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**Vermont Yankee Nuclear Power Corporation v. Natural Resources
Defense Council, Inc. Consumers Power Company v. Nelson
Aeschliman, et al.**

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VERMONT YANKEE NUCLEAR POWER CORPORATION

v. NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.
(Docket No. 76-419)

CONSUMERS POWER COMPANY v. NELSON AESCHLIMAN, et al.
(Docket No. 76-528)

Environmental law—Effect of National Environmental Policy Act upon rulemaking procedures of Nuclear Regulatory Commission and upon Commission's licensing of nuclear power plants

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. Decisions below: 547 F.2d 633 (1976); 547 F.2d 622 (1976). Cases consolidated and scheduled for argument the week of November 28, 1977

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Issue

As part of its nuclear power plant licensing procedure, is the Nuclear Regulatory Commission required by the National Environmental Policy Act to consider the environmental effects of either nuclear waste disposal and reprocessing or alternatives to nuclear power?

Facts

The Supreme Court has consolidated the two cases reviewed here, both of which involve the nuclear reactor licensing procedure of the Nuclear Regulatory Commission (hereinafter "NRC"). One case, *Vermont Yankee v. Natural Resources Defense Council*, involves the licensing of a nuclear reactor located near Vernon, Vermont. The other case, *Consumer Power Co. v. Aeschliman*, pertains to a license granted by the NRC to the Consumer Power Company to construct two nuclear reactors in Midland, Michigan. In both cases, envi-

ronmental and other public interest citizens' groups intervened in the licensing proceedings, seeking reconsideration of the NRC's decision to license both ventures. The citizens' groups appealed the NRC's refusal to reconsider to the United States Court of Appeals for the District of Columbia, alleging that the NRC had failed to comply with the requirements of section 102 of the National Environmental Policy Act (hereinafter "NEPA"), 42 U.S.C. §4332.

Section 102 of NEPA requires federal agencies to perform "detailed environmental impact statements" of all "major federal actions significantly affecting the quality of the human environment." The statute provides that environmental impact statements consider such things as the environmental impact of the proposal, unavoidable adverse effects, alternatives to the proposed action, the relationship between short term uses of the environment and maintenance and enhancement of long term productivity, and any irreversible and irretrievable commitments of resources that would be involved if the proposed project is constructed. The citizens' groups argued in both cases that the NRC had failed to evaluate adequately the dangers attendant to nuclear waste disposal and reprocessing. In the *Consumer Power* appeal, it was further argued that the NRC had failed to consider the energy conservation alternative to construction of a nuclear power generation facility. The NRC had found the environmental effects of nuclear waste reprocessing and disposal to be "insignificant."

The Court of Appeals for the District of Columbia Circuit held that the NRC had acted arbitrarily and capriciously in failing to consider adequately waste disposal and reprocessing issues. The court also held, in *Consumer Power*, that the NRC had been arbitrary in failing to give full consideration to energy conservation alternatives to the proposed nuclear facility in violation of the mandate of NEPA. Thus both cases were remanded to the NRC for further consideration of the issues raised by the citizens' groups.

Background and Significance

Vermont Yankee and *Consumers Power* are cases that arise at a critical point in the development of nuclear power in the United States. The predecessor agency to the NRC, the

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Atomic Energy Commission (hereinafter "AEC"), was created by the Atomic Energy Act of 1954 as part of President Eisenhower's "Atoms for Peace" program. Congress declared in the Act that its purpose was to "encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the health and safety of the public." 42 U.S.C. §2013(d) (1970). The AEC was abolished by the Energy Reorganization Act of 1974, which divided its functions between the NRC and the Energy Research and Development Agency.

At the beginning of the 1970's, critics of nuclear power began to arouse public concern about the safety and overall feasibility of using nuclear reactors to generate electric power for the domestic market. Citizens' groups began to challenge the licensing of nuclear power projects in the courts. In a landmark case in 1971, the United States Court of Appeals for the District of Columbia refused to allow the AEC to defer consideration of environmental issues in granting nuclear reactor construction permits until an operating license was issued. *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1128 (1971). See also *Scientists' Inst. Publ. Inf., Inc. v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973). From that time until the present, plans to construct nuclear power plants have met growing criticism, litigation, and, more recently, large scale demonstrations and civil disobedience by those who question the safety and advisability of such plans.

It is in this context that the controversial issue of the safety of nuclear power reaches the nation's highest court. The central question in these two cases is the advisability of generating electrical power in nuclear facilities at a time when a method for the disposal of extremely toxic nuclear wastes produced therefrom has not yet been identified by the Government. The court held that the NRC had violated NEPA when it refused to prepare environmental impact statements on reprocessing and disposal of toxic nuclear wastes from the two licensed reactors before licensing the disposal sites. The court of appeals also held that the NRC had cut off public participation in the promulgation of rules pertaining to consideration of nuclear waste disposal and reprocessing, and found that the NRC had accepted without critical examination the conclusory statements of Dr. Frank K. Pittman, then Director of the AEC's Division of Waste Management and Transportation. His testimony before the NRC constituted the only discussion of waste disposal considered by the agency. NEPA, said the court, was intended to require the NRC to identify and address information contrary to its own position, to articulate its reasoning, and to specify the evidence on which it relies. While the NRC might reach the same decision when the cases are remanded, the court felt that when the issues are properly "ventilated," Congress, the courts, and the public will be able to make informed decisions about this aspect of nuclear power.

A collateral but important issue raised only in the *Consumer Power* case centers on the refusal by the NRC to consider alternatives to nuclear power. The Court of Appeals indicated that NEPA requires a study of alternatives to proposed projects, and that citizen groups had raised the possibility that the alternative of energy conservation would be more desirable than the construction of a nuclear reactor while important safety questions remain unresolved.

If the Supreme Court chooses to uphold the court of appeals, it would possibly indicate that the Court reads NEPA as imposing a higher duty on agencies to allow a greater modicum of public participation and input when an agency deals with environmental issues. An affirmance would also be an indication to the NRC that it must develop more definite plans for dealing with the potential hazards of nuclear power. Such a result should not, however, be considered an obstacle to the use of nuclear power; rather, it would seem to be merely a warning signal to the NRC that nuclear licenses are not to be awarded without considering the matter. A reversal of the lower court's decision would most likely be based upon the Supreme Court's view that the NRC, and not the courts, possesses the technical expertise to deal with nuclear power issues, and that courts should not, except in unusual circumstances, interfere with the discretion vested in the NRC by Congress. A reversal would also suggest a diminution of the weight to be given to citizen input in nuclear power licensing proceedings, or indicate the Court's unwillingness to construe NEPA broadly so as to require federal agencies to review all feasible alternatives to projects, including abandonment.

Arguments

For Petitioners, Vermont Yankee Nuclear Power Corporation and Consumers Power Company; and Baltimore Gas and Electric Company, as intervenor:

1. The court of appeals erred in substituting its judgment for that of the NRC, which was vested by Congress with great discretion in technical scientific matters.
2. The NRC's procedures for allowing public participation with regard to nuclear waste disposal issues were adequate and did not violate NEPA.
3. The legislative history of the Atomic Energy Act, continuing congressional oversight, and the Energy Reorganization Act demonstrate a congressional determination that nuclear reactor licensing should proceed prior to resolution of the waste disposal issue.
4. In a reactor licensing proceeding, the NRC is not required by NEPA to perform an environmental impact statement on nuclear waste reprocessing and disposal problems relating to the proposed project.
5. Careful and extensive consideration was given by the NRC to the alternative of "energy conservation."

For Respondents, Natural Resources Defense Council, Inc., et al., and Nelson Aeschliman, et al.:

1. The record supports the court of appeals' holding that the NRC had not adequately examined issues relating to nuclear waste reprocessing or disposal.
2. The NRC violated the mandate of NEPA by failing to require an environmental impact statement on disposal or reprocessing of nuclear wastes created by the proposed projects.
3. The NRC violated NEPA when it did not adequately consider the energy conservation alternative to the proposed nuclear projects.