Supreme Court Questions Environmentalist Control Of Energy

The case of Consumers Power v. Aeschliman *proves "that an enterprising lawyer can always find a way to continue a case to stop a nuclear power plant."*
— Myron Cherry, attorney for the intervenors in *Consumers Power*

On Nov. 28, the U.S. Supreme Court gave some important indications that it may be preparing a major decision in environmental law — a decision which would turn around six years of court-sanctioned sabotage of the nation's nuclear energy development.

Since 1971, when Atomic Energy Commission Chairman James Schlesinger failed to appeal the famous Calvert Cliffs case, environmental law has been characterized by the above-cited quote from Mr. Cherry: prohibitively strict enforcement of the National Environmental Policy Act (NEPA) by federal agencies and the courts, plus the well-financed legal onslaughts of various Nader-style environmentalist groups have kept plant after plant from being built or from beginning operation.

However, the Supreme Court heard oral arguments on Nov. 28 for two cases involving nuclear plant construction — *Consumers Power v. Aeschliman* and *Vermont Yankee Nuclear Plant Corporation v. Natural Resources Defense Council* — which could significantly change that.

The seven justices sitting (Justices Powell and Blackmun were not present) showed extreme concern over the devastating economic effect of the environmental law which has been created by lower court decisions. Justice Marshall particularly stressed the lengthy delays in the construction of nuclear plants which have been brought about by environmentalist interventions in Nuclear Regulatory Commission proceedings and in lawsuits in federal court. He pointed out that it is now 1977 and the construction and operating permits in question were issued in 1971.

Other justices questioned the efficacy of a procedure in the Vermont Yankee case in which a nuclear reactor was issued a full operating license in 1972 and then had that license removed, after two years of safe production of power.

The concern of the justices was summed up by Mr. Marshall, who asked: "How can we run a nation on this basis?"

However, the issues raised in the two cases are far more significant than simply the economic dislocation involved in delayed and uncertain construction of nuclear plants. In the Consumers Power case the environmentalists attempted to establish as a rule of law that "conservation," including specific recommendations to stop the consumption of power, must be considered as an *alternative* to building a nuclear generating plant. This conservation criterion, which — pending the Supreme Court's ruling — has been adopted by the Nuclear Regulatory Commission, is a foot in the door for a far more devastating method of fascist economic "planning." The environmentalist attorney representing the intervenors in the case, Myron Cherry, made this clear in an interview this week:

"What was raised in our brief to the Court of Appeals was what we call 'in use conservation.' This means that the environmental impact statement must analyze the environmental effects of the use of the energy created by the generating plant, rather than just the environmental impact of the plant itself on its surroundings. For example, the Midland plant (in Michigan; at issue in the Consumers Power case — ed.) was to produce processed steam for Dow Chemical. What if Dow wants to use it to produce chlorinated hydrocarbons? What if GM wants to use the electricity to build bigger cars? Should that energy be produced? Would conservation be more beneficial to the environment?

"My concept of energy policy has to do with radical planning. I got the idea from (solar power advocate —ed.) Barry Commoner a number of years ago. Then you have to look for the right case so you can structure the legal argument. The Court of Appeals in its decision footnoted our concept of conservation and indicated that we didn't intend to press this claim. Well that's not true. The NRC has adopted a standard of conservation in general and now, in the current NRC hearings on the Midland plant we are pushing the in use argument."

In the Vermont Yankee case, environmentalists asserted that unless the Nuclear Regulatory Commission sponsored an essentially infinite series of "what if?" hearings on the disposal of nuclear reactor waste materials, it would have failed to fulfill its responsibility to fully "ventilate" and create a "meaningful dialogue" on every issue. In a marvelously contrived "Catch-22," the District of Columbia Circuit Court of Appeals, in a decision adopting the environmentalists' argument, refused to specify what procedures would "fully ventilate" the issue.

Confronted with the dismay of some of the Supreme Court justices at the havoc wrought by lower court

decisions, attorneys for both the Natural Resources Defense Council (NRDC) and for Aeschliman and the Saginaw Intervenors attempted to file a motion with the court dismissing the entire matter, claiming that the petition of certiorari (the Court's agreement to hear the case) was improvidently granted and should be revoked.

NRDC attorney Richard Ayres stated that because the NRC has issued its final interim rule on the nuclear fuel cycle (including the disposal of waste) that Vermont Yankee and part of the Consumers Power case were moot. He argued further that since Vermont Yankee had been issued an operating license, the original controversy no longer existed. The justices noted that this was a rather remarkable claim in view of the fact that the Vermont Yankee operating license had already been revoked once and the license on which it was currently operating was issued for an interim period of 18 months.

An attorney for the Center for Law and Social Policy, involved as attorney for the Union of Concerned Scientists which submitted an amicus brief, revealed the actual reason for the Naderites' unusual motion. "The U.S. Supreme Court is not the best place to raise the issues we were pushing. We filed the motion to try to prevent the Justices from overturning our victories in the lower courts.... The oral argument did not go well at all. No one showed very much interest in the merits of the case — how dangerous a problem radioactive waste is. The Justices were primarily concerned with procedural questions."

However, reports from the power companies' attorneys indicate that the Court's concern with procedure went right to the heart of the issues before it. Particularly notable was Justice Rehnquist's sharp questioning of NRDC attorney Ayres. When Ayres argued for "full public participation" in licensing procedures, Justice Rehnquist asked where the law requires public participation. Ayres cited Circuit Court of Appeals decisions in support of his position, to which Justice Rehnquist retorted, "That is not this court." A repeated theme of other, more technical questions was — where in the National Energy Policy Act, passed in 1969, or in the Atomic Energy Act, does Congress require all these procedures? How do the courts read all this into NEPA?

The Court's concern on this point clearly indicates the effect of the amicus briefs, particularly the brief filed by the U.S. Labor Party, in raising the fundamental broad issues involved in the Naderites' efforts to make the courts their ally in legislating an end to progress and scientific development. Now it appears possible, from the tenor of the oral argument, that the Supreme Court is considering reversing the lower court environmentalist decisions which have blocked the road to the development of nuclear power. A decision is expected in the next 60 days.