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

DEC 24 1980

MEMORANDUM FOR: William J. Dircks
Executive Director for Operations

FROM: Howard K. Shapar
Executive Director for Operations

SUBJECT: ATTACHED COMMISSION PAPER "STEVEN SHOLLY, ET AL. V. NRC, ET AL., U.S.C.A., D.C. CIR. NO. 80-1691 - RECOMMENDED FINAL AMENDMENTS TO 10 CFR PART 2, RULES OF PRACTICE, TO IMPLEMENT THE DECISION IN SHOLLY ON HEARING RIGHTS UNDER SECTION 189a. OF THE ATOMIC ENERGY ACT FOR NO SIGNIFICANT HAZARDS CONSIDERATION AMENDMENTS"

The attached Commission paper proposes Commission approval of a Federal Register notice promulgating a final rule implementing the Court's decision in the Sholly case.

In SECY-A-80-183A (see p. 9) the Commission was informed that OELD was reviewing NRC's Rules of Practice to determine whether any changes might be needed to accommodate the Court's interpretation of hearing rights under section 189a. for no significant hazards consideration amendments. Although the Commission has decided to seek judicial review of the Sholly decision, procedures need to be established to enable the Commission to respond promptly to requests for hearing while the issues presented in Sholly are being resolved by the courts. On the basis of the OELD review, now completed, I have concluded that, with some minor modifications, the procedures in 10 CFR Part 2 are adequate to deal with the interpretation of section 189a. in Sholly. Accordingly, the attached Federal Register Notice of Rulemaking (Enclosure A) contains five minor procedural amendments to be effective immediately.

The Chairman of the Atomic Safety and Licensing Appeal Panel, the Chairman of the Atomic Safety and Licensing Board Panel, and the General Counsel have concurred in the recommended final rule. The Director of the Office of Nuclear Reactor Regulation has objected to references in the regulation to "expressions of interest," suggesting, instead, that only "requests for hearing" be mentioned. I believe, however, that the regulation should be promulgated as presently drafted. It simply reflects the Court's language,

while making it abundantly clear that both "expressions of interest" and "requests for hearing" will have to meet all of the Commission's requirements in Part 2 in order for a hearing to be granted.

Howard K. Shapar
Executive Legal Director

cc: A. S. Rosenthal, ASLAP
B. P. Cotter, Jr., ASLBP
L. Bickwit, Jr., GC
H. R. Denton, NRR

For: The Commissioners

From: William J. Dircks
Executive Director for Operations

Subject: STEVEN SHOLLY, ET AL. V. NRC, ET AL., U.S.C.A., D.C. CIR., NO. 80-1691 - RECOMMENDED FINAL AMENDMENTS TO 10 CFR PART 2, RULES OF PRACTICE, TO IMPLEMENT THE DECISION IN SHOLLY ON HEARING RIGHTS UNDER SECTION 189a. OF THE ATOMIC ENERGY ACT FOR NO SIGNIFICANT HAZARDS CONSIDERATION AMENDMENTS.

Purpose: Commission review of a Federal Register notice promulgating a final rule contingent upon issuance of the Court's mandate in Sholly.

Discussion: On November 26, 1980, the General Counsel and the Executive Legal Director provided the Commission (SECY-A-80-183A) with the Staff's preliminary views on the impact of the Court's decision in the Sholly case on agency licensing functions and on the TMI-2 cleanup operation. Sholly held, among other things, that even where a license amendment involves no significant hazards consideration, an interested person who requests a hearing is entitled to a hearing by section 189a. of the Atomic Energy Act before the amendment becomes effective. The Sholly decision has no effect upon the Commission's authority to issue immediately effective amendments when the public health, safety, or interest, or the common defense and security so requires. Nor does Sholly alter existing law with regard to the Commission's pleading requirements which enable the Commission to determine whether a person requesting a hearing is, in fact, an "interested person" within the meaning of section 189a. of the Act, that is whether the person has demonstrated "standing," indicated the specific aspect or aspects of the subject matter of the proceeding as to which intervention is sought, and identified one or more issues to be litigated. (See 10 CFR 2.714.)

In SECY-A-80-183A (see p. 9) the Commission was informed that OELD was reviewing NRC's Rules of Practice to determine whether any changes might be needed to accommodate the Court's interpretation of hearing rights under section 189a. for amendments involving no significant hazards consideration. The Commission has decided to

Contact: Howard K. Shapar
Executive Legal Director
492-7308

seek Supreme Court review of the Sholly decision and the Court of Appeals has not yet issued its mandate. Assuming the Court issues its mandate, procedures need to be established to enable the Commission to respond promptly to requests for hearing while the issues presented in Sholly are being resolved by the courts. On the basis of the OELD review, now completed, the Staff has concluded that, with some minor modifications, the procedures in 10 CFR Part 2 are adequate to deal with the interpretation of section 189a. in Sholly. Although OELD and OGC will examine, once again, whether section 189a. requires an adjudicatory hearing (in the context of an amendment involving no significant hazards consideration), the recommended rule need not be held up pending completion of this review. Accordingly, though no action is needed until the Court's mandate is issued, the Staff is transmitting for Commission review the attached Federal Register Notice of Rulemaking (Enclosure A) containing six minor procedural amendments to §§ 2.700, 2.701(b), 2.704(a), 2.714(a)(1), 2.717(a) and 2.780 in final form. The amendments are presented in comparative text. New material is underlined. No deletions were made in the Commission's existing regulations.

The purpose of the amendments is to provide procedures for expeditious treatment in all phases of the hearing process of written requests for a hearing (including any written expressions of interest which can reasonably be construed to be requests for a hearing) on proposed amendments to reactor construction permits and operating licenses involving no significant hazards consideration. The procedures are not applicable to generalized requests dealing with continued or future construction or operation of a particular facility; requests of this type will be considered under other provisions of the Commission's regulations such as 10 CFR 2.206. In addition, the Director of the Office of Nuclear Reactor Regulation will inform the requester that, upon written request, the requester's name will be placed upon a mailing list to receive automatic notification of requested amendments relating to that facility.

In general, the new procedures are designed to assure that:

(1) If a request for a hearing or an expression of interest in a pending proposed amendment involving no significant hazards consideration is received, it will be expeditiously processed before action is

taken on the proposed amendment. Under the new procedures, except where the public health, safety, or interest or common defense and security requires an effective amendment to be issued immediately, issuance of the amendment will be stayed until it is determined whether a hearing will be held. If a hearing is to be held, action will not be taken on the proposed amendment until after the conclusion of the hearing process and final disposition of the matter.

(2) An expression of interest which simply seeks information or offers comment on a proposed Commission action is separated from an expression of interest which can reasonably be construed as a request for a hearing.

(3) When a request for a hearing or an expression of interest which constitutes a request for a hearing is received, unless the Commission wishes to preside, an administrative law judge or an atomic safety and licensing board appointed by the Chairman of the Atomic Safety and Licensing Board Panel, as appropriate, will promptly rule on essential preliminary matters such as "standing" and identification of the aspect or aspects of the proposed amendment to be litigated.

(4) If a hearing is to be held an atomic safety and licensing board will preside, unless the Commission directs otherwise. OELD and OGC will further explore the feasibility of using administrative law judges to preside at hearings.

(5) All aspects of the proceeding will be conducted expeditiously, without infringement of the rights of any party.

Thus, the amendments provide that where there is a request for a hearing or an appropriate expression of interest in the subject matter of a pending proposed license amendment as to which prior notice of hearing or opportunity for hearing has not been published, an adjudicatory hearing will be ordered and the requester admitted as a party if the requester satisfies the Commission's intervention requirements in 10 CFR 2.714.

Recommendation: That the Commission:

1. Review the Federal Register notice (Enclosed) promulgating amendments to 10 CFR Part 2, "Rules of Practice for Domestic Licensing Proceedings," in final form. No action is necessary until the Court's mandate is issued.

2. Note that:

   (a) The amendments will be effective immediately upon publication in the Federal Register, although comment will be sought with a view to whether further amendment is appropriate.

   (b) The amendments relate solely to agency procedure and practice and are insignificant from the standpoint of environmental impact. Therefore, pursuant to 10 CFR 51.5(d)(2), an environmental impact statement, negative declaration, or environmental impact appraisal need not be prepared.

   (c) The appropriate Congressional Committees will be informed.

   (d) A public announcement, will be, prepared by the Office of Public Affairs and issued when the Federal Register notice is filed with the Office of the Federal Register.

Coordination: The Chairman of the Atomic Safety and Licensing Appeal Panel, the Chairman of the Atomic Safety and Licensing Board Panel and the General Counsel concur in the proposed final amendments.

William J. Dircks
Executive Director for Operations

Enclosures:
Federal Register Notice of
Rulemaking

[7590-01]

Nuclear Regulatory Commission

10 CFR Part 2

Requests for Hearings on Amendments Involving
No Significant Hazards Consideration

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Final Rule.

SUMMARY: In order to implement a recent court ruling, NRC is amending its regulations with respect to participation in proceedings relating to applications for nuclear facility construction permit and operating license amendments involving no significant hazards consideration. The amendments specify procedures that the NRC will use when acting on requests for a hearing on a pending proposed application for amendment, including expressions of interest in the subject matter of the proposed amendment, where the proposed amendment involves no significant hazards consideration and with respect to which there has been no prior publication of notice of intent to issue the amendment. The amendments are immediately effective because they relate to agency practice and procedure. However, public comments are invited on the new regulations, which are subject to modification in response to these comments.

DATE: The amendments are effective [Upon publication in FR]. Comments must be received on or before [30 days after publication in FR].

FOR FURTHER INFORMATION CONTACT: Guy H. Cunningham, III, Esquire, Office of the Executive Legal Director, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555 (Telephone (301) 492-7203).

SUPPLEMENTARY INFORMATION:

Background

The amendments to 10 CFR Part 2 and the new procedures

The purpose of these amendments is to implement the Court's decision in the Sholly case, though the Commission has decided to seek judicial review of the decision and the decision has not been finally disposed of by the courts and though the amendments may have to be modified at a later date. The amendments will assure that if, before issuance of a proposed amendment involving no significant hazards consideration, a request for a hearing is received, the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2 provide procedures for expeditious treatment of such a request. In addition, the amendments will assure that an expression of interest in the subject matter of the pending amendment which is reasonably construed as a request for a hearing (hereafter referred to as "an appropriate expression of interest") will be treated in the same way as such a request. The Commission believes that, with some minor modifications, its Rules in Part 2 are adequate to deal with the Court's interpretation of hearing rights under section 189a. for amendments involving no significant hazards consideration. (The Commission recognizes that there may be cases where such requests for hearing or expressions of interest may be received even before a determination has been made as to whether a requested amendment

involves a significant hazards consideration. These amendments apply to such cases, but nothing in these amendments prohibits the presiding officer, either upon his or her own motion or upon motion of a participant, from deferring the decision on a request for hearing until the determination on significant hazards consideration has been made.)

Generally, the objective of the new rule and new procedures is to assure that if a request for a hearing or an expression of interest in a proposed amendment involving no significant hazards consideration is received, it will be expeditiously processed before action is taken on the proposed amendment. The new procedures are designed to assure that an expression of interest which simply seeks information or offers comment on a proposed Commission action will be separated from an appropriate expression of interest; and, where a request for a hearing or an appropriate expression of interest has been received, a presiding officer will promptly rule on essential preliminary matters such as standing and identification of the aspect or aspects of the proposed amendments to be litigated. Finally, it cannot be overemphasized that the Commission expects presiding officers to conduct the proceeding expeditiously, without, of course, infringing on the rights of any party. Thus, the amendments provide that where there is a request for a hearing or an appropriate expression of interest in a pending proposed license amendment as to which prior notice of hearing or opportunity for hearing has not been published, an adjudicatory hearing will be ordered and the requester admitted as a party if the requester satisfies the Commission's intervention requirements in 10 CFR 2.714. It should be noted that only

written requests or expressions of interest will be considered within these new procedures.

Section 189a. of the Act requires the Commission to grant a hearing only upon the request of a person "whose interest may be affected by the proceeding." In many cases, a request for a hearing without accompanying information as to the requester's affected interest(s) may leave the Commission unable to judge whether the request should be granted; similarly, an expression of interest in a Commission action, without more, may leave the Commission unable to decide whether the person is requesting a hearing, wishes to participate in it, and is legally entitled to participate. Accordingly, the Commission believes it necessary that the information called for by the provisions of its intervention rule in 10 CFR 2.714 must be provided before the Commission can formally determine whether or not to grant a hearing. Section 2.714 requires, in essence, that persons requesting a hearing and intervention set forth with particularity their interest in the proceeding, how that interest might be affected by the results of the proceeding, and the specific aspect or aspects of the subject matter of the proceeding as to which they seek intervention. Subsequent identification of specific contentions, and the bases therefor, is also required. Contentions shall be limited to matters within the scope of the amendment under consideration.

Requests for a hearing, including appropriate expressions of interest, must comply with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. Among other things, this means that under

10 CFR 2.701(a), they shall be filed by mail or telegram addressed to the Secretary of the Commission, United States Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Chief, Docketing and Service Section, or may be delivered to the Commission's Public Document Room, 1717 H Street, N.W., Washington, D.C.; and, as prescribed in § 2.701(b), all documents offered for filing must be accompanied by proof of service.

If a request for a hearing or an appropriate expression of interest in a pending proposed amendment (which may involve no significant hazards consideration and as to which notice of proposed action pursuant to 10 CFR 2.105 has not been published) is filed with the Secretary as required by these amendments, and, on its face, appears to meet the requirements of 10 CFR 2.714, normally the Secretary will refer the filing to the Chairman of the Atomic Safety and Licensing Board Panel, who will designate an atomic safety and licensing board to preside. Alternatively, the Commission may refer the request or appropriate expression of interest to an administrative law judge, who will preside. Either the designated atomic safety and licensing board or administrative law judge will expeditiously make the preliminary determination as to whether the intervention requirements of § 2.714(a) have been met and a hearing shall be held. If an atomic safety and licensing board originally presides and determines that a hearing shall be held, normally it may continue to preside. However, if an administrative law judge originally presides and determines that a hearing shall be held, normally the matter may be referred to the Chairman of the Atomic Safety and Licensing Board Panel, who will appoint an atomic safety and licensing board to preside at the hearing.

If a hearing is granted, the requester shall be a party to the proceeding, subject to any limitations in the order granting the hearing, and shall have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

The Commission notes that, independently of whether a request for a hearing or an appropriate expression of interest in a proposed amendment involving no significant hazards consideration is received, it may publish in the FEDERAL REGISTER, in accordance with 10 CFR 2.105(a)(4), a notice of proposed action on the amendment, if it determines that general notice of an opportunity for a public hearing is warranted.

If the request for a hearing or expression of interest in the subject matter of a proposed amendment involving no significant hazards consideration is filed with the Secretary, and it does not meet the requirements in 10 CFR 2.714, or, if the request or expression of interest is not filed with the Secretary, but, rather, sent to a Commissioner or a Commission staff member, the recipient of the request or expression of interest will send it immediately to the Director, Office of Nuclear Reactor Regulation (NRR). Upon receipt of such a request or expression of interest, the Director of NRR will send the originator a letter (1) enclosing a copy of the Commission's procedural rules in 10 CFR Part 2; (2) pointing out the requirements in 10 CFR 2.714; and (3) informing the author that, unless a request for hearing meeting the procedural requirements of 10 CFR 2.714 is filed with the Secretary within 15 days from the date of the letter, it will be assumed that the

requester has determined not to formally seek an adjudicatory hearing and party status in that hearing and that the proposed amendment may be granted without further notice.

The procedures described in this notice and required by the accompanying amendments will be applied only in cases where the person submitting a request for a hearing or an appropriate expression of interest has identified a particular pending proposed amendment action or a subject matter encompassed within such a proposed amendment action. They will not be applied to generalized requests dealing with continued or future construction or operation of a particular facility (although such generalized requests may require consideration under other provisions of the Commission's regulations such as 10 CFR 2.206). However, where a request or an expression of interest relates generally to actions affecting a particular facility, rather than to a specific proposed amendment, the Director of NRR will inform the author that, upon request, he or she will be placed upon a mailing list to receive automatic notification of amendments requested by the facility licensee.

As previously noted, the Court's decision in Sholly has no effect upon the Commission's authority to issue immediately effective amendments when the public health, safety, or interest, or the common defense and security so requires. Except in those circumstances, however, receipt of a request for a hearing or an appropriate expression of interest in an application for an amendment as to which prior notice of hearing or opportunity for hearing has

not been published shall serve to stay issuance of the amendment until it is determined, in accordance with the procedures specified in these amendments, whether a hearing shall be held. If a hearing is to be held, action shall not be taken on the proposed amendment until the matters raised in the request have been determined.

Finally, although the Commission is not amending 10 CFR 2.718, "Power of presiding officer," it emphasizes that presiding officers are to take expeditiously all appropriate actions within the terms of 10 CFR Part 2 to determine whether a hearing is required with respect to any proposed amendment involving no significant hazards consideration. In addition, the Commission expects presiding officers to deal expeditiously with all aspects of the hearing process using all available appropriate techniques in Part 2, such as, among others, the use of summary disposition, expedited schedules for completion of various hearing phases, appropriate prehearing conferences, expedited discovery, expedited schedules for submission of testimony as well as special care to avoid duplicative testimony, and strict schedules for the submission of findings of fact and conclusions of law.

Because these amendments relate solely to agency procedure and practice, the Commission has found that good cause exists for omitting notice of proposed rulemaking and public procedure thereon, as unnecessary, and for making the amendments effective upon publication in the FEDERAL REGISTER without the customary 30-day notice. However, public comments are invited on the new regulations, which are subject to modification in response to these comments.

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and sections 552 and 553 of Title 5 of the United States Code, the following amendments to Title 10, Chapter 1, Code of Federal Regulations, Part 2, are published as a document subject to codification.

PART 2 - RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. Section 2.700 is revised to read as follows:

§ 2.700 Scope of subpart.

The general rules in this subpart govern procedure in all adjudications initiated by the issuance of an order to show cause, an order pursuant to § 2.205(e), a notice of hearing, a notice of proposed action issued pursuant to § 2.105, a notice issued pursuant to § 2.102(d)(3), or a request for a hearing or an expression of interest in a pending proposed amendment to a construction permit or operating license for a utilization or testing facility as to which prior notice of hearing or opportunity for hearing has not been published.

2. Section 2.701(b) is revised to read as follows:

§ 2.701 Filing of documents.

* * * * *

(b) All documents offered for filing shall be accompanied by proof of service upon all parties to the proceeding or their attorneys of record as required by law or by rule or order of the Commission. The staff of the Commission shall be deemed to be a party. Where the document to be filed is a request for a hearing or an expression of interest in the subject matter of a pending proposed amendment as to which prior notice of hearing or opportunity for hearing has not been published, the applicant for the amendment shall also be served.

3. Section 2.704(a) is revised to read as follows:

§ 2.704 Designation of presiding officer, disqualification, unavailability.

(a) The Commission may provide in the notice of hearing that one or more members of the Commission, or an atomic safety and licensing board, or a named officer who has been delegated final authority in the matter, shall preside.

If the Commission does not so provide, the Chairman of the Atomic Safety and Licensing Board Panel will issue an order designating an atomic safety and licensing board appointed pursuant to section 191 of the Atomic Energy Act of 1954, as amended, or, if the Commission has not provided for the hearing to be conducted by an atomic safety and licensing board, the Chief Administrative Law Judge will issue an order

designating an administrative law judge appointed pursuant to section 3105 of title 5 of the United Stated Code.

Upon receipt by the Secretary of a request for a hearing on a pending proposed amendment to a reactor construction permit or operating license (including an expression of interest is the subject matter of the pending amendment which is reasonably construed as a request for a hearing) as to which prior notice of hearing or opportunity for hearing has not been published, filed in accordance with the requirements of § 2.714, the Commission will normally direct that the filing be referred to an administrative law judge or to the Chairman of the Atomic Safety and Licensing Board Panel for designation of an atomic safety and licensing board to determine expeditiously whether a hearing shall be granted. If an administrative law judge determines that a hearing shall be granted, normally he or she shall refer the matter to the Chairman of an atomic safety and licensing board designated by the Chairman of the Atomic Safety and Licensing Board Panel to preside at the hearing.

4. Section 2.714(a)(1) is revised to read as follows:

§ 2.714 Intervention.

(a)(1) Any person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition

for leave to intervene. In a proceeding noticed pursuant to § 2.105, any person whose interest may be affected may also request a hearing. (The criteria of this section for the granting of a hearing and the admission of a party to that hearing also apply to requests for a hearing, or expressions of interest reasonably construed as requests for a hearing, concerning a proposed reactor construction permit or operating license amendment as to which prior notice of hearing or opportunity for hearing has not been published.) The petition and/or request shall be filed not later than the time specified in the notice of hearing, or as provided by the Commission, the presiding officer or the atomic safety and licensing board designated to rule on the petition and/or request, or as provided in § 2.102(d)(3) or within 15 days of the date of any letter, describing the requirements in this section, sent to the petitioner/requester by the Director of the Office of Nuclear Reactor Regulation. Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer or the atomic safety and licensing board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d) of this section:

* * * * *

5. Section 2.717(a) is revised to read as follows:

§ 2.717 Commencement and termination of jurisdiction of presiding officer.

(a) Unless otherwise ordered by the Commission, the jurisdiction of the presiding officer designated to conduct a hearing over the proceeding, including motions and procedural matters, commences when the proceeding commences. If no presiding officer has been designated, the Chief Administrative Law Judge has such jurisdiction or, if he or she is unavailable, another administrative law judge has such jurisdiction. A proceeding is deemed to commence when a notice of hearing or a notice of proposed action pursuant to § 2.105 is issued, or upon referral to a presiding officer, pursuant to § 2.704(a), of a request for a hearing on a pending proposed amendment to a reactor construction permit or operating license (including an expression of interest in the subject matter of the pending amendment which is reasonably construed as a request for a hearing) as to which prior notice of a hearing or opportunity for a hearing has not been published. When a notice of hearing provides that the presiding officer is to be an administrative law judge, the Chief Administrative Law Judge will designate by order the administrative law judge who is to preside. The presiding officer's jurisdiction in each proceeding will terminate upon the expiration of the period within which the Commission may direct that the record be certified to it for final decision, or when the Commission renders a final decision, or when the presiding officer shall have withdrawn

himself from the case upon considering himself disqualified, whichever is earliest.

* * * * *

6. Section 2.780(a) is revised to read as follows:

§2.780 Ex parte communications.

(a) Except as provided in paragraph (c) of this section, neither (1) Commissioners, members of their immediate staffs, or other NRC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions will request or entertain off the record except from each other, nor (2) any party to a proceeding for the issuance, denial, amendment, transfer, renewal, modification, suspension, or revocation of a license or permit, or any officer employee, representative, or any other person directly or indirectly acting in behalf thereof, shall submit off the record to Commissioners or such staff members, officials, and employees, any evidence, explanation, analysis, or advice, whether written or oral, regarding any substantive matter at issue in a proceeding on the record then pending before the NRC for the issuance, denial, amendment, transfer, renewal, modification, suspension, or revocation of a license or permit. For the purposes of this section, the term "proceeding on the record then pending before the NRC" shall include any application or matter which has been noticed

for hearing or concerning which a hearing has been requested pursuant to this part, except that, where a request for a hearing on a pending proposed amendment to a reactor construction permit or operating license (including an expression of interest treated as a request for hearing) has been received, the proceeding on the record shall be deemed to commence with referral of the request or expression of interest to an administrative law judge or atomic safety and licensing board.

(Secs. 161, 189, Pub. L. 83-703, as amended, 68 Stat. 948, 955, (42 U.S.C. 2201, 2239); Pub. L. 90-23, 81 Stat. 54 (5 U.S.C. 558(c)); sec. 201, Pub. L. 93-438, 88 Stat. 1242 (42 U.S.C. 5841)).

Dated at Washington, D.C., this day of , 198 .

FOR THE NUCLEAR REGULATORY COMMISSION

Samuel J. Chilk
Secretary of the Commission

Office of the Secretary

RECOMMENDED DISTRIBUTION SHEET

Originating Office _____ Contact _____ Ext. _____

Title of Proposed Paper _____

_____

Paper Type: _____ Policy Session _____ Commissioner Action

_____ Consent Calendar _____ Information Report

* * * * *

CHAIRMAN AHEARNE (3) _____

COMMISSIONER GILINSKY (2) _____

COMMISSIONER KENNEDY (6) _____

COMMISSIONER HENDRIE (3) _____

COMMISSIONER BRADFORD (3) _____

CONGRESSIONAL AFFAIRS (1) _____

PUBLIC AFFAIRS (1) _____

GENERAL COUNSEL (5) _____

INSPECTOR & AUDITOR (2) _____

POLICY EVALUATION (4) _____

SECRETARY (10) _____

EXECUTIVE DIRECTOR FOR OPER (3) 3

DEPUTY EDO (1) 1

* * *

ADVISORY COMMITTEE ON REACTOR SAFEGUARDS (1) _____

AS&LBP (2) 2

AS&LAP (2) _____

ADMINISTRATION (3) 5

CONTROLLER (3) _____

EXECUTIVE LEGAL DIR (2) 3

MANAGEMENT & PROGRAM ANALYSIS (5) 5

EQUAL EMPLOYMENT OPPORTUNITY (1) _____

STATE PROGRAMS (2) 2

INTERNATIONAL PROGRAMS (2) _____

NUCLEAR REACTOR REGULATION (10) 10

STANDARDS DEVELOPMENT (5) _____

NUCLEAR MATERIAL SAFETY AND SAFEGUARDS (4) 4

INSPECTION & ENFORCEMENT (3) 3

REGIONAL OFFICES

KING OF PRUSSIA (1) _____

ATLANTA (1) _____

CHICAGO (1) _____

DALLAS (1) _____

SAN FRANCISCO (1) _____

NUCLEAR REGULATORY RESEARCH (4) 4

ANALYSIS & EVALUATION OF OPERATIONAL DATA (2) _____

TOTAL NO. OF COPIES _____

RETURN ORIGINAL TO _____

AA61-2 PDR

December 19, 1980

Note to: Tom Engelhardt

From: Stephen H. Lewis

Thru: Larry Chandler

Subject: IMPACT OF SHOLLY ON LICENSING ACTIONS PROPOSED TO BE TAKEN WITHOUT A LICENSE AMENDMENT

At Joe Scinto's request, I am bringing to your attention a question which has arisen with respect to the attached proposed licensing action on TMI-2. The question arises because of the statement in Sholly that any Commission action which authorizes "any significant change in the operation of a nuclear facility" (slip op. at 23) requires an implementing license amendment.

In this proposed action, the Staff would amend the Recovery Operations Plan to specify certain additional reactor coolant chemistry surveillance requirements. The conditions of the February 11, 1980 Order of the Director, NRR, pursuant to which the facility is currently being maintained, provide that

> 1.2. The Recovery Operations Plan shall describe unit Operations Requirements for the implementation of these Technical Specifications. This plan, and changes thereto, shall be approved by the Commission prior to implementation.

Section 4.0.1 of these conditions provides that Surveillance Requirements shall be performed in accordance with the Recovery Operations Plan, but that the plan shall not be considered a part of the Technical Specifications.

Based upon the fact that the Plan is not part of the Technical Specifications, the Staff proposes to implement the amendment to the Plan without the necessity of seeking an amendment to the license. In support of its action the Staff has prepared an Evaluation. In order to justify the manner in which this action is proposed to be undertaken, the Evaluation should contain a finding that the action does not authorize "any significant change in the operation" of the facility. Such a finding is presently lacking.

Actions which the Staff proposes to undertake without license amendments will occur in many other cases and it may be desirable, therefore, to develop some guidance to the Staff regarding the necessity to make the finding of no significant change in the operation of the facility.

Joe Scinto also suggested that Mr. Shapar might want to focus on this question since he has been closely involved in the interpretation of the Sholly decision.

Stephen H. Lewis

Stephen H. Lewis

8102170517

69 pp

AA61-2 PDR

Steven SHOLLY and Donald E. Hossler, Petitioners,
v.
UNITED STATES NUCLEAR REGULATORY COMMISSION et al. and United States of America, Respondents,

Metropolitan Edison Company et al., Intervenors.

PEOPLE AGAINST NUCLEAR ENERGY, Petitioner,
v.
UNITED STATES NUCLEAR REGULATORY COMMISSION; John Ahearne, Victor Gilinsky, Richard T. Kennedy, Joseph M. Hendrie, and Peter A. Bradford, in Their Individual Capacities; and the United States of America, Respondents,

Metropolitan Edison Company, Jersey Power & Light Company, and Pennsylvania Electric Company, Intervenors.

In Re PEOPLE AGAINST NUCLEAR ENERGY, Petitioner.

Nos. 80-1691, 80-1783 and 80-1784.

United States Court of Appeals, District of Columbia Circuit.

Argued Sept. 8, 1980.

Decided Nov. 19, 1980.

Certiorari Granted May 26, 1981. See 101 S.Ct. 3004.

Petition was filed seeking review of two orders of the Nuclear Regulatory Commission, which temporarily modified nuclear power plant operating license to permit the licensee to release radioactive gas into the atmosphere at a faster rate and authorized the licensee to vent the atmosphere of nuclear containment building. The Court of Appeals held that: (1) petitioner's claims that the Commission violated the Atomic Energy Act by failing to hold requested hearing prior to issuing the orders was not moot; (2) the Commission's finding of "no significant hazards consideration" did not entitle the Commission to dispense with requested hearing prior to issuance of the order for temporary modification of license; and (3) the Commission's order authorizing the licensee to vent the atmosphere of the reactor containment building was a license amendment within the scope of the Atomic Energy Act and, therefore, the Commission's failure to hold requested hearing prior to issuance of the order was a violation of the Act.

Order accordingly.

Petition for rehearing denied, D.C.Cir., 651 F.2d 792.

1. Declaratory Judgment ⇐124

Action seeking declaratory judgment that Nuclear Regulatory Commission violated the Atomic Energy Act by failing to hold a requested hearing before issuing orders which temporarily modified nuclear power plant operating license to permit licensee to release radioactive gas into the atmosphere at a faster rate and authorized licensee to vent atmosphere of reactor containment building, was not moot, although the licensee had completed the venting of the reactor building and both of the orders had expired, since the Commission's conduct was "capable of repetition, yet evading review." Atomic Energy Act of 1954, § 189(a) as amended 42 U.S.C.A. § 2239(a).

2. Action ⇐6

In order to invoke the "capable of repetition, yet evading review" exception to the mootness doctrine, petitioner must not only show that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration," he must also show that "there was a reasonable expectation that the same complaining party would be subjected to the same action again." U.S.C.A.Const. Art. 3, § 2, cl. 1.

3. Electricity ⇐8.5(2)

Nuclear Regulatory Commission's finding of "no significant hazards consideration" did not entitle the Commission to dispense with requested hearing prior to issuance of an order which temporarily modified operating license of nuclear power plant to permit the licensee to release radioactive gas into the atmosphere at a faster

rate, and the Commission's failure to provide such a hearing violated the Atomic Energy Act. Atomic Energy Act of 1954, § 189(a) as amended 42 U.S.C.A. § 2239(a).

4. Electricity ⇐8.5(2)

Nuclear Regulatory Commission's order authorizing nuclear power plant licensee to vent the atmosphere of reactor containment building was a license amendment within the scope of the Atomic Energy Act, in that it granted the licensee authority to do something it otherwise could not have done under the existing license authority, and, therefore, the Commission's failure to hold a requested hearing prior to issuance of the order was a violation of the Act. Atomic Energy Act of 1954, § 189(a) as amended 42 U.S.C.A. § 2239(a).

5. Electricity ⇐8.4

Under the Atomic Energy Act, the Nuclear Regulatory Commission is required to hold a hearing on a nuclear power plant operating license amendment whenever interested parties request one. Atomic Energy Act of 1954, § 189(a) as amended 42 U.S.C.A. § 2239(a).

Petitions for Review of Orders of the United States Nuclear Regulatory Commission and for Writ of Mandamus.

Robert Hager, Washington, D. C., with whom Daniel P. Sheehan, Washington, D. C., was on brief, for petitioners.

Stephen F. Eilperin, Sol., U. S. Nuclear Regulatory Commission, Washington, D. C., with whom E. Leo Slaggie, Atty., U. S. Nuclear Regulatory Commission, was on brief, for respondent United States Nuclear Regulatory Commission.

David A. Strauss, Atty., Dept. of Justice, Washington, D. C., with whom James W. Moorman, Asst. Atty. Gen., and Peter R. Steenland, Jr., Atty., Dept. of Justice, Washington, D. C., were on brief, for respondent United States of America. Stanford Sagalkin and Lois Schiffer, Attys., Dept. of Justice, Washington, D. C., also entered appearances for respondent United States of America.

Mark Augenblick, Washington, D. C., with whom George F. Trowbridge and Matias F. Travieso-Diaz, Washington, D. C., were on brief, for intervenors. Robert E. Zahler, Washington, D. C., also entered an appearance for intervenors.

Before WRIGHT, Chief Judge, and MIKVA and EDWARDS, Circuit Judges.

Opinion *PER CURIAM*.

PER CURIAM:

In this case petitioners seek review of two orders by the Nuclear Regulatory Commission (NRC) permitting the Metropolitan Edison Company to release radioactive gas into the atmosphere from the Three Mile Island nuclear plant.[1] The claim here is that the orders issued by the NRC were made effective without affording petitioners their statutory rights to notice and a hearing.[2]

1. Metropolitan Edison Co., Pennsylvania Electric Co., and Jersey Central Power and Light Co. jointly hold the operating license to the Three Mile Island nuclear plant. In this opinion they are called collectively either "the licensee" or "Metropolitan Edison."

2. The petitioners primarily rely on § 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. § 2239(a) (1976), as amended in 1957, Pub.L. No.85-256, § 7, 71 Stat. 579 (1957), and in 1962, Pub.L.No.87-615, § 2, 76 Stat. 409 (1962). Section 189(a) reads in pertinent part as follows:

> In any proceeding, under this chapter, for the granting, suspending, revoking, or amending of any license ... the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application ... for a construction permit for a facility .... [T]he Commission may, in the absence of a request therefor by any person whose interest may be affected, issue ... an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for ... an amendment to an operating license upon a determi-

On June 26, 1980, this court denied petitioners' request for emergency injunctive relief to block the release of the radioactive gas. Now that the radioactive gas from the nuclear plant has been fully vented into the atmosphere, the petitioners seek only declaratory relief from this court.

I. BACKGROUND

This case arises in the aftermath of a widely publicized accident that occurred on March 28, 1979 at "Unit 2" of the Three Mile Island nuclear plant. As a result of the accident, dangerous concentrations of radioactive gas collected in the reactor containment building, inhibiting cleanup and maintenance work.

Three months after the accident, the NRC issued an "Order for Modification of License," 44 Fed.Reg. 45,271 (1979), suspending Metropolitan Edison's authority to operate Unit 2 of the Three Mile Island plant (TMI-2), and requiring it to "maintain the facility in a shutdown condition." *Id.*[3] The NRC order indicated that, in about thirty days, the Commission would issue a "Safety Evaluation" addressing "the imposition of new and/or revised Technical Specifications setting forth appropriate license conditions." *Id.*

In fact, the NRC issued no such evaluation. Instead, on November 21, 1979, the NRC issued a "Statement of Policy and Notice of Intent to Prepare a Programmatic Environmental Impact Statement," 44 Fed.Reg. 67,738 (1979), which was to be an "overall study of the decontamination and disposal process." *Id.* The NRC Statement of Policy directed the agency's staff

> to include in the programmatic environmental impact statement on the decontamination and disposal of TMI-2 wastes an overall description of the planned activities and a schedule for their completion along with a discussion of alternatives considered and the rationale for choices made.

Id.

On February 11, 1980, the NRC issued another order, 45 Fed.Reg. 11,282 (1980), which stated that

> the facility's operating license should be modified so as to: . . . (3) Prohibit venting or purging or other treatment of the reactor building atmosphere . . . until each of these activities has been approved by the NRC, consistent with the Commission's Statement of Policy and Notice of Intent to Prepare a Programmatic Environmental Impact Statement.

Id.[4]

Six weeks later the NRC published a notice of the "Availability of Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere," 45 Fed.Reg. 20,265 (1980). The notice stated that the Assessment "considers five alternative methods for decontaminating the reactor building atmosphere and recommends that the building atmosphere be decontaminated by purging to the environment through the building's hydrogen control system." *Id.*[5] The NRC staff

nation by the Commission that the amendment involves no significant hazards consideration.

3. Much of the factual basis for the NRC's actions is contained in its report, the "Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere" (May 1980), which is reprinted in the Intervenor-Respondents' Appendix (App.) 18.

4. The February 11, 1980 order specified that any interested person or the licensee could request a hearing before March 21, 1980 on whether the proposed changes in the technical specifications would be sufficient "to protect health and safety or to minimize danger to life and property" or "whether the provisions of this Order would significantly affect the quality of the human environment." *Id.* at 11,283. The order also provided, however, that a request for a hearing on part (3) of the order would not stay the effectiveness of the order. *Id.*

5. The NRC desired to remove the radioactive gas from the reactor building so that workers could begin to clean the building, maintain the equipment, and prepare to remove the damaged fuel from the reactor core. Removing the radioactive gas from the reactor containment building was only the first step in an extensive cleanup.

concluded in the Assessment that venting the gas into the atmosphere would "not constitute a significant environmental impact and, accordingly, the staff does not propose to prepare a separate Environmental Impact Statement on this action." *Id.* at 20,265–66. Public comments on the Assessment originally were due by April 11, 1980, but the period was extended to May 16, 1980. 45 Fed.Reg. 30,760 (1980).

In May of 1980, the NRC issued the "Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere." On June 12, 1980, the NRC issued without a hearing two final orders, entitled "Order for Temporary Modification of License," 45 Fed. Reg. 41,251 (1980), and "Memorandum and Order," 2 Nuclear Reg.Rep. (CCH) ¶ 30,498.-01 (1980). The first order modified the operating license [6] to permit the licensee to release the radioactive gas from the reactor building at a faster rate than the existing specifications allowed.[7] The first order also expressly stated that, because the NRC had found that the modification of the operating license involved "no significant hazards consideration," requests for a hearing would not stay the implementation of the order. 45 Fed.Reg. at 41, 252.[8] The second order authorized release of radioactive gas from the reactor building.[9] Venting was to begin on June 22.[10]

On June 16, petitioners wrote a letter to the NRC requesting that it reconsider its finding of "no significant hazards consideration" and its decision to make the June 12 orders effective immediately. The NRC did not respond.

On June 23, petitioners filed a petition in this court for review of the two June 12 orders.[11] Three days later this court denied the petitioners' requests for emergency injunctive and declaratory relief. The next day, one day before the venting began, the petitioners filed a request for a hearing with the NRC on the two June 12 orders. The hearing request was referred to an Atomic Safety and Licensing Board. On July 3, one of the petitioners in No. 1691 moved the Board to suspend the venting; however, this request was subsequently withdrawn, on July 8, shortly before the venting was completed.

Metropolitan Edison began to vent the reactor building on June 28, 1980, at a rate that was within the original license specifications for a normally operating reactor. On July 8, the licensee began to vent the radioactive gas at a faster rate, pursuant to the specifications set in the June 12 license amendment. The venting was completed on July 11. As the NRC had anticipated, the off-site doses from the venting were below the limits set in the June 12 radiation

6. As part of its argument, the NRC contends that the second order, permitting purging, was not a license amendment. However, the NRC admits that the first order amended the TMI–2 operating license.

7. Before the accident of March 28, 1979, the TMI–2 operating license authorized periodic release of specified amounts of radioactive gas into the atmosphere as a normal and necessary part of plant operations.

8. Part of the basis for the Commission's determination of "no significant hazards consideration" was its conclusion that, although existing *release* rate limits would be exceeded, off-site dose limits would not be breached. Since the NRC's concern was the effect of the venting on human health, the Commission felt that the more direct measure—off-site dose limits—would provide a satisfactory standard to determine the appropriate limits on the venting of the radioactive gas.

9. The NRC made no finding that this order involved "no significant hazards consideration." *See* Brief for Respondent Nuclear Regulatory Commission at 30, 35.

10. By making the orders effective immediately, the Commission failed to give any notice in the Federal Register of the license amendment. The Commission contends that so long as it makes a finding of "no significant hazards consideration," the governing statute does not impose such a notice requirement. *See* note 2 *supra* for statutory notice and hearing requirements.

11. On July 8, 1980, a petition for review (No. 80–1783) and an accompanying petition for writ of mandamus (No. 80–1784) were filed in the Third Circuit. On the NRC's motion, those cases were transferred to this court and consolidated for review with No. 80–1691, the case originally filed in this court.

license amendment. In its draft Programmatic Environmental Impact Statement, NUREG–0683, issued August 14, 1980, the Commission stated that it did not anticipate a recurrence of the purging of the reactor building atmosphere, but that some minor releases of gas might be necessary for data gathering purposes. *See* Brief for Respondent Nuclear Regulatory Commission at 6 n.4 & 20 n.11.

II. MOOTNESS

[1] Because the licensee has completed the venting of the reactor containment building, and because both of the June 12 orders have expired, the Commission and the licensee claim that petitioners' claims for injunctive and declaratory relief are moot.[12] However, because we find that these cases are "capable of repetition, yet evading review,"[13] we hold that the petitioners' claims are justiciable in this court.[14]

The mootness doctrine is primarily based on artic'› III of the United States Constitution, which limits federal court jurisdiction to "cases" or "controversies." Courts have interpreted the constitutional provision to limit their jurisdiction to "a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48, 90 S.Ct. 200, 201, 24 L.Ed.2d 214 (1969). The case or controversy requirement "preserves the separation of powers" and " 'limit[s] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.' " *Tennessee Gas Pipeline Co. v. Federal Power Comm'n*, 606 F.2d 1373, 1379 (D.C.Cir.1979) (quoting *Flast v. Cohen*, 392 U.S. 83, 95, 88 S.Ct. 1942, 1950, 20 L.Ed.2d 947 (1968)).

Cases arising from agency action, no less than cases involving only private parties, are subject to the mootness doctrine. Yet, as this court has recently noted, "the concept of mootness is placed under some strain in the context of administrative orders whose formal legal effect is typically shortlived." *Tennessee Gas Pipeline Co. v. Federal Power Comm'n*, 606 F.2d at 1379–80. The strain is relieved somewhat by an exception first articulated in *Southern Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed.

12. Metropolitan Edison seems to argue that since petitioners' claims for injunctive relief are moot (i. e., the reactor building atmosphere has been purged), the case should be dismissed. This argument, however, misstates the nature of the relief sought by petitioners. They have sought *both* injunctive and declaratory relief in this action. Although petitioners cannot now obtain injunctive relief to prevent the purging, they continue to pursue their claim for a declaratory judgment that the NRC must grant them statutorily mandated notice and a hearing whenever it amends a license. *See, e. g., Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974) (the Court found that even though the strike had been settled, mooting injunctive relief, the petitioner alleged sufficient facts in support of declaratory relief so that the case should not be dismissed as moot).

13. *See Southern Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911).

14. We note that the United States has take: the position that the petitioners' claims are "capable of repetition"—since the Commission has stated that it will continue to deny requested hearings when it finds no significant hazards considerations are involved—but that future claims will not evade review—since "there is no reason to believe that [NRC] actions will characteristically be irreversible." Memorandum of Respondent United States at 4. Consequently, the United States also argues that the petitions should be dismissed as moot.

We reject the Government's position for two reasons. First, as we explain in the text of the opinion, many NRC license amendments are irreversible. The facts in the present case illustrate how making an amendment effective immediately can preclude complete judicial review. Second, we believe that it is unreasonable for the Government to take the position that, in order to seek judicial review of a license amendment, a petitioner must race to the courthouse before the NRC takes an irreversible action. Even if a petitioner could file the petition before the NRC acted, a court more often than not will decline to grant emergency relief. Indeed, such a request for emergency relief was denied in this case. Consequently, because a petitioner will not receive complete judicial review of his claim, even though it might be meritorious, we find that these claims evade review.

310 (1911), where the Supreme Court held that technically moot cases are justiciable if they involve "short term orders, capable of repetition, yet evading review." *Id.* at 515, 31 S.Ct. at 283.

[2] A case is considered justiciable if "the litigant show[s] the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 125–26, 94 S.Ct. 1694, 1699–1700, 40 L.Ed.2d 1 (1974). As this case demonstrates, administrative orders, like labor disputes, often "do not last long enough for complete judicial review of the controversies they engender .... The judiciary must not close the door to the resolution of the important questions these concrete disputes present." *Id.* at 126–27, 94 S.Ct. at 1700–1701. Yet, in order to invoke the *Southern Pacific* exception, the petitioner must not only show that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration," he must also show that "there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350 (1975).

The issue in the present case is not simply whether the NRC will again purge the reactor building atmosphere without first giving notice and holding a hearing. At stake is whether the NRC will continue its policy of making immediately effective license amendments without holding a hearing, even though petitioners request one, whenever the NRC finds that the amendment involves "no significant hazards consideration."

Under this view of the issues in this case, the conditions for avoiding dismissal on grounds of mootness, set forth in *Weinstein*, are met. The Commission has candidly conceded that

> at some point in the TMI–2 cleanup, perhaps on more than one occasion, the Commission will amend the utility's license in respects so minor that the Commission will think itself justified in making the amendment immediately effective based upon a no significant hazards consideration finding. Certainly, that kind of finding has been utilized in the past.

Brief for Respondent Nuclear Regulatory Commission at 23.[15] The Commission plainly intends to adhere to its policy of denying a hearing on a license amendment, under certain circumstances, even though interested parties specifically request a hearing. The chances of recurrence are more than speculative; because the NRC policy will be carried out during the TMI–2 cleanup, there is a "reasonable expectation that the same complaining part[ies]" will be denied their alleged statutory rights to hearing and notice.

As the present case demonstrates, challenges to the NRC's policy of denying a hearing on license amendments may well escape review. The difficulty here is that the orders are often shortlived and the NRC actions, like venting, may be irreversible. The difficulty is compounded when the NRC elects, as in this case, to make its orders effective immediately. These considerations indicate that future challenges to the NRC policy may easily "evade review."

15. This admission entirely undercuts Metropolitan Edison's argument that there is no evidence that the actions complained of will be repeated. In each of the cases cited in Metropolitan Edison's brief, the challenged governmental activity had ceased with no indication that it would be continued at a later time. *See, e. g., Murphy v. Benson*, 270 F.2d 419 (2d Cir. 1959), *cert. denied*, 362 U.S. 929, 80 S.Ct. 750, 4 L.Ed.2d 747 (1960). In the present case, by contrast, the NRC has clearly stated its intention to continue with its allegedly unlawful conduct—making certain license amendments effective immediately without holding a requested hearing or giving notice. We think it obvious that the NRC will also continue to rely on the second method employed in this case for avoiding the notice and hearing requirements of § 189(a)—describing an order as something other than a license amendment. *See* note 6 *supra*. The Commission's continued belief in its authority to follow this policy makes petitioners' challenge to the policy "capable of repetition." *See Nader v. Volpe*, 475 F.2d 916 (D.C.Cir.1973).

This court has stated that "[t]he situations [involving appellate consideration of recurrent controversies] are necessarily variant, and the variables complex.... [T]he court's decision to maintain the appeal, in the interest of sound judicial administration, is dependent on a prediction of a recurrence or continuation of what is perceived to be essentially the same legal dispute." *Alton & Southern Railway Co. v. International Ass'n of Machinists & Aerospace Workers*, 463 F.2d 872, 879 (D.C.Cir. 1972). "While an 'effective remedy' for the immediate dispute is not obligatory, there must be at least a capacity for a declaration of legal right concerning a future projection of the actual dispute that precipitated the litigation." *Id.* at 879–80. In the present case, that capacity exists, and we hold that this case is not moot.

III. THE ORDER FOR TEMPORARY MODIFICATION OF LICENSE

The NRC issued without a hearing the "Order for Temporary Modification of License" (OTML) of June 12, 1980, which substituted off-site dosage limits for release limits in the TMI–2 operating license. The petitioners contend that the NRC's failure to provide a hearing violated section 189(a) of the Atomic Energy Act of 1954. The first sentence of that section provides in relevant part:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit ... the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

The NRC and Metropolitan Edison do not dispute that the OTML constituted a license amendment subject to the terms of section 189(a). They do maintain, however, that under the fourth sentence of the section the Commission could dispense with a hearing. The fourth (and last) sentence of section 189(a) reads:

> The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

The NRC and the licensee argue that the NRC properly made a finding of "no significant hazards consideration" with respect to the OTML, and that consequently a hearing was not required. Although the last sentence of section 189(a) only explicitly "dispense[s] with ... thirty days' notice and publication" upon a determination of "no significant hazards consideration," the NRC and the licensee contend that such a determination also permits the Commission to dispense with a hearing because notice and a hearing are inextricable.[16]

[3] We are convinced that such a finding did not permit the NRC to dispense with a hearing that is otherwise required by section 189(a).[17] This is not the first case in this circuit in which it has been argued that a finding of "no significant hazards consideration" permits the NRC to issue a license amendment without a hearing. In *Brooks*

16. The petitioners, challenging the correctness of the "no significant hazards consideration" determination, also contend that the NRC was required under the third sentence of § 189(a) to provide 30 days' notice and publication in the Federal Register of the Commission's intent to issue the license amendment without a hearing. The third sentence provides that

> the Commission may, *in the absence of a request therefor* by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so.

(Emphasis added.) Since, however, we hold that the petitioners requested a hearing, *see* note 25 *infra*, and that the NRC was required to hold a hearing, we need not reach the question whether the Commission was required to provide 30 days' notice of its intent to issue the license amendment without a hearing.

17. It is noteworthy that respondent United States concedes—indeed argues—that the NRC's failure to provide a hearing violated § 189(a) of the Atomic Energy Act. *See* Memorandum of Respondent United States at 4–21.

v. *Atomic Energy Comm'n*, 476 F.2d 924, 926 (D.C.Cir.1973) (*per curiam*) this court soundly rejected the contention that the fourth sentence in section 189(a) "indicate[d] Congressional intent to dispense with hearings in construction permit amendment proceedings ... when the Commission determines that the amendment involves 'no significant hazards consideration.'" Instead this court, after an examination of the legislative history of section 189(a), held that the fourth sentence only dispenses with requirements of notice and publication. Because this circuit has previously rejected the very construction of section 189(a) offered by the NRC and the licensee,[18] the doctrine of *stare decisis* compels us to hold that the NRC improperly failed to provide a hearing in the instant case.

Moreover, even if this court were not bound by *stare decisis*, we would still adopt the *Brooks* interpretation of the last sentence of section 189(a). The plain language of section 189(a) dispels any notion that by a finding of "no significant hazards consideration" the NRC may dispense with the hearing requirement. The fourth sentence makes no mention of the hearing requirement's being lessened, but makes reference only to the requirements of notice and publication. Despite the plain, unambiguous language contained in the last sentence, the NRC and Metropolitan Edison suggest that the requirements of hearing and notice are so intertwined that the reference to notice in the fourth sentence must also comprehend a hearing. While it is true that requirements of notice and hearing are interrelated, it is clear that Congress was not merging them in section 189(a). That is demonstrated by the third sentence of the section where Congress made explicit reference to the hearing requirement.[19] That sentence plainly demonstrates that Congress did indeed intend to disentangle the two requirements of notice and hearing,[20] and "to lessen the mandatory hearing requirement only when there was no request for a hearing." *Brooks v. Atomic Energy Comm'n*, 476 F.2d at 927.

A review of the legislative history of the 1962 amendments to section 189(a)—by which the last two sentences of the section were added—also firmly persuades us that the *Brooks* court properly construed the last sentence of section 189(a). That history demonstrates that the 1962 amendments to section 189(a) had their origin in congressional concern over a hearing requirement

18. It is true, of course, that 15 months after the *Brooks* decision this court stated in dictum in a footnote that "[a]n amendment can be made without opportunity for a hearing if the AEC determines that it 'involves no significant hazards consideration.'" *Union of Concerned Scientists v. Atomic Energy Comm'n*, 499 F.2d 1069, 1084 n.36 (D.C.Cir.1974). The court provided no support for its far-reaching statement, nor did it even make mention of the recently decided *Brooks* case, which had squarely *held* to the contrary on the basis of the legislative history of § 189(a). We accordingly decline to place any reliance on the dictum in *Union of Concerned Scientists*.

19. For the text of the third sentence, *see* note 16 *supra*.

20. We are cognizant of the fact that the plain meaning of the third and fourth sentences of § 189(a), when read together, produces in theory a somewhat paradoxical result. Under the fourth sentence the NRC may issue a license amendment without providing 30 days' notice and publication in the Federal Register of its intent to do so, while under the third sentence the NRC need not provide a hearing when one has not been requested. As the NRC and the licensee note, it is difficult to imagine how a hearing can be requested when the NRC issues a license amendment without notice. This "paradoxical result" did not occur, however, in the instant case. Although petitioners did not formally request a hearing prior to issuance of the OTML, their prior expressions of interest constituted in effect a request for a hearing. *See* note 25 *infra*. It is also unclear whether the "paradoxical result" will ever in fact occur. As the NRC conceded at oral argument, there may be some type of notice requirement—although perhaps not 30 days' notice and publication in the Federal Register—implicit in the opportunity to seek judicial review of determinations of "no significant hazards consideration." Moreover, our decision today does not reach the question whether some notice of the NRC's intention to amend a license is required under the due process clause of the Fifth Amendment or the Administrative Procedure Act notwithstanding a finding of "no significant hazards consideration."

in *uncontested* cases—that is, when a hearing had not been requested.[21] Representative of that concern was the statement by Raoul Berger, serving as an American Bar Association spokesperson, that

> 14 out of 15 of [the Atomic Energy Commission's] cases have been uncontested. And the central problem appears to be whether trial-type proceedings should be employed under sections 7 and 8 of the Administrative Procedures [*sic*] Act *in uncontested cases* . . . .

AEC Regulatory Problems: Hearings on H.R. 12336 and S. 3491 Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 87th Cong., 2d Sess. 64 (1962) (statement of Raoul Berger) (emphasis added).[22] *Accord, e. g., id.* at 32 (statement of Herzel H. E. Plaine, Chairman, Special Comm. on Atomic Energy Law, ABA). Thus an interpretation of section 189(a) that would permit the NRC to issue a *contested* license amendment without a hearing would enlarge section 189(a) beyond the scope originally intended.[23]

The 1962 Report of the Joint Committee on Atomic Energy also suggests that Congress perceived the changes to section 189(a) as permitting the NRC to dispense only with notice and publication—not a hearing—upon a finding of "no significant hazards consideration":

> *In the absence of a request for a hearing,* issuance of an amendment to a construction permit, or issuance of an operating license, or an amendment to an operating license, would be possible without formal proceedings, but on the public record . . . .
>
> . . . .
>
> Finally, it is expected that *the authority given AEC to dispense with notice and publication* would be exercised with great care and only in those instances where the application presented no significant hazards consideration.

H.R.Rep.No.1966, 87th Cong., 2d Sess. 8 (1962), U.S.Code Cong. & Admin.News 1962, pp. 2207, 2214, S.Rep.No.1677, 87th Cong., 2d Sess. 8 (1962), U.S.Code Cong. & Admin. News 1962, pp. 2207, 2214 (emphasis added). And in a committee hearing one year prior, the Joint Committee on Atomic Energy had noted:

> When no substantial safety question is involved in . . . the amendment . . . the public interest would be protected by . . . publication of an apt notice in the Federal Register [24] and the giving of *an oppor-*

21. Indeed, counsel for Metropolitan Edison testified in 1961 before the Joint Committee on Atomic Energy and argued for retention of a hearing requirement when a hearing has been requested:

> I hope that this committee will seriously consider repeal of the mandatory hearing requirements of section 189(a), leaving intact, of course, the provisions for a hearing at the request of any person whose interest may be affected by the licensing proceedings.

Radiation Safety and Regulation: Hearings Before the Joint Comm. on Atomic Energy, 87th Cong., 1st Sess. 266 (1961) (testimony of George F. Trowbridge).

22. In response the staff counsel to the Joint Committee noted:

> Mr. Berger, I think you are absolutely correct that the difficulty, the background that led to the Joint Committee study and the bills, was the concern over the handling by AEC of uncontested cases . . . .

AEC Regulatory Problems: Hearings on H.R. 12336 and S. 3491 Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 87th Cong., 2d Sess. 70 (1962) (remarks of David Toll).

23. In support of its interpretation of § 189(a) the NRC quotes from a letter written in 1961 by former AEC Commissioner L. K. Olson to the Joint Committee on Atomic Energy, *reprinted in* Staff of the Joint Comm. on Atomic Energy, 87th Cong., 1st Sess., Improving the Regulatory Process, Vol. II, at 578–87 (Comm. Print 1961). The quoted portions of the letter suggest, in ambiguous terms, that the Commissioner was of the view that the AEC should be able to dispense with hearings on license amendments upon a finding that "no substantial new safety questions" are presented. *See* Reply Brief for Respondent Nuclear Regulatory Commission at 9. Even if Commissioner Olson intended his comments to apply to *contested* matters, it is clear from the rest of the legislative history that *Congress* did not share the Commissioner's view.

24. It is not entirely clear what the Committee meant by the phrase "publication of an apt notice in the Federal Register." Presumably it only refers to publication of the amendment *after the Commission has issued it.* This is not inconsistent with the fourth sentence of § 189(a), adopted in 1962, which dispenses with

tunity to any interested party to intervene. . . .

Staff of the Joint Comm. on Atomic Energy, 87th Cong., 1st Sess., Improving the Regulatory Process, Vol. II, at 49–50 (Comm. Print 1961) (emphasis added). The language of the reports, consonant with the plain meaning of section 189(a), thus indicates that the section only permits the NRC to issue a license amendment without a hearing when there has been no hearing request.[25]

Statements by Representative Holifield, Chairman of the Joint Committee on Atomic Energy, and Senator Pastore, Vice-Chairman, on the floors of their respective houses further reinforce the language in the reports. Both individuals explicitly stated that the "amendment [to section 189(a)] in no way limits the right of an interested party to intervene and request a hearing at some later stage, nor does it affect the right of the Commission to hold a hearing on its own motion." 108 Cong.Rec. 16,548 (1962) (remarks of Rep. Holifield); *see id.* at 15,746 (remarks of Sen. Pastore). The interpretation that the NRC and the public utilities press upon us,[26] however, would "limit[ ] the right of an interested party to intervene and request a hearing."

In sum, we are confident that *Brooks* was properly decided and that it dictates the construction that must be attached to the last sentence of section 189(a). Because the NRC's finding of "no significant hazards consideration" did not entitle the Commission to dispense with a requested hearing prior to issuance of the OTML, we hold that its failure to provide a hearing violated section 189(a) of the Atomic Ene. Act.

30 days' notice and publication in the Federal Register of the Commission's *intent to issue* a license amendment without a hearing.

This ambiguity in the quoted language is not unique in the context of § 189(a). The text and legislative history of the section are replete with ambiguities and inconsistencies. *Cf.* note 20 *supra*. But there is no ambiguity in the legislative history or the text of § 189(a) with respect to the question before this court—whether a finding of "no significant hazards consideration" permits the NRC to dispense with a hearing.

25. Whether petitioners did in fact request a hearing was not argued by the parties. While respondent United States suggests in a footnote that "[i]t is not wholly clear that petitioners did make such a request," Memorandum of Respondent United States at 6 n.2, we are convinced that the petitioners requested a hearing. In *Brooks v. Atomic Energy Comm'n*, 476 F.2d 924, 926 (D.C.Cir.1973) (*per curiam*), this court held that expressions of interest may be sufficient to constitute a request for a hearing. In the instant case petitioners' continued interest in—and opposition to—the actions of the NRC at TMI-2 clearly constituted a request for a hearing. Indeed, the petitioners were among the many that submitted comments in April-May 1980 to the NRC regarding the Commission's Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere. *See* text at notes 5–6 *supra*.

26. As part of their argument the NRC and the public utilities contend that the NRC, and the Atomic Energy Commission prior to the creation of the NRC, consistently interpreted the section as permitting license amendments to be issued without a hearing upon a finding of "no significant hazards consideration." *See* 10 C.F.R. § 2.105(a)(3) (1980); *id.* § 50.58(b); *id.* § 50.59(c) (1963); 45 Fed.Reg. 42,908 (1980); 45 Fed.Reg. 20,491–92 (1980); 43 Fed.Reg. 13,928 (1978); 41 Fed.Reg. 10,482–83 (1976); 40 Fed.Reg. 18,231 (1975); 39 Fed.Reg. 10,554 (1974); 39 Fed.Reg. 1,875–76 (1974); 27 Fed.Reg. 12,184 (1962); *Consumers Power Co.*, 7 A.E.C. 297 (1974); *General Electric Co.*, 1 A.E.C. 541 (1960). Even if the history of regulations and administrative practice by the AEC and the NRC were unambiguous—which we do not think it is—deference to the agencies' interpretations would be inappropriate in this case. As we have indicated, the statute and legislative history are in our view unambiguous: a finding of "no significant hazards consideration" does not permit the NRC to dispense with a hearing. As the Supreme Court has noted, "[A]dministrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315, 53 S.Ct. 350, 358, 77 L.Ed. 796 (1933).

It is also worth noting that because of today's decision the NRC will not be able to put into effect a regulation proposed earlier this year that would explicitly permit the NRC to dispense with hearings on license amendments upon a finding of "no significant hazards consideration." *See* 45 Fed.Reg. 20,491–92 (1980). Such a regulation would be clearly inconsistent with the congressional mandate in § 189(a).

IV. THE NRC'S MEMORANDUM AND ORDER

[4, 5] The second order issued by the NRC on June 12, 1980, entitled "Memorandum and Order" (Venting Order), authorized Metropolitan Edison to vent the atmosphere of the reactor containment building. Respondents argue that section 189(a) did not require a hearing with respect to the Venting Order because the order was not a license amendment. We reject respondents' description of the order and find that section 189(a) was indeed applicable and, as a consequence, that petitioners were entitled to a hearing on the Venting Order.

Section 189(a), quoted in pertinent part in note 2 *supra*, requires that a hearing be given upon request "[i]n any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit." 42 U.S.C. § 2239(a) (1976). Respondents maintain that because the Venting Order merely lifted a prior suspension of the licensee's authority to vent, and did not authorize release of a greater amount of radioactive gas than was permitted by the original technical specifications of the operating license, it was not a license amendment. However, on the facts here, this characterization of the Venting Order appears to be nothing more than an after-the-fact rationalization, which finds no support in the record of this case.

The NRC's July 20, 1979 "Order for Modification of License" suspended Metropolitan Edison's authority to operate TMI-2 and directed the licensee to "maintain the facility in a shutdown condition in accordance with the approved operating and contingency procedures." 44 Fed.Reg. 45,271 (1979). In a second order, dated February 11, 1980, the NRC recognized that TMI-2's operating license did not permit venting as part of a cleanup operation because the license specifications pertained only to normal operation of the facility:

> [I]n the present post-accident status of the facility, the license itself does not include explicit provisions or Technical Specifications for assuring the continued maintenance of the plant in a safe, stable condition or for coping with foreseeable off-normal conditions. Moreover, certain portions of the facility's operating license relate to or govern power operation of the facility, the authority for which was suspended by the Order of July 20, 1979. *These provisions are now simply inapplicable to the facility in its present post-accident condition.*

45 Fed.Reg. 11,282 (1980) (emphasis added). The NRC concluded that "the facility's operating license should be *modified* so as to: . . . [p]rohibit venting or purging . . . until . . . approved by the NRC." *Id.* (emphasis added).

There is no indication that this order was intended or perceived as a mere suspension of the licensee's existing authority to vent. In February 1980, it appeared that adequate venting of the reactor building might not be possible under the existing license authority. Consequently, the NRC acted to modify—and thus amend—the TMI-2 license in order to regulate the plant in an "off-normal" condition and to facilitate whatever venting scheme might be determined to be necessary. By its very terms, the February 11, 1980 order was a license amendment intended to reflect TMI-2's post-accident condition. Given that the original operating license was inapplicable, the NRC could not simply rely on its terms as authority for the venting. Authority for venting—in this case the June 12 Venting Order—therefore had to come in the form of a license amendment.

The specific language of the June 12 Venting Order further corroborates our interpretation of that order as a license amendment. In the Venting Order, the NRC noted that TMI-2 was being operated according to the provisions of the February 11, 1980 order, see 2 Nuclear Reg.Rep. (CCH) ¶ 30,498.01, at 29,456 (1980), and the Venting Order did nothing to change that. TMI-2's operating license was not simply "unsuspended" by the Venting Order. Instead, in the words of the NRC, "[i]n the present order we give the approval contemplated by [the February 11] restriction insofar as necessary for the licensee to conduct

a purging of the TMI-2 containment." *Id.* at 29,456-57. Nowhere does the Venting Order support respondents' characterization of it as a reinstatement of some preexisting authority. Rather, the Venting Order appears as an amendment to the February 11 amendment to TMI-2's operating license. Because the June 12 Venting Order modified the February 11 order, and granted the licensee authority to do something that it otherwise could not have done under the existing license authority, the Venting Order was a license amendment within the scope of section 189(a).

Our reading of the Venting Order is also supported by Congress' intent in enacting section 189(a). By requiring a hearing upon request whenever a license is "grant[ed], suspend[ed], revok[ed], or amend[ed]," Congress apparently contemplated that interested parties would be able to intervene before any significant change in the operation of a nuclear facility. Whatever the Venting Order is called, it certainly was such a change.

As we held in Section III of this opinion, the NRC is required under section 189(a) to hold a hearing on a license amendment whenever interested parties request one.[27] Petitioners did so in this case, *see* note 25 *supra*, and the NRC therefore acted unlawfully in refusing to hold a hearing on the Venting Order.[28]

V. CONCLUSION

Because the NRC's actions in this case are "capable of repetition, yet evading review," the issues presented by petitioners are not moot. We hold that under section 189(a) the NRC is required to hold a hearing on license amendments whenever interested parties request one. Finally, we hold that the June 12 Venting Order, which authorized the NRC to release radioactive gas from the disabled nuclear reactor, was a license amendment subject to the hearing requirements of section 189(a). Because the petitioners requested a hearing on the two June 12 license amendments, they were entitled to a hearing under section 189(a). The NRC's refusal to hold a hearing violated the petitioners' statutory rights.

27. We note that the NRC and the public utilities briefly argued that a full adjudicatory hearing was not required here. *See* Brief for Respondent Nuclear Regulatory Commission at 32-34; Brief for Intervenor-Respondents at 44-45. Because this question was not fully briefed and argued by the parties, we express no opinion on the precise nature of the hearing required by § 189(a).

28. Respondent United States argued that petitioners requested a hearing, as provided for in the OTML, and then failed to exhaust their administrative remedies by withdrawing their motion. The intended scope of that hearing and the facts surrounding the withdrawal are somewhat muddled by the record. What is clear, however, is that the offer of a hearing was made only in the OTML and not in the Venting Order. Presumably, then, petitioners would have been able to challenge only the license amendment substituting off-site dosage limits for release limits and not the actual decision to vent. Moreover, any hearing was to revolve around the issues whether the license amendment was in the public interest and whether it should be sustained. *See* 45 Fed. Reg. 41,251, 41,252 (1980). It appears from this description that petitioners would not have been permitted to raise their arguments regarding the NRC's interpretation of § 189(a), which formed the basis of this suit. Finally, the Commission specifically provided that a request for a hearing would not stay the effectiveness of the order. *See id.* But § 189(a) required a hearing upon request on the Venting Order before it went into effect; a hearing after the venting had been completed would not have satisfied the statute's requirement. For all these reasons, the remedy that petitioners allegedly failed to exhaust was an inadequate one and therefore need not have been pursued. *See McNeese v. Board of Educ.*, 373 U.S. 668, 674-76, 83 S.Ct. 1433, 1437-38, 10 L.Ed.2d 622 (1963); *Union Pac. R. R. Co. v. Board of County Comm'rs*, 247 U.S. 282, 38 S.Ct. 510, 62 L.Ed. 1110 (1918).

Steven SHOLLY and Donald E. Hossler, Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION *et al.*, and United States of America, Respondents,

Metropolitan Edison Company *et al.*, Intervenors.

PEOPLE AGAINST NUCLEAR ENERGY, Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION; John Ahearne, Victor Gilinsky, Richard T. Kennedy, Joseph M. Hendrie, and Peter A. Bradford, in their individual capacities; and the United States of America, Respondents,

Metropolitan Edison Company, Jersey Power & Light Company, and Pennsylvania Electric Company, Intervenors.

In re PEOPLE AGAINST NUCLEAR ENERGY, Petitioner.

Nos. 80-1691, 80-1783 and 80-1784.

United States Court of Appeals, District of Columbia Circuit.

March 4, 1981.

Certiorari Granted May 26, 1981. See 101 S.Ct. 3004.

On Suggestion for Rehearing En Banc.

Before McGOWAN, Chief Judge, and WRIGHT, TAMM, ROBINSON, MacKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS and GINSBURG, Circuit Judges.

ORDER

PER CURIAM.

The suggestion for rehearing *en banc* of the Public Utilities has been circulated to the full court and a majority of the court has not voted in favor thereof. On consideration of the foregoing, it is

ORDERED, by the Court, *en banc*, that the suggestion of the Public Utilities is denied.

TAMM, MacKINNON, ROBB and WILKEY, Circuit Judges, would grant rehearing *en banc*. Their statement is attached.

STATEMENT ON DENIAL OF REHEARING EN BANC

TAMM, MacKINNON, ROBB and WILKEY, Circuit Judges:

We would grant a rehearing *en banc* in *Sholly, et al. v. United States Nuclear Regulatory Commission, et al.*, 651 F.2d 780 (D.C.Cir. 1980) to review the startling proposition found within that opinion: that even when the Nuclear Regulatory Commission (NRC) has expressly found that a proposed amendment to an existing nuclear power plant operating license poses "*no significant hazards*" to human health or safety, the Nuclear Regulatory Commission is nevertheless *required* to provide a preamendment hearing to anyone who has expressed "continued interest in—and opposition to" its actions on related matters. At 789 n.25.[1]

The panel's action raises an issue of "exceptional importance." Fed.R.App.P. 35(a). Under the rubric of statutory interpretation, the panel has made a policy decision of major consequence. The panel has read into section 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. § 2239(a) (1976), as amended, the requirement that even notwithstanding a finding of "no significant hazards consideration" in a proposed license amendment, the NRC must nonetheless hold a *prior hearing* on the proposed amendment upon request of any interested person. By then drastically loosening the standard for what constitutes a "request" for a hearing, the panel has thrust upon the NRC the burden of holding full-fledged hearings before even the most trivial amendments to NRC operating licenses may be adopted.

We believe that the panel's inflexible blanket rule violates the Supreme Court's

1. We would only have this court reconsider pages 786-790 of the panel opinion, 651 F.2d, where this proposition is set forth.

unanimous mandate in *Vermont Yankee* rejecting judicial imposition of administrative procedures upon an agency in excess of the statutory minima prescribed by Congress. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543, 98 S.Ct. 1197, 1211, 55 L.Ed.2d 460 (1978). Furthermore, by reversing long-standing NRC policy, the panel's decision forces a major reallocation of Commission resources, which appears likely both to overwhelm the agency's hearing machinery and to divert staff attention from safety issues of greater significance. Finally, the panel decision threatens to result in the closing—for as much as nine months—of numerous power plants currently awaiting license amendments pending completion of hearings, when *post hoc* hearings might in fact be more than adequate to ventilate any health and safety issues posed by most amendments.

The license amendment in this case—a temporary modification of the Three Mile Island nuclear power plant's operating license to permit post-accident release of radioactive gas from the reactor building at rates exceeding existing specifications—was atypical among NRC operating license amendments.[2] Only a tiny fraction of all license amendments involve emergency matters so subject to factual dispute as the hazards attendant to venting radioactive gas into the atmosphere. The Commission acts on an average of more than 400 license amendments per year. NRC's Motion to Stay Issuance of Mandate at 3. For the seventy-one power reactors currently licensed for operation, some 800 license amendment actions are presently before the Commission. The vast bulk of these concern matters such as: changing or adding to the myriad Technical Specifications embedded in a given power plant's 400-page operating license, detailing a plant's operating conditions, modifying surveillance requirements, administrative controls, design features or the like. Affidavit of Roger S.

2. The peculiar circumstances under which the *Sholly* appeal arose made this case particularly inappropriate for judicial articulation of sweeping procedural rules. In the aftermath of the widely publicized Three Mile Island incident, the NRC had suspended the licensee's authority to operate the stricken plant, requiring that the facility be maintained in a shutdown condition. 651 F.2d at 780. Before the accident, the plant's operating license had expressly authorized periodic release of specified amounts of radioactive gas into the atmosphere as part of the plant's normal and necessary operations. *Id.* at 783 n.7. Because the incident had caused "dangerous concentrations of radioactive gas [to] collect [] within [the power plant's] reactor containment building, inhibiting cleanup and maintenance work," *id.* at 782, the NRC proceeded to prepare an overall study of the environmental impacts likely to result from decontamination and disposal of wastes resulting from the incident. In the meantime the Commission modified the facility's operating license to prohibit any venting or purging of the reactor building atmosphere pending explicit future approval. *Id.* at 782.

Almost a year after the incident, after extensive environmental assessment and after concluding that release of gas from the plant would not constitute a significant environmental impact, the Commission tentatively recommended that the reactor building atmosphere be decontaminated by venting the gas through the building's hydrogen control system. *Id.* at 782-783. On 12 June 1980 the NRC modified the plant's operating license to permit the licensee to vent the gas from the reactor building at a rate faster than allowed by existing specifications, based on its explicit finding that offsite radioactive *dose* limits would not be breached if the gas were vented at a rate in excess of existing *release rate* limits. *Id.* at 783 & n.8.

The Commission further expressly found that modification of the operating license would involve "no significant hazards consideration." *Id.* at 783. The petitioners who later challenged the NRC's decision not to provide a hearing on that modification did not file a request for a hearing until the day before venting was to begin. *Id.* at 783. When venting finally began, release proceeded *at* first at a rate within the levels previously specified for normally operating reactors. *Id.* During this period at least one of the petitioners moved to suspend the venting but then subsequently withdrew their request on 8 July. On the same day as the request was withdrawn, the licensee began to vent gas at the faster rate permitted by the 12 June license amendment. Venting was completed in three days, producing offsite doses well under the expected limits; shortly thereafter the 12 June venting orders expired. The Commission has asserted, and petitioners have not controverted, that any future purging of the Three Mile Island reactor atmosphere will be at worst minor and sporadic. *Id.* at 784.

Boyd, Former Director of the Division of Project Management, NRC Office of Nuclear Reactor Regulation at 3, *attached to* Intervenor-Respondents' Petition for Rehearing and Suggestion for Rehearing En Banc [Boyd Affidavit].

The NRC staff completes review of some fifty of these amendments per month; typically, it refuses to make a finding of "no significant hazards consideration" in a proposed amendment unless (1) the proposed change raises no significant new safety information of a type not previously considered in prior safety reviews, (2) the change raises no significant increase in the probability or consequences of an accident, or (3) the change offers no significant decrease in the plant's safety margin. *Id.* at 781–782. Over the past four calendar years, the NRC has published notice in the *Federal Register* of *more than 1500 amendments* to operating plant licenses which the NRC staff found to have "no significant hazards considerations." *Id.* at 782. The NRC has recognized that delay in issuance of license amendments would require plant shutdown if agency review is not expeditiously completed.[3] Moreover, plants already shutdown for refueling or other reasons cannot restart until such review is completed. Thus NRC, practice and regulations have long called for approval of license amendments without hearing upon a finding of no significant hazards, accompanied by post-approval publication of notice in the *Federal Register*.[4]

We believe that the agency's past practice complied fully with statutory mandates. Whether or not a finding of "no significant hazards consideration" has been made, no hearing is required under the applicable language of section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a) (1976), unless a hearing has first been specifically requested. The first sentence of section 189(a) only requires the NRC to grant a hearing on a license amendment proposal "*upon the request* of any person whose interest may be affected by the proceeding." (Emphasis added.) The third sentence, however, permits the NRC "*in the absence* of a request therefor by" such a person to issue an amendment without a hearing, "upon thirty days' notice and publication once in the Federal Register of its intent to do so." (Emphasis added.) Without mentioning hearings, the fourth sentence then specifies that the Commission may even dispense with such "thirty days' notice and publication . . . upon a determination by the Commission that the amendment involves no significant hazards consideration."[5]

The *Sholly* panel read this language to conclude that the agency has for years in fact been operating in violation of section 189(a). The panel first argued that this court had previously held in *Brooks v.*

3. The former Director of the NRC's Division of Project Management estimates that there are about 50 license amendment applications now pending before the NRC which are likely to be classified as having "no significant hazards considerations" and which, if not approved, within the next few months, will result in the shutdown of the reactor involved. Boyd Affidavit at 5.

4. *Id.* at 783.

5. Section 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. § 2239(a) (1976), as amended in 1957, Pub.L.No. 85–256, § 7, 71 Stat. 579 (1957), and in 1962, Pub.L.No. 87–615, § 2, 76 Stat. 409 (1962), reads in pertinent part as follows:

> In any proceeding, under this chapter, for the granting, suspending, revoking, or amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application . . . for a construction permit for a facility . . . . [T]he Commission may, in the absence of a request therefor by any person whose interest may be affected, issue . . . an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for . . . an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

Atomic Energy Comm'n, 476 F.2d 924, 926 (D.C.Cir. 1973) "that the fourth sentence [of section 189(a)] only dispenses with requirements of notice and publication," *not* the requirement of a hearing. 651 F.2d at 786. Furthermore, the panel then independently read the statutory language to require the same conclusion, finding that because the fourth sentence of section 189(a) refers only to thirty days' notice and publication, it "plainly demonstrates that Congress did . . . intend to disentangle the two requirements of notice and hearing." At 787. The legislative history of the 1962 amendments to section 189(a), the panel concluded, demonstrates that Congress perceived the changes to section 189(a) as permitting the NRC to dispense only with notice and publication—not a hearing—upon a finding of "no significant hazards consideration." *Id.* at 788.

We believe that the panel unjustifiably relied on this court's brief *per curiam* opinion in *Brooks* to support its central proposition. We further believe that the panel's independent interpretation of the relevant language in section 189(a) ignored logic and distorted the legislative history of that section.

In *Brooks* two utility companies petitioned the Atomic Energy Commission to modify the provisional construction permits for two nuclear power plant units in order to extend the "latest completion date" specified in the permits. Petitioners, persons living near the proposed construction site, had earlier filed a timely request for a hearing with respect to two issues: whether the provisional construction permits should be modified to protect environmental values in accordance with NEPA and whether operating licenses for those facilities should issue. 476 F.2d at 925–26. The Commission gave petitioners notice that a hearing would be held on the second matter, "but inexplicably failed" to give notice that the proceedings would also permit discussion of the first issue: modification of the construction permits. *Id.* at 926 & n.6.

In ordering a hearing on the issue of extension of permit completion dates, the court made two points. Noting that the Commission's order summarily extending those dates had given "no indication whatsoever that the amendment involved no significant hazards consideration," the court stated "the Commission must surely make the required significant hazards determination, and note such determination in its order, if it intends to put forward such determination as the basis for its denial of a hearing." *Id.* at 926. Second, the court stated that because petitioners had made an undeniable request for a hearing on modification of permits, the Commission had erred in issuing the order without *notice* that the hearing scheduled to take place would also concern permit modification.

We believe *Brooks* to be plainly inapposite here. The *Brooks* court was addressing two questions not before the *Sholly* panel: whether the Commission could dispense with a hearing without first making a finding of no significant hazards, and whether the Commission could dispense with the notice statutorily required *in the third sentence of section 189(a)* when a clear request for a hearing has been made. The *Brooks* court plainly did not seek to lay down the broad rule which the panel here articulates: that the fourth sentence of section 189(a) requires a hearing even when the Commission has made a "no significant hazards consideration" finding. If that rule has indeed been the law of this Circuit since *Brooks*, it comes as a great surprise to us. At least one member of this court, addressing the proposition directly in a case decided after *Brooks*, stated the view that "[a]n amendment can be made without opportunity for a hearing if the AEC determines that it 'involves no significant hazards consideration.'" *Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1084 n.36 (D.C. Cir. 1974) (McGowan, J.). Furthermore, some thirteen NRC regulations and cases listed within the panel opinion, but summarily dismissed there, indicate that both before *and after Brooks* the NRC consistently interpreted section 189(a) to permit issuance of license amendments even without hearings upon a finding of "no significant hazards consideration." 651 F.2d at 789 n.26.

The panel buttresses its puzzling statutory construction with citation from a legisla-

tive history which it concedes to be "replete with ambiguities and inconsistencies." At 788–789 n.24. We would submit that the confusion inherent within that legislative history is alone sufficient reason why it should not have been cited selectively in support of the panel's sweeping rule. While the panel holds that the NRC's "no significant hazards consideration" finding did not entitle the Commission to dispense with a hearing *prior* to the license amendment. At 789, *none* of the legislative history cited supports the notion that Congress intended to require a *prior* hearing.[6] Furthermore, although the panel rejects Judge McGowan's unambiguous statement in *Union of Concerned Scientists* as dictum, its subsequent analysis of the legislative history of the 1962 amendments to section 189(a) makes no mention of the broad and careful statutory analysis of those amendments which lay at the heart of Judge McGowan's well-reasoned opinion.[7]

The panel's reading of the statute and legislative history becomes even more re-

6. *See, e. g.*, the remarks of Representative Holifield and Senator Pastore cited in the panel opinion, 651 F.2d at p. 789: "[A]mendment [to section 189(a)] in no way limits the right of an interested party to intervene and request a hearing *at some later stage* . . ." (Emphasis added).

Even if petitioners sought to bottom their right to a prior hearing on due process grounds, rather than on the language of section 189(a), *cf.* at 786–787 n.20, *discussed in* note 9 *infra*, it is not clear why in most license amendment cases that right could not be accommodated "at a meaningful time and in a meaningful manner" by a *post*-amendment hearing. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 348–49, 96 S.Ct. 893, 909–10, 47 L.Ed.2d 18 (1976). Intervenor-Respondents have suggested that in the vast majority of license amendment cases involving no significant hazards considerations, opportunity for a hearing *after* the amendment has issued would still allow full consideration of all issues involved without endangering plant safety or interfering with normal plant operations. *See* Intervenor-Respondents' Petition for Rehearing and Suggestion for Rehearing En Banc at 12. *See also* Boyd Affidavit at 5; note 11 *infra*.

Certainly the panel could have reached its result without disrupting the Commission's prevailing practice of dispensing with prior hearings on trivial license amendments involving no significant hazards, simply by adopting the type of balancing test previously approved by this court in *Union of Concerned Scientists*:

> [A]dministrative action taken prior to a full hearing has always been permissible when the state's interest in acting promptly to promote the general welfare, including economic well-being, *outweighs the individual's interest in having an opportunity to be heard before the state acts*, perhaps in error, in ways that may cause him significant injury.

Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1081 (D.C.Cir. 1974) (emphasis added). This principle allows the decision whether or not to grant a prior hearing to be based on the facts of the individual case, rather than upon a pronouncement as broad as the one made here.

7. Ironically the panel rejects Judge McGowan's statement as dictum because "[t]he court provided no support for its far-reaching statement, nor did it even make mention of the recently decided *Brooks* case," a case which we believe to be inapposite. 651 F.2d at 787 n.18. Yet the panel's subsequent analysis of the legislative history of the statutory language at issue ignored both the general thrust as well as the express language of Judge McGowan's opinion.

In *Union of Concerned Scientists*, Judge McGowan read the Atomic Energy Act to "erect [ ] a regulatory scheme virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives," 499 F.2d at 1077, *citing Siegel v. AEC*, 400 F.2d 778, 783 (D.C.Cir. 1968). The legislative goal of the 1962 amendments, he noted, was to eliminate the kind of unnecessary procedures imposed here: "[T]he primary purpose of the 1962 amendments [was] to unburden the Commission by authorizing it to . . . *remov[e] the necessity of holding unnecessary and duplicative hearings*." 499 F.2d at 1077 (D.C.Cir. 1974) (emphasis added).

Furthermore, Judge McGowan expressed a marked lack of sympathy with petitioners' "fundamental misunderstanding of the AEC licensing process," suggesting that in cases like this one Congress did not intend to give the public an unequivocal right to participation:

> The role of the A[tomic] S[afety] L[icensing] B[oard] is not to compile a record; it is to review a record already compiled by the Staff and A[dvisory] C[ommittee on] R[eactor] S[afeguards], who have responsibility for the sufficiency of that record . . . . In the Atomic Energy Act . . . [Congress] authorized the Commission, in its discretion, to determine that certain applications present no "significant hazards considerations" and to dispense with notice and publication of impending approval, *excluding the public altogether*.

Id. at 1078 (emphasis added).

markable when combined with its extraordinarily broad conception of what constitutes a request for a hearing, 651 F.2d at 789 n.25. Reading *Brooks* to hold "that expressions of interest may be sufficient to constitute a request for a hearing," the panel then finds that "petitioners' continued interest in—and opposition to—the actions of the NRC at TMI–2 clearly constituted a request for a hearing."[8] By finding such facts to constitute a hearing request, the *per curiam* opinion has virtually read out of the statute the requirement that a hearing be requested. Yet the statutory language leaves no doubt that the NRC has no statutory duty to provide hearings on license amendments when none are requested. Furthermore, as the panel recognized, at 787 n.20, the statute expressly authorizes the NRC to dispense with thirty days' notice and publication, *even if an express request for a hearing is made*, so long as the NRC has made the requisite finding of "no significant hazards consideration."

We submit that the panel's interpretation of section 189(a), taken as a whole, renders it virtually impossible for the NRC faithfully to follow the explicit congressional directives found within that section. The panel has, in effect, eviscerated the congressional mandate found in both the third and fourth sentences of section 189(a). Since under the panel's standard almost any expression of interest constitutes a "request," the NRC will rarely be able confidently to dispense with a hearing on a licensing amendment, despite the fact that Congress authorized it to do so in sentence three. Since the panel recognizes that it is absurd to hold a hearing without first providing notice to interested persons,[9] the NRC will never be able safely to dispense with notice and publication even when a routine amendment undisputedly involves no significant hazards considerations, despite the fact that Congress authorized it to do so in sentence four.[10]

8. At 789 n.25. The panel finds the fact that "petitioners were among the many that submitted comments in April-May 1980" to the NRC regarding the NRC's Environmental Assessment of the plant's decontamination somehow to buttress its finding of an individual hearing request. *Id.*

9. The panel opinion requires that even when there is an undisputed finding of no significant hazards, clearly permitting the Commission to dispense with the 30 days' notice and publication statutorily prerequisite to a hearing, that a hearing must be held nonetheless, even *without* notice or publication to anyone who has a continuing interest in the matter. While acknowledging that this result is "paradoxical," at 786–787 n.20, the panel implies that such a result might never come about because the due process clause of the Fifth Amendment or the Administrative Procedure Act may mandate that the Commission give interested persons *some form* of notice and publication prior to amending a license, *even if the statute expressly authorizes it to dispense with thirty days' notice and publication.* *Id.* If the panel meant to imply by this tantalizing suggestion that notice and publication were in fact constitutionally required in this case, we believe it should have made that point explicitly so that that finding could properly have been the subject of further review.

This repeated evasive tactic by some panels of this court has not gone unnoticed. *See, e. g.*, Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup.Ct. Rev. 345, 372 (criticizing this court's tendency to render decisions which are *de facto* unreviewable):

> [T]he most important factor leading to the *de facto* unreviewability of the D.C. Circuit's positions is the failure of that Court itself to facilitate review, even when the most fundamental issues are at stake. Or to put the point more critically: The pattern of dicta, alternate holdings, and confused holdings out of which the D.C. Circuit's [hybrid rulemaking principles] . . . so clearly and authoritatively emerged had the effect, if not the purpose of assuring compliance below while avoiding accountability above.

10. Even if the Commission makes an uncontested finding that no significant hazards will result from a license amendment, must it nevertheless hold a hearing on that amendment for anyone who has previously expressed interest in or opposition to the NRC in related matters in the past, so long as that person continues to express *some* interest? Despite the fact that the Commission is statutorily authorized to dispense with thirty days' notice and publication in such a case, is it nevertheless required, *sua sponte*, to contact anyone who has submitted a comment about a relevant rulemaking in the preceding months to see if that person would like a hearing?

Finally, while we believe the question deserves further briefing, we are also troubled by the clear indications in the opinion that the panel stretched to lay down a blanket rule for *all* cases in a case that was arguably moot[11] and whose facts were unique and, at points, ambiguous. The parties have suggested that the panel erred not only in summarily finding that a proper request for a hearing had been made, but also in finding that such a request, even if made, had not later been withdrawn.[12] At a minimum, we would have the parties brief and argue these questions as a prerequisite to determining whether the panel's broad ruling was in fact necessary to its disposition of the case.

A number of judges and commentators have leveled criticism at this court for its continuing unwillingness to be guided by the Supreme Court's unequivocal directive in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978) (reversing *NRDC v. NRC*, 547 F.2d 633 (D.C.Cir. 1976), and remanding to this court for a determination of adequacy of the record).[13]

In *Vermont Yankee*, the Supreme Court spoke to this court with one voice, making it "absolutely clear" that "[a]bsent constitutional constraints or extremely compelling circumstances the 'administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" 435 U.S. at 543, 98 S.Ct. at 1211 (citations omitted). The unanimous Court went on specifically to caution us against the type of procedural-imposition which has occurred here:

> [I]f courts continually review agency proceedings to determine whether the agen-

11. Although we do not specifically challenge the panel's finding of mootness, slip op. at 8–12, we express some doubt that the issue which the panel chose to resolve was truly one both "capable of repetition, *yet evading review.*" *Southern Pac. Term Corp. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911) (emphasis added). The Department of Justice, the Commission, and intervenors all convincingly argued that although the question decided here—whether the NRC is required to hold a hearing before issuing a license amendment based on a finding of "no significant hazards"—may well recur in the future, it is unlikely to evade review. *See* Memorandum of Respondent United States of America at 4 ("[T]here is no reason to believe that [the NRC's] actions will characteristically be irreversible."); Brief for Respondent Nuclear Regulatory Commission at 19–25. *See also* Intervenor-Respondents' Petition for Rehearing and Suggestion for Rehearing En Banc at 12:

> The vast majority of operating license amendments—and particularly those involving no significant hazards consideration—are reversible. Changes such as shortened surveillance intervals can be lengthened; revised calculational techniques can be replaced with the prior methods .... In this respect, the amendment facilitating krypton venting from Three Mile Island Unit 2 was truly exceptional in that once released the krypton could not be reclaimed. Even in cases where "irreversible action" is involved, a subsequent hearing would still have the salutory [sic] effect of assuring thorough NRC consideration.

12. *See* Memorandum of Respondent United States of America at 22:

> At the ASLB hearing, ... petitioner Sholly had an opportunity to press his claim that § 189(a) entitled him to such a hearing; he could have attempted to convince the ASLB that the license amendment was invalid because the Commission had not granted a prior hearing. Instead of attempting to do so, he "formally withdrew" his motion to stop the release of radioactive krypton pending the outcome of the hearing .... *He refused to go forward with the hearing.* In this way the Commission was deprived of an early opportunity to correct its error .... This is a further reason for believing that the petition is moot ....

(Emphasis added.)

13. *See, e. g.*, Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup.Ct.Rev. 345, 345 (*Vermont Yankee* brought "into question the willingness of the D.C. Circuit to be guided by the Supreme Court"); Friendly, *Book Review*, 8 Hofstra L.Rev. 471, 481 (1980) (D.C. Circuit judges may have become "overly enthusiastic" in imposing procedural requirements on administrative agencies); Byse, Vermont Yankee *and the Evolution Of Administrative Procedure: A Somewhat Different View*, 91 Harv.L.Rev. 1823, 1832 (1978) (continued judicial imposition of procedural requirements on agencies reflects insensitivity to the concerns of the agency in deploying its resources to conduct its business, undue self-confidence in the assumption that the court's procedural prescription is 'best,' and lack of trust in the political process ...").

cy employed procedures which were, in the court's opinion, perfectly tailored to reach what the court perceives to be the "best" or "correct" result, judicial review would be totally unpredictable. And the agencies, operating under this vague injunction to employ the "best" procedures and facing the threat of reversal if they did not, would undoubtedly adopt full adjudicatory procedures in every instance.

Id. at 546, 98 S.Ct. at 1213.

It is hard to imagine a case where the Supreme Court's concluding statement in *Vermont Yankee* could be more apposite than here:

> Nuclear energy may some day be a cheap, safe source of power or it may not. But 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. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment. In the meantime courts should perform their appointed function.

435 U.S. at 557–58, 98 S.Ct. at 1218–19 (emphasis in original).

We submit the issues raised by *Sholly* demand reconsideration.

AA61-2 PDR

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1691

STEVEN SHOLLY and DONALD E. HOSSLER, PETITIONERS

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION *et al.* and UNITED STATES OF AMERICA, RESPONDENTS

METROPOLITAN EDISON COMPANY *et al.*, INTERVENORS

No. 80-1783

PEOPLE AGAINST NUCLEAR ENERGY, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION; JOHN AHEARNE, VICTOR GILINSKY, RICHARD T. KENNEDY, JOSEPH M. HENDRIE, and PETER A. BRADFORD, in Their Individual Capacities; and THE UNITED STATES OF AMERICA, RESPONDENTS

METROPOLITAN EDISON COMPANY, JERSEY POWER & LIGHT COMPANY, and PENNSYLVANIA ELECTRIC COMPANY, INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 80-1784

IN RE: PEOPLE AGAINST NUCLEAR ENERGY, PETITIONER

Petitions for Review of Orders of the
United States Nuclear Regulatory Commission
and for Writ of Mandamus

Argued September 8, 1980

Decided November 19, 1980

Robert Hager, with whom *Daniel F. Sheehan* was on the brief, for petitioners.

Stephen Eilperin, Solicitor, United States Nuclear Regulatory Commission, with whom *E. Leo Slaggie*, Attorney, United States Nuclear Regulatory Commission, was on the brief, for respondent United States Nuclear Regulatory Commission.

David A. Strauss, Attorney, Department of Justice, with whom *James A. Moorman*, Assistant Attorney General, and *Peter R. Steenland, Jr.*, Attorney, Department of Justice, were on the brief, for respondent United States of America. *Stanford Sagalkin* and *Lois Schiffer*, Attorneys, Department of Justice, also entered appearances for respondent United States of America.

Mark Augenblick, with whom *George F. Trowbridge* and *Matias F. Travieso-Diaz* were on the brief, for intervenors. *Robert E. Zahler* also entered an appearance for intervenors.

Before WRIGHT, *Chief Judge*, and MIKVA and EDWARDS, *Circuit Judges*.

Opinion *per curiam*.

PER CURIAM: In this case petitioners seek review of two orders by the Nuclear Regulatory Commission (NRC) permitting the Metropolitan Edison Company to release radioactive gas into the atmosphere from the Three Mile Island nuclear plant.[1] The claim here is that the orders issued by the NRC were made effective without affording petitioners their statutory rights to notice and a hearing.[2]

On June 26, 1980, this court denied petitioners' request for emergency injunctive relief to block the release of the radioactive gas. Now that the radioactive gas from the nuclear plant has been fully vented into the atmosphere, the petitioners seek only declaratory relief from this court.

---

[1] Metropolitan Edison Co., Pennsylvania Electric Co., and Jersey Central Power and Light Co. jointly hold the operating license to the Three Mile Island nuclear plant. In this opinion they are called collectively either "the licensee" or "Metropolitan Edison."

[2] The petitioners primarily rely on § 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. § 2239(a) (1976), as amended in 1957, Pub. L. No. 85-256, § 7, 71 Stat. 579 (1957), and in 1962, Pub. L. No. 87-615, § 2, 76 Stat. 409 (1962). Section 189(a) reads in pertinent part as follows:

> In any proceeding, under this chapter, for the granting, suspending, revoking, or amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application . . . for a construction permit for a facility . . . . [T]he Commission may, in the absence of a request therefor by any person whose interest may be affected, issue . . . an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for . . . an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

I. BACKGROUND

This case arises in the aftermath of a widely publicized accident that occurred on March 28, 1979 at "Unit 2" of the Three Mile Island nuclear plant. As a result of the accident, dangerous concentrations of radioactive gas collected in the reactor containment building, inhibiting cleanup and maintenance work.

Three months after the accident, the NRC issued an "Order for Modification of License," 44 Fed. Reg. 45,271 (1979), suspending Metropolitan Edison's authority to operate Unit 2 of the Three Mile Island plant (TMI-2), and requiring it to "maintain the facility in a shutdown condition." *Id.*[3] The NRC order indicated that, in about thirty days, the Commission would issue a "Safety Evaluation" addressing "the imposition of new and/or revised Technical Specifications setting forth appropriate license conditions." *Id.*

In fact, the NRC issued no such evaluation. Instead, on November 21, 1979, the NRC issued a "Statement of Policy and Notice of Intent to Prepare a Programmatic Environmental Impact Statement," 44 Fed. Reg. 67,738 (1979), which was to be an "overall study of the decontamination and disposal process." *Id.* The NRC Statement of Policy directed the agency's staff

> to include in the programmatic environmental impact statement on the decontamination and disposal of TMI-2 wastes an overall description of the planned activities and a schedule for their completion along with a discussion of alternatives considered and the rationale for choices made.

---

[3] Much of the factual basis for the NRC's actions is contained in its report, the "Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere" (May 1980), which is reprinted in the Intervenor-Respondents' Appendix (App.) 18.

Id.

On February 11, 1980, the NRC issued another order, 45 Fed. Reg. 11,282 (1980), which stated that

> the facility's operating license should be modified so as to: . . . (3) Prohibit venting or purging or other treatment of the reactor building atmosphere . . . until each of these activities has been approved by the NRC, consistent with the Commission's Statement of Policy and Notice of Intent to Prepare a Programmatic Environmental Impact Statement.

Id.[4]

Six weeks later the NRC published a notice of the "Availability of Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere," 45 Fed. Reg. 20,265 (1980). The notice stated that the Assessment "considers five alternative methods for decontaminating the reactor building atmosphere and recommends that the building atmosphere be decontaminated by purging to the environment through the building's hydrogen control system." *Id.*[5] The NRC staff concluded in the Assessment that venting the gas into the atmosphere would "not constitute a significant

---

[4]The February 11, 1980 order specified that any interested person or the licensee could request a hearing before March 21, 1980 on whether the proposed changes in the technical specifications would be sufficient "to protect health and safety or to minimize danger to life and property" or "whether the provisions of this Order would significantly affect the quality of the human environment." *Id.* at 11,283. The order also provided, however, that a request for a hearing on part (3) of the order would not stay the effectiveness of the order. *Id.*

[5]The NRC desired to remove the radioactive gas from the reactor building so that workers could begin to clean the building, maintain the equipment, and prepare to remove the damaged fuel from the reactor core. Removing the radioactive gas from the reactor containment building was only the first step in an extensive cleanup.

environmental impact and, accordingly, the staff does not propose to prepare a separate Environmental Impact Statement on this action." *Id.* at 20,265–66. Public comments on the Assessment originally were due by April 11, 1980, but the period was extended to May 16, 1980. 45 Fed. Reg. 30,760 (1980).

In May of 1980, the NRC issued the "Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere." On June 12, 1980, the NRC issued without a hearing two final orders, entitled "Order for Temporary Modification of License" and "Memorandum and Order," App. 119 and 125, respectively. The first order modified the operating license[6] to permit the licensee to release the radioactive gas from the reactor building at a faster rate than the existing specifications allowed.[7] The first order also expressly stated that, because the NRC had found that the modification of the operating license involved "no significant hazards consideration," requests for a hearing would not stay the implementation of the order. App. 121–23.[8] The second order

---

[6] As part of its argument, the NRC contends that the second order, permitting purging, was not a license amendment. However, the NRC admits that the first order amended the TMI-2 operating license.

[7] Before the accident of March 28, 1979, the TMI-2 operating license authorized periodic release of specified amounts of radioactive gas into the atmosphere as a normal and necessary part of plant operations.

[8] Part of the basis for the Commission's determination of "no significant hazards consideration" was its conclusion that, although existing *release* rate limits would be exceeded, off-site dose limits would not be breached. Since the NRC's concern was the effect of the venting on human health, the Commission felt that the more direct measure—off-site dose limits—would provide a satisfactory standard to determine the appropriate limits on the venting of the radioactive gas.

authorized release of radioactive gas from the reactor building.[9] Venting was to begin on June 22.[10]

On June 16, petitioners wrote a letter to the NRC requesting that it reconsider its finding of "no significant hazards consideration" and its decision to make the June 12 orders effective immediately. The NRC did not respond.

On June 23, petitioners filed a petition in this court for review of the two June 12 orders.[11] Three days later this court denied the petitioners' requests for emergency injunctive and declaratory relief. The next day, one day before the venting began, the petitioners filed a request for a hearing with the NRC on the two June 12 orders. The hearing request was referred to an Atomic Safety and Licensing Board. On July 3, the petitioners moved the Board to suspend the venting; however, this request was subsequently withdrawn, on July 8, shortly before the venting was completed.

Metropolitan Edison began to vent the reactor building on June 28, 1980, at a rate that was within the original license specifications for a normally operating reactor. On July 8, the licensee began to vent the radioactive gas at a faster rate, pursuant to the specifications set in the June

---

[9]The NRC made no finding that this order involved "no significant hazards consideration." *See* Brief for Respondent Nuclear Regulatory Commission at 30, 35.

[10]By making the orders effective immediately, the Commission failed to give any notice in the Federal Register of the license amendment. The Commission contends that so long as it makes a finding of "no significant hazards consideration," the governing statute does not impose such a notice requirement. *See* note 2 *supra* for statutory notice and hearing requirements.

[11]On July 8, 1980, a petition for review (No. 80–1783) and an accompanying petition for writ of mandamus (No. 80-1784) were filed in the Third Circuit. On the NRC's motion, those cases were transferred to this court and consolidated for review with No. 80–1691, the case originally filed in this court.

12 license amendment. The venting was completed on July 11. As the NRC had anticipated, the off-site doses from the venting were below the limits set in the June 12 radiation license amendment. In its draft Programmatic Environmental Report Statement, issued August 14, 1980, the Commission stated that it did not anticipate a recurrence of the purging of the reactor building atmosphere, but that some minor releases of gas might be necessary for data gathering purposes. *See* Brief for Respondent Nuclear Regulatory Commission at 6 n.4 & 20 n.11.

II. MOOTNESS

Because the licensee has completed the venting of the reactor containment building, and because both of the June 12 orders have expired, the Commission and the licensee claim that petitioners' claims for injunctive and declaratory relief are moot.[12] However, because we find that these cases are "capable of repetition, yet evading review,"[13] we hold that the petitioners' claims are justiciable in this court.[14]

---

[12] Metropolitan Edison seems to argue that since petitioners' claims for injunctive relief are moot (i.e., the reactor building atmosphere has been purged), the case should be dismissed. This argument, however, misstates the nature of the relief sought by petitioners. They have sought *both* injunctive and declaratory relief in this action. Although petitioners cannot now obtain injunctive relief to prevent the purging, they continue to pursue their claim for a declaratory judgment that the NRC must grant them statutorily mandated notice and a hearing whenever it amends a license. *See, e.g., Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974) (the Court found that even though the strike had been settled, mooting injunctive relief, the petitioner alleged sufficient facts in support of declaratory relief so that the case should not be dismissed as moot).

[13] *See Southern Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911).

[14] We note that the United States has taken the position that the petitioners' claims are "capable of repetition"—since the

The mootness doctrine is primarily based on article III of the United States Constitution, which limits federal court jurisdiction to "cases" or "controversies." Courts have interpreted the constitutional provision to limit their jurisdiction to "a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969). The case or controversy requirement "preserves the separation of powers" and "'limit[s] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.'" *Tennessee Gas Pipeline Co. v. Federal Power Comm'n*, 606 F.2d 1373, 1379 (D.C. Cir. 1979) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).

Commission has stated that it will continue to deny requested hearings when it finds no significant hazards considerations are involved—but that future claims will not evade review—since "there is no reason to believe that [NRC] actions will characteristically be irreversible." Memorandum of Respondent United States at 4. Consequently, the United States also argues that the petitions should be dismissed as moot.

We reject the Government's position for two reasons. First, as we explain in the text of the opinion, many NRC license amendments are irreversible. The facts in the present case illustrate how making an amendment effective immediately can preclude complete judicial review. Second, we believe that it is unreasonable for the Government to take the position that, in order to seek judicial review of a license amendment, a petitioner must race to the courthouse before the NRC takes an irreversible action. Even if a petitioner could file the petition before the NRC acted, a court more often than not will decline to grant emergency relief. Indeed, such a request for emergency relief was denied in this case. Consequently, because a petitioner will not receive complete judicial review of his claim, even though it might be meritorious, we find that these claims evade review.

Cases arising from agency action, no less than cases involving only private parties, are subject to the mootness doctrine. Yet, as this court has recently noted, "the concept of mootness is placed under some strain in the context of administrative orders whose formal legal effect is typically shortlived." *Tennessee Gas Pipeline Co. v. Federal Power Comm'n*, 606 F.2d at 1379–80. The strain is relieved somewhat by an exception first articulated in *Southern Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498 (1911), where the Supreme Court held that technically moot cases are justiciable if they involve "short term orders, capable of repetition, yet evading review." *Id.* at 515.

A case is considered justiciable if "the litigant show[s] the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 125–26 (1974). As this case demonstrates, administrative orders, like labor disputes, often "do not last long enough for complete judicial review of the controversies they engender . . . . The judiciary must not close the door to the resolution of the important questions these concrete disputes present." *Id.* at 126–27. Yet, in order to invoke the *Southern Pacific* exception, the petitioner must not only show that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration," he must also show that "there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

The issue in the present case is not simply whether the NRC will again purge the reactor building atmosphere without first giving notice and holding a hearing. At stake is whether the NRC will continue its policy of making immediately effective license amendments without holding a hearing, even though petitioners request one, whenever the NRC finds that the amendment involves "no significant hazards consideration."

Under this view of the issues in this case, the conditions for avoiding dismissal on grounds of mootness, set forth in *Weinstein*, are met. The Commission has candidly conceded that

> at some point in the TMI-2 cleanup, perhaps on more than one occasion, the Commission will amend the utility's license in respects so minor that the Commission will think itself justified in making the amendment immediately effective based upon a no significant hazards consideration finding. Certainly, that kind of finding has been utilized in the past.

Brief for Respondent Nuclear Regulatory Commission at 23.[15] The Commission plainly intends to adhere to its policy of denying a hearing on a license amendment, under certain circumstances, even though interested parties specifically request a hearing. The chances of recurrence are more than speculative; because the NRC policy will be carried out during the TMI-2 cleanup, there is a "reasonable expectation that the same complaining part[ies]" will

---

[15] This admission entirely undercuts Metropolitan Edison's argument that there is no evidence that the actions complained of will be repeated. In each of the cases cited in Metropolitan Edison's brief, the challenged governmental activity had ceased with no indication that it would be continued at a later time. *See, e.g., Murphy v. Benson*, 270 F.2d 419 (2d Cir. 1959), *cert. denied*, 362 U.S. 929 (1960). In the present case, by contrast, the NRC has clearly stated its intention to continue with its allegedly unlawful conduct—making certain license amendments effective immediately without holding a requested hearing or giving notice. We think it obvious that the NRC will also continue to rely on the second method employed in this case for avoiding the notice and hearing requirements of § 189(a)—describing an order as something other than a license amendment. *See* note 6 *supra*. The Commission's continued belief in its authority to follow this policy makes petitioners' challenge to the policy "capable of repetition." *See Nader v. Volpe*, 475 F.2d 916 (D.C. Cir. 1973).

be denied their alleged statutory rights to hearing and notice.

As the present case demonstrates, challenges to the NRC's policy of denying a hearing on license amendments may well escape review. The difficulty here is that the orders are often shortlived and the NRC actions, like venting, may be irreversible. The difficulty is compounded when the NRC elects, as in this case, to make its orders effective immediately. These considerations indicate that future challenges to the NRC policy may easily "evade review."

This court has stated that "[t]he situations [involving appellate consideration of recurrent controversies] are necessarily variant, and the variables complex. . . . [T]he court's decision to maintain the appeal, in the interest of sound judicial administration, is dependent on a prediction of a recurrence or continuation of what is perceived to be essentially the same legal dispute." *Alton & Southern Railway Co. v. International Ass'n of Machinists & Aerospace Workers*, 463 F.2d 872, 879 (D.C. Cir. 1972). "While an 'effective remedy' for the immediate dispute is not obligatory, there must be at least a capacity for a declaration of legal right concerning a future projection of the actual dispute that precipitated the litigation." *Id.* at 879–80. In the present case, that capacity exists, and we hold that this case is not moot.

III. The Order for Temporary Modification of License

The NRC issued without a hearing the "Order for Temporary Modification of License" (OTML) of June 12, 1980, which substituted off-site dosage limits for release limits in the TMI-2 operating license. The petitioners contend that the NRC's failure to provide a hearing violated section 189(a) of the Atomic Energy Act of 1954. The first sentence of that section provides in relevant part:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

The NRC and Metropolitan Edison do not dispute that the OTML constituted a license amendment subject to the terms of section 189(a). They do maintain, however, that under the fourth sentence of the section the Commission could dispense with a hearing. The fourth (and last) sentence of sect on 189(a) reads:

> The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

The NRC and the licensee argue that the NRC properly made a finding of "no significant hazards consideration" with respect to the OTML, and that consequently a hearing was not required. Although the last sentence of section 189(a) only explicitly "dispense[s] with . . . thirty days' notice and publication" upon a determination of "no significant hazards consideration," the NRC and the licensee contend that such a determination also permits the Commission to dispense with a hearing because notice and a hearing are inextricable.[16]

---

[16] The petitioners, challenging the correctness of the "no significant hazards consideration" determination, also contend that the NRC was required under the third sentence of § 189(a) to provide 30 days' notice and publication in the Federal Register of the Commission's intent to issue the license amendment without a hearing. The third sentence provides that

> the Commission may, *in the absence of a request therefor* by any person whose interest may be affected, issue an

We are convinced that such a finding did not permit the NRC to dispense with a hearing that is otherwise required by section 189(a).[17] This is not the first case in this circuit in which it has been argued that a finding of "no significant hazards consideration" permits the NRC to issue a license amendment without a hearing. In *Brooks v. Atomic Energy Comm'n*, 476 F.2d 924, 926 (D.C. Cir. 1973) (*per curiam*), this court soundly rejected the contention that the fourth sentence in section 189(a) "indicate[d] Congressional intent to dispense with hearings in construction permit amendment proceedings . . . when the Commission determines that the amendment involves 'no significant hazards consideration.'" Instead this court, after an examination of the legislative history of section 189(a), held that the fourth sentence only dispenses with requirements of notice and publication. Because this circuit has previously rejected the very construction of section 189(a) offered by the NRC and the licensee,[18] the doctrine of

---

> operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so.

(Emphasis added.) Since, however, we hold that the petitioners requested a hearing, *see* note 25 *infra*, and that the NRC was required to hold a hearing, we need not reach the question whether the Commission was required to provide 30 days' notice of its intent to issue the license amendment without a hearing.

[17] It is noteworthy that respondent United States concedes—indeed argues—that the NRC's failure to provide a hearing violated § 189(a) of the Atomic Energy Act. *See* Memorandum of Respondent United States at 4–21.

[18] It is true, of course, that 15 months after the *Brooks* decision this court stated in dictum in a footnote that "[a]n amendment can be made without opportunity for a hearing if the AEC determines that it 'involves no significant hazards consideration.'" *Union of Concerned Scientists v. Atomic Energy Comm'n*, 499 F.2d 1069, 1084 n.36 (D.C. Cir. 1974). The court provided no support for its far-reaching statement, nor did it

stare decisis compels us to hold that the NRC improperly failed to provide a hearing in the instant case.

Moreover, even if this court were not bound by *stare decisis*, we would still adopt the *Brooks* interpretation of the last sentence of section 189(a). The plain language of section 189(a) dispels any notion that by a finding of "no significant hazards consideration" the NRC may dispense with the hearing requirement. The fourth sentence makes no mention of the hearing requirement's being lessened, but makes reference only to the requirements of notice and publication. Despite the plain, unambiguous language contained in the last sentence, the NRC and Metropolitan Edison suggest that the requirements of hearing and notice are so intertwined that the reference to notice in the fourth sentence must also comprehend a hearing. While it is true that requirements of notice and hearing are interrelated, it is clear that Congress was not merging them in section 189(a). That is demonstrated by the third sentence of the section where Congress made explicit reference to the hearing requirement.[19] That sentence plainly demonstrates that Congress did indeed intend to disentangle the two requirements of notice and hearing,[20] and

---

even make mention of the recently decided *Brooks* case, which had squarely *held* to the contrary on the basis of the legislative history of § 189(a). We accordingly decline to place any reliance on the dictum in *Union of Concerned Scientists*.

[19] For the text of the third sentence, *see* note 16 *supra*.

[20] We are cognizant of the fact that the plain meaning of the third and fourth sentences of § 189(a), when read together, produces in theory a somewhat paradoxical result. Under the fourth sentence the NRC may issue a license amendment without providing 30 days' notice and publication in the Federal Register of its intent to do so, while under the third sentence the NRC need not provide a hearing when one has not been requested. As the NRC and the licensee note, it is difficult to imagine how a hearing can be requested when the NRC issues a license amendment without notice. This "paradoxical result" did

"to lessen the mandatory hearing requirement only when there was no request for a hearing." *Brooks v. Atomic Energy Comm'n*, 476 F.2d at 927.

A review of the legislative history of the 1962 amendments to section 189(a)—by which the last two sentences of the section were added—also firmly persuades us that the *Brooks* court properly construed the last sentence of section 189(a). That history demonstrates that the 1962 amendments to section 189(a) had their origin in congressional concern over a hearing requirement in *uncontested* cases—that is, when a hearing had not been requested.[21] Representative of that concern was the statement by

---

not occur, however, in the instant case. Although petitioners did not formally request a hearing prior to issuance of the OTML, their prior expressions of interest constituted in effect a request for a hearing. *See* note 25 *infra*. It is also unclear whether the "paradoxical result" will ever in fact occur. As the NRC conceded at oral argument, there may be some type of notice requirement—although perhaps not 30 days' notice and publication in the Federal Register—implicit in the opportunity to seek judicial review of determinations of "no significant hazards consideration." Moreover, our decision today does not reach the question whether some notice of the NRC's intention to amend a license is required under the due process clause of the Fourteenth Amendment or the Administrative Procedure Act notwithstanding a finding of "no significant hazards consideration."

[21] Indeed, counsel for Metropolitan Edison testified in 1961 before the Joint Committee on Atomic Energy and argued for retention of a hearing requirement when a hearing has been requested:

> I hope that this committee will seriously consider repeal of the mandatory hearing requirements of section 189(a), leaving intact, of course, the provisions for a hearing at the request of any person whose interest may be affected by the licensing proceedings.

Radiation Safety and Regulation: Hearings Before the Joint Comm. on Atomic Energy, 87th Cong., 1st Sess. 266 (1961) (testimony of George F. Trowbridge).

Raoul Berger, serving as an American Bar Association spokesperson, that

> 14 out of 15 of [the Atomic Energy Commission's] cases have been uncontested. And the central problem appears to be whether trial-type proceedings should be employed under sections 7 and 8 of the Administrative Procedures [*sic*] Act *in uncontested cases* . . . .

AEC Regulatory Problems: Hearings on H.R. 12336 and S. 3491 Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 87th Cong., 2d Sess. 64 (1962) (statement of Raoul Berger) (emphasis added).[22] *Accord*, *e.g.*, *id.* at 32 (statement of Herzel H.E. Plaine, Chairman, Special Comm. on Atomic Energy Law, ABA). Thus an interpretation of section 189(a) that would permit the NRC to issue a *contested* license amendment without a hearing would enlarge section 189(a) beyond the scope originally intended.[23]

---

[22] In response the staff counsel to the Joint Committee noted:

> Mr. Berger, I think you are absolutely correct that the difficulty, the background that led to the Joint Committee study and the bills, was the concern over the handling by AEC of uncontested cases. . . .

AEC Regulatory Problems: Hearings on H.R. 12336 and S. 3491 Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 87th Cong., 2d Sess. 70 (1962) (remarks of David Toll).

[23] In support of its interpretation of § 189(a) the NRC quotes from a letter written in 1961 by former AEC Commissioner L.K. Olson to the Joint Committee on Atomic Energy, *reprinted in* Staff of the Joint Comm. on Atomic Energy, 87th Cong., 1st Sess., Improving the Regulatory Process, Vol. II, at 578–87 (Comm. Print 1961). The quoted portions of the letter suggest, in ambiguous terms, that the Commissioner was of the view that the AEC should be able to dispense with hearings on license amendments upon a finding that "no substantial new safety questions" are presented. *See* Reply Brief for Respondent Nuclear Regulatory Commission at 9. Even if Com-

The 1962 Report of the Joint Committee on Atomic Energy also suggests that Congress perceived the changes to section 189(a) as permitting the NRC to dispense only with notice and publication—not a hearing—upon a finding of "no significant hazards consideration":

> *In the absence of a request for a hearing*, issuance of an amendment to a construction permit, or issuance of an operating license, or an amendment to an operating license, would be possible without formal proceedings, but on the public record. . . .
>
> . . . .
>
> Finally, it is expected that *the authority given AEC to dispense with notice and publication* would be exercised with great care and only in those instances where the application presented no significant hazards consideration.

H.R. Rep. No. 1966, 87th Cong., 2d Sess. 8 (1962); S. Rep. No. 1677, 87th Cong., 2d Sess. 8 (1962) (emphasis added). And in a committee hearing one year prior, the Joint Committee on Atomic Energy had noted:

> When no substantial safety question is involved in . . . the amendment . . . the public interest would be protected by . . . publication of an apt notice in the Federal Register [24] and the giving of *an opportunity to any interested party to intervene*. . . .

---

missioner Olson intended his comments to apply to *contested* matters, it is clear from the rest of the legislative history that *Congress* did not share the Commissioner's view.

[24] It is not entirely clear what the Committee meant by the phrase "publication of an apt notice in the Federal Register." Presumably it only refers to publication of the amendment *after the Commission has issued it*. This is not inconsistent with the fourth sentence of § 189(a), adopted in 1962, which dispenses with 30 days' notice and publication in the Federal Register of the Commission's *intent to issue* a license amendment without a hearing.

This ambiguity in the quoted language is not unique in the context of § 189(a). The text and legislative history of the sec-

Staff of the Joint Comm. on Atomic Energy, 87th Cong., 1st Sess., Improving the Regulatory Process, Vol. II, at 49-50 (Comm. Print 1961) (emphasis added). The language of the reports, consonant with the plain meaning of section 189(a), thus indicates that the section only permits the NRC to issue a license amendment without a hearing when there has been no hearing request.[25]

Statements by Representative Holifield, Chairman of the Joint Committee on Atomic Energy, and Senator Pastore, Vice-Chairman, on the floors of their respective houses further reinforce the language in the reports. Both individuals explicitly stated that the "amendment [to section 189(a)] in no way limits the right of an interested party to intervene and request a hearing at some later stage, nor does it affect the right of the Commission to hold a hearing on its own motion." 108 Cong. Rec. 16,548 (1962) (remarks of Rep. Holifield); *see id.* at 15,746 (remarks of Sen. Pastore). The interpretation that the NRC

---

tion are replete with ambiguities and inconsistencies. *Cf.* note 20 *supra*. But there is no ambiguity in the legislative history or the text of § 189(a) with respect to the question before this court—whether a finding of "no significant hazards consideration" permits the NRC to dispense with a hearing.

[25] Whether petitioners did in fact request a hearing was not argued by the parties. While respondent United States suggests in a footnote that "[i]t is not wholly clear that petitioners did make such a request," Memorandum of Respondent United States at 6 n.2, we are convinced that the petitioners requested a hearing. In *Brooks v. Atomic Energy Comm'n*, 476 F.2d 924, 926 (D.C. Cir. 1973) (*per curiam*), this court held that expressions of interest may be sufficient to constitute a request for a hearing. In the instant case petitioners' continued interest in—and opposition to—the actions of the NRC at TMI-2 clearly constituted a request for a hearing. Indeed, the petitioners were among the many that submitted comments in April-May 1980 to the NRC regarding the Commission's Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere. *See* text at notes 5-6 *supra*.

and the public utilities press upon us,[26] however, would "limit[ ] the right of an interested party to intervene and request a hearing."

In sum, we are confident that *Brooks* was properly decided and that it dictates the construction that must be attached to the last sentence of section 189(a). Because the NRC's finding of "no significant hazards consideration" did not entitle the Commission to dispense with a requested hearing prior to issuance of the OTML, we hold that its

---

[26] As part of their argument the NRC and the public utilities contend that the NRC, and the Atomic Energy Commission prior to the creation of the NRC, consistently interpreted the section as permitting license amendments to be issued without a hearing upon a finding of "no significant hazards consideration." *See* 10 C.F.R. § 2.105(a)(3) (1980); *id.* § 50.58(b); *id.* § 50.59(c) (1963); 45 Fed. Reg. 42,908 (1980); 45 Fed. Reg. 20,491-92 (1980); 43 Fed. Reg. 13,928 (1978); 41 Fed. Reg. 10,482-83 (1976); 40 Fed. Reg. 18,231 (1975); 39 Fed. Reg. 10,554 (1974); 39 Fed. Reg. 1,875-76 (1974); 27 Fed. Reg. 12,184 (1962); *Consumers Power Co.*, 7 A.E.C. 297 (1974); *General Electric Co.*, 1 A.E.C. 541 (1960). Even if the history of regulations and administrative practice by the AEC and the NRC were unambiguous—which we do not think it is—deference to the agencies' interpretations would be inappropriate in this case. As we have indicated, the statute and legislative history are in our view unambiguous: a finding of "no significant hazards consideration" does not permit the NRC to dispense with a hearing. As the Supreme Court has noted, "[A]dministrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933).

It is also worth noting that because of today's decision the NRC will not be able to put into effect a regulation proposed earlier this year that would explicitly permit the NRC to dispense with hearings on license amendments upon a finding of "no significant hazards consideration." *See* 45 Fed. Reg. 20,491-92 (1980). Such a regulation would be clearly inconsistent with the congressional mandate in § 189(a).

failure to provide a hearing violated section 189(a) of the Atomic Energy Act.

IV. The NRC's Memorandum and Order

The second order issued by the NRC on June 12, 1980, entitled "Memorandum and Order" (Venting Order), authorized Metropolitan Edison to vent the atmosphere of the reactor containment building. Respondents argue that section 189(a) did not require a hearing with respect to the Venting Order because the order was not a license amendment. We reject respondents' description of the order and find that section 189(a) was indeed applicable and, as a consequence, that petitioners were entitled to a hearing on the Venting Order.

Section 189(a), quoted in pertinent part in note 2 *supra*, requires that a hearing be given upon request "[i]n any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit." 42 U.S.C. § 2239(a) (1976). Respondents maintain that because the Venting Order merely lifted a prior suspension of the licensee's authority to vent, and did not authorize release of a greater amount of radioactive gas than was permitted by the original technical specifications of the operating license, it was not a license amendment. However, on the facts here, this characterization of the Venting Order appears to be nothing more than an after-the-fact rationalization, which finds no support in the record of this case.

The NRC's July 20, 1979 "Order for Modification of License" suspended Metropolitan Edison's authority to operate TMI-2 and directed the licensee to "maintain the facility in a shutdown condition in accordance with the approved operating and contingency procedures." 44 Fed. Reg. 45,271 (1979). In a second order, dated February 11, 1980, the NRC recognized that TMI-2's operating license did not permit venting as part of a cleanup operation because the license specifications pertained only to normal operation of the facility:

> [I]n the present post-accident status of the facility, the license itself does not include explicit provisions or Technical Specifications for assuring the continued maintenance of the plant in a safe, stable condition or for coping with foreseeable off-normal conditions. Moreover, certain portions of the facility's operating license relate to or govern power operation of the facility, the authority for which was suspended by the Order of July 20, 1979. *These provisions are now simply inapplicable to the facility in its present post-accident condition.*

45 Fed. Reg. 11,282 (1980) (emphasis added). The NRC concluded that "the facility's operating license should be *modified* so as to: . . . [p]rohibit venting or purging . . . until . . . approved by the NRC." *Id.* (emphasis added).

There is no indication that this order was intended or perceived as a mere suspension of the licensee's existing authority to vent. In February 1980, it appeared that adequate venting of the reactor building might not be possible under the existing license authority. Consequently, the NRC acted to modify—and thus amend—the TMI-2 license in order to regulate the plant in an "off-normal" condition and to facilitate whatever venting scheme might be determined to be necessary. By its very terms, the February 11, 1980 order was a license amendment intended to reflect TMI-2's post-accident condition. Given that the original operating license was inapplicable, the NRC could not simply rely on its terms as authority for the venting. Authority for venting—in this case the June 12 Venting Order—therefore had to come in the form of a license amendment.

The specific language of the June 12 Venting Order further corroborates our interpretation of that order as a license amendment. In the Venting Order, the NRC noted that TMI-2 was being operated according to the provisions of the February 11, 1980 order, *see* Venting Order at 10, *reprinted in* App. 134, and the Venting Order did nothing to change that. TMI-2's operating license was not simply

"unsuspended" by the Venting Order. Instead, in the words of the NRC, "[i]n the present order we give the approval contemplated by [the February 11] restriction insofar as necessary for the licensee to conduct a purging of the TMI-2 containment." *Id.* at 11, *reprinted in* App. 135. Nowhere does the Venting Order support respondents' characterization of it as a reinstatement of some pre-existing authority. Rather, the Venting Order appears as an amendment to the February 11 amendment to TMI-2's operating license. Because the June 12 Venting Order modified the February 11 order, and granted the licensee authority to do something that it otherwise could not have done under the existing license authority, the Venting Order was a license amendment within the scope of section 189(a).

Our reading of the Venting Order is also supported by Congress' intent in enacting section 189(a). By requiring a hearing upon request whenever a license is "grant[ed], suspend[ed], revok[ed], or amend[ed]," Congress apparently contemplated that interested parties would be able to intervene before any significant change in the operation of a nuclear facility. Whatever the Venting Order is called, it certainly was such a change.

As we held in Section III of this opinion, the NRC is required under section 189(a) to hold a hearing on a license amendment whenever interested parties request one.[27] Petitioners did so in this case, *see* note 25 *supra*, and the NRC therefore acted unlawfully in refusing to hold a hearing on the Venting Order.[28]

---

[27] We note that the NRC and the public utilities briefly argued that a full adjudicatory hearing was not required here. *See* Brief for Respondent Nuclear Regulatory Commission at 32–34; Brief for Intervenor-Respondents at 44–45. Because this question was not fully briefed and argued by the parties, we express no opinion on the precise nature of the hearing required by § 189(a).

[28] Respondent United States argued that petitioners requested a hearing, as provided for in the OTML, and then failed

V. CONCLUSION

Because the NRC's actions in this case are "capable of repetition yet, evading review," the issues presented by petitioners are not moot. We hold that under section 189(a) the NRC is required to hold a hearing on license amendments whenever interested parties request one. Finally, we hold that the June 12 Venting Order, which authorized the NRC to release radioactive gas from the disabled nuclear reactor, was a license amendment subject to the hearing requirements of section 189(a). Because the petitioners requested a hearing on the two June 12 license amendments, they were entitled to a hearing under section 189(a). The NRC's refusal to hold a hearing violated the petitioners' statutory rights.

---

to exhaust their administrative remedies by withdrawing their motion. The intended scope of that hearing and the facts surrounding the withdrawal are somewhat muddled by the record. What is clear, however, is that the offer of a hearing was made only in the OTML and not in the Venting Order. Presumably, then, petitioners would have been able to challenge only the license amendment substituting off-site dosage limits for release limits and not the actual decision to vent. Moreover, any hearing was to revolve around the issues whether the license amendment was in the public interest and whether it should be sustained. *See* App. 123. It appears from this description that petitioners would not have been permitted to raise their arguments regarding the NRC's interpretation of § 189(a), which formed the basis of this suit. Finally, the Commission specifically provided that a request for a hearing would not stay the effectiveness of the order. *See id.* But § 189(a) required a hearing upon request on the Venting Order before it went into effect; a hearing after the venting had been completed would not have satisfied the statute's requirement. For all these reasons, the remedy that petitioners allegedly failed to exhaust was an inadequate one and therefore need not have been pursued. *See McNeese v. Board of Educ.*, 373 U.S. 668, 674–76 (1963); *Union Pac. R.R. Co. v. Board of County Comm'rs*, 247 U.S. 282 (1918).

AA61-2 PDR

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

NOV 20 1980

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1691

STEVEN SHOLLY and DONALD E. HOSSLER, PETITIONERS

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION *et al.* and UNITED STATES OF AMERICA, RESPONDENTS

METROPOLITAN EDISON COMPANY *et al.*, INTERVENORS

No. 80-1783

PEOPLE AGAINST NUCLEAR ENERGY, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION; JOHN AHEARNE, VICTOR GILINSKY, RICHARD T. KENNEDY, JOSEPH M. HENDRIE, and PETER A. BRADFORD, in Their Individual Capacities; and THE UNITED STATES OF AMERICA, RESPONDENTS

METROPOLITAN EDISON COMPANY, JERSEY POWER & LIGHT COMPANY, and PENNSYLVANIA ELECTRIC COMPANY, INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 80-1784

IN RE: PEOPLE AGAINST NUCLEAR ENERGY, PETITIONER

Petitions for Review of Orders of the
United States Nuclear Regulatory Commission
and for Writ of Mandamus

Argued September 8, 1980

Decided November 19, 1980

Robert Hager, with whom *Daniel P. Sheehan* was on the brief, for petitioners.

Stephen Eilperin, Solicitor, United States Nuclear Regulatory Commission, with whom *E. Leo Slaggie*, Attorney, United States Nuclear Regulatory Commission, was on the brief, for respondent United States Nuclear Regulatory Commission.

David A. Strauss, Attorney, Department of Justice, with whom *James A. Moorman*, Assistant Attorney General, and *Peter R. Steenland, Jr.*, Attorney, Department of Justice, were on the brief, for respondent United States of America. *Stanford Sagalkin* and *Lois Schiffer*, Attorneys, Department of Justice, also entered appearances for respondent United States of America.

Mark Augenblick, with whom *George F. Trowbridge* and *Matias F. Travieso-Diaz* were on the brief, for intervenors. *Robert E. Zahler* also entered an appearance for intervenors.

Before WRIGHT, *Chief Judge*, and MIKVA and EDWARDS, *Circuit Judges*.

Opinion *per curiam*.

PER CURIAM: In this case petitioners seek review of two orders by the Nuclear Regulatory Commission (NRC) permitting the Metropolitan Edison Company to release radioactive gas into the atmosphere from the Three Mile Island nuclear plant.[1] The claim here is that the orders issued by the NRC were made effective without affording petitioners their statutory rights to notice and a hearing.[2]

On June 26, 1980, this court denied petitioners' request for emergency injunctive relief to block the release of the radioactive gas. Now that the radioactive gas from the nuclear plant has been fully vented into the atmosphere, the petitioners seek only declaratory relief from this court.

---

[1] Metropolitan Edison Co., Pennsylvania Electric Co., and Jersey Central Power and Light Co. jointly hold the operating license to the Three Mile Island nuclear plant. In this opinion they are called collectively either "the licensee" or "Metropolitan Edison."

[2] The petitioners primarily rely on § 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. § 2239(a) (1976), as amended in 1957, Pub. L. No. 85-256, § 7, 71 Stat. 579 (1957), and in 1962, Pub. L. No. 87-615, § 2, 76 Stat. 409 (1962). Section 189(a) reads in pertinent part as follows:

> In any proceeding, under this chapter, for the granting, suspending, revoking, or amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application . . . for a construction permit for a facility . . . . [T]he Commission may, in the absence of a request therefor by any person whose interest may be affected, issue . . . an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for . . . an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

I. BACKGROUND

This case arises in the aftermath of a widely publicized accident that occurred on March 28, 1979 at "Unit 2" of the Three Mile Island nuclear plant. As a result of the accident, dangerous concentrations of radioactive gas collected in the reactor containment building, inhibiting cleanup and maintenance work.

Three months after the accident, the NRC issued an "Order for Modification of License," 44 Fed. Reg. 45,271 (1979), suspending Metropolitan Edison's authority to operate Unit 2 of the Three Mile Island plant (TMI-2), and requiring it to "maintain the facility in a shutdown condition." *Id.*[3] The NRC order indicated that, in about thirty days, the Commission would issue a "Safety Evaluation" addressing "the imposition of new and/or revised Technical Specifications setting forth appropriate license conditions." *Id.*

In fact, the NRC issued no such evaluation. Instead, on November 21, 1979, the NRC issued a "Statement of Policy and Notice of Intent to Prepare a Programmatic Environmental Impact Statement," 44 Fed. Reg. 67,738 (1979), which was to be an "overall study of the decontamination and disposal process." *Id.* The NRC Statement of Policy directed the agency's staff

> to include in the programmatic environmental impact statement on the decontamination and disposal of TMI-2 wastes an overall description of the planned activities and a schedule for their completion along with a discussion of alternatives considered and the rationale for choices made.

[3] Much of the factual basis for the NRC's actions is contained in its report, the "Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere" (May 1980), which is reprinted in the Intervenor-Respondents' Appendix (App.) 18.

Id.

On February 11, 1980, the NRC issued another order, 45 Fed. Reg. 11,282 (1980), which stated that

> the facility's operating license should be modified so as to: . . . (3) Prohibit venting or purging or other treatment of the reactor building atmosphere . . . until each of these activities has been approved by the NRC, consistent with the Commission's Statement of Policy and Notice of Intent to Prepare a Programmatic Environmental Impact Statement.

Id.[4]

Six weeks later the NRC published a notice of the "Availability of Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere," 45 Fed. Reg. 20,265 (1980). The notice stated that the Assessment "considers five alternative methods for decontaminating the reactor building atmosphere and recommends that the building atmosphere be decontaminated by purging to the environment through the building's hydrogen control system." *Id.*[5] The NRC staff concluded in the Assessment that venting the gas into the atmosphere would "not constitute a significant

---

[4]The February 11, 1980 order specified that any interested person or the licensee could request a hearing before March 21, 1980 on whether the proposed changes in the technical specifications would be sufficient "to protect health and safety or to minimize danger to life and property" or "whether the provisions of this Order would significantly affect the quality of the human environment." *Id.* at 11,283. The order also provided, however, that a request for a hearing on part (3) of the order would not stay the effectiveness of the order. *Id.*

[5]The NRC desired to remove the radioactive gas from the reactor building so that workers could begin to clean the building, maintain the equipment, and prepare to remove the damaged fuel from the reactor core. Removing the radioactive gas from the reactor containment building was only the first step in an extensive cleanup.

environmental impact and, accordingly, the staff does not propose to prepare a separate Environmental Impact Statement on this action." *Id.* at 20,265-66. Public comments on the Assessment originally were due by April 11, 1980, but the period was extended to May 16, 1980. 45 Fed. Reg. 30,760 (1980).

In May of 1980, the NRC issued the "Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere." On June 12, 1980, the NRC issued without a hearing two final orders, entitled "Order for Temporary Modification of License" and "Memorandum and Order," App. 119 and 125, respectively. The first order modified the operating license[6] to permit the licensee to release the radioactive gas from the reactor building at a faster rate than the existing specifications allowed.[7] The first order also expressly stated that, because the NRC had found that the modification of the operating license involved "no significant hazards consideration," requests for a hearing would not stay the implementation of the order. App. 121-23.[8] The second order

---

[6] As part of its argument, the NRC contends that the second order, permitting purging, was not a license amendment. However, the NRC admits that the first order amended the TMI-2 operating license.

[7] Before the accident of March 28, 1979, the TMI-2 operating license authorized periodic release of specified amounts of radioactive gas into the atmosphere as a normal and necessary part of plant operations.

[8] Part of the basis for the Commission's determination of "no significant hazards consideration" was its conclusion that, although existing *release* rate limits would be exceeded, off-site dose limits would not be breached. Since the NRC's concern was the effect of the venting on human health, the Commission felt that the more direct measure—off-site dose limits—would provide a satisfactory standard to determine the appropriate limits on the venting of the radioactive gas.

authorized release of radioactive gas from the reactor building.[9] Venting was to begin on June 22.[10]

On June 16, petitioners wrote a letter to the NRC requesting that it reconsider its finding of "no significant hazards consideration" and its decision to make the June 12 orders effective immediately. The NRC did not respond.

On June 23, petitioners filed a petition in this court for review of the two June 12 orders.[11] Three days later this court denied the petitioners' requests for emergency injunctive and declaratory relief. The next day, one day before the venting began, the petitioners filed a request for a hearing with the NRC on the two June 12 orders. The hearing request was referred to an Atomic Safety and Licensing Board. On July 3, the petitioners moved the Board to suspend the venting; however, this request was subsequently withdrawn, on July 8, shortly before the venting was completed.

Metropolitan Edison began to vent the reactor building on June 28, 1980, at a rate that was within the original license specifications for a normally operating reactor. On July 8, the licensee began to vent the radioactive gas at a faster rate, pursuant to the specifications set in the June

---

[9]The NRC made no finding that this order involved "no significant hazards consideration." *See* Brief for Respondent Nuclear Regulatory Commission at 30, 35.

[10]By making the orders effective immediately, the Commission failed to give any notice in the Federal Register of the license amendment. The Commission contends that so long as it makes a finding of "no significant hazards consideration," the governing statute does not impose such a notice requirement. *See* note 2 *supra* for statutory notice and hearing requirements.

[11]On July 8, 1980, a petition for review (No. 80-1783) and an accompanying petition for writ of mandamus (No. 80-1784) were filed in the Third Circuit. On the NRC's motion, those cases were transferred to this court and consolidated for review with No. 80-1691, the case originally filed in this court.

12 license amendment. The venting was completed on July 11. As the NRC had anticipated, the off-site doses from the venting were below the limits set in the June 12 radiation license amendment. In its draft Programmatic Environmental Report Statement, issued August 14, 1980, the Commission stated that it did not anticipate a recurrence of the purging of the reactor building atmosphere, but that some minor releases of gas might be necessary for data gathering purposes. *See* Brief for Respondent Nuclear Regulatory Commission at 6 n.4 & 20 n.11.

II. Mootness

Because the licensee has completed the venting of the reactor containment building, and because both of the June 12 orders have expired, the Commission and the licensee claim that petitioners' claims for injunctive and declaratory relief are moot.[12] However, because we find that these cases are "capable of repetition, yet evading review,"[13] we hold that the petitioners' claims are justiciable in this court.[14]

---

[12] Metropolitan Edison seems to argue that since petitioners' claims for injunctive relief are moot (i.e., the reactor building atmosphere has been purged), the case should be dismissed. This argument, however, misstates the nature of the relief sought by petitioners. They have sought *both* injunctive and declaratory relief in this action. Although petitioners cannot now obtain injunctive relief to prevent the purging, they continue to pursue their claim for a declaratory judgment that the NRC must grant them statutorily mandated notice and a hearing whenever it amends a license. *See, e.g., Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974) (the Court found that even though the strike had been settled, mooting injunctive relief, the petitioner alleged sufficient facts in support of declaratory relief so that the case should not be dismissed as moot).

[13] *See Southern Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911).

[14] We note that the United States has taken the position that the petitioners' claims are "capable of repetition"—since the

The mootness doctrine is primarily based on article III of the United States Constitution, which limits federal court jurisdiction to "cases" or "controversies." Courts have interpreted the constitutional provision to limit their jurisdiction to "a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969). The case or controversy requirement "preserves the separation of powers" and "'limit[s] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.'" *Tennessee Gas Pipeline Co. v. Federal Power Comm'n*, 606 F.2d 1373, 1379 (D.C. Cir. 1979) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).

Commission has stated that it will continue to deny requested hearings when it finds no significant hazards considerations are involved—but that future claims will not evade review—since "there is no reason to believe that [NRC] actions will characteristically be irreversible." Memorandum of Respondent United States at 4. Consequently, the United States also argues that the petitions should be dismissed as moot.

We reject the Government's position for two reasons. First, as we explain in the text of the opinion, many NRC license amendments are irreversible. The facts in the present case illustrate how making an amendment effective immediately can preclude complete judicial review. Second, we believe that it is unreasonable for the Government to take the position that, in order to seek judicial review of a license amendment, a petitioner must race to the courthouse before the NRC takes an irreversible action. Even if a petitioner could file the petition before the NRC acted, a court more often than not will decline to grant emergency relief. Indeed, such a request for emergency relief was denied in this case. Consequently, because a petitioner will not receive complete judicial review of his claim, even though it might be meritorious, we find that these claims evade review.

Cases arising from agency action, no less than cases involving only private parties, are subject to the mootness doctrine. Yet, as this court has recently noted, "the concept of mootness is placed under some strain in the context of administrative orders whose formal legal effect is typically shortlived." *Tennessee Gas Pipeline Co. v. Federal Power Comm'n*, 606 F.2d at 1379–80. The strain is relieved somewhat by an exception first articulated in *Southern Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498 (1911), where the Supreme Court held that technically moot cases are justiciable if they involve "short term orders, capable of repetition, yet evading review." *Id.* at 515.

A case is considered justiciable if "the litigant show[s] the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 125–26 (1974). As this case demonstrates, administrative orders, like labor disputes, often "do not last long enough for complete judicial review of the controversies they engender . . . . The judiciary must not close the door to the resolution of the important questions these concrete disputes present." *Id.* at 126–27. Yet, in order to invoke the *Southern Pacific* exception, the petitioner must not only show that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration," he must also show that "there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

The issue in the present case is not simply whether the NRC will again purge the reactor building atmosphere without first giving notice and holding a hearing. At stake is whether the NRC will continue its policy of making immediately effective license amendments without holding a hearing, even though petitioners request one, whenever the NRC finds that the amendment involves "no significant hazards consideration."

Under this view of the issues in this case, the conditions for avoiding dismissal on grounds of mootness, set forth in *Weinstein*, are met. The Commission has candidly conceded that

> at some point in the TMI-2 cleanup, perhaps on more than one occasion, the Commission will amend the utility's license in respects so minor that the Commission will think itself justified in making the amendment immediately effective based upon a no significant hazards consideration finding. Certainly, that kind of finding has been utilized in the past.

Brief for Respondent Nuclear Regulatory Commission at 23.[15] The Commission plainly intends to adhere to its policy of denying a hearing on a license amendment, under certain circumstances, even though interested parties specifically request a hearing. The chances of recurrence are more than speculative; because the NRC policy will be carried out during the TMI-2 cleanup, there is a "reasonable expectation that the same complaining part[ies]" will

---

[15] This admission entirely undercuts Metropolitan Edison's argument that there is no evidence that the actions complained of will be repeated. In each of the cases cited in Metropolitan Edison's brief, the challenged governmental activity had ceased with no indication that it would be continued at a later time. *See, e.g., Murphy v. Benson*, 270 F.2d 419 (2d Cir. 1959), *cert. denied*, 362 U.S. 929 (1960). In the present case, by contrast, the NRC has clearly stated its intention to continue with its allegedly unlawful conduct—making certain license amendments effective immediately without holding a requested hearing or giving notice. We think it obvious that the NRC will also continue to rely on the second method employed in this case for avoiding the notice and hearing requirements of § 189(a)—describing an order as something other than a license amendment. *See* note 6 *supra*. The Commission's continued belief in its authority to follow this policy makes petitioners' challenge to the policy "capable of repetition." *See Nader v. Volpe*, 475 F.2d 916 (D.C. Cir. 1973).

be denied their alleged statutory rights to hearing and notice.

As the present case demonstrates, challenges to the NRC's policy of denying a hearing on license amendments may well escape review. The difficulty here is that the orders are often shortlived and the NRC actions, like venting, may be irreversible. The difficulty is compounded when the NRC elects, as in this case, to make its orders effective immediately. These considerations indicate that future challenges to the NRC policy may easily "evade review."

This court has stated that "[t]he situations [involving appellate consideration of recurrent controversies] are necessarily variant, and the variables complex. . . . [T]he court's decision to maintain the appeal, in the interest of sound judicial administration, is dependent on a prediction of a recurrence or continuation of what is perceived to be essentially the same legal dispute." *Alton & Southern Railway Co. v. International Ass'n of Machinists & Aerospace Workers*, 463 F.2d 872, 879 (D.C. Cir. 1972). "While an 'effective remedy' for the immediate dispute is not obligatory, there must be at least a capacity for a declaration of legal right concerning a future projection of the actual dispute that precipitated the litigation." *Id.* at 879–80. In the present case, that capacity exists, and we hold that this case is not moot.

III. The Order for Temporary Modification of License

The NRC issued without a hearing the "Order for Temporary Modification of License" (OTML) of June 12, 1980, which substituted off-site dosage limits for release limits in the TMI-2 operating license. The petitioners contend that the NRC's failure to provide a hearing violated section 189(a) of the Atomic Energy Act of 1954. The first sentence of that section provides in relevant part:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

The NRC and Metropolitan Edison do not dispute that the OTML constituted a license amendment subject to the terms of section 189(a). They do maintain, however, that under the fourth sentence of the section the Commission could dispense with a hearing. The fourth (and last) sentence of section 189(a) reads:

> The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

The NRC and the licensee argue that the NRC properly made a finding of "no significant hazards consideration" with respect to the OTML, and that consequently a hearing was not required. Although the last sentence of section 189(a) only explicitly "dispense[s] with . . . thirty days' notice and publication" upon a determination of "no significant hazards consideration," the NRC and the licensee contend that such a determination also permits the Commission to dispense with a hearing because notice and a hearing are inextricable.[16]

---

[16] The petitioners, challenging the correctness of the "no significant hazards consideration" determination, also contend that the NRC was required under the third sentence of § 189(a) to provide 30 days' notice and publication in the Federal Register of the Commission's intent to issue the license amendment without a hearing. The third sentence provides that

> the Commission may, *in the absence of a request therefor* by any person whose interest may be affected, issue an

We are convinced that such a finding did not permit the NRC to dispense with a hearing that is otherwise required by section 189(a).[17] This is not the first case in this circuit in which it has been argued that a finding of "no significant hazards consideration" permits the NRC to issue a license amendment without a hearing. In *Brooks v. Atomic Energy Comm'n*, 476 F.2d 924, 926 (D.C. Cir. 1973) (*per curiam*), this court soundly rejected the contention that the fourth sentence in section 189(a) "indicate[d] Congressional intent to dispense with hearings in construction permit amendment proceedings . . . when the Commission determines that the amendment involves 'no significant hazards consideration.'" Instead this court, after an examination of the legislative history of section 189(a), held that the fourth sentence only dispenses with requirements of notice and publication. Because this circuit has previously rejected the very construction of section 189(a) offered by the NRC and the licensee,[18] the doctrine of

---

> operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so.

(Emphasis added.) Since, however, we hold that the petitioners requested a hearing, *see* note 25 *infra*, and that the NRC was required to hold a hearing, we need not reach the question whether the Commission was required to provide 30 days' notice of its intent to issue the license amendment without a hearing.

[17] It is noteworthy that respondent United States concedes—indeed argues—that the NRC's failure to provide a hearing violated § 189(a) of the Atomic Energy Act. *See* Memorandum of Respondent United States at 4-21.

[18] It is true, of course, that 15 months after the *Brooks* decision this court stated in dictum in a footnote that "[a]n amendment can be made without opportunity for a hearing if the AEC determines that it 'involves no significant hazards consideration.'" *Union of Concerned Scientists v. Atomic Energy Comm'n*, 499 F.2d 1069, 1084 n.36 (D.C. Cir. 1974). The court provided no support for its far-reaching statement, nor did it

stare decisis compels us to hold that the NRC improperly failed to provide a hearing in the instant case.

Moreover, even if this court were not bound by *stare decisis*, we would still adopt the *Brooks* interpretation of the last sentence of section 189(a). The plain language of section 189(a) dispels any notion that by a finding of "no significant hazards consideration" the NRC may dispense with the hearing requirement. The fourth sentence makes no mention of the hearing requirement's being lessened, but makes reference only to the requirements of notice and publication. Despite the plain, unambiguous language contained in the last sentence, the NRC and Metropolitan Edison suggest that the requirements of hearing and notice are so intertwined that the reference to notice in the fourth sentence must also comprehend a hearing. While it is true that requirements of notice and hearing are interrelated, it is clear that Congress was not merging them in section 189(a). That is demonstrated by the third sentence of the section where Congress made explicit reference to the hearing requirement.[19] That sentence plainly demonstrates that Congress did indeed intend to disentangle the two requirements of notice and hearing,[20] and

---

even make mention of the recently decided *Brooks* case, which had squarely *held* to the contrary on the basis of the legislative history of § 189(a). We accordingly decline to place any reliance on the dictum in *Union of Concerned Scientists*.

[19] For the text of the third sentence, *see* note 16 *supra*.

[20] We are cognizant of the fact that the plain meaning of the third and fourth sentences of § 189(a), when read together, produces in theory a somewhat paradoxical result. Under the fourth sentence the NRC may issue a license amendment without providing 30 days' notice and publication in the Federal Register of its intent to do so, while under the third sentence the NRC need not provide a hearing when one has not been requested. As the NRC and the licensee note, it is difficult to imagine how a hearing can be requested when the NRC issues a license amendment without notice. This "paradoxical result" did

"to lessen the mandatory hearing requirement only when there was no request for a hearing." *Brooks v. Atomic Energy Comm'n*, 476 F.2d at 927.

A review of the legislative history of the 1962 amendments to section 189(a)—by which the last two sentences of the section were added—also firmly persuades us that the *Brooks* court properly construed the last sentence of section 189(a). That history demonstrates that the 1962 amendments to section 189(a) had their origin in congressional concern over a hearing requirement in *uncontested* cases—that is, when a hearing had not been requested.[21] Representative of that concern was the statement by

---

not occur, however, in the instant case. Although petitioners did not formally request a hearing prior to issuance of the OTML, their prior expressions of interest constituted in effect a request for a hearing. *See* note 25 *infra*. It is also unclear whether the "paradoxical result" will ever in fact occur. As the NRC conceded at oral argument, there may be some type of notice requirement—although perhaps not 30 days' notice and publication in the Federal Register—implicit in the opportunity to seek judicial review of determinations of "no significant hazards consideration." Moreover, our decision today does not reach the question whether some notice of the NRC's intention to amend a license is required under the due process clause of the Fourteenth Amendment or the Administrative Procedure Act notwithstanding a finding of "no significant hazards consideration."

[21] Indeed, counsel for Metropolitan Edison testified in 1961 before the Joint Committee on Atomic Energy and argued for retention of a hearing requirement when a hearing has been requested:

> I hope that this committee will seriously consider repeal of the mandatory hearing requirements of section 189(a), leaving intact, of course, the provisions for a hearing at the request of any person whose interest may be affected by the licensing proceedings.

Radiation Safety and Regulation: Hearings Before the Joint Comm. on Atomic Energy, 87th Cong., 1st Sess. 266 (1961) (testimony of George F. Trowbridge).

Raoul Berger, serving as an American Bar Association spokesperson, that

> 14 out of 15 of [the Atomic Energy Commission's] cases have been uncontested. And the central problem appears to be whether trial-type proceedings should be employed under sections 7 and 8 of the Administrative Procedures [*sic*] Act *in uncontested cases* . . . .

AEC Regulatory Problems: Hearings on H.R. 12336 and S. 3491 Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 87th Cong., 2d Sess. 64 (1962) (statement of Raoul Berger) (emphasis added).[22] *Accord, e.g., id.* at 32 (statement of Herzel H.E. Plaine, Chairman, Special Comm. on Atomic Energy Law, ABA). Thus an interpretation of section 189(a) that would permit the NRC to issue a *contested* license amendment without a hearing would enlarge section 189(a) beyond the scope originally intended.[23]

---

[22] In response the staff counsel to the Joint Committee noted:

> Mr. Berger, I think you are absolutely correct that the difficulty, the background that led to the Joint Committee study and the bills, was the concern over the handling by AEC of uncontested cases. . . .

AEC Regulatory Problems: Hearings on H.R. 12336 and S. 3491 Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 87th Cong., 2d Sess. 70 (1962) (remarks of David Toll).

[23] In support of its interpretation of § 189(a) the NRC quotes from a letter written in 1961 by former AEC Commissioner L.K. Olson to the Joint Committee on Atomic Energy, *reprinted in* Staff of the Joint Comm. on Atomic Energy, 87th Cong., 1st Sess., Improving the Regulatory Process, Vol. II, at 578–87 (Comm. Print 1961). The quoted portions of the letter suggest, in ambiguous terms, that the Commissioner was of the view that the AEC should be able to dispense with hearings on license amendments upon a finding that "no substantial new safety questions" are presented. *See* Reply Brief for Respondent Nuclear Regulatory Commission at 9. Even if Com-

The 1962 Report of the Joint Committee on Atomic Energy also suggests that Congress perceived the changes to section 189(a) as permitting the NRC to dispense only with notice and publication—not a hearing—upon a finding of "no significant hazards consideration":

> *In the absence of a request for a hearing*, issuance of an amendment to a construction permit, or issuance of an operating license, or an amendment to an operating license, would be possible without formal proceedings, but on the public record. . . .
>
> . . . .
>
> Finally, it is expected that *the authority given AEC to dispense with notice and publication* would be exercised with great care and only in those instances where the application presented no significant hazards consideration.

H.R. Rep. No. 1966, 87th Cong., 2d Sess. 8 (1962); S. Rep. No. 1677, 87th Cong., 2d Sess. 8 (1962) (emphasis added). And in a committee hearing one year prior, the Joint Committee on Atomic Energy had noted:

> When no substantial safety question is involved in . . . the amendment . . . the public interest would be protected by . . . publication of an apt notice in the Federal Register [24] and the giving of *an opportunity to any interested party to intervene*. . . .

---

missioner Olson intended his comments to apply to *contested* matters, it is clear from the rest of the legislative history that *Congress* did not share the Commissioner's view.

[24] It is not entirely clear what the Committee meant by the phrase "publication of an apt notice in the Federal Register." Presumably it only refers to publication of the amendment *after the Commission has issued it*. This is not inconsistent with the fourth sentence of § 189(a), adopted in 1962, which dispenses with 30 days' notice and publication in the Federal Register of the Commission's *intent to issue* a license amendment without a hearing.

This ambiguity in the quoted language is not unique in the context of § 189(a). The text and legislative history of the sec-

Staff of the Joint Comm. on Atomic Energy, 87th Cong., 1st Sess., Improving the Regulatory Process, Vol. II, at 49–50 (Comm. Print 1961) (emphasis added). The language of the reports, consonant with the plain meaning of section 189(a), thus indicates that the section only permits the NRC to issue a license amendment without a hearing when there has been no hearing request.[25]

Statements by Representative Holifield, Chairman of the Joint Committee on Atomic Energy, and Senator Pastore, Vice-Chairman, on the floors of their respective houses further reinforce the language in the reports. Both individuals explicitly stated that the "amendment [to section 189(a)] in no way limits the right of an interested party to intervene and request a hearing at some later stage, nor does it affect the right of the Commission to hold a hearing on its own motion." 108 Cong. Rec. 16,548 (1962) (remarks of Rep. Holifield); *see id.* at 15,746 (remarks of Sen. Pastore). The interpretation that the NRC

---

tion are replete with ambiguities and inconsistencies. *Cf.* note 20 *supra*. But there is no ambiguity in the legislative history or the text of § 189(a) with respect to the question before this court—whether a finding of "no significant hazards consideration" permits the NRC to dispense with a hearing.

[25] Whether petitioners did in fact request a hearing was not argued by the parties. While respondent United States suggests in a footnote that "[i]t is not wholly clear that petitioners did make such a request," Memorandum of Respondent United States at 6 n.2, we are convinced that the petitioners requested a hearing. In *Brooks v. Atomic Energy Comm'n*, 476 F.2d 924, 926 (D.C. Cir. 1973) (*per curiam*), this court held that expressions of interest may be sufficient to constitute a request for a hearing. In the instant case petitioners' continued interest in—and opposition to—the actions of the NRC at TMI-2 clearly constituted a request for a hearing. Indeed, the petitioners were among the many that submitted comments in April–May 1980 to the NRC regarding the Commission's Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere. *See* text at notes 5–6 *supra*.

and the public utilities press upon us,[26] however, would "limit[ ] the right of an interested party to intervene and request a hearing."

In sum, we are confident that *Brooks* was properly decided and that it dictates the construction that must be attached to the last sentence of section 189(a). Because the NRC's finding of "no significant hazards consideration" did not entitle the Commission to dispense with a requested hearing prior to issuance of the OTML, we hold that its

---

[26] As part of their argument the NRC and the public utilities contend that the NRC, and the Atomic Energy Commission prior to the creation of the NRC, consistently interpreted the section as permitting license amendments to be issued without a hearing upon a finding of "no significant hazards consideration." *See* 10 C.F.R. § 2.105(a)(3) (1980); *id.* § 50.58(b); *id.* § 50.59(c) (1963); 45 Fed. Reg. 42,908 (1980); 45 Fed. Reg. 20,491-92 (1980); 43 Fed. Reg. 13,928 (1978); 41 Fed. Reg. 10,482-83 (1976); 40 Fed. Reg. 18,231 (1975); 39 Fed. Reg. 10,554 (1974); 39 Fed. Reg. 1.875-76 (1974); 27 Fed. Reg. 12,184 (1962); *Consumers Power Co.*, 7 A.E.C. 297 (1974); *General Electric Co.*, 1 A.E.C. 541 (1960). Even if the history of regulations and administrative practice by the AEC and the NRC were unambiguous—which we do not think it is—deference to the agencies' interpretations would be inappropriate in this case. As we have indicated, the statute and legislative history are in our view unambiguous: a finding of "no significant hazards consideration" does not permit the NRC to dispense with a hearing. As the Supreme Court has noted, "[A]dministrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933).

It is also worth noting that because of today's decision the NRC will not be able to put into effect a regulation proposed earlier this year that would explicitly permit the NRC to dispense with hearings on license amendments upon a finding of "no significant hazards consideration." *See* 45 Fed. Reg. 20,491-92 (1980). Such a regulation would be clearly inconsistent with the congressional mandate in § 189(a).

failure to provide a hearing violated section 189(a) of the Atomic Energy Act.

IV. The NRC's Memorandum and Order

The second order issued by the NRC on June 12, 1980, entitled "Memorandum and Order" (Venting Order), authorized Metropolitan Edison to vent the atmosphere of the reactor containment building. Respondents argue that section 189(a) did not require a hearing with respect to the Venting Order because the order was not a license amendment. We reject respondents' description of the order and find that section 189(a) was indeed applicable and, as a consequence, that petitioners were entitled to a hearing on the Venting Order.

Section 189(a), quoted in pertinent part in note 2 *supra*, requires that a hearing be given upon request "[i]n any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit." 42 U.S.C. § 2239(a) (1976). Respondents maintain that because the Venting Order merely lifted a prior suspension of the licensee's authority to vent, and did not authorize release of a greater amount of radioactive gas than was permitted by the original technical specifications of the operating license, it was not a license amendment. However, on the facts here, this characterization of the Venting Order appears to be nothing more than an after-the-fact rationalization, which finds no support in the record of this case.

The NRC's July 20, 1979 "Order for Modification of License" suspended Metropolitan Edison's authority to operate TMI-2 and directed the licensee to "maintain the facility in a shutdown condition in accordance with the approved operating and contingency procedures." 44 Fed. Reg. 45,271 (1979). In a second order, dated February 11, 1980, the NRC recognized that TMI-2's operating license did not permit venting as part of a cleanup operation because the license specifications pertained only to normal operation of the facility:

> [I]n the present post-accident status of the facility, the license itself does not include explicit provisions or Technical Specifications for assuring the continued maintenance of the plant in a safe, stable condition or for coping with foreseeable off-normal conditions. Moreover, certain portions of the facility's operating license relate to or govern power operation of the facility, the authority for which was suspended by the Order of July 20, 1979. *These provisions are now simply inapplicable to the facility in its present post-accident condition.*

45 Fed. Reg. 11,282 (1980) (emphasis added). The NRC concluded that "the facility's operating license should be *modified* so as to: . . . [p]rohibit venting or purging . . . until . . . approved by the NRC." *Id.* (emphasis added).

There is no indication that this order was intended or perceived as a mere suspension of the licensee's existing authority to vent. In February 1980, it appeared that adequate venting of the reactor building might not be possible under the existing license authority. Consequently, the NRC acted to modify—and thus amend—the TMI-2 license in order to regulate the plant in an "off-normal" condition and to facilitate whatever venting scheme might be determined to be necessary. By its very terms, the February 11, 1980 order was a license amendment intended to reflect TMI-2's post-accident condition. Given that the original operating license was inapplicable, the NRC could not simply rely on its terms as authority for the venting. Authority for venting—in this case the June 12 Venting Order—therefore had to come in the form of a license amendment.

The specific language of the June 12 Venting Order further corroborates our interpretation of that order as a license amendment. In the Venting Order, the NRC noted that TMI-2 was being operated according to the provisions of the February 11, 1980 order, *see* Venting Order at 10, *reprinted in* App. 134, and the Venting Order did nothing to change that. TMI-2's operating license was not simply

"unsuspended" by the Venting Order. Instead, in the words of the NRC, "[i]n the present order we give the approval contemplated by [the February 11] restriction insofar as necessary for the licensee to conduct a purging of the TMI-2 containment." *Id.* at 11, *reprinted in* App. 135. Nowhere does the Venting Order support respondents' characterization of it as a reinstatement of some preexisting authority. Rather, the Venting Order appears as an amendment to the February 11 amendment to TMI-2's operating license. Because the June 12 Venting Order modified the February 11 order, and granted the licensee authority to do something that it otherwise could not have done under the existing license authority, the Venting Order was a license amendment within the scope of section 189(a).

Our reading of the Venting Order is also supported by Congress' intent in enacting section 189(a). By requiring a hearing upon request whenever a license is "grant[ed], suspend[ed], revok[ed], or amend[ed]," Congress apparently contemplated that interested parties would be able to intervene before any significant change in the operation of a nuclear facility. Whatever the Venting Order is called, it certainly was such a change.

As we held in Section III of this opinion, the NRC is required under section 189(a) to hold a hearing on a license amendment whenever interested parties request one.[27] Petitioners did so in this case, *see* note 25 *supra*, and the NRC therefore acted unlawfully in refusing to hold a hearing on the Venting Order.[28]

---

[27] We note that the NRC and the public utilities briefly argued that a full adjudicatory hearing was not required here. *See* Brief for Respondent Nuclear Regulatory Commission at 32-34; Brief for Intervenor-Respondents at 44-45. Because this question was not fully briefed and argued by the parties, we express no opinion on the precise nature of the hearing required by § 189(a).

[28] Respondent United States argued that petitioners requested a hearing, as provided for in the OTML, and then failed

V. CONCLUSION

Because the NRC's actions in this case are "capable of repetition yet, evading review," the issues presented by petitioners are not moot. We hold that under section 189(a) the NRC is required to hold a hearing on license amendments whenever interested parties request one. Finally, we hold that the June 12 Venting Order, which authorized the NRC to release radioactive gas from the disabled nuclear reactor, was a license amendment subject to the hearing requirements of section 189(a). Because the petitioners requested a hearing on the two June 12 license amendments, they were entitled to a hearing under section 189(a). The NRC's refusal to hold a hearing violated the petitioners' statutory rights.

---

to exhaust their administrative remedies by withdrawing their motion. The intended scope of that hearing and the facts surrounding the withdrawal are somewhat muddled by the record. What is clear, however, is that the offer of a hearing was made only in the OTML and not in the Venting Order. Presumably, then, petitioners would have been able to challenge only the license amendment substituting off-site dosage limits for release limits and not the actual decision to vent. Moreover, any hearing was to revolve around the issues whether the license amendment was in the public interest and whether it should be sustained. *See* App. 123. It appears from this description that petitioners would not have been permitted to raise their arguments regarding the NRC's interpretation of § 189(a), which formed the basis of this suit. Finally, the Commission specifically provided that a request for a hearing would not stay the effectiveness of the order. *See id.* But § 189(a) required a hearing upon request on the Venting Order before it went into effect; a hearing after the venting had been completed would not have satisfied the statute's requirement. For all these reasons, the remedy that petitioners allegedly failed to exhaust was an inadequate one and therefore need not have been pursued. *See McNeese v. Board of Educ.*, 373 U.S. 668, 674–76 (1963); *Union Pac. R.R. Co. v. Board of County Comm'rs*, 247 U.S. 282 (1918).