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D.C. CIRCUIT BROADLY EXTENDS NEPA COVERAGE FOR NUCLEAR POWER PLANT ACCIDENTS

NUCLEAR POWER REGULATION—NEPA: The D.C. Circuit holds that psychological health effects in the restart of a nuclear reactor are recognized by NEPA and requires the Nuclear Regulatory Commission to evaluate these factors when assessing the safety of restarting the undamaged reactor at Three Mile Island, Pennsylvania. *People Against Nuclear Energy v. U.S. Nuclear Regulatory Commission*, 678 F.2d 222 (D.C. Cir. 1982).

Editor's Note: While this casenote was at the printer, the Supreme Court reversed the D.C. Circuit Court of Appeals opinion in this case. The Supreme Court found that NEPA only required the Nuclear Regulatory Commission to assess the environmental impact of its actions upon the physical environment. "Although NEPA states its goals in sweeping terms of human health and welfare, these goals are ends that Congress has chosen by means of protecting the physical environment." *Metropolitan Edison Co. v. People Against Nuclear Energy*, No. 81-2399 (together with No. 81-358, *U.S. Nuclear Regulatory Commission v. People Against Nuclear Energy*), slip op. at 12 (April 19, 1983). Since the risk of a nuclear accident does not cause any measurable change in the environment, the effect this risk may have on the psychological health of the neighboring residents is not cognizable under NEPA.

INTRODUCTION

On March 28, 1979 Reactor Unit 2 (TMI-2) of the Three Mile Island, Pennsylvania nuclear power plant (TMI) failed, causing "the worst nuclear accident Americans have yet experienced."¹ At the time of the accident Unit 1 (TMI-1) was in cold shutdown for refueling. The Nuclear Regulatory Commission ordered that TMI-1 remain shutdown until the Commission could conduct hearings to determine if the restart of Unit 1 would affect the health and safety of the nearby residents.

People Against Nuclear Energy (PANE), a group of TMI neighbors, intervened in the Commission's restart hearings. They claimed that the Commission should not allow the restart of TMI-1 without considering the anxiety and mental stress suffered by the nearby residents as a result of the TMI-2 accident.² PANE claimed that the restart of TMI-1 would aggravate the psychological stress suffered as a result of the TMI-2 nuclear

1. *People Against Nuclear Energy v. Nuclear Regulatory Comm'n*, 678 F.2d 222, 223 (D.C. Cir. 1982).

2. The Report of the President's Commission on the Accident at Three Mile Island, *The Need for Change: The Legacy of TMI*, at 35 (1979), found that the neighboring residents suffered mental distress as a result of the TMI-2 accident.

accident. Therefore, they wanted the Commission to include the mental stress suffered by the neighbors of the nuclear plant as part of the Commission's health and safety evaluation for restarting TMI-1. When the Commission refused to include consideration of psychological health effects in their assessment of the safety of restarting TMI-1, PANE petitioned the D.C. Circuit Court of Appeals to review this decision.

The Commission had limited its inquiry into the safety of restarting TMI-1 to the customary NEPA criteria;³ the effect of the activity on human health and the environment.⁴ PANE claimed that the National Environmental Policy Act (NEPA)⁵ and the Atomic Energy Act⁶ required consideration of psychological health effects as an element of human health in studying the impact of projects that affect the environment. PANE also claimed that the TMI-2 nuclear accident constituted "significant new circumstances or information relevant to environmental concerns" that require the Commission, under NEPA, to issue a supplemental environmental impact statement before action significantly affecting the environment can continue.⁷ According to PANE, the Commission's refusal to do so violated NEPA and the Atomic Energy Act.

By a two to one vote, the D.C. Circuit Court of Appeals reversed the Nuclear Regulatory Commission's decision to exclude assessment of the psychological health effects of restarting TMI-1. The court found that NEPA required consideration of psychological health factors while the Atomic Energy Act did not. Although the Atomic Energy Act and NEPA have similar goals, protection of the health and safety of the public, the court limited the recognition of psychological health effects to NEPA. The court did not explain why the Atomic Energy Act did not require consideration of these factors. Presumably, the court remained silent with regard to the Atomic Energy Act to avoid undue intrusion into atomic energy development. In so doing the court protected the psychological health of the neighboring residents without changing the implementation requirements of the Atomic Energy Act.

The court delivered two opinions in response to PANE's petition. An interim judgement announced on January 7, 1982 ordered the Commission to comply with NEPA by assessing the environmental impact of the TMI-1 restart on the neighboring residents' psychological health and the surrounding community's well-being. From this assessment the Commission would decide if a supplemental environmental impact statement was needed. Until the Commission complied with NEPA by assessing these additional

3. 42 U.S.C. § 4321 (1976).

4. *Id.* at §§ 4321, 4331(a).

5. *Id.* at § 4321.

6. 42 U.S.C. § 2133(b) (1976).

7. 40 C.F.R. § 1502.9(c)(1) (1982).

factors it was enjoined from making any decision about the restart of TMI-1.

The court issued an amended judgement on April 2, 1982 upon discovering that it did not have the power to order the Commission to assess psychological health factors in restarting TMI-1. NEPA conferred this power upon the Commission and not upon the court. According to NEPA, federal regulatory agencies must prepare environmental impact statements for federally assisted or regulated projects that significantly affect human health or the environment.⁸ After initial licensing, the federal agency overseeing the project must prepare a supplemental environmental impact statement if significant new circumstances or information relevant to environmental concerns have arisen.⁹ However, the Nuclear Regulatory Commission is given the discretion to determine if new circumstances or information have arisen which are significant enough to require a reassessment of the activity's environmental impact.¹⁰ Upon realizing that the Commission possessed the power to first determine if circumstances or information had significantly changed regarding the potential psychological health effects of operating TMI-1, the court amended its decision to allow the Commission to make this determination. The Commission was also recognized as the proper decision-making body to formulate procedures for making this determination.

The court also lifted the injunction prohibiting the Commission from restarting TMI-1 imposed by their interim judgement because of a guaranteed six to twelve month restart delay due to a corrosion problem.¹¹ The court, however, required the Commission to give the court thirty days notice if a restart decision was reached prior to complying with NEPA. The court is thus able to reinvoke an injunction against the Commission to force compliance with NEPA. The Nuclear Regulatory Commission appealed the circuit court's decision to the Supreme Court and certiorari was granted on November 2, 1982.¹²

DISCUSSION

The D.C. Circuit Court of Appeals concluded that NEPA recognized psychological health as an element of overall human health. Therefore, the Nuclear Regulatory Commission must assess psychological health factors as a component of human health to determine if changes in a

8. 42 U.S.C. § 4332(2)(C) (1976).

9. 40 C.F.R. § 1502.9(c)(1) (1982).

10. See *WATCH v. Harris*, 603 F.2d 310, 317-18 (2d Cir.), *cert. denied*, 444 U.S. 995 (1979); *Asphalt Roofing Mfrs. Ass'n v. ICC*, 567 F.2d 994, 1004 (D.C. Cir. 1977); *Hanly v. Kleindienst*, 471 F.2d 823, 828 (2d Cir. 1972).

11. *New York Times*, Feb. 11, 1982, at A18, col. 1.

12. 51 U.S.L.W. 3339 (U.S. Nov. 2, 1982)(No. 82-358).

federally regulated activity (e.g. nuclear energy production) affect human health and thus require the preparation of a supplemental environmental impact statement. The court arrived at this conclusion without building a step-by-step legal argument. Instead, the court found that "in the wake of a unique and traumatic nuclear accident"¹³ such as the TMI-1 catastrophe, it was essential that NEPA recognize the impact of TMI-1's restart on the neighboring residents' psychological health. According to the Report of the President's Commission on the Accident at Three Mile Island, the major health effect of the TMI-2 accident was its impact on the mental health of the nearby residents.¹⁴ In light of the severity of the TMI-2 accident and its potential hazard to the psychological health of local residents, the court concluded that NEPA, a congressional mandate to safeguard human health, required the Nuclear Regulatory Commission to evaluate psychological health factors in determining the safety of restarting the TMI-1 nuclear reactor.

NEPA was enacted to safeguard the health and welfare of man¹⁵ from new and continuing federally regulated activities.¹⁶ The Commission's continued regulation of the Three Mile Island nuclear plant forced the facility to comply with the NEPA objectives of attaining maximum beneficial use of the environment without risking human health and safety.¹⁷ Since the court viewed the TMI-2 accident as severely affecting the nearby residents' psychological health, it ordered the Commission to recognize these adverse effects as possibly changing the circumstances of operating the nuclear power plant. While the court could not, consistent with NEPA, order a formal assessment of psychological health effects, as evidenced by the court's retreat from its interim judgement, it did require the Commission to take these factors into account when deciding if significant new circumstances or information had arisen concerning the TMI project.

The court supported its decision by pointing to the Nuclear Regulatory Commission's own doubts about the safety of restarting TMI-1. The Commission ordered the delay of the TMI-1 restart¹⁸ because it lacked "the requisite reasonable assurance that the . . . Unit No.1 facility . . . can be operated without endangering the health and safety of the public."¹⁹ The Commission's uncertainty about the safety of the restart added weight to the court's finding that the potentially catastrophic nature of the nuclear accident required special attention to all possible adverse

13. 678 F.2d at 229.

14. Report of the President's Commission, *supra* note 2, at 35.

15. 42 U.S.C. § 4321 (1976).

16. 40 C.F.R. § 1508.18(a) (1981).

17. 42 U.S.C. § 4331(b) (1976).

18. 44 Fed. Reg. 40461 (1979).

19. 678 F.2d at 232.

health effects, including psychological health effects possibly enhanced by the restart of TMI-1.

The court disposed of cases cited by the Commission rejecting the cognizability of psychological health factors by NEPA by distinguishing the TMI-2 accident as unique, severe and potentially extremely damaging to physical human health. The court decided that the severity of the nuclear accident required the evaluation of the effects of the TMI-1 restart on psychological health notwithstanding the rejection of this doctrine by other courts. Thus, the court distinguished the TMI-2 accident from situations such as a community's fear that its character would be changed by low income housing²⁰ or that crime would increase due to the location of a detention center near a residential²¹ neighborhood. This distinction can be criticized. The TMI-2 accident was catastrophic but the accident's adverse effects²² on the psychological health of the nearby residents were short lived.²³ However, the detrimental psychological health effects of the fear of crime from a detention center located in the neighborhood or the physical deterioration of a neighborhood due to low income housing projects are arguably more long lasting because they result in continuing psychological stress to the local residents. The court in *PANE* did not assess the duration of the harm. Instead, it focused on the immediate severity of the psychological harm caused by the TMI-2 accident. Therefore, the court's decision in this case is solely justified by its conclusion that the TMI-2 accident was unique and potentially extremely harmful to human health.

Although the Supreme Court will probably discuss this weakness in its review of the D.C. Circuit's opinion, *PANE* can amplify its argument and make use of the long lasting ill effects of the nuclear accident. *PANE* can argue that the possibility of another nuclear accident at Three Mile Island looms so great in the minds of the nearby residents that TMI-1 should never be restarted. At this point the Supreme Court will have to weigh the harm to the residents' psychological health if TMI-1 is restarted against the stifling effect upon nuclear energy development if TMI-1 is permanently shut down. The Court may be hesitant to so greatly impede nuclear energy development based on psychological health effects that are not easily quantifiable. Before the D.C. Circuit Court of Appeals, the Commission argued that psychological health effects were unquantifiable, and therefore, they could not be properly assessed under NEPA. However,

20. *Nucleus of Chicago Homeowner's Ass'n v. Lynn*, 524 F.2d 225, 231 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

21. 471 F.2d at 833 n.10.

22. There were little or no discernible physical health effects as a result of the TMI-2 accident. Report of the President's Commission, *supra* note 2, at 34-35.

23. *Id.*

the court refused to allow this argument defeat their desired result. It did not rule that psychological factors were quantifiable, but instead stated that the Commission cannot ignore psychological factors on that basis. Under NEPA, federal regulatory agencies must attempt to develop methods of weighing unquantifiable environmental factors so that they are given consideration in the decision-making process.²⁴ The circuit court's decision that these factors must be assessed despite their unquantifiability supports its position that the TMI-2 accident requires special scrutiny of the environmental effects of the TMI operation.

DISSENTING OPINIONS

There was a marked difference of opinion among the court's three-member panel concerning the recognition of psychological health effects by NEPA and the Atomic Energy Act. Justice Wilkey found that NEPA did not recognize psychological health factors while Justice Wright wished to extend the recognition of these factors to the Atomic Energy Act as well.

In his dissent Justice Wilkey concluded that NEPA did not encompass the psychological health effects of operating a nuclear power plant. He supported his position by pointing to NEPA's lack of express language about the subject, the denial of recognition of these factors under NEPA by other courts, and the unquantifiability of psychological health effects. He looked at the end result of the extension of NEPA coverage to the unique situation produced by the TMI-2 accident and concluded that assessment of these factors by NEPA could act as a major roadblock in developing nuclear energy. Justice Wilkey stated that NEPA's recognition of psychological health effects was synonymous with allowing the public to express their opinions about nuclear energy and in effect overrule Congress' decision to permit nuclear energy development. Justice Wilkey hypothesized that special interest groups could stir up hysteria about incidents similar to the TMI-2 accident and thereby invalidate Congress' authority to authorize nuclear energy development.

Justice Wilkey's dissent followed an analysis similar to the court's majority by focusing on the end result of extending NEPA to cover psychological health. However, he relied on the importance of following congressional mandate to promote the development of nuclear energy production, while the majority based its conclusion on the severity of the TMI-2 accident. Thus, the judges arrived at their opposite conclusions because of a difference of opinion about the importance of forestalling the restart of TMI-1 and basic differences in philosophy about nuclear

24. 42 U.S.C. § 4332(2)(B) (1976).

power. The majority placed importance on the broad mandate of NEPA to safeguard human health while Justice Wilkey looked to the possible frustration of nuclear energy development if NEPA was extended to these types of situations.

On the other hand, Justice Wright urged in his dissent that the Atomic Energy Act also recognized psychological health factors. Like NEPA, the Atomic Energy Act is charged with protecting the health and safety of the public from nuclear energy development. Under the Atomic Energy Act the Commission would not issue licenses when it "would be inimical . . . to the health and safety of the public."²⁵ Justice Wright found no good reason for refusing to extend the Atomic Energy Act to the present situation. The majority claimed that such an extension would divert the Act's focus from its primary goal of ensuring the technical safety of operational nuclear reactors. Justice Wright was unconvinced by this rationale because the objectives of NEPA and the Atomic Energy Act to protect the health and safety of the public are so similar.²⁶

CONCLUSION

The majority's opinion provides a new way for groups to protect their health and the health of others from the potential injuries resulting from nuclear accidents. Never before has psychological health been recognized as an important element of human health subject to protection under NEPA. The court's emphasis on safeguarding psychological health was shaped by sensational news reporting that generated fear of nuclear power as well as by each judge's own opinion about the merits of nuclear energy development.

This decision will undeniably change the character of environmental impact assessments of nuclear energy development unless it is reversed by the Supreme Court. According to the D.C. Circuit Court of Appeals, NEPA now requires complete evaluation of all aspects of human health affected by nuclear development, including psychological health. The Supreme Court may not agree with the circuit court's conclusion that the Nuclear Regulatory Commission must pay special attention to psychological health effects from nuclear accidents because this extension of NEPA may become a major new tool for slowing the development of nuclear energy production. Justice Wilkey noted four instances where anti-nuclear groups have used the interim judgement in *PANE* to petition the Nuclear Regulatory Commission to impede the licensing of new nuclear power plants. These anti-nuclear groups claim that according to

25. 42 U.S.C. § 2133(d) (1976).

26. 42 U.S.C. § 4321 (1976); 42 U.S.C. § 2133(d) (1976).

PANE psychological health effects must be assessed as part of environmental impact statements.²⁷ Whether the Commission and the appellate courts will accept this attempted extension of *PANE* to the initial licensing of nuclear power plants is not known. The Supreme Court will undoubtedly consider the anti-nuclear groups attempted use of the D.C. Circuit's opinion and the Commission's reaction to this use when assessing PANE's impact upon nuclear energy development. Use of the *PANE* decision to interfere with initial licensing procedures for new nuclear power plants will weigh heavily upon the Supreme Court if the Court favors unencumbered nuclear energy development. However, the Supreme Court and the D.C. Circuit Court of Appeals must agree that nuclear energy development stands alone as an extremely volatile endeavor and that any decision by the Court will have a weighty impact on nuclear energy development.

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27. 678 F.2d at 248.