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NOTE TO: Cynthia L. Quarterman
Department of Energy Agency Review Team

FROM: Janet Z. Barsy
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SUBJECT: Paper on "Other Major Litigation of Direct Interest to DOE"

DATE: December 5, 2008

At our meeting on November 24, 2008, you expressed an interest in major litigation of direct interest to the Department where DOE has an interest in the outcome of the suit although it is not a party to the litigation.

Attached is a paper prepared by the Office of the Deputy General Counsel for Litigation that summarizes such cases. The claims in one of the cases, *E.I. DuPont de Nemours & Co. v. Stanton*, are briefly discussed in the Transition Paper entitled Pending Significant Litigation Matters under the section "Alleged Exposures to Radioactive and/or Toxic Substances."

Please let us know if you have any questions about this material.

cc: Ingrid Kolb
Director, Office of Management

December 5, 2008

Other Major Litigation of Direct Interest to DOE

Entergy Corporation v. EPA; PSEG Fossil LLC v. Riverkeeper, Inc.; Utility Water Group v. Riverkeeper, Inc., S. Ct. Nos. 07-588, 07-589, and 07-597. The question presented in this litigation is whether Section 316(b) of the Clean Water Act, 33 U.S.C. 1326(b), authorizes EPA to compare costs and benefits in determining the "best technology available for minimizing adverse environmental impact" at cooling water intake structures. The Second Circuit held that EPA may not engage in cost-benefit analysis in determining the "best technology available," and that consideration of cost is limited to choosing "a less expensive technology that achieves essentially the same results" as the best technology that industry can reasonably bear. EPA did not seek certiorari from the Second Circuit's ruling, but, after the Court granted the petitions filed by the industrial parties, EPA took the position that the Second Circuit's decision should be reversed because the relevant statutory text does not unambiguously prohibit consideration of the relationship between costs and benefits. DOE is not a party to this litigation, but has a direct interest in its outcome because the cooling water intake structures at issue are primarily associated with electric power plants. The Court heard oral argument in this matter on December 2, 2007.

* * *

United States of America v. Eurodif, S.A., S. Ct. No. 07-1059. The question presented in this case is whether the Federal Circuit erred in rejecting the Department of Commerce's conclusion that low-enriched uranium ("LEU") imported pursuant to separative work unit ("SWU") transactions–in which the purchaser provides unenriched uranium feedstock to an enricher, and pays the enricher for the SWU used to convert feedstock into LEU–is subject to the antidumping duty laws, 19 U.S.C. 1673. The Federal Circuit concluded that, because of the way such transactions are structured, they do not result in "foreign merchandise * * * being * * * sold in the United States," a predicate of the antidumping laws. Commerce argues that that conclusion failed to accord appropriate deference to its reasonable interpretation of the statute it administers. DOE joined several other agencies in signing on to Commerce's briefs because of the energy policy, foreign policy, and national security interests that the Federal Circuit's decision threatens. In brief, the decision has the potential to undermine an important nonproliferation agreement between the U.S. and Russia; threatens the ongoing economic viability of the United States Enrichment Corporation, the only domestic entity that enriches uranium, and the only facility in the world that produces nuclear materials for U.S. military use; and could result in increasing U.S. dependence on foreign energy sources. The Court heard oral argument in this matter on November 4, 2007.

* * *

E.I. DuPont de Nemours & Co. v. Stanton, S. Ct. No. 08-210. Approximately 2500 individual tort claims are pending against former Hanford contractors (DuPont, General Electric, and UNC Nuclear Industries) in the Eastern District of Washington. The plaintiffs bringing these claims

allege a wide variety of maladies supposedly caused by radiaoactive emissions from Hanford operations, but the core claims are for thyroid diseases that allegedly were caused by emissions of 2radioactive iodine (I-131) in the late 1940s and early 1950s. Although DOE is not a party to this litigation, it has a contractual right to direct the defense, and is obligated to reimburse the contractors for the costs they incur in defending and for any liability imposed upon them.

The district court elected to use a "bellwether" plaintiffs approach to try to dispose of these claims. Twelve "bellwether" plaintiffs were selected. One plaintiff voluntarily dismissed her claims; the claims of five plaintiffs were dismissed by the court on summary judgment; and the remaining six plaintiffs' claims were tried. The only issue at trial was whether the plaintiffs could establish that their illnesses were caused by radioactive emissions from Hanford–because in a series of pretrial rulings the district court concluded that the defendants could not claim immunity under the Government Contractor Defense, could not claim that their actions were non-negligent because they complied with applicable federal nuclear safety standards, and indeed that the defendants were strictly liable. Verdicts in favor of the defendants were returned as to four "bellwether" plaintiffs, and relatively small ($200,000 and $300,000) verdicts were given for two plaintiffs.

The Ninth Circuit reversed the judgments entered against three plaintiffs based on its disagreement with certain evidentiary rulings that the district court had made, but otherwise essentially affirmed all of the lower court's decisions.

The defendants have filed a petition for certiorari presenting three questions: Whether the Ninth Circuit erred by holding that the federal common law government-contractor defense does not apply as a matter of law to claims under the Price-Anderson Act, which provides the exclusive cause of action for all injuries allegedly caused by nuclear emissions? Whether the Ninth Circuit erred by holding that petitioners may be held strictly liable under the Price-Anderson Act for federally authorized nuclear emissions? And whether the Ninth Circuit erred, and deepened an acknowledged circuit split, by holding that a putative class member who files an individual lawsuit while a motion for class certification is pending is nonetheless entitled to class action tolling?

* * *

Cook v. Rockwell International Corporation, 10th Cir. Nos. 08-1224, 08-1226, and 08-1239. This class action lawsuit was filed in 1990 against Rockwell International and Dow Chemical, former operating contractors at DOE's Rocky Flats Plant in Colorado, seeking damages for alleged diminution in the value of real estate in the vicinity of Rocky Flats caused by emissions of plutonium. Because this case arises under the Price-Anderson Act, 42 U.S.C. 2210, DOE is obligated, by statute and by contract, to fully indemnify the defendants for any liability imposed upon them, and reimburses the costs they incur in defending themselves.

The plaintiffs make a nuisance claim predicated on allegations that past plutonium releases from

Rocky Flats created some health risk to class members and, consequently, interfered with the use and enjoyment of their properties. They also make a trespass claim based upon the alleged deposition of plutonium, regardless of whether the material was detectable, on class members' properties. In a series of pretrial rulings, the district court held, *inter alia*, that state-law standards of care are not preempted by federal nuclear regulations, and, therefore, in Price-Anderson actions, such as this case, plaintiffs do not have to prove as an element of their tort claims that any contamination exceeded federal regulatory limits.

Trial commenced on October 3, 2005, and the jury returned a verdict in favor of the plaintiffs on both the nuisance and trespass claims on February 14, 2006. On May 20, 2008, the district court denied the defendants' post-trial motions, and a Rule 54(b) judgment was entered on June 3, 2008. In accordance with the jury's verdict and the court's post-trial rulings, the judgment assesses $725,904,087 in compensatory damages (including pre-judgment interest) against the defendants, $110,800,000 in exemplary damages against Dow, and $89,400,000 in exemplary damages against Rockwell. Post-judgment interest will also be assessed until the judgment is paid.

The defendants have appealed to the Tenth Circuit. By stipulation and order in the district court, execution on the judgment has been stayed pending appeal without requiring the defendants to post a bond. By stipulation and order in the court of appeals, the length of the briefs that the parties may file on appeal has been considerably enlarged, and so has the schedule for filing briefs. The time within which the defendants' opening brief must be filed has not yet begun to run, however, because of unresolved issues in the district court about the completeness of the record. A Tenth Circuit oral argument almost certainly will not occur until 2010.