



POLICY ISSUE **(Information)**

January 29, 2020

SECY-20-0009

FOR: The Commissioners

FROM: Andrew P. Averbach
Solicitor

SUBJECT: ANNUAL REPORT ON COURT LITIGATION (CALENDAR YEAR 2019)

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 10, 2019 (SECY-19-0006). It includes cases filed through the end of 2019 but reflects the status of NRC cases in court as of January 29, 2020.

During the reporting period (Calendar Year 2019), the Commission or NRC officials were sued three times in the courts of appeals,¹ and seven times in federal district court.² During this same period, five cases were closed.³ The number of new filings in 2019 is slightly higher than the number of cases filed in recent years. There were 4 new lawsuits (including cases filed in federal district court and the Court of Federal Claims) in 2018, 3 in 2017, 4 in 2016, 11 in 2015, 6 in 2014, 5 in 2013, 5 in 2012, 11 in 2011, 9 in 2010, and 8 in 2009, for an average of roughly 7 new lawsuits per year over the prior ten years.

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

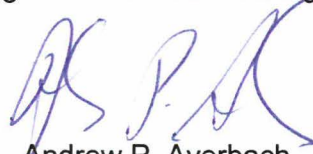
¹ *Massachusetts v. NRC*, No. 19-1198 (D.C. Cir.); *Nuclear Energy Institute v. NRC*, No. 19-1240 (D.C. Cir.); *In Re Public Watchdogs* (No.19-72670) (9th Cir.).

² *Aguirre v. NRC*, Nos. 19-cv-495-BAS-BLM, 19-cv-587-BAS-BLM, 19-cv-1102-BAS-BLM (S.D. Cal.); *Criscione v. NRC*, No. 19-cv-02087-CBD (D. Md.); *Public Watchdogs v. NRC*, No. 3:19-cv-01635-JLS-MSB (S.D. Cal); *Tafazzoli v. NRC*, No. PWG-19-0321 (D. Md.); *Walls v. NRC*, No. 19-cv-02237-PX (D. Md.).

³ *Beyond Nuclear, Inc. v. NRC*, No. 18-1340 (D.C. Cir.); *Nevada v. NRC*, No. 18-1232 (D.C. Cir.); *Berka v. NRC*, No. 1:17-cv-02836-APM (D.D.C.); *Walls v. NRC*, No. 19-cv-02237-PX (D. Md.); *Honeywell International, Inc. v. United States*, No. 18-cv-294 (Fed. Cl.).

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 one new "Touhy" request for NRC testimony, depositions, or other evidence for use in private litigation. See 10 C.F.R. § 9.200 *et seq.*



Andrew P. Averbach
Solicitor

Enclosure:
Litigation Status Report

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SUBJECT: ANNUAL REPORT ON COURT LITIGATION (CALENDAR YEAR 2019) DATED
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LITIGATION STATUS REPORT
(As of January 29, 2020)

ACTIVE CASES¹

Aguirre v. NRC, Nos. 19-cv-495-BAS-BLM, 19-cv-587-BAS-BLM, 19-cv-1102-BAS-BLM (S.D. Cal.)

On March 15, 2019, Michael J. Aguirre filed a complaint in federal district court challenging the agency's treatment of two requests made under the Freedom of Information Act (FOIA) for documents related to spent fuel storage at San Onofre Nuclear Generation Station (SONGS), and, specifically, certain documents related to spent fuel canister misalignment and the discovery of shim pins in an empty canister. The NRC denied Mr. Aguirre's request for expedited processing and administratively closed his requests for failure to make an advance payment for the materials requested and to respond to a request for clarification.

Mr. Aguirre filed a second complaint on March 29, 2019, which has been assigned to the same judge, in which he challenges the agency's response to a second FOIA request related to SONGS (in which Mr. Aguirre requested communications between Southern California Edison (SCE) and the agency concerning enforcement action taken following a 2018 spent fuel canister misalignment incident). Mr. Aguirre made the FOIA request on March 19, 2019, and requested that the agency provide the requested material in advance of a March 25, 2019, webinar, in which he intended to participate. While the agency informed Mr. Aguirre that it would not honor his request for expedited treatment, it has completed the production.

Mr. Aguirre filed a third complaint on June 12, 2019, challenging the agency's response to a third FOIA request for documents reflecting consultations with SCE concerning any proprietary interest SCE may have in the documents he previously requested from the agency. The agency has produced the requested documents.

The Department of Justice (DOJ) filed motions to dismiss the first two complaints on June 13, 2019, asserting that Mr. Aguirre had not exhausted his administrative remedies before the agency and that his claims were premature, and briefing on the motions is complete. DOJ filed a motion to dismiss the third complaint on August 26, 2019, asserting that Mr. Aguirre had not exhausted his administrative remedies and that, in any event, the case was moot. The court has not issued a decision in any of the cases.

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

Criscione v. NRC, No. 19-cv-02087-CBD (D. Md.)

On July 16, 2019, Lawrence Criscione, an NRC employee, filed a complaint asserting whistleblower retaliation in the U.S. District Court for the District of Maryland. Mr. Criscione alleges that the NRC illegally retaliated against him and deprived him of his right to petition Congress in violation of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851(a)(1). Mr.

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, 2020. However, the narratives accompanying the cases listed in this report include any post-January 1 developments.

Criscione filed a complaint in 2014 with the Department of Labor (DOL) containing many of the same allegations he now raises in district court, but, because DOL did not finally resolve his claim within one year, he now seeks de novo review consideration of his claims pursuant to 42 U.S.C. § 5851(b)(4). On December 6, 2019, the Department of Justice filed a motion to dismiss, asserting, among other things, that the United States had not waived its sovereign immunity with respect to claims against the NRC arising under the Energy Reorganization Act, and that certain alleged instances of retaliation alleged in the complaint were barred by the statute of limitations. On January 16, 2020, Mr. Criscione filed an amended complaint. Briefing on the motion to dismiss (which will be applied to the amended complaint) is ongoing.

CONTACT: Vinh D. Hoang, OGC
301-287-9196

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: Elva Bowden Berry, OGC
301-287-0974

Massachusetts v. NRC, No. 19-1198 (D.C. Cir)

On September 25, 2019, the Commonwealth of Massachusetts filed a petition for review challenging various actions of the NRC Staff related to the transfer of the license for the Pilgrim Nuclear Power Station, asserting violations of the Atomic Energy Act (AEA) and the National Environmental Policy Act (NEPA). Massachusetts challenges the license transfer order, an amendment to the Pilgrim license that removed certain requirements related to a contingency fund that the transferor was required to maintain, and an exemption that permits use of money in the decommissioning trust fund for non-decommissioning purposes. Massachusetts also filed a request to stay the applicability of these regulatory actions while they are being litigated before the Commission. The NRC and DOJ filed a response to the motion to stay, together with a motion to dismiss based on the lack of finality of the underlying decisions, on November 22, 2019, and briefing was completed on January 29, 2019. Because the Commission issued a ruling (CLI-19-11) on Massachusetts's request for a stay of the underlying actions on December 17, 2019, Massachusetts withdrew its request for a judicial stay. However, on January 22, 2020, it filed a new petition for review challenging the Commission's decision in CLI-19-11. No action has yet been taken with respect to that petition.

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

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

On July 2, 2018, Daniel Miles appealed an Equal Employment Opportunity Commission (EEOC) decision involving his claims of discrimination to the U.S. District Court for the Northern District

of Illinois. Mr. Miles sought class certification and a variety of remedies for himself. After the EEOC denied class certification, Mr. Miles did not participate in proceedings regarding his individual claims. On September 25, 2019 the Court dismissed the case. In December 2019, Miles appealed. The United States, represented by the Department of Justice, has an opportunity to respond to his appeal.

CONTACT: Garrett Henderson, OGC
301-287-9214

Nuclear Energy Institute v. NRC, No. 19-1240 (D.C. Cir.)

On November 15, 2019, the Nuclear Energy Institute (NEI) filed a petition for review challenging the agency's conclusion, expressed in Regulatory Issue Summary 2016-11 and reaffirmed in a letter dated September 16, 2019, that the agency, rather than Agreement States, must approve requests from reactor licensees made pursuant to 10 C.F.R. § 20.2002 to dispose of low-level radioactive waste. The court has issued a schedule for procedural filings and motion practice, including a deadline of February 10, 2020, for the NRC to file a dispositive motion.

CONTACT: Jennifer Scro, OGC
301-287-9081

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. Suttenger, OGC
301-287-9154

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. The case has now been administratively stayed, pending further developments.

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

Public Watchdogs v. NRC, No. 3:19-cv-01635-JLS-MSB (S.D. Cal), *appeal docketed*, No. 19-56531 (9th Cir.)

On August 29, 2019, Public Watchdogs filed a complaint, together with a request for a temporary restraining order, challenging the agency's 2015 issuance of a license amendment regarding SONGS Units 2 and 3 and the use at SONGS of a dry cask storage system manufactured by Holtec International and maintained by SCE. Public Watchdogs raised claims against the NRC under the Administrative Procedure Act and against SCE, Holtec, and others under California law, and sought to suspend future loading of spent fuel into the Holtec system. The court did not issue immediate relief and directed that the defendants respond. On September 6, 2019, DOJ filed a motion to dismiss the claim against the NRC for lack of jurisdiction, asserting that the case arose as a challenge to a licensing decision under the Hobbs Act, 28 U.S.C. § 2342, and that, as such, it could only have been brought in the court of appeals within sixty days of issuance of the amendment. On September 10, 2019, DOJ filed a separate response to the request for injunctive relief, reasserting its jurisdictional arguments and contending that Public Watchdogs could not succeed on the merits, had failed to establish irreparable harm, and that the safety concerns that it raised were properly brought to the agency via a petition under 10 C.F.R. § 2.206 or 2.802. The other defendants also filed responses on September 20, asserting that the state law claims were barred for lack of jurisdiction and because they are preempted by the Atomic Energy Act, and arguing that permitting fuel loading to continue would not cause irreparable harm. A hearing on the outstanding motions was held on November 25, 2019, and the court issued a decision on December 3, 2019, dismissing the complaint with prejudice. The court found that the majority of the agency actions that Public Watchdogs challenged were reviewable solely under the Hobbs Act or were time-barred, and that the remainder were either enforcement decisions that were unreviewable as a matter of law or raised arguments that Public Watchdogs lacked standing to bring. The court also dismissed the claims against the private defendants for failure to state a claim upon which relief could be granted.

On December 31, 2019, Public Watchdogs appealed the district court's decision to the Ninth Circuit. Briefing is expected to be completed in the Spring of 2020.

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

In Re Public Watchdogs (No. 19-72670) (9th Cir.)

On October 21, 2019, Public Watchdogs filed a petition for a writ of mandamus in the U.S. Court of Appeals for the Ninth Circuit, asserting that the agency had failed to take timely action on Public Watchdogs' petition under 10 C.F.R. § 2.206, which had been filed with the agency on September 24, 2019. Public Watchdogs' petition before the agency sought to require the NRC to take action to halt the loading of spent fuel into canisters at SONGS, and its petition for review sought the suspension of all decommissioning-related operations until the agency issues

a decision on the 2.206 petition. On November 21, 2019, the court requested a response from the agency, which was filed on December 9, 2019. Public Watchdogs filed a reply on December 16, 2019. The court denied the mandamus petition on December 20, 2019. The deadline for filing a petition for certiorari before the Supreme Court is March 19, 2020. The underlying 2.206 petition remains under consideration.

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

Tafazzoli v. NRC, No. PWG-19-0321 (D. Md.)

On February 3, 2019, Sheiba Tafazzoli appealed a Final Agency Decision against her on a constructive discharge claim in the U.S. District Court in the District of Maryland. In addition to constructive discharge, she alleges gender, color, and disability discrimination, hostile work environment, retaliation for previous protected activity, and failure to provide reasonable accommodations. On December 6, 2019, the United States, represented by the Department of Justice, submitted a motion to dismiss/motion for summary judgment.

CONTACT: Garrett Henderson, OGC
301-287-9214

CLOSED CASES

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 did not appeal the decision, although he did submit a new petition for rulemaking on December 26, 2018.

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, objected to the motion and informed the court they intended to move to dismiss the case for lack of finality. On February 15, 2019, the court issued orders deferring consideration of the motion to hold the case in abeyance and setting a schedule for various pretrial filings, including a deadline of April 1, 2019, for respondents' motion to dismiss, which was timely filed. On June 13, 2019, the court issued an order granting the motion to dismiss and ruling that, in light of the pendency of the proceedings before the agency, the order under review was neither final within the meaning of 28 U.S.C. § 2342(4) nor ripe for review. Beyond Nuclear did not seek rehearing before the D.C. Circuit, and the deadline to seek review before the Supreme Court expired on September 11, 2019.

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

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. The court held oral argument on February 21, 2019, and, on February 25, 2019, it issued a decision in favor of Honeywell, ruling that the work at issue was performed in furtherance of an enforcement order, which it deemed to be a form of sanction, and that fees should therefore not have been billed pursuant to Part 170. The court entered judgment in favor of Honeywell on April 10, 2019, in the amount of \$1,946,450.50. The deadline for the Department of Justice to file an appeal has passed.

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

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's time to seek review before the Supreme Court expired on March 28, 2019.

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

Walls v. U.S. Nuclear Regulatory Commission, No. 19-cv-02237-PX (D. Md.)

On October 8, 2019, Carol Walls filed a complaint in the United States District Court for the District of Maryland, alleging discrimination based on age, disability, harassment and retaliation. The Agency settled the case on December 12, 2019, prior to any action being taken in the District Court.

CONTACT: Elva Bowden Berry, OGC
301-287-0974

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 is also 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. Discovery has resumed following the denial of some of the private defendants' motion to dismiss.

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

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. NRC was asked to produce relevant documents, largely relating to AEC source materials licenses. Atlantic Richfield negotiated an administrative order on consent with the Environmental Protection Agency, and has asserted a claim under CERCLA to recover response costs from the United States based on its participation in efforts to procure uranium for defense purposes. Discovery is ongoing.

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

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 completed its document production. On January 22, 2020, EPEC and the Corps of Engineers moved for the entry of a consent decree that would settle EPEC's claims against the government.

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