In the

Supreme Court of the United States

RUSSELL TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Petitioners,

--vs--

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL.

No. 74-1270

Washington, D.C.
December 9, 1975

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Petitioners	:	
v.	:	No. 74-1270
COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL	:	

Washington, D. C.

Tuesday, December 9, 1975

The above-entitled matter came on for argument at 10:34 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

A. RAYMOND RANDOLPH, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530
For Petitioners

DAVID C. MASTBAUM, ESQ., Box 4454, Boulder, Colorado 80302
For Respondents

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 74-1270, Russell Train, Administrator of the Environmental Protection Agency against Colorado Public Interest Research Group.

Mr. Randolph, you may proceed whenever you are ready.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, ESQ.

ON BEHALF OF PETITIONERS

MR. RANDOLPH: Mr. Chief Justice and may it please the Court:

This case is here on writ of certiorari to the Court of Appeals for the Tenth Circuit. The issue is one of statutory interpretation and, we believe, one of considerable importance.

The question is whether nuclear materials, nuclear waste materials, that are already comprehensively controlled and regulated by the successor agencies to the Atomic Energy Commission are pollutants within the meaning of the Federal Water Pollution Control Act as amended in 1972.

If they are pollutants, the result is that these same nuclear materials will be under the regulatory control of the Environmental Protection Agency and if one accepts the argument of the 14 states who are here as Amicus Curiae, eventually under the control of the individual states.

The case arises as a result of a suit that was

brought in October of 1973 in the District Court of Colorado by two organizations representing college students and law students attending school in Colorado and also four individual citizens of the state.

The Respondents, who were Plaintiffs below, sought a declaratory judgment and an injunction against the EPA and its administrator for failing to regulate the particular material, nuclear material that was involved in this case.

They pointed to the fact that there were two facilities, two nuclear facilities within the State of Colorado. One was the Fort St. Vrain generating power station which is a nuclear reactor gas-cooled that had at that time not yet been in operation and the other was the Rocky Flats Plant which is a plant that fabricates plutonium for use in weapons. It is owned by the Federal Government, specifically the Energy Research and Development Administration and run by a private company.

The record here is very, very sparse. This case was decided on cross-motion for summary judgment. Actually, it could have been judgment on the pleadings.

There were only two things outside of the record both of which are in the Appendix. There are two exhibits in regard to draft permits for the Fort St. Vrain Generating Station.

The District Court granted the Environmental

Protection Agency's motion for summary judgment and this was at the pleading stage.

The Court of Appeals reversed, holding that the EPA had the responsibility and duty of regulating the material in question here.

Before I proceed to the argument I think some statutory background is necessary in light of this very sparse record.

The Atomic Energy Act of 1954 conferred upon the Atomic Energy Commission, which is now the Nuclear Regulatory Commission, and ERDA a complete, extensive, exclusive authority and control over the use and disposal of certain nuclear materials.

These materials fall into three categories of substances which are set forth in the footnotes in our brief at page 20.

First of all, source material.

Source material means materials such as uranium 238, from which nuclear fuel is extracted.

The second kind of material that is involved here is special nuclear material such as fissionable material. That is uranium 233, uranium 235 and plutonium.

The third kind of material in addition to source and special nuclear material is by-product material. That means the material that is produced from the fission process

itself and made radioactive as a result of that process.

The Nuclear Regulatory Commission has established maximum permissible limits on the releases of radioactivity into the environment by its licensees.

Its licenses further limit to a minute percentage of those maximum limits the amount that an individual licensee like the Fort St. Vrain generating station can release into the atmosphere, either through the air or through the water.

And, of course, the Court is familiar with the licensing procedures that the NRC conducts. They are detailed, comprehensive and a great deal of time and manpower is spent before a plant, a nuclear generating plant can even be constructed, let alone operated.

After it does get constructed there is another licensing procedure and so on and so forth.

That, essentially, in a nutshell, is what the Atomic Energy Act does.

The Water Act, which was amended in 1972 in several important respects, has as its basic structure in regard to discharges of pollutants into the water, one section that absolutely forbids any discharges of any pollutants into the navigable waters of the United States without a permit.

The permit can be issued by EPA as would have been the case in Colorado in 1972 when this case was started, or if a state has adopted, pursuant to EPA's approval, a plan

for implementing a permit program, then the authority to issue permits is transferred from EPA to the state.

Colorado adopted an approved plan as of April of 1975. It did not have one when this case was begun.

The first point under the Water Act is that, no discharge of pollutant without a permit.

The term pollutant is defined in Section 5026 of the Water Act to include"radioactive materials" and I put quotations around that phrase, "radioactive materials."

This leads to Respondent's argument which is essentially set forth in their complaint and is the argument that was adopted by the Tenth Circuit.

The argument is simply this:

Source, special nuclear, by-product materials under the Atomic Energy Act are radioactive. No question about it.

QUESTION: Is that almost or most radioactive?

MR. RANDOLPH: I'm not sure about that. By the --

QUESTION: I read it, rather radioactive.

MR. RANDOLPH: There are other ways of producing radioactive material and I am not scientific expert enough to know what is more or less radioactive. There are accelerator processes which are not regulated by the Atomic Energy Act.

But they are radioactive. There is no question about that.

Therefore, they are pollutants under the Water Act.

Therefore, they cannot be discharged without a permit, at the time, from EPA -- now, either from EPA or the State of Colorado.

Therefore, EPA must regulate the discharge of the source, special nuclear and by-product material.

EPA refused to do that and what probably precipitated this suit is the regulation of EPA which is set forth at page 18 of our brief.

Which was adopted in the summer of 1973.

In implementing the Water Act, the EPA repeated the statutory language. The term pollutant means radioactive materials discharged into the water.

However, in a comment, the Administrator of EPA stated that the legislative history of Water Act reflects that the term radioactive materials as included in the definition of pollutant covers only radioactive materials which are not encompassed in the definition of source, by-product or special nuclear materials and so forth as covered by the Atomic Energy Act.

This legislative history, which is set forth in detail in our brief and also in the Amicus brief of the utilities here which the Administrator relied upon, which Respondents urge this Court not to look at and which the court below indicated could be disregarded, we think demonstrates conclusively the correctness of EPA's interpretation of this

particular provision in the Water Act.

Before discussing that history, however, I'd like to discuss and stress a few points that we think are important in approaching this problem.

First of all, there is, of course, on this record no evidence whatsoever and, in fact, Respondents' complaint does not even allege that the successor agencies to the Atomic Energy Commission are in any way improperly going to perform their duty in regard to the discharge of nuclear material in question.

They don't claim that the minute amount now released could in any way be reduced and indeed, there is no allegation that there is even the remotest danger to the health or the environment under the current system of regulation.

There is nothing, indeed, in the hearings -- in the extensive hearings that took place before the Water Act was amended in 1972 that indicates anything in regard to any problem whatsoever from the discharge into the water from nuclear power plants.

As a matter of fact, the only statement that is relevant to that question is quoted at the top of the page 43 of the brief Amicus Curiae by the utilities and that statement is from the testimony of Russell Train who is now, of course, the Administrator of EPA and then was Chairman of

the Council on Environmental Quality and he testified that the existing Atomic Energy Commission regulation of discharges such as we are talking about from nuclear plants was rigorous and demanded adherance to "the highest possible standards."

What we are talking about here, in light of the successors to the Atomic Energy Commission's regulations, are discharges from nuclear power plants into the water and into the air that, specifically in regard to the water, cannot exceed five millirems per person per year.

They have to be less than that.

A rem is a radioactive dose. I think the average person in the United States receives a dose of 500 rems.

But to give the Court an idea of what five millirems means, it means simply this, that if you stood outside of a nuclear power plant that was licensed -- and as they have to be, by the NRC -- and took your drinking water from the water that is discharged from that power plant for an entire year, you could not receive a dose of more than five millirems, which is equal to or less than the radioactivity that you would receive from flying from Washington, D.C. to Denver.

Secondly, in establishing the liquid effluent limitations for nuclear power plants, the Nuclear Regulatory Commission must consider the design and operation of the plant. What comes out is intimately related with how the plant is operated and how it is designed.

Reducing the radioactivity discharged into the water could, as we have stated in our brief, result in serious problems in regard to increased gas emissions or solid waste emissions and, indeed, even safety problems.

And let me give the Court an example of what we mean by this. The way that these minute actions of radioactivity get released at all is through an osmosis process. There are rods that are submitted and stuck into the core of a nuclear reactor. They contain the radioactive material.

They are made, generally, of stainless steel. Water within a loop -- this is water that is self-contained -- circulates around those rods as a cooling process. Other water flows through to cool that water in the loop. That is the water that generally is pumped out at the end of the process.

The reason any radioactivity gets out at all is because of a number of things.

Number one, there may be microscopic faults in that stainless steel. There is an osmosis process where there is a transference and so on and so forth.

There is one way, that you don't have to be a scientist to understand, of stopping that from happening and that is to increase the thickness of the stainless steel rods. Increase that, the osmosis stops. The faults disappear

because of the thickness.

Unfortunately, what that would do is require one thing. It would require the nuclear generating plant to operate at a higher temperature and second of all, it would take more time for that plant to cool down if -- God forbid -- there ever were an accident in which the coolant for some reason or another was not working properly and as the scientific material that is cited in all these briefs indicates, the most dangerous problem in operating a nuclear power plant is loss of coolant because that is when a problem can occur.

Of course, the NRC follows a rule of three, generally. For every system that is needed, they have three of them.

Everything is bolted on to a power plant now that can prevent the discharge of radioactivity is now bolted on but that gives, I think, the Court an idea that what we are talking about here is not simply putting something on the end of a pipe to filter out radioactive waste material.

Congress itself recognized the interrelationship that I am talking about.

In the Atomic Energy Act itself, Congress specifically stated that the NRC was forbidden in any way to relinquish its authority and regulatory control over the material we are talking about.

Now, with all this in mind and with the fact that we have had the Atomic Energy Act on the books now for nearly 20 years at the time the Water Act was passed, we think it would be remarkable indeed if Congress directed the EPA to regulate the same nuclear materials for the same purposes that they are being regulated now by the NRC and it's at precisely the same time.

The House Committee Report, which is cited on page 38 of our brief, we thinks, demonstrates that Congress intended no such thing.

The report says that the term pollutant as defined in this bill includes radioactive materials but these materials are not those encompassed in the definition of source, by-product or special nuclear materials as defined by the Atomic Energy Act of 1954 as amended and so on and so forth.

The material that Congress wanted EPA to regulate was the material that was beyond the jurisdiction of the -- what was then the Atomic Energy Commission and this wasn't a statement in a report that was buried away and forgotten -- written but not read by the people that were most concerned with this legislation because this statement in the House Report was specifically cited and relied upon in later floor debates and specifically, in order to defeat an amendment submitted by Congressman Wolff that would have had the effect

submitted on the House floor -- that would have had the effect of allowing the states to be able to regulate radioactive discharges from nuclear power plants.

QUESTION: Of course, those two are not completely inconsistent, are they? One could feel that both EPA and AEC or whatever its successor is should both regulate and still feel that the states ought not to regulate.

MR. RANDOLPH: They are not absolutely inconsistent but I think it is inconceivable that if Congress on the one hand writes a statute and then directs in the reports that they are only dealing with materials that are not regulated by the AEC that they would want the EPA to regulate that material, too and it is also inconceivable, I think, that in light of the lack of any consideration of what a regulatory scheme would result from dual regulation by an agency that, on the one hand, could only regulate how much comes out and an agency, on the other hand that regulates not only that but the design, the operation, the licensing function with no consideration whatsoever, I think that the potential for inconsistent regulations would certainly be there and it is a potential that we think would be dangerous for the reasons we stated and we also think that Congress gave absolutely no consideration to it whatsoever.

And, indeed, the Wolff Amendment that I was about to discuss, Mr. Justice Rehnquist, one of the bases on which

that was opposed is that in this act we are not dealing with the material that is regulated by the Atomic Energy Commission and therefore we are not going to give it to the states.

A number of Congressmen said, if we want to deal with that question, let's amend the Atomic Energy Act directly, not do it collaterally, in which case the legislation should go through the relevant committee, the Joint Committee on Atomic Energy, which handles these particular matters.

The Congressmen that spoke out against that amendment were not only Congressmen who were members of the Joint Committee on Atomic Energy, but also members of the Public Works Committee that reported out this bill and the amendment that I was speaking of, the Wolff Amendment was defeated by a three-to-one margin.

On the Senate side, Senator Pastore, who was then chairman of the Joint Committee on Atomic Energy, sought assurances from Senator Muskie, who sponsored the bill on the Senate side, that this legislation that they were then considering would in no way affect the regulatory responsibility and control under the Atomic Energy Act.

There is no question whatsoever that if the Environmental Protection Agency is given regulatory authority over the same materials that that will have an effect on the responsibility and authority of the Nuclear Regulatory Commission. One hopes it would not be inconsistent but it

nevertheless did have an effect.

I think Respondents have sought to -- and the states, also, have sought to try to work out some system that would operate when you have this redundant regulatory control for the same purposes of the same material.

Someone has to give way some place and there is no question, as I said, that that would really be inconsistent with Senator Muskie's assurances to Senator Pastore that the bill that they had in front of them would not have any effect.

When the Conference Committee reported out this bill, two members of the Conference Committee who were in the House of Representatives again assured that the radioactive materials did not include the Atomic Energy Act regulated nuclear materials, confirming the understanding of the representatives who asked the question.

We think it is important to remember here that we are dealing with a statute that is directed not to regulating the activities of the general public.

What we are dealing here with is a statute with directions to one person, the Administrator of the Environmental Protection Agency, telling him what to regulate and he is a person that Congress, I think, can, in fact, trust to know precisely what Congress had in mind.

The Administrator was testifying at the hearings. He was in active participation with this legislation as it was

going through and I would like to read from what Senator Muskie said on the Senate floor, and this is not quoted in any of the briefs so I'll give the Court the citation.

It is on the second volume of the compiled legislative history on pages 1347 to 1348.

I am taking this out of context. It has got nothing to do with radioactive material. But what he is talking about is, what the Administrator's responsibility in defining and in dealing with the very section we are discussing here, the section defining a pollutant and Senator Muskie says, "I do not want to get into the business of defining or applying these definitions to particular kinds of pollutants. That is an administrative decision to be made by the Administrator.

"Sometimes a particular kind of matter is a pollutant in one circumstance and not in another. That is a decision to be made. I am very reluctant to try to make it on the floor of the Senate."

He goes on, "This bill does not prohibit discharges. It prohibits the discharge of pollutants."

So we get back to what a pollutant is under a particular set of circumstances. "I cannot interpret all the circumstances. The Administrator can do so."

I would like to do that to be helpful to my colleagues but we are going to have to leave it to the judgment of the Administrator and that is precisely what

happened here. It was left to the judgment of the Administrator and he interpreted the legislative history which we think is convincing.

Before I leave that, I'd like to mention one other thing which we think is relevant -- hardly convincing, but when the Nuclear Regulatory Commission and ERDA were formed by the Reorganization Act of 1974, an amendment was proposed in the House that would have had the effect of redefining radioactive materials as used in this act to mean materials including those now regulated under the Atomic Energy Act.

The Amendment was rejected by voice vote. The citations are set out at page 49 of our brief.

In other words, in the House at least, Congress voted on the question that is before the Court and rejected amendment to accomplish the result that the Court of Appeals accomplished here.

That was in December of 1973, a number of months after the suit had been instituted, well before the Court of Appeals decision.

QUESTION: Was it the same Congress as passed the Water Act or was it the following Congress?

MR. RANDOLPH: I think it was the following Congress, Mr. Justice. I would have to check that.

QUESTION: Mr. Randolph, before you go on --

MR. RANDOLPH: Yes, Mr. Justice Powell.

QUESTION: The Water Control Act doesn't create any separate or new commission, as I understand it. There is an Administrator though, isn't there?

MR. RANDOLPH: The duties of administering the Water Act were given to the Administrative Environmental Protection Agency.

QUESTION: So there is no separate staff created by the Water Control Act?

MR. RANDOLPH: So far as I know, no. There may be separate commissions for advice on it, for example.

QUESTION: All right.

MR. RANDOLPH: Consumer problems and --

QUESTION: So only administrative interpretation of the 1974 Act has been by the AEC, as it is now called?

QUESTION: EPA.

MR. RANDOLPH: EPA.

QUESTION: EPA, right.

MR. RANDOLPH. I might say, as we said in the footnote in our brief, that the views that I am expressing to this Court, the views that are expressed in our brief, are concurred in by the Nuclear Regulatory Commission and the Energy and Research Development Administration. I did not file a separate Amicus brief because I think that as far as this issue is concerned, that all three agencies are foursquare set that this material that is sought to be regulated here is

not within the jurisdiction of the EPA.

QUESTION: We have here a disavowal by the EPA, who is the administrator which is a party here.

MR. RANDOLPH: Yes, the Administrator and the agency itself are the only parties for the --

QUESTION: Yes, they are the only parties, but you say the successor to the AEC, the NRC takes a quite consistent position and it does have jurisdiction.

MR. RANDOLPH: Oh, that's right. Well, they have no choice. Regardless of which way this case goes --

QUESTION: They have, in any event --

MR. RANDOLPH: They have, I think, in Section 2092 of the Atomic Energy Act, Congress said, you are prohibited from giving up any regulatory authority.

QUESTION: But their jurisdiction is exclusive.

MR. RANDOLPH: Their jurisdiction had been exclusive until the Court of Appeals decided this case below. In fact, as the Court is probably aware, again, Mr. Justice Rehnquist, there is a possibility of explaining this, but in the northern states, the power case that was decided by the Eighth Circuit, was cited and discussed in the brief, the Court of Appeals there held that the federal law, the Atomic Energy Act, preempted the state so that one of the reasons was that it was necessary and, indeed, the legislative history of the Atomic Energy Act indicated clearly that it was important for one

agency to have exclusive control over this dangerous material.

The Supreme Court, this Court, affirmed that decision in 405 U.S.

QUESTION: Are the members of the Nuclear Regulatory Commission appointed for a term of years or are they removed at will by the President?

MR. RANDOLPH: I don't know.

QUESTION: It seems it might be of some importance because a response to the argument you just made is that there is one President and presumably if he thinks the two are getting out of coordination, he can coordinate them by removing one or telling one what to do.

On the other hand, if there are fixed terms --

MR. RANDOLPH: I know he can remove the EPA Administrator.

QUESTION: Yes. But if the Nucleatory Regulatory Commission has fixed terms, I suppose under Humphrey's executor he couldn't remove them just because he didn't like what they were doing.

MR. RANDOLPH: I suppose that is right. I don't know the answers to that question but I'd be happy to send a letter to the Court.

The role of the Court of Appeals below, of course, was the same role that the EPA Administrator had in this case. That was to effectuate Congress' intention in this act.

I have a note that says they are appointed to a five-year term.

And that was to effectuate Congress' will here.

The court below was looking at the same material, the same information, the same statutes that the EPA administrator was interpreting.

There is an argument here that is put forth that we think is not really a very proper, persuasive argument. That is that, well, if Congress really meant this, they could have said it. Why didn't they write it in?

Well, the fact of the matter is, the argument begs the question because Congress, if you look through the legislative history -- and most of the members, I would suppose, read that report, at least, a great many of them did because they relied on the House report and Muskie's exchange -- thought there was no necessity to write it in because they knew or at least they thought [they knew] what they were dealing with here.

It also is a statement -- well, Congress could not have said it more clearly -- that could be made in every statutory interpretation case. Congress can always speak more clearly. But that statement really imposes upon the Congress some sort of obligation to write in detail every problem and solve every problem that comes up by writing it into this language of the act.

The Court of Appeals' role in this case was not to impose that kind of a requirement on Congress, but to effectuate what its will is.

QUESTION: If the tactical consequence of the decision below be that if the -- whatever the new agency is, successor to the Atomic Energy Commission -- were to say, no, you can't introduce this into the water and EPA were to say, yes, you can, you'd have a conflict between the two agencies as to particular radioactive materials?

MR. RANDOLPH: Absolutely. Absolutely. It is not clear who we control in that situation. I suppose -- there has been a lot of thought that it would be the lesser -- whoever says you can introduce the less -- the least is the one that controls because by doing that you satisfy the -- one agency says five milligrams and the EPA says four, then it would be four because that satisfies EPA.

I might say that EPA, as a result of this decision, if it is reversed, it does not mean that the Environmental Protection Agency has no role to play in regulating radioactive material.

I think we have pointed out in footnote 26 on page 37 of our brief some of the areas that the EPA still has to regulate.

One of the things we mentioned was that EPA was preparing effluent limitations for radium, uranium and thorium

released in ore-mining operations which were not controlled in any way by the Atomic Energy Act.

I might mention to the Court that these regulations, proposed regulations by EPA have now been published on November 6th, 1975. The citation is 40 Federal Register 51722 and, of course, the EPA still has regulatory authority to set what is known as the ambient radiation limits and they have done that, as we have mentioned, on page 52 of our brief.

QUESTION: Does the Atomic Energy Commission have to observe those?

MR. RANDOLPH: Yes. Yes, they do.

QUESTION: And yet, all it has any authority over are specific sources.

MR. RANDOLPH: It is sort of like the Clean Air Act system where the EPA set the ambient quality and the air quality.

QUESTION: Well, yes, but the EPA there, if states don't have the right specific source limitations, can set their own.

MR. RANDOLPH: No -- well, the states do regulate the discharge --

QUESTION: I know, but at least one authority can decide what each specific source may contribute to the pollution of the air.

Here, how is if the Atomic Energy Commission wants to

permit the release of a certain amount of radioactive materials, it may do so right up to the very limit of the EPA general standard.

MR. RANDOLPH: That is right.

QUESTION: Which means no one else may release any.

MR. RANDOLPH: Well, no, the EPA general standards applied to the release of radioactive material from the sources that are governed by the EENRC so when they say -- what they have set as a 25 millirem standard --

QUESTION: Can the EPA set specific standards for release from a specific plant?

MR. RANDOLPH: No. The --

QUESTION: I didn't think so.

MR. RANDOLPH: The -- that was a question that arose in the administration, Mr. Justice White.

QUESTION: Well, that is what the question is in the case, isn't it? And who controls that?

MR. RANDOLPH: That is right. The -- under the -- I might just say that the question that you are asking arose not under the Water Act. Before the Water Act was even passed that question arose because EPA was given authority under the, you know, the authority under the Federal Radiation Council to set the standards and there was some question.

We mentioned the Ash memorandum -- that arose within the administration about what that did. Did that give EPA

authority to --

QUESTION: Well, let's suppose the EPA says there can only be 100 in the water and so the Atomic Energy Commission can't allow a specific source to release any more than 100 total.

MR. RANDOLPH: Cumulative.

QUESTION: Yes. Suppose, though, that there are other sources contributing to the radioactive pollution of radioactive materials of the kind, for example, that you --

MR. RANDOLPH: Suppose on there, there can be no other sources because this is exclusively --

QUESTION: Well, but there are other -- you say that there are other kinds of radioactive materials that are not -- over which the AEC don't have --

MR. RANDOLPH: Radioactive isotopes which are used mainly in hospitals and I think --

QUESTION: Well, what about in mines?

MR. RANDOLPH: EPA regulates the mining.

QUESTION: So you say that the only sources for radioactive materials would be within the exclusive jurisdiction of the AEC?

MR. RANDOLPH: From man-produced radioactive materials other than radioactive isotopes produced by accelerators. I mean, you know, there is radioactivity everywhere. Granted. Buildings have a great deal of

radioactivity. You sit in the Senate Office Building and get 445 rems a year -- millirems a year but as far as man-produced radioactivity that is right.

QUESTION: So you are saying that the EPA may say that these ten sources can only contribute 100. But they can't say that this one of the ten sources may only contribute ten.

MR. RANDOLPH: No, that is right.

QUESTION: Is that what the fight is all about?

MR. RANDOLPH: Who controls the specific discharge limits from an individual plant. That is what the question in this case is. Right.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Mastbaum.

ORAL ARGUMENT OF DAVID C. MASTBAUM, ESQ.

ON BEHALF OF RESPONDENTS

MR. MASTBAUM: Mr. Chief Justice and may it please the Court:

The Federal Water Pollution Control Act is a systematic and comprehensive regulatory scheme designed to restore and maintain a nation's vital water resources.

Every industrial category and, indeed, every energy facility in this country is subject to the Federal Water Pollution Control Act and at the present time, every nuclear facility, including those subject to regulation

under the Atomic Energy Act must obtain a permit pursuant to the Federal Water Pollution Control Act.

What Petitioners seek to do to exclude AEA-regulated materials, that is, radioactive materials subject to the Atomic Energy Act from the existing from the existing permits that nuclear facilities must obtain pursuant to the Water Act.

I would like to make three points this morning.

The first is that the objectives and purposes of the Water Act as well as the express statutory language clearly mandate that all radioactive materials must be regulated pursuant to that act.

Second, that when the legislative history of the act is considered fully and in context it clearly indicates that Congress intended that all radioactive materials be regulated pursuant to the Water Act and,

Third, that the preemption involved in the Northern States power decision has no bearing on the issues which are presented for review today.

The strategy of the Water Act was to create specific limits on the amount of pollutants that could be discharged into our nation's water.

To this end, the act gives the EPA sole responsibility to set effluent limitations and specifically states that other federal permiting and licensing agencies

must accept the EPA limitations and cannot set any of their own.

The Water Act specifically defines several terms which indicate that it was the intent of Congress to regulate all radioactive materials. Thus, the Act specifically defines pollutant to include radioactive materials without limitation or exception.

Further, the Act defines pollution. Pollution includes -- and this is very important -- the man-made or man-induced alteration of the radiological integrity of water.

Third, the act prohibits the discharge of high-level radioactive wastes and radiological warfare agents.

Both of these materials are exclusively regulated by the Atomic Energy Act and,

Fourth, the Act states that nuclear steam electric generating plants are subject to its regulations.

Fifth, the Act regulates toxic pollutants and hazardous materials and indeed, it is indisputed that as these terms are used in the Water Act, radioactive materials would be toxic pollutants and hazardous materials.

The definition of pollutant and pollution are central to the Water Act for as these terms determine the scope of the Act Congress recognized the importance of these terms.

Representative Blatnik, member of the FWPCA's conference committee, made the point succinctly: "The total utility of the bill is reflected in the definition of the term pollutant, pollution, point source, discharge and toxic pollutants."

To revise any of these definitions is to upset the common thread of the bill. If there is a part of this bill that can be labeled most important, it is these definitions. To revise them in a way to limit their coverage is to severely detract from the effectiveness of the bill.

Moreover, these critical definitions as well as the rest of the Act received microscopic scrutiny from Congress.

The final bill was subject to a three-month conference in which the conference committee met 39 times and according to Senator Muskie, the conference committee tried to write into express language as clearly as possible the intent of Congress and not leave final evaluation of the bill to legislative history.

Thus, the definition of pollutant includes radioactive materials without exception or limitation.

The natural meaning of this term in both its popular usage and in a technical sense has always meant, all radioactive materials.

Indeed, the NRC's own regulations define

radioactive materials as any such material, whether or not subject to licensing control by the Commission.

This is found in 10 CFR section 20.313.

Furthermore, the definition of pollutant contains specific exemptions from terms. This Court has reaffirmed on numerous occasions that when a statutory phrase contains specific limitations or exception, no further exceptions are to be applied.

Moreover, the exemption which the Government is seeking in this Court would render the FWPCA's reference to radioactive materials virtually meaningless for the vast majority of radioactive materials that are discharged into water are subject to the Atomic Energy Act. Nothing is left, by comparison.

It should also be noted that whenever Congress has utilized the term radioactive materials in other legislation, when it has intended to include all radioactive materials, it has just utilized the term.

When it has intended to exclude those subject to the Atomic Energy Act, it has said so in express language.

The intent of Congress to include all radioactive materials within the Water Act is further found in the definition of pollutant. The Act defines pollution as a manmade or man-induced alteration of the radiological integrity of water.

Radioactive materials regulated under the Atomic Energy Act are all manmade or man-induced. Therefore, this was the precise type of pollution which Congress had in mind when it defined pollution to mean the manmade or man-induced alteration of the radiological integrity of water.

Since radioactive materials subject to the Atomic Energy Act constitute the vast majority of radioactive materials discharged into water, the exclusion would render meaningless the Congressional intent to protect the radiological integrity of water.

In summary, the language of the Act reflects a consistent intent on the part of Congress to regulate all radioactive materials.

Under the circumstances of this case, we submit that resort to legislative history is unnecessary and unwarranted. However, since the Government places such heavy reliance on it, we will present the legislative history in context.

The Government utilizes the legislative history in the case at bar to create, not to solve, ambiguity.

It is our position that both the Senate bill and the Conference Committee plainly intended to include all radioactive materials.

While the exemption which the Government seeks in this Court had some support in the House, it never attained

the status of legislative language and was specifically rejected by the Conference Committee.

QUESTION: What do you mean when you say it was specifically rejected by the Conference Committee?

MR. MASTBAUM: Mr. Justice, the Petitioners have cited a portion of the House Report. The Conference Committee specifically considered the definition of pollutant and adopted a new definition that was different from both the House and the Senate versions.

The House had included two addition exceptions to that definition. These exclusions were cut out of the Conference Bill.

Furthermore, the precise language found in the House report which excluded radioactive materials subject to the Atomic Energy Act was not found anywhere in the Conference Report.

QUESTION: Well, but it is a little strong to say that they specifically rejected it, isn't it? Isn't it more accurate to say that they came up with different language which did not include the House provisions?

I mean, you are not talking about, for instance, a conference report that said the House bill provided such and such but the Conference determined that we did not want the law to say this.

MR. MASTBAUM: In light of the microscopic

scrutiny that Senator Muskie emphasized the Conference Bill received, it can only be assumed that the fact that the Conference Bill and the Conference Report contains no statement which would indicate an intent to exclude radioactive materials regulated under the Atomic Energy Act as a very express and very strong rejection.

QUESTION: Well, when you say it can only be assumed, I think you concede some of what I am asking you.

QUESTION: Well, the Conference Bill did not change the words "radioactive materials," did it?

MR. MASTBAUM: No, it did not.

QUESTION: And that is what the argument is here, what those words mean.

MR. MASTBAUM: That is precisely right.

QUESTION: And the exceptions that were in the House Report were not exceptions to radioactive materials.

MR. MASTBAUM: That is right. However --

QUESTION: So that the Conference action did not purport to widen or limit whatever the word radioactive materials might have meant.

MR. MASTBAUM: That is precisely right. However, in light of the fact that the Conference specifically considered the scope of the term and in light of Senator Muskie's statement that the Conference had tried to write into law as clearly as possible the intent of Congress --

QUESTION: Well, what about the statements on the House floor after the Conference Report?

Didn't Mr. Anderson make a statement as to what the Conference did?

MR. MASTBAUM: That is correct. However --

QUESTION: Didn't he say that the original understanding as to the meaning, or, he said, the scope of radioactive materials had not been changed?

MR. MASTBAUM: Let me address that specifically.

First, by moving over to the Senate subsequent to --

QUESTION: Well, let's talk about the House.

Let's talk about Mr. Anderson for a minute.

MR. MASTBAUM: I think it is necessary for me, in order to explain that, to move over to the Senate.

QUESTION: Well, all right, go ahead.

MR. MASTBAUM: In the Senate there were a number of debates which indicated that it was the intent of -- or it was the understanding of the Senate members of the Conference that all radioactive materials be included.

In fact, let me quote you from Senator Buckley, who was engaged in a colloquy with Senator Muskie.

Senator Buckley declared himself deeply concerned about Section 511 (c)(2)(b). This clause may, I understand, bar any federal permitting or licensing agency such as AEC from imposing as a condition precedent to the issuance of

any license or permit any effluent limitation other than those limitations established pursuant to the FWPCA.

Now, this would seem to indicate that Senator Buckley's understanding in his colloquy with Senator Muskie that any effluent limitation established by EPA for any material would have to be accepted by the AEC.

Now, I agree with you that there is a conflict in the House and Mr. Robert Zener, who is the General Counsel of the EPA and on the brief of the Petitioners in the case at bar, in a more scholarly moment, noted that the House and Senate conferees on the Water Act often made contradictory statements when they returned to their respective chambers.

QUESTION: Now, how about -- when are you going to get to what Mr. Anderson said?

MR. MASTBAUM: If I could just --

QUESTION: Well --

MR. MASTBAUM: In the treatise on the Federal Environmental Law, Mr. Zener analyzed such discrepancies in connection with Section 13 and 14 of the Water Act as follows:

"This is one of the many situations in the legislative history of the 1972 Amendment where the Senate and House managers made statements in the floor debates which they apparently could not agree on at the conference.

"In these situations, the statements are dubious as indication of Congressional intent."

I guess that is the answer to your question, Mr. Justice White, that the statements of the House are dubious and lack --

QUESTION: Unlike the ones on the Senate.

MR. MASTBAUM: Well, if the ones in the Senate are dubious, then I would rely on the Conference Report which clearly indicates that there is no --

QUESTION: Yes, but the Conference Report did not purport to change the meaning of radioactive materials, as it came to them. They didn't change the --

MR. MASTBAUM: But while the conferees considered the extent of the exclusions and the scope of the definition --

QUESTION: Not with respect to radioactive materials. Did they?

QUESTION: The Conference Report doesn't help you, I don't think, insofar as establishing your position.

QUESTION: Mr. Mastbaum, may I ask you this question? If you prevail in this case, do you agree with the Solicitor General that there will be duplicative regulation by the NRC and the EPA that could be conflicting?

MR. MASTBAUM: No, I do not. What will occur will be that the EPA will have the sole authority to set effluent limitations.

The NRC and ERDA will have the authority to license nuclear facilities and be responsible for the

operation of those facilities.

Their licenses will merely have to reflect the EPA's standards established pursuant to the Water Act. There is no duplication.

As a matter of fact it will result in the uniformity in that all aspects of water pollution from nuclear facilities will be subject to the Water Act.

QUESTION: And the NRC authority that it has exercised for 20 years will be taken away from it?

MR. MASTBAUM: No, that is not true. The Water Act is very practical. It requires that the EPA --

QUESTION: But that authority that had existed would be limited by your view of the new act.

MR. MASTBAUM: The NRC's authority?

QUESTION: Yes, the NRC's authority.

MR. MASTBAUM: It would be limited but it must be remembered that the EPA has broad radiation authority and experience. When it was established pursuant to Reorganization Plan 3 of 1970, the Federal Radiation Council was transferred to the EPA from the AEC as well as the Bureau of Radiological Health from the Department of Health, Education and Welfare.

QUESTION: Right. But do you think it is reasonable to infer from what, in effect, is silence by Congress in the legislative history that it was taking

away from an agency that operated for 20 years some of its jurisdiction?

MR. MASTBAUM: Well, I do not concede that there was silence in Congress.

QUESTION: I know you rely on language in the statute itself, but --

MR. MASTBAUM: Well, I also rely on language that one can find in the legislative history. For example, in the debate that the Government refers to between Senator Pastore and Senator Muskie. Subsequent to the discussion, the consequences of EPA regulation under the Water Act there was a discussion on the setting of specific effluent limitations from nuclear facilities and this discussion arose in the context of Northern States Power versus Minnesota and that case, as you know, preempted the states from regulating radioactive materials that were subject to the Atomic Energy Act.

QUESTION: But didn't the Atomic Energy Act possess exclusive control in the Commission over atomic energy? I think that --

MR. MASTBAUM: At the time it was adopted, it was adopted 20 years earlier than the Water Pollution Control Act.

QUESTION: Right and you are saying the 1974 Act subtracted a certain portion of the exclusive control,

largely by silence so far as specific discussion of it was concerned in the Congressional legislative history.

MR. MASTBAUM: Well, I don't concede silence.

QUESTION: Right. You haven't pointed to anything very specific so far.

MR. MASTBAUM: Well --

QUESTION: Except the language in the Act which I concede gives you quite an arguable position.

MR. MASTBAUM: Well, if the exception -- it must be remembered that what the Government is seeking to exclude from the Water Act is a very significant form of pollution.

If Congress had intended to exclude those materials when they made specific reference to them, not only in the definition of pollutants but in the definition of pollution, they would have said so, undoubtedly.

There is some support for the Government's position, but that is primarily in the House.

QUESTION: Mr. Mastbaum, is your plain language --

MR. MASTBAUM: I -- I -- excuse me.

QUESTION: Your plain language argument that might be, have some -- a certain amount of substance -- if there had not been the Atomic Energy Act at all. But don't you think that when you have two Congressional statutes that -- and one of them -- and they seem to be clashing or they

seem to be inconsistent, isn't there some ground for making room for both of them?

MR. MASTBAUM: The Federal Water Pollution Control Act, I think, would take precedence. My cocounsel --

QUESTION: Well, why do you say that? It was passed later but let's assume there was no legislative history whatsoever with respect to what the words radioactive materials meant, as used in the Water Act. Nevertheless, you have another statute which purports to give the Atomic Energy Commission some of the same jurisdiction.

MR. MASTBAUM: The Water Act specifically states that any Agency's authority which is inconsistent with the Water Act must yield to the Water Act, 1371, 33 U.S. Code.

My cocounsel has just reminded me that in the Senate Report there is a specific reference to radioactive materials subjected to the Atomic Energy Act.

That is in the discussion section 1316 of the final version of Bill Section 306 and the Senate Bill. The Senate Committee specifically stated that EPA's Office of Radiological Health should prepare itself to regulate nuclear fuel's processing plants.

Well, the functions of the Office of Radiological Health deal purely with radioactive materials subject to the Atomic Energy Act and the only discharges from nuclear fuels processing plants are those subject to the Atomic Energy Act.

QUESTION: Well, now, was the section of the Senate bill that the Senate report was addressing to there, was that carried over verbatim into the final bill?

MR. MASTBAUM: If it wasn't verbatim, it was very close. It dealt with new sources of pollution that the EPA should regulate and from the list of sources included in Section 306, the section indicated that EPA did not have the authority at this time to regulate nuclear fuel processing plants but that it should develop the authority and its Bureau of Radiological Health / should prepare to regulate the discharges of radioactive materials from these plants.

QUESTION: But you criticized the reliance on the House Committee Report because you say, the Conference Committee didn't go this same way.

Now, if you are going to rely on the Senate Committee Report it seems to me you have got to show that that is somehow more faithful to the Conference Report or that the Conference Report, in effect, adopts it.

MR. MASTBAUM: Section 306, the one that I had been referring to, is the same as the comparable provision of the Senate Bill and the House Amendment so therefore they apparently did accept the Senate version.

QUESTION: Mr. Mastbaum, do you say that the Energy Commission has no jurisdiction over how much pollutions are put in the water?

MR. MASTBAUM: Well, I would say that what would happen if this Court affirms the Tenth Circuit would be that the Environmental Protection Agency would set effluent limitations for radioactive materials and then the Nuclear Regulatory Commission or ERDA would ensure that the subject of their licensing authority would meet those limitations.

QUESTION: So that they would have no independent authority at all any more.

MR. MASTBAUM: They would have the authority to regulate those facilities but they would not have any authority --

QUESTION: They would have no authority over regulating the pollution.

MR. MASTBAUM: Yes, they could regulate the pollution but they could not establish the limits, that is all.

QUESTION: So now you have got Congress deliberately setting up two competing commissions.

MR. MASTBAUM: I don't think --

QUESTION: Do you think that Congress meant to do that?

MR. MASTBAUM: I don't think that we have two competing agencies here.

On the one hand, we have the Environmental

Protection Agency --

QUESTION: You either have two or one is superior.

MR. MASTBAUM: Well, I think the missions and functions of these --

QUESTION: That is why I wanted to know what is your position. Is the EPA superior?

MR. MASTBAUM: With respect to matters --

QUESTION: You have the last word.

MR. MASTBAUM: With respect to matters related to environmental pollution, the EPA --

QUESTION: Would have the last word.

MR. MASTBAUM: -- is superior.

QUESTION: And that right has been taken away from the Commission.

MR. MASTBAUM: That is correct, with respect to water pollution.

QUESTION: Is there any evidence in the record, in the testimony in support of the view that the Atomic Energy Commission had failed adequately to protect the public interest in the discharge of radioactive materials into the waters of our country?

MR. MASTBAUM: We do not claim that there is any problem with respect to that but the Water Act establishes a new regulatory scheme with specific effluent limitations.

These limitations enforced by permit program give

more control over pollution.

Furthermore, they are technology-forcing. That is, there is a phased approach to pollution control. There are several dates which have been set far in advance for achieving more stringent pollution control and therfore, by subjecting the nuclear facilities to this law, we have, hopefully, the advancement of technology which will result in cleaner water.

QUESTION: Mr. Mastbaum?

MR. MASTBAUM: Yes?

QUESTION: What do you understand by this statement in the Government's brief as to what it concedes EPA would still be able to do even if the Government wins?

"Thus the lines of authority were clearly drawn. EPA was to set generally applicable radiation standards limiting the total amount of permissible radiation in the environment from major categories of sources."

Now, I assume, from what I heard the Government say, that the EPA, under the Government's view, would be entitled to set limits on radiation releases into the water from major categories of sources, namely, power plants, for example. Is that right?

MR. MASTBAUM: I think the point that you make is very important because the Government concedes that EPA has the responsibility to set general or ambient

environmental standards for radiation. However --

QUESTION: Well, when they say "From major categories of sources," wouldn't power plants, wouldn't the facilities managed by the AEC be a major category of sorts?

MR. MASTBAUM: While that is true, they are dealing with the total number of plants.

The only way to effectively reach that point is to provide for specific limitations. The EPA may establish general limits.

QUESTION: So you are just making an effectiveness argument but assume that the AEC -- the AEC, after the general standards were set by the EPA, honestly carried out its task and limited the radiation to -- and kept the radiation released within the limits set by EPA.

Now, would you be satisfied or not?

MR. MASTBAUM: Well, I am not persuaded that they would do that.

QUESTION: So your argument is that they won't do it, rather than if they did it -- if they did do it, it would not be enough.

MR. MASTBAUM: My argument is that the Water Act clearly and unequivocally includes all radioactive materials. The precise regulatory scheme established under that Act will result in the EPA being able to achieve a fulfillment of the general environmental standards which they are

required to set.

QUESTION: Will the states come in by the back door if not the front if EPA is given the authority that you contend because of the provisions of the Water bill?

MR. MASTBAUM: The question of whether or not the states would be preempted from regulating the radioactive materials pursuant to the Water Act has never arisen at this time. If --

QUESTION: I didn't mean by preemption but I meant by participation in the EPA process.

MR. MASTBAUM: The rule for the states would be one. If it is found that the states are preempted from setting effluent limits, the EPA would set effluent limits and then, as the states take over individual permit programs, they would include the EPA and federal limits within the state .

QUESTION: Well, that would be a result somewhat contrary to the Irke? case, wouldn't it, the Northern States Power Company.

MR. MASTBAUM: No, it wouldn't. In Northern States Power, the issue was whether or not the states were preempted under the Atomic Energy Act.

It is our position that under the Water Act, radioactive materials discharged into water are now being regulated. Therefore, the Atomic Energy Act has no bearing

on preemption under the Water Act.

QUESTION: Well, admittedly not direct, but the states would have a role in regulating that they would not have if your contention were rejected.

MR. MASTBAUM: They would have a very limited role pursuant to a federal regulatory scheme.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Mastbaum.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:35 o'clock a.m., the case was submitted.]