

POLICY ISSUE INFORMATION

January 27, 2012

SECY-12-0015

FOR: The Commissioners

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

SUBJECT: ANNUAL REPORT ON COURT LITIGATION (CALENDAR YEAR 2011)

PURPOSE:

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

DISCUSSION:

Enclosed is a report updating events in Nuclear Regulatory Commission (NRC) court litigation since my last annual report dated February 3, 2011 (SECY-10-0015). This report reflects the status of NRC cases in court as of January 27, 2012.

During the reporting period (Calendar Year 2011), the Commission or NRC officials were sued eleven (11) times in the courts of appeals¹ and once in federal district court.² During this same one-year period ten (10) cases were closed.³ The twelve (12) new lawsuits in 2011 are in

¹ *In re: Aiken County*, No. 11-1271 (D.C. Cir.); *Brown v. NRC*, No. 11-1441 (8th Cir.); *New Jersey v. NRC*, No. 11-3228 (3d Cir.); *New York v. NRC*, Nos. 11-1045, 11-1051, 11-1056, 11-1057 (D.C. Cir.); *Shieldalloy, Inc. v. NRC*, No. 11-1449 (D.C. Cir.); *Sustainable Energy & Economic Develop. Coalition v. NRC*, No. 11-1457 (D.C. Cir.); *Vermont Department of Public Service v. NRC*, Nos. 11-1168 & 11-1177 (D.C. Cir.).

² *Anderson v. Jaczko*, No. 11-1370 (D. Md.), appeal pending, No. 11-2428 (4th Cir.).

³ *In re: Aiken County (& Consolidated Cases)*, Nos. 10-1050, 10-1069 & 10-1082 (D.C. Cir.); *Brown v. NRC*, No. 11-1441 (8th Cir.); *General Electric Company v. U.S. Department of Interior, et al.*, Civ. No. 10-404 MCA/RHS (D. N.M.); *Honeywell International, Inc. v. NRC*, No. 10-1022 (D.C. Cir.); *New Jersey Environmental Federation v. NRC*, No. 09-2567 (3rd Cir.); *Peterson v. NRC*, No. 10-1097 (D.C. Cir.); *San Luis Obispo Mothers for Peace v. NRC*, 08-75058 (9th Cir.); *Shieldalloy v. NRC*, No. 09-1268 (D.C. Cir.).

line with what we have come to expect over the past decade. There were 9 new lawsuits in 2010, 8 in 2009, 13 in 2008, 11 in 2007, 8 in 2006, 11 in 2005, 13 in 2004, 14 in 2003, and 8 in 2002, for an average of 10.7 new lawsuits a year.

During this reporting period (2011) we also handled twenty-five (25) requests (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.* And 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. One of our attorneys (Charles E. Mullins) received an award from the Department of Justice for his work last year on discovery and in helping to settle the multi-million dollar *Westinghouse-Hematite* case (No. 4:03-CV-00861 (E.D. Mo.)).

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Enclosure:
Litigation Status Report

LITIGATION STATUS REPORT
(As of Jan. 27, 2012)

ACTIVE CASES¹

In re: Aiken County, No. 11-1271 (D.C. Cir.)

This lawsuit, filed by several parties from South Carolina and Washington, seeks mandamus relief against NRC for allegedly unlawful inaction and delay in the Yucca Mountain licensing proceeding. NRC's brief maintains that Congress's cut-off of appropriated funds for the Yucca proceeding prevents the agency from continuing with the proceeding and from deciding whether to approve or disapprove the DOE license application. The case is set for oral argument on May 2, 2012.

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

Anderson v. Jaczko, No. 11-1370 (D. Md.), appeal pending, No. 11-2428 (4th Cir.)

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 has appealed the district court decision to the court of appeals (Fourth Circuit).

CONTACT: Mark J. Maxin
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Baig v. NRC, No. 10-842 (FLW) (D.N.J.)

Plaintiff, a former NRC employee, claims that he suffered age discrimination and national-origin 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 lawsuit, but allowed plaintiff to amend his complaint. Proceedings are ongoing on the amended complaint.

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Blue Ridge Environmental Defense League v. NRC, No. 09-1112 & 10-1058 (D.C. Cir.)

These lawsuits challenge NRC's decision to reinstate previously-withdrawn construction permits at TVA's Bellefonte site. Because a related adjudication was pending before NRC, the court of appeals, on our motion, held the initial lawsuit in abeyance. We moved to dismiss the second suit for lack of jurisdiction, but the court directed full briefing on the issue. NRC filed its brief, on

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, 2012. But narratives accompanying each listed case include post-January 1 developments.

both jurisdiction and the merits last March, and the court heard oral argument in October. We are awaiting a decision.

CONTACT: Jeremy Suttenger, OGC
Grace H. Kim, OGC
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Brodsky v. NRC, No.09-Cv-10594 (S.D.N.Y.), appeal pending, No. 11-2016 (2d Cir.)

This federal district court lawsuit challenged 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 that plaintiffs thereafter filed in district court raised various procedural and NEPA-based challenges to the exemptions. In collaboration with our office, the U.S. Attorney successfully moved for dismissal and summary judgment. The district court ruled that NRC's grant of the exemptions was reasonable and lawful, and violated no hearing rights. Plaintiff has appealed to the Second Circuit, where the case has been briefed and is awaiting oral argument.

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El Paso Natural Gas Company, et al., v. United States of America, et al., No. 07-00905, RJL (D. D.C.):

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. 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. The case is still pending in the district court, where discovery and other motions are pending. NRC is a named defendant in the lawsuit, along with other federal agencies and the United States.

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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 continue to dispute various issues before the trial judge.

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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. The case has been held in abeyance, at the joint request of all parties, subject to periodic status reports.

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New Jersey v. NRC, No. 11-3228 (3d 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 to await the outcome of *Shieldalloy v. NRC*, No. 11-1449 (D.C. Cir.).

CONTACT: James E. Adler
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New York v. NRC, Nos. 11-1045, 11-1051, 11-1056, 11-1057 (D.C. Cir.)

These consolidated lawsuits – brought by New York, NRDC, BREDL, and the Prairie Island Indian Community – challenge NRC's Waste Confidence Decision and Waste Confidence Rule. Vermont and Connecticut joined New York in its petition for review. Petitioners argue that NRC ought to have prepared an environmental impact statement analyzing waste confidence, and also maintain that NRC lacked sufficient record support for its finding that spent-fuel storage onsite for at least 60 years can be accomplished in a safe and environmentally acceptable manner. In addition, petitioners challenge the Rule's expression of confidence that a permanent repository will be available when necessary.

All briefs have been filed, and oral argument will be on March 20.

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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.

Many status reports have since been filed. The most recent indicates that a federal district court in Utah has remanded various Interior Department rulings back to the Department for reconsideration, but that the Department has not yet resolved the case on remand. Hence, our lawsuit remains in abeyance.

CONTACT: Grace H. Kim, OGC
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Shieldalloy, Inc. v. NRC, No. 11-1449 (D.C. Cir.)

This is the second time around for Shieldalloy’s attempt to force NRC to retain regulatory authority over a contaminated site in New Jersey (owned by Shieldalloy), notwithstanding NRC’s entering into an agreement with New Jersey transferring regulatory authority to the state. Last year the court of appeals held 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 has gone back to the court to try to set aside the Commission decision.

The court has set a briefing schedule, but not an oral argument date. NRC’s brief is due in April.

CONTACT: Grace H. Kim, OGC
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Sustainable Energy & Economic Develop. Coalition v. NRC. No. 11-1457 (D.C. Cir.)

This lawsuit challenges an NRC adjudicatory decision in the ongoing Comanche Peak COL proceeding. The Board rejected a contention on mitigative strategies, and the Commission upheld the Board ruling. Petitioners disagree with the contention-admissibility ruling. We filed a motion to dismiss the lawsuit as premature, given that the COL decision was not scheduled to be reached for several years and that petitioners themselves were still before the Board and the Commission raising Fukushima-driven claims for reopening. Petitioners apparently agree with our position, as they recently decided to withdraw their lawsuit. The motion for voluntary dismissal is pending before the court.

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

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 (*Tatel*, Sentelle & Griffith) 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 upheld the government's position that implied conditions (here, providing unbiased advice) are actionable as well.

The case remains pending before the district court on remand..

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Vermont Department of Public Service v. NRC, Nos. 11-1168 & 11-1177 (D.C. Cir.)

These consolidated cases (one brought by Vermont and the other by the New England Coalition) claim that NRC unlawfully renewed Vermont Yankee's operating license without requiring Vermont Yankee to have in place a state water-quality certification under section 401 of the Clean Water Act. Both sides filed dispositive motions, but the motions panel referred the motions to the merits panel. We filed our brief in January. Our brief argues that the lawsuits should be dismissed for failure to exhaust remedies at NRC and also that petitioners' merits claims are wrong. Oral argument is set for May 9, 2012.

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CLOSED CASES

In re: Aiken County (& Consolidated Cases), Nos. 10-1050, 10-1069 & 10-1082 (D.C. Cir.)

These consolidated lawsuits challenged a decision by the Department of Energy (DOE) to abandon its effort to obtain an NRC license for a high-level waste facility at Yucca Mountain and to withdraw its license application. The lead case was filed by Aiken County (SC). It was consolidated with *Ferguson v. Obama*, No. 10-1052 (D.C. Cir.), *South Carolina v. DOE*, No. 10-1069 (D.C. Cir.), and *Washington v. DOE*, No. 10-1082 (D.C. Cir.).

Three of the consolidated suits (all but *Ferguson*) named NRC or NRC officials as respondents, but petitioners' court of appeals briefs do not argue specific claims against NRC. The court of appeals (*Sentelle*, Brown & Kavanaugh) ruled that petitioners' suit was not ripe because the question whether DOE may lawfully withdraw its Yucca license application was still pending at NRC. Judge Brown wrote a concurring opinion calling attention to the possibility of an unreasonable-delay claim against NRC. Judge Kavanaugh wrote a concurring opinion questioning the constitutionality of NRC's "independence" in assessing the DOE Yucca application.

The Justice Department represented the government at the court of appeals.

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Brown v. NRC, No. 11-1441 (8th Cir.)

This lawsuit challenged the renewal of the Duane Arnold operating license on NEPA grounds. We moved to dismiss the suit on the ground of timeliness – petitioners did not file suit within 60 days of license issuance, as required by the Hobbs Act, but instead used a later Federal Register announcement as the trigger for the 60-day deadline. We also moved to dismiss on the ground that petitioners had not exhausted NRC remedies – that is, they never sought an NRC hearing on their NEPA grievance, despite an opportunity to do so.

In a short, *per curiam* decision the court of appeals (Murphy, Arnold & Shepherd) agreed with our timeliness argument and dismissed the suit. The court did not reach our exhaustion-of-remedies argument.

CONTACT: Charles E. Mullins, OGC
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General Electric Company v. U.S. Department of Interior, et al., Civ. No. 10-404 MCA/RHS (D. N.M.)

This case was an attempt by General Electric to obtain reimbursement for clean-up activities at the mine(s) associated with the Church Rock Mill. The NRC regulates the tailings pile associated with the Mill, but not the mine. GE filed the complaint (naming NRC as a defendant, among other agencies) and then initiated settlement negotiations, which produced an agreement leading to a consent decree. NRC had no liability under the agreement

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Honeywell International, Inc. v. NRC, No. 10-1022 (D.C. Cir.)

This petition for review challenged an NRC decision not to grant a licensee, Honeywell, an exemption in 2009 from decommissioning financial-assurance requirements. NRC had twice previously (in 2007-2008) granted Honeywell an exemption – allowing self-financing in lieu of a

surety – on the ground that Honeywell’s strong bond rating and corporate goodwill compensated for its failure to have “tangible net worth” at least ten times the current decommissioning cost estimate of its licensed fuel facility in Metropolis, Illinois. NRC said that Honeywell’s declining tangible net worth no longer justified the exemption.

The court of appeals (*Rogers, Brown & Griffith, JJ*) remanded the exemption-denial for further proceedings. The court held that NRC had not adequately explained why Honeywell’s bond position and corporate goodwill did not continue to justify an exemption, notwithstanding a decline in tangible net worth. The court said that the Commission had “left too much to Inference” and had not indicated “how far the tangible net worth must decline and over what period.”

On remand NRC Staff again denied the exemption, but Honeywell is contesting that decision in a Licensing Board proceeding.

CONTACT: Robert M. Rader, OGC
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New Jersey Environmental Federation v. NRC, No. 09- 2567 (3rd Cir.)

This petition for review challenged NRC’s decision, after an extensive adjudication, to grant Oyster Creek’s license renewal application. Petitioners maintained that NRC made many procedural errors during the adjudication and that NRC unlawfully referred some issues to later resolution by the NRC Staff. In a thorough opinion, the court of appeals (*Fisher, Ambro & Sanchez, JJ*) upheld NRC’s position in full, including NRC rulings on timeliness of contentions and on reopening a closed record.

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Peterson v. NRC, No. 10-1097 (D.C. Cir.)

Petitioner, an advocate for a spent fuel disposal plan that he has developed as an alternative to Yucca Mountain, attempted to intervene in the Yucca Mountain adjudicatory proceeding. The Licensing Board and the Commission rejected his intervention petition for lack of standing and for lack of an admissible contention. Petitioner challenged the decision in court, but his brief did not explain why NRC should have allowed his entry into the adjudication but instead argued various questions of national policy.

The court of appeals declined to dismiss the case on our motion, but after full briefing the court (Ginsburg, Griffith & Kavanaugh, JJ) denied the petition for review summarily. In a short, *per curiam* order the court pointed out that petitioner had not offered any reason why NRC’s decision was unlawful.

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

Petitioner in this lawsuit, a citizens group, challenged the Commission's decision, after a hearing, to uphold the NRC Staff's environmental assessment of the consequences of a terrorist attack on an ISFSI at Diablo Canyon. Petitioner maintained 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),

This time around, the court (*Thomas, Reinhardt & Restani, JJ*) upheld NRC's decision in full. The court held that NRC was not obliged under NEPA, or under any other law, to make available to intervenors security-sensitive documents exempt from public disclosure under NEPA. The court also found, on the record here, that the NRC Staff's environmental assessment on the terrorism issue was adequate.

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

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

This petition for review challenged NRC's decision to make New Jersey an agreement state to the extent that the agreement covers a contaminated site that petitioner owns. Petitioner claimed 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. The court of appeals (*Williams, Sentelle & Rogers, JJ*) held that NRC had not adequately explained why it rejected Shieldalloy's request that the agency retain NRC jurisdiction over the Shieldalloy site. The court therefore remanded the case to NRC without resolving various other arguments Shieldalloy had raised.

On remand, the Commission solicited the parties' views, and then issued a decision reiterating the lawfulness of the transfer of authority to New jersey. Shieldalloy has filed a fresh lawsuit challenging that decision.

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