

ADJUDICATORY ISSUE

(Information)

SECY-06-0031

February 9, 2006

FOR: The Commission

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

SUBJECT: ANNUAL REPORT ON COURT LITIGATION (CALENDAR YEAR 2005)

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 27, 2005 (SECY-04-0021). This report reflects the status of NRC cases in court as of February 9, 2005⁶

During the reporting period (calendar year 2005), the Commission, its officials, or the United States were sued five times in the courts of appeals¹ and three times in federal district court.² In addition, the United States (through the Department of Justice) acted on the Commission's behalf in (a) bringing a damages lawsuit,³ (b) moving to intervene in a CERCLA clean up case,⁴ and (c) filing two *amicus curiae* briefs,⁵ one in a preemption case and one in a bankruptcy case.

¹ *County of Suffolk v. NRC*, No. 05-6684-ag (2d Cir.); *Farmer v. NRC*, No. 05-70718 (9th Cir.); *Nevada v. NRC*, No. 05-1350 (D.C. Cir.); *Ohngo Gaudadeh Devia v. NRC*, No. 05-1419 (D.C. Cir.); *Utah v. NRC*, No. 05-1420 (D.C. Cir.).

² *Viacom Inc. v. United States*, No. 1:05-cv-00468 ESH (D.D.C.); *Curtiss-Wright Electro-Mechanical Corp. v. United States*, No. 05-CV-0813 (W.D. Pa.); *Engelhard Corp. v. United States*, No. 05-11241-JLT (D. Mass.).

³ *United States v. Science Applications International Corp.*, No. 04-CV-1543 (RWR) (D.D.C.). (This lawsuit actually was filed in late 2004, but I inadvertently did not report it in last year's litigation status report.)

⁴ *Missouri v. Westinghouse Electric, L.L.C.*, No. 4:05-CV-00315 SNL (E.D. Mo.).

⁵ *Nielson v. Private Fuel Storage, L.L.C.*, No. 04-575 (S. Ct.); *In re: Babcock & Wilcox Co.*, No. 05-232 (E.D. La.).

During this same one-year period eight cases were closed.⁶ The 11 new court cases in 2005 are roughly in line with what we have come to expect over the past decade. There were 13 new cases in 2004, 14 in 2003, 8 in 2002, 5 in 2001, 9 in 2000, 15 in 1999, 12 in 1998, 4 in 1997, and 10 in 1996, for an average of roughly 10 new cases per year.

We also handled seven requests (so-called "*Touhy*" requests) for NRC testimony, depositions or other evidence for use in private litigation in 2005. The seven *Touhy* requests in 2005 are about half as many as last year (13), but generally consistent with recent trends. A decade ago we saw as many as 20-30 *Touhy* requests per year. In recent years 10 *Touhy* requests or so are more typical.

Finally, in 2005 we handled several labor-intensive document requests (discovery) in lawsuits against the government not directly involving the NRC. These document requests came chiefly in a series of money damage suits arising out of the Department of Energy's failure to meet its statutory deadline (1998) for opening a high-level waste repository. We also continued to collect documents connected to the government-wide *Jicarilla-Laguna* Indian trust litigation.

Attachment: Litigation Status Report

⁶ *In re: Babcock & Wilcox Co.*, No. 05-232 (E.D. La.); *Citizens Awareness Network v. United States*, Nos. 04-1145 & 04-1359 (1st Cir.); *Dean v. Diaz*, No. 8:04-cv-02686-RWT (D. Md); *Long v. Meserve*, No. 1:03-cv-00142-BBM (N.D. Ga.); *Public Citizen v. NRC*, No. 04-1293 (D.C. Cir.); *Skull Valley Band of Goshute Indians v. Nielson*, No. 02-4149 (10th Cir.), *cert. denied sub nom. Nielson v. Private Fuel Storage, L.L.C.*, No. 04-575 (S.Ct.); *Toro v. Meserve*, No. 1:03-cv-00988-WMN (D. Md.).

LITIGATION STATUS REPORT
(As of Feb. 9, 2006)

ACTIVE CASES⁷

Cheh v. Diaz, No. 8:03-cv-02414-AW (D. Md.), *appeal pending*, No. 04-2086 (4th Cir.)

This personnel lawsuit complains of discrimination and reprisal. The district court entered summary judgment for the NRC. Plaintiff has appealed to the Fourth Circuit. NRC lawyers are working with the United States Attorney's office in Baltimore on this case.

CONTACT: Marvin L. Itzkowitz
415-1550

County of Suffolk v. NRC, No. 05-6684-ag (2d Cir.)

Petitioner, a county in New York, challenges a Commission adjudicatory decision turning down a request for a hearing on emergency planning issues in connection with Millstone's license renewal application. The Commission stressed that its regulations expressly exclude emergency planning from the license renewal inquiry.

The court of appeals has set a briefing schedule making our brief due in April. It is also possible that petitioner will withdraw its lawsuit.

CONTACT: Jared K. Heck
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Curtiss-Wright Electro-Mechanical Corp. v. United States, No. 05-CV-0813 (W.D. Pa.).

In this case, a subsidiary of Westinghouse is suing the government under CERCLA in an attempt to recover clean-up and decommissioning costs. Westinghouse contends that the U.S. is liable for some of the costs because (1) the AEC contracted with the site for fuel for the Navy and some of the contamination results from those contracts, and (2) the AEC allegedly allowed the owners to bury wastes at the site.

The case is in discovery. NRC has contributed documents and NRC lawyers are working with Justice Department lawyers in preparing pleadings.

CONTACT: Charles E. Mullins
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⁷ For statistical purposes, we list as "active" any case that was pending before a court as of January 1, 2006. The narratives accompanying each listed case include post-January 1 developments.

Engelhard Corp. v. United States, No. 05-11241-JLT (D. Mass.)

This lawsuit seeks money damages from the United States arising out of the clean-up of a former nuclear fuels facility in Plainville, Massachusetts. Engelhard argues that the United States (*i.e.*, the AEC) exercised sufficient “control” over the nuclear manufacturing operation that the United States may be held liable as an “operator” under CERCLA. Engelhard also invokes RCRA, “federal common law,” and the Declaratory Judgment Act.

The government has filed a motion to dismiss large portions of the lawsuit. The Justice Department is taking the lead on this lawsuit, with support from NRC lawyers.

CONTACT: Susan G. Fonner
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Farmer v. NRC, No. 05-70718 (9th Cir.)

This lawsuit challenges a Commission adjudicatory decision refusing to allow a state employee-“whistleblower” to obtain a hearing to demand more stringent enforcement relief than the NRC staff ordered. After a court of appeals mediator made an extensive but unsuccessful effort to broker a settlement of the case, petitioner’s lawyer withdrew and petitioner was left to seek a judicial remedy *pro se*. So far he has not yet filed a brief. It is unclear whether petitioner will pursue the case.

The court of appeals has consolidated this lawsuit with a separate suit petitioner brought against the Department of Labor. DOL denied petitioner’s whistleblowing complaint (seeking damages) on the ground of state sovereign immunity.

CONTACT: Jared K. Heck
415-1623

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

This is one of three companion Price-Anderson lawsuits seeking government reimbursement for damages, attorney’s fees, and costs incurred in a private tort suit. Millions of dollars in Price-Anderson claims are at stake in the three cases.

The underlying private tort suit, *Heinrich v. Sweet*, arose out of alleged medical misuse of an NRC-licensed research reactor at MIT. The reactor was used (decades ago) for “boron neutron capture therapy,” which allegedly harmed rather than helped cancer patients. The United States Court of Appeals for the First Circuit ruled in 2003 that plaintiffs were not entitled to damages, and the Supreme Court denied *certiorari*. Invoking a 1959 Price-Anderson indemnity agreement between MIT and the Atomic Energy Commission, Massachusetts General Hospital claims reimbursement from the government for the substantial legal fees and costs it incurred in defending the *Heinrich* lawsuit.

We are working with the Department of Justice on the defense of the hospital's Price-Anderson lawsuit, along with two companion suits (*MIT v. United States* and *Sweet v. United States*). In 2002, the Claims Court (Firestone, J.) rejected our argument, in a summary judgment motion, that Price-Anderson does not cover what are, in essence, medical malpractice claims.

We now are litigating questions concerning the amount of damages (legal fees and costs expended in the tort cases), if any, that plaintiffs can collect. Ultimately, after the court renders final judgment, the government may appeal the Claims Court's threshold ruling that Price-Anderson applies to cases like this. The government is also exploring the possibility of settlement.

CONTACT: Marjorie S. Nordlinger
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 Price-Anderson 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 MIT. The Claims Court judge rejected our argument that such claims fall outside Price-Anderson. As explained above (in the discussion of *Massachusetts General Hospital*), the Claims Court rejected our threshold argument on Price-Anderson's applicability, and we currently are pursuing other defenses.

CONTACT: Marjorie S. Nordlinger
415-1616

Missouri v. Westinghouse Electric, L.L.C., No. 4:05-CV-00315 SNL (E.D. Mo.)

The State of Missouri sued Westinghouse under state and federal law (CERCLA) to clean up the contaminated Hematite site (the location of a former nuclear fuels manufacturing facility). Missouri and Westinghouse have lodged a proposed consent decree that ostensibly would give Missouri regulatory jurisdiction over nuclear materials.

On behalf of the NRC and the Department of Energy, the United States has filed a motion to intervene to protect federal responsibilities against state encroachment and to protect federal financial interests. NRC lawyers are collaborating with Justice Department lawyers on the case. The district court has not yet acted on the government's motion to intervene.

CONTACT: Charles E. Mullins
415-1618

Nevada v. NRC, No. 05-1350 (D.C. Cir.)

In this case, Nevada challenges the Commission's denial of a petition for rulemaking seeking changes in the NRC's "Waste Confidence Rule." Nevada maintains that the rule – which (among other things) envisions a permanent high-level waste repository by 2025 – places the NRC under inappropriate pressure to approve DOE's expected license application for the proposed Yucca Mountain HLW facility. We moved to dismiss Nevada's suit for lack of standing, but the court of appeals' motions panel deferred action on the motion until after full briefing and argument of the entire case. There is no briefing schedule yet.

CONTACT: Steven F. Crockett
415-2871

Nuclear Information and Resource Service v. NRC, No. 04-71432 (9th Cir.)

Petitioners in this case seek judicial review of recent NRC amendments to its transportation safety regulations (10 C.F.R. Part 71). Petitioners say that the NRC failed to do an adequate NEPA analysis in connection with the rule amendments. The court of appeals originally held the suit in abeyance to await completion of a related rulemaking at the Department of Transportation. Once DOT issued its regulations, petitioners brought suit against DOT in federal district court in San Francisco. The district court threw out the case against DOT for lack of jurisdiction, but petitioners have appealed that ruling to the court of appeals.

Both our case and the DOT case now have been fully briefed, and the court of appeals has consolidated the two cases. The court has set no oral argument date.

CONTACT: Grace H. Kim
415-1607

Ohngo Gaudadeh Devia v. NRC, No. 05-1419 (D.C. Cir.)

This lawsuit challenges a series of Commission adjudicatory decisions resulting in an authorization to the NRC staff to license the proposed Private Fuel Storage ISFSI in Utah. The court of appeals has consolidated Ohngo Gaudadeh Devia's suit with a companion suit filed by the State of Utah (No. 05-1420). We anticipate that the two petitioners will raise a wide array of challenges to the PFS facility. The court has not yet set a briefing schedule.

CONTACT: Grace H. Kim
415-1607

Public Citizen v. NRC, No. 03-1181 (D.C. Cir.)

This lawsuit argues that the Commission unlawfully imposed new "design basis threat" requirements through orders it issued in 2003 without prior notice and public comment. Petitioners claim that the Commission may not alter agency rules without invoking the

rulemaking process. After briefing and oral argument, the court of appeals held this case in abeyance pending the NRC's then-expected, and now ongoing, "design basis threat" (DBT) rulemaking. By court order, we periodically report to the court on the progress of the DBT rulemaking.

CONTACT: Jared K. Heck
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San Luis Obispo Mothers for Peace v. NRC, No. 03-74628 (9th Cir.)

This lawsuit challenges two Commission adjudicatory decisions in a proceeding to license an ISFSI at Diablo Canyon. The first decision declined to suspend ISFSI licensing proceedings to await NRC security enhancements, and the second rejected contentions demanding an environmental impact statement considering the potential effects of terrorism. Petitioners maintain, among other things, that the threat of terrorism is sufficiently tangible to require a NEPA review and that the Commission erred in simply following a prior NEPA-terrorism ruling (in the *PFS* litigation) rather than adjudicating the issue anew. The case was argued in October 2005, and is awaiting decision.

CONTACT: Charles E. Mullins
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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," conducted by Dr. William Sweet decades ago. Dr. Sweet, like MIT and Mass General, seeks from the government Price-Anderson reimbursement for his legal fees and costs. As noted above (in the discussions of the *Massachusetts General* and *MIT* cases), the Claims Court rejected our argument that medical malpractice-type claims lie outside Price-Anderson. In consultation with DOJ, we currently are pursuing other defenses.

CONTACT: Marjorie S. Nordlinger
415-1616

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

The government sued SAIC 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. Department of Justice lawyers are taking the lead in this case, with support from NRC lawyers.

CONTACT: Marvin L. Itzkowitz
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Utah v. NRC, No. 05-1420 (D. C. Cir.)

This suit, like *Ohngo Devia Gaudadeh v. NRC*, NO. 05-1419 (D.C. Cir.), attacks the Commission adjudicatory decisions authorizing the licensing of the proposed Private Fuel Storage ISFSI. The court of appeals has consolidated the two cases, but has not yet set a briefing schedule.

CONTACT: Grace H. Kim
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Viacom Inc. v. United States, No. 1:05-cv-00468 ESH (D.D.C.)

This lawsuit seeks CERCLA seeks reimbursement of response costs under CERCLA. The case arises out of the clean-up of a former Westinghouse facility in Bloomfield, New Jersey. Plaintiff says that much of the remediation of the facility was done under the supervision of the NRC and that the NRC was satisfied with the work as of 1973, when it terminated the Viacom license. The case is now in discovery.

CONTACT: Jared K. Heck
415-1623

Westinghouse Electric Co. v. United States, No. 4:03-CV-00861 (DDN) (E. D. Mo.)

This is a lawsuit for government contribution under CERCLA for cleanup of the Hematite site in Missouri. We are working with the Justice Department in defending the suit. Discovery is ongoing. The United States is seeking to intervene in a companion suit, *Missouri v. Westinghouse Electric Co.*, involving the State of Missouri's effort to "settle" with Westinghouse in a way that compromises the federal government's interests.

CONTACT: Charles E. Mullins
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CLOSED CASES

In re: Babcock & Wilcox Co., No. 05-232 (E.D. La.)

This is a complex bankruptcy proceeding. A bankruptcy judge in Louisiana ruled in 2004 that notwithstanding the Price-Anderson Act a bankruptcy settlement could provide for distributing millions of dollars in damages allegedly caused by radiation. A group of nuclear insurers appealed the decision to the federal district court in New Orleans. At our urging, the Department of Justice filed a "Statement of Interest of the United States" – bankruptcy terminology for an *amicus curiae* brief – arguing that Price-Anderson procedures and protective provisions ordinarily should govern radiation tort claims, whether a company is in bankruptcy or not.

Shortly after our filing, and perhaps in reaction to it, the parties to the bankruptcy proceeding renegotiated their settlement. This time, the settlement excluded radiation tort claims. The district court therefore did not rule on the question raised in our *amicus* brief.

CONTACT: Marjorie S. Nordlinger
415-1616

Citizens Awareness Network v. United States, Nos. 04-1145 & 04-1359 (1st Cir., decided Dec. 10, 2004)

In these consolidated cases various advocacy groups challenged the NRC's new Part 2 hearing process. One of the cases, *Public Citizen v. NRC*, originally was filed in the D.C. Circuit, but was transferred to the First Circuit by operation of law (28 U.S.C. § 2112). The First Circuit rejected our motion to transfer all the cases back to the D.C. Circuit. The consolidated cases then proceeded to briefing and oral argument in the First Circuit.

Petitioners' chief claim was that the NRC is required by law – the Atomic Energy Act (AEA) and the Administrative Procedure Act (APA) – to provide formal, “on-the-record” adjudicatory hearings in reactor licensing cases. Without reaching that question, the court of appeals (*Selya & Howard, JJ.*, Lipez, J., concurring) agreed with our argument that the NRC's new procedures meet the APA's requirements for “on-the-record” hearings. The court explicitly left open the question whether the AEA's hearing requirement (§ 189) requires such hearings or, as the NRC has argued, leaves room for the agency to provide a less formal process.

The court addressed the subjects of discovery and cross-examination in some detail. The court said that the APA does not mandate discovery of any kind and that, in any event, the new rules' requirement of “mandatory disclosure” seemingly compensates for the loss of “traditional discovery.” As for cross-examination, the court pointed out that the NRC's new rules do not bar cross-examination outright but, like the APA, allow cross-examination when necessary to complete an adequate record. The court brushed aside as “meritless” petitioners' constitutional arguments for additional procedures at NRC hearings.

The court, and particularly the concurring Judge, expressed some concern that the NRC had taken the position that its new rule satisfied APA requirements “belatedly,” thus forcing an extended and unnecessary debate during the Part 2 rulemaking on the NRC's authority to depart from the APA. But in the end the judges agreed that “we cannot say that the Commission's desire for more expeditious adjudications is unreasonable, nor can we say that the changes embodied in the new rules are an eccentric or plainly inadequate means for achieving the Commission's goals.”

An intervenor on petitioners' side, the National Whistleblower Center, petitioned for rehearing *en banc*. The court turned down the petition. No one sought Supreme Court review.

CONTACT: Steven F. Crockett
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Dean v. Diaz, No. 8:04-civ-02686-RWT (D. Md.)

This is a employment discrimination case in which the government sought summary judgment. The district court ultimately dismissed the suit. NRC lawyers worked with the United States Attorney's office in Baltimore on this case.

CONTACT: Marvin L. Itzkowitz
415-1550

Long v. Meserve, No. 1:03-cv-00142-BBM (N.D. Ga.)

This was an employment discrimination case. The government reached a settlement with plaintiff just before trial. NRC lawyers worked with the United States Attorney's office in Georgia on this case.

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Public Citizen v. NRC, No. 04-1293 (D.C. Cir.)

This lawsuit challenged Commission security orders directed against licensees who transport spent nuclear fuel. Petitioner characterized the NRC orders as regulations improperly issued without notice and comment. To avoid jurisdictional issues, petitioner also made its notice-and-comment claim in a hearing request filed with the NRC. After the Commission turned down the hearing request, petitioner decided to withdraw its suit.

CONTACT: Jared K. Heck
415-1623

Skull Valley Band of Goshute Indians v. Nielson, No. 02-4149 (10th Cir., decided August 4, 2004), *cert. denied sub nom. Nielson v. Private Fuel Storage, L.L.C.*, No. 04-575 (S.Ct.)

In this case the United States Court of Appeals for the Tenth Circuit (*Henry, McConnell & Seymour, JJ*), affirmed a federal district court decision striking down various Utah laws regulating storage and transportation of spent nuclear fuel.

The court of appeals found the Utah laws -- enacted to make difficult or impossible the proposed Private Fuel Storage (PFS) facility for interim storage of spent nuclear fuel -- preempted by federal law. PFS-related health and safety issues, the court reasoned, are for the NRC, not the state, to decide. The court stressed that Utah's concerns "have been considered in the extensive regulatory proceedings before the NRC." The court said that it was "hopeful that Utah's concerns -- and those of any state facing this issue in the future -- will receive fair and full consideration there."

In its opinion the court expressed its agreement with *Bullcreek v. NRC*, 359 F.3d 536 (D.C. Cir. 2004), where the D.C. Circuit rejected Utah's argument that the Nuclear Waste Policy Act

prohibited the NRC from licensing an away-from-reactor spent fuel storage facility. The court also agreed with the government's *amicus curiae* brief that issues relating to NRC licensing authority cannot be litigated in ordinary federal district court litigation, but only through the special judicial review scheme (direct review in the court of appeals) established by the Atomic Energy Act and the Hobbs Act.

Utah then sought certiorari in the Supreme Court. Utah maintained that PFS's (and the Skull Valley Band of Goshutes') preemption-based challenge to Utah's laws was unripe and in any event invalid. The Court asked the Solicitor General to file a brief for the United States. We collaborated with DOJ on that brief – which offered arguments supporting the Tenth Circuit's ripeness and preemption holdings. The Court denied certiorari.

CONTACT: Grace H. Kim
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Toro v. Meserve, No. 1:03-cv-00988-WMN (D. Md.)

This was an employment discrimination lawsuit. Working with the United States Attorney's office in Baltimore, the NRC participated in discovery and ultimately obtained a dismissal of the case without prejudice.

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