



POLICY ISSUE **(Information)**

January 10, 2019

SECY-19-0006

FOR: The Commissioners

FROM: Andrew P. Averbach
Solicitor

A handwritten signature in black ink, appearing to read "A.P. Averbach".

SUBJECT: ANNUAL REPORT ON COURT LITIGATION (CALENDAR YEAR 2018)

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 22, 2018 (SECY-18-0009). It includes cases filed through the end of 2018 but reflects the status of NRC cases in court as of January 10, 2019.

During the reporting period (Calendar Year 2018), the Commission or NRC officials were sued two times in the courts of appeals,¹ once in federal district court,² and once in the Court of Federal Claims.³ During this same period, five cases were closed.⁴ The number of new filings in 2018 is similar to the number of cases filed in recent years, though smaller than the average ten years ago. There were 2 new lawsuits (including cases filed in federal district court) in 2017, 4 in 2016, 10 in 2015, 6 in 2014, 3 in 2013, 5 in 2012, 11 in 2011, 9 in 2010, 8 in 2009, and 13 in 2008, for an average of 7 new lawsuits per year over the prior ten years.

CONTACT: Andrew P. Averbach, OGC
301-415-1956

¹ *Nevada v. NRC*, No. 18-1232 (D.C. Cir.); *Beyond Nuclear, Inc. v. NRC*, No. 18-1340 (D.C. Cir.).

² *Miles v. NRC*, No. 1:18-cv-04571 (N.D. Ill.).

³ *Honeywell International, Inc. v. United States*, No. 18-cv-294 (Fed. Cl.).

⁴ *Beyond Nuclear, Inc. v. NRC*, No. 15-1173 (D.C. Cir.); *Friends of the Earth v. NRC*, No. 16-1004 (D.C. Cir.); *Nat. Res. Def. Council v. NRC*, No. 16-1298 (D.C. Cir.); *Oglala Sioux Tribe v. NRC*, No. 17-1059 (D.C. Cir.); *In re State of Texas*, No. 17-60191 (5th Cir.).

We have also continued to participate in lawsuits brought by or against the United States or in which the United States and/or its agencies have been named as a third-party defendant. Much of this work has involved responding to requests for documents related to the activities of the Atomic Energy Commission (AEC) and/or its licensees, and working with the Department of Justice to review pleadings and implementing and maintaining litigation holds for materials that may be relevant to ongoing litigation.

Finally, during this reporting period we handled four new "Touhy" requests for NRC testimony, depositions, or other evidence for use in private litigation. See 10 C.F.R. § 9.200 *et seq.*

Enclosure:

1. Litigation Status Report

cc: SECY
ASLBP
CFO
OEDO
OGC
OCAA
OCA
OIG
OPA
REGIONS

LITIGATION STATUS REPORT
(As of January 10, 2019)

ACTIVE CASES¹

Berka v. NRC, No. 1:17-cv-02836-APM (D.D.C.)

On December 14, 2017, George Berka commenced a lawsuit in the U.S. District Court for the District of Columbia seeking to require the NRC to amend its rules so as to lift restrictions on the process by which power plants that have ceased operations may restart. Mr. Berka had previously sought such an amendment to the NRC's rules via a petition for rulemaking filed in 2015, but the petition was not docketed as a result of Mr. Berka's failure to satisfy the agency's filing criteria. NRC, represented by the Department of Justice, filed a motion to dismiss the case on June 1, 2018, asserting that the complaint was, in essence, a petition for review of the agency's 2015 denial of the petition for rulemaking, and that such a petition is appropriately filed in the courts of appeals under the Hobbs Act. NRC further explained that transfer of the case to the D.C. Circuit was not appropriate because a petition for review under the Hobbs Act must be filed within 60 days of a final order and that, as a result, such a petition would be untimely. On December 19, 2018, the court issued a short order dismissing the case for lack of jurisdiction for the reasons raised in the NRC's motion. Mr. Berka has until February 18, 2019, to appeal the decision to the D.C. Circuit.

CONTACT: Jennifer Scro, OGC
301-287-9081

Beyond Nuclear, Inc. v. NRC, No. 18-1340 (D.C. Cir.)

On December 27, 2018, Beyond Nuclear, Inc. filed a petition for review challenging the Commission's referral to the Atomic Safety and Licensing Board (Board) of Beyond Nuclear's assertions, in two separate licensing proceedings, that the Commission lacks authority under the Nuclear Waste Policy Act (NWPA) to issue licenses for the construction and operation of spent fuel storage facilities that will store spent fuel to which the U.S. Department of Energy holds title. Upon filing the petition for review, Beyond Nuclear also filed a motion to hold its petition in abeyance pending resolution by the agency of the arguments that the Commission referred to the Board. The NRC and the United States, which is also named as a party, have objected to the motion and have informed the court they intend to move to dismiss the case for lack of finality.

CONTACT: Andrew P. Averbach, OGC
301-415-1956

¹ For statistical purposes, we counted as "active" any case pending before a court, or still subject to further judicial review, as of January 1, 2019. However, the narratives accompanying the cases listed in this report include any post-January 1 developments.

Honeywell International, Inc. v. United States, No. 18-cv-294 (Fed. Cl.)

On February 16, 2018, Honeywell International, Inc. commenced a lawsuit in the Court of Federal Claims against the United States, claiming that the NRC illegally exacted \$1.9 million in fees assessed pursuant to 10 C.F.R. Part 170 relating to the Metropolis Works uranium conversion facility. Honeywell asserts that the charges, for work performed in 2012 and 2013, result from "orders related to civil penalties or other civil sanctions" and are therefore not fee-billable pursuant to 10 C.F.R. § 170.31, note 2. The agency previously expressed to Honeywell that it disagrees with this conclusion, and that the fees are not related to penalties or sanctions and are therefore properly billable to the licensee. On June 18, 2018, the United States, represented by the Department of Justice, moved to dismiss the complaint, asserting that Honeywell cannot assert a claim for illegal exaction because the agency properly and reasonably determined that the services at issue were not fee-billable. Honeywell opposed the motion and filed a cross-motion for summary judgment. Oral argument has not yet been scheduled.

CONTACT: Michael J. Clark, OGC
301-287-9182

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 the mishandling of annual leave at the time of retirement. The parties prepared a stipulation with respect to certain agencies, including NRC, for which sufficient information concerning the calculation of damages has been provided, and a partial settlement agreement has been reached. The proceedings remain ongoing.

CONTACT: Mark J. Maxin, OGC
301-287-3424

Miles v. NRC, No. 1:18-cv-04571 (N.D. Ill.)

On July 2, 2018, Daniel Miles appealed an Equal Employment Opportunity Commission decision involving his claims of discrimination to the U.S. District Court for the Northern District of Illinois. Mr. Miles is seeking class certification and a variety of remedies for himself. On September 24, 2018, after Mr. Miles corrected certain errors in filing that had prevented the case from being processed, the court ordered the agency to respond to Mr. Miles's amended complaint. The Department of Justice has filed an answer on behalf of the agency, and no further action has been taken.

CONTACT: Shannon Rogers, OGC
301-287-0702

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

This petition for review challenges NRC's "Yucca Mountain Rule," 10 C.F.R. Part 63, which implements an Environmental Protection Agency (EPA) rule establishing standards for reviewing the Yucca Mountain repository application. Given the suspension of adjudicatory proceedings before the Commission related to Yucca Mountain and the uncertainty surrounding the Yucca Mountain project (including the lack of new appropriations from Congress from the Nuclear Waste Fund), the case, as well as a companion case brought against EPA challenging the EPA standards, has been held in abeyance, subject to periodic status reports, since 2010. In these reports, the parties have advised the court of the resumption of the licensing process following the issuance of a writ of mandamus in *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013), but they have continued to advise the court that the future of the project remains uncertain.

CONTACT: Jeremy M. Suttnerberg, OGC
301-287-9154

Nevada v. NRC, No. 18-1232 (D.C. Cir.)

On July 2, 2018, Commissioner Wright denied the State of Nevada's request that he recuse himself from the Yucca Mountain licensing proceedings due to his prior involvement with the adjudication and public statements he had made concerning the proposed project. On August 29, 2018, Nevada filed a petition for review of this decision pursuant to the NWPA. The NRC moved to dismiss the petition, asserting that the only vehicle for seeking a Commissioner's recusal under the NWPA is a petition for a writ of mandamus, that Nevada neither requested nor established a basis for mandamus relief, and that Nevada's petition was not ripe for review. On December 28, 2018, the court issued an order declining to address the agency's jurisdictional arguments concerning mandamus review but granting the motion to dismiss on ripeness grounds. Nevada has until February 11, 2019, to seek rehearing and, if no rehearing petition is filed, until March 28, 2019, to seek review before the Supreme Court.

CONTACT: Andrew P. Averbach, OGC
301-415-1956

Charles E. Mullins, OGC
301-287-9156

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 (PFS) spent fuel storage facility. The case is fully briefed, but the court of appeals decided to hold the case in abeyance because PFS had failed to obtain necessary approvals from Department of the Interior (DOI) sub-agencies and the case was therefore not ripe for review. 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.

CONTACT: Grace H. Kim, OGC
301-287-9153

CLOSED CASES

Beyond Nuclear, Inc. v. NRC, No. 15-1173 (D.C. Cir.)

This petition for review challenged two orders associated with the NRC's issuance of a combined license to DTE Electric Company (DTE) for Fermi Nuclear Power Plant, Unit 3. In the first order (CLI-15-13), the Commission upheld the Board's dismissal on timeliness grounds of Beyond Nuclear's contention challenging the NRC's consideration of the environmental impacts of the anticipated transmission corridor for the proposed unit under the National Environmental Policy Act (NEPA). The Commission also declined in that order to permit the Board to consider, on a *sua sponte* basis in a contested proceeding, related NEPA issues concerning the transmission corridor, as the Board had proposed. In the second order (CLI-14-3), the Commission denied Beyond Nuclear's petition to review the Board's ruling in favor of the license applicant on its challenge to the adequacy of the applicant's quality assurance program.

On November 27, 2017, the court issued a brief order denying the petition for review, finding that (1) the Commission neither plainly erred nor abused its discretion in deeming Beyond Nuclear's transmission corridor contention untimely and declining to consider the adequacy of the transmission corridor analysis on a *sua sponte* basis; and (2) the Commission reasonably upheld the Board's determination with respect to DTE's quality assurance program, given that its factual findings were supported by the record and that its interpretation of the relevant regulations was correct. On March 1, 2018, the Supreme Court docketed Beyond Nuclear's petition for a writ of certiorari challenging the D.C. Circuit's decision. The United States and the NRC waived their right to oppose Beyond Nuclear's petition. The Supreme Court denied the petition on April 16, 2018.

CONTACT: Michelle D. Albert, OGC
301-287-9259

Friends of the Earth v. NRC, No. 16-1004 (D.C. Cir.)

On January 8, 2016, Friends of the Earth (FOE) filed a petition for review by the D.C. Circuit of CLI-15-21, in which the Commission affirmed the Board's denial of FOE's petition to intervene in the Diablo Canyon license renewal proceedings based on contentions related to seismic analysis. The Commission agreed with the Board that the contentions were not within the scope of the license renewal proceedings and that waiver of Commission regulations so as to permit litigation of issues of this type was not warranted. Shortly after filing its petition for review, FOE requested that the case be held in abeyance, asserting that it was not clear whether the licensee, Pacific Gas & Electric (PG&E), intended to operate its Diablo Canyon units after the expiration of their license terms and that, as a result, the court need not adjudicate the matter at the time. NRC objected to the motion, noting that PG&E had not withdrawn its applications for license renewal and that, as a result, the petition was ripe for review. The court denied the motion on May 18, 2016, and subsequently issued a briefing schedule. However, following the announcement of an agreement whereby PG&E would cease operating the Diablo Canyon units at the conclusion of the initial license terms (such that license renewal would not be necessary), FOE and PG&E jointly moved, with the NRC consenting, to hold the case in abeyance pending state regulatory approval of the parties' agreement. The court granted the motion. The agreement was later approved by the state and the license renewal application was withdrawn. On August 2, 2018, the NRC and PG&E filed a motion to dismiss the case on the ground that

the petition for review had become moot. The court granted this motion, without opposition by FOE, on September 25, 2018.

CONTACT: James E. Adler, OGC
301-287-9173

Natural Resources Defense Council v. NRC, No. 16-1298 (D.C. Cir.)

In 2016, Natural Resources Defense Council and Powder River Basin Resource Council filed a petition for review of CLI-16-13, the Commission's decision upholding the issuance of a license to Strata Energy to build and operate an *in situ* uranium recovery facility in Wyoming. Petitioners asserted that the agency could not, consistent with NEPA, "augment" the agency's analysis of environmental impacts contained in an Environmental Impact Statement with additional information developed through an adjudicatory proceeding. Petitioners also challenged several of the agency's findings on the merits with respect to environmental risks and impacts to groundwater associated with the license, as well as the rejection or dismissal of contentions prior to the adjudicatory hearing based on failure to comply with NRC rules of procedure. Oral argument was held on October 10, 2017, before Judges Kavanaugh, Williams, and Ginsburg. On January 22, 2018, the court issued a decision deeming the NRC's augmentation of the environmental record through its adjudicatory process to be permissible in this case, given that the record, as augmented, contained a complete depiction of the relevant environmental data that supported issuance of the license, and rejecting petitioners' remaining arguments. Petitioners did not seek further review.

CONTACT: Eric V. Michel, OGC
301-287-3704

Oglala Sioux Tribe v. NRC, No. 17-1059 (D.C. Cir.)

This petition for review challenged the issuance of a license to Powertech (USA), Inc. for the Dewey-Burdock *in situ* uranium recovery project, including the Commission's decision in CLI-16-20. Among other things, that decision affirmed the Board's decision to keep the license in place notwithstanding the Board's identification of certain deficiencies related to the treatment of cultural and historic resources in the Environmental Impact Statement for the project and the staff's efforts to consult with the Tribe. The Tribe asserted that issuance of the license violated NEPA, the National Historic Preservation Act (NHPA), and the Atomic Energy Act. NRC moved to dismiss the petition, asserting that the decision under review did not constitute final agency action because of the ongoing consideration by the Board of NEPA and NHPA issues. The court declined to rule on the motion and directed the parties to include the jurisdictional arguments in their briefs. Oral argument was held on March 20, 2018, before Judges Garland, Henderson, and Griffith.

On July 20, 2018, the court issued a decision holding that it had jurisdiction under the collateral order doctrine to consider whether keeping the license in place violated NEPA. It held that the agency erred in requiring the Tribe, upon a demonstration that the agency had not adequately evaluated the impact of the project on cultural resources, also to demonstrate that irreparable harm would occur if the license remained in place. The court did not vacate the license, however, and it remanded the case to the agency for further proceedings consistent with its

opinion. The time for NRC and other parties to seek rehearing before the D.C. Circuit or certiorari at the U.S. Supreme Court has expired.

CONTACT: James E. Adler, OGC
301-287-9173

In re State of Texas, No. 17-60191 (5th Cir.)

Texas filed a petition for a writ of mandamus and related relief under the NWPA, asserting that the NRC has violated its obligations under the Act and under the writ of mandamus issued by the D.C. Circuit in *In re Aiken County* by keeping the adjudicatory proceedings associated with the Yucca Mountain repository in suspension. Texas also sought relief against the Departments of Energy and Treasury, and it asked the court, among other things, to require the resumption of the adjudication and to require the NRC to request additional funds from Congress for purposes of issuing a final decision on the license application. Texas also filed a motion for a preliminary injunction against DOE, seeking to stop DOE's consent-based siting activities; and Nevada, as intervenor, moved to dismiss the case, asserting a variety of jurisdictional arguments. NRC filed a response to the petition on June 29, 2017, asserting that the relief sought against the agency was untimely, moot, and filed in the wrong court, and that, on the merits, the petition should be denied because the NRC had acted in accordance with its obligations both under the NWPA and the D.C. Circuit's mandamus order in *Aiken County*. On June 1, 2018, the court granted Nevada's motion to dismiss the case as untimely (noting that the NRC and DOE had supported the motion "in substance"). It ruled that no action or inaction identified in Texas's petition had taken place within the NWPA's 180-day statute of limitations and that Texas could not rely on an asserted "continuing violation" to bring its claims within the limitations period. The time for Texas to seek further review before the Fifth Circuit and the Supreme Court has expired.

CONTACT: Charles E. Mullins, OGC
301-287-9156

CASES IN WHICH NRC HAS PARTICIPATED OR IS PARTICIPATING IN DISCOVERY ON BEHALF OF UNITED STATES

***105 Mount Kisco Associates, LLC v. Paul Carozza*, No.7:15-cv-05346-NSR-JCM (S.D.N.Y.)**

This is a defensive case under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) alleging that the United States is liable (as an operator, arranger, and transporter) for radiological contamination at a site in Westchester County, New York. The plaintiffs allege that the business at the site processed ore for the Manhattan Project. From 1942 into the mid-1960s, the Canadian Radium plant in Mount Kisco, New York, processed uranium ore and other radioactive materials. During some portion of this period, the plant is alleged to have provided refined uranium to the Government for the Manhattan Project. It also is alleged to have sold the other radioactive elements it extracted from this ore (for example, radium) to other non-governmental clients. The facility stopped production by 1966.

At the request of the Department of Justice, the NRC provided materials related to the site's AEC license. The Court has stayed discovery while it considers a motion to dismiss by the non-federal defendants.

CONTACT: Charles E. Mullins, OGC
301-287-9156

***Atlantic Richfield Co. v United States and the Pueblo of Laguna*, No. 1:15-cv-00056 (D.N.M.)**

This is a lawsuit under CERCLA seeking recovery for cleanup efforts at the Jackpile mine site in New Mexico. All defendants moved to dismiss the case, and the court stayed discovery while it considered the motions. On February 9, 2016, the court dismissed the United States as a party, but the case is still proceeding with respect to other parties. NRC was asked to locate and retain relevant documents. Atlantic Richfield has negotiated an administrative order on consent with the Environmental Protection Agency, and the parties, including the United States, are engaged in mediation.

CONTACT: Charles E. Mullins, OGC
301-287-9156

***EPEC Polymers, Inc. v. NL Industries, Inc.*, No. 3:12-cv-03842 (D.N.J.)**

The United States is defending against a third-party complaint alleging that the U.S. Army Corps of Engineers is responsible for environmental response costs under CERCLA because it dredged thorium-containing materials from the Raritan River in New Jersey and disposed of them on a site now owned by the plaintiff. The plaintiff alleges that the thorium was discharged from a facility owned by defendant NL Industries, Inc., in Sayreville, New Jersey. NL in turn alleges that the thorium is traceable to the activities of Tenneco Chemicals, Inc., the holder an AEC license, and that NRC performed a field team investigation and approved the decommissioning of plaintiff's site in the late 1990s or early 2000s. NRC has worked with the Department of Justice to obtain documents related to the AEC license and the field team investigation.

The United States has completed its document production, but additional production may occur as the site clean-up continues. The parties are engaged in discussions to attempt to settle the case.

CONTACT: Charles E. Mullins, OGC
301-287-9156

Jeremy M. Suttenger, OGC
301-287-9154

SUBJECT: ANNUAL REPORT ON COURT LITIGATION (CALENDAR YEAR 2018) DATED
JANUARY 10, 2019

DISTRIBUTION:

- A. Averbach's Chron.
- M. Zobler
- B. Clark
- C. Safford
- B. Ammon
- M. Clark
- M. B. Spencer
- A. Silvia
- J. Bielecki
- J. Maltese
- P. Moulding
- M. Lemoncelli
- S. Vrahoretis
- J. Martin
- T. Campbell
- D. Roth
- M. Maxin
- R. Baum

Document Name: G:\LC\Averbach\Admin\Litigation Reports\Annual Litigation Report 2019

Office:	OGC	OGC	OGC	OGC
Name:	A. Averbach			
Date:	01/10/19			

OFFICIAL RECORD COPY