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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
(Eugene Division)

NEWPORT FISHERMEN'S WIVES, INC., an Oregon nonprofit corporation, **CITY OF NEWPORT, LINCOLN COUNTY, PORT OF NEWPORT** and **MIDWATER TRAWLERS COOPERATIVE,** an Oregon cooperative,

Plaintiffs,

v.

UNITED STATES COAST GUARD, an agency of the United States Department of Homeland Security,

Defendant.

Case No. 6:14-cv-1890-MC

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

(Oral Argument Requested)

I. INTRODUCTION AND RELEVANT FACTUAL BACKGROUND.

The Court is familiar with the facts in this case, which will not be repeated at length in this brief. From plaintiffs' vantage point, the facts reflect poorly on an agency that historically has benefitted the Newport community greatly through the functioning of its Newport Air Station's search and rescue (SAR) capability. Without involving stakeholders, and with blinders

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on to the realities of the dangers of the cold waters off Oregon's central coast, the Coast Guard skipped required National Environmental Policy Act (NEPA) procedures before making a decision to decommission a rescue helicopter that has consistently saved lives throughout its 27 years of service. While the agency steadfastly defended its conduct, in part by attempting to rewrite historical facts, congressional action in the form of the Howard Coble Coast Guard and Maritime Transportation Act of 2014, Public Law No. 113-281 (the Act), brought the Newport community a brief reprieve, specifically by preventing the Coast Guard from closing the Newport Air Station for the remainder of the current calendar year.

Aside from the brief respite allowed by the Act, the Coast Guard continues to defend its conduct while now attesting it has changed course of its own volition and "presently has no intention to close the Air Facility or relocate the [SAR] helicopter operating there . . . ." Second Declaration of Captain Christopher Martino (Second Martino Decl.) ¶ 3. The Coast Guard also attests that although it had "considered" closing the Newport Air Station in 2014, it never really made a final decision to do so, despite strong evidence in the case to the contrary. *Id.* ¶ 4. The Coast Guard further maintains that it complied fully with NEPA before it announced the closure of the Newport Air Station in early October 2014, which decision the agency again characterizes as "the now-abandoned *proposal* to cease operations" at Newport. *Id.* ¶ 6 (emphasis added). Yet at the same time, the Coast Guard acknowledges that the agency's NEPA decision, which took the form of a categorical exclusion determination, was finalized after the fact "on November 10, 2014." *Id.* ¶ 9.

Captain Martino's characterizations of the Coast Guard's October 2, 2014 decision to close the Newport Air Station as only a "proposal," a "now-abandoned proposal" and a

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"proposed cessation of operations" are clearly false. This is made abundantly clear by the testimony of Admiral Richard Gromlich at the October 20, 2014 town hall meeting organized by the City of Newport, Port of Newport and Lincoln County. A transcript of that testimony includes the following statement:

> But those decisions are tough ones and they're made at the highest levels of our organization, and in this case, the final decision to close those air facilities was made by the Commandant of the Coast Guard. The air facility here in Newport will close on the thirtieth of November, and, even at my level of the Coast Guard, as the Congressman alluded to, I can't do anything about that as far as the closure date or offer to delay the closing in any way. I've got to carry that out.

Third Declaration of Ginny Goblirsch ("Third Goblirsch Decl."), ¶ 8 (emphasis added).

The Coast Guard also makes the surprising and false representations that it was the *agency* that in mid-October 2014 "hosted a stakeholder's meeting" and "hosted a town hall meeting" to discuss the Newport Air Station's closure with the affected community. Second Martino Decl. ¶ 8. Yet as Ginny Goblirsch testifies in her declaration, not only was it the three public body plaintiffs to this case that organized the stakeholders and town hall meetings, but the Coast Guard was a reluctant meeting participant, one that repeated the mantra that its decision to close the Newport Air Station was final and would not be reversed regardless of community input. Third Goblirsch Decl. ¶¶ 4-7 & Ex. D.

This is the atmosphere in which the Coast Guard urges the Court to dismiss plaintiffs' case primarily on mootness grounds as well as ripeness and standing As demonstrated below, the Coast Guard's motion should be denied. Instead, pursuant to a separate motion filed herewith, the plaintiffs seek only to stay the case until January 1, 2016, at which time the parties should be required to confer as to next steps and schedule a status conference with the Court.

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II. DISMISSAL IS NOT WARRANTED.

The Coast Guard's motion to dismiss rests largely on mootness grounds, with ripeness and standing assertions thrown in for good measure. Each is discussed in turn below.

A. Defendant's Mootness Argument Falls Far Short of the Legal Standard.

Given the factual record in this case, which must be evaluated in the light favorable to plaintiffs, the Coast Guard's mootness argument is greatly overstated. As Judge Haggerty recently emphasized, a party asserting mootness "has a heavy burden to meet." *Am. Humanist Ass'n v. United States*, ____ F.Supp.3d _____, No. 3:14-cv-00565-HA, 2014 WL 5500495, at *4 (D. Or. Oct. 30, 2014) (so stating in a case rejecting defendants' motion to dismiss an inmate's lawsuit that alleged a deprivation of constitutional rights due to the prison's refusal to recognize Humanism as a religion, even though the prison accommodated the inmate's religious beliefs after the lawsuit was filed). Indeed, where a defendant asserts mootness based on its voluntarily cessation of challenged conduct, that burden is increased. *Id.* More specifically, the "voluntary cessation of challenged conduct moots a claim only if 'subsequent events [make] it absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur.'" *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000), which in turn relied on prior Supreme Court precedent). The reason a defendant's voluntary cessation does not generally render a case moot is "because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Emps. Int'l Union, Local 1000*, ___ U.S. ___, 132 S.Ct. 2277, 2287 (2012).

Here, the Coast Guard not only continues to deny that it ever decided to close the Newport Air Station but it also claims its voluntary conduct after the filing of this lawsuit has

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mooted plaintiffs' claims. Docket No. 36 at 6 (stating that plaintiffs' "claims have been rendered moot by the Coast Guard's decision not to cease operations at AIRFAC Newport and to continue to operate the helicopter at the facility under the same conditions"). To be sure, the Coast Guard acknowledges that the Act also puts sideboards around the agency's conduct for the time being, *id.*, until it sunsets in less than 11 months. But the central theme in the Coast Guard's brief is the notion that the agency "decided [not] to follow through on that plan" to close the Newport Air Station, *id.*, which is a quintessential example of a defendant relying on its voluntary cessation of challenged conduct in an effort to avoid judicial review.

The Coast Guard continues to defend the legality of its currently reversed decision to remove the SAR helicopter from Newport, and for that matter refuses to even admit that it made such a decision in the first instance despite compelling evidence to the contrary. On this record, the clear and unambiguous statement of Admiral Gromlich that "the final decision to close those air facilities was made by the Commandant" must trump the *post hoc* rationalization of Captain Martino, a declarant with no personal knowledge of the agency's decision-making process in this case, that the Coast Guard was only floating a "proposal" that has now been voluntarily withdrawn.

Two Ninth Circuit cases are instructive here. In *Headwaters, Inc. v. Bureau of Land Mgmt.*, 893 F.2d 1012 (9th Cir. 1990), the court noted that claims for declaratory relief remain alive only when "the challenged government activity . . . is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Id.* at 1015 (quoting *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122 (1974)). In *Headwaters*, following the

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termination of the timber sale originally challenged in that case, the Ninth Circuit found that the possibility of future timber sales that could possibly impact the plaintiff was "too uncertain, and too contingent upon the BLM's discretion, to permit declaratory adjudication predicated on prejudice to [plaintiff's] 'existing interests.'" *Id.* (footnote omitted). In this case, we have a situation where the Coast Guard has, pursuant to a statutory directive, suspended its decision to close the Newport Air Station. According to Captain Marino, the Coast Guard "presently has no intention to close the air facility or relocate the MH-65 helicopter operating there," but at the same time, the agency has no doubt provided input to the administration that has resulted in the President's recently released budget request seeking language authorizing defendant to close the air stations in Newport and Charleston, South Carolina. Third Goblirsch Decl. Ex. D. Clearly, the threat of closure has not "evaporated or disappeared" and the competing positions of plaintiffs and the Coast Guard that will collide in Congress this year constitutes the type of "continuing and brooding presence" that makes this case far from moot.

The Ninth Circuit's decision in *Oregon Natural Resources Council, Inc. v. Grossarth*, 979 F.2d 1377 (9th Cir. 1992), is also instructive with respect to the "voluntary cessation" exception to the mootness doctrine. In *Grossarth*, which involved a cancelled timber sale, the Ninth Circuit found that the agency's cancellation of that timber sale, and announcement that it would comply with NEPA for any future sales, did not invoke the "voluntary cessation" exception to the mootness doctrine. *Id.* at 1379. In contrast to the facts in *Grossarth*, the record in this case strongly supports plaintiffs' contention that there is a "reasonable expectation" of a recurrence of "the same allegedly unlawful conduct by the [agency] in the future." *Id.* In this case, the Coast Guard has made no commitment regarding the future of the Newport Air Station

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beyond the legally mandated twelve and one-half months between the stipulated injunction of December 11, 2014 and the January 1, 2016 sunsetting of legislation that was signed into law on December 18, 2014. Given the pending budget request from the Coast Guard, there is much more than a reasonable expectation that the Coast Guard will simply implement a now-disrupted decision with a new and equally illegal categorical exclusion, all the while attempting to claim that the so-called new decision and the NEPA compliance question must rest on a new pre-decision categorical exclusion rather than the one that clearly postdated the decision that was announced on October 2, 2014.

In short, on the facts of this case, the Coast Guard's mootness argument should be rejected.

B. Plaintiffs Have Previously Demonstrated Both Ripeness and Standing.

Regarding ripeness, the Coast Guard fails to acknowledge that ripeness "is an element of jurisdiction [that] is measured at the time an action is instituted; ripeness is not a moving target affected by a defendant's action." *Malama Makua v. Rumsfeld*, 136 F.Supp.2d 1155, 1161 (D. Hawai'i 2001) (rejecting Army's argument that its withdrawal of challenged NEPA documents, namely a supplemental environmental assessment and finding of no significant impact, did not render the case unripe) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189-91 (2000)). *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992) (so holding as to jurisdictional issues generally, and expressly rejecting the argument that events subsequent to filing a lawsuit can retroactively confer jurisdiction where jurisdiction did not exist at the time of filing); *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 814 (8th Cir.

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2006) ("Jurisdictional issues such as standing and ripeness are determined at the time the lawsuit was filed . . . .").

The Coast Guard did not seriously challenge the ripeness of plaintiffs' action when opposing plaintiffs' motion for a preliminary injunction – nor should it have done so. As plaintiffs pointed out in prior briefing, the Coast Guard half-heartedly implied (in a footnote) that plaintiffs' action was not ripe for review because there was no final agency action. Docket No. 18 at 27 n.5. Plaintiffs explained why the Coast Guard was wrong:

> Setting aside the Coast Guard's decision to close the Newport Air Station well in advance of the November 10, 2014 categorical exclusion decision, it is black letter law that a categorical exclusion issued in the absence of an EA or EIS is a final agency action subject to judicial review. *See, e.g., Friedman Brothers Inv. Co. v. Lewis*, 676 F.2d 1317, 1319 (9th Cir.1982) (determining that a federal agency's decision that a bus yard qualified for a categorical exclusion from NEPA was a reviewable final agency action even though the federal agency had "not made a final commitment to fund the construction of the bus depot").

Docket No. 22 at 24 n.3. The Coast Guard's argument fares no better now.

Regarding standing, the Coast Guard's position rests on assertions previously made in opposing plaintiffs' motion for a preliminary injunction. Docket No. 36 at 10 ("The Coast Guard briefly summarizes its argument [made in its opposition to plaintiffs' motion for a preliminary injunction] here."). This makes sense given that "[j]urisdictional issues such as standing . . . are determined" at the outset of a case. *Sierra Club*, 446 F.3d at 814. Yet the Coast Guard ignores the fact that plaintiffs met the agency's standing argument *head on* by aggressively establishing all of the elements for Article III and prudential standing under NEPA, an argument to which the Court is respectfully referred rather than repeating it here. Docket No. 22 at 10-21.

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Again, the standing inquiry focuses on whether the particular plaintiffs before the Court have alleged a sufficiently personal stake in the outcome of the controversy to warrant the Court's exercise of federal jurisdiction. If not these plaintiffs, then whom? The plaintiffs in this case are by no means strangers to the serious issues before the Court, all of which implicate the public interest. Rather, the plaintiff coalition – comprised of the Newport Fisherman's Wives, Inc., City of Newport, Lincoln County, Port of Newport and the Midwater Trawlers Cooperative – has demonstrated highly personal stakes in the outcome of this case for purposes of standing. Keep in mind too that the plaintiff coalition need only establish the standing of one of its members. *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) (where one of three groups of plaintiffs was found to have standing, the Court did not "consider the standing of the other plaintiffs"). The Coast Guard's standing argument thus is without merit.

III. CONCLUSION.

For the reasons set forth above and as supported by the record in this case, the Court should deny the Coast Guard's motion to dismiss and grant plaintiffs' motion to stay the case through December 31, 2015.

DATED this 9th day of February, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February, 2015, I served the foregoing **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS** on the following:

Sean C. Duffy
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Environment & Natural Resources Division
Natural Resources Section
P.O. Box 7611, Ben Franklin Station
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by the following indicated method(s):

☐ by **mail** with the United States Post Office at Portland, Oregon in a sealed first-class postage prepaid envelope.

☐ by **email**.

☐ by **hand delivery**.

☐ by overnight mail.

☐ by **facsimile**.

☒ by the court's Cm/ECF system.

/s/Michael E. Haglund
Michael E. Haglund