

American Bar Association  
Section of Public Utility, Communications,  
and Transportation Law

Report of  
**NUCLEAR ENERGY COMMITTEE**  
2009 Spring Council Meeting

Chair: James H. Miller, III  
Vice Chairs: M. Stanford Blanton  
George L. Edgar  
Joseph M. Farley  
Gerald Garfield  
Jay Matthew Gutierrez  
Jon C. Wood

## **EXECUTIVE SUMMARY**<sup>1</sup>

On the legislative front, Senate Majority Leader Harry Reid introduced a bill that would establish a commission to review the nation's policies regarding high-level radioactive waste and spent nuclear fuel ("SNF"), in light of the reduction in funding for the Yucca Mountain Repository. Bills introduced in both the House and the Senate would place prohibitions on the importation of radioactive waste into the United States. Senator George Voinovich sponsored legislation that would create a Nuclear Fuel Management Corporation, and Senator Orrin Hatch introduced a bill that would encourage the use of thorium fuel cycle nuclear power generation. The recently enacted 2009 Omnibus Appropriations Act provides funding for nuclear energy activities at the Department of Energy ("DOE"), nuclear waste disposal, loan guarantee programs, and operational expenses of the Nuclear Regulatory Commission ("NRC").

On the judicial front, the Court of Federal Claims allowed recovery for pre-acquisition damages due to the DOE's breach of the standard contract regarding its obligation to dispose of SNF under the Nuclear Waste Policy Act ("NWPA"), reasoning that the NWPA and Standard Contract created an exception to the Anti-Assignment Act. In another SNF-related action, the Court of Federal Claims granted the Government's motion to dismiss Consumers Energy Company's claim that DOE's actions were a taking of Consumers' vested contract rights. The Court of Federal Claims also denied Consumers Energy Company's claim for interest because converting damages from as-spent dollars to time price differential dollars was an impermissible claim for interest. Separately, the Court of Federal Claims held that Vermont Yankee Nuclear Power Corporation had assigned its right to pursue all SNF claims in the contract for sale of the facility, excepting only claims related to the one-time fee.

In other matters, the Court of Appeals for the Ninth Circuit affirmed the grant of the State of Washington's motion for summary judgment, finding that the "mixed" transuranic waste at the Hanford site "designated for" the Waste Isolation Pilot Plant was not exempt from the State's Hazardous Waste Management Act. The U.S. Supreme Court held the Department of Commerce reasonably treated separative work unit contracts as sales of goods for the purposes of the antidumping provision of the Tariff Act. The Court of Appeals for the Third Circuit held that when reviewing a renewal application, the NRC is not required to examine the environmental impact of a hypothetical terrorist attack on the facility. The District Court for the Northern District of Illinois held that Exelon's decision to deny a union member unescorted access in a nuclear facility was arbitrable under the collective bargaining agreement.

On the administrative front, the NRC completed several longstanding rulemaking efforts. In February 2009, the NRC approved a final rule requiring an aircraft impact assessment for all new nuclear power plants. The aircraft crash scenarios would be treated as "beyond-design-bases events," meaning the rule's requirements are intended to provide an additional level of protection. Applicants are now required to analyze whether the design features of their facility

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<sup>1</sup> Chad A. Pilcher and Millie Ronnlund, associates at Balch & Bingham LLP, contributed to the Legislative and Judicial sections, and Tyson R. Smith, Emily J. Duncan and Rachel Miras-Wilson, associates at Winston & Strawn LLP, contributed to the Administrative section of this report.

could avoid or mitigate the impact of a large commercial aircraft. Separately, in March 2009, the NRC issued a final rule amending its security regulations and adding new security requirements pertaining to nuclear power reactors. The rulemaking establishes and updates generically applicable security requirements similar to those imposed after the terrorist attacks of September 11, 2001 and adds several new requirements developed as a result of insights gained from implementation of prior security orders.

The bulk of recent adjudicatory activity has focused on new power reactors. To date, the NRC has received 17 COL applications for 26 new units. Licensing Boards have granted the requests for hearings and petition to intervene in five proceedings (Bellefonte, Calvert Cliffs, Harris, North Anna, and Vogtle). Licensing Boards in two proceedings denied the requests for hearings entirely (Lee and Summer). Licensing Boards are currently considering petitions filed in the Fermi and Levy County proceedings. In four of the proceedings in which a petition was granted, the presiding Licensing Board admitted contentions related to the absence of low-level waste disposal sites (Bellefonte, North Anna, Calvert Cliffs, and Vogtle). Licensing Boards have uniformly rejected all contentions challenging the Commission's waste confidence decision and disposal of spent fuel.

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## **I. LEGISLATIVE ACTIVITY**

### **A. Nuclear Waste**

#### **1. Storage of High Level Radioactive Waste and Spent Nuclear Fuel (“SNF”)**

On March 12, 2009, Senator Harry Reid (D-NV) introduced S. 591, the “National Commission on High Level Radioactive Waste and Spent Nuclear Fuel Establishment Act of 2009.” S. 591 would create a commission to review the nation’s policies regarding high-level radioactive waste and SNF. The bill was referred to the Senate Committee on Environment and Public Works on March 12, 2009.

The commission to be established by S. 591 would evaluate potential improvements in the United States’ approach to high-level radioactive waste and SNF management in the event that the Yucca Mountain repository never becomes fully operational for waste disposal. The commission would also submit a report to the appropriate Congressional committees that describes the findings, conclusions, and recommendations of the commission regarding the storage of nuclear and radioactive waste.

Some of the alternatives to be considered by the commission include: transferring responsibility for the high-level radioactive waste and spent fuel management program to a government corporation established for that purpose; developing cost-sharing options between the federal government and private industry for the development of nuclear fuel management technology and licensing; establishing federal or private centralized interim storage facilities in communities that are willing to serve as hosts; and requiring the transfer of SNF inventories to at-reactor dry casks in a manner to ensure public safety and security of the inventories while long-term solutions for SNF management are developed.

#### **2. Management of SNF**

On October 1, 2008, Senator George Voinovich (R-OH) introduced S. 3661, the “United States Nuclear Fuel Management Corporation Establishment Act of 2008.” S. 3661 would establish a corporation to manage the United States’ SNF. The bill was referred to the Senate Committee on Environment and Public Works on October 1, 2008.

S. 3661 would amend the Atomic Energy Act of 1954 to create the United States Nuclear Fuel Management Corporation. The bill authorizes this corporation to manage a SNF enterprise, which would eliminate the need for federal funding for the management of SNF. The corporation would also assume responsibility for the activities, obligations, and use of the federal government’s resources pertaining to SNF management.

#### **3. Importation of Radioactive Waste**

On January 14, 2009, Representative Bart Gordon (D-TN) introduced H.R. 515, the “Radioactive Import Deterrence Act.” H.R. 515 would place prohibitions on the Nuclear Regulatory Commission’s (“NRC”) ability to allow the importation of radioactive waste. The

bill was referred to the House Energy and Commerce and Ways and Means Committees on January 14, 2009. A companion bill, S. 232, was introduced in the Senate on the same day by Senator Lamar Alexander (R-TN). That bill was referred to the Senate Committee on Environment and Public Works.

H.R. 515 and S. 232 would amend the Atomic Energy Act of 1954 to prohibit the NRC from issuing a license authorizing the import into the United States of low-level radioactive waste or specific radioactive waste streams exempted from regulation by the NRC. However, the bill exempts from this prohibition any low-level radioactive waste being returned to a federal or military facility authorized to possess such material and low-level radioactive waste resulting from the use in a foreign country of nuclear material obtained by the foreign user from an entity in the United States that is being returned to the United States for management and disposal

H.R. 515 and S. 232 would authorize the President of the United States to waive this prohibition and authorize the grant of a specific license to import materials if there is a finding that such importation would meet an important national or international policy goal. Certain licenses would be grandfathered in, but the bill would prohibit the extension or amendment of these licenses regarding the amount of material permitted to be imported.

## **B. Thorium**

On October 2, 2008, Senator Orrin Hatch introduced S. 3680, the “Thorium Energy Independence and Security Act of 2008.” S. 3680 would encourage the use of thorium fuel in nuclear power generation. The bill was referred to the Senate Committee on Energy and Natural Resources on October 2, 2008.

S. 3680 would amend the Atomic Energy Act of 1954 to direct the Secretary of Energy to establish and fund an office for the regulation of thorium fuel cycle nuclear power generation in both the Office of Nuclear Energy, Science and Technology at the Department of Energy and the NRC. The bill would require the NRC Chairman to promulgate regulations for facilities and materials used in thorium fuel cycle nuclear power generation. It would also require the heads of the newly established offices to implement demonstration projects for thorium generation, as well as recommend methods for strengthening international partnerships to advance nuclear non-proliferation through the use of thorium, and for providing incentives to nuclear reactor operators to use low-waste thorium fuels instead of other fuels.

## **C. Energy Independence**

On September 29, 2008, while still a member of the House of Representatives during the 110<sup>th</sup> Congress, Senator Mark Udall (D-CO) introduced H.R. 7239, the “American Energy, American Innovation Act of 2008.” The bill was referred to the House Committees on Energy and Commerce, Natural Resources, and several other committees on September 29, 2008. It was referred to the subcommittee on Energy and Mineral Resources on December 1, 2008. H.R. 7239 would provide appropriations to the NRC to establish an additional 60 full-time equivalent positions to expedite and streamline the processing of applications for new nuclear plants and establish an interagency working group to make recommendations to coordinate federal

government actions and programs to promote increasing domestic manufacturing capacity and export of domestic nuclear energy products and services.

#### **D. Pathway to Nuclear Power Act**

On September 25, 2008, Congressman Gresham Barrett (R-SC) introduced H.R. 7086, the “Pathway to Nuclear Power Act.” This bill was designed to help the United States meet its growing energy needs and strengthen the nation’s energy security through the development of nuclear power. The bill was referred to the House Committees on Energy and Commerce, Ways and Means, Rules, and Judiciary on September 25, 2008.

H.R. 7086 would amend the Energy Policy Act of 2005 to revise the terms and conditions governing the federal loan guarantees for innovative technology projects, modify the contract authority of the Secretary of Energy, convert the Nuclear Energy Research Initiative into the Nuclear Power 2010 program, and instruct the Secretary of Labor to promulgate regulations to implement workforce training programs for the nuclear industry.

H.R. 7086 would also create an interagency working group to make recommendations to coordinate federal actions and programs to promote domestic manufacture and export of nuclear energy products and service. The bill would also amend the Atomic Energy Act of 1954 to revise administrative procedures for licensing new nuclear plants and amend the Nuclear Waste Policy Act of 1982 to establish the U.S. High Level Nuclear Waste Management Corporation. In certain situations, the Secretary of Energy would be required to propose an adjustment to the fee for electricity generated from civilian nuclear power reactors, and the bill would replace the Nuclear Waste Fund with a Nuclear Waste Revolving Fund and a Nuclear Waste Legacy Fund.

#### **E. Appropriations**

On March 11, 2009, President Barack Obama signed the “Omnibus Appropriations Act, 2009” (H.R. 1105) into law. H.R. 1105 was introduced by Representative David Obey (D-WI) on February 23, 2009, and Congress passed the bill on March 10, 2009.

H.R. 1105 appropriates \$792,000,000 to the Department of Energy (“DOE”) for expenses including the purchase, construction, and acquisition of plant and capital equipment, and other expenses necessary for nuclear energy activities. Of that amount, \$2,854,500 must be used for “Congressionally Directed Nuclear Energy Projects.”

H.R. 1105 includes \$535,503,000 for necessary expenses in carrying out uranium enrichment facility decontamination and decommissioning, remedial actions, and other activities under the Atomic Energy Act of 1954 and the Energy Policy Act of 1992. For nuclear waste disposal activities under the Nuclear Waste Policy Act of 1982, H.R. 1105 allocates \$145,390,000 to the Nuclear Waste Fund for the acquisition of real property or facility construction or expansion. Of that amount, \$15,000,000 must be allocated to state and local governments in Nevada and California to fund oversight and licensing responsibilities. Further, \$1,855,425 must be used for “Congressionally Directed Nuclear Waste Disposal Projects.” The bill also guarantees loans up to \$47,000,000,000 for eligible projects under section 502 of the Congressional Budget Act of 1974, of which \$18,500,000,000 must be for nuclear power facilities.

H.R. 1105 makes available \$1,034,656,000 to the NRC for necessary expenses of the Commission in carrying out the purposes of the Energy Reorganization Act of 1974 and the Atomic Energy Act of 1954. The bill requires that the estimated revenues from licensing fees, inspection services, and other collections, estimated at \$860,857,000 for fiscal year 2009, be retained and used for necessary salaries and expenses in this account. Therefore, the fiscal year 2009 appropriation is estimated at \$173,799,000.

## **II. JUDICIAL ACTIVITY**

### **A. SNF**

Beginning in 1998, nuclear utilities began filing suits against DOE for its failure to remove SNF from reactor sites pursuant to the terms of the Standard Contract and the NWPA. The following discussion summarizes the aspects of each SNF decision that are unique to that decision.

#### **1. *Dominion Resources, Inc. v. United States***

On October 15, 2008, the U.S. Court of Federal Claims employed a “but-for” test in determining plaintiff nuclear plant owners’ mitigation damages.<sup>2</sup> The Court allowed damages incurred prior to one plaintiff’s acquisition of the nuclear plant, reasoning that the assignment provision in the NWPA and Standard Contract created an exception to the Anti-Assignment Act. Also allowed were: costs for Independent Spent Fuel Storage Installation (“ISFSI”) construction; work platform and cask-loading related modifications because DOE could not provide certainty as to the dimensions of the casks it would have used; costs to load casks and fuel characterization charges because the plaintiff will be required to pay for them again when DOE does perform; and internal labor. The Court reduced damages for, or excluded: crane upgrades not necessarily associated with breach; some insufficiently supported internal labor and non-labor costs; and allowance for funds used during construction because plaintiff could not show borrowed funds were used specifically for breach-related projects.

#### **2. *Consumers Energy Co. v. United States***

On September 30, 2008, the United States Court of Federal Claims granted the Government’s motion to dismiss as to Consumers Energy’s (“Consumers”) claim that DOE’s actions regarding SNF were a taking of Consumers’ vested contract rights.<sup>3</sup> Reasoning that Consumers has no rights to the removal of SNF apart from the Standard Contract, the Court noted that the Government’s liability for breaching the Standard Contract had already been established, making the contract claim viable. The Court held that because Consumers retains its full range of remedies for breach of contract, the breach of contract by DOE does not constitute the taking of a vested contract right.

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<sup>2</sup> *Dominion Resources, Inc. v. United States*, 84 Fed. Cl. 259 (2008).

<sup>3</sup> *Consumers Energy Co. v. United States*, 84 Fed. Cl. 152 (2008).

### 3. *Consumers Energy Co. v. United States*

On November 26, 2008, the U.S. Court of Federal Claims granted the Government's motion for summary judgment on Consumers' claims for interest and attorney and expert fees.<sup>4</sup> The Court found Consumers' conversion of its damages from as-spent dollars to time price differential dollars by adjusting for inflation was an impermissible claim for interest under 28 U.S.C. § 2516. Consumers did not show necessity for increased borrowing due to DOE's partial breach, so could not claim interest on borrowed funds; the claim could not be termed one for allowance of funds used during construction because Consumers did not mention this approach until after the Government moved for summary judgment and made only conclusory statements on the issue. The Court held that the Government's alleged bad faith in the primary conduct of breaching the contract did not support Consumers Energy's claim for attorney fees.

### 4. *Vermont Yankee Nuclear Power Corp. v. United States*

On October 22, 2008, the United States Court of Federal Claims granted a motion for partial summary judgment finding that Vermont Yankee Nuclear Power Corporation ("Vermont Yankee") assigned its ownership of, and right to pursue, SNF claims.<sup>5</sup> In the sale of its power station, Vermont Yankee agreed to deliver all SNF and assign "any claims...related to the [DOE's] defaults under the DOE Standard Contract accrued as of Closing, whether relating to periods prior to or following the Closing, excluding such claims as may relate to the one-time fee with respect to fuel used to generate electricity prior to April 7, 1983." Holding that this provision limited Vermont Yankee to claims related solely to the one-time fee, the Court found that Vermont Yankee did not retain its claim for damages for storing SNF prior to the sale and associated regulatory costs. The Court also found that Vermont Yankee did not retain its claim for diminution in value of the power station resulting from DOE's breach because it was unrelated to the one-time fee.

### B. *Radioactive Waste Disposal – Washington v. Chu*

On March 10, 2009, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's grant of the State of Washington's motion for summary judgment, finding that the "mixed" transuranic waste ("TRUM") at the Hanford site "designated for" the Waste Isolation Pilot Plant ("WIPP") was not exempt from the State's Hazardous Waste Management Act ("HWMA"), Wash. Rev. Code §§ 70.105.020, 70.105.030 and its implementing regulations.<sup>6</sup> DOE argued that it no longer had an obligation under HWMA, because the WIPP Land Withdrawal Amendment Act of 1996, Pub. L. 104-201, provided an exemption to the prohibition against storing untreated TRUM for waste "designated ... for disposal at WIPP," which DOE argued included waste at other facilities that would eventually be disposed at WIPP. The Ninth Circuit held that the exemption only applied to waste physically at WIPP, and the statute did not contemplate the exemption would affect TRUM at other facilities, not yet at WIPP.

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<sup>4</sup> *Consumers Energy Co. v. United States*, 84 Fed. Cl. 670 (2008).

<sup>5</sup> *Vermont Yankee Nuclear Power Corp. v. United States*, 84 Fed. Cl. 339 (2008).

<sup>6</sup> *Washington v. Chu*, No. 06-35227, 2009 U.S. App. LEXIS 5455 (9th Cir. March 10, 2009).

**C. Low Enriched Uranium Processing – *United States v. Eurodif S. A.***

On January 26, 2009, the U.S. Supreme Court held the Department of Commerce reasonably treated separative work unit (“SWU”) contracts as sales of goods for the purposes of the antidumping provision under Section 731 of the Tariff Act.<sup>7</sup> A French uranium enricher argued and the Court agreed that the antidumping provision applied only to foreign goods being sold at less than fair value, not to contracts for services. A SWU contract is predicated on the legal fiction that a utility buyer of Low Enriched Uranium (“LEU”) is paying cash for the SWU used to process the feed uranium into LEU, and will receive back from the enricher the same feed uranium it sent in, in the form of LEU. Noting the Department is not bound by the parties’ private contractual interpretation, the Court found the Department’s position that the transaction was a sale of goods rather than services reasonable because the feed uranium the utilities sent in was a fungible commodity, untracked once received by the enricher and the enrichment process resulted in substantial transformation of the feed uranium.

**D. NRC License Renewal – *N.J. Dep’t of Env’tl. Prot. v. United States***

On March 31, 2009, the U.S. Court of Appeals for the Third Circuit held that when reviewing an application to renew the license for a nuclear power facility, the NRC is not required to examine the environmental impact of a hypothetical terrorist attack on the facility.<sup>8</sup> The NRC denied the New Jersey Department of Environmental Protection’s (“NJDEP”) request to intervene in the Oyster Creek Nuclear Generating Station relicensing proceeding, in which NJDEP argued that the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, required such analysis. The Court, agreeing with the NRC, found that the causal link between the relicensing and an aircraft terrorist attack was too attenuated to require NEPA review especially in light of the NRC’s very limited control over aviation security to prevent such an attack. The Court further held that even if NEPA required such a review, the NRC had already completed the review through its Generic Environmental Impact Statement (“GEIS”), which determined the likelihood of attack to be small with results no worse than those of internally initiated events. NJDEP did not show that NRC could have evaluated the risks more meaningfully than it did with the GEIS and the site-specific Supplemental EIS, which analyzed alternatives at Oyster Creek to mitigate severe accidents.

**E. Unescorted Access Determinations by Licensee – *Exelon Generation Co., LLC v. Int’l Bhd. Of Elec. Workers Local 15***

On September 29, 2008, the U.S. District Court for the Northern District of Illinois, Eastern Division, granted International Brotherhood of Electrical Workers Local 15’s (“Local 15”) motion for summary judgment and motion to stay the proceedings and compel arbitration.<sup>9</sup> Exelon filed a declaratory judgment complaint against Local 15 asking that the Court declare that

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<sup>7</sup> *United States v. Eurodif S. A.*, 129 S. Ct. 878 (2009).

<sup>8</sup> *N.J. Dep’t of Env’tl. Prot. v. United States*, No. 07-2271, slip op. (3d Cir. March 31, 2009).

<sup>9</sup> *Exelon Generation Co., LLC v. Int’l Bhd. Of Elec. Workers Local 15*, No. 06 CV 6961, 2008 U.S. Dist. LEXIS 75099 (N.D. Ill. Sept. 29, 2008).

Exelon's decision to deny unescorted access authorization at its nuclear plant to a union member is not arbitrable under the collective bargaining agreement ("CBA"). The NRC requires Exelon as a licensee to have an approved physical security plan, which includes an access authorization program. Exelon argued that the NRC-approved Nuclear Energy Institute guidelines, "NEI 03-01" and its access authorization plan provide that Exelon's review of its decision to deny unescorted access is final and internal and, further, that Exelon is not free to modify NEI 03-01 without NRC approval. The Court explained that Exelon may have "tied its own hands" by developing and obtaining NRC approval of its site authorization plan which does not allow for arbitration of the denial of unescorted access, but no NRC regulation or other federal mandate required such arbitration be prohibited. The Court held that the decision to deny unescorted access was arbitrable under the CBA, and because NRC regulations did not bar the arbitration, the Court stayed the proceedings and compelled arbitration.

**F. Recovery of Costs from Shutdown due to Westinghouse Steam Generators Replacement – *AEP Texas Central Co. v. Pub. Utility Comm'n of Texas***

On December 22, 2008, the Court of Appeals of Texas, Thirteenth District, affirmed the district court's decision upholding the Public Utility Commission's ("PUC") denial of recovery of cost for replacement power during a shutdown of the South Texas Project nuclear power plant ("STP").<sup>10</sup> The utility sought recovery in its final fuel reconciliation proceeding; Westinghouse sold and manufactured the four steam generators which had to be replaced due to deteriorating tubes. Westinghouse had claimed the generators should perform for 40 years, but the replacement occurred after only 12 years. The utility sued after the STP shutdown to replace the four generators and an undisclosed settlement was reached. The PUC considered the claims regarding Westinghouse made in the suit, determining that Westinghouse acted imprudently. The PUC then imputed Westinghouse's imprudence onto the utility, found the costs for replacement power were not reasonable and necessary, and denied recovery. The Court found the PUC's determination proper, and affirmed the district court decision.

**III. ADMINISTRATIVE ACTIVITY**

**A. Nuclear Regulatory Commission Policy, Practices, and Procedures**

**1. FY09 Budget**

In March 2009, Congress finally approved the NRC's budget for FY09 at \$1.046 billion. The approved budget is slightly higher than the original request. Prior to passage of the omnibus spending legislation, the NRC had been operating at FY08 budget levels. Approximately \$49 million in Nuclear Waste Fund monies will be allocated to NRC review of the Yucca Mountain high-level waste application.

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<sup>10</sup> *AEP Texas Central Co. v. Pub. Utility Comm'n of Texas*, No. 13-06-311-CV, 2008 Tex. App. LEXIS 9541 (Tex. Civ. App. Dec. 22, 2008).

## **2. New Plant Developments**

### **(a) Status of Combined Operating License (“COL”) Applications**

To date, the NRC has received 17 COL applications for 26 new nuclear units. The NRC has completed its acceptance review for all of the applications, and they have all been accepted for docketing. Technical and environmental reviews are underway (except as discussed below). Similarly, there are several ongoing adjudicatory proceedings involving the proposed new reactors.

### **(b) Combined License Application (“COLA”) Reviews Suspended**

In January 2009, Entergy Operations, Inc. notified the NRC that it is reconsidering its technology choice for Grand Gulf Unit 3 and River Bend Station Unit 3. Both of those applications were based on the General Electric-Hitachi Economic Simplified Boiling Water Reactor (“ESBWR”) technology. Entergy requested that the NRC suspend its review efforts of these combined license applications until further notice pending its reevaluation of the alternative technologies. Entergy stated that it hoped to make a technology decision by the end of 2009.

In February 2009, UniStar Nuclear Energy requested that the NRC delay the review schedule for the Nine Mile Point Unit 3 COL application until September 2009. According to UniStar, the change would ensure adequate schedule spacing between the review of the lead EPR application (Calvert Cliffs Unit 3, the reference-COLA) and the Nine Mile Point application. UniStar also noted that maintaining the spacing between the schedules is important to allow for optimal allocation of available resources.

### **(c) COL/ESP-ISG-04**

The NRC developed Interim Staff Guidance to address the Commission’s limited work authorization (“LWA”) rulemaking. The revised LWA rule became effective on November 8, 2007. The major change was the revision of the definition of construction in 10 C.F.R. 50.10(a) to exclude those activities that have no reasonable nexus to radiological health and safety or common defense and security (*e.g.*, site clearing and grading). The guidance addresses the definition of construction and the delineation of preconstruction activities and those activities requiring prior approval of the NRC.

Specifically, the definition of construction excludes excavation. Excavation includes the removal of any soil, rock, gravel, or other material below the final ground elevation to the final parent material. Thus, these excavation activities may be conducted without NRC approval. However, placing permanent, nonstructural dewatering materials, mudmats, or engineered backfill in advance of placing the foundation and associated permanent retaining walls is not an excavation activity and is considered to fall within the scope of construction.

Construction further includes installation of the foundation, including soil compaction; the installation of permanent drainage systems and geofabric; the placement of backfill, concrete (*e.g.*, mudmats), or other materials that will not be removed before placement of the foundation of a structure; the placement and compaction of a subbase; the installation of reinforcing bars to be incorporated into the foundation of the structure; the erection of concrete forms for the

foundations that will remain in place permanently (even if nonstructural); and the placement of concrete or other material constituting the foundation of any systems, structures and components (“SSC”) within the scope of the definition of construction. Construction also encompasses the “onsite, in-place” fabrication, erection, integration, or testing activities for any in-scope SSC.

**(d) DOE Loan Guarantees**

In October 2008, DOE announced that it received 19 applications from 17 electric power companies for federal loan guarantees to support the construction of 14 nuclear power plants in response to its June 30, 2008 solicitation. The applications reflect the intentions of those companies to build 21 new reactors, with some applications covering two reactors at the same site. All five reactor designs that have been certified, or are currently under review for possible certification, by the NRC were represented in the applications. Subsequently, DOE winnowed the list of applicants to five finalists, none of which have been announced publicly. Secretary of Energy Steven Chu stated that changes in the loan guarantee program should allow the first loan guarantees for new reactors to be awarded by May 2009.

**(e) Reinstatement of Bellefonte Construction Permits**

On February 19, 2009, the NRC Commissioners authorized the reinstatement of construction permits for Tennessee Valley Authority’s (“TVA”) Bellefonte Units 1 and 2. The NRC first granted permits to build the plant in northeast Alabama in 1974, but TVA stopped construction in the 1980s, and the project was never finished. In 2006, TVA asked the NRC to withdraw the permits. Two years later, however, TVA requested that the permits be reinstated, and that the unfinished units be placed in deferred status. In a February 18, 2009 directive to the NRC Staff, the Commissioners said the units should be classified as having a terminated status because certain standards for the maintenance of structures and equipment along with the associated records have not been maintained. The NRC Staff performed an environmental assessment on February 24, 2009, and found no significant impacts associated with reinstating the permits. The order reinstating the permits was issued by the NRC Staff on March 9, 2009, and was published in the Federal Register on March 13, 2009. Individuals adversely impacted by the reinstatement of the permits have until May 8 to request a hearing. On March 30, 2009, the Blue Ridge Environmental Defense League petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the reinstatement of the Bellefonte Construction Permit.

**(f) Policy Statement Regulation of Advanced Reactors**

On October 14, 2008, the NRC issued its final policy statement on the regulation of advanced reactors. The Commission had issued a draft of the policy statement for comment on May 9, 2008 and the comment period ended on July 8, 2008. The final statement reinforces the Commission’s current policy regarding advanced reactors and includes new items to be considered during the reactors’ design including security, emergency preparedness, threat of theft, and international safeguards.

The original advanced reactor policy statement (“ARPS”) was issued on July 8, 1986 with the goals of maintaining the earliest possible interaction between applicants and the NRC,

providing all interested parties with the Commission's views on the desired characteristics of advanced reactor designs, and expressing the Commission's intent to issue timely comments on the implications of the designs for safety and the regulatory process. The Commission decided to revise the ARPS after the events of September 11, 2001. Since then, the NRC has required licensees to upgrade their physical security measures and develop mitigative strategies. For applicants, the NRC wanted to provide expectations and guidance on security matters so applicants would have this information early in the design stage enabling them to design a plant that meets the Commission's standards. Thus, the revised ARPS integrates the Commission's expectations for security and emergency preparedness with its current expectations for safety.

#### **(g) Commission Approves Aircraft Impact Final Rule**

On February 17, 2009, the NRC approved a final rule requiring all new nuclear power plant applicants to analyze whether the design features of their facility could avoid or mitigate the impact of a large commercial aircraft. The aircraft-crash scenarios would be treated as "beyond-design-bases events," meaning the rule's requirements are intended to provide an additional level of protection. While the NRC does not believe reactor operators should be required to prevent an aircraft strike (that being the federal government's responsibility), the NRC is working with other agencies and the intelligence community to provide "layered protection against such a threat."

The final rule requires applicants to show they have incorporated design features and functional capabilities so that even in the event of an aircraft impact at a nuclear power plant, the reactor core would remain cooled or the containment structure would remain intact. In addition, applicants must demonstrate that the spent fuel cooling or spent fuel pool integrity would be maintained. NRC Chairman Dale Klein stated his belief that reactor designers should not have to go back and recertify their designs. He added, however, that some vendors have voluntarily analyzed their designs in the event the rule was approved. The rule is expected to be published by early June.

#### **(h) Design Certification Rulemaking Process**

The NRC Staff has been implementing actions to streamline the design certification rulemaking ("DCR") process for new reactor designs and, on January 30, 2009, issued SECY-09-0018 to inform the Commission of its progress. There are currently 10 COL applications docketed that incorporate designs that have been submitted to the NRC for certification. Thus, the NRC Staff is reviewing COL applications in parallel with the NRC review of the design certification applications, but the DCR must be completed before the NRC can make a decision on the COL application using that design. Because this could cause a delay in the completion of the COL hearing process, the NRC Staff concluded that a rulemaking schedule shorter than the standard 24-month schedule would be beneficial for DCR rulemakings.

To shorten the DCR process, the NRC Staff implemented the following changes: dedicate a rulemaking project manager to each DCR; develop standard document templates, procedures, and training; start the rulemaking when the advanced FSER for the design is under review; optimize the concurrence process; initiate a working group and steering committee; manage the impact of the information collection approval process; inform applicants of the consequences of

late design changes; suggest that the proposed rule need not reference the FSER as a published NUREG; inform management of any Staff Requirements Memorandum imposed on DCRs; and optimize ACRS review time. The NRC Staff also considered two other changes – reduce the public comment period to 60 days and optimize Commission review time – but determined the drawbacks of these changes outweighed their benefits, and the changes were not implemented. The process changes that have been initiated will reduce the DCR schedule by approximately seven months (from 19.5 to 12.5 months).

**(i) Reactivation of Watts Bar 2**

The Watts Bar Nuclear Power Plant, located in southeastern Tennessee, was originally to consist of two pressurized water reactors. Unit 1 was the last power reactor licensed in the U.S., but Tennessee Valley Authority (“TVA”) suspended construction on Watts Bar Unit 2 in 1985. On August 3, 2007, TVA informed the NRC that it planned to resume construction. On July 7, 2008, the NRC issued an order extending the construction permit completion date to March 31, 2013. The NRC Staff issued SECY-09-0012 on January 15, 2009 to establish the licensing review approach. The NRC Staff will use the licensing basis for Unit 1 as a reference for the review and licensing of Unit 2. TVA has completed its initial schedule of engineering and construction activities required for the completion of the facility, and has scheduled the remaining supporting activities. TVA plans to have Unit 2 operating by 2013.

**(j) Vogtle Early Site Permit Limited Work Authorization**

Southern Nuclear Operating Company’s Vogtle site, located near Augusta, Georgia, was issued its final safety evaluation report (“FSER”), early site permit (“ESP”), and limited work authorization (“LWA”) on February 5, 2009. The company plans to build two Westinghouse AP1000 reactors, and expects them to be online in 2016 and 2017. Southern Nuclear submitted its application for the ESP on August 15, 2006. The NRC conducted a hearing on contested environmental issues from March 16 to March 19, 2009, and the mandatory hearing was held from March 23 to March 25, 2009. On March 18, 2009, the Georgia Public Service Commission approved the certificate authorizing construction of the reactors for State permitting purposes.

**3. License Renewal**

**(a) Status of License Renewal Applications**

To date, the NRC has issued operating license renewals for 51 nuclear units. Three renewals have been issued since September 2008: James A. Fitzpatrick (license issued September 8, 2008); Wolf Creek, Unit 1 (license issued November 20, 2008); and Harris, Unit 1 (license issued December 17, 2008). Currently, applications for 14 units are under review, including Oyster Creek (received July 22, 2005); Pilgrim 1 (received January 27, 2006); Vermont Yankee (received January 27, 2006); Susquehanna (received September 15, 2006); Indian Point Units 2 and 3 (received April 30, 2007); Vogtle (received June 29, 2007); Beaver Valley (received August 28, 2007); Three Mile Island (received January 8, 2008), Prairie Island, Units 1 and 2 (received April 15, 2008); Kewaunee Power Station (received August 14, 2008); Copper Nuclear Station (received September 20, 2008); Duane Arnold Energy Center (received October 1, 2008); Palo Verde (received December 15, 2008); and Crystal River (received

December 18, 2008). The NRC has also received numerous letters of intent to apply for license renewal (at 17 sites). In accordance with 10 C.F.R. § 2.109, a renewal application must be submitted at least five years before the expiration of the license in order to ensure that the plant can operate uninterrupted during the renewal process.

#### **4. Security Initiatives**

##### **(a) National Source Tracking System (“NSTS”)**

NSTS is an NRC initiative designed to allow Agreement State and Federal Government agencies to track transactions of specific types and quantities of radiological sealed sources. Tracking capabilities span the entire life cycle of each source, from manufacture or import to receipt and transfer, ending with export, decay, or burial. In the final rule, published in November 2006, the NRC required licensees to report certain transactions, including the manufacture, transfer, receipt, disassembly, or disposal, of nationally tracked sealed sources. The rule also requires licensees to provide their initial inventory of nationally tracked sources to the NSTS and annually reconcile the information in the NSTS with the licensees’ actual inventory. Additionally, the final rule requires manufacturers to assign a unique serial number to each nationally tracked source. The NRC had planned to develop the NSTS information system so that licensees could begin reporting radiological source data in November 2007. However, due to contractor delays, the NRC postponed system deployment until December 2008, and revised the initial licensee reporting deadline to January 31, 2009.

##### **(b) Power Reactor Security Rulemaking**

On March 27, 2009, the NRC issued a final rule amending its security regulations and adding new security requirements pertaining to nuclear power reactors. Final Rule, “Power Reactor Security Requirements,” 74 Fed. Reg. 13926 (March 27, 2009). The rulemaking establishes and updates generically applicable security requirements similar to those imposed after the terrorist attacks of September 11, 2001 and adds several new requirements developed as a result of insights gained from implementation of prior security orders. The final rule is effective May 26, 2009. For current 10 C.F.R. Part 50 licensees, compliance with the final rule is required by March 31, 2010; however, current licensees are required to submit their cyber security plans within 180 days of the effective date of the rule.

Key elements of the new rule include safety/security interface requirements that explicitly require licensees to manage and access the potential conflicts between security activities and other plant activities that could compromise plant security or safety; enhancements to the normal radiological sabotage-based physical security requirements via the new requirement that mixed-oxide fuel be protected from theft or diversion; cyber security requirements designed to provide high assurance that digital systems and networks are adequately protected against cyber attacks; a new regulatory framework to facilitate consistent application of NRC requirements for mitigative strategies and response procedures for potential or actual aircraft attacks; an increase in the rigor for many elements of the preexisting access authorization program requirements; and training and qualification enhancements.

### **(c) Rulemaking Plan for Material Control and Accounting**

On February 9, 2009, the Commission approved Option 4 of the NRC Staff's rulemaking plan for SECY-08-0059, "Part 74: Material Control and Accounting ("MC&A") of Special Nuclear Material ("SNM")." Option 4 involves conducting a rulemaking limited to revising and consolidating current MC&A regulations in Part 74. This will result in the relocation of the Nuclear Materials Management and Safeguards System-related reporting requirements for ISFSIs that are currently located in Part 72. Part 74 will be updated to clarify which requirements apply to which types of facilities, and the general provisions will be revised to include general performance objectives for the MC&A program that will apply to nearly all licensees.

The Commission directed the NRC Staff to consider integrating the MC&A proposals presented in SECY-08-0059 into the effort to develop the regulatory framework for reprocessing facilities; work with the Executive Branch to address the consequences of imposing any new requirements on existing treaties and the international community; and continue its efforts to share information with DOE on security and MC&A programs. The Commission noted that DOE is currently revising its existing categorization table. The Commission instructed that, once DOE's program has gained some operating experience, the NRC Staff should provide to the Commission a paper describing the program's successes and hurdles. At that time, the NRC Staff should also provide a recommendation on application of such a categorization table to both current and potential new facilities. The Commission advised that if the NRC Staff proposes to recommend adoption of a new categorization table, its justification will need to be clearly focused on improving the regulation of MC&A activities at licensed commercial facilities, and not solely on consistency with DOE's approach.

### **5. Enhancement to Emergency Preparedness**

On January 9, 2009, the NRC Staff submitted for Commission approval SECY-09-007, "Proposed Rule Related to Enhancements to Emergency Preparedness Regulations (10 C.F.R. Part 50)." The proposed rule would codify certain voluntary protective measures contained in NRC Bulletin 2005-02, "Emergency Preparedness and Response Actions for Security Based Events," and other generically applicable requirements similar to those previously imposed by Commission orders. It would further amend other licensee emergency plan requirements based on a comprehensive review of the current regulations and guidance. The proposed requirements would enhance the ability of licensees to prepare to take and taking certain emergency preparedness and protective measures in the event of a radiological emergency; address, in part, security issues identified after the terrorist events of September 11, 2001; and clarify regulations to effectuate consistent emergency plan implementation among licensees.

### **6. Criminal Prosecutions from Davis-Besse**

On January 2, 2006, the NRC Staff issued to David Geisen, a former engineer at the Davis-Besse nuclear plant, an Order prohibiting him from any involvement in NRC licensed activities for a period of five years. The Order related to many of the same facts and issues as pending criminal proceedings against Geisen. Geisen filed an answer to the Order, and the NRC Staff requested and received a stay of the enforcement proceeding until after the conclusion of

the criminal proceeding. Geisen was convicted on three criminal counts in federal court in October 2007. In May 2008, he was sentenced to four months of home confinement with electronic monitoring, three years of probation, 200 hours of community service, and a \$7,500 fine.

In June 2008, Geisen requested that the hearing on the Order be reinstated. The Licensing Board agreed with the parties that there had been an “outcome” in the criminal proceeding, and the Board held a hearing in the enforcement proceeding from December 8 to 12, 2008. The Board held additional oral argument on March 3, 2009. To date, the Board has not yet issued its ruling.

## **7. NRC Closes Out Indian Point Siren Enforcement Activity**

On March 3, 2009, the NRC closed out the enforcement actions taken against Entergy Nuclear Operations, Inc. (“ENO”) for its prior failures to implement a new Emergency Notification System (“ENS”) at the Indian Point facility. Section 651(b) of the Energy Policy Act of 2005 required installation of back-up power for the ENS by January 2005 for nuclear plants sited within a 50-mile radius of a permanent population in excess of 15,000,000. In reaching its determination, the NRC considered the following: the issuance of enforcement penalties totaling of \$780,000 to bring ENO into compliance with NRC Orders; ENO’s cooperation with Federal Emergency Management Agency (“FEMA”) to address that agency’s requirements for the new ENS; FEMA’s approval of the ENS; Entergy’s notification that the ENS was operational in August 2008; and a recent determination that the ENS reliability tests and corrective actions were acceptable.

## **8. Waste Confidence Decision Update; Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operations**

On October 9, 2008, the NRC published in the Federal Register a proposed rulemaking to revise its generic determination on the environmental impacts of spent fuel storage in conjunction with an update to its Waste Confidence Decision. The proposed rule would amend 10 C.F.R. § 51.23(a) to state the NRC’s determination that spent fuel can be stored safely, without significantly affecting the environment, until a disposal facility is available. The NRC’s object in revising the rule is to take into account scientific and technological developments that have occurred over the last two decades and provide an updated generic rule regarding waste confidence, an issue the NRC expects to be raised in numerous combined license application proceedings.

The NRC is also proposing to update and revise its Waste Confidence Decision. The Waste Confidence proceedings, which the NRC first initiated in October 1979, resulted in five findings. The NRC is proposing to amend Finding 2 and Finding 4. The objectives of Finding 2 were to predict when a repository for HLW and spent fuel would be available for use and how long spent fuel would need to be stored on a reactor site pending the opening of the repository. Finding 4 reflects the NRC’s confidence that spent fuel can be stored safely for several decades without impacting the environment. In 1984, the NRC determined that spent fuel could be stored safely for at least 30 years beyond the expiration of a reactor’s operating license. In 1990, the

NRC changed this timeline to 30 years beyond a 40-year initial license and 30-year license renewal period for a total of at least 100 years. Now, based on the NRC's review of spent fuel pools and dry cask storage along with post-9/11 security enhancements and study results, the NRC would like to revise Finding 4 to state that spent fuel can be stored safely for at least 60 years beyond the life of a reactor's license in spent fuel storage basins or dry storage facilities.

The Waste Confidence Decision had been a settled issue since 1990. In 1999, the NRC evaluated the Decision and found revision unnecessary. At that time, the NRC decided that it would only comprehensively reconsider the Decision when the repository development and corresponding regulatory activities "run their course" or "significant and pertinent unexpected events" occur that raise "substantial doubt" about the Decision. The NRC admits that these criteria have not been met. Even as recently as 2005, the NRC found no reason to reopen its Waste Confidence Decision in the absence of a denial of Yucca Mountain's license or DOE's abandonment of the site. Nevertheless, the NRC is proceeding to update the Decision.

## **9. Texas Approves Low-Level Waste ("LLW") Facility**

Waste Control Specialists ("WCS") received a final license for LLW disposal from Texas regulators on January 14, 2009. While the site will not be ready to accept the LLW until mid-2010, the site would be the first built in the U.S. in the last 30 years. The license allows WCS to dispose of Class A, B, and C LLW at the site, which is located on the Texas – New Mexico border. Initially, only Texas and Vermont, the two states included in the Texas Compact, will be able to dispose waste there. However, the Compact's seven-member commission can agree to contract with other states for disposal access. The license also allows WCS to operate a facility for the disposal of the federal government's LLW.

## **10. Security Guard Inattentiveness**

The NRC's investigation into the security guard inattentiveness events at the Peach Bottom facility culminated in a \$65,000 fine to Exelon Generation, LLC in January 2009 for a deliberate breach of the agency's security requirements. The NRC determined that select security guards willingly abrogated their responsibility to report observed instances of inattentive behavior. The NRC launched a range of inspections and investigations in September 2007 after video recordings of inattentive security officers came to light. Separately, the NRC initiated a lessons-learned assessment to identify potential improvements in its allegation review processes. The review team developed recommendations for improvements to allegation procedures, practices and policies, and to the inspection program aimed specifically at enhancing the NRC's ability to identify conditions of inattentiveness. Subsequently, the NRC issued Allegation Guidance Memorandum ("AGM") 2008-001, "Interim Guidance in Response to Lessons Learned from the Allegation Assessment of Inattentive Security Officers at Peach Bottom Atomic Power Station." The AGM is designed to provide interim guidance to the NRC staff responsible for handling allegations.

## **11. Enforcement Summary**

The NRC reported that 83 percent of the 104 operating commercial nuclear power plants were being operated by licensees in a manner that required only routine agency oversight in

2008. Although all 104 plants continue to be operated safely, several have required an additional level of agency oversight ranging from supplemental inspections, demands for information and/or the development of licensee-specific performance improvement plans. At the close of 2008, only one reactor, (Palo Verde Unit 3) required the NRC’s highest level of attention. Cooper and Palo Verde Units 1 and 2 required the second highest level of agency oversight for past performance issues. In March 2009, the NRC confirmed the performance improvement commitments made by the operator of Palo Verde and returned the three units to routine agency oversight.

Additionally, the NRC’s Executive Director of Operations approved in December 2008 a request to continue the agency’s heightened oversight of the Indian Point facility throughout CY 2009. This inspection program deviation is needed to ensure that the NRC can continue to inspect and monitor Entergy’s resolution of its groundwater tritium remediation issues.

The enforcement trends for Traditional (*i.e.*, those involving Severity Levels and possibly civil penalties) and the Significance Determination Process (“SDP”) of the Reactor Oversight Process, which summarize escalated enforcement actions from 2000 to 2008 are provided below in the following data tables:

**Figure 1 -- Traditional Historical Enforcement Summary**

	<b>Number of Escalated Enforcement Actions</b>	<b>Number of Escalated Enforcement Actions w/CP</b>	<b>Number of Escalated Violations</b>	<b>Proposed Civil Penalty (CP) Amount</b>	<b>Average CP per Escalated Enforcement Action</b>
<b>2000</b>	<b>10</b>	<b>2</b>	<b>12</b>	<b>\$198,000</b>	<b>\$99,000</b>
<b>2001</b>	<b>6</b>	<b>3</b>	<b>6</b>	<b>\$198,000</b>	<b>\$66,000</b>
<b>2002</b>	<b>3</b>	<b>2</b>	<b>4</b>	<b>\$348,000</b>	<b>\$174,000</b>
<b>2003</b>	<b>6</b>	<b>2</b>	<b>6</b>	<b>\$120,000</b>	<b>\$60,000</b>
<b>2004</b>	<b>8</b>	<b>4</b>	<b>8</b>	<b>\$208,000</b>	<b>\$52,500</b>
<b>2005</b>	<b>12</b>	<b>8</b>	<b>17</b>	<b>\$5,886,000</b>	<b>\$735,750</b>
<b>2006</b>	<b>10</b>	<b>3</b>	<b>10</b>	<b>\$229,000</b>	<b>\$76,333</b>
<b>2007</b>	<b>6</b>	<b>3</b>	<b>6</b>	<b>\$260,000</b>	<b>\$52,000</b>
<b>2008</b>	<b>3</b>	<b>2</b>	<b>3</b>	<b>\$930,000</b>	<b>\$465,000</b>

**Figure 2 -- Historical SDP Enforcement Summary**

	<b>Number of Escalated Enforcement Actions</b> <sup>1/</sup>	<b>Number of Escalated Findings</b> <sup>2/</sup>	<b>White Findings</b>	<b>Yellow Findings</b>	<b>Red Findings</b>
2000	9	11	10	0	1
2001	18	20	18	2	0
2002	24	26	24	0	1
2003	13	16	11	2	2
2004	15	16	15	0	0
2005	17	17	14	2	1
2006	16	17	14	0	0
2007	11	11	9	2	0
2008	8	8	8	0	0

- 1 Under the revised Enforcement Policy, the SDP is used to evaluate most inspection findings to determine the safety significance. For those actions issued under this approach, escalated actions are categorized as: (1) either low to moderate risk significance (“**White**”); (2) moderate to substantial risk significance (“**Yellow**”); or (3) great risk significance with a significant reduction in safety (“**Red**”). Very low risk significance findings (“**Green**”) are not included.
- 2 Often escalated actions involve multiple findings. As a result, the number of escalated findings tends to exceed the total number of escalated actions issued in a given year.

## **12. Withdrawal of Draft Final Decommissioning Rule**

The Commission approved a request by the NRC Staff to withdraw a draft final rulemaking package on decommissioning funding that was under review by the Commission (COMSECY-08-0038). According to the NRC Staff, withdrawal was needed to evaluate removal of draft final rule language in 10 C.F.R. Part 30, Appendix A (III)(E) which would impose a joint and several liability requirement on the guarantor of a Parent Guarantee. This provision would require a parent company to be responsible for any cost overruns of its subsidiary company if the subsidiary company, as an NRC licensee, uses the parent company to assure sufficient funds are available to complete future decommissioning activities — that is, it would provide for “joint and several liability” of the parent company. The nuclear industry asserted that promulgation of this requirement would be a policy change. The Staff agreed that imposing such liability generically by rule, as opposed to case-by-case determinations, would be a change in NRC policy. Accordingly, the NRC Staff will evaluate the policy change and submit the results of that analysis to the Commission.

## **B. Important NRC Adjudication Developments**

### **1. EnergySolutions – CLI-08-24**

On October 6, 2008, the Commission held EnergySolutions' application for a license to import up to 20,000 tons of LLW from decommissioned nuclear facilities in Italy and its accompanying application for a license to export LLW back to Italy in abeyance pending further Commission action. EnergySolutions applied for the export and import licenses on September 14, 2007. The application indicated that EnergySolutions would dispose of some of its LLW at its facility in Tennessee and send the remaining waste to its facility in Utah. However, the Utah facility is only licensed to dispose of Class A waste, and, therefore, any waste that was not Class A waste and could not be disposed of in Tennessee would be exported back to Italy. EnergySolutions told the Commission that it did not expect to need to use the export license.

The State of Utah and a consortium of public interest groups requested a hearing. At issue is the Northwest Interstate Compact on Low-Level Radioactive Waste Management ("Compact") of which Utah is a member. The Compact states that no facility located in any party state can accept LLW generated outside the region of the party states. The Compact has allowed EnergySolutions' Utah facility to accept domestic out-of-compact LLW but not foreign LLW. EnergySolutions argues that its Utah facility is not a regional facility, and the Compact, therefore, lacks jurisdiction over it. EnergySolutions is currently seeking a declaratory judgment from a federal court to that effect. The NRC Commission decided to defer action on EnergySolutions' application until the dispute over the Compact is resolved in the federal court system.

### **2. PG&E – CLI-08-26**

The Commission, in CLI-08-26, issued an order resolving the Diablo Canyon ISFSI proceeding on remand from the Ninth Circuit Court of Appeals. Following remand, the NRC Staff prepared a Supplemental Environmental Assessment ("EA") to address the likelihood of a terrorist attack on the ISFSI and the potential environmental consequences of such an attack. San Luis Obispo Mothers For Peace challenged the EA Supplement, arguing, *inter alia*, that the Commission improperly withheld information from the public; that the Commission failed to consider certain types of terrorist attacks; and that the EA Supplement failed to consider the environmental impacts of land contamination and latent health effects. Previously, the Commission had rejected the first two claims. The final claim was the subject of a hearing.

A majority of the Commission concluded that the NRC Staff properly determined that the environmental impacts of the postulated terrorist attacks were not significant and therefore did not warrant preparation of a full-blown Environmental Impact Statement ("EIS"). In doing so, the Commission rejected the Mothers for Peace final contention. The Commission reviewed the analyses performed by the Staff and found them to be adequate. The Commission also found that PG&E input in the proceeding, which was based on PG&E expert's testimony, "reinforced" the Commission's finding that the NRC Staff's analysis was reasonable. Commissioner Jaczko dissented, arguing that the NRC failed to adequately address land contamination and health impacts in the EA Supplement.

### **3. Commission Denies Petition to Suspend License Renewal Proceedings**

By Memorandum and Order dated October 6, 2008, the Commission denied four petitions filed by a number of public interest groups. The petitions were filed in four license renewal proceedings: Oyster Creek Nuclear Generating Station, Indian Point Nuclear Generating Unit Nos. 2 and 3, Pilgrim Nuclear Power Station, and Vermont Yankee Nuclear Power Station. The petitions requested that the Commission suspend the license renewal proceedings pending a “comprehensive overhaul” of the manner in which the NRC Staff reviews license renewal applications. Petitioners’ request was based primarily on an audit report issued by the NRC’s Office of the Inspector General (“OIG”). The Commission denied the petitions, stating that neither the OIG report, nor the Commission itself, had found that past license safety renewal safety reviews were inadequate or that the process requires a comprehensive revision.

### **4. Oyster Creek – CLI-08-28**

On November 6, 2008, the Commission ruled on a petition in the proceeding concerning AmerGen Energy Company, LLC’s (“AmerGen”) license renewal application for the Oyster Creek Nuclear Generating Station. Intervenors to the proceeding sought to reopen the record and introduce a new contention based on Draft Regulatory Information Statement (“RIS”), “Fatigue Analysis of Nuclear Power Plant Components,” published April 11, 2008. The draft RIS stated that the use of a simplified “Green’s function” analysis for calculating cumulative usage factors related to metal fatigue could be non-conservative if not correctly applied. The intervenors asserted that the predictions of metal fatigue at Oyster Creek were not conservative. The Commission upheld the Licensing Board’s decision, denying the intervenors’ petition because it agreed with the Board that the petition failed to articulate a claim with specificity as required by the Commission’s rules.

### **5. Indian Point License Renewal – CLI-08-29**

On December 9, 2008, the Commission issued an order affirming the denial of a joint petition to intervene and request for hearing on Entergy’s license renewal application for Indian Point Nuclear Generating Units 2 and 3. Petitioners, Westchester Citizen’s Awareness Network, Rockland Country Conservation Association, Public Health and Sustainable Energy, Sierra Club and Richard Brodsky (collectively, “WestCAN”) were expelled by the Licensing Board from the adjudication on July 31, 2008 for WestCAN counsel’s “appalling lack of candor” and “repeated misrepresentation of the facts.” The Commission upheld the expulsion, finding that WestCAN’s severe and pervasive procedural non-compliance, which resulted in needless expenditure of time and resources by other hearing participants, rose to the level justifying dismissal. The abuses engaged in by WestCAN counsel included repeatedly including inaccurate service dates on pleadings, repeatedly claiming that an untimely document had been timely served, inaccurately claiming that documents submitted at different times were identical, and inaccurately certifying that all participants had been served in a particular manner.

Eight intervenors remain in the proceeding: the State of New York, Riverkeeper, Inc., Hudson River Sloop Clearwater, the State of Connecticut, Westchester County, the Town of Cortlandt, the Village of Buchanan, and the New York City Economic Development Corporation.

## **6. Millstone Uprate – CLI-08-17 and LBP-08-09**

On August 12, 2008, the NRC Staff approved Dominion Nuclear Connecticut, Inc.’s request to amend its operating license for Millstone Power Station, Unit 3, in Waterford Connecticut to increase the unit’s authorized core power level from 3,411 to 3,650 megawatts thermal.

The Connecticut Coalition Against Millstone and Nancy Burton had moved to intervene and requested a hearing in the proceeding, but the Atomic Safety and Licensing Board denied the petition, finding that although the petitioners had standing, they did not submit an admissible contention. The petitioners appealed the Board’s decision, but, in CLI-08-17, the Commission affirmed it. After the Commission’s decision, the petitioners filed four pleadings seeking leave to file new and/or amended contentions. The Board, in LBP-08-09, denied the pleadings.

## **7. Shieldalloy – CLI 09-01**

Shieldalloy Metallurgical Corporation (“Shieldalloy”) requested a license amendment to authorize the decommissioning of its Newfield, New Jersey facility in fall of 2006. In June 2008, the Licensing Board issued a memorandum noting concerns about the extraordinarily slow pace of the proceeding and questioning whether there are currently adequate protective measures in place to protect nearby residents. The Board, recognizing its lack of authority to inquire further into the NRC Staff’s performance of its regulatory oversight responsibilities, referred its concerns to the Commission. In response to the Board’s concerns, the NRC Staff asserted that Shieldalloy has certain protective measures in place that are essentially the same as those contemplated by the decommissioning plan.

On January 27, 2009, the Commission issued an order acknowledging the slow pace of the decommissioning proceeding, but agreeing with the Board that there have been no failures in the NRC Staff’s technical review. The Commission stated its expectations that Shieldalloy will cooperate fully with the NRC Staff and that the NRC Staff will accord sufficient priority to meeting the estimated safety and review schedule. Further, the Commission noted that it has no reason to conclude that there are any ongoing violations of health and safety standards at Shieldalloy.

## **8. MOX – CLI-09-02**

In 2001, Shaw Areva MOX Services, LLC applied to build a mixed oxide (“MOX”) fuel fabrication facility. The applicant submitted a construction authorization request, and the approval of construction was granted in July 2005. In 2006, the applicant applied for its operating license though it had not yet begun construction, and intervenors applied for and were granted a hearing. The NRC Staff, in early 2008, announced its intention to issue a “possession and use” license to the Applicant before construction was complete. Intervenors then filed a late contention stating that the Applicant had not completed construction as required under Section 70.23(a)(8). Two months later, the NRC Staff changed its position and decided to issue the “possession and use” license only after construction was completed.

The Licensing Board, after hearing arguments, dismissed the late-filed contention, but imposed two conditions: the applicant had to give the intervenors at least 60 days written notice

prior to asking the NRC Staff to make the completion finding; and the NRC Staff, once asked by the applicant, had to provide intervenors at least 30 days written notice before making its decision on the completion finding.

The NRC Staff asked the Commission to reverse the Board's imposition of the two conditions, and the intervenors requested that, if the Commission did not uphold the Board's ruling on the late-filed contention, the Board admit the contention and hold it in abeyance pending the Staff's issuance of its completion finding. In CLI-09-02, the Commission granted the Staff's request for interlocutory review, finding that the Board "overstepped the bounds of its authority." The Commission also affirmed the Board's dismissal of the late-filed contention, but ruled that if 60 days after the pertinent information becomes available the intervenors submit an otherwise admissible contention regarding construction of the MOX facility, it will be considered timely.

### **9. Bellefonte – CLI-09-03**

In CLI-09-03, the Commission reversed a Licensing Board decision in the Bellefonte COL proceeding admitting a contention regarding low-level waste. The contention alleged that the applicant failed to offer a viable plan for disposal of low-level radioactive waste ("LLRW") because, as of June 30, 2008, the disposal facility in Barnwell, South Carolina no longer accepts Class B and Class C LLRW that is generated outside the Atlantic Compact Commission States of Connecticut, New Jersey, and South Carolina. According to the Commission, the Board erred in admitting the proposed contention because the contention constituted a collateral attack upon Table S-3. The Commission also declined to initiate a low-level waste confidence proceeding, reasoning that applicants have been safely managing low-level waste for years. Similar contentions have been admitted in four other proceedings and denied in at least one other proceeding.

### **10. Other New Reactor Orders – Duke (LBP-08-17); Shearon Harris (LBP-08-21); Summer (LBP-09-02); Vogtle (LBP-09-03); Calvert Cliffs (LBP-09-04)**

In the William States Lee proceeding, the Licensing Board in LBP-08-17 found that the petitioners had established standing, but had not proffered an admissible contention. Accordingly, the request for hearing was denied.

In the Shearon Harris proceeding, the petitioner submitted several contentions, including aircraft hazards, carbon footprint, low-level and high-level waste, and uranium fuel reliability. The petitioner also raised issues regarding cost of new units, use of high-density spent fuel pools, fire protection, emergency planning, and water usage by the proposed plant. In LBP-08-21, the Licensing Board admitted one contention relating to design and operational procedures associated with the still-pending design certification revision for the AP1000. Consistent with the Commission's policy statement on new reactor proceedings, the Board held the contention in abeyance pending completion of the design certification rulemaking by the NRC Staff.

In the Summer proceeding, two groups requested a hearing. The petitioners argued that the design and operating procedures are not in the COL application, and that the COL does not

consider aircraft attacks or the impacts of fires resulting from such attacks. They also asserted the applicant overestimated the need for power, underestimated the costs of the proposed reactors, and failed to fully consider alternative energy sources. The Board in LBP-09-02 found that petitioners had established standing, but had not proffered an admissible contention. Accordingly, the request for hearing was denied.

In the Vogtle COL proceeding, the Board in LBP-09-03 found that petitioners had standing, but admitted only one contention related to low-level waste disposal.

In the Calvert Cliffs Unit 3 proceeding, petitioners submitted seven proposed contentions. The contentions included challenges to the participation of Électricité de France (“EDF”), the use of a parent guarantee for decommissioning funding, cumulative impacts to the Chesapeake Bay, and the risks associated with a nearby LNG facility. The petition also raises issues regarding high-level and low-level waste. The Board in LBP-09-04 found that petitioners had standing and admitted portions of three contentions: a challenge to the participation and influence of EDF (foreign ownership and control); a challenge concerning the proper timing for the Applicant to submit the financial tests for parent company guarantees; and a challenge concerning low level waste disposal.

## **11. License Renewal Orders – Vermont Yankee, Prairie Island, and Oyster Creek**

### **(a) Vermont Yankee**

Entergy Nuclear Operations, Inc. submitted an application to renew the operating license for its Vermont Yankee Nuclear Power Station on January 25, 2006. The plant has been in operation since 1979, and the license is scheduled to expire on March 21, 2012. The renewal, if approved, would extend Entergy’s license for an additional 20 years. On November 24, 2008, the Licensing Board issued a partial decision on three of the contentions considered at the July 21, 2008 hearing: the analytical methods employed in Entergy’s Environmentally Corrected Cumulative Usage Factor (“CUFen”) Reanalysis were flawed by uncertainties and assumptions and produced overly optimistic results; Entergy’s license renewal application does not include an adequate plan to monitor and manage aging of the steam dryer during the period of extended operation; and Entergy’s license renewal application does not include an adequate plan to monitor and manage aging of plant piping due to flow-accelerated corrosion during the period of extended operation.

The Board ruled that license renewal was not authorized and, therefore, cannot be granted until 45 days after Entergy satisfactorily completes the required metal fatigue calculations and serves them on the NRC Staff and the other parties. The Board ruled that until that time, the proceeding on the CUFen contention would remain open and the contention held in abeyance. The Board did, however, close the record regarding the two other contentions provided Entergy continues to monitor and inspect the steam dryer during the period of extended operation.

### **(b) Prairie Island**

Northern States Power is seeking to renew its operating license for the Prairie Island Nuclear Generating Plant Units 1 and 2 for an additional 20 years. The current license is set to

expire on August 9, 2013 for Unit 1 and October 29, 2014 for Unit 2. On December 5, 2008, the Licensing Board granted the Prairie Island Indian Community's petition to intervene and request for a hearing. The Board found that the Community had standing and admitted seven contentions, some of which were limited and reworded by the Board. The contentions discuss historical and archaeological resources in the region; site restoration costs; environmental justice or the effect of the renewal on the adjacent minority population; the aging of containment coatings; and monitoring the effects of embrittled reactor vessel internals, primary water stress corrosion cracking of nickel-alloy components, and flow accelerated corrosion.

The applicant submitted a motion for reconsideration or referral to the Commission, but the Board denied the motion because Northern States Power did not meet the rigorous standards required for reconsideration or referral to the Commission.

### **(c) Oyster Creek**

AmerGen Energy Company, LLC is seeking a 20-year renewal of its license to operate the Oyster Creek Nuclear Generating Station. The current license expires on April 9, 2009. Six organizations, collectively known as "citizens," argued that the Atomic Safety and Licensing Board must reject the license renewal request because AmerGen's management program for corrosion of the drywell shell in the sand bed region near the plant is inadequate. The Board sided with AmerGen and rejected the contention in LBP-07-17.

On January 14, 2008, the citizens petitioned the Commission to review LBP-07-17. Four months later, the Commission asked the parties to submit briefs on the issue of whether the structural analysis that AmerGen has committed to perform on the Oyster Creek drywell shell matches or bounds the sensitivity analysis Judge Baratta discussed in his "Additional Statement" in LBP-07-17. Judge Baratta would require that AmerGen perform a 3-D finite element structural analysis of the drywell shell to determine the thickness of the shell as well as further sensitivity analyses to determine the shell's thickness between measured locations. On August 21, 2008, the Commission referred the issue to the Board for resolution. The Board held oral argument, and the parties submitted supplemental briefs.

The Board, on October 29, 2008, concluded that AmerGen's proposed approach is satisfactory, but the Board made several recommendations, including directing the Staff to review AmerGen's completed analysis to verify its adequacy. On April 1, 2009, the Commission, by Memorandum and Order CLI-09-07, found the Board's decisions in LBP-07-17 to be reasonable and declined to disturb them. The Commission further found no inconsistency between the Board's decision and Judge Baratta's Additional Statement and directed the NRC Staff to enhance its review and verification of AmerGen's structure analysis.

## **C. High Level Waste Storage and Developments**

### **1. Docketing of Application Notice of Hearing, Petitions to Intervene**

On September 8, 2008, the NRC accepted for docketing the Department of Energy's ("DOE") license application for the proposed high-level nuclear waste repository at Yucca Mountain, Nevada. The Commission also adopted DOE's environmental impact statement, but requested that DOE supplement some aspects of its groundwater analysis. The decision to

docket the application triggers a three-year deadline (with a possible one-year extension), set by Congress, for the Commission to decide whether or not to grant a construction authorization. NRC officials have stated that this deadline is contingent on the NRC receiving sufficient resources from Congress.

Notice of opportunity for hearing was published in the Federal Register on October 22, 2008. Fourteen petitioners seeking to intervene in the proceeding filed approximately 320 proposed contentions. Three NRC Atomic Safety and Licensing Boards conducted oral arguments in the proceeding from March 31 through April 2, 2009. The Boards will issue rulings on the petitioners' standing and the admissibility of the proposed contentions.

## **2. Commission Approves Final Rule On Dose Standard After 10,000 Years**

On March 13, 2009, the Commission published in the Federal Register Final Rule, "Implementation of a Dose Standard After 10,000 Years." 74 Fed. Reg. 10811. The rule incorporates the Environmental Protection Agency's ("EPA") site-specific radiation dose standards for a high-level nuclear waste repository at Yucca Mountain, Nevada, as required by the Environmental Protection Act. The final rule amends 10 C.F.R. Part 63 to retain EPA's standard dose limit for individuals of 15 millirem for the first 10,000 years after disposal and adopts EPA's 100 millirem dose limit for the period after 10,000 years and up to 1 million years. The final rule also follows the EPA by specifying a range of values for the deep percolation rate to be used to represent climate change after 10,000 years. Further, the final rule specifies that calculations of radiation doses for workers will be made using the same weighting factors that EPA is using to calculate individual doses to members of the public. The effective date of the final rule is April 13, 2009.