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Denial of Hearing at Three Mile Island Held to Be Error

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DENIAL OF HEARING AT THREE MILE ISLAND HELD TO BE ERROR

ENVIRONMENTAL LAW: The Nuclear Regulatory Commission (NRC) is required by the Atomic Energy Act of 1954 to hold hearings at the request of any interested person when considering nuclear power plant license amendments, notwithstanding an NRC finding of "no significant hazard." *Sholly v. Nuclear Regulatory Commission*, 15 ERC 1231 (1981); *cert. granted*, 49 U.S.L.W. 3882, 80-1640 (May 26, 1981), 651 F.2d 780 (D.C. Cir. 1980), *rehearing denied*, 651 F.2d 792 (D.C. Cir. 1980), *cert. granted*, 49 U.S.L.W. 3882 (U.S. May 26, 1981).

INTRODUCTION

Since the nuclear accident of March, 1979, decontamination of the Three Mile Island (TMI) nuclear power plant has posed a continuous problem. The accident caused unknown amounts of radioactive gas to form inside the reactor building. Clean-up and technical crews therefore could not enter the disabled reactor without first purging the radioactive gas. The licensee[1] contended, and the NRC agreed, that the release of the radioactive gas into the atmosphere was a necessary function of the decontamination process.[2] To begin this process, the TMI licensee needed the permission of the NRC.

The accident prompted the NRC to issue an "Order for Modification of License,"[3] which suspended the plant's operating license and required a shutdown of the reactor. On February 11, 1980, the license was further modified to prohibit purging the radioactive gas until approved by the NRC.[4] The decontamination process began when the NRC later published an Assessment of Decontamination,[5] in which it recommended "that the building atmosphere be decontaminated by purging to the environment through the building's hydrogen control system."[6] In that assessment, the NRC determined that the venting

1. Metropolitan Edison So., Pennsylvania Electric Co., and Jersey Central Power and Light Co. jointly hold the operating license to the Three Mile Island nuclear plant and are referred to as licensee or General Public Utilities Company.
2. 45 Fed. Reg. 20,265 (1980).
3. 44 Fed. Reg. 45,271 (1980).
4. 45 Fed. Reg. 11,282 (1980).
5. 45 Fed. Reg. 20,265 (1980).
6. *Id.*

of radioactive gas into the atmosphere at the TMI site would not cause a "significant environmental impact"[7] because the offsite doses would not exceed limits set by the NRC.

On June 12, 1980, the NRC issued two unpublished orders which became effective immediately approving the release of the radioactive gas. The "Order for Temporary Modification of License"[8] (OTML) permitted the TMI licensee to release the radioactive gas at a faster rate than existing specifications allowed.[9] The second order, "Memorandum and Order"[10] (hereinafter venting order) authorized the venting of the radioactive gas into the atmosphere to begin on June 22, 1980.

On June 16, 1980, the plaintiffs in *Sholly v. NRC*, a group comprised of concerned individuals and an environmental group,[11] asked that the NRC reconsider its finding of no significant environmental impact and its decision to make the OTML and the venting order effective immediately. The NRC failed to respond to this request. The United States Court of Appeals for the District of Columbia denied the plaintiffs' petition for an emergency injunction and declaratory relief on June 16, 1980. A few days later, the plaintiffs requested a hearing before the NRC to challenge the two June orders. The hearing was never held. Instead, the licensee began to vent the radioactive gas at a faster rate, pursuant to the OTML, until the venting was completed on July 11, 1980.

On appeal,[12] the plaintiffs contended that the venting order and the OTML were amendments to the operating license and that their statutory right to notice and hearing in such proceedings had been

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7. *Id.*

> An environmental impact is any alteration of environmental conditions or creation of new set of environmental conditions, adverse or beneficial, caused or induced by the action or set of actions under consideration. Assessment of the significance of the environmental impact generally involves two major elements: a quantitative measure of magnitude and a qualitative measure of importance. Such a determination is a matter of agency judgement and concensus at the project level.

K. LEE and L. L. KOUMJIAN, ENVIRONMENTAL IMPACT STATEMENT 10 2d ed. 1978).

8. 651 F.2d 780, 783 (D.C. Cir. 1980).

9. *See*, 10 C.F.R. § 20.101-20.108 (1980).

10. 651 F.2d 780, 783 (D.C. Cir. 1980).

11. Steven Sholly, Donald E. Hossler and an environmental group named "People Against Nuclear Energy."

12. On July 8, 1980, a petition for review (No. 80-1783) and an accompanying petition for writ of mandamus (No. 80-1784) were filed in the Third Circuit. Those cases were transferred to the District of Columbia Circuit and consolidated for review with No. 80-1691, the case originally filed in that court.

denied.[13] The plaintiffs pointed to section 189(a) of the Atomic Energy Act of 1954,[14] which requires the NRC to give notice and hold a hearing on license amendments when requested to do so by interested persons.

The NRC responded that, under section 189(a), the agency has authority to dispense with a public hearing upon a finding that an action will not cause harm to public health and safety.[15] That section states that "the Commission may dispense with . . . notice and publication . . . upon a determination . . . that the amendment involves no significant hazards consideration."[16] The NRC argued that the word "hearing" is implied where the word "notice" is found in the statute. According to the NRC, the statute permits the agency to dispense with notice, publication, and hearings upon a finding of no significant environmental hazard.

The court in *Sholly* analyzed the OTML and the venting order separately and held that both orders were license amendments which triggered the hearing requirements of section 189(a). The court held that the NRC was required to hold a hearing at the plaintiffs' request, and therefore did not reach the question of whether the Commission was required to provide 30 days' notice of its intent to issue the license amendments without a hearing.

As a secondary issue, the NRC also contended that the plaintiffs' claim for injunctive and declaratory relief was moot because the radioactive gas had already been released into the atmosphere and the two June orders had expired. The court held that the plaintiffs' claim was not moot because the actions of the NRC and the licensee were "capable of repetition, yet evading review."[17]

MOOTNESS

The NRC argued that dismissal of the suit was proper because the dispute was already settled and therefore no issue of continuing prac-

13. Judicial review of government decisions concerning atomic energy is authorized by section 189(b) of the Atomic Energy Act of 1954, 42 U.S.C. § 2239(b) (1976). Section 301 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5871(g) (1976), § 502(a) of the Department of Energy Organization Act of 1974, 42 U.S.C. § 7192(a) (Supp. III 1979), and 28 U.S.C. § 2342(4) (1976) grant the United States courts of appeals exclusive jurisdiction over all final NRC orders reviewable under 42 U.S.C. § 2239(B) (1976).

14. 42 U.S.C. § 2239(a) (1976).

15. *See*, 42 U.S.C. § 2012(d); § 2133(d); § 2201(b) (1976).

16. 42 U.S.C. § 2239(a) (1976).

17. *See*, Southern Pacific Terminal v. Int. Comm. Comm'n, 219 U.S. 498 (1911), Nader v. Volpe, 475 F.2d 916 (D.C. Cir. 1973).

tical importance to the real interests of the litigants remained to justify judicial review. The court held that the plaintiffs' claim was not moot. The court looked to Article III of the United States Constitution, which restricts the exercise of federal judicial power to "cases or controversies."[18] This constitutional provision limits judicial review to real and substantial controversies capable of conclusive judicial relief.[19] Litigants must also have a sufficient personal interest in the outcome of the case.[20] These requirements are intended to assure the presentation of concrete issues in an adversary setting.[21] The court in *Sholly* held that an actual controversy existed between the NRC, the licensee and the plaintiffs, and that the parties had a legally cognizable interest in the outcome of the case.[22]

In *Tennessee Gas Pipeline Co. v. Federal Power Commission,*[23] the court held that the mootness doctrine was applicable to agency action as well as to private action. Courts may determine that moot cases are still justiciable if they involve "short-term orders, capable of repetition, yet evading review."[24]

A case is considered to be justiciable if "the litigant shows the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest."[25] In *Sholly,* the plaintiffs had to show that the NRC's orders were "short-term, capable of repetition, yet evading review" and that "there was a reasonable expectation that the same complaining party would be subject to the same action again."[26] The chances of the NRC making such orders effective immediately and allowing the purging of the radioactive gas into the atmosphere in the future supported "reasonable expectations that the same complaining parties will be denied their statutory rights to a hearing and notice."[27]

The court reasoned that the issue before it was not simply whether the NRC would again allow the release of radioactive gas into the atmosphere without first giving notice and holding hearings. The court

18. U.S. Constitution art. III, § 2.
19. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).
20. Baker v. Carr, 369 U.S. 186 (1962).
21. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).
22. When a real controversy ceases to exist or the parties lose a legally cognizable interest in its outcome, the federal courts, under the mootness doctrine, no longer have the power to decide the issue. Under certain factual situations, however, the courts allow an individual's action to survive despite the parties' loss of a personal intereset in the merits of the case if the claim itself is "capable of repetition, yet evading review." *See,* Southern Pac. Terminal Co. v. ICC, 219 U.S. 498 (1911); Powell v. McCormack, 395 U.S. 486 (1969).
23. 606 F.2d 1373 (D.C. Cir. 1979).
24. Southern Pac. Terminal Co. v. Int. Comm. Comm'n, 219 U.S. 498 (1911).
25. Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974).
26. Weinstein v. Bradford, 423 U.S. 147, 149 (1975).
27. *Id.*

also considered whether the NRC could continue making license amendments effective immediately without allowing a hearing, even when requested, whenever the agency decides that the amendment involves no significant environmental hazards. This problem would never be addressed if the legal proceedings take longer to resolve than the time it takes to physically release the gas. The licensee would have only to release the gas prior to any court action to avoid judicial review. The court recognized this timing problem and ruled for immediate consideration and resolution of a controversy surrounding "irreversible and irretrievable" future events.

NOTICE AND HEARING

Once the mootness question was decided, the court considered the hearing requirements of section 189(a) of the Atomic Energy Act of 1954, which provides in part that:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit. . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.[28]

The plaintiffs argued that the OTML was an amendment to the operating license and thus, the NRC was obligated under the AEA to provide a hearing upon request.

The NRC conceded that the OTML was an amendment, but drew the court's attention to the last sentence of section 189(a), which states that it "may dispense with . . . notice and publication . . . upon a determination . . . that the amendment involves no significant hazards consideration."[29] Such a determination implies that there is no perceived danger or harm to public health and safety. The NRC reasoned that it was within its discretion and power to find no significant hazard from the release of radioactive gas because it found no imminent or immediate danger to public safety posed by the controlled release of that gas. The NRC further argued that its finding of no significant hazard permitted the commission to dispense with a hearing because "notice" and "hearing" are inextricable. The commission contended that section 189(a) also refers to "hearing" when it mentions "notice" because both phrases are so closely related that the mention of one naturally implies a reference to the other.

The District of Columbia Circuit Court of Appeals had previously

28. 42 U.S.C. § 2239(a) (1976).
29. *Id.*

held in *Brooks v. Atomic Energy Commission*[30] that section 189(a) clearly requires the commission to grant a hearing with respect to license amendments upon the request of any interested party. In *Brooks,* the court rejected the NRC's contention that it may dispense with the hearing requirement when it determines that the amendment contains no significant hazards consideration.[31] The court rejected the same arguments in *Sholly* because of the *Brooks* decision and on the basis of a legislative analysis of section 189(a).

The court found that the legislative history of the amendment distinguishes the requirements of hearing and notice.[32] A mandatory hearing is required only on the application for issuance of a construction permit.[33] Legislative history indicates that the issuance of amendments to operational licenses "would be only after a 30 day *public notice,* and an offer of a *hearing*"[34] (emphasis added). The court's opinion did not specifically address the notice issue.

The court also rejected the NRC's argument that the requirements of notice and hearing are so interrelated that Congress intended to merge the two in the third sentence of section 189(a). That sentence provides that, "the Commission may dispense with such thirty day notice . . . with respect . . . to an amendment . . . upon a determination by the Commission that the amendment involves no significant hazards consideration."[35] The court interpreted that sentence in conjunction with the fourth sentence of section 189(a) to mean that Congress did intend to separate the two requirements of notice and hearing.[36] The court stated that the legislative history of the third sentence indicated that Congress intended "to lessen the mandatory hearing requirements only when there was no request for a hearing."[37]

Although there was a question in *Sholly* as to whether the plaintiffs formally requested a hearing prior to the issuance of the OTML, an expression of interest may be sufficient to constitute a request for a hearing.[38] "Certainly logic compels the conclusion, as Congress recognized, that one may not timely request a hearing if he lacks

30. 476 F.2d 924 (D.C. Cir. 1973).

31. In dictum, however, the same court later stated that "an amendment can be made without the opportunity for a hearing if the [NRC] determines that it involves no significant hazards consideration." Union of Concerned Scientists v. Atomic Energy Comm'n, 499 F.2d 1068, 1084 (D.C. Cir. 1974).

32. H.R. REP. NO. 1966, 87th Cong., 2d Sess. 8 (1962); S. REP. NO. 1677, 87th Cong., 2d Sess. 8 (1962).

33. *Id.*

34. *Id.*

35. 42 U.S.C. § 2239(a) (1976).

36. 651 F.2d 780, 787 (D.C. Cir. 1980).

37. *Id.*

38. Brooks v. Atomic Energy Comm'n, 476 F.2d 924 (D.C. Cir. 1973).

notice that the Commission is about to take action."[39] Legislative history indicates that Congress intended the NRC to be able to dispense with notice and publication upon a finding of no significant hazard consideration, but not with the hearing requirement.[40]

The NRC argued that the venting order, which authorized the licensee to vent the radioactive gas into the atmosphere, was not a license amendment and, therefore, was not subject to the hearing requirements of section 189(a). The NRC contended that the venting order was not an amendment because it only lifted the prior suspension of the licensee's authority to vent; the order did not authorize the release of a greater amount of radioactive gas than that permitted by the original operation license. Because the venting order gave the licensee power in excess of that permitted by the original licensee, it was held to be an amendment to that license and was therefore within the scope of section 189(a) and its hearing requirements.

CONCLUSION

The interpretation of section 189(a) of the Atomic Energy Act and its relation to the NRC decision-making process and to subsequent judicial review are the essential issues in *Sholly v. NRC.* The court viewed the issues as mere definitional problems and went through a laborious exercise to explain its interpretation of what Congress meant by "hearing" and "notice." The issues presented, however, involve more than semantics.

The operation of nuclear power reactors inevitably creates great amounts of highly radioactive waste,[41] and the potential for many unforeseeable technical problems.[42] More than 70 commercial nuclear reactors are in operation in this country and the NRC has pro-

39. *Id.* at 927.

40. H.R. REP. NO. 1966, 87th Cong., 2d Sess. 8 (1962); S. REP. NO. 1677, 87th Cong., 2d Sess. 8 (1962).

41. For example, Plutonium-239, a radioisotope connected with nuclear waste hazards, has been shown to cause lung tumors in experimental animals in inhaled doses as small as one microcurie, which corresponds to 25 millionths of a gram. W. BAIR, C. RICHMOND & B. WACHOLZ, A RADIOBIOLOGICAL ASSESSMENT OF THE SPATIAL DISTRIBUTION OF RADIATION DOSE FROM INHALED PLUTNOIUM, table III-A (Atomic Energy Comm'n Report WASH-1300, 1974). *See also,* P. FAULKNER, THE SILENT BOMB 115 (1977), for a further discussion on nuclear wastes.

42. For example, evidence suggests that a manual shut-off of a pressure-operated relief valve that was open for two hours prevented a total core meltdown that could have occurred absent the manual shut-off within 30 to 60 minutes. Report of The President's Commission on the Accident at TMI (Kemeny Report) 51-56 (1979); *Also see,* R. D. Pollard, THE NUGGET FILE (1979), for excerpts from the government's special file on nuclear power plant accidents and safety defects obtained by the Union of Concerned Scientists under the Freedom of Information Act.

jected that over 500 such reactors will be in operation by the year 2000.[43] Perhaps the court's decision should have placed more emphasis on considerations of nuclear safety.

The statutes under which the NRC operates seem to grant the agency broad powers in fostering nuclear development and in making determinations about public health and safety.[44] Public debate, in the form of public hearings, affords perhaps the best means for assuring that government and industry adhere strongly to public health and safety considerations.[45]

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43. Mannenbach, *The Decision to Choose Nuclear Power Before and After Three Mile Island*, 11 ENVT'L L. 421 (1981).

44. *Compare*, 42 U.S.C. § 2013(a) (1976) *with* 42 U.S.C. § 2012(d); 2133(b); 2134(a), (d), 2201(i); 2232(a) (1976).

45. This case has made a positive impact on the TMI community. The NRC has established an advisory panel for the purpose of obtaining input from the residents of the TMI area which will participate in commission decisional processes. The panel membership consists of three residents of the TMI vicinity, three people from the scientific community, three members of state agencies and three people from local goverment agencies. *See*, 45 Fed. Reg. 71692, 76306 (1980).