

ADJUDICATORY ISSUE (Information)

January 31, 2014

SECY-14-0013

FOR: The Commissioners

FROM: Andrew P. Averbach /RA/
Solicitor

SUBJECT: ANNUAL REPORT ON COURT LITIGATION (CALENDAR YEAR 2013)

PURPOSE:

To inform the Commission of the status of litigation in the courts.

DISCUSSION:

Enclosed is a report updating court litigation since the last annual report dated January 28, 2013 (SECY-13-0013). This report reflects the status of NRC cases in court as of January 31, 2014.

During the reporting period (Calendar Year 2013), the Commission or NRC officials were sued three times in the courts of appeals¹ and twice in federal district court.² During this same one-year period, eleven cases were closed.³ The number of new filings in 2012 is smaller than the number of new filings over the past decade. There were 5 new lawsuits in 2012; 11 in 2011, 9 in 2010, 8 in 2009, 13 in 2008, 11 in 2007, 8 in 2006, 11 in 2005, 13 in 2004, and 14 in 2003, for an average of 10.3 new lawsuits per year over the prior ten years.

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¹ *Natural Resources Defense Council v. NRC*, No. 13-1311 (D.C. Cir.); *Nye County v. NRC*, No. 13-1260 (D.C. Cir.); *Shieldalloy Metallurgical Corp. v. NRC*, No. 13-1259 (D.C. Cir.).

² *Criscione v NRC*, No. 13-cv-00942-RMC (D.D.C.); *Public Employees for Environmental Responsibility v. NRC*, No. 13-cv-01248-JDB (D.D.C.).

³ *In re Aiken County*, No. 11-1271 (D.C. Cir.); *Anderson v. Jaczko*, No. 11-cv-1370 (D. Md.); *Baig v. NRC*, No. 10-cv-842 (D.N.J.); *Beyond Nuclear v. NRC*, No. 12-1561 (1st Cir.); *Blue Ridge Environmental Defense League v. NRC*, No. 12-1106 (D.C. Cir.); *Criscione v NRC*, No. 13-cv-00942-RMC (D.D.C.); *Massachusetts v. NRC*, Nos. 12-1404, 12-1772 (1st Cir.); *Public Employees for Environmental Responsibility v. NRC*, No. 13-cv-01248-JDB (D.D.C.); *Pueblo of Laguna v. United States*, No. 02-24 (Fed. Cl.); *Shieldalloy Metallurgical Corp. v. NRC*, No. 11-1449 (D.C. Cir.); *Texas Instruments v. United States*, No. 09-701C (Fed. Cl.).

During this reporting period we also handled six so-called "Touhy" requests for NRC testimony, depositions, or other evidence for use in private litigation. See 10 C.F.R. § 9.200 *et seq.* In addition, we continued to handle a steady stream of discovery demands in lawsuits for or against the United States but not involving the NRC as a party. The chief burden in this area again this year came in cases brought in the U.S. Court of Federal Claims seeking money damages against the government for not meeting the statutory deadline (1998) for a high-level waste disposal facility.

Enclosure:

[Litigation Status Report](#)

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OCAA
OCA
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REGIONS

LITIGATION STATUS REPORT
(As of Jan. 31, 2014)

ACTIVE CASES¹

ABB Inc. v. United States, No. 3:13-cv-01265-CSH (D. Conn.)

ABB and Combustion Engineering (CE) are wholly owned subsidiaries of ABB Holdings. CE owns a site at Windsor, Connecticut where it conducted contract work on naval reactors for the Atomic Energy Commission from 1955 through 1961. CE later conducted licensed operations for commercial entities under both the AEC and the NRC at other areas on the site. The United States subsequently designated that portion of the Windsor location that had been used for Naval Reactor contract work for cleanup under the Formerly Utilized Sites Remedial Action Program (FUSRAP). However, the Corps of Engineers (which performs FUSRAP cleanup) indicated that it would take several years to complete this activity.

ABB/CE decommissioned the portion of the site used for NRC-licensed work and then asked the Corps of Engineers to allow it to decommission the FUSRAP portion under NRC auspices and to sue the government for contribution. The NRC and the Corps agreed to this proposal. ABB/CE has now completed that work and filed this lawsuit under CERCLA, seeking contribution from the United States, which is represented by the Department of Justice. ABB/CE claims that the United States is liable in part because of the AEC ownership and control of the Naval Reactor contract process.

Discovery has been suspended while the parties seek resolution of the case. The parties have agreed to enter mediation.

CONTACT: Charles E. Mullins, OGC
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In re Aiken County, No. 11-1271 (D.C. Cir.)

Aiken County (South Carolina), together with the states of South Carolina and Washington and a number of other parties, filed this lawsuit in the fall of 2011 seeking mandamus relief against NRC for allegedly unlawful inaction and delay in the Yucca Mountain licensing proceeding. NRC's brief argued that Congress's cut-off of appropriated funds for the Yucca proceeding justified the agency holding the licensing proceeding in abeyance. Subsequent to oral argument, the Department of Justice (at the court's direction) filed an amicus brief on behalf of the United States and NRC and petitioners filed supplemental briefs responding to the brief of the United States. The court then entered an order holding the case in abeyance pending potential Congressional direction concerning the disposition of funds previously appropriated from the Nuclear Waste Fund for Yucca Mountain-related activities. The parties then filed subsequent status reports responding to various Congressional actions.

On August 13, 2013 the court issued an order granting the writ of mandamus and directing NRC to continue the licensing process, *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013), and the Commission has implemented this direction. The State of Nevada sought rehearing of the

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, 2014. However, narratives accompanying each listed case include any post-January 1 developments.

decision, but its petition was denied on October 28, 2013, and the decision became final as of January 27, 2014.

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Brodsky v. NRC, No. 09-cv-10594 (S.D.N.Y.)

This lawsuit challenges fire-protection exemptions that NRC granted to Indian Point. The case was originally brought in the Court of Appeals for the Second Circuit, but that court found that it lacked jurisdiction. Petitioners (now plaintiffs) then re-filed their case in federal district court, which held that (1) plaintiffs were not entitled to an adjudicatory hearing on the exemptions at issue; and (2) the exemptions were reasonably rooted in sound record evidence. Plaintiffs appealed and, on January 7, 2013, the Court of Appeals for the Second Circuit issued a decision that upheld the district court's conclusion concerning the validity of the exemption. However, the court remanded the case back to the district court, with instruction that it remand the case back to the Commission, so that the Commission could either articulate why public participation was not required prior to the issuance of an environmental assessment and a finding of no significant environmental impact, or for other appropriate action. In response to the court's order, the Commission circulated a draft environmental assessment and finding of no significant impact related to the exemption. On August 27, 2013, the Commission published in the Federal Register a final EA and FONSI, and issued its determination that the fire protection exemption should remain in place. Mr. Brodsky has indicated that he plans to pursue his challenge before the district court, which has continued to exercise jurisdiction over the case, but no additional action has yet been taken.

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

Budzynski v. Macfarlane, No. 12-cv-3174 (D. Md.)

Plaintiff, an NRC employee, claims that he was a victim of age discrimination when he was not selected for a position advertised in an NRC vacancy announcement. The NRC assisted the United States Attorney's office in filing a motion for summary judgment. The motion for summary judgment is currently pending before the court; oral argument is scheduled for March 31, 2014.

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El Paso Natural Gas Company, v. United States, No. 07-cv-905 (D.D.C.), *appeal pending*, Nos. 12-5156, 12-5157 (D.C. Cir.)

El Paso Natural Gas filed this lawsuit to compel the United States to clean up two sites associated with the Tuba City Mill: the Tuba City Dump, and the Highway 160 site. NRC is a named defendant in the lawsuit, along with other federal agencies and the United States. All defendants are represented by the Department of Justice.

The suit asserts a number of theories of liability including the APA, CERCLA, RCRA, and UMTRCA . The Navajo Nation has intervened as a plaintiff. The district court dismissed the APA and UMTRCA claims against the Department of Energy, and issued a Rule 54 partial judgment allowing El Paso to appeal on those issues to the D.C. Circuit. That court affirmed the district court's dismissal order. *El Paso Natural Gas Co. v. United States*, 632 F.3d 1271 (D.C. Cir. 2011). The United States then moved for dismissal of the remaining claims and the district court granted that motion as well. Both plaintiffs appealed and the court of appeals held oral argument on the consolidated case in September 2013. We await a decision from the court.

CONTACT: Charles E. Mullins, OGC
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Kandel v. United States, No. 06-cv- 872 (Fed. Cl.)

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, all of whom are represented by the Department of Justice. The court denied the government's motion to dismiss on statute of limitations grounds, and the parties currently have cross-motions for partial summary judgment on the merits of the case pending before the court.

CONTACT: Mark J. Maxin, OGC
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Natural Resources Defense Council v. NRC, No. 13-1311 (D.C. Cir.)

On June 22, 2011, Exelon, the owner and operator of the Limerick Generating Station, applied for renewal of its operating licenses for an additional 20 years. On November 22, 2011, NRDC petitioned to intervene in the license renewal proceeding, proposing four contentions relating to NRC's compliance with the National Environmental Policy Act, one of which (relating to severe accident mitigation alternatives) was admitted in part by the Atomic Safety and Licensing Board. On July 9, 2012, NRDC moved the Board to admit a new contention alleging that Exelon's Environmental Report failed to address the environmental impacts of continued storage of reactor spent fuel. Although the Commission ultimately determined that denial of NRDC's NEPA contention was warranted (on the ground that the contention was covered by existing regulations and NRDC's waiver petition did not satisfy the applicable waiver criteria), the Commission directed the Staff to consider whether any of NRDC's SAMA claims were new and significant information and document its review in its Environmental Impact Statement. The Commission also directed the Board to hold the continued storage contention in abeyance pending the result of the waste confidence rulemaking. NRDC's petition seeks

review of the Commission's determination that NRDC must seek waiver of the applicable regulation to litigate its SAMA claims and that the waiver standard was not satisfied.

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Navajo Nation v. United States, No. 06-cv-945 (Fed. Cl.)

The Navajo Nation alleges that the United States has mishandled the royalties Nation from the exploitation of oil, gas, coal, uranium, and other natural resources that accrue to the benefit of the Nation and its members. The case was filed in 2006 and the Department of Justice, representing the Government, requested NRC to assist in discovery. The case was subsequently referred to alternative dispute resolution (ADR) and discovery was stayed.

The case has now been removed from ADR and discovery has been re-initiated. The deadline for the completion of fact discovery is May 1, 2014.

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

This petition for review challenges NRC's "Yucca Mountain Rule," 10 CFR Part 63, which implements an EPA rule establishing standards for reviewing the Yucca Mountain high level waste application. Given the suspension of proceedings related to Yucca Mountain, the case has been held in abeyance, subject to periodic status reports. The court has ordered that the parties submit motions to govern proceedings in the case on or before February 24, 2014.

CONTACT: Andrew P. Averbach, OGC
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New Jersey v. NRC, No. 11-3228 (3rd Cir.)

In this lawsuit, New Jersey challenges NRC's Decommissioning Planning Rule insofar as that rule assumes a 1% real rate of return on decommissioning funds. At New Jersey's request, the case has been held in abeyance pending the outcome of the *Shieldalloy* litigation (discussed below), which concerns the validity of the NRC's transfer of authority to New Jersey as an Agreement State.

CONTACT: James E. Adler, OGC
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Nye County v. NRC, No. 12-1136 (D.C. Cir.)

This is a companion case to *In re Aiken County*, No. 11-1271 (D.C. Cir.) the mandamus case. In this case, the same parties who filed the mandamus case challenge the Commission's decision in CLI-11-07 (Sept. 9, 2011) directing the Atomic Safety and Licensing Board to close down the licensing board proceeding reviewing the application to construct the Yucca Mountain geologic repository. Petitioners stated that they filed the case for "protective" purposes in case they did not prevail in the *Aiken County* case.

Petitioners filed an unopposed motion to hold the case in abeyance pending resolution of the mandamus case. Following the decision in *Aiken County*, the court, at the parties' request, agreed to hold the case in abeyance pending expiration of the time for further review of the *Aiken County* decision. The time to file a petition for certiorari in the *Aiken County* has expired and, on January 30, 2014, the Petitioners filed a motion to dismiss the case voluntarily.

CONTACT: Charles E. Mullins
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Nye County v. NRC, No. 13-1260 (D.C. Cir.)

Shortly after the D.C. Circuit's decision in *Aiken County*, the petitioners in this case filed a motion in the Yucca Mountain adjudicatory proceeding seeking the disqualification of Chairman Macfarlane on the ground that she had previously expressed opinions on matters that are at issue as part of the Commission's consideration of the Yucca Mountain license application. The Chairman denied the motion, pledging that she could and would remain objective in considering the license application. The petitioners then filed an emergency petition in the D.C. Circuit seeking a writ of mandamus, a preliminary injunction, and review on the merits of the Chairman's decision. The court denied the petition for a writ of mandamus and the motion for a preliminary injunction and instructed the parties to proceed with the case as a petition for review. The NRC has filed a motion to dismiss the case, asserting that it the underlying decision is not final and that the court, having denied the petition for a writ of mandamus, lacks jurisdiction to review the Chairman's decision, which is not a final order under the Nuclear Waste Policy Act. This motion, and the petitioners' motion for summary reversal of the Chairman's decision, are currently pending before the court.

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Pueblo of Laguna v. United States, No. 02-24 (Fed. Cl.); ***Jicarilla Apache Nation v. United States***, No. 02-25 (Fed. Cl.)

In these cases the plaintiffs (two separate Indian tribes) seek an accounting of the federal government's alleged mismanagement of the tribe's trust funds and other properties. Plaintiffs also seek recovery for monetary loss and damages. The court issued discovery and document preservation orders in both cases and the NRC provided documents to DOJ.

The *Laguna* case has settled and the case was dismissed on December 9, 2013. The *Jicarilla* case was tried on the Tribe's investment claims for the 1972 to 1992 time period in the spring of 2012 and the court issued a decision in favor of the Tribe earlier this year. The parties are now litigating the Tribe's investment claims from 1993 to the present.

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

This is the caption for three consolidated lawsuits filed by dissident Goshutes and the State of Utah challenging a series of Commission adjudicatory decisions authorizing issuance of a license for the proposed Private Fuel Storage spent fuel storage facility. The case is fully briefed, but the court of appeals decided to hold the case in abeyance, as not currently "ripe," because PFS has failed to obtain necessary approvals from Department of the Interior (DOI) sub-agencies. PFS went to federal district court to challenge the other agencies' decisions. PFS prevailed in 2010, obtaining a remand to DOI. Ever since, the parties have filed a series of joint status reports in the D.C. Circuit agreeing that the case should remain in abeyance pending further developments. Although PFS previously moved to terminate its NRC license, the parties have reported to the court that discussions are underway between PFS and the Skull Valley Band of Goshute Indians concerning continuation of the project, and the case remains in abeyance..

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Shieldalloy Metallurgical Corp. v. NRC, No. 13-1259 (D.C. Cir.)

In response to the D.C. Circuit's decision in *Shieldalloy Metallurgical Corp. v. United States*, No. 11-1449 (D.C. Cir.) (discussed below in "closed cases"), the Commission issued a memorandum and order, CLI-13-06, reinstating New Jersey's authority to regulate Shieldalloy's Newfield, New Jersey, site, and further explaining why New Jersey's standards governing license termination were consistent with the Commission's. Shieldalloy has filed a petition for review of the Commission's order, and its initial brief is due on February 4, 2014.

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Tronox, Inc. and United States v. Kerr-McGee Corporation, Case No. 09-10156 (ALG)/Adv. Proceeding No. 09-1198 (ALG) (Bankr. S.D.N.Y.)

On December 12, 2013, a decision was handed down in this fraudulent conveyance lawsuit, which was litigated as part of a bankruptcy case involving Tronox. Tronox, and Kerr-McGee before it, were liable for clean-up costs at numerous sites including for decommissioning the facility of an NRC licensee, Cimarron. Tronox and the United States, which is represented by the Department of Justice, claimed that Kerr-McGee had transferred its most valuable assets in

order to shelter it from environmental liabilities, resulting in Tronox and its affiliates being unable to manage their liabilities and having to file for bankruptcy. In the December 12 decision, the court found for the plaintiffs, and awarded between \$5.1 - \$14.1 billion in damages, depending on resolution of a remaining question of offset, which remains under consideration.

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United States v. Science Applications International Corp., No. 04-cv-1543 (D.D.C.)

The government sued SAIC under the False Claims Act 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. SAIC at the same time was a hired consultant for entities with an interest in the outcome of the NRC rulemaking. After a jury trial where the United States was represented by Department of Justice and NRC lawyers, the government won a \$6.5 million verdict and judgment. The district court rejected SAIC's motion to set aside the verdict.

The court of appeals reversed the district court judgment because of defects in the jury instructions on calculating damages and on when corporate employees' "collective knowledge" could be imputed to the corporation. The court did, however, reject SAIC's position that only express contract conditions are actionable under the False Claims Act, and it upheld the government's position that implied conditions (here, providing unbiased advice) are actionable as well.

On remand, SAIC moved to reopen discovery on damages. The district court granted SAIC's motion in part, permitting limited discovery on damages until April 18, 2014 and ordering that a scheduling conference be held on April 22, 2014.

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CLOSED CASES

Anderson v. Jaczko, No. 11-cv-1370 (D. Md.)

Plaintiff filed a lawsuit complaining that she was a victim of harassment and race discrimination while working at NRC. The district court dismissed her suit for lack of jurisdiction and for failure to state a claim. Plaintiff appealed the district court decision to the United States Court of Appeals for the Fourth Circuit, which remanded the case back to the district court to reconsider its conclusion in light of allegedly new evidence. The district court issued an order on January 13, 2013, denying reconsideration of its previous conclusion, and the Fourth Circuit affirmed the district court's decision on August 6, 2013.

CONTACT: Laura C. Zaccari, OGC
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Baig v. NRC, No. 10-cv-842 (D.N.J.)

Plaintiff, a former NRC employee, claimed that he suffered discrimination in employment. Working with the United States Attorney's office, NRC filed a motion to dismiss or for summary judgment. The court dismissed the eight counts raised in the original complaint, but permitted plaintiff to file an amended complaint with respect to two of the eight dismissed counts (alleging discrimination based upon age and national origin). Plaintiff filed an amended complaint and, following discovery, defendant filed a motion for summary judgment. The court granted the motion for summary judgment on April 10, 2013, and denied a motion for reconsideration on October 24, 2013.

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Beyond Nuclear v. NRC, No. 12-1561 (1st Cir.)

Petitioners in this case argue that they were wrongly dismissed from the Seabrook license-renewal proceeding. They advanced a NEPA-alternatives contention, premised on the future availability of offshore wind farms to provide baseload power, which the Commission rejected as too speculative and not adequately supported. The Court of Appeals denied the petition for review on January 4, 2013, holding that the Commission's decision correctly interpreted NEPA and was adequately supported by the record, and no further review was sought.

CONTACT: Jeremy Suttenger, OGC
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Blue Ridge Environmental Defense League v. NRC, No. 12-1106 (D.C. Cir.)

In this case, petitioners (several citizens' groups) challenged NRC's issuance of a COL for two new reactors at the Vogtle site in Georgia. Petitioners argued that NRC's environmental review was deficient for failure to take adequate account of the Fukushima accident in Japan. The case was consolidated with a companion suit challenging the rule approving the AP1000 certified design (the design used at Vogtle). On May 13, 2013, the court denied the petition. Among other things, the court found that NRC's denial of petitioners' contention was "well supported by the record and represents a reasonable interpretation of NRC's contention-

specificity regulations, and also rejected petitioners' claim that the Commission's Fukushima Task Force Report constituted "new information" requiring supplementation of the Vogtle Environmental Impact Statement. The court denied a petition for rehearing on July 23, 2013.

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Criscione v NRC, No. 13-cv-00942-RMC (D.D.C.)

In this case, an NRC employee commenced an action under the Freedom of Information Act and the Privacy Act challenging the Office of Inspector General's denial of the employee's request for information related to an interview conducted by the OIG, which was investigating the release of documents to the U.S. Special Counsel and to Congress. The NRC, represented by the Department of Justice, and Mr. Criscione entered into a settlement and stipulation of dismissal on October 28, 2013.

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Massachusetts v. NRC, Nos. 12-1404, 12-1772 (1st Cir.)

In this case, the Commonwealth of Massachusetts challenged an NRC adjudicatory decision in the Pilgrim license renewal case. The thrust of Massachusetts's argument was that the NRC did not adequately consider, for NEPA purposes, the Fukushima accident and, specifically, the conclusions of the Fukushima task force, when it determined that the Commonwealth's late-filed contentions were inadmissible. On February 25, 2013, the United States Court of Appeals for the First Circuit denied the petition, rejecting each of Massachusetts's arguments, and no further review was sought

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Public Employees for Environmental Responsibility v. NRC, No. 13-cv-01248-JDB (D.D.C.)

This case involves a Freedom of Information Act request, submitted by Public Employees for Environmental Responsibility (PEER), to the NRC seeking disclosure of eleven specific flooding-related records. In particular, in this case, PEER alleged that the NRC had violated FOIA by failing to disclose ten of the requested records in their entirety. Prior to the lawsuit being filed, the NRC had provided PEER with a partial response, and during the course of the litigation, the NRC provided PEER with additional records not provided in the partial response with some redactions. In November 2013, PEER and the NRC reached a settlement agreement, and as part of that settlement agreement, the NRC provided PEER with additional materials and a detailed index describing information withheld in certain records.

CONTACT: Michelle D. Albert, OGC
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Shieldalloy Metallurgical Corp. v. NRC, No. 11-1449 (D.C. Cir.)

In this litigation, Shieldalloy attempted for a second time to force the NRC to retain regulatory authority over a contaminated site in New Jersey (owned by Shieldalloy), notwithstanding NRC's designation of New Jersey as an Agreement State. In 2012, the D.C. Circuit ruled that NRC had not adequately explained why it was not retaining authority over the New Jersey site. On remand, the Commission issued a lengthy formal opinion justifying its position. Shieldalloy challenged this determination and also asserted that the transfer was invalid because New Jersey's rules governing license termination, and specifically its rules concerning restricted release decommissioning, were less restrictive than the NRC's. On February 13, 2013, the court issued an order affirming certain components of the Commission's order but determining that the Commission had not adequately explained how the preference it articulated for unrestricted release decommissioning comported with the text of the applicable regulation. For this reason, the court invalidated the transfer of authority to New Jersey and remanded the issue to the Commission for further proceedings.

CONTACT: Grace H. Kim, OGC
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Texas Instruments v. United States, No. 09-701C (Fed. Cl.)

Over the last 20 years, the Corps of Engineers removed a significant amount of radioactive contamination from the Shpack Superfund site in Norton and Attleboro, Massachusetts. This contamination was identified by the NRC in the early 1970s. After removal of the material, the Corps initiated procedures to file a claim against Texas Instruments (TI) under CERCLA, having concluded that the material most likely came from TI and was the result of TI's work under AEC naval reactor contracts in the 1950s and 1960s. In response, TI filed this lawsuit in the Court of Federal Claims, claiming that it was not the responsible party and that, alternatively, if it was the responsible party it was indemnified under the AEC contracts involved.

The parties negotiated a settlement and the court entered a consent decree which, *inter alia*, dismissed this case with prejudice.

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