UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SHUDDE FATH,	§	
SAVE BARTON CREEK ASSOCIATION,	§	
FRIENDS OF THE WILDFLOWER CENTER,	§	
CAROLE KEETON,	§	
FRANK CLOUD COOKSEY,	§	
SUSAN AND JERRY JEFF WALKER,	§	
DR. LAURIE DRIES,	§	
SAVE OUR SPRINGS ALLIANCE, INC.,	§	No. 1:16-CV-234-LY
MOPAC CORRIDOR NEIGHBORS ALLIANCE,	§	
THE FRIENDSHIP ALLIANCE OF NORTHERN	§	
HAYS COUNTY, INC., AND	§	
CLEAN WATER ACTION,	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
TEXAS DEPARTMENT OF TRANSPORTATION	§	
AND CENTRAL TEXAS MOBILITY AUTHORITY,	§	
Defendants.	§	

PLAINTIFFS' BRIEF ON THE MERITS

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LIST OF EXHIBITS

GLOSSARY OF TERMS

AASHTO – American Association of State Highway Transportation Officials

APA – Administrative Procedures Act

BMPs – Best Management Practices

CEQ – Council on Environmental Quality

CAMPO – Capital Area Metropolitan Planning Organization

CTRMA – Central Texas Regional Mobility Authority

EA – Environmental Assessment

EIS – Environmental Impact Statement

FHWA – Federal Highway Administration

FONSI – Finding of No Significant Impact

FWS – Fish and Wildlife Service

ICI – Indirect and Cumulative Impacts

MSAT – Mobile Source Air Toxics

NEPA – National Environmental Policy Act

TCEQ – Texas Commission on Environmental Quality

TxDOT – Texas Department of Transportation

WPAP – Water Pollution and Abatement Plan

I. BACKGROUND

A. Legal challenges

Plaintiffs challenge the validity and sufficiency of environmental studies accompanying a suite of fully-integrated highway infrastructure actions along, and connecting with, the existing MoPac South highway corridor. Pigeonholed by their agency proponents into three project names (SH 45 SW-Phase 1, Intersections, and Express Lanes), this suite of actions cuts for 14 unbroken miles (but for a 650-foot gap) through and over the recharge zone for the Austin area's most significant, and threatened, environmental feature, the Barton Springs segment of the Edwards Aquifer. The aquifer and the areas crossed by the new roadways host three federally-listed endangered species[1]—all forced onto the list because they face near-term extinction, primarily from the direct, indirect, and cumulative effects of Defendants' extensive highway construction and the associated urbanization that follows.

Defendants failed for two reasons to meet their federal statutory obligation under NEPA to prepare a single environmental analysis of (at minimum) the three pieces of their current and ongoing MoPac South highway infrastructure undertaking. First, they failed to perform a unified single analysis of the cumulative actions, and their cumulative impact, prior to initiating any of the actions, as required by § 1508.25(a)(2) of the CEQ's NEPA regulations. Second, they failed to satisfy the requirements of the FHWA's § 771.111(f) regulation for segmenting the three pieces of the MoPac South initiative by considering improper factors and failing to consider the required factors set out in the rule. The agencies also failed to perform a sufficient environmental assessment ("EA") of the Intersections piece to justify the "finding of no significant impact" as to it. Finally, the administrative record ("AR") fails to show that the agencies complied with Section 4(f) by avoiding noise and other impacts that would constitute a prohibited constructive use of the Lady Bird Johnson Wildflower Center, a park or recreation area of significance.

[1] They are the golden-cheeked warbler, the Barton Springs salamander, and the Austin blind salamander.

B. The road segments, the setting, and key facts

The attached map, Exhibit 5, illustrates, the three highway segments directly at issue in this case. Starting at the end farthest from downtown Austin, SH 45 SW Phase I would be a new tolled four-lane highway running southeast to northwest, starting in the southeast, just downstream of the Barton Springs Edwards Aquifer recharge zone, connecting to the recently expanded five-lane FM 1626 corridor and running 3.6 miles across mostly undisturbed, undeveloped land—and through 58 acres of what until the last few months was habitat for the endangered golden-cheeked warbler—where it will seamlessly link to the southern end of a modified MoPac South. At the other end, starting at West Cesar Chavez Street, is Express Lanes, an 8-mile tolled expansion of current MoPac South. Express Lanes will change MoPac South from an untolled four-to-ten lane roadway into a partially-tolled eight-to-sixteen lane throughway. Intersections is between SH 45 SW and Express Lanes. It would add six new lanes to 2.1 miles of MoPac, two highway lanes and one auxiliary lane in each direction.[2] When inserted, Intersections will complete the conversion of MoPac South into a continuous, high-speed expressway linking the newly expanded FM 1626 with the tolled MoPac Improvement Project north of Lady Bird Lake.[3]

Intersections and Express Lanes are admitted federal projects, as are two related-in-time companion projects, FM 1626 and the MoPac Improvement project—with which they (and SH 45 SW) link. As shown in Exhibit 5, SH 45 SW, Intersections, and Express Lanes are the only parts of the MoPac/SH 45 SW corridor that cross the Barton Springs recharge zone.

The agencies set the three highway infrastructure actions—SH 45 SW, Intersections, and Express Lanes—in motion at essentially the same time and with roughly the same schedules. The Express Lanes EA launched in April 2013 with an expected completion in Fall 2015. Ex. 3. The

[2] Contrary to its usual description, Intersections will not "remove" stoplights at Slaughter Lane and La Crosse Avenue. It will build through-lanes under them, so that MoPac traffic will not have to slow down or stop. Regional travelers on the new MoPac lanes would avoid these traffic signals if Intersections were built. But traffic crossing MoPac or entering or exiting MoPac at Slaughter or La Crosse would still navigate stop lights on both sides of the new MoPac main lanes. *See* INT AR0011686-89, AR011937-38.

[3] In the next decade or so, under the long-term plans approved by CAMPO the 14-mile MoPac South suite of actions would be part of a loop starting at IH- 35 on Austin's south side and running more than 25 miles near downtown Austin's west side, to link again with IH-35 on Austin's north side. *See* INT AR010184.

Intersections EA launched the following month with an expected completion in late 2014. Ex. 3. The SH 45 SW study launched the next month, in June 2013, with an expected completion in 2015.[4] Ex. 3. They all started out as federally-funded projects, but along the way TxDOT moved SH 45 SW into the "state-funded" category. As shown in the footnote below, there are a host of interlocking transportation efforts in the area.[5]

Since it was placed into the "state funded" category, SH 45 SW did not receive an environmental analysis under federal law. Instead, TxDOT followed a more skeletal, non-NEPA-compliant state process which, for example, allowed the agencies to publish a draft EIS finding "no significant impacts" while carrying out the actual scientific studies to "support" the previous conclusions made after the fact. The state Record of Decision on SH 45 SW issued March 4, 2015, finding no significant environmental impacts from SH 45 SW.[6] SH 45 AR 024252. For Intersections, TxDOT issued its finding of no significant impact (FONSI) on December 22, 2015. INT AR11710-11. Clearing activities and construction staging are underway for SH 45 SW while Intersections has been slated to launch in May.

C. The Contrasting, Holistic Approach to Listing the Endangered Salamanders.

A few months after the agencies launched their environmental studies, an important event occurred: the U.S. Fish & Wildlife Service (FWS) listed the Austin Blind salamander as an endangered species. INT AR006525. The listing, based on the best available scientific and commercial information, was supported by two scientific peer review panels. INT AR006530. The

[4] These dates are found at various places in the record but the attached and offered Exhibit 3, a pertinent excerpt of a CTRMA Board report from October 2013, sets out the dates clearly with other relevant information. "CTRMA" refers to the Central Texas Regional Mobility Authority. It is a regional political subdivision governed by an appointed board. For the matters in this case, it is acting as an agent for TxDOT and, consequently, is also directly governed by NEPA and the CEQ regulations in carrying out its duties.

[5] In October 2012, just six months before launching the three South MoPac studies, Defendants launched yet a fourth environmental study on the proposed Oak Hill Parkway project. The estimated $529 million proposal would connect to the Express Lanes project and add six new toll lanes running over 3 miles west from MoPac along US 290 and SH 71. Ex.3; *see generally* http://www.oakhillparkway.com. Over half of the Oak Hill Parkway would cross the Barton Springs Edwards recharge zone; the remainder falls in the upstream contributing zone. *Id*. Of the four environmental studies, the Oak Hill study is the only one slated for a full NEPA EIS. Although started first and slated to conclude in early 2016, with a projected 2018 construction start, no draft EIS has yet been released for public comment. Only the EA and FONSI for Intersections and the state Final EIS for SH 45 SW have been completed.

[6] TxDOT conducted a supplemental environmental analysis for SH 45 SW, which issued July 15, 2016.

listing and its detailed statement in support is particularly relevant here for two reasons. First is the extent to which FWS found that the Austin Blind salamander (AB salamander) and its high-quality aquifer and Barton Springs habitat were threatened by the *cumulative* effects of large scale highway construction and operation and associated urbanization planned for and taking place in the Barton Springs watershed.[7]

Second is the degree to which Defendants, in developing their piecemeal environmental studies, sought to ignore and minimize the overwhelming science amassed by FWS that the exact highway development activities they were pursuing threatened the very survival of the species and the aquatic habitats on which they depend. Most notably, Defendants assert that for SH 45 SW there will be no significant effects, and for Intersections "no effects" at all to the Austin Blind salamander and its Barton Springs habitat because of the water quality mitigation measures it is undertaking pursuant to the state's "Edwards Aquifer Rules." INT AR011662-63. However, a major reason for listing the AB salamander as endangered was the inadequacy of local and state rules to protect water quality and the salamander.[8]

II. APPLICABLE LAW

A. Standards of Review

Plaintiffs agree, but for one critical addition, with the Court's statement of the applicable standards of review set out in in its Order on Preliminary Injunction (Doc. 89) ("PI Order"). Rather than repeat them, we incorporate them by reference. *See* PI Order at 4-5.

[7] "Cumulatively, as threats to the species increase in tandem with increasing urbanization within the surface watersheds of these species, more and more populations will be lost." INT AR006569. "Degradation of habitat, in the form of reduced water quality and quantity and disturbance of springs sites []is the primary threat to the [AB salamander]. Reductions in water quality occur primarily as a result of urbanization, which increase the amount of impervious cover in the watershed and exposes the salamander to more hazardous material sources. . . . Construction activities are a threat to both water quality and quantity because they can increase sedimentation and exposure to contaminants as well as dewater springs." *Id*.

[8] "Data indicate that water quality degradation at Barton Springs continues to occur despite the existence of current regulatory mechanisms in place to protect water quality; therefore, these mechanisms are not adequate to protect [Austin blind salamanders] and its habitat now, nor do we anticipate them to sufficiently protect the species in the future. INT AR006569. FWS further declared that the TCEQ Edwards Rules specifically allowed for increased pollutant discharge and "these regulations were not intended or designed specifically to be protective of the salamanders." INT AR006564.

The addition—especially critical given the argument that Defendants failed to follow a CEQ regulation that is *not* addressed in FHWA regulations—is that the Court owes no deference to TxDOT's interpretation of NEPA or the CEQ regulations. No deference is owed because "NEPA is addressed to all federal agencies and Congress did not entrust" its administration to any one agency. *Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C. Cir. 2002) (citing cases); *see also Alaska Wilderness League v. Jewell*, 811 F.3d 1111, 1117 n.2 (9th Cir. 2015) (same). This no-deference principle has even greater strength in the context of this case, in which the agency bound by NEPA had no role in developing the CEQ regulations and is here taking its first step as an entity directly charged with implementing them, not to mention NEPA itself.

B. Fundamentals of NEPA and CEQ regulations.

Plaintiffs challenge the decision not to study the actions as cumulative actions and to segment them for study purposes,[9] as well as the inadequacy of the Intersections FONSI. They also challenge Intersections because it will constitute an impermissible use of the Lady Bird Johnson Wildflower Center. The challenges are detailed below. All are brought under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (APA), particularly § 706(2)(A)'s requirement that courts are to set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Ultimately, Plaintiffs seek to have the challenged administrative decisions vacated and the matters remanded to TxDOT for it to act consistently with the law, as determined by this Court and, while the matters are under administrative review on remand, to have the Court enjoin any further physical activity at the sites of the infrastructure actions.[10]

1. NEPA as a process requirement

Enacted in 1969, NEPA requires federal agencies to prepare an environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environ-

[9] When agencies have made clear—as TxDOT has here—that they do not intend to prepare a single comprehensive impact statement on all proposed projects in a region, courts may entertain a NEPA challenge to such a decision. *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976).

[10] Plaintiffs understand that there may be a need to craft the injunction so that environmentally-protective interim activity—such as steps to prevent erosion and run-off in areas already subjected to clearing and related activities—may be undertaken as needed.

ment." 42 U.S.C. § 4332(2)(C). NEPA's essential premise is that federal agencies are compelled to take a "hard look" in advance at the environmental effects of actions subject to NEPA. *See, e.g., Gulf Restoration Network v. U.S. Dep't of Transp.*, 452 F.3d 362, 367 (5th Cir. 2006). The statute does not dictate policy choices that agencies must take once they have met their NEPA responsibilities. *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 676 (5th Cir.), *cert. denied*, 506 U.S. 823 (1992) (even allows projects patently destructive of the environment). But it does move environmental consciousness to the forefront by imposing an enforceable legal requirement that agencies adhere to a "necessary" process before moving forward with a project. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see also Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998) (NEPA "emphasizes the importance of coherent and comprehensive up-front environmental analysis").

2. Binding nature of CEQ's NEPA regulations on TxDOT

In 1970, the White House's Council on Environmental Quality ("CEQ") developed guidelines to help federal agencies implement NEPA's requirements. As things developed, some federal agencies treated the guidelines as only advisory, so CEQ revised the guidelines into regulations intended to bind the agencies, rather than merely advise them. 43 Fed. Reg. 55,978 (Nov. 29, 1978). Codified at 40 C.F.R. Parts 1500-1508, these regulations specifically provide that they are "binding" on federal agencies. 40 C.F.R. § 1500.3. The courts have validated their binding nature. *Andrus v. Sierra Club*, 442 U.S. 347, 356-58 (1979); *City of Dallas v. Hall*, 562 F.3d 712, 722 (5th Cir. 2009), *cert. denied*, 559 U.S. 935 (2010). Further, courts must give the CEQ regulations "substantial deference." *Methow Valley*, 490 U.S. at 356; *Save Barton Creek Ass'n v. FHWA*, 950 F.2d 1129, 1134 (5th Cir.), *cert. denied*, 505 U.S. 1220 (1992).

Despite typically functioning as a state agency, the Texas Department of Transportation ("TxDOT") is bound by NEPA and, quite importantly in the context of this case, the CEQ regulations, because it is acting as a federal agency. In December 2014, it entered into a memorandum of understanding with the Federal Highway Administration (FHWA) in which FHWA's

NEPA and § 4(f) responsibilities were delegated to TxDOT. The MoPac South "endeavors" in dispute are among the first, if not *the* first, actions by TxDOT as FHWA's NEPA *alter ego*.[11] While TxDOT began the environmental evaluations for MoPac South in 2013, before entering into the MOU, it was acting in the stead of FHWA when the decisions at issue in this case were made and published.

III. ARGUMENT

CLAIM 1: Impermissible failure to conduct a single environmental analysis of the three projects.

Against this backdrop, attention now can be focused on the first main issue in the case: Under NEPA and the CEQ regulations, was TxDOT required to conduct its evaluation of the potential environmental impacts of SH 45 SW, Intersections, and Express Lanes in a unified single environmental analysis? That it did not do that is undisputed. Two separate analyses, and the related decisions based on them, have already been completed, one for SH 45 SW and one for Intersections. Neither evaluated the potential environmental impacts of the other or of Express Lanes. As a result, if the law requires that all three be evaluated in a single environmental document, then TxDOT has violated NEPA, its decisions must be vacated, and an injunction should issue stopping activity under the legally invalid decisions while the proper evaluation is conducted on remand to the agency from this Court.

A. CEQ NEPA regulations §§ 1508.25(a)(1) and 1508.25(a)(2) impose separate, independent legal requirements on TxDOT.

The first step in determining the answer to the "single analysis" issue is recognition that the law requires two separate, independent inquiries, one for whether these actions are "cumulative actions" under the CEQ regulations and another—a *separate* one—for whether these actions are "connected actions." These provide alternate, independent grounds for invalidation. If TxDOT falls short under either inquiry, it has violated NEPA and not acted "in accordance with law."

[11] Making it doubly clear that TxDOT was fully obligated to adhere not only to NEPA, but also the binding CEQ regulations, paragraph 3.1.1 of the MOU specifically lists the CEQ regulations as among the NEPA obligations TxDOT must meet. INT AR009900-01, *see also* AR009907 (TxDOT subject to CEQ regulations and federal court decisions on NEPA).

To understand why the law requires separate inquiries for these two NEPA concepts—"cumulative actions" and "connected actions"—it is necessary to walk through the way CEQ regulations operate and , it helps to look at the critical terms where this inquiry originated.

1. *Kleppe v. Sierra Club*

In the 1976 NEPA decision in *Kleppe v. Sierra Club*, the Court distinguished agency actions that are "proposed" from those that are merely "contemplated." 427 U.S. 390 (1976). After explaining that it could properly consider whether there was a NEPA violation when agencies have made clear that they are not going to prepare a single comprehensive impact statement on "*all proposed actions in the region*," *Id*. at 409 (emphasis added), the Court explained when NEPA required a full analysis: "when several proposals for . . . actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together." *Id*. at 410. This, of course, describes the situation here. But Plaintiffs cannot stop at *Kleppe* because, though it set the NEPA standard, the decision ultimately rejected the NEPA challenge in the circumstances before the Court.

2. CEQ makes NEPA regulations binding and incorporates *Kleppe*'s concept

CEQ, however, took careful note of this important standard when it revised and strengthened its NEPA regulations in 1978 and made them binding on agencies in TxDOT's situation. *See Fritiofson v. Alexander*, 772 F.2d 1225, 1242 (5th Cir. 1985) ("1978 binding CEQ regulations "reflect the recognition in *Kleppe* . . . that comprehensive impact statements may sometimes be required").[12] CEQ instructed agencies that they had to make sure that they properly define "the proposal which is the subject of an [EIS]," and, in that connection, "[p]roposals…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*." § 1502.4(a) (emphasis added). To determine the need for the single

[12] The Court should not be thrown off the *Fritiofson* trail by subsequent case history showing that it is "abrogated." It was abrogated but only on the single point of deference. *See Sabine River*, 951 F.2d at 677 (noting that, after *Fritiofson*, the Supreme Court in *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360 (1989), had adopted the "arbitrary and capricious" standard of review instead of the Fifth Circuit's prior "reasonableness" standard). In all other respects, including the points made further along in this brief, *Fritiofson* remains binding precedent.

impact statement it required ("*shall* be"), section 1502.4(a) directs agencies to follow the scoping rules in § 1508.25.[13] Thus, the required test for when a single impact statement has to be prepared is in § 1508.25, specifically subsection (a). *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1097-98 & n.12 (9th Cir. 2012) ("[W]hether an agency must prepare a single EIS for more than one proposal turns on the criteria set forth in § 1508.25." *Id*. at 1098 (quoting subsection (a) in particular). In § 1508.25(a), CEQ specifically directs that agencies "shall consider 3 types of actions." The two with which the Court must be concerned in this case are "connected actions," identified in subsection § 1508.25(a)(1), and "cumulative actions," identified in subsection (2).[14]

These two legal rubrics are distinct. An agency's NEPA analysis must satisfy each of them independently. *Coal. on Sensible Transp., Inc. ("COST") v. Dole*, 826 F.2d 60, 69-70 (D.C. Cir. 1987). There, the appeals court separately evaluated a cumulative impact claim and a segmentation claim (the latter of which is undertaken for "connected actions," as further discussed below). After observing that the cumulative impact claim might be viewed by some "as simply a replay of the improper-segmentation argument already considered," the court explained the error in such a reading. The CEQ regulations, it said, "provide a distinct meaning" to the cumulative impacts concept. *Id*. at 70.[15] *See also Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1172-74 & 1182-84 (10th Cir. 2002) (providing separate analyses for (a)(2) cumulative actions and (a)(1) connected actions); *Coal. on W. Valley Nuclear Wastes v. Chu*, 592 F.3d 306, 311 (2d Cir. 2009) (same distinction; only analyzed "connected actions").

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[13] "Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement." § 1502.4(a), 2nd sent.

[14] The third category of actions is "similar actions," found in subsection (3) of § 1508.25(a). Unlike the other two § 1508.25(a) categories, the responsible agency retains some discretion about conducing a single environmental analysis for actions under this rubric. *See* § 1508.25(a)(3), 2nd sent. ("*may* wish") (emphasis added). Plaintiffs do not rely on this category, and it is not further discussed in this brief.

[15] Later authority from the District of Columbia Circuit makes it clear that *COST*'s "cumulative impacts" discussion is really about "cumulative actions." *See Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 51 (D.C. Cir. 2015) (referring to it as the "cumulative actions doctrine"). Consistent with *COST*, this later decision continued to perform separate NEPA analyses for cumulative and connected actions. *Id*. at 49-51.

The Fifth Circuit has similarly drawn a clear distinction between the two § 1508.25 requirements. *See Fritiofson*, 772 F.2d at 1242. *Fritiofson*'s distinction is key and clearly spelled out. There the court tells us "cumulative actions" in § 1508.25 are "defined in a manner consistent with *Kleppe*." *Id*. In contrast, "connected actions" are "defined in a manner consistent with the criteria in the independent-utility cases"—which is to say, under what is commonly referred to as segmentation analysis. *Id*. *Fritiofson* further explains it is "important to remember that issues of economic and functional dependence are distinct from questions of environmental synergy, and that concerns in both areas may trigger the need for a comprehensive EIS." *Id*. at 1241 n.10.

Since *Fritiofson*, the Fifth Circuit has continued to perform separate analyses for these two NEPA concepts. *See O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 234-38 (5th Cir. 2007) (cumulative impacts first, segmentation next). In fact, it may fairly be said that, without directly discussing the point, the same distinction was implicitly recognized in the *SBCA* segmentation case. There, in the course of its segmentation analysis of the facts at hand, the court explained that *those* cases found NEPA violations in the context of "simultaneous or continuous construction." 950 F.2d at 1141.[16] *SBCA* did not directly address the issue of "cumulative actions," which encompass concurrently pending "proposals," the issue presented in this case.

3. Incorrect preliminary legal conclusion in Preliminary Injunction Order.

With it established that cumulative actions and connected actions are two different NEPA requirements, binding on TxDOT as part of the CEQ regulations, the need for the Court to re-evaluate and modify its PI Order is apparent. There, the Court's analysis focuses only on segmentation under the FHWA 23 C.F.R. § 771.111(f) rule. That is the FHWA rule that substantially overlaps with the CEQ "connected actions" rule —and justifies that approach by concluding that the "FHWA regulations control" over the separate CEQ regulations *Id*. at 5. The authority most immediately relied upon by the Court in supporting that conclusion is *COST*—but that case

[16] Both of the two "distinguished" cases—*Hawthorn Envtl. Pres. Ass'n v. Coleman*, 417 F. Supp. 1091 (N.D. Ga. 1976), *aff'd per curiam*, 551 F.2d 1055 (5th Cir. 1977), and *Named Indiv. Members of San Antonio Conservation Soc'y v. Tex. Dep't of Highways*, 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972)—pre-date *Kleppe* and the 1978 promulgation of, among other CEQ regulations, § 1508.25(a).

specifically holds that conducting a segmentation analysis under FHWA's § 771.111(f) is *not* the same thing as conducting an analysis of cumulative actions and impacts. 826 F.2d at 70 (calling them "distinct"). *Fritiofson*, which is controlling precedent, reaches the same conclusion. 772 F.2d at 1242.[17] The argument here is not that the CEQ regulations supply something above and beyond § 771.111(f) on the issue of segmentation. The CEQ regulations add a legally separate and distinct standard, that TxDOT entirely disregarded and that, had it been addressed, would have required a single environmental analysis for the three-piece infrastructure program for the MoPac South corridor. The FHWA regulations, particularly § 771.111(f), do not "control" over the CEQ's § 1508.25(a)(2) regulation about "cumulative actions." They simply do not address the concept—meaning that TxDOT has no choice but to address the binding rule in § 1508.25(a).

4. FHWA's own regulations acknowledge that they do not supplant CEQ regulations

Reinforcing this governing law, and consistent with it, are FHWA's own NEPA regulations, which state that the "regulation"—meaning all of the Part 771 provisions—"*supplements*" the CEQ's NEPA regulations. 23 C.F.R. § 771.101 (emphasis added). "The provisions of [Part 771] *and* the CEQ regulations apply" to projects where the FHWA—TxDOT in this instance—exercises authority. 23 C.F.R. § 771.109(a)(1) (emphasis added). Thus, the FHWA's own regulations recognize that § 771.111(f) does not override the CEQ regulations. Rather, it is the regulation that must be applied in the highway context to determine whether a series of related actions

[17] Plaintiffs disagree with the Court's statement on this point but do not mean this as direct criticism of the Court. In the rush attending the preliminary injunction hearing, their briefing was less pointed and clear, and provided the Court less assistance, than they would have wished. As reflected in the transcript, at least one member of the appellate panel hearing the emergency stay application at oral argument on November 4, 2016, was perplexed at the argument's focus, stating "whether it was improperly segmented or not they did not actually consider the cumulative effect of it. . . . it's a better argument." Ultimately, the *per curiam* denial of the emergency stay did not directly and definitively determine the question of whether, as the appeals panel characterized it, this Court was correct in its PI Order in "determining that Section 771.111(f) supplies the exclusive means for determining whether an agency has improperly segmented its environmental analysis." 5th Cir. Order at 3 (Nov. 4, 2016). This statement confuses Plaintiffs' argument by treating the argument that, beyond FHWA § 711.111(f), CEQ regulations also apply to TxDOT as being made in conjunction with the *segmentation* argument. That is incorrect. The argument—perhaps not well made and certainly not well enough made—was that the CEQ regulations, and § 1508.25(a)(2) in particular, had to be satisfied, too, not because they said something different about segmentation than the FHWA regulation but because they said something on a different legal requirement, cumulative actions. In any event, the panel order is not authoritative case law past the immediate circumstance it addressed, 5th Cir. Order at 4 n.1, and was carefully drawn to state, not that Plaintiffs were wrong, but only that they had not provided "on-point authority, *id*. at 4.

are freed somehow from the "connected actions" single-analysis requirement of § 1508.25(a)(1). *See, e.g., Utahns*, 305 F.3d at 1183 (citing *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1037 (10th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002)).

FHWA lacks authority to wipe away § 1508.25(a)(2)'s requirement for single environmental analyses for "cumulative actions" by enacting a regulation complementing § 1508.25(a)(1)'s separate requirement as to "connected actions."[18] Section 771.111(f) has no effect on § 1508.25(a)(2) and the cumulative actions analysis it requires.

B. Violation of "cumulative action" rule of § 1508.25(a)(2)

CEQ regulation § 1508.25(a)(2) provides that TxDOT "shall consider . . . cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." Under § 1508.7, "cumulative impacts" are the environmental impact resulting 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) . . . undertakes such other actions."

As *Fritiofson* recognized, 772 F.2d at 1242, these provisions are intended to make binding the principle first stated by the Supreme Court in *Kleppe*. *Kleppe* said, in this regard, that "when several proposals for . . . actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together." 410 U.S. at 410.

The three projects, which TxDOT has decided will be environmentally analyzed separately, not together, are "cumulative actions" under the *Kleppe* and § 1508.25(a)(2) principles. The "cumulative action" principle fits the trio of SH 45 SW, Intersections, and Express Lanes like a glove. The highway segments will indisputably have cumulative impacts on important and ex-

[18] Courts consistently use segmentation analysis to evaluate the "connected actions" requirement in §1508.25(a)(1). *See, e.g., Sierra Club*, 803 F.3d at 49; *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313-17 (D.C. Cir. 2014); *Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 426 (4th Cir. 2012); *Utahns*, 305 F.3d at 1182-84; *Fritiofson*, 772 F.2d at 1242. *Uthans*, in particular, was a NEPA highway case that analyzes § 1508.25(a)(1) "connected actions" together with the FHWA's § 771.111(f).

tremely vulnerable land, water, and wildlife resources, as well as on commuters and the Lady Bird Johnson Wildlife Center.[19] It is undisputed that Defendants ignored the binding § 1508.25(a)(2) standard. The case law supports the conclusion that this violation is substantive and not waived even assuming compliance with § 771.111(f). *O'Reilly* identifies the covered cumulative actions to be those "closely related and proposed or reasonably foreseeable actions that are related by timing *or* geography." *O'Reilly*, 477 F.3d at 234-35 (emphasis added), quoting *Vieux Carre Prop. Owners, Residents, & Assocs., Inc. v. Pierce*, 719 F.2d 1272, 1277 (5th Cir. 1983).[20]

In *Blue Mountains Biodiversity Project*, the court held that the Forest Service had failed to meet NEPA's cumulative actions requirement when it separately studied logging projects "in the same watershed." 161 F.3d at 1214.[21] The court highlighted that, even though the environmental study did not treat the projects as coordinated, the agency did make them part of a "coordinated Tower Fire recovery strategy." *Id*. at 1215.

Finally, in *Delaware Riverkeeper v. FERC*, the lead opinion for the court tacked onto the end of its opinion a holding that the agency had violated the cumulative actions requirement. 753 F.3d 1304, 1319-20 (D.C. Cir. 2014). This, it turns out, was the determinative holding, as the two concurring opinions (in a three-judge panel) show. The first concurrence found the cumulative impacts shortcomings determinative, given the "close timing, functional interdependence, and physical connectedness" of the four projects. *Id*. at 1320 (J. Brown, concurring in part). The second concurrence joined in invalidation of the environmental decisions specifically because of "the timing of these different projects." *Id*. (J. Silberman, concurring).

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[19] The connecting and concurrently proposed Oak Hill Parkway will add to these harmful cumulative impacts.

[20] A little further along in the opinion, the *O'Reilly* court confirms that its reference to "or geography" includes a geographic element in the cumulative actions rule. 477 F.3d at 235 ("foreseeable future developments *in the project area*") (emphasis added). This matches *Kleppe*'s inclusion of a geographic component. 427 U.S. at 410 ("upon a *region*") (emphasis added). This may differ slightly from the District of Columbia Circuit, which has said that the cumulative actions doctrine "is not concerned with geographic segmentation." *Sierra Club*, 803 F.3d at 51. In the Fifth Circuit, it is.

[21] *Blue Mountains* did not specifically cite § 1508.25(a)(2), but a later decision in that circuit explained that it really was a § 1508.25(a)(2) case. *See Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895 (9th Cir. 2002).

C. The cumulative action rule covers non-federal projects, including SH 45 SW

An important component of the cumulative actions analysis, with its necessary consideration of cumulative impacts, is that the range of cumulative impacts that must be considered is expressly extended to include non-federal actions, too. *See, e.g.*, § 1508.7 (range of actions extends to all actions "*regardless* of what agency (Federal *or non-Federal*) . . . undertakes such other actions") (emphases added). The District of Columbia Circuit only recently confirmed that § 1508.25(a)(2)'s obligation incudes non-federal actions, too. *Sierra Club*, 803 F.3d at 51 (referring to § 1508.25(a)(2), "it prevents agencies from ignoring the environmental effects of other actions, *without regard to whether their author was federal*") (emphasis added).

This means that TxDOT's insistence that SH 45 SW is a non-federal project because it does not use federal funds, even if correct, does not remove SH 45 SW from being swept into the analysis required by § 1508.25(a)(2). Regardless of its federal or non-federal status, it, too, must be part of the cumulative actions/cumulative impacts analysis demanded by CEQ's NEPA regulations. This point takes on even greater potency when the fact that the very same agency—TxDOT—is in charge in the very same way of both the indisputably federal actions (Intersections and Express Lanes) and the alleged non-federal action (SH 45 SW).

In conclusion, Defendants' failure to perform a single environmental analysis assessing the three cumulative actions, and their cumulative impact, violates NEPA requirements under § 1508.25(a)(2). They are more than just reasonably foreseeable actions (which alone would be sufficient to bring them under § 1508.25(a)(2)). They started at the same time and are concrete proposed actions, not mere "drawing board" projects. They cover the same territory and critical environmental features—or, to borrow *Blue Mountain*'s phrase, they are "in the same watershed." They are physically connected, with one running seamlessly into the other over a 14-mile span (which is precisely the way they were planned and designed). Similar to the disjunction observed in *Blue Mountain* (in which the responsible agency treated the projects in a coordinated fashion for its fire protection mission but not for environmental analysis purposes), the transpor-

tation agencies evaluated the three projects in a coordinated fashion for its mission (traffic and highway improvements) but not for environmental analysis purposes. CTRMA Answer ¶ 49; SH 45 AR 012840, INT AR010740. The violation of NEPA and the § 1508.25(a)(2) cumulative actions mandate is clear and compelling.

CLAIM 2: Defendants violated FHWA's § 771.111(f) by considering improper factors and failing to consider required factors when segmenting SH 45 SW, Intersections and Express Lanes.

A. The Court's Preliminary Injunction order.

This court, in its order on preliminary injunction, in setting aside CEQ's §1504.2 and § 1508.25(a) rules, turned to the FHWA's § 771.111(f) "segmentation" rule as the only one that applies to Plaintiffs' highway segmentation claims. It quotes the FHWA rule, but then turns to *SBCA v. FHWA* and preceding cases rather than the content of the rule itself. The court's drift away from the rule to the case law is understandable; other courts have taken the same approach, ignoring both the plain language of Section 771.111(f) and the intent of the rule.

However, a close reading of *SBCA* makes clear that its segmentation analysis followed NEPA common law and did **not** apply FHWA's 771.111(f) rule. 950 F. 2d at 1140, n. 15. The *SBCA* court found that this common law applied where, as there, only state highway projects existed that were alleged to be part of a larger and likely federal future highway action.[22] This common law utilizes the terms "independent utility" and "logical termini," but is distinct from the definitions of these terms in, and the additional requirements of, § 771.111(f). The details of § 771.111(f) matter.

B. What FHWA's anti-segmentation rule says and means

The FHWA anti-segmentation rule provides:

> (f) ***In order to ensure meaningful evaluation of alternatives*** and to avoid commitments to transportation improvements before they are fully evaluated, the action evaluated in each EIS or finding of no significant impact (FONSI) shall:

[22] *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430 (5th Cir. Unit B 1981), relied on most heavily by the *SBCA* court, references only the common law of "independent utility" and "logical termini."

> (1) Connect logical termini ***and be of sufficient length to address environmental matters on a broad scope****;*
> (2) Have independent utility or independent significance, i.e., be usable **and be a reasonable expenditure even if no additional transportation improvements in the area are made**; ***and***
>
> (3) **Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.**

23 C.F.R. § 711.111(f) (emphasis added)

Most importantly, the rule defines "logical termini" *in terms of the environment* and *not* in transportation terms. The case law use of "logical termini" – and the agencies' reference to it here -- is the opposite: logical termini are almost always found provided that each end of a road segment proposed for study connects to other roads. For the most, cornfields and *cul de sacs* are the only illogical termini. The question is only about connecting one road to another.

But § 711.111(f) is different. "Logical termini" must "be of sufficient length to address environmental matters on a broad scope." This requirement, missing from the NEPA common law, cannot be ignored, as it was by the agencies here.

> The policy underlying the segmentation doctrine should not get lost in this plethora of [§ 711.111(f)]factors. The motivating concern is the prevention of agency evasion of NEPA by carving up one project or related projects into segmented bits too small to allow for consideration of environmental matters on a broad scope.

Ass'n Concerned About Tomorrow v. Dole, 610 F. Supp. 1101, 1108-09 (N.D. Tex. 1985).

In many cases, the common law segmentation doctrine similarly circumscribes the "independent utility" factor to near-slogan status. As with "logical termini," if a road segment proposed for study can be driven on from point A to point B, and there's at least some modicum of human activity at each end, then "independent utility" is often found. But the rule requires more: the segment must be "usable and be a reasonable expenditure even if no additional transportation improvements in the area are made." This clearly calls for a financial, or cost-benefit, inquiry. Rarely, as here, is such an analysis presented.

The courts, including this one, when referencing the common law anti-segmentation doctrine, often point to this "independent utility" factor as the most important one, giving less atten-

tion to the other two enumerated factors or to the framework assigned to the three factor test. But the text of the rule provides no basis for favoring one part of the rule and disfavoring the others. The factors are connected with an "and"; they all apply. "Each of the factors set forth in the FHWA regulation bears on whether segmentation is proper." *N.C. Alliance for Transp. Reform, Inc. v. U.S. Dep't of Transp.*, 151 F. Supp. 2d 661, 680 (M.D.N.C. 2001).

The third factor, not restricting "consideration of alternatives for other reasonably foreseeable transportation improvements" is often ignored altogether, or, as in this case, is merely repeated as a conclusion without support. The framework for evaluating the three mandatory and co-equal factors-- to ensure meaningful evaluation of alternatives and avoiding commitments to transportation improvements before they are fully evaluated-- is similarly often quoted with no basis or analysis of any kind.

In short, the common law segmentation doctrine does not fully match the express terms of the FHWA anti-segmentation rule. The rule's words are important—most especially the dictate that "logical termini" must allow for evaluation of environmental matters on a broad scope. Courts "must give effect, if possible, to every clause and word of a statute." *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014).[23]

C. Defendants relied on the area's regional transportation plan list when determining the scope of its studies, in violation of both FHWA and CEQ rules.

From the beginning, when the agencies first addressed the obvious question of why SH 45 SW was being studied separately from the connected and proposed expansion of South MoPac, the first and unequivocal answer has been the same: that the CAMPO regional transportation plan list defines a "project" that dictates the scope of the required environmental studies. The agencies stated repeatedly and consistently that since the CAMPO plan lists SH 45 SW Phase I, SH 45 SW Phase II, Intersections and Express Lanes as four separate projects, then four separate

[23] The canons of construction of course apply equally to any legal text and not merely to statutes. *Smith v. Brown*, 35 F.3d 1516, 1522-23 (Fed. Cir. 1994); *Black & Decker Corp. v. Comm'r of Internal Revenue*, 986 F.2d 60, 65 (4th Cir. 1993) ("Regulations, like statutes, are interpreted according to the canons of construction.").

studies are required. In other words, from the agencies' view at the time, the CAMPO long-range plan project list trumps both the CEQ and FHWA rules defining the scope of required environmental studies. This is a fundamental misreading of the law. It is also a stark admission to having not merely considered an impermissible factor in deciding the scope of its environmental studies but having been controlled by this factor.

In response to comments on the SH 45 SW state study re-evaluation asking why SH 45 SW was not being studied together with MoPac, the agencies responded: "The SH 45 SW project is included in the Capital Area Metropolitan Planning Organization (CAMPO) 2035 plan as a stand-alone project, and as such, each is studied separately." R-002. *See also* AR O22446 AR 017420. This answer has carried through to today. On the MoPac South environmental study website the agencies' "Project FAQs" reads in pertinent part:

> *Why aren't MoPac South, MoPac Intersections, and SH 45 SW being considered together in a single study?*
>
> The Texas Department of Transportation and the Central Texas Regional Mobility Authority are working together to conduct environmental studies on several projects, including MoPac South and MoPac Intersections. SH 45SW recently received a Record of Decision and is moving forward into final design.
>
> Each of these projects is included as a stand-alone project in the [CAMPO] 2040 Plan, and as such, is being studied separately.[24]

Here, as elsewhere, the answer goes on to assert "independent utility" in the absence of other transportation expenditures. But the words are clear: this is merely a secondary point that supports the project scope dictated by CAMPO's regional plan list. By considering the CAMPO plan as dictating the scope of its studies, the agencies acted "not in accordance with law."[25]

D. The AR fails to support a rational consideration of FHWA's anti-segmentation rule at the time it defined the scope of its studies.

[24] http://www.mopacsouth.com/about/faqs.php (accessed Dec. 4, 2017)

[25] Plaintiffs refer the court, and incorporate by reference, the argument set out at pp. 16 -26 of Plaintiffs' Memorandum in Support of Preliminary Injunction (Doc. 69)

Initially Defendant CTRMA's Board approved a $6 million contract for a NEPA-compliant study "to implement the MoPac South Project from Cesar Chavez south to SH 45 in Travis County," a ten-plus mile stretch. Contract for Engineering Services, at 3 (Mar. 27, 2013) (Plfs.' PI Memo, Ex. 3A).[26] Six weeks later TxDOT entered into a $4 million contract for "environmental studies, public involvement, alternative evaluation and development" and other services for "the proposed SH 45 between Loop 1 and I-35 located in Travis and Hays Counties." Work Authorization No. 3, at 1 (May , 2013) (Plfs.' PI Memo, Ex. 3F). The contract requires that the study comply with NEPA requirements. *Id*. at 11.

Within weeks, these two federal studies on two connecting highway projects were split into four pieces, with three parts moving forward and one part left behind. Of the three moving forward, the most controversial and most environmentally damaging piece if taken in isolation—SH 45 SW Phase I—was relabeled a "state" project not subject to NEPA and advanced as quickly as possible through a truncated state review process. The eastern half of SH 45 SW, connecting from FM 1626 to I-35, was dropped from consideration despite the terms of TxDOT's $4 million study contract. The MoPac South study was also bifurcated—into an eight-mile "Express Lanes" study the two-mile Intersections study. Despite being funded and approved by CTRMA as "from Cesar Chavez south to SH 45," the scope of the proposed improvements shrunk, stopping a short distance north of SH 45 SW. The revised Intersections spans 2.07 miles, extending 3,700 feet south of La Crosse and 2,500 feet north of Slaughter, adding six lanes of capacity, three in each direction. In their ultimate configuration, SH 45 SW Phase I and Intersections would terminate just 650 feet shy of each other.

In September 2011 TxDOT commissioned a study for "establishing the SH 45 Southwest project logical termini." Plfs. Mot. to Complete AR, Ex. A2, Doc. 24 (p. 339-511). The purpose was to determine if it could be built in two pieces (MoPac to FM 1626 and 1626 to I-35) or

[26] The contract is available at http://www.mobilityauthority.com/about/board-meeting-agenda.php/36 (agenda item 5 download link).

whether it needed to be built in one piece, from MoPac to I-35. *Id*. at 345-46. FHWA personnel participated in this study, although their exact role is not known because this information is excluded from the AR. *See* Meeting Summ. for SH 45 SW "Logical Termini Evaluation Matrix" (Feb. 14, 2012) (Plfs.' PI Memo, Ex. 3D). Completed in November 2012, the "Logical Termini Technical Memorandum SH 45 Southwest Traffic Study "("Logical Termini" study) illustrates TxDOT's failure to apply § 771.111(f) standards as written. In framing the question, the study collapses all three factors into the "logical termini" inquiry. SH 45 AR 012807. It refuses to acknowledge that these are three *separate* standards to consider.

Most importantly, the report quotes the rule that a project must "[c]onnect logical termini and be of sufficient length to address environmental matters on a broad scope." *Id.* However, the 35-page report never again mentions the environment or how the proposed termini would or would not "be of sufficient length to address environmental matters on a broad scope." Instead, the report only analyzes traffic flow projections for the year 2035 that would result under the two options considered. The environment plays no part in the entire report even though the plain language of the rule calls for a primarily environmental, not transportation, inquiry.

The logical termini study mentions that for the then two-lane FM 1626, the road "would be improved to a five lane facility" pursuant to the recently approved "environmental clearance." *Id*. Final FHWA approval for the FM 1626 expansion from Brodie Lane to RM 967 was given in November 2011. 76 Fed. Reg. 68,810 (Nov. 7, 2011); SH 45 AR at 011930. The report never considers that FM 1626 was not yet built and was a federal project, and that the correct question was whether a two-lane FM 1626 was a logical terminus for the proposed SH 45 SW toll road. One, not-yet-built road project cannot be considered already built to support a "logical terminus" finding on a planned connecting road. *See Indian Lookout Alliance v. Volpe*, 484 F.2d 11 (8th Cir. 1973) (finding a county line where a concurrently planned project would connect an illogical terminus).

Despite purporting to be a "logical termini" study, TxDOT's analysis completely ignores any consideration of the western terminus, at MoPac. As on the eastern end, it assumes that this western terminus has already been upgraded to a "freeway style facility" with the construction of Intersections. SH 45 AR 012818-19, 012840. There is no consideration that perhaps SH 45 SW and Intersections, or, at that time SH 45 SW plus the MoPac South expansion, needed to be considered together in order to be able to consider "environmental matters on a broad scope." In fact, it shows that they were considered together for everything except the purpose of studying their combined environmental impacts.

TxDOT's SH 45 SW logical termini study also quotes the independent utility/ independent significance standard correctly. SH 45 AR 012807. Yet most of the logical termini study projects future year traffic flows on the surrounding roadway network, and then, in the "Conclusions," finds that either of the two SH 45 SW options (one piece or two) is a "desirable project in the study area." SH 45 AR 012839. However, none of this analysis is even relevant because all of it assumes that all of the other projected future network improvements in the CAMPO 2035 plan are put in place, including specifically Intersections. SH 45 AR 012818. *See Hawthorn Envtl. Pres. Ass'n*, 417 F. Supp. at 1100 (finding substantial likelihood of success on segmentation claim where "[t]he state has not made any traffic studies on this section of the highway, but all studies relate to the entire northern segment of the Bypass.").

To the limited extent the agencies sought to show compliance with the FHWA rule on Intersections, they repeated their earlier errors. There is no traffic analysis without the connecting projects assumed to be built. The AR is devoid of any analysis showing that Intersections is of "sufficient length to address environmental matters on a broad scope." Common sense tells us that a two mile stretch of road over the Barton Springs Edwards recharge zone, considered standalone and apart from the 8-mile and 3.6 mile projects being pursued simultaneous at either end simply cannot "address environmental issues on a broad scope." The Court need not agree with

this conclusion. It need only review the AR and see that the agencies simply never even considered the matter.

In summary, the AR establishes beyond any doubt that the agencies relied on factors not intended by Congress and failed to properly apply the plain language of the FHWA anti-segmentation rule.

E. SH 45 SW Phase I as a stand-alone project is subject to NEPA.

CEQ NEPA regulations provide that "major Federal action" encompasses not only actions by the federal government but also actions by nonfederal actors "with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. Due to space constraints and the court's ruling on preliminary injunction, Plaintiffs re-urge their claim that SH 45 SW, in addition to its relationship to the federal road segments at both ends, is subject to NEPA because it is both subject to federal control and potentially subject to federal funding and control, based on our briefing in support of preliminary injunction. That briefing, Doc. 69 at pp. 26-31, and the evidence relied therein, is incorporated herein by reference for all purposes.

CLAIM 3: The EA For MoPac Intersections Is Deficient Under NEPA.

If a proposed federal action will "significantly affect [ ] the quality of the human environment," NEPA requires the relevant federal agency to prepare an EIS for the action. 42 U.S.C. § 4332(2)(C). An agency may, however, prepare an EA in order to determine whether the proposed action is significant enough to warrant an EIS. 40 C.F.R. § 1501.4. If the EA concludes with a Finding of No Significant Impact, no EIS is necessary. *Id*. An EA must disclose and analyze the environmental effects of the proposed action, including its direct, indirect, and cumulative effects. *Id*.§§ 1508.9; 1508.25; *see La. Crawfish Prod. Ass'n-W. v. Rowan*, 463 F.3d 352, 357-58 (5th Cir. 2006).

If the court finds that "the project *may* have a significant impact" on the environment, or 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 order the agency to prepare an EIS or correct the defi-

ciencies in it analysis. *O'Reilly*, 477 F.3d at 239 (quoting *Fritiofson*, 772 F.2d at 1238-39); *Louisiana v. Lee*, 758 F.2d 1081, 1084 (5th Cir. 1985). While an EA and FONSI "need not possess the same detail or clarity as an EIS and may, in part, be informal, mere perfunctory or conclusory language will not be deemed to constitute an adequate record and cannot serve to support the agency's decision not to prepare an EIS." *I-CARE*, 770 F.2d at 434 (citing *Md.-Nat'l Capital Park & Planning Comm'n v. U.S. Postal Serv.*, 487 F.2d 1029, 1039-40 (D.C. Cir. 1973)).

Here, the EA violates NEPA by failing to provide sufficient analysis and support for its conclusion that no EIS was required. Specifically, the EA is deficient because it fails to adequately analyze: (1) direct impacts to groundwater quality and endangered salamanders; (2) impacts to air quality; (3) indirect effects; and (4) cumulative impacts.[27]

A. The EA Fails to Adequately Evaluate Cumulative Impacts

In this case, TxDOT violated NEPA by failing to conduct a cumulative impacts analysis. The ICI Memo contains only cursory and conclusory statements and does not constitute the "hard look" required by NEPA. *See Sierra Club v. Sigler*, 695 F.2d 957, 976 (5th Cir. 1983). The EA states that the proposed project "would not result in substantial direct or indirect impacts to any resource." INT AR011664. TxDOT then applies this finding to TxDOT policy to conclude that a cumulative impact analysis is not required. *Id.;* INT AR010374. This policy is at odds with NEPA's statutory text, implementing regulations, and case law.

Cumulative impact is defined as "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...." 40 C.F.R. § 1508.7. The Fifth Circuit has held that, in the context of an EA or EIS, a "meaningful cumulative-effects study" must identify:

> (1) the area in which effects of the proposed project will be felt;
> (2) the impacts that are expected in that area from the proposed project;
> (3) other actions—past, proposed, and reasonably foreseeable—that have had or are expected to have impacts in the same area;

[27] For ease of reference, the references to the EA from here on out will include the accompanying technical memoranda that the EA relies upon.

(4) the impacts or expected impacts from these other actions; and
(5) the overall impact that can be expected if the individual impacts are allowed to accumulate.

La. Crawfish Prod, 463 F.3d at 357-58 (reviewing EA) (citing *Fritiofson*, 772 F.2d at 1236). The impacts analysis must contain some "quantified or detailed information," and be more than perfunctory; it must provide a 'useful analysis of the cumulative impacts of past, present, and future projects.' " *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379 (9th Cir. 1998).). When making the NEPA-threshold decision on whether to prepare an EIS, agencies must analyze whether it is reasonable to anticipate cumulatively significant impacts from the proposed project when added to the impacts from "past, present, and reasonably foreseeable future actions" that are "related." 40 C.F.R. §§ 1508.7, 1508.27(b)(7); *Fritiofson*, 772 F.2d at 1243.

The EA does not identify other actions, their impacts, or the overall impacts. Despite the "reasonably foreseeable" future actions to construct SH 45 SW and MoPac South Express Lanes, the EA is completely silent on the issue of the cumulative effects these three projects would have on the environment, including Barton Springs. Indeed, a member of the public reviewing the EA would have no indication that SH 45 SW and Express Lanes are being planned at all, even though they would be built in the same geographic area at the same time. Similarly, no information is provided as to the cumulative increase of impervious cover and associated runoff that could impact the Barton Springs segment of the Edwards Aquifer. The *only* place in the AR where Defendants acknowledge a connection between the projects is found in the response to public comments. INT AR010750; INT AR010750.

Plaintiffs recognize that "NEPA does not require an agency to restate all of the environmental effects of other projects presently under consideration." Order on Prelim. Inj. at 11 (citing *Piedmont Heights*, 637 F.2d at 441). But here, Defendants did not even conduct the bare minimum—the cumulative-impacts analysis *does not even mention one single other project*. The EA has the correct title, but none of the required content. Even under the narrow standard of arbitrary and capricious review, this discussion cannot pass muster. *See Natural Res. Def. Council v. Ho-*

del, 865 F.2d 288, 298 (D.C. Cir. 1988) (While "the [ ]EIS contains sections headed 'Cumulative Effects' ... nothing in the [ ]EIS provides the requisite [cumulative] analysis").

"In accordance with TxDOT guidance, a cumulative impacts analysis should focus on resources anticipated to be substantially impacted by the proposed project (either directly or indirectly), as well as resources that would be affected by the proposed project to any degree that are also considered at risk or in poor or declining health." INT AR010371. This TxDOT policy has no basis in federal law. In fact, the focus on resources that would be "substantially impacted" contradicts CEQ's definition of cumulative impacts, which states that "[c]umulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *See* 40 C.F.R. § 1508.7. The Memo here even misapplies TxDOT's own guidelines, which provide that a consideration on whether to analyze cumulative impacts on resources of concern is whether "this *or other activities* will substantially affect the priority resources." INT AR008290 (emphasis added) ("If the project effects are minor, look for other activities (government or private) in the region that may affect the resource. The key factor is whether there are substantial impacts on the resource, not whose actions are causing the impacts."). Yet the ICI Memo only considered whether MoPac Intersections substantially affected a priority resource, and ended the analysis when it concluded the answer was no. Defendants did not follow TxDOT's policy (which is not even as stringent as NEPA requires) to consider whether the effects of multiple projects in the reason would substantially affect the resource.

Furthermore, the position that no cumulative impacts analysis is required when there are no "substantial" impacts vitiates the requirement to consider cumulative impacts in an EA. Because an EA, by definition, is prepared when there are not known significant impacts, and there is no meaningful difference between "substantial" and "significant," then under TxDOT's logic, an EA would never have to include cumulative impacts analysis (except, possibly, if there were direct impacts to at-risk resources. But there is nothing in NEPA or CEQ regulations that state a cumulative impact analysis need only be limited to effects on vulnerable resources. The status of

vulnerability may affect the analysis, but not whether to conduct it. Effects are defined to include "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetics, historic, cultural, economic, social, or health effects." 40 C.F.R. § 1508.8.

The adequacy of a cumulative-impacts analysis usually turns on whether future actions were "reasonably foreseeable." Here, that is not even an issue; TxDOT concedes that SH 45 SW and MoPac South are reasonably foreseeable projects not included in the cumulative-impacts analysis. *See* INT AR010741; AR010750 ("[T]his project was **not** analyzed in light of other past, present, and reasonably foreseeable future actions such as SH 45SW and MoPac South.") (emphasis added) [28]; *see also* TxDOT Answer ¶ 44 (Doc. 12); CTRMA Answer ¶ 49 (Doc. 65) (admitting that SH 45 SW is a "reasonably foreseeable project" relative to the MoPac Intersections study). SH 45 SW and MoPac South Express Lanes constitute "reasonably foreseeable" future actions whose cumulative impacts must be responsibly addressed. There is a reasonable basis to believe that the other road projects will be implemented. *See Tex. Com. on Natural Res. v. Van Winkle*, 197 F. Supp. 2d 586, 618-19 (N.D. Tex. 2002). The Final EIS for SH 45 SW was approved in January 2015. However, Defendants have failed to discuss in the EA or ICI Memo the cumulative impacts of any of these projects and Intersections as required by NEPA. The other projects were not even *mentioned*, much less *evaluated*. *See Grand Canyon Trust*, 290 F.3d at 345 ("[A] meaningful cumulative impact analysis must identify ... the overall impact that can be expected if the individual impacts are allowed to accumulate."). Nor does the EA mention past projects in the area. *See* 40 C.F.R. § 1508.7; *City-of-Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1160 (9th Cir. 1997) (EIS must "catalogue adequately past projects in the area").

[28] Although the issue was not briefed in Plaintiffs' Emergency Motion for Injunction Pending Appeal before the Fifth Circuit, Judge Costa raised substantial questions regarding cumulative impacts during oral argument. *Available at* http://www.ca5.uscourts.gov/OralArgRecordings/16/16-51281_11-4-2016.MP3 at 22:29 and 24:45 ("I have [the ICI Memo] right here, and I don't see where it talks about all 3 projects.").

The brief discussion of cumulative impacts that does exist is limited to examining the potential for temporary construction activities to directly affect at-risk resources.[29] There is no basis in NEPA, its regulations, or the cases construing them that allows for such a narrow focus for cumulative impacts. Nor does this discussion comply with NEPA by taking into account the effects of "past, present, and reasonably foreseeable future actions." The ICI Memo summarily dismisses potential construction related impacts as "merely possible, not probable" and "unlikely to occur given the BMPs and other regulatory procedures that would be in place for the proposed project." AR010374. "General statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Neighbors of Cuddy Mountain*, 137 F.3d at 1380.

The EA addresses almost exclusively the traffic benefits of constructing this road (and others) and virtually ignores the adverse environmental impacts of, for example, the increased vehicular traffic over the recharge zone. Aggravating this asymmetry is the consistent assumption in the traffic analyses that all three projects will be built. Against these traffic benefits, a few environmental costs are set out.[30] This is impermissible under NEPA; an agency "cannot tip the scales of an EIS by promoting possible benefits while ignoring their costs." *Sierra Club v. Sigler*, 695 F.2d at 979.[31]

B. The EA Fails to Adequately Analyze Direct Impacts to Groundwater Quality and Endangered Salamanders from the Project.

[29] Here the AR also states that cumulative impacts of the three projects are analyzed in the Traffic Noise and Air Quality Technical Memoranda. INT AR010740. This is false; neither Memo discusses cumulative impacts of future projects (or even mentions them). See INT AR10511-12, AR010593, AR010595AR010606.

[30] TxDOT staff were directed to represent to the public "the impact of each project on the other is considered in the various analyses including indirect and cumulative impacts, air quality, and noise impacts." TxDOTFATH_ 00001114. TxDOT's attempts to mislead the public strike at the core of NEPA's purpose of public disclosure and meaningful public participation.

[31] *See also Chelsea Neighborhood Ass'n v. U.S. Postal Serv.*, 516 F.2d 378 (2d Cir. 1975) (finding EIS deficient because it used the benefits of a housing project as a selling point for a project while ignoring the environmental consequences thereof); *Senville v. Peters II*, No. 2:03-CV-279, 2006 WL 2585130 at * 2(D. Vt. July 20, 2006) (including other road construction in traffic model only does not constitute "hard look" of cumulative impacts on environment required under NEPA).

The EA lacks adequate information to support the conclusion that the project will have "no effect" on groundwater quality in the Edwards Aquifer Barton Springs segment and the federally endangered Austin Blind and Barton Springs Salamander that inhabit it. Because the impact to groundwater quality and the salamanders are interrelated, and TxDOT justifies its finding of no impact to endangered species in part on the findings of no impact to groundwater, this section will discuss these analyses together.

It is not disputed that Intersections occurs over the recharge zone of the Edwards Aquifer Barton Springs segment. INT AR010451. The Barton Springs and Austin Blind Salamanders ("*Eurycea* species")[32] are subterranean, completely aquatic species that are "dependent upon water/flow quality from the Barton Springs segment of the Edwards Aquifer," and whose known habitat occurs downstream of the project within the aquifer." INT AR010436. Nevertheless, the EA concludes that the project would have "no effect" on either salamander. INT AR011663. This determination is based, in part, on the conclusions in the Water Resources Technical Memorandum that Intersections will have "minimal and discountable impacts to water quantity" and "possible, but negligible impacts to water quality." INT AR010580. As explained below, these statements are wholly unsupported in the record.

1. Groundwater Quantity

The extent of the discussion on the project's impacts to groundwater quality is as follows:

> The proposed improvements would result in minimal impacts to water quantity resulting from the placement of 7.7 acres of new impervious cover. All of the impervious cover would be placed within the existing ROW. Any impacts to water quantity are anticipated to be insignificant and discountable. The proposed improvements would also not require the withdrawal or use of groundwater.

INT AR010577. The EA does not provide any information on why the addition of 7.7 acres of impervious cover would only result in minimum impacts. FWS documented the impacts of increased impervious cover on water quantity and concluded that it threatened *Eurycea* salaman-

[32] The scientific genus of the species is *Eurycea*, and scientific reports as well as the EA often use this term when discussing multiple species within the genus.

ders. INT AR006556-58. Moreover, the Memo gives no explanation as to why the placement of impervious cover in the existing ROW is connected to the impacts on water quality, nor is this evident on its face. Just because TxDOT currently owns the land does not have any bearing on the effect of new pavement. The existing ROW is undeveloped; it contains native vegetation and large trees, and currently allows rainwater to penetrate the ground where it falls. See INT AR009033-37 (photos of existing native flowers, trees, and grass in ROW). And while the highway project will not require the withdrawal or use of groundwater, that is not the only way in which a project can adversely impact groundwater quantity.

Elsewhere in the EA, there appears to be a concession that groundwater flow could be reduced by the project, in the form of a proposed BMP to "design permanent protection, if applicable, to restore groundwater flow in severed conduits ***to the extent practicable***." INT AR011663. The EA neither identifies what measures would constitute "permanent protection" nor what would trigger this requirement. Nor does the EA explain what "to the extent practicable means." This wording indicates that permanent effects are at least possible, without ensuring any minimum level of protection. Thus, by TxDOT's own admission, the project could reduce groundwater flow, affecting the habitat of the completely aquatic salamanders. It is unreasonable to find that there will be "no effect" on the species, while maintaining that pollutant loads of stormwater runoff will be higher and groundwater recharge could be permanently reduced.

Finally, the EA makes absolutely no attempt to evaluate the cumulative impacts of increased impervious cover on groundwater quantity, even though the finding of "minimal impacts" is "precisely the reason" why a cumulative impacts analysis is required—if multiple projects result in impervious cover over the recharge zone, the effects on water quantity could no longer be said to be "minimal." *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1029 (9th Cir. 2007) (finding NEPA analysis insufficient where it concluded that there were no cumulative impacts because the effects were "localized, temporary, and of minor magnitude.").

In short, the Memo cites to no hard data to support its conclusion that impacts to groundwater quantity would be minimal. Because this analysis is fatally flawed, the conclusion in the Biological Studies Memo relying on this conclusion is also in error.

2. Groundwater Quality

The project lies within the surface or subsurface drainage basin of one recharge feature and several features that directly recharge the Edwards Aquifer, including the subsurface drainage basin for Blowing Sink Cave, a cave that connects directly to the Edwards Aquifer and is home to Barton Springs Salamanders. INT AR011656. The EA explains how construction activities could contaminate the aquifer, followed by general statements of future plans that may be taken to avoid impacts. *See id.* These include statements that temporary and permanent BMPs will be constructed to protect water quality, excavation will be planned in a way to avoid closed depressions; and an "appropriate buffer" will be placed around sensitive drainage zones. *Id*. Some of these tactics are even less definite, couched in the language of future intentions or possibilities—"Care should be taken…"; "berms or sandbags **can** be erected" (emphasis added); "TCEQ guidelines suggest…". *Id*. These vague statements do not sufficiently identify mitigation measures, nor how they would reduce water quality impacts to an insignificant level.

The AR indicates that mitigation measures would be necessary to avoid significant impacts to groundwater and the *Eurycea* salamanders. *See* INT AR010741, AR010750 ("This project has been determined to have no substantial permanent direct or indirect impacts to any resources **after mitigation.**") (emphasis added). Thus, by Defendants' own admission, the project "may" have significant environmental impacts, and only through mitigation is an EIS avoided. The Fifth Circuit approves of the use of "mitigated FONSIs," but references to vague mitigation measures to reduce environmental impacts are not sufficient under NEPA. *O'Reilly*, 477 F.3d at 234 (finding EA violated NEPA where it provided "only cursory detail" as to mitigation measures "and how they serve to reduce those impacts to a less-than-significant level"). The salamanders will be affected by sedimentation caused by construction and greater erosion due to the increased im-

pervious cover and rerouting of rainfall that would otherwise infiltrate directly into the aquifer. INT AR00657. It is arbitrary and capricious to conclude there will be no effects without specifically identifying construction and operation methods and explaining how those methods will avoid adverse effects. *See Sierra Club v. FHWA*, 715 F. Supp. 2d 721, 736-37 (S.D. Tex. 2010), *aff'd*, 435 F. App'x 368 (5th Cir. 2011) ("[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA" citing *Robertson* at 352).

The EA cannot rely on the implementation of a TCEQ-approved Water Pollution Abatement Plan (WPAP) to conclude that impacts of the project would be minimal. TxDOT did not submit a WPAP application until December 1, 2016, over nine months after the NEPA process ended (and eighteen months after this June 2015 Memo). INT AR010375. Thus, in concluding that there will be no significant impacts, the EA relies on the *future* adoption of a plan that is nowhere close to finalization. References to future potential methods that will be designed after the NEPA process is complete do not satisfy NEPA's procedural mandates or fulfill its purposes to allow informed decisionmaking and public participation. *O'Reilly*, 477 F.3d at 234. NEPA's expressed purpose to inform the public before decisions are made is not fulfilled when the public lacks sufficient information to understand, and thus submit comment, on the measures to be employed to ensure environmental impacts are not significant. "Agency regulations require that public information be of 'high quality' because [a]ccurate scientific analysis, expert agency comments, and *public scrutiny* are essential to implementing NEPA." *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998) (internal quotation marks omitted) (citing 40 C.F.R. § 1500.1(b)).[33] The City of Austin, in commenting on the Draft EA, pointed out several problems with the potential

[33] In response to Plaintiffs' requests that TxDOT supplement the AR with WPAP materials following the conclusion of that process, TxDOT states that the "WPAP process does not begin until the project is fully designed and the construction schedule is finalized, is not within the scope of NEPA, and is post-decisional, thus it is not appropriate for supplementation." July 27, 2016 Letter from Bohuslav to Hicks, Ex. 12 to Defs.' Jt. Opp'n to Plfs.' Mot. to Compel (Doc. 42-12 at 3).

BMPs identified and expressed concern that there was not enough information to adequately review or comment on the effectiveness of the water-quality control measures. INT AR011342-43.

Although TCEQ regulations allow public comment on WPAP applications, this is not a sufficient substitute because the comments are to TCEQ, TxDOT is not required to publically notice availability of the draft application, and neither TxDOT nor TCEQ are required to respond to public comment. 30 Tex. Admin. Code § 213.4(a). Thus, NEPA's mandate to "insure that environmental information is available to public officials and citizens *before* decisions are made" is not satisfied. 40 C.F.R. § 1500.1(b) (emphasis is added); *see id.* (noting "public scrutiny [is] essential to implementing NEPA). Further, having a WPAP in place does not relieve the agency from analyzing environmental impacts of that plan's implementation. There is no legal or factual support in the AR that a WPAP will result in a project with no significant impacts.[34] Ex. 1, Decl. of Lauren Ross ¶¶ 10, 12, 19 (highway construction mitigation promises not fulfilled).

Furthermore, compliance with the TCEQ Edwards Rules alone does not justify a "no effect" determination. The EA states that BMPs will remove 80% of the increase in total suspended solids from stormwater runoff in compliance with the Edwards Rules. INT AR0104052. The EA does not explain how the 20% increase in total suspended solids that would not be removed—and could infiltrate into the aquifer—will have "no effect" on the salamanders. FWS has specifically concluded that this increase poses a threat to the *Eurycea* species. INT AR006563. Further, the Edwards Rules do not regulate other pollutants commonly resulting from highway projects, including settled sediment, zinc and other heavy metals, and nutrients. INT AR017446 (comparing City of Austin Save Our Springs Ordinance with Edwards Rules); INT AR010572. It is unreasonable to find that there will be "no effect" on the species, while maintaining that pollutant loads of stormwater runoff will be higher.

[34] Moreover, The EA repeatedly asserts that groundwater quality will be protected through the use of "BMPs and other regulatory control measures." INT AR010375. But the only groundwater quality regulations applicable to the project are the TCEQ's Edwards Aquifer Protection Rules, which require BMPs. INT AR010576. Thus, it is misleading to suggest that multiple forces are at work to ensure that groundwater quality is protected.

Moreover, in listing the Austin Blind Salamander as endangered, the FWS expressly found that existing regulatory control measures, including TCEQ's Edwards Rules, were not adequate to prevent jeopardy to the species. INT AR006563 ("Federal, State, and local laws and regulations have been insufficient to prevent past and ongoing impacts" to the Austin blind salamander and its "habitat from water quality degradation, reduction in water quantity, and surface disturbance of spring sites, and are unlikely to prevent further impacts to the species in the future.").

Defendants' reliance on hazardous material traps to justify a finding of no effect to groundwater or salamanders is similarly misplaced. *See* INT AR010452 ("Existing hazardous material traps will be maintained, repaired, or replaced.").[35] No detail or criteria is provided as to which, if any, will be replaced, and how that determination, or what repairs will be made, nor how maintenance will be accomplished for the life of the project. The Water Resources Memo acknowledges that a hazardous material trap could be overwhelmed if a spill occurs during a flood, but do not actually address this contingency, circularly concluding that the existence of the traps reduce the probably that a spill will reach the aquifer. INT AR010578. These are the sort of "general statements about 'possible effects' and 'some risk' that have been found lacking under NEPA. *See Van Winkle,* 197 F. Supp. 2d at 619 (citing *Neighbors of Cuddy Mountain*, 137 F.3d at 1380.

The EA describes a response plan that would be implemented if an underground void is encountered during excavation. That response plan includes development, with a geologist, to develop a void mitigation plan. This response plan is used to justify the conclusion that the project will have no effect on water or biological resources. However, this conclusion is contradicted by TxDOT's stated response measures to unplanned void intrusion, which include action to detect and mitigate for effects that have already occurred, and minimize additional harmful effects. INT AR010452. The responses to void intrusion cannot reverse effects that have already occurred.

[35] Moreover, these HMTs only have a capacity of 8,000 gallons, INT AR010572, and FWS has noted that transporters of hazardous materials can carry volumes up to 10,000 gallons or more. INT AR006550. One hazardous materials spill could degrade water quality to a degree that it alone could cause irreversible declines or extirpation of salamanders and significant declines in habitat quality. *Id*.; INT AR010572. Defendants never address this discrepancy.

Therefore, it is arbitrary and capricious to declare that there will be "no effects." This violates NEPA. *See O'Reilly*, 477 F.3d at 233 (finding comparable statements about best management practices deficient because it "neither describes what these [mitigation] practices may include nor how they will work."). Significantly, any protection of voids wholly depends on the contractor reporting void discoveries, which the EA intends to accomplish by "project wide-awareness and contractor education." INT AR010580. Such vague commitments to make third-parties aware of the need for mitigation does not even rise to the level of promises to mitigate made by third-parties that have been found insufficient under NEPA. *See Lee*, 758 F.2d at 1083 (citing *Pres. Coal., Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir. 1981).

FWS has documented the threat to the continued existence of native aquatic salamanders posed by highway construction and operation, particularly increases in impervious cover. INT AR006556, AR006564, AR000495; Ex. 4 (1998 Report); Refined Impervious Cover Analysis (Plfs.' Mot. to Complete AR, Ex. A1, Doc. 5). Based on these consistent findings, FWS and Texas Parks and Wildlife, agencies with expertise on species protection, did not agree with TxDOT's "no effect" determination for the endangered salamanders. INT AR011485-86 (Tex. Parks & Wildlife Dep't comment); AR009967. However, TxDOT does not address the impact that impervious cover will have on the salamanders. Although TxDOT cited to the Austin Blind Salamander listing in generally describing the species, INT AR 010445-46, it did not refer to the conclusions in the listing or supporting body of scientific evidence in discussing the direct or cumulative effects to the species, in violation of NEPA. Agencies have an affirmative duty to disclose and analyze scientific information counseling against a proposed action or calling into question the expected environmental effects. 40 C.F.R. §§ 1502.9(b); 1502.24; 1508.27(b)(4).[36]

[36] In another example of the inconsistency that plagues Defendants' position, the agencies originally found that the project "may affect, but is not likely to adversely affect," the *Eurycea* species. Draft Prelim. EA (Feb. 2015), TxDOTFATH_00001016 (Plfs' Mot. to Complete AR, Ex. 3B Doc. 176). Notably, the analysis there is the same as the ultimate analysis included in the Biological Studies Memo. *Compare* TxDOTFATH_00001015-16 *with* AR010451-53. A "may affect" determination requires consultation with FWS. INT AR010429.

Moreover, the AR reflects that Defendants failed to engage FWS in commenting on Intersections. FWS's comments on SH 45 SW make it abundantly clear that highway projects in the recharge zone cause harm even with BMPs in place. SH 45 AR017170-71.[37] As Texas Parks and Wildlife observed, quoting the FWS letter on the SH 45 SW DEIS, "[c]omplete elimination of water quality impacts would require the retention of all runoff from the site, during construction, and roadway, once the project in completed." INT AR011486. For this reason, Texas Parks and Wildlife recommended that TxDOT coordinate with FWS on this project. INT AR011479. FWS, while not being formally requested to comment, contacted TxDOT about its concerns and "highly recommend[ed] that TxDOT consult with the Service." INT AR009967.[38] Defendants ignored the views from expert agencies calling Defendants' conclusions into doubt, and found the impacts to be insignificant in disregard of NEPA. *See* 40 C.F.R. § 1508.7(b) (in evaluating significance agencies should consider "the degree to which the action may adversely affect endangered species or its [critical] habitat," and the degree to which environmental effects are likely to be highly controversial"); *see also Save Our Sonoran, Inc. v. Flowers*, 381 F.3d 905, 914 (9th Cir. 2004 ("The objections filed by other federal agencies underscore the conclusion" that plaintiffs had raised serious environmental issues).

CLAIM 4: Defendants' Section 4(f) analysis and "no use" determination were arbitrary, capricious, and an abuse of discretion.

The record fails to demonstrate that the proposed project would not substantially impair the Lady Bird Johnson Wildflower Center ("Wildflower Center" or "the Center"), a property protected by Section 4(f). Therefore, Defendants' determination of no constructive use was arbitrary, capricious, and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A).

[37] TxDOT began consultation under section 7 of the Endangered Species Act in June 2016, four months after the notice of final agency action and one month after two organizations (one a plaintiffs in this suit) sent a Notice of Intent to Sue. This failure to coordinate with the FWS prior to issuing the EA further demonstrates that TxDOT failed to adequately consider impacts to endangered species.

[38] Although a September 2014 email shows that CTRMA indicated consultation with FWS and FHWA would occur for "the MoPac South corridor" encompassing Intersections and Express Lanes, *see* INT AR009173, FWS's and Texas Parks and Wildlife's subsequent recommendations to consult show this process was abandoned (notably, after TxDOT signed the MOU and took over for FHWA).

Two federal statutory provisions, 49 U.S.C. § 303 and 23 U.S.C. § 138, prohibit the "use" of such resources as parks and recreation areas that have been determined to be of national, state, or local significance. These provisions are typically referred to together as "Section 4(f)."[39] Section 4(f) embodies "the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites." 23 U.S.C. § 138(a).

Use of significant parks and recreation areas is allowed under certain circumstances: (a) when there is no feasible and prudent avoidance alternative to the use of the land *and* the action includes all possible planning to minimize harm resulting from such use; or (b) the use of the property will have a *de minimis* impact. 49 U.S.C. § 303; 23 U.S.C. § 138; 23 C.F.R. § 774.3.

Under Section 4(f), a use can be direct, constructive, or simply temporary. 23 C.F.R. § 774.17. A direct use occurs when the project permanently incorporates land from Section 4(f) property, while a "constructive use" occurs when the project does not actually incorporate property, but the proximity impacts are so severe that the protected activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired." *Id*. at § 774.15(a). Substantial impairment occurs when those activities, features, or attributes are "substantially diminished." *Id*.

In order to determine if constructive use will occur, the agency must: (1) identify "current activities, features, or attributes of the property" that qualify it for Section 4(f) protection and which may be sensitive to proximity impacts; (2) analyze the proximity impacts; and (3) consult on the foregoing identification and analysis with officials who have jurisdiction over the 4(f) property. *Id*. at § 774.15(d). If the proximity impacts will be mitigated, the agency need only consider net impacts in determining constructive use. *Id*.[40]

[39] The requirements originated in Section 4(f) of the Department of Transportation Act of 1966 (Pub. L. 89-670, 80 Stat. 931), and are still commonly referred to as "Section 4(f)." *See* 23 C.F.R. § 774.1.

[40] Under Section 4(f), the agency is the FHWA or FTA, whichever is making the approval for the transportation program or project at issue. "Agency" also means the State or State agency that is functioning as the FHWA or FTA in carrying out delegated responsibilities. 23 C.F.R. § 774.17.

The Supreme Court uses a three-step analysis to review an agency's decision to use Section 4(f) property. *Overton Park*, 401 U.S. at 416-17. The court must determine (a) whether the agency acted within the scope of its authority; (b) that the agency's decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; and (c) whether the agency followed necessary procedural requirements. *Id*. (citing 5 U.S.C. § 706). An agency's action is arbitrary and capricious if the agency relied on "factors that Congress has not intended it to consider" or "entirely failed to consider an important aspect of the problem." *Audubon Nat'l Soc'y of the Cent. Atl. States, Inc. v. U.S. Dep't of Transp.*, 524 F. Supp. 2d 642, 660 (D. Md. 2007) (*quoting Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 287-88 (4th Cir. 1999)).

The Lady Bird Johnson Wildflower Center is a unique 279-acre public park adjacent to MoPac near the La Crosse Avenue intersection. INT AR011465. "It is a public botanic garden, wildlife haven, popular events center, outdoor recreation space, and nationally renowned native plan research and conservation organization." *Id*. The Center depends on revenue from admissions, memberships and rentals to realize its mission. *Id*. The Center is concerned that the project "could jeopardize [its] existence." *Id*. at INT AR011466.

Here, Defendants acknowledge that the Center is a property protected by Section 4(f), but conclude that the project would not "use" the Center. INT AR011653. The "no use" determination (and the position that SH 45 SW is a state project) means Defendants did not reach a "formal" 4(f) analysis that would require minimal harm under 23 C.F.R. § 774.3.

Defendants' no use determination is arbitrary and capricious because (A) it fails to demonstrate that the noise impacts will not substantially impair the Center; (B) it fails to consider other proximity impacts that would substantially impair the Center; (C) its noise abatement analysis relies on improper factors; and (D) it acted beyond its scope by improperly segmenting the Intersections, MoPac South, and SH 45 SW before complying with Section 4(f).

A. Defendants' no use determination was arbitrary and capricious because it failed to demonstrate that the noise impacts would not substantially impair the Center.

A constructive use can occur when the projected increase in noise from the project "substantially interferes with the use and enjoyment of a noise-sensitive facility of a property protected by Section 4(f), such as . . . [e]njoyment of an urban park where serenity and quiet are significant attributes." 23 C.F.R. § 774.15(e)(1).

In response to the Draft EA, Michael Abkowitz, then the "official with jurisdiction" over the Center under 23 C.F.R. § 774.15(d), explained that the Wildflower Center is a noise-sensitive facility "where serenity and quiet are significant attributes." INT AR011467. Nevertheless, the EA concluded "(1) the affected park activities, features or attributes do not meet the definition of being 'noise-sensitive facilities' and (2) the proposed noise barrier would reduce the noise level at these locations beyond the existing conditions." INT AR011653-54. However, the EA, and the Traffic Noise Technical Memorandum ("Noise Memo") upon which it relies, are both flawed.

The EA and Noise Memo give no clear basis for the conclusion that the Center's activities, features, or attributes do not meet the definition of a noise-sensitive facility, nor does Defendants' response to comments. AR010740-45. Defendants' projections concluded, taking into account mitigation, that only the trails closest to MoPac would be impacted, but already experience noise impacts. AR010744. The problem is that this conclusion, as well as the conclusion that the mitigation expected from noise barriers will actually decrease noise beyond existing conditions, both rely on Defendants' calculations of existing as well as projected future noise levels—calculations that were never validated or calibrated. Decl. of Todd Busch, Ex. 2 ¶ 12.[41] Furthermore, Defendants do not disclose the underlying values assigned to calculation parameters within the FHWA Traffic Noise Model, including but not limited to: volumes by vehicle type, percentage of each vehicle type, and assumed speeds of each vehicle type." *Id*. ¶ 17. The lack of

[41] According to expert Todd Busch, "TxDOT does not validate the calculated existing noise levels through comparisons to measured noise levels with documented traffic and meteorological conditions," nor does TxDOT "properly calibrate the calculated future noise levels with reference to the arithmetic differences between calculated and measured, existing noise levels." Decl. of Todd Busch, Ex. 2 ¶ 12.

disclosure of key information indicates that Defendants' analysis is not reliable in terms of forecasting actual impacts. *Id*. ¶ 20.

B. Defendants' constructive use determination was arbitrary and capricious because it did not consider all proximity impacts.

In addition to (1) an increase in noise as previously noted, a constructive use also occurs when (2) the proximity of the project "substantially impairs esthetic features or attributes of a property" where such features or attributes are important elements of the property; (3) the project restricts access which "substantially diminishes the utility" of a significant publicly owned park, recreation area, or historic site; (4) the vibration impact from construction or operation substantially impairs the use of property; or (5) the "ecological intrusion" of the project substantially diminishes the value of wildlife habitat, substantially interferes with wildlife access, or substantially reduces the use of wildlife habitat in a wildlife and waterfowl refuge. 23 C.F.R. § 774.15(e). The record shows that Defendants considered noise in their 4(f) analysis, but did not analyze aesthetics, access, and ecological integrity according to section 774.15(d).

Specifically, the Center expressed concern that an increase in noise, air pollution, and light pollution, visual blight from sound barriers, the introduction of invasive species or plant disease, threats to pollinator populations, and public access during construction and upon completion would threaten the viability of the Center. *See* INT AR08040-41; AR011465-68; AR008040-41. The AR demonstrates that Defendants did consult to some extent with the Center on noise impacts and potential sound barriers. *See* INT AR08040-41; AR09980-81; INT AR11465-68; INT AR11549-52; AR11561-65; AR11617-19; AR11620-25; and AR11626-29. Despite acknowledging concerns, there is no evidence to show that Defendants analyzed visual blight from sound walls, public access, or threats to pollinators and native species in determining "no use."[42]

The effect of analyzing only noise impacts in the Section 4(f) determination means a conclusion of "no use" was much easier to reach, and thus, a "formal" 4(f) analysis was avoided. Alt-

[42] The Wildflower Center was consulted on roadside seed mixes, but this was not out of concern for threats to the Center, but because it had been retained early on in the project as a paid consultant on this piece of the project.

hough other sections of the EA and technical memoranda mentioned some of these impacts, they were not analyzed for "use" under Section 4(f). Responses to the Center's 4(f) concerns were met with general conclusory remarks and references to technical memos, which were wholly insufficient, as mentioned above. INT AR010743-45. This is an important distinction because if a 4(f) analysis had analyzed aesthetic impacts, for example, and determined that the sound walls constituted a "use" of the Wildflower Center aesthetic attributes (which is essentially what the Center itself concluded, when it rejected them), then Defendants would have had to conduct a formal 4(f) analysis and document feasible and prudent avoidance alternatives and plan to minimize harm, or find the use will have *de minimis* impacts. *See* 23 C.F.R. § 774.3; *see also Audubon Nat'l Soc'y*, 524 F. Supp. 2d at 682 (in which the agency acknowledged the use of sound barriers would create additional adverse visual impacts).

The Center offers typical recreation amenities like trails, but it is the emphasis on conservation, research, native landscaping, and its unique beautification efforts that make its attributes uniquely appealing to the public and are also important to its status as a protected 4(f) property. *See Audubon Nat'l Soc'y*, 524 F. Supp. 2d at 682 (noting how some 4(f) properties may be particularly sensitive due to the type of activities, and that "unique and unusual" challenges should be considered). Defendants' proposed sound wall constituted such an aesthetic impairment, the Center actually refused them. INT AR011633 ("After careful consideration of the wall's likely impact on noise experienced by Center visitors, its visual appearance, and consistency with the Center's mission and Lady Bird Johnson's vision for highway beautification, we respectfully decline the proposed wall adjacent to our property.").[43] While this analysis may not have prevented the project, the AR shows that it would have likely afforded greater protections to the Wildflower Center, in line with the spirit and purpose of Section 4(f) to make special effort to preserve the

[43] TxDOT's Director of Environmental Affairs rejected the Center's request for a modified barrier as inconsistent with TxDOT's policy for a "feasible and reasonable" alternative, despite TxDOT staff acknowledging that it was a "reasonable" request given the "sensitivity" of the Center. INT AR011563-64. Because Defendants determined "no use," nothing required Defendants to look into alternative sound barriers or make any other effort to minimize the visual harm.

natural beauty of the countryside and public park and recreation lands. Because Defendants' Section 4(f) "no use" determination was made without considering these proximity impacts, it was therefore, arbitrary and capricious.

C. Defendants' noise abatement analysis is arbitrary, capricious, and an abuse of discretion because it relies on improper factors.

When determining if a constructive use will occur, an agency need only consider net impacts, if any of the proximity impacts will be mitigated. Defendants' Noise Memo relies on TxDOT's "Guidelines for Analysis and Abatement of Highways Traffic Noise" to determine whether proposed mitigation or abatement measures are "feasible" and "reasonable." INT AR010595, AR010603. In order to be reasonable, the abatement measure "must not exceed the cost-effectiveness criterion of $25,000." INT AR010603, AR004135. This cost was arrived at in a study commissioned by TxDOT[44] in 1999; yet, FHWA rules require that "[t]he highway agency shall re-analyze the allowable cost for abatement on a regular interval, not to exceed 5 years." 23 C.F.R. § 772.13(d)(2)(ii).[45]

The impact of this error is that Defendants' cost-effectiveness cap may be thirty percent lower than what federal guidelines intend, preventing, in this case, certain noise abatement measures from being installed around the Center, a constraint exacerbated by the decision to limit their noise abatement materials to only concrete, instead of other less expensive materials (*see* Busch Decl. ¶ 16). Coupled with the fact that "no use" was only arrived at because noise mitigation would supposedly keep levels below the FHWA noise-abatement criteria threshold, Defendants are essentially using noise mitigation to avoid a formal 4(f) analysis, which would require efforts to minimize harm, and artificially controlling cost-effectiveness criteria to further limit alternatives analysis. Therefore, Defendants erred in calculating cost effectiveness of abatement measures, *and* the error would likely change the outcome of the case.

[44] Center for Transportation Research, Report 3965-1: Validation and Cost Effectiveness Criterion for Evaluating Noise Abatement Measures", University of Texas at Austin, 1999.

[45] A simple calculator on the Bureau of Labor Statistics' website shows that the Consumer Price Index estimates inflation alone would mean that $25,000 in 1999 would be worth more than $35,500 in 2015. *See* https://www.bls.gov/data/inflation_calculator.htm

D. Defendants acted beyond the scope of their authority by segmenting the project before complying with Section 4(f).

Plaintiffs incorporate the arguments above demonstrating that the projects were improperly segmented. The Fifth Circuit has decided that "Section 4(f) does not authorize the Secretary to separate a 'project' into 'segments.' " *San Antonio Conservation Soc'y*, 446 F.2d at 1023. Defendants only conducted a 4(f) analysis for Intersections, not for SH 45 SW, saying it was not subject to 4(f). SH 45 R00088-89. Therefore, in addition to violating NEPA's anti-segmentation rule, Defendants have acted beyond their scope of authority by segmenting the project before complying with Section 4(f).

IV. REMEDY

The foregoing arguments demonstrate why, under the APA, Defendants' actions should be vacated and the matters remanded to the agency for development of environmental analysis consistent with NEPA and section 4(f). Defendants' actions in failing to conduct a single environmental analysis for the three-part endeavor were "not in accordance with law," 5 U.S.C. § 706(2)(A), because they are inconsistent with: (a) § 1508.25(a)(2); and (b) § 1508.25(a)(1). The Intersections EA and FONSI were "arbitrary and capricious" under the same APA provision. Finally, Intersections violates the Section 4(f) prohibition on use of the Lady Bird Johnson Wildflower Center.

In addition to vacating and remanding the decisions under the APA, the Court also should issue an injunction against further activity, beyond necessary protective environmental efforts, on the three projects while the matters are pending on remand to Defendants. Plaintiffs are entitled to such an injunction in this NEPA case if they can satisfy the four factors set out in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157-58 (2010), for injunctions when NEPA is violated: (1) irreparable injury to plaintiffs; (2) inadequacy of remedies available at law to compensate for the injury; (3) balance of hardships in the absence of injunction favors plaintiffs; and (4) the public interest would not be disserved.

The Court should keep at the forefront the nature of environmental injury, particularly in an infrastructure undertaking of this magnitude affecting a fragile environment of such susceptibility to harm.[46] As the Supreme Court has recognized: "[e]nvironmental injury, by its nature, can seldom be adequately remedied … and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 545 (1978).

As to adequacy of remedies available at law and the balance of hardships, the fundamental purpose and point of NEPA are that the acting agencies are the ones charged with looking at the full range of applicable technical, scientific, and environmental issues in advance. Agency decisions are not supposed to be made based on "incomplete information." *Marsh*, *supra*, 490 U.S. at 371. NEPA and the APA do not provide for monetary damages, so those are not available in cases such as this one. And, without interim injunctive relief, reliance purely on the APA remedial option of vacating the agency decision and remanding for further, NEPA-required evaluation would turn NEPA's public policy upside down. The agency would be acting first—that is proceeding with the project—with what is supposed to be an advanced hard look occurring after the work has commenced and even proceeded to the point of completion. So the APA remedy is inadequate to protect against the harm—shoot first and ask questions later—disapproved of in NEPA's very structure. The Supreme Court has long recognized that the equitable discretion of federal courts must be guided by "recognized, defined public policy." *Meredith v. Winter Haven*, 320 U.S. 228, 235 (1943). Here, that public policy is that the agency is supposed to study first and act later, as guided by the study.

Set out below is the factual support for the requested injunction. But, ultimately, it is not the duty of citizens (such as Plaintiffs) to evaluate all of the anticipated adverse environmental effects of agency action that they challenge. NEPA, after all, squarely places that job in the laps of Defendants. Plaintiffs can, and do, demonstrate that there will be actual irreparable harm in the

[46] Recall that the main trigger for endangered species listings for fauna in the area has been due to the massive impingements wrought by highway construction.

absence of an injunction, but, in deciding whether to issue the injunction, the test cannot be that the plaintiffs have to have assessed and catalogued the full range of those harms. To do that, they would have to have performed what, in essence, would be the EIS that Defendants are obligated to prepare.

A. Plaintiffs will suffer irreparable harm in the absence of an injunction.

In partial support of the irreparable harm that Plaintiffs have suffered and will further suffer, Plaintiffs resubmit the expert declarations of Dr. Norma Fowler, Dr. Phil Bennett, and Dr. Lauren Ross that were submitted in support of Plaintiffs' request for preliminary injunction.[47] While some of the environmental harm set out in those declarations has already been inflicted and cannot be undone, the degree of environmental harm would increase substantially if further clearing, boring, and paving were allowed on the SH 45 SW Phase I project.

Plaintiffs also rely on the attached declarations of Dr. Lauren Ross and Mr. Todd Busch in showing the kinds and likelihood of further injury to Plaintiffs' water, wildlife, public health, and natural and cultural heritage interests if construction on SH 45 SW is allowed to continue and construction on Intersections is allowed to go forward.

Plaintiffs have suffered irreparable injury as a result of the clearing and scraping of more than 200 acres of Edwards Aquifer recharge zone and the destruction of 58 acres of endangered Golden cheeked warbler habitat. Previously intact warbler habitat on protected City of Austin lands on both sides of 45SW have been fragmented and degraded by Defendants actions. These harms would increase substantially in the absence of any injunction. Without an injunction, the endangered Austin Blind and Barton Springs salamander would suffer further harm of exactly the kind that U.S. FWS identified as placing the species at near-term risk of extinction: urbanization, substantial impervious cover, and sedimentation and habitat destruction from large scale. highway construction.

[47] Also attached and incorporated into this trial brief are the plaintiff declarations admitted in the preliminary injunction phase. These show the harms to the plaintiffs.

Plaintiffs right to a balanced and fair consideration of alternatives to the proposed MoPac South/SH 45 SW endeavor has also been prejudiced, irrevocably, by the financial investment already made by Defendants. Allowing construction to continue would lead to further irreparable injury to Plaintiffs environmental interests as well as its procedural interests in a full evaluation of "environmental matters," including alternatives, "on a broad scope."

B. Monetary damages are an inadequate remedy. This should be without dispute.

C. The balance of hardships lean heavily in favor of granting an injunction.

With an injunction, Defendants would be required to comply with NEPA, preserving the Edwards Aquifer and endangered species habitats, protecting the Lady Bird Johnson Wildflower Center, and preserving the potential for the meaningful consideration of alternatives (including a mix of alternatives) that would help move traffic between northern Hays County and central Austin without converting MoPac into a western Interstate 35 alternative. Defendants would potentially lose the investment they have thus far made in preparing the SH 45 SW right of way for construction. This is small fraction of the total costs of building SH 45 SW and a tiny percentage of the estimated total costs of building the SH 45 SW/MoPac South corridor loop. Defendants, as well as Plaintiffs, would actually benefit, saving enormous amounts of time and money, by undertaking a single "cumulative action" EIS process, rather than undertaking several separate EIS processes. Defendants would benefit also by understanding the environmental impacts and opportunities for reducing those impacts before the impacts occur and before decisions are made.

D. An injunction pending NEPA compliance would not disserve the public interest.

The overwhelming public interest in protecting the vulnerable water resources and endangered species of the Barton Springs Edwards Aquifer would be served by an injunction. There is no dire public safety, public health, or national security interest that would balance against injunctive relief. To the extent Defendants wish to pursue safety improvements at Slaughter Lane and La Crosse, by, for example, adding or adjusting lights and signage, adding sidewalks, or taking other interim actions it has not seen fit to undertake so far, the injunction could be drafted to

allow these small-scale safety improvements (or they could be pursued as an interim action subject to a NEPA categorical exclusion).

Defendants own traffic studies show that commuters travelling between northern Hays County and South Austin would only save 2 to 3 minutes or 4 to 12% on their commute once SH 45 SW is completed. SH 45 AR 014071-72. However, these minimal savings require the completion of both Intersections and Express Lanes. Defendants have yet to publish even a draft Environmental Assessment on Express Lanes, even though the process was intended to be completed last year. Similarly, no draft EIS has been published on the Oak Hill Project. Thus, an injunction pending compliance with NEPA would not result in any significant delay or hardship to either commuters or Defendants.

IV. CONCLUSION

In sum, Defendants acted arbitrarily, capriciously, and "not in accordance with law," and, as a result, their environmental decisions are invalid under NEPA and its binding regulations. 5 U.S.C. § 706. They improperly segmented the projects; they did not perform the required "cumulative action" environmental analysis of the three pieces; and they did not properly analyze the effects of MoPac Intersections on the environment or the Wildflower Center, as required by NEPA and section 4(f) . For the above reasons, the actions Defendants took, and decisions they made, pursuant to their environmental studies should be vacated, and further construction enjoined pending compliance with NEPA.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on February 6, 2017, I electronically filed the foregoing PLAINTIFFS' BRIEF ON THE MERITS with the Clerk of the Court, using the CM/ECF system, which will automatically notify all counsel of record electronically.

/s/ Kelly Davis
Kelly D. Davis