February 7, 2000 SECY-00-0029

FOR: The Commission

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

SUBJECT: LITIGATION REPORT - 2000 - 01

Dienethal v. NRC, No. 99-1132 (D.C. Cir., decided January 21, 2000)

Petitioner in this case challenged a license amendment for Commonwealth Edison's shut-down Zion reactor. The amendment, among other things, removed a requirement that radiation protection personnel ("RPP") be present 24 hours a day. The Licensing Board dismissed the hearing request for lack of standing. On appeal to the Commission (and ultimately to the court of appeals), petitioner maintained that, as a nearby resident, he had standing because a reduction in RPP increased the risk that radiation would migrate offsite and injure him. The Commission turned down petitioner's appeal, holding that he had failed to raise his RPP argument for standing before the Board, and that his argument lacked substance given Zion's shutdown. Petitioner then brought this lawsuit.

Ten days after oral argument in the court of appeals, the panel of judges (Williams, Randolph & Tatel, JJ) issued a one page judgment-order denying the petition for judicial review on the ground that "[t]here is no reversible error in the procedural reasons on which the Commission relies, and they are sufficient to justify the Commission's decision."

Petitioner has 45 days to seek rehearing and 90 days to seek Supreme Court review.

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National Whistleblower Center v. NRC, Nos. 99-1002 & 99-1043 (D.C. Cir., rehearing granted November 22, 1999)

As reported previously (Litigation Report 1999-6, SECY-99-274), on November 12 a split panel of the D.C. Circuit issued a decision requiring the Commission to reconsider whether to grant the sole potential intervenor in the Calvert Cliffs license renewal proceeding an extension of time to formulate and file contentions. The panel reasoned that the Commission improperly

had stiffened its extension-of-time standards, moving from a "good cause" test to an "unavoidable and extreme circumstances" test, without providing advance notice and opportunity for public comment.

Ten days later, on its own motion, the court reconsidered. It vacated the panel decision and set the case for supplemental briefing and oral argument. Chief Judge Edwards explained that the vacated panel opinion "fails to address some critical issues in this case," pointing in particular to the apparent "procedural" nature of the agency's extension-of-time rule and to the Commission's legal flexibility to alter procedural rules without prior notice and comment.

We now have filed supplemental briefs, on issues specified by the court, and we are awaiting a March 2 oral argument date. The original January 26 argument date was postponed due to a snowstorm.

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Grand Canyon Trust v. NRC, No. 99-70922 (9th Cir., order denying motion to dismiss issued January 28, 2000)

This petition for review challenges the Commission's failure to grant emergency relief on a section 2.206 petition and also the agency's issuance of a license amendment approving a reclamation plan for the former Atlas mill tailings site in Moab, Utah. Petitioners' principal claim is that the NRC licensing action violates the Endangered Species Act by not taking adequate account of endangered fish in the Colorado River.

Petitioners filed an opening brief in October, but we filed a motion to dismiss their lawsuit as premature. We argued that petitioners ought not be permitted to seek court of appeals relief setting aside the Moab reclamation plan where, as here, they also are challenging the same plan in a pending ASLBP proceeding. The Ninth Circuit's "Appellate Commissioner" has denied our motion "without prejudice" to our renewing the prematurity argument in a full answering brief. We now will file the brief as directed.

Petitioners are seeking Endangered Species Act relief not only before the ASLBP and the court of appeals, but also before a federal district court in Utah.

CONTACT: Marjorie S. Nordlinger
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Eastern Navajo Dine v. NRC, Nos. 99-1190, 99-1194, 99-1195 & 99-1196 (D.C. Cir., sanctions order issued Nov. 24, 1999)

Several months ago the court of appeals (Silberman, Henderson & Tatel, JJ) dismissed as premature petitioners' challenge to several interlocutory adjudicatory orders in the pending Hydro Resources case and ordered petitioners to show cause why they should not be assessed sanctions for bringing clearly groundless lawsuits. Subsequently, in a November 24 order, the court in fact assessed sanctions and asked us to "submit documentation supporting [our] fees and costs within 30 days."

We consulted with the Department of Justice, and prepared papers seeking $6,258.59. This figure reflected attorney salaries, overhead and printing expenses associated with our motion to dismiss (and a reply memorandum). Petitioners did not object to our figure and in fact promptly submitted a check in the requested amount. The court of appeals, though, has not yet issued a final order reducing the sanctions to an amount certain.

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Envirocare of Utah v. NRC, No. 99-1294 (D.C. Circuit, order of dismissal issued Nov. 26, 1999)

In October, the court of appeals upheld a Commission decision refusing to grant "competitor's" standing to Envirocare to intervene in licensing proceedings involving Quivira Mining and International Uranium. Envirocare of Utah v. NRC, 194 F.3d 72 (D.C. Cir. 1999). See Litigation Report 1999-6, SECY-99-274. Subsequently, Envirocare decided to withdraw this companion lawsuit, which had been held in abeyance. This lawsuit challenged the NRC's rejection of a section 2.206 petition attacking a license amendment granted to International Uranium. The court of appeals granted Envirocare's motion to dismiss its petition for review voluntarily. No briefs had been filed.

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Westinghouse Electric Co. v. United States, No. 99-1015C (U.S. Court of Federal Claims, filed Dec. 23, 1999)

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

Plaintiff has named the United States, the NRC and the Department of Energy as defendants in the case. We are investigating the facts to see whether there is a basis for claiming no NRC involvement. Department of Justice lawyers are representing the government in the Court of Federal Claims.

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