

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

THE DELAWARE RIVERKEEPER,	:	
THE DELAWARE RIVERKEEPER	:	
NETWORK and AMERICAN LITTORAL	:	
SOCIETY	:	
Plaintiffs,	:	
	:	CIVIL ACTION NO. 07-2489
v.	:	
	:	
JAMES S. SIMPSON, ET AL.,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

Tucker, J.

March 17, 2008

Presently before the Court are Plaintiffs' Complaint and Motion for Preliminary Injunction (Docs. 1, 10 & 11), Defendants' Responses in Opposition (Docs. 7, 9, 12, 14-19, 22, 27 & 28) and Plaintiffs' Replies (Docs. 13, 20, 24 & 32). For the reasons set forth below, upon consideration of the parties' submissions and oral argument held before this Court on December 13, 2007, Plaintiffs' Request for a Preliminary Injunction is denied and Defendants' Motion to Dismiss is granted.

BACKGROUND

Plaintiff, Delaware Riverkeeper, is a full time privately funded ombudsman who is responsible for the protection of waterways in the Delaware River Watershed. Plaintiff, Delaware Riverkeeper Network (DRN), is an affiliate of the American Littoral Society and was created in 1988 to protect and restore the Delaware River, its tributaries and habitats. Plaintiff, American Littoral Society (ALS) is a non-profit organization established to promote the study

and conservation of marine life and its habitat, particularly in coastal zones. The Plaintiffs bring this action on behalf of its members, many of whom have lived in the vicinity of the project at the center of this matter. Plaintiffs' challenge the failure of the Federal Transit Authority (FTA) to comply with the National Environmental Policy Act (NEPA) and Executive Order 11988 in deciding to provide \$3.5 million in funding for an intermodal transportation center and residential development ("Intermodal Facility"). The Intermodal Facility is proposed to be constructed in a floodplain and in a National Register Historic District in Easton, Pennsylvania. The structure is planned to be twelve-stories, will include 525 parking spaces, a bus plaza, retail spaces and 147 condominiums. The top seven stories of the Intermodal Facility will loom over the three-story historic buildings constructed on higher ground to overlook the river and avoid floods. Plaintiffs believe the structure will degrade the experiences of visitors to Riverside Park, which they argue is the most valuable public open space in Easton. They further assert that the view of the historic skyline of Easton from across the river of Phillipsburg, New Jersey--a historic district--will be entirely obliterated.

Plaintiffs argue that despite such serious environmental concerns, the FTA utilized a categorical exclusion to exempt itself from any meaningful analysis of environmental impacts and public oversight of its decisions. They seek to have the FTA's decisions to utilize a categorical exclusion and authorize set aside. 5 U.S.C. §706 ("reviewing court shall...hold unlawful and set side agency action" that is arbitrary and capricious or adopted "without observance of procedure required by law"). Plaintiffs aver that they have no adequate remedy at law. It is their contention that unless the Court grants the requested relief, the Defendants' actions will cause irreparable harm to the environment, to Plaintiffs and to the public in violation

of federal law and the public interest.

Defendants counter that FTA has retracted its categorical exclusion and suspended funding pending compliance with an environmental assessment under NEPA, thus not making Plaintiffs' Administrative Procedures Act claims challenging the determination ripe. It is their contention that Plaintiffs allege speculative injury from potential action, which requires a chain of events to occur which may or may not come to pass at some time in the future.

LEGAL STANDARD

I. Preliminary Injunction

“[T]he grant of injunctive relief is an ‘extraordinary remedy which should be granted only in limited circumstances.’” Instant Air Freight Co. v. C. F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989) (citing Frank’s GMC Truck Ctr, Inc. v. Gen. Motors Corp., 847 F.2d 100, 102 (3d Cir. 1988)). Generally, in determining whether to grant a preliminary injunction or a temporary restraining order, courts in this Circuit review four factors:

(1) the likelihood that the applicant will prevail on the merits at the final hearing; (2) the extent to which the plaintiffs are being irreparably harmed by the conduct complained of; (3) the extent to which the defendants will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest.

S & R Corp. v. Jiffy Lube Int’l. Inc., 968 F.2d 371, 374 (3d Cir. 1992) (citing Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 197-98 (3d Cir. 1990)). “While the burden rests upon the moving party to make [the first] two requisite showings, the district court” should look to the factors three and four when relevant. Acierno v. New Castle County, 40 F.3d 645, 653 (3d Cir.

1994). “All four factors should favor relief before an injunction will issue.” S & R Corp., 968 F.2d at 374, (citing Hoxworth, 903 F.2d at 192).

In order to prove irreparable harm, the moving party “must ‘demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial.’” Acierno v. New Castle County, 40F.3d 645, 653 (3d Cir.1994) (quoting Instant Air Freight Co., v. C.F. Air Freight, Inc., 882 F.2d 797, 801 (3d Cir.1989). “Economic loss does not constitute irreparable harm.” Acierno, 40 F.3d at 653. “[T]he injury created by a failure to issue the requested injunction must ‘be of a peculiar nature, so that compensation in money cannot atone for it.’” ” Acierno, 40 F.3d at 653 (citations omitted). The word “irreparable connotes ‘that which cannot be repaired, retrieved, put down again, atoned for.’” ” Id. (citations omitted). In addition, the claimed injury cannot merely be possible, speculative or remote. “[M]ore than a risk of irreparable harm must be demonstrated. The requisite for injunctive relief has been characterized as a ‘clear showing of immediate irreparable injury,’ or a ‘presently existing actual threat; [an injunction] may not be used simply to eliminate a possibility of a remote future injury...”” Acierno, 40 F.3d at 655 (citations omitted).

DISCUSSION

A. Federal Transit Administration and the Lehigh and Northampton Transportation Authority

Because the Federal Transit Administration (FTA) has not rendered a final agency decision, Plaintiffs are unable to meet the requirements for a preliminary injunction. The funds designated for the project have been frozen, pending an Environmental Assessment (EA), as required by the National Environmental Policy Act (NEPA). Plaintiffs’ initial complaint and

request for preliminary injunction stemmed from the FTA's categorical exclusion (CE) determination. On July 18, 2007, the FTA revoked its CE, requiring the Lehigh and Northampton Transportation Authority (LANTA) to conduct an EA for the entire Easton Intermodal Transportation Center project and also suspended all federal funding until LANTA complied with NEPA. Thus Plaintiffs' arguments in favor of a preliminary injunction become speculative as to the likelihood of success on the merits and the potential for irreparable harm pending a final determination by the FTA.

A preliminary injunction is an extraordinary remedy, placing the burden upon the moving party to demonstrate that (1) it has a likelihood of success on the merits; (2) that it will suffer irreparable harm without an injunction; (3) that the injunction will not harm the non-moving party and finally, (4) that public interest favors such relief. S & R Corp., 968 F.2d at 374. The Administrative Procedures Act (APA) states that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. §704. Because of the FTA's mandate that an EA occur, there is no final agency action ripe for this Court's review. Calio v. Pennsylvania Dep't of Transp., 101 F.Supp.2d 325, 329 (E.D. Pa. 2000) ("The requirement of a final agency action has been considered jurisdictional. If the agency action is not final, the Court therefore cannot reach the merits of the dispute.") (citations omitted); see also FTC v. Standard Oil of Cal., 449 U.S. 232 (1980) (treating finality as a ripeness issue); Solar Turbines Inc. v. Seif, 879 F.2d 1073, 1080 (3d Cir. 1989) (demonstrating the Third Circuit's treatment of finality as a ripeness issue). While the APA does not expressly define "final agency action," the Supreme Court opinion in Franklin v. Massachusetts offers helpful guidance stating, "[t]he core question is whether the agency has completed its decision making process, and whether the result of that process is one that will definitely affect the parties." 505 U.S. 788, 797

(1992). Generally, the Court must determine if “the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action...that harms or threatens to harm [Plaintiff].” Nat’l Park Hospitality Ass’n v. Dep’t of Interior, 538 U.S. 803, 808 (2003) (quoting Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 891 (1990)). Central to Plaintiffs’ motion is the FTA’s granting of a CE to LANTA and the approval of federal funds for the project. Because that CE has now been revoked pending an EA, there are additional findings needed for a final judgment and Plaintiffs will have an opportunity to voice its concerns. Hooker Chem. Co. v. EPA, 642 F.2d 48 (3d Cir. 1981)(determining that an issue was not ripe because the EPA withdrew an order central to the lawsuit after its filing and preserved the right to do additional administrative investigations).

In a similar case in the Third Circuit, Hooker Chemical Company v. EPA, the agency issued orders against chemical companies alleging violation of government regulations related to the dumping of chemicals. Hooker, 642 F.2d at 49. The companies petition to the federal court for review was dismissed due to the lack of ripeness created when the EPA withdrew its order for further investigation after the commencement of the lawsuit. Id. The similarities in timing and circumstance lead the Court to conclude that a similar resolution is appropriate. Contrary to Plaintiffs’ assertions, the current matter is distinguishable from the cases relied upon in its motion because it is clear that the FTA has yet to reach a final decision on the project. Exxon Corp. v. Train, 554 F.2d 1310, 1315 (5th Cir. 1977)(the Court sees this case, which Plaintiffs rely heavily upon as distinguishable because the agency explicitly recognizes that it made a final action). For the foregoing reasons, Plaintiffs’ motion is denied as it pertains to the Federal Defendant, FTA.

The Court will also grant Defendants FTA and LANTA’s Motion to Dismiss. Because

the FTA has retracted its CE, suspended funding pending an EA and NEPA compliance and there is no evidence to suggest that the parties has continued to act in furtherance of the project, Plaintiffs' claims are not ripe for adjudication.

B. Easton Parking Authority

Following the parties' submissions related to Plaintiffs' complaint and its request for a preliminary injunction, Defendant Easton Parking Authority filed a Motion to Dismiss based on mootness, which the Court will grant. While cases may become moot when circumstances change, such as in the present matter, mootness is not achieved until those circumstances "eliminate a plaintiff's personal stake in the outcome of the suit." County of Morris v. Nationalist Movement, 273 F.3d 527, 533 (3d Cir. 2001)(quoting Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 698-99 (3d Cir. 1996)). A matter is not moot "so long as there remains the possibility that the plaintiff can obtain 'any effective relief.'" Don't Ruin Our Park, 802 F.Supp. 1239, 1244 (M.D.Pa. 1992)(citing S.E.C. v. Med. Comm. for Human Rights, 404 U.S. 403, 407 (1972)).

The Plaintiff has offered for the Court's review, a newspaper article and ad for bids related to the Easton Intermodal Facility Project, suggesting that the Easton Parking Authority has not properly ceased activities in furtherance of the project. A Defendant may demonstrate its voluntary cessation of prohibited activities by (1) establishing that the wrongful conduct cannot reasonably occur and (2) "interim relief or events" must have "completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). Here, Defendants have demonstrated that following the injunction request, they received notice from LANTA that an EA was performed pursuant to NEPA and that public hearings were scheduled regarding the project. Neither the request for bids nor the newspaper

articles suggest that the Easton Parking Authority did nothing more than prepare itself to commence the project upon getting the proper authorization to do so upon a final agency decision by the FTA. The Court is satisfied that the Easton Parking authority could not have physically begun to work on the project without proper authorization from FTA and the notice from LANTA in October constituted “interim relief” that “completely and irrevocably eradicated the effects of the alleged violation.” Davis, 440 U.S. at 631. Accordingly, Plaintiff’s request is denied.

Because the alleged violation at the center of Plaintiffs’ complaint was revoked, which also created a problem with ripeness in Plaintiffs’ request for a preliminary injunction, the complaint is dismissed. Without a final agency action Plaintiffs’ claims are not ripe for adjudication. 5 U.S.C. §704 (stating that a final agency action for which there is no other adequate remedy in a court is subject to final judicial review). Without finality, the Court lacks proper jurisdiction to review until the FTA has completed its decision making process. Franklin, 505 U.S. at 797; see also Philadelphia Federation of Teachers, et. Al. V. Ridge, 150 F.3d 319, 322 (3d Cir. 1998)(preventing Federal courts from entangling themselves in abstract disagreements); Ass’n of Cmty. Org. For Reform Now (ACORN) v. SEPTA, 462 F.Supp. 879, 884 (E.D. Pa. 1978)(stating that in administrative matters, the adjudication of premature claims can disrupt an agency’s decision making process). Evaluating the merits of Plaintiffs’ claims and whether or not their rights are adversely affected is premature in the absence of the FTA’s final decision. For these reasons, Defendants’ Motion to Dismiss is granted. An appropriate order follows.

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JAMES S. SIMPSON, ET AL.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this ____ day of March, 2008, upon consideration of the Plaintiffs' Complaint and Request for a Preliminary Injunction (Docs. 1, 10 & 11), Defendants' Responses in Opposition and Motions to Dismiss (Docs. 7, 9, 12, 14-19, 22, 27 & 28) and Plaintiffs' Responses (Docs. 13, 20, 24 & 32), it is **HEREBY ORDERED AND DECREED** that Plaintiff's Request for a Preliminary Injunction is **DENIED**. **IT IS FURTHER ORDERED** that Plaintiff's Complaint is **DISMISSED WITHOUT PREJUDICE**.

BY THE COURT:

/S/ Petrese B. Tucker

Hon. Petrese B. Tucker, U.S.D.J.