



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

September 14, 1979

MEMORANDUM FOR: Chairman Hendrie  
Commissioner Gilinsky  
Commissioner Kennedy  
Commissioner Bradford  
Commissioner Ahearne

FROM: Stephen F. Eilperin, *SEE* Solicitor

SUBJECT: PORTER COUNTY CHAPTER OF THE IZAAK WALTON  
LEAGUE OF AMERICA, ET AL. V. NRC, NOS.  
78-1556, etc. (D.C. Cir., Sept. 6, 1979)  
(Bailly case)

In an important decision handed down by Judge Leventhal on September 6, the D.C. Circuit court of appeals upheld all aspects of the Commission's decision not to initiate proceedings for the revocation of the Bailly construction permit. In doing so, the court has given strong support to a wide ranging role for the NRC staff in nuclear regulation; to the Commission's procedures for responding to 2.206 requests; and to the operating license review as the usual forum for addressing issues, arising during construction of a plant, that relate to the safety of operating the completed plant.

When first filed in 1976 by the Porter County Chapter of the Izaak Walton League and others, the petitions alleged some dozen areas in which new developments warranted institution of proceedings. In the court of appeals, the petitioners pressed only one substantive issue, the Mark II containment. This unresolved safety issue came to light only after the CP was issued. The Director of NRR, in denying this aspect of the petition, found reasonable assurance that programs already underway could resolve the issue in the course of construction, and stated that the adequacy of that resolution could be addressed in the OL proceeding. The Commission affirmed his decision.

The court first rejected "petitioners' contention that the [Atomic Energy] Act mandates the institution of proceedings to suspend and revoke the construction permit whenever evidence not available at the initial permit proceedings raises 'serious, unresolved safety questions.'" Slip op. p. 8. Rather, the court agreed with the Commission

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"that the nature of the requisite safety showing is shaped by the requirements of the statute and that the determination whether the safety questions raised necessitate initiation lies in the first instance, within the discretion of the Commission's enforcement arm, the NRC staff."

In holding that the existence of an unresolved safety issue does not require revocation of a CP or institution of revocation proceedings the court stated:

The Commission has interpreted 2.206 to require issuance of a show cause order when "substantial health or safety issues" have been raised. Consolidated Edison Co., 2 N.R.C. 173, 176 (1975). As the Commission's brief indicates, the nature of the showing of substantiality depends upon the requirements of the outstanding license. This discriminating approach fairly reflects the statutory standard providing for revocation for reasons which "would warrant the Commission to refuse to grant a license or an original application."

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[W]hile a utility must demonstrate "reasonable assurances" that a proposed plant can be operated safely before it may obtain an operating license, 10 C.F.R. 50.57(a)(3) (1979), the unresolved safety questions do not require denial of a construction permit. NRC regulations require only a "reasonable assurance" that the safety questions will be resolved prior to completion of construction. That finding must be based on a judgment that the technical information needed will be available in time, when the final safety analysis report is prepared at the operating license stage, and that the utility has begun the research and development necessary to resolve the safety problem. Id. 50.35(a) (1979).

The court went on to remark

[The Commission] is not bound to launch full-blown proceedings simply because a violation of the statute is claimed. It may properly undertake preliminary inquiries in order to determine whether the claim is substantial enough under the statute to warrant full proceedings. The appropriate agency official has substantial discretion to decline to initiate proceedings based on this review, at least where, as here, he gives reasons for denying or deferring a hearing. The NRC procedure here accords with these precepts. (footnotes omitted) Slip op. pp. 10-11.

The court then turned to and rejected petitioners other argument, their claim that as an institutional matter the staff should be barred from ruling on the 2.206 request since staff had supported issuance of the construction permit. The court's discussion on this point is a classic exposition of the meaning of agency expertise and the role of the staff.

The contention of petitioners is evocative of a monolithic assumption that once members of a staff have taken a position, (a) their view is forever fixed and (b) it will infect other members of the agency with regulatory responsibilities. As appears from Withrow v. Larkin, however, there is a distinction between claims of "structural" bias, against which there is a strong presumption, and individual bias. See 421 U.S. at 50-51 n.16. And Withrow dismissed the due process objection even where functions were combined in a body composed of the same persons.

Petitioners distort matters by assuming that the decision whether to institute proceedings is a "contested matter" in which the Director acts as the "judge." Such a view does not take account fully of the manifold activities of the staff. The staff's functions occupy a broad range, encompassing preliminary investigations of license applications, participation in licensing proceedings, monitoring compliance following issuance of the license, and, if necessary, initiation of enforcement procedures. The common denominator is the application of expertise to a preliminary sizing up of a situation before a procedure is set in train to culminate in a decision in an adjudicative proceeding by an independent decisionmaker. There is no requirement of the duplication of staffs for each of these preliminary functions. The limited number of available experts might preclude such a course in any event. But there is more to it than that. The point is that the various preliminary functions are interrelated and their efficient discharge is aided by staff's familiarity with developing situations. The staff's expertise is central and integrative. This is an inherent part of the concept of agency expertise.

The importance of having the benefit of this expertise does not disappear simply because a petition seeking agency action is filed; at all points, the staff's preliminary judgment remains vital to effective regulation. Petitioners do not deny the relevance of these factors; indeed, they endorse the role of the staff in licensing and enforcement except for the particular circumstances where a request for staff reconsideration in the light of new evidence is made by outsiders. Whether the reexamination is triggered from within or outside the agency,

the essential nature of the staff's function is the same; to undertake a preliminary investigation and reach a judgment, based on the application of administrative knowledge and expertise, as to whether action is required. The law does not require that the Commission be deprived of staff administration because of the speculation that a judgment of the past may preempt the future. The due process clause makes a basic assumption of intellectual integrity in assessing a whole record in the light of new information. So far as appears, the context of this Act and experience under it, is consistent with that assumption; nothing before us requires a special legal barrier to the staff's role. (footnotes omitted). Slip op. pp. 16-18.

Lastly, the court reiterated Vermont Yankee's warning against imputing new procedural requirements for nuclear regulation where Congress has not explicitly required them. Here, the "safety-assuring procedure that Congress has devised after due reflection" for such safety concerns as arose in this case is the opportunity for adjudicative proceedings at the OL stage.

cc: OPE  
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SECY