**MAX RENEA HICKS**
ATTORNEY AT LAW

P. O. Box 303187
Austin, Texas 78703

(512) 480-8231
rhicks@renea-hicks.com

October 26, 2016

Lyle W. Cayce, Clerk
U. S. Court of Appeals, Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

*by* e-mail

Re: *Fath, et al. v. Texas Dep't of Transportation, et al.*,
No. 16-51281—emergency motion for injunction pending appeal

Dear Mr. Cayce:

Forwarded with this letter in the above-referenced matter are Appellants' Emergency Motion for Injunction Pending Appeal and Record Excerpts accompanying it.

The emergency motion requests the Court to issue an injunction by no later than 4:00 p.m. on November 7, 2016, to stop the two appellee agencies (Texas Department of Transportation and Central Texas Regional Mobility Authority) from beginning right-of-way clearing activities for a highway called State Highway 45 Southwest (just south of Austin) which they have scheduled to commence on November 8, 2016.

The emergency motion provides additional detail but the clearance activities for the highway will cause irreparable harm by permanently destroying the habitat (trees and similar vegetation) for a listed endangered species, the Golden-Cheeked Warbler, under the Endangered Species Act.

Opposing counsel have been notified by telephone yesterday and e-mail today of the filing of this motion. They, and their contact numbers, are:

Matt Bohuslav (TxDOT): 512/475-4099
Jane Webre (CTRMA): cell 512/426-4775, direct office 512/495-6320
Mike Merriman (CTRMA): direct office 512/495-6307.

Sincerely,

__/s/ *Renea Hicks*_____
Max Renea Hicks

encl.

cc: Bill Bunch/Kelly Davis (*by* e-mail)
Clark Richards (*by* e-mail)
Matt Bohuslave (*by* e-mail)
Casey Dobson/Jane Webre/Mike Merriman (*by* e-mail)

**No. 16-51281**

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**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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SHUDDE FATH, SAVE BARTON CREEK ASS'N, FRIENDS OF THE WILDFLOWER CENTER, CAROLE KEETON, FRANK CLOUD COOKSEY, SUSAN AND JERRY JEFF WALKER, DR. LAURIE DRIES, SAVE OUR SPRINGS ALLIANCE, INC., MOPAC CORRIDOR NEIGHBORS ALLIANCE, THE FRIENDSHIP ALLIANCE OF NORTHERN HAYS COUNTY, INC., and CLEAN WATER ACTION,
*Plaintiffs-Appellants*,

v.

TEXAS DEPARTMENT OF TRANSPORTATION and
CENTRAL TEXAS REGIONAL MOBILITY AUTHORITY,
*Defendants-Appellees*.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION
No. 1:16-cv-234

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# APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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Renea Hicks
LAW OFFICE OF MAX RENEA HICKS
P. O. Box 303187
Austin, Texas 78703
(512) 480-8231
rhicks@renea-hicks.com

Clark Richards
RICHARDS, RODRIGUEZ & SKEITH, LLP
816 Congress Avenue, Suite 1200
Austin, Texas 78701
(512) 476-0005
crichards@rrsfirm.com

Bill Bunch
SAVE OUR SPRINGS ALLIANCE
905 W. Oltorf St., Suite A
Austin, Texas 78704
(512) 477-2320
bill@sosalliance.org

ATTORNEYS FOR PLAINTIFFS-APPELLANTS

**CERTIFICATE OF INTERESTED PERSONS**
**No. 16-51281**

SHUDDE FATH, *ET AL.*,
*Plaintiffs-Appellants*,

v.

TEXAS DEPARTMENT OF TRANSPORTATION, *ET AL.*,
*Defendants-Appellees*.

The undersigned counsel of record certifies the following listed persons and entities as described in the fourth sentence of Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

| **Parties/entities** | **Counsel** |
|---|---|
| *Plaintiffs-Appellants*<br>Shudde Fath<br>Save Barton Creek Association<br>Friends of the Wildflower Center<br>Carole Keeton<br>Frank Cloud Cooksey<br>Susan and Jerry Jeff Walker<br>Dr. Laurie Dries<br>Save Our Springs Alliance, Inc.<br>MoPac Corridor Neighbors Alliance<br>The Friendship Alliance of Northern Hays County, Inc.<br>Clean Water Action | Renea Hicks (*lead counsel*)<br>LAW OFFICE OF MAX RENEA HICKS<br><br>Dan Richards<br>Clark Richards<br>RICHARDS, RODRIGUEZ & SKEITH, LLP<br><br>Bill Bunch, SAVE OUR SPRINGS ALLIANCE<br>Kelly Davis, SAVE OUR SPRINGS ALLIANCE |
| *Defendant-Appellee*<br>Texas Department of Transportation | Matthew Bohuslav<br>TEXAS ATTORNEY GENERAL'S OFFICE<br>P.O. Box 12548<br>Austin, Texas 78711<br>(512) 320-0667<br>matthew.bohuslav@texasattorneyngeneral.gov<br><br>Shane D. Neldner |

| | |
|---|---|
| | TEXAS ATTORNEY GENERAL'S OFFICE<br>P.O. Box 12548, Capitol Station<br>Austin, Texas 78711<br>(512) 463-2004<br>shane.neldner@texasattorneygeneral.gov |
| *Defendant-Appellee*<br>Central Texas Regional Mobility Authority | C. Brian Cassidy<br>LOCKE LORD BISSELL & LIDDELL<br>100 Congress, Suite 300<br>Austin, Texas 78701<br>(512) 305-4700<br>bcassidy@lockelord.com<br><br>Casey Dobson<br>Jane Webre<br>Michael Merriman<br>SCOTT DOUGLAS & MCCONNICO LLP<br>303 Colorado Street, Suite 2400<br>Austin, Texas 78701<br>(512) 495-6300<br>cdobson@scottdoug.com<br>jwebre@scottdoug.com<br>mmerriman@scottdoug.com<br><br>Elizabeth E. Mack<br>LOCKE LORD BISSELL & LIDDELL, LLP<br>2200 Ross Avenue, Suite 2200<br>Dallas, Texas 75201<br>(214) 740-8000<br>emack@lockelord.com<br><br>John Robert Nelson<br>LOCKE LORD LLP<br>600 Congress Avenue, Suite 2200<br>Austin, Texas 78701<br>(512) 305-4700<br>jnelson@locklord.com |

*/s/ Renea Hicks*
Renea Hicks
*Counsel of Record for Plaintiffs-Appellants*

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**EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL**

This is an environmental case under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d ("NEPA"), and the binding regulations by the Council on Environmental Quality implementing NEPA ("CEQ regulations") (codified Ch. 40 C.F.R.) on appeal from denial of a preliminary injunction. The movant-appellants ("Plaintiffs") seek an emergency injunction under the All Writs Act, 28 U.S.C. § 1651(a), enjoining two government agencies in Texas from starting clearing activities for a new roadway in an environmentally fragile area near the city limits of Austin. These activities begin on November 8, prompting Plaintiffs to ask that the requested injunction issue no later than 4:00 pm the day before, November 7, 2016.

This injunction would preserve the *status quo* pending a final trial on the merits or a ruling in this appeal. The new roadway is one of three linked roadway projects closely related in timing and geography, with cumulative impacts, requiring an overall environmental analysis. A Texas state agency, standing in the shoes of the Federal Highway Administration, has refused to perform this comprehensive analysis. Whether any of them in isolation has independent utility, the three pieces are, in reality, "one continuous course of action"—same time, same place, same environment—that NEPA requires be studied in a single environmental analysis.

TXDOT failed to meet its NEPA obligations under §§ 1502.4(a) and 1508.25(a) of the CEQ regulations. The district court rested its preliminary injunc-

tion denial on the erroneous legal conclusion that these CEQ rules are supplanted or displaced, rather than merely supplemented, by the Federal Highway Administration's (FHWA) anti-segmentation rule at 23 C.F.R. § 771.111(f).

By confining its analysis to the anti-segmentation rule and relegating the CEQ's cumulative and single course of action rules to legal irrelevancy, the district court committed a legal error that, when corrected, requires that the most immediate project be stopped until NEPA and the CEQ regulations are satisfied. By allowing TXDOT to artfully dodge NEPA by looking only at the anti-segmentation rule violates the CEQ's cumulative and single-course of action regulations. They require a single analysis of the projects' combined environmental impacts. The specific actions that Defendants are poised to initiate just two weeks from now, in the absence of the requested emergency injunction cannot be undone; their environmental effects are harsh and irreversible. NEPA and its binding regulations do not force this chain of events on Plaintiffs and, under law, forbids it.

The only rights that those such as Plaintiffs have under NEPA are procedural rights. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (NEPA mandates, not particular results, but a "necessary process"). This makes it particularly critical that agencies be compelled to closely adhere to NEPA's procedural requirements. NEPA is generally recognized as an environmental Magna

Carta,[1] and its procedures require no more than a hard look *in advance* at the consequences of governmental actions that threaten the environment—but *that* is a legal requirement, not mere precatory language The denial of the preliminary injunction is inconsistent with this NEPA mandate and would allow what is plainly a single course of action in an environmentally fragile and critical area of Central Texas to proceed as separate pieces without the requisite advance look at their combined environmental impacts and potential alternatives.

The requested emergency injunction will allow this Court, and possibly the district court, an opportunity to determine whether Plaintiffs are correct in NEPA reading on this point; it is urged that the requested injunction be issued. There is no justification for Defendants to insist that a project they argue has been on the drawing board for a quarter century move forward now before the courts address basic NEPA issues and whether its procedural mandates may be evaded by a shell game.

## I. OVERVIEW OF UNDERLYING LAWSUIT AND ACTION GIVING RISE TO THIS EMERGENCY MOTION

### A. General description of parties and environmental claim

Plaintiffs challenge the decision of two government agencies[2] to proceed with a 3-piece set of temporally, geographically, and functionally united highway projects

[1] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 193 (D.C. Cir. 1991)

[2] The two agencies are the Texas Department of Transportation ("TxDOT") and the Central Texas Regional Mobility Authority ("CTRMA"), the latter a regional governmental entity. As discussed below in Part B.1, although TxDOT generally functions as a state agency, it is acting as a federal agency in the circumstances of this case. CTRMA serves primarily as TxDOT's agent in connection with the challenged activities. Hence, the text focuses mainly on TxDOT's actions.

in the South Austin area without performing in advance the requisite "hard look" at the environmental impacts of the cumulative actions. The linked set of projects would overlay the recharge zone of one of the most environmentally sensitive groundwater bodies in the United States, the Barton Springs segment of the Edwards Aquifer. MRE 116-117. In addition to its importance as a unique urban water body, it also hosts three listed endangered species, listed specifically because large highway construction and closely related urbanization constitute a combined threat of near-term extinction. *See* MRE 85-86. Since these highly vulnerable water and wildlife resources are not threatened by any one action, but rather are by the *combined* direct, indirect, and cumulative impacts of major highway construction and ensuing urbanization, the only way to fulfill NEPA's mandate is to study Defendants' three-part corridor project together in one study. *See Kleppe v. Sierra Club*, 427 U.S. 390, 409-10 (1976)(environmental consequences must be studied together where several proposals for actions involving similar activity will have "cumulative or synergistic environmental impact upon a region" and are "pending concurrently before an agency").

**B. Imminent construction on SH 45 SW and permanent destruction of endangered species habitat**

The piece of most immediate environmental concern is State Highway 45 Southwest Phase I ("SH 45 SW"). In addition to crossing the Aquifer's recharge zone, paving over some, and introducing pollution to other, caves and sinkholes

that provide direct pipelines into the aquifer and Barton Springs, SH 45 SW would cut a surface swath across about 3.6 miles of mostly undisturbed land containing mature woodlands providing habitat for the endangered Golden-Cheeked warbler.

TxDOT and CTRMA have announced that they are poised to begin clearing the SH 45 SW right-of-way on November 8. MRE 133, 176 ¶ 10. That is when they will begin bulldozing the path, clearing out brush and trees, and "earth-grubbing," which involves tearing out and destroying the root systems of the felled trees. It is undisputed that 58 acres of warbler habitat currently exist on the SH 45 SW right-of-way. MRE 73, 90. The endangered warblers use the right-of-way and regularly nest alongside it on protected land on both sides, and any clearing and "grubbing" of the right-of-way will destroy the habitat and fragment and degrade the remaining nearby habitat. MRE 99, 104-107, 109-111. This habitat destruction cannot be mitigated. Similarly, this clearing and subsequent construction cannot prevent the direct flow of construction sediment and other pollution directly into the aquifer and endangered salamander habitat. MRE 116-120. Defendants do not dispute that SH 45 SW construction plans violate guidelines approved by U.S. FWS to protect the endangered Barton Springs salamander. MRE 227-228.

Defendants openly recognize the irreparable harm that will be done. In fact, it is the very reason that they have given for insisting on going forward now with these activities instead of waiting for this lawsuit to be decided on the merits in at

most a few months. Defendants complain that they cannot wait until spring and, instead, want to start destroying trees and clearing right-of-way on November 8 because the endangered warblers will not be in the area then; they will be wintering farther south. The birds will return in the spring—but it will not be to any of their tree habitat in the SH 45 SW corridor. Unless Defendants are stopped by the Court order requested here, the habitat will be gone by then.

## II. PLAINTIFFS SOUGHT A PRELIMINARY INJUNCTION, BUT IT WAS DENIED.

### A. Plaintiffs request a preliminary injunction to stop commencement of SH 45 SW land-clearing actions.

Plaintiffs filed their NEPA suit under the Administrative Procedure Act at the end of February.[3] MRE 7. Plaintiffs held off filing a formal application with the district court until it became clear that Defendants' target date for starting clearance work would come before issues about the administrative record could be resolved and final trial held. Then, Plaintiffs filed their application, seeking exactly the same relief in the trial court that they now seek here. MRE 41-45; *see also* MRE 46-126, 227-228. Defendants responded in opposition. *See* MRE 127-178. The district court heard argument on October 12—no testimony or exhibits were offered. *See* MRE 18. The parties relied on their written submissions and evidence.

[3] All events in court occurred during 2016.

## B. The district court denied the requested preliminary injunction.

The district court denied the preliminary injunction in a written order on October 19. MRE 213-226. Before summarizing the district court's rationale for denying the requested injunction, the arguments for it will be summarized, preceded by a short explanation of TxDOT's unique role in this matter.

### 1. TxDOT is functioning for NEPA purposes as a federal agency.

Day to day, year to year, TxDOT is, as its name suggests, an agency of the State of Texas. But at the end of 2014, it entered into a Memorandum of Understanding ("MOU") with an arm of the United States Department of Transportation, the Federal Highway Administration ("FHWA"), and was delegated FHWA's NEPA responsibilities. The MoPac South undertaking at issue in this case is among TxDOT's first steps in FHWA's NEPA shoes.

The MOU made it clear that TxDOT was obligated to follow NEPA and CEQ regulations. Paragraph 3.1.1 specifically provided: "TxDOT assumes… all of the USDOT Secretary's responsibilities for compliance with [NEPA] with respect to" federal highway projects, including "statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for Federal highway projects such as 23 U.S.C. 139, **40 CFR parts 1500-1508**, DOT Order 5610.1 C, and 23 CFR part 771 as applicable." MRE 209-210 (emphasis added). *See also* MOU ¶ 5.1.1, MRE 211 (stating TxDOT subject to, among other things, CEQ regulations and

federal court decisions). While TxDOT had started its three separate environmental evaluations for the MoPac South undertaking a year and a half before being delegated federal NEPA duties, it was acting under the MOU at the time it issued the environmental decisions under challenge here.

**2. Summary of Plaintiffs' arguments for preliminary injunction**

An overview of Defendants' three-part project is first. The three parts would be studied and built at the same time and in the same place. Together, they are a fully-linked road running a total of 14 unbroken miles (but for a tiny 650-foot gap in one spot). They all are perched atop the recharge zone of the vulnerable Barton Springs aquifer. Together, they would create a major new travel corridor linking rural areas in northern Hays County to job centers in central Austin and beyond. Despite the painfully obvious fact that they together serve a single continuous transportation function, Defendants nonetheless separated them into three compartmentalized studies: (a) SH 45 SW; (b) Intersections; and (c) Express Lanes. Agency evaluation of all of them began at essentially the same time in 2013, one in April, one in May, and one in June. MRE 27-32.The attached map shows the three parts, their connecting roadways, and their relationship to the aquifer. MRE 207.

SH 45 SW would be a brand new tolled four-lane road running southeast to northwest, starting on the east end at a recently expanded five-lane roadway and extending to, and tying seamlessly into, the southern end of MoPac South. Initiat-

ing their work as a federal environmental study, Defendants reversed course and carried out a purely state, non-NEPA study of SH 45 SW. *See* MRE 92-93, 27-28.

Express Lanes would be an 8-mile tolled expansion of existing MoPac South, which currently runs 10.5 miles from north of a bridge crossing Lady Bird Lake near downtown Austin to a termination point where SH 45 SW would tie into it. Express Lanes would convert MoPac South from an untolled four-to-ten-lane roadway into a partially-tolled eight-to-sixteen-lane throughway. MRE 133, 172.

The Intersections Project is between MoPac South Express Lanes and SH 45 SW that will link them together. Together, the three would make MoPac South into a continuous, high speed highway and new north-south travel corridor linking the newly expanded FM 1626 at the southeast to the now-under-construction "MoPac Improvement Project" toll lane expansion to the north. MRE 58, 172.

Despite its name, Intersections would add six lanes (two express and one auxiliary in each direction) to 2.1 miles of the southern end of MoPac, with only a 650-foot gap before the SH 45 SW piece begins. MRE 50, 88-89, 95. Intersections would also replace the only two stoplights for MoPac travelers, providing elevated, crossover bridges and new stop lights for local traffic. MRE 88-89.

Initiated under one contract for preliminary engineering and environmental studies from "Cesar Chavez to SH 45 SW," Defendants bifurcated the NEPA analysis into a short-form Environmental Assessment" ("EA") and "Finding of No

Significant Impact" for the 2.1 mile Intersections, MRE 49, MRE 96, MRE 88-89, and a still pending EA for the connecting 8.1 mile Express Lanes.[4] MRE 133.

Plaintiffs argued that NEPA required TxDOT to study the environmental impacts of these three projects under one umbrella evaluation, before Defendants could go forward with construction on any one of the bureaucratically-separate pieces. MRE 46-48, 63. They are "cumulative actions" and "similar actions" constituting a "single course of action" under NEPA and the CEQ regulations (ignored by Defendants) and, thus, their environmental impacts had to be studied together. Otherwise the cumulative and combined environmental impacts on the aquifer, endangered species, the Lady Bird Johnson Wildflower Center, and other resources and, equally important, the consideration of alternatives to establishing a new major, 14-mile highway corridor would never be analyzed together. MRE 56-60.

**3. The district court's rationale for denying the preliminary injunction**

The district court first held that the CEQ regulations governing federal agencies (including TxDOT) do not apply to challenges alleging improper segmentation of projects. MRE 217-218. Instead, it held that TxDOT could rely exclusively on the segmentation rule promulgated especially by and for FHWA. MRE 218 (citing 23 C.F.R. § 771.111(f)). It then applied the FHWA segmentation regulation by considering not the linkages among the three projects but by focusing on only one

[4] The Intersections and Express Lanes Environmental Assessments share an official public information and comment website at www.MopacSouth.com.

of the projects—Intersections—to see if it, standing alone, satisfied the criteria. MRE 218-222.[5] It concluded that Intersections by itself met the 23 C.F.R. § 771.111(f) criteria. MRE 220.

The court then turned to the separate question of "cumulative impacts." Here, it did look at the CEQ regulations, but only in a narrow sense, entirely separate from the analysis about cumulative, connected, and similar actions, and single continuous course of action. It concluded that Defendants' narrow analysis, and decision not to consider the cumulative impacts of SH 45 SW and Express Lanes in the Intersections EA, and thus the FONSI, was sufficient. MRE 223. It held that, again standing alone, the Intersections environmental analysis considered cumulative impacts sufficient for NEPA purposes. MRE 222-223.

Finally, the district court determined that there was insufficient federal involvement in the SH 45 SW project to subject it as a separate project to NEPA's requirements for environmental analysis. *Id*. at 11-13. As a result of its conclusion on the likelihood of success factor, the district court did not address the other requirements for a preliminary injunction. *Id*. at 14.

## III. THE DISTRICT COURT COMMITTED LEGAL ERROR IN TWO WAYS, AND THIS COURT SHOULD ISSUE AN INJUNCTION WHILE THIS APPEAL IS PENDING.

### A. Plaintiffs focus in this motion on only one of the legal issues below.

[5] The court indicates at the end of a footnote that, while it will "address only the Intersections project," it still will "analyze the project *in the context of its relation to the SH 45SW and Express Lanes projects*." MRE 219, n.2. (emphasis added). The latter does not appear to have happened. Neither of those two other projects is mentioned in the analysis on this point.

For this emergency motion, Plaintiffs focus their attention, and the Court's, on one of the several legal issues preliminarily determined below: that the CEQ regulations governing federal agencies in carrying out their NEPA duties did not apply to TxDOT's decision setting the scope of each study to three, smaller, blinkered studies rather than pursue a single comprehensive study of its overall project.

### B. The Court's failure to require TxDOT to follow binding CEQ regulations was a critical legal error.

#### 1. TxDOT is legally obligated to follow *all* CEQ regulations, not just those that are consistent with its chosen course of action.

The district court improperly allowed TxDOT to pick and choose which CEQ regulations to follow in applying NEPA to its MoPac South endeavors. The rules and the MOU with FHWA left TxDOT with no such choice. TxDOT agreed that it was assuming "all" of FHWA's NEPA responsibilities for highway projects, specifically including "*40 CFR parts 1500-1508*," which are the CEQ regulations, and 23 CFR part 771, as applicable. MRE 209-210 (emphasis added). This acceptance of the duty to observe the full gamut of CEQ regulations was a necessary component of TxDOT's stepping into the shoes of the federal government for NEPA purposes since the "CEQ regulations . . . are binding on federal agencies[.]" *City of Dallas v. Hall*, 562 F.3d 712, 722 (5th Cir. 2009).

Even the FHWA regulations for NEPA implementation—which the district court treated as an independent set of rules trumping CEQ regulations—make clear

that the CEQ regulations remain fully applicable, independent of the § 771.111(f) rules that the Court used to deny the preliminary injunction:

> This regulation prescribes the policies and procedures . . . for implementing the National Environmental Policy Act of 1969 as amended (NEPA), and *supplements* the NEPA regulation of the Council on Environmental Quality (CEQ), 40 CFR parts 1500 through 1508 (CEQ regulation). *Together* these regulations set forth all FHWA . . . requirements under NEPA for the processing of highway and public transportation projects.

23 C.F.R. § 771.101 (emphasis added). "The provisions of this regulation *and* the CEQ regulation apply" to projects where the FHWA—and TxDOT standing in its shoes—exercises authority. 23 C.F.R. § 109(a)(1) (emphasis added).

**2. The district court improperly relieved TxDOT from complying with CEQ regulations—§§ 1502.4(a) and 1508.25(a)—that it was bound to follow, but did not.**

The district court does not even cite in any substantive discussion[6]—while reading them out of existence—two related provisions of the CEQ regulations which TxDOT violated. The first is § 1502.4(a), which specifies:

> Agencies *shall* use the criteria for scope (§1508.25) to determine which proposal(s) *shall be* the subject of a particular statement. Proposals or parts of proposals which are *related to each other closely enough to be, in effect, a single course of action shall* be evaluated in a single impact statement.

40 C.F.R. § 1502.4(a) (emphasis added). The second, to which § 1502.4(a) instructs agencies such as TxDOT to turn, requires ("*shall* consider") agencies to consider in one impact statement "[c]umulative actions, which when viewed with

[6] The district court does not cite one of the controlling regulations—§ 1502.4(a). Its only citation to the other one is merely to note it at the beginning of the discussion of cumulative impacts. MRE 222. It is not mentioned or discussed in the part of the injunction denial where it is salient.

other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." 40 C.F.R. § 1508.25(a)(2). The CEQ regulations "require that an agency consider . . . 'cumulative actions' within a single EA or EIS." *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1118 (9th Cir. 2000) (citing 40 C.F.R. § 1508.25). This CEQ regulation also calls for "similar actions" with common timing and geography to be considered together in one environmental study, yet the record is clear that Defendants, and then the trial court, never even considered these standards.[7]

Rather than apply or discuss these CEQ requirements, the district court ruling supplants (rather than supplements) them with the narrower and substantively different FHWA regulation about individual segmentation decisions, § 771.111(f). MRE 218. While the court opens the discussion with a toss-away observation of the real governing rule—that is, that the "general rule under NEPA" makes segmentation of highway projects "improper," MRE 217—it forces the square peg of this case into the round hole of § 771.111(f) by concluding that the latter provision controls over any other. This is a fundamentally erroneous application of NEPA law, and the cases relied upon by the court do not support its ruling.

[7] It is important to note that a federal court "owes no deference" to an agency's (here, TxDOT's) interpretation of NEPA or the CEQ regulations "because NEPA is addressed to all federal agencies and Congress did not entrust administration of NEPA" to the individual agencies by themselves." *Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C. Cir. 2002).

It first cites *Coalition on Sensible Transportation, Inc. v. Dole*, 826 F.2d 60 (D.C. Cir. 1987). MRE 217-218. But *Sensible Transportation* does not hold that § 771.111(f) overrides the NEPA requirements in §§1502.4(a) and 1508.25(a)(2). It barely mentions the latter regulations, much less provides an analysis of them—and that is because the plaintiffs there relegated the issue to a footnote. *See* 826 F.2d at 436 n.8. It merely finds (at the end of a footnote) that this point "essentially" raises the segmentation issue in a different context. In Plaintiffs' case, though, §§ 1502.4(a) and 1508.25(a) were hardly relegated to footnote status. Their preliminary injunction argument *begins* with a discussion of the failure of TxDOT to meet the mandates of these two regulations. *See* MRE 47, 56-60.

Even more significant is the district court's next citation, where it says that the D.C. Circuit that decided *Sensible Transportation* "later looked back" to it and confirmed the propriety of what the court painted as its approach (a picture which itself was not the picture actually painted in *Sensible Transportation*). *See* MRE 218, citing *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014). *Riverkeeper* hardly validated the district court's over-reading of *Sensible Transportation*. In fact, it showed the necessity of relying on § 1508.25(a) and ensuring that agencies comply with it in meeting their NEPA obligations. Unlike the district court here, the *Riverkeeper* court specifically applied § 1508.25(a) as a separate requirement that must be met if NEPA is to be followed. "[W]hen determining the

contents of an EA or an EIS, an agency *must* consider all . . . "cumulative actions" and "similar actions." 753 F.3d at 1314 (emphasis added). The D.C. appeals court then goes on to specifically repudiate the reading the district court gave to the CEQ regulations generally and *Sensible Transportation* in particular.[8] It is worth quoting in some detail because it so plainly refutes the key holding below:

> It is noteworthy that FERC does not at all address the requirements of 40 C.F.R. § 1508.25(a)(1) or § 1508.25(a)(3) in defending its determination that the four projects should be treated separately. Indeed, FERC never even cites the applicable regulations which form the basis of Petitioners' claims in this case. . . . Instead, FERC relies on the four factors we announced in *Taxpayers Watchdog v. Stanley*, 819 F.2d 294 (D.C. Cir. 1987), to argue that it did not impermissibly "segment" its NEPA analysis. But as we made clear in *Coalition on Sensible Transportation, Inc. v. Dole*, 826 F.2d 60, 68 (D.C. Cir. 1987), an agency's consideration of the proper scope of its NEPA analysis should be guided by the governing regulations. There, we stated that "[i]n considering the proper scope of the ... project, the district court quite properly referred to Federal Highway Administration regulations." *Id*. We then quoted the agency-specific scoping regulations that govern in the context of a federal highway project. *Id*. (quoting 23 C.F.R. § 771.111(f)). We then remarked that *Taxpayers Watchdog* relied on "the same or closely similar factors." *Id*. But even if the analyses were closely related, *the point remains: the agency's determination of the proper scope of its environmental review must train on the governing regulations, which here means 40 C.F.R. § 1508.25(a)*.

753 F.3d at 1315 (emphasis added).

The district court tries to buttress its misapplication of the way CEQ regulations operate in this context by citing two Fifth Circuit cases, *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225 (5th Cir. 2007), and *Save Barton Creek Ass'n v.*

[8] *Riverkeeper* dealt specifically with subsections (1) and (3) of § 1508.25(a), rather than subsection (2), which is more pertinent here. *See* 753 F.3d at 1308-09, 1314-15. But that focus changes nothing in the rationale's applicability.

*FHWA*, 950 F.2d 1129 (5th Cir. 1992). MRE 218. *Save Barton Creek* provides no support for the district court's undue truncation of the CEQ regulations. It does not even cite or discuss the two sections, §§ 1502.4(a) and 1508.25, and it certainly does not hold that they are supplanted by the FHWA's own NEPA regulations. The key difference between *SBCA* and this case, disregarded in the district court's analysis, is that here, unlike in *SBCA*, the three segments at issue *are* "scheduled for simultaneous or continuous construction[.]" *SBCA*, 950 F.2d at 1141. This, of course, mirrors the "one continuous course of action" language of § 1502.4(a), the provision which the district court erroneously dispensed with as a legal impediment to letting SH 45 SW construction go forward.

A second key difference is that the future, merely "contemplated" highway segments in *SBCA* would circumnavigate the Austin region, and, unlike here, would not share a common geography with cumulative impacts to the highly vulnerable water and wildlife resources found in southwest Austin. See 950 F.2d at 1137. These differences meant that §§ 1502.4(a) and 1508.25(a) were not pertinent to *SBCA*, and thus not discussed there.

Plaintiffs submit that Defendants' three-part MoPac South /SH 45 SW endeavor is, to quote the very words of §1504.2(a), "in effect, a single course of action." They are cumulative actions and similar actions, pursued at the same time, functionally interdependent, and with cumulative impacts on well-defined, highly vul-

nerable water and wildlife resources that are at grave threat precisely because of cumulative—not individual—impacts of highway construction and urbanization. The record is clear that Defendants wholly ignored these controlling and applicable regulations in defining the narrow scope of each study, constituting textbook arbitrary and capricious decisionmaking, and the trial court abused its discretion in refusing to apply them. *See Motor Vehicle Mfrs.' Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding agency action is arbitrary and capricious if the agency has relied on factors which Congress did not intend it to consider or "entirely failed to consider an important aspect of the problem.")

Finally, *O'Reilly* separated the analysis of cumulative impacts from segmentation, citing § 1508.25(a) in connection with the former, not the latter. 477 F.3d at 234 (§ 1508.25 requires "that agencies take cumulative impacts into consideration during NEPA review"). This is anything but support for the district court's conclusion that segmentation analysis displaces § 1508.25(a)'s requirements.

In sum, the district court's rationale for disregarding the requirements of §§ 1502.4(a) and 1508.25(a) is inconsistent with the CEQ regulations themselves, clashes with FHWA's own regulations which make clear that the CEQ regulations *and* § 771.111(f) must be satisfied under NEPA, and is not only not supported, but refuted, by the case authority it cites in support, particularly by *Riverkeeper*.

**3. Plaintiffs will suffer irreparable harm in the absence of an emergency injunction; Defendants will suffer limited harm; and the public interest would be served by an injunction.**

Granting a preliminary injunction is appropriate where the plaintiff shows that the threatened harm to the environment and plaintiff's interests is irreparable. *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 574 (5th Cir. 1974). Plaintiffs described the irreparable harm to the environment that would be suffered in the absence of a preliminary injunction. *Supra* at 6, MRE 48, 94. A temporary injunction order is also necessary "to preserve the court's ability to render a meaningful decision on the merits." *Callaway*, 489 F.2d at 573. Thus, "[a]lthough the fundamental fairness of preventing irremediable harm to a party is an important factor…, the most compelling reason in favor of (granting a preliminary injunction) is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act." *Id*. (citing Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2947). Plaintiffs have met this burden.

In contrast, Defendants' harms will be primarily monetary, of limited extent, and speculative, based on potential escalated costs due to delay. Further, Defendants will likely have to slow down their SH 45 SW construction any way because, as they have admitted, the MoPac Intersections project needs to be completed before or at the same time as the SH 45 SW project. MRE 87 ("The desire is to open the MoPac mainlanes extending under Slaughter Lane and under La Crosse Ave-

nue before SH 45SW is open to traffic."). Defendants do not intend to initiate construction on Intersections until next May, or later. MRE 37.

The final factor in considering whether to grant a preliminary injunction is whether the injunction is in the public interest. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). Here, the SH 45 SW toll way does not serve any critical national defense or public health or safety need that would outweigh the public interest benefits of protecting endangered species habitat, preserving the integrity of the NEPA process, and protecting the Court's jurisdiction. Generally, courts have found that the public interest in requiring agencies to comply with NEPA prior to a project commencing is ample to merit an injunction. *W. Ala. Quality of Life Coal. v. FHWA*, 302 F. Supp. 2d 672, 687 (S.D. Tex. 2004).

## PRAYER FOR RELIEF

Plaintiffs urge the Court to issue an emergency injunction under the All Writs Act before November 8, barring TxDOT, CTRMA, and their agents from commencing any construction or surface clearance activities on the SH 45 SW right-of-way until this Court reaches a final decision on the preliminary injunction appeal.

Respectfully submitted,

*/s/ Renea Hicks*
Renea Hicks
Texas Bar No. 09580400
LAW OFFICE OF MAX RENEA HICKS
P. O. Box 303187
Austin, Texas 78703

(512) 480-8231
rhicks@renea-hicks.com

*/s/ Clark Richards*
Clark Richards
Texas Bar No. 90001613
RICHARDS, RODRIGUEZ & SKEITH, LLP
816 Congress Avenue, Suite 1200
Austin, Texas 78701
(512) 476-0005
crichards@rrsfirm.com

*/s/ Bill Bunch*
Bill Bunch
Texas Bar No. 03342520
Save Our Springs Alliance
905 W. Oltorf St., Suite A
Austin, Texas 78704
(512) 477-2320
bill@sosalliance.org

ATTORNEYS FOR PLAINTIFFS-APPELLANTS

**CERTIFICATE OF SERVICE**

Using the appellate CM/ECF system, this document was served on all registered counsel for the parties and transmitted to the Clerk of the Court on the 26th day of October, 2016.

*/s/ Renea Hicks*
Renea Hicks
ATTORNEY FOR PLAINTIFFS-APPELLANTS