

Report of The Committee On The Environment

This report of the Committee on the Environment reviews selected developments in environmental law during 1983 that affect energy interests.

I. DEVELOPMENTS UNDER NEPA

A. *Metropolitan Edison Co. v. People Against Nuclear Energy*

The Supreme Court has held that psychological injuries allegedly caused by resuming operations at the previously shutdown Three Mile Island Unit 1 nuclear power plant ("TMI-1") are not environmental impacts cognizable under Section 102(2)(C) of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4332(2)(C). *Metropolitan Edison Co. v. People Against Nuclear Energy* ("PANE"), 103 S. Ct. 1556 (1983), *rev'g* 678 F.2d 222 (D.C. Cir. 1982). In a unanimous opinion, Justice Rehnquist ruled that extending NEPA to considerations of psychological health damage caused by risk would defeat the purpose of the Act and open the door to claims grounded solely on disagreement with government policy decisions. The Court's decision reversed a D.C. Circuit ruling that required NRC to evaluate the potential psychological health effects on residents in the TMI-1 area before permitting renewed operation of the nuclear reactor.

The D.C. Circuit held that psychological health effects were to be treated under NEPA like any other impact on human health. According to the court, the members of PANE had alleged medically recognized post-traumatic anxieties caused by the nuclear accident at TMI-2. The fact that these anxieties were not readily quantifiable, the court held, should not exclude them from NEPA's coverage.

Among the defenses urged before the D.C. Circuit was that NRC's decision to allow resumption of operations at TMI-1 was not a "major federal action" within the meaning of Section 102(2)(C) of NEPA, and therefore was not subject to NEPA's requirements. PANE countered that NRC's statutory responsibility over licensed nuclear reactors imposed a continuing obligation to comply with NEPA. A majority of the D.C. Circuit adopted the latter argument, concluding that the "major federal action" was not solely the initial licensing of TMI-1 but NRC's continuing exercise of supervisory responsibility over its operation and maintenance. In dissent, Judge Wilkey pointed out that a broad interpretation of the majority's holding would subject day-to-day operations of licensed facilities to NEPA review, even when an agency proposes no action to upset the *status quo* of the facility. Judge Wilkey argued that the majority's broad holding was unwarranted because it would significantly increase the NEPA burdens on regulatory agencies.

The Supreme Court rejected the D.C. Circuit's analysis of psychological health effects without considering whether NEPA applied to the NRC's decision to permit resumed operations at TMI-1. According to the Court, Section 102(2)(C) of NEPA must be read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effects at issue. In this context, the Court concluded that allegations of psychological harm based on perceived risks of a nuclear accident were beyond the intended reach of NEPA.

B. *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*

In *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 103 S. Ct. 2246 (1983), the Supreme Court upheld NRC's generic rule that assumes, for purposes of NEPA, that the permanent storage of nuclear wastes in bedded-salt repositories does not have a significant impact on the environment (the "zero-release"

assumption). The generic rule prevents licensing boards from considering the environmental risks of long-term nuclear waste storage in their NEPA analysis for individual nuclear plants.

The Supreme Court's ruling reversed a D.C. Circuit decision that invalidated NRC's generic rule on grounds that it was arbitrary and capricious and inconsistent with NEPA. *Natural Resources Defense Council v. NRC*, 685 F.2d 459 (D.C. Cir. 1982). The basis for the D.C. Circuit's ruling was that NRC had not factored the consideration of uncertainties surrounding the zero-release assumption into the licensing process in such a manner that the uncertainties could potentially affect the outcome of any decision to license a particular plant. Initially, the Supreme Court reiterated that NEPA requires only that federal agencies take a "hard look" at the environmental consequences of a proposed action and that the role of the courts is to ensure that the agency has adequately considered and disclosed the environmental impact of its action. According to the Court, NRC's extensive proceedings included a careful consideration of the uncertainties affecting nuclear waste storage and satisfied NEPA's requirements.

The Court affirmed that NEPA does not require agencies to adopt any particular internal decisionmaking structure. The generic method chosen by NRC to evaluate the environmental impacts of the fuel cycle and inform the licensing boards of its evaluation was clearly an appropriate method of conducting the "hard look" required by NEPA. According to the Court, NRC's decision to affix a zero value to the environmental impacts of long-term storage would violate NEPA only if NRC acted arbitrarily in deciding generically that the uncertainty was insufficient to affect any individual licensing decision. The Court reviewed the context in which the zero-release assumption was made and concluded that NRC's assumption was within the bounds of reasoned decisionmaking.

II. DEVELOPMENTS UNDER THE CLEAN AIR ACT

A. Air Emission Regulation by EPA

The Supreme Court in May 1983 agreed to review the D.C. Circuit's decision in *Natural Resources Defense Council ("NRDC") v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982), which struck down EPA's revised, relaxed definition of a "stationary source" in nonattainment areas. The Court's resolution of the "stationary source" dispute may remove much of the confusion surrounding EPA's "bubble concept."

At issue in *NRDC v. Gorsuch* was EPA's adoption of a plant-wide definition of "stationary source" that allows states to treat an entire industrial plant as a single source. 40 C.F.R. §§ 51.18(j), 52.24(f). Previous EPA regulations, repealed on October 14, 1981, had defined "installation," and accordingly "stationary source," to include not only a plant, but also each individual piece of equipment at a plant. 47 Fed. Reg. 50,768 (1981). The stated purpose of the definitional change was to exempt intra-plant modifications of existing equipment from the Clean Air Act's new source review process if increased emissions from the new or modified unit were offset by a corresponding decrease from another unit such that aggregate plant emissions do not increase more than a *de minimis* amount. EPA's regulations thus adopted the "bubble concept," focusing on the net effect of changes in an entire plant, rather than inspection of each individual unit or piece of equipment within a plant.

The D.C. Circuit vacated EPA's revised definition, holding that the bubble concept is *per se* inconsistent with the Clean Air Act's nonattainment program. The court announced a "bright line test" based on its interpretation of its prior decisions

in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), and *ASARCO Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978). That test holds that the bubble concept is "mandatory" for Clean Air Act programs designed merely to maintain existing air quality, but is "inappropriate" in schemes like the nonattainment program that were enacted to improve ambient air quality. Concluding that a plant-wide definition would preserve rather than improve air quality, the court rejected EPA's regulations without considering whether the definition was consistent with the language or legislative history of the Clean Air Act.

The petitions for review by the Supreme Court attack the holding in *NRDC v. Gorsuch* on three substantive grounds. First, it is argued that the circuit court violated established principles of judicial review by substituting its judgment for that of EPA on basic policy issues. Instead of pointing to any controlling statutory language or legislative history, the petitioners claim that the court applied its "bright line" test because of the court's own policy judgment that the bubble concept would cause unacceptable harm to the environment. Second, petitioners maintain that the *NRDC v. Gorsuch* decision upsets the historical federal-state relationship created by Congress by denying the states the flexibility to select measures necessary to meet air quality goals. Finally, the petitioners point out that the D.C. Circuit's decision will have substantial adverse economic impacts not required by the terms of the Clean Air Act.

B. *Sierra Club v. EPA*

In *Sierra Club v. EPA*, 719 F.2d 436 (D.C. Cir. 1983), the D.C. Circuit reversed and remanded several facets of EPA's "stack height" regulations, 47 Fed. Reg. 5868, promulgated under Section 123 of the Clean Air Act, 42 U.S.C. § 7423. The core of the stack height regulations is the determination of the height dictated by "good engineering practice" ("GEP"). GEP height is defined in Section 123 to be that necessary to ensure against certain kinds of localized atmospheric disturbances created by the source itself or "nearby" obstacles, and resulting in "excessive concentrations" of pollutants in the immediate vicinity of the source. 42 U.S.C. § 7423(c). EPA's regulations allow source operators to select one of three methods to determine GEP height, including a method that utilizes certain mathematical formulas and a modelling method based on physical demonstrations.

The D.C. Circuit remanded that portion of EPA's regulations that defined "nearby" structures for purposes of application of the mathematical formula method, but did not apply the same limitations to those who select demonstration models to calculate GEP height. The court concluded that, in refusing to apply the "nearby" limitation to demonstrations as well as formulas, EPA exceeded the statutory authority conferred under Section 123.

The court also remanded EPA's definition of "excessive concentrations" of pollutants in the vicinity of a stack. According to the court, the regulations utilized a numerical increase in pollutants for an area, rather than a standard that accounts for the actual health effects of such an increase as required by the Clean Air Act.

EPA's definition of "dispersion techniques" that are prohibited from receiving emission credit under the Clean Air Act was also remanded on grounds that it limited the prohibition to only two types of techniques. The D.C. Circuit directed EPA to develop rules disallowing credit for all "dispersion techniques" consistent with the requirements of Section 123.

C. *Ruckelshaus v. Sierra Club*

On July 1, 1983, the Supreme Court held in a 5-4 decision that lawyers are not eligible for awards of fees or costs under Section 307(f) of the Clean Air Act, 42

U.S.C. § 7607(f), when they represent parties that failed to achieve "some success on the merits" of their claims against EPA. *Ruckelshaus v. Sierra Club*, 103 S. Ct. 3274 (1983). The original controversy in that case stemmed from an unsuccessful suit brought by the Environmental Defense Fund (EDF) and the Sierra Club, challenging EPA's sulfur dioxide emission standards for coal-fired power plants. *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981). Despite their lack of success on the merits, EDF and Sierra Club petitioned the D.C. Circuit for attorney's fees incurred in the *Sierra Club* action. The environmental groups relied on Section 307(f) of the Clean Air Act, which allows a court to award attorneys' fees in certain proceedings "whenever it determines that such an award is appropriate." 42 U.S.C. § 7607(f). EDF and Sierra Club argued that, even though they did not prevail on any counts of their challenge, attorney's fees were "appropriate" since the groups had "substantially contributed" to the goals of the Clean Air Act by litigating "important, complex, and novel" issues of statutory interpretation. The D.C. Circuit agreed with this argument, and awarded more than \$90,000 to the two groups. *Sierra Club v. Gorsuch*, 672 F.2d 33 (D.C. Cir.), *amended* 684 F.2d 972 (D.C. Cir. 1982).

The Supreme Court reversed the D.C. Circuit's decision, holding that attorney's fees for the unsuccessful environmental groups were not "appropriate" under Section 307(f). Writing for the majority, Justice Rehnquist concluded that the well established "American Rule" predicates fee awards on at least some success by the claimant. Finding nothing in the language or legislative history of the Clean Air Act suggesting that Congress intended to abandon this principle, the Court felt compelled to reject the groups' claims.

In dissent, Justice Stevens argued that Congress never intended the outcome of Clean Air Act cases to be conclusive in determining whether to award attorneys' fees. According to Justice Stevens, the groups' litigation efforts provided technical and legal assistance to the D.C. Circuit in its evaluation of an important and complex case, and attorneys' fees were "appropriate" whether or not they prevailed.

III. DEVELOPMENTS UNDER THE CLEAN WATER ACT

On September 26, 1983, the Fifth Circuit reversed a trial court's determination that ninety percent of a 20,000 acre tract of land in Avoyelles Parish, Louisiana were wetlands, holding that the district court erred in substituting its judgment for EPA's final wetland determination. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983). In reversing the district court, the Fifth Circuit held that EPA's determination that approximately eighty percent of the tract were wetlands was not arbitrary and capricious. However, the court of appeals affirmed the portion of the district court's ruling that enjoined the owners of the 20,000 acre tract from engaging in any additional clearing activities on land determined to be wetlands until the owners acquired a dredge and fill permit under Section 404 of the Clean Water Act, 33 U.S.C. § 1344.

The tract of land at issue in *Avoyelles Sportsmen's League* is predominantly forest. The topography of the tract is uneven, however, resulting in some areas with permanent water impoundments. In 1978, the owners of the 20,000 acre tract began a large-scale deforestation program, intending to grow soybeans on the land. The district court enjoined that program on grounds that the owners' clearing activities would result in the discharge of dredged and fill materials into the waters of the United States in violation of Sections 301(a) and 404 of the Clean Water Act.

The Fifth Circuit's decision upheld the district court's ruling to the extent that it was consistent with EPA's wetland determination. Judge Randall concluded that the bulldozers and backhoes used in the landowners' deforestation program were point

sources within the meaning of the Clean Water Act. In filling in the sloughs and leveling the land, the Fifth Circuit held that the owners were redepositing fill material into waters of the United States, and that such activities constituted a discharge of a pollutant.

IV. DEVELOPMENTS UNDER SUPERFUND

Litigation of EPA enforcement actions under the Comprehensive Environmental Response, Compensation, and Liability Act ("Superfund"), 42 U.S.C. § 9601 *et seq.*, brought EPA's Superfund program out of a stage of infancy during 1983. Recent developments suggest a substantial increase in potential liability for those who generate or handle hazardous substances.

Superfund regulates and provides for the cleanup of hazardous waste disposal sites. The Act requires the owner or operator of any facility or vessel that handles hazardous wastes to immediately notify EPA's National Response Center of any unpermitted release of a hazardous substance, as defined in the Act. 42 U.S.C. § 9603(a). In addition to reporting releases of hazardous substances, parties responsible for releases are obligated under Superfund to clean them up. When this is not done, EPA is authorized to take appropriate remedial action to restore the environment and seek reimbursement of its response costs from any responsible party or parties. 42 U.S.C. §§ 9604, 9607(a).

Liability for response costs under Superfund is strict, in the sense that no showing of fault or negligence is required. *United States v. Price*, Civ. No. 80-4104 (D. N.J. July 28, 1983), 19 ERC 1638. Three statutory defenses are allowed, however, where the release was caused solely by (1) an act of God, (2) an act of war, or (3) an act or omission of a third person, other than an employee or agent of the responsible party, which could not have been reasonably foreseen or prevented. 42 U.S.C. § 9607(b).

In *Ohio v. Georgeoff*, 562 F. Supp. 1300 (N.D. Ohio 1983), a federal district court held that a transporter of hazardous wastes could not escape Superfund liability by alleging that the hazardous wastes found at a dump site were transported prior to enactment of the statute. The court in *Georgeoff* concluded that a retroactive application of Superfund was necessary to accomplish the Act's goal of a "complete cleanup" of older dump sites.

Compounding the problems of strict and retroactive liability, two federal courts held in 1983 that joint and several liability is permissible under Superfund. *United States v. Wade*, Civ. No. 79-1426 (E.D. Pa. Dec. 20, 1983); *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802 (S.D. Ohio 1983). The courts in *Wade* and *Chem-Dyne* ruled that an individual defendant may be held jointly and severally liable for the total costs of the cleanup unless the harm caused by the hazardous release can be apportioned according to the contribution of each responsible party. The burden of proving apportionment, the courts held, was upon each defendant. In *Wade*, the court also held that the only causation elements the government must prove to establish a *prima facie* case for Superfund liability are (1) the defendant disposed of hazardous waste at the dump site, and (2) the hazardous substances found at the site are also found in the defendant's waste.

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