

FILED

UNITED STATES COURT OF APPEALS

JAN 28 2011

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FISHERMEN INTERESTED IN SAFE
HYDROKINETICS; et al.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY
COMMISSION,

Respondent.

No. 09-72920

FERC No. 13053-001

ORDER

Before: THOMPSON and TALLMAN, Circuit Judges, and TARNOW, Senior District Judge.*

Petitioners Fishermen Interested in Safe Hydrokinetics seek review of an order of the Federal Energy Regulatory Commission (“FERC”) denying their request for rehearing of an order issuing a preliminary permit to Green Wave Energy Solutions, LLC (“Green Wave”), for a proposed “hydrokinetic” power generation installation designed to convert ocean wave action into electricity. Petitioners objected to FERC’s issuance of the preliminary permit prior to the

* The Honorable Arthur J. Tarnow, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

development of a comprehensive plan for the Pacific Ocean region off the coast of California, Oregon, and Washington.

Because the permit at issue has now been cancelled by FERC due to Green Wave's failure to comply with its conditions, this case is dismissed as moot. *See Nat'l Wildlife Fed'n v. FERC*, 801 F.2d 1505, 1506 n.1 (9th Cir. 1986) (dismissing as moot appeal pertaining to preliminary permit that was revoked); *Wash. State Dept. of Fisheries v. FERC*, 801 F.2d 1516, 1519 (9th Cir. 1986) (dismissing as moot appeals pertaining to preliminary permits that were cancelled prior to oral argument).

Contrary to Petitioners' argument, FERC retained jurisdiction to cancel Green Wave's permit after Petitioners filed their petition for review. After a petition for review of a FERC order is filed, we have exclusive jurisdiction to modify or set aside that order. 16 U.S.C. § 8251(b). However, FERC did not in any way "modify" or "set aside" Green Wave's permit order by enforcing its terms, which expressly provided that the permit could be cancelled for failure to comply with its requirements. There is no indication that FERC lacked the authority to continue to administer the terms of its permit order in this way after the petition for review was filed; in fact, 16 U.S.C. § 8251(c) provides that, notwithstanding § 8251(b), the filing of a petition for review "shall not, unless

specifically ordered by the court, operate as a stay of the Commission's order." 16 U.S.C. § 8251(c).

Given that the permit that Petitioners sought to have vacated has been cancelled, there is no longer a live controversy between the parties, and the case is moot. *See Pub. Utils. Comm'n of Cal. v. FERC*, 100 F.3d 1451, 1458 (9th Cir. 1996). Petitioners argue that we could still grant the relief they seek by holding generally that FERC must prepare a comprehensive plan prior to issuing preliminary permits for hydrokinetic projects. But such a disposition, without any connection to a particular permit application that threatens Petitioners with a particular injury, would plainly fly in the face of Article III case-or-controversy requirements. *See Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149–50 (2009) (holding that plaintiffs' challenge to a Forest Service regulation could not survive "in the abstract" after the particular action which prompted the challenge was no longer at issue).

This case is not saved from mootness by the "capable of repetition while evading review" exception, which applies "only in exceptional circumstances" when (1) the duration of the challenged action is too short to allow full litigation before it ceases; and (2) there is a reasonable expectation that the complaining party will be subjected to the same action or injury again. *Pub. Utils. Comm'n*, 100 F.3d at 1459 (internal quotation marks omitted). We agree with Petitioners

that there is a reasonable expectation that FERC will continue to issue preliminary permits for hydrokinetic projects off the West Coast. However, the three-year duration of these permits does not render a challenge to their issuance “likely always to become moot before federal court litigation is completed” as required for the exception to apply. *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1509–10 (9th Cir. 1994). Indeed, several disputes over the issuance of preliminary permits have been litigated in federal court in the past. *See Nat’l Wildlife Fed’n*, 801 F.2d at 1513; *Wash. State Dept. of Fisheries*, 801 F.2d at 1518; *Sierra Club v. FERC*, 754 F.2d 1506, 1509 (9th Cir. 1985). If and when FERC issues another preliminary permit for a hydrokinetic project off the Pacific coast without a comprehensive plan, Petitioners are free to again raise the same challenges that they have attempted to raise in this case.

Respondent’s Motion to Dismiss is GRANTED, and the case is DISMISSED. This case is stricken from the oral argument calendar on February 15, 2011, in San Francisco. Each party shall bear its own costs.