

**POLICY ISSUE**  
(INFORMATION)

January 26, 2017

SECY-17-0012

FOR: The Commissioners

FROM: Andrew P. Averbach **/RA/**  
Solicitor

SUBJECT: ANNUAL REPORT ON COURT LITIGATION (CALENDAR YEAR 2016)

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 February 17, 2016 (SECY-16-0015). It includes cases filed through the end of 2016 but reflects the status of NRC cases in court as of January 26, 2017.

During the reporting period (Calendar Year 2016), the Commission or NRC officials were sued 4 times in the courts of appeals.<sup>1</sup> No suits were commenced in federal district court. During this same period, seventeen cases were closed.<sup>2</sup> The number of new filings in 2016 is smaller than

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

---

<sup>1</sup> *Friends of the Earth v. NRC*, No. 16-1004 (D.C. Cir.); *Friends of the Earth v. NRC*, No. 16-1189 (D.C. Cir.); *Natural Resources Defense Council v. NRC*, No. 16-1298 (D.C. Cir.); *Sustainable Energy & Economic Development Coalition*, No. 16-1108 (D.C. Cir.).

<sup>2</sup> Eleven of these closed cases were either direct challenges to the Commission's Continued Storage Rule, *New York v. NRC*, No. 14-1210 (D.C. Cir.); *Prairie Island Indian Community v. NRC*, No. 14-1212 (D.C. Cir.); *Beyond Nuclear, Inc. v. NRC*, No. 14-1216 (D.C. Cir.); *Natural Resources Defense Council v. NRC*, No. 14-1217 (D.C. Cir.), or were challenges to the application of the rule in reactor licensing proceedings, *Missouri Coalition for the Environment v. NRC*, 15-1114 (D.C. Cir.); *Blue Ridge Environmental Defense League v. NRC*, No. 15-1258 (D.C. Cir.); *Blue Ridge Environmental Defense League v. NRC*, No. 15-1259 (D.C. Cir.); *Blue Ridge Environmental Defense League*, No. 15-1260 (D.C. Cir.); *Nuclear Information Research Service v. NRC*, No. 15-1261 (D.C. Cir.); *Sustainable Energy & Economic Development Coalition v. NRC*, No. 15-1262 (D.C. Cir.); *Southern Alliance for Clean Energy v. NRC*, No. 15-1427 (D.C. Cir.). The remaining five were either challenges to decisions relating to operating reactor licensing or operations, *Friends of the Earth v. NRC*, No. 14-1213 (D.C. Cir.); *Natural Resources Defense Council v. NRC*, No. 14-1225 (D.C. Cir.); *Vermont v. NRC*, No. 15-1279 (D.C. Cir.); *Friends of the Earth v. NRC*, No. 16-1189 (D.C. Cir.); *Brodsky v. NRC*, No. 15-1330 (2d Cir.), or district court actions involving personnel matters, *Thompson v. NRC*, No. 1:15-01302-RDB (D. Md.)

the number of new filings last year (the total for which was largely driven by challenges associated with the Continued Storage Rule). There were 10 new lawsuits (including cases filed in federal district court) in 2015; 6 in 2014; 3 in 2013; 5 in 2012, 11 in 2011, 9 in 2010, 8 in 2009, 13 in 2008, 11 in 2007, and 8 in 2006, for an average of 8.4 new lawsuits per year over the prior ten years.

We continue to handle a steady stream of discovery demands 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. The descriptions of cases set forth in the enclosed report include the more significant cases of this type (though they are not included in the count of cases filed against the Commission). Much of this work involves responding to requests for documents related to the activities of the Atomic Energy Commission (AEC) and/or its licensees. This work also includes working with the Department of Justice to review pleadings and implementing litigation holds for materials that may be relevant to ongoing litigation.

During this reporting period we also handled 3 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 26, 2017)

**ACTIVE CASES<sup>1</sup>**

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

This petition for review challenges two orders associated with NRC's issuance of a combined license to DTE Electric Company 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 NRC's NEPA compliance with respect to consideration of the environmental impacts of the anticipated transmission corridor for Fermi Unit 3. The Commission also declined in that order to permit the Board to consider, on a *sua sponte* basis in a contested proceeding, NEPA issues related to the transmission corridor. In the second order (CLI-14-3), the Commission denied Beyond Nuclear's petition to review the Board's ruling in favor of the applicant on its challenge to the adequacy of the applicant's quality assurance program. In its petition for review, Beyond Nuclear argues that these Commission decisions should be reversed and remanded. Beyond Nuclear filed its opening brief on October 28, 2016, and reply brief on December 23, 2016; NRC and intervenor DTE Energy Company filed their briefs on December 6, 2016. Oral argument is expected in spring 2017.

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

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

Friends of the Earth (FOE) seeks review of a Commission decision (CLI-15-21) that denied its attempt to intervene in NRC proceedings related to the renewal of the Diablo Canyon operating licenses. FOE argued before the Commission that the operating licenses for Diablo Canyon Units 1 and 2 may not be renewed until the agency explores, in an evidentiary hearing, the impact of the certain seismic information on the safe operation of the plant; the Commission affirmed the dismissal of its contentions and denial of its related waiver request. On June 20, 2016, FOE and Pacific Gas and Electric Company (PG&E), along with other parties, submitted a joint settlement proposal to the California Public Utilities Commission (CPUC), under the terms of which PG&E agreed to, *inter alia*, retire Diablo Canyon at the expiration of its current operating licenses. On June 29, 2016, PG&E and FOE jointly requested that the court suspend briefing in this matter pending action by the CPUC. On July 21, 2016, the court entered an order holding the case in abeyance and directing the parties to file status reports at 120-day intervals.

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

---

<sup>1</sup> For statistical purposes, we counted as "active" any case pending before a court, or still subject to further judicial review, as of January 1, 2016. However, the narratives accompanying the cases listed in this report include any post-January 1 developments.

***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 are in the process of preparing a stipulation with respect to certain agencies, including NRC, for which sufficient information concerning the calculation of damages has been provided.

CONTACT: Mark J. Maxin, OGC  
301-415-1554

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

Natural Resources Defense Council and Powder River Basin Resource Council have 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 assert that, where the NRC Staff prepares a final environmental impact statement and issues a license prior to an adjudicatory hearing, the agency violates NEPA when the presiding officer of that hearing considers supplemental information that was not included in the EIS. Petitioners also challenge 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. Briefing is scheduled to be completed by March 1, 2017, and oral argument is anticipated in the late spring or early summer of 2017.

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

***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 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 has been held in abeyance, subject to periodic status reports. 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*. The case remains in abeyance.

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, as not currently "ripe," because PFS had failed to obtain necessary approvals from Department of the Interior (DOI) sub-agencies. 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. Although PFS previously moved to terminate its NRC license, it has withdrawn its termination request, and the parties have advised the court that PFS is still awaiting official action on the approvals.

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

***Sustainable Energy & Economic Development Coalition v. NRC***, No. 16-1108 (D.C. Cir.)

This case involves petitioners' contention that a foreign, minority owner (Toshiba America Nuclear Energy Corporation) of the South Texas Project Units 3 and 4, has effectively taken control of the project through financing arrangements with the license applicant (Nuclear Innovation North America, LLC) such that issuance of a license would violate the prohibition against foreign ownership, control, or domination (FOCD) of nuclear reactors under the Atomic Energy Act. The Licensing Board resolved the FOCD contention against petitioners, finding that issuance of a license for the units would not violate the FOCD prohibition. The Commission denied review in CLI-15-07, and petitioners seek judicial review of the Commission's decision. A briefing schedule has been established, with petitioners' initial and reply briefs due on March 10, 2017 and May 19, 2017, respectively, and respondents' brief due on April 28, 2017. Oral argument is likely to take place during the second half of 2017.

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

**CLOSED CASES*****Brodsky v. NRC***, No. 15-1330 (2d Cir.)

This lawsuit challenged certain fire-protection exemptions that NRC issued with respect to Indian Point Unit 3. The case was originally brought in the Court of Appeals for the Second Circuit, but that court found that it lacked jurisdiction. Plaintiffs then re-filed their case in federal district court. The district court ruled for NRC on both grounds raised in the complaint. Plaintiffs appealed and, on January 7, 2013, the appellate court issued a decision that upheld the district court's conclusion concerning the validity of the exemption. However, the court remanded the case back to the district court, with instruction that it remand the case back to the Commission, so that the Commission could either articulate, within 120 days of the issuance of the appellate court's mandate, why public participation was not required prior to the issuance of an environmental assessment (EA) and a finding of no significant environmental impact (FONSI) relating to the exemption, or for other appropriate action. In response to the court's order, the Commission circulated a draft EA and FONSI related to the exemption. On August 27, 2013, the Commission published in the Federal Register a final EA and FONSI and issued its determination that the exemption should remain in place. On February 15, 2014, Mr. Brodsky filed a brief before the district court, challenging NRC's actions on remand and, among other things, asserting that the EA supporting the exemption was invalid because it did not address the possible consequences of a terrorist attack. The U.S. Attorney filed its responsive brief on behalf of NRC on April 11, 2014, and, on February 26, 2015, the court granted the agency's motion for summary judgment. The court ruled that the agency satisfied NEPA's public participation requirements by issuing the draft EA for comment and responding to the comments and that no additional hearing was required. The court also rejected a number of additional arguments raised by Mr. Brodsky on the ground that they had already been resolved in prior phases of the litigation, including arguments related to the effects of a potential terrorist attack. Mr. Brodsky appealed this decision to the Second Circuit, asserting that NRC's issuance of the exemption did not comply with NEPA because the agency failed to consider the effects of terrorism when it issued the exemption. NRC argued in reply that the issue of terrorism was addressed in prior phases of the litigation and that, in any event, the agency satisfied its obligations under NEPA because it evaluated the consequences of all forms of radiological releases attributable to the exemption, regardless of their cause, and because NEPA does not require a specific analysis of terrorism-induced events. The case was argued on May 23, 2016, before the Second Circuit, and, on June 2, 2016, the court issued a summary affirmance order, ruling that Mr. Brodsky's arguments about terrorism had been waived as a consequence of his failure to raise them in connection with his prior appeal and that the agency had adequately responded to comments about terrorism in evaluating the environmental impacts of the exemption.

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

***Friends of the Earth v. NRC***, No. 14-1213 (D.C. Cir.)

On October 28, 2014, Friends of the Earth (FOE) filed a petition for review related to an update to the Final Safety Analysis Report (FSAR) for Diablo Canyon, asserting that this update should not have taken place without interested parties being afforded the opportunity for a hearing. NRC and the United States moved to dismiss the petition, asserting that (1) because of the pendency of the same issue in an adjudication before the Commission (in which Friends of the Earth made the same argument, relying on the same FSAR update that it identified in its petition for review), no final order issue had been issued that was reviewable under the Hobbs Act; and (2) Friends of the Earth had not exhausted its administrative remedies. On February 20, 2015, the court referred the motion to the merits panel. NRC then moved to defer briefing on the case, noting that the same issue was still pending for the agency. The court granted NRC's motion to defer briefing pending resolution by the Commission of FOE's request for a hearing on the asserted *de facto* license amendment. The Commission subsequently determined in CLI-16-9 that no *de facto* license amendment had taken place. The parties subsequently requested, and the court agreed, that the case be held in abeyance while FOE determined whether to file a separate petition for review of the Commission's determination in CLI-16-9. FOE opted not to seek such review and filed a motion to dismiss its petition for review voluntarily; the court granted the motion on August 25, 2016.

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

***Friends of the Earth v. NRC***, No. 16-1189 (D.C. Cir.)

On June 16, 2016, Friends of the Earth filed an emergency petition for mandamus seeking to prevent the restart (or, in the alternative, to compel the shutdown) of Indian Point Unit 2 as a result of concerns relating to baffle-former bolt degradation that FOE had raised before the Commission and that the Commission had channelled into its 2.206 process. The court ordered immediate briefing on the petition and, on June 21, 2016, NRC filed a brief arguing that mandamus was not warranted because the court lacked jurisdiction in the absence of a final decision on the 2.206 petition; that the agency's decision not to prevent restart of Unit 2 was an exercise of enforcement discretion that was presumptively unreviewable; and that, in any event, the agency had a reasonable basis for denying FOE's request for emergency relief. On June 23, 2016, the court issued a brief *per curiam* order denying the mandamus petition, stating that FOE had failed to demonstrate a clear and indisputable right to a writ of mandamus.

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

Eric V. Michel, OGC  
301-287-3704

***Natural Resources Defense Council v. NRC***, No. 14-1225 (D.C. Cir.)

This case involved application of 10 C.F.R. § 51.53(c)(3)(ii)(L) to Exelon's application to renew the operating licenses for Limerick Generating Station Units 1 and 2. That regulatory provision exempts Exelon from including in its Environmental Report a site-specific severe accident mitigation alternatives (SAMA) analysis because the NRC Staff had previously considered SAMAs in the Final Environmental Statement supporting issuance of the Limerick operating licenses. In two orders, the Commission determined that NRDC's SAMA-related contentions impermissibly challenged section 51.53(c)(3)(ii)(L) and were therefore not admissible and that NRDC had not shown that the issues it sought to litigate were unique to Limerick, such that waiver of the provision was not warranted. NRDC originally filed a petition for review on December 24, 2013 (No. 13-1311), which was dismissed for lack of jurisdiction. On November 5, 2014, NRDC filed a second petition (case No. 14-1225), in which it asserted that it had been improperly denied a hearing opportunity with respect to its assertion that there was new and significant information relating to SAMAs that should have been considered as part of the license renewal and that NRC improperly denied its waiver request. Oral argument was held on September 17, 2015, before Judges Rogers, Brown, and Kavanaugh. The court issued an order affirming the Commission's orders on April 26, 2016. The court accepted NRC's arguments that, in light of the agency's generic determination about SAMAs in 10 C.F.R. § 51.53(c)(3)(ii)(L), the proper forum for petitioners to raise their arguments concerning new and significant information about SAMAs was through the rulemaking process and, to the extent their concerns were unique, through an application for a waiver (which in this case the court deemed not to be warranted).

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

***New York v. NRC***, No. 14-1210 (D.C. Cir.); ***Prairie Island Indian Community v. NRC***, No. 14-1212 (D.C. Cir.); ***Beyond Nuclear, Inc. v. NRC***, No. 14-1216 (D.C. Cir.); ***Natural Resources Defense Council v. NRC***, No. 14-1217 (D.C. Cir.)

Four sets of petitioners -- (1) the States of New York, Connecticut, and Vermont; (2) the Prairie Island Indian Community; (3) NRDC; and (4) Beyond Nuclear, BREDL, Missouri Coalition for the Environment, New England Coalition, NIRS, Riverkeeper, SLO Mothers for Peace, Sustainable Energy and Economic Coalition, Inc., and Southern Alliance for Clean Energy -- challenged NRC's Continued Storage Rule and the Generic Environmental Impact Statement (NUREG-2157) that the rule incorporates, asserting violations of the National Environmental Policy Act. NEI, several individual plant operators, and the Commonwealth of Massachusetts were admitted as intervenors, and Sierra Club and the California State Energy Resources Conservation and Development Commission appeared as amici curiae. Petitioners contended, among other things, that the impacts of continued storage could not be analyzed generically; that the agency failed to consider alternatives or to evaluate mitigation; and that the agency made improper assumptions in support of its analysis. Oral argument was held before Judges Kavanaugh, Edwards, and Sentelle on February 22, 2016. The court issued a decision on June 3, 2016, denying the petitions for review and holding that the agency did not act arbitrarily or capriciously in promulgating the Continued Storage Rule under NEPA. Among other things, the court accepted the agency's technical judgments in determining that the impacts were essentially common to all sites, and it found that the agency's assumptions underlying its analysis were reasonable. The environmental groups other than NRDC filed a petition for rehearing en banc on July 18, 2016; this petition was denied on August 8, 2016.



After these cases were filed, a number of environmental groups filed related petitions for review of the dismissal by the Commission of so-called “placeholder” contentions relating to the Continued Storage Rule. The petitions for review sought to invalidate the issuance of any reactor licenses (or license renewals) that had been issued or might be issued in the future on the basis of the Continued Storage Rule. Such claims were raised in:

- *Missouri Coalition for the Environment v. NRC* (D.C. Cir. No. 15-1114): (Callaway license renewal)
- *Beyond Nuclear, Inc. v. NRC* (D.C. Cir. No. 15-1173) (Fermi Unit 3 combined license)
- *Blue Ridge Environmental Defense League v. NRC* (D.C. Cir. 15-1258) (Sequoyah license renewal)
- *Blue Ridge Environmental Defense League v. NRC* (D.C. Cir. 15-1259) (WS Lee Units 1 and 2 combined license)
- *Blue Ridge Environmental Defense League v. NRC* (D.C. Cir. 15-1260) (North Anna Unit 3 combined license)
- *Nuclear Information Research Service v. NRC* (D.C. Cir. 15-1261) (Levy Units 1 and 2 combined license)
- *Sustainable Energy and Economic Development Coalition v. NRC* (D.C. Cir. 15-1262) (STP Units 1 and 2 license renewal)
- *Sustainable Energy and Economic Development Coalition v. NRC*, No. 16-1108 (D.C. Cir.) (STP Units 3 and 4 COL)
- *Southern Alliance for Clean Energy v. NRC* (D.C. Cir. 15-1427) (Watts Bar 2 operating license)

These cases were held in abeyance pending the resolution of *New York v. NRC*. With the exception of *Beyond Nuclear* and *Sustainable Energy* (STP Units 3 and 4), in which the petitioners raised issues in addition to the Commission’s reliance on the Continued Storage Rule, each was voluntarily dismissed after the decision in *New York* became final.

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

Michelle D. Albert, OGC  
301-287-9259

***Thompson v. NRC***; 1:15-01302-RDB (D. Md.)

Plaintiffs, employees of an NRC contractor, brought civil rights complaints against NRC employees and the agency. The court initially granted a motion to dismiss filed by a former employee on the ground that the claims were not properly brought against federal employees and were in any event time-barred. In 2016, the court granted the agency’s motion to dismiss or for summary judgment, and the case is now closed.

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

***Vermont v. NRC***, No. 15-1279 (D.C. Cir.)

On August 13, 2015, the State of Vermont, Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation filed a petition for review of NRC's issuance of an exemption relating to the release of decommissioning trust funds for the management of spent fuel. Petitioners contended that the exemption would lead to the release of funds for improper purposes, thus jeopardizing the ability of the Vermont Yankee plant to decommission safely and/or limiting the amount of money left in the fund following the completion of decommissioning, which is ultimately to be re-distributed back the utility petitioners and the Vermont ratepayers. On November 4, 2015, petitioners filed a new petition with the Commission, seeking review of the issuance of the same exemption challenged before the court as well as several issues related to the decommissioning of the Vermont Yankee plant. In NRC's view, this petition rendered the agency's issuance of the exemption non-final for purposes of judicial review under the Hobbs Act and, on November 16, 2015, the agency filed a motion to dismiss the petition for review for lack of jurisdiction. Vermont opposed, asserting that the petition before the agency did not render the exemption non-final because the agency had discretion to consider it and there was no guarantee that the petition would, in fact, be considered. On February 8, 2016, the court granted the motion to dismiss in a short per curiam decision, stating that Vermont's petition had been rendered "incurably premature."

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

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

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

This is a lawsuit under the Comprehensive Environmental Response, Compensation, and Liability Act (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 has been asked to locate and retain any relevant documents and issue a litigation hold.

Atlantic Richfield is in the final stages of negotiating language with the Environmental Protection Agency for an administrative order on consent. In the meantime, the litigation hold and preservation order remain in effect.

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

***Commonwealth of Pennsylvania. v. Lockheed Martin Corp.***, No. 09-cv-00821 (M.D. Pa.)

The Commonwealth filed a CERCLA case against Lockheed Martin over the cleanup of the Quehanna site in central Pennsylvania. Lockheed Martin, in turn, sued the United States for contribution, alleging that the waste left at the site was due to activities performed pursuant to government contracts, including contracts that involve the activities of the Atomic Energy Commission. The parties have completed settlement negotiations, reached an agreement, and filed a joint motion for a consent decree (which is still pending) that will dismiss both the current case as well as all reimbursement claims against the United States. The dismissal will be without prejudice to Lockheed's right to file a breach of contract claim against the Department of Energy in the Court of Federal Claims.

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

***El Paso Natural Gas Company, v. United States***, No. 07-cv-905 (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. NRC is a named defendant in the lawsuit, along with other federal agencies and the United States. All defendants are represented by the Department of Justice.

The suit asserts a number of theories of liability including the Administrative Procedure Act (APA), CERCLA, the Resource Conservation Recovery Act (RCRA), and the Uranium Mill Tailings Radiation Control Act (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 partial judgment allowing El Paso to appeal on those issues to the D.C. Circuit. That court affirmed the district court's dismissal order. *El Paso Natural Gas Co. v. United States*, 632 F.3d 12721 (D.C. Cir. 2011). The United States then moved for dismissal of the remaining claims and the district court granted that motion as well.

Both plaintiffs appealed and the D.C. Circuit affirmed the dismissal of most of the claims with two exceptions. *El Paso Natural Gas Co. v. United States*, 750 F.3d 863 (D.C. Cir. 2014). First, the court of appeals agreed that one of the plaintiffs' claims should have been dismissed "without prejudice" instead of "with prejudice." Second, the court re-instated the plaintiffs' RCRA claims relating to groundwater contamination at the Highway 160 site and remanded them to the district court for further proceedings.

The district court has held the case in abeyance at the parties' request. The parties have reached a tentative settlement agreement to resolve the claims of the Navajo Nation that would involve the drilling of additional monitoring wells and the possibility of further legal action based on any new data observed.

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

***El Paso Natural Gas Co. v. United States***, No. 3:14-cv-08165-DGC (D. Az.)

This CERCLA lawsuit seeks the cleanup of waste resulting from mining at 19 mines in New Mexico and Arizona between the late 1940's and the 1960s. The Department of Justice filed an answer to the initial complaint and requested that NRC search for any potentially relevant documents concerning the mines. We did not locate any relevant NRC documents.

The Department of Justice asked the court to dismiss NRC as a named party and the court granted that request. However, NRC – as a part of the Federal government – still has an obligation to monitor the case and provide any relevant documents.

The parties have completed discovery and motions for summary judgment and/or a trial are expected in 2017.

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 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. OGC attorneys have coordinated with the Department of Justice in obtaining documents related to the AEC license and the field team investigation.

The United States has completed document production and the original parties have made an initial production. Additional production may occur as the site clean-up continues. The case is now in mediation.

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

Jeremy M. Suttenger, OGC  
301-287-9154

***Pueblo of Laguna v. United States***, No. 02-24 (Fed. Cl.); ***Jicarilla Apache Nation v. United States***, No. 02-25 (Fed. Cl.)

In these cases, the plaintiffs (two separate Indian tribes) sought accountings of the federal government's alleged mismanagement of the tribe's trust funds and trust resources. Plaintiffs also sought recovery for damages. The court issued discovery and document preservation orders in both cases and NRC provided documents to the Department of Justice.

The *Laguna* case settled and was dismissed on December 9, 2013. The *Jicarilla* case was tried on the Tribe's trust fund investment claims for the 1972 to 1992 time period in the spring of 2012 and the court issued a decision in favor of the Tribe. The parties in *Jicarilla* were scheduled to litigate Phase 2 of a 3-phase proceeding in July 2016 after several delays due to the assignment of a new judge to the case. The parties reached agreement on settlement prior to the Phase 2 trial and entered into a stipulation of dismissal on December 6, 2016. The \$124 million settlement resolved all claims brought or that could have been brought against the United States asserting that the tribe's funds and resources had been mismanaged.

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

***United Nuclear v. United States***, No. 1:15-cv-00411 (D.N.M.)

This is a CERCLA lawsuit seeking recovery for cleanup efforts at the San Mateo mine in New Mexico. The parties have not yet started discovery. NRC was asked to locate and retain any relevant documents, and NRC has advised the Department of Justice that it has not located and will be unlikely to locate any relevant documents.

The parties initiated settlement negotiations, proceeded to mediation, and eventually reached a tentative settlement agreement. The terms are still being reviewed, but the court has held the case in abeyance and not conducted any initial pre-trial proceedings.

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

***United States v. Energy Solutions, Inc.*** No. 1:16-cv-01056-GMS (D. Del).

In late 2016, the United States commenced an action seeking to block the merger between Energy Solutions, Inc. and Waste Control Specialists, Inc., on the ground that the merger would have anticompetitive effects on the market for low-level radioactive waste disposal. Trial is tentatively scheduled for April 2017. NRC is working with the Department of Justice to produce documents relevant to the lawsuit.

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