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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILD EQUITY INSTITUTE, *et al.*,

No. C 11-00958 SI

Plaintiffs,

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS AND VACATING
HEARING**

v.

CITY AND COUNTY OF SAN FRANCISCO,
et al.,

Defendants.

15 Currently before the Court is defendants' motion to dismiss the case pursuant to Federal Rule
16 of Civil Procedure 12(b)(1). Defendants argue that when the United States Fish and Wildlife Service
17 issued its final Biological Opinion and Incidental Take Statement on October 2, 2012, the case became
18 moot. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter suitable for disposition without
19 oral argument and therefore VACATES the hearing currently scheduled for December 14, 2012.
20 Having carefully considered the papers submitted, the Court GRANTS defendants' motion to dismiss,
21 for the reasons set forth below.

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BACKGROUND

25 Plaintiffs, various non-profit conservation groups, filed suit against the City and its officials for
26 violating the Endangered Species Act (the "ESA"), 16 U.S.C. §§ 1531-1544. Plaintiffs allege that
27 defendants' operations and activities at Sharp Park Golf Course have caused the "taking" of the
28 threatened Californian red-legged frog (the "Frog") and the endangered San Francisco garter snake (the
"Snake"), and that therefore, defendants should have obtained an Incidental Take Permit pursuant to

1 Section 10 of the ESA, 16 U.S.C. § 1539(a)(1)(B). Compl. at ¶ 1. Specifically, plaintiffs contend that
2 defendants’ water management at Sharp Park has exposed frog egg masses to the air, causing fatal
3 desiccation of the egg masses, thereby reducing the frog population. *Id.* at ¶¶ 54-60. Plaintiffs also
4 claim that other golf course operation activities – lawn mowing and golf cart usage – harm the Snake
5 and Frog by running them over. *Id.* at ¶¶ 54-62. Defendant City owns and operates Sharp Park, which
6 is a public park located in the City of Pacifica and contains an 18-hole golf course constructed in 1930.
7 The Court allowed the San Francisco Public Golf Alliance (“SFPGA”) to intervene as a defendant in
8 this action as well. Docket No. 44.

9 The lawsuit was filed in March, 2011. In May 2011, the City asked the U.S. Army Corps of
10 Engineers (the “Corps”) to initiate formal Section 7 consultation with the United States Fish and
11 Wildlife Service (“FWS”). In August 2011, the City submitted a section 404 permit application to the
12 Corps for the Sharp Park Pump House Safety and Infrastructure Improvement Project (the “Project”),
13 and in October the Corps requested that the FWS provide a formal consultation on the City’s section
14 404 permit application for the Project. Over the next several months, the City developed multiple drafts
15 of a Biological Assessment, and the FWS began its formal consultation process. On April 26, 2012, this
16 Court issued a stay pending the FWS’s formal consultation and the issuance of its final Biological
17 Opinion (“BiOp”). Docket No. 141.

18 On October 2, 2012, the FWS issued its final BiOp. Docket No. 146. In the BiOp, the FWS
19 made a jeopardy determination, in accordance with regulation, based on the status of the species, the
20 environmental baseline, the effects of the proposed action, and cumulative effects. BiOp 19-20. In its
21 report on the effects of the proposed action, the FWS analyzed the effects of the construction, the
22 ongoing golf course maintenance and operations, and the restoration actions. *Id.* at 30-38. The FWS
23 concluded that the “Project, as proposed, is not likely to jeopardize the continued existence of the
24 California red-legged frog or San Francisco garter snake.” *Id.* at 38.

25 As part of the BiOp, the FWS also issued an Incidental Take Statement (“ITS”). As explained
26 in the ITS, Section 9 of the ESA makes it unlawful for any person to “take” any endangered or
27 threatened species. 16 U.S.C. § 1538(a)(1)(B). “Take” is defined to mean “harass, harm, pursue, hunt,
28 shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct.” BiOp 39; 16 U.S.C.

1 § 1532(19). The ESA allows the FWS to authorize certain types of incidental take. “Under the terms
2 of section 7(b)(4) and section 7(o)(2), taking that is incidental and not intended as part of the agency
3 action is not considered to be prohibited taking under the Act provided that such taking is in compliance
4 with this Incidental Take Statement.” BiOp 39.

5 The ITS states that the FWS anticipates that, as a result of the construction activities, all Frogs
6 and Snakes within the Horse Stable Pond construction site will be subject to incidental take in the form
7 of harassment or capture, and anticipates that, in total, one Frog will be killed or injured. *Id.* at 39-40.
8 The FWS further anticipates that, due to golf course maintenance and operations, all Frogs and Snakes
9 will be subject to incidental take in the form of harassment, and one Frog and one Snake will be killed
10 or injured. *Id.* at 40. Furthermore, the FWS anticipates that 130 Frog egg masses each year will be
11 subject to incidental take in the form of harm, harassment, capture, injury, or death as a result of
12 pumping activities for the next 10 years. *Id.* Finally, the FWS found that all Frogs and Snakes in the
13 restoration area will be subject to incidental take in the form of harassment. *Id.*

14 In the “Terms and Conditions” section, the ITS states that “to be exempt from the prohibitions
15 of Section 9 of the Act, the Corps and the City shall ensure compliance with the following terms and
16 conditions These terms and conditions are nondiscretionary.” *Id.* at 41. The ITS outlines 31
17 requirements or sub-requirements that the City and Corps must follow; if they fail to comply, “the
18 protective coverage of section 7(o)(2) may lapse.” *Id.* at 39, 41-45.

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20 **LEGAL STANDARD**

21 Federal Rule of Civil Procedure 12(b)(1) allows a party to challenge a federal court’s jurisdiction
22 over the subject matter of the complaint. Fed. R. Civ. Pro. 12(b)(1). As the party invoking the
23 jurisdiction of the federal court, the plaintiffs bear the burden of establishing that the court has the
24 requisite subject matter jurisdiction to grant the relief requested. *See Kokkonen v. Guardian Life Ins.*
25 *Co. of America*, 511 U.S. 375, 377 (1994) (citation omitted).

26 The jurisdiction of federal courts depends on the existence of a “case or controversy” under
27 Article III of the Constitution. *See PUC v. FERC*, 100 F.3d 1451, 1458 (9th Cir. 1996). A claim is
28 moot if it has lost its character as a present, live controversy, and if no effective relief can be granted:

1 “Where the question sought to be adjudicated has been mooted by developments subsequent to filing
2 of the complaint, no justiciable controversy is presented.” *Flast v. Cohen*, 392 U.S. 83, 95 (1968). A
3 claim also may be considered moot if interim relief or events have completely and irrevocably
4 eradicated the effects of the alleged violation. *See Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135
5 F.3d 1260, 1274 (9th Cir. 1998). It does not matter if the controversy was “live” when the complaint
6 was filed. *SW. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 82 F. Supp. 2d 1070, 1079 (D. Ariz.
7 2000) (citing *Humboldt Cnty. v. United States*, 684 F.2d 1276, 1283-84 (9th Cir. 1982)). Accordingly,
8 “Article III of the Constitution prohibits federal courts from taking further action on the merits in moot
9 cases,” and the moot case must be dismissed due to the court’s lack of subject matter jurisdiction.
10 *Envtl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1076 (9th Cir. 2001) (citations omitted).

11 12 DISCUSSION

13 Defendants argue that plaintiffs’ case must be dismissed because the ITS renders the case moot.
14 The ITS “functions as a safe harbor provision immunizing persons from Section 9 liability and penalties
15 for takings committed during activities that are otherwise lawful and in compliance with its terms and
16 conditions.” *Arizona Cattle Growers’ Ass’n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d
17 1229, 1239 (9th Cir. 2001) (citing 16 U.S.C. § 1536(o)). Other cases in this circuit agree that the ITS
18 shields plaintiffs from liability under the ESA as long as they comply with its terms. *See e.g., Center*
19 *for Biological Diversity v. Salazar*, 695 F.3d 893, 909 (9th Cir. 2012) (“Take that complies with the
20 terms and conditions of an ITS is not a prohibited take under Section 9.”) (citing 16 U.S.C. § 1536(o)(2);
21 50 C.F.R. § 402.14(i)(5)); *Oregon Wild v. Connor*, No. 6:09-CV-00185-AA, 2012 WL 3756327, at *2
22 (D. Or. Aug. 27, 2012) (“A ‘take’ occurring under an ITS is exempt from ESA Section 9 liability”
23 (citing *Ramsey v. Kantor*, 96 F.3d 434, 441 (9th Cir. 1996) (“Section 7(o) ‘indicates that any taking –
24 whether by a federal agency, private applicant, or other party – that complies with the conditions set
25 forth in the incidental take statement is permitted’”)).

26 Furthermore, “case law confirms that issuance of a Biological Opinion, with an ITS, moots ESA
27 Section 9 claims.” *Oregon Wild*, 2012 WL 3756327, at *2 (citing *S. Utah Wilderness Alliance v.*
28 *Medigan*, No. 92-cv-1094, 1993 WL 19650, at *1 (D.D.C. Jan. 6, 1993); *Or. Natural Res. Council v.*

1 *Bureau of Reclamation*, No. 91-cv-6284, 1993 U.S. Dist. LEXIS 7418, at *24-*25 (D. Or. Apr. 5,
2 1993)). In the instant case, plaintiffs alleged that the City’s operation and maintenance of the Sharp
3 Park results in an unauthorized take of the Frog and the Snake, and “[b]y taking these species without
4 obtaining an Incidental Take Permit . . . the City is violating the ESA.” Compl. ¶ 1. The ITS now
5 authorizes take of the Frog and the Snake by golf course operation and maintenance activities, and the
6 construction and restoration projects. If the City fails to abide by the terms of the ITS, then plaintiffs
7 will have a new cause of action, but until then the City is shielded from liability. Therefore, the Court
8 finds that plaintiffs’ claims are rendered moot by the ITS.

9 Plaintiffs argue that, although generally an ITS might render a Section 9 claim moot, in this case
10 it does not because of the particular requirements of this ITS. Plaintiffs point to the ITS statement that,
11 “[t]he measures described below are non-discretionary, and must be implemented by the Corps of
12 Engineers and the City so that they become binding conditions of any grant or permit issued to the City,
13 as appropriate, in order for the exemption in section 7(o)(2) to apply.” BiOp 39. Plaintiffs argue that
14 this clause shows that the ITS is not self-effectuating, but requires to Corps to incorporate the terms of
15 the ITS into a grant or permit to effectuate the ITS. Therefore, they argue, only after a grant is issued
16 incorporating these terms will the case become moot.

17 The Court disagrees with this interpretation of the ITS. Other language in the ITS clearly
18 contemplates that the document is self-effectuating: “to be exempt from the prohibitions of Section 9
19 of the Act, the Corps and the City *shall ensure compliance* with the following terms and conditions .
20 . . . These terms and conditions are nondiscretionary.” *Id.* at 41 (emphasis added). Thus, the language
21 contemplates that the City and Corps must immediately comply with all of terms of the ITS for Section
22 9 immunity, and the cannot wait for a permit that incorporates the terms of the ITS. Furthermore, many
23 of the terms relate to the activities at the Park which would not necessarily be covered by the Project
24 permit (for example, ongoing activities having nothing to do with construction, like mowing, gopher
25 control, and golf cart driving, or future conservation activities not related to construction, like
26 development of a water quality monitoring plan and future reporting requirements). *Id.* at 41-46.
27 Moreover, the ESA implementing regulations clearly state that the ITS does not need a separate grant
28 or permit to be effectuated. 50 C.F.R. § 402.14(i)(5) (stating that any taking that is “in compliance with

1 the terms and conditions of that [ITS] statement is not a prohibited taking under the Act, and *no other*
2 *authorization or permit under the Act is required.*”) (emphasis added).


3 Plaintiffs are concerned that unauthorized take of the Frogs and the Snakes will continue to occur
4 until a permit is issued, and that the Corps might deny the permit, grant a permit without incorporating
5 the ITS conditions, or delay a decision on the permit indefinitely. However, because the ITS is self-
6 effectuating, even if the Project permit is denied for other reasons, the Corps and the City are required
7 to follow each of the terms and conditions in the ITS. If they fail to do so, their take of the Frog and the
8 Snake will no longer be immune from liability, and plaintiffs will have a new cause of action against
9 them. Similarly, if the Corps issues a permit that fails to incorporate the conditions of the ITS, the ITS
10 will have been violated and plaintiffs can renew their suit. Finally, even if the Corps delays its decision
11 on the permit, the other requirements in the ITS that have nothing to do with the Project (e.g., mowing
12 and golf cart requirements) must still be followed, or defendants will lose their immunity from suit.

13
14 **CONCLUSION**

15 For the foregoing reasons, the Court finds that the ITS renders plaintiffs’ claims moot.
16 Accordingly, Defendants’ motion to dismiss is GRANTED. The case is DISMISSED WITHOUT
17 PREJUDICE. The clerk shall close the file.

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19 **IT IS SO ORDERED.**

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21 Dated: December 6, 2012

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24 SUSAN ILLSTON
25 United States District Judge
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