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NRDC v. EPA: The Final Chapter in the Listing Saga

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NRDC v. EPA: THE FINAL CHAPTER IN THE LISTING SAGA

I. INTRODUCTION

The disposal of used oil has become a controversial issue and has been the source of one of the United States Environmental Protection Agency's ("EPA's") regulatory problems for over a decade. EPA estimated in 1992 that there are over 1.3 billion gallons of used and waste oil generated annually by the United States.1 In 1988, in which "1.35 billion gallons of used lubricating oil [were] generated in the United States, approximately 480 million gallons were disposed into the environment."2 At least 180 million gallons of this total was a result of crankcase oil discarded by individuals.3

These statistics underscore the significance of the issue of whether or not "used oil" should be listed as a hazardous waste and


This massive amount of oil is comprised of both used automobile crankcase oil and used industrial oils. Used Oil Hearing, supra, at 24. After use, EPA estimated that only 100,000,000 gallons are re-refined or reclaimed, while 400,000,000 gallons are disposed of either indiscriminately or with garbage and trash. Id.


3. Beiring, supra note 2, at 157-58 n.5. See also Paula J. Meske, Comment, The Solid Waste Dilemma: Municipal Liability and Household Hazardous Waste Management, 23 ENVTL. L. 355, 370 (1993) (stating that while 17% of used oil generated in the United States comes from households, only 10% of this amount is recycled).

4. See Thomas R. Kline et al., Energy Resources Law: Update on Environmental and Health and Safety Regulatory Issues, 28 Torte & Ins. L J. 211, 216 (1993) (quoting 40 C.F.R. §§ 260.10, 279.1 (1990) (EPA defines "used oil" as "any oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use is contaminated by physical or chemical impurities"). See also Beiring, supra note 2, at 160 (quoting Used Oil Recycling Act of 1980 § 3, 42 U.S.C. § 6903(36) (1988) (setting forth the definition stated by Congress for used oil as "any oil which has been (A) refined from crude oil, (B) used, and (C) as a result of such use, contaminated by physical or chemical impurities"); Paul J. Dickman, Leaking Underground Storage Tanks: The Scope ofRegulatory Burdens and Potential Remedies Under RCRA and CERCLA, 21 N. Ky. L. Rev. 619, 624 (1994) (defining "used oil" as a "'catch all' medium for spent cleaning solvents and degreasing chemicals").

(377)
thus required to be disposed of pursuant to the Resource Conservation and Recovery Act ("RCRA"). This long-standing issue has captured the attention of Congress, EPA, oil recyclers, the Hazardous Waste Treatment Council ("HWTC") and other interest groups, all of whom have critical interests in the decision.

RCRA established a "cradle-to-grave" regulatory structure to monitor the safe treatment, storage and disposal of hazardous waste. Under RCRA, EPA has been granted broad powers through which to regulate the treatment and disposal of hazardous wastes. As part of its duties, EPA is required to evaluate substances in order to determine if they should be listed. Once a substance is listed,


6. James H. Hoeksema, Clean the Air, 22 ENVTL. L. 1579, 1579 (1992) (this editorial was authored by the Assistant General Counsel of The National Oil Recyclers Association). The oil industry sought to prevent used oil from being listed, reasoning that listing discourages used oil from being recycled. Id. See also Kyle Dudley Roberts, Comment, Texas Responds to the Used Oil Problem: The Used Oil Collection, Management, and Recycling Act, 45 Sw. L.J. 1247, 1254 (1991) (citing Current Developments, 22 ENV'T REP. (BNA) 488, 489 (June 21, 1991)). On the other side of the spectrum, proponents for listing rely on the example set by California, whose decision to list used oil resulted in recycling 50% more than states who have chosen not to list used oil as hazardous. Id. But see Meske, supra note 3, at 370 n.88 (quoting 22 ENV'T REP. (BNA) 488 (June 21, 1991)).

7. United Technologies Corp. v. EPA, 821 F.2d 714, 716 (D.C. Cir. 1987). See generally RCRA § 1004, 42 U.S.C. § 6903(5). RCRA defines a "hazardous waste" as:

- a solid waste... which because of its quantity, concentration, or physical, chemical, or infectious characteristic may—

  A. cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

  B. pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

Id.

8. Yang, supra note 5, at 1369 (discussing authority of EPA Administrator and wide latitude given to EPA in defining and listing hazardous wastes).


By 1990, over 100 hazardous substances and over 700 hazardous chemical compounds were listed. Yang, supra note 5, at 1368-69 n.91 (citing 40 C.F.R. §§ 261.30-33 (1990)).

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strict regulatory conditions are to be promulgated for the handling and disposing of the substance.\textsuperscript{10}

Recently, EPA exercised its discretion in an attempt to "end" the controversy surrounding used oil by deciding not to list used oil as a hazardous waste. The United States Court of Appeals for the District of Columbia Circuit upheld this decision in \textit{Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency.}\textsuperscript{11} The court found the decision by EPA to be within the agency's broad, congressionally-delegated discretion for making listing determinations.\textsuperscript{12}

This Note will first trace the development of EPA's decision not to list used oil as a hazardous waste. Second, it will give an overview of the criteria used and how EPA reached its decision. Then, this Note will scrutinize how the court interpreted Congress' statutory grant of power to EPA. This Note will conclude by exploring the potential impact of this decision on the environment, the treatment of used oil and future interpretations of RCRA.

\section{II. Background}

\subsection{A. Statutory Background}

RCRA was designed to establish a framework for the federal government's program of solid and hazardous waste regulation.\textsuperscript{13} Congress, through RCRA, "delegat[ed] to EPA the task of promulgating regulations identifying the characteristics of hazardous waste and listing specific wastes as hazardous."\textsuperscript{14} Under RCRA, there are two ways in which a substance will be deemed a hazardous waste. A substance may be either a listed or a characteristic hazardous waste. After a substance has been identified or listed as a hazardous waste, EPA must then concern itself with the management procedures for that substance. \textit{Id. See infra} note 19 and accompanying text.

\textsuperscript{10} \textit{American Petroleum}, 906 F.2d at 733. After a substance has been identified or listed as a hazardous waste, EPA must then concern itself with the management procedures for that substance. \textit{Id. See infra} note 19 and accompanying text.

\textsuperscript{11} 25 F.3d 1063, 1073 (1994). The Circuit Court for the District of Columbia found that EPA's decision not to list was consistent with congressional intent. \textit{Id. at 1070}. The court further asserted that to hold otherwise would "reduce the regulatory scheme to a mere 'steppingstone' in the listing process." \textit{Id.}

\textsuperscript{12} \textit{NRDC}, 25 F.3d at 1074. For further discussion of the court's holding in \textit{NRDC}, see \textit{infra} notes 93-115 and accompanying text.


\textsuperscript{14} \textit{NRDC}, 25 F.3d at 1065 (citing RCRA § 3001, 42 U.S.C. § 6921). Under RCRA, EPA is responsible for identifying hazardous wastes, monitoring their use and promulgating regulations for their disposal. Yang, \textit{supra} note 5, at 1369 (citing RCRA § 3001, 3002, 42 U.S.C. §§ 6921(a)-(b), 6922(a), 6923(a), 6924(d)(2)).
waste. To determine whether a substance should be a listed hazardous waste, EPA initially compiles lists identifying substances considered to be "potentially hazardous substances." EPA then applies technical criteria with which it evaluates the substances and then decides whether or not to list the substance as "hazardous." Once a substance is identified and listed as a hazardous waste, RCRA requires EPA to promulgate regulations which establish standards for "recordkeeping, labelling, appropriate containment and 15. See 40 C.F.R. §§ 261.10-.11 (1990).
16. NRDC, 25 F.3d at 1065 (referring to 40 C.F.R. § 261, subpart D (1990)). See supra note 9 and accompanying text.
17. Id. at 1065-66. See 40 C.F.R. § 261.11 (1990), which provides, in relevant part:
The Administrator shall list a solid waste as a hazardous waste only upon determining that the solid waste meets one of the following criteria:
(1) It exhibits any of the characteristics of hazardous waste identified in subpart C. . .

(3) It contains any of the toxic constituents listed in appendix VIII and, after considering [a set of eleven] factors, the Administrator concludes that the waste is capable of posing a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported or disposed of, or otherwise managed.

Id.

The eleven criteria referred to by § 261.11(a)(3) consist of:
(i) The nature of the toxicity presented by the constituent.
(ii) The concentration of the constituent in the waste.
(iii) The potential of the constituent or any toxic degradation product of the constituent to migrate from the waste into the environment under the types of improper management considered in paragraph (a)(3)(vii) of this section.
(iv) The persistence of the constituent or any toxic degradation product of the constituent.
(v) The potential for the constituent or any toxic degradation product of the constituent to degrade into non-harmful constituents and the rate of degradation.
(vi) The degree to which the constituent or any degradation product of the constituent bioaccumulates in ecosystems.
(vii) The plausible types of improper management to which the waste could be subjected.
(viii) The quantities of the waste generated at individual generation sites or on a regional or national basis.
(ix) The nature and severity of the human health and environmental damage that has occurred as a result of the improper management of wastes containing the constituent.
(x) Action taken by other governmental agencies or regulatory programs based on the health or environmental hazard posed by the waste or waste constituent.
(xi) Such other factors as may be appropriate.

use of a manifest system that would insure all wastes are treated, stored or disposed of in licensed facilities.

A substance may also be deemed a RCRA hazardous waste based on the characteristics of ignitability\(^\text{19}\), corrosivity\(^\text{20}\), reactivity\(^\text{21}\) and toxicity.\(^\text{22}\) In such instances, a substance is labelled a "characteristic hazardous waste." In contrast to a listed hazardous waste, EPA action is not required for a substance to become a char-

\(^{18}\) RCRA § 3002, 42 U.S.C. §§ 6922(a)(1)-6924(a)(5). See also Yang, supra note 5, at 1369-70 (once implemented, these regulations are to be reviewed periodically). Once a substance is described and listed as a hazardous waste, EPA also assigns the substance a waste code. American Petroleum, 906 F.2d at 733. See also Hazardous Waste Treatment Council v. EPA, 861 F.2d 270, 271 (D.C. Cir. 1988) [hereinafter HWTC] (describing the process EPA is required to follow as mandated under RCRA).

\(^{19}\) 40 C.F.R. § 261.21 (1990). A substance displays the characteristic of "ignitability" when it shows any of the following:

1. It is a liquid . . . containing less than 24 percent alcohol by volume

2. It is not a liquid and is capable . . . of causing fire through friction . . . or spontaneous chemical changes and, when ignited, burns so vigorously and persistently that it creates a hazard.

3. It is an ignitable compressed gas as defined in 49 CFR 173.300 . . .

4. It is an oxidizer as defined in 49 CFR 173.151.

\(^{20}\) 40 C.F.R. § 261.22 (1990). A waste satisfies the standard for corrosivity when it meets either of the following descriptions:

1. It is aqueous and has a pH of less than or equal to 2 or greater than or equal to 12.5 . . .

2. It is a liquid and corrodes steel . . . at a rate greater than 6.35 mm . . . per year. . . .

\(^{21}\) 40 C.F.R. § 261.23 (1990). A waste displays characteristics of reactivity when any of the following exist:

1. It is normally unstable and readily undergoes violent change without detonating.

2. It reacts violently with water.

3. It forms potentially explosive mixtures with water.

4. When mixed with water, it generates toxic gases, vapors or fumes in a quantity sufficient to present a danger to human health or the environment.

5. It is a cyanid or sulfide bearing waste which . . . can generate toxic gases, vapors or fumes . . .

6. It is capable of detonation or explosive reaction if it subjected to a strong initiating source or if heated under confinement.

7. It is readily capable of detonation or explosive decomposition or reaction at a standard temperature and pressure.

8. It is a forbidden explosive as defined in 49 CFR 173.51. . . .

\(^{22}\) 40 C.F.R. § 261.24 (1990). A substance satisfies the standard for toxicity when it contains any of the listed contaminants in concentrations equal to or greater than those listed in the same table Id. For further detail of the specific contaminants and the requisite levels to be classified within characteristics of toxicity, see 40 C.F.R. § 261.24, Table 1 (1990).
characteristic hazardous waste under RCRA initially. Under the statute as passed in 1976, if "any solid waste exhibit[ed] one or more of these characteristics [it was] automatically deemed a 'hazardous waste.' It must be noted, however, that EPA subsequently changed this language so there is no longer a presumption of hazardousness. Thus, a waste will be classified as a RCRA hazardous waste if it contains a hazardous characteristic and if the Administrator determines that the substance will pose a threat to human health and the environment.

Because EPA failed to timely promulgate stringent regulations, in 1984 Congress enacted the Hazardous and Solid Waste Amendments ("HSWA"). HSWA amended RCRA by mandating specific strict deadlines within which EPA was to resolve the used oil issue.

23. See infra note 24.
24. Yang, supra note 5, at 1369 (citing 40 C.F.R. § 261.20-.24 (1990)). Any substance which is deemed a characteristic hazardous waste under the second method, even if not listed as one by EPA, falls under the regulation of RCRA Subtitle C. See Dickman, supra note 4, at 627 n.45 (describes 40 C.F.R. §§ 261.21-24 (1993) as "[p]roviding analytical procedures for determining the concentrations of various chemicals in waste products and sets [sic] limits for these concentrations, above which wastes are classified as characteristically hazardous."). Dickman further notes that "specific characteristics of a material, such as corrosivity, ignitability, or reactivity, can render it a characteristically hazardous waste under these sections." Id. See also American Petroleum, 906 F.2d at 733. But see 1 JOHN-MARK STENSVAA, HAZARDOUS WASTE LAW AND PRACTICE § 5.9A, at 1 & n.48 (Treatise Cumulative Supplement 1993) ("A waste must be listed if it meets any of the [40 C.F.R. § 261.11] criteria") (quoting D. STEVER, LAW OF CHEMICAL REGULATION AND HAZARDOUS WASTE § 5.02(2)(b) (1986)).


Previously, any substance which exhibited one of the four characteristics was automatically "deemed a hazardous waste." American Petroleum, 906 F.2d at 733. Once determined to be hazardous, even if not formally listed, the substance would be regulated under Subtitle C of RCRA. Id. See HWTC, 861 F.2d at 271. But see David M. Flannery & Robert E. Lannan, Hazardous Waste-The Oil and Gas Exception, 89 W. VA. L. REV. 1089 (1987) (history of oil and gas exception from Subtitle C of RCRA).


28. RCRA § 3014, 42 U.S.C. § 6935. HSWA requires the following of EPA:
Not later than [November 8, 1985], the Administrator shall propose whether to list or identify used automobile and truck crankcase oil as
HSWA forced EPA to "make a final determination whether to list or identify used automobile and truck crankcase oil and other used oil as hazardous wastes under [RCRA] section 6921." Arguably, at the expense of discouraging the recycling of used oil, the apparent intent behind the HSWA provisions was to regulate used oil recycling activities so as to prevent such activities from posing potential hazards to the environment and human health.

As a result of the pressure placed on EPA by HSWA and Congress, on November 29, 1985, EPA announced its first proposal to list used oil as a hazardous waste. The Agency based its decision upon the discovery that the substances contained in used oil are "mobile, persistent, and biaccumulative, and capable of migration in hazardous concentrations, and, therefore, that these wastes are capable of causing . . . substantial harm if mismanaged."
The proposal to list used oil resulted in an overwhelming number of negative comments. Opponents to the listing argued that listing used oil would lead to "uncontrolled dumping of oil into the environment," thereby frustrating attempts at recycling used oil. In addition, the opponents claimed that businesses would incur hefty expenditures on new reporting procedures or management of their facilities in order to adhere to the listing regulations.

Due to the overwhelming negative feedback, a final decision was announced in 1986 not to list recycled used oil as a hazardous waste. EPA's proposal not to list used oil was based upon the "be-

33. Hoeksema, supra note 6, at 1579-80. EPA subsequently filed a proposal to hear comments on "listing only used oil destined for disposal as hazardous while relying on special management standards to govern recycled used oil." 51 Fed. Reg. 8206 (1986). EPA received over 800 comments from various associations including municipalities, generators and recyclers. Hoeksema, supra note 6, at 1579. See 51 Fed. Reg. 8206 (vast majority of speakers at public hearings held around the United States urged Agency not to list used oils as hazardous); Hearings on Hazardous Waste Matters, Before House Subcomm. on Oversight & Investigations, 96th Cong., 2d Sess. 90-92 (1980) (statement of EPA).

34. See 22 ENV'T REP. (BNA) 488 (June 21, 1991) (discussing testimony of American Petroleum Institute before Subcommittee on Transportation and Hazardous Materials of House Energy and Commerce Committee, which claimed that California legislation listing used oil as hazardous waste "placed stricter restrictions on its disposal, [and] has increased the cost of recycling and discouraged [recycling]"). See generally Decision Not to Adopt Proposed Rule, 51 Fed. Reg. 41,902 (1986) (acknowledging hundreds of comments EPA received from broad spectrum of parties proposing that such listing would disrupt existing recycling practices).

35. Russiello, supra note 1, at 171 (discussing that increasing costs could lead to decrease in oil being used as a substitute fuel, and forcing businesses to dispose of oil improperly in avoidance of compliance costs); Rodgers, supra note 27 (insisting that facilities that recycle used oil will need to fully comply with the standards applicable to owners and operators of any hazardous waste treatment, storage and disposal facility); J. Thomas Wolfe, Realistic Recycling, 37 FED. B. NEWS & J. 90 (1990) (stating that legislators feared that economic burdens concomitant with listing used oil would result in fewer businesses handling substance).

But see Russiello, supra note 1, at 171 (discussing threat posed to human health and the environment, including report of over 60 used oil recycling facilities listed as national priority hazardous waste sites). For further discussion of the threat to human health and the environment caused by the mismanagement of used oil, see infra notes 135-138 and accompanying text.

36. Decision Not to Adopt Proposed Rule, 51 Fed. Reg. 41,900 (1986). Proponents of this decision voiced "that the listing would not only discourage used oil recycling, but would ultimately be environmentally counterproductive because used oil left unrecycled would be disposed of in manners posing greater risk than recycling." Id.

Congressional hearings held by the House Subcommittee on Energy, Environment and Safety Issues Affecting Small Business discovered that EPA's proposal to list used oil would in fact be environmentally counterproductive. Id. EPA, siding with Congress, argued that listing would discourage recycling and in turn increase detrimental disposal practices. Id. EPA stated that "this increased disposal could result from decreased use of used oil as fuel by industrial burners and decreased
lie[f] that listing would discourage recycling of used oil and could have an environmentally counterproductive effect."³⁷ Interest groups who would lose economically as a result of this decision protested EPA’s rationale.³⁸ The reasoning behind the EPA decision was successfully challenged before the United States Court of Appeals for the District of Columbia Circuit in NRDC, as discussed below.

B. Circuit Court’s Evaluation of EPA Decisions

The United States Court of Appeals for the District of Columbia Circuit addressed EPA’s decision not to list recycled used oil³⁹ as a hazardous waste in Hazardous Waste Treatment Council v. EPA.⁴⁰

The 1986 Superfund Amendments and Reauthorization Act ("SARA") provides an alternative method to regulate used oil management practices. See Beiring, supra note 2, at 174-75 (discussing SARA and its effect on used oil practices). See generally NRDC, 25 F.3d at 1066 (EPA based its decision "primarily on its perception that the stigma associated with labelling used oil as 'hazardous' would discourage recycling").

37. Meske, supra note 3, at 370 (quoting Identification and Listing of Hazardous Waste: Used Oil, 51 Fed. Reg. 41,901 (1986)). See also Beiring, supra note 2, at 174; Russiello, supra note 1, at 177 (listing used oil would result in uncontrolled amount of disposal); Dickman, supra note 4, at 627 (used oil was not listed due to stigmatic effects on oil recycling efforts); John Quares & Arline M. Sheehan, Superfund, and Toxic Substances, Recent RCRA Developments, C352 ALI-ABA 367 (1988).

38. Hoeksema, supra note 6, at 1579.

39. See HWTC, 861 F.2d at 271. (Definition of recycled oil is set forth in 42 U.S.C. § 6903(37) (1982) as "any used oil which is reused, following its original use, for any purpose . . . including oil which is re-refined, reclaimed, burned or reprocessed").

40. HWTC, 861 F.2d at 271. HWTC challenged a final EPA determination not to list used oil destined for recycling and recycled oil as hazardous wastes. Id. EPA defended its action by asserting that if it were to list recycled oil as hazardous, "such a listing would attach the stigma of the label 'hazardous waste' to recycled oil, thus discouraging recycling and its environmentally beneficial effects." Id. at 271.

The court addressed the issues of standing and jurisdiction at the outset. Id. at 272-74. Since the HWTC represents multiple associations, it is permitted to bring a suit on behalf of the other members who may not be able to bring suit individually. Id. at 272-73. The organization’s suit, however, must satisfy a two-prong test, referred to as the “Hunt Test.” Id. at 273 (citing Hunt v. Washington State Apple Advertising Comm’n, 432 U.S. 333, 343 (1977)). Under this test, HWTC was required to show that its members “suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision.” Id. The court found that the petitioner met all requirements of the test. Id. Declaring that it indeed had jurisdiction to hear this case, the court relied upon the Administrative Procedure Act ("APA"), which "authorizes judicial review of 'agency action', [including] the failure to promulgate a rule." Id. at 274. (citing 5 U.S.C. §§ 701-706, 702, 551(13) (1982)).
The interpretations by EPA of RCRA section 6935(b), and whether the section authorized EPA to base its decision on nontechnical factors was critical to the court's analysis. 41 Pursuant to the controlling provision, RCRA section 6935(b), EPA was to determine "whether to list or identify used automobile and truck crankcase oil and other used oil as hazardous wastes under section 6921." 42 Thus, the court vacated EPA's decision, holding that EPA was not allowed to consider stigmatic consequences when deciding whether or not to list recycled used oil as a hazardous waste, since those consequences were not listed as a consideration under section 6921. 43

The court scrutinized EPA's statutory interpretation of RCRA with the two-step inquiry established by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 44 The first prong of the test consists of an analysis of whether the intent of Congress was clear in allowing EPA to consider stigmatic consequences. 45 If so, then the intent be given effect by the court and the agency. 46 The second prong was implicated if Con-
gress had not directly addressed the issue. The court was then required to consider "whether the agency's construction of the statute is 'permissible,' 'rational and consistent with the statute.' "

Applying the *Chevron* analysis, the *HWTC* court interpreted and evaluated the relevant statutory language and the grant of authority by Congress to EPA.

The court first addressed the meaning of RCRA section 6935(b), which the court found "required the EPA to determine whether used oil meets the criteria for hazardous waste specified in 42 U.S.C. § 6921." EPA tried to support its decision by arguing that section eight of the Used Oil Recycling Act ("UORA") directed EPA to "ensure that the recovery and reuse of used oil are not discouraged" when

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47. *Chevron*, 467 U.S. at 843 (quoting NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 123 (1987)). See *HWTC*, 861 F.2d at 274 (quoting *Chevron*, 467 U.S. at 842). A judicial construction is not imposed upon the agency if Congress is silent on the issue. *Chevron*, 467 U.S. at 844. Rather, the agency construction is to be evaluated. *Id.* The court is not to determine if the agency construction was the only permissible one. Rather, the construction must only be consistent with the statute. *Id.* at 843, n.11.

48. *HWTC*, 861 F.2d at 274-77. The court looked to the historical development of the statute to determine how Congress directed EPA in its consideration of listing used oil. *Id.* at 275-76. The court noted that Congress intended that EPA consider the impact listing used oil would have on recycling and reuse. *Id.* Subsequently, Congress separated the effect on recycling from EPA's decision, warranting consideration of recycling only after the final decision was made by EPA. *Id.*

49. *Id.* at 274. (citing RCRA § 3014(b), 42 U.S.C. § 6935(b) which states that: "the Administrator shall make a final determination whether to list or identify used automobile and truck crankcase oil and other used oil as hazardous wastes under section 6921 . . . .").

50. *HWTC*, 861 F.2d at 274. To ascertain the meaning of RCRA § 3014, the court followed the analysis set forth in *K Mart* by looking to the "particular statutory language at issue." *HWTC*, 861 F.2d at 274 (quoting *K Mart*, 486 U.S. at 291). The language was silent regarding stigmatic characteristics, referring only to technical characteristics to be considered when deciding to list a substance. *Id.*

51. Used Oil Recycling Act ("UORA"), Pub. L. No. 96-463, 94 Stat. 2055-59 (1980) (codified as amended in scattered sections of 42 U.S.C.). Section eight of UORA sets forth a deadline for EPA to determine whether used oil is characteristic of a hazardous waste under RCRA. *HWTC*, 861 F.2d at 271. The determination, as well as a detailed statement of the determination, were to be reported to Congress. *Id.* In addition, the Act mandated a deadline by which time EPA had to promulgate regulations establishing standards and requirements for the treatment of recycled oil. *Id.* The regulations instituted by EPA were designed to protect the public health and environment from any potential hazards associated with recycled oil. *Id.*
determining the listing of substances. Thus, since commentary received by EPA illustrated the potential uncontrolled disposal of wastes, EPA argued that it was forced not to list used oil in order to fulfill the purpose of UORA. Rejecting this argument, the court considered "the language and design of the statute as a whole." The court found that section eight only required that EPA make a single determination regarding used oil, and report that determination to Congress, since the court concluded that EPA's obligation under section eight was fulfilled, the section was no longer in effect.

Under its interpretation of section eight of UORA, the only task of the HWTC court was to consider what RCRA required. Since RCRA only referred to technical considerations, Congress' failure to mention any stigmatic considerations led the court to conclude that only technical criteria clearly stated under section 6921 should be used. Based on the conclusion reached by the court in HWTC, the Court of Appeals in NRDC remanded the November 1986 decision to the Agency to further "consider whether any recycled oils met the technical criteria for listing promulgated under 42 U.S.C. § 6921."

52. HWTC, 861 F.2d at 275 (quoting Used Oil Recycling Act of 1980, Pub. L. No. 96-463). For further discussion of EPA's argument relating to UORA § 8, see Beiring, supra note 2, at 176-79; Russiello, note 1, at 178-79.

EPA further asserted that § 7 of UORA creates a statutory ambiguity. Russiello, supra note 1, at 179. It was alleged that Congress intended that the Agency have two tracks through which to deal with recycled oil, with identical authority on each track. Id. See HWTC, 861 F.2d at 275. Track one allowed EPA to regulate recycled oil without listing it as a hazardous waste, while track two provided for regulation of the substance by listing. HWTC, 861 F.2d at 275. Contrary to EPA's statutory interpretation, the court rejected the argument. Id. at 275. See also Beiring, supra note 2, at 177-80 (discussing two ostensible options given to EPA).

53. For further discussion of the comments received by EPA, see supra notes 33-35 and accompanying text. See also Hoeksema, supra note 6, at 1579-80 ("As a result of the overwhelmingly negative responses to the proposal, and the realization that listing used oil as a hazardous waste would likely lead to uncontrolled dumping of oil into the environment, EPA reversed its decision. . . .")

54. HWTC, 861 F.2d at 275-77 (quoting K Mart, 486 U.S. at 291).

55. Id.

56. Id. at 275. While interpreting statutory language, the court looked to "the plain meaning of a statute by examining . . . the 'particular statutory language at issue, as well as the language and design of the statute as a whole.'" Id. at 274 (quoting K Mart, 486 U.S. at 291).

57. NRDC, 25 F.3d at 1066. EPA, in response to the court's decision to remand in HWTC, reported that the listing decision surrounding used oil would sprout from one of the following:

1. listing all used oil as hazardous,
2. listing only certain categories of used oil as hazardous, or
3. not listing any used oils as hazardous, but relying instead on other federal regulations.
In addition to the HWTC decision, the Court of Appeals for the District of Columbia set forth a relevant rule of statutory interpretation in American Petroleum Institute v. EPA. In American Petroleum, the court partially upheld EPA's decision to preclude land treatment as a method of treating certain hazardous wastes. However, the court vacated the part of the decision based on exempting certain RCRA restrictions from EPA's evaluation of land disposals.

In arriving at its holding, the court in American Petroleum looked to EPA's interpretation of RCRA. The court noted that when an agency "bases a decision on a standard it unjustifiably believes was mandated by Congress, [its] decision must not be enforced, even though [it] might be able to adopt the very same standard in the exercise of its discretion." Since EPA could not support its decision to abandon certain RCRA restrictions, the

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Id. at 1066 (citing 56 Fed. Reg. 48,000, at 48,019-48,021 (1991)).

58. 906 F.2d 729 (1990). Petitioners bringing this action included the American Petroleum Institute, the American Iron and Steel Institute, the Chemical Manufacturers Association ("CMA") and the National Association of Metal Finishers. Id. at 732.

59. American Petroleum, 906 F.2d at 731. Petitioners challenged EPA's decision that RCRA precluded them from considering land treatment as a method for treating hazardous wastes. Id. NRDC, CMC and HWTC also contested part of an EPA decision establishing treatment standards for K061, a hazardous waste. Id.

60. American Petroleum, 906 F.2d at 732, 742. The court held that EPA was in fact precluded by RCRA from considering land treatment of hazardous wastes, and consequently denied the petition for review on this issue. Id. Review was also denied since EPA exhibited sufficient reasoning for its abandonment of comparative risk. Id. Regarding treatment standards for K061 hazardous waste, the court granted petition for review as a result of EPA's unlawfully exempting factors from its consideration. Id.

61. American Petroleum, 906 F.2d at 735. The court used the test established in Chevron to review the EPA interpretation of RCRA. Id. at 740. Following the two-step analysis, the court concluded that Congress had not spoken on this issue, and a review of the agency construction was necessary. Id. at 741. The court stated that any permissible construction by EPA "must comport with the broader 'statutory purpose' of the RCRA." Id. The court remanded the issue for a determination as to whether the construction by EPA was permissible. Id.

62. Id. at 735 (quoting International Bhd. of Elec. Workers, Local Union No. 474 v. NLRB, 814 F.2d 697, 708 (D.C. Cir. 1987)). See also Securities and Exch. Comm'n v. Chenery Co., 318 U.S. 80, 95 (1943) ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.").
court vacated and remanded the decision for further consideration.\(^{63}\)

In *New York v. Reilly*,\(^ {64}\) the Court of Appeals for the District of Columbia remanded for further consideration the part of an EPA decision which the court determined was comprised of insufficient evidentiary support.\(^ {65}\) In the words of the court, the decision lacked "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."\(^ {66}\) Thus, since EPA did not adequately support its decision not to impose a ban on the burning of lead-acid vehicle batteries, the court remanded this decision for an explanation from EPA as to why it did not impose the ban.\(^ {67}\)

C. Statutory Interpretation

Over the past twenty years, courts have attempted to resolve exchanges between EPA and parties who have challenged EPA’s congressional grant of authority. In interpreting the boundaries of EPA discretion, these courts have evaluated the agency’s authority according to the different standards, as set forth below.

1. *Broad Discretion Allowed to EPA*

When interpreting the numerous provisions of RCRA, the courts have given great deference to EPA interpretations.\(^ {68}\) In

\(^{63}\) *American Petroleum*, 906 F.2d at 729. The court explained the two propositions supporting this decision. *Id.* First, the court stated that an agency’s interpretive discretion is bound by its previous interpretations of RCRA. *Id.* at 742. Second, the court recognized that an agency is entitled to construe its own regulations. *Id.* In conclusion, the court leaned toward forcing EPA to comply with its statutory mandate to prescribe treatment standards for K061, a hazardous waste. *Id.*

\(^{64}\) 969 F.2d 1147 (D.C. Cir. 1992).

\(^{65}\) *Reilly*, 969 F.2d at 1149. The court upheld EPA’s decision to drop the waste separation provision, since the decision was adequately supported under the statute. *Id.* Subsequently, the court remanded the second decision back to EPA due to inadequate support regarding a ban on lead-acid vehicle battery combustion. *Id.*

\(^{66}\) *Id.* at 1150-51 (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951)). Later in its opinion, the court noted that it was “extremely deferential to administrative agencies in cases involving technical rulemaking decisions.” *Id.* at 1149. The court further stated that “as long as Congress delegates power to an agency to regulate on the borders of the unknown, courts cannot interfere with reasonable interpretations of equivocal evidence.” *Id.* at 1151-52 (citing Public Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1505 (D.C. Cir. 1986)).

\(^{67}\) *Reilly*, 969 F.2d at 1149. According to the court, the decision did not represent the best demonstrated technology for reducing harmful incinerator emissions. *Id.*

1990, the United States Court of Appeals for the District of Columbia Circuit in NRDC, while discussing RCRA, stated that “the statute gives the Administrator broad discretion in determining the criteria for listing wastes and in the actual listing of specific wastes.” Further, the court in Lo Shippers Action Committee v. Interstate Commerce Commission additionally held that the agency should be allowed “due deference normally owed an agency’s interpretation of a statute committed to its care.”

Similarly, in a case involving the Clean Air Act (“CAA”), the court in Reilly allowed the EPA Administrator to be “free to exercise his discretion,” since Congress had not assigned specific weights to any of the factors that EPA was to consider. Thus, EPA can either emphasize or deemphasize particular factors. The court further stated that it accords administrative agency decisions extreme deference.

2. Arbitrary and Capricious

In reaching its decision in HWTC, the Court of Appeals for the District of Columbia applied the arbitrary and capricious standard of review. A decision will be invalidated under this standard if it is

69. 907 F.2d 1146 (D.C. Cir. 1990). The petitioner challenged EPA regulations for the disposal of hazardous wastes by deep injection. Id. at 1149. The court determined that EPA ignored its statutory duty to promulgate regulations in this area and failed to sufficiently rebut NRDC’s statutory challenges. Id. The court, therefore, remanded this issue for further proceedings. Id.

70. NRDC, 907 F.2d at 1159, n.12 (citing RCRA § 3001(a)-(b), 42 U.S.C. § 6921(a)-(b)). The court looked to the plain meaning and congressional intent of the statute in order to define an ambiguity in the statute. Id. at 1159. Additionally, the court examined the legislative history to aid its determination. Id. at 1160.

71. 857 F.2d 802 (D.C. Cir. 1988). This dispute arose over allowances provided to Lo Shippers Action Committee which the members argued were inadequate. Id. at 803. The petitioners also sought “the establishment of Commission-ordered allowance structures.” Id.

72. Id. at 807. Upon review, the court held the Commission was allowed to take appropriate action in its discretion and thus, denied the petition. Id. at 807-08.


74. Reilly, 969 F.2d at 1150 (citing Center for Auto Safety v. Peck, 751 F.2d 1336, 1342 (D.C. Cir. 1985)). For further discussion of the facts and holding of Reilly, see supra notes 64-67 and accompanying text.

75. Id. at 1152. The court upheld EPA’s decision not to promulgate materials separation rules. Id. The agency was allowed, in its discretion, to balance the costs and benefits of air against nonair. Id. The petitioners alleged that the Administrator’s decision to omit factors from its decision making process, without any substantial supporting evidence, constituted an arbitrary and capricious decision. Id. at 1150. The court concluded, however, that the evidence presented by EPA provided sufficient evidence to support its change of view. Id.

76. HWTC, 861 F.2d at 274 (citing 5 U.S.C. § 708(2)(A)).
“arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The Court of Appeals for the District of Columbia has previously noted that when reviewing an agency’s action under the arbitrary and capricious standard, a court must affirm the agency if it has articulated a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.” Further, the Supreme Court in *Chevron* noted that if Congress left a legislative gap for an agency to supplement, the regulations are “given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”

### 3. Plainly Erroneous

The Supreme Court and the Court of Appeals for the District of Columbia have articulated a “plainly erroneous” standard of review of agency decisions. The Supreme Court has held that with respect to an agency’s interpretation of its own regulations, “provided it does not violate the Constitution or a federal statute, such an interpretation must be given controlling weight unless it is ‘plainly erroneous’ or inconsistent with the regulation it interprets.” Thus, agencies are afforded a presumption that their construction of the relative statute is permissible unless it impedes the statutory purpose.

77. *Id.* (quoting 5 U.S.C. § 706(2)(A)). The court first looked to the framework for listing hazardous wastes. For further discussion of the framework, see *supra* notes 14-26 and accompanying text. For further discussion of the listing criteria, see HWTC, 861 F.2d at 271 (discussing criteria and requirements RCRA lists for EPA to follow); *American Petroleum*, 906 F.2d at 732-33; Yang, *supra* note 5, at 1369-70; *Reilly*, 969 F.2d at 1150-51.


80. *Stinson v. United States*, 113 S. Ct. 1913, 1914 (1993). The Court in *Stinson* addressed the decision by the Court of Appeals for the Eleventh Circuit holding that the commentary to the United States Sentencing Guidelines (“Guidelines”) is not binding on federal courts. *Id.* In so holding, the Court decided that an explanatory or interpretative commentary in the Guidelines is authoritative, unless it violates the United States Constitution. *Id.*
The United States Court of Appeals for the District of Columbia Circuit followed the "plainly erroneous" standard in *Hazardous Waste Treatment Council v. Reilly*. The court noted that "because the EPA is charged with the administration of RCRA, we defer to its interpretation whenever the statute is silent or ambiguous with respect to a specific issue." Further, the court will accept an agency's interpretation of its regulations as long as it is not "plainly wrong" or "plainly erroneous."

### III. The Factual Setting of NRDC

In May 1992, EPA restated its decision not to list as hazardous any used oil destined for disposal. EPA determined that used oil failed to meet the threshold requirements which would warrant its listing. EPA concluded that Subtitle C of RCRA already regulated most of the oils and that used oil destined for disposal would therefore still be covered under Subtitle C. Thus, under this interpre-

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81. 938 F.2d 1390 (D.C. Cir. 1991). Petitioners alleged that North Carolina’s hazardous waste treatment program was ineligible under RCRA, due to its inconsistency with federal government programs. *Id.* at 1992. North Carolina enacted a statute requiring dilution of commercial hazardous waste treatment discharges into surface waters. *Id.* EPA disputed the claim, finding the state statute to be consistent. *Id.*

82. *HWTC*, 938 F.2d at 1395. The court added that an agency's interpretation will be upheld as long as it is reasonable and consistent with the statutory purpose. *Id.* (citing *Chevron*, 467 U.S. at 844-45).

83. *Id.* (quoting Chemical Mfrs. Ass’n v. EPA, 919 F.2d 158 (D.C. Cir. 1990); Udall v. Tallman, 380 U.S. 1, 17 (1965)). The court held that EPA's interpretation of the statutory language was consistent with the purpose of RCRA, and therefore, permissible under that statute. *Id.* at 1396-97. Further, the court noted that the language of the statute allowed "the agency enormous latitude in structuring its own implementing regulations and in interpreting them." *Id.* at 1396.

84. *NRDC*, 25 F.3d at 1066-67. This Final Rule promulgated by EPA announced the deferral of EPA's listing decision with respect to recycled oils. *Id.* at 1067 (citing 57 Fed. Reg. at 21,524 (1992)). Subsequently, on September 10, 1992, EPA issued another determination stating that recycled oil would not be listed as a hazardous waste. *Id.* (citing 57 Fed. Reg. 41,566 (1992)). EPA additionally established regulations concerning the management of recycled used oils. *Id.* See also, Kline, *supra* note 4, at 216 (discussing final regulations issued by EPA on May 20, 1992).

The court in *NRDC* noted that in the present case the issue it was addressing did not pertain to recycled used oils. 25 F.3d at 1067.

85. *NRDC*, 25 F.3d at 1067 (citing Final Rule, 57 Fed. Reg. 21,531 (1992)). EPA found no grounds to list used oil since it was not "typically and frequently" hazardous. *Id.*

86. *Id.* (citing 57 Fed. Reg. 21,528 (1992)). See also Dickman, *supra* note 4, at 627 (explaining Subtitle C coverage for used oil destined for disposal exhibiting hazardous characteristics, and coverage under Subtitle I if stored in underground storage tank). *But see* Flannery & Lannan, *supra* note 26 (discussing history of oil and gas waste exception from Subtitle C of RCRA).
tation, there was no need to additionally list gasoline-powered engine oils under RCRA.87

In response to EPA's decision to exclude used oil from the hazardous waste list, NRDC, the Association of Petroleum Re-Refiners, and HWTC brought an action against EPA.88 The petitioners challenged the basis for the Agency's decision not to list, alleging that EPA failed to comply with RCRA and EPA's hazardous waste listing regulations.89 The court faced the issue of whether EPA's determination was inconsistent with RCRA and EPA's listing regulations.90

The Court of Appeals for the District of Columbia held that EPA's decision not to list used oil as a hazardous waste was reasonable.91 Further, the court concluded that used oil did not have to be listed as a hazardous waste, even though it displayed one of the characteristics under the statutory criteria for a characteristic hazardous waste.92

IV. ANALYSIS

A. Narrative

The United States Court of Appeals for the District of Columbia Circuit conceded that EPA was not compelled by the statutory

87. NRDC, 25 F.3d at 1067. Further, EPA declared that current regulations would cover any proposed risks which mismanagement of the oils would pose. Id. The remaining oils did not meet the initial threshold requirements to mandate a listing. Id.

88. Id. at 1063.

89. Id. at 1064. Prior to addressing the merits of the case, the court addressed the argument that petitioners lacked standing to raise this claim. Id. at 1067. Intervenors argued that since used oil is already regulated under RCRA Subtitle C, there was no basis for an injury to the petitioners for EPA's failure to regulate a substance under the same regulation. Id. The court concluded that the failure of the petitioners to establish a right to relief did not bar them from crossing the "threshold of justiciability." Id.


91. NRDC, 25 F.3d at 1069-70. The Agency adopted a construction of the statute which afforded it considerable discretion when employing any of the three criteria utilized in making listing determinations. Id. See Identification and Listing of Coke By-Products Wastes, 57 Fed. Reg. 37,288 (1992). For further discussion of the three listing criteria, see supra note 19 and accompanying text.

92. NRDC, 25 F.3d at 1069. The court recognized the Agency's authority to exercise its discretion, either in a broad or narrow manner, under the criteria set forth in the statute relating to the listing of a particular waste. Id. Thus, the court permitted EPA to decide whether to list every substance which exhibits a certain characteristic or not to list such a substance, based upon the fulfillment of particular criteria. Id.
language in RCRA to list a substance on the sole basis that the substance exhibits a single characteristic. On the contrary, the Administrator has been allowed broad discretion in making listing determinations under section 6921(a) provided that a decision is based upon technical criteria promulgated in the statute.

By examining congressional intent and the plain meaning of the language in the statute, the court interpreted the broad power delegated to EPA by Congress as manifesting the intention to give the Agency “substantial room to exercise its expertise in determining the appropriate grounds for listing.” The court relied primarily on its prior decision in HWTC that EPA may not rely on extraneous factors when making a listing determination. Further, the court mandated that the support for the Agency’s decision must come from technical criteria listed in the statute.

The court concluded that EPA’s interpretation of its listing regulations under RCRA section 6921 did not pose a contrary result. Due to the wide discretion afforded to EPA, the court held that after examining the congressional intent behind the statute, that EPA interpretations of RCRA were reasonable and consistent with its grant of authority under the statute. The court determined

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93. *Id.* at 1069. The petitioners alleged that EPA’s decision not to list used oil was contrary to law, and that RCRA obligated EPA to list oils if they exhibit toxicity. *Id.* at 1067-68; 40 C.F.R. § 261.11(a)(1).

94. *NRDC*, 25 F.3d at 1067. For further discussion of EPA decisions based on technical criteria, see *supra* notes 39-67 and accompanying text.

95. *Id.* at 1070. The court evaluated petitioner’s claim that the Administrator lacked discretion to decline to list used oil. *Id.* at 1067. Petitioners alleged that the word “shall” indicates a lack of discretion on the part of the Agency in listing decisions. *Id.* at 1068. The court, however, rejected the argument on the grounds that the petitioners misquoted the statute by omitting the word “only.” *Id.* By inserting “only” into the statute, it establishes the presence of a toxic characteristic as a prerequisite to listing, but not an obligation to list. *Id.* at 1068.

96. *Id.* at 1069. The court restated its decision in HWTC that due to the HSWA, EPA was expressly directed not to rely on extraneous factors, but to base determinations “under section 6921.” *Id.*

97. *Id.* The court stated that “EPA is required by statute to base its used oil listing decisions exclusively on its technical listing criteria promulgated under RCRA section 6921.” *Id.* at 1069.

98. *NRDC*, 25 F.3d at 1069. Petitioners argued that EPA applied contradictory interpretations of sections (a)(1) and (a)(3). *Id.* The court found that the statutory section allowed the Administrator to base the decision on any of the three grounds for listing in the regulation. *Id.* For discussion of the three grounds for listing, see *supra* note 17. Thus, the Administrator could list used oil as hazardous on the grounds that it exhibits the toxicity characteristic. *Id.* at 1069.

99. *NRDC*, 25 F.3d at 1067-70. The court examined other listing determinations, and recognized that the interpretation of C.F.R. § 261.11 devised to EPA broad discretion when considering any of its three listing criteria for hazardous wastes. *Id.* at 1069.
that the petitioners failed to establish a "blatant inconsistency with regulatory language that would justify [the court's] rejection of EPA's interpretation of its own regulation." In the same way, EPA has been free to deemphasize or emphasize any of the factors considered when making the listing determination. Therefore, EPA was within its authority not to list used oil as a hazardous waste even though the substance exhibited toxicity characteristics.

The court dismissed the petitioners' argument that EPA acted arbitrarily in its decision since "no other environmental statute can regulate disposal as effectively as Subtitle C's expansive 'cradle-to-grave' hazardous waste disposal mechanism." While EPA listing criteria require that EPA consider other regulatory programs when trying to control a hazardous substance, the court refused to consider the argument finding that it was not raised in a timely manner.

The petitioners also challenged EPA's reliance on the toxicity characteristic leaching procedure ("TCLP") as tending toward under-regulation of hazardous wastes. The court looked to the

100. Id. at 1068. The court reached its decision by stating an analogy. Id. While examining the meanings of "only" and "shall," the court found that the statement "'cross only if the light is green'" did not prohibit pedestrians from considering other factors when deciding whether or not to cross. Id. Thus, the court asserted, the same reasoning holds true for the EPA interpretation of RCRA. Id. The court also referred to Stinson and HWTC in recognizing an agency's interpretation of its regulations. Id. at 1068-69 (citing Stinson, 113 S. Ct. at 1919; HWTC, 938 F.2d at 1395).

101. Id. at 1071. Looking to precedent and the criteria set forth in the statute, the court determined that EPA had been afforded great discretion to give greater weight to factors which it deemed appropriate. Id. See Reilly, 969 F.2d at 1150; Lo Shippers, 857 F.2d at 806.

102. NRDC, 25 F.3d at 1074. The court held that the agency was free to evaluate the substance under the balancing test set forth under the statute. Id. For further discussion of the criteria considered under the balancing test, see supra note 17.

103. NRDC, 25 F.3d at 1072 n.4.

104. Id. at 1067 n.3. The court concluded that the petitioners first raised this argument in their reply brief, not allowing EPA sufficient time to prepare for this argument. Id. Accordingly, the court dismissed the argument. Id.

105. Id. at 1072-73. The petitioners relied upon several instances where EPA discovered the application of TCLP to be problematic. Id. at 1072. Consequently, EPA concluded that the use of the TCLP test would result in underregulation of hazardous used oils. Id. (citing 55 Fed. Reg. 46,354 (1990)), which stated that TCLP test "tends to underestimate the leachability of hazardous constituents from oily wastes"). See also 55 Fed. Reg. 11,851 (1990) ("It is particularly difficult to predict the behavior of oily wastes in the TCLP test."); SCIENCE APPLICATIONS INTERNATIONAL CORP., USED OIL CHARACTERIZATION SAMPLING AND ANALYSIS PROGRAM (Aug. 30, 1991) (report prepared by EPA contractor indicating that clogging during TCLP "introduced potential measurement errors" into EPA's commissioned study of used oil toxicity).
applicable time for judicial review and determined that it had lapsed so there was no acceptable forum within which this argument could be heard. 106

B. Dissent

Judge Wald concurred in the majority’s analysis of the issue involving statutory construction. 107 Judge Wald dissented, however, from the majority’s refusal to consider the petitioners’ challenge to the testing procedure on the notion that it was not timely raised. 108 Although the majority accepted EPA’s statutory interpretation and the decision not to list, the majority did not require EPA to present any factual basis for its decision. 109

Judge Wald stated that the majority should have analyzed current management practices for used oil in the interest of ensuring proper management of the substance. 110 Further, Judge Wald found that barring the challenger’s arguments was inappropriate because the majority’s analysis ignored the rationale for the decision. 111 Referring to a previous case before the United States Court of Appeals for the District of Columbia, Judge Wald recalled that

106. NRDC, 25 F.3d at 1072-73. The decision by EPA to use the TCLP test to identify toxic characteristics in solid wastes, including used oil, was handed down on March 29, 1990. Id. at 1073. According to RCRA § 7006(a), a petitioner has ninety days to seek judicial review of this petition. Id. at 1073.

107. Id. at 1078. For further discussion of the majority’s holding, see supra notes 93-106 and accompanying text.

108. Id. at 1074 (Wald, J., dissenting). The petitioners claims were found not to be timely raised on appeal and not to be timely raised below. Id. at 1078. Thus, the arguments addressing the past records of mismanagement of used oil and EPA’s disregard of plausible management scenarios were not heard. Id. For further discussion of the court’s decision to dismiss petitioners arguments, see supra notes 106-09 and accompanying text.

109. NRDC, 25 F.3d at 1080. The majority relied upon a reading of the relevant section of the petitioners’ brief in concluding that the petitioners were not attacking EPA on the grounds that the decision lacked factual support. Id. at 1071 n.4. Instead, the court found the argument to be based upon the “plain language and purpose [of RCRA and the agency’s regulation, which] forecloses EPA from concluding that any plausible mismanagement of used oil will not occur.” Id. Thus, the court stated that to entertain the petitioners’ argument would be unfair to the Agency, since EPA did not have proper notice of the attack by the petitioners on the factual sufficiency of the decision. Id.

110. Id. at 1078. Instead, the dissent and the executive director of the HWTC, asserted that the “two judges ‘turned themselves into a jurisprudence pretzel to come to this decision.’” COURT UPHOLDS EPA DECISION THAT USED OIL SHOULD NOT BE LISTED AS HAZARDOUS UNDER RCRA, 25 ENV’T REP. (BNA) 229 (1984).

111. NRDC, 25 F.3d at 1080. The petitioners challenged EPA evidence supporting a no-listing decision. The majority, however, invoked principles of appellate briefing, resulting in the claim never being considered. Id. at 1078-80. Consequently, without a timely argument attacking the evidence for the decision, the court did not have to consider the basis for the decision. Id. The dissent ar-
the court "only recently . . . held that the EPA could not presume without evidentiary support that hazardous waste would be managed in a particular, undesirable manner." Further, the dissent reasoned that the same standard should be applied in the present case, requiring EPA to cite evaluations rendering the current mismanagement standards as sufficient for the no-list decision.

Judge Wald emphasized that "EPA need[ed] to make its case that existing regulation of used oil are enough; to require less would turn rulemaking and appellate review into a game of hide and seek . . . ." For this reason, the dissent favored reconsideration of the decision to evaluate the assessment of the regulatory scheme designed to prevent used oil from contaminating the environment.

C. Critical Analysis: The District of Columbia's Inadequate Discussion of EPA Authority

The Court of Appeals for the District of Columbia correctly analyzed EPA's statutory interpretation by engaging in the Chevron two-step analysis. Pursuant to the first step of this analysis, the court was required to decide whether Congress clearly intended to obligate the Administrator to list a substance exhibiting a toxic characteristic. Second, if Congress was found not to have directly addressed this issue, the court must determine whether the agency's construction of the statute was permissible, rational, and

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112. Id. at 1080 (citing Edison Elec. Inst. v. EPA, 2 F.3d 438). The dissent further discussed the treatment of Edison Elec. by the court in NRDC, commanding that "the [a]gency must at least provide some factual support for its conclusion that such a mismanagement scenario is plausible." NRDC, 25 F.3d at 1080 (quoting Edison, 2 F.3d at 446).

113. NRDC, 25 F.3d at 1080 (Wald, J., dissenting). Judge Wald would have remanded the decision for further examination of the "regulatory landscape" EPA relied upon for its no-list decision. Id.

114. Id. at 1080 (Wald, J., dissenting).

115. Id. Since EPA has wrestled with this decision for over fifteen years, and has withdrawn its previous proposal to list used oil, the dissent asserted that an adequate factual basis should have been shown to support this decision. Id.

116. NRDC, 25 F.3d at 1068-70. For further discussion of the two-step analysis evaluating an agency's statutory interpretation, see supra, notes 44-47 and accompanying text.

117. NRDC, 25 F.3d at 1068-70. The court found that the word "only" used in the statute granted EPA discretion in its listing decisions. Id. at 1069. For further discussion of the court's examination of congressional intent, see supra notes 39-67 and accompanying text.
consistent with the statute.\textsuperscript{118} The court sought to ascertain the intent of Congress, and concluded that Congress' broad delegation of power to EPA to develop listing criteria illustrates its intent for the Agency to have substantial room in decision making.\textsuperscript{119}

While the court's opinion in \textit{NRDC} appeared to be consistent with existing case law, the amount of discretion allowed EPA by the \textit{NRDC} court increases the already broad discretion afforded to EPA in its listing determinations. In previous cases, the Court of Appeals for the District of Columbia limited EPA's decision making by demanding that evidence be shown to support the Agency's determinations.\textsuperscript{120} This limitation was narrowed in \textit{HWTC}, when the court held that the decision must be based upon the technical criteria set forth in the statute.\textsuperscript{121} In \textit{NRDC}, however, the court afforded EPA broad discretion in its decision regarding used oil.\textsuperscript{122} Specifically, the court did not require that EPA show that specific criteria were met or provide any evidentiary support.\textsuperscript{123}

While the holding in \textit{NRDC} was a logical extension of the reasoning behind the court's decision in \textit{HWTC}, the \textit{NRDC} court failed to examine the basis for EPA's listing decision, assuming that EPA relied upon technical criteria. In \textit{HWTC}, however, the court mandated that the EPA decision be founded upon the criteria set forth in RCRA.\textsuperscript{124}

Notably, the dissent in \textit{NRDC} correctly pointed out that the District of Columbia Court of Appeals should have considered arguments relating to the factual basis for such a decision, since this is

\textsuperscript{118} \textit{Chevron}, 467 U.S. at 843. Through its analysis the court did not find any inconsistencies with the statutory language and EPA's interpretation to warrant a rejection of EPA's interpretation. \textit{NRDC}, 25 F.3d at 1068.

\textsuperscript{119} \textit{NRDC}, 25 F.3d at 1070. The court, after examining the statute, concluded that the multi-factor balancing test allowed EPA to consider "such factors as may be appropriate." \textit{Id.} at 1069. Thus, the court interpreted this language as permitting wide discretion for EPA listing decisions. \textit{Id.} \textit{See also \textit{NRDC}, 907 F.2d at 1159 n.12; Identification and Listing of Coke By-Products Wastes, 57 Fed. Reg. 37,288 (1992).}

\textsuperscript{120} \textit{See HWTC}, 861 F.2d at 270. The court in \textit{HWTC} remanded the EPA decision for further consideration, since EPA had considered stigmatic consequences not listed within the statutory language of RCRA. \textit{Id. For further discussion of HWTC, see supra notes 39-58 and accompanying text.}

\textsuperscript{121} \textit{HWTC}, 861 F.2d at 270. The court noted that it "expressly forbade" EPA to consider extraneous factors when making its listing determinations. \textit{See NRDC, 25 F.3d at 1069.}

\textsuperscript{122} \textit{NRDC}, 25 F.3d at 1074 (Wald, J., dissenting).

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} \textit{HWTC}, 861 F.2d at 270-74. For further discussion of \textit{HWTC}, see \textit{supra} notes 39-58 and accompanying text. \textit{See also Karlin, supra note 26; John Quarles & Arline M. Sheehan, Superfund, and Toxic Substances, Recent RCRA Developments, C352 ALI-ABA 367 (1988).}
critical to a complete analysis of an EPA determination.\textsuperscript{125} The court should have clearly allowed the merits to be heard, rather than “risk reaching an improvident outcome by refusing to review the factual basis (or lack thereof) for the EPA’s decision.”\textsuperscript{126}

The particular basis for EPA’s decision was critical to the fairness of the decision, especially in light of the \textit{Edison Electric} decision.\textsuperscript{127} It must be noted that the court previously demanded a showing from EPA “to provide some factual support for its conclusion that such a mismanagement scenario is plausible.”\textsuperscript{128} In the instant case, EPA should have been compelled by the court to prove that existing regulations concerning used oil are sufficient. By failing to do so, the court overlooked an important opportunity to prevent a potential tragedy, especially with the “high stakes involved for clean air, soil, and groundwater.”\textsuperscript{129}

\textsuperscript{125.} NRDC, 25 F.3d at 1072. The court concluded that the petitioners’ challenge to the factual basis of EPA’s decision would not be addressed. \textit{Id.} In reaching its decision, the court relied on procedural rules and existing case law requiring that the argument be raised in the opening brief. \textit{Id.}

The dissent contested the majority decision dismissing the petitioners’ arguments, asserting that the petitioners in their first brief “challenged EPA’s determination that other environmental statutes controlled any plausible mismanagement scenarios.” \textit{Id.} at 1078. In previous examinations of the situation, EPA compiled numerous fact findings illustrating the threatening capacity of used oil on the environment and human health. \textit{Id.} at 1075. EPA determined that used oils “are capable of causing (indeed, repeatedly have caused) substantial harm if mismanaged.” \textit{Id.}

\textsuperscript{126.} \textit{Id.} at 1079 (Wald, J., dissenting). Judge Wald asserted that, rather than dismissing the claim, the court could have ordered supplemental briefing to provide EPA with an opportunity to respond to petitioner’s argument. \textit{Id.} Further, the court’s failure to consider either the factual basis or current management practices for oil in upholding EPA’s decision not to list used oil as a hazardous waste was criticized as being “intellectually dishonest” by Richard Fortuna, the Executive Director of the HWTC. \textit{25 ENV’T REP. (BNA) 229} (1994).

\textsuperscript{127.} NRDC, 25 F.3d at 1079-80. Recently, the Court of Appeals for the District of Columbia held that “the EPA could not presume without evidentiary support that hazardous waste would be managed in a particular, undesirable manner.” \textit{Id.} at 1080 (quoting \textit{Edison}, 2 F.3d at 438). The court required EPA to produce evidence to support its contention that waste had been disposed of in a particular manner; lacking such support, the decision could not stand. \textit{Edison}, 2 F.3d at 446.

The court has previously either vacated or remanded EPA decisions which lacked evidentiary support based upon the technical criteria in the statute. For further discussion of the court’s treatment of past EPA decisions, and the support demanded by the court, see supra notes 39-67 and accompanying text.

\textsuperscript{128.} NRDC, 25 F.3d at 1080 (Wald, J., dissenting) (quoting \textit{Edison}, 2 F.3d at 446). The dissent noted that EPA has not been afforded the presumption that a hazardous waste would be mismanaged in a particular situation, without any evidentiary support. \textit{Id.} (citing \textit{Edison}, 2 F.3d at 438).

\textsuperscript{129.} \textit{Id.} at 1080 (Wald, J., dissenting). The dissent reasoned that EPA had not produced any records as to whether the statutory framework which is to prevent contamination of the environment will work in practice. \textit{Id.}
V. The Lasting Effects of the EPA Decision

The NRDC holding will likely have the effect of increasing the discretion of EPA. The court's reasoning makes it clear that future EPA listing decisions will be upheld as long as EPA has some grant of authority to make the determination, regardless of considering any management practices or the factual basis for the listing determination. There is no specific grant of authority allowing EPA to apply its expertise determining the listing of substances, since no criteria were held by the court to be compelling. Congressional intent, as shown through the inquiries established by the court, is to be controlling. The idea that Congress intended EPA to have wide discretion in determining, based upon its expertise, that a substance should or should not be listed regardless of any threatening characteristics it may exhibit, was illustrated in NRDC. Consequently, it will be up to EPA alone to determine the listing of a substance, without any checks upon its authority or discretion. Ultimately, the only limitations placed upon EPA for its decision are grounded in statutory criteria.

The NRDC decision should please businesses, specifically oil recyclers, who will not be burdened with the exorbitant costs associated with hazardous waste treatment, storage and disposal. Additionally, the fear of decreasing incentive to recycle by listing used oil should diminish. Instead, according to EPA's rationale, businesses will now have a greater motivation to recycle without fear of EPA action.

130. Id. at 1070. For a discussion concerning how congressional intent is controlling under the two-step analysis, see supra notes 44-47 and accompanying text.

131. NRDC, 25 F.3d at 1070. Since the petitioners failed to establish that EPA was required by statute to list every waste which displayed a hazardous characteristic, the court could not hold the EPA interpretation to contravene the statute. Id.

132. HWTC, 861 F.2d at 270. For further discussion of the court's holding in HWTC that EPA was not to consider stigmatic consequences, see supra notes 39-58 and accompanying text.

133. Thomas Wolfe, Realistic Recycling, 37 Fed. B. News & J. 90 (1990) (stating that if used oil were listed as hazardous waste, legislators feared few would handle waste because of accompanying burdens of treatment, disposal and storage regulations). See Rodgers, supra note 27 (noting economic arguments raised by those against treating used oil as hazardous waste contending listing would be accompanied by Superfund liabilities which would discourage recycling activities).

134. See Beiring, supra note 2, at 174 (discussing EPA's decision not to list used oil as justified on grounds that listing used oil would discourage recycling and cause increase in uncontrolled dumping). See also, NRDC, 25 F.3d at 1066 (Agency's decision rested upon assertion that listing used oil would discourage recycling); Russiello, supra note 1, at 177 (listing used oil as hazardous waste would lead to uncontrolled dumping).
By inference, the incentive for businesses cannot be obtained without a detrimental effect on the environment. The adverse impact used oil has on the environment is significant. Since mismanaged used oil can migrate by land, air and sea, its impact will be felt throughout our ecosystem.\textsuperscript{135} Previous compilations of records reporting over eighty major mismanagement incidents contaminating the ground or drinking water with lead illustrate the potentially threatening impact used oil can have on the environment.\textsuperscript{136} Additionally, the toxic constituents contained in oil are capable of migrating into hazardous concentrations which can lead to further pollution of water, soil, crops, and damage plant and animal life if mismanaged.\textsuperscript{137} Human lives can also be seriously impacted by the toxic constituents present in used oil, causing liver and kidney damage, reproductive disorders, dysfunctions to the nervous system, heart failure and stillbirths.\textsuperscript{138}

The failure to strictly enforce the treatment of used oil could result in a careless waste of a limited resource.\textsuperscript{139} A major source of United States petroleum used for lubricating oil is already being seriously depleted.\textsuperscript{140} EPA estimates that by 1997, 230 million gal-

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\textsuperscript{135} Beiring, \textit{supra} note 2, at 161, states the following:

Oil and its contaminants can seep into soils, migrate into groundwater, and runoff into surface waters. Improper burning of used oil can result in oil entrained in airborne dust particles, and emissions containing high concentrations of heavy-metals. "Burning of used oil mixed with other hazardous wastes often creates products of incomplete combustion which can be carcinogenic." \textit{Id. See also} Identification and Listing of Hazardous Waste, 56 Fed. Reg. 48,034 (1991) (to be codified at 40 C.F.R. pts. 261, 266).

\textsuperscript{136} \textit{NRDC}, 25 F.3d at 1075 (citing 50 Fed. Reg. 49,267). The cost to clean up these sites ranges from $10,000 to $5,150,000 per site. \textit{Id}. \textit{See also} U.S. Environmental Protection Agency, Listing Waste Oil As a Hazardous Waste: Report to Congress (joint appendix) 103 (1981) (describing the possibility of ground water becoming non-potable due to contamination by used oil).

\textsuperscript{137} \textit{NRDC}, 25 F.3d at 1077. \textit{See also}, RODGERS, \textit{supra} note 27 (discussing well-documented reports of potential of used oils to pollute drinking water). Further, the evacuation of Times Beach and Love Canal exemplify toxic disasters which could potentially result from the mismanagement of used oil. RODEGERS, \textit{supra} note 27.


\textsuperscript{139} \textit{See} Beiring, \textit{supra} note 2, at 158; \textit{Recycling of Used Oil: Hearing Before the Senate Committee on Environment and Public Works}, 96th Cong., 2d Sess. 2 (1980).

\textsuperscript{140} \textit{See infra} note 142. \textit{See also} Beiring, \textit{supra} note 2, at 158.
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Ions of used oil will be generated annually from households.\textsuperscript{141} With regulations setting forth the proper management of used oil, the oil could be cleansed properly and used again, lengthening the life of this resource.

The purpose of used oil programs "[are] to protect the environment from spills and improper disposal, to conserve energy, and to preserve petroleum resources. This requires efforts to prevent illegal dumping, isolate used oil from other wastes for recycling, and ensure that collected oil is properly handled."\textsuperscript{142} If used oil were listed, regulations could emphasize lower safety regulations and require recyclers to follow specific cleansing procedures.\textsuperscript{143} It remains to be seen which federal regulations will apply to suits regarding the mismanagement of used oil. The numerous regulations involving environmental procedures could provide a loophole for careless mismanagers to slip through.\textsuperscript{144} It will ultimately be up to EPA in its future actions to ensure the proper management of used oil.

\textit{Susan M. Kanapinski}


\textsuperscript{142} Beiring, \textit{supra} note 2, at 169 (quoting Michael L. Courtright, \textit{Used Oil: Don't Dump It, Recycle It}, \textit{MACHINE DESIGN}, Oct. 25, 1990, at 82).

\textsuperscript{143} Rusiello, \textit{supra} note 1, at 181-82 (discussing why used oil should be listed under RCRA as hazardous).

\textsuperscript{144} See \textit{HWTC}, 861 F.2d at 271 (court discussing maze of statutes involving hazardous wastes it must muddle through in deciding the case before it). See gener-
ally R. Zener, \textit{GUIDE TO FEDERAL ENVIRONMENTAL LAW} xv (1981) (stating that "there has been a proliferation of new Federal environmental statutes. . . . Each new federal environmental statute contains a maze of detailed and complex provi-
sions, which the EPA has sought to implement through voluminous regulations"); Yang, \textit{supra} note 5, at 1368 ("EPA's statutory framework is among the most compli-
cated in the federal government.").