UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

NARRAGANSETT INDIAN TRIBE, ACTING BY AND THROUGH THE NARRAGANSETT INDIAN TRIBAL HISTORIC PRESERVATION OFFICE, Plaintiff, v. NICOLE R. NASON in her official capacity as Administrator of the FEDERAL HIGHWAY ADMINISTRATION, Defendant	C.A. No. 19-cv-158-WES-PAS

DEFENDANT'S REPLY BRIEF
IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

Defendant Nicole R. Nason[1], in her official capacity as Deputy Administrator of the Federal Highway Administration ("FHWA" or "the Agency"), respectfully submits this reply memorandum of law in response to Plaintiff's Objection to Federal Defendants' Motion to Dismiss Plaintiff's Complaint. For the reasons set forth below, the Defendant requests that its Motion to Dismiss be granted.

ARGUMENT

1) **The Court May Consider the Agency's Attached Materials Without Converting the Motion to One for Summary Judgment**.

As a threshold matter, Plaintiff's opposition challenges FHWA's inclusion of materials in its Motion to Dismiss, arguing that the declaration and exhibits are "not proper for consideration

[1] Since the time Plaintiff filed the complaint in this matter, Nicole R. Nason has replaced Deputy Administrator Brandye L. Hendrickson as Administrator of the Federal Highway Administration. In accordance with Federal Rule of Civil Procedure 25(d), Administrator Nason is automatically substituted as Defendant in place of former Deputy Administrator Hendrickson.

at the motion to dismiss stage." (Plaintiff's Brief ("Pl. Br.") at 1 n. 1.) First, as noted in Defendant's initial papers, as a matter of well-settled First Circuit law, a party can properly include extrinsic materials in support of a challenge to subject matter jurisdiction under Rule 12(b)(1). (See Defendant's Motion ("Def. Mot.") at 6.) Even in the Rule 12(b)(6) context, Defendants can properly attach some additional materials outside the four corners of the complaint without converting it to one for summary judgment. See Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 16-17 (1st Cir. 1998) "When deciding a motion to dismiss, the court is not limited to the facts alleged in the complaint but nay take a 'common sense' approach to determine what materials may be considered." Half Moon Ventures, LLC v. Energy Development Partners, LLC, 2019 WL 2176308, *3 (D.R.I. May 20, 2019). For example, in addition to the complaint, the court may also consider "facts extractable from documentation annexed to or incorporated by reference in the complaint and matters susceptible to judicial notice." Jorge v. Rumsfeld, 404 F.3d 556, 559 (1st Cir. 2005).

In this case, the documents attached to the Agency's motion to dismiss go directly to defendant's challenge of the existence of subject matter jurisdiction and are properly before the Court on a Rule 12(b)(1) motion. See Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir. 2002); Aversa v. United States, 99 F.3d 1200, 1210 (1st Cir. 1996). As explained in the Agency's motion, the declaration and exhibits demonstrate that consultation is ongoing and FHWA has not reached a final decision on the Viaduct. (Def. Mot. at 7-8.) Without any final decision on the project and any associated new programmatic agreement, there is no final agency action subject to court review. Moreover, even in the 12(b)(6) context, the factual status of the challenged (and purportedly, though not actually final) agency action is arguably incorporated by reference in the pleadings, and properly reviewable in the context of a motion to dismiss.

2) **A Decision on the Termination of the Programmatic Agreement Is Not a Final Agency Action on the Undertaking**.

In its opposition to Defendant's motion to dismiss, Plaintiff states that it "is challenging the June 28, 2018 decision which concluded FHWA's statutory responsibilities *as it relates to the termination of the PA*. This decision represented final agency action *as it relates to the termination of the PA*." (Pl. Br. at 5.) (Emphases added.) Plaintiff confuses a final decision on the termination of the Programmatic Agreement (PA) with a final decision on the undertaking, which has not yet occurred.

NHPA requires agencies to take certain procedural steps in reaching a final decision on an undertaking. 36 C.F.R. § 800.8(c)(4). An "undertaking" includes a project, activity, or program" that is "carried out by or on behalf of [a] Federal agency." 54 U.S.C. § 300320. See also 36 C.F.R. § 800.16(y) (defining undertaking). In this case, the undertaking is the Providence Viaduct Project. As explained in Defendant's motion to dismiss, while the original Programmatic Agreement has been terminated, the FHWA has not reached a final decision as to what action it will take under NHPA with respect to the Viaduct Project, and thus there is no final agency action subject to court review. (Def. Mot. at 7-8.). Moreover, Plaintiff's attempt to revive its challenge to the unreviewable (as this Court and the First Circuit have previously found) earlier termination of the PA by attempting to tie it to the as-yet-incomplete process of agency decisionmaking on the undertaking does not provide an avenue for review of the PA's termination by other means. Put another way, conjoining an unreviewable issue with an unripe one cannot suffice to provide jurisdiction in this Court over Plaintiff's claim.

3) FHWA's Decision to Terminate the PA and Reinitiate Consultation Does Not Support a Viable Claim that FHWA Violated the APA.

Even if this action were not otherwise jurisdictionally barred (which it is), Plaintiff's complaint in this action remains based upon the same flawed legal predicate that foreclosed its

earlier complaint in this Court: it argues that terminating the PA violated the NHPA. Plaintiff argues that FHWA's decision to terminate the PA was arbitrary and capricious because the PA is "the very document that evidenced FHWA compliance with NHPA" and that "terminating the PA . . . was in direct violation of the NHPA procedures." (Pl. Br. at 9.) However, as FHWA previously argued, Plaintiff's disagreement with FHWA's decisionmaking process is not sufficient to support a viable claim that FHWA violated the APA. (Def. Mot. at 10.) As explained in Defendant's motion and decided earlier by the First Circuit, NHPA does not require federal agencies to enter into PAs at all, nor prevent agencies from terminating PA's. Narragansett Indian Tribe v. RI Dep't of Trans., 903 F.3d 26, 30 (1st Cir. 2018). Without any statutory or regulatory duty to enter into or terminate a PA, Plaintiff cannot demonstrate that FHWA's termination of the PA involving the Tribe was arbitrary or capricious.

Plaintiff acknowledges such, but then attempts to circumvent the argument that PA's are not required by stating that, "while FHWA is correct that the First Circuit stated 'nothing in the regulations prevents the agency from terminating such an agreement,' this statement does not stand for the same proposition that an agency is free to terminate an agreement when such termination will result in a violation of the NHPA." (Pl.'s Br. 10-11 (citation omitted).) However, Plaintiff offers no statute, regulation, or caselaw to support its contention that termination of the PA could violate the NHPA. Nor could it. The fact that a PA could provide one means of satisfying an agency's obligations under NHPA does not mean that agency is required to use a PA, or that, having pursued that route, it is prohibited from changing course when the PA proves unworkable.

Furthermore, as explained in Defendant's motion, Section 106 of the NHPA is characterized as a requirement that agency decisionmakers "stop, look, and listen," but not that they reach particular outcomes. See Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d

800, 805 (9th Cir. 1999) (per curiam); see also Nat'l Mining Ass'n v. Fowler, 324 F.3d 752, 755 (D.C. Cir. 2003) (requirements imposed by § 106 are procedural, not substantive). In this case, FHWA documented its rationale for re-initiating Section 106 consultation and included consideration of ACHP's comments, thus fulfilling its technical obligations required by the NHPA. (Def. Mot. at 9-10.) Plaintiff's arguments to the contrary do not demonstrate any arbitrary or capricious agency action, and, as such, Plaintiff cannot secure relief under the APA.

CONCLUSION

For the foregoing reasons, the Defendant respectfully requests that the Court dismiss the Plaintiff's complaint.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on the 20th day of September, 2019, I electronically filed the within Reply Brief with the Clerk of the United States District Court for the District of Rhode Island using the CM/ECF System. The following participants have received notice electronically:

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