UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

AQUIFER GUARDIANS IN URBAN AREAS and PEOPLE FOR EFFICIENT TRANSPORTATION, INC.,	)	
	)	**No. Civ. SA-05-CA-1170-XR**
Plaintiffs	)	
	)	
v.	)	**Motion for Preliminary Injunction and Supporting Memorandum**
	)	
UNITED STATES FEDERAL HIGHWAY ADMINISTRATION, and TEXAS DEPARTMENT OF TRANSPORTATION,	)	**Hearing Requested**
	)	
Defendants.	)	
	)	

MOTION

Plaintiffs hereby move for a preliminary injunction barring further land clearing and construction on the expansion of U.S. 281 north of Loop 1604 in Bexar County, Texas. Plaintiffs request that an evidentiary hearing be set on this motion as soon as possible after the completion of briefing.

CONFERENCE

Plaintiffs have attempted to confer with counsel for Federal and State Defendants, but have been unable to obtain agreement by Defendants to halt construction activities for sufficient time to allow resolution of the final merits of this matter on an expedited basis.

INTRODUCTION

In this action, Plaintiffs, Aquifer Guardians in Urban Areas, and People for Efficient Transportation, Inc. (collectively "AGUA"), seek relief from the failure of the Federal Highway Administration and the Texas Department of Transportation

(collectively "Highway Agencies") to comply with the requirements of the National Environmental Policy Act ("NEPA") for the proposed expansions of United States Highway 281 ("US 281") and Loop 1604. US 281 bisects the Edwards Aquifer recharge zone from north to south as it extends north of Loop 1604. Plaintiff Exhibit ("Pl. Ex.") A (map of recharge zone showing US 281 and Loop 1604). Loop 1604 in this vicinity runs east to west through the recharge zone. Id. These projects are "being proposed as . . . part of the 'starter toll system' for Bexar County."

The highway expansions will contribute to the ongoing degradation of the Edwards Aquifer, the region's primary water supply, as well as subject nearby residents to noise pollution above federal standards, exacerbate harmful air pollution levels that already exceed federal standards for ground level ozone, diminish community cohesion, increase the cost of travel, increase congestion and travel times during the construction phase, and through urbanization contribute to the ongoing fragmentation of wildlife habitat, including for endangered species such as the golden-cheeked warbler.[1]

Local communities are being overwhelmed by uncontrollable and unplanned residential growth, which is largely out of governmental control because of grandfathering legislation. "Law Lets Developers Ignore Growth Controls," San Antonio Express News (10/16/2005) (Pl. Ex. E). As the San Antonio Express News recently editorialized, the "Aquifer faces peril as a city grows wrong way." Pl. Ex. F. The proposed toll roads will greatly accelerate these harmful trends and the highway agencies are moving forward without taking any meaningful look at the implications of their

[1] Plaintiffs' members will be harmed by the construction and operation of this 15-lane highway. Pl. Ex. B (Standing declarations of some of plaintiffs' members). This motion is also supported by the expert testimony of George Veni, Ph.D. and William Barker, MA, AICP, Pl. Exs. C and D, and documentary evidence attached as Pl. Ex. E-S. A summary of the factual basis, declarations, and documents are contained in the Appendix as required by local rule.

actions. Most egregiously, and patently illegal under NEPA, the agencies have utterly failed to ever consider alternatives to the proposed massive toll road projects. The Highway Agencies must be required to prepare a full supplemental environmental impact statement that considers reasonable alternatives, rather than the piecemeal accumulation of collectively inadequate environmental assessments and re-evaluations prepared sporadically over the past twenty-one years.

BACKGROUND

Relevant Statutes and Regulations

National Environmental Policy Act

"NEPA imposes upon federal agencies procedural duties that are designed to insure fully-informed and well-considered decisions, the merits of which judicial review is not concerned." Richland Park Homeowners Ass'n, Inc. v. Pierce, 671 F.2d 935, 941 (5th Cir. 1982) (citing Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980)). Because NEPA only imposes procedural requirements and does not authorize a court to review the substantive merits of agency actions affecting the environment, courts have emphasized that "[t]hese [procedural] provisions are not highly flexible. Indeed, they establish a strict standard of compliance." Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C.Cir.1971).

NEPA's essential purpose is "to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1 (c).[2] To accomplish its

[2] The Fifth Circuit in Sabine River Authority v. U.S. Dep't of the Interior, has explained: "To assist federal agencies in resolving whether they must prepare an EIS, the federal Council on Environmental Quality

purpose, NEPA requires that all federal agencies must prepare a "detailed statement" regarding all "major Federal actions significantly affecting the quality of the human environment . . .." 42 U.S.C. § 4332(2)(C). This statement, known as an Environmental Impact Statement ("EIS"), must describe (1) the "environmental impact of the proposed action," (2) any "adverse environmental effects which cannot be avoided should the proposal be implemented," (3) any "alternatives to the proposed action," and (4) any "irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented." Id. An agency must supplement its environmental analysis if: "(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(i-ii).

"Major Federal actions" requiring preparation of an EIS include "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies . . .." 40 C.F.R. § 1508.18(a). Whether an agency action "significantly" affects the environment takes into account both the context and intensity of a proposed action. 40 C.F.R. § 1508.27. The intensity of an action's impacts involves several factors, almost all of which are implicated here, including: "[t]he degree to which the proposed action affects public health or safety"; "[u]nique characteristics of the geographic area . . . or ecologically critical areas"; "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial"; "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or

("CEQ") has issued regulations to which these agencies can turn for guidance. These regulations are entitled to substantial deference and 'are binding on federal agencies.'" 951 F.2d 669, 677 (5th Cir. 1992) (internal citations omitted).

unknown risks"; "[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration"; "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts"; "[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat"; and "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." Id. § 1508.27(b)(2)-(10).

CEQ regulations provide for the preparation of a document known as an environmental assessment ("EA") so that agencies may determine whether a particular action may have a significant impact on the quality of the human environment and thus require preparation of an EIS. 40 C.F.R. § 1501.4(b),(c). Besides assisting an agency in determining whether an EIS is required, an EA also serves the additional purpose of "aid[ing] an agency's compliance with the Act when no [EIS] is necessary." 40 C.F.R. § 1508.9(a)(2). For example, CEQ regulations specify that every EA, as well as every EIS, must include a discussion of "alternatives as required by section 102(2)(E)" of NEPA. Id. at § 1508.9(b).

NEPA also requires the consideration of the cumulative impacts of actions. CEQ regulations define "cumulative impact" thusly:

> Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or persona undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7.

CEQ has emphasized the importance of considering cumulative impacts. In its 1997 report entitled "Considering Cumulative Effects Under the National Environmental Policy Act," CEQ notes that "[e]vidence is increasing that the most devastating environmental effects may result not from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time." CEQ Report at 1 (on-line at **http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm**). CEQ has determined that unintended consequences on the human environment continue to occur from federal agency decision-making and that "is largely attributable to this incremental (cumulative) impact." Id. According to CEQ:

> The passage of time has only increased the conviction that cumulative effects analysis is essential to effectively managing the consequences of human activities on the environment. The purpose of cumulative effects analysis, therefore, is to ensure that federal decisions consider the full range of consequences of actions. Without incorporating cumulative effects into environmental planning and management, it will be impossible to move towards sustainable development, i.e., development that meets the needs of the present without compromising the ability of future generations to meet their own needs (World Commission on Environment and Development 1987; President's Council on Sustainable Development 1996). To a large extent, the goal of cumulative effects analysis, like that of NEPA itself, is to inject environmental considerations into the planning process as early as needed to improve decisions. If cumulative effects become apparent as agency programs are being planned or as larger strategies and policies are developed then potential cumulative effects should be analyzed at that time.

CEQ Report at 3; see also 40 C.F.R. § 230.7.

ARGUMENT

Standard of Review

In a challenge to an agency's compliance with NEPA, a court must determine whether the actions complained of were arbitrary or capricious under the Administrative Procedure Act. As the Supreme Court has articulated:

> The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' In reviewing that explanation, we must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: 'We may not supply a reasoned basis for the agency's action that the agency itself has not given.'

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal citations omitted).

The Supreme Court has further explained, "Courts should not automatically defer to the agency 'without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance – or lack of significance – of the new information,'" in reviewing an agency decision not to prepare a new or supplemental environmental impact statement. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989) (internal citation omitted).

Standard For Preliminary Injunctive Relief In NEPA Cases

A preliminary injunction is an extraordinary remedy. Mississippi Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618, 621 (5th Cir.1985). To obtain a preliminary injunction, the moving party must establish four factors: (1) a substantial likelihood of success on the merits, (2) a substantial threat that failure to grant the injunction will result in irreparable injury, (3) the threatened injury outweighs any damage that the injunction may cause the opposing party, and (4) the injunction will not

disserve the public interest. Allied Marketing Group, Inc. v. CDL Marketing, Inc., 878 F.2d 806, 809 (5th Cir.1989).

As the Supreme Court has noted, "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.'" Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 545 (1987). Moreover, the Fifth Circuit has reinforced the principle that:

> When a federal agency is found to have reached a decision on a proposed construction project without complying with NEPA-mandated procedures, the normal remedy afforded by the courts, where appropriate, is an injunction prohibiting construction and maintaining the status quo until the agency has complied with the statutorily-required procedures.

Richland Park Homeowners Ass'n, supra, 671 F.2d at 941 (emphasis added) (citing Rodgers, Handbook on Environmental Law 798-809 (1977); Natural Resources Defense Council, Inc. v. Callaway, 524 F.2d 79, 95 (2d Cir. 1975)).

I. PLAINTIFFS ARE CERTAIN TO SUCCEED ON THE MERITS

A. Under the Plain Language of CEQ NEPA Implementing Regulations the Proposed Project Requires the Preparation of an EIS Due to the Presence of Numerous "Significance Factors"

The Fifth Circuit has adopted the nationally prevalent rule that a "'court should require the filing of an impact statement,' 'if the court finds that the project *may* cause a significant degradation of some human environmental factor.'" Citizen Advocates for Responsible Expansion, Inc. v. Dole ("I-CARE"), 770 F.2d 423, 438 (5th Cir. 1985) (quoting Louisiana v. Lee, 758 F.2d 1081, 1084 (5th Cir. 1985)).[3] Under this rule, Plaintiffs need not prove that the project will degrade the environment, "but merely [that]

[3] Various circuits, including the Fifth Circuit in I-CARE, once applied a "reasonableness" standard to its analysis of an agency's compliance with NEPA. The Supreme Court since has clearly held that the correct standard of review was "arbitrary and capricious," but questioned whether there was any pragmatic difference between "arbitrary and capricious" and "reasonableness." See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377-78 n. 23 (1989).

the project might affect negatively and significantly a single environmental factor." I-CARE, 770 F.2d at 432-33. Since the expansion of U.S. 281 and Loop 1604 implicates the vast majority of the environmental significance factors established by CEQ regulations – even though under Circuit precedent only one factor would be sufficient to require an EIS – it is beyond question that an EIS is required.

An EIS is required for the expansion of U.S. 281/Loop 1604 based on "[t]he degree to which the proposed action affects public health or safety"; "[u]nique characteristics of the geographic area such as proximity to . . . ecologically critical areas"; "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial"; "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks"; "[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration"; "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts"; "[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat"; and "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27(b)(2)-(10).

1. Air, water and noise pollution, as well as frontage lanes, pose threats to public health and safety and threaten violations of Federal requirements.

Air pollution from highways has been linked to a number of health problems and diseases, including asthma and other respiratory ailments, leukemia, lung and other cancers, and cardiopulmonary disease. Fact Appendix ("Appx.") at 19; Barker

Declaration at ¶ 18 n.38. The documents prepared by the Highway Agencies show the deterioration of air quality in the San Antonio area since at the time of 2000 Reevaluation the area was in attainment for ozone pollution but by the time of the 2004 Reevaluation San Antonio no longer met the "8-hour" ozone standard. Appx. at 9. Yet, none of the analyses discuss any air pollutants beside carbon monoxide and ozone, despite the well-known health problems associated with traffic related pollutants such as particulates and benzene. Appx. at 19; Barker Declaration at ¶ 17.[4] More egregiously, the 2004 Reevaluation actually uses the fact that the area is not in attainment with ozone standards – but the entire region is involved in a process known as an "Early Action Compact" – to ignore localized ozone pollution impacts of the greatly expanded highway. The Early Action Compact relieves the Highway Agencies of the substantive obligation to comply with the transportation conformity requirements of the Clean Air Act, but that in no way eliminates the procedural requirement to document and consider the air pollution effects on the local human environment through the NEPA process.

The fact that the Highway Agencies must still consider air pollution impacts through the NEPA process is highlighted by their hypocritical consideration of localized air pollution impacts in rejecting potential noise mitigation measures. The 2000 Reevaluation explicitly acknowledges that noise levels will exceed federal standards.[5] Appx. at 5-6. However, the 2000 Reevaluation dismisses traffic management devices that could moderate the speed of traffic and thereby reduce noise (as well as smooth the

[4] Benzene and other pollutants associated with transportation facilities have also been found in local groundwater wells at levels of concern to human health. Barker Declaration at ¶ 16. Highways have been recognized by the Texas Commission on Environmental Quality and the local office of the FWS as major sources of aquifer contamination. Appx. at 18-19.

[5] The 2000 and 2004 Reevaluations improperly limit their reconsideration of noise to whether the feasibility of mitigation has changed, not whether noise impacts of the highways are now significant and therefore require an EIS under current circumstances.

overall flow of traffic during times of congestion) because they might "increase congestion and air pollution." Id.; 2000 Reevaluation at 9. So clearly air pollution is a significant environmental concern to the Highway Agencies, but only when used as a rational to eliminate noise mitigation measures. However, there is no quantification of to what extent traffic management devices would increase congestion or air pollution. Elsewhere, the 2000 Reevaluation states that carbon monoxide ("CO") concentrations are below National Ambient Air Quality Standards ("NAAQS") "and therefore, the project will not have a substantial impact on air quality." Id. at 5.

So even though noise pollution will exceed federal standards and air pollution (at least for the only pollutant, CO, analyzed in the 2000 Reevaluation) at that time did not exceed federal standards, TxDOT dismissed reductions in noise levels without any quantification of the air pollution trade-off or whether the increased air pollution would result in the exceedance of air pollution standards. Of course, now the ozone levels exceed federal air quality standards and there are numerous other air pollutants associated with substantial health impacts on highways that were not analyzed at all. Therefore, the bottom line is that air, water and noise pollution all warrant preparation of an EIS. Moreover, the adverse safety consequences of frontage roads also warrant discussion in an EIS. See Barker Declaration at ¶ 15. CEQ regulations require the preparation for projects, such as this, that affect public health or safety, or threaten violations of federal environmental standards. 40 C.F.R. § 1508.27(b)(2),(10).

2. The Edwards Aquifer recharge zone and endangered species habitats in the geographic area are ecologically critical and sensitive

The Edwards Aquifer has been designated as a sole source drinking water aquifer entitled to special consideration under the Safe Drinking Water Act. 42 U.S.C. § 300h-3(e); 40 C.F.R. Part 149. According to the Edwards Aquifer Authority:

> The Edwards Aquifer is one of the major groundwater systems in Texas. It has been a source of water for people in south central Texas for more than 12,000 years. Today, it is the primary source of water for approximately 1.7 million people.
> . . .
> The recharge zone is located in an area geologically known as the Balcones Fault Zone. In the recharge zone porous and permeable Edwards Limestone is exposed at the surface and provides a path for water to reach the artesian zone.
>
> Recharge is water that enters the aquifer through features such as fractures, sinkholes and caves. Streams from the Edwards Plateau flow across the recharge zone, percolating into the ground. Rain falling directly on the recharge zone also percolates into the ground and enters the Edwards Aquifer.

http://edwardsaquifer.org/pages/geology.htm; see also Appx. at 11.

In addition to its incalculable importance as a drinking water source, the Edwards Aquifer and associated springs provide habitat for over fifty species of plants and animals endemic to Central Texas, i.e. found nowhere else, and for nine federally listed aquatic species, including three salamanders, two fish, three aquatic invertebrates and one plant. The cave environments of central Texas, formed by the process of water dissolving limestone as it recharges the aquifer, have been recognized to support one of the most important cave faunas in the world. Appx. at 15-17. Additionally, the Balcones Escarpment along the edge of the Edwards Plateau is the prime habitat of the endangered Warbler. Appx. at 12-15. This region epitomizes the CEQ's significance factor

pertaining to the "[u]nique characteristics of the geographic area" for which an EIS is required. 40 C.F.R. 1508.27(b)(3); see Middle Rio Grande Conservancy Dist. v. Norton, 294 F.3d 1220, 1229 (10th Cir. 2002) (finding significance based on "aesthetic, economic, ecological, and cultural value" of the affected resource); Audubon Soc. of Cent. Arkansas v. Dailey, 977 F.2d 428, 435 (8th Cir. 1992) (requiring EIS based on unique characteristics of area where "expected large increase in traffic through the area, especially through traffic, could adversely affect recreational uses in [local] parks").

3. The expansion of infrastructure spurring development over the recharge zone, as well as the tollway system, are highly controversial and establish a precedent for speculative funding of toll roads

As explained by Barker, the proposed work on US 281 is the initial phase of a $1 billion "starter system" of tollroads proposed by the Alamo Regional Mobility Authority. Barker Declaration at ¶ 1. The extensive use of toll roads throughout urban areas is highly controversial, both from the standpoint of the vocal public opposition but also as a matter of fiscal policy. Id. at 6. Yet, as the Highway Agencies fail to analyze "the economic impacts of increasing the cost of travel through tolls . . .." Id. at ¶ 8; see also id. at ¶ 14; Pl. Ex. B (standing declarations of local residents and business owner). The fact that this toll road will set a precedent for the future speculative funding of transportation infrastructure in the San Antonio metropolitan area – and therefore dictate that such projects must have more lanes and frontage roads, see Barker Declaration at ¶ 15 – also dictates that an environmental impact statement must be prepared. 40 C.F.R. § 1508.27(b)(4)-(6).

4. The indirect and cumulative effects of urbanization will adversely affect endangered species, and the effects on recovery of the golden-cheeked warbler are highly uncertain and controversial

There can be no doubt that the proposed toll road starter system and the expansion of U.S. 281 and Loop 1604 in particular will impact the Warbler and karst species. See supra at 12; infra at 23-25; Appx. at 12-17. This impact to endangered species is itself a CEQ significance factor requiring the preparation of an EIS. 40 C.F.R. § 1508.27(b)(9); see Foundation for North American Wild Sheep v. U.S. Dept. of Agriculture, 681 F.2d 1172, 1182 (9th Cir. 1982) (impacts to sensitive species, the bighorn sheep, a significance factor requiring preparation of EIS); Sierra Club v. Norton, 207 F. Supp. 2d 1310, 1333-1339 (S.D. Ala. 2002) (impacts to endangered Alabama beach mouse required EIS). However, the impacts to the Warbler implicate another significance factor as well, because the extent of these impacts is highly uncertain. Id. at § 1508.27(b)(5). While it is clear that the urbanization that is an accepted indirect effect of such highway construction will adversely impact local Warbler populations, there is the further danger that this urbanization will impede the range-wide recovery of the species.

The Warbler Recovery Team has advised that the areas "most critical to the survival of the species are regions 5 and 6 (these two regions collectively encompass the Austin-San Antonio corridor)." Pl. Ex. M at 2. It is currently unknown whether sufficient habitat remains in the recovery unit encompassing Bexar County to meet the criteria for recovery of the species. "Additional studies are currently underway to determine whether or not [Warbler] habitat patches large enough to sustain two populations with over 3,000 breeding pairs each are feasible in this recovery unit." Pl. Ex. N at 57; see supra at 13-14. This scientific controversy and the profound ramifications for the goal of recovery of the species to the point at which it may be removed from the endangered species list clearly warrant an EIS. As the Court found in

Sierra Club v. Norton, where the agency "lacks [fundamental] information on the effect loss of optimal habitat will have on the species . . ., it would seem that any alleged 'finding' that the project will not significantly affect the species is the purest sophistry." 207 F. Supp. 2d at 1331; see also Anderson v. Evans, 371 F.3d 475, 492 (9th Cir. 2004) (plaintiffs raised "'substantial questions' as to the significance of the effect on the local area [due to] the highly uncertain impact of the Tribe's whaling on the local whale population and the local ecosystem"); Middle Rio Grande Conservancy Dist. v. Norton, 294 F.3d 1220, 1229 (10th Cir. 2002) (finding controversy where a "substantial dispute exists as to the effect of the [action]"); California v. Norton, 311 F.3d 1162, 1176 (9th Cir. 2002) (NEPA documentation inadequate where "[t]he environmental effects of the leases are the subject not only of scientific, but also of public controversy."); National Parks & Conservation Association v. Babbitt, 241 F.3d 722, 736-37 (9th Cir.2001) (court found a controversy because of substantial public comment that "urged that the EA's analysis was incomplete and the mitigation uncertain"); Fund for Animals v. Babbitt, 89 F.3d 128, 133 (2d Cir.1996) (reversing finding that NEPA did not apply because the scheduled moose hunt implicated factor for activities that have "highly controversial environmental effects.").

Additionally as Dr. Veni explains, there is a high likelihood of significant impacts to endangered karst species and the description of the karst habitats in the vicinity of the project in the various NEPA documents are inaccurate. Veni Declaration at ¶ 9-10, 14-17. Most importantly, Dr. Veni makes clear that the Highway Agencies did not undertake the necessary analyses and mitigation measures to ascertain and avoid impacts to endangered species, as the agencies have done for other projects in aquifer recharge

zones and karst habitats, such as recent construction on Highway 183A in Williamson County. Id. at ¶ 15-16.

B. Even If an EIS Is Not Required, the Highway Agencies Have Illegally Failed to Consider Any Alternatives in Any NEPA Document.

Probably the most egregious failure on the part of the Highway Agencies is to decide to fund and construct the proposed project without ever discussing, or even mentioning, any alternatives to the proposed project – a fifteen lane tolled superhighway. See Barker Declaration at ¶¶ 6, 15. While federal agencies often attempt to evade the requirement to discuss alternatives by attempting to pawn off slight variations to the proposed action in the alternatives section, in this case the environmental assessments in both the 2000 and 2004 Reevaluations fail even to include a section on alternatives. 2000 Reevaluation at i (Table of Contents) and 2004 Reevaluation at I (Table of Contents). Moreover, the Highway Agencies can not claim to "tier" to the initial environmental assessment's discussion of alternatives, because while the 1984 EA has a section entitled "Description of Project and Reasonable Alternatives" there is a not a single alternative mentioned.[6] Nor does the 1984 EA even mention any alternatives that were considered preliminarily and then eliminated from consideration because they were not feasible.

Regulations promulgated by the CEQ to implement NEPA describe the consideration of alternatives as "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. According to the Fifth Circuit, the purpose of the requirement to consider alternatives is "to insist that no major federal project should be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely

[6] CEQ regulations encouraging "tiering" in which a subsequent environmental assessment incorporates by reference discussion from an earlier NEPA document. 40 C.F.R. § 1508.28.

different means." Environmental Defense Fund v. Corps of Engineers, 492 F.2d 1123, 1135 (5th Cir. 1974). "No decision is more important that delimiting what these 'reasonable alternatives' are . . . [since] [o]ne obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence)." Simmons v. Corps of Engineers, 120 F.3d 664, 666 (7th Cir. 1997).

Besides assisting an agency in determining whether an EIS is required, an EA also serves the additional purpose of "aid[ing] an agency's compliance with the Act when no [EIS] is necessary." 40 C.F.R. § 1508.9(a)(2). For example, CEQ regulations specify that every EA, as well as every EIS, must include a discussion of "alternatives as required by section 102(2)(E)" of NEPA.[7] Id. § 1508.9(b); see Richland Park Homeowners Ass'n, supra, 671 F.2d at 944 ("The § 102(2)(E) obligation to consider alternatives is not limited to . . . actions for which preparation of an EIS is required") (citing Aertsen v. Landrieu, 637 F.2d 12, 20 (1st Cir. 1980)); River Road Alliance, Inc. v. Corps of Engineers, 764 F.2d 445, 452 (7th Cir.1985), cert. denied, 475 U.S. 1055, 106 S.Ct. 1283, 89 L.Ed.2d 590 (1986) ("This requirement is independent of the question of environmental impact statements, and operative even if the agency finds no significant impact . . .. For nonsignificant impact does not equal no impact; so if an even less harmful alternative is feasible, it ought to be considered."); Sierra Club v. Watkins, 808 F.Supp. 852, 870-71 (D.D.C. 1991); Ayers v. Espy, 873 F.Supp. 455 (D. Colo. 1994).

Here there are numerous reasonable alternatives that should have received at least preliminary consideration. Barker Declaration at ¶ 15. Also there are clearly

[7] Section 102(2)(E) of NEPA requires that every agency must also "study, develop, and describe alternatives to recommended courses of action . . .." 42 U.S.C. § 4332(2)(E).

intermediate expansions that could have been considered in between jumping from a currently six lane road to a fifteen lane toll highway. Design improvements that eliminate traffic lights without adding as many additional lanes would also address the purpose and need of the project because the Highway Agencies have repeatedly emphasized that the need for the project stems from "signalized intersections" that "result[] in tremendous congestion, particularly during peak periods, thus reducing the overall operational efficiency of the corridor." 2004 Reevaluation at 4; see Barker Declaration at ¶ 15.

Comparison of the utter lack of any identified alternatives in this case to the EAs upheld by the Fifth Circuit in Sierra Club v. Espy demonstrates the insufficiency of the Highway Agencies' compliance with the law. 38 F.3d 792 (5th Cir. 1994). The Espy Court recognized that an "EA must 'include brief discussions of the need for the proposal, of alternatives . . ., of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.'" 38 F.3d at 802-03 (citing 40 C.F.R. § 1508.9(b)). While the Fifth Circuit did accept defendants arguments that "[w]hile an EA must contain a discussion of alternatives, the range of alternatives that the Forest Service must consider 'decreases as the environmental impact of the proposed action becomes less and less substantial,'" the Court merely found that "the EAs prepared by the Forest Service for the nine timber sales appear likely to satisfy NEPA's requirements." Id. (emphasis added) (internal citation omitted). In striking contrast to the complete lack of alternatives in the Highway Agencies' analyses, "eight of the nine EAs [at issue in Espy] consider four alternatives: a no action alternative, an uneven-aged management alternative, and two even-aged management alternatives. The ninth EA

considers the four above alternatives and an additional uneven-aged management alternative." 38 F.3d at 803.

Additionally, the EAs in Espy pertained to individual timber sales within Texas National Forests. The Forest Service had already developed Land and Resource Management Plans covering the entire National Forest and analyzed those plans and thirteen alternative plans for managing the forests in a programmatic EIS. Id. at 796. So the site-specific EAs for individual timber sales were "tiered" to the programmatic EIS and the approved management plan (chosen from thirteen alternative plans), yet they still considered four or five site-specific alternatives. Thus, the Fifth Circuit was able to conclude:

> The EAs in this case remain "rough-cut, low-budget" documents that are tiered to the FEIS and that incorporate the still-relevant objectives and requirements of the LRMP. When examined under this light, we conclude that the EAs adequately address the need for the proposal, the alternatives, the environmental consequences, and the agencies and persons consulted.

Id. at 803.

The circumstances are far different here. First, even if the Court upholds the FONSI, this is not a project for which the impacts border on the *de minimus* and for which the Highway Agencies can be excused from considering any alternatives, as CEQ regulations and Fifth Circuit precedent clearly require for an EA. Second, the Highway Agencies have not done a programmatic EIS for highway projects over the Edwards Aquifer recharge zone – as the Forest Service did for the overall timber harvesting program discussed in Espy – so that the individual highway segment EAs could be tiered to that programmatic EIS. CEQ regulations support such an approach and some courts

have required a programmatic EIS under certain circumstances.[8] Plaintiffs do not seek to have this Court compel the Highway Agencies to prepare a programmatic EIS for all road building over the Aquifer recharge zone because some courts have found that it is up to the agencies in the first instance to decide how to comply with the requirements of NEPA. However, in the absence of a programmatic EIS with such discussion of the cumulative effects of the broader highway system and programmatic alternatives, the EAs for individual highway segments, or more appropriately the EISs for individual highway segments, simply cannot be utterly devoid of meaningful analysis of alternatives.

The Highway Agencies' failures to consider reasonable alternatives through the reevaluation process are most analogous to the recent decision of a District Court in Vermont under extremely similar facts. Senville v. Peters, 327 F.Supp.2d 335 (D. Vt. 2004). In the most heavily populated county in Vermont there has been "a steady transformation from a rural society and economy to an urban and suburban economy," with "extensive growth and development pressure and severe burdens on some local roads." Id. at 340. A four-lane limited access 15.8 mile highway was proposed "to relieve congestion on existing highways" and a draft environmental impact statement was prepared in 1985 and finalized in 1986. Id. at 340-41. Much of the work remained uncompleted two decades later when in 2002, FHWA "decided to reevaluate . . . the next phase of construction plus the already built segments." Id. at 342. A final revised

[8] 40 CFR § 1508.28 ("'Tiering' refers to the coverage of general matters in broader environmental impact statements . . . with subsequent narrower statements or environmental analyses incorporating by reference the general discussions and concentrating solely on the issues specific to the [individual project]"); see City of Tenakee Springs v. Block, 778 F.2d 1402, 1407 (9th Cir. 1985) (where there are large scale plans for regional development, NEPA requires both a programmatic and site-specific EIS); LaFlamme v. Federal Energy Regulatory Commission, 852 F.2d 389, 401-02 (9th Cir.1988) (where several foreseeable similar projects in a geographical region have a cumulative impact, they should be evaluated in a single EIS).

reevaluation issued on August 15, 2003 in which "FHWA concluded that no additional or new significant environmental impacts had been identified, and issued a [Record of Decision] ROD on August 22, 2003." Id. The 2003 ROD adopted the 1986 EIS as well.

The court in Senville found that it could review the adequacy of the 1986 EIS under its review of the 2003 ROD because "[p]reliminary, procedural, or intermediate agency action is subject to review on the review of the final agency action." Id. at 346 (citing 5 U.S.C.A. § 704). The court noted that "[i]n twenty-three pages the 1986 FEIS considered and rejected five alternatives [to the highway] and three alternative alignments for the highway." Id. at 347. The court found that "[a]lthough the alternatives section of this document is hardly a model of rigorous exploration, the information was sufficient to permit a reasoned decision among the alternatives presented," and concluded that "[t]he discussion of alternatives in the 1986 FEIS was not legally inadequate." Id. at 347, 348.

Yet, the court found that even though the 1986 EIS had an adequate discussion of alternatives – unlike TxDOT's 1984 EA that did not mention any alternatives – it was a violation of NEPA for the 2003 reevaluation to fail to consider alternatives. The court started its analysis by recognizing that the "[c]ase law is consistent: NEPA requires federal agencies to consider alternatives to a proposed action, even when a full-scale EIS is not prepared." 327 F.Supp.2d at 352. However, the court found that the FHWA has failed to meet the requirements of NEPA to consider alternatives in the reevaluation. As the court described:

> The [reevaluation] included an 'Alternatives' section. In an introductory paragraph it mentioned the alternatives presented in the 1986 FEIS, and dismissed the 'No-Action, Alternative Transportation Modes and Rebuilding Existing Roadways' alternatives as not having met the

> project's purpose and need. The remainder of the section described and discussed the changes in the selected alternative, the four-lane limited access road. These included minor changes in alignment and elimination of interchanges. The purpose of this section was clearly stated: 'to identify the . . . changes that have occurred since the 1986 [] FEIS, and to evaluate the selected alternative's ability to continue to meet the project's purpose and need requirements.
>
> **The section labeled 'Alternatives' thus was not a consideration of alternatives, but an examination of the changes to the selected alternative and a justification for constructing the next segments. The [reevaluation] did not consider alternatives to the proposed project.**

Id. (emphasis added).

The court ruled that "FHWA could [not] redefine the constituent elements of this EA [reevaluation] to avoid considering any reasonable alternatives to the" proposed project" because "deference to an agency's interpretation of its regulations does not extend to approving an interpretation that contradicts the unambiguous requirements of NEPA and CEQ regulations that implement it." Id. In Senville, as here, "NEPA required that FHWA consider alternatives to its selected alternative in the environmental document it prepared." Id. at 353. However, the failure of the Highway Agencies here is far more egregious because there has never been any analysis or consideration of any alternatives in any of the environmental documents prepared for the expansion of U.S. 281 over the Edwards Aquifer recharge zone. Continence of such flagrant disregard for the law by State and Federal agencies would undermine respect for the law and the faith in the citizens along the proposed route in the fairness and equal treatment of the law.

C. The 2000 and 2004 Reevaluations Are Arbitrary and Capricious Due To Clear Factual Errors, Blatant Omissions and Improper Analysis

Even if Plaintiffs fail to demonstrate that a project may have significant impacts – which would require the Court to order the preparation of an EIS – if "the agency's

review was flawed in such a manner that it cannot yet be said whether the project may have a significant impact . . . the court should remand the case to the agency to correct the deficiencies in its analysis." Fritiofson v. Alexander, 772 F.2d 1225, 1238 (5th Cir. 1985). [9] In this case serious factual errors and improper analyses, at a minimum, require a remand to the FHWA to correct the deficiencies in the record and its decision.

1. The conclusion of no affect to golden-cheeked warblers runs counter to the premises and analyses in the indirect and cumulative effects section

The Warbler was listed as an endangered species in 1990, so the 1984 EA understandably does not mention the species. However, the extent of the discussion of the project's impact on the Warbler in the 2000 Reevaluation is limited to the following sentence:

> A survey for suitable habitat for the Golden-cheeked Warbler . . . [w]as performed by a qualified biologist and since no suitable habitat was found within the existing right-of-way or immediately adjacent to the right-of-way, no adverse impacts to the Golden-cheeked Warbler . . . are expected.

2000 Reevaluation at 11. Similarly, the 2004 Reevaluation states that, since no suitable habitat occurs along the right-of-way and the nearest known Warbler location is 2.4 miles away, there will be no effect to the species from the project. 2004 Reevaluation at 29, 31-32.

The conclusion of "no effect" to the Warbler utterly ignores the sprawl inducing indirect effects of highways. One of the most severe and detrimental effects of highway construction is the attendant urbanization and development. Appx. at 19-20 (citing

[9] Abrogated on other grounds by Sabine River Authority v. U.S. Dep't of the Interior, 951 F.2d 669, 677 (5th Cir. 1992) (clarifying that standard of review in NEPA cases is arbitrary and capricious rather than reasonableness); see supra at 20 n.3 (Supreme Court has explained that there is little pragmatic difference between cases applying the reasonableness standard and those applying arbitrary and capricious standard). Texas courts have continued to rely on Fritiofson. See e.g. Stewart v. Potts, 126 F.Supp.2d 428, 435 n.4 (S.D.Tex. 2000) ("Sabine River, however, only overruled Fritiofson on the standard of judicial review employed not on any of the grounds discussed by the Court in this Order").

Angeremeier et al.). The Fifth Circuit in National Wildlife Federation v. Coleman, recognized that highway agencies were responsible for the indirect effects on endangered species caused by development encouraged by highway construction. 529 F.2d 359 (5th Cir. 1976).

Similarly, the court in the Senville case found the FHWA's failure to consider the growth inducing effects of a highway on areas "not directly adjacent to the" project to be arbitrary and capricious. 327 F.Supp.2d at 368. The court found that:

> The dismissive treatment of relocated growth pressures on the outlying [areas] is inconsistent with a hard look at relocated or redirected growth, particularly when the issue was not part of the original EIS . . . the [c]ourt cannot conclude that the determination that relocated growth will have an insignificant impact upon [areas outside the immediate vicinity of the highway] is based upon reason.

Id. FWS experts have recognized that numerous past, ongoing and reasonably foreseeable residential construction projects in the vicinity of U.S. 281 and Loop 1604 in San Antonio-Austin corridor are destroying, degrading and fragmenting substantial amounts of Warbler habitat. Appx. at 12-15.

Even the 2004 Reevaluation recognizes that "[s]econdary development associated with the proposed project may result in impacts to biological communities and natural habitats that, in turn, may have cumulative effects that result in habitat fragmentation and disruption of wildlife populations." 2004 Reevaluation at 36. However, nowhere in the 2004 Reevaluation is that analysis ever extended to the consideration of the significance of impacts to endangered species, such as the golden-cheek warbler the habitat of which is being lost at a substantial rate in the area due to massive residential developments. At a minimum, a remand is required "to correct the deficiencies in [this] analysis." Fritiofson, 772 F.2d at 1238.

2. The analysis of impacts to karst species is similarly flawed

As described immediately above for the Warbler, the environmental analyses also improperly ignore indirect and secondary effects of induced and relocated growth on endangered karst species by discounting any impacts beyond 1.5 miles of the highway expansion. However, as explained by Dr. Veni, this failure to consider impacts to endangered karst species is compounded by glaring inaccuracies pertaining to the existence of karst habitat in the project area. Dr. Veni points out that while the reevaluations state that the nearest locality for listed species is 2.4 km (1.5 miles) to the east, "in fact, fives caves with endangered species are know within that distance from the highway project area, with the closest locality only 380 meters to the west." Veni Declaration at ¶ 14. According to Dr. Veni, prior to the current expansion, "[a]t least 13 caves in Karst Zone 2 [where there is a high probability of karst species being present] within 2 km of Highway 281 have been destroyed or filled by road and urban construction and none were biologically evaluated." Id. at 9. Therefore, it is clear that urbanization along the U.S. 281 corridor will effect karst habitats and karst species, contrary to the unsupported conclusions of the reevaluations.

3. The reevaluations illogically presume a reduction in travel costs despite the addition of tolls

The NEPA documentation "for this project erroneously claims that the project will result in 'reduced vehicle operating costs for highway users'" without factoring in the cost of tolls on commuters and local businesses. Barker Declaration at ¶ 14 (citing 2004 Reevaluation at 14). Therefore, the analysis on the economic impacts is inherently flawed and fails to document and consider the negative economic impacts of tolls. Id. at

¶ 14 n.16,17; see also Pl. Ex. B (standing declaration of local residents and business owner).

II. AN INJUNCTION IS NECESSARY TO PREVENT IRREPERABLE INJURY TO PLAINTIFFS

The environmental injuries threatened here, by their nature, are irreparable and the "normal remedy" for violations of NEPA is an injunction maintaining the status quo until the agency fully complies with the procedural requirements of the law. Supra at 20 (quoting Village of Gambell, supra, 480 U.S. at 545; Richland Park Homeowners Ass'n, supra, 671 F.2d at 941). "[H]arm to the environment may be presumed when an agency fails to comply with the required NEPA procedure." Davis v. Mineta, 302 F.3d 1104, 1115 (10th Cir. 2002).

Courts that have found a substantial likelihood of a NEPA violation have routinely recognized the need to stem momentum towards the completion of the agency's preferred course of action lest it become a fait accompli and any subsequent NEPA procedures a hollow gesture. See Fritiofson, supra, 772 F.2d at 1248-49 (while remanding to agency "injunction against work on the . . . project must, therefore, be continued until the project is adequately analyzed"); I-CARE, supra, 770 F.2d at 443 (enjoining federal and state of Texas highway agencies "until there has been compliance" with NEPA); Richland Park Homeowners, supra, 671 F.2d at 941 (injunctive relief halting construction and preserving the status quo is the normal and proper remedy for an agency's failure to comply with NEPA); and Named Individual Members of San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013, 1029 (5th Cir.1971), cert. denied, 406 U.S. 933, 92 S.Ct. 1775, 32 L.Ed.2d 136 (1972) (injunctive relief warranted for violations of NEPA).

III. AN INJUNCTION WOULD NOT IRREPARABLY HARM DEFENDANTS AND WOULD SERVE THE PUBLIC INTEREST.

A. The Public Interest Is Served If Government Officials Act In Accordance With the Law

Agency compliance with environmental laws "invokes a public interest of the highest order: the interest in having government officials act in accordance with the law." Seattle Audubon Society v. Evans, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991), aff'd, 952 F.2d 297 (9th Cir. 1991); see also Fund for Animals v. Espy, 814 F. Supp. 142, 152 (D.D.C. 1993) ("the public has a strong public interest in the meticulous compliance with the law by public officials."); Patriot v. U.S. Department of Housing and Urban Development, 963 F.Supp. 1, 6 (D.D.C. 1997) ("the public interest is best served by having federal agencies comply with the requirements of federal law").

B. Delays In Construction Start Would Benefit Current Commuters and Local Businesses

Defendants may argue that any injunction would prolong the currently unfavorable traffic conditions for local commuters and residents. To the contrary, the start of construction will greatly exacerbate, not ease, the travel headaches of the local public. A recent study demonstrated that for many major highway projects the additional time that commuters spend stuck in construction traffic takes years or decades to be made up for through the ostensible increased traffic movement after construction is completed. Barker declaration at ¶ 20 n.43. Indeed, for at least one highway construction project the study found that commuters would never make up for the time lost stuck sitting in construction delays. Any delays in the start of construction will only benefit the general public and that general public interest will be further advanced if the result of an

injunction is a complete re-thinking of how to improve transportation in the U.S. 281/Loop 1604 corridors. See generally Pl. Ex. B.

C. Expansion of U.S. 281 north of Loop 1604 will exacerbate bottleneck at the intersection of 281 and Loop 410

According to a report by the American Highway Users Alliance – which includes the Alliance of Automobile Manufacturers, the Sand & Gravel Association, Portland Cement Association, the Associated Equipment Distributors and Associated General Contractors of America – San Antonio has three of the worst traffic bottlenecks in America. According to the 2004 report, the U.S. 281 and Loop 410 interchange was the 149th worst bottleneck. See Barker Declaration at ¶ 21 n.44. In 2002 the intersection handled an average of 167,325 vehicles per day and drivers experienced an annual 1,778,000 hours worth of delays.

The Alliance report advises that by targeting funds specifically to improving such bottlenecks transportation officials will reduce commuting time, traffic deaths and injuries, and environmental damage. Instead the proposed project will increase the capacity of U.S. 281 and arterials to feed traffic into that bottleneck and make it progressively worse, as sprawl increases further and further north along the 281 corridor. Barker Declaration at ¶ 21.

CONCLUSION

Therefore, Plaintiffs respectfully request that a preliminary injunction issue for the brief period required to resolve this matter on the merits. Plaintiffs commit to taking

all possible step to expedite a final resolution should an injunction issue. Plaintiffs request that only a nominal bond be required to secure the injunction.[10]

Dated this 21st day of December, 2005

Respectfully Submitted,

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[10] Rule 65(c) of the Federal Rules of Civil Procedure requires an applicant for preliminary relief to post security "in such sum as the court deems proper." "The amount of security required is a matter for the discretion of the trial court; it may elect to require no security at all." Corrigan Dispatch Co. v. Casa Guzman, S.A., 569 F.2d 300, 303 (5th Cir. 1978). The federal courts have recognized that nominal bond is sufficient and appropriate where public interest groups seek enforcement of environmental laws. See, e.g., NRDC v. Morton, 337 F.Supp. 167, 169 (D.D.C. 1971), aff'd, 458 F.2d 827 (D.C. Cir. 1972) (setting $100 bond for preliminary injunction against large offshore oil lease sale).