



Spring 1977

## EPA without Authority to Regulate Nuclear Waste

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### Recommended Citation

Myra C. Lynch, *EPA without Authority to Regulate Nuclear Waste*, 17 NAT. RES. J. 325 (1977).  
Available at: <https://digitalrepository.unm.edu/nrj/vol17/iss2/10>

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## EPA WITHOUT AUTHORITY TO REGULATE NUCLEAR WASTE

Environmental Protection Agency has no authority under the Federal Water Pollution Control Act to regulate discharges of radioactive nuclear waste materials. *Train v. Colorado Public Interest Research Group*, \_\_\_\_ U.S. \_\_\_\_, 96 S.Ct. \_\_\_\_, 48 L. Ed. 2d 434 (1976).

Claiming potential harm from the effluent discharges from two Colorado nuclear power plants, the Colorado Public Interest Research Group, Inc. and other Colorado-based organizations and citizens brought suit against the Environmental Protection Agency and its administrator, Russell Train. Train had disclaimed any responsibility under the Federal Water Pollution Control Act<sup>1</sup> to set any standards governing the discharge of source, byproduct, and special nuclear materials.<sup>2</sup> The facilities are operated in conformity with radioactive effluent standards imposed by the Atomic Energy Commission pursuant to the Atomic Energy Act<sup>3</sup> and now administered by its successor, the Nuclear Regulatory Commission.

The Tenth Circuit Court of Appeals reversed an earlier District Court ruling<sup>4</sup> and held that the Federal Water Pollution Control Act requires the Environmental Protection Agency to regulate discharges into the nation's waters of all radioactive materials. That decision<sup>5</sup> was based on the Act's definition of "pollutant" which does include, without any qualification, the term "radioactive materials."<sup>6</sup>

Reversing the Court of Appeals, the Supreme Court relied heavily upon the detailed legislative history of the Federal Water Pollution Control Act and found a congressional intent not to alter the A.E.C.'s control of radioactive effluents. The legislative history, including Senate floor exchanges and Senate and House Committee

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1. 33 U.S.C. § 1251 *et seq.* (Supp. V, 1975).

2. The Atomic Energy Act of 1954 has defined these terms. "Source materials" are uranium and thorium and ores containing those materials. "Special nuclear materials" means plutonium, enriched uranium 233 and 235, and any material artificially enriched by plutonium and U<sub>233</sub> and U<sub>235</sub>. "Byproduct materials" includes any radioactive material except special nuclear material which is yielded in or made radioactive by exposure to the radiation incident to the production or use of special nuclear material. *See* 42 U.S.C. § § 2014 *et seq.* (1970).

3. 42 U.S.C. § 2011 *et seq.* (1970).

4. 373 F. Supp. 991 (1974).

5. 507 F.2d 743 (1974).

6. 33 U.S.C. § 1362(6) (Sup. V, 1975).

Reports, was found to speak explicitly and "with force" to the exclusion of source, byproduct, and special nuclear materials from the Act's permit program. Reliance on the "plain meaning" of the words "radioactive materials" was thus held error to the extent that the legislative history was not considered. The Court, upon reviewing the legislative history, concluded that the "pollutants" subject to regulation under the F.W.P.C.A. do not include source, byproduct, and special nuclear materials. Train was found to be acting in accordance with his statutory mandate in declining to regulate the discharge materials.

The decision can be read as effectively removing the E.P.A. from an active role in the important current effort to establish environmental standards for radioactive waste materials. The overlapping responsibilities of the E.P.A. and the N.R.C. have been a source of confusion as well as concern. Representing the E.P.A., W. D. Rowe stated in July 1976, one month after this case was decided, that the E.P.A. would have the function of developing environmental performance criteria for radioactive waste disposal.<sup>7</sup> The chairman of the N.R.C., Marcus A. Rowden, qualified Rowe's assertion when he stated that the E.P.A. will set "some standards" for radiation in the environment and N.R.C. will set standards for the "operation of facilities."<sup>8</sup>

The Court's decision and some recent developments suggest that the lines of responsibility are becoming quite clear. At a recent E.P.A. sponsored workshop devoted to a discussion of "pertinent issues" in radioactive waste management,<sup>9</sup> it was announced that E.P.A. will develop environmental standards by mid-1978 for high level and transuranic wastes, medical-dental wastes, mill tailings, and mining wastes. The proposed criteria will be adopted following a second workshop held in Albuquerque, New Mexico, April 12-14, 1977, and will be issued for public comment this summer. The timetable calls for final criteria to be adopted by the end of 1977 with standards based on the criteria being issued by mid-1978. The criteria are to be coordinated with E.R.D.A.'s Environmental Impact Statement on high level wastes now being developed.

After the subsequent standards are adopted, the Nuclear Regulatory Commission will then re-enter the picture with the very important practical task of developing regulations. The "who's in charge

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7. Energy Research and Development Administration, Proceedings of the International Symposium on the Management of Wastes from the L.W.R. Fuel Cycle, at 42 (1976).

8. *Id.* at 50.

9. *E.P.A. Takes First Step to Establish Radwaste Environmental Standards*, 2 Nuclear Fuel 2 (February 7, 1977).

here?" question in the rapidly polarizing nuclear energy-environmental concern dialogue has been partially answered by this case and the recent developments; E.P.A. will assist, but the N.R.C. will have the real authority for regulation of nuclear wastes.

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