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The Continuing Problem of Nuclear Waste

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RECENT DEVELOPMENTS

THE CONTINUING PROBLEM OF NUCLEAR WASTE

ENVIRONMENTAL LAW–RADIOACTIVE WASTE STORAGE: The Energy Research and Development Administration (ERDA) must prepare site-specific environmental impact statements for the construction of high-level radioactive waste storage tanks in order to comply with the requirements of the National Environmental Policy Act. In addition, ERDA must look at design and safety alternatives in the construction of these tanks. *NRDC v. ERDA*, ____ F. Supp. ____(DDC 1978).

The National Resources Defense Council, Inc. (NRDC) and several other parties brought a three count suit against the Energy Research and Development Administration (ERDA) in the U.S. District Court for the District of Columbia concerning the construction of 22 high-level radioactive waste storage tanks at the Hanford Reservation in Richland, Washington and the Savannah River Plant in Aiden, South Carolina.[1] NRDC challenged ERDA's failure to seek and obtain licensing under section 202(4) of the Energy Reorganization Act of 1974[2] (the Energy Act) for the construction of the tanks. Further, NRDC alleged that the Nuclear Regulatory Commission (NRC) failed to assume jurisdiction and exercise its licensing authority over the tanks under section 202(4) of the Energy Act. The decision on the part of ERDA to not prepare site-specific environmental impact statements (EISs) for the waste tanks under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA)[3] was also challenged by NRDC.

The 22 storage tanks in question were authorized by ERDA to be built in 1976 and 1977[4] to replace deteriorating tanks and to provide for storage of additional wastes.[5] The tanks, expected to be completed in 1979 and 1980, would all be double-shell, stress-relieved corbon steel tanks which should prevent leakage such as has occurred in the present single-shell tanks.[6] The existing tanks, as well

1. NRDC v. ERDA, ____F. Supp. ____, (D.D.C. 1978).
2. 42 U.S.C. §5842(4) (Supp. II 1975).
3. 42 U.S.C. §4332(2)(C) (1970).
4. ERDA projects 76-8-a, 76-8-b, 77-13-c, 77-13-d.
5. Most Government generated high-level radioactive wastes are presently stored at Hanford and Savannah.
6. Some 20 of the present tanks at Hanford and Savannah have leaked 450,000 gallons of high-level radioactive waste into the surrounding soil.

as the new ones, are considered by ERDA to be part of "an interim program" for waste management until a permanent storage program can be implemented.[7] Wastes would be stored in these new tanks for at least 15-20 years, and possibly longer. The licensing issue hinged on whether the new tanks would be for the long-term storage of high-level radioactive wastes, as opposed to short-term storage. NRDC wanted the tanks to be licensed by the NRC in order to have the "environmental, safety, and economic effects and implications" of waste storage in these tanks recognized and evaluated.[8]

ERDA sought a summary judgment on the licensing issue, alleging that the tanks were not licensable within the scope of section 202(4) of the Energy Act. This section states that the NRC shall have licensing authority over "facilities authorized for the express purpose of subsequent long-term storage of high-level radioactive waste."[9] ERDA claimed that these tanks were not for long-term storage. ERDA had told Congress these tanks were part of its "interim, i.e., short-term, storage of waste" and that "long-term storage will be available between 15 and 20 years after construction of the tanks in question have been completed."[10]

NRDC contended that, in spite of what ERDA claimed, the tanks were facilities for the "express purpose of long-term storage." Therefore, they were licensable under section 202(4) of the Energy Act. Plaintiffs asserted that "long-term" storage meant any storage for more than 20 years. Plaintiffs based this contention upon language from a senate committee report dealing with NRC licensing under 202(4) of the Energy Act, which defined "long-term" as "tens to hundreds of years."[11] The district court, however, did not agree with this interpretation. The court stated any storage over 20 years does not necessarily have to be considered "long-term."

NRDC then claimed that any storage "substantially likely" to be used for more than 20 years was "authorized for the express purpose of long-term storage." The court said that Congress would have used the term "substantially likely" in defining "long-term storage" if they had wanted the statute to cover those situations. Summary judgments in favor of the defendants were therefore granted on the licensing issues.

ERDA denied that they violated section 102(2)(C) of NEPA by

7. An ultimate storage program is expected to be selected and implemented sometime between the years 1994 and 2000.

8. Plaintiff's memorandum, April 25, 1977 at 28.

9. *Supra* note 3.

10. S. Rep. No. 94-514, 94th Cong., 1st Sess. 76 (1975).

11. S. Rep. No. 93-980, 93d Cong., 2d Sess. 59 (1974).

not preparing site-specific EISs for the tanks in issue.[12] Such EISs, ERDA claimed, were not required because the 1976 tanks would not have a significant environmental impact[13] and, besides, the effects of all the tanks were analyzed in separate programmatic environmental impact statements (PEIS) for the entire Hanford and Savannah River projects.[14] But NRDC attacked the sufficiency of these PEISs as concerns the construction of the tanks. For NEPA requires, NRDC asserted, ERDA to "analyze design alternatives and alternative safety features for the new tanks and to evaluate the long-term planning and decision-making consequences of the present construction of the (tanks)."[15]

The court recognized that the PEISs for both the Hanford and Savannah River projects were necessary under Section 102(2)(C). But the construction of the new waste tanks, the court stated, might not be analyzed in enough detail in the PEISs to satisfy NEPA requirements.

In considering the PEISs, the court first held that they did not adequately cover design and safety feature alternatives. This was the case in spite of ERDA's argument that NEPA's "rule of reason" did not require an analysis of every conceivable project variation. ERDA had relied upon *Brooks v. Coleman*[16] in making this claim. In *Brooks,* the 9th Circuit held that an adequate EIS did not necessarily have to discuss a particular design alternative.

The D.C. Court limited the application of *Brooks* to its particular facts. In holding the PEISs to be inadequate, the court relied instead on two cases which held that "all reasonable alternatives must be considered even if such alternatives 'do not offer a complete solution to the problem.' "[17] It was noted that ERDA's own regulations require them to analyze reasonable alternatives.[18]

Both NRDC and ARHCO, ERDA's principle contractor at Hanford, had advanced reasonable, "focused and feasible," design and safety alternatives for the tanks in issue.[19] The court stated that

12. NEPA requires EISs to cover, among other things, "the environmental impact of (a) proposed action, any environmental effects which cannot be avoided should the proposal be implemented, and alternatives to the proposed action."

13. If this were true, NEPA would not require an EIS on them. This contention was later withdrawn.

14. The PEISs analyzed the overall ongoing waste management operations at Hanford and Savannah River.

15. *Supra* note 1, at ____.

16. 518 F.2d 17 (9th Cir. 1975).

17. NRDC v. Morton, 458 F.2d 827, 836 (DC Cir. 1972) aff'g 337 F. Supp. 165 (D.D.C. 1971); NRDC v. Callaway, 524 F.2d 79, 93 (2nd Cir. 1975).

18. 40 C.F.R. §1500.8(a)(4) (1977).

19. NRDC notified ERDA of these by letter in August 1975.

ERDA should have at least given reasons why the alternatives presented by NRDC should not have been considered further.

The court also found the PEISs were inadequate in discussing the "long-term planning and decision-making implications" of the construction of the tanks in issue. ERDA, in 1975, had been forced to act and to act quickly because of the leakages from some of the existing tanks. Their only choice was to construct some kind of new storage tanks. Within this choice, however, ERDA had had several decisions to make. The method of construction they selected determined both the durability of the tanks and the ease of removing the wastes from these tanks for placement in their ultimate storage place. Durability and ease of removal, in turn, would affect the selection of an ultimate storage program. Hence, the construction of these tanks has long-term planning implications. These were not discussed in the PEISs and so section 102(2)(C) of NEPA's requirements were not met.

The court granted NRDC's summary judgment motion on the NEPA issue. Further, ERDA was given 30 days in which to file a timetable for the preparation of adequate site-specific EISs for the tanks.

This case indicates that the problem of nuclear waste and nuclear waste storage is far from being solved. It is clear that reasonable design and safety alternatives of storage tanks and facilities need to be examined and implemented in dealing with the short-term solution of this problem. Long-term solutions are, however, at a minimum. Hopefully, cases such as this will demonstrate to ERDA that environmental groups will not accept an inadequate solution to the long-term problems associated with nuclear wastes and its storage.

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