

NATURAL RESOURCES DEFENSE COUNCIL

February 12, 2004

VIA FACSIMILE AND FIRST CLASS MAIL

The Honorable Gary Locke, Governor  
State of Washington  
Office of the Governor  
P.O. Box 40002  
Olympia, Washington 98504

The Honorable Mark Sanford, Governor  
State of South Carolina  
Office of the Governor  
P.O. Box 12267  
Columbia, South Carolina 29211

The Honorable Ted Kulongoski, Governor  
State of Oregon  
Office of the Governor  
160 State Capitol  
900 Court Street  
Salem, Oregon 97301

The Honorable Dirk Kempthorne, Governor  
State of Idaho  
Office of the Governor  
700 West Jefferson, 2<sup>nd</sup> Floor  
P.O. Box 83720  
Boise, Idaho 83720

Re: Negotiations between the States and the Department of Energy Regarding the Legislative Reversal of *NRDC v. Abraham*, 271 F.Supp.2d 1260 (D.Id. 2003) and amendments to the Nuclear Waste Policy Act, 42 U.S.C. § 10101 *et seq.*

Dear Governors Locke, Sanford, Kulongoski and Kempthorne:

We write on behalf of the Natural Resources Defense Council (NRDC) and the Snake River Alliance. It has come to our attention that some of your offices have commenced private negotiations with the Department of Energy (DOE) regarding amendments to the Nuclear Waste Policy Act, 42 U.S.C. § 10101 *et seq.* (NWP). As we understand it, such negotiations and the potential legislation that may result from such talks could effectively reverse a case decided last summer in the Federal District Court in Idaho, *NRDC v. Abraham*, 271 F.Supp.2d 1260 (D.Id. 2003). In that case, the Chief Federal District Judge in Idaho found that the NWP applies to DOE's high-level radioactive waste (HLW) and that DOE's HLW must be disposed of in a deep geologic repository pursuant to the NWP.

Since the commencement of *NRDC v. Abraham*, your states have urged DOE to negotiate the dispute rather than pursue resolution of the matter in a federal court. DOE has rebuffed your every attempt to collectively negotiate. Appropriately protecting your interests during the litigation, your states filed a joint "Friend of the Court" brief in *NRDC v. Abraham*, effectively arguing that DOE's actions had, in fact, violated the NWP. We remind you that NRDC actively sought your involvement and thought it an important perspective to be brought before the court. Indeed, after our perspectives prevailed and in response to DOE's immediate attempts to legislatively reverse *NRDC v. Abraham*, your top environmental officials wrote:

DOE's recent proposal to reopen the Nuclear Waste Policy Act runs counter to our mutual interests ... reasonable solutions exist within the current law without undermining public trust in DOE's efforts to properly manage nuclear waste... The federal court decision only confirmed long-standing national policy, which requires disposal of high-



level waste in a geologic repository while all other properly treated, less radioactive wastes to be disposed elsewhere.

States Letter August 12, 2003. Attachment 1.

Since DOE lost *NRDC v. Abraham* last summer, the agency has continued the litigation by appealing the decision to the United States Court of Appeals for the Ninth Circuit. In addition, DOE has sought legislative reversal of the matter by attempting to negotiate with some of your states on a one by one basis rather than collectively and openly negotiating a resolution of the dispute. The DOE's efforts to pressure the states have recently taken a more visible form. In its Fiscal Year 2005 Budget, DOE has proposed sequestering \$350 million in needed cleanup funding pending "satisfactory" resolution of the HLW dispute. See *DOE FY 2005 Budget Request*, Environmental Management, High-Level Waste Proposal at 291.

We request that you do the following things in regard to these matters.

First, you may best protect the public health and environment in your respective states by refusing to be bullied, one by one, into allowing DOE the wholesale exemptions that it wants from the NWSA. Your congressional delegations supported you in the fall of 2003 when DOE attempted to put language on the proposed Energy bill that would legislatively reverse *NRDC v. Abraham*. If you remain consistent with the positions you took last fall, we have every expectation that your delegations will support you again.

Second, we request that you conduct any and all negotiations of these matters with the full participation of all the interested parties and in a manner that promotes public trust. Throughout the District Court litigation, the states have consistently and appropriately noted that final disposition of defense HLW is a matter of immense public importance. Several other states, including New Mexico and New York, also have an enormous stake in the equitable resolution of these matters. In response to an order from the United States Court of Appeals for the Ninth Circuit related to DOE's appeal of *NRDC v. Abraham*, we stated:

We believe that the Idaho Federal District Court correctly decided the matter, but we are confident that reasonable solutions to the Defendants'/Appellants' policy concerns exist under current law. Thus, mediation between the parties conducted under the purview of this Court could provide an opportunity to resolve these disputes without further litigation. Importantly, to effectively resolve these issues via mediation, the Plaintiffs/Appellees would welcome the participation of the amici from the Idaho Federal District Court proceeding (the States of Idaho, Washington, South Carolina and Oregon) and other states, such as New York, that might have substantial interest in these matters.

NRDC Letter, October 10, 2003. Attachment 2.

Our position as expressed to the Ninth Circuit remains unchanged. We believe that the District Court decided the matter correctly and we are confident that reasonable solutions to DOE's cleanup policy concerns exist under current law. We also strongly subscribe to the belief that matters such as the final disposition of millions of gallons of the most radioactive waste in the world that are stored near important water supplies should be negotiated with the full involvement of all of the affected states, tribes, and interested public. We believe that the Ninth Circuit mediation process can still be a reasonable forum for such discussions, but we are open to other alternatives so long as all of the interested parties may participate.

You can halt this closed process. Your top environmental officials eloquently noted that it is important that we not "undermine public trust in DOE's efforts to properly manage nuclear waste." We could not agree more. To reverse *NRDC v. Abraham* and provide DOE with the blanket exemption it seeks from the NWPA in secret negotiations would do immeasurable harm to public trust in the cleanup of the nuclear weapons complex.

If you disagree and proceed without the involvement of all of the interested parties, we would appreciate an explanation of how such a course of action is appropriate and will not gravely undermine public trust in the results of any such negotiations.

In light of the fact that continued litigation will undoubtedly harden positions and detract from serious negotiations, we look forward to hearing from you or your staffs at the earliest possible convenience.<sup>1</sup> Please do not hesitate to contact us at (202) 289-6868 if you have any further questions.

Sincerely,



Thomas B. Cochran, Ph.D.  
Director, NRDC Nuclear Program  
Wade Greene Chair for Nuclear Policy



Geoffrey H. Fettus, Esq.  
Staff Attorney, NRDC  
Counsel to the Snake River Alliance

Enclosures, Attachments 1-2.

cc: The Honorable Bill Richardson, Governor of New Mexico  
The Honorable George Pataki, Governor of New York  
The Honorable Christine Gregoire, Attorney General of Washington  
The Honorable Eliot Spitzer, Attorney General of New York  
Members of Congressional Delegations of Idaho, South Carolina, Oregon, Washington, New Mexico, and New York  
Mr. Ray Givens, Counsel to the Confederated Tribes and Bands of the Yakama Nation  
Mr. Dan Israel, Counsel to the Shoshone-Bannock Tribes

---

<sup>1</sup> NRDC *et al.*, will file a responsive brief on March 18, 2004 in DOE's appeal of *NRDC v. Abraham*. In the week following NRDC's filing we understand that the affected states intend to file a "Friend of the Court" brief that will be entirely consistent with their earlier positions.

Attachment 1

August 12, 2003

The Honorable Spencer Abraham  
U.S. Department of Energy  
1000 Independence Ave. SW  
Washington, DC 20585

Dear Secretary Abraham:

The Department of Energy and states affected by DOE facilities face technical, political, and fiscal challenges as we decide how to treat and dispose of high-level waste created by Cold War-era reprocessing. It will take our combined efforts to devise and implement responsible, effective policies that protect human health and the environment as well as respect taxpayer dollars.

We write to express concern with DOE's current strategy for addressing this key issue. DOE's recent proposal to reopen the Nuclear Waste Policy Act runs counter to our mutual interests.

Fortunately for our shared high-level waste challenge, reasonable solutions exist within the current law without undermining public trust in DOE's efforts to properly manage nuclear waste. DOE already has the tools it needs to address this issue by making internal policy changes; it doesn't need a sledgehammer to do the job.

DOE's recent statements to Congress appear to exaggerate the impacts of the recent judicial decision on high-level waste classification. The federal court decision only confirmed long-standing national policy, which requires disposal of high-level waste in a geologic repository while allowing properly treated, less radioactive wastes to be disposed elsewhere.

The court's ruling allows DOE to proceed with retrieval and treatment of liquid waste from tanks at Hanford, Savannah River and INEEL. If the wastes in question are not highly radioactive following treatment, DOE has the ability now to develop a classification strategy to qualify these wastes for management, including disposal, outside a high-level waste repository. What the court rejected was giving DOE free rein to override national policy as expressed in the Nuclear Waste Policy Act.

The States of Idaho, Oregon, South Carolina and Washington participated in the lawsuit, not as parties, but as friends of the court to protect our interests in safe, cost-effective, timely cleanup and responsible use of repository capacity. As you may know, last November the states made a concrete proposal to resolve these issues outside of litigation, outlined the legal and practical risks associated with continuing to litigate this matter, and offered to enter into mediation with the parties. DOE rejected our efforts and chose to litigate instead.

Today we renew our offer to work with DOE to develop a waste classification strategy that ensures protective, cost-effective, and timely disposal of the nation's defense high-level radioactive waste in a manner consistent with the court's opinion.

We urge to you to reconsider your strategy and to work with the states on a reasonable solution within the framework of existing law. By doing so, we can do the job right without jeopardizing progress on repository development, slowing down cleanup or undermining public trust in our efforts.

Letter to The Honorable Spencer Abraham

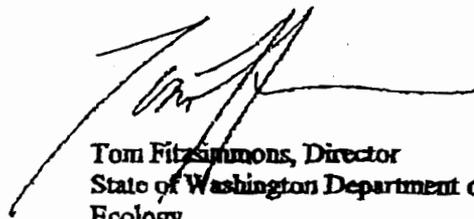
Page 2

August 12, 2003

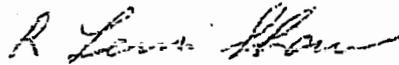
---



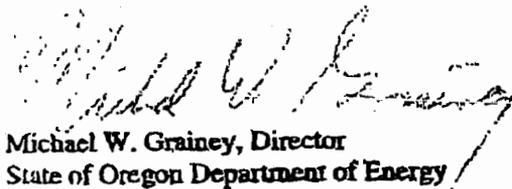
C. Stephen Allred, Director  
State of Idaho Department of  
Environmental Quality



Tom Fitzsimmons, Director  
State of Washington Department of  
Ecology



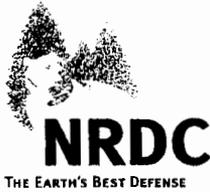
R. Lewis Shaw, Deputy Commissioner  
South Carolina Department of Health And  
Environmental Control



Michael W. Grainey, Director  
State of Oregon Department of Energy

Cc: Governors, Attorneys General and Congressional Delegations of Idaho, Oregon, South  
Carolina, Washington

Attachment 2



NATURAL RESOURCES DEFENSE COUNCIL

October 10, 2003

**VIA FACSIMILE**

Mr. Stephen Liacouras, Circuit Mediator  
U.S. Court of Appeals for the Ninth Circuit  
Thomas F. Eagleton Courthouse  
95 Seventh & Mission Streets  
San Francisco, CA 94103  
FAX: (415) 556-9725

Re: Case No. 03-35711

Dear Mr. Liacouras:

Pursuant to the September 26, 2003 Order directing the parties to inform you whether this matter is appropriate for settlement discussions or mediation, the Plaintiffs/Appellees respond in the affirmative.

We believe that the Idaho Federal District Court correctly decided the matter, but we are confident that reasonable solutions to the Defendants'/Appellants' policy concerns exist under current law. Thus, mediation between the parties conducted under the purview of this Court could provide an opportunity to resolve these disputes without further litigation. Importantly, to effectively resolve these issues via mediation, the Plaintiffs/Appellees would welcome the participation of the amici from the Idaho Federal District Court proceeding (the States of Idaho, Washington, South Carolina and Oregon) and other states, such as New York, that might have substantial interest in these matters.

There is no need to keep this letter confidential and you may share it with the other parties in the case. If you have any questions, please do not hesitate to call me at (202) 289-2371. Thank you for your assistance in this matter.

Sincerely,

Geoffrey H. Fettus, Staff Attorney  
Natural Resources Defense Council  
1200 New York Avenue, N.W., Suite 400  
Washington, D.C. 20005  
*Counsel for Plaintiffs/Appellees*