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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

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

Plaintiffs,

v.

UNITED STATES COAST GUARD,
Defendant.

Case No. 6:14-cv-01890-MC

**DEFENDANT'S MOTION
TO DISMISS THE COMPLAINT
AND MEMORANDUM IN
SUPPORT THEREOF**

DEF'S MOTION TO DISMISS

DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, Defendant United States Coast Guard hereby moves this Court to dismiss Plaintiffs' Complaint in its entirety. The bases for this motion, as set forth in the accompanying memorandum, are that: (1) due to a change in circumstances, Plaintiffs' claims under the National Environmental Policy Act and Homeland Security Act are now moot, (2) any claims that Plaintiffs may raise with regard to future conduct are not ripe for review, and (3) even if the Court finds otherwise, Plaintiffs also lack standing. The Defendant's Motion to Dismiss should therefore be granted as to all claims.¹

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

In light of the Howard Coble Coast Guard Maritime Transportation Act of 2014 (the "Coast Guard Act"), Pub. L. No. 113-281, 128 Stat. 3022 (2014), which was signed into law on December 18, 2014, the Coast Guard will not cease operations at the Newport Air Facility ("AIRFAC Newport") as previously planned. *See* Dec. 11, 2014 Minutes of Proceedings, ECF No. 33. The above-captioned litigation has been rendered moot by intervening legislative action and any possible future claims are not ripe. Even if the Court finds otherwise, Plaintiffs do not have standing. For these reasons, Defendant hereby moves this Court to dismiss the Complaint for lack of subject matter jurisdiction.²

As this Court is aware, section 225 of the Coast Guard Act contains the following prohibition:

(b) Prohibition.—

¹ In compliance with Local Rule 7-1, the parties discussed and attempted to resolve the issues raised in this motion but were unable to do so.

² Plaintiffs filed their complaint on November 25, 2014. ECF No. 1. Plaintiffs filed an amended complaint on December 9, 2014 ("Compl."). ECF No. 21. References to the complaint in this brief are to the amended complaint.

- (1) In general.—The Coast Guard may not—
 - (A) close a Coast Guard air facility that was in operation on November 30, 2014; or
 - (B) retire, transfer, relocate, or deploy an aviation asset from an air facility described in subparagraph (A) for the purpose of closing such facility.
- (2) Sunset.—This subsection is repealed effective January 1, 2016.

The Coast Guard Act thus prohibits the Coast Guard from taking the action that forms the basis of Plaintiffs' claims – “decommission[ing] Newport Air Station and eliminate[ing] the helicopter air rescue capability serving Oregon’s central coast on December 15, 2014.” Compl. ¶¶ 24, 34. In light of this prohibition, the Coast Guard will not cease helicopter operations at AIRFAC Newport as originally proposed. Currently, the Coast Guard has no intention to close the air facility and it will continue to operate an MH-65 helicopter from the air facility as it is currently operating. Declaration of Captain Christopher Martino in Support of Defendant’s Motion to Dismiss (“Martino MTD Decl.”) ¶ 3. The Coast Guard Act’s prohibition on ceasing operations at AIRFAC Newport for the remainder of 2015 renders Plaintiffs’ claims moot.

Notwithstanding the mootness of Plaintiffs’ claims, the Coast Guard anticipates that Plaintiffs will contend that the claims are not moot because of the possibility that the Coast Guard may, after the legislation sunsets on January 1, 2016, decide to cease helicopter operations at Newport and in doing so, will rely upon the same Categorical Exclusion Determination that it relied upon in anticipation of ceasing operations last December. The Coast Guard has no current plan to cease helicopter operations at AIRFAC Newport. Any claim based on the premise that the Coast Guard may cease operations at AIRFAC Newport is not ripe for review and therefore cannot be maintained.

In the alternative, even if the Court were to disagree that Plaintiffs’ claims are moot and future claims are unripe, the Coast Guard maintains, as it has throughout, that Plaintiffs do not

have standing to bring these claims. *See* Defendant’s Brief in Opposition to Plaintiffs’ Motion for a Preliminary Injunction (“Def.’s Br.”) at 10 – 13. Because Plaintiffs have not met their burden to demonstrate that they have suffered an injury that was caused by the actions of the Coast Guard, they lack standing.

For all of the foregoing reasons – mootness, the lack of ripeness, the absence of standing – the Court does not have subject matter jurisdiction. It should accordingly dismiss the Complaint.

II. FACTUAL BACKGROUND

The Coast Guard established AIRFAC Newport in 1987 as a base of operations for a single Coast Guard helicopter to operate primarily in search and rescue efforts along the Oregon coastline. Declaration of Captain Christopher A. Martino (Martino Decl.) ¶ 2, ECF No. 19. Due to numerous upgrades in the capabilities of vessels and helicopters, and improvements in communications capabilities, any search and rescue operations for the area presently served by AIRFAC Newport can now be addressed within the Coast Guard’s national two-hour response standard from Air Station Astoria, or Air Station North Bend. *Id.* ¶¶ 6-16, Exhibit 2.

Beginning in February 2012, the Coast Guard began to explore the possibility of relocating helicopters operating out of Newport and Charleston, South Carolina, which it determined were providing redundant search and rescue coverage, to locations with critical resource gaps. *Id.* ¶ 23. As part of its FY 2014 budget request, which was passed in January 2014, the Coast Guard proposed to cease operations at these air facilities. Beginning in October 2014, the Coast Guard conducted an environmental review of the proposal pursuant to the National Environmental Policy Act (“NEPA”). It concluded that the proposed actions fell within categorical exclusions so that preparation of an Environmental Assessment or Environmental Impact Statement was not required. *See id.*, Exhibit 3.

Before entering a final decision to cease operations at AIRFAC Newport, the Coast Guard notified numerous stakeholders, including state and federal government officials, tribal officials, municipal officials, and members of the public, to inform them of its proposal. Martino MTD Decl. ¶ 7. In addition, the Coast Guard held town hall meetings on October 15 and October 20, 2014 during which it informed relevant stakeholders and members of the public of the planned closure and allowed for their input. *Id.* ¶ 8, Exhibit 1. The Coast Guard subsequently moved back the proposed closure date of AIRFAC Newport from November 30 to December 15, 2014. Martino Decl. ¶ 32.

On December 10, 2014 Congress intervened, with both houses passing the Coast Guard Act, section 225 of which prohibits the Coast Guard from closing AIRFAC Newport in 2015. Because of this development, on December 11, 2014 the Coast Guard agreed that it would not cease operations at AIRFAC Newport on December 15, 2014 as originally planned, and would continue to operate an MH-65 helicopter under the same conditions as it was then operating. ECF No. 33. A final decision to cease operations at AIRFAC Newport – which can only be made at Coast Guard headquarters – thus was never made. *See* Martino Decl. ¶ 32; 14 U.S.C. § 93(a)(3). On December 18, 2014, the President signed the Coast Guard Act. The prohibition within that Act is now law. The Coast Guard is prohibited from ceasing helicopter operations at AIRFAC Newport before January 2016 and it has no current plans to do so after that date. Martino MTD Decl. ¶¶ 2-3.

III. ARGUMENT

If the Court determines that it lacks subject matter jurisdiction at any time, it must dismiss the action. Fed. R. Civ. P. 12(h)(3). In resolving a motion under Rule 12(b)(1), the Court is not limited to the allegations in the pleadings if the “jurisdictional issue is separable from the merits of the case[.]” *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

A. Plaintiffs' Claims Must be Dismissed as Moot

Under Article III of the Constitution, “the exercise of judicial power depends upon the existence of a case or controversy.” *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964). A federal court does not have jurisdiction “to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.” *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (citations and quotation marks omitted); *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003) (“Mootness is a jurisdictional issue.”). A “live controversy must persist throughout all stages of the litigation.” *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1128-29 (9th Cir. 2005) (en banc) (citation omitted). In cases like this, the central question is “whether changes in the circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief.” *Id.* (quoting *West v. Sec’y of the Dep’t of Transp.*, 206 F.3d 920, 925 n.4 (9th Cir. 2000)).

A plaintiff bears the burden of demonstrating that a case or controversy exists at all stages of the litigation. If an actual, or threatened injury from a challenged government action no longer exists, or a change in circumstances deprives a court of the ability to provide any meaningful or effective relief for the alleged violation, the matter is moot and must be dismissed for lack of jurisdiction. *See Mills v. Green*, 159 U.S. 651, 653 (1895); *Feldman v. Bomar*, 518 F.3d 637, 642-43 (9th Cir. 2008).

In their Complaint, Plaintiffs allege that the removal of the rescue helicopter and decommissioning of AIRFAC Newport would reduce the Coast Guard’s search and rescue mission in violation of the Homeland Security Act. Compl. ¶ 22. Plaintiffs further allege that in determining to remove the rescue helicopter and decommission AIRFAC Newport, the Coast Guard failed to conduct a proper environmental review in violation of NEPA. *Id.* ¶¶ 31-33.

Both of these claims have been rendered moot by the Coast Guard’s decision not to cease

operations at AIRFAC Newport and to continue to operate the helicopter at that facility under the same conditions, and further by the enactment of the Coast Guard Act, which prohibits the Coast Guard from closing AIRFAC Newport or retiring, transferring, relocating, or deploying the helicopter. Taken together, the Coast Guard's action and the enactment of the Coast Guard Act ensure that the Coast Guard will not remove the rescue helicopter, or decommission AIRFAC Newport, on December 15, 2014, as originally planned, or indeed at any time in 2015.

In its prior brief the Coast Guard offered numerous reasons why Plaintiffs' claims are likely to fail. The Coast Guard showed that Plaintiffs lack standing to bring claims under NEPA or the Homeland Security Act, Def.'s Br. at 10–13, and that Plaintiffs do not fall within the zone of interests of either statute, Def.'s Br. at 14–16. The Coast Guard further showed that it conducted an appropriate environmental review and properly concluded that the proposed action was subject to a categorical exclusion and that no extraordinary circumstances required further environmental analysis,³ Def.'s Br. at 16–20, and that the proposed action did not violate the Homeland Security Act. Def.'s Br. at 20–22.

The Plaintiffs' claims and the Coast Guard's response to those claims are premised on the possibility that Coast Guard would remove the helicopter from AIRFAC Newport on December 15, 2014. Not only has the Coast Guard not decided to follow through on that plan, it is no longer possible: December 15, 2014 has come and gone and the Coast Guard is now statutorily prohibited from closing AIRFAC Newport. *See Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1169 (9th Cir. 2007) (holding that NEPA and other

³ In the amended complaint, Plaintiffs continue to allege, upon information and belief, that the Coast Guard has not prepared the checklist that it produces as part of the categorical exclusion determination process. Compl. ¶ 31. Not only is this allegation incorrect, the Coast Guard provided the categorical exclusion determination and checklist. Martino Decl., Exhibit 3. In the event the Court does not dismiss the Complaint, Defendant asks that the Court strike the first sentence in paragraph 31 of the Complaint. *See Fed. R. Civ. P. 12(f)*.

statutory challenges to an agency's proposed action were rendered moot following enactment of a new statute that superseded the proposed action); *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 79 (D.C. Cir. 2011) (finding environmental claims moot when agency's subsequent action superseded the Record of Decision). Here the challenged action cannot occur, and therefore considering the claims on the merits would require the Court "to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology*, 506 U.S. at 12 (citations and quotation marks omitted). And to do so would be improper as Article III courts lack the authority to issue advisory opinions. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

At this juncture, the Court would also be unable to provide Plaintiffs with any meaningful relief from the potential injuries they allege. Plaintiffs allege potential injuries to public safety and the environment due to the loss of the helicopter. Compl. ¶¶ 11, 32. But the potential injuries that Plaintiffs allege can only occur if helicopter operations at AIRFAC Newport cease. Because any threat of injury no longer exists, the Court can no longer provide any meaningful or effective relief for the alleged violations. *See Mills*, 159 U.S. at 653.

The Court no longer has subject matter jurisdiction over this matter. The Coast Guard decided not to take the action Plaintiffs complain of, and the Coast Guard Act forbids it from doing so. Plaintiffs' claims have been rendered moot. Therefore, the Complaint should be dismissed.

B. To the Extent that Plaintiffs Claims Are Based on Potential Future Conduct, Such Claims are Not Ripe

Plaintiffs contend that because the prohibition in the Coast Guard Act contains a sunset provision, absent a formal commitment that AIRFAC Newport will remain in place for a substantial multi-year period, the Court should stay proceedings in this case. Jan. 12, 2015 Joint Status Report, ECF No. 34 at 2. The Coast Guard anticipates that Plaintiffs will claim that this

case is not moot because the Coast Guard may, at some future time, decide to cease operations at AIRFAC Newport. Such a claim, should Plaintiffs raise it, is unripe.

The ripeness doctrine, like the mootness doctrine, is closely related to standing because it “originate[s] from the same Article III limitation.” *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 n.5 (2014) (internal quotation marks omitted); *Mont. Envtl. Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1188 n.3 (9th Cir. 2014). But whereas “standing is primarily concerned with who is a proper party to litigate a particular matter, ripeness addresses when that litigation may occur.” *Lee v. Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997) (emphasis in original omitted). The basic rationale of the ripeness requirement is “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements[.]” *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

The “Constitution mandates that prior to our exercise of jurisdiction there exist a constitutional ‘case or controversy,’ that the issues presented are ‘definite and concrete, not hypothetical or abstract.’” *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (citation omitted). A dispute is ripe in the constitutional sense if it “present[s] concrete legal issues, presented in actual cases, not abstractions.” *Colwell v. HHS*, 558 F.3d 1112, 1123 (9th Cir. 2009) (internal quotation marks and citation omitted). “A claim is not ripe for adjudication if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’” *Texas v. United States*, 523 U.S. 296, 300 (1998) (citations and quotation marks omitted); *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 739 (9th Cir. 2012). This is because, “if the contingent events do not occur, the plaintiff likely will not have suffered an injury that is concrete and particularized enough to establish the first element of standing.” *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009) (citation omitted).

Here, any potential activities that Plaintiffs may complain of have not occurred and are not planned. Therefore there is no injury to Plaintiffs, much less an injury that is traceable to the Coast Guard or redressable by a favorable decision. The Coast Guard does not have any plan in

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place to close AIRFAC Newport. Even if it were someday to develop such a plan, it would begin a new environmental review at that time and the final decision based on that new environmental analysis would be subject to a new challenge and judicial review. Martino MTD Decl. ¶ 9. Any claims that Plaintiffs may have are contingent upon events that have not occurred. *See Alcoa*, 698 F.3d at 793 (holding that claims based on harms that may occur, but which “have not occurred and are not reasonably likely to occur in the future” are “too contingent and speculative” to satisfy the standing and ripeness test).

Any claims that Plaintiffs may have with respect to the Coast Guard plans for AIRFAC Newport are based entirely on speculation about plans that do not currently exist and decisions that have not been made.⁴ They are not ripe for review and fall outside the Court’s subject matter jurisdiction. Accordingly, Plaintiffs’ Complaint should be dismissed.

C. Plaintiffs’ Claims Must be Dismissed Because Plaintiffs Lack Standing

“No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (internal quotation marks and citation omitted). Thus, “those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (citation omitted). The law of Article III standing, “serves to prevent the judicial process from being used to usurp the powers of the political branches.” *Clapper v. Amnesty Int’l USA*, 133 S.Ct. 1138, 1146 (2013) (citation omitted). “To establish Article III standing, a plaintiff must show (1) an ‘injury in fact,’ (2) a sufficient ‘causal connection between the injury and the conduct complained of,’ and (3) a ‘likel[i]hood’ that the injury ‘will be redressed by a favorable

⁴ Further, as the Coast Guard explained in its previous brief, because there has been no final agency action, Plaintiffs may not avail themselves of the APA’s waiver of sovereign immunity, and hence there is no jurisdiction for the suit. *See* Def.’s Br. at 20 n.5.

decision.” *Susan B. Anthony List* 134 S.Ct. at 2341 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The injury that the plaintiffs must show it has suffered is one that is “(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000); *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011).

As the Coast Guard noted in its opposition to Plaintiffs’ motion for a preliminary injunction, Plaintiffs have failed to meet (1) their burden of demonstrating that they have suffered a concrete, particularized injury that is actual or imminent, and (2) their burden of demonstrating a sufficient causal connection between their alleged injuries and Coast Guard’s then-planned conduct. Def.’s Br. at 10–13. The Coast Guard briefly summarizes its argument here. With respect to alleged injuries, Plaintiffs express a generalized interest in how Coast Guard search and rescue operations are conducted, but this is not sufficient to establish the concrete and non-conjectural injury that is required for standing purposes. *See Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). To establish an “actual or imminent injury,” the alleged injury must be tied to the challenged action, identify a particular site at issue and relate to an imminent future injury as opposed to a past injury. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009).

Plaintiffs allege two types of potential injuries in their Complaint – potential bodily injuries to persons who may experience boating accidents or otherwise be swept out to sea, and potential environmental degradation from oil spills. None of these allegations of possible future injury – whether the result of an oil spill, high seas, a rip-current, or (most improbably) a rogue wave, all of which are raised in declarations that Plaintiffs have submitted – are more than mere conjecture. *See Lyons* 461 U.S. at 108 (declining to accept the possibility that the plaintiff would be stopped and subjected to a chokehold as a sufficient injury for standing purposes).

More problematic for Plaintiffs is their inability to show that the potential injuries from these speculative events would be traceable to the Coast Guard. Oil spills, capsized ships, and rip-currents are events that are traceable to the actions of numerous third parties – e.g. ship operators or equipment manufacturers – as well as the forces of nature and are wholly outside the

control of the Coast Guard. For purposes of standing it is insufficient “if the injury complained of is the result of the independent action of some third party not before the court[.]” *Bennet v. Spear*, 520 U.S. 154, 169 (1997) (internal quotation marks, punctuation, alterations, emphasis in original and citation omitted).

Even if the court concludes that this case is not moot, because the Plaintiffs have not met their burden to demonstrate that they have suffered an injury in fact caused by actions of the Coast Guard, they lack standing and the Court does not have subject matter jurisdiction. Accordingly, for this reason also the Complaint should be dismissed.

IV. CONCLUSION

For the foregoing reasons, the Court should grant Defendant’s motion to dismiss the Complaint.

Dated: January 26, 2015

Respectfully submitted,

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Certificate of Service

I hereby certify that on January 26, 2015, I electronically filed the foregoing Defendant's Motion to Dismiss with the Clerk of the Court via the CM/ECF system, which will provide service to counsel for Plaintiffs.

s/ Sean C. Duffy
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