NUCLEAR ACCIDENTS: JUDICIAL REVIEW OF THE NRC’s DUTY TO ISSUE A HEALTH WARNING

I. Introduction

The increased release of carcinogens and toxins into the environment has resulted in much controversy over the long term effects on public health from breathing, ingesting and absorbing these substances. This controversy is demonstrated by the recent litigation over DES, asbestos, atomic blasts, nerve gas and nuclear power. The injunctive relief sought in these actions has ranged from warnings and abatement orders to the closing of facilities which emit toxins.

Radiation hazards, particularly the long term health effects of low level radiation, have generated much concern. Litigation in this area has centered on the planning and construction of nuclear power plants. Due to the risks and benefits inherent in the use of nuclear power, proponents advocate the construction of these plants because of society’s energy needs while opponents argue against their construction because of the dangers posed to public health by radiation emissions.

As a result of the Three Mile Island nuclear power accident,
the theoretical battles over nuclear power production crystalized in *Johnsrud v. Carter*.

Section II of this Comment analyzes the *Johnsrud* issue: whether residents living near the Three Mile Island facility were entitled to a health warning as a minimum precautionary measure because of the uncertain amount of radiation emitted as a result of the accident. In *Johnsrud*, the plaintiffs requested that the president of the United States be held responsible for the issuance of such a warning.

This Comment proposes that the Nuclear Regulatory Commission ("NRC") is the proper defendant in a suit which requests such a health warning. A brief analysis of the history and functions of the NRC in section III supports this conclusion. Thereafter, two issues concerning judicial review of the NRC will be discussed in sections IV and V respectively. Section IV will analyze whether the issuance of a health warning is a nondiscretionary duty of the NRC, or a matter, the determination of which, is within the agency's discretion. This analysis will determine the scope of the court's review over an action requesting the NRC to issue a health warning. Section V will discuss whether a district court or a court of appeals is the appropriate forum in which to bring such an action, assuming the NRC is the proper defendant.

16. *Id.*, slip op. at 3.
17. *Id.*
18. The Administrative Procedure Act provides that a person who has suffered a legal wrong or who has been adversely affected or aggrieved by agency action is entitled to judicial review. 5 U.S.C. § 702 (1976). The only exceptions are where there is a statutory prohibition on review or where agency action is committed to agency discretion by law. 5 U.S.C. § 701 (1976).
19. 5 U.S.C. § 706 (1976) (Scope of Review) provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall:

(2) hold unlawful and set aside agency action, findings and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of a statutory right


The 1954 Act provides for both district court review pursuant to 42 U.S.C. § 2231 (1976)
II. Johnsrud v. Carter

On March 28, 1979, the United States experienced the "worst accident" in the history of nuclear power generation, when the Three Mile Island nuclear power plant, located near Middletown, Pennsylvania, sustained a mechanical malfunction after several water pumps stopped working. Thereafter, a series of events "compounded by equipment failures, inappropriate procedures, and human errors and ignorance" escalated the crises. For the people living in the communities surrounding Three Mile Island, "the rumors, conflicting official statements, a lack of knowledge about radiation releases, the continuing possibility of mass evacuation, and the fear that a hydrogen bubble trapped inside a nuclear reactor might explode were real and immediate."
As a result of the accident, *Johnsrud v. Carter,* a class action complaint, was filed in the United States District Court for the Eastern District of Pennsylvania on March 30, 1979. The plaintiffs requested the United States to order an evacuation of all persons within a specified distance from the Three Mile Island facility. On April 19, 1979, the plaintiffs filed an amended complaint seeking mandatory injunctive relief which requested the United States and President Carter to issue a public warning to each resident within 200 miles of Three Mile Island:

Of the fact that they have an increased risk of injury to health and reproductive capabilities by virtue of having been exposed to, being exposed to and continuing to be exposed to manmade radiation added to the natural background radiation by leakage of radioactive material from Three Mile Island and by direct radiation emanating from the containment building.

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28. Id., slip op. at 3.
29. Id.
30. Id.
31. Id. at 2.
32. Id. at 3. The Commission's Report, supra note 21, stated "that the actual release [of radiation at TMI] will have a negligible effect on the physical health of individuals." Id. at 12. See The Three Mile Island Nuclear Accident: Transcript of Proceedings Before The Senate Subcommittee on Health and Scientific Research, 96th Cong., 1st Sess. at 142-46 (April 4, 1979). [hereinafter cited as Proceedings Before The Subcommittee on Health and Scientific Research.] However, The Commission's Report, supra note 21, admits that the health effects of low-level radiation are unknown and that the degree of danger from such doses can only be measured indirectly. Id. at 12, 35. Yet, the report concluded that the radiation doses (at TMI) were so low "that the overall health effects will be minimal." Id. at 12. Furthermore, "although a site emergency was declared at 0654 (on March 28), the first environmental radiation survey was not performed until 0748." Investigation Into TMI Accident, supra note 24, at 11-3-77. There were also reports of deficiencies (either due to mechanical malfunctions or operator misjudgments) and omissions in monitoring "in-plant" and "off-site" radiation leakage. The Commission's Report, supra note 21, at 34, 101-07. See Investigations Into TMI, supra note 24, at 11-1-35, 36, 43-6, 11-3-5, 6, 10, 18, 41, 84, 90, 94, 97; Proceedings Before The Subcommittee on Health and Scientific Research, supra, at 31, 34; Accident at the Three Mile Island Nuclear Power Plant: Oversight Hearings Before the Subcomm. on Energy and the Environment of the House Committee on Interior and Insular Affairs, 96th Cong., 1st Sess. (1979) [hereinafter cited as Oversight Hearings]. However, The Commission's Report, supra note 21, concluded: "these deficiencies did not affect the commission staff's ability to estimate the radiation doses on health effects resulting from the accident." Id. at 34. Accord, Investigation Into TMI, supra note 24, at 11-3-98, 99.

Essentially, the plaintiff's requested warning would acknowledge the uncertainty associated with the accrual effects of low-level radiation on public health and safety, particularly when there are monitoring deficiencies during the incident.

It should be noted that if the plaintiffs reworded the first line of the requested warning...
The district court dismissed the amended complaint for lack of subject matter jurisdiction, holding that the action was barred by the doctrine of sovereign immunity and that the case presented a non-justiciable political question.\footnote{Id. See Johnsrud v. Carter, No. 79-1185, slip op. at 4-6 (E.D. Pa., May 18, 1979).}

The Third Circuit, relying on its decision in \textit{Jaffee v. United States},\footnote{592 F.2d 712 (3d Cir.), cert. denied, 441 U.S. 961 (1979). In Johnsrud v. Carter, No. 79-1950 (3d Cir. Apr. 23, 1980), the Third Circuit court stated:} held that the district court did have jurisdiction over the

from “of the fact that they have an increased risk of injury to health. . .” to “of the fact that they may have an increased risk of injury to health. . .” then their request may be viewed more favorably because the warning would then acknowledge that there are differing views on health effects associated with low-level radiation, i.e. that there is uncertainty. For general discussions for and against the hazards of radiation see \textit{Yellin, Judicial Review and Nuclear Power: Assessing the Risks of Environmental Catastrophe}, \textit{45 Geo. Wash. L. Rev.} 969 (1979); \textit{Comment The Energy Crisis: Reasonable Assurances of Safety in the Regulation of Nuclear Power Facilities}, \textit{55 J. Urb. L.} 371 (1978); \textit{Poulin, Who Controls Low-Level Radioactive Wastes}, \textit{6 Envt'r L. App.} 201 (1977).

Johnsrud action pursuant to section 1331, Title 28 United States Code ("section 1331"). The court stated that the district court had jurisdiction for two related reasons. First, the plaintiffs had alleged a violation of their rights under federal constitutional, statutory, and common law. Second, in an equitable action under section 1331 seeking "non-statutory" review, the Administrative Procedure Act ("APA") serves to waive the defendant's sovereign immunity. Since the district court's jurisdiction depended in part

op. at 4-5.

In explanation of this statement the court further stated:

[n]on-statutory suits for review are so described because they are not brought under statutes that specifically provide for review of agency action. Indeed review, if available at all, is through actions involving matters which arise under the Constitution, laws, or treaties of the United States as provided in 28 U.S.C. § 1331. . . .

Id. at 4 n.3. See notes 37, 38 infra and accompanying text.

35. 28 U.S.C. § 1331(a) states:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or an officer or employee thereof in his official capacity.

36. Johnsrud v. Carter, No. 79-1950, slip op. at 5 n.6 (3d Cir. April 23, 1980). The District Court in Johnsrud summarized:

The plaintiffs contentions to be that the radiation which is released into the environment by Metropolitan Edison Power Co., the plant operator, will cause them to suffer irreparable harm in violation of their fundamental rights guaranteed under the First, Fourth, and Tenth Amendments of the United States Constitution. Further, the plaintiffs assert that the exposure to radiation violates their statutory and civil rights granted by 42 U.S.C. § 1985(e) and 42 U.S.C. § 1986.

Johnsrud v. Carter, No. 79-1185, slip op. at 1, 2 (E.D. Pa., May 18, 1979).

The complaint also alleged that the government's purported duty to issue the requested warning "arises in part under the terms of the Atomic Energy Act of 1954 as amended, 42 U.S.C. § 2011 et. seq., and the regulations promulgated thereunder." Johnsrud v. Carter, No. 79-1950, slip op. at 5 n.6. It is not within the scope of this Comment to discuss the plaintiff's federal constitutional, statutory and common law claims.


A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof.

38. 5 U.S.C. § 702 (1976) further provides:

An action in a court of the United States seeking other than money damages and stating a claim that an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party. . . .

For discussions of the partial elimination of sovereign immunity as a barrier to non-statutory review of federal administrative action in suits seeking equitable relief under 28
on the utilization of the APA, the defendant in Johnsrud necessarily had to be an agency. Therefore, as the court noted, it is an open question whether the President of the United States is an agency within the meaning of the APA. Accordingly, the court suggested that the plaintiffs may wish to specifically designate a responsible agency and amend their complaint. Thus, it may be in the plaintiffs' best interests to specifically name a responsible federal agency to ensure that nothing deters the court from reaching the merits of the suit.


5 U.S.C. § 551 (1) (1976) provides:

(1) “agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;
(B) the courts of the United States;
(C) the governments of the territories or possessions of the United States;
(D) the government of the District of Columbia;
(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
(F) courts martial and military commissions;
(G) military authority exercised in the field in time of war or in occupied territory; or
(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641 (b)(2), of title 50, appendix.

See Soucie v. David, 448 F.2d 1067, 1073 n.17 (D.C. Cir. 1970) (“The statutory definition of ‘agency’ specifically excludes Congress and the courts of the United States, but does not specifically exclude the President. . . .”); Amalgamated Meat Cutters and Butcher Workmen v. Connally, 337 F. Supp. 737, 761 (D.D.C. 1971) (“The leading students of the APA whose analyses are often cited by the Supreme Court, and who, on some matters are in conflict which each other, seem to be in agreement that the term ‘agency’ in the APA includes the President—a conclusion fortified by the care taken to express exclusion of ‘Congress’ and ‘the courts’. But we need not consider whether an action for judicial review can be brought against the President eo nomine.”); K. DAVIS, THE ADMINISTRATIVE PROCESS 1.2 at 4-5 (1978). See, e.g., Senate Select Committee on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 58 (D.D.C. 1973).


41. To assure clear definition of the particular individuals who will be personally responsible for compliance with a court’s mandatory or injunctive decree, 5 U.S.C. § 702 (1976) provides in part:
III. The NRC Is The Proper Defendant In A Suit Requesting A Health Warning

A brief analysis of the NRC’s role in the nuclear industry will demonstrate that there are several reasons why the NRC is the federal agency that should be responsible for issuing a health warning. First, the Energy Reorganization Act\(^4\) gives the NRC extensive regulatory duties under the Atomic Energy Act (“AEA”) in connection with the licensing of nuclear facilities and controlling uses of source, by-product and special nuclear materials.\(^4\) Second,

The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided that any mandatory or injunctive decree shall specify the federal officer or officers (by name or title), and their successors in office, personally responsible for compliance. See H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 5, reprinted in U. S. Code Cong. & Ad. News at 6132.

Thus, if the court decides either that the president is not an agency within the meaning of Section 702, Title 5 of the United States Code (“Section 702”) or that the president as an agency is not the proper party to issue a warning, the plaintiffs should already have safeguarded their interests by having designated, in addition to the president, an existing federal agency responsible for nuclear radiation safety. Furthermore, the plaintiffs must specify the officer or officers of that agency who could be responsible to issue a warning.

Even if the plaintiff’s fail to amend their complaint to name another agency, one could interpret section 702 as standing for the proposition that the court may in its discretion name the appropriate agency to implement its decree, particularly in light of the extraordinary circumstances of the instant case. Section 702 states that an action may be commenced by naming the United States and that only the court’s decree must specify the federal officers involved. Because a decree by the court would come after its review of the merits of the case, the court would be in as good a position as the plaintiffs to name the appropriate agency. See Jaffee v. United States, 592 F.2d. 712, 720 (3d Cir.), cert. denied, 441 U.S. 961 (1979).


“The term ‘by-product material’ means (1) any radioactive material (except special nu-
although other agencies play a role in regulating radiation, the NRC is the prime federal regulator of nuclear radiation.\textsuperscript{44} Finally, the AEA mandates that the NRC license and regulate nuclear facilities in a manner that will protect public health and safety.\textsuperscript{45} The report of the President's Commission on Three Mile Island stressed that safety from radiation hazards is one of the NRC's primary functions.\textsuperscript{46} The report criticized the NRC for overlooking its safety activities while emphasizing its regulatory role.\textsuperscript{47} The Commission's report and the hearings on Three Mile Island before the House Subcommittee on Energy and the Environment\textsuperscript{48} both show that the NRC was deficient in protecting public safety.\textsuperscript{49} These reports and hearings, rather than refute the contention that the NRC should have issued a health warning, support it by emphasizing the need for an internal restructuring of the NRC to ensure that the agency attends to radiation safety.\textsuperscript{50} Therefore, one way of ensuring that the NRC carries out "its primary mission of assuring safety"\textsuperscript{51} is to name the NRC as the proper agency to be

\textsuperscript{44} For a detailed discussion on the interrelation of federal agencies in setting radiation standards and controls see Hallmark, Radiation Protection Standards and the Administrative Decision-Making Process, 8 ENV'TL. L. 785, 789-90 (1978); Train v. Colorado Pub. Interest Research Group, 426 U.S. 1 (1975). 
\textsuperscript{45} See notes 57, 59 infra and accompanying text. 
\textsuperscript{46} See generally Oversight Hearings, supra note 32. 
\textsuperscript{47} Id. at 19-21. 
\textsuperscript{48} See generally Oversight Hearings, supra note 32. 
\textsuperscript{49} Id. See The Commission's Report, supra note 21. 
\textsuperscript{50} The Commission's Report, supra note 21, at 22. 
\textsuperscript{51} See note 41 supra.
charged with a duty to warn.62

IV. A Health Warning: Discretionary Matter or Non-Discretionary Duty?

The APA generally provides that a person who has suffered a legal wrong or who has been adversely affected or aggrieved by a federal administrative agency's action is entitled to judicial review.63 However, there are two exceptions to this provision. One is when agency action is committed to agency discretion by law. The other exception is when a statute prohibits review.64

Agency action is committed to agency discretion only in rare instances where statutes are drawn in such broad terms that the agency is given absolute discretion, so that, in effect there is no law which governs the agency's actions.65 Where a statute gives an agency limited discretion, however, a court may review the agency's decision, to determine whether it is arbitrary and capricious.66 The mandate "to protect the health and safety of the public"67 is found in sections of the AEA that pertain to the regulatory


However, a warning may prove harmful to individuals with cancer-phobia. See Ferrara v. Galuchio, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958).

53. See note 18 supra.

54. 5 U.S.C. § 701 (1976) states in pertinent part:
   (a) This chapter applies, according to the provisions thereof, except to the extent that-
   (1) statutes preclude judicial review; or
   (2) agency action is committed to agency discretion by law.


57. See 42 U.S.C. §§ 2051(d) (1976), 2073(b) (1976), 2098(b) (1976), 2099 (1976), 2111
functions of an agency. Case law demonstrates that because of this mandate, such functions of the NRC involve limited discretion and, therefore, may be reviewed by courts to determine whether the NRC's decisions have been arbitrary and capricious. The courts are to utilize the "arbitrary and capricious" test if they determine, that the issuance of a health warning is a regulatory function. The duty to warn, however, does not arise from


58. See note 57 supra.

59. The NRC's regulatory functions include licensing, inspection and enforcement decisions. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978) (review of AEC orders with respect to licensing nuclear reactors); New England Coalition On Nuclear Pollution v. Nuclear Regulatory Comm'n, 582 F.2d 87 (1st Cir. 1978) (review of NRC orders concerning proposed nuclear power plant); Virginia Elec. and Power Co. v. Nuclear Regulatory Comm'n, 571 F.2d 1289 (4th Cir. 1978) (review of an order of NRC imposing civil penalties for making false statements in connection with application for license to construct and operate a nuclear power plant); Izaak Walton League v. Atomic Energy Comm'n, 533 F.2d 1011 (7th Cir.), cert. denied, 429 U.S. 945 (1976) (review of AEC orders which authorized permit for construction of a nuclear power plant); Citizens for Safe Power, Inc. v. Nuclear Regulatory Comm'n, 524 F.2d 1291 (D.C. Cir. 1975) (review of a final decision and order of AEC affirming issuance of an operating license for a constructed commercial power reactor); Nader v. Nuclear Regulatory Comm'n, 513 F.2d 1045 (D.C. Cir. 1975) (review of AEC's order denying a petition seeking a shutdown or derating of twenty nuclear power plants); Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971) (review of AEC's impact statement concerning an underground nuclear test); New Hampshire v. Atomic Energy Comm'n, 406 F.2d 170 (1st Cir. 1969) (review of AEC's order refusing to consider evidence of possible thermal pollution of river as a result of the discharging of cooling water by facility of a license seeking permission to build a nuclear power reactor); Cotter Corp. v. Seaborg, 370 F.2d 686 (10th Cir. 1966) (review of AEC regulation limiting Commission's duty to carry out its commitment to purchase uranium concentrates to those ore reserves developed prior to a certain date); Nader v. Ray, 363 F. Supp. 946 (D.D.C. 1973) (review of AEC decision to permit continued operation of certain reactors); Nuclear Data, Inc. v. Atomic Energy Comm'n, 344 F. Supp. 719 (N.D. Ill. 1972) (review of AEC's license agreement); Crowther v. Seaborg, 312 F. Supp. 1205 (D. Colo. 1970) (review of AEC's proposed project to flare gas contained in a cavity by nuclear detonation).


61. See note 88 supra and accompanying text.

62. 42 U.S.C. § 2201 (1976). The general duties of the Commission are reflected in the titles of the subsections in section 2201:
allegations that an agency governed by the AEA implemented its tasks improperly. Rather the requested relief involves the direct relationship between the public and the NRC\textsuperscript{63} which arises from the fact that the federal government has assumed sole responsibility for nuclear power plant regulation and control.\textsuperscript{64}

The "General Provisions" subchapter of the AEA,\textsuperscript{65} which is distinct from the sections governing an agency's regulatory functions\textsuperscript{66} makes explicit certain findings concerning the development, use, and control of atomic energy. These Congressional findings include, \textit{inter alia}, that the processing and utilization of nuclear material must be regulated to protect the health and safety of the public.\textsuperscript{67} Indeed, Congress further specified that regulation of nu-

(a) Establishment of Advisory boards, (b) Standards governing use and possession of material, (c) Studies and investigations, (d) Employment of personnel, (e) Acquisition of material, property, ... negotiation of commercial leases, (f) Utilization of other federal agencies, (g) Acquisition of real and personal property, (h) Consideration of license applications, (i) Regulations governing restricted data, (j) Disposition of surplus materials, (k) Carrying of firearms, ... (m) Agreements regarding production, (n) Delegation of functions, (o) Reports, Rules and regulations, (q) Easements for right-of-way, (r) Sales of utilities and related services, (s) Succession of Authority, (t) Contracts, (u) Additional contracts: guiding principles; appropriations, (v) Contracts for production or enrichment of special nuclear material; domestic licenses; other nations; prices; materials of foreign origin; criteria for availability of services under this subsection; Congressional review; (w) License fees for nuclear power reactors.

Transfer of functions: (a)-(d), (f), (g), (i)-(k), (n)-(q) and (s) were transferred to and vested jointly in the NRC and the Administrator of ERDA by Energy Reorganization Act of Oct. 11, 1974 Pub. L. No. 93-438, 88 Stat. 1233, which provided that only the Administrator was to establish the basic standards and procedures respecting national security and that no functions delegated to officers of the NRC were to include functions relating to the development of atomic energy or the atomic industry. Similar functions under subsections (h) and (w) were transferred to and vested exclusively in the NRC.

63. Plaintiffs requesting such a warning need not allege that the NRC's and licensee's actions in controlling the accident were inappropriate. The duty arises when the NRC becomes aware of radiological emissions. \textit{See} notes 33-35 supra and accompanying text. \textit{See generally} Johnsrud v. Carter, No. 79-1950 (3d Cir. Apr. 23, 1980). As a minimum precautionary measure, the NRC should warn to minimize the risk of health injury to the public. \textit{See} note 32 supra; notes 71, 72, 112, 122 infra.


66. \textit{See} note 57 supra.

67. 42 U.S.C. \textsection 2012 (1976) states in part:

The Congress of the United States makes the following findings concerning the development, use, and control of atomic energy:

(d) The processing and utilization of source, byproduct, and special nuclear
clear facilities by the United States is necessary and in the national interest in order to protect the health and safety of the public.  

An examination of the act's legislative history is required to understand whether these provisions are subject to the interpretation that Congress created the AEA, thereby monopolizing the regulation of nuclear power plants, because it felt a duty to protect the health and safety of the public. If the existence of such a duty was in part the motivation for enacting the AEA, then the resultant duty created by the statute to protect the health and safety of the public would devolve upon the governmental agencies created by legislature pursuant to the Act.

The Senate report accompanying the 1946 Atomic Energy Act found that establishing the government as the monopoly producer of fissionable material was in part justified because the production of such material "is attended by serious hazards to public health and safety." The report further stated that "the responsibility for minimizing these hazards is clearly a governmental function." Thus, in 1946, when "the generation of useful power from atomic energy was a distant goal," the government, aware of the potential material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public. [emphasis added].

68. 42 U.S.C. § 2012(e) (1976) provides:

Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public. [emphasis added].

69. See notes 53, 54 supra. The plaintiff's claim that the president should issue the warning. See notes 32 and 39 supra and accompanying text. However, this Comment maintains that because the NRC is the primary federal regulator of nuclear radiation, it should issue the warning. See notes 54-58 supra and accompanying text.


72. Id.

73. S. Rep. No. 1699, 83rd Cong., 2d Sess. reprinted in [1954] U.S. CODE CONG. & AD. News 3456, 3458. "It was commonly believed 8 [sic] years ago that the generation of useful power from atomic energy was a distant goal, a very distant goal. Atomic energy then was 95 percent for military purposes, with possibly 5 percent for peacetime uses." Id. See generally 100 CONG. REC. 10368 (1954) (remarks of Rep. Hickenlooper).
ially serious hazards associated with this form of energy, decided to monopolize the field partly because it felt a duty to protect the public health and safety.\textsuperscript{74}

By 1954, civilian uses of atomic power had become a major industrial component of American society.\textsuperscript{75} This expanded civilian use of atomic power led Congress to amend the 1946 AEA.\textsuperscript{76} The new act reduced the government’s domination of the nuclear field by permitting private participation in the development of nuclear power.\textsuperscript{77} It was believed that such participation “need not bring with it attendant hazards to the health and safety of the American people.”\textsuperscript{78} This statement did not intimate that technology had advanced to the stage where health and safety hazards associated with nuclear power could be eradicated. Read in conjunction with the 1946 Senate report,\textsuperscript{79} the statement can be interpreted to mean that an increased risk to the public health and safety of an already apparent hazard would not follow from permitting private participation in the nuclear field.\textsuperscript{80} This interpretation is bolstered by the fact that the final 1954 AEA\textsuperscript{81} still required federal control over the regulation of nuclear power plants.\textsuperscript{82} Thus, the retention of


The resources of the Atomic Energy Commission and of its contractors appeared fully adequate to develop atomic power reactors at a rate consistent with foreseeable technical progress. Moreover, there was little experience concerning the health hazards involved in operating atomic plants, and this fact was in itself a compelling argument for making the manufacture and use of atomic materials a Government monopoly. Id. [emphasis added.]

\textsuperscript{75} Id. at 3458-59. See generally 100 Cong. Rec. 10368 (1954) (remarks of Rep. Hickenlooper).


\textsuperscript{82} See 42 U.S.C. § 2012(d)-(e) (1976). See also 42 U.S.C. § 2201 (1976); note 64 supra and accompanying text.
such control evidences the government’s intent to maintain its duty to protect public health and safety by minimizing the potentially serious hazards associated with atomic energy.\textsuperscript{83} Indeed, the phrase “to protect the health and safety of the public,” which was used for the first time in the 1954 act, highlights this intent.\textsuperscript{84}

Support for the interpretation that the administrative agencies created under the AEA\textsuperscript{85} retained the duty to minimize the harms of atomic energy is found in New Hampshire v. Atomic Energy Commission.\textsuperscript{86} The First Circuit, in New Hampshire, concluded that the AEC properly refused to consider evidence of the effects of non-radiological pollution in the planning of privately owned and operated installations.\textsuperscript{87} Although factually the case concerned the licensing and regulatory duties of the AEC,\textsuperscript{88} the court felt compelled to analyze the legislative intent supporting the AEA and the AEC.\textsuperscript{89} The court crystallized the agency’s responsibility by stating, “in short, we conclude that, in enacting the Atomic Energy Acts of 1946 and 1954, in overseeing its administration, and in considering amendments, the Congress has viewed the responsibility of the Commission as being confined to scrutiny of and protection against hazards from radiation.”\textsuperscript{90}

The First Circuit reached this conclusion after it had already made a separate reference to the AEC’s regulatory responsibilities.\textsuperscript{91} Therefore, the statement inferentially pertains not only to the Commission’s discretionary actions in regulating nuclear power plants but also to its direct duty to protect the public health and safety. This is particularly so because the New Hampshire court referred to Congress’ enactment of and amendments to the Atomic

\textsuperscript{83} The words “must” and “necessary” respectively found in § 2012(d) and (e), Title 42, United States Code demonstrate the fact that the government still took seriously it’s responsibility to minimize the public health and safety hazards associated with atomic energy. See S. Rep. No. 1211, 79th Cong., 2d Sess. reprinted in [1946] U.S. Code Cong. Serv. 1327-30.


\textsuperscript{85} See notes 35, 37 supra and accompanying text.

\textsuperscript{86} 406 F.2d. 170 (1st Cir. 1969).

\textsuperscript{87} Id. at 176.

\textsuperscript{88} See note 89 infra and accompanying text.

\textsuperscript{89} 406 F.2d at 174, 175.

\textsuperscript{90} Id at 175.

\textsuperscript{91} Id.
Energy Act,\textsuperscript{92} which imply a broader scope of responsibility than the execution of regulatory functions. Thus, because Congress intended any government body which operated under the AEA to bear a direct protective duty to the public, the NRC has acquired this duty.\textsuperscript{93}

That Congress' responsibility to the public's health and safety was a major factor justifying the passage of the AEA,\textsuperscript{94} indicates that in both the final 1946 act\textsuperscript{95} and in the subsequent 1954 amendment\textsuperscript{96} Congress intended that the government's duty to minimize atomic energy hazards remains constant and nondiscretionary.\textsuperscript{97} Alternatively, Congress could have enacted the 1946 Atomic Energy Act\textsuperscript{98} without taking responsibility for public health and safety. Congress again had the opportunity to curtail or modify this responsibility in 1954 yet it failed to do so.\textsuperscript{99} The final version of the 1954 AEA demonstrates that Congress chose to reaffirm its objective legal duty to protect public health by minimizing atomic energy hazards.\textsuperscript{100}

This nondiscretionary duty which devolves upon the NRC,\textsuperscript{101} differs from the agency's responsibility to regulate nuclear power. The latter task requires technical expertise in the development and production of devices utilizing nuclear energy.\textsuperscript{102} For example, some of the subjects within the purview of this latter category are: emergency core cooling systems,\textsuperscript{103} atomic devices for the produc-

\textsuperscript{92} Id. See notes 71, 72, 84 supra and accompanying text.

\textsuperscript{93} 42 U.S.C. § 2012(d)-(e) (1976) arose from the duty Congress felt to protect the public health and safety by minimizing the hazards of radiation. This duty is severable from the NRC's discretionary regulatory functions as enumerated in subsequent AEA chapters. See notes 62, 68, 70-74 supra and accompanying text.

\textsuperscript{94} See notes 72-74 supra and accompanying text.

\textsuperscript{95} See note 70 supra.

\textsuperscript{96} See note 77 supra.

\textsuperscript{97} The case law involving nuclear power does not foreclose this argument since the courts never stated that the NRC does not have a nondiscretionary duty to protect the public health and safety, but rather the courts have determined that in suits contesting the NRC's regulatory activities, the agency's actions are discretionary. See notes 59, 60 supra.

\textsuperscript{98} See note 70 supra.

\textsuperscript{99} See note 77 supra.

\textsuperscript{100} See notes 53, 84 supra.

\textsuperscript{101} See 42 U.S.C. § 2012(d)-(e) (1976) and section V infra. See also notes 93-96 supra and accompanying text.

\textsuperscript{102} See notes 57, 59 supra and accompanying text.

\textsuperscript{103} See, e.g., Nader v. Nuclear Regulatory Comm'n, 513 F.2d 1045 (D.C. Cir. 1975);
tion or utilization of special nuclear material,\textsuperscript{104} nuclear fuel cycle hazards,\textsuperscript{105} provisions for nuclear research,\textsuperscript{106} rules and regulations governing licenses and licensees,\textsuperscript{107} plant siting alternatives,\textsuperscript{108} and construction permits.\textsuperscript{109} The NRC’s decisions pertaining to these technical planning and regulatory functions, which include setting radiation standards,\textsuperscript{110} require the agency to balance the health and safety risks to the public with the present state of technology and the need to develop nuclear power for the benefit of the general welfare.\textsuperscript{111}

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\item See, e.g., Cotter Corp. v. Seaborg, 370 F.2d 686 (10th Cir. 1966); Nuclear Data, Inc. v. Atomic Energy Comm’n, 344 F. Supp. 719 (N.D. Ill. 1972).
\item See, e.g., New England Coalition v. Nuclear Regulatory Comm’n, 582 F.2d 87 (1st Cir. 1978).
\item See, e.g., Izaak Walton League v. Atomic Energy Comm’n, 533 F.2d 1011 (7th Cir. 1976).
\item See notes 102-09 supra and accompanying text and notes 111, 112 infra.
\item The weighing [of residual risks against the benefits of the reactor] requires a value judgment as well as a measuring, and thus the standards are not scientific numbers below which no danger exists. The value judgment embodies complex social and political considerations, for atomic energy has a potential that suggests unlimited benefits to entire nations and presents a risk to entire populations of people, and perhaps their progeny.
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The nondiscretionary protective duty to the public that arises when the NRC becomes aware of radiological emissions during a nuclear accident, on the other hand, does not involve the agency's planning and regulatory considerations. The agency's nondiscretionary duty applies to the consequences of these decisions. Moreover, requiring the NRC to issue a health warning will both alert the segment of the public exposed to the radiation of the fact that they are or may be subject to an increased risk of health injury and allow the generation of nuclear power to continue, thereby benefiting the general welfare.

Furthermore, if the court decides that the NRC's protective duty is reviewable, it need not defer to the agency's expertise in


112. See note 111 supra and accompanying text. See also notes 113, 122 infra and accompanying text.

113. The fact that the NRC has regulated a plant and set radiation safety standards does not foreclose the possibility of health hazards arising from actual radiation emissions. See note 32 supra. This possibility exists even though the radiation dose may be less than a particular standard. In Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566 (W.D. Okla. 1979), the court found that, since the employee was contaminated in her home, the private radiation standard should apply. Therefore, the jury was proper in returning a verdict against Kerr-McGee Corp. on the theories of strict liability and negligence. The court stated: "Although her body burden [the employee's radiation exposure] constituted approximately one-fourth of that permitted by regulation for a radiation worker during her lifetime, it exceeded by two and a half times the exposure permitted to any member of the public [under normal circumstances]." Id. at 583. Likewise, the possible health hazards associated with the accrual and aggravating effects of low-level radiation, see note 32 supra, may occur at levels below which the Commission will order an evacuation. See The Commission's Report, supra note 21, at 13, 38-42.


115. See note 32 supra and note 122 infra.

116. See note 61 supra and accompanying text.

117. "Primary jurisdiction ... applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." United States v. Western Pac. R.R., 352 U.S. 59, 63-64 (1956) (citation omitted). See Honicker v. Hendrie, 465 F. Supp 414, 419 (M.D. Tenn. 1979).

[T]he doctrine of primary jurisdiction would require that the court stay its hand until the agency charged by Congress with the responsibility of regulating the subject matter has had an opportunity to apply its expertise.
determining if a health hazard exists because this is not a question as to which the agency's technical knowledge is determinative: when there is a nuclear accident the technical methodology and data that the NRC previously used in planning or operating a nuclear power plant or device is not in issue.\textsuperscript{118} The pertinent question is whether the public must be informed\textsuperscript{119} of the health hazards associated with accidental low-level radiation emissions,\textsuperscript{120} particularly when there are monitoring deficiencies\textsuperscript{121} during the incident. This question requires an objective weighing by a court of the various views on the health effects of low-level radiation.\textsuperscript{122} To

...
defer to an agency would be to accept an agency's decision without evaluating that decision within the context of other opinions.  

Tentence of the asbestos contaminant in air and water gave rise to a reasonable medical concern for the public health—the contaminant created some health risk—then "the existence of this risk to the public justifies an injunctive decree requiring abatement of the health hazard on reasonable terms as a precautionary and preventive measure to protect the public health." Reserve Mining v. Environmental Protection Agency, 514 F.2d at 520. A warning to the residents of TMI that they have or may have an increased risk of health injury, see note 32 supra, would be similar to Reserve Mining's abatement order in that no social or economic consequences to the nuclear power industry or general welfare would flow from the request. See also Nader v. Nuclear Regulatory Comm'n, 513 F.2d at 1045 (the court upheld the AEC's order denying a petition seeking a shutdown or derating of twenty nuclear power plants); Honicker v. Hendrie, 465 F. Supp. at 419 (the court remanded the proceeding to the NRC under the doctrine of primary jurisdiction after the plaintiff requested the NRC to revoke licenses of all nuclear fuel facilities within the jurisdiction of the commission). See notes 113, 115, 116, 117 supra and accompanying text.

For other cases supporting the view that the possibility of a health hazard requires precautionary measures, see Industrial Union Dep't v. Hodgson, 499 F.2d 467, 483-84 (D.C. Cir. 1974) (the industries required four years to switch to a two-fiber asbestos standard but "in order to insure that the employees handle materials likely to produce asbestos dust carefully and to prevent persons from entering areas where they will be exposed to such dust needlessly, cautionary labels and warning signs" were required); Banzhaf v. Federal Communications Comm'n, 405 F.2d 1082, 1090 (D.C. Cir. 1968) ("In short, we think the Cigarette Labeling Act represents the balance drawn between the narrow purpose of warning the public 'that cigarette smoking may be hazardous to health' and the interests of the economy . . ."). In 1969, after more conclusive evidence established the risk, the government switched the warning to read "The Surgeon General Has Determined That Cigarette Smoking is Dangerous to Your Health." Larus & Brother Co. v. Federal Communications Comm'n, 447 F.2d 876, 880 (4th Cir. 1971).

123. While giving his speech on Radiological Hazards in War and Peace (103 Cong. Rec. 10569 (1957)), Representative Holifield made the following statement during his discussion on man-made radiological dangers:

The Atomic Energy Commission has continually given out assurances that we had nothing to worry about and yet, we find, using testimony from their own experts that there is no reason to worry. . . .

It has been my experience that a Congressional investigation is often the only way to make the Atomic Energy Commission come out into the open. We literally squeeze the information out of the Agency. Except for the Congressional hearings, the AEC would withhold some important information that the public should have. . . .

Id. at 10572. See notes 26, 42, 47, 49 supra and accompanying text.

It was not until 25 years after this report, when Jaffee alleged that because of his exposure to radiation from an atomic blast he developed inoperable cancer, that the Jaffee court took judicial notice of the dangers of radiation from nuclear detonation and held that soldiers ordered to be present at the 1953 blast while on military duty were entitled to a health warning. Jaffee v. United States, 592 F.2d at 720.

It would be unfortunate if the Johnsrud plaintiffs had to wait 25 years before a court would entertain the request for a health warning, particularly when there is uncertainty as to the health effects caused by low-level radiation emissions as there was uncertainty in
In light of the foregoing discussion, it is submitted that, when there is a radiological accident in a nuclear power plant which jeopardizes public health and safety, the NRC has the discretion to determine the technical alternatives\textsuperscript{124} that will rectify the problem. In addition, however, when the NRC becomes aware that there were radiological emissions, it also has the nondiscretionary duty to minimize the effects of the radiological hazard on the public health and safety.\textsuperscript{128} Corrective measures may serve to lessen the potential seriousness of the accident, but they will not minimize the impact of the radiation emissions already released on the public. A reliable warning\textsuperscript{126} on which the exposed individuals can

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\item[124.] See notes 32, 122 supra and notes 125, 168 infra.
\item[125.] See notes 32, 71 supra and accompanying text. Additionally, the need to warn arises after the occurrence of an event which the NRC had the discretion to control. In \textit{Jaffee}, the Third Circuit stated “[t]here are two ‘agency actions’ that Jaffee asks this court to review . . . second, the Government’s failure, in the years since the [atomic] explosion, to give medical warning. . . .” 592 F.2d at 719. During the course of determining that the agency action could be reviewed the \textit{Jaffee} court, without explanation, stated “We need not decide whether military orders given to soldiers by superior officers are committed to agency discretion or otherwise beyond judicial review.” \textit{Id.} at 719 n.16. The court’s statement is subject to the interpretation that while the military order is discretionary, if the outcome of the order is detrimental then a nondiscretionary duty to warn arises. This interpretation is supported by the Third Circuit’s finding that the doctrine of exhaustion of administrative remedies was not applicable to the claims presented in \textit{Jaffee}. \textit{Id.} See note 165 infra.
\item[126.] See notes 43-47, 122 supra and accompanying text. See generally notes 32, 52, 112, 123 supra and note 168 infra.
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make informed decisions\textsuperscript{127} would serve this latter nondiscretionary duty.

V. Judicial Review of the NRC: District Court or Appellate Court?

Other than the agency discretion exception to the APA's general provision for judicial review, a particular statute governing an agency may also\textsuperscript{128} preclude review. Although the NRC is subject

\textsuperscript{127} See notes 32, 52, 124 supra and accompanying text and note 168 infra and accompanying text.

\textsuperscript{128} See note 18 supra. It is not within the scope of this Comment to discuss whether plaintiffs who request a health warning after having been subject to radiation emissions have standing to sue. Suffice it to say that with the liberalized standing requirements under 5 U.S.C. § 702 (1976), it is likely that a court will find that plaintiffs have standing. See United States v. Scrap, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); Crowther v. Seaborg, 312 F. Supp. 1205 (D. Colo. 1970).

Moreover, the ripeness doctrine should not affect a court's decision. The two policy objectives underlying the ripeness doctrine are: avoiding premature adjudications which could embroil the courts in abstract debates over administrative policies; and protecting the agencies from judicial intervention before administrative decisions are formalized and felt in a concrete way by the affected parties. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). See Black v. Beame, 419 F. Supp. 599, 603 (S.D.N.Y. 1976) ("In general, a controversy over an agency's action or inaction is deemed ripe for adjudication if (1) it presents legal issues fit for resolution, and (2) the action or inaction of the agency has a 'direct and immediate impact' on the plaintiffs.")

If a court finds that the NRC has a non-discretionary duty to warn of radiation emissions, particularly when there are monitoring deficiencies, and the NRC doesn't issue this warning, an adjudication by a court as to the propriety of injunctive relief will not be premature since the NRC will have breached its duty to the public. Furthermore, a court's adjudication will not interfere with the agency's determinations if the NRC's duty to warn is nondiscretionary. See discussion in section IV supra.

If, as an alternative to finding that the NRC has a nondiscretionary duty to warn, a court finds that the plaintiffs' federal constitutional and common law rights have been violated by the agency's failure to warn, then the court's decision will neither be premature nor interfere with an agency's determination. However, in this latter instance, a court may postpone judicial review to ensure that the NRC's decision whether to warn has been formalized. See Johnsrud v. Carter, No. 79-1950, slip op. at 3.

In addition to standing and ripeness questions, a court must determine whether the NRC's failure to warn constitutes agency action reviewable under the APA. It seems that it does. Section 551, Title 5, United States Code supports this proposition. Section 551 states: " 'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13) (1976) (emphasis added). If a court finds that the NRC violated a nondiscretionary duty by failing to issue a health warning, then it is almost certain that a court will find the agency's inaction to constitute action under the APA. See Environmental Defense Fund, Inc. v. Hardin, 428
to judicial review under the Atomic Energy Act, an ancillary problem arises because the NRC is subject to both nonstatutory review in a district court and statutory review in a court of appeals. Therefore, in order to avoid seeking review in the wrong court, a plaintiff must initially decide whether the subject matter of his or her suit mandates appellate review. This decision is necessary because non-statutory review in the district court is available only in the absence of a specific statute authorizing review in a particular court.

Whether a suit requesting the NRC to issue a health warning in the event of a nuclear accident requires statutory review by the court of appeals depends on whether it is a "proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees" found in section 2239, Title 42, United

Freshman, J. (D.C. Cir. 1970) ("[w]hen administrative inaction has precisely the same impact on the rights of the parties as a denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief."); Nor-Am Agricultural Products, Inc. v. Hardin, 435 F.2d 1133, 1141 (7th Cir. 1970). But see Elmo Div. of Drive-X Co. v. Dixon, 348 F.2d 342, 344 (D.C. Cir. 1965). On the other hand, if a court finds that the plaintiff's constitutional and common law rights have been violated by the NRC's failure to warn, without deciding whether the NRC has such a nondiscretionary duty, then the court can determine that the agency's delay in issuing a warning is a final and reviewable action. See 5 U.S.C. § 706 (1976). Again, as with the ripeness doctrine, a court may postpone review to ensure that the NRC decision to warn has been formalized. See 5 U.S.C. § 706(1) (1976). Deering Milliken, Inc. v. Johnston, 295 F.2d 856, 865 (4th Cir 1961) ("Delay so long as it continues and so long as there is any vestige of a right which will suffer further impairment by an extension of the delay, may not be final in the usual sense of that word, but when it amounts to a violation of section 6 (a) of the APA and to a legal wrong within the meaning of section 10(a) of that Act, it is final action. . ."). See also Jaffee v. United States, 592 F.2d 712, 720 (3rd Cir.), cert. denied, 441 U.S. 961 (1979).


130. See Note, Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals, 88 Harv. L. Rev. 980 (1975).

131. See notes 18, 20, 35, 37 supra.


States Code ("section 2239").134 This determination in turn, hinges on whether Congress intended section 2239 to apply only to the NRC’s direct procedures with licensees or to include NRC actions that may have an indirect impact on the manner in which the agency regulates its licensees.135


135. See Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970). "There is great contrariety among administrative agencies created by Congress as respects ‘the extent to which, and the procedures by which, different measures of control afford judicial review of administrative action.’ . . . The answer of course, depends on the particular enactment under which review is sought. It turns on ‘the existence of courts and the intent of Congress as deduced from the statutes and precedents.’ " Id. at 156 (citations omitted). See also Elmo Div. of Drive-X Co. v. Dixon, 348 F.2d 342, 344 (D.C. Cir. 1965).

If a court determines that NRC actions that may have an indirect impact on the manner in which the agency regulates its licensees are subject to § 2239, Title 42, of the United States Code then one could argue for district court jurisdiction based on the fact that the NRC’s failure to warn is not a final order arising out of an agency proceeding. See Writers Guild of America, West, Inc. v. Federal Communications Comm’n, 423 F. Supp. 1064, 1079 (C.D. Cal. 1976) ("At the very least the term ‘order’ [under the Administrative Orders Review Act] implies a formal agency mandate issued at the culmination of some regular agency proceeding. . . . Here the plaintiffs complain of informal actions of the Commission not entered of record, not served upon the parties, and taken wholly outside agency proceedings.") Pursuant to 10 C.F.R. § 2.206 (1978), however, a plaintiff can petition the NRC for emergency relief by bringing an enforcement proceeding which allows any person to request the institution of a proceeding under § 2.202 "to modify, suspend or revoke a license, or for such other action as may be proper." (emphasis added). Any decision the NRC makes under 10 C.F.R. § 2.206 is a final order. Cf. Honicker v. Hendrie, 465 F. Supp. 414, 417 (M.D. Tenn. 1979). Thus, if a court finds that NRC actions which may indirectly affect the agency’s regulation of licensees come within the purview of § 2239, then it follows that the court will interpret 10 C.F.R. § 2.206 (1978) broadly.

If a court decides that the exhaustion doctrine, see note 165 infra, does not apply to such cases as Johnsrud, then even if the action were found to be within the scope of § 2239, it would not be a final order arising out of an agency proceeding. See Writers Guild of America, West, Inc. v. Federal Communications Comm’n, 423 F. Supp. at 1079. The NRC’s failure to warn, however, would be a final agency action because a court’s decision would not interfere with an agency’s determinations. Further, there is no adequate remedy in other courts; exhaustion of administrative remedies is not required and the action is not an appealable final order. See Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967); PepsiCo, Inc. v. Federal Trade Comm’n, 472 F.2d 179, 187 (2d Cir. 1972); Nor-Am Agricultural Products, Inc. v. Hardin, 435 F.2d 1133, 1141 (7th Cir. 1970); Elmo Div. of Drive-X Co. v. Dixon, 348 F.2d 342, 344 (D.C. Cir. 1965); Deering Milliken, Inc. v. Johnston, 295 F.2d 866, 865 (4th Cir. 1961). See also note 18 supra. Compare Note, Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals, 88 HARV. L. REV. 980, 988 (1975) ("final orders" should be construed to include all agency actions that are not barred by the doctrine of finality) with Ecology Action v. Atomic Energy Comm’n, 492 F.2d 998 (2d Cir. 1974); Thermal Ecology Must Be Preserved v. Atomic Energy Comm’n, 433 F.2d 524 (D.C. Cir. 1970).
The 1946 AEA\textsuperscript{136} simply provides that the APA shall be applicable to any AEC agency action.\textsuperscript{137} Therefore, the 1946 AEA did not exempt any suit from district court review. In 1954, the Senate's preliminary amendments to the 1946 Act\textsuperscript{138} included a more thorough chapter on judicial review and administrative procedures.\textsuperscript{139} The Senate's subheading to this chapter describes it as applying to procedures and conditions for issuing licenses.\textsuperscript{140} Section 181 of this chapter incorporates, among other things, the APA provision found in the 1946 Act.\textsuperscript{141} Sections 182 through 188 contain specific information pertaining to licenses and provisions for dealing with licensees and construction permits.\textsuperscript{142}

Section 189 then provides for judicial review of a final order entered in "certain agency actions."\textsuperscript{143} This proposal is the first evidence of Congress' intent to exempt certain AEC suits from dis-

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\item[139.] \textit{Id.} at 3483. "Chapter 16, Jurisdictional Review and Administrative Procedure." \textit{Id.}
\item[140.] \textit{Id.} "This chapter describes the procedures and conditions for issuing licenses under the bill." \textit{Id.}
\item[141.] \textit{See note 137 supra.} S. Rep. No. 1699, 83d Cong., 2d Sess. \textit{reprinted in} [1954] U.S. \textit{Code Cong. & Ad. News} at 3483. Section 181 makes the provisions of the Administrative Procedure Act applicable to all agency actions of the Commission. Where publication of data involved in agency action is contrary to the national security and common defense, then identical secret procedures are required to be set up within the Commission. The Commission is required to grant a hearing to any party materially interested in any agency action. \textit{Id.}
\item[142.] \textit{Id.} at 3483-84. Section 182 sets forth the information that the Commission may require in any application for a license so as to assure the Commission of adequate information on which to fulfill its obligations to protect the common defense and to protect the health and safety of the public. \textit{Id.} at 3483. Section 183 provides that the licenses shall include certain terms. \textit{Id.} at 3483-84. Section 184 provides requirements concerning the transfer, assignment, or disposition of licenses. \textit{Id.} at 3484. Section 185 governs the issuance of construction permits. \textit{Id.} Section 186 governs revocation of licenses. \textit{Id.} Section 187 requires that all licenses shall be subject to amendment, revision, or modification by amendments to the act or by action of the Commission. \textit{Id.} Section 188 permits the Commission, under certain circumstances, "to continue the operation of a facility whose licenses are revoked. . . ." \textit{Id.}
\item[143.] \textit{Id.} at 3484. Section 189 provides for judicial review of a final order of the Commission entered in certain agency actions. \textit{Id.} See H.R. 5487, 81st Cong., 2d Sess. 64 Stat. 1129 (1950) (which provides in part that "[t]he court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of [various administrative agencies]."). \textit{See note 136 supra} and accompanying text.
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strict court review. It is reasonable to conclude that section 189 applies only to the sections which directly precede it because: 1) section 181 already provides for general review of agency actions; and 2) as a matter of construction section 189 comes after the technical sections. Thus, the inference to be drawn is that section 181 encompasses nonstatutory review under the APA of any agency actions other than those arising out of sections 182 through 188.\[144]\n
Arguably since this proposed chapter on judicial review and administrative procedures includes a narrowly worded subheading which mentions procedures and conditions for issuing licenses,\[146]\nsections 181 and 189 could apply only to licensing actions. Therefore, in the absence of any provision for judicial review of other agency actions such review is precluded. If a limited construction of both sections is adopted, however, then a presumption of judicial review of all agency actions not embraced by sections 181 through 189 would exist. Moreover, the proposed act contains no specific exclusion and no "clear and convincing" showing of a congressional intent to preclude such judicial review.\[146]\n
The interpretation that section 189 applies specifically to sections 182 through 188 while section 181 applies to all other agency action is further bolstered by the final draft of the 1954 AEA.\[147]\n
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144. See notes 138, 143 supra.  
145. See note 140 supra.  
146. The general rule is that administrative action is subject to judicial review; nonreviewability must be shown by a specific exclusion on the face of a statute or by a clear and convincing showing of congressional intent to preclude judicial review before courts will cut off an aggrieved party's right to be heard. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Ortego v. Weinberger, 516 F.2d 1005 (5th Cir. 1975); Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97, 101 (2d Cir.), cert. denied, 400 U.S. 949 (1970); Fry Roofing Co. v. United States Environmental Protection Agency, 415 F. Supp. 799 (W.D. Mo.), aff'd, 554 F.2d 885 (8th Cir. 1976); City Wide Coalition Against Childhood Lead Paint Poisoning v. Philadelphia Hous. Auth., 356 F. Supp. 123, 128 (E.D. Pa. 1973). See also H.R. 1980, 79th Cong., 2d Sess. (1941). If there is no showing that Congress sought to prohibit judicial review of agency actions not falling within the purview of sections 182 through 189, then such review in the district court can be presumed. See Abbot Laboratories v. Gardner, 387 U.S. 136 (1967). See also Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970); Paramount Farms, Inc. v. Morton, 527 F.2d 1301 (7th Cir. 1975); Hunt v. Weinberger, 527 F.2d 544 (6th Cir. 1975); City of Camden v. Plotkin, 466 F. Supp. 44 (D.N.J. 1978).  
This draft includes all of the sections proposed by the Senate but omits the Senate's restrictive subheading.

Furthermore, the final version of section 181, a "general" provision, provides that the APA applies to all AEC agency action. Section 189 of the 1954 Act, not only follows the technical sections pertaining to licenses, licensees and permits, but also specifies in part that it applies:

[i]n any proceeding . . . for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties.

The recently codified versions of sections 181 and 189 of the 1954 AEA are section 2231, Title 42, United States Code ("section 2231") and section 2239 respectively. These codifications do not differ substantially from their counterparts in the 1954 Act. This fact demonstrates that since judicial review of agency action has been provided for under section 2231, then section 2239 should be restricted to the subjects specifically listed under it. As a result, NRC actions that have no immediate effect on the agency's licensing and inspection of licensees or enforcement of rules regulating them fall within the purview of section 2231 and are therefore

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149. See note 140 supra.
151. Id. § 189. The final version of § 189 is more specific than the Senate's original proposal. See 100 Cong. Rec. 10686 (1954) (remarks of Reps. Hickenlooper and Pastore). See also notes 138, 143 supra.
152. See notes 41-42 supra. 42 U.S.C. § 2239 is preceded by § 2232 applying to License applications; § 2233, Terms of licenses; § 2234, Inalienability of licenses; § 2235, Construction permits; § 2236, Revocation of Licenses; § 2237, Modification of License; and § 2238, Continued operation of facilities.
154. See note 20 supra.
155. Id.
156. THE COMMISSION'S REPORT, supra note 21, at 19. There may be a contrary result if the complaint in an action requesting a health warning was framed in such a manner as to have the NRC mandate to licensees the duty to issue a warning upon notice of a nuclear power accident. Such an action would then be infringing on the NRC's enforcement activities.
reviewable by a district court.\textsuperscript{157}

An examination of the case law in this area also supports a narrow interpretation of section 2239. A majority of the cases reviewed by the courts of appeal involving either the NRC or AEC concern license applications or revocations, siting and design of nuclear power plants.\textsuperscript{158} The district court cases, on the other hand, deal with nondiscretionary legal questions pertaining to the agencies\textsuperscript{159} or with subjects other than procedures for licenses, licensees, construction permits, compensation, or patents.\textsuperscript{160}

A restrictive interpretation of section 2239 is also supported by the different policies behind nonstatutory and statutory review. The emphasis in nonstatutory suits in district courts is upon assuring individuals access to a judicial forum to seek redress against the government and its agencies and officials in an effort to preserve their federal legal rights.\textsuperscript{161} The primary policies behind stat-

\textsuperscript{157} See Abbot Laboratories v. Gardner, 387 U.S. at 144; Elmo Div. of Drive-X Co. v. Dixon, 348 F.2d at 344.


[P]laintiffs are not requesting review of the granting or denying of a license. They request this Court to direct the AEC to comply with a specific statutory mandate. In this regard the Court does have jurisdiction to consider the issues presented, namely, whether there has been a violation of clear, nondiscretionary, legal duty.


utory review in the courts of appeal are, first, a legislative confidence in a court that has acquired more substantive and procedural expertise in areas of administrative law and, second, a need to expedite the implementation of agency programs by reducing delays associated with judicial review.163

For example, the emphasis in an action requesting a health warning in the event of a nuclear accident is on the claim that residents living near a nuclear power plant have been deprived of their federal constitutional, statutory and common law rights by unknowingly being subject to irreparable harm caused by radiation emissions.164 Thus, such an action contains the policies for nonstatutory review because the individuals are seeking to vindicate their federal legal rights allegedly violated by the government.165 The

& Ad. News, 6126, 6130 6138, 6139. Nonstatutory suits against the United States were utilized to avoid the doctrine of sovereign immunity and to facilitate review—"to provide judicial review to individuals claiming that the Government has harmed or threatens to harm them" Id. at 1626. See Johnsrud v. Carter, No. 79-1950, slip op. at 5 n.6; Jaffee v. United States, 592 F.2d at 719 n.12. L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 356 (1965) ("Statutes authorizing review in the district court may reflect concern to make review more easily available.").

162. See Note, Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals, 88 Harv. L. Rev. 980, 983 (1975).


164. Id. See also note 32 supra and accompanying text.

165. See note 161 supra; Jaffee v. United States, 592 F.2d at 720. Although the Department of Defense is subject to judicial review under section 1331 only in nonstatutory suits, the court's emphasis in Jaffee is on the government's failure to warn the soldiers of the dangers of radiation from nuclear detonation and not on the army's power to order the soldiers to be present near the blast. Id. at 718-20. Similarly, the Johnsrud plaintiffs are suing the government for its failure to warn the Three Mile Island residents of the increased risk to their health caused by the additional radiation from the TMI 2 nuclear power plant to the natural background radiation. The plaintiffs are not suing an agency for relief based on its faulty operations at Three Mile Island. Johnsrud v. Carter, No. 79-1950, (3d Cir., Apr. 23, 1980). See notes 32-41 supra and accompanying text.

In contrast to Jaffee and Johnsrud, the plaintiffs in Honicker v. Hendrie, 465 F. Supp. 414 (M.D. Tenn 1979), sought to revoke licenses of all nuclear fuel cycle facilities within the Commission's jurisdiction on the grounds that the defendant's licensing of such facilities allegedly deprived plaintiff of life without due process and failed to assure adequate protection of public health and safety in violation of the Atomic Energy Act, Title 42 of the United States Code. While the plaintiffs brought the action to vindicate an alleged violation of their federal constitutional and statutory rights, the relief sought directly interfered with the NRC's licensing, inspection and enforcement activities. Therefore, even if they had exhausted their administrative remedies, the suit was subject to judicial review in the court of appeals. Honicker v. Hendrie, 465 F. Supp. at 417-18.

A court will invoke the doctrine of exhaustion of administrative remedies when a claim is
substantive or procedural experience of the court of appeals is rela-

However, if the court decides that the NRC has a nondiscretionary legal duty to warn the public, then the exhaustion doctrine will not apply because an action requesting such a warning will present a question of law which is cognizable in the district court even in the absence of exhaustion. See Drake v. Detroit Edison Co., 443 F. Supp. 833, 836-837 (D. Mich. 1978); Izzak Walton League of America v. Schlesinger, 337 F. Supp. 287, 291 (D.D.C. 1971). But see Casey v. Federal Trade Comm'n, 578 F.2d 793 (9th Cir. 1978). See also section IV supra. Moreover, regardless of whether the plaintiffs could petition the agency, the doctrine of exhaustion has no application in this case because:


b) Bypassing an administrative procedure in this instance will not seriously impair the ability of an agency to perform its functions. See Ecology Center v. Coleman, 515 F.2d 860, 866 (6th Cir. 1976). The plaintiffs request a public health warning. They do not seek to interfere with the NRC's licensing and enforcement functions. See notes 112, 113 supra and accompanying text. See also Jaffee v. United States, 592 F.2d at 719.

c) Exhaustion is not necessary because the administrative remedy under consideration is futile. See Honicker v. Hendrie, 465 F. Supp. at 418. In order to issue a proper health warning the NRC would have to acknowledge that the residents living near a nuclear plant bear an increased risk to their health. See note 32 supra and accompany text. Based on the fact that the NRC did not acknowledge these health risks in its report on Three Mile Island, it is doubtful that the agency would now change its position. See INVESTIGATIONS INTO TMI, supra note 24, at 24. Cf. Colorado v. Veterans Administration, 430 F. Supp. 551, 552 (D. Colo. 1977), cert. denied, 100 S. Ct. 663 (1980) ("Exhaustion . . . is not required when it seems clear beyond a reasonable doubt that the relevant agency will not grant the relief in question.")


e) Exhaustion will not be required where a nonfrivolous claim is made that the agency's action will result in a deprivation of constitutional rights. This aspect of the exhaustion doctrine will have effect if the court decides that plaintiffs such as those in Johnsrud have had their federal constitutional rights violated by the NRC's inaction, Johnsrud v. Carter, No. 79-1950, slip op. at 5-6. See Honicker v. Hendrie, 465 F. Supp. at 414-17.

f) The courts are in a more objective position to decide whether radiation emissions have caused an increased risk of health injury to the public. See Writers Guild of America, West, Inc. v. Federal Communications Comm'n, 423 F. Supp. at 108 (no need to exhaust administrative remedies when the agency is biased). Therefore, the need for the NRC to develop a factual record, Scanwell Labs. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970), should be overshadowed by the importance of an initial review by the district court of the agency's failure to warn.

g) It is not likely that the judiciary will be overburdened with suits stemming from the same administrative failure because nuclear power accidents are infrequent. See Ecology Center v. Coleman, 515 F.2d 860, 866 (5th Cir. 1975).
tively unimportant in such an action because the decision to issue a health warning essentially requires an objective analysis of the various views on the effects of low level radiation. Both courts are equally qualified to analyze such views.

Initial review in the court of appeals may expedite the issuance of a health warning. However, the proper development of the legal issues involved in a suit of this type is more likely if the district court first resolves such issues with a view towards the pos-

h) The role of administrative autonomy has no significance in an action requesting a health warning. See Ecology Center v. Coleman, 515 F.2d at 866; section IV and note 128 supra.

i) Furthermore, in Jaffee v. United States, 592 F.2d at 719 n.16, the court stated that "the doctrine of administrative exhaustion has no application to this case." Id. The Third Circuit did not give a reason for its decision. However, due to the similarities in Jaffee and such cases as Johnsrud, it would be appropriate if the court held that the doctrine of exhaustion did not apply to such latter cases.

166. See text accompanying note 162 supra.
167. See note 32 supra and accompanying text.
168. In Jaffee v. United States, 592 F.2d at 720, the Third Circuit took judicial notice that the dangers of radiation from nuclear detonation are a matter of public knowledge. Although more time has elapsed for the health dangers from nuclear detonations to be explored and publicized, than it has for the dangers from low level radiation, the fact remains that the Jaffee court must have based its decision to take judicial notice on available sources concerning the subject. Such a decision is especially important because proof of causation in radiation injury suits is difficult. See Mahoney v. United States, 220 F. Supp. 823 (E.D. Tenn. 1963), aff'd, 339 F.2d 605 (6th Cir. 1963); Gregg v. United States, 186 F. Supp. 44 (E.D.S.C. 1960); Bulloch v. United States, 145 F. Supp. 824 (D. Utah 1956). Thus, arguably the increased risk to health caused by low level radiation (or at least, the uncertainty surrounding dangers of low level radiation) can be judicially noted based on the various materials available on the subject. See note 32 supra.


170. See Central Hudson Gas & Elec. Corp. v. Environmental Protection Agency, 587 F.2d 549, 557 (2d Cir. 1978)
The benefits which result from a system in which issues of law are resolved first by a district court and then by the Courts of Appeals are well-known particularly to the judges on the Courts of Appeals. . . . Thus, we are not inclined to favor an expansive construction of our own exclusive jurisdiction, because to do so would deprive us of the wisdom and sound judgment which district judges apply to questions we are eventually called upon to review. . . .

Id. at 557.

By the same token, once the court of appeals takes jurisdiction over a case presenting a question of law, it has the power in the interest of justice to reach the merits of the suit regardless of the fact that the district court is the proper forum. See id. at 557-58. See also Nor-Am Agricultural Products, Inc. v. Hardin, 435 F.2d 1133 (7th Cir. 1970); Pepsico, Inc. v. Federal Trade Comm'n, 472 F.2d 179 (2d Cir. 1972).
sibility of a review by an appellate court.\textsuperscript{171} The legislative history and case law under the AEA, along with an analysis of the policy differences between nonstatutory and special statutory review, demonstrate that a suit requesting the NRC to issue a health warning should be reviewed in the district court. This conclusion is buttressed by the assertion that the NRC has a nondiscretionary legal duty to minimize the effects of radiation hazards on the public health and safety.\textsuperscript{172} Such a request comes within the purview of section 2231, which provides that the APA applies to AEC agency actions and as a result is subject to district court review; it does not have an immediate effect on the agency's licensing and inspection of licensees or enforcement of rules governing them and therefore should not be reviewed by the court of appeals pursuant to section 2239.

VI. Conclusion

It is submitted that when the NRC becomes aware of radiological emissions resulting from a nuclear power accident, it has the nondiscretionary duty to minimize the effects of this hazard on the public health and safety. As a minimum precautionary measure, a reliable warning on which the individuals exposed to radiation can make informed decisions would fulfill this duty.

The direct legal duty of the NRC to the public requires an objective weighing by the court of the various views on the health effects of low-level radiation. The failure to warn violates rights granted to all individuals by the Atomic Energy Act and possibly federal constitutional and common law rights as well. Therefore, failure of the NRC to comply with its nondiscretionary duty to warn will be subject to unrestrained nonstatutory judicial review in the district court.

Valerie Acerra


\textsuperscript{172} See section IV supra.