

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO.

TITLE

BALTIMORE GAS AND ELECTRIC CO., ET AL.,
Petitioners

v.

No. 82-52

NATURAL RESOURCES DEFENSE COUNCIL, INC.;

UNITED STATES NUCLEAR REGULATORY
COMMISSION, ET AL., Petitioners

v.

No. 82-54

NATURAL RESOURCES DEFENSE COUNCIL,
INC., ET AL.; and

COMMONWEALTH EDISON COMPANY, ET AL.,
Petitioners

v.

No. 82-55

NATURAL RESOURCES DEFENSE COUNCIL,
INC., ET AL.

PLACE

Washington, D. C.

DATE

April 19, 1983

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ALDERSON REPORTING

(202) 628-9300
440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

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IN THE SUPREME COURT OF THE UNITED STATES

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BALTIMORE GAS AND ELECTRIC CO., :
ET AL., :
Petitioners :

v. : No. 82-524

NATURAL RESOURCES DEFENSE :
COUNCIL, INC.; :
UNITED STATES NUCLEAR REGULATORY :
COMMISSION, ET AL., :
Petitioners :

v. : No. 82-545

NATURAL RESOURCES DEFENSE :
COUNCIL, INC., ET AL.; and :
COMMONWEALTH EDISON COMPANY, ET :
AL., :
Petitioners :

v. : No. 82-551

NATURAL RESOURCES DEFENSE :
COUNCIL, INC., ET AL. :

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Washington, D.C.
Tuesday, April 19, 1983

1 The above-entitled matter came on for oral
2 argument before the Supreme Court of the United States
3 at 2:12 p.m.

4 APPEARANCES:

5 DAVID A. STRAUSS, ESQ., Office of the Solicitor General,
6 Department of Justice, Washington, D.C.;
7 on behalf of the Petitioners.

8 TIMOTHY B. ATKESON, ESQ., Washington, D.C.;
9 on behalf of the Respondents.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

DAVID A. STRAUSS, ESQ.,
on behalf of the Petitioners

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TIMOTHY B. ATKESON, ESQ.,
on behalf of the Respondents

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Strauss, you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID A. STRAUSS, ESQ.

ON BEHALF OF THE PETITIONERS

MR. STRAUSS: Thank you, Mr. Chief Justice, and may it please the Court.

The issue in this case is whether the Nuclear Regulatory Commission adequately considered the impact that disposing of the spent fuel from nuclear power plants will have on the environment. In 1972, the Commission began an informal rulemaking proceeding to consider this and other associated environmental impacts and the effect they should have on applications for licenses to build or operate nuclear reactors.

Seven years later the Commission adopted the final version of the rule that is at issue here. In the interim the Commission had conducted two extensive staff studies, three informal rulemaking proceedings in which literally thousands of pages of comments were exchanged, and a total of over two weeks of hearings. The rule itself went through four versions that differed in detail.

The rule specifies in a table the amount of radioactivity that will be released to the environment

1 in the course of disposing of various kinds of nuclear
2 wastes, and it provides that this table is to be
3 included in the environmental impact statements that are
4 prepared in connection with each individual reactor
5 license.

6 The licensing boards that consider individual
7 applications are then not to receive additional evidence
8 on the amount of radiation released. The reason for
9 precluding the boards from reconsidering the radiation
10 releases in individual cases is that these releases are
11 entirely generic, that is to say they are always the
12 same for a reactor of a given size no matter where or
13 when the reactor is built.

14 Many aspects of this rule are not at issue
15 here. For example, the Commission made the very
16 pessimistic assumption that all of the radioactive gases
17 would escape from the wastes, and it listed in the table
18 the resulting amounts of radioactivity that would be
19 released.

20 The aspect of the rule that is at issue here
21 concerns high-level solid wastes, many of which remain
22 radioactive for thousands of years. The Commission's
23 conclusion reflected in the rule is that these wastes
24 can be buried in a certain geologic formation of a kind
25 that is found in 24 of the 50 states in such a way that

1 they will not release a significant amount of radiation
2 to the environment.

3 The Commission studied a number of events,
4 natural or manmade, that might cause radiation to escape
5 from such a repository. For example, the Commission
6 concluded that a direct hit by a meteorite a mile and a
7 quarter in diameter would release radiation sufficient
8 to contaminate the area within roughly an 11-mile radius
9 of the repository. But such a meteorite --

10 QUESTION: Does the record show how many
11 meteors there are that big they planned around?

12 MR. STRAUSS: Well, the record shows that such
13 a meteorite hit could be expected on the average once
14 every ten trillion years.

15 QUESTION: So they do not have any record of
16 the most recent one?

17 (Laughter)

18 MR. STRAUSS: An earthquake fault, the
19 Commission estimated, would occur at a typical site
20 every 25 billion years. A more likely although still
21 unlikely occurrence is that ground water would penetrate
22 the repository, but ground water usually moves very
23 slowly and the Commission calculated that by the time
24 the radioactive materials in the groundwater reached the
25 surface they would be so diluted and they would have

1 decayed to such a degree that a person receiving the
2 maximum exposure to that ground water would be subject
3 to radiation roughly equal to the background radiation
4 of the atmosphere and the soil.

5 The Commission accordingly concluded that so
6 far as science could determine the chances of a
7 substantial release of radiation from the repository are
8 minimal to the point of being banishing, and the more
9 likely occurrences would not release significant amounts
10 of radiation. Now, the Court of Appeals did not question
11 that conclusion.

12 At the same time the Commission acknowledged
13 explicitly and, in fact, repeatedly that there is, of
14 course, a certain irreducible and imponderable
15 uncertainty involved in predicting what will happen so
16 far into the future and in making predictions about a
17 repository site that has not yet been specifically
18 designated. But the Commission concluded that although
19 these uncertainties exist, a reasonable working
20 assumption that the licensing boards are to use is that
21 there will be no releases of radiation from the solid
22 wastes once the repository has been sealed.

23 The Court of Appeals had invalidated an
24 earlier version of the rule on the ground that the
25 Commission did not follow sufficiently elaborate

1 procedures in assessing the impacts of nuclear wastes.
2 This Court reversed.

3 On remand, the Court of Appeals, now working
4 with a rulemaking record that had been greatly
5 supplemented by the Commission, invalidated all versions
6 of the rule on the ground that the Commission violated
7 the National Environmental Policy Act when it determined
8 not to allow licensing boards to reconsider in
9 individual proceedings the uncertainties associated with
10 the disposal of high-level wastes. We then sought
11 certiorari.

12 Although the Court of Appeals based its
13 decision squarely on NEPA, the National Environmental
14 Policy Act, it never identified the language in NEPA or
15 in any decision of this Court that prohibits the
16 Commission from doing what it did here. As this Court
17 has said several times, what NEPA requires is that an
18 agency consider the environmental consequences of its
19 actions and ordinarily disclose them to the public.

20 The Commission did consider the uncertainties
21 associated with high-level waste disposal, and it made
22 those uncertainties fully explicit. In fact, the Court
23 of Appeals did not suggest otherwise. On the contrary,
24 both the Court of Appeals and Respondents quote at some
25 length from the Commission's own statements in

1 attempting to show what we freely concede, that there
2 are inevitably uncertainties associated with an inquiry
3 of this sort, nor was the Commission's consideration of
4 these issues not meaningful or only abstract as the
5 Court of Appeals suggested.

6 For several years the Commission has been on
7 record as saying that it would not continue to license
8 reactors at all if it did not have reasonable assurance
9 that wastes could be disposed of safely. If the
10 ultimate outcome of the Commission's investigation of
11 the waste disposal problem had been that the risks
12 associated with any category of wastes are unacceptably
13 great or if that is ever the outcome because the
14 Commission's investigation of this matter is continuing,
15 the Commission would halt all reactor licensing.

16 If the Commission were to conclude that the
17 risks associated with waste disposal, while not that
18 severe, are still grave it would be open to it to
19 decide, for example, to permit reactors to be built or
20 operated only where the need for power is particularly
21 exigent. But the Commission concluded instead that the
22 ascertainable risks are minimal, and as I said the Court
23 of Appeals did not question that conclusion on this
24 rulemaking record and that the unavoidable uncertainties
25 should not affect the rate at which reactors are

1 licensed.

2 Since that conclusion was reached after
3 thorough, explicit and candid consideration, it simply
4 cannot violate NEPA.

5 QUESTION: Mr. Strauss, my feeling about
6 reading the briefs was that it was very much like two
7 ships passing in the night, that apparently each party
8 wanted to follow its own line of analysis and there
9 wasn't too much interaction between them. What exactly
10 do you think the Court of Appeals did wrong in saying
11 that NEPA could make this -- that NRC couldn't make this
12 a generic rule?

13 MR. STRAUSS: I think the Court of Appeals
14 relied on NEPA for a requirement that is simply not
15 found in NEPA.

16 QUESTION: Do you understand the Court of
17 Appeals to have had any broader rationale, perhaps I
18 should say more precise rationale, than just the
19 generalized provisions of NEPA?

20 MR. STRAUSS: I don't, Justice Rehnquist. The
21 Court of Appeals relied on NEPA to a great extent. It
22 also nominally said that the Commission's action
23 violated the arbitrary and capricious standard, but
24 every time it said that it right away said and we find
25 the standards to inform the arbitrary and capricious

1 rule in NEPA.

2 I think what is going on in the Court of
3 Appeals' opinion and in Respondent's brief as well is,
4 because they do not object to the thoroughness or the
5 candor of the Commission's discussions which is the
6 stuff of NEPA. What they seem to be doing is operating
7 with an assumption that NEPA requires that environmental
8 impacts not only be considered by the Commission itself
9 but be considered and reconsidered and perhaps
10 relitigated at every subsequent stage of the agency's
11 decision-making process where it might possibly affect a
12 subordinate official's decision.

13 QUESTION: Did the Court of Appeals say that
14 in so many words?

15 MR. STRAUSS: No, it did not say that in so
16 many words. It used phrases like the NEPA
17 decision-making process, a phrase Respondents use as
18 well.

19 QUESTION: Perhaps my questions would be
20 better addressed to them.

21 QUESTION: May I ask you a question since you
22 have been interrupted? Would you agree that the NEPA
23 requires the preparation of an environmental impact
24 statement at some stage in the proceedings which
25 discloses in a meaningful way that there is some

1 uncertainty about the permanent storage of nuclear
2 wastes?

3 MR. STRAUSS: Yes.

4 QUESTION: In your view, where will that
5 disclosure be made in the environmental impact
6 statements that may be made consistently with the rule?

7 MR. STRAUSS: The environmental impact
8 statement at each licensing stage, at both the
9 construction license and the operating license stage,
10 incorporate --

11 QUESTION: Table S-3?

12 MR. STRAUSS: -- Table S-3 and the references
13 it incorporates which --

14 QUESTION: Well, does that mean that the
15 disclosure we are talking about then, in future
16 environmental impact statements is that which we can
17 find in Table S-3?

18 MR. STRAUSS: In Table S-3 and the references
19 it makes incorporating --

20 QUESTION: Then isn't the legal question
21 whether the incorporation by reference of all these
22 other documents is an adequate compliance with the
23 statute?

24 MR. STRAUSS: Well, that is a possible legal
25 question. That is not the ground on which the Court of

1 Appeals asserted.

2 QUESTION: I know, but don't we have to be
3 satisfied on that in order to be sure that the statute
4 has been complied with?

5 MR. STRAUSS: That could be a potential
6 challenge raised to this rule or certainly to a
7 subsequent environmental impact statement, but the
8 standards for incorporation by reference in
9 environmental impact statements are necessarily
10 flexible. There is really no point in sort of trying to
11 come up with a capsule phrasing of these uncertainties
12 instead of referring people to the fuller discussions.

13 QUESTION: Your opponent ends his brief by
14 saying that all that has to be done is to attach a
15 rather short summary that there are, in fact, some risks
16 associated with this. Do you understand that the rule
17 would preclude such a summary from being attached to
18 individual environmental impact statements that may be
19 made with respect to particular licensing applications?

20 MR. STRAUSS: The rule does not require any
21 summary to be attached.

22 QUESTION: My question is does it forbid it.
23 It forbids the individual decision to reexamine the
24 basic problem, as I understand it --

25 MR. STRAUSS: That is right.

1 QUESTION: -- but does it also forbid the EIS
2 that is issued in connection with a particular license
3 application from including a short summary saying well,
4 the Table S-3 should be understood to reflect certain
5 risks associated with the long-term storage of wastes?

6 MR. STRAUSS: My understanding is that the
7 EISs in individual cases are prepared in accordance with
8 Commission regulations and there would now not be any
9 specific regulation telling the staff to summarize --

10 QUESTION: I understand there is nothing
11 telling them to do it. I am asking if there is anything
12 prohibiting them from doing it.

13 MR. STRAUSS: I do not know of anything
14 specifically prohibiting them from doing it if they did
15 it off their own bat, as it were. I think it is worth
16 trying to think about what advantage would be gained by
17 trying to summarize these uncertainties. I do not know
18 that a summary could say any more than what I just said.

19 QUESTION: Yes, but the thing is that what you
20 have just said is a lot plainer to the ordinary layman
21 than ever what one would get out of reading Table S-3 if
22 he was not as well informed as you are.

23 MR. STRAUSS: Well, I think that is right.
24 The Table S-3 came with a statement of consideration.
25 The statement of --

1 QUESTION: And a lot of cross references.

2 MR. STRAUSS: Well, there were cross
3 references in quotations, but I think that accompanying
4 statement lays it out quite clearly, about as clearly as
5 I have laid it out to the Court that there are
6 uncertainties associated here. That is the language
7 that the Court of Appeals quoted from at such length.

8 QUESTION: I understand, but that is something
9 you have to go to another document to find.

10 MR. STRAUSS: That is right, but that, I
11 think, there are two points to be made about that. The
12 CEQ guidelines that were in effect at the time this
13 Council of Environmental Quality got them as they were
14 in effect at the time the rule was issued specifically
15 envision incorporation by reference of other documents.

16 QUESTION: To this extent? Do you think to
17 this extent?

18 MR. STRAUSS: Well, they are flexible. They
19 do not specify the extent, and it is just pointless to a
20 large extent to require the documents be attached to an
21 environmental impact statement instead of simply saying
22 if you are interested in this problem further the NRC --

23 QUESTION: You do not even say that. That is
24 the point. You do not even say if you are interested in
25 this problem further this is what you will find.

1 MR. STRAUSS: Well, I doubt very much that
2 anyone who is interested in this problem would not know
3 what to do when he looked at that Table S-3.

4 I think actually, Justice Stevens, you brought
5 out another point about what the Commission has done
6 here as opposed to what Respondents and apparently the
7 Court of Appeals would have them do. The Commission has
8 made a very clear and visible and public focused
9 decision on a matter of no small importance, the
10 question whether reactor licensing is to continue at the
11 same pace despite these imponderable and irreducible
12 uncertainties.

13 The Commission made its decision, made it
14 visibly, and that is exactly the sort of thing that NEPA
15 is supposed to encourage. The Respondent's solution
16 would have the effect of scattering the decision on this
17 question among a multitude of very low visibility
18 decisions made by licensing boards in particular cases,
19 decisions that because these uncertainties are really
20 inherently unquantifiable would necessarily be kind of
21 inscrutable, and it cannot be the case that NEPA
22 requires a less visible decision that members of the
23 public would have a more difficult time appreciating
24 than what the Commission did here.

25 I should say that we are not suggesting that

1 there are no limits at all on an agency's ability to
2 organize its internal affairs and to allocate
3 decision-making responsibility between the agency itself
4 and its subordinate bodies, but the question is one of
5 the overall reasonableness of what the agency has done.
6 It is not a specific inflexible mandate from NEPA, and I
7 think in order to best understand the reasonableness of
8 what the Commission did here, reasonableness deriving
9 from the arbitrary and capricious test, the best way to
10 understand it is to think about what the alternatives
11 might have been in as concrete terms as possible.

12 Respondents and the Court of Appeals are
13 somewhat vague on this and understandably so. For
14 example, it appears that they would want the licensing
15 board to reconsider these uncertainties in a somewhat
16 plenary fashion. They would want to be able to try to
17 explain to the licensing boards that these uncertainties
18 should persuade them not to license a particular reactor.

19 Well, it is easy to see how that could quickly
20 turn each licensing proceeding into a rerun of this
21 monumental rulemaking. These issues are very complex,
22 very technologically difficult. The scientific learning
23 on them is found in many sources, and many arguments and
24 considerations could be brought to bear if this
25 question, to what extent should these uncertainties

1 affect the decision to license a reactor, if that
2 question were tossed open in individual licensing
3 proceedings.

4 If that question were not tossed open, if as
5 Respondents sometime seem to suggest the licensing
6 boards are just supposed to be given a little package
7 that will explain to them exactly what these
8 uncertainties are and this package is somehow to be
9 inserted in the ledger that licensing boards are thought
10 to draw up, if that and no further inquiry at the
11 licensing board stage is to be permitted, if that is
12 what Respondents have in mind, then you have to wonder
13 just what will be accomplished by that. The package is
14 unlikely to give them any better sense of the
15 uncertainties than what I have said to the Court, as I
16 said, Justice Stevens, or than what the Commission has
17 said, and the result would be that a licensing board
18 would engage in the process of balancing these
19 unquantifiable, imponderable uncertainties against such
20 things as the need for nuclear power. The Commission
21 could --

22 QUESTION: Is it your understanding, Mr.
23 Strauss, that in these individual licensing proceedings
24 it is a hearing in which people may be heard, I take it,
25 in opposition to licensing, that one is permitted to

1 argue that this established amount of uncertainty is a
2 reason for not granting the license. There is nothing
3 in the Commission's policy that would prevent that, is
4 there?

5 MR. STRAUSS: Well, it would be -- The values
6 that are established in the table can be argued about.

7 QUESTION: Yes, you cannot relitigate, so to
8 speak, the values in the table, but you can argue that
9 the established figures in the table show sufficient
10 uncertainty that this particular plant ought not to be
11 licensed.

12 MR. STRAUSS: Well, the values in the table
13 reflect such uncertainties that exist usually by, as I
14 said in the case of the gases, by saying we will assume
15 everything is released simply by assuming the worst case
16 and to that extent they already have taken into account
17 the uncertainties, and you would be entitled to say,
18 look, licensing this will cause the release of so many
19 curies of such and such a gas and that will have
20 damaging effects on health and --

21 QUESTION: And that to me is a ground that I
22 urge upon you for not granting the license.

23 MR. STRAUSS: That is right. You would be
24 able to make that argument.

25 QUESTION: Mr. Strauss, is that a fair

1 portrayal of the portion of S-3 that relates to
2 long-term storage of waste? As I understood the order,
3 the licensing boards are told not to base any decision
4 on this at all, that that has been decided on a generic
5 basis which in turn would mean that there would be no
6 purpose in an individual opponent of a licensing
7 application rearguing this point. I think this in
8 effect is like a pre-trial order saying this issue has
9 been decided.

10 MR. STRAUSS: Well, the values in the table
11 are to be taken --

12 QUESTION: And one of the values in the table
13 is you shall not consider the risk of release from
14 permanent storage.

15 MR. STRAUSS: The working assumption, that is
16 right, is that solid waste --

17 QUESTION: So the answer to Justice
18 Rehnquist's question is that argument would not be open
19 in an individual proceeding.

20 MR. STRAUSS: You would not be able to argue.
21 The Commission has decided that the assumption is to be
22 that solid wastes will not release --

23 QUESTION: Correct.

24 MR. STRAUSS: -- radioactivity in the
25 environment. You would not be able to --

1 QUESTION: Your point is that you have made
2 that ruling on a generic basis, and it is to be excluded
3 from the individual proceeding.

4 MR. STRAUSS: That is right, that ruling, that
5 is right.

6 QUESTION: How about the wastes other than the
7 solid wastes?

8 MR. STRAUSS: Oh, no. What you have to assume
9 there is that the values reflected in the table
10 accurately reflect how much radioactivity will be
11 released.

12 QUESTION: So and one could still argue for
13 the licensing board the worst case hypothesis that
14 however unlikely it is to occur it is still a reason not
15 to license?

16 MR. STRAUSS: Well, the worst case hypothesis
17 is built right into the table. The Commission in the
18 case of these gases has already done it, and you would
19 be able without even arguing that the licensing board
20 should adopt the worst case hypothesis say our working
21 assumption is that all the gases will be released. This
22 will have a severe health affect. You could argue
23 that. I mean, in fact, I think the Commission has said
24 this, although it has not bound the licensing boards to
25 it. In fact, these gaseous releases are not large

1 enough to have a major health affect, but in the
2 current state of affairs you could argue otherwise to a
3 licensing board.

4 I will save the rest of my time for rebuttal.
5 Thank you.

6 CHIEF JUSTICE BURGER: Mr. Atkeson.

7 ORAL ARGUMENT OF TIMOTHY B. ATKESON, ESQ.,

8 ON BEHALF OF THE RESPONDENTS

9 MR. ATKESON: Mr. Chief Justice, and may it
10 please the Court.

11 We represent Respondent, Natural Resources
12 Defense Council, and we are joined by a Respondent, the
13 State of New York, and by 15 other states and several
14 citizens groups as amicae.

15 The issue in the case before us is the
16 integrity of the review process by which environmental
17 review is given to the licensing of individual nuclear
18 power plants under the National Environmental Policy
19 Act. Mr. Strauss has identified the S-3 rulemaking
20 under which the Nuclear Regulatory Commission analyzed
21 the impacts of the nuclear fuel cycle and developed the
22 S-3 table which is attached to Respondent NRC's brief.
23 If the Court would care to examine what the table looks
24 like.

25 In this table the Nuclear Regulatory

1 Commission sets out what is deemed to be the
2 environmental impact at various parts of the nuclear
3 fuel cycle, and if the Court would look down towards the
4 bottom of the table there is a highlighted item referred
5 to as TRU and HLW (deep) which turns out to be
6 transuranic and high-level waste deep, and it is
7 followed by a cryptic number, which in this text is much
8 too hard to read, but which says 1.1 times 10 to the
9 seventh. When this is multiplied out it turns about to
10 be 11 million curies, by far the highest amount --

11 QUESTION: Eleven million what?

12 MR. ATKESON: Excuse me, Your Honor?

13 QUESTION: Eleven million what?

14 MR. ATKESON: Eleven million curies, a
15 measurement of radioactivity. Eleven million curies, by
16 far the highest amount of radioactivity represented on
17 this table.

18 In other words, in the S-3 table the Nuclear
19 Regulatory Commission is instructing its licensing
20 boards that this immense amount of radioactivity, which
21 I would add is generated for each nuclear power plant
22 per year, is to be regarded as having throughout the
23 hundreds and thousands of years of its intense toxicity
24 zero release to the environment.

25 This means that the licensing boards which

1 must conduct the environmental review of nuclear power
2 plants are being instructed that for all practical
3 purposes the high-level waste disposal problem does not
4 exist. We submit that in the context of this case what
5 the government is arguing is that an agency may taken an
6 environmental problem in advance, consider it
7 generically in the abstract, and then for policy reasons
8 eliminate it from consideration in subsequent actual
9 decision making about actual nuclear power plants by
10 setting a zero value on it.

11 It is conceded that the problems of the
12 disposal of high-level waste are significant.

13 QUESTION: Mr. Atkeson, do you support the
14 Court of Appeals reasoning for deciding that the Nuclear
15 Regulatory Commission ought not to have done this on a
16 generic basis?

17 MR. ATKESON: Mr. Justice Rehnquist, we
18 contend that the Court of Appeals was correct in saying
19 that it as a decision-making device this was improper,
20 that the decision making involved here is the review of
21 actual nuclear power plants and that the rule, if it had
22 been made correctly, could have been reviewed and
23 applied in that licensing. But since the Court arrived
24 at the conclusion that the decision was a clear error of
25 judgment, it could not be applied.

1 QUESTION: Well, what is it about NEPA that
2 prevents a generic approach like this? What is it in
3 the language? I read the Court of Appeals' opinion with
4 some care, and I am inclined to agree with Mr. Strauss
5 that the principle opinion never points to any section
6 of the Act. It just refers to "NEPA." What section of
7 the Act do you rely on?

8 MR. ATKESON: Mr. Justice Rehnquist, the
9 problem here is, and I think this was said in the Court
10 of Appeals' decision, that if the Regulatory Commission
11 had arrived at an appropriate decision on the record
12 about the impact of high-level waste disposal, I think
13 the decision incorporates the thing that --

14 QUESTION: Did you understand my question?

15 MR. ATKESON: Yes, Your Honor, that if the
16 Commission had correctly decided that the impact of
17 high-level waste disposal was insignificant then that
18 could have bound the licensing boards. What happened
19 here --

20 QUESTION: I asked you what section of NEPA
21 you were relying on to fault the generic approach of the
22 NRC.

23 MR. ATKESON: Your Honor, the fault of the
24 generic approach is that having arrived at a generic
25 review of the problem, the Commission did not

1 incorporate that generic review into the --

2 QUESTION: I take it from your answer you are
3 simply unable to cite any section of NEPA that supports
4 the result you are urging.

5 MR. ATKESON: Well, the problem here is the
6 problem that the generic result that the Commission
7 actually found in its acknowledged uncertainties and
8 risks associated with high-level waste disposal were
9 then not factored into the S-3 table.

10 QUESTION: Mr. Atkeson, in your view did the
11 NRC consider all of the relevant evidence?

12 MR. ATKESON: Justice O'Connor, I think our
13 view is that the record fulsome. In its final decision
14 --

15 QUESTION: It did consider, in other words,
16 the evidence that was available. You disagree with its
17 conclusion?

18 MR. ATKESON: Well actually, Justice O'Connor,
19 most of the grounds for questioning the decision of the
20 NRC here are in statements made by the NRC itself or
21 endorsed in the record. The Commission said, we agree
22 with the interagency review group which was reporting to
23 the President of the United States at the same time that
24 there are uncertainties as to when and where the
25 repositories will be constructed or whether they will

1 perform as expected. Those are very basic uncertainties.

2 QUESTION: Yes, but it did consider, in your
3 view, the relevant evidence.

4 MR. ATKESON: I think on the whole, yes, they
5 did.

6 QUESTION: Did it also adequately describe the
7 environmental questions surrounding the back end of the
8 fuel cycle?

9 MR. ATKESON: Justice O'Connor, they did
10 identify all the major areas of uncertainty. What is
11 involved, though, that on the one hand they would say we
12 concede this, we concede this, we concede, but for
13 policy reasons we reach this conclusion. What we are
14 saying is that the concessions they made as to
15 environmental uncertainty should have been incorporated
16 in Table S-3. What you get in Table S-3 is merely the
17 cryptic entry, buried at federal repository.

18 Mr. Strauss says that he is perfectly prepared
19 to have some supplementing of this as he said in
20 response to Justice Steven's question, but he is not
21 prepared to allow the licensing boards to take account
22 of that uncertainty and that is the basic problem here.

23 The National Environmental Policy Act --

24 QUESTION: Mr. Strauss, let me just interrupt
25 if I may. I know Justice Rehnquist tried, and I would

1 like to try again. What provision of what statute do
2 you rely on to say they had the duty to do that?

3 MR. ATKESON: Mr. Justice Stevens, the
4 provision of the statute involved is the provision of
5 the National Environmental Policy Act, Section 1022(c)
6 which says that the environmental impact of the action
7 is to be set out in the environmental impact statement
8 and is to accompany the proposal through the agency
9 review process. In this case, the agency review process
10 starts with the licensing board. It is the licensing
11 board that is the only entity in the Nuclear Regulatory
12 Commission that considers the environmental impact
13 statement.

14 In other words, if this issue is screened off
15 from consideration by the nuclear licensing board, then
16 nobody considers it in the context of an actual power
17 plant licensing.

18 QUESTION: Do you by that argument then
19 suggest that it would never be permissible to have a
20 generic rule excluding any issue from individual
21 consideration?

22 MR. ATKESON: As the lower --

23 QUESTION: Any issue affecting the
24 environment, that is.

25 MR. ATKESON: As the lower court pointed out,

1 if the record in this case has warranted a finding that
2 there was zero environmental effect then the Commission
3 would have been warranted in instructing the licensing
4 board to take no account.

5 QUESTION: Well, if you say that then you are
6 objecting to the substance of the decision rather than
7 to the procedure?

8 MR. ATKESON: We are saying that the error of
9 the Court can be considered in one way or the other, and
10 I think that is the way the lower court put it. It said
11 the Commission has made either a mistake of judgment in
12 assessing the impact and setting it out, or it has made
13 a procedural error in precluding the licensing boards
14 from considering this factor.

15 The essence of the problem here is that the
16 Commission conceded the uncertainties and risks. It
17 then screened them out of the S-3 table on policy
18 grounds. The result is that the mandate of NEPA for the
19 licensing boards to consider all the environmental
20 impacts in licensing nuclear power plants was not obeyed.

21 QUESTION: Well, that is not a mandate to all
22 licensing boards. That is a mandate to the Nuclear
23 Regulatory Commission, is it not, that presumably can be
24 allotted to its subordinate bodies within reason as the
25 NRC sees fit?

1 MR. ATKESON: Mr. Justice Rehnquist, the fact
2 is, and this is reflected in the report on Nuclear
3 Regulatory Commission procedures that in all instances
4 the environmental impact statement is scrutinized by the
5 licensing board. That is the only comprehensive review
6 of the environmental impact statements that takes
7 place. It could be changed, but it has not been changed.

8 QUESTION: I am a little confused as perhaps
9 some of the rest of us are. Is it the fact of a risk
10 that is the core of your position, the fact that there
11 is a risk which is undetermined, cannot be identified,
12 cannot be measured?

13 MR. ATKESON: Mr. Chief Justice, there is a
14 great deal in the record that documents the risk. There
15 is the risk while the high-level waste is on the surface
16 of the earth. There is risk attendant on its being
17 taken down to the repository if a repository is
18 developed, and there is a risk documented in the record
19 while it is in the repository. Incidentally, the
20 Nuclear Waste Policy Act passed by Congress at the end
21 of the last year provides that for a period of time the
22 waste is to be retrievable while it is in the
23 repository, which means it may be back on the surface.

24 QUESTION: Mr. Atkeson, in your view could an
25 individual licensing agency adopt a generic rule to the

1 effect that the long-term storage of waste would have no
2 likely effect on the environment?

3 MR. ATKESON: It is possible that the
4 Commission could argue that since it has authority under
5 the Atomic Energy Act to license or not license a
6 nuclear power plant that it could adopt such a rule
7 under that Act, but it would seem to us on the basis of
8 the record in this case that it would be arbitrary and
9 capricious for it to say on the basis of the facts as
10 they are here that those facts could never in any future
11 licensing on a particular actual nuclear power plant be
12 considered.

13 QUESTION: Mr. Atkeson, when airlines are
14 licensed by the CAB or when they are built by airlines,
15 no one would think that they should guarantee that no
16 airplane would never fall and no accident would ever
17 happen and no injury would ever follow. No one think
18 that that should be done, would they seriously? And yet
19 sometimes 200 or 300 people are killed at one time in an
20 airplane accident. Is that not something of what we are
21 dealing with in the broad picture here?

22 MR. ATKESON: I know that the question of how
23 much risk is acceptable is constantly under
24 consideration in our society, and I know that one of the
25 purposes of this rulemaking was to quantify the risk as

1 precisely as possible, and I think that the Commission
2 has done a tremendous job in this respect in the seven
3 years of the rulemaking. But what is left at the end is
4 that the Commission acknowledges as a continuing area of
5 uncertainty and risk, and it seems to us that it is
6 incumbent on the Commission to set that out candidly in
7 the S-3 table and if it is set out there at an
8 appropriate time in the future in the case of a perhaps
9 marginal plant that a decision is made not to go forward
10 with that.

11 QUESTION: The first atomic power plant goes
12 back a good deal more than seven years, though, does it
13 not?

14 MR. ATKESON: Excuse me?

15 QUESTION: The first atomic power plant goes
16 back considerably more than seven years.

17 MR. ATKESON: Licensing took place in the
18 1950s.

19 QUESTION: The first one was under the Power
20 Reactor Development Corporation case decided by this
21 Court almost twenty years ago, I would guess.

22 MR. ATKESON: Yes, at the outset of the 60s.

23 The question has been asked what level of risk
24 is acceptable, what is an appropriate response to the
25 requirement of NEPA that risks and uncertainties be set

1 out in the environmental impact statement. I think I
2 heard Mr. Strauss say that the Commission at this point
3 is satisfied that the risk is not such as to preclude
4 further licensing of nuclear power plants.

5 What he then added was that if the risk is
6 deemed to be at some other point, the Commission might
7 make the decision not to license in certain cases where
8 there was not a clear need for power. Incidentally, the
9 Nuclear Regulatory Commission has adopted subsequent to
10 the S-3 rule a rule that the class nine reactor core
11 meltdown accidents be considered in the context of
12 environmental impact statements.

13 So in response to your question, Mr. Chief
14 Justice, we are engaged in the activities of the Nuclear
15 Regulatory Commission in some very fine assessments of
16 what degree of risk is acceptable in the licensing of
17 nuclear power plants, and those issues, as I say, are
18 sent out to the licensing boards for review. We have
19 drawn the Court's attention to the problem with the
20 original and the interim rule in this case that the
21 health, socio-economic and cumulative impacts of the
22 fuel cycle are screened from review as those original
23 and interim rules were phrased.

24 The Commission acknowledged this deficiency by
25 amending the Table S-3 rule to make clear that these

1 health, socio-economic and cumulative impacts could be
2 considered. It is clear that these were appropriate to
3 be considered and that they were improperly screened
4 from review --

5 QUESTION: Did anyone ever try to have them
6 considered, Mr. Atkeson? I had the impression at least
7 as to the health effects no one ever asked to have them
8 considered.

9 MR. ATKESON: Mr. Justice Rehnquist, the
10 matter was drawn to the attention of the Commission at
11 the time of the interim rulemaking, and it was not for
12 two years that the Commission got around to amending the
13 thing. So the matter was being litigated before the
14 Commission for some time before the amendment took place.

15 This case is not about the propriety of
16 generic rulemaking, nor about the wisdom of building
17 nuclear power plants in the face of uncertainty
18 regarding nuclear waste disposal. Essentially, it is a
19 case about the Commission's prolonged attempted to
20 isolate the problems of nuclear waste disposal from the
21 problem of deciding whether it is worth it in any
22 particular instance to license a plant that will create
23 substantial amounts of additional waste.

24 Nothing in the Vermont Yankee decision of this
25 Court which was explicit in its recognition of the

1 problems of high-level waste disposal suggests that an
2 agency has discretion under NEPA to exclude significant
3 environmental uncertainties and risks from the NEPA
4 decision-making process when it comes to licensing
5 particular nuclear plants. The law requires disclosure
6 of these uncertainties, and the Commission inexplicably
7 refused to do so despite its recognition of their
8 significant nature.

9 The issue here which Congress had made all the
10 more important by its heavy reliance in the Nuclear
11 Waste Policy Act on use of NEPA analysis is maintaining
12 the integrity of the NEPA process based on clear,
13 candid disclosure and consideration of the significant
14 environmental risks of creating high-level waste in the
15 licensing of particular nuclear power plants. For the
16 reason stated today and as summarized in our brief, the
17 judgment of the Court of Appeals should be affirmed.

18 CHIEF JUSTICE BURGER: Do you have anything
19 further, Mr. Strauss?

20 MR. STRAUSS: Mr. Chief Justice, unless the
21 Court has some questions, I have nothing further.

22 CHIEF JUSTICE BURGER: Thank you, gentlemen.
23 The case is submitted.

24 (Whereupon, at 2:57 p.m., the case in the
25 above-entitled matter was submitted.)

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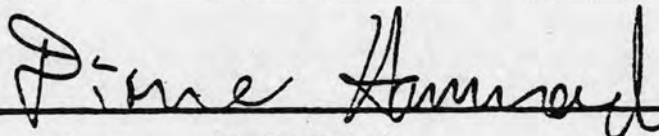
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