

## Technical Note #6: Judicial Review of NRC Actions

Few NRC actions relevant to radiation and the reproductive health of workers have been tested by judicial review or tort litigation, and the reported decisions all indicate considerable judicial deference to the NRC on the technical aspects of its decisions. Thus, judicial accountability on the technical (e.g., health, science, risk analysis) aspects of NRC decisions has been minimal.

A recent example of judicial deferral to the Commission's decisions is the decision in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.* At issue was a determination by NRC, in the face of great scientific uncertainty, that the storage of high-level nuclear wastes would have no significant environmental impact. The U.S. Supreme Court found the Commission's zero-release assumption to be within the bounds of reasoned decision-making and reversed the 1<sup>st</sup> Circuit's requirement of greater consideration of possible environmental consequences. Justice O'Connor described the judiciary's role in the judicial review of NRC decisions:

A reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.<sup>2</sup>

This is consistent with prior court decisions which repeatedly manifest extreme judicial deference to NRC decisions on technical, health, and safety issues in the handling of radioactive materials. While NRC's occupational exposure standards have apparently not been directly challenged in court, other NRC standards and provisions for health and safety (usually licensing actions) have been judicially reviewed. The court decisions all demonstrate a judicial reluctance to question the technical or factual basis for Commission actions.

Federal court deference to NRC actions extends back to *Crowther v. Seaborg*,<sup>3</sup> decided in 1970. In that case, the AEC proposed permitting an atmospheric release of radioactive gas to be created by an underground nuclear explosion. Although predicted exposures to individuals in the general population were well below AEC's standard of 0.5 rem/year, plaintiffs sought to enjoin the release. Extensive expert testimony was used to attack the validity of AEC's standard in an attempt to prove that scientific evidence indicated a high risk of chromosomal aberrations in the general public to be exposed, and that health science studies supported a ten-fold reduction. The Federal district court found the radiation protection standards, reached by AEC or NRC use of a cost-benefit analysis approach, to be reasonably adequate to protect life, health, and safety. In its opinion, characterized by deference to the AEC, the court stated:

The law provides a strong presumption of validity and regularity when administrative officials decide weighty issues within the specific area of their authority and the burden is on the plaintiffs to overcome this presumption.

All that is required to establish the reasonableness of the decision setting a standard under the statutory directive to protect health and safety is that it be made carefully in light of the best of available scientific knowledge.<sup>4</sup>

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1. *Baltimore Gas & Electric Co. v. Natural Resources Defense Council Inc.*, 103 S. Ct. 2246 (1983).

2. *Id.* at 2256.

3. *Crowther v. Seaborg*, 312 F. Supp. 1205 (D. Colo. 1970).

While NRC's occupational radiation standards have not been directly challenged, it is reasonable to assume that the same judicial affirmation of expertise granted NRC's general population standards would be provided NRC's occupational radiation standards. Actions to hold NRC liable under various tort theories have been filed against the agency for alleged personal injuries. But these have failed to result in judicial scrutiny of NRC technical expertise. These attempts must be analyzed from an understanding of the Federal Tort Claims Act of 1946.<sup>5</sup> The Act abrogated the Federal Government's immunity from tort liability. However, the Act preserved federal immunity with respect to acts or omissions which fall within the "discretionary function" of an agency. Claims by employees for radiation injury against NRC have consistently failed due to the discretionary function exception.

Under the Atomic Energy Act, Congress gave NRC extensive discretion to deal with matters relating to health and safety. Pertinent language is contained in 42 U.S.C. § 2051(a):

The Commission is directed to exercise its powers in such manner as to ensure the protection of health and the promotion of safety during research and production activities. The arrangements made pursuant to this section shall contain such provisions (1) to protect health, (2) to minimize danger to life or property, and (3) to require the reporting and to permit the inspection of work.

*Blaber v. United States*<sup>6</sup> involved an action under the Federal Tort Claims Act for personal injury and for death resulting from a thorium explosion at a facility under contract with the AEC. The court barred the suit by finding that AEC's duty to issue health and safety regulations was a discretionary function.

... when the Commission decides the extent to which it will undertake to supervise the safety procedures of private contractors, it is exercising discretion at one of the highest levels. Decisions of this kind are therefore within... [its] discretionary function [under the Federal Tort Claims Act].<sup>7</sup>

In *Bramer v. United States*,<sup>8</sup> the plaintiff was injured by a radiation leak at a laboratory operated by a university under contract with the AEC. The contract had delegated responsibility for health and safety programs to the university. The contract also recognized that the work was dangerous. The plaintiff sued the AEC on the non-delegable duty doctrine; the common law theory that delegation of inherently dangerous activities does not shield the delegator from liability. The court barred the suit on the grounds that the AEC was not bound by the non-delegable duty doctrine, due to the discretionary exemption of the Federal Tort Claims Act.

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4. 312 F. Supp. at 1234.

2. 28 U.S.C. § 2680 (1982).

6. *Blaber v. United States*, 332 F.2d 629 (2d Cir. 1964).

7. *Id.* at 631.

8. *Bramer v. United States*, 412 F. Supp. 569 (C.D. Cal. 1976).

These examples of failed tort actions demonstrate, as do the examples of deferential judicial review, that the NRC's technical bases for its final actions and ' operational activities have not been adequately examined by the courts. Thus, the courts have not provided for technical accountability because of NRC's alleged expertise and scope of discretion.