Historic Supreme Court Ruling Eases Nuclear Power Development

In a landmark decision April 3, the U.S. Supreme Court reversed the previous decision on the development of nuclear power and remanded the *Vermont Yankee* and *Consumers Power* cases to the U.S. Circuit Court of Appeals for the District of Columbia. A stunning 7-0 vote lined up Court liberals and conservatives alike in a stinging rebuke, written by Justice William Rehnquist, of both the liberal Washington, D.C. Circuit Court of Appeals and the environmentalist intervenors. The Court's decision in these two cases cleared the decks for a political fight in Congress for the development of nuclear power.

The progress of the two cases, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* (NRDC) and *Consumers Powers Co. v. Aeschliman* has been closely watched by forces supporting nuclear power who believed that, given the issues presented, the court could very well take the opportunity to address the extensive common law case precedent created by environmentalists and Fabian lower court judges. It is this common law which has succeeded in obstructing the construction of every plant generating nuclear power.

Two major points were driven home in the forceful opinion of Justice Rehnquist. First, the courts cannot substitute their policy judgment for that of Congress. Second, the Circuit Court improperly intruded into the Nuclear Regulatory Commission's licensing authority by mandating more extensive and elaborate procedures than those required by law. Such "legislation by judiciary" has been the heart of environmentalist legal strategy. The April 3 opinion is the first in which the Supreme Court has directly reviewed the application of the National Environmental Policy Act of 1970 to the Nuclear Regulatory Commission. The decision can potentially halt the sabotage of nuclear power directed by Energy Secretary James Schlesinger.

The environmentalists had understood that an actual Supreme Court review of the National Environmental Policy Act (NEPA) and its procedures could prove extremely dangerous to their campagin to stop nuclear power through endless litigation, thereby defeating congressional intent to develop nuclear technologies. At the time the two cases were argued before the Supreme Court, the NRDC and other intervenors asked the court to dismiss them as moot. The Court refused that effort to derail review, noting that the Washington D.C. Circuit decides almost all challenges to administrative agency action and "the decision of that court in this case will serve as precedent for many more proceedings for judicial review of agency actions . . ." As well, the opinion notes, the NRDC has already cited the Circuit Court opinion (in a case which they now claim is moot) as binding precedent for their renewed efforts to stop the construction of the Vermont Yankee plant!

The strong language of the Court's decision and its unequivocal attack on judicial efforts to circumvent the clear intent of Congress, mark a major turning point in the battle for the development of nuclear power. Environmentalists have relied upon extraordinary court-dictated regulatory procedures and requirements to indefinitely stall plant construction.

Consumers Power Chairman Selby remarked, "The decision will enable our people to devote 100 percent of their effort to completing the Midland plant on schedule instead of attending seemingly endless hearings." A Consumers Power attorney described the ruling as "a 103 percent victory."

The impetus the Court's decision extends far beyond the mere literal reading of the opinion. NRDC attorney Richard Ayres admitted, "The rhetoric is clearly helpful to industry. I can't underestimate the importance of the language. As a matter of law, it says the courts are not free to place procedural barriers in the way of congressional intent. However, the most troublesome thing is the language which is used . . ."

Ayers' assessment is correct. The court's decision, because it has remoralized pronuclear forces, approaches in historical importance the great decisions of the 19th century John Marshall Court — *McCullough v.*

Where Do The Environmentalists Go From Here?

Natural Resources Defense Council attorney Richard Ayres, after the environmentalist defeat in the Supreme Court decision brooded: "In closing tighter the inquiry into procedures, the Nixon Court (in reference to the fact that many of the justices were appointed during the Nixon Administration) is showing again that it closes its doors to the average citizen and is responsive to big business. In our closing argument before the Court, we mentioned the comparison between procedures in the U.S. and in France, (West) Germany and Japan. There is no access for the individual citizen to government. *This accounts for the violence we have seen over there.* Over the past few years there have been a number of very violent incidents. *Citizens have to be heard or else go somewhere else." (Emphasis added.)*

Maryland, Gibbons v. Ogden and the *Dartmouth College* case — which established by 1825 the legal basis for the development of the United States as an industrial power. The incompatibility of the Circuit Court's decisions against nuclear power with the U.S. Constitution's commitment to scientific and industrial progress was forcefully put before the court in the *Consumers Power* case in a widely circulated *amicus curiae* brief by the U.S. Labor Party. The influence of that brief is clearly shown in the language of the Supreme Court's opinion.

An immediate result of the Supreme Court decision will be to undercut Energy Secretary James Schlesinger's proposed Nuclear Siting and Licensing Act, which would provide government funding for Naderite environmentalist intervenors and would also give state agencies the same intrusive rulemaking powers which the Supreme Court has just denied the Circuit Court of Appeals. Schlesinger's bill was predicated on the demoralization of worn down industrialists. That demoralization has been erased by the Court's go-ahead for nuclear power. Now Congress has to make that decision a reality.

What The Court Said

The Intent of Congress

. . . Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action . . . It (National Environmental Policy Act) is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals, or of this Court, would have reached had they been members of the decision making unit . . . Administrative decisions should be set aside in this context only for substantial procedural or substantive reasons, not simply because the court is unhappy with the results reached. . . .

Conservation

. . . The term "alternatives" is not self-defining. To make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility . . . as the Commission pointed out, the phrase "energy conservation" has a deceptively simple ring . . . Taken literally, the phrase suggests a virtually limitless range of possible actions and developments that might, in one way or another, ultimately reduce projected demands for electricity from a particular proposed plant. . . .

The Role of the Washington D.C. Circuit Court of Appeals

". . . Neither the statute nor its legislative history (NEPA) contemplates that a court should substitute its judgment for that of an agency as to the environmental consequences of its actions . . ." (Quoting from *Kleppe v. Sierra Club*). We think the Court of Appeals has forgotten that injunction here . . . the Court of Appeals has unjustifiably intruded into the administrative process.

And, concerning the Circuit Court's order to return a reactor safety report to make its language understandable to laymen, ". . . it is simply inconceivable that a reviewing court should find it necessary or permissible to order the Board to return the report to ACRS. Our view is confirmed by the fact that the putative reason for the remand was that the public did not understand the report, and yet not *one* member of the supposedly uncomprehending public even asked that the report be remanded. This surely is. . ." judicial intervention run riot. . . .

The Tactics of the Intervenors

The proposed plant underwent an incredibly extensive review. The reports filed and reviewed literally fill books. The proceedings took years. The actual hearings themselves over two week. To then nullify that effort seven years later because one reports refers to other problems . . . borders on the Kafkaesque. . . .

While it is true that NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful . . . Indeed administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more than to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented . . ."