IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DELAWARE AUDUBON SOCIETY, CENTER FOR FOOD SAFETY, and PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, Plaintiffs, vs. Secretary, United States Department of the Interior, DALE HALL, Director of United States Fish And Wildlife Service, and UNITED STATES FISH AND WILDLIFE SERVICE, an administrative agency of the United States Department of the Interior, Defendants.	))))))))))))))))))	Case No. 1:06-cv-223

PLAINTIFFS REPLY BRIEF IN SUPPORT
OF THEIR MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

I. DEFENDANTS BEAR A "HEAVY BURDEN" OF PROOF TO ESTABLISH MOOTNESS BASED ON THE ALLEGED VOLUNTARY CESSATION OF ALLOWING FARMING AT THE REFUGE 4

II. DEFENDANTS HAVE FAILED TO CARRY THEIR HEAVY BURDEN OF PROOF TO ESTABLISH MOOTNESS BASED ON THE ALLEGED VOLUNTARY CESSATION OF ALLOWING FARMING AT THE REFUGE 5

A. The Facts Of This Case Show That The Most Likely Reason For The Defenants' Voluntary Cessation Of Allowing Farming On The Refuge Was To Avoid Litigation 6

a. Defendants' Conduct Immediately Prior To This Litigation 7

b. Defendants' Conduct In the Settlement Negotiations Of This Case 8

c. The Lateness Of Defendants' Mootness Claim 8

B. Defendants Are Not Entitled To Any "Presumption" That Requires A Finding Of Mootness 11

CONCLUSION 14

TABLE OF CITATIONS

FEDERAL CASES

Armster v. United States District Court for the Central District of California, 806 F.2d 1347 .... 6, 10

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971) 11

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 and 289 n. 10 (1982) 4

Clarke v. United States, 915 F.2d 699 (D.C. Cir. 1990) 12

Coral Springs Street Systems, Inc. v. City of Sunrise, 371 F.2d 1320 (11th Cir. 2004) 11

Friends of the Earth v. Laidlaw Envt'l Services, Inc., 528 U.S. 167, 189 (2000) 4

Magnuson v. City of Hickory Hills, 933 F.2d 562, 565 (7th Cir. 1991) 5, 12

Ragsdale v. Turnock, 841 F.2d 1358, 1366 (7th Cir. 1988) 5, 9, 11

Sasnett v. Litscher, 197 F.3d 290, 291-92 (7th Cir. 1999) 6, 10

United States v. Chemical Foundation, 272 U.S. 1 (1924) 11

United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968) 4

United States v. Gov't of Virgin Islands, 363 F.3d 276, 285 (3d Cir. 2004) 5, 6, 9

United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) 4

Walling v. Helmrich & Payne, Inc., 323 U.S. 37, 43 (1944) 10

FEDERAL STATUTES

16 U.S.C. §668dd *et seq.* 3

42 U.S.C. § 4331 et seq. 3

OTHER

13A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3533.7 (2d ed. 2004) 5

Plaintiffs Delaware Audubon Society, Center for Food Safety, and Public Employees for Environmental Responsibility hereby submit their Reply Brief in Support of their Motion for Summary Judgment.

Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment ("Mem. Opp.") is striking in what it fails to do. Despite their burden to respond, Defendants fail to offer any challenge to Plaintiffs' standing, the factual basis for Plaintiffs' claims, or the law which governs Plaintiffs' claims. Defendants do not contest that, despite the clear statutory requirements of the National Wildlife Refuge System Administration Act, 16 U.S.C. §668dd *et seq*., they failed to make the required compatibility determinations before allowing farming at the Prime Hook Wildlife Refuge. Nor do they contest that, despite the clear requirements of the National Environmental Policy Act, 42 U.S.C. § 4331 et seq., Defendants failed to perform the required Environmental Assessment and Environmental Impact Statement before allowing the planting of Genetically Modified Crops at the Refuge. Defendants' failure to acknowledge the legal requirements asserted by Plaintiffs here necessitates a court ruling on the legal issues in this case. In completely failing to challenge the merits of Plaintiffs' claims as Rule 56 requires, Defendants have acquiesced to Plaintiff's claims that they violated these statutes in this case.

Defendants have instead hung their hat on the slender reed of mootness, claiming that their post-litigation decision to voluntarily cease allowing farming at the Refuge until the completion of a Comprehensive Conservation Plan renders Plaintiffs' claims no longer capable of adjudication by this Court. The Court should reject Defendants' mootness argument. Defendants have failed to carry their "heavy burden" of showing that their voluntary cessation renders this case moot. With liability unchallenged and a continuing live controversy, the Court should grant Plaintiffs' Motion for Summary Judgment.

I. DEFENDANTS BEAR A "HEAVY BURDEN" OF PROOF TO ESTABLISH MOOTNESS BASED ON THE ALLEGED VOLUNTARY CESSATION OF ALLOWING FARMING AT THE REFUGE.

Defendants' mootness argument rests on one single fact: the alleged voluntary cessation of the thirty-plus year practice of allowing farming on the Refuge, including the recent practice of allowing the use of GMO crops. The Supreme Court has stated "[i]t is well settled that " 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice" for "if it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.' " *Friends of the Earth v. Laidlaw Envt'l Services, Inc.*, 528 U.S. 167, 189 (2000) (*quoting City of Mesquite v. Aladdin's Castle, Inc*., 455 U.S. 283, 289 and 289 n. 10 (1982)); see *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot"). When the basis for mootness is voluntary cessation, "[a] case *might* become moot if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw,* 528 U.S. at 191 (emphasis added). Precisely because the voluntary cessation of allegedly wrongful activity can be undone by an equally voluntary decision to resume the conduct, courts have consistently held that "[t]he heavy burden of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968); *see Laidlaw*, 528 U.S. at 189 (*quoting Concentrated Phosphate*).

Defendants completely ignore the Supreme Court's clear and long-standing requirement of their burden of proof. However, this Court should hold Defendants to the established legal standard governing mootness based on voluntary cessation. Application of that standard shows

that the Defendants have utterly failed to carry their burden, and thus their mootness argument is without merit.

II. DEFENDANTS HAVE FAILED TO CARRY THEIR HEAVY BURDEN OF PROOF TO ESTABLISH MOOTNESS BASED ON THE ALLEGED VOLUNTARY CESSATION OF ALLOWING FARMING AT THE REFUGE.

At its core, Defendants' mootness argument rests on the legally deficient assertion that a "presumption" of future government compliance means that violations cannot be reasonably expected to recur. Mem. Opp. 15- 16. This argument ignores the law on voluntary cessation. A close examination of the law as applied to the facts of this case shows that Defendants have failed to carry their heavy burden.

In cases involving voluntary cessation of challenged conduct by public officials, courts generally require that the cessation of challenged conduct be accompanied by circumstances indicating the change is a "genuine" act of "self-correction" in order to find mootness. *See Magnuson v. City of Hickory Hills,* 933 F.2d 562, 565 (7th Cir. 1991); *see also* 13A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3533.7 (2d ed. 2004) (noting that while "[c]ourts are more apt to trust public officials than private defendants to desist from future violations ... the tendency to trust public officials is not complete ... nor is it invoked automatically"). Where the governmental defendant has ceased to engage in the challenged conduct only for practical or strategic reasons—such as avoiding litigation—the cessation does not make the case moot. *See United States v. Gov't of Virgin Islands,* 363 F.3d 276, 285 (3d Cir. 2004) (holding that where Government of Virgin Islands withdrew from challenged contract just before litigation was initiated and governor offered only general reason that withdrawal was in the "best interest" of the Virgin Islands, voluntary cessation was likely only a strategic move to avoid litigation and therefore case was not moot); *Ragsdale v. Turnock*, 841 F.2d 1358, 1366 (7th

Cir. 1988).

The case law suggests that a key factor in determining whether a government defendant's voluntary cessation of alleged wrongful conduct renders a case moot is whether the defendant has shown that the change in conduct was the result of serious deliberation and made for convincing reasons other than the desire to avoid litigation, *see e.g.*, *Gov't of Virgin Islands,* 363 F.3d at 285. Under the facts of this case, this factor strongly points away from a finding of mootness here.

A. The Facts Of This Case Show That The Most Likely Reason For The Defenants' Voluntary Cessation Of Allowing Farming On The Refuge Was To Avoid Litigation.

As noted above, the Third Circuit has found that voluntary cessations of wrongful activity by governmental defendants that is motivated by litigation purposes does not render a case moot. In a related vain, where a government defendant has not acknowledged that its past conduct is illegal, courts are less likely to find a cessation of challenged conduct makes the case moot. *See Armster v. United States District Court for the Central District of California,* 806 F.2d 1347, 1359 (9th Cir. 1986) (holding that where Justice Department did not concede that challenged conduct was illegal, bare assertion that it would not recur was insufficient to establish mootness because "[i]t has long been recognized that the likelihood of recurrence of challenged activity is more substantial when the cessation is not based on a recognition of the initial illegality of that conduct"); *see also Sasnett v. Litscher,* 197 F.3d 290, 291-92 (7th Cir. 1999).

The facts in this case strongly suggest that avoidance of litigation (and the system-wide precedent that a ruling in this case would set) likely motivated the Defendants' voluntary cessation. This can be seen in: (a) the Defendants' conduct immediately prior to the commencement of this litigation; (b) the Defendants' conduct in the settlement negotiations of

this case; and (c) the lateness of Defendants' mootness claim.

a. Defendants' Conduct Immediately Prior To This Litigation

Defendants do not offer any rationale why they chose to voluntarily cease their practice of allowing farming at the Refuge. Instead, one has to parse through the vague references and attachments to find some kind of explanation. The most direct is contained in a letter written to Senator Carper's office on August 30, 2007—**one week after the Plaintiffs had filed the present Motion for Summary Judgment**. In that letter, the Regional Director for the Fish and Wildlife Service's Northeast Regional Office claimed that, starting in July 2005 Defendants had received "divergent public comments" about farming at the Refuge, and that these "mixed viewpoints" led to a decision not to enter into cooperative farming agreements. *See* McMahon Declaration, ¶ 15 and Attachment E thereto at pp. 3-4. The contemporaneous evidence in the Administrative Record prepared for this litigation, however, shows no such qualms about allowing farming during late 2005 and early 2006:

* On December 5, 2005, Anthony Leger, the Regional Chief for the National Wildlife System within FWS, wrote Gene Hocutt at PEER taking the position that farming was a compatible use and that a written Compatibility Determination was not needed. (A.R. US 000803-05) On the issue of GMOs, Legar took the position that GMOs will be considered within the CCP process without any claim that their use need be suspended until the CCP process was completed.

* On January 13, 2006, Jonathon Schafler, the Prime Hook Refuge Manager, wrote an email to Mark Martell of Delaware Audubon (A.R. US 000807-09) and stated: "No cooperative farmer gets more than a year's contract until we decide the farming policy through the CCP" (AR 808). In other words, Cooperative Farming Agreements would not be banned until the CCP process was completed—only limited to a year in length.

* In January or February 2006, the Refuge entered into Cooperative Farming Agreements with Fred Bennett III (A.R. US 000840-48) and Carlton Wells & Sons, Inc. (A.R. US 000849-54).

Thus, despite hearing "divergent public comments" and "mixed viewpoints" eight months earlier, all evidence indicates that the Refuge and the FWS were full speed ahead on farming at the Refuge up to the date that Plaintiffs filed their complaint in this case—April 4, 2006.

b. Defendants' Conduct In the Settlement Negotiations Of This Case

Only after the Plaintiffs filed their complaint did the Defendants start to change their tune, and then only slowly. As this Court is aware from the numerous extensions of time sought by the Defendants to answer, the parties negotiated a tentative settlement of this case in August 2006. *See* Docket No. 18 (August 15, 2006 letter from US Attorney to the Court). The settlement broke down in February 2007. *See* Docket Nos. 22 (February 26, 2007 letter from Vivian Houghton to the Court); 23 (February 26, 2007 letter from US Attorney to the Court). Thus, the contacts by the Refuge Manager with the farmers in November 2006 and January 2007 that Defendants now tout as evidence of their decision to voluntarily cease allowing farming, *see* McMahon Decl. ¶ 11 and Attachment B thereto, were likely driven by the tentative settlement of this litigation, not by some serious, deliberative process or policy.

c. The Lateness Of Defendants' Mootness Claim

After the settlement broke down in early February 2007, the Defendants were forced to answer Plaintiffs' complaint. Their answer, filed February 28, 2007, makes no mention of the decision (supposedly made in 2006) to voluntarily cease allowing farming at the Refuge until the CCP process is completed. Nor does the Answer raise the issue of mootness at all.

The first mention of mootness came in the Status Report filed June 8, 2007, and thereafter Defendants commenced what appears to be a concerted campaign to create a record to support a claim of mootness. On July 26, 2007, the Regional Chief for the National Wildlife Refuge System (who in December 2005 said compatibility determinations were not needed and

GMOs would be dealt with but not prohibited until the CCP process was complete (*see* A.R. US 000803-805)) issued a memo expressing his understanding that farming will not occur until the CCP process was complete. *See* McMahon Decl. at ¶ 12 and Attachment C thereto. On August 6, 2007, the Complex Manager sent a letter to the cooperative farmers to "confirm" that no farming will occur until the CCP process is complete. McMahon Decl. at ¶ 13 and Attachment D thereto. And on August 30, 2007, the above-referenced letter to Senator Carper's office was sent.

From this evidence, the conclusion is inescapable that Defendants' mootness claim arose from litigation concerns. No evidence exists that the Defendants did anything to stop farming until well after this case was filed. Defendants, faced with having to respond to Plaintiffs' Motion for Summary Judgment and the prospect that an award of relief to Plaintiffs would create a damaging precedent for Defendants, are now trying to short-circuit judicial consideration of their conduct via mootness. This threat of bad precedent is not mere speculation. As Defendants themselves admit, farming occurs on 181 out of nearly 500 National Wildlife Refuges nationwide. Mem. Opp. p. 2. Based on limited review of documents from other refuges, the problems of allowing farming without compatibility determinations and allowing the use of GMOs without any environmental assessments is not limited to Prime Hook alone. *See* Rostov Decl. ¶ 4. Defendants' late assertion of mootness here appears designed to shield the Defendants from the inexorable effects of collateral estoppel on similar claims elsewhere. Such litigation motives preclude findings of mootness. *See Gov't of Virgin Islands,* 363 F.3d at 285; *Ragsdale*, 841 F.2d at 1366 (finding claim not moot because "the State produced no pre-existing documentation of the policy. We share the district court's concern that the State's position on this provision is asserted only in this litigation").

Further proving that the reason for the voluntary cessation does not support a finding of mootness is the fact that the Defendants have not acknowledged that their conduct at Prime Hook violated the NWRSAA, NEPA, and the APA. In the Factual background section of their brief, Defendants take the position that farming at the Refuge was "consistent with the Refuge system's Cropland Management guidance," Mem. Opp. 2, "serves a number of objectives" of the refuge, *id*. at 3, was "as permitted in the Refuge System Manual," *id*., and generally argues that both the farming and the use of GMOs was pursuant to and in compliance with various Refuge System policies. *Id*. 4-10. Defendants may be trying to keep their options open for the CCP process to provide the necessary cover for the resumption of farming with GMOs, but the utter failure to recognize that what the Defendants did was unlawful is fatal to the assertion of mootness here. As the Ninth Circuit said in denying a claim of mootness after a government assertion of voluntary cessation, "[i]t has long been recognized that the likelihood of recurrence of challenged activity is more substantial when the cessation is not based on a recognition of the initial illegality of that conduct." *Armster,* 806 F.2d at 1359. *See Sasnet*, 197 F.3d at 291-92. *See also Walling v. Helmrich & Payne, Inc.*, 323 U.S. 37, 43 (1944) (defendant's decision to cease offering allegedly illegal contract terms two months after complaint was filed but before trial did not moot controversy where defendant failed to acknowledge illegality of conduct).

Quite simply, all evidence points to a litigation motive for the Defendants' sudden declaration of a voluntary cessation of allowing farming at the Refuge. That litigation motive, plus the utter failure to acknowledge the illegality of the underlying conduct here, means that the Defendants have not carried their heavy burden to show mootness.

B. Defendants Are Not Entitled To Any "Presumption" That Requires A Finding Of Mootness.

A large part of Defendants' argument here rests on the claim of a "presumption" that governmental actors will follow the law such that a promise not to violate the law in the future is sufficient to establish mootness. This is not an accurate statement of the law. The "presumption" of agency "regularity and compliance" Defendants find in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415 (1971) and *United States v. Chemical Foundation*, 272 U.S. 1 (1924) is inapplicable here because (a) it refers to past decision making, having nothing to do with future conduct, (b) neither case dealt with mootness from a voluntary cessation of governmental conduct, and (c) it applies only in the absence of clear evidence to the contrary. In this case, the evidence clearly shows that the Defendants violated the NWRSAA by allowing farming without making compatibility determinations for over 10 years and violated NEPA by allowing farming of GMOs without the necessary environmental analyses for six years. Indeed, up to the filing of the complaint these same actors believed they had done nothing wrong despite the fact that Plainitffs Delaware Audubon and PEER raised the very concerns that drive this lawsuit. *See* A.R. US000803-805, 807-809. It is more than a bit of a stretch to claim that government officials who did not follow the law before will suddenly follow the law now—especially when they have not acknowledged that their previous course of conduct was wrongful.

The cases Defendants cite (Mem. Opp. 15-16) are easily distinguishable. *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.2d 1320 (11th Cir. 2004), involved mootness based on the fact that the City had enacted a new ordinance which eliminated the constitutional infirmities of the old code. There is no evidence that Defendants here changed any Refuge System policies, manuals, guidance, or anything else. The assertion that Defendants will not engage in certain conduct in the future is a far cry from enacting a new law. In *Ragsdale v.*

Turnock, 841 F.2d 1358 (7th Cir. 1988), the court specifically found a claim ***not*** moot even though the Defendant claimed he would not enforce the challenged reporting requirement because "the State produced no pre-existing documentation of the policy. We share the district court's concern that the State's position on this provision is asserted only in this litigation." *Id*. at 1366. In other words, a claim of voluntary cessation that appears to be motivated by litigation strategy entitles the government actor to no solicitude or special "presumption" for mootness purposes. The court in *Clarke v. United States,* 915 F.2d 699 (D.C. Cir. 1990) found that the voluntary cessation doctrine ***did not even apply*** in that case:

> We find that non-reenactment of a one-time condition that expired of its own terms cannot be viewed as cessation of conduct . . . In essence, Congress shot an arrow into the air, and it fell to earth. It stretches the words beyond recognition to say that Congress "voluntarily ceased" anything merely because it refrained from shooting some more arrows after the first landed. More important, extension of the doctrine to this case would not fit its basic theory. While the cessation of an ongoing activity pending a lawsuit may well imply an intent to renew the activity once the court has dropped out, this is hardly true of Congress's allowing a one-time provision to pass into history by its own terms.

Id. at 705-06. In fact, the only remotely applicable language of *Clarke*—"the cessation of an ongoing activity pending a lawsuit may well imply an intent to renew the activity once the court has dropped out"—supports Plaintiffs' position because it articulates the very risk inherent in Defendants' belated claim of voluntary cessation here. In short, Defendants offer no valid legal support for their claim that the mere promise not to allow farming for some unknown period of time in the future justifies a "presumption" or a finding of mootness, especially in light of the clear litigation motive behind Defendants' voluntary cessation here.

In contrast, the cases cited in section A above involved governmental actors who voluntarily ceased the challenged conduct but whose promise did not result in a finding of mootness. As Wright and Miller states (and cited by the 7th Circuit in *Magnuson*, 933 F.2d at

565), while "[c]ourts are more apt to trust public officials than private defendants to desist from future violations ... the tendency to trust public officials is not complete ... nor is it invoked automatically"). Rather, factors such as the Defendants' motive in claiming mootness must be explored. Because Defendants failed to explain why they decided to voluntarily cease allowing farming at the Refuge, there is simply no evidence of the serious deliberation or long-standing policy that courts require in order to find mootness. Indeed, all the evidence available strongly suggests that the mootness claim here is merely a litigation tactic to avoid a crippling precedent. That is simply not enough to satisfy Defendants' "heavy burden" in this case and provides this Court with more than enough support to conclude that there is a risk of recurrence of Defendants' wrongful conduct such that Plaintiffs' claims are not moot.

CONCLUSION

For the reasons set forth above and in Plaintiffs' Brief in Support of their Motion for Summary Judgment, Plaintiffs have established that they are entitled to judgment as a matter of law on all their claims. Because this controversy is not moot, Plaintiffs Delaware Audubon Society, Center for Food Safety, and Public Employees for Environmental Responsibility respectfully request that this Court makes findings of fact and conclusions of law and enter summary judgment in Plaintiffs' favor on all claims.

Respectfully submitted,

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