District Court: Department of Energy Not Required to Amend its Environmental Assessment After Nuclear Materials Were Transported

The United States District Court for the Western District of Michigan has ruled that it has no authority, after a shipment of nuclear fuel rods derived from weapons grade plutonium from New Mexico to Canada through Michigan was delivered, to order the United States Department of Energy (DOE) to amend its finding that the shipment would cause no significant environmental impact.

As part of a strategy to reduce their stockpiles and dispose of surplus weapons-grade plutonium, the United States and Russia committed to programs to make peaceful use of portions of the stockpiles. In one pilot project called the "Parallex Project," the two countries each agreed to convert approximately four ounces of the material into fuel rods and then ship them to an experimental nuclear reactor in Canada.

In early 1999, in conformance with National Environmental Policy Act (NEPA), the U.S. Department of Energy ("DOE") conducted an environmental assessment considering the environmental impact of fabricating the fuel rods and transporting them from Los Alamos, New Mexico to Canada by way of Michigan. In September of 1999, the DOE published a Finding of No Significant Environmental Impact in the Federal Register. In December of 1999, environmentalists sued DOE in federal court seeking an order stopping DOE from making the shipment.

In the 1999 case, the DOE argued that stopping the project could lead to a decision by Russia to halt further cooperation in the Parralex Project, and hinder efforts to help Russia find ways to dispose of its surplus weapons-grade plutonium. The Parralex Project was a direct result of negotiations between U.S. President Bill Clinton and Russian President Boris Yeltsin. According to the DOE, American credibility would be harmed by a decision to halt the shipment. Although the court in the 1999 decision found flaws in DOE's environmental assessment, the court agreed with DOE's position that stopping the shipments would harm the United States' foreign policy, sending the world community the wrong message and casting doubts as to the United States' seriousness about its international commitments. The court found in 1999 that U.S. foreign policy concerns outweighed the deficiencies in DOE's environmental assessment.

The DOE proceeded with its shipment in 2000. But even though the planned nuclear fuel shipment from New Mexico arrived in Canada in January 2000 and the shipment from Russia arrived in Canada in September 2000, the environmental groups asked the court to declare that the DOE's

environmental assessment was inadequate and to order DOE to produce an amended environmental assessment. The groups wanted the environmental assessment amended to show that it only applied to a single shipment from each superpower. After the 1999 court decision, the environmentalists feared more shipments of plutonium would be made in the future, and hoped to forestall further shipments.

Mootness

The DOE asked the court to dismiss the environmentalists' case because the case was "moot." An issue is deemed "moot" in federal courts when a court "is not in a position to prevent what has already occurred" and a plaintiff can't show both that the defendant's actions are likely to be repeated and that the repetition could not be challenged in advance.

The environmentalists argued that in another case, *Columbia Basin Land Protection Ass'n v. Schlesinger*, a group of farmers was allowed to sue the DOE even after 191 powerline towers that the farmers opposed were built. The court in *Columbia Basin* allowed the farmers to sue because if the farmers could show that the DOE's environmental impact statement was inadequate, the court would be able to find a remedy – ordering the DOE to remove the towers. But the 1999 *Hirt* court pointed out that this case was different: Once the nuclear fuel was delivered to Canada, the deliveries could not be undone. Thus, the court could not provide a remedy for the completed fuel delivery.

The environmentalists also complained that the DOE regarded the 2000 fuel delivery as only a "test" of the Parallex Project, and that the United States was likely to ship more nuclear fuel through the United States to Canada. The court found, however, that the environmentalists failed to allege any facts showing that future shipments would cause any environmental harm. Therefore, the environmentalists could not show that ordering the DOE to amend its environmental assessment would prevent any future environmental harm.

The court also reiterated its point, made in its 1999 opinion, that foreign policy considerations, over which the court had no power to direct the executive branch of the United States government, still prevented the court from stopping the Parallex Project.

Thus, because nothing that the environmentalists asked the court to do would undo the fuel shipments that had already taken place, the court had no authority to order the DOE to change its

environmental assessment of the fuel shipments. Therefore, the court dismissed the environmentalists' case as moot.

Hirt v. Richardson, 1:99-CV-933, 2001 WL 32778 (W.D. Mich.) Jan. 8, 2001.

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