Pending Significant Litigation Matters

DOE is involved in a number of litigation matters arising out of its diverse activities and programs

Summary: DOE currently has three significant pending litigation matters:

- Spent Fuel Litigation
- Alleged Exposures to Radioactive and/or Toxic Substances
- National Interest Electric Transmission Corridor Litigation.

Issue

DOE is involved in a number of litigation matters arising out of the Department's diverse activities and programs. Below is a summary of significant pending litigation matters.

Status

Spent Nuclear Fuel Litigation

As specified by the Nuclear Waste Policy Act of 1982 (NWPA), DOE entered into contracts with more than 45 utilities in which, in return for payment of fees into the Nuclear Waste Fund, the Department was required to begin disposal of spent nuclear fuel (SNF) by January 31, 1998. Because DOE has no facility available to receive SNF under the NWPA, DOE has been unable to begin disposal of the utilities' SNF as required by the contracts. Significant litigation claiming damages for partial breach of contract has ensued as a result of this delay.

To date, eight suits have been settled involving utilities that collectively produce about 29.7 percent of the nuclear-generated electricity in the United States. Under the terms of the settlements, the Judgment Fund, 31 U.S.C. 1304, paid approximately $353.4 million to the settling utilities for delay damages they have incurred through September 30, 2008 and will make annual payments to them for future costs as they are incurred. In addition, two cases have been resolved by final judgments: a judgment of $35 million that was not appealed and paid by the Judgment Fund; and a final judgment awarding no damages affirmed by the appellate court.

Fifty-seven cases remain pending either in the Court of Federal Claims or in the Court of Appeals for the Federal Circuit. Liability is probable in these cases, and in many of these cases orders have already been entered establishing the Government's liability and the only outstanding issue to be litigated is ascertaining the amount of damages to be awarded. However, it should be noted that the courts have not resolved the significant issue as to whether the Government can assert the unavoidable delays defense, under which, if applicable, the Government would not be liable for any damages.

Under current law, the Department will not be required to reimburse any damages or settlements in this litigation that have been paid out or will be paid out of the Judgment Fund.

Alleged Exposures to Radioactive and/or Toxic Substances

A number of class action and/or multiple plaintiff tort suits have been filed against current and former DOE contractors in which the plaintiffs seek damages for alleged injuries or diminution of property values caused by exposure to radioactive and/or toxic substances as a result of the historic operations of DOE nuclear facilities. The most significant of these cases arise out of operations of the facilities at Rocky Flats, Colorado; Hanford, Washington; Paducah, Kentucky; Portsmouth (Piketon), Ohio; Mound, Ohio; and Brookhaven, New York. Collectively, in these cases, damages in excess of $109 billion are sought.

These cases are being vigorously defended. Two cases have gone to trial. In the Rocky Flats litigation, the jury returned a substantial verdict in favor of the plaintiffs. The court has entered judgment on the verdict, and the defendants have filed appeals. In the Hanford litigation, following rulings by the court of appeals, seven of twelve "bellwether" plaintiffs' claims were resolved in favor of the defendants, relatively small judgments in favor of two "bellwether" plaintiffs were affirmed, and three "bellwether" plaintiffs' claims were remanded to the district court for further proceedings. The defendants have filed a petition for a writ of certiorari in the U. S. Supreme Court. Proceedings on the remaining Hanford plaintiffs' claims have been suspended while appeals are prosecuted. In addition to the Rocky Flats and Hanford cases, some cases have been dismissed by trial courts based on legal rulings, and some of those rulings have been appealed to the courts of appeals. Final resolution of these issues has not been determined.

Based on the resolution of prior similar litigation, and the favorable results obtained to date in most of the pending cases, the Department believes that the likelihood of liability in many of these cases is remote, and that in those cases where liability is reasonably possible, if any liability is ultimately imposed, it would be significantly less than what the plaintiffs seek.

National Interest Electric Transmission Corridor Litigation

Section 1221(a) of the Energy Policy Act of 2005 (Pub. L. 109-58) (EPAct) added a new section 216 to the Federal Power Act (FPA), 16 U.S.C. § 824p. FPA section 216(a) requires the Secretary of Energy to conduct a nationwide study of electric transmission congestion within one year from the date of enactment of that section and every three years thereafter. Following consideration of alternatives and recommendations from interested parties, the Secretary is required to issue a report based on the study "which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor [(NIETC)]." 16 U.S.C. § 824p(a)(2). The effect of a National Corridor designation is to delineate geographic areas within which, under certain circumstances, the Federal Energy Regulatory Commission (FERC) may authorize "the construction or modification of electric transmission facilities." 16 U.S.C. § 824p(b). However, FERC jurisdiction is triggered only when either: the State does not have authority to site the project; the State lacks the authority to consider the interstate benefits of the project; the applicant does not qualify for a State permit because it does not serve end-use customers in the State; the State has withheld approval for more than one year; or the State has

conditioned its approval in such a manner that the project will not significantly reduce congestion or is not economically feasible. 16 U.S.C. § 824p(b)(1).

DOE published a National Electric Transmission Congestion Study in August 2006, which was followed by a notice and comment period, a draft NIETC designation, and further opportunity for comment. On October 5, 2007, DOE designated two NIETCs, the Mid-Atlantic Corridor (DOE Docket No. 2007-OE-01) and the Southwest Corridor (DOE Docket No. 2007-OE-02), in a National Electric Transmission Congestion Report and Order. 72 Fed. Reg. 56992. After considering requests for rehearing, DOE issued an Order Denying Rehearing, effective March 11, 2008, which affirmed the NIETC designations. 73 Fed. Reg. 12959.

Various states, state utility commissions, and environmental groups have filed a total of 18 lawsuits, in both district and courts of appeals, challenging DOE's NIETC designations. The cases currently pending in district court are awaiting the court's ruling on the Government's motion to dismiss for lack of subject matter jurisdiction. For the circuit court cases, which represent the majority of the litigation, the Judicial Panel on Multidistrict Litigation randomly selected the Ninth Circuit Court of Appeals as the circuit in which all petitions for review of DOE's NIETC designations are to be heard. The Ninth Circuit has issued an order consolidating the individual petitions for review, and has set the following briefing schedule: the petitioner's brief is due December 29, 2008, and the Government's brief is due March 30, 2009. Unless a party was to file a motion for expedited oral argument, oral argument will likely not be held until late 2009 or early 2010.

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