CASE LAW AND ADMINISTRATIVE DECISIONS

CASE LAW

Canada

Decision rejecting a request to carry out a new environmental assessment of the project to construct a spent nuclear fuel dry storage facility (2001)

Following the decision of the Minister of the Environment of 14 April 1999 approving the project to construct a spent fuel dry storage facility at the Bruce Nuclear Power Plant on Lake Huron, the Inverhuron and District Ratepayers Association introduced a claim for judicial review to invalidate the environmental assessment process. The Association argued that the Minister's decision was based upon an irrelevant environmental assessment and that it did not properly consider the uncertainty as to the possible environmental effects of the project on human health. The Association also called for a public review of the project.

In January 2000, the Federal Court dismissed the application for judicial review on the grounds that the Association could not interfere with the Minister's decision-making process. It also reviewed the factors that the Canadian Environmental Assessment Act of 23 June 1992 required to be considered and held that each of them had duly been taken into account in the final design of the project.

The Association appealed this decision before the Federal Appeal Court, arguing in particular that the Court was required to carry out a "significant search" to determine whether or not the environmental assessment and its associated documents provided the Minister with a reasonable basis for concluding that the radiological impact of the project's final design was not likely to cause significant adverse environmental effects. The Appeal Court, which made its ruling on 20 June 2001, dismissed this argument. It stated that the Court must not turn into an "academy of science" and that "it is not for the Judges to decide what projects are to be authorised, but, as long as they follow the statutory process, it is for the responsible authorities".

France

Judgement refusing an application to annul a Decree authorising an extension to the Melox nuclear installation (2001)

On 16 March 2001, the Council of State (*Conseil d'État* – Supreme Administrative Court in France) rejected an appeal entered by the *Collectif national Stop Melox et Mox*, an independent ecological movement, against the Decree of 30 July 1999 authorising the General Company for Nuclear Materials (*Compagnie générale des matières nucléaires* – Cogema) to carry out an extension to the Melox major nuclear installation, situated in the commune of Chusclan, in the Gard department. In particular, the Court rejected the claim that the absence of a new public enquiry was illegal, pursuant to Section 6 of the Decree of 11 December 1963 on Major Nuclear Installations (the text of this Decree as amended is published in *Nuclear Law Bulletin* No. 12). According to the Council of

State, it was not demonstrated by the contents of the application that the contested activity, which was limited to the construction of an annex for sorting and storage in order to separate Mox fuel into different levels of quality without increasing the capacity for production, introduced modifications capable of substantially modifying the importance or the purpose of the installation, or which would increase its risks.

Decisions on the authorisation to unload and store Australian spent nuclear fuel in France (2001)

In its judgement of 15 March 2001, the County Court (*Tribunal de grande instance*) of Cherbourg ruled on an application made by Greenpeace to prevent the General Company for Nuclear Materials (*Compagnie générale des matières nucléaires* – Cogema) from accepting the unloading and storage in France of spent nuclear fuel originating from a research reactor belonging to the Australian Nuclear Science and Technology Organisation (ANSTO) with a view to its reprocessing in La Hague. The judges believed that "doubts existed with regard to the legality of the envisaged activities, not just in relation to their importation but also with regard to the real use of this fuel, assimilated in fact to waste",[1] and that such doubts were susceptible to cause illegalities preventing reception of this waste.

On 3 April 2001, the Court of Appeal of Caen reversed this judgement on the grounds that "Cogema was in possession, at the time of arrival of the ship, of the necessary regulatory and administrative authorisations to import and stock this nuclear material in France".[2] According to the judges, damage which could result from the storage of such materials in France is currently hypothetical, given that such damage would only take place if the licences for their reprocessing, requested by Cogema, were refused.

The Court declared, however, that it did not have jurisdiction to decide the issue of whether the Australian spent fuel should be assimilated to waste which would, in this event, mean that Cogema had violated the terms of the 1991 Act on Radioactive Waste Management (see *Nuclear Law Bulletin* Nos. 49 and 50; the text of this Act is published in *Bulletin* No. 49) which prohibits the storage of foreign radioactive waste. Also, on 21 May 2001, Greenpeace served another writ against Cogema before the County Court of Cherbourg on new procedural grounds.

Judgement of the Council of State refusing to classify depleted uranium as waste (2001)

By its judgement of 5 November 1998, the Court of Appeal of Bordeaux reversed the judgement of the Administrative Tribunal of Limoges which, on 9 July 1998, had annulled a Prefectoral Order of 20 December 1995 authorising the storage of depleted uranium by the General Company of Nuclear Materials (*Compagnie générale des matières nucléaires* – Cogema) on the site of an old uranium mine and mill at Bessines (in the Haute-Vienne department).

Following the application introduced by the Association for the Defence of the Limousin countries (*Association de défense des pays limousins* – Adepal), supported by Limousin Nature Environment (*Limousin Nature Environnement*), to annul this Order, on 23 May 2001 the Council of State (*Conseil d'État* – Supreme Administrative Court in France) ordered the Association to pay 20 000 French Francs compensation to Cogema.

1. Editors' translation.

2. Idem.

On the issue related to the type of materials to be stored at Bessines, the Council of State ruled that depleted uranium cannot be considered to be waste as "it can be enriched by a procedure"[3] for future use. It also stated that depleted uranium oxide is "a product obtained at an intermediary stage of a transformation process"[4] and considered that "the fact that such procedures may be postponed depending on various criteria, in particular economic criteria, does not mean that depleted uranium oxide should be treated as waste or even less so as final waste".[5]

The Council of State also rejected a series of other arguments invoked by the appellants, for example that the Cogema had omitted to include in its risk study the risk of an aeroplane crashing into the installation. The Council of State rejected this reason, expressing the opinion that as there is a very low probability of such en event occurring, it is not compulsory to take it into account.

Netherlands

Court Case on closure of the Borssele NPP (2001)

In February 2000, the Council of State (the supreme administrative court in the Netherlands) reversed a decision of the Dutch Government providing for the closure of the Borssele nuclear power plant as of 31 December 2003. This reversal had the effect of reinstating the former operating licence with no time limitation (see *Nuclear Law Bulletin* Nos. 65 and 66).

On 22 June 2001, the Government introduced a new claim before the Den Bosch Court to recognise the validity of an agreement concluded with SEP (the Dutch association of electricity producers) providing for the closure of the plant on 1 January 2004. Under this agreement, the Dutch utility EPZ, owner of the Borssele NPP, was to receive 70 million Dutch guilders as compensation for the early closure of the plant.

EPZ, which considers the agreement to be inapplicable, argued that, in addition to the deregulation of the electricity market and the fact that SEP no longer exists, the agreement was signed with SEP and accordingly is not binding on EPZ. To this argument, the Government replied that at that time, SEP represented EPZ in the negotiations as the country's highest electricity authority and thus that EPZ had accepted the agreement to receive the agreed sum of compensation upon the plant closure date. EPZ also argued that no contract confirming such an arrangement had been signed and therefore there was no binding agreement.

On 21 September 2001, the Court ruled that the Government had so far failed to provide sufficient evidence of the existence of a binding agreement between the Government and EPZ for an early shutdown of the plant. However the Court decided to hold a second hearing on 9 November 2001, thereby allowing both parties to gather and present new and additional evidence.

3. Editors' translation.

4. Idem.

5. Idem.

United States

Rulings of the US Court of Appeals for the District of Columbia Circuit regarding the Calvert Cliffs' operating licence renewal proceeding (2000)

In April 1998, Baltimore Gas & Electric Company, now Calvert Cliffs Nuclear Power Plant, Inc., applied to the Nuclear Regulatory Commission to renew its licence to operate the Calvert Cliffs nuclear power plant. Pursuant to the 1991 NRC License Renewal Rule, as amended in 1998 (see *Nuclear Law Bulletin* No. 62), the NRC published notice in the Federal Register of the opportunity for a hearing on the renewal application, and referred the hearing request from the National Whistleblower Center (NWC) to the NRC Atomic Safety and Licensing Board. The Board issued an order giving NWC three weeks, i.e. until 11 September 1998, to file the contentions detailing its concerns, indicating that this period of time might be extended only if unavoidable and extreme circumstances were demonstrated.

NWC filed motions with the Board and the NRC on the grounds that the NRC policy statement, referral order and hearing schedule unfairly restricted the time to frame its contentions and that requests for extensions should be governed by the "good cause" standard. Both the NRC and the Board denied NWC's request for an extension of time, finding that it had failed to demonstrate unavoidable and extreme circumstances warranting an extension.

Following a new petition from NWC, the NRC and the Board agreed to extend the deadline to 1 October 1998. However, as NWC had filed its contentions late (on 13 October 1998), the Board dismissed the petition to intervene and the NRC confirmed this decision.

NWC filed a petition for review of the NRC order with the US Court of Appeals for the District of Columbia Circuit. A first panel initially ruled on 12 November 1999 that the NRC's unavoidable and extreme circumstances standard "is effectively an amendment of the Commission's regulations made without notice and comment required by the Administrative Procedure Act". The Court overruled the NRC's decision and requested that the question of "whether [petitioner] had good cause for an extension of time to file contentions" be considered. However, the case was reheard and on 3 April 2000, a three-judge panel ruled in favour of the NRC. The Court agreed that NWC filed untimely hearing requests and it rejected the claim that "the NRC erred in adopting and applying an unavoidable and extreme circumstances test, in lieu of a good cause test, to assess requests for extensions of time", concluding that the petitioner was simply wrong in claiming that the NRC lacked the authority to adopt this test as an adjudicatory rule.

NWC entered an appeal before the US Supreme Court, which declined on 8 January 2001 to hear the case.

Rulings related to the compensation claims ensuing from the Three Mile Island accident (2000-2001)

Following the Three Mile Island accident in 1979, approximately 2 100 persons filed lawsuits claiming that the radioactive releases had caused health problems. Ten of these lawsuits were chosen as test cases. The US District Court granted summary judgement on 7 June 1996 in favour of the defendants and dismissed all 2 100 pending lawsuits for lack of evidence (see *Nuclear Law Bulletin* No. 59).

In November 1999, the US Court of Appeals for the Third Circuit upheld the dismissal of the ten test cases, but stated that the constitutional right to have their cases heard by a jury had been denied to the remaining plaintiffs and on that ground these claims were reinstated.

On 5 June 2000, the US Supreme Court rejected the appeal by Metropolitan Edison and its holding company, GPU Inc., along with other Three Mile Island owners and operators, to reverse the Court of Appeals ruling. The Court also rejected a separate appeal from ten people regarding the above-mentioned cases and who argued that the 1996 hearing on expert testimony had been too extensive and had intruded on their right to have the facts decided by a jury.

On 30 April 2001, the US Court of Appeals for the Third Circuit confirmed the 1996 ruling stating that plaintiffs seeking damages related to the Three Mile Island accident may not add new evidence to their cases. They may only advance causation theories based on evidence of records existing at the close of discovery. The decision accordingly prevents the plaintiffs from introducing new theories on the causes of radiogenic cancer.

ADMINISTRATIVE DECISIONS

United States

Decision of the US Department of Commerce regarding imposition of countervailing and antidumping duties on imports of low enriched uranium from the European Union (2001)

On 7 December 2000, the United States Enrichment Company (USEC) and its wholly owned subsidiary the United States Enrichment Corporation, producers of low enriched uranium (LEU), filed a petition for the imposition of antidumping and countervailing duties on LEU imports from France, Germany, the Netherlands and the United Kingdom before the US Department of Commerce (DOC). The Petitioners argued that Eurodif S.A. and its US sales agent Cogema, which are controlled by the French government, and Urenco Ltd., a British-Dutch-German consortium, are selling LEU into the US market below their cost of production and benefiting from unfair government subsidies in their home markets. They claimed that imports of LEU from these countries would cause material injury to the US industry. According to USEC, sales of LEU in the United States should conform with trade law requirements of fair pricing.

Imposition of antidumping duties under US trade law requires affirmative final determinations both from the DOC that the imports were dumped and from the US International Trade Commission that they injured a US industry. Accordingly, on 27 December 2000, the DOC initiated investigation on imports of LEU from the countries concerned by the petition.

On 8 May 2001, the DOC made a preliminary determination that US imports of uranium from the four countries concerned were being subsidised, calculating the net subsidy rates at 13.94% for Eurodif and 3.72% for Urenco. Thus it decided that countervailing duties should be imposed on future imports of LEU from Urenco and Eurodif.

The preliminary anti-dumping findings were issued on 6 July 2001. The DOC made negative determinations on uranium imports from Germany and the Netherlands, finding that the dumping margins fell below the US standard for imposing antidumping duties. On the other hand it ruled that LEU imports from France and the United Kingdom was dumped on the US market, the dumping margins being at 17.52% for Eurodif and 3.35% for Urenco (in the United Kingdom).