ADJUDICATORY ISSUE
INFORMATION

January 30, 2002 SECY-02-0019

FOR: The Commission

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

SUBJECT: ANNUAL REPORT ON COURT LITIGATION (CALENDAR YEAR 2001)

PURPOSE: To Inform the Commission of the Status of Litigation in the Courts

DISCUSSION:

Attached is a report updating events in NRC court litigation since my last cumulative annual report dated January 31, 2001 (SECY-00-014). This report reflects the status of NRC cases in court as of January 30, 2002.

During the reporting period (calendar year 2001), the Commission or its officials were sued three times in the courts of appeals,[1] and once in the United States Court of Federal Claims.[2] The Commission also participated in one federal district court case as amicus curiae.[3] During this same one-year period 8 cases were closed.[4] The 5 new cases in 2001 continue an erratic pattern of new case filings. There were 9 in 2000, 15 in 1999, 12 in 1998, 4 in 1997, 10 in 1996, and 16 in 1995, for an average of roughly 10 per year in recent times.

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[1] Orange County v. NRC, Nos. 01-1073 & 01-1246 (D.C. Cir.); Novoste Corp. v. NRC, No. 01-1162 (D.C. Cir.)

[2] Massachusetts General Hospital v. United States, No. 01-434 C (U.S. Court of Federal Claims).

[3] The Skull Valley Band of Goshute Indians v. Leavitt, No. 2:01CV00270C (D. Utah).

[4] Grand Canyon Trust v. NRC, No. 99-70922 (9th Cir.); Grand Canyon Trust v. Babbitt, No. 2:98CV0803S (D. Utah); Kennedy v. Southern California Edison Co., No. 98-56157 (9th Cir.); In re: Maxima Corp., No. 98-18580-pm (D. Md., Bkrptcy Ct.); National Whistleblower Center v. NRC, Nos. 99-1002 & 99-1043 (D.C. Cir.); Novoste Corp. v. NRC, No. 01-1162 (D.C. Cir.); State of Maine v. NRC, No. 00-1476 (D.C. Cir.)

We also handled 11 requests (so-called "Touhy" requests) for NRC testimony, depositions or other evidence for use in private litigation in 2000. The 11 Touhy requests in 2001 are the same total as last year, and lower than what we saw a few years ago (e.g., 20 in 1997, 29 in 1996, and 36 in 1995).

Attachment: Litigation Status Report

LITIGATION STATUS REPORT
As of January 30, 2002

ACTIVE CASES [1]

Massachusetts General Hospital v. United States, No. 01-434 C (U.S. Court of Federal Claims)

This is the third in a series of companion lawsuits seeking government reimbursement for damages, attorney's fees, and costs incurred in a private tort suit. The private suit, Heinrich v. Sweet, arises out of alleged medical misuse of an NRC-licensed research reactor at MIT. Massachusetts General claims reimbursement under a 1959 indemnity agreement between MIT and the Atomic Energy Commission.

We are working with the Department of Justice on the defense of this lawsuit, along with two companion suits (MIT v. United States and Sweet v. United States). The discussion of the Sweet and MIT cases, below, discusses the situation in further detail.

In April, the Claims Court judge is expected to hear oral argument on the government's motion to dismiss and for summary judgment, with a decision expected later this year.

CONTACT: Marjorie S. Nordlinger, OGC
415-1616

Massachusetts Institute of Technology v. United States, No. 00-292 C (United States Court of Federal Claims)

This lawsuit, a companion to Sweet v. United States and Massachusetts General Hospital v. United States, seeks reimbursement of attorney's fees and costs incurred in defending a tort suit, Heinrich v. Sweet, arising out of alleged medical misuse of a research reactor at the Massachusetts Institute of Technology (MIT). MIT relies on a 1959 indemnity agreement between MIT and the Atomic Energy Commission under the Price-Anderson Act -- an agreement that requires the government, according to MIT, to reimburse MIT's legal expenses exceeding $250,000. MIT says that it incurred more than one million dollars in expenses in defending the Heinrich suit.

In conjunction with the Department of Justice, we filed a motion to dismiss and for summary judgment. In April, the Claims Court judge is expected to hear oral argument, with a decision expected later this year.

CONTACT: Marjorie S. Nordlinger, OGC
415-1616

Orange County v. NRC, Nos. 01-1073 & 01-1246 (D.C. Cir.)

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[1]For statistical purposes, we list as "active" any case that was pending before a court as of January 1, 2002. The narratives accompanying each listed case include post-January 1 developments.

These two lawsuits seek judicial review of the NRC's grant of a license amendment permitting Carolina Power and Light Company to put into service two previously unused spent fuel pools at CP&L's Shearon Harris facility. The first suit (No. 01-1073) challenges the NRC staff's finding of "no significant hazards consideration," which made the amendment immediately effective prior to completion of an underlying adjudicatory hearing. The second suit (No. 01-1246) challenges the Commission's final adjudicatory order refusing to review a Licensing Board decision approving the license amendment.

The court of appeals denied petitioner's request for a stay of the license amendment pending appeal. The court also consolidated the two petitions for review. In addition, a court mediator has invited all parties, Orange County, CP&L, and the NRC to attend a mediation session at the courthouse in early February. Our appellate brief is due in late April. The court has not yet assigned a panel of judges to the case or set an oral argument date.

CONTACT: Charles E. Mullins, OGC
415-1618

The Skull Valley Band of Goshute Indians v. Leavitt, No. 2:01CV00270C (D. Utah)

This lawsuit challenges Utah legislation designed to restrict the building of a proposed Independent Spent Fuel Storage Installation on Indian land in Utah. Private Fuel Storage, LLC, is seeking an NRC license for the proposed ISFSI. PFS, along with the Skull Valley Band of Goshute Indians, is challenging the Utah law in federal district court in Utah.

Working with the Department of Justice, we recently filed an amicus curiae brief. What prompted our concern was a Utah counterclaim filed by Utah. It maintained that the NRC lacks authority to license the PFS facility. In Utah's view, the Nuclear Waste Policy Act eliminated the NRC's general power under the Atomic Energy Act to license away-from-reactor ISFSIs. Utah has raised this same issue in licensing proceedings pending before an NRC licensing board.

Our amicus brief argues that the Hobbs Act confers "exclusive jurisdiction" on the courts of appeals to review NRC licensing and rulemaking decisions, and that federal district courts cannot act in those areas. The brief also points out that Utah should exhaust its adjudicatory and rulemaking remedies, and obtain final Commission decisions, before seeking judicial review in court.

This case is set for oral argument in April. PFS and the tribe recently filed a summary judgment motion attacking the Utah legislation on several grounds, including federal preemption. We are considering whether to recommend amicus participation on any of the summary judgment issues.

CONTACT: Grace H. Kim, OGC
415-3605

Sweet v. United States, No. 00-274 C (U.S. Court of Federal Claims)

This lawsuit, a companion to Massachusetts General Hospital v. United States and MIT v. United States, arises out of medical research and treatment, known as "boron neutron capture therapy" (BNCT), conducted by Dr. William Sweet decades ago. The BNCT procedure involved use of AEC-licensed research reactors at MIT and at the Brookhaven National Laboratory. The families of several of Dr. Sweet's patients filed tort suits for damages against Dr. Sweet and others on the claim that BNCT treatment caused radiation-related injury and death to loved ones. See Heinrich v. Sweet, 62 F.Supp.2d 282 (D. Mass. 1999).

Late in 1999, a federal district court jury in Boston entered multi-million dollar judgments against Dr. Sweet and against Massachusetts General Hospital. Those verdicts were reduced to approximately one million dollars on post-trial motions, and currently are on appeal before the United States Court of Appeals for the First Circuit.

in the Court of Federal Claims Dr. Sweet maintains that the NRC must indemnify him for the legal expenses he has incurred thus far (about $300,000) and for any actual judgments that are entered against him in this or in future similar lawsuits. According to Dr. Sweet, when the AEC licensed the MIT and Brookhaven reactors, it entered indemnity contracts agreeing, under the Price-Anderson Act, to pay any damages for "public liability" arising out of a "nuclear incident." Dr. Sweet claims that this contract covers lawsuits and potential liability against him for his medical use of the MIT and Brookhaven reactors. MIT and Massachusetts General Hospital have filed companion suits.

We collaborated with the Department of Justice in filing a motion to dismiss and for summary judgment. Our motion argues, among other things, that Price-Anderson indemnity agreements do not cover what are, in essence, medical malpractice claims. We expect an oral argument in April and a decision later in the year.

CONTACT: Marjorie S. Nordlinger, OGC
415-1616

Syms v. Olin Corp., et al., No. 00-CV-732A (SR) (W.D. N.Y.)

Several property owners in upstate New York filed this lawsuit against a private corporation and a number of government agencies and officials, including the NRC. Plaintiffs seek money damages as compensation for their past and future "response costs" in cleaning up radioactive contamination at a former Manhattan Project site near Lake Ontario. Plaintiffs invoke both CERCLA and the Federal Tort Claims Act as the basis for their damages suit.

We are working with Department of Justice attorneys in defending this suit. It is not clear that the NRC is a proper defendant. The government has filed an answer to the complaint.

CONTACT: Susan G. Fonner, OGC
415-1629

Westinghouse Electric Co. v. United States, No. 99-1015C (U.S. Court of Federal Claims)

This is a damages case arising out of an environmental cleanup of a contaminated industrial site in Blairsville, Pennsylvania, used in the production of fuel for the Navy's nuclear programs. The claim is that a contract between the Atomic Energy Commission and plaintiff obliges the government to foot the bill for the cleanup. Plaintiff seeks monetary relief under both the contract and CERCLA.

Plaintiff has named the United States, the NRC and the Department of Energy as defendants in the case. We have informed the Department of Justice that there is no basis for NRC involvement because the Blairsville site is not an NRC-regulated site, but derives from an AEC function inherited by DOE. We are cooperating with DOJ on discovery proceedings.

CONTACT: Charles E. Mullins, OGC
415-1618

CLOSED CASES

Grand Canyon Trust v. NRC, No. 99-70922 (9th Cir.)

This lawsuit challenged an NRC-approved reclamation plan for a mill tailings site at Moab, Utah. Petitioners claimed violations of the Endangered Species Act and the National Environmental Policy Act. All parties filed briefs in the case last year, and the court of appeals scheduled oral argument. Subsequently, however, the court postponed the oral argument in light of new legislation transferring jurisdiction over the site from the NRC to the Department of Energy, effective in October, 2001.

After holding the case in abeyance for some months, the court of appeals eventually dismissed the case, without prejudice to its reinstatement no later than November 28, 2001. Petitioners made no effort to reinstate the case on or before November 28.

CONTACT: Marjorie S. Nordlinger, OGC
415-1616

Grand Canyon Trust v. Babbitt, No. 2:98CV0803S (D. Utah)

This lawsuit, brought by Utah environmental groups and individuals, claimed that the Secretary of the Interior and the NRC have violated the Endangered Species Act in allowing the Atlas Corporation to continue to store radioactive mill tailings near the Colorado River and in considering a reclamation plan that will leave the mill tailings in place. The NRC staff had not yet taken licensing action to permit the reclamation plan at the time the lawsuit was filed, but did so few months later.

We moved to dismiss the suit against the NRC on the ground that exclusive jurisdiction for judicial review of NRC licensing-related activities lies in the courts of appeals under the Hobbs Act. The district court agreed with our position, and dismissed plaintiffs' claims against the NRC. The court rejected plaintiffs' "attempt to evade" the Hobbs Act's exclusive jurisdiction provision by challenging "ongoing" NRC activities rather than "final" NRC orders as specified in

the Act. Citing precedent, the court concluded that the courts of appeals have exclusive jurisdiction to review not only final NRC licensing orders but also NRC actions "ancillary" to licensing. Finally, the court ruled that the Endangered Species Act's own jurisdictional provisions, which contemplate district court lawsuits, do not override the Hobbs Act's express provision for court of appeals jurisdiction in NRC licensing matters.

Subsequently, legislation transferring authority over the Colorado site to the Department of Energy seemingly rendered plaintiffs' lawsuit moot, and litigation terminated.

CONTACT: Marjorie S. Nordlinger, OGC
415-1616

Kennedy v. Southern California Edison Co., No. 98-56157 (9th Cir.)

This was a private "radiation tort" suit arising out of leukemia allegedly caused by radioactive "fuel fleas" that escaped the San Onofre reactor site. After trial, a federal court jury found against plaintiffs. A panel of the court of appeals set aside the jury verdict on the ground of improper jury instructions. The court ruled that plaintiffs could prevail if they could show even a small probability -- a 1 in 100,000 chance -- that the fuel fleas had caused the leukemia.

On our recommendation, the Justice Department approved the filing of a government amicus curiae brief arguing for rehearing and contesting what we considered an extreme view of tort causation. We expressed concern that the panel ruling ultimately could lead to an unwarranted expansion of tort liability, including (in some cases) government liability, under the Price Anderson Act.

After rebriefing and reargument, the same Ninth Circuit panel (Boochever, Hawkins & Thomas, JJ.) abandoned its original position. Taking a fresh view of the trial court record, the court decided that plaintiffs' evidence at most showed an "infintesimal" or "theoretical" possibility of causation. This, held the court, did not justify a judgment for plaintiff and rendered any technical defects in the jury instructions "harmless."

CONTACT: Marjorie S. Nordlinger, OGC or
Steven F. Crockett, OGC
415-1600

In re: Maxima Corp., No. 98-18580-pm (Chapter 11), Adversary No. 0-1371-pm (D. Md., Bankruptcy Ct.)

This lawsuit, the offshoot of an ongoing Chapter 11 bankruptcy proceeding, sought from the NRC approximately $50,000 in allegedly overdue payments under contracts for computer services. The plaintiff was the bankruptcy trustee. Working with the United States Attorney's office and with our Office of Administration, we ultimately settled this case for a small amount of money.

CONTACT: Grace H. Kim, OGC
415-3605

National Whistleblower Center v. NRC, Nos. 99-1002 & 99-1043 (D.C. Cir.)

This lawsuit arose out of the Calvert Cliffs license renewal proceeding. It had a long and unusual history in the courts.

On November 12, 2000, a split panel of the D.C. Circuit issued a decision requiring the Commission to reconsider whether to grant the sole potential intervenor in the Calvert Cliffs proceeding an extension of time to formulate and file contentions. The panel reasoned that the Commission improperly had stiffened its extension-of-time standards, moving from a "good cause" test to an "unavoidable and extreme circumstances" test, without providing advance notice and opportunity for public comment.

Ten days later, on its own motion, the court reconsidered. It vacated the panel decision and set the case for supplemental briefing and oral argument before a reconstituted panel. (One of the judges on the original panel had retired.) Chief Judge Edwards explained that the vacated panel opinion "fails to address some critical issues in this case," pointing in particular to the apparent "procedural" nature of the extension-of-time rule and to the Commission's legal flexibility to alter procedural rules without prior notice and comment. After rebriefing and reargument, the court of appeals (Edwards, C.J., Williams & Sentelle, JJ.) ruled in favor of the NRC on all issues.

The court held, "first, that the NRC was free to adopt, without resort to notice-and-comment rulemaking, the 'unavoidable and extreme circumstances' standard for application in the Calvert Cliffs proceeding." The court pointed out that the Commission had given advance notice of the new standard, both in a policy statement and in a case-specific order, and that the standard was a reasonable means to accomplish "expedited case processing." No notice and comment were necessary, said the court, because the new standard "embodies a procedural rule." Finally, commenting that "this case appears to be much ado about nothing," the court concluded that the new extension-of-time standard had not harmed petitioners, because the Commission granted petitioners one extension of time, and they never sought another.

Petitioner unsuccessfully sought review before the en banc court of appeals and before the United States Supreme Court. The Supreme Court's denial of certiorari on January 8, 2001, brings the long-running litigation to an end.

CONTACT: Marjorie Nordlinger, OGC
415-1616

Novoste Corp. v. NRC, No. 01-1162 (D.C. Cir.)

This lawsuit sought judicial review of NRC staff instructions on the licensing of petitioner's brachytherapy system. Petitioner viewed the instructions as tantamount to a binding NRC rule. In addition to filing its lawsuit, petitioner asked the NRC staff to clarify and modify its instructions. After the NRC staff issued a new guidance document, petitioner withdrew its lawsuit.

CONTACT: John F. Cordes, OGC
415-1600

State of Maine v. NRC, No. 00-1476 (D.C. Cir.)

The State of Maine filed this lawsuit to contest the NRC's amendment of Part 72 of its regulations to add the "NAC-UMS" dry cask storage system to the agency's list of approved spent fuel storage casks. Maine also filed a motion seeking to stay the effectiveness of the NAC-UMS rule. Maine's principal argument was that the NRC had not adequately consulted the Department of Energy on the NAC-UMS storage system (which is designed to be a dual-purpose cask covering both on-site dry storage and ultimate transport to a national repository). We opposed the State of Maine's stay motion. The cask manufacturer, NAC, and its potential user, Maine Yankee, intervened in the lawsuit and also opposed the stay motion.

The parties thereafter engaged in settlement talks. With the Commission's approval, we reached a settlement agreement whereby the NRC would give DOE a chance to comment on the transportation aspects of the NAC-UMS cask and the State of Maine would withdraw its lawsuit. On Maine's motion, the court of appeals subsequently dismissed Maine's petition for review.

CONTACT: Steven F. Crockett, OGC
415-1622