, OGC
301-415-1607

***Salsman v. NRC*, No. 08-74043 (9th Cir.)**

Petitioner, an individual citizen with great interest in the hazards of uranium, filed an unsuccessful rulemaking petition with NRC arguing that uranium's hazards (non-radiological) are worse than NRC has thought and warrants changes in 10 C.F.R. Part 20. He has challenged the rulemaking denial in court.

The case is awaiting oral argument and decision. Our brief maintains that Mr. Salsman is suffering no personal harm from the current Part 20, and therefore lacks standing to sue. We also argue that NRC's denial of the rulemaking petition was reasonable on the merits.

CONTACT: Maxwell C. Smith, OGC
301-415-1246

***San Luis Obispo Mothers for Peace v. NRC*, 08-75058 (9th Cir.)**

Petitioner in this lawsuit, a citizens group, challenges the Commission's decision, after a hearing, to uphold the NRC Staff's environmental assessment of the consequences of a terrorist attack on the proposed ISFSI at Diablo Canyon. Petitioner maintains that, to adequately address the terrorism issue, the Commission ought to have provided access to non-public security information and conducted a closed-door hearing. The Commission hearing in this

case was pursuant to a court directive in earlier litigation, *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert denied*, 127 S.Ct. 1124 (2007),

All briefs have been filed, and the case is awaiting oral argument.

CONTACT: Charles E. Mullins, OGC
301-415-1618

***Shieldalloy v. NRC*, No. 09- 1268 (D.C. Cir.)**

This petition for review challenges NRC's decision to make New Jersey an agreement state, insofar as the agreement covers a contaminated site that petitioner owns. Petitioner claims that New Jersey's regulatory program, as it relates to petitioner's site, is incompatible with NRC's, rendering NRC's entry into an agreement with New Jersey unlawful. Petitioner originally sought a stay from the court of appeals, but recently withdrew its stay motion. The case is awaiting a briefing schedule.

CONTACT: Grace H. Kim, OGC
301-415-3605

***United States v. Science Applications International Corp.*, No. 04-CV-1543 (RWR) (D.D.C.), appeal pending, No. 09-5385 (D.C. Cir.)**

The government sued SAIC for damages and other relief arising out of SAIC's contract to provide unbiased advice to the NRC. The NRC hired SAIC to support the agency's rulemaking effort to develop standards applicable to the release of radioactive materials into the environment. After a trial where the United States was represented by Department of Justice and NRC lawyers, the government won a \$6.5 million judgment.

SAIC filed an unsuccessful post-trial motion seeking to set the judgment aside. SAIC has now appealed to the D.C. Circuit. The government's brief is due in March..

CONTACT: Robin A. Baum, OGC
301-415-2202

***Westinghouse Electric Co. v. United States*, No. 4:03-CV-00861 (DDN) (E. D. Mo.)**

This is a lawsuit for government contribution under CERCLA for cleanup of the Hematite site in Missouri. We are working with the Justice Department in defending the suit. The United States successfully intervened in a companion suit, *Missouri v. Westinghouse Electric Co.*, involving the State of Missouri's effort to halt the State of Missouri's effort to "settle" with Westinghouse in a way that would compromise the federal government's interests. The government has filed a counterclaim and cross-claims against various parties seeking contribution should the government be held financially liable under CERCLA.

CONTACT: Charles E. Mullins, OGC
301-415-1618

CLOSED CASES

***Crane v. NRC*, No. 08-72973 (9th Cir.)**

Petitioner in this case, formerly a lawyer at NRC, challenged the agency's denial of his rulemaking petition. The rulemaking petition had asked NRC to roll back a 1997 rule allowing doctors to release radiation-treated patients from the hospital if the potential dose to other persons did not exceed 500 millirem. Petitioner sought restoration of NRC's former rule, which he views as more protective. After reviewing the petition and the comments it triggered, NRC refused to alter the 1997 rule.

After oral argument, the court of appeals (O'Scannlain, Kleinfeld & Berzon) issued a short, unpublished opinion dismissing the petition for review for lack of standing. The court ruled that, although petitioner had been treated with radiopharmaceuticals in the past, he was not currently affected by NRC's patient-release rules.

CONTACT: Robert M. Rader, OGC
301-415-1955

***Dey v. NRC*, No. 08-3299 (Fed. Cir.)**

This petition for review challenged a Merit Systems Protection Board (MSPB) decision sustaining an NRC decision to remove an employee from his position. The court of appeals (Newman, Schall & Gajarsa, JJ) upheld the MSPB decision as supported by substantial evidence. The court decision is not reported.

CONTACT: John S. Farrington, OGC
301-415-2196

***Dey v. Klein*, No. 08-cv-02400 (D. Md.)**

This is an employment discrimination suit. NRC lawyers collaborated with the United States Attorney's office on the case. The government filed a motion to dismiss, and thereafter plaintiff indicated that he no longer wished to pursue the case. The district court (Messitte, J) entered an order of dismissal.

CONTACT: John Farrington, OGC
301-415-2196

***Epstein v. United States*, No. 08-3963 (3d Cir.)**

In this case, petitioner seeks to overturn an NRC denial of a rulemaking petition. The rulemaking petition asked NRC to expand its license renewal reviews to include emergency

planning. We filed the record, but petitioner failed to file a brief on its due date. The court of appeals dismissed the suit for non-prosecution.

CONTACT: Grace H. Kim, OGC
301-415-1607

New Jersey Dept. of Environmental Protection v. NRC, No. 07-2271 (3d Cir.)

This lawsuit attacked an NRC adjudicatory decision in the *Oyster Creek* license renewal proceeding. The Licensing Board and the Commission rejected New Jersey's sole contention – that NEPA required a study of the consequences of a terrorist attack. New Jersey, relying on the Ninth Circuit's decision in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert denied*, 127 S.Ct. 1124 (2007), asked the court of appeals to reinstate its "NEPA-terrorism" contention.

The court (*Roth*, McKee & Smith, JJ) ruled for NRC. The court held that that NEPA-proximate cause principles preclude such terrorism claims. The court expressly disagreed with the Ninth Circuit's contrary view. The court also ruled in the alternative that, even if NEPA did require a terrorism analysis, NRC's Generic Environmental Impact Statement (GEIS) for license renewal sufficed. The court pointed out that the GEIS adequately analyzes the consequences of a terrorist attack adequately by comparing them to accident consequences.

New Jersey sought no further review.

CONTACT: Charles E. Mullins, OGC
301-415-1618

Public Citizen v. NRC, Nos. 07-71868 & 07-72555 (9th Cir.)

This lawsuit, filed by citizens groups, challenged NRC's new Design Basis Threat Rule. Under 28 U.S.C. § 2112, a similar suit, filed by the State of New York in the Second Circuit was transferred to the Ninth Circuit and consolidated with this one. Petitioners argued, in essence, that NRC's new rule doesn't take adequate account of the threat of air attack and gives too much weight to licensees' cost-based defense capabilities.

The court of appeals (*Hall*, Nelson & Thomas, JJ) ruled for NRC. The court held that NRC's Design Basis Threat Rule did not conflict with NRC's longstanding approach to adequate protection and did not improperly take licensees' costs into account. The court ruled further that NRC reasonably declined to include defense against air attacks among licensees' responsibilities under the Design Basis Threat Rule. The court also ruled that the NRC did not act unlawfully in withholding safeguards information from the notice-and-comment rulemaking. Finally, the court held that excluding air attacks from the Design Basis Threat Rule did not trigger a duty to perform a NEPA analysis.

Judge Thomas concurred in part and dissented in part. He dissented on the question whether NRC should have included air attacks in the Design Basis Threat Rule. He would have remanded that question to NRC for a better explanation.

Petitioners sought no further review.

CONTACT: Steven F. Crockett, OGC
301-415-2871