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DISTRICT COURT REVIEW OF NRC'S THREE MILE ISLAND DECISIONS UPHELD

ADMINISTRATIVE LAW: Subject Matter Jurisdiction in the District Courts Over Environmental Claims: The Third Circuit Court of Appeals held that the district court has subject matter jurisdiction over actions by citizen group plaintiffs against the Nuclear Regulatory Commission arising out of the nuclear accident at Three Mile Island power plant, even when the plaintiffs have not exhausted all remedies with the Nuclear Regulatory Commission. *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 485 F. Supp. 81 (M.D. Pa. 1980), *rev'd* 619 F.2d 231 (3rd Cir. 1980), *cert. den. sub. nom., General Public Utilities Corp. v. Susquehanna Valley Alliance*, 101 S. Ct. 893 (1981) (Justice Rehnquist, dissenting).

INTRODUCTION

The Three Mile Island power plant is located on an island in the Susquehanna River near Harrisburg, Pennsylvania. An accident there on March 28, 1979, caused the shutdown of Unit Two of the plant. The shutdown resulted in the accumulation of 600,000 gallons of high level radioactive waste water in the reactor containment building, 250,000 gallons of intermediate level radioactive waste water in the auxiliary buildings and tanks, and 100,000 gallons of high level radioactive waste water in the reactor's primary cooling system. This waste water must be disposed of before Unit Two can resume operations.

The Nuclear Regulatory Commission (NRC) authorized the owners and operators of Three Mile Island to construct and operate EPICOR-II, a system designed to decontaminate the radioactive water at the Three Mile Island plant. The water treated by EPICOR-II was to be discharged into the Susquehanna River.

The Susquehanna Valley Alliance (SVA), a citizen's group formed to protect the environmental quality of the Susquehanna River and the surrounding area, filed suit in the United States District Court for the Middle District of Pennsylvania to enjoin the use of EPICOR-II. The SVA feared that EPICOR-II would be incapable of fully decontaminating the radioactive water and that its use would result in the additional release of radioactive pollutants into the air and water.

The SVA's complaint set forth four substantive claims. Count I

alleged violation of the National Environmental Policy Act of 1969 (NEPA)¹ on the basis that the NRC failed to prepare an environmental impact statement regarding the use of EPICOR-II and that the NRC fragmented its consideration of disposal of the contaminated water. Count II alleged violation of the Atomic Energy Act (AEA)² on the ground that owners and operators of the plant failed to obtain a license or construction permit for EPICOR-II. Count III alleged future violation of the Federal Water Pollution Control Act (FWPCA)³ because of the possible discharge of high level radioactive pollutants into the Susquehanna River through anticipated failure of EPICOR-II to adequately treat the waste water. Count IV alleged violation of the first, fifth, ninth, tenth, and fourteenth amendments of the United States Constitution.

The defendants⁴ filed motions to dismiss for failure to state a claim and for lack of subject matter jurisdiction. The defendants argued that the district court lacked subject matter jurisdiction because the SVA had failed to exhaust its administrative remedies with the NRC.⁵ The district court agreed and dismissed the SVA's complaint.

The Third Circuit Court of Appeals reversed the district court on the NEPA claim, the FWPCA claim, and the constitutional claim. The Supreme Court denied certiorari without opinion. Justice Rehnquist, joined by the Chief Justice and Justice Powell, filed an opinion dissenting from the denial of certiorari. The law in the Third Circuit is therefore, that NEPA, the FWPCA, and the United States Constitution give rise to private causes of action against administrative agencies triable in the district courts when administrative remedies would fail to prevent irreparable harm to the plaintiffs.

DISTRICT COURT JURISDICTION

The Third Circuit's approach to the SVA's complaint was to review the administrative and judicial scheme applicable to each of the

1. 42 U.S.C. §§ 4321-4361 (1976).

2. 43 U.S.C. §§ 2011-2296 (1976 & Supp. I 1977).

3. 33 U.S.C. §§ 1251-1376 (1976 & Supp. I 1977).

4. Three Mile Island Nuclear Reactor, General Public Utilities Corporation, Metropolitan Edison Company, Jersey Central Power and Light Company, Pennsylvania Electric Company, the Nuclear Regulatory Commission, and several individuals in decision-making capacities with the Nuclear Regulatory Commission and the private companies.

5. Exhaustion of administrative remedies is a doctrine of judicial administration that requires plaintiffs to exhaust the prescribed administrative remedy before seeking judicial relief. The doctrine was created to prevent premature interference with the administrative process and to enhance judicial efficiency by allowing the administrative process to go forward without interruption. *See* *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) and *McKart v. United States*, 395 U.S. 185 (1969).

SVA's claims. The issue to be decided was whether the availability of review in the courts of appeal of the NRC's final decisions precluded review by the district courts of non-final decisions of the NRC.

Atomic Energy Act

The Third Circuit determined that the adequacy of the NRC's compliance with licensing or construction permit requirements under the AEA is not reviewable in the district courts because of the review provisions in the act itself.⁶ Private plaintiffs may seek redress only through agency procedures or in the courts of appeals after the NRC has issued a final order.⁷ The district court therefore properly dismissed the SVA's claim alleging violations of the AEA. The court also determined, however, that the exclusive review provision of the AEA does not prevent plaintiffs from pursuing claims against nuclear licensees for other statutory violations.

Federal Water Pollution Control Act

The FWPCA allows any citizen to initiate a civil action on his own behalf against any person alleged to be in violation of the act or against any administrator who has allegedly failed to perform any nondiscretionary act under the FWPCA.⁸ No district court hearing is permitted in such an action until 60 days after the plaintiff has given notice of the alleged violation to the responsible administrator.⁹ The Third Circuit concluded that the district court could properly hear the SVA's FWPCA claim because the NRC had notice of that claim for 60 days prior to the time the court acted.

National Environmental Policy Act

NEPA requires preparation of an environmental impact statement whenever a federal governmental agency makes a "recommendation or report on proposals for . . . major federal actions significantly affecting the quality of the human environment."¹⁰ Enforcement of the impact statement requirement has generally been held to be

6. § 2239 of the AEA provides for review of the NRC's final orders in licensing or construction permit proceedings under the AEA in the manner prescribed by 28 U.S.C. § 2342. 28 U.S.C. § 2342 declares that the court of appeals has exclusive jurisdiction over all final orders of the Atomic Energy Commission made reviewable by § 2239.

7. 42 U.S.C. § 2271(c) provides that no action shall be brought for violation of the Atomic Energy Act except by the Attorney General of the United States or by the Nuclear Regulatory Commission.

8. 33 U.S.C. § 1365(a) (1976).

9. 33 U.S.C. § 1365(b) (1976).

10. 42 U.S.C. § 4332(c) (1976).

within the jurisdiction of the district courts, even though no enforcement provision exists within NEPA itself.¹¹

Private parties are permitted to intervene in all NRC licensing proceedings to raise the issue of the necessity of an environmental impact statement.¹² The NRC argued that because of this intervention procedure the statutory scheme provided review of alleged NEPA violations exclusively in the courts of appeals. The Third Circuit found that the NRC's interpretation could leave a gap in the protection of plaintiffs because the appellate courts only have jurisdiction over NRC's final orders. Before an appealable final order is issued, private parties may be permitted to make major expenditures without considering environmental issues. These expenditures distort the perspective of the reviewing court concerning the desirability of the questioned action.¹³ Plaintiffs are left without an effective challenge to such agency decisions. The Third Circuit therefore concluded that judicial review of alleged NEPA violations was necessary before the NRC issues a final order.

The Third Circuit determined that appellate courts may have the power to review the NRC's compliance with NEPA through the use of the All Writs Act¹⁴ or by holding that any grant of a construction permit by the NRC is a final order for purposes of review. The court found both approaches undesirable. A factual record is often necessary to determine whether an environmental impact statement should be prepared. Jurisdiction should properly lie in the district courts because they are better equipped than the appellate courts to form the needed record. The court also feared that the second approach would create a proliferation of litigation over the issue of finality.

The Constitutional Claim

The Third Circuit's opinion implies that district courts cannot renounce traditional jurisdiction simply because an agency may be able to hear a claim within its proceedings.¹⁵ Moreover, even if the ex-

11. *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n. of Okla.*, 426 U.S. 776 (1976); *Environmental Defense Fund v. Tennessee Valley Auth.*, 468 F.2d 1164 (6th Cir. 1972); *Scientists' Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973).

12. 10 C.F.R. § 2.206 (1981) permits any person to request initiation of commission proceedings to revoke, suspend, modify or take other action with respect to an operator's license.

13. This argument has not, however, persuaded the courts of other jurisdictions to issue preliminary injunctions. See *National Indian Youth Council v. Andrus*, 501 F. Supp. 649 (D. N.M. 1980) and the cases collected therein.

14. 28 U.S.C. § 1651 (1976) as interpreted in *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966).

15. The court stated, "certainly a complaint alleging a cause of action for private relief implied from provisions of the United States Constitution states a claim within the subject matter jurisdiction of the district courts." 619 F.2d 231, 244 (M.D. Pa. 1980).

haustion doctrine applied to constitutional claims, it would have been waived in this case. The Third Circuit has held that the doctrine does not apply when administrative procedures would fail to prevent irreparable injury.¹⁶ The district court was held to have subject matter jurisdiction in this case because the SVA alleged irreparable injury to constitutional rights for which the NRC could not provide an adequate remedy.

THE DISSENT TO THE DENIAL OF CERTIORARI

A minority of the United States Supreme Court dissented to the denial of certiorari. The opinion, written by Justice Rehnquist, directly addressed only the NEPA claim. Justice Rehnquist agreed with the defendants' argument that Congress gave the NRC exclusive authority to regulate its nuclear licensees and limited judicial review of the NRC's decisions to the court of appeals. He further determined that the United States Supreme Court, in *Vermont Yankee Nuclear Power Corp. v. NRDC*,¹⁷ had applied this review limitation to the NRC's compliance with NEPA.

Justice Rehnquist's primary concern was that the Third Circuit's decision was contrary to the doctrine of exhaustion of administrative remedies. He feared that the Third Circuit's decision "will spawn others like it allowing circumvention of agency review and pursuit of NEPA claims directly in the district courts."¹⁸ Such a review procedure, Justice Rehnquist believed, duplicates administrative and judicial effort and invites procedural chaos. More importantly, it leads to premature interruption of agency processes and public interference with agency decision-making. Justice Rehnquist concluded that the district court lacked subject matter jurisdiction over the NEPA claim.

CONCLUSION

The Third Circuit's review was limited to the narrow question of whether subject matter jurisdiction existed in the district courts over NEPA, AEA, FWPCA, and constitutional claims arising from decisions by the NRC. The Third Circuit concluded that NEPA, the FWPCA, and the United States Constitution give rise to causes of action which are within the subject matter jurisdiction of the district courts.

The court's analysis of the FWPCA claim is not as thorough as its

16. *American Fed'n of Gov't Employees, Local 1004 v. Resor*, 442 F.2d 993 (3rd Cir. 1971).

17. 435 U.S. 519, 526-527 (1978).

18. 101 S. Ct. 893, 896.

analysis of the NEPA and constitutional claims. The conditions for jurisdiction under the FWPCA had not been met. The defendants had not discharged any water into the Susquehanna River and the NRC had not given permission for such a discharge. The court's analysis therefore should properly have resulted in a finding of no jurisdiction in the district court over the FWPCA claim.

The Third Circuit's approach to judicial review of agency decisions allows for the flexibility often necessary in environmental cases. The instant case, involving a threatened release of radioactive water upstream from a city's drinking water intake, demonstrates the necessity for timely judicial review of agency decisions. The Third Circuit's approach allows district court review of non-final agency decisions in cases where irreparable harm is threatened. Thus, plaintiffs are provided greater protection from contested agency decisions.

The Third Circuit also allows the district court to postpone review until further agency action is taken in cases where irreparable harm is not threatened. The agency is allowed the opportunity to resolve the issue first, thereby reducing premature interference with agency processes.

Justice Rehnquist's approach would leave plaintiffs without an adequate remedy against non-final agency decisions that remain effective during the administrative appeal process. His approach favors agency autonomy and places a high premium on agency expertise, but fails to protect against agency decisions made without regard to the public interest.¹⁹

The United States Supreme Court's decision to deny certiorari in this case and to allow the Third Circuit's decision to stand upholds NEPA's policy of reasoned decision-making. Plaintiffs must have access to an impartial tribunal to contest agency decisions in cases where irreparable harm is threatened and private parties are allowed to expend large sums of money before considering environmental issues. The Third Circuit's decision realistically addresses this problem and permits plaintiffs access to the district court to contest such agency decisions.

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19. See Slap, *Fallout From Three Mile Island: Direct Access to District Court*, THE NAT'L L.J. June 22, 1981, at 29, col. 1 (quoting editorial, Philadelphia Inquirer, January 16, 1981) where the author suggests that the NRC is not adequately protecting the public interest in the clean-up operations at Three Mile Island.