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CHANGING THE RULES? *NRDC v. ABRAHAM* & THE RECLASSIFICATION OF HIGH LEVEL NUCLEAR WASTE

Joanne Hughes Burkett

“The residents of Washington and South Carolina and Idaho are now finding out what the people of Nevada have known for years. The Department of Energy makes up the rules as it goes along. If it confronts an obstacle that it is unable to overcome, it simply changes the rules.”

The Honorable Shelley Berkeley, U.S. House of Representatives, Nevada¹

I. INTRODUCTION

The United States District Court for the District of Idaho, in *NRDC v. Abraham*,² recently invalidated a portion of an internal order of the U.S. Department of Energy (DOE). DOE Order 435.1³ would have allowed DOE to reclassify some high-level nuclear defense waste as “incidental” and dispose of it at sites around the country that store reprocessing waste from nuclear weapons production.⁴ The court held that, under the Nuclear Waste Policy Act (NWPA) of 1982,⁵ the Department of Energy did not have discretion to dispose of defense-related high-level radioactive waste in any place other than a repository established under the NWPA.⁶

The court made its decision primarily on statutory interpretation grounds. First, the NWPA mandates, by the use of the word “shall,” that the Secretary of Energy arrange for a repository to dispose of defense

¹ J. R. Pegg, *House: Nuclear Waste Should Not Be Classified Less Hazardous* (Oct. 3, 2003) <www.physicsforums.com> (last accessed June 1, 2004).

² *NRDC v. Abraham*, 271 F. Supp. 2d 1260 (D. Idaho 2003). For another discussion of this case, see David K. Mears and John Ruple, *Nat. Resources Def. Council v. Abraham: Preventing the Dept. of Energy from Defining Away High-Level Nuclear Waste*, 24 J. Land Resources & Envtl. L. 77 (2004).

³ U.S. Dept. of Energy, Radioactive Waste Management Order 435.1 (July 9, 1999), published at 64 Fed. Reg. 37948 (July 14, 1999).

⁴ U.S. Dept. of Energy, Radioactive Waste Management Manual 435.1-1, Chapter II(B) (July 9, 1999).

⁵ 42 U.S.C. § 10101 *et. seq.* (2004).

⁶ *NRDC*, 271 F. Supp. 2d at 1260.

high-level waste (HLW).⁷ This mandate limits DOE's discretion by permitting disposal only in a repository established under NWPA.⁸

Second, DOE ignored the word "include" in its reading of 42 U.S.C. § 10107(b)(2) and treated the phrase regarding cost allocation as a limitation on its duty.⁹ The court held that such a reading violated a cardinal rule of statutory interpretation: that no word be ignored.¹⁰ "Include" introduces illustrative examples,¹¹ so cost allocation is merely one type of arrangement DOE must make when it disposes of defense HLW in an NWPA-approved repository.¹²

Finally, the court said that Congress spoke clearly in the NWPA when it defined high-level waste according to its source, rather than its concentration, and did not delegate to DOE any authority to establish alternative definitions.¹³ Because Congress' intent was clear, the court allowed no administrative discretion¹⁴ and invalidated a portion of the Order.¹⁵

This decision is important because it precludes DOE from dealing with high-level waste by relaxing regulatory standards. It means DOE cannot skip an important step in the clean-up process.

This comment will cover the facts and procedural history of *NRDC v. Abraham* in Part I; discuss the legal framework and pre-existing rules

⁷ 42 U.S.C. §10107(b)(2) (2004)

Unless the President finds, after conducting the evaluation required in paragraph (1), that the development of a repository for the disposal of high-level radioactive waste resulting from atomic energy defense activities only is required, taking into account all of the factors described in such subsection, the Secretary **shall proceed** promptly with arrangement for the use of one or more of the repositories to be developed under subtitle A of title I for the disposal of such waste. Such arrangements **shall include the allocation of costs** of developing, constructing, and operating this repository or repositories. The costs resulting from permanent disposal of high-level radioactive waste from atomic energy defense activities shall be paid by the Federal Government, into the special account established under section 302. (emphasis added).

⁸ *NRDC*, 271 F. Supp. 2d at 1263.

⁹ *Id.*

¹⁰ *Id.* at 1264, citing *U.S. v. Luna-Madellaga*, 315 F.3d 1224, 1230 (9th Cir. 1993).

¹¹ *Id.*, citing *Fed. Land Bank of St. Paul v. Bismarck Co.*, 314 U.S. 95, 100, (1941).

¹² *Id.*

¹³ *Id.* at 1266.

¹⁴ *Id.*, citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

¹⁵ *Id.*

governing this case in Part II; present the legal arguments of each side in Part III; analyze possible future action by each stakeholder in Part IV, and summarize the importance of the case in Part V.

II. FACTS & PROCEDURAL HISTORY

A. High-level Nuclear Waste

The operation of nuclear reactors results in spent nuclear fuel containing highly radioactive fission products.¹⁶ For example, the solid 12-foot-long fuel rods removed from commercial nuclear reactors during refueling are intensely radioactive and contain much of the original uranium, the plutonium that has been produced, long-lived fission products such as cesium-137 and strontium-90, and a number of other radionuclides and fission products.¹⁷ Fresh from the reactor, spent fuel is dangerous material that requires active cooling.¹⁸ The physical heat and intense radioactivity constrain transportation and storage, so the highly radioactive spent fuel is stored temporarily at individual reactor sites in pools of water that provide radiation shielding and cooling.¹⁹ With a "once-through" fuel cycle,²⁰ as the short-term storage pools fill, the need for a long-term, off-site storage option becomes more imperative.²¹

Alternately, the fuel cycle could involve reprocessing of spent fuel to

¹⁶ Richard Wolfson, *Nuclear Choices A Citizen's Guide to Nuclear Technology* 213 (rev. ed., MIT Press 1995).

¹⁷ Dixy Lee Ray & Lou Guzzo, *Trashing the Planet: How Science Can Help Us Deal with Acid Rain, Depletion of the Ozone, and Nuclear Waste (Among Other Things)* 150 (Regnery Gateway 1990).

¹⁸ Wolfson, *supra* n. 16, at 224.

¹⁹ *Id.* at 213.

²⁰ *Id.* at 216. In a once-through nuclear fuel cycle, natural uranium is mined, enriched and prepared as fuel; the fuel is fissioned in a reactor, and then stored as high-level nuclear waste.

²¹ *Id.* at 227. Note however, that "by the year 2000, all the waste generated since the beginning of the commercial nuclear power industry would cover a single football field to a depth about 10 feet. The small volume of radioactive waste is the reason on-site storage has been a viable temporary option, and is the reason we can consider a single waste-storage facility for the entire United States, occupying at most a few square miles. On the other hand, its virulent radioactivity and its long life make nuclear garbage unlike any other waste." *Id.*

recover useful isotopes.²² Reprocessing also alters the character of the waste by reducing the amount of long-lived radioactivity it contains,²³ thereby facilitating its handling, interim storage, transportation, and ultimate disposal.²⁴

Reprocessing of spent nuclear fuel entails breaking up the spent fuel rods and dissolving the fuel in strong acid.²⁵ Chemical separation removes the unfissioned uranium and plutonium and produces a liquid, high-level nuclear waste (HLW).²⁶

This liquid waste, which consists of highly radioactive particles suspended in an acid chemical solution, generally is neutralized and placed in storage tanks.²⁷ Over time, the radioactive particles in the liquid fractionate. Plutonium and its related elements sink to the bottom of the tanks and form a solid sludge, while cesium and its atomic relatives remain suspended in the liquid on top.²⁸

The uranium recovered from reprocessing can be enriched and then re-enter the fuel cycle.²⁹ The plutonium can be mixed with enriched uranium to make a "mixed oxide" that can substitute for uranium as reactor fuel.³⁰ Alternately, the plutonium can be used in the production of nuclear weapons.³¹

Several European and Asian countries, without major uranium resources but with economies committed to nuclear power, have developed sophisticated reprocessing plants, using robots to move the spent fuel through a complex series of chemical and physical reprocessing stages.³² An international market in reprocessed plutonium is now a reality.³³

²² *Id.* at 236. In a nuclear fuel cycle with reprocessing, uranium-235 and plutonium-239 are removed from spent fuel and either recycled into new reactor fuel or the plutonium can be used for weapons production.

²³ Wolfson, *supra* n. 16, at 235.

²⁴ Ray & Guzzo, *supra* n. 17, at 151.

²⁵ Wolfson, *supra* n. 16, at 235.

²⁶ *Id.* See also U.S. Env'tl. Prot. Agency, *Spent Nuclear Fuel and High-Level Radioactive Waste* <http://www.epa.gov/rpdweb00/docs/radwaste/snf_hlw.htm> (last accessed June 1, 2004).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

However, the United States opted out of this market early, in the late 1970s, when concerns over proliferation of nuclear weapons led President Jimmy Carter to ban reprocessing of U.S. commercial reactor fuel.³⁴ President Reagan lifted the reprocessing ban in 1981, but the nuclear industry has shown little interest in pursuing reprocessing.³⁵ Interest remains low because the United States has major reserves of uranium and no urgent need to reprocess spent fuel.³⁶ In addition, private industry lost millions of dollars on a reprocessing plant that was built but never used and continues to be unwilling to take further economic risks on reprocessing.³⁷ Moreover, plutonium from reprocessed spent nuclear fuel, though not ideal bomb material, is sufficient to make a crude fission bomb.³⁸ Thus, the public's concerns about proliferation continue and likely are enhanced by the advent of terrorism.³⁹

In addition to being used to generate commercial electricity, nuclear reactors are used in government-sponsored research programs; in universities and industries; in science and engineering experiments; by the U.S. Navy and other military services; and in the production of nuclear weapons.⁴⁰ Over the past fifty years, spent fuel from Department of Defense nuclear reactors routinely has been reprocessed for use in producing nuclear weapons or for reuse in new fuel.⁴¹ In the United States, the nuclear weapons industry has produced considerably more HLW from reprocessing than have all the nation's commercial power reactors.⁴²

³⁴ *Id.* at 236.

³⁵ *Id.*

³⁶ *Id.* at 237.

³⁷ Ray & Guzzo, *supra* n. 17, at 152.

³⁸ Wolfson, *supra* n. 16, at 236.

³⁹ *Id.* at 235.

⁴⁰ U.S. Envtl. Prot. Agency, *supra* n. 26.

⁴¹ *Id.*

⁴² *Id.* "Compared to the total inventory of HLW, the volume of commercial HLW from the reprocessing of commercial spent fuel is almost insignificant, less than one percent. Defense-related HLW comprises greater than ninety-nine percent of the volume of HLW." *Id.*

*B. Managing High-Level Waste*⁴³

In the Atomic Energy Act of 1954,⁴⁴ Congress granted to the Atomic Energy Commission, a predecessor of DOE, the authority to manage high-level nuclear waste.⁴⁵ In 1982, Congress passed the Nuclear Waste Policy Act (NWPA),⁴⁶ which officially adopted deep geologic repositories as the nation's long-term strategy for disposing of the most hazardous nuclear waste.⁴⁷ The NWPA authorized the DOE to site, build, and operate the repositories.⁴⁸

The NWPA also gave the President authority to determine if HLW from defense activities would be stored separately or in a repository also used to store commercially produced high-level waste.⁴⁹ In a memo to the Secretary of Energy in 1985, President Reagan concluded that a separate repository for waste from the Department of Defense (DOD) was unnecessary.⁵⁰ At the recommendation of the Secretary of Energy and in accordance with the Act, Congress finally approved a site for the repository at Yucca Mountain, Nevada, in 2002.⁵¹

In the Nuclear Waste Policy Act, Congress defined HLW as "highly radioactive material resulting from the reprocessing of spent nuclear fuel" and illustrated that definition with two examples: (1) "liquid waste produced directly in reprocessing" and (2) "solid material derived from such liquid waste that contains fission products in sufficient

⁴³ For an excellent timeline depicting the history of nuclear waste classification and regulatory activities, see Hanford Watch, *History of Hanford Tank Waste Classification & Regulatory Activities* <http://www.hanfordwatch.org/archive/HISTORY_OF_WASTE_CLASSIFICATION.htm> (last accessed June 1, 2004).

⁴⁴ 42 U.S.C. §§ 2011 *et. seq.* (2004).

⁴⁵ 42 U.S.C. § 2201b (2004) (authorizing the AEC to "establish by rule, regulation or order, such standards and instructions to govern the possession and use of special nuclear material . . . as the Commission may deem necessary").

⁴⁶ Pub. L. No. 97-425, 96 Stat. 2201 (Jan. 7, 1983) (codified at 42 U.S.C. § 10101 *et. seq.*).

⁴⁷ 42 U.S.C. § 10101 *et. seq.* (2004)

⁴⁸ 42 U.S.C. § 10131 (2004); see also §§ 10132, 10134.

⁴⁹ 42 USC § 10107(b)(2); see also Mealey's Poll. Liab. Rep. 1 (July 2003) and *NRDC v. Abraham*, 244 F.3d 724, 744 (9th Cir. 2001).

⁵⁰ Memorandum from Ronald Reagan, President of the United States, to John S. Harrington, Secretary of Energy (Apr. 30, 1985) (copy on file with author).

⁵¹ Pub. L. No. 107-200, 116 Stat. 735 (July 24, 2002).

concentration.”⁵² The NWPA treats solids and liquids differently. Though the NWPA definition considers primarily the source of the waste, for solids derived from liquid waste, it also considers the hazard.⁵³ Liquid waste from reprocessing is always HLW; however, high-level solid waste may be reclassified as low-level, but only after treatment to remove fission products.⁵⁴

Today, defense-related HLW comprises more than ninety-nine percent of the volume of all HLW stored in underground tanks or stainless steel silos on federal reservations at the Idaho National Engineering and Environmental Laboratory (INEEL) facility, the Hanford site in Washington state, and the Savannah River Site (SRS) in South Carolina.⁵⁵ Managing these tanks and silos is DOE’s most expensive and technologically complex problem.⁵⁶ In 1999, the DOE issued DOE Order 435.1 and an accompanying interpretive manual to govern the management of HLW at these facilities.⁵⁷

Instead of identifying a process for treating high-level solid waste so that it might be reclassified as low-level based on the concentration of radioactivity, DOE claims in Order 435.1 and its accompanying manual to have the discretion to deal with the HLW at these sites by means other than disposition at the Yucca Mountain site pursuant to the NWPA.⁵⁸ *NRDC v. Abraham* was filed to challenge that discretion.⁵⁹

⁵² According to Congress in the Nuclear Waste Policy Act, the term ‘high level radioactive waste’ means:

the highly radioactive **material resulting from the reprocessing of spent nuclear fuel**, including liquid waste produced directly in reprocessing and any solid material derived from such waste that contains fission products in sufficient concentrations.

42 U.S.C. §10101(12) (2004) (emphasis added).

Note that the HLW at issue in *NRDC v. Abraham* is the second type, radioactive particles that have formed a solid of residual HLW at the bottom of interim storage tanks.

⁵³ *NRDC*, 271 F. Supp. 2d at 1265. *See also* Dept. of Energy Order On Radioactive Waste Declared Invalid, 16-10 Mealey’s Poll. Liab. Rep. 1 (July 2003).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ NRDC Press Backgrounder, *Energy Department Reclassifies High Level Waste to Avoid Cleanup* (Feb. 2003) <<http://www.nrdc.org/media/pressreleases/030215.asp>> (last accessed June 1, 2004).

⁵⁷ 64 Fed. Reg. 37948 (July 14, 1999).

⁵⁸ U.S. Dept. of Energy, *supra* n. 4, at Chapter II(B)(2).

⁵⁹ Pl.’s Compl. ¶ 5, *NRDC v. Abraham*, 271 F. Supp. 2d 1260 (D. Idaho 2003).

C. The Cleanup Process under DOE Order 435.1

For years, DOE worked with state permitting agencies to implement plans to remove HLW from interim storage tanks and change it into a more stable form suitable for shipment to a national repository.⁶⁰ Under the NWSA, DOE has the authority to treat HLW and separate out a solid low-level fraction for burial as low-level waste.⁶¹ Prior to DOE Order 435.1, the DOE waste management strategy for high-level waste was to use a "salt waste process" to remove as much radioactivity from the tank waste as possible.⁶² The highly radioactive product of the process would be vitrified⁶³ in preparation for disposal at a high-level nuclear waste repository. The remaining waste product, with only .0022% of its original radioactivity, could be disposed of as industrial solid waste.⁶⁴ Unfortunately, in 1988 the only operational salt waste process failed technologically and was shut down.⁶⁵

DOE did not identify alternative technology for a new salt waste process until 2001.⁶⁶ In the interim, DOE experimented with a non-technology based, alternative process to deal with the tank waste. In 1996, DOE permanently closed two of the "cleanest" tanks at its Savannah River Site in South Carolina by removing for vitrification the liquid HLW, called supernate, and covering solid HLW left in the bottom of the tanks by filling the tanks completely with a cement-like grout.⁶⁷ DOE did not plan to move this grout-covered residual HLW to a permanent depository,

⁶⁰ David Wilson, *Prepared Witness Testimony before the Committee on Energy and Commerce* (July 17, 2003) <<http://energycommerce.house.gov/108/Hearings/07172003hearing1014/Wilson1601print.htm>> (last accessed June 1, 2004).

⁶¹ 42 U.S.C. § 10101(12)(A) (2004). See also Dr. Thomas Cochran, *The High-Level Waste Case: DOE Order 435.1 Declared Invalid as it Relates to Incidental Waste*, Statement made before the National Academy Board on Radioactive Waste Management, Washington, D.C. (Sept 3, 2003) (copy on file with author).

⁶² David Wilson, *Briefing Paper on the Proposed SRS Salt Waste Initiative 1* (on file with author).

⁶³ Vitrify – to change or make into glass or a similar substance, esp. through heat fusion. *American Heritage Dictionary* 1353 (2d college ed., Houghton Mifflin 1982).

⁶⁴ Wilson, *supra* n. 62, at 1.

⁶⁵ Wilson, *supra* n. 62, at 2.

⁶⁶ *Id.*

⁶⁷ Cochran, *supra* n. 61. "Tank 17 was closed abandoning 2,200 gallons of HLW in the bottom of the tank. Tank 20 was closed abandoning 1,000 gallons of HLW. These were the two cleanest tanks at SRS prior to closing."

as required by the NWPA.⁶⁸ Instead, DOE justified leaving this HLW in place by claiming it could be reclassified as “incidental waste.”⁶⁹

The term “incidental waste” is not found in any federal statute addressing nuclear waste disposal. The Atomic Energy Commission (AEC) first used the term “incidental waste” in a 1969 Notice of Proposed Rulemaking in which the AEC stated that the term “high-level waste” did not include certain “incidental wastes” from reprocessing operations such as ion exchange beds, sludges, and contaminated laboratory items.⁷⁰ Although the Final Rule did not include the incidental waste terminology, the Nuclear Regulatory Commission (NRC) and DOE continued to recognize the concept.⁷¹ The benefit of the concept, from the agency’s perspective, is that waste classified as incidental need not be disposed of in the permanent repository.⁷² Under DOE’s view, incidental waste is exempt from disposal in an underground repository because it does not pose a long-term threat to the environment or to humans.⁷³

In DOE Order 435.1,⁷⁴ DOE identified two ways it can determine if waste from reprocessing spent nuclear fuel is incidental and not high-level waste: the citation process and the evaluation process.⁷⁵ The citation process relies on the description in 34 Fed. Reg. 8712 for proposed 10 CFR Part 50, Appendix D, Paragraphs 6 and 7; waste classified as incidental through the citation process includes items such as clothing,

⁶⁸ *Id.*

⁶⁹ Declaration of Dr. Thomas B. Cochran, NRDC Director of Nuclear Programs, *NRDC v. Abraham*, Case No. 01-CV-413 (BLW) (Jan. 22, 2003).

⁷⁰ U.S. Dept. of Energy, *Summary of Public Comments on Dept. of Energy Order 435.1, Radioactive Waste Management* <<http://web.em.doe.gov/em30/pubsum16.html>> (last accessed June 1, 2004).

⁷¹ *Id.*, citing 55 Fed. Reg. 5992, 5993; *see also* DOE/EIS-0082-S (1994), which analyzes the impacts of on-site disposal as low-level waste of low-activity fractions of high-level waste; DOE/EIS-0203-F (1995), which considers alternatives to produce a high-level waste form suitable for a geological repository and a low-activity form disposable as low-level waste; and finally DOE/EIS-0189 (1996), which says residual waste remaining in the tanks after removal of as much of the waste as practicable would be considered waste incidental to reprocessing and disposed of in-place as low-level waste; and low-activity wastes remaining after process the high-level tank waste to remove as much of the high-level radioactivity as practicable could be considered waste incidental to reprocessing.

⁷² *Id.*

⁷³ *DOE Order On Radioactive Waste Declared Invalid*, 16-10 Mealey’s Poll. Liab. Rep. 1, July 2003.

⁷⁴ U.S. Dept. of Energy, *supra* n. 3.

⁷⁵ *Id.*

tools, and equipment contaminated from reprocessing plant operations.⁷⁶

The evaluation process relies on three criteria that must be documented in all management decisions that reclassify waste as incidental.⁷⁷ In DOE Order 435.1, DOE treats as incidental under the evaluation process those wastes:

- (1) that have been or will be processed to remove key radionuclides to the maximum extent technically and economically practical;
- (2) that will be combined into a solid form at a concentration not exceeding the limits for Class C low-level waste in 10 CFR Part 61, Subpart C - Performance Objectives;⁷⁸ and,
- (3) that are to be managed under safety performance objectives that satisfy 10 CFR Part 61.55 or 40 CFR Part 191, as appropriate, or will meet alternative requirements for waste classification and characterization as DOE may authorize.⁷⁹

Wastes classified as incidental through the evaluation process have included large volumes of low-activity liquid wastes (separated from high-level waste streams), which have been disposed of in a saltstone solid form or a grout (such as the two closed tanks at SRS), and tank heels,⁸⁰ which safely could remain in closed high-level waste tanks and that would have been prohibitively costly to remove.⁸¹

At issue in *NRDC v. Abraham*⁸² was the fraction of HLW currently in

⁷⁶ *Id.*; see also U.S. Dept. of Energy, *supra* n. 4, at Chapter II(B)(1).

⁷⁷ *Id.*; see also U.S. Dept. of Energy, *supra* n. 4, at Chapter II(B)(2).

⁷⁸ See limits in 10 C.F.R. §§ 61.41 (Protection of the general population from releases of radioactivity), 61.42 (Protection of individuals from inadvertent intrusion), 61.43 (Protection of individuals during operations), and 61.44 (Stability of the disposal site after closure).

⁷⁹ U.S. Dept. of Energy, *supra* n. 4, at Chapter II(B)(2). See also U.S. Dept. of Energy, *supra* n. 70.

⁸⁰ See Idaho Natl. Engr. & Env'tl. Laboratory, *INEEL Reducing Risk to the Aquifer Through Reducing Liquid and Cleaning Underground Storage Tanks* <<http://newsdesk.inel.gov/contextnews.cfm?ID=364>> (last accessed June 1, 2004). Tank heel is a term of art referred to in context at this site; the "heel" level is the lowest level of extraction possible using existing equipment.

⁸¹ U.S. Dept. of Energy, *supra* n. 70.

⁸² 271 F. Supp. 2d 1260 (2003).

interim storage that DOE, under the authority of DOE Order 435.1, might seek to label “incidental” and permanently dispose outside of a deep geologic repository.⁸³

D. Procedural History

The Natural Resources Defense Council (NRDC), the Yakima Nation, and the Snake River Alliance filed suit in May 2000 to challenge the legality of DOE Order 435.1, under which DOE could close HLW tanks at its facilities.⁸⁴ NRDC is a national non-profit membership environmental organization incorporated in New York state with a nationwide membership that includes over 20,000 individuals in the affected states of Idaho, Washington, and South Carolina.⁸⁵ The Yakima Nation is a federally recognized Indian tribe whose reservation is twenty-five miles west of the Hanford site in south-central Washington.⁸⁶ The Snake River Alliance is an Idaho-based non-profit environmental organization of over 1,000 dues-paying members, most of whom live in southern Idaho.⁸⁷

The plaintiffs originally sued in the United States Court of Appeals for the Ninth Circuit, invoking that court’s original jurisdiction under the Nuclear Waste Policy Act.⁸⁸ The Ninth Circuit concluded it lacked jurisdiction because DOE Order 435.1 was not a final agency decision under the NWPA and thus was not eligible for review by an appellate court.⁸⁹ Instead, the authority for DOE Order 435.1 to address waste

⁸³ *Id.* See also Cochran, *supra* n. 69, at 3.

⁸⁴ NRDC Press Backgrounder: *Energy Department Reclassifies High Level Waste to Avoid Cleanup* <<http://www.nrdc.org/media/pressreleases/030215.asp>> (Feb. 2003) (last accessed June 1, 2004).

⁸⁵ Pl.’s Compl. ¶ 11, *NRDC v. Abraham*, 271 F. Supp. 2d 1260 (D. Idaho 2003).

⁸⁶ *Id.* at ¶ 13.

⁸⁷ *Id.* at ¶ 16; see also www.snakeriveralliance.org. Note: an interesting aspect of this case that is beyond the scope of this note is the role of citizen suits in prompting judicial review of administrative discretion. For more information on that topic, see 2003 Widener Law Symposium, especially James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits* at 30, 10 Wid. L. Symp. J. 1 (2003).

⁸⁸ 42 U.S.C. § 10139(a)(1) (2004) (“the United States courts of appeals shall have original and exclusive jurisdiction over any civil action -- (A) for review of any final decision or action of the Secretary, the President, or the Commission under this subtitle.” ‘This subtitle’ refers to 42 U.S.C. §§ 10131, *et seq.* (Repositories for Disposal of High-Level Radioactive Waste and Spent Nuclear Fuel), which establishes procedures for disposal of HLW and SNF in repositories).

⁸⁹ *NRDC v. Abraham*, 244 F.3d 742, 744 (9th Cir. 2001).

management at DOE facilities comes from the Atomic Energy Act of 1954,⁹⁰ the Energy Reorganization Act of 1974,⁹¹ and the Department of Energy Organization Act of 1977,⁹² which do not give original jurisdiction to circuit courts of appeal.

Rather than dismissing the case, in March 2001 the Ninth Circuit transferred it to the United States District Court for the District of Idaho.⁹³ Jurisdiction was proper in this court because it was the only District in the Ninth Circuit in which any plaintiffs resided.⁹⁴ In August 2002, the Idaho District Court denied the defendant's motion to dismiss.⁹⁵ In July 2003, the court issued its final decision on cross motions for summary judgment in *NRDC v. Abraham*.⁹⁶

III. THE LEGAL FRAMEWORK

A. Plain Meaning

Traditionally, statutory analysis begins with the plain meaning of the text.⁹⁷ "The primary rule of statutory construction is to ascertain and give effect to the plain meaning of the language used."⁹⁸ For example, if Congress chose to use "shall" instead of "may," it is reasonable to assume Congress intended the action to be mandatory.⁹⁹ The court's task is to "give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive."¹⁰⁰ Therefore, where Congress used reasonably plain terms to

⁹⁰ 42 U.S.C. §2151 *et seq.* (2004).

⁹¹ 42 U.S.C. §5801 *et seq.* (2004).

⁹² 42 U.S.C. §7101 *et seq.* (2004).

⁹³ *NRDC*, 244 F.3d at 748.

⁹⁴ *Id.*

⁹⁵ Memorandum, Decision, & Order, *NRDC v. Abraham*, Case No. CV-01-413-S-BLW (Aug. 9, 2002).

⁹⁶ 271 F. Supp. 2d 1260 (ID July 2, 2003).

⁹⁷ *Alaska Dept. of Envtl. Conservation v. U.S. EPA*, 298 F.3d 814, 818 (9th Cir. 2002), citing *In re Bonner Mall Partnership*, 2 F.3d 899, 908 (9th Cir. 1993).

⁹⁸ *Hughes Air Corp. v. Pub. Util. Commn. of Cal.*, 644 F.2d 1334, 1337 (Cal. App. 1981).

⁹⁹ *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 523 U.S. 26, 35 (1998) citing *Anderson v. Yungkau*, 329 U.S. 482 (1947).

¹⁰⁰ *Griffin v. Oceanic Contractors*, 458 U.S. 564, 570 (1982), citing *Consumer Prod. Safety Commn. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). See also *Est. of Coward*

express its will, courts generally regard the language as dispositive.¹⁰¹

B. Significance of Every Section

Another fundamental principle of legal interpretation is that no word or section be ignored.¹⁰² Courts presume that Congress intended to enact each statutory section and prefer an interpretation that gives meaning to each word and each section.¹⁰³ Courts also try to construe statutes harmoniously and avoid interpretations that make some sections unnecessary.¹⁰⁴

C. Deference

Courts review an administrative agency's interpretation of its responsibility under a statute using a two-part process announced by the U.S. Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁰⁵

The first step in undertaking a *Chevron* analysis is to determine whether Congress spoke directly to the precise question at issue.¹⁰⁶ "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear

v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992), citing *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991).

¹⁰¹ See e.g., *U.S. v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989); *Consol. Bank, N.A. v. U.S. Dept. of the Treas.*, 118 F.3d 1461, 1463 (11th Cir. 1997).

¹⁰² *Alaska Dept. of Envtl. Conservation v. U.S. EPA*, 124 S. Ct. 983, 1002 (2004) citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is, moreover, 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant.'"); see also *Va. v. Md.*, 124 S. Ct. 598 (2003); *U.S. v. Curtis*, 245 F. Supp. 2d 512, 517 (W.D.N.Y. 2003); *City of L.A. v. U.S. Dept. of Commerce*, 307 F.3d 859, 869 (9th Cir. 2002); *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

¹⁰³ *Biodiversity Legal Foundation v. Badgely*, 309 F.3d 1166, 1175 (9th Cir. 2002) "It is an elementary canon of construction that an interpretation which gives effect to all sections of a statute is preferred."

¹⁰⁴ *U.S. v. Luna-Madellaga*, 315 F.3d 1224, 1227 (Thomas, J., dissenting) (9th Cir. 2003), citing *U.S. v. Powell*, 6 F.3d 611, 614 (9th Cir. 1993). See also *Central Mont. Elec. Power Co-op v. Admin. of Bonneville Power*, 840 F.2d 1472, 1478 (9th Cir. 1988); *Beisler v. CIR*, 814 F.2d 1304, 1307 (9th Cir. 1987).

¹⁰⁵ *Chevron v. NRDC*, 467 U.S. 837 (1984).

¹⁰⁶ *Id.*

congressional intent.”¹⁰⁷ “The words chosen by Congress, given their plain meaning, leave no room for the exercise of discretion.”¹⁰⁸ Therefore, if Congress was clear, both the court and the agency must give effect to its unambiguous intent.¹⁰⁹

If the court determines that the statutory language is ambiguous, the second step in a *Chevron* analysis is to decide if the agency’s interpretation of its authority is reasonable and warrants deference.¹¹⁰ Legislative delegation of authority to an administrative agency may be explicit or implicit.¹¹¹ If Congress expressly delegates to an agency the authority to promulgate a gap-filling rule, then when a court interprets that rule it gives controlling weight to the rule, unless it is arbitrary, capricious, or manifestly contrary to the statute.¹¹² If the delegation of rule-making authority is implicit, a court should defer to the agency’s reasonable interpretation and not substitute its own construction.¹¹³ However, where an agency’s interpretation violates the clear statutory language and intent, that interpretation should not receive deference.¹¹⁴

IV. THE LEGAL ARGUMENTS

The plaintiffs in *NRDC v. Abraham* challenged the legality of DOE Order 435.1, asserting that DOE exceeded its authority under NWPA by attempting to redefine high-level waste.¹¹⁵ They sought a declaratory

¹⁰⁷ *Id.* at fn. 9 (citations omitted).

¹⁰⁸ *Griffin*, 458 U.S. at 564 (1982).

¹⁰⁹ *Chevron*, 467 U.S. at 842.

¹¹⁰ *Id.*

¹¹¹ *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (“The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”).

¹¹² *Chevron*, 467 U.S. at 844.

¹¹³ *Id.*

¹¹⁴ *Chevron*, 467 U.S. at 842. See also *Biodiversity Leg. Found. v. Badgley*, 309 F.3d 1166, 1174 (9th Cir. 2002) (“Although we give deference to an agency’s construction of a statutory provision it is charged with administering, we must reject those constructions that are contrary to clear congressional intent or that frustrate the policy Congress sought to implement”), citing *Am. Fed. of Govt. Employees v. Fed. Labor Rel. Auth.*, 204 F.3d 1272, 1274-1275 (9th Cir. 2000) and *Eisinger v. Fed. Labor Rel. Auth.*, 218 F.3d 1097, 1100-01 (9th Cir. 2000).

¹¹⁵ Pl.’s Compl. ¶ 56, 57, *NRDC v. Abraham*, 271 F. Supp. 2d 1260 (D. Idaho 2003).

judgment and injunctive relief.¹¹⁶

Their challenge relied on three arguments: (1) that the NWPA and its definitions of HLW apply to DOE, which is required to dispose of defense activity waste in a repository as defined by the Act; (2) that HLW, though initially defined by its source, can be treated or separated and **then** (emphasis added) solidified into high-level and non-high-level components based on the concentration of fission products contained in the waste; and (3) that DOE Order 435.1 violates NWPA by ignoring some factors and inserting others into the classification of HLW and also by giving DOE unfettered discretion to classify waste.¹¹⁷

To rebut these claims, the Department of Energy originally asserted four affirmative defenses: that the plaintiffs lacked standing to litigate their claims, that the claims were not ripe for review, that the plaintiffs had failed to assert a claim upon which relief could be granted, and that some or all claims were barred.¹¹⁸

A. Denying Defendant's Motion to Dismiss – August 2002

In its August 2002 decision, the District Court found that the law of the case doctrine¹¹⁹ did not apply.¹²⁰ “The law of the case doctrine presumes a hearing on the merits.”¹²¹ Without holding a merits hearing, the Ninth Circuit had remanded the case because it lacked original jurisdiction¹²² and found merely that “Order 435.1 [was] not a decision under ... any ... section of NWPA.”¹²³ The Idaho District Court had jurisdiction because it was the only district within the Ninth Circuit where a target plaintiff resided.¹²⁴ The Court of Appeals specifically had left open the issues of standing, ripeness, and the merits.¹²⁵

First, the District Court examined the three standing requirements from *Lujan v. Defenders of Wildlife*: a plaintiff must show (1) an invasion of a

¹¹⁶ *Id.* at ¶¶ 63-66.

¹¹⁷ Amicus Brief 1-2, *NRDC v. Abraham*, 271 F. Supp. 2d 1260 (D. Idaho 2003).

¹¹⁸ Def.'s Answer 17-18, *NRDC v. Abraham*, 271 F. Supp. 2d 1260 (D. Idaho 2003).

¹¹⁹ Law of the Case Doctrine: “a decision rendered in a former appeal of a case is binding in a later appeal.” *Black's Law Dictionary* 402 (2d pocket ed., West 2001).

¹²⁰ Memorandum, Decision, & Order, *supra* n. 95, at 8.

¹²¹ *U.S. v. Hatter*, 532 U.S. 557, 566 (2001).

¹²² See 42 U.S.C. §10139(a)(1)(A) (2004).

¹²³ *NRDC*, 244 F.3d at 747.

¹²⁴ *Id.*

¹²⁵ *Id.*

legally protected interest which is both (a) “concrete and particularized” and (b) “actual or imminent, not conjectural or hypothetical”; (2) “a causal connection between the injury and the conduct complained of”; and (3) “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”¹²⁶ The court found that each plaintiff had met the requirements of the *Lujan* test and had standing.¹²⁷

On the issue of ripeness, the court examined the considerations outlined in *Ohio Forestry Ass’n v. Sierra Club*: (1) the hardship to plaintiffs if review is delayed, (2) whether judicial review would interfere with subsequent agency action, and (3) whether it would benefit the court to allow further factual development of the issues involved.¹²⁸ The court noted that it “need not wait until threatened injury comes to fruition before undertaking judicial review.”¹²⁹ Declining to agree with DOE that harm was not imminent,¹³⁰ the court found that DOE Order 435.1 was ripe for review.¹³¹

Finally, the District Court denied DOE’s motion to dismiss, finding that publication of a notice of availability in the Federal Registry indicated that DOE Order 435.1 was the mandatory, non-discretionary, and final expression of DOE’s interpretation of its responsibilities to manage and dispose of radioactive waste.¹³² Without ruling on the merits of plaintiffs’ claim, the court found that both the Atomic Energy Act¹³³ and the Nuclear Waste Policy Act¹³⁴ had provisions concerning the characterization of radioactive waste and that the issues in the case pertained to interpretation of those statutes.¹³⁵ Therefore, dismissal at this stage was inappropriate.¹³⁶

B. Ruling on Cross-motions for Summary Judgment – July 2003

¹²⁶ *Lujan v. Defenders of Wildlife*, 504 U.S. 560 (1992).

¹²⁷ Memorandum, Decision, & Order, *supra* n. 95, at 14.

¹²⁸ *Ohio Forestry Assn. v. Sierra Club*, 523 U.S. 726, 733 (1998).

¹²⁹ Memorandum, Decision, & Order, *supra* n. 95, at 7.

¹³⁰ Memorandum, Decision, & Order, *supra* n. 95, at 7, n. 5 (Plaintiffs suggested at oral argument that the two closures at SRS occurred while they were unable to obtain timely judicial review).

¹³¹ Memorandum, Decision, & Order, *supra* n. 95, at 8.

¹³² Memorandum, Decision, & Order, *supra* n. 95, at 6 (Under *Whitman v. Am. Trucking Assn.*, 531 U.S. 457, 478-479 (2001), publication of an implementation policy in the Federal Register indicates that the agency’s action is final).

¹³³ 42 U.S.C. §2011 *et seq.* (2004).

¹³⁴ 42 U.S.C. §10101(12) (2004).

¹³⁵ Memorandum, Decision, & Order, *supra* n. 95, at 9.

¹³⁶ *Id.*

In the July 2003 decision, the Idaho District Court began by reaffirming its conclusion that the issue was ripe.¹³⁷ Then it elaborated on the interpretation of NWPA as it applies to nuclear waste from defense facilities, dismissing DOE's argument that "Congress did not intend that [the] NWPA would apply to atomic energy defense facilities."¹³⁸

1. DOE's authority and duties related to DOD nuclear waste

DOE insisted that it has the authority to choose where to dispose of defense waste,¹³⁹ but the court found that interpretation inconsistent with 42 U.S.C. § 10107(b)(2).¹⁴⁰ Initially, in 42 U.S.C. § 10107 Congress exempted defense activities from the NWPA¹⁴¹ but in the very next subsection directed the President to decide within two years whether to maintain separate waste disposal programs or join defense waste with civilian nuclear waste.¹⁴² Once the President decided on a joint or separate repository for defense HLW, the NWPA required that the Secretary of Energy "shall proceed promptly" to arrange such a repository.¹⁴³ Use of the term "shall" makes the directive mandatory and non-discretionary.¹⁴⁴ This mandate limits DOE's discretion by permitting disposal only in a repository established under the NWPA.¹⁴⁵

Courts avoid statutory interpretations that make some sections

¹³⁷ *NRDC*, 271 F. Supp. 2d at 1263. "*National Park Hospitality Assn. v. Dept. of Interior* . . . did not change the law of ripeness, and its analysis does not persuade the Court to change its opinion." (citations omitted).

¹³⁸ Def.'s Brief 21, *NRDC v. Abraham*, 271 F. Supp. 2d 1260 (D. Idaho 2003).

¹³⁹ *Id.*

¹⁴⁰ *NRDC*, 271 F. Supp. 2d at 1263.

¹⁴¹ 42 U.S.C. §10107(a) (2004) ("Subject to the provisions of subsection (c), the provisions of this Act [42 U.S.C. § 10101 *et. seq.*] shall not apply with respect to any atomic energy defense activity or to any facility unused in connection with any such activity.").

¹⁴² 42 U.S.C. §10107(b)(1) (2004) ("Not later than 2 years after the date of the enactment of this Act [enacted Jan. 7, 1983], the President shall evaluate the use of disposal capacity at one or more repositories to be developed under subtitle A of title I [42 U.S.C. § 10131 *et. seq.*] for the disposal of high-level radioactive waste resulting from atomic energy defense activities.").

¹⁴³ *See supra* n. 7.

¹⁴⁴ *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 31 (1998).

¹⁴⁵ *NRDC*, 271 F. Supp. 2d at 1263.

unnecessary.¹⁴⁶ Accepting DOE's interpretation that defense waste is exempt from NWPA would make 42 U.S.C. §10107(b) entirely null.¹⁴⁷ Therefore, by including 42 U.S.C. §10107(b), Congress unambiguously intended that DOE not dispose of defense HLW somewhere other than a repository established under the NWPA.¹⁴⁸

In the alternative, DOE argued that its duty under the NWPA was limited to allocating costs associated with disposing of defense HLW in a repository.¹⁴⁹ DOE ignored the word "include" in its reading of 42 U.S.C. § 10107(b)(2) and treated the phrase regarding cost allocation as a limitation on its duty.¹⁵⁰ However, cost allocation is listed in the statute as merely one of the types of "arrangements" DOE may have to make in order to secure a repository.¹⁵¹ The court held that DOE's interpretation violated a cardinal rule of statutory interpretation, that no word be ignored.¹⁵² "Include" introduces illustrative, not limiting, examples,¹⁵³ so cost allocation is merely one type of arrangement DOE must make when it disposes of defense HLW in an NWPA-approved repository.¹⁵⁴

The court cited both the administrative¹⁵⁵ and legislative¹⁵⁶ record to support its determination that DOE's arguments were unpersuasive.¹⁵⁷

2. Legality of DOE Order 435.1

¹⁴⁶ *U.S. v. Luna-Madellaga*, 315 F.3d 1224, 1230 (Thomas, J., dissenting) (9th Cir. 2003).

¹⁴⁷ *Amicus Br. 2, NRDC v. Abraham*, 271 F. Supp. 2d 1260 (D. Idaho 2003).

¹⁴⁸ *NRDC*, 271 F. Supp. 2d at 1263.

¹⁴⁹ *Def.'s Answer, NRDC v. Abraham*, 271 F. Supp. 2d 1260 (D. Idaho 2003).

¹⁵⁰ *Id.*

¹⁵¹ 42 U.S.C. §10107(b)(2) (2004).

¹⁵² *NRDC*, 271 F. Supp. 2d at 1264 citing *United States v. Luna-Madellaga*, 315 F.3d 1224, 1230 (9th Cir. 1993).

¹⁵³ *Id.* citing *Federal Land Bank of St. Paul v. Bismarck Co.*, 314 U.S. 95, 100, 62 S. Ct. 1 (1941).

¹⁵⁴ *Id.*

¹⁵⁵ See DOE, *Civilian Radioactive Waste Management Program Plan*, Revision 1, May 1996 (excerpted in *Natural Resources Journal*, Appendix A (Fall 1996)).

¹⁵⁶ See 128 Cong. Rec. Part 6, p. 8219 (Appendix 7). Senator Alan Simpson (R-WY), addressing an amendment that eventually became §10107, supported a unified disposal system, rather than separate civilian and defense repositories, and felt the amendment would require the President to choose a unified system unless a defense-only repository was clearly needed.

¹⁵⁷ *NRDC*, 271 F. Supp. 2d at 1264.

Finally, in its concise decision, the court addressed the legality of DOE Order 435.1, looking for an ambiguity in the statute that would indicate Congress intended an administrative agency to have some discretion in defining high-level nuclear waste.¹⁵⁸ Citing *Chevron v. NRDC*¹⁵⁹ the court worked from the premise that if Congress' intent is clear, both the judicial branch and administrative agency must execute that intent.¹⁶⁰ An agency's authority to "fill any gaps left ... by Congress"¹⁶¹ ends when its policies "directly conflict with its governing statute."¹⁶²

DOE Order 435.1 set forth three criteria DOE could meet in order to reclassify the solid HLW as low-level or incidental.¹⁶³ DOE implied in its brief that the reclassification process was rigorous,¹⁶⁴ but the court found each criterion replete with discretion.¹⁶⁵

The language of the first criteria, "to the extent technically and economically practical," meant DOE could reclassify HLW as incidental if it was too difficult or expensive to treat.¹⁶⁶ In that phrase, DOE seemed to be relying on a cost-benefit risk analysis that recognizes the concept of ALARA (As Low As Reasonably Achievable). ALARA is used by the Nuclear Regulatory Commission, the Occupational Health and Safety Administration, and other federal and state regulatory agencies as a work principle that recognizes reducing exposure to zero is not always

¹⁵⁸ *Id.*

¹⁵⁹ *Chevron*, 467 U.S. at 842.

¹⁶⁰ *Id.* at 843.

¹⁶¹ *Id.*

¹⁶² *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 134-35 (1990).

¹⁶³ U.S. Dept. of Energy, *supra* n. 3, at (B)(2)(a):

HLW may be considered incidental waste if it meets the following criteria: "(1) key radionuclides must be removed to the extent technically and economically practical; (2) the waste must meet safety requirements comparable to the performance objectives set out in 10 C.F.R. part 61, Subpart C; and (3) the waste must be managed in accordance with DOE's requirements for low-level waste in Chapter IV of the Manual, provided the waste is ... a solid form that does not exceed concentration limits for Class C low-level waste set out in 10 C.F.R. § 61.55, or must meet such alternative requirements for waste classification and characterization as DOE may authorize.

¹⁶⁴ Def.'s Brief 8, *NRDC v. Abraham*, 271 F. Supp. 2d 1260 (D. Idaho 2003).

¹⁶⁵ *NRDC*, 271 F. Supp. 2d at 1265.

¹⁶⁶ *Id.*

possible.¹⁶⁷ Social, technical, economic, practical and/or public policy considerations may make a small level of exposure risk acceptable, if it is kept “as low as reasonably achievable.”¹⁶⁸ The District Court searched for an intentional gap left by Congress in the law that would allow technical or economic factors to affect the definition of HLW.¹⁶⁹ Perhaps remembering the U.S. Supreme Court’s finding in *Whitman v. American Trucking Assn.*,¹⁷⁰ that, unless delegated the authority to do so, an administrative agency may not consider implementation costs when setting standards to protect public health,¹⁷¹ the court had to dismiss this criterion when it could not find room in the definition for discretion.¹⁷²

The second criterion was not a benchmark criterion at all, but a statement of intent that DOE would use the safety requirements from 10 C.F.R. 61, Subpart C to handle the HLW it chose to reclassify as low-level.¹⁷³ The third criterion was completely discretionary because it allowed “alternative requirements for waste classification ... as DOE may authorize.”¹⁷⁴

The court found that the incidental waste provision in DOE Order 435.1 directly conflicts with the definition of HLW Congress included in the NWSA, which “pays no heed to technical or economic constraints in waste treatment.”¹⁷⁵ Neither does NWSA authorize the establishment of “alternative requirements” for waste.¹⁷⁶ The court felt that Congress had spoken clearly, and that under *Chevron*, “that is the end of the matter.”¹⁷⁷ The incidental waste provision of DOE Order 435.1 was invalid.¹⁷⁸

However, the court did not order an injunction to prevent DOE from grouting HLW with concrete for permanent disposal, as DOE had done prior to issuing DOE Order 435.1.¹⁷⁹ Without elaborating, the court

¹⁶⁷ MSDS HyperGlossary, *ALARA - As Low As Reasonably Achievable* <<http://www.ilpi.com/msds/ref/alara.html>> (last accessed June 1, 2004).

¹⁶⁸ *Id.*

¹⁶⁹ *NRDC*, 271 F. Supp. 2d at 1265.

¹⁷⁰ *Whitman v. Am. Trucking Assn.*, 531 U.S. 457 (2001).

¹⁷¹ *Whitman*, 531 U.S. at 486.

¹⁷² *NRDC*, 271 F. Supp. 2d at 1266.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1265.

¹⁷⁶ *Id.*

¹⁷⁷ *Chevron*, 467 U.S. at 842.

¹⁷⁸ *NRDC*, 271 F. Supp. 2d at 1265.

¹⁷⁹ *Id.*

expressed confidence that DOE would heed its decision but invited the plaintiffs to re-open the case if the need for injunctive relief arose.¹⁸⁰

V. POSSIBLE FUTURE ACTION BY EACH STAKEHOLDER

A. NRDC's Option

NRDC requested but was denied an injunction to prohibit DOE from taking any action inconsistent with the NWPA, including grouting HLW with concrete for permanent disposal.¹⁸¹ The court saw no indication that DOE would violate its order but expressed its willingness to reopen the case.¹⁸² The plaintiffs' option is merely to monitor DOE's reaction to the order and petition the court should the need for an injunction arise.¹⁸³

B. DOE's Options

DOE, however, has several options. First, two weeks after the July 2003 ruling, DOE administrators asked the House Committee on Energy & Commerce's Subcommittee on Oversight & Investigations to support a legislative reversal of the court.¹⁸⁴ The department wanted Congress to "reaffirm" its authority under the NWPA, which the court had denied.¹⁸⁵

An administrator from the Office of Environmental Management (OEM) reported on the progress of DOE's high-level waste treatment programs at the West Valley Demonstration Project in western New York state, at the Defense Waste Processing Facility at the Savannah River Site, and at the Waste Treatment Plant construction at the Hanford site, highlighting the reduction in both cost and scheduled length of the cleanup

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Jesse Roberson, Asst. Sec. for Envtl. Mgmt., U.S. Dept. of Energy, Testimony, *A Review of DOE's Radioactive High-Level Waste Cleanup Program*, before the U.S. House of Representatives Comm. on Energy and Commerce, Subcomm. on Oversight & Investigations (108th Cong. 2003) <<http://energycommerce.house.gov/108/Hearings/07172003hearing1014/Roberson1599.htm>> (last accessed June 1, 2004).

¹⁸⁵ NRDC Press Release, *DOE Asks Congress to Reverse Recent Court Decision on High Level Waste* (July 17, 2003) <www.nrdc.org/media/pressreleases/030717.asp> (last accessed June 1, 2004).

projects.¹⁸⁶ The OEM official then identified the decision in *NRDC v. Abraham* as “a significant challenge to safe and effective remediation of [DOE’s] spent nuclear fuel reprocessing wastes” and asserted that the incidental waste provisions invalidated by the court were consistent with DOE’s longstanding approach to safely managing wastes according to the health and environmental risks they pose.¹⁸⁷ The Assistant Secretary predicted that the court’s ruling would jeopardize DOE’s ability to provide safe and cost-efficient, risk-based treatment and disposal of certain wastes.¹⁸⁸

In August 2003, the U.S. Department of Justice filed a notice on behalf of DOE with the U.S. District Court in Idaho saying it had appealed the July ruling by Judge Winmill to the 9th Circuit Court of Appeals in San Francisco.¹⁸⁹ The notice did not say on what grounds DOE was appealing.¹⁹⁰ DOE did not ask for an expedited appeal.¹⁹¹

Additionally, in August, DOE Secretary Abraham requested that House Speaker Hastert introduce legislation that would support DOE’s authority to determine the threat level of waste according to a risk- or hazard-based formula, rather than by the source of the waste as under the NWPA.¹⁹² DOE wanted Congress to allow administrative discretion by directing that “financially feasible” be the controlling criteria in waste management decisions.¹⁹³ According to DOE, this strategy would allow DOE to expedite site cleanup at a reduced cost to taxpayers.¹⁹⁴ However, by early October lawmakers in the House had rebuffed attempts to include such a provision in the proposed Energy Policy Act of 2003.¹⁹⁵

DOE continued to assert it had longstanding authority to classify material from reprocessing and that the Idaho court decision unreasonably

¹⁸⁶ See Roberson, *supra* n. 185.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Def.’s Notice of Appeal, *NRDC v. Abraham*, 271 F. Supp. 2d 1260 (D. Idaho 2003).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Concerned Citizens for Nuclear Safety, *DOE Secretary Abraham Attempts to Overtake High-level Waste Decision* <<http://www.nuclearactive.org/news/082003.html>>.

¹⁹³ *Id.*

¹⁹⁴ Matthew L. Wald, *Energy Dept. Seeks Power to Redefine Nuclear Waste*, New York Times A17 (October 1, 2003).

¹⁹⁵ Josh Galinas, *House’s Decision Pleases All Sides*, The Augusta Chronicle (GA) B2 (Oct. 7, 2003).

inhibited its ability to manage the costs, pace and flexibility of HLW cleanup.¹⁹⁶ DOE then turned to the governors of affected states, seeking their support to broker a solution with Congress.¹⁹⁷

Additionally, in its 2005 fiscal year budget, DOE increased the pressure on affected states by making the appropriation request for defense site cleanup contingent on resolution of the waste reclassification issue.¹⁹⁸ In an attempt to assert its authority on the issue, DOE reserved the right to delay funding for cleanup activities at sites around the country, thereby fulfilling its own prediction that waste cleanup would be jeopardized.¹⁹⁹

VI. THE IMPORTANCE OF THE CASE

NRDC v. Abraham should motivate DOE to focus its resources on complying more quickly with the NWPA's requirements for a long-term solution to the hazards of nuclear waste.

The decision does not require that every atom of HLW go to the repository, but DOE cannot base the standard for removing HLW from the tanks on economic factors.²⁰⁰ Though no cleanup is ever absolutely complete, Congress did not provide for a balancing of long-term public safety with short-term economic constraints.

In sum, DOE overreached its authority and violated the law. While proceeding with a judicial appeal, it maneuvered in Congress for a reversal and pressured its stakeholder states economically to garner their support for increasing its authority.²⁰¹ Instead, DOE should strive, not to evade the law and abandon dangerous waste, but to uphold the high standards of public safety that accelerated cleanup is meant to address. This course of

¹⁹⁶ Pegg, *supra* n. 1.

¹⁹⁷ George Lobsenz, *DOE Negotiating On Nuclear Waste Dispute*, 32 *The Energy Daily* 30 (Feb. 17, 2004).

¹⁹⁸ U.S. Dept. of Energy, FY 2005 Congressional Budget Request: Defense Site Acceleration Completion, High-Level Waste Proposal 291 <<http://www.mbe.doe.gov/budget/05budget/content/em/defsitacc.pdf>> (last accessed June 1, 2004) (the appropriation includes \$350,000,000 that will be requested only to the extent that legal uncertainty concerning certain reprocessing wastes is satisfactorily resolved through pending litigation or by new legislation. This funding was planned to be used for activities relating to accelerated clean up and disposal of certain waste from reprocessing that would not require use of a repository for spent nuclear fuel).

¹⁹⁹ *Id.*

²⁰⁰ *NRDC*, 271 F. Supp. 2d at 1265.

²⁰¹ See *supra* nn. 184-185, 189, 192, 197-198.

action will increase cooperation between stakeholders and inspire greater public confidence in the government and its nuclear programs.