

No. 03-35711

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NATURAL RESOURCES DEFENSE COUNCIL, et al.,

Plaintiffs-Appellees,

v.

SPENCER ABRAHAM, Secretary, Department of Energy, et al.,

Defendant-Appellants.

ON APPEAL FROM A FINAL JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF IDAHO

AMICUS BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES

**FILED ON BEHALF OF AMICI CURIAE STATES IDAHO,
OREGON, NEW MEXICO, NEW YORK, SOUTH CAROLINA,
WASHINGTON, AND THE NEW YORK STATE ENERGY RESEARCH
AND DEVELOPMENT AUTHORITY**

CHRISTINE O. GREGOIRE
Attorney General

DAVID K. MEARS
Senior Assistant Attorney General
WSBA #28995
P.O. Box 40117
Olympia, WA 98504-0117
360-586-6743

TABLE OF CONTENTS

I.	INTEREST OF AMICI CURIAE.....	1
II.	EXPLANATION OF IMPORTANT TERMS	2
III.	SUMMARY OF ARGUMENT	4
IV.	ARGUMENT	6
A.	DOE HAS MADE A FINAL DECISION INTERPRETING THE NWPA THAT IS SUBJECT TO JUDICIAL REVIEW	6
B.	THE NWPA REQUIRES THAT ALL HLW BE DISPOSED IN A DEEP GEOLOGIC REPOSITORY	7
1.	Introduction.....	7
2.	A Plain Reading of the NWPA Demonstrates that Congress Intended the NWPA to Apply to the Disposal of Defense HLW	8
3.	The NWPA Requirement that DOE Permanently Isolate HLW in a Deep Geologic Repository Serves as a Limitation on DOE's AEA-based Authority	12
4.	The Legislative History of the NWPA Indicates Congress's Intent that DOE Dispose of Defense Activity Waste in a Deep Geologic Repository	13
C.	WHEN READ TOGETHER, THE AEA AND NWPA SUPPORT AN INTERPRETATION THAT THE NWPA APPLIES TO THE DISPOSAL OF DEFENSE WASTE	18
D.	ORDER 435.1 FAILS TO FOLLOW THE STATUTORY DEFINITION OF HLW AND ALLOWS DOE TO DISPOSE OF HLW OTHER THAN IN A DEEP GEOLOGIC REPOSITORY	21
1.	Order 435.1 Fails to take into account the source and content of the material subject to the reclassification	21
2.	Order 435.1 is invalid because it allows reclassification of waste based upon factors not found in the NWPA, and based upon undefined "alternative requirements"	24

V. CONCLUSION.....27

TABLE OF AUTHORITIES

Cases

<i>Animal Defense Fund v. Hodel</i> , 840 F.2d 1432 (9 th Cir. 1988) amended by 867 F.2d 1244 (9 th Cir. 1989)	2
<i>Biodiversity Legal Foundation v. Badgely</i> , 309 F.3d 1166 (9 th Cir. 2002)	12
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council</i> , 467 U.S. 837 (1984)	27
<i>Greenwood Trust v. Massachusetts</i> , 971 F.2d 818 (1 st Cir. 1992)	19
<i>Hellon & Ass’n., Inc. v. Phoenix Resort Corp.</i> , 958 F.2d 295 (9 th Cir. 1992)	12
<i>Monce v. City of San Diego</i> , 895 F.2d 560 (9 th Cir. 1990)	12
<i>Mt. Adams Veneer Co. v. United States</i> , 896 F.2d 339 (9 th Cir. 1990)	6
<i>Natural Resources Defense Council v. Abraham (“NRDC”)</i> , 271 F. Supp. 2d 1260 (D. Id 2003)	4, 7, 23
<i>Ohio Forestry Ass’n, Inc. v. Sierra Club</i> , 523 U.S. 726 (1988)	6
<i>Seattle School Dist. No. 1 v. Washington</i> , 633 F.2d 1338 (9 th Cir. 1980)	20
<i>United States v. Boren</i> , 278 F.3d 911 (9 th Cir. 2002)	13
<i>United States v. Mead</i> , 533 U.S. 218 (2001)	27
<i>United States v. Trident Seafoods Corp.</i> , 92 F.3d 855 (9 th Cir. 1992)	19

Statutes

42 U.S.C. 10101(12).....	5, 11, 19
42 U.S.C. 10101(2).....	21
42 U.S.C. 10101(3).....	11
42 U.S.C. 10107(a).....	9
42 U.S.C. 10107(b).....	9, 16
42 U.S.C. 10107(b)(1).....	10
42 U.S.C. 10107(b)(2).....	10
42 U.S.C. 10107(b)(3).....	10
42 U.S.C. 10121.....	9, 11, 16
42 U.S.C. 10131(a)(1).....	9
42 U.S.C. 10131(a)(3).....	9
42 U.S.C. 10131(a)(7).....	9
42 U.S.C. 2011.....	12
42 U.S.C. 2014(dd).....	5, 19
42 U.S.C. 2021a.....	7
42 U.S.C. 5814.....	12
42 U.S.C. 5841(f).....	12
42 U.S.C. 7151(a).....	12
42 U.S.C. 10107(c).....	9, 16

Rules

Fed. R. App. P. 29(a).....	1
----------------------------	---

Regulations

10 C.F.R. 61.58	26
64 Fed. Reg. 37948	1

Web Sites

<i>DOE Hanford Site Strategic Initiative 2: Accelerate Tank Waste Treatment Completion by 20 Years, Accelerate Risk Reduction and Save up to \$20 Billion,</i> http://www.hanford.gov/docs/hpmp/factsheets/fs-2.pdf	8
Nuclear Regulatory Commission, http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/radwaste.html	2
<i>Radioactive Waste Disposal: An Environmental Perspective,</i> http://www.epa.gov/radiation/docs/radwaste/index.html	2

Legislative History

128 Cong. Rec. at 32955-6	23
128 Cong. Rec., Pt. 19 at 26324	23
128 Cong. Rec., Pt. 26306	13
128 Cong. Rec., Pt. 6 at 8219	16, 17
H.R. Rep. No. 97-491, Pt. 1, <i>reprinted in 1982 U.S.C.C.A.N. 3792</i>	14, 22
H.R. Rept. 97-491, Pt. 2, <i>reprinted in 1982 U.S.C.C.A.N. 3836</i>	15, 16, 22
House Bill 3809	13
S. Rep. No. 100-218 at 9, <i>reprinted in 1988 U.S.C.C.A.N. 1476</i>	21
Senate Bill 1662	13

Miscellaneous

DOE Savannah River HLW Tank Closure Record of Decision,
67 Fed. Reg. 53784 (Aug. 19, 2002).....8

Nuclear Waste Policy Act of 1982,
P.L. 97-425, 96 Stat. 2201.....14

I. INTEREST OF AMICI CURIAE

The states of Washington, Oregon, Idaho, South Carolina, New Mexico, New York, and the New York State Energy Research and Development Authority (States) submit this brief as Amici Curiae pursuant to Fed. R. App. P. 29(a). The States urge this Court to affirm the decision of the District Court, hold that the Nuclear Waste Policy Act of 1982 (NWPA) requires geologic isolation of material meeting the definition of "High Level Radioactive Waste" (HLW), and invalidate that portion of United States Department of Energy's (DOE) Order 435.1¹ which purports to allow DOE to reclassify such wastes. The States file this brief because the millions of gallons of highly radioactive waste subject to the DOE's decisions regarding classification are managed in or near the states of Washington, Oregon, Idaho, South Carolina and New York and pose a significant threat to our citizens' health and natural resources.

DOE's "evaluation method" for reclassifying HLW in Order 435.1, and DOE's arguments that it is not constrained by the NWPA in the management of defense activity radioactive waste, present significant concerns to the States. In addition to being responsible for ensuring the protection of our citizens, the States have obligations under federal and state environmental laws to ensure that DOE

¹ DOE issued Order 435.1 accompanied by a manual and implementation guide. 64 Fed. Reg. 37948. Appellants Excerpts of the Record (ER) at 109-306. These documents will be referred to collectively as the Order or Order 435.1.

properly manages its waste, including the waste resulting from the reprocessing of spent nuclear fuel.

While the States support DOE's efforts to expedite the closure of radioactive waste storage tanks, the States insist that DOE do so within the bounds of the law. This Court should reject DOE's attempt to avoid its obligation to permanently isolate HLW through its use of Order 435.1 as contrary to both the plain language and the purpose of the NWPA.

II. EXPLANATION OF IMPORTANT TERMS

The States offer the following discussion of the nuclear fuel cycle and the "reprocessing of spent nuclear fuel" to assist the Court in its consideration of this case.²

Nuclear energy and nuclear weapons production facilities, or reactors, operate by bombarding (irradiating) nuclear fuel materials made of unstable uranium 235 atoms (U^{235}). The neutrons cause the U^{235} atoms to split (fission) into smaller radioactive atoms (fission products), releasing heat and more neutrons,

² The States offer this information to assist the Court in understanding the complex factual and technical background of the issues in this case. *Animal Defense Fund v. Hodel*, 840 F.2d 1432 (9th Cir. 1988) amended by 867 F.2d 1244 (9th Cir. 1989). Although references to these terms are scattered throughout the record, readily understandable discussions of the information in this introductory section can be found in public, documents on the Nuclear Regulatory Commission's and Environmental Protection Agency's web-sites. See, e.g., *Fact Sheet on Radioactive Waste*, Nuclear Regulatory Commission, <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/radwaste.html>; *Radioactive Waste Disposal: An Environmental Perspective*, <http://www.epa.gov/radiation/docs/radwaste/index.html>.

which continue the reaction. "Fission products" are radioactive elements with atomic weights less than the original uranium element. Other uranium atoms in the fuel (U^{238}) absorb free neutrons to become larger "transuranic" radioactive atoms. "Transuranic" elements have atomic weights and numbers greater than uranium.³

As nuclear fuel is "reacted," proportionally less and less U^{235} is available in the fuel and conversely, more and more "fission products" and "transuranic" elements are present. At some point, the reaction becomes inefficient and the fuel is removed from the reactor. The term "spent nuclear fuel" refers to the reacted fuel rod and materials contained in it that remain after nuclear fuel is "reacted." Although the fuel is considered "spent," it still contains considerable amounts of U^{235} and other valuable radioactive isotopes which can be extracted through "reprocessing."

The "reprocessing of spent nuclear fuel" involves the dissolution of the fuel rod in an acid bath. The resulting highly acidic, highly radioactive and thermally hot liquid is subjected to various chemical processes to extract the remaining U^{235} , Pu^{239} and other radioactive isotopes of scientific value. These processes leave behind "fission products" and unusable "transuranic" elements suspended in an acid chemical solution.

³ The transuranic isotope plutonium 239 (Pu^{239}) is produced by the absorption of free neutrons and release of electrons by the uranium 238 (U^{238}) isotope and is a principal ingredient in nuclear weapons.

Across the DOE nuclear weapons complex, this waste was placed into tanks for storage to await treatment and disposal. *Natural Resources Defense Council v. Abraham* (“NRDC”), 271 F. Supp. 2d 1260, 1262 (D. Id 2003) (also ER 352); Appellees Supplemental Excerpts of the Record (SER) 166-171, 175, 178-180. Since being placed into tanks, the waste has settled and layers of sludge, “tank heels,” and saltcakes of varying thicknesses have formed at the tank bottoms. *Id.* The chemical composition of the waste in the tanks varies depending upon the nature of the chemicals used to dissolve the fuel rods, and whether chemicals were added to neutralize the acid. *Id.*

III. SUMMARY OF ARGUMENT

In the late 1970s and early 1980s, Congress recognized that spent nuclear fuel and radioactive waste generated as a result of the reprocessing of spent nuclear fuel pose a grave, long-term threat to public health and the environment. As a consequence of this threat, Congress enacted the NWPA to ensure that this waste is permanently isolated in a deep geologic repository. In both the NWPA and the Atomic Energy Act (AEA), Congress defined “high-level radioactive waste” to require DOE to consider first, the source of the waste and second, the concentration of fission products in solidified wastes. The definition follows:

- (A) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including the liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations; and
- (B) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

42 U.S.C. 10101(12). The AEA incorporates this definition by reference. 42 U.S.C. 2014(dd).

By using the same definition in the NWPA and AEA, Congress made plain its intent to include spent nuclear fuel reprocessing waste resulting from defense activities within the scope of the HLW disposal scheme that Congress established in the NWPA. Congress clearly intended that the definition of HLW would apply to both commercial and defense waste and that HLW from both sources would be permanently isolated. This intent becomes even clearer when reading this definition in the context of Congress's reasons for enacting the NWPA, to wit, permanently isolating radioactive waste because of the long-term danger it poses to human health and the environment.

The evaluation method of DOE Order 435.1, however, establishes a system for reclassifying high-level radioactive waste that provides DOE unlimited discretion to determine whether a large volume of highly radioactive waste stored in or near our states is required to be disposed of in a deep geologic repository. Such unfettered discretion is not provided for in the NWPA or AEA and this Court should affirm the District Court's decision invalidating DOE's attempt, through Order 435.1, to ignore the criteria in these statutes.

IV. ARGUMENT

A. DOE HAS MADE A FINAL DECISION INTERPRETING THE NWPA THAT IS SUBJECT TO JUDICIAL REVIEW

Order 435.1 reflects a definitive statement of DOE's position. The Order and its implementing manual have a direct and immediate effect upon the cleanup decisions being made at the sites. DOE's Order has the status of law with regard to DOE and its contractors. Appellants' Brief at 47. The establishment of the "evaluation method" as the framework under which classification decisions are made is a final legal determination. For these reasons, this Court should find that DOE's Order 435.1 represents an agency action ripe for review. *See Mt. Adams Veneer Co. v. U.S.*, 896 F.2d 339, 343 (9th Cir. 1990).

It would damage the interests of the States and the public to allow DOE to proceed to make waste disposal decisions based upon the incorrect interpretation of the law reflected in the evaluation method of Order 435.1. Unlike the circumstances presented in *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1988), the damage done by allowing DOE to implement Order 435.1 would be concrete, and not speculative. Here, DOE is making near-term decisions regarding waste disposal, such as the selection of technologies and systems for waste retrieval, treatment and disposal of HLW that involve massive investments of public funds. By the time that DOE has made a final decision regarding final status of the waste in the tanks, DOE may have invested billions of taxpayer dollars and constructed massive treatment facilities on the assumption that it is not

required to treat or dispose of HLW in a deep geologic repository. Judicial review after such a course has been set will be too late.

B. THE NWPA REQUIRES THAT ALL HLW BE DISPOSED IN A DEEP GEOLOGIC REPOSITORY

1. Introduction

DOE is responsible for managing millions of gallons of highly radioactive waste resulting from the reprocessing of spent nuclear fuel across the United States, primarily at the Hanford Site in Washington State, the Idaho National Engineering and Environmental Lab (INEEL), and the Savannah River Site in South Carolina. SER 168, 175, 179.⁴ As noted by the District Court, when referencing this waste, “[i]t is undisputed that the waste stored at Hanford, INEEL, and Savannah River is highly radioactive and the result of reprocessing.” *NRDC* at 1265 (also ER 360).⁵

This waste is stored in tanks in various states of decay, some which have leaked in the past. SER 171-172, 176, 180. DOE has made it a priority to remove and treat much of this waste on a highly accelerated schedule. *See, e.g., DOE Hanford Site Strategic Initiative 2: Accelerate Tank Waste Treatment Completion by 20 Years, Accelerate Risk Reduction and Save up to \$20 Billion,*

⁴ Pursuant to the West Valley Demonstration Project Act (“WVDPA”), 42 U.S.C. 2021a note, DOE is also responsible for the management of certain high level radioactive waste located at the Western New York Nuclear Service Center in West Valley, New York.

⁵ DOE’s assertion that this statement by the District Court is in error, lacks any factual basis in the record and begs the fundamental question at issue in this case.

<http://www.hanford.gov/docs/hpmp/factsheets/fs-2.pdf>. In order to achieve this highly accelerated schedule, DOE proposes to leave some of this “highly radioactive material resulting from the reprocessing of spent nuclear fuel,” in place at the sites where it is currently stored. *See, e.g., DOE Savannah River HLW Tank Closure Record of Decision*, 67 Fed. Reg. 53784 (Aug. 19, 2002) (SER 403-410). To do so, DOE proposes to use the “criteria” established in the “evaluation method” portion of Order 435.1. ER 139-40.⁶ This Order purports to allow DOE to “reclassify” the waste as something other than HLW. As discussed below, the NWPA requires DOE to dispose of HLW in a deep geologic repository, and DOE’s attempt to reclassify such waste as provided in Order 435.1 to circumvent this requirement has no statutory support. This Court should therefore uphold the District Court’s decision invalidating Order 435.1.

2. A Plain Reading of the NWPA Demonstrates that Congress Intended the NWPA to Apply to the Disposal of Defense HLW

The NWPA marks a watershed event in the management of radioactive waste in the United States. In this Act, Congress responded to the lack of a comprehensive strategy for the disposal of the extraordinarily dangerous spent nuclear fuel and HLW. Through the NWPA, Congress unmistakably determined that the safest place for the disposal of spent nuclear fuel and HLW, regardless of its source, is permanent isolation in a deep geologic repository.

⁶ As noted in Appellee’s Brief at 14, the challenge in this case is limited to Order 435.1’s “evaluation method” for reclassifying HLW. The States ask that the Court invalidate only this portion of Order 435.1.

In passing the NWPA in 1983, Congress specifically found that “radioactive waste creates potential risks and requires safe and environmentally acceptable methods of disposal.” 42 U.S.C. 10131(a)(1). Congress noted that “federal efforts” to dispose of radioactive waste “during the past 30 years” were “not adequate.” 42 U.S.C. 10131(a)(3). Congress also determined that “high-level radioactive waste and spent nuclear fuel” had become “major subjects of public concern” and that “appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and the environment for this or future generations.” 42 U.S.C. 10131(a)(7).

Congress also included specific provisions in the NWPA in keeping with its intent to protect “the public health and safety and environment for this and future generations” from the adverse effects of defense HLW. *Id.* Sections 8(b), 8(c) and 101 of the NWPA, 42 U.S.C. 10107(b), (c) and 10121, expressly reference defense HLW waste in the context of disposal in a repository.

DOE argues, however, that Section 8(a) of the NWPA, 42 U.S.C. 10107(a), completely exempts DOE from the requirements of the NWPA. Appellants’ Brief at 20-21. DOE also claims that it is under no obligation to dispose of defense HLW in a repository. *Id.* at 36. DOE’s argument, however, ignores the plain language of the NWPA. While Section 8(a) exempts “atomic energy defense activity” and “any facility used in connection with such activities” from the provisions of the NWPA, neither the definition of HLW nor the requirement that

HLW be disposed of in a “repository” is within the scope of this exception.

Section 8(a) does not, therefore, exempt DOE from the NWPA’s requirement that DOE dispose of HLW in a deep geologic repository.

When reading the NWPA as a whole, it is evident that it was intended as a comprehensive solution to disposal of both commercial and defense activity waste. Section 8(b)(1) gives the President two years to evaluate and decide whether to dispose of defense activity waste in a separate repository or a mixed repository. 42 U.S.C. 10107(b)(1). The President is not authorized to select a disposal option other than a repository. The only discretion given to DOE is to determine if a separate “repository for the disposal of high-level radioactive waste resulting from atomic energy defense activities” is required. 42 U.S.C. 10107(b)(2). If the President determines that a separate defense repository is not required, DOE is to “proceed promptly with arrangement for the use of one or more of the repositories to be developed under” the NWPA. *Id.* Section 8(b)(3) provides that any repository developed exclusively for defense activity waste is to be subject to the requirements of the Nuclear Regulatory Commission regarding the operation of repositories. 42 U.S.C. 10107(b)(3).

Section 8(c) confirms that Congress has established a distinction between “defense activity” and disposal of waste produced from that activity. In Section 8(c), Congress requires DOE to comply with the NWPA in developing a repository for defense wastes if such wastes would not be placed in the civilian repository.

Finally, in Section 101 of the NWPA, 42 U.S.C. 10121, Congress declared its intent that “notwithstanding” any provisions in Section 8, any “repository” developed exclusively for defense activity wastes is subject to the NWPA requirements for notification and participation by States and Tribes. These sections make little sense if DOE is free, as it argues, from any constraints under the NWPA regarding disposal of defense activity waste. Instead, when read together, these provisions make it clear that Congress envisioned disposal of defense activity waste in a repository. While “defense activit[ies]” may be exempt from NWPA requirements, disposal of waste resulting from those activities is not.⁷ The only logical reading of these provisions, and the one derived from reading the NWPA in its entirety, is that DOE must abide by the NWPA requirement to place HLW in a deep geologic repository.

DOE’s broad reading of the “atomic energy defense activity” exemption provided by Section 8(a) fails because DOE ignores the specific HLW disposal requirements, for both civilian and defense wastes, established in Sections 8(b), (c) and 101. Courts construing statutes always prefer an interpretation that gives effect to each section. *Biodiversity Legal Foundation v. Badgely*, 309 F.3d 1166,

⁷ Section 8(a) exempts DOE’s “atomic energy defense activit[ies]” from the Act. “Atomic energy defense activity” is a defined term in the Act which includes the “management,” not “cleanup” or “disposal,” of defense waste. 42 U.S.C. 10101(3). There is nothing in this definition to support a claim that “management” of HLW allows DOE to ignore disposal requirements established in Section 8(b) and the definition of HLW established in Section 2, 42 U.S.C. 10101(12). *See* Appellees Brief at 28-30.

1174 (9th Cir. 2002). This Court should give effect to all provisions of the NWPA and find that the Act requires DOE to dispose of HLW in a deep geologic repository.

3. The NWPA Requirement that DOE Permanently Isolate HLW in a Deep Geologic Repository Serves as a Limitation on DOE's AEA-based Authority

The Atomic Energy Act of 1954, 42 U.S.C. 2011, was enacted long before the NWPA and does not expressly address the disposal of HLW. Indeed, not until it enacted the NWPA, did Congress even define HLW, a definition it later incorporated into the AEA. Thus, to the extent that DOE's argument that it has discretion to manage HLW is based on the AEA, that argument is without merit. The fact that the AEA, and DOE's organic statutes⁸ give DOE broad authority to manage radioactive waste does not conflict with the NWPA requirement that DOE dispose of HLW in a deep geologic repository. These statutes must be harmonized with the later-enacted and more specific NWPA. *Hellon & Ass'n., Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992) (later, more specific statutes govern over earlier, more general statutes); *Monce v. City of San Diego*, 895 F.2d 560, 561 (9th Cir. 1990) (statutes that apply to the same issue should be harmonized where possible).

In this case, finding that Congress enacted a specific mandate regarding the disposal of defense activity HLW through the NWPA is consistent with the AEA

⁸ Energy Reorganization Act of 1974, 42 U.S.C. 5814, 5841(f) and Department of Energy Organization Act, 42 U.S.C. 7151(a).

and is an appropriate interpretation. This interpretation does not require the Court to find that the AEA has been repealed or even amended. The NWPA established the nation's goal as the disposal of all HLW in deep geologic repositories for both commercial generators and DOE. The AEA does not otherwise direct the DOE regarding disposal of these wastes since it simply vests DOE with management authority.⁹ Accordingly, there is no conflict.

4. The Legislative History of the NWPA Indicates Congress's Intent that DOE Dispose of Defense Activity Waste in a Deep Geologic Repository

Despite the clear intent of Sections 8(b) through (c) and 101 that DOE dispose of its HLW in a deep geologic repository, DOE argues that Congress intended to exempt DOE from this requirement. While resort to the legislative history in this instance is unnecessary because Congress clearly expressed its intent in the language of the statute, *United States v. Boren*, 278 F.3d 911, 914-915 (9th Cir. 2002), this history confirms Congress's intent that DOE dispose of defense activity HLW in a repository.

Congress did not break new ground in concluding that all HLW should be placed in a deep geologic repository. In the House Report accompanying H.R. 3809,¹⁰ the Committee on Interior and Insular Affairs noted, "[c]onstruction of

⁹ As noted in FN5, there is a distinction between "management" and "disposal" of waste.

¹⁰ There were several versions of the Act introduced as bills in the House of Representatives and the Senate. See 128 Cong. Rec., Pt. 26306; House Bill 3809 (SER 250-285); Senate Bill 1662 (SER 286-338). House Bill 3809 ultimately

permanent, deep geologic facilities has been the primary plan for high level waste disposal since being recommended by the National Academy of Sciences in 1957.” H.R. Rep. No. 97-491, Pt. 1 at 34 *reprinted in* 1982 U.S.C.C.A.N. 3792, 3800 (SER 230). DOE now argues that Congress intended this plan to apply only to commercial HLW.

The legislative history of the NWPA, however, does not support DOE’s claim. In fact, this history shows that Congress was concerned with the long-term threats posed by the disposal of HLW without regard to the origins of that waste, noting “[t]he failure of the government to provide a permanent waste disposal facility during the more than 30 years of Federal nuclear activities is unmitigated.” *Id.* at 28, 3794 (SER 227). The same report cites the loss of federal credibility with regard to the “widely publicized and massive leaks of radioactive liquids from tanks at the Federal Hanford reservation” as background for why Congress enacted the NWPA. *Id.* at 27, 3793 (SER 226).¹¹

This report on House Bill 3809 also presaged the debate over how defense activity wastes should be addressed by Congress and the compromise language ultimately enacted:

The Committee rejected an amendment proposed to explicitly exempt from the Act any facilities for disposal of defense nuclear wastes, in order to assure that facilities constructed and operated under this Act could be available for disposal of wastes from the Department of

became the bill enacted by both houses. *See* Nuclear Waste Policy Act of 1982, P.L. 97-425, 96 Stat. 2201.

¹¹ The wastes at Hanford are exclusively defense activity wastes.

Energy or the Department of Defense if those agencies should elect to use these facilities.

* * *

The Committee does not endorse in principle or in practice the separation of programs for management of defense and commercial high-level nuclear waste. It is not the objective of this legislation to address that issue, however.

* * *

It could further erode public acceptance of domestic nuclear technology if a public perception existed that a nuclear waste management program represented a solution for only half of the nation's high-level nuclear wastes.

Id. at 45, 3811 (SER 235).

Despite being rejected by the House Committee on Interior and Insular Affairs, the amendment referenced in that report was introduced in the Act when it was reported out of the House Armed Services Committee. H.R. Rept. 97-491, Pt. 2 at 3, *reprinted in* 1982 U.S.C.C.A.N. 3836 (SER 339). The Armed Services Committee report explained that this amendment was made to clarify that defense activities were not governed by the NWPA.

The amendments to H.R. 3809 recommended by the committee reinforce the special character and importance of the atomic energy defense activities of the United States. While recognizing that a program for the establishment of repositories for radioactive wastes must go forward, the recommended amendments serve a single basic but highly important purpose. That purpose is to prevent vital atomic energy defense activities of the United States from being impeded or burdened by extraneous activities not related to national defense or national security.

The Committee on Armed Services amendments are designed to prevent the establishment of storage facilities for civilian generated nuclear waste at facilities now being operated for national defense purposes. The committee emphasizes that the recommended

amendments do not foreclose the disposal of defense-generated radioactive waste in such repositories as may be established by this legislation.

Id. at 11, 3843 (Emphasis added) (SER 344).

Relying upon similar provisions in this same report, DOE argues that defense activity waste is not governed by the NWPA. *See* Appellants' Brief at 29-31. The version of the NWPA as reported from the House Armed Services Committee, however, did not contain the relevant language now found in the NWPA at Sections 8(b)-(c) or 101, 42 U.S.C. 10107(b)-(c), 10121. Thus, this report does not accurately reflect the legislative intent of the Act. The debate surrounding whether to include defense activity waste continued after the Armed Services Committee completed its work and resulted in the language now found in the NWPA.

On April 29, 1982, the Senate considered Senator Simpson's (Wyoming) proposal to add a new section 801 to its version of the bill, similar to the language now found in the NWPA at Section 8(b). *See* 128 Cong. Rec., Pt. 6 at 8219, 8277 (1982). This amendment was offered as a compromise to allay concerns about the NWPA and its exemption of defense activity waste. It provided that as part of a comprehensive waste disposal study, the President was to consider whether to dispose of defense activity waste in a separate repository or to put it into the commercial repository required under the NWPA.

Senator Simpson's statements in support of this amendment make it clear that Section 8 of the NWPA reflects a compromise:

By addressing the problem of defense waste disposal, this amendment would make this bill a truly comprehensive nuclear waste management act.

Congress in the DOE National Security Act has already directed the President to prepare by July of 1983 a detailed plan for the permanent disposal of defense nuclear waste. This plan must include schedule for major decision, descriptions of needed facilities and estimates of needed expenditures.

However, nothing in that act requires the President give careful consideration to the option of a unified disposal system as an alternative to separate, duplicative systems of civilian and defense repositories.

Our amendment would remedy this deficiency by requiring the President, in preparing his plan, to evaluate also these options, taking into account all relevant factors, and to proceed with a unified system unless he [sic] determines there is a demonstrated clear need for a defense only repository.

See 128 Cong. Rec., Pt. 6 at 8219.

While Congress did not want to interfere with DOE's nuclear weapons program, Congress did not intend for DOE to dispose of defense activity HLW as though it presented a different, lower level of risk than commercial activity HLW. Instead, Congress sought to create a comprehensive solution to the problem of HLW disposal, leaving to the President only the choice of whether to use a combined commercial-defense repository or separate repositories. The Act allowed for a period of time in which the President was to make that determination. In making this decision, the President was to consider the impact to the national security that the Armed Services Committee had cited as its concern. Upon

making a decision that the wastes would be placed in the same repository, the Secretary was directed to “promptly make arrangements for disposal” of defense activity waste. On April 30, 1985, the President made this decision and thus resolved the debate. SER 138a. Having chosen to commingle defense and commercial wastes, DOE cannot now contend that it is exempt from the NWPA, or that its waste classification is not governed by the definitions in the Act.

DOE’s position in this case defies the plain language and history of the NWPA. Nothing in the Act or its history suggests that DOE has the discretion to dispose of HLW in anything other than a deep geologic repository.¹² To accept DOE’s argument that it is free to dispose of defense activity waste in whatever fashion it chooses is contrary to the express terms of the statute and would negate the negotiated resolution of the congressional debate. The States urge this Court to reject this argument, adopt the reasoning of the District Court, and invalidate the “evaluation method” portion of Order 435.1.

C. WHEN READ TOGETHER, THE AEA AND NWPA SUPPORT AN INTERPRETATION THAT THE NWPA APPLIES TO THE DISPOSAL OF DEFENSE WASTE

At the heart of the NWPA, and at the center of this case, is the definition of “high-level radioactive waste.” The NWPA defines “high level radioactive

¹² That placing all defense HLW in the only proposed deep geologic repository (Yucca Mountain) may not be possible due to limitations on space is irrelevant to deciding whether DOE is free to reclassify HLW, independent of the NWPA. Nothing in the NWPA limits DOE to using only one HLW deep geologic repository.

wastes” as “the highly radioactive material resulting from the reprocessing of spent nuclear fuel.” 42 U.S.C. 10101(12). After enacting the NWPA, to ensure a “definite Federal policy” for the identification and permanent isolation of “high-level radioactive wastes,” Congress amended the AEA to incorporate the definition of high-level waste established in the NWPA. 42 U.S.C. 2014(dd).

More specifically, in 1988, six years after the enactment of the NWPA, Congress enacted the Price-Anderson amendments to the AEA. These amendments added a definition of HLW to the AEA for the first time, giving HLW the same meaning in the AEA as in the NWPA: “[t]he terms “high-level radioactive waste” and “spent nuclear fuel” have the meanings given such terms in section 10101 of this title.” 42 U.S.C. 2014(dd). Congress also, in these amendments, extended the protection of the Price-Anderson Act to DOE contractors disposing of defense activity HLW. These amendments demonstrate that Congress viewed the NWPA as applying to DOE’s AEA-based authority and requiring DOE defense activity HLW to be disposed according to that Act. Congress is presumed to have known of its former legislation and to have passed new laws in view of provisions of legislation already enacted. *United States v. Trident Seafoods Corp.*, 92 F.3d 855, 862 (9th Cir. 1992). When Congress borrows language from one statute and incorporates it into a second statute, language of the two acts should be interpreted in the same way. *Greenwood Trust v. Massachusetts*, 971 F.2d 818, 827 (1st Cir. 1992). *Seattle School Dist. No. 1 v.*

Washington, 633 F.2d 1338, 1348 (9th Cir. 1980). Reading the NWPA and AEA in *pari materia*, the Court should find that the NWPA mandate to dispose of HLW was incorporated into the AEA through extending the Price-Anderson protections to the disposal of defense activity waste and incorporating the NWPA definition of HLW.

The legislative history of the 1988 amendments supports this conclusion. The 1988 Price-Anderson Amendments were intended to extend financial protection to contractors disposing both commercial and defense waste. In the Senate Report on these amendments, Congress made plain its intent to address issues of indemnification for accidents involving both commercial and defense waste and to gain public acceptance of DOE's emplacement of defense activity waste in the NWPA mandated repository:

The bill extends DOE's indemnification authority for an additional thirty years for contractors involved in the storage or disposal of spent nuclear fuel, high-level radioactive waste, or transuranic waste, and thereby provides a mechanism for compensation for accidents arising out of these activities that is similar to the compensation mechanism for accidents at commercial nuclear power plants. The compensation system for damages arising from accidents performed under license or contract with the federal government should not depend upon the type of activity that caused the damage.

The Nuclear Waste Policy Act of 1982 established a framework for the national program to develop a permanent geologic repository for high-level radioactive waste and spent nuclear fuel. To gain public acceptance in potential host states for the repository and in states through which the waste may be transported it will be necessary to provide assurance that the citizens of such states will be fully compensated for any damages arising from the disposal, storage, or transportation of radioactive materials pursuant to this program.

* * *

Accidents involving other types of wastes are to be funded from the same sources as accidents involving other DOE contractors. Thus, for example, accidents involving waste generated by defense programs would be compensated from the general revenues of the Treasury.

S. Rep. No. 100-218 at 9, *reprinted in* 1988 U.S.C.C.A.N. 1476, 1484.

Since the language of the statute and the legislative history make no distinction between defense and commercial HLW, this Court should not find one. DOE's failure to conform Order 435.1 to the definition of HLW in the AEA and the NWSA, should lead this Court to uphold the District Court and find that the "evaluation method" provisions of Order 435.1 are invalid.

D. ORDER 435.1 FAILS TO FOLLOW THE STATUTORY DEFINITION OF HLW AND ALLOWS DOE TO DISPOSE OF HLW OTHER THAN IN A DEEP GEOLOGIC REPOSITORY

1. Order 435.1 Fails to take into account the source and content of the material subject to the reclassification

The definition of HLW contains only two elements. First, the waste must "result from reprocessing." Second, with respect to solid wastes that are "derived" from liquid wastes, the "solids" must contain "sufficient concentrations" of fission products. No other factors are found in the definition. 42 U.S.C. 10101(2). Order 435.1, however, purports to authorize the classification of "highly radioactive waste resulting from reprocessing" as "waste incidental to reprocessing," based only on the technical and economic practicality of treating it and whatever waste classification standards DOE determines to be appropriate. As such, Order 435.1

is a bold attempt by DOE to administratively subvert the carefully crafted legislative solution to a long-standing and critical public health and safety issue.

The legislative history of the HLW definition illuminates its meaning. As introduced, both House Bill 3809 and Senate Bill 1662 defined HLW by reference to its source. SER 251, 293. Both definitions also indicated that solidified wastes that were produced from high-level liquid wastes were included in the definition. *Id.* Neither definition, however, considered the concentration of fission products in the solidified waste form or the radiologic threat posed by treated solids. *Id.* As the bill moved through various committees the definition evolved but remained consistent. See H.R. Rept. No. 97-491, Pt. 1 at 2, *reprinted in* 1982 U.S.C.C.A.N. 3792 (SER 214). As reported from the House Armed Services Committee, however, the definition took on a new element relating to the concentration of “fission products in solidified wastes.” See H.R. Rept. No. 97-491, Pt. 2 at 2, *reprinted in* 1982 U.S.C.C.A.N. 3836 (SER 340). In explaining this change the Committee Report states:

The recommended definition takes into consideration both the source and the hazard of the waste and permits the regulatory agency responsible by law for setting standards for radioactivity (the EPA) to determine the concentration of fission products and transuranic elements that require permanent isolation. This definition is consistent with EPA’s responsibility to set those standards.

Id. Ultimately, the definitions recommended by the two committees in the house were merged. On September 30, 1982, the bill read into the Congressional Record contained a definition similar to that contained in the current Act. 128 Cong. Rec.,

Pt. 19 at 26324 (SER 363). The term was adopted by the House on December 20, 1982, as it reads today. 128 Cong. Rec. at 32955-6 (SER 382-3).

Thus, the legislative history makes clear that Congress intended the first consideration be the source of the material as “resulting from reprocessing.” Second, Congress contemplated that the liquid waste could be solidified through treatment and that the solid materials containing “sufficient concentrations” of “fission products” be disposed of as HLW. Resulting “solid materials derived from such liquid waste” with less than “sufficient concentrations” would not constitute HLW and could be disposed of otherwise.

Congress gave no definition to the term “derived.” Webster’s Third New International Dictionary of the English Language, however, provides the following definition: “Derived: adj. 1: formed or developed out of something else . . . reflected or secondary in character: not original or primary” Consistent with this definition, solid wastes “formed or developed out of” the liquid wastes through treatment, and which contain less than “sufficient concentrations” of fission products may be considered non-HLW under the NWSA.¹³

¹³ With regard to the implied authority for DOE to reclassify “solid material derived from liquid wastes,” DOE raises the question of whether this reference to “solid material” precludes DOE from reclassifying liquid waste. Appellants’ Brief at 41-42. The District Court stated that “the NWSA does not offer the option of reclassification for liquid waste produced directly in reprocessing.” *NRDC*, 271 F. Supp. 2d at 1265 (ER 359). The Court based this conclusion on the language of the statute which the Court read to only allow for reclassification of solid material “extracted” from liquid waste. *Id.* DOE interprets the District Court’s reading of the NWSA to preclude the reclassification of liquid waste that has been solidified through treatment. While this is not the correct reading of the District Court’s

DOE, however, ignores both this legislative history and the plain language in the NWPA definition of HLW by adopting the “evaluation method” provisions of DOE’s Order 435.1. The evaluation method of the Order ignores the defining elements of the NWPA by allowing DOE to reclassify the material resulting from the reprocessing of spent nuclear fuel without requiring the solidification of the waste through treatment and without ensuring that fission products are less than “sufficient” concentrations. For this reason, this Court should uphold the District Court’s decision and invalidate the “evaluation method” provisions of Order 435.1.

2. Order 435.1 is invalid because it allows reclassification of waste based upon factors not found in the NWPA, and based upon undefined “alternative requirements”

Order 435.1 directs that reclassification decisions include consideration of factors that are irrelevant under the definition of HLW. In both section (B)(2)(a)(1) and (B)(2)(b)(2) of Chapter II, the Order 435.1 Manual directs the waste manager to consider the “maximum extent that is technically and economically practical” to remove “key radionuclides.” (ER 139-140). These factors, however, are not found in the definition of HLW and cannot be used to justify reclassifying HLW without regard to whether fission products are less than “sufficient concentrations.” If a solidified waste resulting from reprocessing has a sufficient concentration of fission products, it is HLW regardless of the cost or the

decision, nor of the statute, this Court does not need to decide this point. Order 435.1 is invalid for the simple reason that it allows DOE to reclassify material resulting from reprocessing, whether solid, liquid, treated or untreated, without regard to the requirements of the NWPA.

technical practicability of removing any more radionuclides. Consideration of these factors would allow reclassification of a material if it is not practical to treat it further or if further treatment is cost prohibitive. Such considerations are irrelevant to whether deep geologic isolation should be required.

Further, in section (B)(2)(a)(3) of the Order 435.1 Manual, Chapter II, DOE can reclassify the highly radioactive waste resulting from reprocessing as “low-level waste” if, once solidified, the remaining material is:

. . . incorporated in a solid physical form at concentration that does not exceed the applicable concentration limits for Class C low level waste as set forth in 10 CFR 61.55, Waste Classification; or will meet alternative requirements for waste classification and characterization as DOE may authorize.

Id. (Emphasis added). While this section would initially require consideration of concentrations, the disjunctive term “or” allows DOE to disregard fission product concentrations and simply re-name the waste based upon undefined and, to date, unknown “alternative requirements.”

In section (B)(2)(b)(2) of the Order’s Manual, Chapter II, no consideration is given to the concentration of “fission products” at all. Rather, it provides that waste can be considered “transuranic waste” if it “will be incorporated in a solid physical form and meet alternative requirements for waste classification and characteristics, as DOE may authorize.” ER 140.

DOE’s argument that it is not free to ignore the concentrations of fission products under the “alternative requirements” language in these two section would

be reassuring except for the fact that it relies upon language completely absent from the Order. Further, the United States' argument is dependent upon DOE applying the Order in conjunction with a statute, the NWPA, which they argue does not apply to defense waste in the first instance.

In its arguments to this Court, DOE suggests that it can only impose "alternative requirements" where such requirements will assist in determining whether the "waste is 'highly radioactive' and/or 'contains fission products in sufficient concentrations' to require permanent isolation in a deep geologic repository." Appellants' Brief at 58. This language is, notably absent from the Order. DOE also suggests that "alternative requirements" might be found in the Nuclear Regulatory Commission's regulations allowing case by case determinations based upon performance measures, 10 C.F.R. 61.58, or to be developed at some point in the future. Appellants' Brief at 59-61. Even as argued by DOE to this Court, these "alternative requirements" remain so ill-defined and disconnected from the criteria in the statutes that this Court should find the Order invalid as contrary to the NWPA and AEA. Further, this Court should not allow DOE to rewrite the Order through post hoc legal arguments.

The Court should reject DOE's attempt to redefine HLW through an interpretation of the NWPA that would allow it to avoid compliance with the NWPA's requirement to dispose of HLW in a deep geologic repository.¹⁴ DOE

¹⁴ DOE's interpretation is not entitled to deference because it is contrary to the plain language of the NWPA. *Chevron U.S.A., Inc. v. Natural Resources*

cannot ignore Congress's intent to require HLW disposal in a repository by simply calling the waste by a different name.

V. CONCLUSION

The plain language of the NWPA, supported by the legislative record, makes it clear that DOE is obligated to dispose of defense-generated HLW in a deep geologic repository. DOE cannot escape this obligation by reclassifying the highly radioactive material resulting from the reprocessing of spent nuclear fuel independent of the criteria in the NWPA and AEA. Instead, DOE must apply the statutory definition of HLW in the NWPA, which only authorizes the reclassification of this material where it is treated such that the resulting solids no longer have sufficient concentrations of fission products to qualify as HLW. Under Order 435.1 and its implementing manual, DOE has declared itself free of

///

///

Defense Council, 467 U.S. 837, 842 (1984). To the extent this Court finds the statute ambiguous and considers DOE's interpretation, this Court is not obligated to give deference to an interpretation based upon arguments developed during this litigation and one so clearly at odds with the overall purpose and legislative history of the statute. *United States v. Mead*, 533 U.S. 218, 228 (2001).

these statutory criteria. For these reasons, this Court should uphold the District Court decision and invalidate the "evaluation method" provisions of Order 435.1.

RESPECTFULLY SUBMITTED this 24th day of March, 2004.

CHRISTINE O. GREGOIRE
Washington Attorney General



DAVID K. MEARS (#28995)
Senior Assistant Attorney General
Attorneys for Amicus Curiae
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6743
(360) 586-6760 fax

HARDY MYERS
Oregon Attorney General
Mary H. Williams
Oregon Solicitor General
David E. Leith
Assistant Attorney General
Oregon Department of Justice

CARLISLE ROBERTS
General Counsel
Samuel L. Finklea, III
Chief Counsel for Env. Quality Cntrl.
SC Dept. of Health & Env. Cntrl.

LAWRENCE G. WASDEN
Idaho Attorney General
Darrell G. Early
Deputy Attorney General
Natural Resources Division
Environmental Quality Section

ELIOT SPITZER
New York Attorney General
Linda E. White
Assistant Attorney General
Environmental Protection Bureau

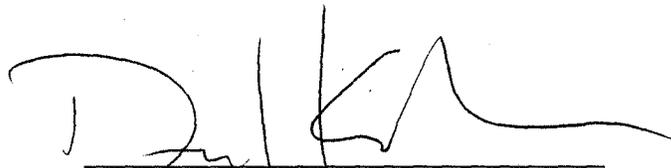
New York State Energy Research
Development Authority
Sheila D. Jones
Akin Gump Strauss Hauer & Feld

PATRICIA A. MADRID
New Mexico Attorney General
Stephen R. Farris
David M. Pato
Assistant Attorneys General

**CERTIFICATE PURSUANT TO FEDERAL RULES OF APPELLATE
PROCEDURE 29(d) AND NINTH CIRCUIT RULE 32-1**

Pursuant to Federal Rules of Appellate Procedure 29(d) and Ninth Circuit Rule 32-1, I certify that the foregoing Amicus Brief is proportionally spaced, has a typeface of 14 points, and contains 6,994 words.

Dated this 24th day of March, 2004.

A handwritten signature in black ink, appearing to read 'DK Mears', written over a horizontal line.

DAVID K. MEARS
Senior Assistant Attorney General
WSBA #28995
P.O. Box 40117
Olympia, WA 98504-0117
360-586-6743

CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the attached Amicus Brief and Certificate of Compliance to be served by first class mail on the following parties this 24th day of March 2004.

Geoffrey H. Fettus
Natural Resources Defense Council
1200 New York Avenue, N.W.
Suite 400
Washington, D.C. 20005

Dan Israel
Shoshone-Bannock Tribes
3455 Table Mesa Drive, Suite E-149
Boulder, CO 80305

Lawrence J. Lucas
Law Offices of Lawrence J. Lucas
P.O. Box 1343
Boise, ID 83701

David E. Leith
Oregon Department of Justice
1162 Court Street, NE
Salem, OR 97301-4096

Ray Givens
Givens Law Firm
P.O.Box 400
912 Sherman Avenue
Coeur d'Alene, ID 83816

Charles M. Brocius
Executive Director
Environmental Defense Institute
P.O. Box 220
Troy, ID 83871

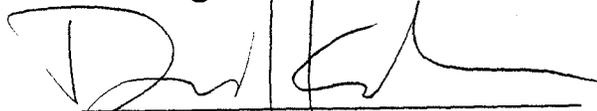
Darrell G. Early
Idaho Office of the Attorney General
1410 North Hilton, 2nd Floor
Boise, ID 83706

Samuel L. Finklea III
South Carolina Department of Health &
Environmental Control
2600 Bull Street
Columbia, SC 29201

Ronald M. Spritzer
Thomas L. Sansonetti
Greer S. Goldman
Department of Justice
Environment & Natural Resources Div.
P.O. Box 23795
L'Enfant Station
Washington, D.C. 20026

Sheila Jones
Akin Gump Strauss Hauer & Feld
1333 New Hampshire Avenue
Washington, D.C. 20036

Marc Johnston
Mark Kasischke
Office of General Counsel
Department of Energy
1000 Independence Ave., SW
Washington, D.C. 20585



DAVID K. MEARS
Senior Assistant Attorney General