

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF
THE YAKAMA NATION, a federally-
recognized Indian tribal
government and as *parens patriae*
on behalf of the Enrolled Members
of the Confederated Tribes and
Bands of the Yakama Nation;
FRIENDS OF THE COLUMBIA GORGE, an
Oregon non-profit corporation;
NORTHWEST ENVIRONMENTAL DEFENSE
CENTER, an Oregon non-profit
corporation; COLUMBIA RIVERKEEPER,
a Washington non-profit
corporation; DAWN STOVER, a
Washington resident; and DANIEL
LICHTENWALD, a Washington
resident,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE, UNITED STATES
DEPARTMENT OF AGRICULTURE ANIMAL
AND PLANT HEALTH INSPECTION
SERVICE; TOM VILSACK, Secretary of
the United States Department of
Agriculture; and CINDY SMITH,
Administrator of the United States
Department of Agriculture Animal
and Plant Health Inspection
Service,

Defendants.

NO. CV-10-3050-EFS

**ORDER GRANTING PLAINTIFFS'
MOTIONS FOR PRELIMINARY
INJUNCTION HEARING and
MOTION FOR EXPEDITED
HEARING, DENYING MOTION TO
STRIKE DECLARATION, and
REQUIRING SETTING OF
SCHEDULING CONFERENCE**

1 A telephonic hearing occurred in the above-captioned matter on
2 August 30, 2010, on Plaintiffs Confederated Tribes and Bands of the
3 Yakama Nation's ("Yakama Nation") Motion for Preliminary Injunction (Ct.
4 Rec. [66](#)) and Friends of Columbia Gorge, Northwest Environmental Defense
5 Center, Columbia Riverkeeper, Dawn Stover, and Daniel Lichtenwald's
6 Motion for Preliminary Injunction (Ct. Rec. [24](#)). After obtaining a
7 temporary restraining order (Ct. Rec. [37](#)), Plaintiffs seek a preliminary
8 injunction barring the United States Department of Agriculture ("USDA")
9 from authorizing shipments of Hawaiian municipal waste (hereinafter
10 "garbage") into the mainland. Plaintiffs were represented by Michael
11 Chappell, Tom Buchele, Anthony Broadman, Gabriel Galanda, and Julio
12 Carranza.

13 Defendants USDA, USDA Animal and Plant Health Inspection Service
14 (APHIS), USDA Secretary Tom Vilsack, and APHIS Administrator Cindy Smith
15 oppose the motions. They were represented by Ty Bair and Pam DeRusha.

16 After reviewing the submitted material and relevant authority and
17 hearing from counsel,¹ the Court is informed. As explained below, the
18 motions are granted and a preliminary injunction is entered.

19 ¹ Also before the Court were the Motion to Strike Supplemental
20 Declaration of Rebecca Bech (Ct. Rec. [69](#)) and Motion to Expedite Hearing
21 thereon (Ct. Rec. [72](#)) filed by the environmental organization and
22 individual Plaintiffs. The Court found good cause to grant an expedited
23 hearing. After hearing from counsel, the Court denied the motion to
24 strike APHIS Deputy Administrator for Plant Protection and Quarantine
25 (PPQ) Bech's untimely declaration.
26

1 **A. Background**

2 Prior to 2006, federal regulations barred the shipment of Hawaiian
3 garbage for dumping in the continental United States (hereinafter "the
4 mainland"). Then, in 2006, APHIS proposed amending the regulations to
5 allow for shipment of certain garbage to the mainland, 71 Fed. Reg.
6 20,030 (April 19, 2006), and ultimately determined such was appropriate
7 in accordance with 7 C.F.R. §§ 330.402-403. APHIS began assessing the
8 environmental and pest risks associated with hauling garbage, which would
9 be baled and then wrapped in plastic, from Hawaii to the Roosevelt
10 Regional Landfill (hereinafter "Roosevelt Landfill") located near the
11 Columbia River² and the Yakama Nation³ reservation in Washington. In
12 pertinent part, APHIS prepared an environmental assessment (EA), which
13 concluded that Hawaiian Waste Systems' (HWS) proposed shipment of
14 Hawaiian garbage to the Roosevelt Landfill would have no significant
15 environment impacts. Thereafter, APHIS issued a Finding of No
16 Significant Impact (FONSI). Each of the Plaintiffs submitted comments
17 in response to the FONSI; however, it is unclear whether APHIS considered
18 the Yakama Nation's comments.

19 ² The environmental organizations' members and individual
20 Plaintiffs enjoy hiking and observing the wildlife on the land near the
21 Roosevelt Landfill and fishing and swimming in the Columbia River.

22 ³ The Yakama Nation is a federally-recognized Indian tribe. 1855
23 Treaty with the Yakama, 12 Stat. 951. The Yakama Nation enjoys reserved
24 "in common" usufructuary rights on the land in and immediately
25 surrounding the Roosevelt Landfill.
26

1 Thereafter, APHIS and HWS entered into Compliance Agreements,
2 allowing HWS to handle and transport up to 150,000 tons of garbage from
3 Hawaii to the Roosevelt Landfill annually. After the garbage is unloaded
4 at a Washington or Oregon port, it will be shipped by rail and truck
5 along the Columbia River Gorge for burial at the Roosevelt Landfill.

6 On July 28, 2010, Plaintiffs filed this lawsuit, seeking a temporary
7 restraining order and preliminary injunction preventing the shipment of
8 Hawaiian garbage to the mainland until the Court has resolved Plaintiffs'
9 claims that Defendants violated the National Environmental Protection Act
10 (NEPA), 42 U.S.C. §§ 4321-4370e; Section 106 of the National Historic
11 Preservation Act (NHPA), 16 U.S.C. §§ 470 *et seq.*; the Yakama Treaty of
12 1855; federal Indian trust common law; the American Indian Religious
13 Freedom Act, 42 U.S.C. §§ 1996 *et seq.*; Presidential Executive Orders
14 13,175, 13,007, and 12,898; and the Administrative Procedures Act, 5
15 U.S.C. §§ 500 *et seq.* (Ct. Recs. [1](#) & [56](#).) On July 29, 2010, after
16 hearing from counsel, the Court entered a temporary restraining order
17 enjoining Defendants from authorizing shipments of Hawaiian garbage into
18 the mainland and set this preliminary injunction hearing. (Ct. Rec. [37](#).)

19 On August 11, 2010, APHIS cancelled the Compliance Agreements with
20 HWS in order to conduct additional analysis pursuant to the NHPA. (Ct.
21 Rec. [58](#): Decl. Bech ¶ 5.) HWS appealed this cancellation; on August 27,
22 2010, APHIS Administrator Smith denied the appeal. (Ct. Rec. [67](#): Decl.
23 Bech ¶ 8.) On August 27, 2010, APHIS-PPQ Deputy Administrator Bech filed
24 a declaration stating:

25 9. APHIS had determined that it would be appropriate to
26 conduct additional . . . NEPA . . . analysis regarding
 HWS' petition to move MSW from Hawaii to the mainland,

1 U.S. to further assess the impacts associated with the
2 movement under a compliance agreement. Such analysis
3 will be made available for public review and comment
4 prior to issuing any NEPA final decision document.

- 5 10. Unless and until APHIS is satisfied that it has completed
6 all of its obligations under the NHPA and under NEPA as
7 per 7 C.F.R. § 330.402(b)(2), regarding HWS' petition to
8 move MSW from Hawaii to the mainland, U.S., no new
9 compliance agreement will be issued by APHIS.

10 *Id.* At the hearing, defense counsel Mr. Bair clarified that the EA and
11 FONSI will remain in effect while APHIS conducts supplemental
12 environmental review.

13 **B. Authority and Analysis**

14 Defendants have not challenged the evidence submitted by Plaintiffs
15 in support of their preliminary injunction requests; rather, Defendants
16 contend that a preliminary injunction is inappropriate because this
17 lawsuit is moot and no injury will be suffered given that APHIS has
18 cancelled the Compliance Agreements, will supplement its environmental
19 analysis, and will engage in consultation as required by the NHPA.

20 1. Mootness Doctrine

21 Defendants are correct that this Court's jurisdiction is limited to
22 cases or controversies.⁴ U.S. Const. art. III § 2. A case is moot if

23 ⁴ The standing and mootness doctrines are both based on the
24 Constitution's case-or-controversy requirement. *Friends of the Earth,*
25 *Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000)
26 (citing U.S. Const. art III § 2). Standing is determined at the time the
lawsuit is filed; whereas, the question of mootness arises during the
pendency of the lawsuit: "[t]he requisite personal interest that must

1 the issues are no longer live and the court is unable to grant effective
2 relief. *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 846 (9th Cir. 2009);
3 *GTE Cal., Inc. v. FCC*, 39 F.3d 940, 945 (9th Cir. 1994). Nonetheless,
4 "completion of activity is not the hallmark of mootness." *Neighbors of*
5 *Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1065 (9th Cir. 2002).

6 There are exceptions to the mootness doctrine. *EEOC*, 558 F.3d at
7 847. The relevant exception is voluntary cessation, which applies "if
8 the defendant voluntarily stops the allegedly illegal conduct to avoid
9 a judgment against him, unless it is 'absolutely clear that the allegedly
10 wrongful behavior could not reasonably be expected to recur.'" *Forest*
11 *Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1095 (9th Cir. 2003)
12 (quoting *Laidlaw Env'tl. Servs.*, 528 U.S. at 189). This is a "stringent"
13 standard, and the party claiming mootness has the "'heavy burden of
14 persuad[ing]' the court that the challenged conduct cannot reasonably be
15 expected to start up again." *Laidlaw Env'tl. Servs.*, 528 U.S. at 189
16 (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S.
17 199, 203 (1968)). The timing of the voluntary cessation is a factor in
18 considering the defendant's motivation for voluntarily ceasing the
19 challenged action. *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505,
20 1511 (9th Cir. 1994).

21
22
23 exist at the commencement of the litigation (standing) must continue
24 throughout its existence (mootness)." *Id.* at 189 (citing quotations
25 omitted); see also *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d
26 808, 814 (8th Cir. 2006).

1 Following the initiation of this lawsuit, APHIS 1) cancelled the
2 Compliance Agreements with HWS, 2) stated that it will engage in
3 consultation consistent as required by the NHPA, and 3) represented that
4 it will engage in supplemental environmental analysis associated with
5 hauling Hawaiian garbage to the Roosevelt Landfill. Yet, APHIS has
6 neither 1) withdrawn the EA or FONSI nor 2) represented that it will
7 consult with the Yakama Nation. The FONSI marked the consummation of
8 APHIS's decision-making process and legal consequences flow from it—it
9 is a final action. See *Sierra Club*, 446 F.3d at 815-16. Accordingly,
10 simply withdrawing the Compliance Agreements, communicating with agencies
11 in compliance with the NHPA, and conducting supplemental environmental
12 analysis does not afford Plaintiffs the entire relief they were seeking,
13 i.e., invalidation of the EA and FONSI. Further, if the FONSI remains,
14 APHIS has the regulatory authority to enter into a compliance agreement
15 allowing the shipment of Hawaiian garbage to the Roosevelt Landfill
16 without seeking public comment or providing notice. 7 C.F.R. § 330.403.
17 These circumstances are clearly different than those before the district
18 court in *Wildwest Institute v. Seesholtz*—a case relied upon by
19 Defendants. No. CV-07-199-S-BLW, 2008 WL 3289486 (D. Idaho Aug. 8,
20 2008).

21 Accordingly, the Court finds that Defendants have failed to
22 establish the stringent standard necessary to prevent the application of
23 the voluntary-cessation exception to the mootness doctrine because the
24 challenged conduct, i.e., reliance upon the allegedly-inadequate EA and
25 FONSI and deficient interaction with the Yakama Nation, has not been
26 withdrawn or recognized as deficient. This Court can still give

1 effective relief by 1) declaring that APHIS failed to comply with NEPA's
2 procedural requirements and 2) requiring APHIS to consult with the Yakama
3 Nation prior to taking final agency action. *See EEOC*, 558 F.3d at 847-48
4 (finding that voluntary cessation exception to the mootness doctrine
5 applied because FedEx had not given any assurance that it would not
6 challenge another administrative subpoena). *Cf. Forest Guardians*, 329
7 F.3d at 1095 (determining agency met heavy burden because agency admitted
8 that its forest management plan was defective and it had not attempted
9 to issue permits under the defective plan); *Am. Rivers v. Nat'l Marine*
10 *Fisheries Serv.*, 126 F.3d 1118, 1123-24 (9th Cir. 1997) (finding case
11 moot because biological opinion had been superseded by a newer biological
12 opinion that would not expire for three years, thereby providing
13 sufficient time to challenge new biological opinion); *Nome Eskimo Cmty.*
14 *v. Babbitt*, 67 F.3d 813, 815-16 (9th Cir. 1995) (determining challenge to
15 agency's notice that it would accept bids for lease rights was moot
16 because agency counsel represented that the agency would not attempt
17 further mineral development for five years); *Aluminum Co. of Am. v.*
18 *Bonneville Power Admin.*, 56 F.3d 1075, 1078 (9th Cir. 1995) (finding
19 challenge to 1993 record of decision (ROD) moot because it had expired
20 and agency action was being taken pursuant to a new ROD for which there
21 was sufficient time to obtain judicial review); *N.W. Env'tl. Def. Ctr. v.*
22 *Allen*, No. 05-1279-AA, 2007 WL 1746333 (D. Or. June 13, 2007) (finding
23 no agency action for the court to review because the biological opinion
24 was withdrawn by the agency so that it could comply with a recent Ninth
25 Circuit decision; however, the court imposed a notice requirement on the
26 agency if it planned on issuing a new biological opinion). Finding that

1 effective relief can be given, the Court proceeds to the merits of
2 Plaintiffs' motions for preliminary injunction.

3 2. Preliminary Injunction

4 The Court highlights again that Defendants did not challenge the
5 evidence submitted by Plaintiffs in support of their preliminary
6 injunction request. Defendants submit, however, that neither Plaintiffs
7 nor the public are likely to suffer harm if the preliminary injunction
8 is not entered because the Compliance Agreements with HWS were cancelled
9 and supplemental environmental analysis will occur.

10 A preliminary injunction may be issued to maintain the status quo
11 if the plaintiffs establish that they are "likely to succeed on the
12 merits, that [they are] likely to suffer irreparable harm in the absence
13 of preliminary relief, that the balance of equities tips in [their]
14 favor, and that an injunction is in the public interest." *Winter v.*
15 *NRDC*, 129 S. Ct. 365, 374 (2008). The Ninth Circuit uses a "sliding
16 scale" under which a preliminary injunction may be issued if there are
17 serious questions going to the merits and the balance of hardships tips
18 sharply in the plaintiffs' favor, along with satisfaction of the two
19 other *Winter* factors. *Alliance for the Wild Rockies v. Cottrell*, ---
20 F.3d ---, 2010 WL 2926463 (9th Cir. July 28, 2010).

21 The Court finds this standard is met. First, regardless of 1) the
22 cancellation of the Compliance Agreements and 2) APHIS's stated intent
23 to comply with the NHPA and conduct supplemental environmental analysis,
24 there are serious questions relating to whether the EA sufficiently
25 analyzed the impacts that the shipment of Hawaiian garbage will have on
26 the affected Northwest area, including the ports, routes of train or

1 truck travel, and the Roosevelt Landfill. Other than a no-action
2 alternative, there was no analysis of alternatives. For these reasons,
3 the Court finds it likely that Plaintiffs will prevail on their NEPA
4 claims that the EA and FONSI failed to adequately analyze the
5 environmental impacts of shipment and receipt of Hawaiian garbage to the
6 Roosevelt Landfill, which is located on lands ceded by the Yakama Nation,
7 wherein tribal members enjoy "in common" usufructuary rights, and in
8 close proximity to the Columbia River, in which the environment
9 organization members and individual Plaintiffs enjoy fishing, boating,
10 and swimming. *See Ctr. for Biological Diversity v. Nat' Highway Traffic*
11 *Safety Admin.*, 538 F.3d 1172, 1220 (9th Cir. 2008). Further, there are
12 serious questions about whether Defendants adequately consulted with the
13 Yakama Nation as required by the Yakama Treaty of 1855 and federal Indian
14 trust common law.

15 Second, Plaintiffs are likely to suffer irreparable harm in the
16 absence of a preliminary injunction barring the shipment of Hawaiian
17 garbage. The Roosevelt Landfill is located in the area in which tribal
18 members exercise their "in common" hunting, gathering, and fishing rights
19 protected by the Yakama Treaty of 1855. The introduction of an invasive
20 species or contamination by the Hawaiian garbage would immeasurably harm
21 the resources and waterways enjoyed by the Yakama Nation, the
22 environmental organization members, and the two individual Plaintiffs,
23 as well as the Yakama Nation's logging industry. The cancellation of the
24 Compliance Agreements and stated intent to conduct supplemental
25 environmental analysis does not lessen the likelihood of irreparable harm
26 because the injury under NEPA occurred when APHIS issued its allegedly

1 deficient EA and FONSI. *See Siera Club*, 446 F.3d at 816 ("The injury-in-
2 fact is increased risk of environmental harm stemming from the agency's
3 allegedly uninformed decision-making."). Further, APHIS may enter into
4 a new compliance agreement without seeking public comment or giving
5 public notice so long as the FONSI remains effective. 7 C.F.R. §
6 330.403.

7 Third, the balance of equities tips sharply in Plaintiffs' favor.
8 While the USDA has an interest in encouraging economic growth and Hawaii
9 has an interest in disposing its garbage, those interests are trumped by
10 Plaintiffs' interests in ensuring that the environmental impacts and the
11 related economic consequences resulting from those environmental impacts
12 are fully considered before Hawaiian garbage is shipped to the Roosevelt
13 Landfill. The pre-2006 regulation prohibiting the shipment of Hawaiian
14 garbage to the mainland is evidence of the historic concerns about the
15 environmental risks inherent in such shipments. While 7 C.F.R. § 330.402
16 lifted that ban, APHIS's fidelity to the NEPA reprocess is critical. And
17 APHIS acknowledges that some level of supplemental environmental analysis
18 is necessary under the circumstances.

19 Fourth, a preliminary injunction is in the public interest. Although
20 baled garbage will remain at the Honolulu port longer than anticipated,
21 it has already sat there for over 230 days. There is nothing before the
22 Court indicating that the presence of the garbage in Honolulu will injure
23 the public. In comparison, the introduction of an invasive species from
24 Hawaii to the mainland will injure those who enjoy these lands, waters,
25 and wildlife, and those who benefit from industries, such as the timber
26 and soft-fruit industries, which may be affected by an invasive species.

1 3. Conclusion

2 Accordingly, the Court determines Plaintiffs have established that
3 a preliminary injunction is necessary. Nonetheless, the Court will
4 lessen the scope of the previously-imposed bar to that area of the
5 mainland wherein the Plaintiffs will likely suffer injury. In addition,
6 the parties are to meet and confer regarding scheduling and submit a
7 joint status certificate; thereafter, a scheduling conference will be
8 held.

9 For the reasons given above, **IT IS HEREBY ORDERED:**

10 1. Friends of Columbia Gorge, Northwest Environmental Defense
11 Center, Columbia Riverkeeper, Dawn Stover, and Daniel Lichtenwald's
12 Motion to Expedite Hearing (**Ct. Rec. 72**) is **GRANTED**.

13 2. Friends of Columbia Gorge, Northwest Environmental Defense
14 Center, Columbia Riverkeeper, Dawn Stover, and Daniel Lichtenwald's
15 Motion to Strike Supplemental Declaration of Rebecca Bech (**Ct. Rec. 69**)
16 is **DENIED**.

17 3. The Yakama Nation's Motion for Preliminary Injunction (**Ct. Rec.**
18 **66**) is **GRANTED**.

19 4. Friends of Columbia Gorge, Northwest Environmental Defense
20 Center, Columbia Riverkeeper, Dawn Stover, and Daniel Lichtenwald's
21 Motion for Temporary Restraining Order and Preliminary Injunction (**Ct.**
22 **Rec. 24**) is **GRANTED**.

23 5. Defendants are enjoined from:

- 24 a. authorizing shipments, subject to USDA-APHIS permitting,
25 of Hawaiian garbage to Washington or Oregon ports on the
26 Columbia River and/or to the Roosevelt Landfill,

1 including those shipments authorized under any compliance
2 agreements between HWS and USDA-APHIS, and

3 b. permitting, authorizing, allowing, or otherwise granting
4 permission to HWS or any other private trash hauling
5 enterprise to load, ship, transport, or otherwise export
6 Hawaiian garbage from Honolulu to Washington or Oregon
7 ports on the Columbia River and/or to the Roosevelt
8 Landfill.

9 6. The \$100.00 bond (Ct. Rec. [38](#)) posted by Plaintiffs shall
10 remain posted.

11 7. No later than **September 13, 2010**, the parties shall file a
12 joint status certificate setting forth the results of their meet and
13 confer regarding 1) the production of the administrative record, 2) the
14 briefing and calendaring of summary judgment motions, 3) trial date and
15 length, and 4) other helpful scheduling information for the Court.

16 **IT IS SO ORDERED.** The District Court Executive is directed to file
17 this Order and provide copies of this Order to counsel.

18 **DATED** this 30th day of August 2010

19
20 s/Edward F. Shea
21 EDWARD F. SHEA
22 United States District Judge

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