The Burger Court Opinion Writing Database

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.

435 U.S. 519 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 20, 1978

Re: 76-419 - Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.

76-528 - Consumers Power Co. v. Nelson Aeschliman

MEMORANDUM TO THE CONFERENCE:

This will confirm that a special Conference will be held at 10:15 p.m. on Monday, following a brief sitting, to discuss the above-mentioned cases. Any others may be discussed by unanimous consent or waivers.

WEB

Wm Brennan
1977

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 22, 1978

Dear Bill:

Re: 76-419 Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc.

This will confirm that I am prepared to join an opinion along the lines of your March 14 memorandum.

Regards,

WEB

Mr. Justice Rehnquist

cc: The Conference

✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 30, 1978

Dear Bill:

Re: 76-419; 528 Vt. Yankee Nuclear Power v. National Resources Defense Council; Consumers Power Co. v. Aeschliman

This will serve to confirm my informal join by memorandum March 22.

Regards,

WEB

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 12, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-419, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., and, No. 76-528, Consumers Power Co. v. Nelson Aeschliman, et. al.

After studying the supplemental responses on mootness, I am convinced that subsequent events have not made these cases moot. However, I am equally convinced that there is no reason for us to render a decision on the merits of these cases.

I think we would have to "stretch" to read the opinion of the court of appeals as mandating cross-examination in rulemaking held under NEPA and 5 U.S.C. § 553. Moreover, the question whether environmental consequences of the spent fuel cycle must be considered during the licensing of individual reactors is largely mooted by the Nuclear Regulatory Commission's spent fuel rulemaking, in which NRC has -- independently of the court of appeals' decision -- agreed that such consequences must be considered during the cost-benefit stage of licensing. With respect to Vermont Yankee this leaves as the only question whether there was an adequate basis for the first spent fuel rule adopted. This, too, is moot as a practical matter for all licensees except Vermont Yankee itself, since the NRC has, after remand from the court of appeals, determined that the data values in its original table S-3 were not as good as they might have been and has proposed new values after new proceedings, which will henceforth be in effect.

In my opinion, none of the issues presented in No. 76-528 which are independent of the spent fuel issues warrant consideration by this Court on certiorari.

For the reasons stated above, I would dismiss the grants of certiorari in these cases as improvidently granted. I suppose a supporting per curiam would be desirable and attach a hastily written one which might be adequate with some polishing.

W.J.B., Jr.

1st DRAFT

SUPREME COURT OF THE UNITED STATES

VERMONT YANKEE NUCLEAR POWER CORP. v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., et. al.*

No. 76-419. Argued November --, 1977.
Decided January --, 1978.

PER CURIAM.

On December 11, 1967, petitioner, Vermont Yankee Nuclear Power Corporation, was granted a construction permit for a nuclear power plant to be built in Vernon, Vermont. 4 A.E.C. 36 (1967). Pursuant to rules of the Nuclear Regulatory Commission (formerly the Atomic Energy Commission), petitioner thereafter applied for an operating permit for the Vernon plant. This application

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*/ With No. 76-528, Consumers Power Co. v. Nelson Aeschilman, et. al.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 21, 1978

Dear Mr. Justice Marshall:

I spoke with Mr. Justice Brennan by phone yesterday concerning the conference scheduled for Monday, January 23, 1978. Although he may well be in the office Monday morning, he will not arrive before 11:00 a.m. Therefore, he asks if you would vote for him at the conference. His votes are as follows:

1. No's 76-419 & 76-528, Vermont Yankee Power Corp. v. NRDC and Consumers Power Co. v. Nelson Aeschliman. We circulated a memorandum and rough draft per curiam dismissing these cases as improvidently granted (I have attached a copy for your convenience). As explained in the circulation, Mr. Justice Brennan feels (a) that the cases are not technically moot, but (b) they should nonetheless be dismissed.

2. No. 76-944, Nixon v. Warner Communications, Inc. Mr. Justice Brennan stands by his initial vote to affirm, but would be willing to join a reversal along the lines suggested by Mr. Justice White at the first conference on these cases, if that can be done in light of recently submitted briefs of the parties.

Yours,

Whit Peters
Law Clerk

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 10, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-419, Vermont Yankee Nuclear Power Corp. v. Nuclear Regulatory Comm'n, and No. 76-528, Consumers Power Co. v. Nuclear Regulatory Comm'n

I still feel strongly that we should dismiss these cases as improvidently granted. For this reason, I am circulating another draft of a per curiam in an attempt to justify that disposition. Because I was unable to attend the conference at which my earlier per curiam was discussed, I am not aware of all the objections to it. However, to the extent I have learned of objections, I have attempted to accomodate them.

My basic reason for thinking we should DIG is that there is simply not much left of these cases in light of a correct reading of the record and subsequent administrative developments. Yet if there was a Court preferring to remand these cases to the Court of Appeals to allow it to sort out what is left of these cases -- as we did in EPA v. Brown, 431 U.S. 99 (1977), last Term -- I would go along, but I really do not see the need.

W.J.B., Jr.

v

SUBSTANTIAL CHANGES THROUGHOUT

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

2d WANG DRAFT

From: Mr. Justice Brennan

Circulated: 1/12/78

SUPREME COURT OF THE UNITED STATES

Recirculated: 2/10/78

VERMONT YANKEE NUCLEAR POWER CORP. v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., et. al.*

No. 76-419. Argued November 28, 1977.
Decided February --, 1978.

PER CURIAM

We granted certiorari[1/] to consider important questions concerning the application of federal environmental law to the licensing of nuclear power reactors. For reasons set forth below, we now dismiss the writs as improvidently granted.

I

In 1967 petitioner in No. 76-419, Vermont Yankee Nuclear Power Corporation, was granted a construction permit for a nuclear power plant to be built near Vernon, Vermont.[2/] Pursuant to rules of the Atomic Energy

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*/ Consolidated with No. 76-528, Consumers Power Co. v. Nelson Aeschliman, et. al.

1/ 429 U.S. 1090 (1977).

2/ Vermont Yankee Nuclear Power Corp., 4 AEC 36 (1967).

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 2/17/78

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 76–419 AND 76–528

Vermont Yankee Nuclear Power Corporation, Petitioner,
76–419 *v.*
Natural Resources Defense Council, Inc., et al.

Consumers Power Company, Petitioner,
76–528 *v.*
Nelson Aeschliman et al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February —, 1978]

PER CURIAM.

We granted certiorari[1] to consider important questions concerning the application of federal environmental law to the licensing of nuclear power reactors. For reasons set forth below, we now dismiss the writs as improvidently granted.

I

In 1967 petitioner in No. 76–419, Vermont Yankee Nuclear Power Corporation, was granted a construction permit for a nuclear power plant to be built near Vernon, Vt.[2] Pursuant to rules of the Atomic Energy Commission, now the Nuclear Regulatory Commission,[3] petitioner thereafter applied for an operating permit for the Vernon plant.[4] This application

[1] 429 U. S. 1090 (1977).

[2] *Vermont Yankee Nuclear Power Corp.*, 4 A. E. C. 36 (1967).

[3] Hereafter the word "Commission" will be used to refer to either the Atomic Energy Commission or its successor as the case may be.

[4] For a discussion of the licensing scheme established by the Atomic

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 27, 1978

Memorandum Re: No. 76-419, Vermont Yankee Nuclear Power Corp v. NRDC; No. 76-528, Consumers Power Co. v. Aeschliman

Dear Bill,

Your exhaustive draft on these cases, it seems to me, largely confirms my feeling that a plenary decision here is of value only to the immediate parties. However, now that all this effort has been spent, there is little to be gained by DIG'ing these cases. Therefore, I now withdraw my suggestion to DIG.

If, however, your memo is to be a majority opinion for the Court, I feel that I must write separately with respect to Part II -- that is, unless you find it possible to change your draft to make this unnecessary.

With respect to Part II-A, I'm concerned that we do not confuse what is before us. At some points, you suggest that you agree that the NRC rulemaking decided (1) that the spent fuel cycle must be considered in reactor licensings and (2) that this rule should be applied retroactively to Vermont Yankee, albeit without reopening the license adjudication to perform the cost-benefit analysis inspection of Table S-3 showed to be unnecessary. If this is so, then the only issue is whether the NRC may do this. On this issue, I agree with you that "We can scarcely overturn the Commission's determination in this regard . . . ." Memo, at 18. However, I also agree with your conclusion, at 17-18, that NEPA requires the NRC to consider spent fuel issues in individual reactor licensings. Accordingly, and recognizing that the NRC's position on retroactive application of its rule is not free from doubt, I would write to make it clear both that NRC may adopt its rule and that it must.

In addition, I seriously question the paragraph that begins on page 18 and carries over to 19. Without knowing what "all the questions associated with fuel reprocessing or waste disposal," Memo, at 18, are, I feel in no position to say whether they must or must not be considered in licensing. Moreover, I have real trouble with the novel theory of judicial review that we uphold the Court of Appeals because of the "Commission's own opinion that it must give consideration to the environmental effects of the back-end of the fuel cycle." Id., at 18-19. This strikes me as putting the cart before the horse.

I am also troubled by Part II-B. I continue to adhere to my view that the Court of Appeals did not require the NRC to follow any specific procedures on remand. A point on which we are in apparent agreement. See Memo, at 21. Therefore I really must question what we are achieving by discussing the case as if it did. If the problem is that the Court of Appeals was too cavalier in its discussion, hoping to achieve by in terrorem effect what it knew it could not achieve directly, then we can take care of that -- as I tried to in my per curiam -- simply by interpreting the opinion narrowly. I do not think this case warrants anything more, especially since we are in agreement -- and the law in this Court is very clear -- that if enhanced procedures are ever to be required, they can only be required on a showing of need that is totally lacking in this case.

Second, since I think it is clear that, at the least, the Court of Appeals decided that there was an inadequate basis for the NRC's spent-fuel rule, I see no need to remand for further consideration of the issue of the adequacy of the spent fuel rule. Whether or not a remand on this issue could be said to "border[] on the Kafkaesque," Memo, at 37, I do think it simply wastes everyone's time.

Sincerely,

W.J.B., Jr.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 28, 1978

Memorandum re: Nos. 76-419 & 76-528, Vermont Yankee Nuclear Power Corp. v. NRDC

Thank you for your letter of February 27. Let me say in response that I am not sure a majority agrees that the spent-fuel rule was in fact applied retroactively. Were a majority to agree, then we would not have to decide the "must" issue. However, if there is no majority or if a majority would prefer not to decide the proper interpretation of the record, I would prefer to see this section written to reflect that NRC must and a fortiori that it may consider spent-fuel issues in individual reactor licensings. I would not be able to agree to affirm the Court of Appeals because they happen to be in agreement with a decision of the NRC.

With respect to Part II-B, I see that we are simply in disagreement about the proper reading of the Court of Appeals' opinion. Because of this and because I am not sure where a majority lies on this question, I will write separately along the lines I have suggested in my circulated per curiam. Although, on my view, the Court of Appeals necessarily decided that the record was inadequate to support the NRC's rule, I am not inclined -- as you apparently also are not -- to review the record and pass on its adequacy. Instead, given the passage of time and events as outlined in my per curiam, I would simply decline to review this issue.

I will attempt to circulate something shortly.

Sincerely,

W.J.B., Jr.

Mr. Justice Rehnquist

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 20, 1976

Re: Nos. 76-419 & 76-528, Vermont Yankee v. NRDC.

Dear Bill,

As Byron noted the other day, you are a damned good fisherman. Indeed, so good that I now give up the sporting fight and, again like Byron, "acquiesce" in your catch in these cases. (You know I couldn't possibly join).

Bill

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 27, 1978

RE: Nos. 76-419 Vermont Yankee Nuclear Power v. Natural Resources Defense Council and
No. 76-528 Consumers Power Co. v. Aeschliman

Dear Bill:

Just to complete the meal of crow, I also acquiesce in your opinion for the Court.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 16, 1978

Re: Nos. 76-419 & 76-528
Vermont Yankee Nuclear Power Corp.
v. NRDC

Dear Bill,

My preference in this case was to dismiss the writ as improvidently granted with a Per Curiam, in the light of subsequent administrative developments, but that is now a lost cause. I am in substantial agreement with the memorandum you have circulated, and, if it is converted into an opinion for the Court, I would join it.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 24, 1978

Re: Nos. 76-419 & 76-528, Vermont Yankee Nuclear Power Corp. v. NRDC

Dear Bill,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 7, 1978

Re: 76-419 Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc.

&

76-528 Consumers Power Company v. Nelson Aeschliman

Dear Bill,

I am in essential agreement with most of your memorandum in this case. What questions I have I am sure can be worked out when you can spare a moment from pen, pencil and paper.

Sincerely,

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 14, 1978

Re: 76-419 Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.

&

76-528 Consumers Power Company v. Aeschliman

Dear Bill,

I join.

Sincerely,

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 24, 1978

Re: Nos. 76-419 & 76-528--

Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., et al
and
Consumers Power Company v. Nelson Aeschliman, et al.

Dear Bill,

Please join me.

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 3, 1978

Re: Nos. 76-419, 76-528, Vermont Yankee Nuclear Power Corp v. NRDC

Dear Bill:

With respect to Part II-B of your memorandum, I agree with Bill Brennan that the Court of Appeals' opinion, while extremely ambiguous, is most appropriately read only to hold that the spent fuel rule was inadequately supported by the rulemaking record. However, I would be in substantial agreement with your analysis if I thought the procedural questions were presented by this case. If you could soften some of the language just a bit, it would be easier for me to join your position. I would be content with something along the lines of the following:

(1) Substitute the following for the first sentence of the first full paragraph on p. 21:

> In prior opinions we have intimated that, even in a rule-making proceeding, when an agency is making a "quasi-judicial" determination by which a very small number of persons are "'exceptionally affected, in each case upon indivudual grounds,'" additional procedures may be required in order to afford the aggrieved individuals due process.

(2) Substitute for the second full sentence on p. 22:

> Absent Constitutional constraints or extraordinary circumstances "the administrative agencies 'should be free . . .

(3) Substitute the following for the third line in the first full paragraph on p. 22:

> that a court routinely may require . . .

I am in agreement with the remainder of your memorandum, as recirculated on March 1.

Sincerely,

T.M.

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 6, 1978

Re: Nos. 76-419, 76-528, Vermont Yankee Nuclear Power Corp. v. NRDC

Dear Bill:

Sorry for the mixup in the page references in my letter of March 3. The first suggestion was intended to refer to the first sentence in the first full paragraph on p. 19 of your second draft; the second suggestion was addressed to the second full sentence on p. 20 of your second draft.

Sincerely,

T. M.

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 31, 1978

Re: No. 76-419 - Vermont Yankee Nuclear Power v.
Natural Resources Defense Council and
No. 76-528 - Consumers Power Co. v. Aeschliman

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Rehnquist

cc: The Conference

(file copy)

Supreme Court of the United States
Washington, D. C. 20543

76-419

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 29, 1977

Dear Chief:

As I have a long-standing commitment to be in New York Wednesday evening, I must leave the Court no later than 4:15 p.m. to make my 4:50 p.m. flight.

You may recall that because of my law firm's participation I am out of 76-419, Vermont Yankee Nuclear Power Corp. If it will not inconvenience you or other members of the Conference, I would appreciate our considering first the other cases that are to be discussed at tomorrow's Conference.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 27, 1978

No. 76-419 Vermont Yankee v. Natural Resources Defense Council
No. 76-528 Consumers Power v. Aeschilman

Dear Bill:

Please show at the end of the next draft of your memorandum that I took no part in the consideration or decision of the above cases.

Sincerely,

L. Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 17, 1978

Re: No. 76-419 - Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council; and No. 76-528 - Consumers Power Co. v. Nelson Aeschliman

Dear Bill:

As presently disposed, I would dissent from any action of the Court dismissing the writ in this case as improvidently granted. Since you conclude in your cover memo that the case is not moot, I gather that we would both agree that the decisions of the Court of Appeals continue to jeopardize Vermont Yankee's operating license and Consumers Power's construction license. If they do not, and the case is therefore moot, the proper course would be to vacate and remand with instructions to dismiss. United States v. Munsingwear, 340 U.S. 36 (1950).) Given the continuing jeopardy to these nuclear power operations, I cannot agree that we are no longer faced by "meaningful litigation." Petitioners, joined by the Solicitor General, contend that the decisions of the Court of Appeals are having a continuing and adverse effect on the Commission's licensing and rulemaking proceedings. Respondents' briefs, which principally stress mootness, do not convince me to the contrary. Since we have already heard oral argument, studied the issues, and voted on them in Conference, I would proceed to decide them publicly.

Sincerely,

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 10, 1978

Re: No. 76-419 - Vermont Nuclear Power Corp. v. National Resources Defense Council, Inc., et al.

Dear Bill:

I realize that, as you state in your memorandum of February 10th, you were not at the Conference of January 20th, and I also realize that my recollection of the Conference deliberations are very likely no more accurate than those of any of the rest of us who attended. Nonetheless, these recollections are that the Chief, Byron, John, and I voted against dismissing the case as improvidently granted, and I assume as a result of this vote the Chief on the assignment sheet which was circulated January 24th assigned the case to me for a memorandum. I anticipate circulating such a memorandum by the middle of next week.

Sincerely,

WHR

Mr. Justice Brennan
Copies to the Conference

P.S. As you know, Harry and Lewis are out of the case.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: FEB 24 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 76–419 AND 76–528

Vermont Yankee Nuclear Power Corporation, Petitioner,
76–419 *v.*
Natural Resources Defense Council, Inc., et al.

Consumers Power Company, Petitioner,
76–528 *v.*
Nelson Aeschliman et al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1978]

Memorandum of MR. JUSTICE REHNQUIST.

In 1946, Congress enacted the Administrative Procedure Act, which as we have noted elsewhere was not only "a new, basic and comprehensive regulation of procedures in many agencies," *Wong Yang Sun* v. *McGrath*, 339 U. S. 33 (1950), but was also a legislative enactment which settled "long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest." *Id.*, at 40. Section 553 of the Act, dealing with rule-making, requires that ". . . notice of proposed rulemaking shall be published in the Federal Register . . . ," describes the contents of that notice, and goes on to require in subsection (c) that after the notice the agency "shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 27, 1978

Re: Nos. 76-419 and 76-528 - Vermont Yankee Nuclear Power Corp. v. NRDC

Dear Bill:

Thank you for your letter of February 27th pertaining to the above entitled case. I think I can make some of the accommodations which you specify in your letter, but am more doubtful about some of the others.

To be specific, I certainly agree with the statement contained in the third paragraph of your letter (regarding consideration of the spent fuel cycle) that "the only issue is whether the NRC may do this". We both agree that we would not and cannot overturn the Commission's determination in this regard. It seems to me that that is as far as we need go in this case; your suggestion that the opinion should be written "to make it clear both that NRC may adopt its rule and that it must" adopt the rule would seem to me to be dicta. I would prefer not to pass on it here, but if a majority of the Court wishes to do so, I will write it that way, since I happen to agree with your conclusion that it not only "may", but "must".

It seems to me that the Commission's conclusion that it may consider the spent fuel cycle takes care of the substantive

problem which you deal with in the first paragraph of the second page of your letter. Really, all we have before us is Vermont Yankee's claim that NRC may not pass on the spent fuel cycle, and we are rejecting that. This is an adequate reason for upholding the determination of the Court of Appeals on that point, although for a different reason than the Court of Appeals did; the Court of Appeals was considering the claim of NRDC that the agency must undertake this consideration, but by reason of the change of position of the parties this issue is really no longer before us.

Thus far I do not believe we are in substantive disagreement, and I will be perfectly willing to try to rewrite Part II-A to make this more clear.

I do not feel that I can accommodate the suggestions contained in the second and third paragraphs on page 2 of your letter. For the reasons contained in pages 19-21 of my circulating memorandum in this case, I do not think it can be fairly said that the Court of Appeals did not review the procedures employed by the agency and remand because it considered the procedures inadequate. It admittedly did not require NRC to follow any specific procedures, but as I have summarized the import of its opinion on pages 19-21, I think that the mandate to the agency is inescapable.

I likewise do not think it sufficiently clear that Judge Bazelon and Judge Edwards agreed with Judge Tamm that there was simply an inadequate basis for NRC's spent fuel rule under the Administrative Procedure Act, and the purpose of the remand prescribed in my memorandum is to permit them to join him in that conclusion if they so desire.

In sum, I am hopeful that I can accommodate entirely or in large part the substance of your suggestions with respect to the requirement that the agency consider the spent fuel cycle.

I cannot, however, bring myself to write an opinion that says we took this case because it involved important issues involving the scope of judicial review of agency action, but we now proceed to read the Court of Appeals' opinion narrowly, so as not to implicate those issues, and therefore affirm its judgment.

Sincerely,

WHR

Mr. Justice Brennan

Copies to the Conference

STYLISTIC CHANGES THROUGHOUT

pp 15-16

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: MAR 1 1978

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 76-419 AND 76-528

Vermont Yankee Nuclear Power Corporation, Petitioner,
76-419 *v.*
Natural Resources Defense Council, Inc., et al.

Consumers Power Company, Petitioner,
76-528 *v.*
Nelson Aeschliman et al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1978]

Memorandum of MR. JUSTICE REHNQUIST.

In 1946, Congress enacted the Administrative Procedure Act, which as we have noted elsewhere was not only "a new, basic and comprehensive regulation of procedures in many agencies," *Wong Yang Sun* v. *McGrath*, 339 U. S. 33 (1950), but was also a legislative enactment which settled "long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest." *Id.*, at 40. Section 553 of the Act, dealing with rule-making, requires that ". . . notice of proposed rulemaking shall be published in the Federal Register . . . ," describes the contents of that notice, and goes on to require in subsection (c) that after the notice the agency "shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 6, 1978

Re: Nos. 76-419 and 76-528 - Vermont Yankee Nuclear Power Corp. v. NRDC

Dear Thurgood:

Thank you for your letter of March 3rd, with its suggestions for the memorandum in the above entitled case. I do not think we are far apart in substance, but either some of your proposed changes would require some additional language to make the memorandum flow correctly, or you were working from an earlier draft of the memorandum with respect to your specific changes. Since I am dictating this in the office on Saturday, and I really do not know how our filing system works, I cannot locate the earlier draft. I will get back to you as soon as I do with specific replies or proposed additional language which I would hope would meet the substance of your suggestions.

Sincerely,

Mr. Justice Marshall

Copies to the Conference

P.S. The fact that I don't understand our filing system is in no sense a reflection on the staff in our chambers; I have consciously avoided making any effort to understand it. WHR

pp 3, 13-15, 20-21, 23, 25

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

3rd DRAFT Recirculated: MAR 14 1978

SUPREME COURT OF THE UNITED STATES

Nos. 76–419 AND 76–528

Vermont Yankee Nuclear Power Corporation, Petitioner,
76–419 *v.*
Natural Resources Defense Council, Inc., et al.

Consumers Power Company, Petitioner,
76–528 *v.*
Nelson Aeschliman et al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1978]

Memorandum of MR. JUSTICE REHNQUIST.

In 1946, Congress enacted the Administrative Procedure Act, which as we have noted elsewhere was not only "a new, basic and comprehensive regulation of procedures in many agencies," *Wong Yang Sun* v. *McGrath*, 339 U. S. 33 (1950), but was also a legislative enactment which settled "long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest." *Id.*, at 40. Section 553 of the Act, dealing with rule-making, requires that ". . . notice of proposed rulemaking shall be published in the Federal Register . . . ," describes the contents of that notice, and goes on to require in subsection (c) that after the notice the agency "shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of

P. 1

STYLISTIC CHANGES THROUGHOUT

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Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
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Mr. Justice Rehnquist

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4th DRAFT

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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In 1946, Congress enacted the Administrative Procedure Act, which as we have noted elsewhere was not only "a new, basic and comprehensive regulation of procedures in many agencies," *Wong Yang Sun* v. *McGrath*, 339 U. S. 33 (1950), but was also a legislative enactment which settled "long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest." *Id.*, at 40. Section 553 of the Act, dealing with rule-making, requires that ". . . notice of proposed rulemaking shall be published in the Federal Register . . . ," describes the contents of that notice, and goes on to require in subsection (c) that after the notice the agency "shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 5, 1978

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 76-419, Vermont Yankee Nuclear Power Corp. v. NRDC, Inc., and No. 76-528, Consumers Power Co. v. Aeschliman

Two cases were held for Vermont Yankee. I think both should be granted, vacated, and remanded for further consideration in light of Vermont Yankee, and will vote accordingly.

1) No. 76-548, Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.

This case was decided in the same Court of Appeals opinion which decided No. 76-419, Vermont Yankee. It is the instant Baltimore case which actually challenges the rulemaking proceedi in which the spent fuel rule was promulgated. Vermont Yankee originally involved a challenge to the license issued for Vermon Yankee's nuclear reactor whether or not the rule was valid. Since the Commission applied the rule to Vermont Yankee's licens application (and since the Court of Appeals thought that it was necessary to at least consider the back-end of the fuel cycle in licensing proceedings), we were required to consider the validity of the rule even though we only granted cert in Vermont Yankee and not in this case. Since in Vermont Yankee we directl addressed the Court of Appeals' invalidation of the spent fuel rule, I will vote to grant, vacate and remand this case for reco sideration in light of our decision in Vermont Yankee.

2) No. 76-745, Long Island Lighting Company v. The Lloyd Harbor Study Group, Inc.

In 1973, a permit was issued to petitioner to construct the Shoreham Nuclear Power Station. Thereafter, the construction

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 10, 1978

Re: 76-419 and 76-528 - Vermont Yankee Nuclear Power Corp. v. NRDC

Dear Bill:

Please join me.

Respectfully,

Mr. Justice Rehnquist

Copies to the Conference