IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

NATURAL RESOURCES DEFENSE COUNCIL, INC.; CONFEDERATED TRIBES & BANDS OF THE YAKAMA NATION; SNAKE RIVER ALLIANCE; and SHOSHONE-BANNOCK TRIBES, Plaintiffs, v. SPENCER ABRAHAM, Secretary, Department of Energy; and UNITED STATES OF AMERICA, Defendants.	Case No. CV-01-413-S-BLW MEMORANDUM DECISION AND ORDER

INTRODUCTION

The Court has before it a Motion to Dismiss filed by Defendants Spencer Abraham, Secretary of the Department of Energy, and the United States of America, pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court has heard the oral argument of counsel, reviewed and considered all of the parties' filings, and given serious consideration to the difficult issue presented. For the following reasons the Court will deny Defendants' Motion to Dismiss.

BACKGROUND

This case was transferred to this Court by the Ninth Circuit. *See NRDC v. Abraham*, 244 F.3d 742 (9th Cir. 2001). In its opinion, the Circuit found that it lacked original or exclusive jurisdiction under 42 U.S.C. § 10139 to entertain Plaintiffs' claims because the decision by the

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DOE in promulgating Order 435.1 was not made pursuant to the Nuclear Waste Policy Act, 42 U.S.C. §§ 10101 *et seq.* *See id.* at 747. However, the Ninth Circuit expressly noted that issues relating to standing, ripeness, and the merits of the Plaintiff's claims must be decided by this Court. *See id.*

Plaintiffs' Complaint alleges that DOE Order 435.1 violates the NWPA and the Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq.*, because it allows DOE radioactive waste facilities, as well as DOE contractor facilities, to reclassify high-level radioactive waste as "incidental waste" or "waste incidental to reprocessing," ("WIR"). Plaintiffs argue that the motive for this reclassification is to exempt high-level waste from the application of the more stringent disposal provisions found in the NWPA.[1]

Plaintiffs' Complaint alleges that the incidental waste provision of Order 435.1 establishes two standards: the "citation" standard and the "evaluation" standard.[2] Under the "evaluation" standard, high-level waste may be re-categorized as low-level or transuranic waste if: (1) it is treated to reduce its level of radioactivity to the extent technically and economically practicable; (2) it is disposed of according to the requirements for the disposal of low-level waste; and (3) it is solidified and is no more radioactive than the highest category of radioactivity for low-level waste, *or* it meets other criteria established by the DOE. DOE Manual 435.1-1 at II-2 (emphasis added).

Plaintiffs urge that such a standard makes DOE compliance with the NWPA optional.

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[1] Plaintiffs allege that "incidental waste," as it is defined by Order 435.1, is high-level waste and that, absent a presidential directive to the contrary, the NWPA mandates that all high-level radioactive waste must be disposed of in geologic repositories established by the Act. *See* Plaintiff's Complaint, ¶ 5; *see also* 42 U.S.C. 10107(b)(2).

[2] Plaintiffs do not challenge the validity of the "citation" standard in their complaint.

They claim that they will suffer direct and immediate harm if the Defendants are allowed to follow Order 435.1 because it will allow the DOE to permanently store high-level radioactive waste, i.e., high-level waste that has been reclassified as "incidental waste," in concrete storage tanks[3] rather than removing the waste and shipping it to geologic repositories as required by the NWPA. *See* 42 U.S.C. § 10107. They assert that leaching, i.e., spilling, of high-level waste has occurred at the three DOE sites- Hanford, Savannah River, and INEEL- and that it will inevitably continue into the future. *See* Plaintiffs' Complaint, ¶'s 33-38.

The Plaintiffs have moved for declaratory and injunctive relief pursuant to 5 U.S.C. § 706 of the APA. They seek a ruling by the Court invalidating Order 435.1 as arbitrary, capricious, and contrary to law. Plaintiffs argue that a permanent injunction should issue that would prohibit the DOE from taking any action with respect to radioactive waste in the tanks at the three DOE sites that is inconsistent with the requirements of the NWPA governing the disposal of high-level waste. Specifically, the Plaintiffs request that the Court issue a permanent injunction preventing the Defendants from "grouting" with concrete for permanent disposal any additional high-level radioactive waste tanks at the three sites in Washington, South Carolina, and Idaho. In addition, the Plaintiffs request that the Court retain jurisdiction over this proceeding to ensure future compliance by the Defendants with the Court's orders. *See* Plaintiffs' Complaint, ¶'s 63-69.

DISCUSSION

The Defendants Motion to Dismiss advances several arguments for dismissing the Plaintiffs' Complaint. First, the Defendant argues that Order 435.1 should not be considered

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[3] Storage is done by a process known as "grouting" in which the residue high-level waste is mixed with cement and the tank is then essentially filled with cement and sealed.

"final agency action" for purposes of judicial review. Second, they contend that the case is not "ripe" for judicial review until the DOE or one of its contractors actually applies the Order on a case specific basis. Third, they suggest that the Law of the Case Doctrine prevents the Court from assuming jurisdiction over the Plaintiff's claims. Finally, they contend that the Plaintiffs' Complaint fails to state a claim upon which relief may be granted. The Court will address each of these arguments in turn.

1. DOE Order 435.1 Constitutes "Final Agency Action" for Purposes of Judicial Review.

"Final agency action" is characterized by two criteria: (1) "the action must mark the consummation of the agency's decisionmaking process," e.g., not merely of a "tentative or interlocutory nature;" and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Defendants argue that Order 435.1 does not constitute "final agency action" because the Order, along with its accompanying Guidance and Manual, are merely tools used by the DOE facilities to manage radioactive waste. In the Defendants' view, the Plaintiffs can not show any immediate or direct impact from the Order. According to the Defendants, the Order isn't self-executing and doesn't determine which waste is "waste incidental to reprocessing;" rather, such decisions will be made on a "case-by-case" or "waste stream by waste stream basis." Defendants allege that the Order has yet to be applied by the DOE and therefore represents only the DOE's policy concerning its waste-management authority.

Courts have generally interpreted the "finality" element in a flexible and pragmatic way. *See Abbott Lab. v. Gardner*, 387 U.S. 136, 149 (1967). While Order 435.1 may or may not be

final agency action in the "highly technical sense" because it has yet to be applied by the DOE or one of its constituents, common sense dictates that the Order itself represents the DOE's final interpretation of its statutory mandate. *See Comm. for Idaho's High Desert v. Collinge*, 148 F.Supp 2d 1097, 1100 (D. Idaho 2001) (Holding that the implementation of a predator control program was a "contingent future event" in a "highly technical sense" but in common terms it was inevitable.) The relevant agency action involved in this case is the promulgation of the Order 435.1 itself and not the subsequent actions to be made pursuant to that Order.

Order 435.1 is not merely an intermediate step as Defendants' claim. *See Abbott Lab.*, 387 U.S. at 148-49. In fact, following a lengthy development period of more than eight years, Order 435.1 was published in the Federal Register. *See* 64 Fed. Reg. 29393; *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 477-78 (2001) (Finding that publication in the Federal Register of an EPA implementation policy was an indicator that the agency's action was final.) The deliberate nature of the DOE's decision in promulgating the Order is informative because it suggests that the DOE was well aware that "rights or obligations" would ultimately be determined by the Order.

The language utilized in the DOE Order, Guidance, and Manual is specific and mandatory in nature. DOE Manual 435.1-1 states that "implementation of the requirements *shall* begin at the earliest possible date, and all DOE entities *shall* be in compliance with this directive within one year of its issuance . . . ." DOE Manual 435.1-1 at i (emphasis added). This express language contradicts Defendants' argument that DOE officials and contractors are vested with the unfettered discretion to apply Order 435.1 as they see fit. In fact, DOE waste facilities and contractors are subject to "corrective actions whenever necessary" to ensure that the

"requirements of DOE O[rder] 435.1 . . ." are met. DOE Manual 435.1-1 at III-3, IV-2.

The Court finds that DOE Order 435.1 is a final expression of the agency's interpretation of its congressional mandate to manage and dispose of radioactive waste. The Court also finds that the Order is non-discretionary in that the various DOE officials and contractors are not free to act in contravention of the Order without risking possible "corrective actions" being levied upon them by the DOE. Consequently, the Court finds that DOE Order 435.1 constitutes final agency action for purposes of judicial review.

2. The Issues Raised are Ripe for Judicial Review.

When undertaking a ripeness analysis, the Court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001). In making this analysis, the Court must avoid letting judicial review interfere with subsequent agency action. *See id.*; *see also Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998).

The Defendants mirror their previous argument and insist that Order 435.1 is not ripe for judicial review because no component of the DOE has applied the WIR process defined in the Order. In making this argument, they rely largely upon the Supreme Court's opinion in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998), which outlined three primary ripeness considerations: (1) the hardship to plaintiffs if review is delayed; (2) whether judicial review would interfere with subsequent agency action; and (3) whether it would benefit the court to allow further factual development of the issues involved.

Under this standard, Defendants contend that the Plaintiff's claims are not ripe for judicial review, but are based upon sheer speculation about what the DOE might do; that until the DOE

actually applies the Order, the "plans" at the Savannah River Site, Hanford, and INEEL cause no immediate harm. In other words, there is no immediate harm until the DOE or one of its elements makes a decision at a particular site. Further, Defendants contend that the Plaintiffs can't define any future harm that would occur from postponing review until future administrative decisions have taken place and the facts have been developed.

However, the Defendants' position seems to be at odds with the undisputed facts and the Plaintiff's allegations. Order 435.1 appears to be a definitive position by the Defendants as to the reclassification of high-level waste, which was created following almost nine years of development, including a notice and comment period. The WIR process has already been applied twice in South Carolina at the Savannah River Site prior to the promulgation of Order 435.1 and the Plaintiffs allege that DOE's future tank cleanup program is largely premised upon Order 435.1 and its accompanying Guidance and Manual.[4]

Moreover, delaying review of Order 435.1 until the DOE makes a site specific decision in conformance with the Order may cause substantial harm. Tank closures, once undertaken, aren't readily altered and future judicial review may therefore be foreclosed until it is too late.[5] The Court need not wait until a threatened injury comes to fruition before undertaking judicial review. This is particularly true where the DOE Order has the force of law and requires immediate compliance by DOE facilities as well as DOE contractors. In such a case, a justiciable

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[4] Plaintiffs have acknowledged that the Defendants have yet to apply the "WIR" process found in Order 435.1 and reclassify high-level waste at the three facilities as low-level waste for purposes of disposal. *See* Plaintiffs' Complaint, ¶ 40

[5] The Court notes that counsel for Plaintiffs suggested during oral argument that the closure of two tanks at Savannah River occurred under circumstances in which they were unable to bring a timely action to obtain judicial review of that decision.

controversy exists that is ripe for review, because the Court can "firmly predict" the result that would occur through the application of Order 435.1. *See Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1436 (9th Cir. 1997) (citing *Reno v. Catholic Social Services*, 509 U.S. 43, 69 (1993) (O'Connor, J., concurring); *see also Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581-82 ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.").

In short, the Court concludes that there is a clear indication of the hardship that plaintiffs and the intervenors will suffer if review is delayed, there is no indication that undertaking judicial review at this juncture would interfere with subsequent agency action, and the Court perceives no benefit which would be obtained by allowing further factual development of the issues involved. Under such circumstances, the Court concludes that Order 435.1, and its mandate that all DOE contractors and entities comply with its provisions, are ripe for judicial review. *Ohio Forestry Ass'n*, 523 U.S. at 737.

3. The Law of the Case Doctrine Does Not Prevent the Court from Considering the Plaintiff's Claims.

The law of the case doctrine requires that a district court respect prior rulings issued by circuit courts on issues of law. *See United States v. Hatter*, 532 U.S. 557, 565-66 (2001) (emphasis added). Defendants' contend that the doctrine precludes this Court from assuming jurisdiction over this matter because the Ninth Circuit has already ruled that DOE Order 435.1 is not a decision under any part of the NWPA. *See NRDC*, 244 F.3d at 747.

However, this is a misapplication of the law of the case doctrine. First, the doctrine simply does not apply where an appellate court or the Supreme Court has not issued a ruling on

the merits. "The law of the case doctrine presumes a hearing on the merits." *Hatter*, 532 U.S. at 566. Prior to remanding this case to the District Court of Idaho, the Ninth Circuit specifically left open the issues of standing, ripeness, and the merits for a decision by this Court. *See NRDC*, 244 F3d at 747.

The inapplicability of the law of the case doctrine is also indicated by the nature of the Ninth Circuit's decision to remand this case to the District Court rather than dismissing the action altogether. The Ninth Circuit remanded this case because the NWPA's provision vesting original and exclusive jurisdiction in the Circuit Court is limited to cases arising *under* the NWPA, not because the Plaintiffs' Complaint did not in any way implicate the NWPA as the Defendants have suggested in their pleadings. *See id*; *see also* 42 U.S.C. § 10139(a)(1)(A). Therefore, the Court finds that the law of the case doctrine is not applicable.

4. The Plaintiffs' Have Made Cognizable Claims Upon which Relief May be Granted.

In deciding whether a plaintiff has stated a claim upon which relief may be granted, the Court must accept all of the plaintiff's factual allegations as true and construe them in the light most favorable to the Plaintiff. *See Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1999) (citation omitted). There are very few factual disputes in this case. The problems that are to be resolved by the Court are legal in nature and, more succinctly, pertain to statutory interpretation. Currently, both the Atomic Energy Act and the NWPA have provisions that either directly address or allude to the characterization of radioactive waste.

It is the Defendants' contention that the Plaintiff's Complaint cannot possibly state a claim upon which relief can be granted because the actions they object to do not pertain to the statute

cited in their Complaint. The DOE asserts that its waste management activities are governed solely by the AEA and the Energy Reorganization Act. However, the Court has heretofore been unable to find a substantive provision of the AEA specifically delegating waste characterization or classification authority to the agency. Defendants have cited 42 U.S.C. 2201(i)(3) which delegates authority to the DOE to issue Orders and Directives that "*govern any activity authorized pursuant to this Act* [AEA], including standards and restrictions governing the *design, location, and operation* of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property." (Emphasis added).

The statutory language of the NWPA, which was passed by Congress almost thirty years subsequent to the passage of the AEA, contradicts the Defendants' argument that the AEA exclusively governs the disposal of high-level waste. The NWPA defines the term "disposal" in plain language: ". . . [T]he emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or other highly radioactive material with no foreseeable intent of discovery . . . ." 42 U.S.C. § 10101(9). Moreover, the AEA has specifically adopted the definitions of "high-level radioactive waste" and "spent nuclear fuel" included in the NWPA. *See* 42 U.S.C. § 2014(dd).

The Court cannot find, as a matter of law, that DOE Order 435.1 classifies waste as WIR exclusively for management purposes and without regard for the statutory and regulatory requirements for disposal of high-level radioactive waste. Likewise, the Court cannot rule out the possibility that Order 435.1 will be used, as the Plaintiffs fear, as a tool to circumvent the more stringent disposal requirements of the NWPA. In short, Order 435.1, and its accompanying Manual and Guide, necessarily implicates the disposal provisions found in the NWPA by reclassifying high-level waste as low level waste.

Furthermore, the DOE doesn't have unconstrained authority to dispose of high-level waste as the Defendants claim.[6] Unless the President finds otherwise, defense high-level waste must be disposed of in civilian repositories established by the NWPA. 42 U.S.C. § 10107(b)(2); *see also NRDC*, 244 F3d at 744. A Presidential Directive issued by President Reagan on April 30, 1985 determined that there was no basis for establishing a repository for Department of Defense high-level waste. Therefore, DOD high-level waste cannot be disposed of in any other place other than a repository established under the NWPA unless the President makes a finding to the contrary at some time in the future.

The language, purpose, and history of the NWPA make clear that Congress didn't intend that DOE's compliance with the NWPA to be voluntary. Additionally, any finding that the WIR evaluation process operates solely under the authority of the AEA would render the NWPA meaningless. The legislative history reveals that the NWPA was enacted in direct response to "the need to address problems besetting *nuclear waste management* . . . ." H.R. Rep. No 97-491, 97th Cong., 2nd Sess. at 26 (1982) (emphasis added). In light of this background, it is inconceivable that Congress intended to allow the DOE unfettered discretion in the management of radioactive waste as the Defendants have alleged.

The Court recognizes that a high degree of deference should be given to the DOE's interpretation of statutes such as the AEA and the NWPA. *See Forest Guardians v. Dombeck*, 131 F.3d 1309, 1311 (9th Cir. 1997). The Court should not substitute its own construction

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[6] The Court notes that the Defendants have acknowledged in their memorandum that a presidential directive could provide that the DOE dispose of defense high-level waste at a civilian repository constructed pursuant to the NWPA. *See* Defendants' Memo at 20, n. 13 (Docket No. 20).

unless the statute is silent or ambiguous on the matter and the agency's interpretation is not a "permissible construction." *See Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984). However, agency constructions that are "contrary to congressional intent" must be rejected by the Court. *See id.* (citations omitted).

The NWPA is neither silent, nor ambiguous on the classification of radioactive waste. The definitions section of the NWPA necessarily involves the manner in which the DOE should classify radioactive waste. *See* 42 U.S.C. § 10101(12). If Congress had intended to allow the DOE complete discretion as to the classification of radioactive waste for management purposes it is highly unlikely that it would have included the meaning of high-level waste in the NWPA's definitions section. *See id.* By defining a specific class of radioactive waste, i.e., high-level radioactive waste, Congress has issued a de facto limitation upon the DOE's authority to classify radioactive waste for management purposes. Therefore, the Court finds that the Plaintiffs' Complaint includes cognizable claims upon which relief may be granted.

5. The Plaintiffs Meet the Requirements for Standing.

Upon referral, the Ninth Circuit left issues of standing to be decided by this Court. *See* NRDC, 244 F.3d at 747. The parties have not raised the issue of standing in their various pleadings to the Court. Nevertheless, the Court is required to address the issue of standing *sua sponte* and will therefore discuss it briefly herein. *See Bernhardt v. County of L.A.*, 279 F.3d 862, 868 (9th Cir. 2002) (citation omitted).

In order to meet the requirements for standing, a Plaintiff must show: (a) "an invasion of a legally protected interest which is concrete and particularized"; (b) that such an interest is "actual or imminent, not conjectural or hypothetical"; and c) "it must be likely, as opposed to

merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotation marks omitted). The Plaintiffs bear the burden of establishing these elements. *See id.* at 561.

"An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right," the interests at stake relate to the organization's purpose, and "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citation omitted).

The named Plaintiffs in this case included two environmental groups, Natural Resources Defense Council (NRDC) and Snake River Alliance, and two Indian tribes, Confederated Tribes & Bands of the Yakama Nation and the Shoshone-Bannock Tribe. Plaintiffs' asserted interests include, but are not limited to, the protection of water resources, the maintenance of healthy fisheries, and general concerns for human safety and welfare.

NRDC has a nationwide membership of more than 390,000 individuals, including over 20,000 members in the states of Idaho, South Carolina, and Washington. They have a long history of environmental advocacy and monitoring federal agency actions concerning the environment.

Snake River Alliance is an Idaho-based environmental group with over 1,000 members, mostly southern Idahoans. Many of its members are directly affected by the INEEL site because the site is located on top of the Snake River aquifer. The aquifer supplies much of the drinking water and irrigation for the state of Idaho. (Docket No. 10).

The Yakama Nation is a federally recognized Indian tribe. The Yakama hold treaty rights

to fish in the Columbia River Basin. A portion of the Hanford site ("Hanford Reach") includes spawning areas for chinook salmon. Fishing has long played a substantial role in the Yakama culture. (Docket No. 10).

The Shoshone-Bannock Tribe is a federally recognized Indian tribe located in the state of Idaho. The Shoshone-Bannock assert a legal right, secured by treaty, to fish for rainbow trout and sturgeon below Shoshone Falls on the Snake River in Idaho. The Shoshone-Bannock express concern over the threat of high-level hazardous waste from the INEEL site contaminating the groundwater which feeds the Snake River. They are also concerned about the impact that DOE Order 435.1 may have upon health of Tribal members "in and about the Snake River." *See* Memo. in Support of Motion to Intervene at 2-3 (Docket No. 14).

The improper disposal of high-level radioactive waste poses a serious threat to the Plaintiffs collective interests. It is abundantly clear that the Plaintiffs can demonstrate an imminent threat to a legally protected interest and that threat can be positively traced to the promulgation of Order 435.1. Additionally, a favorable ruling will more likely than not accomplish the remedy sought by the Plaintiffs, e.g., prevent the disposal of high-level radioactive waste on-site at Hanford, Savannah River, and INEEL. *See Clinton v. City of New York*, 524 U.S. 417, 430 (1998) (citation omitted). The Court therefore finds that the Plaintiffs' have standing to pursue this action.

CONCLUSION

Therefore, pursuant to its review authority under 5 U.S.C. §§ 704 & 706, the Court will Deny the Defendants' Motion to Dismiss. However, in denying the Defendants' motion the Court makes no ruling as to the merits of the Plaintiffs' claims.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED, that Defendants' Motion to Dismiss (Docket No. 16) is hereby DENIED.

Dated this 9th day of August, 2002.

B. LYNN WINMILL
Chief Judge, United States District Court

* * * COMMUNICATION RESULT REPORT (AUG. 9.2002 7:08PM) * * *

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Re: *NRDC v. Abraham* – Civ. No. 01-413-S-BLW -- Attached is the Judge's decision on the pending motion to dismiss.

FROM: Judge Winmill (contact: Law Clerk Dave Metcalf)
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