City of West Chicago, Illinois v. United States Nuclear Regulatory Commission

701 F.2d 632 (7th Cir. 1983)

[Chief Judge Cummings] Petitioner * * * challenges a Nuclear Regulatory Commission (NRC) order of February 11, 1982, granting Kerr-McGee Corporation (KM) a license amendment (Amendment No. 3) authorizing demolition of certain buildings at KM's West Chicago facility, and acceptance for on site storage of contaminated soil from offsite locations * * * We uphold the NRC order * * *

I. Facts

KM operated a milling facility in West Chicago for the production of thorium and thorium compounds from 1967 to 1973. Although the plant closed in 1973, there is presently on site approximately 5 million cubic feet of contaminated waste material consisting of building rubble, contaminated soil, and tailings from the milling of thorium ore. * * * The current NRC license for the West Chicago site is a "source material" license * * * authorizing KM to possess and store thorium ores. * * * Amendment No. 3 [to KM's license], which is the focus of the City's suit challenging the NRC order, was issued in September 1981 and allowed demolition of six * * * buildings on site in a non-emergency situation. Amendment No. 3 also authorized receipt and storage on site of contaminated material that was formerly taken from the site for use as landfill.

On October 14, 1981, the City brought suit challenging the issuance of Amendment No. 3 * * * Judge McGarr temporarily enjoined KM's activities under the amendment and ordered the NRC to give notice to the City and consider any request for hearing that the City might make. NRC did so, and on February 11, 1982, issued its order denying the City's request for a formal, trial-type hearing, addressing the contentions raised by the City in the written materials it submitted, and issuing Amendment No. 3. Meanwhile, the City filed a preliminary injunction motion raising the same claims in the district court. On April 5 the district court dismissed the City's motion * * * [The city then appealed this dismissal.]

The City challenges the NRC order * * * on both procedural and substantive grounds, contending first, that the NRC violated its own regulations, the Atomic Energy Act, due process, and the National Environmental Policy Act (NEPA) in issuing Amendment No. 3, and second, that the order must be set aside because it is both unsupported by substantial evidence in the record and arbitrary and capricious. We address the procedural issues first.

The Atomic Energy Act of 1954 (AEA), § 189(a), 42 U.S.C. § 2239(a), clearly requires NRC to grant a "hearing" if requested "[i]n any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit * * *." The parties in this case are arguing about the kind of "hearing" the NRC is required to conduct when issuing an amendment to a source materials license. The City argues that NRC must hold a formal, adversarial, trial-type hearing as provided by NRC regulations * * * NRC and intervenor KM argue that the NRC may hold an informal hearing in which it requests and considers written materials without providing for traditional trial-type procedures such as oral testimony and cross-examination. * * * In the circumstances of this case, we find that an informal hearing suffices. * * *

NRC agrees that a party who requests a hearing pursuant to the notice of opportunity for a hearing issued under Section 2.105 is entitled to a notice of hearing under Section 2.104 and a formal hearing will be convened. However, Section 2.105 by its own terms requires issuance of a notice of proposed action only in limited circumstances * * * [n.5] The City argues that Amendment No. 3 effectively licenses KM to receive offsite thorium for commercial disposal under Section 2.105(a)(2). By its terms Section 2.105(a)(2) requires notice of proposed action as to (1) commercial disposal, which this is not, since KM is only a temporary storage site and is apparently not being reimbursed or otherwise compensated for its action, (2) by a waste disposal licensee, such as those licensed at Hanford, Washington, or Barnwell, South Carolina. KM, to the contrary, operates under a source materials license, rather than under a license for a commercial waste disposal site, and had no intention of changing its status.

> n.5. Section 2.105 Notice of proposed action.
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> (a) If a hearing is not required by the Act or this chapter, and if the Commission has not found that a hearing is in the public interest, it will, prior to acting thereon, cause to be published in the Federal Register a notice of proposed action with respect to an application for:
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> (1) A license for a facility;
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> (2) A license for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee; or
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> (3) An amendment of a license specified in paragraph (a)(1) or (2) of this section and which involves a significant hazards consideration; * * *
>
> (6) Any other license or amendment as to which the Commission determines that an opportunity for a public hearing should be afforded.

Finally, the City argues that NRC should have found that the "public interest" required a formal hearing. We note that the determination of whether the public interest requires a hearing is left to NRC's discretion, and find that in this case, NRC had ample cause to reject the City's argument. * * *

The City claims that a materials licensing hearing under Section 189(a) of the AEA must be in accordance with Section 5 of the Administrative Procedure Act (APA), 5 U.S.C. § 554. Section 554 does not by its terms dictate the type of hearing to which a party is entitled; rather it triggers the formal hearing provisions of Sections 556 and 557 of the APA if the adjudication in question is required by the agency's governing statute to be "determined on the record after opportunity for an agency hearing * * *." The City argues that Section 189(a) of the AEA triggers the formal hearing provisions of the APA because it provides that the "Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding."

[The] three magic words [“on the record”] need not appear for a court to determine that formal hearings are required. See, e.g., *Seacoast Anti-Pollution League v. Costle*. However, even the City agrees that in the absence of these magic words, Congress must clearly indicate its intent to trigger the formal, on-the-record hearing provisions of the APA. [*Florida East Coast*]. We find no such clear intention in the legislative history of the AEA, and therefore conclude that formal hearings are not statutorily required for amendments to materials licenses.

In adopting rules to carry out the AEA, * * * the Atomic Energy Commission (AEC) * * * provide[d] by regulation for formal hearings on request in all licensing cases. * * * In 1957, the Act was amended to add the second sentence of Section 189(a), mandating a hearing on certain applications for construction permits even when uncontested. * * * After the 1957 amendment took effect, there was a significant amount of criticism of the AEC for overformalizing the licensing process. The staff of the Joint Committee on Atomic Energy published a report criticizing the AEC for going "further in some respects than the law required, particularly in regard to the number of hearings required and the formality of procedures." With respect to materials licenses, the Joint Committee staff suggested registration rather than licensing of materials, though it did recommend hearings before a hearing examiner in contested materials licensing cases. The Joint Committee then held hearings to explore legislative improvements to the AEC regulatory process. * * * [T]he Committee concentrated mainly on reactor licensing, * * * and dispensed with the mandatory hearing requirement in uncontested operating license, but not construction permit, proceedings.

The AEC continued to hold formal hearings in all contested reactor cases, as well as in materials licensing cases. However, based on the threadbare legislative history concerning materials licenses, we are unable to conclude that the AEC's procedures were mandated by statute. Even if the legislative history indicates that formal procedures are required by statute in reactor licensing cases * * * we do not accept the City's argument that this by necessity indicates that all hearings under the first sentence must be formal as well. * * *

The City argues that under the APA, agency action is classified either as rulemaking or adjudication, and since licensing is adjudication, NRC is obliged to provide a formal hearing in this case. The "on the record" requirement of APA Section 554, according to the City has been relevant primarily in cases involving rulemaking, not adjudication, *United States v. Florida East Coast Ry*.; in adjudication, the City claims the absence of the "on the record" requirement is not decisive. For example, Section 402 of the Federal Water Pollution Control Act (FWPCA), which provides for a "public hearing," has been held by three courts including this one to require a formal hearing pursuant to Section 554. *Seacoast Anti-Pollution League v. Costle*. [In *Seacoast,* the] First Circuit relied principally on the adjudicative nature of the decision at issue — issuance of a permit to allow discharge of a pollutant — finding that primarily the rights of the particular applicant would be affected, and that resolution of the issues required specific factual findings by the EPA Administrator. *Seacoast Anti-Pollution League v. Costle*. The court also mentioned the judicial review provision of Section 509 of the FWPCA, which provides for review of a determination required under the FWPCA to be made "on the record." * * * [However, unlike] the "on the record" requirement of Section 509 of the FWPCA, there is no indication even in the judicial review Section of the AEA, the governing statute, that Congress intended to require formal hearings under the APA.

Thus even in adjudication, the "on the record" requirement is significant at least as an indication of congressional intent. We agree with the courts and commentators who recognize that adjudication may be either informal or formal. Formal adjudications are those required by statute to be conducted through on-the-record proceedings. Informal adjudications constitute a residual category including "all agency actions that are not rulemaking and that need not be conducted through `on the record' hearings."

Despite the fact that licensing is adjudication under the APA, there is no evidence that Congress intended to require formal hearings for all Section 189(a) activities. In light of the above analysis, we conclude that NRC did not violate the AEA when it denied the City's request for a formal hearing.