

ORIGINAL

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-2399 & 82-358

TITLE METROPOLITAN EDISON COMPANY, ET AL.,  
Petitioners

v.

PEOPLE AGAINST NUCLEAR ENERGY, ET AL.; and

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL.,  
Petitioners

v.

PEOPLE AGAINST NUCLEAR ENERGY, ET AL.

PLACE Washington, D. C.

DATE March 1, 1983

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3 METROPOLITAN EDISON COMPANY, ET       :

4     AL.,                                       :

5                                       Petitioners,       :

6                         v.                               :   No. 81-2399

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8     ET AL.; and                               :

9 UNITED STATES NUCLEAR REGULATORY       :

10    COMMISSION, ET AL.,                    :

11                                       Petitioners,       :

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15 - - - - -x

16                                       Washington, D.C.

17                                       Tuesday, March 1, 1983

18                         The above-entitled matters came on for oral

19 argument before the Supreme Court of the United States

20 at 10:02 o'clock a.m.

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1 APPEARANCES:

2 PAUL M. BATOR, ESQ., Office of the Solicitor General,  
3 Department of Justice, Washington, D.C.; on behalf  
4 of the Petitioners.

5 WILLIAM S. JORDAN, III, ESQ., Washington, D.C.; on  
6 behalf of the Respondents.

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1                                    P R O C E E D I N G S

2                    CHIEF JUSTICE BURGER: We will hear arguments  
3 first this morning in Metropolitan Edison against People  
4 Against Nuclear Energy.

5                    Mr. Bator, you may proceed whenever you are  
6 ready.

7                    ORAL ARGUMENT OF PAUL M. BATOR, ESQ.,  
8                    ON BEHALF OF THE PETITIONERS

9                    MR. BATOR: Mr. Chief Justice, and may it  
10 please the Court, this case involves Three Mile Island  
11 Unit 1 nuclear power reactor, TMI 1. TMI 1 is one of  
12 two units at Three Mile Island. It was in the other  
13 unit, TMI 2, that the Three Mile Island accident  
14 occurred in March of 1979.

15                    When that accident occurred, TMI 1 happened to  
16 be shut down for routine refueling, and it has been shut  
17 down ever since, and this case involves its restart.

18                    The question before the Court is whether the  
19 Nuclear Regulatory Commission, before it may begin --  
20 before it may permit TMI 1 to restart, is required by  
21 the National Environmental Policy Act, NEPA, is required  
22 to make an inquiry in order to predict whether and to  
23 what extent psychological stress will occur on restart  
24 because of the fear and anxiety of neighboring residents  
25 that there may be a second accident at Three Mile Island.

1           The government's central contention is that  
2 NEPA does not require administrative agencies to conduct  
3 an inquiry for the purpose of predicting fears that  
4 their proposed actions may engender.

5           The central purpose of NEPA is to require the  
6 government to take a hard look at the impact of its  
7 proposed actions on the natural environment, and on the  
8 direct consequence of those interventions, and we argue  
9 that stress caused by fear and anxiety that government  
10 action may be harmful to you is not an environmental  
11 impact, and is therefore not cognizant.

12           Now, I may give a humble example to the  
13 Court. If the government proposes to put massive  
14 amounts of fluoride into the water, of course, the  
15 government must make a scrupulous inquiry whether the  
16 fluoridation will be harmful or helpful to health. But  
17 our contention is that Congress did not contemplate that  
18 a separate and distinct inquiry be made into whether  
19 fluoridation will cause popular anxiety.

20           QUESTION: Well, isn't the question here  
21 whether the Act of Congress and Congress itself intended  
22 that that be a subject of the inquiry, rather than  
23 whether in fact anxiety is aroused by these problems?

24           MR. BATOR: Yes, Mr. Chief Justice. Our  
25 contention is that the statute, properly read, does not

1 require the Commission to make such a subsidiary and  
2 distinct inquiry into the question of stress.

3           On the other hand, the Court of Appeals of the  
4 District of Columbia in this case held that it is not  
5 enough to do what the Commission in this case did, which  
6 is to engage in an extensive, an exhaustive inquiry into  
7 the question of the safety of restart, taking into  
8 account for that inquiry the painful lessons of TMI 2.

9           Rather, the Court ruled that apart from the  
10 actual safety issue, stress resulting from fears about  
11 safety is an independent factor.

12           QUESTION: Mr. Bator, can I ask you about your  
13 hypothetical? It seems to me that is different from  
14 this case, because there you are assuming an  
15 environmental impact, namely, the fluoridation, and  
16 psychological impairment of health as a result of an  
17 environmental impact. Is that correct? Are you saying  
18 that wouldn't be something you would look at?

19           MR. BATOR: We are saying --

20           QUESTION: Then you are arguing that  
21 psychological health is not health.

22           MR. BATOR: No, Your Honor. We readily  
23 concede that psychological health is health.

24           QUESTION: And you are saying you don't have  
25 to look at it even if it's caused by a change in the

1 environment? That's a different argument than your  
2 brief makes.

3 MR. BATOR: No, our argument, Justice Stevens,  
4 is that there are two sorts of health impairments,  
5 including mental health impairments, that must be kept  
6 distinct. If the government intervenes in the  
7 environment, and the intervention itself directly causes  
8 health effects, including mental health effects, then  
9 that consequential impact must be considered in the NEPA  
10 process.

11 QUESTION: Well, that is your fluoride case.  
12 It seems to me that's your fluoride case. I think you  
13 may have picked a bad hypothetical.

14 MR. BATOR: No, our argument, Your Honor, is  
15 that the -- maybe I -- maybe another illustration would  
16 help.

17 QUESTION: I think maybe --

18 MR. BATOR: Because the role in which mental  
19 health can come in is if there is a direct, almost a  
20 traumatic consequence. That is, if the government  
21 proposes to build an airport, and there would be a  
22 tremendous amount of noise which would drive people mad,  
23 or if the government licenses an emission of lead that  
24 will cause retardation among children, then it seems to  
25 us that that kind of mental health effect is like other



1 health effects.

2           The crucial distinction between that and this  
3 case and the fluoridation case is the proposition about  
4 fear and anxiety. We don't think that anxiety produced  
5 by the fear of an environmental impact counts as an  
6 environmental impact.

7           QUESTION: What you are saying, I take it, is  
8 that you don't need committees and parades and pickets  
9 to draw attention to the vibration and the noise of an  
10 airplane going over at 300, 400, 500 feet or 1,000 feet,  
11 and that that is quite a different thing.

12           MR. BATOR: Yes, we believe it is quite a  
13 different thing really for a number of very, we submit,  
14 very profound reasons.

15           I would like to take it back to the statute,  
16 because it seems to me that the key to this case is to  
17 ask the question, what was the central concern, what was  
18 the central focus of this statute.

19           This statute instructed the government to pay  
20 more attention than it had heretofore done to the  
21 impacts that governmental action has on the natural  
22 environment. Now, that's not because Congress was in  
23 some abstract way worried about the land and the water  
24 and the air and plant life and animal life. Of course,  
25 the ultimate purpose in worrying about those phenomena

1 was to safeguard human health and human welfare.

2 But the central finding of NEPA was that  
3 insensitivity to the natural environment was dangerous,  
4 might produce dangers to man's health and welfare. And  
5 Congress created a statutory structure that rather  
6 insistentlly says that you must focus your attention on  
7 the environmental impact of what it is you do.

8 The statutory structure, as it were, puts two  
9 hurdles before the agency. It says that the impact  
10 statement is required only if the proposed action has a  
11 significant impact on the human environment, and then,  
12 importantly, the statute does not just stop there. It  
13 doesn't say that all the effects of that impact must be  
14 studied, only the environmental impact effects of that  
15 action must be studied.

16 Now, we concede, Your Honors, that there is a  
17 sense in which the restart of TMI 1 changes the  
18 environment, and Respondent in this case argues from  
19 that, well, they will restart TMI 1, and that is an  
20 impact -- that is a change in the environment, and that  
21 causes stress, but there is, we submit, a very critical  
22 muzzle in that argument, because the stress is produced  
23 not by the harmful consequences of the environmental  
24 impact. There is no argument here that there will be a  
25 change in the water or the air which then produces

1 stress in any kind of traumatic way.

2       The point that is being made is that the  
3 stress is a product of people's anxiety and fear that  
4 there may be a second accident here. That is the impact  
5 that they are worried about.

6       Now, we think that the statute does not  
7 require for the government to make this separate and  
8 subsidiary inquiry, and we think it would be extremely  
9 undesirable from the viewpoint of the purposes of the  
10 statute to require this subsidiary impact.

11       We submit that it would really dilute and  
12 confuse the environmental impact process if this second  
13 order, rather confusing question -- see, you go through  
14 the first inquiry, and you say, is this plant safe?

15       QUESTION: There is no question, is there,  
16 that the impact statement would have to consider the  
17 possibility of another accident?

18       MR. BATOR: Yes, and in fact, did. If Your  
19 Honors will look at the impact assessment that was  
20 conducted in connection with this restart in the joint  
21 appendix, there was an elaborate inquiry made into the  
22 question of risk. That is, it is not our argument that  
23 only certain impacts count. They have to, and we do  
24 consider the question of whether restart creates the  
25 possibility of a second accident, and that counts,

1 because if there is such an accident, there would be a  
2 dreadful impact on the environment.

3 But we sharply distinguish between that  
4 inquiry and the question whether on restart people will  
5 be simply frightened of that accident, whatever actual  
6 risks there are. That is, our submission, Your Honor,  
7 is that the intelligent way to deal with anxiety about  
8 accidents is to do everything possible under the sun to  
9 prevent them from happening, that is, that the rational  
10 way to deal with anxiety is to make this unit safe  
11 beyond a reasonable doubt, and to do it as openly as  
12 possible so that everybody understands the facts.

13 But to underlay that inquiry with a separate  
14 inquiry into the question of what people's subjective  
15 perceptions with respect to safety are seems to us to  
16 dilute the central inquiry, and we further submit that  
17 it really has very little to do with the environment.

18 That is, anxieties are not -- about safety are  
19 not identical with, they are not even necessarily  
20 parallel with concerns about the environment. There are  
21 human anxieties about government interventions that are  
22 relatively benign environmentally. And there may be  
23 huge human anxieties about interventions that are not at  
24 all benign.

25 In other words, there isn't a tracking between



1 the anxiety issue and the environmental issue.

2 Furthermore, the very process of the rule  
3 announced by the Court of Appeals in this case, that  
4 there must be -- that there is a legal rule that  
5 administrative agencies must make a formal inquiry in  
6 order to predict stress seems to us to create a  
7 confusing and diluting side issue into the real business  
8 of these agencies, including their concern for the  
9 environment.

10 That is to say that what will happen here is a  
11 fiercely controversial struggle about proper  
12 methodologies. We don't make the point that stress  
13 can't be measured, but it is difficult, and it is  
14 controversial, and the methodologies for doing it are  
15 extremely controversial, and what will happen here as  
16 the opinion of the Court of Appeals stands, Your Honors,  
17 we believe, is that there will be very, very elaborate  
18 batteries of experts quarreling here, and a very rich  
19 opportunity for complicated procedures and complicated  
20 litigation about whether the proper methodologies were  
21 used, and whether the predicted stress was correctly and  
22 fairly measured.

23 Your Honor, I will take only one more minute  
24 of your time. I want to draw the attention of the Court  
25 to the actual procedural history of this case. This is

1 not a case where shortly after the accident the Nuclear  
2 Regulatory Commission said, well, let's start up this  
3 other plant. That plant shut down in 1979. Since that  
4 time, there has been an immense administrative  
5 proceeding devoted to the question whether it is safe to  
6 start it again.

7           There were hearings, interventions, written  
8 submissions. The oral hearings themselves took nine  
9 months. They generated a 26,000-page transcript. These  
10 hearings were devoted to the central problems of this  
11 case, the questions whether it is safe to restart TMI  
12 1. These were questions of the design, of management,  
13 of technical capabilities, of emergency planning, all  
14 the other questions which the accident raised for TMI  
15 1.

16           It was in connection with these proceedings  
17 that the Commission did -- was quite aware that it had  
18 to -- take account of compliance with NEPA, and it was  
19 clear from the beginning that the stress question would  
20 be a question here. Respondent in this case, a group of  
21 residents near Three Mile Island, called People Against  
22 Nuclear Energy, was the principal party pressing the  
23 submission that stress and anxiety was an independent  
24 issue in this case, and they made contentions before the  
25 Commission, and they were the ones that took the case to

1 the Court of Appeals in the District of Columbia.

2           So, what we have here is this curious parallel  
3 affair, the Commission engaging in this tremendously  
4 complicated and scrupulous process devoted to the  
5 question of whether this plant can safely be started up,  
6 keeping in mind all the time that we think that that  
7 kind of proceeding conducted fully in the open is the  
8 most rational way to deal also with the question of  
9 anxiety.

10           And then we have had this subsidiary,  
11 complicated litigation devoted to the question whether  
12 this other issue, this issue devoted entirely to  
13 people's subjective perceptions with respect to safety,  
14 is an independent issue, and that there is a legal right  
15 to have that made an independent, formal subject of  
16 inquiry.

17           QUESTION: Mr. Bator, I think that I am having  
18 some difficulty understanding the line that you want to  
19 draw here. If you concede that psychological concerns  
20 could be the proper subject of an inquiry in the case of  
21 fluoridation of water or a lead poisoning situation, how  
22 do you differentiate that from this situation? What is  
23 the line that you draw in saying that it should be  
24 considered in some instances but not others?

25           Is it because in this instance you argue that

1 it has been concluded that it is safe to physical health  
2 to restart it, and therefore it is only the anxiety  
3 factor? What is --

4 MR. BATOR: Justice O'Connor, the line we  
5 would seek to draw and that we hope to persuade the  
6 Court to draw is really the line that is given to us by  
7 the statute. The statute says, the environmental impact  
8 statement must consider the environmental impact of  
9 government interventions.

10 If health consequences are a direct product of  
11 an adverse change in the environment as a result of  
12 government intervention -- that is our airplane case,  
13 that is our lead poisoning case -- then health effects  
14 come in. On the other hand, we would argue fiercely  
15 that the fluoridation anxiety is not the kind of health  
16 effect that has independent status, because a stress  
17 effect that is produced simply by anxiety about the  
18 environment is not directly caused, as the statute  
19 requires, by an impact on the environment.

20 In other words, we really think that the  
21 statute contemplates the wise policy that this  
22 strung-out subsidiary mental health effect be restricted  
23 to those situations where it is pretty clear that there  
24 is an actual change in the water, or the land, or in the  
25 air, that directly propagates some kind of mental health



1 change.

2 QUESTION: I take it that your -- the other  
3 side urges that without proving any change whatsoever in  
4 the environment, or any threatened change, that anxiety  
5 is --

6 MR. BATOR: Yes, there are many, many  
7 government actions that create anxiety. If the  
8 government licenses a dangerous drug, that creates not  
9 only anxiety, it creates an actual health danger, but  
10 the danger to health is not a product of an  
11 environmental intervention, and therefore it isn't under  
12 NEPA that those dangers must be considered.

13 If the government closes an Air Force base and  
14 people are worried about unemployment, that is an  
15 anxiety. If the government raises the tax rate, people  
16 might go crazy with worry and fear as a result. There  
17 are a million ways in which the government affects the  
18 anxiety level, but NEPA is a special statute. It really  
19 deals with only one form of threat to man's welfare. It  
20 is not an all-purpose welfare statute.

21 QUESTION: You would analogize this, I guess,  
22 to building a prison. Neighbors are afraid there might  
23 be escapes and the like, but that is not an  
24 environmental hazard.

25 MR. BATOR: We believe that people's anxieties

1 about the crime rate and about prison escapes are not an  
2 environmental impact. That is our submission.

3 QUESTION: Well, is the fact of escapes, the  
4 possibility of escapes from a prison an environmental  
5 impact?

6 MR. BATOR: The -- there is at least one Court  
7 of Appeals opinion that has indicated, at least, that  
8 that may be.

9 QUESTION: What is the government's position?

10 MR. BATOR: The government is not absolutely  
11 overjoyed by that proposition, but we think that in any  
12 event it is wholly distinguishable from this one.

13 There is a -- There is a body of rather  
14 intricate law under NEPA that deals with socioeconomic  
15 and other actual consequences that are called secondary  
16 consequences. Even with respect to those, Your Honor,  
17 we would think that the statute requires that that kind  
18 of socioeconomic effect come in only if it can be traced  
19 direct to the environmental impact of the government  
20 action, and that is why we have trouble in the case that  
21 you gave, we have a hard time seeing exactly how it is  
22 that there has been an adverse change in the natural  
23 environment, but it is, I suppose, a case that one can  
24 confound oneself with.

25 QUESTION: Well, the line that you stated in

1 response to Justice O'Connor's question like, I suppose,  
2 most other lines, kind of blurs in places.

3 MR. BATOR: Yes. The government concedes that  
4 there are hard cases, but we don't think this is one,  
5 Mr. Justice Rehnquist.

6 Mr. Chief Justice, if I may, I would like to  
7 reserve the remainder of my time for rebuttal.

8 CHIEF JUSTICE BURGER: Very well.

9 Mr. Jordan.

10 ORAL ARGUMENT OF WILLIAM S. JORDAN, III, ESQ.,

11 ON BEHALF OF THE RESPONDENTS

12 MR. JORDAN: Thank you, Mr. Chief Justice.

13 May it please the Court, quoting to the  
14 Presidential Commission on the Accident at Three Mile  
15 Island, "That accident was the worst crisis yet  
16 experienced by the nation's nuclear power industry. It  
17 resulted in the evacuation of tens of thousands of  
18 people who lived in the area surrounding Three Mile  
19 Island." And the President's Commission found that the  
20 most serious health effect of that accident was severe  
21 mental stress to that population.

22 PANE, my clients here, is an organization of  
23 local citizens who have lived and worked in the Three  
24 Mile Island area for many years, often for generations.  
25 PANE has alleged before the Nuclear Regulatory

1 Commission that the restart of TMI 1 would cause further  
2 health damage to this traumatized, sensitized population.

3           The factual allegation has never been  
4 challenged. The Court of Appeals ruled that NEPA  
5 requires the NRC to consider the health damage in the  
6 unique circumstances of Three Mile Island in reaching a  
7 decision on the restart of TMI 1.

8           Indeed, the Commission itself has issued a  
9 policy statement implementing the Court's decision in  
10 which the Commission interprets that decision to require  
11 consideration of psychological health damage only where  
12 there has been a nuclear accident, and where there has  
13 been a traumatized population, circumstances directly  
14 comparable to those now before the Court.

15           They are discussed at Page 42 of our brief.

16           We believe the Commission's interpretation and  
17 application of that lower court's decision is entirely  
18 reasonable. In fact, we would be satisfied if the  
19 Commission would simply implement its policy statement  
20 here.

21           But this case turns on the language of Section  
22 102(2)(c) of NEPA. That section requires environmental  
23 -- federal agencies to prepare environmental impact  
24 statements with respect to major federal actions  
25 significantly affecting the quality of the human



1 environment. That is the trigger for when an EIS must  
2 be prepared. There is a two-part test. First, there  
3 must be an effect on the quality of the human  
4 environment. Second, that effect must be significant  
5 under the goals and the purposes of NEPA.

6 QUESTION: Mr. Jordan, where is that statute  
7 set out? Do you have a handy reference to it?

8 MR. JORDAN: Yes, Justice Rehnquist. It is in  
9 the appendix at the end of our brief, I believe the  
10 first item in the appendix there. And I believe it is  
11 on the second page of that appendix. I am not -- It is  
12 102(2)(c).

13 This dispute, as you have just heard, is  
14 centered around the question of whether this health  
15 damage involves an effect on the quality of the human  
16 environment. We believe it does. Indeed, we believe we  
17 can accept the government's formulation of the  
18 applicable test as it did in its brief, its initial  
19 brief. There must be an effect upon the environment or  
20 propagated through the environment.

21 I remind the Court that the Commission has  
22 just told you they do not dispute that psychological  
23 health damage is encompassed by NEPA if the  
24 environmental nexus test is met.

25 Of course, the environmental concern, the

1 environmental impact that is of most concern here is the  
2 health damage, but that arises as what the Council on  
3 Environmental Quality regulations term an indirect  
4 effect. That is in --

5 QUESTION: Mr. Jordan, can you give me just an  
6 idea of what would alleviate the anxiety in this case?

7 MR. JORDAN: Well, that, of course, would be a  
8 matter for the Commission when the case goes back  
9 there. In our view, we believe that at least one thing  
10 that would alleviate the anxiety, in fact prevent the  
11 anxiety or -- we don't think that anxiety is really the  
12 useful word here. The question is psychological  
13 health. It would prevent the psychological health from  
14 occurring if, in our view, TMI 1 is not restarted.

15 Now, there are a number of other  
16 possibilities.

17 QUESTION: Is that forever?

18 MR. JORDAN: In our view, if you didn't start  
19 -- if you never started TMI 1, the health damage would  
20 never occur. It is certainly a question of fact as to  
21 what the best --

22 QUESTION: So the only way that your clients  
23 can be satisfied is to just keep it shut down forever.  
24 There is no other way.

25 MR. JORDAN: Well, as a matter of law here,

1 Justice Marshall, the question before the Commission in  
2 dealing with the facts will be what is -- what should we  
3 do about this health damage that will occur? Should we  
4 -- what kind of mitigative action should we take? And I  
5 suggest --

6 QUESTION: Assuming that I am the Commission,  
7 and I am asking you, what would your answer be?

8 MR. JORDAN: We would argue to the Commission  
9 as a matter of fact that the seriousness is so great  
10 that in fact the reactor should not be restarted, but I  
11 believe we would also argue to the Commission that if it  
12 did not reach that determination, there are a number of  
13 other mitigative actions that it might take, and those  
14 have been discussed by amicus -- American Psychological  
15 Association in this case, for example.

16 Some of those involve treatment of  
17 individuals, or providing the health care that is  
18 necessary to deal with health damage. And I might note  
19 to the Court that that is exactly like an action that  
20 the Nuclear Regulatory Commission is currently taking at  
21 two reactors with respect to the damage of possible  
22 radiation health damage. They provide potassium iodide  
23 tablets to the population. That is not making the  
24 reactor safer. That is treating the individuals. That  
25 is very similar to the kind of thing one might do here.

1                   QUESTION: But is it not so that psychiatrists  
2 or psychologist will tell you -- they have written it,  
3 surely -- that a subject like the placing of Pershing  
4 missiles in NATO countries in Europe causes great  
5 anxiety to some people, to the point where they can't  
6 cope with daily life as a result of the prospect of  
7 putting Pershing missiles in Germany and various other  
8 places. Does is the rule of one psychiatrist about one  
9 or two or three patients control these things?

10                  MR. JORDAN: No, I don't think it does at all.  
11 The question --

12                  QUESTION: Your people don't want this plant  
13 at this site at all. Isn't that true?

14                  MR. JORDAN: That -- My clients would prefer  
15 that this plant not restart, but that is not -- that  
16 does not answe the question of whether the one or even  
17 ten psychiatrists who all believe the same thing control  
18 the outcome. They don't. That is very much up to the  
19 Nuclear Regulatory Commission, which -- and in fact, I  
20 think -- it has occurred to me that this is quite  
21 distinct from the cases of where psychiatrists are  
22 involved in court proceedings, such as in insanity  
23 defense or something of that sort.

24                  This is an agency that has a great deal of  
25 discretion.



1                   QUESTION: My thought was directed at the  
2 Presidential Commission comments that you reported,  
3 widespread apprehension. Was that apprehension any  
4 different from the widespread apprehension that was  
5 aroused by a campaign on fluoridation?

6                   MR. JORDAN: I have never heard, Your Honor --  
7 That is a question of fact that I can't answer, but I  
8 have never heard of psychological health damage  
9 occurring as a result of widespread apprehension of  
10 fluoridation, but I think to take the fluoridation  
11 example it may be useful.

12                   Assume that we have fluordation in the water,  
13 and assume that it, like Three Mile Island Unit 1, the  
14 fluoridation has been ongoing. Then it turns out that  
15 in fact fluoridation is dangerous, and perhaps like  
16 dioxin was dangerous at Times Beach, Missouri, and then  
17 the people are traumatized, and then we can see that  
18 there is psychological health damage in that population.

19                   It seems to me that is the kind of situation  
20 we have here.

21                   But I think it is important to understand why  
22 it is that this is an environmental impact. It is not  
23 simply a federal action that causes health damage. This  
24 is an action that changes the environment at Three Mile  
25 Island. There will be the restart of the reactor, which

1 has its own physical manifestations. It has steam  
2 arising from the cooling towers, visible for miles. It  
3 has low level radiation. It has a number of visible  
4 aspects of its operations, those all physical  
5 manifestations. Second --

6 QUESTION: Mr. Jordan?

7 MR. JORDAN: Sir.

8 QUESTION: What if the government puts in an  
9 airport right adjacent to a city, and makes the  
10 environmental statement and so forth, and ultimately the  
11 airport is constructed, and there is considerable noise  
12 that would have required an environmental statement, and  
13 then the airport is shut down for, say, six months or a  
14 year. Does the government have to file an environmental  
15 impact statement again when it decides to reactivate the  
16 airport?

17 MR. JORDAN: I -- that is -- we are assuming  
18 there are no changes in the way the airport is operated.

19 QUESTION: Yes.

20 MR. JORDAN: The environmental effects are all  
21 the same. And there is no change in the requirements  
22 related to the airport. I would say not. That is  
23 really the issue that is not -- it is not here that the  
24 parties, as far as I can tell, have all agreed that  
25 there is a major federal action here involving this

1 restart, and the reason that it is not comparable to the  
2 airport starting up with no changes in its requirements  
3 or its operations is that in this case, there were  
4 substantial license amendments as a result of the  
5 hearing. There were changes to the operation of TMI 1  
6 that resulted from the experience at TMI 2, the  
7 examination of TMI 1, and so on, and substantial license  
8 amendment changes, very similar to other license  
9 amendments, for which it is my understanding that the  
10 Commission routinely does an environmental assessment to  
11 determine whether there is an effect or not. In fact,  
12 they did an environmental assessment here.

13 QUESTION: Is an assessment the same as an  
14 EIS?

15 MR. JORDAN: No, Justice Rehnquist. The  
16 assessment is, in effect, an initial look at the facts,  
17 and in this case, indeed, we are seeking, although it  
18 hasn't been called that, we are seeking what is in  
19 effect an assessment.

20 QUESTION: Mr. Jordan. Excuse me.

21 MR. JORDAN: Yes, Justice Marshall.

22 QUESTION: Isn't the real difference that  
23 there was an accident here, and there wasn't an accident  
24 at the airport?

25 MR. JORDAN: Well, I think that --

1           QUESTION: Isn't there any significance to the  
2 fact that there was an accident here?

3           MR. JORDAN: Absolutely. The fact that there  
4 was an accident here is crucial.

5           QUESTION: Well, you've been hiding it.

6           MR. JORDAN: I'm sorry?

7           QUESTION: You've been hiding it as the answer  
8 to this question.

9           MR. JORDAN: Not at all. That was exactly the  
10 point I just wanted to get to.

11          QUESTION: I see.

12          (General laughter.)

13          MR. JORDAN: The second --

14          QUESTION: When you get to that, tell us how  
15 many people were injured and how many people were killed  
16 in that accident.

17          MR. JORDAN: Yes, sir. The next point, of  
18 course. I have given you the first of the physical  
19 environmental changes, the restart with its physical  
20 manifestations. The second is the fact that there -- it  
21 is really combined, if you will. There was an accident  
22 at Three Mile Island Unit 1, and Justice Burger has  
23 asked how many people were injured. I don't know of any  
24 who were killed or who we know have any sort of  
25 radiation physical injury.



1           However, we do know from the President's  
2 Commission and indeed from later studies that there are  
3 a number of people who suffer from damage to their  
4 health, and that is what NEPA is about.

5           Now, the issue here, of course, is the  
6 restart, and the restart brings with it the physical  
7 reality of the potential for another accident. That is  
8 a change to the environment at Three Mile Island. It  
9 applies no where else, and it is inherent in the  
10 environment there. That is what is really the source  
11 for the health damage.

12           Of course, we have a traumatized population  
13 now facing the possibility of another nuclear accident  
14 in their environment, and under the CEQ regulations, I  
15 will cite for you 40 CFR 1508.8(b) here, this is an  
16 indirect effect of those first two environmental  
17 changes. As such, it is an environmental change.

18           I would suggest it is cognizable under NEPA  
19 exactly as the potential for cancer from some federal  
20 action within an environment is cognizable under NEPA.  
21 There was a federal action. It results in a change  
22 within the environment, and health damage is the result,  
23 and there is no question whatsoever that any federal  
24 agency would have to examine not only -- not only the  
25 radiation or the amount of radiation that spewed forth

1 from the facility, but the resulting health damage.

2 QUESTION: But how about in your drug that  
3 might cause cancer example? You say that there would  
4 have to be a statement with respect to the cancer  
5 causing potential. Would there also have to be a  
6 statement as to the psychological fear that by taking  
7 the drug you might get cancer?

8 MR. JORDAN: You may have misread my example,  
9 Justice Rehnquist. I was not referring to a drug that  
10 might cause cancer, but to a federal facility that might  
11 cause cancer. I don't think that distributing a drug  
12 causes an environmental effect. It is entirely  
13 different for the reasons that we have addressed.

14 QUESTION: Well, let's take the environmental  
15 impact, and the potential for causing cancer.

16 MR. JORDAN: Yes.

17 QUESTION: Would the environmental impact  
18 statement also have to cover the psychological fear that  
19 cancer might be caused?

20 MR. JORDAN: Again, I think it is important to  
21 make the distinction. We are not talking about covering  
22 fear. We don't care about fears, rational or  
23 irrational, that do not constitute damage to health. So  
24 the question is --

25 QUESTION: Well, but the damage to health you

1 are talking about --

2 MR. JORDAN: Yes.

3 QUESTION: -- comes from fear, doesn't it? I  
4 mean, it is quite amorphous, really.

5 MR. JORDAN: Really, that's a question for a  
6 scientist to answer. My understanding is that fear is a  
7 component of it, and the fear arises from the physical  
8 change to the environment with the result of health  
9 damage, and I want to answer your example about whether  
10 -- when there is a possibility for cancer one must  
11 examine psychological health damage.

12 And I think the answer is, as with any  
13 environmental issue, an agency need not examine it  
14 unless there is a reason to examine it. The agency may  
15 say, we know of no reason to believe that the mere fact  
16 tha cancer is a possibility from this operation will  
17 cause psychological health damage.

18 If someone wants us to consider it, it must  
19 make a threshold showing that in fact there is a  
20 likelihood, a reasonable likelihood that it would occur  
21 here. That is really what I think Vermont Yankee  
22 clearly authorizes an agency to do.

23 QUESTION: So you say if a threshold showing  
24 were made that psychological damage resulting in fear of  
25 the cancer were made, the environmental impact statement

1 would have to cover not only the potential for causing  
2 cancer, but the psychological effect of fear of cancer?

3 MR. JORDAN: If people will be psychologically  
4 -- their health will be damaged by a federal action  
5 affecting their environment, and there is a real -- a  
6 basis for that showing, and the agency has established  
7 -- and in fact, I think the agency here has established  
8 a threshold showing requirement of the pre-existing -- a  
9 previous accident, of pre-existing traumatic  
10 population.

11 That is a fact situation within the state of  
12 the art in which reasonable predictions can be made  
13 about the likely psychological health. That is the kind  
14 of threshold showing that an agency could establish.

15 QUESTION: Well, the -- I take it -- you said  
16 the agency has to respond to a showing by a group such  
17 as yours since the agency certainly didn't try to  
18 establish the thing. It was more or less pushed on it  
19 by your group.

20 MR. JORDAN: Well, and we believe in fact if  
21 that -- if the showing is made --

22 QUESTION: The agency has to respond.

23 MR. JORDAN: -- the agency has to respond, but  
24 it does have the authority to set that threshold.

25 QUESTION: Supposing that the government is



1 contemplating a public housing development in a  
2 neighborhood where a great many neighbors oppose public  
3 housing, and genuinely fear what the effect of public  
4 housing is going to be on the value of their houses,  
5 their neighborhood, and the like.

6           Now, could they come into the agency that was  
7 responsible for that development and make a showing from  
8 -- say a doctor testifies that there are genuine  
9 psychological problems here. These people are so  
10 obsessed with their dislike of public housing that they  
11 are going to have psychological damage if it goes  
12 through. And say the agency has to consider that kind  
13 of thing?

14           MR. JORDAN: No, and in fact I think that  
15 gives us a good place to see the distinction. You go  
16 back to the statute. Is there an effect on the  
17 environment? That is the question. NEPA is not about  
18 the relationships among human beings. It is about the  
19 effect that the environment has upon human beings.

20           QUESTION: Well, but that is certainly a  
21 change in the environment, and the change is thought by  
22 some -- is feared by some people, and you can get a  
23 doctor to testify that there is psychological damage.

24           MR. JORDAN: I would suggest that that in fact  
25 is not, and we have argued in the brief that that is not

1 a change in the environment under NEPA.

2 QUESTION: Well, where is the bright line, or  
3 at least a gray line?

4 MR. JORDAN: Well, I think there is -- the  
5 bright line can be drawn between that example and the  
6 case before you now. In this case, we do not have the  
7 relationships among people that is at issue. We have a  
8 physical change within the area where these people  
9 live. A physical, not a social --

10 QUESTION: Why isn't the construction of  
11 housing a physical change? I just don't follow your  
12 argument at all.

13 MR. JORDAN: Well, I think the construction of  
14 housing -- construction of housing is a physical change,  
15 but it has not the slightest relationship by itself to  
16 the effect of the psychological damage. That is --

17 QUESTION: Well, I know, but the doctor  
18 testifies it does.

19 MR. JORDAN: I don't think the doctor would  
20 testify that constructing the housing is what causes the  
21 damage.

22 QUESTION: Suppose instead of housing it were  
23 a prison for irreconcilables.

24 MR. JORDAN: Well, what was held in --  
25 assuming they were irreconcilables -- I don't think they

1 were -- but in the Hanly v. Kleindienst case, the second  
2 of the two Hanly cases, the Court held there that the  
3 agency needed to examine the likelihood of an increase  
4 in crime in that neighborhood.

5           The increase in crime, as we read it, arises  
6 not from the -- it arises not from the construction of  
7 the jail that was at issue there, by which I mean it  
8 doesn't arise from the bricks and the mortar and the  
9 actual physical construction of the building. Rather,  
10 it arises from the change in the character of the  
11 neighborhood that for some reason promotes the crime,  
12 and crime is a significant concern under NEPA in the  
13 urban environment, and so that is what the Court there  
14 held has to be -- the Court held there that that  
15 potential increase had to be considered.

16           Now, here, we have --

17           QUESTION: Does NEPA specify crime?

18           MR. JORDAN: I believe NEPA -- Certainly the  
19 legislative history does, and there is no question of  
20 that.

21           QUESTION: How do we know just from the  
22 language of the statute that crime must be considered  
23 where you suggest other things need not be considered?

24           MR. JORDAN: If I recall correctly, Section  
25 101 -- I'm sorry, Section 2, the introductory section,

1 refers to crime. I could be incorrect. But there is no  
2 doubt from the legislative history that crime was a  
3 concern of the statute, speaking in particular of the  
4 urban environment.

5 But we have a case here that is even more  
6 physical, if you will, more environmental than the Hanly  
7 2, the jail character of the neighborhood case. We have  
8 a case where there is a change in the environment.

9 QUESTION: Mr. Jordan, may I move away from  
10 crime, back to nuclear energy?

11 MR. JORDAN: Certainly.

12 QUESTION: Let's assume that a new nuclear  
13 plant is proposed to be located 25 miles from Three Mile  
14 Island. What would your position be with respect to  
15 it? Or move it ten, or move it --

16 MR. JORDAN: Okay, it's a new --

17 QUESTION: It's a brand new plant.

18 MR. JORDAN: -- nuclear plant?

19 I think then the question -- you are doing a  
20 very much similar thing to restarting TMI 1. Let's  
21 assume it is right on Three Mile Island, on the island  
22 itself. It seems to me that probably the example is the  
23 same. You have to examine -- you are taking -- you are  
24 doing exactly the same physical change to the  
25 environment.



1           QUESTION: So your short answer is that you  
2 would oppose the construction of one 25 miles away?

3           MR. JORDAN: I can't tell you whether my  
4 clients would oppose the construction of one 25 miles  
5 away or not.

6           QUESTION: Is there a limiting principle to  
7 your position? Is it mileage? Is it new plants versus  
8 old plants?

9           MR. JORDAN: No, I -- it is whether the  
10 environment --

11          QUESTION: Is it --

12          MR. JORDAN: It is whether psychological  
13 health damage can be expected to occur within that  
14 environment, and I think the question here would be, it  
15 would really be a matter of fact as to whether that had  
16 the effect on these -- this population that TMI 1 has.  
17 You have given the one example that no one else has to  
18 me, which is, what if you do the same thing to the same  
19 population, but not with Three Mile Island Unit 1.

20          QUESTION: Even apart from the same  
21 population, Mr. Jordan, in view of all of the publicity  
22 that the accident had in Three Island, do you think the  
23 people of the United States would have any substantially  
24 less apprehension -- I am not talking about all the  
25 people, but some people -- about a new plant that is

1 proposed, or indeed about existing plants?

2 MR. JORDAN: Well, in fact, I suspect that  
3 generalized concern is greater than it was before Three  
4 Mile Island -- the Three Mile Island accident occurred,  
5 but the question is not one of apprehension or even  
6 fear. The question is psychological health damage. And  
7 I don't think there's another community -- someone  
8 living in Chicago or somewhere else --

9 QUESTION: I thought you --

10 MR. JORDAN: -- there is no showing they would  
11 be traumatized.

12 QUESTION: I thought you had argued initially  
13 that this health damage comes from anxiety,  
14 apprehension, and fear.

15 MR. JORDAN: The health damage arises as a  
16 result of the physical change to that environment, and  
17 there is -- fear is one aspect of the cause of --

18 QUESTION: What evidence is there that this  
19 physical change has occurred independent of what you had  
20 argued initially, that it is anxiety, apprehension, and  
21 fear generated by the fact of the accident?

22 MR. JORDAN: No, I'm sorry. I may have lost  
23 you. It is not -- we are not -- we are talking about  
24 two --

25 QUESTION: Well, you said that was your

1 argument.

2 MR. JORDAN: We are talking about really two  
3 points at which trauma occurs, has occurred and, we  
4 expect, will occur. The first is when the accident  
5 itself happened. There is evidence in that case, from  
6 the Presidential Commission and other studies, of  
7 psychological health damage. Now I am talking --

8 QUESTION: From what? From what?

9 MR. JORDAN: From what these people lived  
10 through when the accident occurred.

11 QUESTION: Anxiety, apprehension, and fear.

12 MR. JORDAN: Anxiety, apprehension, and fear  
13 were doubtless among the causal relationships between  
14 the physical occurrence of the accident and their  
15 traumatization, and they may well have -- in fact, they  
16 probably did have exposure to low level radiation.

17 QUESTION: Let me change Justice Powell's  
18 hypothetical. Not 25 miles away, but suppose they  
19 decide they are going to just make this Three Mile  
20 Island, that whole plant a museum, close it except as a  
21 museum, take all the dangerous materials out of it, and  
22 let visitors come, but right alongside of it they are  
23 going to build a new, presumably safer, modern plant.  
24 Then, I put to you the question Justice Powell put to  
25 you. Would you have the same objections to that new

1 plant that you have to reopening the old one, when it is  
2 right next door, 200 yards away?

3 MR. JORDAN: I can't -- what all the  
4 objections would be, I don't know, but if the -- the  
5 question would be, would psychological health damage be  
6 caused, and I must say I expect that with this existing  
7 traumatized population, the answer would be, yes, there  
8 is a basis for saying in this case, as we see in no  
9 other, that the psychological health damage must be  
10 examined in that situation, but that's a unique case of  
11 Three Mile Island.

12 QUESTION: May I ask you a question?

13 MR. JORDAN: Justice Stevens.

14 QUESTION: Supposing you had -- perhaps it is  
15 an unlikely situation -- but a restart situation, you  
16 restart Three Mile Island, but assume that you could do  
17 it in a way that would cause no effect on the physical  
18 environment. Say you had no smoke come out of the  
19 smokestacks, and no -- the water discharge would be  
20 exactly like everything else. No physical impact on the  
21 environment. Would you have a case then?

22 MR. JORDAN: I think we would, and the reason  
23 that we would is, you have assumed no effect  
24 whatsoever. I am afraid I will have to --

25 QUESTION: See, the government is arguing no



1 causal connection.

2 MR. JORDAN: Yes.

3 QUESTION: I say, well, let's take it one step  
4 further and say no impact at all on the physical  
5 environment.

6 MR. JORDAN: Okay.

7 QUESTION: How do you get within the statute  
8 in that case?

9 MR. JORDAN: I gave you really a three-part  
10 test or a three-part showing of environmental impact  
11 here. The first was the initial impacts of operation of  
12 the reactor.

13 QUESTION: I am saying there are none.

14 MR. JORDAN: I think that is what you have  
15 just eliminated.

16 QUESTION: Right.

17 MR. JORDAN: You remain in that environment  
18 with the potential for an accident. Unless you have  
19 eliminated that from your hypothesis --

20 QUESTION: Say you have analyzed the -- say  
21 you conclude there is zero potential, just  
22 hypothetically.

23 MR. JORDAN: I would --

24 QUESTION: But your people don't believe it,  
25 you know.

1 MR. JORDAN: Yes.

2 QUESTION: But the statement says there is  
3 zero potential.

4 MR. JORDAN: Justice Stevens, we have  
5 addressed that in our brief in a footnote, because the  
6 -- I believe it was the utilities claimed that we were  
7 making that argument. Of course, in fact, we're not.  
8 Our -- the allegations that have to be considered as  
9 true here take into account the potential for the  
10 accident, so in fact that's not the case here, but  
11 assuming that it were in some way absolutely impossible  
12 for that to happen, I think that you still have the  
13 physical change to the environment by virtue of the  
14 existence --

15 QUESTION: Well, that is my -- my hypothesis  
16 is that you don't. That's my hypothesis.

17 MR. JORDAN: Um-hm.

18 QUESTION: Is the mere --

19 MR. JORDAN: Nonetheless, I would have to  
20 answer that by saying there is still a physical change  
21 even within that reactor. There is a difference, and it  
22 is locatable to Three Mile Island and no where else, and  
23 the environment in which these people live becomes  
24 unhealthy to them because there is a physical change in  
25 it, although it is certain to remain inside the reactor,

1 because the question is going to be here psychological  
2 health damage, as we have shown, is cognizable under  
3 NEPA and was a concern of Congress. In fact it was in  
4 virtually the second paragraph of Senator -- statement.

5 QUESTION: Isn't that true as long as the  
6 plant is there?

7 MR. JORDAN: I'm sorry, Justice Marshall?

8 QUESTION: Isn't that true as long as the  
9 plant exists, whether it is started up or not?

10 MR. JORDAN: That -- I don't see a reason to  
11 say that. There would be no -- There would certainly be  
12 nothing -- more trauma that had already happened as a  
13 result of the Unit 2 accident. Again, we are, in that  
14 case, we are -- not is the same as the allegations that  
15 we have made.

16 Thank you, Mr. Chief Justice.

17 CHIEF JUSTICE BURGER: Do you have anything  
18 further, Mr. Bator?

19 MR. BATOR: Not unless there are questions.

20 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
21 The case is submitted.

22 (Whereupon, at 10:54 o'clock a.m., the cases  
23 in the above-entitled matter were submitted.)

24

25

CERTIFICATION

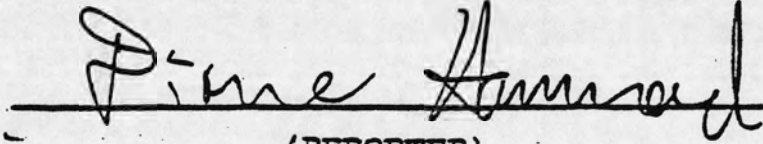
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METROPOLITAN EDISON COMPANY, ET AL., Petitioners v. PEOPLE AGAINST NUCLEAR ENERGY, ET AL., #81-2399 and

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL., Petitioners v. PEOPLE AGAINST NUCLEAR ENERGY, ET AL #82-358

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