ORIGINAL

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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JUL 28 2010

JAMES R. LARSEN, CLERK
_______________DEPUTY
SPOKANE, WASHINGTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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|---|---|
| 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 | NO. **CV-10-3050-EFS**<br><br>COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF |



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1 corporation; COLUMBIA RIVERKEEPER, a Washington non-
2 profit corporation; DAWN STOVER, a Washington resident; DANIEL
3 LICHTENWALD, a Washington resident;
4
Plaintiffs,
5
v.
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UNITED STATES DEPARTMENT OF
7 AGRICULTURE; UNITED STATES DEPARTMENT OF AGRICULTURE
8 ANIMAL AND PLANT HEALTH INSPECTION SERVICE; TOM
9 VILSACK, Secretary of the United States Department of Agriculture;
10 CINDY SMITH, Administrator of the United States Department of Agriculture
11 Animal and Plant Health Inspection Service;
12
Defendants.
13

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18 Pacific Environmental Advocacy Center
Lewis & Clark Law School
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Northwest Environmental Defense Center,
Columbia Riverkeeper, Dawn Stover,
Daniel Lichtenwald

Plaintiffs the Confederated Tribes and Bands of the Yakama Nation, signatory to the 1855 Treaty With the Yakama, 12 Stat. 951 ("Yakama Nation" or "Nation"), Friends of the Columbia Gorge, Columbia Riverkeeper, Northwest Environmental Defense Center, Dawn Stover, and Daniel Lichtenwald (collectively "Plaintiffs") allege as follows:

## I. INTRODUCTION

1. Plaintiffs bring this action for declaratory and injunctive relief in response to Defendants' decision to allow the unlimited dumping of municipal solid waste ("MSW") from the Hawaiian Islands at the Roosevelt Regional Landfill ("Landfill") in Klickitat County, Washington. The Landfill is within the 10 million acres of land the Yakama Nation ceded to the United States in exchange for the rights guaranteed by the Yakama Treaty of 1855; it sits astride, abuts and is surrounded by the historic fishing, hunting and gathering



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1 areas, ceremonial sacred sites, and religiously and culturally significant historic
2 properties, of the Yakama People.
3 2. Under Article III of the Treaty of 1855, the Yakama Nation reserved
4 and retains "the right of taking fish at all usual and accustomed places, in
5 common with citizens of the Territory, and of erecting temporary buildings for
6 curing them; together with the privilege of hunting, gathering roots and berries,
7 and pasturing their horses and cattle upon open and unclaimed land," which
8 includes the lands underneath, adjoining and around the Landfill. The Yakama
9 Nation also enjoys companion use, access and religious rights to those lands.
10 3. Since time immemorial and continuing to this day, Yakama citizens
11 fish for species like salmon, sturgeon, sucker and eel along the Columbia River
12 and other tributaries near the Landfill. Yakama citizens hunt game such as
13 deer, elk, upland birds, cottontail rabbit and porcupine in the lands surrounding
14 the Landfill, for subsistence and ceremonial purposes. Yakama citizens gather
15 huckleberries and chokecherries and roots like lammush and bitterroot, and
16 pick various flowers and plants, from the lands surrounding the Landfill – all
17 for use as food or medicine. Having not meaningfully consulted with the
18 Yakama Nation as required by a multitude of federal laws, Defendants have
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1 completely failed to consider the potential irreversible harm that Hawaiian
2 MSW would have on Yakama Treaty-protected lands and resources and
3 federally-protected cultural and religious practices.

4 4. Defendants have categorically failed to satisfy the consultation
5 requirements of Section 106 of the National Historic Preservation Act, 16
6 U.S.C. § 470 *et seq.* ("NHPA"), having decided to permit the private
7 importation of MSW from Hawaii to the Landfill, and Washington State in
8 general, without having made any effort whatsoever to identify Yakama and
9 non-tribal historic properties that are registered or eligible for listing on the
10 National Register of Historic Places that could be impacted by that federal
11 decision and undertaking. Defendants have further failed to confer with either
12 the Washington State Historic Preservation Officer ("SHPO") or the Yakama
13 Nation Tribal Historic Preservation Officer ("THPO"), or sought approval of
14 the federal Advisory Council on Historic Preservation ("Advisory Council"), as
15 required by 36 C.F.R. § 800.4(a). As such, Defendants have not at all taken
16 into account the harm Hawaiian garbage could do to nearby historic properties
17 with Native American cemeteries, cairns denoting ceremonial or burial sites
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1 and ancestral remains; village ruins; petroglyphs and pictographs; or fishing
2 sites or culturally modified trees used for ceremonial and hunting purposes.
3 5. Beyond that fatal procedural flaw, Defendants' decision to allow the
4 dumping of Hawaiian garbage in the Pacific Northwest represents a significant
5 change in agency policy and regulations. Prior to 2006, in order to protect the
6 continental United States from the accidental importation of invasive species
7 along with Hawaiian MSW, federal regulations categorically barred the
8 shipping of Hawaiian garbage for dumping in the continental United States. 71
9 Fed. Reg. 20,030 (April 19, 2006).
10 6. Defendants changed this regulatory policy without (a) properly
11 consulting the Yakama Nation, as required by federal Treaty, Executive
12 Orders, statutes, regulations and common law, or (b) preparing a
13 comprehensive Environmental Impact Statement ("EIS"), as required by the
14 National Environmental Policy Act ("NEPA").
15 7. An EIS, had Defendants prepared one, would have fully documented
16 and disclosed to the public the actual risks, and possible harms from,
17 Defendants' decision to expose the Pacific Northwest's ecosystems, and
18 Yakama 's Treaty-protected habitat and ways of life, to the risks posed by
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1 invasive species from imported Hawaiian garbage. An EIS also would have
2 addressed reasonable alternatives to dumping Hawaii's garbage on Yakama's
3 ceded lands; evaluated the effectiveness and adequacy of mitigation measures
4 to avoid any such adverse impacts, and Defendants' monitoring of those
5 measures; evaluated the cumulative impacts of Defendants' decision; and
6 discussed the outcome of Defendants' required meaningful consultation with
7 the Yakama Nation.

8 8. Beginning in 2005, Defendants prepared a series of cursory
9 environmental assessments ("EAs") and accompanying "risk assessments" that
10 purported to evaluate the impacts and risks created by changes to the federal
11 regulations regarding the importation of garbage from Hawaii, and specific or
12 "regional" proposals to actually accomplish such importation. This agency
13 course of action culminated in the May 2010 Environmental Assessment (the
14 "2010 EA") that is directly challenged in this Complaint. That 2010 EA
15 incorporates by reference, or "tiers to," the analyses in Defendants' prior EAs
16 regarding the importation of Hawaiian garbage and in turn, purports to analyze
17 the likely impacts and risks created by a specific proposal to import Hawaiian
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1 garbage through several Columbia River ports, including the Port of Longview,
2 Washington.
3 9. The 2010 EA proposes to transport the Hawaiian waste through the
4 entirety of the Columbia River Gorge National Scenic Area, a bi-state area
5 designated by Congress in 1986 for the protection and enhancement of the
6 natural, scenic, cultural, and recreational resources of the Columbia River
7 Gorge, and extending approximately 85 miles along the Columbia River.
8 APHIS's decision would increase air pollution within the National Scenic
9 Area, both because of new transportation within the Scenic Area and from new
10 transportation at locations upwind of the National Scenic Area. Air quality and
11 visibility within the Columbia River Gorge are already degraded by existing
12 pollution sources. According to the U.S. Forest Service, visibility in the
13 National Scenic Area is impaired approximately 95% of days. Acid deposition
14 in the eastern Gorge is damaging ecosystems, threatening Native American
15 cultural resources, and harming views.
16 10. The 2010 EA, and each of Defendants' preceding EAs, concludes
17 erroneously that the importation of Hawaiian garbage would have no
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1 significant environmental impacts and that Defendants were therefore not
2 required under NEPA to complete a thorough EIS.
3 11. Despite the fact that multiple public comments, including comments
4 from each of the Plaintiffs, request a more detailed analysis, Defendants refuse
5 to undertake an EIS and issued a Finding of No Significant Impact ("FONSI")
6 under NEPA on May 17, 2010. 75 Fed. Reg. 29,706 (May 27, 2010).
7 Defendants had similarly issued a FONSI and refused to prepare an EIS at each
8 of the earlier stages of their decision to change agency regulations and allow
9 the importation of garbage from Hawaii into the continental United States.
10 12. Based on the May 17, 2010 FONSI, by June of 2010, Defendants
11 had rapidly entered into Compliance Agreements with a for-profit company,
12 Hawaiian Waste Systems, LLC ("HWS"), to handle and transport up to
13 150,000 tons of MSW from Honolulu to the Roosevelt Regional Landfill,
14 annually, via the Port of Longview, Washington ("the Violative Project"). The
15 Hawaiian garbage would be shipped from Longview to the Roosevelt Landfill
16 via rail through and along the Columbia River Gorge. There are a myriad of
17 historic sites of traditional religious and cultural importance to the Yakama
18 People that are listed or eligible for listing on the National Register of Historic
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1 Places, along the proposed transportation route from Longview to the Landfill.
2 Defendants totally failed to identify, or consult with state, tribal and federal
3 entities about, those historic sites during the federal permitting process.
4 13. It is HWS' stated intent to transport and dump as much as one
5 million tons of Hawaiian household and commercial garbage to the Pacific
6 Northwest each year.
7 14. Those Compliance Agreements and Defendants' explanation to the
8 Yakama Nation Tribal Chairman by telephone on July 27, 2010 that Defendant
9 APHIS will allow the immediate importation of Hawaiian garbage on July 30,
10 2010, pursuant to those agreements, represent Defendants' final agency action
11 for purposes of judicial review under the Administrative Procedure Act
12 ("APA"), 5 U.S.C. §704 and 706 (2).
13 15. Nowhere in Defendants' environmental analyses do they consider in
14 any detail the potentially catastrophic and irreversible effects on Pacific
15 Northwest ecosystems generally, and the Yakama Nation's aboriginal lands
16 and indigenous ways of life in particular, from the release of invasive species
17 contained in any imported Hawaiian MSW. Defendants also never considered
18 nor evaluated any reasonable alternatives to dumping Hawaiian garbage in
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Washington State and they failed to consider the cumulative impacts this decision would have on the serious invasive species problem ongoing in the Pacific Northwest; nor did Defendants consider the impact of the Violative Project on the Columbia River Gorge's serious environmental problems.

16. Defendants' findings of no significant impact relied heavily on their bold assumption that any for-profit private company importing Hawaiian MSW would "scrupulously comply" with multiple mitigation measures designed to prevent the release of invasive species. However, Defendants' EAs fail to explain how Defendants intend to effectively monitor compliance with the mitigation measures. Defendants' publicly disclosed analyses quite simply assume, and implicitly ask the public to blindly trust, that such unspecified monitoring by Defendants will occur and will be effective. History dictates that blind faith in the Federal Government and its private contractors is not justified. Blind faith on the part of the Yakama Nation in such federal and private actors is most certainly not historically justified. As a matter of law, such unspecified monitoring is an insufficient basis for Defendants to avoid the duty to prepare an EIS as required by NEPA.



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1 17. In addition to per se violating Section 106 of the NHPA, Defendants
2 have acted unlawfully by both (a) entering into the Compliance Agreements
3 and (b) issuing the May 17, 2010, FONSI for the Violative Project, without
4 meaningful consultation with the Yakama Nation, or preparing a complete and
5 thorough EIS regarding the potential negative effects of and the irreparable
6 harm that could be caused by the Hawaiian MSW and the accompanying plant
7 pests, noxious weeds and pathogens. Defendants' actions are arbitrary,
8 capricious, an abuse of discretion and violate federal law.

9 18. Defendants have abrogated the Yakama Treaty of 1855; federal
10 Indian trust common law; NEPA and the Council on Environmental Quality's
11 NEPA regulations; the National Historic Preservation Act; the American
12 Indian Religious Freedom Act; Presidential Executive Orders 13,175, 13,007
13 and 12,898; and the APA.

14 19. Accordingly, this Court should declare Defendants' final agency
15 actions unlawful and should preliminarily and, and permanently, enjoin those
16 actions and the Violative Project.

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1 **II. JURISDICTION**

2 20. The District Court has jurisdiction over this action pursuant to 28
3 U.S.C. § 1331 and § 1362. Plaintiffs, including the Yakama Nation, a
4 federally-recognized Indian tribe, assert claims arising under the 1855 Treaty
5 with the Yakama, 12 Stat. 951; the U.S. Constitution; and other laws of the
6 United States, including the Supremacy Clause of Article VI, § 2, and federal
7 common law.

8 21. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b),
9 and (e) because a substantial part of the actions or omissions giving rise to the
10 claims occurred in this District.

11 **III. PLAINTIFFS**

12 22. Plaintiff Confederated Tribes and Bands of the Yakama Nation is a
13 federally-recognized Indian tribal government as signatory to the 1855 Treaty
14 With the Yakama, 12 Stat. 951. The Yakama People have resided in the
15 Columbia River Basin, including modern day Klickitat County, Washington,
16 since time immemorial. The Yakama Reservation, established by Article II of
17 the Treaty of 1855, is approximately 25 miles northwest of the Roosevelt
18 Landfill in South Central Washington, and has approximately 1.3 million acres
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1 of land within its boundaries. Under Article I of the Treaty of 1855, the
2 Yakama Nation ceded over 10 millions of acres of its aboriginal lands to the
3 United States, comprising approximately one quarter of the State of
4 Washington, including all of Klickitat County and the land in and immediately
5 surrounding the Roosevelt Landfill. Plaintiff Yakama Nation and its more
6 than 10,200 enrolled Tribal citizens reserved and possess rights to fish, hunt,
7 gather traditional foods and medicines, and worship throughout their aboriginal
8 lands, and to otherwise access and traditionally use those lands, pursuant to
9 Article III of the Yakama Treaty and as a result of federal common law and
10 statute. The Yakama Nation complains on its own accord and as *parens*
11 *patriae* for the enrolled members of the Confederated Tribes and Bands of the
12 Yakama Nation.

13 23. Plaintiff Friends of the Columbia Gorge ("Friends") is a non-profit
14 conservation organization dedicated to vigorously protecting the resources of
15 the Columbia River Gorge. Friends has approximately 4,700 members,
16 including members who reside in Hawaii; Longview, Washington; Klickitat
17 County, Washington; and within the Columbia River Gorge National Scenic
18 Area. Friends' members use the Columbia River Gorge for agricultural
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1 purposes, including farming, fruit growing, and winemaking, as well as
2 recreational pursuits. Friends is concerned about the resource impacts of the
3 proposed shipping of Hawaii garbage, including but not limited to the impacts
4 of potentially introducing invasive plants, insects, and other pests to the
5 Columbia Gorge ecoregion; and the transportation impacts of shipping
6 Hawaiian garbage through the Columbia River Gorge. The Project poses a
7 threat to the resources that Friends strives to protect and adversely affects and
8 aggrieves Friends, both as an organization and on behalf of its members.
9 Friends participated in the administrative proceedings on this project by filing
10 written comments.

11 24. Plaintiff Northwest Environmental Defense Center ("NEDC") is a
12 non-profit organization, with its principal place of business in Portland,
13 Oregon. NEDC is comprised of citizens, attorneys, law students, and
14 scientists. NEDC's mission is to protect the environment and natural resources
15 of the Pacific Northwest, by providing legal support to individuals and
16 grassroots organizations with environmental concerns, and engaging in
17 litigation independently and in conjunction with other environmental groups.
18 NEDC's members live, recreate, and study in and around the Pacific
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1 Northwest, including the Columbia River valley and the Columbia River Gorge
2 National Scenic Area, and derive recreational, inspirational, scientific, and
3 aesthetic benefit from their activities in those areas. NEDC actively
4 participates in procedures and decisions by federal agencies concerning the
5 management and protection of listed anadromous fish species in the Columba
6 River system, and NEDC's members intend to continue to use and enjoy the
7 areas where the importation of Hawaiian garbage could occur and where the
8 release of invasive species from that garbage would cause severe adverse
9 impacts on that use and enjoyment.

10 25. Plaintiff Columbia Riverkeeper ("Riverkeeper") is a non-profit
11 Washington corporation. Riverkeeper's mission is to restore and protect the
12 water quality of the Columbia River and all life connected to it, from the
13 headwaters to the Pacific Ocean. Riverkeeper is a membership-based
14 organization with over 3,000 members, some in Central and Eastern
15 Washington, and is supported by individuals and foundations throughout
16 Oregon and Washington. Riverkeeper works throughout the Columbia Basin
17 to protect water quality, fish and wildlife habitat, and healthy communities.
18 Riverkeeper has members that swim, hike, fish, and observe wildlife and are
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1 further connected by a common interest and concern for anadromous
2 salmonids, which spend their lifecycle in different parts of the Columbia River
3 Basin and in the Pacific Ocean. Riverkeeper's staff and members have an
4 interest in protecting salmonids, including salmonid rearing, migration, and
5 spawning, and other aquatic and terrestrial life. Riverkeeper's interest in
6 protecting salmonids includes promoting government and private party
7 decisions that restore habitat, protect existing habitat, and restore the cold
8 water conditions salmon depend upon for survival. Riverkeeper members are
9 thus directly affected by the outcome of a NEPA process for regarding the
10 importation of Hawaiian municipal solid waste (MSW) because such
11 importation poses a risk to ecological integrity and biological diversity of the
12 Columbia River Basin. By permitting the importation of MSW, Defendants
13 introduce a new pathway for the introduction of invasive species to the
14 Columbia River Basin. Invasive species are generally detrimental to
15 endogenous species, such as anadromous salmonids as they alter habitat and
16 destroy native biodiversity adversely affecting the structure of the ecosystem,
17 and otherwise affect rearing, spawning, and migration. Riverkeeper members
18 thus have a particular interest in Defendants' NEPA process regarding the
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1 importation of Hawaiian MSW.

2 26. Plaintiff Dawn R. Stover is a resident of Klickitat County,
3 Washington. She is a member of Friends of the Columbia Gorge and she
4 supports the Friends' mission to protect and enhance the resources of the
5 Columbia River Gorge ("the Gorge"). Ms. Stover is a freelance science and
6 environmental writer and editor. She regularly uses and enjoys the
7 recreational, natural, cultural, and scenic resources of the Gorge. Ms. Stover
8 regularly hikes in the gorge and participates in bird counts and bird watching
9 throughout Klickitat County, including at Rock Creek and Sundale. Ms. Stover
10 also visits Catherine Creek, Major Creek, and the Columbia Hills Natural Area
11 Preserve at which places she especially enjoys the natural state and
12 biodiversity. By failing to comply with NEPA in granting the permit at issue,
13 Defendants failed to take into account and appropriately respond to Ms.
14 Stover's comments. Additionally, by permitting the importation of Hawaiian
15 MSW, Defendants provide a pathway for the introduction of invasive species
16 that Ms. Stover understands may rapidly and easily spread to other areas,
17 threatening the recreational, natural, cultural, and scenic resources of the Gorge
18 that she currently enjoys. Ms. Stover has witnessed such infestations of
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1 invasive species in the Gorge and has been involved in efforts to remove them.
2 Ms. Stover thus has intimate knowledge of the difficulty of removing
3 established invasive species. Ms. Stover's use and enjoyment of the Gorge
4 would be harmed by the proposal to ship Hawaiian garbage through the Gorge.
5 27. Plaintiff Daniel H. Lichtenwald is a resident of Klickitat County,
6 Washington where he regularly hikes and explores on foot many trails and
7 public land areas along the Columbia River, in the upland prairies and shrub
8 steppe, as well as the higher elevation forested areas. Mr. Lichtenwald is
9 acutely aware of the permanent and ongoing negative altering and degrading
10 effects that invasive plants and animals have on the health and productivity of
11 indigenous ecosystems. Mr. Lichtenwald volunteers and participates in
12 projects conducted by conservation groups and agencies to protect and restore
13 native scenic, natural and cultural resources in Klickitat County to protect and
14 restore water quality and aquatic habitat for native species along the Columbia
15 River and its tributaries. Mr. Lichtenwald has volunteered with Friends of the
16 Columbia Gorge in habitat and landscape enhancement projects involving the
17 manual removal of noxious weed infestations in the Columbia River Gorge
18 National Scenic Area. Additionally, Mr. Lichtenwald is a volunteer site
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1 steward who monitors and removes noxious plants found and reports on two
2 Washington Department of Natural Resources Natural Area Preserves in
3 Klickitat County, Washington. Mr. Lichtenwald also observes and conducts
4 field surveys of birds in Klickitat County, Washington, including upland areas
5 adjacent to the Columbia River and in the eastern parts of the county where the
6 Roosevelt landfill is situated. Mr. Lichtenwald is thus intimately familiar with
7 the area, its resources, and the threat posted to those resources by invasive
8 species. Mr. Lichtenwald's use and enjoyment of these areas of Klickitat
9 County could be permanently harmed by the introduction of new invasive
10 species. Mr. Lichtenwald commented on Defendants' proposal to permit the
11 importation of Hawaiian MSW and was dissatisfied with the response he
12 received. Mr. Lichtenwald has thus been injured by Defendants' failure to
13 comply with NEPA, which creates an enormous risk to his use and enjoyment
14 of the natural and recreational areas of Klickitat County.

15 **IV. DEFENDANTS**

16 28. Defendant United States Department of Agriculture ("USDA") is an
17 agency of the United States government.

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1 29. Defendant USDA Animal and Plant Health Inspection Service
2 ("APHIS") is an agency of the USDA.
3 30. Defendant Tom Vilsack is the Secretary of the USDA, and is sued in
4 his official capacity.
5 31. Defendant Cindy Smith is the Administrator of APHIS, and is sued
6 in her official capacity.
7 **V. FACTS COMMON TO ALL CLAIMS**
8 **A. Yakama Treaty, Property, Cultural, Religious and Other Rights**
9 32. The Confederated Tribes and Bands of the Yakama Nation is a
10 federally-recognized Indian tribal government, whose Reservation was
11 established by the 1855 Treaty With the Yakama, 12 Stat. 951, Article II. The
12 Yakama Nation currently occupies, regulates and self-governs approximately
13 1.3 million acres of lands within the Yakama Indian Reservation, including the
14 natural resource and cultural properties within those reserved lands.
15 33. In exchange for the rights guaranteed by the Yakama Treaty of
16 1855, the Yakama Nation ceded over 10 million acres of land to the United
17 States. *Id.*, Art. I. By and through the Treaty of 1855, the Nation reserved, and
18 the United States guaranteed the Yakama, "the right of taking fish at all usual
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1 and accustomed places, in common with citizens of the Territory, and of
2 erecting temporary buildings for curing them; together with the privilege of
3 hunting, gathering roots and berries, and pasturing their horses and cattle upon
4 open and unclaimed land." *Id.*, Art. III. The Yakama Nation's reserved
5 fishing, hunting and gathering rights, and companion access, and use and
6 religious rights, extend throughout the 10 million acres of Yakama's ceded
7 lands in Washington State. These ceded lands include much of the Columbia
8 River Gorge and all of Klickitat County. The Nation regulates the natural
9 resource and cultural properties within those ceded lands.

10 34. The Roosevelt Regional Landfill is situated in Klickitat County,
11 within the Yakama Nation's ceded lands and a few miles from the Columbia
12 River. The Landfill, project, related intermodal facility and rail-line running
13 along the Columbia River Gorge:

14 • Are located in gathering areas for roots like lammush and
15 bitterroot, and are surrounded by huckleberries, chokecherries and various
16 indigenous flowers and plants, all of which the Yakama People gather and have
17 always gathered for subsistence, medicinal and religious purposes;
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1 • Are located in the natural habitat for indigenous species like
2 salmon, sturgeon, sucker, eel, deer, elk, cottontail rabbit and porcupine, all of
3 which the Yakama People take and have always taken for subsistence,
4 medicinal and religious purposes;

5 • Abut usual and accustomed Yakama fishing areas throughout the
6 Gorge and hunting and gathering areas, and related access points, throughout
7 Klickitat County and South Central Washington; and

8 • Are near Yakama sacred sites and historic properties of cultural
9 and religious significance, including cemeteries, cairns denoting ceremonial or
10 burial sites, ancestral remains, village ruins, petroglyphs and pictographs, and
11 fishing sites and culturally modified trees used for ceremonial and hunting
12 purposes.

13 35. Under various federal laws, United States agencies are required to
14 meaningfully consult with the Yakama Nation when federal actions or
15 undertakings will have direct or indirect effect on Yakama's Treaty, property,
16 economic, cultural, and religious and other rights. Defendants have generally
17 failed to meaningfully consult with the Nation in regard to the Violative Project
18 or any of the environmental analyses that served to permit the dumping of
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Hawaiian garbage and various invasive species and pathogens into Yakama ceded lands and historic fishing, hunting and gathering areas.

36. Defendants have also specifically failed to endeavor to identify any National Register- listed or -eligible historic properties – be they Yakama or non-tribal – that could be affected by the federal undertaking to allow Hawaiian MSW to be imported to the Landfill, and failed to consult with the Washington SHPO or Yakama THPO or confer with the federal Advisory Council in that regard, as required by Section 106 of the NHPA.

**B. Defendants' "Tiered" Environmental Assessments and FONSIs, and Failure to Take a "Hard Look"**

37. In 1969, Congress enacted NEPA which requires all federal agencies to adequately assess the impact of federal actions "significantly affecting the quality of the human environment." 42 U.S.C. § 4332. NEPA's purpose is twofold: (1) insure that agencies carefully and fully contemplate the environmental effects of their actions, and (2) insure that the public has sufficient information to participate in the agency's decision. In order to accomplish those goals NEPA, the Act's implementing regulations and binding decisions from the Ninth Circuit Court of Appeals require federal agencies to take a "hard look" at their proposals' direct and indirect effects, to assess the



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1 cumulative effects of those proposals and to consider a range of reasonable
2 alternatives.
3 38. NEPA requires federal agencies to prepare a public EIS before
4 undertaking any action that will have a *significant effect* on the quality of the
5 environment. 42 U.S.C. § 4332(2)(C). An EIS must be prepared if substantial
6 questions are raised as to whether a project may cause significant degradation
7 of some human environmental factors. Whether an action's effects are
8 "significant" requires consideration of many factors, including those set out in
9 the Council on Environmental Quality's NEPA regulations. 40 C.F.R. §
10 1508.27. Satisfying even one of these factors may suffice to reach the
11 "significance" threshold.
12 39. If an agency is uncertain whether an action will have a
13 significant affect on the environment, the agency may begin the environmental
14 review process by preparing an environmental assessment ("EA"). 40 C.F.R. §
15 1501.3, § 1508.9. An EA "shall include brief discussions of the need for the
16 proposal, of alternatives . . . [and] of the environmental impacts of the
17 proposed action and alternatives." 40 C.F.R. § 1508.9(b). If the conclusion of
18 the EA is that the action clearly will not have a significant affect, then the EA
19



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1 should culminate in a FONSI. 40 C.F.R. § 1501.4(e), § 1508.13. Otherwise, if
2 substantial questions are raised, an EIS must be prepared. 40 C.F.R. §
3 1501.4(c). Before concluding that no significant environmental impact exists,
4 an agency must complete a thorough environmental analysis. In order to
5 satisfy NEPA's public participation requirements, all of the legally required
6 analysis must be set out in the NEPA documents that the agency makes
7 available to the public.
8 40. Beginning in 2005, Defendants began evaluating proposals by
9 several different waste hauling companies to ship municipal solid waste from
10 the Hawaiian Islands to the continental United States. At that time, binding
11 federal regulations, designed to protect the United States mainland from the
12 introduction of invasive species, barred any importation of garbage from
13 Hawaii. Thus, before considering any such specific proposals, Defendants had
14 to evaluate and decide whether to change those protective regulations. 70
15 Fed.Reg. 29,269 (May 20, 2005). Defendants proceeded to prepare a series of
16 four EAs, each of which evaluated a single stage in the administrative decision-
17 making process and resulted in a FONSI. This "tier" of EAs and FONSIs
18 resulted in the specific Compliance Agreements with the lowest waste hauling
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1 bidder, HWS, which are at issue here. In essence, Defendants have decided to,
2 for the first time ever, allow garbage to be imported into the continental United
3 States, thereby creating an entirely new avenue for the introduction of invasive
4 species; and they have done so without preparing a comprehensive EIS at any
5 stage of their decision-making process.

6 41. In May of 2005, Defendants issued a draft EA that purported to
7 evaluate a change to federal regulations that would allow for the importation of
8 Hawaiian garbage. Defendants' draft EA includes an attached Risk
9 Assessment. Defendants accepted comments on that EA for 30 days. In
10 August of 2006, Defendants issued a revised, final EA and attached Risk
11 Assessment (the "Regulation Revision EA"). Based on Defendants'
12 Regulation Revision EA, Defendants issued a FONSI regarding the regulatory
13 change and specifically revamped federal regulations to allow for the
14 importation of Hawaiian garbage to the United States mainland, subject to what
15 Defendants consider to be appropriate safeguards. 71 Fed.Reg. 49,309 (Aug.
16 23, 2006).

17 42. Defendants' Regulation Revision EA evaluates a proposal from
18 waste haulers to compress Hawaiian MSW into bales and wrap it in plastic.
19



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That EA concludes that such measures would, by depriving the baled MSW of oxygen, kill most insect and animal pests. However, Defendants and their Regulation Revision EA acknowledge that many invasive weed seeds and many types of pathogens would not be killed by the baling and wrapping process and could be released if the plastic-wrapped bales were breached prior to burial in a landfill. Defendants also acknowledge the risk that other types of invasive species could attach themselves to the outside of the bales.

43. Defendants evaluated a number of mitigation measures to avoid breaches of the plastic wrapping. Ultimately, however, Defendants determined that the risk associated with this proposed regulatory change was "low." Defendants' low probability determination depends primarily on private waste haulers conducting multiple "inspections" of the plastic-wrapped bales and those for-profit waste haulers' strict compliance with the mitigation requirements in any Compliance Agreement. To insure strict compliance with the mitigation requirements, Defendants' own risk assessment insisted that the private waste haulers' compliance with the required mitigation had to be monitored by federal agency personnel. However, nowhere in the Regulation Revision EA do Defendants detail how they intend to accomplish that



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1 necessary monitoring to insure invasive species are never released from the
2 bales; nor do Defendants evaluate why they expect such monitoring to be
3 effective.

4 44. The Regulation Revision EA is noteworthy in several other respects.
5 Because it admits that, even with all necessary mitigation, the risk of invasive
6 species gaining entry into the continental United States from Hawaiian MSW is
7 "not zero", the Regulation Revision EA notes that "harm to the quality of the
8 environment" from such an introduction could be an indirect adverse effect of
9 Defendants' decision. The only specific harm the Regulation Revision EA
10 mentions is the increased use of pesticides that might be necessary to eradicate
11 any invasive species. The Regulation Revision EA's discussion of that effect
12 is only a few lines long and explains that such effects are better addressed in
13 "site-specific assessments." However, such an analysis is not to be found in
14 the Defendants' subsequent "site-specific assessments."

15 45. The Regulation Revision EA also acknowledges Defendants' legal
16 obligations to consult with federally-recognized Indian tribal governments and
17 suggests that such consultation would occur in the context of site-specific
18 proposals. That required consultation also never occurred.

19



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1 46. Despite the new risk created by the proposal to import Hawaiian
2 MSW to the United States mainland, Defendants refused requests from public
3 comments to include an analysis of alternatives to importing Hawaiian
4 garbage, insisting that considering such alternatives was beyond the scope of
5 the Regulation Revision EA. That EA also includes no discussion of the
6 cumulative impacts of the new risk created by the importation of Hawaiian
7 MSW along with the existing risks and problems caused by invasive species.
8 47. Shortly after completing the Regulation Revision EA, Defendants
9 issued a draft EA regarding a specific proposal to import garbage into the
10 continental United States by shipping it via barge from Honolulu, Hawaii to a
11 landfill in Roosevelt, Klickitat County, Washington. The proposal called for
12 the plastic-wrapped baled Hawaiian garbage to be shipped on barges into the
13 Columbia River Gorge and off-loaded approximately four miles from the
14 Roosevelt Regional Landfill. After allowing for public comment on this EA,
15 and its attached risk assessments, Defendants issued a final EA in December of
16 2006 ("2006 Site-Specific EA") and published their FONSI for this site-
17 specific proposal on December 21, 2006. 71 Fed. Reg. 78,129 (Dec. 28, 2006).
18
19



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1 48. The 2006 Site-Specific EA incorporates the analysis from the
2 Regulation Revision EA, reaches the same "low risk" conclusion based on
3 mitigation and monitoring (but also does not detail how and when such
4 monitoring would occur), again refuses to consider any action alternative other
5 than importing Hawaiian garbage, and focuses on increased barge traffic
6 through the Columbia River when addressing cumulative impacts. The 2006
7 Site-Specific EA, however, never resulted in signed compliance agreements
8 because the waste hauler failed to obtain the necessary approvals to construct a
9 dock at which the barges could unload the Hawaiian MSW near the Landfill.
10 49. Because Defendants had received several additional proposals to
11 import Hawaiian garbage, in February of 2008, Defendants published a draft
12 EA for the "Regional Movement of Plastic-Baled MSW from Hawaii to
13 Washington, Oregon and Idaho." This "Regional EA" looked broadly at the
14 possibility of importing Hawaiian garbage and landfilling it at any of the
15 qualified landfills in those three states, using a number of transportation
16 options. The Regional EA suffers from all the same deficiencies as the
17 Regulation Revision EA and the 2006 Site-Specific EA. Significantly, it
18 repeatedly notes that a site-specific NEPA analysis would still be required
19



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1 before Defendants could approve any specific Hawaiian garbage importation
2 proposal. Defendants finalized the Regional EA in April 2008 and issued their
3 third FONSI regarding imported Hawaiian garbage on June 6, 2008. 73 Fed.
4 Reg. 34,700 (June 18, 2008).

5 50. In December of 2009, in response to a specific proposal from a
6 waste hauler, Defendants issued for public comment another draft EA,
7 regarding bringing in baled garbage to several ports along the Columbia River
8 and shipping it via truck or train to the Roosevelt Regional Landfill.
9 Defendants finalized this EA in May of 2010 ("the 2010 Site-Specific EA")
10 and issued their fourth Hawaiian garbage FONSI on May 17, 2010. 75 Fed.
11 Reg. 29,706 (May 27, 2010). The 2010 Site-Specific EA and its attached Risk
12 Assessment are even more cursory than the Defendants' three preceding EAs.
13 That is primarily because this most-recent EA is "tiered" to the Regional EA,
14 and it incorporates by reference the analysis from the 2006 Site-Specific EA.

15 51. Plaintiffs submitted extensive comments on the draft 2010 Site-
16 Specific EA, but Defendants dismissed or refused to address almost all of
17 Plaintiffs' stated concerns. In particular, these comments noted that the risks
18 created by the Hawaiian garbage proposal(s) were in fact not "low"; insisted
19



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1 that Defendants had an obligation under NEPA to evaluate the severe
2 consequences of the introduction of additional invasive species even if the risk
3 were "low"; asked for a more comprehensive cumulative impacts analysis;
4 questioned how Defendants intended to sufficiently monitor compliance with
5 the required mitigation measures by any private waste-hauler; and in the
6 instance of the Yakama Nation, requested meaningful consultation regarding
7 such issues as required by federal law. Although once again asked by the
8 public to consider alternatives to the importation of Hawaiian MSW, such as
9 additional recycling in Hawaii, Defendants again insisted such alternatives
10 were beyond the scope of their NEPA obligations.

11 52. In comment letters to APHIS, Plaintiff Friends of the Columbia
12 Gorge raised concerns about the direct, indirect, and cumulative impacts of the
13 proposed garbage trafficking on air quality in the National Scenic Area, and the
14 need for APHIS to thoroughly analyze this issue. The EA failed to adequately
15 address this issue and failed to apply the appropriate standards for evaluating
16 cumulative impacts from increased barge, train, and truck traffic on air quality
17 and climate change.

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1 53. A number of other persons and entities (in addition to Plaintiffs)
2 submitted comments during Defendants' decision-making process expressing
3 serious reservations about importing Hawaiian garbage. For example, the
4 States of Idaho and California severely criticized the proposal. In addition, the
5 National Park Service and the Oregon Invasive Species Council both expressed
6 serious concerns about the additional risk of invasive species and Defendants'
7 ability to monitor the for-profit waste hauler's compliance with mitigation
8 measures. Moreover, the City and County of Honolulu Department of
9 Environmental Services "discouraged" Defendants from going forward with
10 the proposal, specifically telling them: "The City has the ability to provide
11 basic public health service to its constituents without having to go forward with
12 shipping of any garbage."

13 54. Before issuing the FONSI for the 2010 Site-Specific EA,
14 Defendants did not meaningfully consult with the Yakama Nation, as required
15 by, *inter alia*, three United States Presidential Executive Orders, Nos. 13175,[1]
16 13,007, and 12,898; the American Indian Religious Freedom Act ("AIRFA");
17

18 [1] Instructs APHIS to receive "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications," particularly where those
19 policies touch upon "tribal treaty and other rights."



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1 NEPA regulations, 40 C.F.R. §§ 1501.2[2] and 1508.8, 1508.27,[3] and Defendant
2 APHIS' own Directive 1040.1.[4] In particular, Defendant APHIS never met
3 with the Yakama Nation Tribal Council with regard to the Project before
4 issuing that FONSI. Nor did they consult in any way with the Washington
5 SHPO, Yakama THPO or federal Advisory Council pursuant to Section 106 of
6 the NHPA before entering into the Compliance Agreements with HWS.

7 55. By issuing the FONSI for the 2010 Site-Specific EA and entering
8 into the Compliance Agreements with HWS, Defendants arbitrarily and
9 capriciously concluded that Yakama historic fishing, hunting and gathering
10 areas and ceremonial sacred sites, and religiously and culturally significant
11 historic properties, and the indigenous plant and animal species and Yakama's
12
13

[2] Requires federal agencies to "consult[] early with . . . Indian tribes . . . when [the agency's] involvement is reasonably foreseeable."
14
[3] Requires agencies doing a NEPA analysis to consider the "[i]mpacts that may be both beneficial and adverse." 40 C.F.R. § 1508.27(b)(1). 40 C.F.R. § 1508.8 defines these to
15
include both direct and indirect impacts related to the "aesthetic, historic, cultural, economic, social, or health" effects on the environment.
16
[4] Requires APHIS to "[c]onsult with the tribal leaders of federally recognized tribal governments before taking actions that affect them; . . . Consider the impact of APHIS
17
projects, programs, and activities on tribal trust resources and establish communication systems with tribal leaders to ensure that tribal government rights and concerns
18
are considered during their development; [and] Consider the impact of APHIS projects, programs, and activities on tribal trust resources and establish communication systems with tribal leaders to ensure that tribal government rights and concerns are considered during
19
their development . . . ."



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1 practices associated with those lands and species, would not be adversely
2 impacted by the Violative Project.

3 **C. Defendants' Compliance Agreements**

4 56. On or around June 10, 2010, Defendants APHIS and Hawaiian
5 Waste Systems entered into two Compliance Agreements, which operate to
6 bestow federal permission on the Project. The first Compliance Agreement
7 permits HWS to handle and transport urban solid waste at/from an unnamed
8 refuse facility in Honolulu, Hawaii, **indefinitely**. The Second Compliance
9 Agreement permits HWS to transport urban solid waste to the Roosevelt
10 Regional Landfill, **indefinitely**.

11 57. Pursuant to the Compliance Agreements, HWS proposes to import
12 150,000 tons of Hawaiian municipal solid waste into South Central
13 Washington – or equivalently 410 tons per day. Under a low-bid contract with
14 the City and County of Honolulu, HWS will earn $90.89 to $99.83 per ton of
15 MWS that it exports from Hawaii. Upon information and belief, HWS' bid
16 was at least $55.00 less per ton than the next highest private hauler's bid.

17 58. Under the Compliance Agreements, HWS will sort household and
18 commercial garbage transported to a Honolulu refuse facility from throughout
19



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1 the Hawaiian Islands, at that facility. The Hawaiian MSW will include heavy
2 metals and agricultural waste.
3 59. HWS will self-inspect the inter-island urban solid waste and bale the
4 waste in plastic film. In turn:
5 • The plastic-wrapped bales of waste, each of which will weigh as
6 much as four tons, will be staged by Defendant HWS in Honolulu for at least
7 five days before being transloaded by a forklift or other heavy machinery, with
8 grapplers, into containers.
9 • Once "containerized," plastic-wrapped bales of waste will again
10 be transloaded by a forklift or other heavy machinery onto a barge in Honolulu,
11 which will carry the waste bales across the Pacific Ocean and to the Port of
12 Longview.
13 • At the Port of Longview, the plastic-wrapped waste bales will
14 again be transloaded, under Defendant HWS's sole supervision, by a forklift or
15 other heavy machinery off of the barge and onto a railcars or truck, which will
16 then be transported either to an intermodal facility near the Columbia River, or
17 directly to the Roosevelt Regional Landfill.
18
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- At the intermodal facility, the plastic-wrapped waste bales would once again be loaded by a forklift or other heavy machinery onto trucks and driven to the Landfill, under Defendant HWS's sole supervision.

60. At the Landfill, the plastic-wrapped waste bales will finally be moved, into the actual landfill and buried, also under HWS's sole supervision.

61. The likelihood of ripped or punctured plastic-wrapped bales, and thus the release of plant pests, noxious weeds and pathogens into the Pacific Northwest natural environment and habitat, is increased by the fact that multi-ton bales will be moved in and out of metal containers, from loading dock to loading dock, and from barge to rail to truck, at least five times between Hawaii and the Roosevelt Regional Landfill. The bales are proposed to be grappled and loaded by heavy machinery into and out of the containers.

62. APHIS has apparently decided to allow profit-seeking HWS to self-regulate its own compliance and mitigation measures for preventing the release of invasive species at all stages of the garbage trafficking journey: in Honolulu, at the Port of Longview, at the intermodal facility near the Landfill, at the Landfill, and en route between these locations. The Compliance Agreements do not indicate how and when Defendants intend to monitor



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1 HWS' compliance with essential mitigation measures. While the plastic-
2 wrapped bales are being barged from Honolulu to the Port of Longview,
3 neither HWS nor Defendants will monitor compliance and mitigation measures
4 to prevent the release of invasive species, according to the Compliance
5 Agreements.

6 63. The Compliance Agreements mandate that HWS take no longer
7 than 75 days from the date the urban solid waste is initially baled, and the date
8 the plastic-wrapped waste bales are finally buried at the Landfill, particularly
9 when the plastic-wrapped bales have been exposed to the sun or elements. The
10 integrity of the plastic-wrap is compromised when exposed to sunlight for too
11 long.

12 64. Upon information and belief, 20,000 tons of plastic-wrapped and
13 baled Hawaiian municipal solid waste have been sitting in the open at a staging
14 area in Honolulu since October 2009 – far longer than 75 days – and is
15 awaiting immediate transport to the Landfill by HVS and its subcontractors.
16 Some of the bales sit exposed to the sun and elements, and others have been
17 loaded into containers. The plastic-wrap around multiple bales sitting at the
18 staging area has been breached.

19



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1 65. On April 12, 2010, HWS was cited by the State of Hawaii
2 Department of Health, and fined $40,400.000, for storing (1) the plastic-
3 wrapped bales beyond the permitted time, and (2) containerized bales in an
4 unpermitted location for over three months.

5 **D. Defendants' Suspension of HWS' Permits Due to Non-Compliance**

6 66. Under the Compliance Agreements, HWS was originally scheduled
7 to begin transporting urban solid waste from Honolulu to the Roosevelt
8 Regional Landfill by July 12, 2010. However, on July 8, 2010, Defendant
9 APHIS suspended the Compliance Agreements and thereby temporarily ceased
10 the Violative Project due to pest control noncompliance on the part of HWS,
11 specifically identifying punctures and tears of the plastic-wrapped bales.

12 67. On July 27, 2010, Defendants notified the Yakama Nation Tribal
13 Council Chairman by telephone that Defendant APHIS has permitted HWS to
14 begin barging the 20,000 tons of plastic-wrapped and baled Hawaiian MSW
15 that has been sitting at a staging area in Honolulu since October 2009, on July
16 30, 2010. Based upon that information, and belief, Defendant APHIS has
17 reinstated, or by July 30 will reinstate, the Compliance Agreements with HWS,
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19



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1 which is a federal undertaking under Section 106 of the NHPA and represents
2 Defendants' final agency action for purposes of judicial review under the APA.
3
4 **FIRST CLAIM FOR RELIEF ON BEHALF OF THE YAKAMA NATION**
5 (Violation of Treaty with the Yakama of 1855)

6 68. Plaintiff Yakama Nation hereby incorporates all prior allegations
7 by reference.

8 69. Defendants' acts and/or omissions violate and will imminently
9 interfere with and violate rights guaranteed to the Confederated Tribes and
10 Bands of the Yakama Nation pursuant to the Yakama Treaty of 1855, 12 Stat.
11 951. In particular, Defendants have violated and will imminently interfere with
12 and violate Yakama's "right of taking fish at all usual and accustomed places,
13 in common with citizens of the Territory, and of erecting temporary buildings
14 for curing them; together with the privilege of hunting, gathering roots and
15 berries, and pasturing their horses and cattle upon open and unclaimed land,"
16 as well as related use, access and religious rights. *Id.*, Article III.
17
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1 70. Defendants' acts and/or omissions are therefore "otherwise not in
2 accordance with law," particularly common law, in violation of 5 U.S.C. §
3 706(2)(a).

4 **SECOND CLAIM FOR RELIEF ON BEHALF OF ALL PLAINTIFFS**
(Violation of NEPA – Invalid FONSI)

5

6 71. Plaintiffs hereby incorporate all prior allegations by reference.

7 72. The 2010 Site-Specific EA and FONSI, and the Compliance
8 Agreements, which are directly challenged in this Complaint, were the
9 culmination of Defendants' decision-making process that approved the creation
10 of a new way for invasive species to enter the continental United States.
11 Defendants first changed their regulations, which had previously provided
12 complete protection by barring all garbage importation from Hawaii.
13 Defendants then began considering various proposals for importing Hawaiian
14 MSW, which they analyzed both site-specifically and regionally. Finally
15 Defendants approved the Violative Project, by merely incorporating by
16 reference Defendants' prior analyses: i.e., the 2010 EA "tiers" to the Regional
17 EA and merely incorporates the 2006 Site-Specific EA, which merely
18 incorporates the 2006 Regulation Revision EA. Each of these EAs resulted in
19 Defendants issuing a FONSI.



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1 73. Although Defendants had multiple opportunities and several years
2 to satisfy their NEPA obligations by preparing at least one comprehensive EIS
3 that thoroughly analyzes and considers the environmental consequences of and
4 risks created by allowing Hawaiian garbage to be imported to the United States
5 mainland, Defendants have failed to ever do so. The 2010 Site-Specific EA and
6 FONSI rely upon a series of cursory and incomplete analyses, each of which
7 refuses to take a comprehensive "hard look" at the environmental issues.
8 Under NEPA a complete EIS is required if substantial questions are raised as to
9 whether a project may cause significant degradation of environmental factor.
10 The 2010 FONSI cannot and does not satisfy this legal standard.
11 74. The consideration of reasonable range of alternatives is one of
12 NEPA's most central requirements and reasonable alternatives must be given
13 full and meaningful consideration in both an EIS and EA. 42 U.S.C.
14 §4332(C)(iii); 40 C.F.R. § 1502.14, 1508.9(b). A federal agency cannot avoid
15 the consideration of reasonable alternatives by narrowly defining the scope of
16 its analysis, especially when an agency's own mandate requires it to look at
17 other alternatives that avoid risks or harms created by a proposed action. Here,
18 Defendant APHIS describes its basic charge as "protecting American
19



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1 agriculture." APHIS, About APHIS, http://www.aphis.usda.gov/about_aphis/.
2 At multiple stages of Defendants' NEPA analysis, public comments asked for
3 Defendants to consider additional alternatives such as increased recycling.
4 Defendants refused to do so. When considering a proposal that would in fact
5 create new risks for American agriculture and the environment in general,
6 Defendants refusal to consider and evaluate reasonable alternatives that would
7 completely avoid that risk violates NEPA's requirements, is unreasonable and
8 is arbitrary and capricious.

9 75. NEPA requires the consideration of an action's cumulative
10 impacts, which are the action's individual impacts along with the impacts of
11 other past, present and reasonably foreseeable future actions. 40 C.F.R. §
12 1508.7. NEPA specifically mandates the meaningful consideration of
13 cumulative impacts when an agency is considering avoiding an EIS by issuing
14 a FONSI. 40 C.F.R. § 1508.27(b)(7). None of Defendants' related EAs come
15 close to offering a meaningful consideration of the cumulative impacts of
16 imparting Hawaiian garbage into the continental United States. For example,
17 Defendants never fully consider the cumulative impact of the invasive species
18 risk created by their proposal along with the already existing risks of invasives
19



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1 caused by other actions. That cumulative risk would be especially acute for the
2 multiple species listed under the Endangered Species Act, 16 U.S.C. § 1531, *et*
3 *seq*. ("ESA"), that use or inhabit the areas that could be impacted by such an
4 additional introduction of invasive species. Defendants also never consider the
5 cumulative impacts of the added air emissions caused by the barges and trains
6 that would be used to import the Hawaiian garbage, on the Columbia River
7 Gorge's already dirty air. Defendants' failure to fully consider the cumulative
8 impacts of their proposed action violates NEPA's requirements, is
9 unreasonable and is arbitrary and capricious.
10 76. NEPA requires an agency to consider a proposed action's direct
11 and indirect impacts. 40 C.F.R. § 1508.8. An agency cannot avoid addressing
12 a foreseeable impact unless it is remote and highly speculative. Defendants
13 here insisted that the risk of an introduction of invasive species created by
14 importing Hawaiian garbage was "low," but conceded that it was "not zero."
15 Defendants in fact significantly underestimate the risk of invasives caused by
16 their proposed action. However, in light of the severe consequences of such an
17 introduction of additional invasive species, Defendants were obligated to
18 disclose and consider those consequences even if they believed the risk was
19



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1 "low." In the Regulation Revision EA, Defendants admit that the possible
2 introduction of an invasive species was an indirect effect of their proposed rule
3 change and promised that an analysis of that indirect effect would occur in
4 subsequent, site-specific proposals. The 2010 site-specific EA contains no
5 analysis of the environmental effects that would occur if invasive species were
6 introduced into the Pacific Northwest from imported Hawaiian garbage.
7 Especially telling is the absence of a complete analysis regarding indirect
8 impacts on species listed under the ESA, including the multiple listed
9 anadromous fish species that use or inhabit the Columbia River. Defendants'
10 failure to fully and completely consider and disclose the environmental impacts
11 from the accidental introduction of invasive species violates NEPA, is
12 unreasonable, and is arbitrary and capricious.

13 77. Defendants consulted with the National Marine Fisheries Service
14 ("NMFS") and the U.S. Fish & Wildlife Service ("USFWS") regarding
15 Defendants' obligations and the relevant impacts of the actions addressed in
16 2006 Site-Specific EA and the Regional EA under the ESA. Defendants even
17 prepared a Biological Assessment regarding the Regional EA that they attached
18 to the 2010 Site-Specific EA, but Defendants did not publicly disclose other
19



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documents regarding their ESA consultations during the NEPA process. Plaintiffs are still evaluating whether Defendants, NMFS and USFWS complied with all of their ESA obligations and plaintiffs reserve the right to amend this complaint to add any such ESA claims after plaintiffs complete that evaluation. However, as a matter of law, NEPA imposes analytical and public disclosure obligations regarding impacts on listed species that are different and in some ways broader than those imposed by the ESA, and Defendants' purported compliance with its ESA obligations cannot cure the significant omissions in its publicly-disclosed NEPA analysis regarding impacts on ESA listed species.

78. NEPA requires an agency to discuss how proposed actions' impacts may be mitigated, 40 C.F.R. § 1502.16(h), 1508.20, and an agency may be able to use such mitigation measures to support a FONSI. However, a "mitigated FONSI" is valid only when the mitigation measures significantly compensate for a proposed action's adverse environmental impacts; the agency must analyze mitigation measures in detail and explain how effective the measures would be. Merely listing mitigation measures is insufficient. Each of Defendants' FONSIs, including their 2010 FONSI, depended heavily on the



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1 mitigated risk created by the garbage handling measures Defendants intended
2 to impose on waste haulers in the Compliance agreements. However,
3 Defendants' own analysis also recognized that such measures would work only
4 if they were "scrupulously followed" and such compliance insured through
5 monitoring by Defendants. Active and effective monitoring thus is an essential
6 element of Defendants' 2010 FONSI. Nowhere in Defendants' NEPA analysis
7 do Defendants provide any details regarding how and when they will monitor
8 for compliance, and Defendants fail to provide any explanation for why they
9 believe their unspecified monitoring will be effective. Conclusory assertions
10 that monitoring will occur and will work is an insufficient basis for upholding a
11 FONSI, and Defendants' 2010 FONSI therefore violates NEPA, is
12 unreasonable, and is arbitrary and capricious.

13 79. NEPA regulations require an agency to meaningfully consult early
14 in the decision-making process with federally-recognized Indian tribal
15 governments when the agency's involvement is foreseeable, 40 CFR § 1501.2,
16 and to consider direct and indirect impacts to the "aesthetic, historic, cultural,
17 economic, social, or health" effects on the environment. 40 CFR §§ 150.8.8,
18 1508.27. Defendants failed to meaningfully consult with the Yakama Nation
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early, or prior to the issuance of the FONSI, to determine whether the importation of Hawaiian urban solid waste would have direct or indirect impact on Yakama historic fishing, hunting and gathering areas and ceremonial sacred sites, and religiously and culturally significant historic properties, and the indigenous plant and animal species and Yakama's practices associated with those lands and species.

80. The NEPA violations set forth above are offered only as examples of how Defendants' 2010 Site-Specific EA and FONSI violate NEPA. Plaintiffs reserve the right to offer other examples in their briefing or in an amended Complaint after they have had a chance to review the complete administrative record.

81. Defendants' 2010 Site-Specific EA and FONSI and the prior NEPA analysis that it tiers to or incorporates, and the resulting Compliance Agreements, are unreasonable and are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of NEPA, NEPA's implementing regulations and the APA, 5 U.S.C. § 706(2)(A).



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## THIRD CLAIM FOR RELIEF BY THE YAKAMA NATION

(Breach of Fiduciary Duty)

82. Plaintiff Yakama Nation hereby incorporates all prior allegations by reference.

83. Pursuant to the United States trust obligation to the Yakama Nation, Defendants were required to meaningfully consult with the Yakama Nation prior to issuing the FONSI, and, to determine whether Hawaiian urban solid waste would affect Yakama historic fishing, hunting and gathering areas and ceremonial sacred sites, religiously and culturally significant historic properties, and the indigenous plant and animal species and Yakama's practices associated with those lands and species.

84. Defendants have not meaningfully consulted with the Yakama Nation, in violation of the Treaty of 1855, NEPA, AIRFA, NHPA, Presidential Orders 13175, 13007 and 12898, and various federal and agency-specific regulations.

85. By failing to meaningfully consult with the Yakama Nation, Defendants have breached and will imminently breach their minimum fiduciary duty to the Yakama Nation.



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**FOURTH CLAIM FOR RELIEF BY THE YAKAMA NATION**
(Violation of Executive Order 13175 and APHIS Directive 1040.1)

86. Plaintiff Yakama Nation hereby incorporates all prior allegations by reference.

87. By failing to meaningfully consult with the Yakama Nation, Defendants' acts and/or omissions violate and will imminently violate United States Presidential Executive Order 13175, 3 C.F.R. § 304, and Defendant APHIS-issued Directive 1040.1.

88. These acts and/or omissions resulted in an arbitrary and capricious decision to issue a FONSI instead of an EIS pursuant to NEPA, in violation of 5 U.S.C. § 706(2)(a).

**FIFTH CLAIM FOR RELIEF BY THE YAKAMA NATION**
(Violation of NEPA and CEQ's NEPA Tribal Consultation Regulations)

89. Plaintiff Yakama Nation hereby incorporates all prior allegations by reference.

90. NEPA requires APHIS to have meaningfully consulted early with the Confederated Tribes and Bands of the Yakama, in order to determine whether the Project would have any significant effect on Yakama Treaty-protected and historic fishing, hunting and gathering areas and ceremonial



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1 sacred sites, and religiously and culturally significant historic properties, and
2 the indigenous plant and animal species and Yakama's practices associated
3 with those lands and species.

4 91. Defendants have failed to meaningfully consult with the Yakama
5 Nation, or undertake an EIS, regarding the potential adverse effects of
6 Hawaiian urban waste, and the accompanying non-indigenous plant pests and
7 noxious weeds and pathogens from rotting food, upon Yakama's Treaty
8 resources and way of life.

9 92. By failing to consult with the Yakama Nation, in violation of the
10 Treaty of 1855, NEPA, AIRFA, NHPA, Presidential Orders 13175, 13007 and
11 12898, and various federal and agency-specific regulations , Defendants have
12 failed to meaningfully consider the environmental impacts of the Project.

13 93. USDA Defendants' acts and/or omissions therefore violate and
14 will imminently violate NEPA and the CEQ's NEPA regulations, specifically
15 40 CFR § 1501.2.

16 94. These acts and/or omissions resulted in an arbitrary and capricious
17 decision to issue a FONSI instead of an EIS pursuant to NEPA, in violation of
18 5 U.S.C. § 706(2)(a).

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**SIXTH CLAIM FOR RELIEF BY THE YAKAMA NATION**
(Violation of Section 106 of the NHPA)

95. Plaintiff Yakama Nation hereby incorporates all prior allegations by reference.

96. Section 106 of the National Historic Preservation Act (NHPA) requires that federal agencies "take into account the effect of the[ir] undertaking[s] on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f.

97. Sites of historical significance including, but not limited to, areas containing human remains, designated cemeteries, cairns denoting ceremonial sites or burial sites, Native American village ruins, petroglyphs, pictographs, fishing sites, and culturally modified trees used for ceremonial and hunting purposes, are near and may be damaged by the Violative Project ("Sites of Historical Significance"). These include both real and personal property of traditional, religious and cultural significance to the Yakama Nation and other Native American tribes, and they are included in or are eligible for inclusion in the National Register of Historic Places.



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1 98. The NHPA implementing regulations require Defendants, at all
2 stages of the Section 106 process, to consult with the Washington SHPO, and
3 tribes that "attach[ ] religious and cultural significance to historic properties
4 that may be affected by an undertaking," in order "to identify historic
5 properties potentially affected by the undertaking." 36 C.F.R. §§
6 800.2(c)(2)(ii); 800.1.
7 99. By failing to take into account the effect of the Violative Project
8 on the myriad Sites of Historical Significance, and by failing to consult with
9 both the Washington SHPO and Yakama THPO, and other consulting parties
10 contemplated by 36 C.F.R. §§ 800.2(c), and to confer with the federal
11 Advisory Council, Defendants acted in violation of the NHPA.
12 100. These acts and/or omissions resulted in an arbitrary and capricious
13 decision to issue a FONSI instead of an EIS pursuant to NEPA, in violation of
14 5 U.S.C. § 706(2)(a).

15 **SEVENTH CLAIM FOR RELIEF BY THE YAKAMA NATION**

(Violation of Executive Orders 13007 and 12898)

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17 101. Plaintiff Yakama Nation hereby incorporates all prior allegations
by reference.
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1 102. Executive Order 13,007 requires agencies to (1) accommodate
2 access to and ceremonial use of Indian sacred sites, and (2) avoid adversely
3 affecting the physical integrity of such sacred sites.
4 103. Executive Order 12,898 requires federal agencies to "make
5 achieving environmental justice part of its mission by identifying and
6 addressing, as appropriate, disproportionately high and adverse human health
7 or environmental effects of its programs, policies, and activities on minority
8 populations and low-income populations," including Native American
9 populations.
10 104. By failing to take into account the effect of the Violative Project
11 on the myriad Sites of Historical Significance, failing to consult the Yakama
12 Nation to discover Yakama sacred sites, and failing to address the adverse
13 effects that the Project would have on the Yakama Nation and its membership
14 and population, Defendants acted in violation of Executive Orders 13007 and
15 12898.
16 105. These acts and/or omissions resulted in an arbitrary and capricious
17 decision to issue a FONSI instead of an EIS pursuant to NEPA, in violation of
18 5 U.S.C. § 706(2)(a).
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## EIGHTH CLAIM FOR RELIEF BY THE YAKAMA NATION
(Violation of AIRFA)

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106. Plaintiff Yakama Nation hereby incorporates all prior allegations by reference.

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107. AIRFA requires federal agencies "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . ." 42 U.S.C. § 1996. Defendants much therefore consider Native American cultural interests, and seek to understand and avoid interfering with Native American religious beliefs and practices.
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108. By failing to take into account the effect of the Violative Project on the myriad Sites of Historical Significance, and failing to consult Yakama Nation, Defendants acted in violation of AIRFA.
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109. These acts and/or omissions resulted in an arbitrary and capricious decision to issue a FONSI instead of an EIS pursuant to NEPA, in violation of 5 U.S.C. § 706(2)(a).
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## RELIEF

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WHEREFORE, Plaintiffs respectfully requests that this Court:
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A. Preliminarily and permanently enjoin Defendants from carrying out either Compliance Agreement or otherwise permitting the handling and
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1 transportation of Hawaiian municipal solid waste from Hawaii to the Roosevelt
2 Regional Landfill, pending:
3 (1) Defendant APHIS' meaningful consultation with the Yakama
4 Nation regarding the potential adverse effects upon Yakama historic fishing,
5 hunting and gathering areas and ceremonial sacred sites, and religiously and
6 culturally significant historic properties, and the indigenous plant and animal
7 species and Yakama's practices associated with those lands and species, as
8 required by federal law;
9 (2) Defendant APHIS' consultation with the Washington State SHPO,
10 the Yakama Nation and its THPO and other consulting parties contemplated by
11 36 C.F.R. §§ 800.2(c), and conferral with the Advisory Council, in order to
12 identify historic properties potentially affected by the proposed importation of
13 Hawaiian municipal solid waste from Hawaii to the Roosevelt Regional
14 Landfill, especially those historic properties of religious and cultural
15 significance to the Yakama Nation, as required by Section 106 of the NHPA.
16 16 U.S.C. § 470f; 36 C.F.R. § 800.1; and
17 (3) Defendant APHIS' preparation of a comprehensive EIS regarding
18 the consideration of a reasonable range of alternatives; a comprehensive
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cumulative impacts analysis; a complete consideration of the impacts that would be caused by the introduction of invasive species from Hawaiian garbage, including the potential adverse effects upon federally protected imperiled species and upon the Yakama Nation's historic fishing, hunting and gathering areas and ceremonial sacred sites, and religiously and culturally significant historic properties, and the indigenous plant and animal species and Yakama's practices associated with those lands and species; and any other legal requirements imposed by NEPA.

B. Vacate Defendants' 2010 Site-Specific EA, FONSI and Compliance Agreements and deem them to be arbitrary, capricious, an abuse of discretion and not in accordance with law, for the reasons set forth in Paragraph A above and for any other reasons the Court determines to be applicable;

C. Award Plaintiffs their costs and reasonable attorneys' fees; and

D. Award Plaintiffs such other relief as the Court deems just and appropriate.

DATED this 28th day of July 2010.



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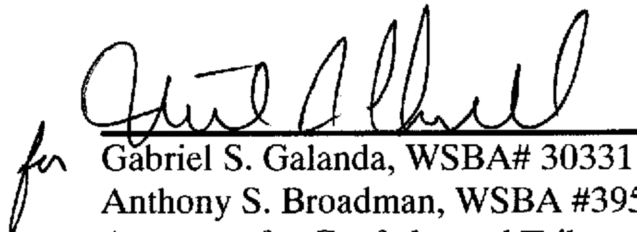

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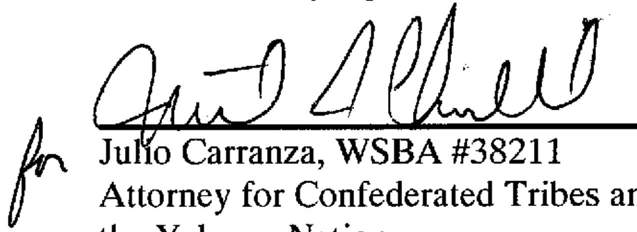

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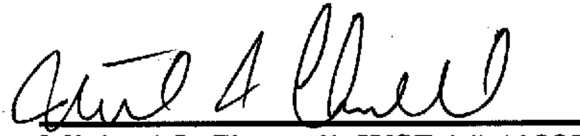

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