IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR FOOD SAFETY, *et al*, Plaintiffs, vs. KEN SALAZAR, Secretary, United States Department of the Interior, *et al*, Defendants.	)	Ca No. 11-1457 JEB

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION TO DISMISS

In this matter the Center for Food Safety, the Public Employees for Environmental Responsibility and Beyond Pesticides ("Plaintiffs") allege that the Ken Salazar, Secretary of the U.S. Department of the Interior, Daniel M. Ashe, Director of the United States Fish and Wildlife Service (FWS), and FWS ("Federal Defendants") authorized certain farming activities at Refuges in the FWS Southest Region ("Region 4") without determining that such use of the Refuge was compatible with its purposes under the National Wildlife Refuge System Administration Act of 1966, as amended, 16 U.S.C. § 668dd ("NWRSAA"), and without conducting an environmental analysis under the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4361 ("NEPA").

However, the actions that Plaintiffs challenge, specifically cooperative farming practices and farming with genetically modified crops ("GMCs"), will no longer be allowed after the end of the 2012 growing season until Region 4 completes appropriate environmental analysis under NEPA and a compatibility determination. Declaration of David Viker at ¶ 5. (Exhibit A.)

Therefore, Plaintiffs' claims are now moot. Accordingly, this Court should deny Plaintiffs' motion for summary judgment and dismiss this action.

FACTUAL BACKGROUND

GMCs are crops grown with seeds that have been genetically modified to be resistant to certain herbicides. AR at 311. The use of GMCs reduces the amount of toxic pesticides that need to be used to grow certain crops. Id. Approximately, 69 percent of agricultural lands at the Refuges in Region 4 use GMC while the remaining 31 percent use conventional seed. Id. These lands are farmed either by refuge employees by private farmers under cooperative farming agreements with the FWS.

Twenty five Refuges or refuge complexes in Region 4 have agriculture as part of their mission. AR at 312. Each of these Refuges has completed or is in the process of completing Comprehensive Conservation Plans ("CCPs") that incorporate Migratory Bird Use Day and farming objectives. Id. Farming is critical to insuring that there is enough food for various species of migratory birds. Id. Under the cooperative farming agreements, a certain amount of crop is not harvested and is left as a food source for the migratory birds. Almost all of the crops for the 2012 growing season have been planted.

Region 4 is preparing an Environmental Assessment ("EA") to analyze the impacts of the use of GMC in the Refuges. Viker Declaration at ¶ 5.

LEGAL BACKGROUND

A. Mootness

The Supreme Court has long held that "[th]e exercise of judicial power under Article III of the Constitution depends on the existence of a case or controversy." Preiser v. Newkirk, 422

U.S. 395, 401 (1975). As the Supreme Court has explained, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Raines v. Byrd, 521 U.S. 811, 818 (1997). Accordingly, federal courts lack jurisdiction "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992); see also Am. Rivers v. Nat'l Marine Fisheries Serv., 126 F.3d 1118, 1123 (9th Cir. 1997). Furthermore, courts have "neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them." Preiser, 422 U.S. at 401.

The case-or-controversy requirement "subsists through all stages of federal judicial proceedings, trial and appellate." Spencer v. Kemna, 523 U.S. 1, 7 (1998) (citations omitted); Rendell v. Spencer, 484 F.3d 236, 241-42 (3rd Cir. 2007). "[T]hroughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." Id. (citation and internal quotation marks omitted); see also Pub. Utils. Comm'n v. FERC, 100 F.3d 1451, 1458 (9th Cir. 1996). The plaintiff bears the burden of demonstrating the existence of a case or controversy at all stages of the litigation. New Jersy Turnpike Authority v. New Jersy Central Power and Light, 772 F2d 25, 33 (3rd Cir. 1985). A "mere physical or theoretical possibility" that the challenged conduct will again injure the plaintiff is insufficient to establish a present case or controversy. Murphy v. Hunt, 455 U.S. 478, 482, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982).

Thus, if actual or threatened injury from the particular action challenged no longer exists,

or a change in circumstances deprives a court of the ability to provide any meaningful or effective relief for the alleged violation, the matter is moot and must be dismissed for lack of jurisdiction. See Mills v. Green, 159 U.S. 651, 653 (1895).

B. NEPA

The purpose of NEPA is to ensure that agencies take a "hard look" at the environmental consequences of proposed actions. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (citeing Kleppe, 427 U.S. at 410 n.21.) It is well-settled, however, that NEPA is an "essentially procedural" statute and does not require an agency to follow the most environmentally sound course of action. Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978); Robertson, 490 U.S. at 350.

Regulations promulgated by the Council on Environmental Quality ("CEQ"), 40 C.F.R. §§ 1500-08, guide application of NEPA and are entitled to substantial deference. Robertson, 490 U.S. at 355-56. While NEPA requires federal agencies proposing "major Federal actions significantly affecting the quality of the human environment" to prepare an environmental impact statement ("EIS"), 42 U.S.C. § 4332(2)(C), the CEQ regulations recognize that not all agency actions will have significant environmental impacts. Thus, an agency may prepare an EA in the first instance to determine whether a significant impact exists which would necessitate an EIS. See 40 C.F.R. §§ 1501.3(a), 1501.4. If the agency determines after preparing an EA that the proposed action will not cause significant impacts, then the agency may issue a FONSI in lieu of preparing an EIS. 40 C.F.R. § 1501.4(e).

C. NWRSAA

The NWRSAA addresses the administration, policy, and mission of the National Wildlife

Refuge System. 16 U.S.C. § 668dd. It is the policy of the Refuge System that each refuge shall be managed to fulfill the mission of the entire system as well as the specific purposes for which the specific refuge was established, including farming. See Id. at § 668dd(a)(3). An important component of the management of each refuge is the CCP and a step-down component known as a "compatibility determination" ("CD"). See 50 C.F.R. § 26.41. A refuge manager may not allow a new use or expand, renew or extend an existing use of a refuge unless he/she completes a CD. Id. A "compatible use" is a wildlife-dependant recreational use, *or any other use of a refuge,* that in the sound professional judgment of the FWS will not materially interfere with or detract from the mission of the Refuge System or the purpose of the specific refuge. See 16 U.S.C. § 668ee(1)(emphasis added); see also Wyoming v. United States, 279 F.3d 1214, 1228 (10th Cir. 2002).

ARGUMENT

I. Plaintiffs' Claims Are Moot Because There Will Be No Farming with GMC at Refuges in Region 4 until There Is Appropriate NEPA Compliance and Compatibility Determinations.

Because FWS will not allow farming at the Refuges in Region 4 after the 2012 growing season until there is appropriate NEPA analysis and compatibility determinations, there remains no "live" controversy. See Viker Declaration at ¶ 5.

The particular decision regarding which Plaintiffs sought review, i.e. allowing cooperative farming that uses GMCs at the Refuges, will no longer exist after the end of the 2012 growing season and will not be repeated absent additional environmental analysis and compatibility determinations. Id.. at ¶ 5. Therefore, there is no basis for meaningful relief. Since it is impossible for the court to "grant any effectual relief whatsoever," the matter is moot.

Church of Scientology, 506 U.S. at 12; see also Citizens for Responsible Gov't State Political Action Comm. v. Davidson, 236 F.3d 1174, 1182 (10th Cir. 2000) (action moot if any relief would have no "effect in the real world"). In such a case, Article III prevents the Court from issuing advisory opinions on a "hypothetical state of facts" that Plaintiffs assert may at some time come to pass. Nat'l Advertising Co. v. City & County of Denver, 912 F.2d 405, 412 (10th Cir. 1990).

II. No Exceptions to the Mootness Doctrine Apply

There are two recognized exceptions to the mootness doctrine. The first is for challenges to conduct that is "capable of repetition yet evading review," and the second is for voluntary cessation of allegedly unlawful conduct. See City of Los Angeles v. Lyons, 449 U.S. 934, 935 n.1 (1980). Neither exception applies here.

The "repetition/evasion" exception "is a narrow one, and applies only in 'exceptional situations'" that are not present here. Headwaters, Inc. v. BLM, 893 F.2d 1012, 1016 (9th Cir. 1989) (citing Los Angeles v. Lyons, 461 U.S. 95, 109, 103 S.Ct. 1660, 1669, 75 L.Ed.2d 675 (1983)). Under this exception, "federal courts may exercise jurisdiction over otherwise moot matters in which [1] the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and [2] there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." Id. (citations omitted).

There is no indication that there will be insufficient time to litigate any future the decision to allow farming with GMC at the Refuges in Region 4, if and when a decision is made. Moreover, there is no reasonable expectation that the Refuges will undertake cooperative farming in the manner that Plaintiff complains of in this litigation. Here, the Declaration of

David Viker states that Defendants do not intend to allow cooperative farming with GMC until they complete NEPA analysis and compatibility determinations. The FWS will clearly communicate its position to the cooperative farmers. See Viker Declaration, ¶ 5. Thus, the "repetition/evasion" exception does not apply here.

The "voluntary cessation" exception arises where "despite the apparent demise of the controversy, its resolution has a reasonable chance of affecting the parties' future relations." Clarke v. United States, 915 F.2d 699, 703 (D.C. Cir. 1990). The early cases developing the exception focused on preventing a private defendant from returning to its "old ways." Id. at 705. Thus, voluntary cessation does not save an action from mootness where: (1) there is no reasonable expectation that the wrong will be repeated; and (2) interim events have eliminated the effects of the alleged violation. County of Los Angeles v. Davis, 440 U.S. at 631.

The burden is typically on the moving party to demonstrate that the there is no reasonable expectation of a recurrence. New Jersy Turnpike Authority, 772 F2d at 33. Agencies, however, are entitled to a presumption of agency regularity and compliance. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971); United States v. Chem. Found., 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."). Based upon the general presumption that public officers "discharge their duties correctly, lawfully, and in good faith," Frizelle v. Slater, 111 F.3d 172, 177 (D.C. Cir. 1997), courts have treated the cessation of allegedly unlawful conduct by government officials with more solicitude than similar actions by private parties. Coral Springs Street Systems, Inc. v. City of Sunrise, 371 F.3d 1320, 1329 (11th Cir. 2004); Ragsdale v. Turnock, 841 F.2d 1358,

1365 (7th Cir. 1988); see also Clarke, 915 F.2d at 705 (with respect to Congress, "[a]t least in the absence of overwhelming evidence (and perhaps not then) it would seem inappropriate for the courts to either impute such manipulative conduct to a coordinate branch of government, or to apply against that branch a doctrine that appears to rest on the likelihood of a manipulative purpose."). The Court should apply the presumption of good faith and regularity to FWS here.

FWS has demonstrated that there is no reasonable expectation that the conduct at issue will be repeated. If FWS should decide to authorize the use of GMCs at the Refuges in Region 4, it will only be after the appropriate environmental analysis under NEPA, compatibility determinations and other required findings. If Plaintiffs bring a challenge to that new decision, this will create a controversy that is separate and distinct from the basis for the current case. Such an agency decision would be amenable to judicial review in a new action. In addition, the second component of the "voluntary cessation" exception is not met because FWS has decided not to allow cooperative farming with GMO until there has been appropriate NEPA analysis and compatibility determinations. Thus, neither prong of this exception to the mootness doctrine is satisfied. The Court now lacks jurisdiction over this matter and should enter an order of dismissal.

III. Plaintiffs' Claims are Prudentially Moot.

Alternatively, the Court should dismiss these claims because this case is prudentially moot. The prudential mootness doctrine recognizes that "in some circumstances, a controversy, not actually moot, is so attenuated that consideration of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has power to grant." See Chamber of Commerce v. U.S. Dep't of Energy, 627 F.2d 289, 291 (D.C. Cir. 1980).

(citing Warth v. Seldin, 422 U.S. 490, 498–500 (1975)); see also Greenbaum v. EPA, 370 F.3d 527, 534 (6th Cir. 2004) (recognizing and applying the doctrine of prudential mootness). Thus, the federal courts may withhold both declaratory and injunctive relief when prudence so requires. See A.L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324, 331 (1961) (declaratory relief); United States v. W.T. Grant Co., 345 U.S. 629, 635-36 (1953) (injunctive relief). Prudential mootness's central inquiry is whether circumstances have "changed since the beginning of litigation that forestall any occasion for meaningful relief." S. Utah Wilderness Soc'y v. Smith, 110 F.3d 724, 727 (10th Cir. 1997); see also Coal. for Gov't Procurement v. Fed. Prison Indus., 365 F.3d 435, 458 (6th Cir. 2004) ("The test for mootness is whether the relief sought would, if granted, make a difference in the legal interest of the parties.").

For example, in Benavides v. Housing Authority of City of San Antonio, 238 F.3d 667, 670 (5th Cir. 2001), the court held that an NHPA challenge to a demolition project was moot because the units had been demolished to the point that they were no longer habitable. See also Coal. for Canyon Pres. v. Bowers, 632 F.2d 774, 780 (9th Cir. 1980) (noting if the project is substantially complete, ordering further "compliance with state or federal environmental policy acts may not result in any major changes or environmental benefits"). Of more relevance here, courts have also applied the doctrine of prudential mootness to cases where the government has already changed or is in the process of changing policies or where it appears that any repeat of the actions in question is highly unlikely. See Reeve Aleutian Airways, Inc. v. United States, 889 F.2d 1139, 1144 (D.C. Cir. 1989) (where government's challenged practice underwent substantial revision, reviewing court could not be certain of the final action's ultimate form); Building and Constr. Dep't v. Rockwell Int'l Corp., 7 F.3d 1487, 1491-92 (10th Cir. 1993) (court

may decline to grant declaratory or injunctive relief where the government already changed or is in the process of changing policies); Cascadia Wildlands Project v. U.S. Fish & Wildlife Service, 219 F.Supp. 2d 1142 (D. Or. 2002) (staying claims against a withdrawn biological opinion being replaced by a revised opinion).

That is exactly the situation before this Court. The FWS has decided not to allow farming with GMC after the 2012 growing season until there is analysis under NEPA and compatibility determinations. The FWS has also stated that if, after preparation of an EA, a FONSI cannot be signed, the FWS will prepare an EIS. Viker Declaration at ¶ 5. This voluntary action provides the substantive relief Plaintiff would be entitled to if it prevailed on its NEPA claimi.e., if Plaintiff were to prevail on its NEPA claim, the appropriate remedy would be for the Court to remand the action to the agency for further NEPA analysis. Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp., 423 U.S. 326, 333 (1976) (judicial review of agency action ordinarily requires remand to agency so that agency can exercise its discretion). Thus, in light of FWS's commitment to conducting NEPA analysis and compatibility determinations prior to any use of GMC at the Refuges there really is no other meaningful relief this Court can grant. Therefore, this Court should stay its hand and decline to order the relief that Plaintiff seek.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion for summary judgment and grant Federal Defendants motion to dismiss.

Dated this 21st day of March, 2012

Respectfully submitted,
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