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Andrea L. Smith

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NUCLEAR WASTE AND NUCLEAR REGULATORY COMMISSION LICENSING

ENVIRONMENTAL LAW—NUCLEAR REGULATORY COMMISSION—The Nuclear Regulatory Commission (NRC) must consider the environmental effects of nuclear wastes before issuing operating licenses to nuclear power plants. The NRC must address the problem either in individual licensing proceedings or in generic administrative proceedings in which the NRC makes decisions or rules concerning the future issuance of licenses. Any decision or rule so made must be supported by an administrative record that indicates the issue of nuclear waste disposal has been thoroughly ventilated. *Natural Resources Defense Council v. U.S. Nuclear Regulatory Commission*, 547 F.2d 633 (D.D.C. 1976), *cert. granted*, 429 U.S. 1090 (1977).

The Natural Resources Defense Council (NRDC) appealed to the U.S. Court of Appeals, District of Columbia, two decisions of the Nuclear Regulatory Commission (NRC). The two appeals were consolidated by the Court for purposes of review. Both cases raised the issue of whether and to what extent information concerning the environmental effects of radioactive wastes must be considered in licensing nuclear reactors. Specifically, the D.C. Court reviewed the NRC's order granting a license to the Vermont Yankee Nuclear Power Station (appeal #74-1385) and the NRC's rulemaking proceeding, which concluded the environmental effects of nuclear waste disposal were insignificant in the cost-benefit analysis for licensing individual reactors (appeal #74-1386).

Appeal number 74-1385 involved a proceeding to license the Vermont Yankee nuclear reactor pursuant to the National Environmental Policy Act.¹ The Atomic Safety and Licensing Board,² under the now defunct Atomic Energy Commission,³ had granted the Vermont Yankee license. Petitioners, the NRDC and others, appealed to the Atomic Safety and Licensing Appeal Board. Petitioners sought consideration of the environmental effects of that portion of the

1. National Environmental Policy Act of 1969, 42 U.S.C. § § 4321 *et seq.* (1970).

2. 42 U.S.C. § 2241 (1970).

3. The A.E.C. was abolished by the Energy Reorganization Act of 1974, 42 U.S.C. § 5814, and its functions divided between the United States Nuclear Regulatory Commission, which was substituted as formal respondent by order of the Court, and the Energy Research and Development Administration (ERDA). For consistency, the "NRC" is used throughout.

nuclear fuel cycle involving the reprocessing and disposal of nuclear wastes attributable to the operation of the Vermont Yankee nuclear reactor. The Appeal Board held that Licensing Boards need not consider the "operations of the reprocessing plants or the disposal of wastes" in individual licensing proceedings.⁴ This appeal ensued.

The Appeal Board justified its decision on two grounds. First, the environmental effects issue of reprocessing and waste disposal is too "contingent and presently indefinable"⁵ [sic] to be evaluated at the time of licensing an individual nuclear reactor. In reversing, the Court of Appeals noted that a reactor licensing is a "major federal action significantly affecting the quality of the human environment," which requires a "detailed" environmental impact statement under NEPA.⁶ The requisite impact statement must consider "any adverse environmental effects which cannot be avoided should the proposal be implemented" and "any irreversible and irretrievable commitments of resources which would be involved in the proposed action." Thus, the Court stated that NEPA implicitly requires federal agencies to make reasonable forecasts about the future. Agencies cannot "shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'"⁷

The second ground advanced by the Appeal Board for its decision was that the environmental effects of reprocessing and waste disposal are more appropriately considered when these types of facilities are themselves licensed. Again the Court charged that the Appeal Board was ignoring its obligations under NEPA. Once a nuclear reactor is operating, it is too late to consider whether the nuclear wastes it creates should have been produced. The purpose of NEPA is to holistically determine beforehand whether "irreversible and irretrievable commitments of resources" should be made. After wastes have been produced, it is only a matter of "engineering details to make the best of the situation."⁸ The Court held, therefore, that absent effective generic proceedings to consider these issues, they must be dealt with in individual licensing proceedings. The order granting the Vermont

4. *In re Vermont Yankee Nuclear Power Corp.*, ALAB-56, 4 AEC 930 (1972), I-J.A. 72, 76 (ALAB refers to the Atomic Licensing Appeals Board; references to the joint appendix in 74-1385 are in the form "I-J.A.").

5. *Id.* at I-J.A. 82.

6. *Supra* note 1, at § 4332(2)(c).

7. *Scientists' Institute for Public Information, Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

8. *Natural Resources Defense Council v. U.S. Nuclear Regulatory Comm'n*, 547 F.2d 633, 640 (D.C. Cir. 1976), *cert. granted* as to the Vermont Nuclear case *sub nom.* *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 429 U.S. 1090 (1977) this case has been consolidated with *Consumers Power Co. v. Aeschliman*.

Yankee license was remanded to await the outcome of rulemaking proceedings that would consider these issues.

Appeal number 74-1386 involved the rulemaking proceeding instituted by the NRC specifically in reference to the Vermont Yankee decision discussed *supra*. The NRC concluded that the environmental effects of that portion of the nuclear fuel cycle involving nuclear waste disposal were "relatively insignificant" and accordingly promulgated a rule reflecting this conclusion.⁹ The NRC's rulemaking hearing was informal; neither discovery nor cross-examination were allowed. Petitioners for review¹⁰ argued primarily that they, as public interest intervenors, were denied a meaningful opportunity to participate in the proceeding. Petitioners did not question the NRC's authority to proceed by informal rulemaking. Rather, they insisted that in particular circumstances more substantial procedures than those prescribed by the Administrative Procedures Act¹¹ should be required.

Although the Court conceded that "[a]bsent extraordinary circumstances, it is not proper for a reviewing court to prescribe the procedural format which an agency must use to explore a given set of issues,"¹² it held that the record developed by agency procedures must support the agency's decision. Under the Administrative Procedure Act, a reviewing court must set aside agency actions that are "capricious and arbitrary" or "unsupported by substantial evidence."¹³

The Court, therefore, turned its attention to the evidence. The NRC had concluded that the environmental effects of nuclear waste disposal were insubstantial and that further discussion was not required in future licensing proceedings. The primary basis for the NRC's conclusion was the data¹⁴ assembled by the NRC staff and testimony based on this data presented at the hearing. After a detailed examination of the record, the Court found that the NRC had only superficially addressed the problems engendered by waste disposal storage sites, such as radiation released by or surveillance and

9. 39 Fed. Reg. 14188 (April 22, 1974), I-J.A. 507. The rule is codified as Part 51.20(e) of 10 C.F.R. (1975) in a section entitled "Applicant's Environmental Report—Construction Permit Stage."

10. NRDC and Consolidated National Intervenors, Inc., a coalition of almost eighty public interest groups and individuals.

11. 5 U.S.C. § 553 (1970).

12. *Supra* note 8, at 644. The U.S. Supreme Court in *Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976), established this guideline.

13. 5 U.S.C. § 706(2)(a) & (e) (1970).

14. The data was assembled in a document entitled *Environmental Survey of the Nuclear Fuel Cycle*, 37 Fed. Reg. 24192 n. 1; *id.* at 24193.

maintenance of these sites. The Court noted that many procedural devices for creating a dialogue with Petitioners were available to the NRC: e.g., document discovery, interrogatories, and limited cross-examination. The use of these devices might have created a record to support the NRC's rule. But as it is, the Court found that the record did not sustain a decision to adopt a rule limiting consideration of the environmental effects of nuclear wastes. "The Commission's [NRC's] action in cutting off consideration of waste disposal and reprocessing issues in licensing proceedings based on the cursory development of the facts . . . was capricious and arbitrary."¹⁵ The Court set aside and remanded portions of the rule relating to these matters.

Circuit Judge Tamm, in a separate opinion concurring in the result, noted that remanding a portion of the rule will probably not alter the NRC's conclusion. Merely imposing additional delay by increasing the adversarial procedures required at the rulemaking stage will not change the pro-nuclear bias demonstrated by the NRC. The majority opinion implies that this is acceptable; at least the NRC will have to acknowledge the risks and problems inherent in the nuclear waste disposal issue. "NEPA does not guarantee a particular outcome on the merits; rather, the statute mandates only a 'careful and informed decisionmaking process' to enlighten the decisionmaker and the public."¹⁶

The United States Supreme Court has granted certiorari on the *Vermont Yankee* decision and will hear the case during its present term.¹⁷ The Court may reinstate the Vermont Yankee license, which was granted without any consideration by the NRC of the environmental effects of nuclear wastes. Or the Court may uphold the D.C. Court's decision, which required that these issues be addressed either during individual licensing proceedings or in generic rulemaking proceedings. The latter course will most likely be followed because NEPA, at least implicitly, requires that these issues be considered. However, after a probably pro forma consideration of them by the NRC, the NRC will eventually grant the Vermont Yankee license.

ANDREA L. SMITH

15. Natural Resources Defense Council v. U.S. Nuclear Regulatory Comm'n, *supra* note 8, at 655.

16. *Id.* at 654.

17. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, *supra* note 8.