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13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF ARIZONA**

15 Save the Scenic Santa Ritas, *et al.*,
16 Plaintiffs,

17 v.

18 U.S. Army Corps of Engineers, *et al.*,
19 Defendants,

20 and

21 Rosemont Copper Company,
22 Intervenor-Defendant.

No. 4:19-cv-00177-TUC-JAS (Lead)
No. 4:19-cv-00205-TUC-JAS (C)

**ROSEMONT COPPER COMPANY’S
MOTION TO DISMISS COMPLAINTS
FOR LACK OF SUBJECT-MATTER
JURISDICTION**

Expedited Consideration Requested

23
24 Pursuant to Federal Rule of Civil Procedure 12(b)(1), Intervenor-Defendant
25 Rosemont Copper Company (“Rosemont”) moves for an order dismissing all of Plaintiffs’
26 claims in the above-entitled consolidated actions for lack of subject-matter jurisdiction
27 because their claims are moot. Rosemont has surrendered the Section 404 permit which is
28 the subject matter of the claims. Therefore, effective relief can no longer be granted by the

1 Court, mooting the lawsuits. *See, e.g., Grand Canyon Tr. v. U.S. Bureau of Reclamation*,
2 691 F.3d 1008, 1016 (9th Cir. 2012) (“If an event occurs that prevents the court from
3 granting effective relief, the claim is moot and must be dismissed.” (citation omitted)).

4 Because Plaintiffs have sought a temporary restraining order/preliminary injunction,
5 Rosemont requests that the Court consider this motion on an expedited basis as it bears on
6 the Court’s jurisdiction to grant Plaintiffs’ relief.

7 **I. PROCEDURAL BACKGROUND**

8 The facts relevant to this motion are simple and undisputed. In 2019, Defendant U.S.
9 Army Corps of Engineers (“Corps”) issued a permit to Rosemont (“the Permit”), allowing
10 Rosemont to discharge fill materials into potential waters of the United States (“WOTUS”)
11 at specified locations within the proposed Rosemont Project footprint and utility corridor
12 pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344. (*See* Case No. 19-CV-
13 00205, Doc. 13-9 (copy of Corps Permit No. SPL-2008-0816-MB).) Plaintiffs immediately
14 filed lawsuits against the Corps under the Administrative Procedure Act (“APA”), alleging
15 that the Corps improperly issued the Permit. (Case No. 19-CV-00177, Doc. 1; Case No.
16 19-CV-00205, Doc. 1.) Both complaints seek a declaration that in issuing the Permit, the
17 Corps violated the Clean Water Act, the National Environmental Policy Act (“NEPA”), and
18 the APA, and request an order vacating the Permit and the Corps’ NEPA documents. (Case
19 No. 19-CV-00177, Doc. 52-2 at 94;¹ Case No. 19-CV-00205 Doc. 1 at 89.²)

20 The Court subsequently concluded, in the related action previously filed by
21 Plaintiffs, that the environmental impact statement (“EIS”) upon which the Corps based its
22 environmental analysis under NEPA was flawed and vacated the EIS. *See Ctr. for*
23 *Biological Diversity v. U.S. Fish & Wildlife Serv.*, 409 F. Supp. 3d 738, 766 (D. Ariz. 2019).
24 As a result of that ruling, the Corps suspended Rosemont’s Permit on August 23, 2019.

26 ¹ Citation to Save the Scenic Santa Ritas Plaintiffs’ amended complaint.

27 ² Save the Scenic Santa Ritas Plaintiffs also alleged that the Corps violated the Endangered
28 Species Act (“ESA”) in relying on Biological Opinions issued by the U.S. Fish and Wildlife
Service on the Rosemont Project. (Case No. 19-CV-00177, Doc. 52-2 at 93–94.)

1 (Case No. 19-CV-00177, Doc. 98.) Because Rosemont’s Permit was suspended, the Court
2 stayed Plaintiffs’ lawsuits challenging the Permit until the Corps “takes further action to
3 reinstate, modify, or revoke the suspended Clean Water Act permit.” (Case No. 19-CV-
4 00177, Doc. 102.)

5 Given the status of the Permit, including the uncertainty about its reinstatement,
6 Rosemont decided to voluntarily surrender the Permit. Accordingly, by letter dated April
7 28, 2022, Rosemont formally notified the Corps that it surrenders the Permit. A true copy
8 of Rosemont’s letter to the Corps is attached as **Exhibit A**. As a result, the Permit which is
9 the subject matter of the lawsuits no longer exists and is not effective.

10 **II. THERE IS NO LONGER A LIVE CONTROVERSY BECAUSE ROSEMONT** 11 **HAS SURRENDERED THE PERMIT**

12 Because Rosemont has surrendered the Permit, there is no longer a live controversy
13 regarding the propriety of the Corps’ actions in issuing the Permit. “Where the issues
14 presented are no longer live and the parties, therefore, lack a legally cognizable interest for
15 which courts can grant a remedy, an action is generally moot.” *Forest Guardians v. U.S.*
16 *Forest Serv.*, 370 F. Supp. 2d 978, 984 (D. Ariz. 2004) (holding claims regarding Forest
17 Service special use permit were moot because permit expired). It is well-accepted that
18 where a permit is no longer effective, claims related to it become moot. *See, e.g., Madison*
19 *v. Tulalip Tribes of Wash.*, 163 F. App’x 499, 500 (9th Cir. 2006) (holding “the question of
20 whether the EPA should have complied with NEPA when it extended coverage under the
21 1998 general [NPDES] permit [wa]s no longer live” because that permit expired); *Native*
22 *Americans for Enola v. U.S. Forest Serv.*, 60 F.3d 645, 646 (9th Cir. 1995) (explaining that
23 action became moot when activities were completed and permit expired); *Nw. Res. Info,*
24 *Ctr., Inc. v. Nat’l Marine Fisheries Serv.*, 56 F.3d 1060, 1069–70 (9th Cir. 1995)
25 (challenged permit for operation of transportation program expired, rendering challenge
26 moot).

27 Thus, where a claim challenges a permit that has been surrendered, the claim
28 becomes moot. *See Wash. State Dep’t of Fisheries v. FERC*, 801 F.2d 1516, 1519 (9th Cir.

1 1986) (noting that surrender of permit mooted pending appeal). For example, in
2 *Riverkeeper, Inc. v. Mirant Lovett, LLC*, the court explained that the defendant’s
3 surrendering of a Clean Water Act permit made it impossible to order injunctive and
4 declaratory relief pursuant to plaintiff’s Clean Water Act claim alleging violations of
5 defendant’s permit. *See* 675 F. Supp. 2d 337, 347–48 (S.D.N.Y. 2009). The court rejected
6 plaintiff’s contention that the defendant could restart its violations of the permit because the
7 permit no longer existed. *See id.* Plaintiff’s claim therefore became moot when the
8 defendant surrendered the permit given that it was no longer effective. *See id.*

9 Courts have come to the same conclusion as to expired permits. In *National Parks*
10 *Conservation Ass’n, Inc. v. U.S. Army Corps of Engineers*, the court dismissed claims under
11 the Clean Water Act, ESA, and the APA, for lack of a live controversy when the challenged
12 Section 404 permit expired. 574 F. Supp. 2d 1314, 1324 (S.D. Fla. 2008). In *Ohio Valley*
13 *Environmental Coalition v. Hurst*, the plaintiff sought an injunction preventing use of a
14 Corps’ nationwide permit until an EIS had been completed on its environmental impacts.
15 604 F. Supp. 2d 860, 875–76 (S.D. W. Va. 2009). But because the permit had expired, the
16 court determined that the challenge to the permit was moot and could not be prosecuted.
17 *See id.* Similarly, in *WaterWatch of Oregon v. U.S. Army Corps of Engineers*, the
18 challenged Section 404 permit expired during the course of the lawsuit. No. CIV. 99-861-
19 BR, 2000 WL 1100059, at *2 (D. Or. June 7, 2000). As a result, the court held that the case
20 had become moot because the permittee would have to obtain a new permit, and at that
21 time, would be subject to the ESA’s consultation requirements before it could engage in
22 any further conduct covered by the expired permit. *See id.* In sum, claims that challenge
23 permits that are no longer effective are moot.

24 Consequently, because Rosemont has surrendered the Permit—rendering it void and
25 without effect—Plaintiffs’ claims challenging the Corps’ actions in issuing that Permit are
26 moot. Indeed, no effective judicial relief can be provided because there is no Clean Water
27 Act permit to address. Moreover, no activities can be undertaken by Rosemont pursuant to
28 the Permit, and, therefore, Plaintiffs face no injuries based on the issuance of the Permit.

1 Thus, Plaintiffs' claims challenging the issuance of the Permit must be dismissed for lack
2 of subject-matter jurisdiction.

3 For the foregoing reasons, Rosemont respectfully requests that this Court grant its
4 motion and dismiss the above-entitled lawsuits challenging the Corps' issuance of the
5 Permit. A proposed form of order is filed herewith.

6 RESPECTFULLY SUBMITTED this 3rd day of May, 2022.

7 FENNEMORE CRAIG, P.C.

8

9 s/ Norman D. James

10 Norman D. James

11 George O. Krauja

12 Mick Rusing

13 RUSING LOPEZ & LIZARDI, P.L.L.C.

14 Attorneys for Rosemont Copper Company

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EXHIBIT A



April 28, 2022

SENT VIA FEDERAL EXPRESS

Tori White
Chief, Operations and Regulatory
U.S. Army Corps of Engineers, South Pacific Division
Phillip Burton Federal Building
450 Golden Gate Avenue
San Francisco, California 94102

RE: Rosemont Copper Company Section 404 Permit, Corps Permit No. SPL-2008-0816-MB

Dear Ms. White:

On behalf of Rosemont Copper Company, I hereby surrender the above-referenced Section 404 permit. The permit was issued by the South Pacific Division on March 8, 2019 but has been suspended since August 23, 2019. No work authorized by the permit has been conducted.

Please do not hesitate to reach out to me if you have any questions about Hudbay's Arizona projects.

Sincerely,

A handwritten signature in blue ink, appearing to read "JDR", with a long horizontal stroke extending to the right.

Javier Del Rio
Vice President, South America and USA

1 action are dismissed.

2 IT IS FURTHER ORDERED that in light of this determination regarding the Court's
3 subject-matter jurisdiction, all pending motions are denied.

4 The Clerk is directed to enter a judgment consistent with the foregoing and denying
5 all relief sought by Plaintiffs.

6 DATED this ____ day of _____, 2022.

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Honorable James A. Soto
United States District Judge

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