IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

LOS ALAMOS STUDY GROUP and CONCERNED CITIZENS FOR NUCLEAR SAFETY,	)	
Plaintiffs,	)	
v.	)	No. 94-1306-M Civil
HAZEL O'LEARY, Secretary of Energy, and DEPARTMENT OF ENERGY,	)	
Defendants.	)	

DECREE

OF

PRELIMINARY INJUNCTION

Pursuant to the findings and conclusions set forth in the Memorandum Opinion accompanying this Order and entered this date, and the court being fully advised in the premises,

IT IS HEREBY ORDERED that the Motion for Preliminary Injunction filed by plaintiffs Los Alamos Study Group and Concerned Citizens for Nuclear Safety on November 16, 1994, should be, and is hereby, GRANTED.

IT IS FURTHER ORDERED that the defendants Hazel O'Leary, Secretary of

Energy and the Department of Energy, shall prepare a comprehensive environmental impact statement of the Dual-Axis Radiographic Hydrotest ("DARHT") facility at Los Alamos National Laboratories, as announced in their Notice of Intent published in **59 Fed. Reg. 60134**, pursuant to the National Environmental Policy Act, **42 U.S.C. § 4332(2)(c)** and the regulations promulgated by the Council on Environmental Quality, that includes disclosure and evaluation of the following:

A. The direct and indirect environmental effects of all major federal actions involving the construction and operation of the DARHT facility, for both the first and the second accelerator projects;

B. How each major federal action involving the construction and operation of the DARHT facility, in conjunction with all related or connected actions, as well as past, present, and reasonably foreseeable future actions, cumulatively or synergistically impact the quality of the human environment;

C. A reasonable range of alternatives to each major federal action involving the construction and operation of the DARHT facility, as listed in the defendants' Notice of Intent referred to above.

IT IS FURTHER ORDERED that defendants are hereby **ENJOINED** from all further construction of the DARHT facility, including procurement and installation of the Special Facilities Equipment stage, or from taking any other actions in furtherance thereof **PENDING** the completion of an environmental impact statement and record of decision, and review of the same as required under the applicable regulations. Prohibited actions do not include measures necessary to prepare for the delay in

construction and operation, or to preserve and support the integrity of the existing facility and physical plant.

IT IS FURTHER ORDERED that, pursuant to **Fed. R. Civ. P. 65(c)**, plaintiffs shall be required to post SECURITY in the amount of **One Hundred Dollars ($100.00).**

IT IS FURTHER ORDERED that the court shall retain jurisdiction over this case for the purpose of hearing and resolving any dispute between the plaintiffs consumer groups and the Department of Energy regarding the adequacy of the final environmental impact statement. Thereafter, upon good cause showing, the injunction shall be dissolved. In the interim, this action is hereby **ADMINISTRATIVELY TERMINATED**. The Clerk of Court shall administratively terminate this action in his records, without prejudice to the right of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination to the litigation.

IT IS SO ORDERED.

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

LOS ALAMOS STUDY GROUP and CONCERNED CITIZENS FOR NUCLEAR SAFETY,

Plaintiffs,

v.

HAZEL O'LEARY, Secretary of Energy, and DEPARTMENT OF ENERGY,

Defendants.

No. 94-1306-M Civil

MEMORANDUM OPINION AND ORDER

This matter comes on for consideration on Plaintiffs' Motion for Declaratory Relief and Preliminary Injunction. Having considered the motion and responses and being otherwise fully advised in the premises, I find that plaintiffs's motion for preliminary injunction is well taken and is hereby granted, and that consideration of plaintiffs' motion for declaratory judgment will be deferred until a trial on the merits.

BACKGROUND

Plaintiffs are non-profit consumer groups which seek to enjoin the construction now in progress for the Dual-Axis Radiographic Hydrotest ("DARHT") facility at Los Alamos National Laboratories until the Department of Energy ("DOE") completes an environmental impact statement ("EIS"). Plaintiffs' motion is based on the agency's alleged failure to prepare an EIS to analyze and disclose the facility's environmental consequences, as required by the **National Environmental Policy Act, 42 U.S.C. § 4321 - § 4361.**

I. Description of DARHT

DARHT is a radiographic facility which will use hydrotesting to provide advanced diagnostic evaluation of nuclear weapon components to ensure their safety, reliability and performance. DARHT is basically a huge x-ray machine that allows scientists to peer into nuclear weapon components as they are subjected to the impact of a non-nuclear explosion, mimicking the first of the two steps in a complete nuclear detonation.

The Department of Energy has planned the construction of DARHT in three phases. The general support facility, the Radiographic Support Laboratory, was completed in 1990. The second and third phases are currently under construction. The Hydrodynamic Firing Site, about 20% complete, is the facility where hydrodynamic testing will be performed and is scheduled for completion in early 1996. The Special Facilities Equipment phase, consisting of the procurement and installation of the first accelerator and support equipment should be completed in 1996 and 1997,

respectively. Operations of the DARHT facility with the first accelerator is scheduled for operation in 1997. The second accelerator project is not scheduled to begin until January 1997 with start-up slated for December 2000.

II. History of the Case

A. NEPA Requirements

The National Environmental Policy Act of 1969 ("NEPA") created a national policy to "encourage productive and enjoyable harmony between man and his environment." **42 U.S.C. § 4321.** NEPA charges federal agencies with the responsibility of considering every significant aspect of the environmental impact of a proposed action. Baltimore Gas & Electric Co. v. Nat'l Res. Defense Council, **462 U.S. 87 (1983).** Through the process, the public is ensured that the agency has indeed considered the environmental effects in making decisions. Id.; See Protect Key West, Inc. v. Cheney, **795 F.Supp. 1552, 1560-61 (S.D. Fl. 1992).**

NEPA directs agencies to prepare a detailed statement on the environmental impact for all "major Federal actions significantly affecting the quality of the human environment." This "hard look" is to take into account various factors: environmental impact, unavoidable adverse effects, alternatives to the proposed action, the relationship between short-term uses and long-term productivity and irreversible commitments of resources called for by the proposal. Sierra Club v. Hodel, **848 F.2d 1068, 1093 (10th Cir. 1988)** rev'd on other grounds, **949 F.2d 362 (10th Cir. 1991); 42 U.S.C. § 4332(2)(C)(i-iv).** The Council on Environmental Quality ("CEQ") was formed in 1970 to promulgate regulations binding federal agencies in implementing

NEPA. 42 U.S.C. § 4342; Exec. Order No. 11,991 of May 24, 1977, 10 C.F.R. 1021.1(b) (1987). CEQ regulations set out the basic requirements for compliance, including instructions to agencies in the technical preparation of NEPA documents. CEQ also directs agencies to formulate their own implementing procedures, for example, by identifying and developing categories of activities which require varying levels of NEPA documentation, including "categorical exclusions" which are exempted from the NEPA review process. 40 C.F.R. § 1501.3; 40 C.F.R. § 1501.4; 1507.3.

Unless an action has been categorically excluded, CEQ regulations under NEPA require an Environmental Assessment ("EA") to be prepared for all major federal actions as a kind of crossroads in the compliance process. The EA is followed either by a finding that the action will have no significant impact on the human environment ("FONSI") or by the preparation of an Environmental Impact Statement ("EIS"). 40 C.F.R. § 1501.4; see Sierra Club v. Hodel, 848 F.2d at 1093; Protect Key West, 795 F.Supp. at 1561. The present controversy centers largely around DOE's use of a categorical exclusion for exemption of the DARHT facility from either an EA or an EIS. I review the somewhat elaborate history behind the exclusion as well as the exclusion's application to the DARHT project to illuminate the backdrop against which the issues are raised.

B. DOE's Categorical Exclusion

Plaintiffs allege that defendants violated NEPA not only by creating an exclusion which was invalidly promulgated but also by relying on an exclusion different from the one actually created in order to exempt the DARHT facility from the usual NEPA process. In 1979 and 1980, DOE promulgated regulations pursuant to the CEQ directive with a simple and brief announcement that it adopted the CEQ regulations for "implementing the procedural provisions of NEPA." **55 Fed. Reg. 45918 (1979) (codified at 10 C.F.R. § 1021.2)(1987))**. These DOE regulations did not contain any categorical exclusions. At the same time, DOE published guidelines which included categories of typical classes of activities requiring various levels of NEPA scrutiny including "categorical exclusions." **Proposed Guidelines for Compliance with NEPA, 44 Fed. Reg. 42136 (1979); Final Guidelines, 45 Fed. Reg. 20694 (1980).**

The "categorical exclusions" in DOE's 1980 guidelines were:

> Proposed actions which are the same as other actions for which the environmental effects have already been assessed in a NEPA document and determined by DOE to be clearly insignificant and where such assessment is currently valid.

Final Guidelines, Section D, 45 Fed. Reg. 20700 (1980). If the action was not within the typical classes of actions listed in Section D, the guidelines provided that DOE review the "individual proposed action" and determine that neither an EA nor an EIS was required "where it [was] clear that the proposed action [was] not a major Federal action significantly affecting the quality of the human environment." **Final Guidelines, Section A, paras. 3(b),(c)(1), 45 Fed. Reg. 20696 (1980).** If so determined, a "brief

memorandum ["Memo to File" or "MTF" was] prepared," explaining the basis for the determination that no NEPA documentation was required. Id. **at para. 3(c)(1).** However, if it was not immediately clear that the proposed action would have no significant environmental effects, then an Action Description Memo ("ADM") was prepared and submitted to the Environmental Programs Branch of the DOE for a "determination of the appropriate level of NEPA documentation." **Webb Decl., ¶ 7.**

The above measures were in place at the time DARHT was first conceived in the early 1980's.

C. DARHT and the Exclusion

DOE conducted a site-wide environmental impact statement for Los Alamos National Laboratories ("LANL") in 1979, and issued a record of decision in 1981. The EIS included consideration of hydrotesting at the existing Pulsed High Energy Radiation Machine Emitting X-Rays ("PHERMEX") facility which had been in use since 1961.

DOE first considered DARHT in an Action Description Memorandum prepared in August 1982, revised in February 1984 and again in July 1987 to take into account modifications to the DARHT facility. The ADMs generally acknowledged existing negative environmental effects, stating an intention to minimize them in compliance with environmental regulations.

Because the 1982 ADM contained "substantial analysis and evaluation," it was sent to DOE Headquarters to determine the appropriate level of NEPA review. **Webb Decl., ¶ 8.** The ensuing Memo-to-File stated that the proposed action "clearly will not

have a significant impact on the human environment. . . ". **MTF from R. Stern, Dir., DOE Ofc. of Env. Compliance, Docs., Tab 7.**

The 1984 and 1987 ADM revisions on DARHT were both followed by Memos-to-File issued from the Albuquerque office determining that neither an EA nor an EIS needed to be performed. The MTF addressing the 1984 revision concluded that the proposed DARHT project was "not [a] major Federal action significantly effecting the quality of the human environment." **MTF from P. Ramey, Dir., Env., Safety & Health Div., Albq. office, Docs. Rel. to DARHT, Tab 9.** The MTF responding to the 1987 ADM decided that the environmental effects were "[s]ubstantially the same as actions previously evaluated in existing NEPA documentation and determined to be insignificant, [and that therefore] further NEPA was not required," the language closely, but not exactly, mirroring that of the Section D categorical exclusion from the guidelines. **MTF from C. Soden, Chief, Albq. Env. Progr. Branch, Docs., Tab 11.** Placing DARHT within this category virtually excluded the DARHT facility from the NEPA process and resulted in no actual NEPA documentation ever being generated for the project.

D. After the Exclusion

In February, 1990, Secretary of Energy James Watkins revoked the Section D categorical exclusion, along with the use of the Memo-to-File because of suspected abuses of the process leading to questionable compliance with NEPA obligations. **Memorandum from Sec. of Energy Watkins to All Operations Ofc. Mgrs., Tab 14; Sec. of Energy Notice (SEN) 15-90 at I(C), Docs., Tab 16.**

In April 1992, DOE promulgated new rules, completely revising 10 C.F.R. pt. 1021. Based on the earlier NEPA guidelines, the rules incorporate an "expanded list of typical classes of actions, including categorical exclusions . . . [which] do not "require the preparation of either an [EA] or an [EIS]." **Final Rule, NEPA Implementing Procedures, 57 Fed. Reg. 15122 (1992) (codified at 10 C.F.R. pt. 1021).** These regulations provide "more specificity and detail than the Guidelines." Id. The exhaustive list of categorical exclusions (requiring neither an EA nor an EIS) spell out agency actions with particularity, **10 C.F.R. § 1021.410, app. A, B,** bear little resemblance to the exclusions set forth in the earlier non-codified guidelines and have no counterpart to the controversial "catch-all" exclusion.

Over a year after the new regulations went into effect, Joseph Vozella, Chief of Los Alamos Area Office's ("LAAO") Environment, Safety and Health Branch, on a review of internal agency documents, determined that "no further NEPA documentation [was] required" for DARHT. The decision rested on a finding that the DARHT project was "encompassed within the [1987 Action Description Memorandum]" and was therefore in compliance with NEPA. **Mem. from Joseph Vozella, Chief, Env., Safety and Health Branch, DOE, LAAO, Docs., Tab 18.**

III. Present Posture of Case

Last October, plaintiffs sent notice to Hazel O'Leary, Secretary of Energy, that they regarded DOE to be in violation of NEPA by continuing to construct DARHT without having completed an adequate environmental assessment of the project. Plaintiffs requested a halt to the construction and the preparation of an EIS. In the last

several months, the parties have engaged in settlement negotiations resulting in a suspension of specialized equipment procurement and in a notice of intent by DOE to prepare an EIS on DARHT. When DOE refused to stop construction on the project, plaintiffs filed this lawsuit.

A hearing on the matter was held on December 9, 1994.

DISCUSSION

I. Laches

Defendants charge plaintiffs with delay in bringing suit, claiming that plaintiffs' action is barred by laches, because plaintiffs first knew of the DARHT project in January but did not send the notice of NEPA non-compliance to Secretary of Energy O'Leary until October 3, 1994.

Mere lapse of time does not amount to laches. Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1339 (10th Cir. 1982). An environmental action may be barred by the equitable defense of laches if 1) plaintiff has delayed unreasonably in bringing suit and 2) defendant has been unduly prejudiced by the delay. Id. The application of laches is within the discretion of the district court. Park County Resource Council v. U.S. Dep't of Agriculture, 817 F.2d 609, 617 (10th Cir. 1987).

There is little factual support to defendants' contention of unreasonable delay on the part of the plaintiffs. The record offers ample evidence to the contrary.

Some general information about the DARHT project was available to the public in 1989 and 1990 through LANL news bulletins and through the local newspaper. Docs., Tab 51 at 6-8. Information contained in the news bulletin was of a general

publicity nature, touting the benefits of a "state of the art" radiographic facility. Id. at pp. 6, 7. The release in the "Los Alamos Monitor" consisted of an article describing congressional funding approval for several laboratory projects; the announcement of a $16.8 million appropriation for DARHT took up one and one-half lines. Id. at p. 8.

Mary Burton Risely, co-founder and co-director of plaintiffs' Los Alamos Study Group ("LASG"), testified that although the group was "loosely formed" to investigate LANL activities, it was not formally organized as a public interest organization until 1993. Risely Aff., Pltfs.' Reply, Ex. 24 ¶ 6. Several months after formally organizing, LASG requested from LANL specific information about NEPA documentation for the DARHT project. Their requests were met with responses which were either incomplete or clouded with misinformation. Id., ¶ 6(b)-(d). Although LANL eventually retracted the misinformation concerning NEPA documentation, it denied LASG's subsequent requests in February and March for a tour of the DARHT facility. Id., ¶ 6(e)-(h). What followed were more letters, apparently unfruitful meetings and more delays in responding to plaintiffs' inquiries about DARHT's construction status and contract information. Pltfs.' Reply, Ex. 24, ¶ h-n. Consequently, plaintiffs did not learn that construction on DARHT had actually begun until early September 1994, after which DOE initiated the settlement negotiations resulting in limited success.

I find that plaintiffs pursued their claim with reasonable diligence and that any delay was due primarily to defendants' stalling. Defendants cannot now point to these delays as a basis for an affirmative defense of laches. Bolstering my finding is an overriding policy that laches is to be used sparingly in environmental cases, because

the named plaintiff ordinarily is not the only victim of the alleged environmental injury. Park Cty. Resource Council, 817 F.2d at 617. However, the facts in the present case are clear enough that I need not rely on this policy to find that laches is inappropriate and does not defeat plaintiffs' claim.

II. Standard of Review

The appropriate standard of review of an agency decision dealing with the NEPA review process is the arbitrary and capricious standard of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A); Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992). While highly deferential to agency matters, the court may set aside an agency decision if it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Friends of the Earth v. Hintz, 800 F.2d 822, 831 (9th Cir. 1986).

The agency finding in this situation, which resulted in no EIS ever being done for the DARHT facility until now, is subject to judicial review. 5 U.S.C. § 701. The purpose of judicial review is simply "to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious." Baltimore Gas, 462 U.S. at 97-98 (cit. omitted). A court can require that the agency follow the NEPA directive to take a "hard look" at the environmental consequences before taking a major action. Id.

Using the appropriate standard of review, I turn to the critical question of whether injunctive relief to stop further construction on DARHT is warranted, pending DOE's completion of an EIS.

III. Injunctive Relief

A preliminary injunction constitutes drastic relief that should be granted only in cases where the necessity for it is clearly established. Potawatomi Indian Tribe v. Enterprise Mgt. Consultants Inc., 883 F.2d 886, 888-89 (10th Cir. 1989). The Tenth Circuit has outlined four prerequisites for the granting of a preliminary injunction: 1) a substantial likelihood that the plaintiff will eventually prevail on the merits; 2) a showing that the plaintiff will suffer irreparable harm without issuance of the injunction; 3) that the threatened injury to the plaintiff outweighs any harm the proposed injunction may pose to the defendant; and 4) a showing that the injunction, if issued, would not be adverse to the public interest. Id. at 889.

The Tenth Circuit relaxes the requirement for substantial likelihood of success if the last three balancing factors tip decidedly in favor of plaintiff, who then need only show a "fair ground for litigation." Potawatomi Indian Tribe v. Enterprise Mgt. Consultants Inc., 883 F.2d at 889 (cit. omitted).; Southern Utah Wilderness Alliance v. Thompson, 811 F.Supp. 635, 641 (D. Utah 1993) (cit. omitted).

Statutory violations in environmental cases do not generally give rise to a presumption of irreparable injury. Amoco Production Co. v. Gambell, 480 U.S. 531, 545 (1987); But cf., Southern Utah, 811 F.Supp. at 641 (injunctive relief presumptively available with substantial likelihood of NEPA violation); Public Service Co. of Colorado v. Andrus, 825 F.Supp. 1483, 1505 (D. Idaho 1993) (dictum) (presumption of irreparable damage in cases involving NEPA violations may still be used by the Ninth Circuit by limiting Amoco's holding to ANILCA-type statutes); Sierra

Club v. U.S. Forest Service, 843 F.2d 1190, 1995 (9th Cir. 1988) (court questioned applicability of Amoco to NEPA violations, but issued injunction based on balancing of harms "if [Amoco] applies"). As the Supreme Court noted, the rejection of the presumption of irreparable harm has little practical consequence in cases involving alleged environmental injury, because in balancing the harms, if such injury is sufficiently likely, the balance will usually favor the issuance of the injunction to protect the environment. Amoco, 480 U.S. at 545 (quoted in Save the Yaak Comm. v. Block, 840 F.2d 714, 722 (9th Cir. 1988).

Jurisdictions which follow the holding in Amoco, including the Tenth Circuit, apply traditional equitable principles of irreparable injury and inadequacy of legal remedies even upon a finding that the agency has violated the NEPA statute. See Sierra Club v. Hodel, 848 F.2d at 1097 (injunction is justified under traditional principles of equity, as applied in the NEPA context) (cit. omitted), Save the Yaak Comm., 840 F.2d at 716; Town of Huntington v. Marsh, 884 F.2d 648, 651 (2nd Cir. 1989); Sierra Club v. Marsh, 872 F.2d 497, 504 (1st Cir. 1989). Some jurisdictions followed this analysis for NEPA cases even before Amoco was decided: State of Wisconsin v. Weinberger, 745 F.2d 412 (7th Cir. 1984) (no presumption mandating an injunction in cases involving NEPA violations); Environmental Defense Fund v. Marsh, 651 F.2d 983, 1005 (5th Cir. 1981) (injunction for NEPA violation often appropriate, but should be limited by general equity principles).

Applying these traditional equitable principles, I now specifically address the four prerequisites underlying consideration of a preliminary injunction.

A. Likelihood of Success on Merits

Defendants claim that although no EA or EIS was completed for DARHT, they performed a "series of environmental analyses" "pursuant to DOE NEPA guidelines in effect at the time" and made a good faith determination that further NEPA documentation was not required for DARHT. **Defts.' Opp. to Pltfs.' Mot. for Prel. Inj. at 9 [hereinafter, "Defts.' Opp."].** Defendants are incorrect in suggesting that the question of whether or not an EIS must be prepared is moot because an EIS is in progress now. On the contrary, the question is central to the plaintiffs' claim that an activity for which an EIS should have been prepared is nonetheless proceeding without the environmental effects having been adequately considered.

The question is also crucial to whether there is a substantial likelihood of success on the merits. I find that plaintiffs offer sufficient evidence demonstrating with sufficient probability that defendants violated NEPA requirements.

Creation of Categorical Exclusion

The plaintiffs' contentions surrounding the categorical exclusion are two-fold: the manner in which defendants ("DOE") created the exclusion and second, use of the exclusion to exempt DARHT from NEPA review. Plaintiffs allege that the exclusion was invalid because it lacked notice-and-comment rule making, thus rendering its invocation arbitrary, capricious and not in accordance with law. Plaintiffs also allege that the exclusion defendants actually relied on differed from the one contained in the 1987 guidelines.

The Administrative Procedure Act sets out specific provisions for public notice, comment and publication a federal agency must follow when promulgating substantive rules. **5 U.S.C. § 553.** However, an administrative agency is not required to promulgate "detailed rules interpreting every statutory provision that may be relevant to its actions." Pulido v. Heckler, **758 F.2d 503, 506 (10th Cir. 1985) (citing** American Power & Light Co. v. SEC, **329 U.S. 90 (1946).**

Even though lacking the binding force or deference accorded a formal rule, Amrep Corp. v. F.T.C., **768 F.2d 1171, 1178 (10th Cir. 1985) (binding policy created through either rule**[making procedures or adjudications), the guidelines could have been formulated to provide "internal guidance" for DOE in carrying out the NEPA review process. **44 Fed. Reg. 42137, III, Note (1979).** Written comments were requested in the proposed guidelines, and referenced in final publication. **44 Fed. Reg. 42136 (1979); 45 Fed. Reg. 20694 (1980).** No notice of a public meeting was given. **5 U.S.C. § 553 (b)(1) (notice of proposed rule making shall include a statement of the time, place, and nature of public rule-making proceedings).** Although DOE had at the same time formally adopted CEQ regulations in 10 C.F.R. pt. 1021, the guidelines containing the exclusion were not codified.

I need not decide at this time whether or not these provisions were valid guidelines or invalid rules because the issue pales beside what I consider to be the stickier aspect of the exclusion, which I turn to next.

Use of the Exclusion

Regulations in place at the time DOE completed the 1987 Action Description Memorandum list factors an agency must consider in order to determine whether the proposed activity would "significantly" affect the environment, and, if present, necessitate the preparation of an EA or EIS. These factors include effects which are highly controversial, highly uncertain or involve "unique or unknown risks." **40 C.F.R. § 1508.27(4), § 1508.27(5);** see Greenpeace U.S.A. v. Evans, **688 F.Supp. 579, 582 (W.D. Wash. 1987).** Given that operations at the DARHT facility will include the use of radioactive and toxic substances, and that proposed nuclear testing is typically met with public controversy, DOE's application of an exclusion for DARHT is questionable at best.

Use of the exclusion is suspect for several other reasons. First, the DARHT project was subjected in 1982, 1984 and 1987 to three Action Description Memoranda, which DOE itself designated as the appropriate process to follow when the action "*fails* the test of clearly insignificant" (emphasis supplied). **Webb Decl., ¶ 7.** In all three situations, DOE responded to the 1982 ADM and its revisions with a determination not to proceed with further NEPA documentation. Given the clarifying function of the ADMs and the language of the findings in the resulting Memos-to-File, it appears DOE was relying on the exclusion in generating all three ADMs, even though the 1987 Memo-to-File copies the exclusion language most closely. Essentially, an agency activity that began with a questionable status as to its significance (thereby precipitating an ADM) repeatedly ended up with determinations that the activity would not have a significant effect on the human environment, and

so qualified within a categorical exclusion. 40 C.F.R. § 1508.4. However, DOE offered no reason or explanation supporting these findings in any of its Memos-to-File. See 40 C.F.R. § 1508.4 (categorical exclusion findings should be based in procedures adopted by agency in implementation of CEQ regulations); Jones v. Gordon, 792 F.2d 821, 828 (9th Cir. 1986) (agency must provide "reasoned explanation of its decision"). This lack of explanation drastically weakens, if not eliminates, any authority behind the conclusions reached by DOE in the Memos-to-File. See Save the Yaak Comm., 840 F.2d at 717 (agency's decision to forego EIS considered unreasonable if agency does not supply a "convincing statement of reasons" why potential effects are insignificant).

Second, the exclusion assumes a past assessment of the action's environmental effects. The last NEPA document was a site-wide EIS completed in 1981, before DARHT was in its initial stages. The ensuing ADMs related to DARHT were memoranda which were internally generated and maintained.

Third, the exclusion requires that this past assessment be "currently valid." Final Guidelines, Section D, 45 Fed. Reg. 20700 (1980). The site-wide EIS, began in 1979 and completed in 1981, hardly qualifies as a currently valid assessment consistent with the purposes of NEPA.

DOE began to revise 10 C.F.R. pt. 1021 in November, 1990, with the final rules in place by April, 1992. 57 Fed. Reg. 15122 (1992). Yet in 1993, three years after the exclusion had been revoked, DOE again determined that no further NEPA documentation would be needed for the DARHT project after conducting a review of

internal agency documents. DOE legitimized this exemption by placing it under the umbrella of the 1987 Action Description Memorandum, suggesting that the exclusion which was operative in 1987 would have the same result in 1993, notwithstanding the fact that the justification for the exclusion was now invalid.

A court need not defer to agency decisions which have not considered relevant factors and lack a rational basis. Southern Utah, 811 F.Supp. at 642; Friends of the Earth v. Hintz, 800 F.2d 822, 831 (9th Cir. 1986). The above facts indicate that at a trial on the merits, DOE's use of the categorical exclusion to exempt the DARHT facility from the NEPA process is sufficiently likely to be found arbitrary and capricious and outside the scope of the requirements set forth in CEQ NEPA regulations.

Public disclosure

Agency procedures implementing NEPA must involve the public in complying with CEQ regulations. 40 C.F.R. § 1507.3(b); 40 C.F.R. § 1506.6(a) (agencies shall make diligent efforts to involve the public in preparing and implementing their NEPA procedures). Evidence contained in the record strongly suggests that DOE eliminated the public from any knowledge of its internal determinations about DARHT or its exclusions.

First, the determinations from the Memos-to-File discussed above were never disclosed to the public. See 40 C.F.R. § 1501.4(e)(1) (agency shall make FONSI available to public). Also, DOE failed to follow its own procedures which allowed for additional review in the event that public comment raised a "substantial question regarding [a] categorization" affecting NEPA assessment. Final Guidelines, 45 Fed.

Reg. 20696, Section A(3)(b)(3). Public comment cannot be elicited without public disclosure. DOE has since acknowledged the critical element of public involvement in carrying out the NEPA mandate. **57 Fed. Reg. 15122 (rule's purpose is to enhance public review opportunities and "ensure that [DOE's] NEPA procedures are more accessible to the public").**

Second, the documents related to the DARHT facility which have been submitted by the defendants contain some material disseminated to the public, but do not rise to the level of NEPA-related information about the DARHT project. This material can be summarily categorized as either public relations materials or notices of appropriations for the facility. See Docs., Tab 51; see Discussion infra part I. As defendants do not present these DARHT documents as any kind of administrative record or functional equivalent, I need not address the material's unsuitability as a "hard look" at environmental consequences.

Timing of assessment

Another aspect of this case influencing the likelihood of success is the question of when an EIS is to be done. Environmental assessment and resulting information must be available before agency action is taken. **40 C.F.R. § 1500.1(b).** NEPA recognizes the limiting effect continued activity has on the selection of available alternatives. Under NEPA regulations, it is illegal for an agency to continue an activity while an EIS is being prepared unless such action "will not prejudice the ultimate decision on the program." **40 C.F.R. § 1506.1(c);** see also **10 C.F.R. § 1021.211.** NEPA works on a preventative level. Its provisions ensure as thorough an assessment

as possible, with input coming from both outside agencies and public, so that an agency can make an informed decision at the outset. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989) (purpose of NEPA is to prevent damages to the environment by focusing attention on proposed agency action so that "agency will not act on incomplete information, only to regret its decision after it is too late to correct") (cit. omitted).

The decision by DOE to begin an EIS at this point does little to ameliorate the fact that it was not done before the DARHT project began. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 317 n.12 (the cessation of violations does not bar issuance of an injunction) (cit. omitted); see also Public Service, 825 F.Supp. at 1503-04 (agency's statements that it will perform the required NEPA analysis not sufficient to invoke voluntary cessation exception to mootness doctrine). Indeed, some of the damage NEPA seeks to prevent may already be done. Bias toward one alternative or another may already exist as construction was allowed to start and progress without public input. Public Service, 825 F.Supp. at 1505 (NEPA process enables agency to review reasonable alternatives before its actions proceed so far that its decisions regarding the program become "cast in stone").

Based on the above discussion concerning DOE's questionable use of a questionable categorical exemption; the violations of the public disclosure mandate of NEPA; and the untimely performance of an EIS coupled with the refusal to temporarily suspend construction on DARHT, I find there is a probability that plaintiffs

would succeed on the case's merits in showing that defendants violated NEPA substantively and procedurally.

B. Irreparable Harm or Injury

Plaintiffs have proved a substantial likelihood of success on the merits, but they must also show irreparable harm in allowing defendants to continue DARHT construction before an EIS is done. Town of Huntington, 884 F.2d at 653 (threat of injury must be proved, not assumed). However, plaintiffs need only establish a sufficient likelihood of harm. See Public Service, 825 F.Supp. at 1505. Proof that significant effects on the human environment will in fact occur is not essential. Sierra Club v. U.S. Forest Service, 843 F.2d 1190 (9th Cir. 1988) (cit. omitted); Protect Key West, 795 F.Supp. at 1563 (harms sought to be prevented are those plaintiff *may* suffer) (emphasis supplied); Public Service, 825 F.Supp. at 1505 (plaintiff must show a sufficient likelihood that irreparable injury may occur).

Defining the Harm or Injury

Case law has recognized the unique characteristics of environmental harm. NEPA is a purely procedural statute in that it sets forth procedures decision makers must follow, but it is substantive as well in that it demands that "a decisionmaker [sic] consider all significant environmental impacts before choosing a course of action." Sierra Club v. Marsh, 872 F.2d at 502. NEPA's procedural requirements support its substantive mandate. Town of Orangetown v. Gorsuch, 718 F.2d 29, 34-35 (2nd Cir. 1983) (NEPA provides a "procedural framework within which substantive judgments must be made"); Public Service, 825 F.Supp. at 1494 (court must ensure

agency compliance with the substantive purposes of NEPA as well as the procedural duties). NEPA can require that the agency take a "hard look" at environmental consequences, but cannot dictate the result or influence the substantive decision the agency makes, even though some of the environmental consequences may turn out to be adverse. Sierra Club v. Marsh, 872 F.2d at 502. NEPA's purely procedural nature also limits the court's role in reviewing agency decisions. Id. A court can only require that NEPA's procedures are carried out before major federal actions are taken or allowed to proceed further. Public Service Co., 825 F.Supp. at 1505; see also Town of Orangetown, 718 F.2d at 35 (once agency has made a decision subject to NEPA's procedural requirements, court's role is simply to insure that agency has considered environmental consequences).

Violations under NEPA are not purely procedural violations. The harm ensuing from a NEPA violation is intrinsic to the statute's discrete objective. The harm at stake is a harm to the environment, but the harm consists of "the added risk to the environment" that occurs when governmental decision makers make up their minds without having before them an analysis of the likely effects of their decision upon the environment. Sierra Club v. Marsh, 872 F.2d at 500 (citing Commonwealth of Mass. v. Watt, 716 F.2d 946 (1st Cir. 1983). When a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the very harm that NEPA intends to prevent has been suffered. Id. The special nature of environmental harms does not allow room to back-track once the actual harm occurs. Amoco, 480 U..S. at 545 ("environmental injury, by its nature, can seldom

be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable") (cit. omitted).

Assessing the Harm

The main thrust of defendants' argument rests on the alleged failure of plaintiffs to specify any environmental harm except for "vague" construction-related impacts. Defendants point out that they have taken measures to mitigate and monitor any potential impacts to DARHT's construction-related activity.

Plaintiffs cite disruptive effects of construction activity as only one of several causes for concern. They allege that DARHT poses potentially more serious but less obvious environmental impacts such as radioactive and toxic air emissions; radioactive and toxic soil contamination; radioactive waste generation through the use of plutonium, and impacts on Native American archaeological sites.

The question here is whether plaintiffs can show that irreparable harm is sufficiently likely if DOE is allowed to continue construction without first completing an EIS, despite any pre-EIS environmental considerations DOE may have taken.

The environmental analyses contained in the DOE's Action Description Memoranda described potential soil and water erosion hazards and noted that facility sites were not located in a floodplain or wetland. The ADMs also noted that no rare or endangered species known to exist on Laboratory lands would be impaired. **Docs., Tabs 6, 8, 10; Webb Decl., ¶¶ 8-11.** Archaeological impacts were discussed, identifying mitigation measures for the various sites at risk. The ADMs also stated that operation of the facility would comply with "all regulations applicable to DOE

projects." Id. Toxic waterborne and airborne emissions would be within applicable environmental standards. Id.

Mitigation Measures

Defendants ask this court to consider various mitigation measures they have completed in assessing the feasibility of further construction activities. **Defts.' Opp. at 21.** A few of these measures dealt with sewage and drainage for the construction site. **State permit for septic tank and wastewater holding tank, 1990, Docs., Tab 32; permit from EPA, 1994, for Stormwater Pollution Prevention Plan, pursuant to Clean Water Act, Docs., Tab 39.** Some measures were taken to abate the usual annoyances which usually accompany construction, such as soil and vegetation disturbance, noise generation and air emissions of dust and diesel fuel. **Griego Decl., ¶¶ 17, 18.** A few mitigation measures addressed the more insidious effects of the project. A Toxic Substances Control Act survey was completed internally by DOE's Environmental Protection Group in 1992. **Docs., Tab 36.** A soil sampling to determine residual contamination was completed over six years ago, in March 1988. **Reconnaissance Sampling Plan, Docs., Tabs 30-31.** DOE conducted archeological surveys of Native American sites, most notably Nakemuu, which could possibly be affected by construction activity and DARHT operations. Discussion of mitigation measures focused on effects from shrapnel debris and construction. No attention was given to impact of seismic activity on the sites. **Action Description Memoranda, Docs., Tabs 6, 8, 10; Letter to Hazel O'Leary, Pltfs.' Brief, Ex. 7 at 9.**

While mitigation measures can be taken into account to justify an agency decision not to prepare an EIS, Park Cty. Resource Council, 817 F.2d at 621, they do not replace the agency's obligation to take the requisite "hard look" at environmental consequences. The scope of DOE's mitigation measures do not rise to this level.

Other environmental concerns

The EPA granted construction approval for DARHT in 1988 pursuant to the National Emission Standards for Hazardous Air Pollutants ("NESHAP"). However, in 1992, the EPA found DARHT to be in non-compliance with NESHAP for air emission standards. Letter from EPA, Air, Pesticides & Toxics Div., Pltfs.' Reply, Ex. 4, 5.

Defendants also point out the similarity of the DARHT project to the PHERMEX facility now in operation. While DARHT may present substantially the same type of environmental effects as the single-axis unit PHERMEX, the cumulative effects of an additional dual-axis machine were not encompassed within the 1979 site-wide EIS, regardless of how closely DOE has followed the effects of PHERMEX over the years. Defts.' Opp. at 22 n.6. See Public Service, 825 F.Supp. at 1505 (when assessing environmental effects of shipment and storage of fuel at national engineering laboratory, DOE should have calculated risks of nuclear exposure for cumulative effect of repeated exposures, not simply from one shipment).

Plaintiffs cite other areas for concern which DOE appears not to have adequately examined. Estimates of airborne concentrations of toxic metals such as beryllium, lead and uranium were made using 1982 testing site data. 1984 ADM, Docs., Tab 8. DOE's sampling approach for soil contamination leaves questions as to

its integrity and reliability. Pltfs.' Reply, Ex. 3. Other consequences associated with the possible use and disposal of plutonium, such as contingency procedures in the event of breach of containment vessels, have not been specifically addressed in any of the Action Description Memoranda or mitigation measures performed by DOE. Pltfs.' Mem. Brief in Supp. of Prel. Inj. at 4.

Defendants argue that plaintiffs' allegations are "vague and unsubstantiated predictions of future harms." Defts.' Opp. at 18, 20. While plaintiffs have clearly demonstrated that a risk of environmental harm is sufficiently likely, requiring a showing of actual harm may not be possible. NEPA's objective is to prevent environmental harm before it occurs, recognizing that this type of harm is often not obvious or immediate. An agency's shortcomings in environmental inquiries should not turn out to be a detriment to plaintiffs expected to do better making the same inquiries. Sierra Club v. Hodel, 848 F.2d at 1097 (irreparable injury found to exist where impossible to assess because of incomplete studies). NEPA requires federal agencies, not plaintiff consumer groups, to take the requisite "hard look" at environmental consequences. An agency would have little incentive to make comprehensive environmental assessments when it can cast that burden onto a plaintiff trying to build a case for a NEPA violation. Shifting the congressional mandate of environmental analysis from federal agency to plaintiff perverts the statute's objective.

Effect on alternatives

Defendants claim that any harm plaintiffs may suffer is not irreparable because the DARHT facility will not become fully operational until 1997. However, harm involving a NEPA violation does not necessarily hinge on when it will occur. Sierra Club v. Marsh, 872 F.2d at 500 ("plaintiff seeking an injunction cannot be stopped at the threshold by pointing to additional steps between the governmental decision and environmental harm"). Moreover, defendants' argument ignores the distinctive characteristic of harm as interpreted under the NEPA mandate. NEPA endeavors to prevent the *risk* of harm to the environment when an agency makes decisions without having done an adequate environmental assessment. Id. The problems associated with starting an EIS *in medias res* are further compounded as DOE continues construction of the DARHT facility. Work progresses, and the risk of harm increases, as certain alternatives become less workable. Public Service, 825 F.Supp. at 1505 (the more effort and resources that are put into a project, the less likely an agency is to abandon the project or to change it . . . regardless of what the NEPA review reveals"). Once a project is completed, the same environmental considerations that may have earlier halted or caused a modification in the action, no longer outweigh the commitment of time, energy and financial resources expended. See Sierra Club v. Marsh, 872 F.2d at 500 ("[i]t is far easier to influence an initial choice than to change a mind already made up").

Defendants give their assurance that they will remain open to all reasonable alternatives, including the "no action" alternative, in which DARHT would not be operated and DOE would continue to use PHERMEX. Defts.' Opp. at 23 & Ex. 1. It

is difficult to believe that an agency would choose or even seriously consider this option for an activity once it is 100% completed. Sierra Club v. Marsh, 872 F. 2d at 500 ("Once large bureaucracies are committed to a course of action, it is difficult to change that course - even if new, or more thorough, NEPA statements are prepared . . . "). It is equally difficult to imagine DOE opting for the "containment" alternative, requiring three years to accomplish, in which the DARHT facility would be modified to contain airborne emissions, when defendants now react squeamishly to a delay of less than a year in which to complete an EIS. Only a few months ago, in finding that no "cost-effective, program-effective alternatives" existed, defendants themselves did not consider a "no-action" alternative to be acceptable. Summary Descr. of DARHT Operations for Possible Env. Assessment, Pltfs.' Mem. Brief, Ex. 1 at 7. I also note that DOE came to the decision to perform an EIS only after extensive negotiation and much struggle on the part of the plaintiffs consumer groups. This fact challenges DOE's averred commitment to keep an open mind to all the reasonable alternatives, 59 Fed. Reg. 60134, despite the outlay of money and resources the project may eventually incur. Tr. of Proceedings at 65.

DOE's promise to consider non-operation of DARHT as an alternative seems overly optimistic. Sierra Club v. Marsh, 872 F.2d at 500. (setting aside an agency action does not necessarily undo the harm, as the agency may have already become committed to a previously chosen course of action). DOE's refusal to halt construction pending completion of the EIS contributes to this skepticism.

NEPA requires an agency to make decisions which are "fully informed and well-considered." Vermont Yankee Nuclear Power Corp. v. Nat'l Re. Defense Council, Inc., 435 U.S. 519, 558 (1978), cited in Sierra Club v. U.S. forest Service, 843 F.2d 1990, 1192 (9th Cir. 1988). Plaintiffs have shown that the insufficiently detailed discussion of DARHT's environmental impacts leaves remaining deficiencies in DOE's analyses and increases the risk of environmental harm. This risk is the very harm NEPA tries to avert, and establishes that irreparable harm is sufficiently likely.

C. Balance of Hardships

Defendants assert that any harm plaintiffs may suffer does not outweigh the harm an injunction would cause in terms of national security and financial cost.

Harm to national security

DOE emphasizes the role of DARHT in the "stockpile stewardship program," in the development of alternative capabilities for ensuring that existing nuclear weapons remain safe, secure and reliable. Id. Although there is no national defense exception to NEPA compliance, it is a factor the court may weigh when considering equitable relief. State of Wisconsin v. Weinberger, 745 F.2d 412, 425 (7th Cir. 1984).

I find that the delay associated with completing an EIS will not endanger national security to a degree that would prevent the dispensing of injunctive relief. The cases relied on by defendants to discourage judicial appraisals of situations where national security is concerned are not helpful to an analysis of the present situation. These cases involved imminent danger to national security, NEPA violations that were minor and more formalistic, or the administration of military affairs. Comm. for Nuclear

Responsibility, Inc. v. Seaborg, 463 F.2d 796 (D.C. Cir. 1971) (delay in detonation of nuclear device posed risk of mechanical or technical failure); Concerned about Trident v. Rumsfeld, 555 F.2d 817 (D.C. Cir. 1977) (where Navy had completed several EAs and an EIS, but failed to adequately assess one of the chosen sites as alternative); Chappel v. Wallace, 462 U.S. 296 (1983) (enlisted personnel seeking damages from superior officer for constitutional violation).

Ample evidence points to the fact that the existing nuclear stockpile is, at this time, safe and reliable. See, Hearings on the House Subcomm. for Energy and Water Development Appropriations, 103rd Cong., 2nd Sess. 736 (1994) (statement of Dr. Harold Smith, Ass't to the Sec'y of Defense for Atomic Energy). Suspending DARHT construction will have no effect on the PHERMEX system which is an operating hydrotest facility currently supplying diagnostic information for the stockpile stewardship program. Although completing an EIS will delay moving the program into full operation, DOE has not presented the court with enough evidence amounting to a reason to fear that the delay has threatened or will threaten national security by endangering plans for the Comprehensive Test Ban Treaty. There is also no reason to believe that a delay resulting from a NEPA review will result in a loss of intellectual resources, as defendants allege. As plaintiffs point out, scientists considering retirement in the interim during which DOE is completing the EIS can either opt to delay retirement or work after retirement as consultants.

Because compliance with NEPA is an obligation an agency is assumed to be aware of, delay associated with preparing an EIS cannot be considered an unforeseen

setback. Protect Key West, 795 F.Supp. at 1563 (delays for environmental assessment "should [be] built into the project schedule originally"). In fact, in October 1994, DOE figured in a six-month delay in construction for NEPA review purposes to take place from November 1994 to May 1995. Pltfs.' Mem. Brief, Ex. 11. Other delays have been part of DARHT history, for example, the four-year delay between the first two stages (the radiographic support lab and the groundbreaking for the hydrotest firing site). See Tr. of Proceedings at 45. DOE is in the best position to expedite the completion of the EIS, having done some preliminary environmental analyses.

Effect of delay on economic harm

Considerable cost is involved whether construction proceeds but an alternative other than full operation is selected, or is suspended until DOE finished the EIS. Approximately $19 million would be spent over the next year if construction continues while the EIS is being done.

Defendants claim an approximate $12 million cost in a year's delay which includes elements of design, management, construction and restarting costs. Burns Decl., ¶ 9; Programmatic Cost Impact Due to Project Delay for EIS, Pltfs.' Reply, Ex. 22 & Defts.' Ex. A. This figure, however, may be inflated for several reasons. See Weida Aff., Pltfs.' Reply, Ex. 23. First, defendants' estimates reflect some costs which are were committed as a project expense, unrelated to the delay itself, for example, machine upgrades and maintenance. Id., ¶ 6(f). Second, some items should not have been included at all. The projected $1.5 million cost of an EIS preparation

for DARHT is a legal obligation of the agency and cannot be assessed as a cost of delay. Id., ¶ 6(e). DOE included an escalated cost of the DARHT second axis, when Congress has not yet authorized or funded this item. Id., ¶ 6(h). Also, defendants' estimate does not include any offsets intrinsic to a delay, and at the same time, incorporates a generous 15% contingency fee. Id., ¶ 6(d)(g).

The fact that construction of the housing facility is almost one-quarter complete and the procurement stage well on its way to being half done, is not enough of a reason in itself to support a denial of an injunction. See Foundation on Economic Trends v. Weinberger, 610 F.Supp. 829, 943 (D.C.D.C. 1985) (courts have enjoined ongoing projects to preserve full opportunity to choose among alternatives); Richland Park Homeowners Ass'n, Inc., 671 F.2d 935, 942 (project which has proceeded to advanced stage of completion may be enjoined if NEPA violations are blatant and public interest not irreparably harmed).

I find that the balance of harms favors the plaintiffs. A comparatively short delay for the purpose of ensuring that environmental consequences have been properly assessed does not create a state of urgency constituting a threat to national security. The exigency in getting a dual-axis machine in place does justify a shortcut around the NEPA mandate, particularly when DARHT operations are not scheduled to begin until the year 2000. Any economic harm is not such that it outweighs the environmental harm which is likely to ensue without adequate NEPA-based evaluation. My findings do not in any way diminish the importance of the DARHT project, but rather underscore the critical nature of the NEPA objective.

D. Public Interest

Consideration of public interest weighs against the defendants. DOE's pledge to enlist public participation during forthcoming EIS preparations is especially meaningful considering the lack of public disclosure associated with the DARHT proposal. Public interest "of the highest order" is served by "having government officials act in accordance with the law." Public Service, 825 F.Supp. at 1509. In this situation, failure of officials to carry out the NEPA directive could have repercussions damaging to the health and safety of the public. Therefore, issuance of an injunction would not be adverse to the public interest.

IV. Attorney's Fees

Plaintiffs request a reimbursement for costs, expenses, expert witness fees, and attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). I defer decision on this matter to the time when the merits of the case are tried.

CONCLUSION

I find that this court has equitable jurisdiction based on a showing of irreparable injury by plaintiffs as well as a lack of adequate legal remedy. Plaintiffs would likely succeed at trial in their claim that DOE's actions concerning the DARHT facility violated the National Environmental Policy Act, 42 U.S.C. § 4321 - § 4361. Plaintiffs' risk of environmental harms flowing from such violation outweighs any harm to defendants in terms of a project delay pending DOE's completion of an EIS. Lastly, a

consideration of the public interest supports my finding that the imposition of an injunction favoring plaintiffs is appropriate.

Fed.R.Civ.P. 65(c) requires a giving of security by the plaintiffs, in an amount the district court may deem proper. See also State of Kansas ex. rel. Stephan, v. Adams, **705 F.2d 1267, 1269 (10th Cir. 1983).** Posting a substantial bond on non-profit environmental groups might chill the private mechanisms of enforcement NEPA has traditionally encouraged. See Natural Resource Defense Council v. Morton, **337 F.Supp. 167, 169 (D.C.D.C. 1971);** Wilderness Soc'y v. Tyrrel, **701 F.Supp. 1473, 1492 (E.D. Cal. 1988),** rev'd on other grounds, **918 F.2d 813 (9th Cir. 1990).** I therefore require that the plaintiffs post a nominal bond for security in the amount of $100.00.

A Decree of Injunction will be issued contemporaneously with this Memorandum Opinion and Order.

IT IS SO ORDERED.

SENIOR UNITED STATES DISTRICT JUDGE