

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BUCKINGHAM TOWNSHIP,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
et al.,	:	
	:	
Defendants,	:	
and	:	
	:	
BRADLEY L. MALLORY, SECRETARY	:	
FOR THE DEPARTMENT OF	:	
TRANSPORTATION, COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
	:	
Intervenor.	:	NO. 97-6761
	:	
Newcomer, J.	:	January , 1998

M E M O R A N D U M

Presently before this Court are defendants' Motion to Dismiss Complaint or, Alternatively, for Summary Judgment, and plaintiff's response thereto. For the following reasons, the Court will grant the Motion.

Also before this Court are plaintiff's Motion for a Preliminary Injunction, and the defendants' response thereto.<sup>1</sup> For the following reasons, the Court will deny the Motion.

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1. Warrington Township, Doylestown Township, Chalfont Borough, New Britain Township, New Britain Borough and Montgomery Township have filed an amici curiae brief in opposition to Buckingham Township's motion for a preliminary injunction. Buckingham Township Civic Association, Clean Air Council, Delaware Riverkeeper Network, an affiliate of the American Littoral Society, Raymond Proffitt Foundation, Sierra Club - Pennsylvania Chapter, and Working Alternatives to Community Highways, as amici curiae, have filed a memorandum in support of the issuance of a preliminary injunction.

I. Introduction

Plaintiff Buckingham Township, a municipal subdivision of the Commonwealth of Pennsylvania, has filed a Complaint in which it alleges that defendants<sup>2</sup> have violated the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 et seq., and its implementing regulations thereunder, 23 C.F.R. Part 771, and the Federal Highway Act, 28 U.S.C. § 101 et seq., as amended by the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA") (codified at scattered sections of the U.S.C.). Plaintiff has filed a motion for a preliminary injunction. Defendants have rejoined by filing a motion to dismiss Complaint or, alternatively, for summary judgment. The parties have also filed responses to these motions.

Subsequent to the filing of these aforementioned motions, plaintiff filed an Amended Complaint on January 14, 1998, in which it added claims against intervenor-defendant Bradley Mallory as the representative of the Pennsylvania Department of Transportation ("PennDot"). Plaintiff also added a

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2. The defendants are the United States of America; David Gendell, Regional Administrator, Federal Highway Administration ("FHWA"); Ronald Charmichael, Division Administrator, FHWA; and Ken Wykle, Federal Highway Administrator of the FHWA (collectively referred to as the "federal defendants"). On December 31, 1997, this Court granted Bradley Mallory's Motion to Intervene as a defendant pursuant to Federal Rule of Civil Procedure 24. The intervenor has adopted the position and arguments contained in the federal defendants' response and motion.

claim that defendants violated the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 670, et seq.<sup>3</sup>

This case arises out of the proposed improvement of U.S. Route 202, Section 700. Section 700 of U.S. Route 202 extends from just south of Pennsylvania State Route 63 in Montgomery Township, Montgomery County, to the Pennsylvania State Route 611 Bypass in Doylestown Township, Bucks County. This section of highway is approximately 9 miles in length, covers 9,100 acres and crosses 2 counties and 8 municipalities.<sup>4</sup>

In a November 1989 report, in response to requests from local and county planners, the Delaware Valley Regional Planning Commission ("DVRPC")<sup>5</sup> recommended that studies be commenced to address mobility deficiencies and projected growth with respect to U.S. Route 202, Section 700. In the November 1989 report, the DVRPC also concluded that the "new alignment corridor,"<sup>6</sup> which

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3. Because plaintiff's Amended Complaint does not alter or moot the issues raised in defendants' motion to dismiss or, alternatively, for summary judgment, the Court will treat this Motion as a motion to dismiss plaintiff's Amended Complaint or, alternatively, for summary judgment.

4. The counties are Bucks and Montgomery Counties, and the municipalities are Upper Gwynedd Township, Lower Gwynedd Township, Montgomery Township, New Britain Borough, New Britain Township, Chalfont Borough, Doylestown Township, and Warrington Township.

5. The DVRPC is the designated metropolitan planning organization for the Philadelphia region and includes state and local government representation, including representatives from Montgomery and Bucks Counties.

6. The "new alignment corridor" represents just one alternative as to how Section 700 can be improved.

had been recommended in a PennDot 1968 study concerning this same section of highway, was still viable through lands mostly reserved for the highway by local township actions.<sup>7</sup>

In light of the DVRPC's report, PennDot initiated more detailed environmental and preliminary engineering studies for U.S. Route 202, Section 700. PennDot also advertised and held four public meetings between February 7, 1991, and December 13, 1994, concerning studies of improvements to U.S. Route 202, Section 700, prior to initiating the formal environmental process.

Pursuant to NEPA and its attendant FHWA regulations, FHWA, as lead agency,<sup>8</sup> approved a draft Environmental Impact Statement ("DEIS") for circulation on July 10, 1996. The DEIS was circulated to the public, and its availability was published in the Federal Register on August 9, 1996. 61 Fed. Reg. 41607-41608. NEPA permits state-wide agency involvement in the preparation of an environmental impact statement ("EIS") to support federal approval of a major federal action, i.e., funding of highway construction in this case. See 42 U.S.C. § 4332(D).

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7. Plaintiff and amici curiae claim that the improvement of Section 700 is not a "local improvement" but rather an attempt by defendants, PennDot, DVRPC and the New Jersey Department of Transportation to transform U.S. Route 202 from a two-lane rural highway into a multi-lane regional superhighway, providing a potentially region-modifying new route for commerce and growth between New Jersey's major interstate highways and Interstate-76 at Valley Forge.

8. "Lead Agency means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement." 40 C.F.R. § 1508.16.

In accordance with the provisions of 23 C.F.R. § 771.111(h) and 23 U.S.C. § 128, a public hearing was held by PennDot on September 12, 1996, which included the opportunity for public comment on the DEIS. Plaintiff was among the numerous participants and was represented by the Vice-Chairman of the Township's Board of Supervisors. PennDot also held a meeting with Buckingham Township Supervisors on September 19, 1996.

On October 11, 1996, after having sought and received a time-extension to submit its comments, Buckingham Township submitted extensive comments on the DEIS. In response to plaintiff's comments, additional traffic analysis was done which confirmed the accuracy of the prior analysis. The final report of the additional traffic analysis was documented in Supplement No. 4. This supplement is expressly referred to in the final Environmental Impact Statement ("FEIS") on page P-2 as a supporting document and, as stated on page P-2, is available for any member of the public to review and comment on. Defendants maintain that plaintiff was provided a copy as soon as Supplement No. 4 was finalized.

Contrary to defendants' position, plaintiff maintains that defendants did not provide it with a copy of Supplemental No. 4 immediately after it was finalized. Instead, plaintiff maintains that defendants "placed [Supplemental No. 4] in the administrative record, bearing the date February 1997 and stamped 'Draft', but did not disclose its existence." (Pl.'s Mot. Prelim. Inj. at 5).

While Supplemental No. 4 was allegedly being "embargoed," plaintiff made a formal document request to PennDot and the DVRPC.<sup>9</sup> PennDot and DVRPC allegedly refused to produce any data. As a result, plaintiff brought suit in the Commonwealth Court of Pennsylvania pursuant to the Public Documents Act of the Commonwealth of Pennsylvania. Defendants subsequently agreed to produce the requested data. Hence, on September 23, 1997, the DVRPC disclosed to plaintiff the existence of Supplemental No. 4, which was stamped "draft" but appeared to be in final form according to plaintiff. Plaintiff allegedly was not permitted to have a copy of Supplemental No. 4. Because the DVRPC would not allow plaintiff to have a copy of Supplement No. 4, plaintiff instituted a new suit in the Commonwealth Court of Pennsylvania. Ultimately, Supplemental No. 4 was released to plaintiff on October 10, 1997.<sup>10</sup>

During this time period, plaintiff also learned that PennDot was making plans to develop a substantial highway interchange in Buckingham Township. Although PennDot allegedly represents that this interchange is independent from the Section 700 project, plaintiff maintains that this interchange is being planned as a remedial measure to cope with the massive amount of traffic that would be discharged into Buckingham Township when

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9. At this time, plaintiff claims that it did not know that Supplemental No. 4 existed.

10. None of the instant documents before this Court explain whether this document was released pursuant to an order of the Commonwealth Court.

Section 700 was finished. A study on this proposed interchange is not included in either the DEIS or the FEIS.

On October 8, 1997, PennDot approved the FEIS for circulation. On October 16, 1997, the FHWA, through David Lawton, the FHWA Region 3 Director of Planning and Program Development, approved the FEIS for circulation. The United States Army Corps of Engineers, the United States Environmental Protection Agency and the Pennsylvania Department of Environmental Protection are cooperating agencies for the NEPA environmental process.<sup>11</sup> See 23 C.F.R. § 771.111(d). Hundreds of copies of the FEIS were mailed to commentators, including plaintiff.

On November 14, 1997, notice of availability of the FEIS was published in the Federal Register at 62 Fed. Reg. 61111-61112. As noted on the cover sheet of the FEIS, development and approval of a Record of Decision ("ROD"),<sup>12</sup> if it should occur, will not take place until after all environmental review agency and public comments, including plaintiff's comments, have been received and considered. The comment period is open until January 30, 1998. No actions which would further the

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11. "Cooperating agency means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment." 40 C.F.R. § 1508.5.

12. The ROD provides the basis for an agency's decision with respect to a project that requires an EIS. See 23 C.F.R. § 771.127.

construction of a proposed project with federal-aid funds can be approved prior to the approval of the ROD.

Subsequent to the approval for circulation of the FEIS, plaintiff filed suit in this Court on November 3, 1997, seeking to have this Court determine that the study area, as defined by defendants, is invalid, and that the environmental studies were inadequate in time and scope. Plaintiff also seeks to preliminarily and permanently enjoin defendants from issuing the EIS until they have redefined the study area, publicly circulated studies of the effects in Buckingham Township, and coordinated with local authorities - including plaintiff.<sup>13</sup>

In Count I of the Amended Complaint, plaintiff alleges that the defendants have acted in an arbitrary and capricious manner and have violated their obligations under the ISTEA amendments to the Federal Highway Act. Specifically, plaintiff claims that defendants have violated the ISTEA amendments by denying consultation with affected local officials such as plaintiff; by arbitrarily selecting a study area which does not contain logical termini, so as to permit proper identification, analysis and data collection concerning the environmental impacts of the project; by denying adequate opportunity for public officials to analyze the information in draft form and respond to it; by precluding comments on the analysis from being included in

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13. Plaintiff, through its Amended Complaint, also attacks the sufficiency of the FEIS that was filed after plaintiff's original Complaint.

the administrative record; and by precluding the acquisition of the information to determine whether the project is consistent or inconsistent with the "Air Quality Plan" for the area.

In Count II of the Amended Complaint, plaintiff asserts that defendants have acted in an arbitrary and capricious manner and have violated their obligations under NEPA and its attendant regulations. Specifically, plaintiff alleges that defendants have prevented public comment by excluding relevant information from the DEIS; precluded identification of the environmental effects through an arbitrary and irrelevant study area; failed to acquire the information necessary to identify and develop alternatives to the project; potentially defeated judicial review of the EIS by preventing the plaintiff from making comments in a timely fashion to be included in the administrative record; and precluded the decision maker from having the necessary information to properly make the statutorily required judgments concerning the environmental impact of the project.

In Count III of the Amended Complaint, plaintiff asserts that PennDot, as represented by intervenor-defendant Mallory, has violated sections 511 and 512 of "the PennDot Act, the Pennsylvania Administrative Code, respectively, 71 P.S.C. Section 511 et seq., and Article I Section 27 of the Pennsylvania Constitution . . . ." (Am. Compl. ¶ 72). Plaintiff alleges that Mallory violated these sections and the state constitution by refusing in bad faith to evaluate the environmental impacts, by failing to consult with plaintiff, and by arbitrarily and

capriciously determining to build Section 700. In Count IV, plaintiff contends that defendants have violated the NHPA by failing to consider the impacts of the Section 700 project on the historical buildings in Buckingham Township.

Although plaintiff asserts many distinct claims in its Amended Complaint under different statutory and regulatory schemes, it primarily argues that the entire NEPA-mandated EIS process undertaken by defendants is irreparably flawed because the "study area" was defined in such an arbitrary and capricious manner so as to exclude Buckingham Township from the study area. As a result, plaintiff claims that the NEPA-mandated EIS process undertaken by defendants is in violation of NEPA because it does not fully consider all environmental and community factors, namely those environmental and community factors as they relate to Buckingham Township and other surrounding areas.

Presently plaintiff moves to preliminarily enjoin defendants from proceeding to take further action to advance U.S. 202, Section 700, until defendants are in full compliance with the requirements of NEPA and its attendant regulations. Specifically, plaintiff argues that defendants shall not be permitted to proceed with the administrative process until there has been further circulation of Supplement No. 4 and the plans underlying the proposed interchange for public comment, consultation with affected local officials, and subsequent filing of a new FEIS. Defendants oppose plaintiff's motion, arguing that plaintiff is not entitled to injunctive relief because it

cannot demonstrate a probability of success on the merits and irreparable harm.<sup>14</sup>

Defendants have also moved to dismiss plaintiff's Complaint or, alternatively, for summary judgment, which the Court treats as a motion to dismiss plaintiff's Amended Complaint or, alternatively, for summary judgment. In general, defendants argue that plaintiff cannot currently maintain this action because plaintiff's claims are not ripe for adjudication. Defendants contend that this action is not ripe because there has been no final federal agency decision on the Section 700 project and no administrative record has been compiled. In response, plaintiff generally rejoins that this action is ripe for adjudication because "[i]f the FEIS is in violation of NEPA right now, then no additional amount of public comment or supplementation of the record will 'cure' the deficiency." (Pl.'s Resp. to Defs.' Mot. Dismiss or Summ. J. at 13). Plaintiff also appears to argue that this Court should review defendants' conduct because, if this Court does not review this action now, then the Court will effectively be prevented from ever reviewing defendants' conduct due to this Court's limited standard of review in administrative agency review cases.

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14. As noted in note 1 supra, certain amici curiae have filed briefs in support of and in opposition to plaintiff's motion for a preliminary injunction.

## II. Legal Standards

### A. Rule 12(b)(6) Standard

Pursuant to Fed. R. Civ. P. 12(b)(6), a court should dismiss a claim for failure to state a cause of action only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Because granting such a motion results in a determination on the merits at such an early stage of a plaintiff's case, the district court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 664-65 (3d Cir. 1988) (quoting Estate of Bailey by Oare v. County of York, 768 F.2d 503, 506 (3d Cir. 1985)), cert. denied, 489 U.S. 1065 (1989).

### B. Summary Judgment Standard

A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Electric Co., 862 F.2d 56, 59 (3d Cir. 1988). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,

249 (1986). The evidence presented must be viewed in the light most favorable to the nonmoving party. Id. at 59.

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleading and designate specific facts by use of affidavits, depositions, admissions, or answers to interrogatories showing there is a genuine issue for trial. Id. at 324. Moreover, when the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (quoting Celotex, 477 U.S. at 322). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322). The nonmovant must specifically identify evidence of record, as opposed to general averments, which supports his claim and upon which a reasonable jury could base a verdict in his favor. Celotex, 477 U.S. at

322. The nonmovant cannot avoid summary judgment by substituting "conclusory allegations of the complaint . . . with conclusory allegations of an affidavit." Lujan v. National Wildlife Foundation, 497 U.S. 871, 888 (1990). Rather, the motion must be denied only when "facts specifically averred by [the nonmovant] contradict "facts specifically averred by the movant." Id.

### III. Discussion

#### A. NEPA

"NEPA was enacted as a national policy to accomplish significant substantive environmental goals set forth in 42 U.S.C. § 4321. NEPA imposes upon agencies essentially procedural duties to insure fully informed and well considered decisions on proposed actions with environmental consequences." Oregon Natural Resources Council v. Marsh, 845 F. Supp. 758, 764 (D. Or. 1994), rev'd in part on other grounds, 52 F.3d 1485 (1995), (citing 42 U.S.C. § 4332; Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558, 98 S. Ct. 1197, 1219, 55 L. Ed. 2d 460 (1978); Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227, 100 S. Ct. 497, 499-500, 62 L. Ed. 2d 433 (1980)). "These procedural duties are implemented by regulations promulgated by the [Council on Environmental Quality], 40 C.F.R. § 1500-08." See also 23 C.F.R. § 771.101-.137 (setting forth policy and procedures of the FHWA and Urban Mass Transit Administration for implementing NEPA and the Council Environmental Quality ("CEQ") regulations). These regulations encompass and control the preparation of an EIS

when a proposed action may significantly affect the environment. 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.3; see also 23 C.F.R. § 771.101-.137.

In the context of highway and urban mass transportation projects, NEPA and its FHWA implementing regulations, 23 C.F.R. Part 711, create a full range of agency administrative actions which must be taken before federal-aid highway funds may be utilized by a state highway agency for any project. Projects likely to cause significant impact on the environment require the preparation of a DEIS. 23 C.F.R. § 771.123(a). A notice of intent to prepare a DEIS must be published in the Federal Register. A scoping process must be initiated. 23 C.F.R. § 771.123(b). When the FHWA is satisfied that the DEIS complies with all NEPA requirements, the DEIS is approved for circulation to the public by the signing and dating of the cover sheet. 23 C.F.R. § 771.123(e). Notice of its availability must be published in the Federal Register. 23 C.F.R. § 771.123(i).

The approved DEIS must be made available to the public, circulated to local, state and federal agencies for comment, and filed with the Environmental Protection Agency ("EPA"). 23 C.F.R. § 771.123(g). A public hearing must be held and a minimum of 45 days must be allowed for public comments to be received. 23 C.F.R. § 771.123(h) and (i).

After comments on the DEIS have been received and considered, the FEIS must be prepared. It must identify the preferred alternative and evaluate all reasonable alternatives.

It must discuss all substantive comments received on the DEIS and the agency responses to those comments. It must summarize the public involvement in the process and describe mitigation measures to be incorporated into the proposed project. 23 C.F.R. § 771.125(a).

Prior to FHWA approval, the FEIS must be reviewed for legal sufficiency. FHWA approval is indicated by the signing and dating of the cover page. 23 C.F.R. § 771.125(b) & (c). Approval of the FEIS is not an "Administrative Action" and does not obligate FHWA to commit federal-aid highway funds to the project. 23 C.F.R. § 771.125(e). The approved FEIS must be printed and distributed in accordance with FHWA and CEQ regulations, including the mailing of copies to substantive commentators on the DEIS. Its availability must be published in the appropriate local newspapers. It must be filed with the EPA, and its availability published in the Federal Register. 23 C.F.R. § 771.125(f) & (g).

After the FEIS has been circulated, the FHWA must receive public comments to the FEIS. See 23 §§ 771.125(g), .127(a); Lawton Decl. ¶ 8. The FHWA must then review and consider the comments. Only then can the FHWA prepare and sign a ROD which presents the basis for the agency decision, summarizes any mitigation measures to be incorporated into the project, and documents any required approvals pursuant to Section 4(f). 23 C.F.R. § 771.127. Until the ROD is signed, an agency can order whatever further studies or actions which may be necessary before

completing the administrative process. See 23 C.F.R. § 771. 130 (providing for supplemental environmental impact statements if further study is warranted); Lawton Decl. ¶ 9.

### B. Ripeness

As stated above, plaintiff alleges that defendants violated NEPA and many of NEPA's attendant regulations.<sup>15</sup> In response, defendants argue that this action is not ripe for adjudication because there has been no final federal agency action with respect to the Section 700 project. Defendants thus ask this Court to dismiss plaintiff's Complaint or, alternatively, to grant summary judgment. Because this Court agrees that plaintiff's claims are not ripe, it will grant defendants' alternative motion for summary judgment.<sup>16</sup>

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15. Judicial review of plaintiff's claims is governed by Section 10 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. Under the APA, a reviewing court may only hold unlawful an agency decision if that decision is arbitrary, capricious or otherwise not in accordance with the law. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). The role of a court in NEPA litigation is "simply to ensure that the agency has adequately considered and disclosed the environmental impact of its action and that its decision is not arbitrary or capricious." Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97-98 (1983); see also Clairton Sportsmen's Club v. Pennsylvania Turnpike Commission, 882 F. Supp. 455, 465-66 (W.D. Pa. 1995).

16. Before I explain why plaintiff's claims are not ripe for adjudication, I briefly note that there is some discrepancy among the federal courts as to whether a ripeness argument in the context of NEPA should be treated under Rule 12(b)(6) or Rule 12(b)(1). Compare Environmental Defense Fund v. Johnson, 476 F. Supp. 126, 127 n.2 (S.D.N.Y. 1979) with Association of Com. Orgs. Reform Now v. Southeastern Pa. Transp. Auth., 462 F. Supp. 879 (E.D. Pa. 1978). Although persuasive arguments exist in favor of treating a ripeness argument in the context of NEPA under Rule

(continued...)

Where injunctive relief is sought with regard to an administrative determination, the "courts have traditionally been reluctant" to grant such relief unless there is a "controversy 'ripe' for judicial resolution." Abbott Laboratories v. Gardner, 387 U.S. 136, 148, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681 (1967). In Abbott Laboratories, the Court observed that the "basic rationale" for the ripeness doctrine:

is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by challenging the parties.

Id. at 148-49, 87 S. Ct. at 1515.

Under the ripeness doctrine, an agency must have taken "final" action before judicial review is appropriate; this requirement of finality is codified at Section 10(c) of the APA,

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16. (...continued)

12(b)(1), this Court finds that these arguments are more properly reviewed under Rule 12(b)(6) or Rule 56. There can be no doubt that this case "arises under" both NEPA and the other federal environmental legislation cited by plaintiff, and that 28 U.S.C. § 1331 confers subject matter jurisdiction upon the court. Defendants' principal ground for moving for dismissal or, alternatively, for summary judgment, is that there has been no final agency action within the meaning of Section 10(c) of the APA. As the Court in Johnson found, "[s]ince the APA is not an independent grant of subject matter jurisdiction, see Califano v. Sanders, 430 U.S. 99, 107 S. Ct. 980, 51 L. Ed. 2d 192 (1977), the alleged lack of finality under Section 10(c) certainly cannot deprive this court of jurisdiction to entertain plaintiff['s] colorable claim under NEPA." Johnson, 476 F. Supp. at 127 n.2. Defendants' ripeness claim essentially attacks the legal sufficiency of plaintiff's claim not the jurisdiction of this Court. Therefore, the proper standard of review is Rule 12(b)(6) or Rule 56 in the alternative.

5 U.S.C. § 704, and has been applied to actions challenging the adequacy of an EIS under Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C). See National Wildlife Fed'n v. Goldschmidt, 504 F. Supp. 314, 323 (D. Conn. 1980); Environmental Defense Fund, Inc. v. Johnson, 629 F.2d 239, 241 (2d Cir. 1980); Sierra Club v. United States Army Corps of Engineers, 481 F. Supp. 397, 399 (S.D.N.Y. 1979); Southeastern Pa. Transp. Auth., 462 F. Supp. 879, 883-85; Natural Resources Defense Council, Inc. v. Andrus, 448 F. Supp. 802, 806 (D.D.C. 1978).

In Army Corps of Engineers, the Court emphasized the importance of the finality requirement in the context of a challenge to an EIS upon which an agency is to act:

The adequacy of an EIS can only be evaluated in light of specific proposals. For example, an EIS must discuss all relevant alternatives to proposed agency action. Whether the content and scope of those discussions is adequate necessarily depends on the precise nature of the agency's final recommendation.

481 F. Supp. at 399.

In this case, the Court finds that plaintiff's claims are not ripe because there has not yet been a final agency decision. In support of this conclusion, the Court notes that the undisputed facts establish that the NEPA environmental review process has not been completed. As stated above, the FEIS has recently been approved for circulation, and the FHWA is receiving comments on the FEIS. Following receipt of these comments, the FHWA will review these comments and then make its decision on the project through the issuance of a ROD. The ROD however cannot be

issued until the comment period has been completed and the comments of environmental review agencies and of the public have been evaluated, including the comments of plaintiff. (Lawton Decl. ¶ 8). Until the ROD is issued, the FHWA can order whatever further studies or actions that may be warranted in light of the FHWA's evaluation of comments or information received during the comment period.

Based on these facts, it is clear that there has not yet been a final agency decision - the effects of which can be felt on plaintiff in a concrete way. In its Amended Complaint, plaintiff primarily argues that defendants have violated the action-forcing procedural requirements of NEPA. Plaintiff contends that these NEPA violations are ripe for adjudication because the issuance of the FEIS has essentially made defendants' NEPA violations incurable, i.e., although the administrative review process is not complete, this action is ripe because the alleged NEPA violations committed by defendants can never be cured. This proposition is simply contrary to fact and law.

To begin, the facts establish that the pending NEPA administrative review process provides plaintiff with an opportunity to present all of its grievances and arguments to the FHWA. Indeed, the FHWA has stated that it will receive comments from environmental review agencies and the public until January 30, 1998. (Lawton Decl. ¶ 8). Additionally, the FHWA has reserved the right to order any further studies if its evaluation of the comments or other information indicate that such studies

are warranted. (Lawton Decl. ¶ 9). Under these facts, it is manifestly obvious that the FHWA has simply not reached a final decision with respect to the issues raised in plaintiff's Amended Complaint. Indeed, the FHWA cannot give any further approvals of the Section 700 project until the FHWA issues the ROD - which it has not yet done.

Moreover, the applicable federal regulations also provide the FHWA with the opportunity to supplement its DEIS, FEIS or supplemental EIS whenever the FHWA determines that "[n]ew information or circumstances relevant to environmental concerns and bearings on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS." 23 C.F.R. § 771.130(a). In this case, these regulations specifically would permit the FHWA to address any deficiencies contained in the current EIS. The regulations would even permit the FHWA to address issues of limited scope. 23 C.F.R. § 771.130(f). Further, this supplemental EIS would have to be developed using the same process and format as an original EIS, except that scoping is not required. See 23 C.F.R. § 771.130(d). Consequently, plaintiff's argument - that defendants' alleged NEPA violations are not curable - is without merit.

In sum, the uncontroverted facts of this case and the law establish that the FHWA, either independently or through its agents, has not issued a final decision with respect to the Section 700 project and, more specifically, with respect to the environmental considerations that are implicated by this project.

Admittedly, the FHWA and PennDot are currently accepting comments from the public on the FEIS which they will then evaluate and address in the forthcoming ROD. Because the administrative review process mandated by NEPA and its regulations has yet to close, plaintiff's cannot presently maintain suit against defendants.

Before turning to plaintiff's motion for a preliminary injunction, the Court must address one further issue raised by plaintiff with respect to ripeness. It appears that plaintiff argues that this Court should adjudicate plaintiff's claims now because the standard of judicial review in NEPA cases will effectively preclude this Court from reviewing all of plaintiff's claims after the administrative review process has been completed. This argument is without merit.

When advancing this argument, plaintiff fails to recognize that this Court's standard of review is static. In other words, if this action were presently ripe, this Court would still have to apply the same standard of judicial review that it would have to apply after the administrative process was completed. Thus, plaintiff incorrectly implies that this Court can review plaintiff's claims under a less stringent standard of review presently as opposed to after the administrative review process.

C. Preliminary Injunction

Because this Court will grant defendants' alternative motion for summary judgment, the Court will deny plaintiff's motion for a preliminary injunction as moot.

IV. Conclusion

Accordingly, for the foregoing reasons, this Court will grant defendants' alternative motion for summary judgment.<sup>17</sup> The Court will also deny plaintiff's motion for a preliminary injunction as moot.

An appropriate Order follows.

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Clarence C. Newcomer, J.

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17. All parties have received notice and a reasonable opportunity to present all material pertinent to the disposition of defendants' motion, and they have availed themselves of this opportunity by submitting exhibits appended to their papers. Therefore, pursuant to Fed. R. Civ. P. 12(b), this Court will treat defendants' motion as one for summary judgment, rather than a motion to dismiss. Cowgill v. Raymark Indus., Inc., 780 F.2d 324, 329 (3d Cir. 1986); Bryson v. Brand Insulations, Inc., 621 F.2d 556, 559 (3d Cir. 1980). To the extent that plaintiff requests additional time to conduct discovery, this Court rejects plaintiff's request. The issue which this Court decides today - ripeness - simply does not require additional discovery. Indeed, no dispute of material fact exists with respect to the dispositive facts.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BUCKINGHAM TOWNSHIP,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
et al.,	:	
	:	
Defendants,	:	
and	:	
	:	
BRADLEY L. MALLORY, SECRETARY	:	
FOR THE DEPARTMENT OF	:	
TRANSPORTATION, COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
	:	
Intervenor.	:	NO. 97-6761

O R D E R

AND NOW, this            day of January, 1998, upon consideration of the following Motions, and any responses thereto, it is hereby ORDERED that:

1. Defendants' Alternative Motion for Summary Judgment is GRANTED;
2. Plaintiff's Motion for a Preliminary Injunction is DENIED;
3. Judgment is ENTERED in favor of defendants and against plaintiff; and
4. The Clerk of the Court shall mark this case closed.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, J.