

Case Law

France

Judgement of the European Court of Human Rights on the Right to a Fair Trial, in the Litigation Collectif Stop MELOX and MOX versus France (2007)

On 12 June 2007, the European Court of Human Rights (ECHR) dismissed the claim of *Collectif Stop MELOX and MOX* against France, concerning a decree authorising increased production of nuclear fuels from mixed oxides uranium/plutonium (“MOX”) at the plant Melox.

The applicant had appealed against this decree to the Council of State (*Conseil d’État* – Supreme Administrative Court) in 1999. This appeal was dismissed and the plaintiff was required to pay 5 000 francs (FRF) (750 euros) to Cogema, operator of the site, licensee and intervening party at the trial.

Before the ECHR, the applicant association claimed an infringement of the principle of “equality of arms”, one of the constitutive elements of the fundamental concept of right to a fair trial under Article 6§1 of the European Convention on Human Rights, on account of the fact that the Council of State had not questioned the standing of a private-law company, Cogema, to intervene in an action against a ministerial decision and thus against the state. The ECHR held that there had been no violation of Article 6§1 and Cogema, a private-law company, was entitled to intervene in litigation concerning “an administrative decision which goes to the legal basis of one of an aspect of the economic activity of that company”.

Decision of the Council of State Quashing a Decree Concerning a Nuclear Installation in Brennilis, for the Want of Public Information and Consultation (2007)

In its Decision of 6 June 2007, the Council of State (*Conseil d’État* – Supreme Administrative Court), on the application for annulment by the antinuclear association “*Le Réseau Sortir du Nucléaire*” revoked Decree No. 2006-147 of 9 February 2006 authorising *Électricité de France* to carry out final shut-down operations and full dismantling of the nuclear installation EL-4-D, a disposal facility for materials at the nuclear power plant Monts d’Arrée (Brennilis) in the Finistère.

The Council of State judged that the proceedings which led to the decision to grant a licence did not comply with the purposes required by European Law on Public Information and Consultation, notably Council Directive 85/337/EC of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment. The Council noted that “notwithstanding the absence of national legislation on this matter, the provisions of the decree must ensure that communication of information to the public is carried out in a way compatible with the purposes of the directive”.

South Africa

Judgement of the Cape High Court in the Case of McDonald and Others versus Minister of Minerals and Energy and Others (2007)

On 12 June 2007, the Cape High Court (Cape Provincial Division) delivered its judgement in the case of McDonald and Others *versus* Minister of Minerals and Energy and Others. This matter dealt with an application concerning the legality of a regulation restricting development of property located within a 5 km radius of the Koeberg Nuclear Power Station (KNPS) and that of a delegation of authority by a Minister pursuant to safety regulations.

The applicants were owners of property located within a 5 km zone of the KNPS, who wished to sell their properties to a developer. Development of property within this zone was restricted pursuant to regulations made by the Minister under section 38(4) of the National Nuclear Regulator Act 47 of 1999 authorising regulations on development around a nuclear installation to ensure effective implementation of an applicable emergency plan (NNRA, see *Nuclear Law Bulletin* No. 65) and subsequent requirements laid down by the National Nuclear Regulator (Regulator) pursuant to the powers conferred upon it under Regulation 3 of the regulations.

The owner's application for rezoning properties for development was precluded by virtue of the above restriction. The applicants claimed invalidity of both Regulation 3 and the requirements laid down pursuant thereto. They challenged the validity of Regulation 3 on the basis of the maxim *delegatus delegare non potest*, a functionary entrusted with powers by virtue of empowering legislation has to exercise those powers itself and may not delegate such powers to any other body unless authorised to do so.

The Court decided that the regulations made by the Minister neither dealt with the substance of the subject matter nor did they set objective criteria in respect thereof. Instead such matters are dealt with in the requirements which were made by the Regulator without the participation of the Minister. It further decided that the effect of Regulation 3 is to delegate the substance of the Minister's regulatory power to the Regulator. The Court held that, having regard to the provisions of the NNRA under consideration, such delegation by the Minister was clearly unauthorised and amounts to an impermissible abdication by the Minister of the power to regulate.

The Regulator asked the Court to suspend operation of the judgement for a period of a year so as to avoid a gap being created by the setting aside of the regulation and the requirements. The Court stated that development within the 5 km zone from KNPS is still governed by the terms of the Structure Plan (Guide Plan) which was approved in 1981 under the Physical Planning Act 88 of 1967. The Guide Plan has statutory force and effect independently of the NNRA. One of the provisions of the Guide Plan places a restriction on further development within a radius of 5 km from the KNPS unless such development is "truly place bound" (forms an integral part of KNPS). The Court therefore refused to suspend the operation of the judgement and held that the Guide Plan will continue to regulate all decisions relating to further developments surrounding KNPS until such time as the Minister has made new regulations.

United Kingdom

Decision of the Wick Sheriff Court Fining UKAEA for Plutonium Exposure (2007)

On 12 July 2007, the United Kingdom Atomic Energy Authority (UKAEA) was fined 15 000 pounds (GBP) by Wicks Sheriff Court after pleading guilty to charges of breaching Sections 2(1), 2(2) (a), (b) and (c) and 33(1) (a) of the Health and Safety at Work Act 1974 (see *Nuclear Law Bulletin* Nos. 14 and 15). Two workers at the Dounreay nuclear plant were exposed to radioactive plutonium (including one who received a plutonium intake of 1.7 millisieverts) as they were carrying out work related to the storage of lead bricks and their disposal as intermediate level waste. Following the exposure the UKAEA has implemented improvements required by the nuclear installations inspectorate.

United States

Judgement of the US Court of Appeals on Environmental Analysis of the Effects of Terrorism (2006)

A public interest group, the San Luis Obispo Mothers for Peace (SLOMFP), challenged two NRC adjudicatory decisions in a proceeding to licence an independent spent fuel storage installation (ISFSI) at the Diablo Canyon nuclear power plant, operated by the Pacific Gas and Electric Company (PG&E) in California.¹ The first NRC decision declined to suspend the ISFSI licensing proceedings to await NRC physical security enhancements. The second NRC decision rejected contentions filed by SLOMFP in the proceeding related to the NRC's analysis of the potential environmental consequences of a terrorist attack under the National Environmental Policy Act (NEPA). The NRC had previously determined in a separate adjudicatory proceeding involving the licensing of an ISFSI, *in the matter of private fuel storage*,² that NEPA did not necessitate an environmental analysis of the potential environmental consequences of terrorist attacks because there was no proximate cause between the licensing of a nuclear facility and a terrorist attack that would have environmental consequences.

On 4 June 2006, in *San Luis Obispo Mothers for Peace v. NRC*,³ the United States Court of Appeals for the ninth circuit held that it was unreasonable for the NRC to refuse to categorically consider the environmental effects of a terrorist attack on nuclear facilities. The Court remanded the case to the NRC for further NEPA proceedings on the terrorist issue. The Court did, however, uphold the NRC's decision not to suspend its licensing proceeding and agreed with the NRC that a licensing proceeding was not an appropriate forum to revisit the validity of NRC security regulations.

PG&E filed a writ of *certiorari* in the United States Supreme Court. The United States Department of Justice, while agreeing with PG&E that the ninth circuit decision on the NEPA-terrorism issue was incorrect, did not support Supreme Court review at that time. On 16 January 2007, the Supreme Court denied *certiorari*.⁴

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1. *Pacific Gas & Electric Co.* (Diablo Canyon power plant independent spent fuel storage installation), CLI-03-12, 58 NRC 185 (2003).
 2. CLI-02-25, 56 NRC 340, 348-349 (2002).
 3. 449 F. 3d 1016 (ninth cir. 2006).
 4. 127 S. Ct. 1124 (2007).

SLOMFP recently asked the Court of Appeals to award them approximately 162 000 U.S. Dollars (USD) in attorney's fees under the Equal Access to Justice Act, and the NRC is currently working with the United States Department of Justice in responding to that claim.

Subsequent to the Supreme Court's denial of *certiorari*, the NRC ruled that it would comply with the mandate of the ninth circuit Court of Appeals with respect to the Diablo Canyon licensing proceedings, but refused to alter its policy of not conducting environmental reviews on the potential effects of terrorism in other licensing proceedings currently underway.⁵ In its supplemental environmental assessment for the Diablo Canyon ISFSI, issued on 31 August 2007,⁶ the NRC staff determined that "the construction, operation, and decommissioning of the Diablo Canyon ISFSI, even when potential terrorist attacks on the facility are considered, will not result in a significant effect on the human environment. NRC security requirements, imposed through regulations and orders, and implemented through the licensee's security plans, in combination with the design requirements for dry cask storage systems, provide adequate protection against successful terrorist attacks on ISFSIs. Therefore, a terrorist attack that would result in a significant release of radiation affecting the public is not reasonably expected to occur."

Proceedings are still underway on Diablo Canyon's ISFSI. The interveners have filed contentions with respect to the supplemental environmental assessment, which now await a Commission decision as to their admissibility in the proceeding.

Vacatur of US Court of Federal Claims Decision Regarding Price-Anderson Compensation of Costs in a Private Tort Claim

In early 2007, the US Court of Federal Claims vacated a 2002 decision in which it held that plaintiffs were entitled to recovery of legal fees and costs under the Price-Anderson Act incurred in defending a private tort suit concerning the medical misuse of nuclear technology. The litigation involved three companion Price-Anderson lawsuits with millions of dollars in Price-Anderson claims at stake.

The underlying private tort suit, *Heinrich v. Sweet*, arose out of alleged medical misuse of an NRC-licensed research reactor at the Massachusetts Institute of Technology (MIT) performed by a number of doctors and institutions. The reactor was used by Dr. William Sweet in the 1950s and 1960s for "boron neutron capture therapy", which allegedly harmed rather than helped cancer patients. In 1999, a jury found Massachusetts General Hospital (MGH) and Dr. Sweet jointly and severably liable for wrongful death and negligence.⁷ On appeal, the United States Court of Appeals for the first circuit ruled in 2002 that the plaintiffs were not entitled to damages and vacated the jury verdict.⁸ The United States Supreme Court later denied *certiorari*. Dr. Sweet, MGH and MIT subsequently sought reimbursement from the United States Government in the US Court of Federal Claims for the

5. *Amergen Energy Co.* (license renewal for Oyster Creek Nuclear Generating Station), CLI-07-08, 65 NRC 124 (2007).

6. Notice of Availability of Supplement to the Environmental Assessment and Final Finding of No Significant Impact for the Diablo Canyon Independent Spent Fuel Storage Installation, 72 Fed. Reg. 51,687 (10 September 2007).

7. *Heinrich v. Sweet*, 118 F. Supp. 2d 73, 83 (D. Mass. 2000). MIT was found not liable on any of the claims.

8. *Heinrich v. Sweet*, 308 F. 3d 48 (first cir. 2002).

substantial legal fees and costs they incurred in defending the *Heinrich* lawsuit, invoking a 1959 Price-Anderson indemnity agreement between MIT and the Atomic Energy Commission.

In 2002, the Federal Claims Court had rejected the government's threshold argument, made in a summary judgement motion, that the Price-Anderson Act does not cover what are, in essence, medical malpractice claims, and held that plaintiffs MGH, MIT and Dr. Sweet were entitled to indemnification of litigation costs generated by the *Heinrich* litigation.⁹ Subsequently (after discovery), the government settled all of the plaintiffs' claims for an amount the United States Department of Justice considered reasonable. On a motion by the government, the Federal Claims Court in January 2007 vacated its original liability ruling as moot, noting that "a determination regarding the proper scope of the indemnity provisions of the Price-Anderson Act should await another case in which the litigation triggering the act's indemnity provisions squarely address the parties' liability under that act."¹⁰

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9. *Sweet, Massachusetts Institute of Technology & Massachusetts General Hospital v. United States*, 53 Fed. Cl. 208 (2002).
 10. *Massachusetts Institute of Technology & Massachusetts General Hospital v. United States*, 75 Fed. Cl. 129, 133 (2007).