

ATTACHMENT 1

July 31, 2024

Via E-Mail

James M. Bass
Executive Director, CTRMA
jbass@ctrma.org

Bobby Jenkins
Chairman, CTRMA
bjenkins@ctrma.org

Nikelle S. Meade
Vice Chairman, CTRMA
nmeade@ctrma.org

David Singleton
Board Treasurer, CTRMA
dsingleton@ctrma.org

Mike Doss
Board Secretary, CTRMA
mdoss@ctrma.org

David B. Armbrust
Board Member, CTRMA
darmbrust@ctrma.org

Heather Gaddes
Board Member, CTRMA
hgaddes@ctrma.org

Ben Thompson
Board Member, CTRMA
bthompson@ctrma.org

RE: MoPac South Project Requires a Rigorous Environmental Impact Statement to Evaluate the Significant Effects of the Proposed Action

On behalf of the Travis County Commissioners Court (“the Commissioners Court”), we submit this letter to facilitate well-informed discussion and decision-making by the Central Texas Regional Mobility Authority (“CTRMA”) and the Texas Department of Transportation (“TxDOT”) with respect to the National Environmental Policy Act (“NEPA”) obligations that flow from the MoPac South project.

As explained below, it is the view of the Commissioners Court that the MoPac South expansion requires a full Environmental Impact Statement (“EIS”) at this time, in light of clear evidence that the project is likely to have significant environmental effects on a number of sensitive resources in Travis County including, but not limited to: degradation of local air and water quality, including impacts to the Edwards Aquifer Recharge Zone; impacts to endangered species and important ecological resources in the area; and impacts to unique geographic features such as Lady Bird Lake and Zilker Park. As such, CTRMA (in coordination with TxDOT) must fulfill its duty under NEPA to evaluate these impacts in an EIS, rather than in a less rigorous Environmental Assessment (“EA”). Contrary to suggestions otherwise, under both NEPA and its implementing regulations as recently updated, preparing an EIS should not unduly extend the project timeline and it will allow for both the public and decision-makers to more fully weigh the various project alternatives and to better understand the impacts of the proposal and its feasible alternatives. By contrast, an EA—regardless of length or complexity—is never a legally valid substitute for an EIS when, as here, an EIS is required by NEPA and its implementing regulations due to the significance of the proposed action’s impacts.

Seen in this light, it is clear that if CTRMA is genuinely interested in the most efficient and productive use of time to both complete this study and open the new roadway, the prudent course is to begin preparing an EIS now.¹

Legal Background

Before turning to a discussion of NEPA’s application to the current decision-making process, we provide a brief background on the statutory and regulatory framework relevant to the MoPac South project.

NEPA and Its Implementing Regulations

Congress enacted NEPA in 1969 to “encourage productive and enjoyable harmony between man and his environment” and to promote government efforts “that will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321. NEPA is “the basic national charter for protection of the environment” and it “establishes the national environmental policy of the Federal Government to use all practicable means and measures to foster and promote the general welfare, create and maintain conditions under which humans and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” 40 C.F.R. § 1500.1(a).

The Council on Environmental Quality (“CEQ”)—an agency within the Executive Office of the President—has promulgated regulations implementing NEPA, *see* 40 C.F.R. §§ 1500-1508, which are “binding on all federal agencies.” *Id.* § 1500.3(a).² The regulations are “intended to ensure that agencies identify, consider, and disclose to the public relevant environmental information early in the process before decisions are made and before actions are taken.” *Id.* § 1500.1(b). To this end, NEPA requires agencies to prepare a “detailed statement”—i.e., an EIS—for all “major federal actions significantly affecting” the environment. 42 U.S.C. § 4332(C). This requirement applies where there is “a reasonably foreseeable significant effect on the quality of the human environment.” 42 U.S.C. § 4336(b)(1).

An EIS must describe (1) “the environmental impact of the proposed action,” (2) “the adverse environmental effects which cannot be avoided,” and (3) “alternatives to the proposed

¹ Our firm has decades of collective legal experience successfully litigating and advising local governments, nonprofit organizations, and other public interest clients on federal environmental law issues, including the application of NEPA to federal highway matters. A representative list of our firm’s cases can be accessed here: <https://www.eubankslegal.com/caselist>.

² CEQ recently finalized a substantial overhaul to aspects of its regulations that implement NEPA. *See* CEQ, National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35,442 (May 1, 2024). Because these amended regulations went into effect on July 1, 2024, *see id.*, all references to the CEQ regulations herein are to the amended version, which should govern any NEPA process to consider the environmental impacts of the MoPac South project.

action.” 42 U.S.C. § 4332(C)(i)-(iii). In addition, an agency shall “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(H). The purpose of the EIS “is to serve as an action-forcing device by ensuring agencies consider the environmental effects of their action in decision making, so that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government”; an EIS “shall provide full and fair discussion of significant effects and shall inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse effects or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

The revised CEQ regulations emphasize that “[t]he alternatives section is the heart of the [EIS].” *Id.* § 1502.14. An EIS must “identify the reasonably foreseeable environmental effects of the proposed action and the alternatives in comparative form based on the information and analysis presented in the sections on the affected environment (§ 1502.15) and the environmental consequences (§ 1502.16).” 40 C.F.R. § 1502.14. Agencies are required to “[r]igorously explore and objectively evaluate reasonable alternatives to the proposed action, and, for alternatives that the agency eliminated from detailed study, briefly discuss the reasons for their elimination.” *Id.* § 1502.14(a). Each alternative should be “considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits.” *Id.* § 1502.14(b).

Agencies are directed to consider a broad range of environmental effects, defined as “changes to the human environment from the proposed action or alternatives that are reasonably foreseeable,” 40 C.F.R. § 1508.1(i), including “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health” impacts and must address them in the EIS. 40 C.F.R. § 1508.1(i)(4). Direct effects are those “caused by the action and occur at the same time and place,” while indirect effects are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* § 1508.1(i)(1), (2). Cumulative impacts are those that result from the “incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable future actions,” regardless of whether undertaken by other federal agencies or private third parties. *Id.* § 1508.1(i)(3). “Cumulative impacts can result from actions with individually minor but collectively significant effects taking place over a period of time.” *Id.*

When the proposed agency action “does *not* have a reasonably foreseeable significant effect on the quality of the human environment,” or if an agency is uncertain as to whether an EIS is required, it may prepare an EA to help it determine if an EIS is necessary. 42 U.S.C. § 4336(b) (emphasis added). The EA, in turn, must “provide sufficient evidence for determining whether to prepare” an EIS.” 40 C.F.R. § 1501.5(c). NEPA allows agencies to conduct a less rigorous examination of alternatives in an EA than in an EIS. *Compare* 40 C.F.R. § 1501.5(c)(ii) (requiring “brief discussion [in the EA] of alternatives as required by section 102(2)(H)”), *with* 40 C.F.R. § 1502.14(a), (b) (requiring EISs to “[r]igorously explore . . . all reasonable alternatives” and “[d]iscuss each alternative considered in detail”). If, based on the EA, an agency concludes that its proposal does not entail any significant impacts, it must prepare and publish a Finding of No Significant Impact (“FONSI”). *Id.* §§ 1501.6, 1501.3.

To streamline agency reviews, Congress recently amended NEPA to clarify that EISs (excluding citations and appendices) “shall not exceed 150 pages” absent “extraordinary complexity.” 42 U.S.C. § 4336a(e)(1)(A); *see also* 40 C.F.R. § 1502.7. Even a project of extraordinary complexity shall not result in an EIS that “exceed[s] 300 pages.” 42 U.S.C. § 4336a(e)(1)(B). In either case, EIS processes should not exceed two years. *See id.* § 4336a(g)(1)(A); *see also* 40 C.F.R. § 1501.10. And for projects requiring an EA, Congress mandated that EAs (excluding citations and appendices) “shall not exceed 75 pages,” 42 U.S.C. § 4336a(e)(2), and EA processes should not exceed one year. *Id.* § 4336a(g)(1)(B); *see also* 40 C.F.R. §§ 1501.5(g), 1501.10 (updated CEQ regulations mirroring these page limits and deadlines).

Relevant here, CEQ’s recent amendments include additional instruction on how to determine the proper level of NEPA review. *See* 40 C.F.R. § 1501.3 (explaining factors to determine whether an EA or an EIS is appropriate). In assessing whether a proposed action is likely to have significant effects on the human environment—which is the sole determining factor in whether an EIS is required—agencies are directed to “examine both the context of the action and the intensity of the effect.” *Id.* Relevant context includes, but is not limited to, “characteristics of the geographic area, *such as proximity to unique or sensitive resources or communities with environmental justice concerns.*” *Id.* § 1501.3(d)(1) (emphasis added) (noting that agencies “shall analyze the significance of an action in several contexts”).

With regard to the intensity of a proposed action, the updated CEQ regulations require the agency, at minimum, to evaluate the following enumerated factors, among others not relevant here: (1) “[t]he degree to which the action may adversely affect public health and safety”; (2) “[t]he degree to which the action may adversely affect unique characteristics of the geographic area such as historic or cultural resources, parks, Tribal sacred sites, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas”; (3) [w]hether the action may violate relevant Federal, State, Tribal, or local laws”; and (4) “[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat, including habitat that has been determined to be critical under the Endangered Species Act of 1973.” *Id.* § 1501.3(d)(2)(ii)-(iv), (viii). While helpful to guiding an agency’s determination of significant effects in the context of a proposed action, these enumerated factors are merely representative examples, and significant effects to other resources would also warrant preparation of an EIS.

FHWA’s NEPA Regulations

In addition to CEQ’s binding regulations, the Federal Highway Administration (“FHWA”) has adopted its own regulations that supplement its NEPA duties (and the NEPA duties of state agencies standing in place of FHWA for a particular project). *See* 23 C.F.R. Part 771; *see also* 23 C.F.R. § 771.01 (explaining that FHWA’s regulations “supplement[]” CEQ’s regulations).

Consistent with NEPA, the FHWA regulations reiterate that “[a]ctions that significantly affect the environment require an EIS.” 23 C.F.R. § 771.115. The regulations describe “three classes of actions” under NEPA and set forth a non-exhaustive list of representative examples of actions that ordinarily warrant an EIS, an EA, or a categorical exclusion (“CE”). *See id.* One of

the enumerated examples of an action that would “normally require an EIS” is “[a] highway project of four or more lanes on a new location.” *Id.* § 771.115(a)(2).³

With respect to EAs, rather than identifying specific examples of actions that ordinarily require preparation of an EA, FHWA’s regulations instead contain a “catch-all” provision, stating that “[a]ll actions that are not EISs or CEs are EAs.” *Id.* § 771.115(c).

Brief Factual Background

Project History

The MoPac South project currently under consideration by CTRMA involves proposed changes to the 8-mile stretch of MoPac Expressway between Cesar Chavez Street and Slaughter Lane designed to improve roadway safety and mobility. In light of projected population growth in Travis and Hays counties and concerns about increased travel times along MoPac, CTRMA initiated a preliminary Environmental Study in 2013 to develop alternatives with the objective, among other goals, to “[r]educe congestion delays and provide travel time savings for all roadway users.” See CTRMA, MoPac South Environmental Study Overview, <https://www.mopacsouth.com/environmental>.

In 2015, after considering various alternatives, including: adding general purpose lane(s) in each direction, adding high occupancy vehicle lane(s) in each direction; adding transit only lanes in each direction; adding express lane(s) in each direction; incorporating non-capital intensive Transportation Systems Management or Transportation Demand Management strategies; as well as a no-build alternative, CTRMA selected the Express Lane(s) Alternative as the “Reasonable Build Alternative.” See <https://www.mopacsouth.com/about/faqs.php>. It then solicited public comment on six potential express lane configurations, including five alternatives developed by CTRMA and one developed by the City of Austin, which would have included, among other attributes, a new right-of-way through Zilker Park. Of the five alternatives developed by CTRMA, two include one additional express lane in each direction, and the other three include two additional express lanes in each direction, for a combined total of four new lanes. See <https://www.mopacsouth.com/environmental/express-lanes-alternative.php>. The proposed express lanes are described as “special lanes that would be separated from the existing non-tolled general-purpose lanes,” and would be available for use by individual drivers, for the price of the variable tolls, as well as public transit buses, registered vanpools, and emergency vehicles. *Id.*

The project was temporarily placed on hold in 2016 due to pending litigation, but was resumed in 2021, at which point CTRMA solicited additional public comment. In addition, while the project was suspended, the Capital Area Metropolitan Planning Organization (“CAMPO”) released a new Regional Transportation Plan reflecting updated traffic data: CAMPO 2045 that

³ Notably, four of the six examples enumerated by FHWA make explicit mention of whether the potential project would be located within an existing right-of-way, while the example relevant here—a highway project of four or more lanes on a new location—makes no such limitation on where the “new location” is with regard to any existing rights-of-way. See 23 C.F.R. § 771.115(a)(1)-(6).

had notable implications for the MoPac South Environmental Study. Whereas the previous CAMPO model projected travel time between Cesar Chavez and Slaughter Lane under a No Build scenario to be 52 minutes in 2035 for northbound morning traffic and 51 minutes in 2035 for southbound evening traffic, the updated 2045 Plan model showed a sizeable drop in the projected travel time, which CTRMA itself recognized: “[p]rojected travel time along the corridor has decreased” due largely to the “projected decentralized population and employment demographic trends.” See 2045 Traffic Forecast Update at 12, <https://www.mopacsouth.com/MPS%202045%20Update.pdf>.

In fact, the decrease in projected travel time was striking, with the 2045 Plan showing that even under the No Build alternative, travel time along the corridor in 2045 would be only 20 minutes in the morning. *Id.* This is less than half of the previously projected 2035 travel time and only an additional 6 minutes over the 2022 measured baseline. See *id.* at 12, 20. Likewise, travel time in 2045 under a No Build alternative would be only 22 minutes for southbound evening traffic. *Id.* at 12. Again, this is less than half of the previously projected 2035 travel time and only an additional 5 minutes over the 2022 baseline. See *id.* at 12, 20. CTRMA represented these additional 6 minutes as a “42% increase” in travel time and the additional 5 minutes in the evening as a “30% increase,” *id.* at 20, and then cited these figures as a problem to be addressed by the MoPac South Environmental Study: “Under the No-Build Alternative (Do Nothing), it could take 30%-42% more time to travel between Cesar Chavez Street and Slaughter Lane by 2045,” when in fact in absolute terms the additional travel time of 5 or 6 extra minutes would be negligible to many drivers. See <https://www.mopacsouth.com/environmental/>. While the 2045 model data has since been incorporated by CTRMA into the traffic forecasting for this project, work on the CAMPO 2050 Plan model is already underway. In the event the 2050 Plan model, expected in May 2025, shows further reductions in the projected additional travel times, the CTRMA traffic forecast for this project must again be revisited.

At the present time, CTRMA plans to “continue to analyze and ultimately identify the best express lane(s) operational configuration option using technical analyses and public input.” See <https://www.mopacsouth.com/environmental/>. The agency explains that once the draft Environmental Assessment is completed, which it states will “demonstrate[] an analysis of the alternatives considered, and present[] an assessment of potential impacts to the human and natural environment,” it will be made available for public comment and “[w]ith support from its partners, CTRMA will make a final recommendation to TxDOT for their review.” *Id.* Note that in this instance, TxDOT is acting as a federal agency in carrying out the NEPA obligations on behalf of FHWA.⁴

⁴ As CTRMA explains, “the environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried-out by TxDOT pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated December 9, 2019, and executed by FHWA and TxDOT.” See <https://www.mopacsouth.com/environmental/>; see, e.g., *Save Barton Creek Ass’n v. Texas Dep’t of Transportation*, No. 1:19-CV-761-RP, 2021 WL 7183951, at *3 (W.D. Tex. Sept. 13, 2021) (“For the Project, TxDOT is a federal agency

Project Impacts

The Commissioners Court has consistently expressed concern about the potential impacts from the MoPac South expansion in seeking a more thorough and comprehensive EIS for the project. In a January 4, 2022 comment letter, the Commissioners Court explained that because “the project study area is located in a very environmentally sensitive area that includes Barton Creek, Barton Springs and the Edwards Aquifer Recharge Zone, locations of endangered species and Lady Bird Lake, many people believe that the environmental study already should be conducted as an EIS rather than an EA.” To that end, the Commissioners Court stated that “[a] clearer explanation is needed so the public understands why you are doing an EA instead of an EIS, and how the CTRMA will ensure our environment is adequately protected when constructing and operating the project.” The Commissioners Court remains concerned that in light of the following serious impacts, the MoPac South project is almost certain to have significant effects on the human environment thereby warranting an EIS:

Impacts to Air Quality

The MoPac South project is intended to address a projected increase in travel demand in the form of vehicles using the roadway, resulting in increasingly greater traffic congestion, and adversely affecting overall mobility. The selection of an expanded roadway solution to address future transportation issues may have significant implications for air resources locally and regionally. For example:

- Increased greenhouse gas emissions from vehicles compared to other solutions
- Nitrous oxide (NO_x) production and associated ozone (O₃) formation
- Particulate matter generation, especially PM_{2.5}, during both the construction phase (from increased congestion, construction-related dust, and heavy equipment emissions), as well during the operational life of the project

The Austin-Round Rock (“ARR”) area is already on the verge of nonattainment for both the O₃ and PM_{2.5} National Ambient Air Quality Standards (“NAAQS”), which are designed to protect public health. The ARR area exceeded the NAAQS for O₃ in 2023 and is all but certain to exceed the newly adopted 2024 PM_{2.5} NAAQS. If the MoPac South project contributes to worsening conditions for O₃ or PM_{2.5}, or both, this represents a potentially significant impact that should be addressed via an EIS. Localized air quality effects may also be of concern with respect to potential exposure to PM_{2.5} at Austin High School, which is immediately adjacent to the northern terminus of the project.

Impacts to Water Quantity and Quality

with responsibility for NEPA compliance by virtue of its memorandum of understanding with the Federal Highway Administration.”).

Throughout the length of the project, there is a focus on intensified construction within the existing right-of-way corridor to accommodate new lanes and bridge structures. This increases impervious cover intensity within the right-of-way and may reduce the capacity to provide stormwater quantity and quality controls within the project area. Impacts are likely to be felt downstream in sensitive areas where water quality and quantity controls are essential for endangered species as well as parkland uses. This is a potentially serious impact that affects lands that have been set aside—with great public investment—to protect water quality, habitat for endangered species, and recreational uses.

Similarly, at the crossing of the Colorado River/Lady Bird Lake, new bridge structures and overhead roadways appear likely to produce a substantial increase in impervious cover and delivery of greater volumes of untreated stormwater to the riverbank below where there are already problems with erosion and water quality. The intensification of bridge infrastructure here has the potential to create ongoing problems for water quality and bank stabilization. These issues are exacerbated by the hike and bike trail at this location, as well as proximity to the old landfill. Failure to properly manage the multiple issues at this location may have a significant environmental impact.

Impacts to Endangered Species and other Ecologically Critical Resources

Nearly all the waterways downstream of the project corridor warrant special protection because they are critical to water quality in Barton Springs and to the protection of endangered species. Additionally, there are a number of karst features within a couple of hundred feet of the project corridor, including Whirlpool Cave, which is protected under the Balcones Canyonlands Conservation Plan, a component of a federal Endangered Species Act incidental take permit. Water quality and quantity impacts associated with the MoPac South project must be carefully examined to ensure there are no significant impacts to these iconic aquatic systems.

Impacts to Unique Characteristics of the Geographic Area

In addition to the above impacts, the MoPac South project and the construction of new bridge structures and overhead roadways is likely to adversely impact a number of iconic parks and public spaces in the area including, among others: Zilker Park, the Barton Creek Greenbelt, the Austin Nature and Science Center, and Lady Bird Lake and the adjacent hike and bike trail.

CTRMA itself has acknowledged that the MoPac South project involves a wide range of potential impacts to assess, including: endangered species and wildlife, the Barton Creek Greenbelt and Barton Springs; the Edwards Aquifer Recharge Zone and water quality; water resources, wetlands, and floodplains; vegetation; cultural resources; traffic noise; air quality; as well as impacts to park lands and bicycle and pedestrian facilities. *See* <https://www.mopacsouth.com/about/faqs.php>.

CTRMA's Insistence on Avoiding an EIS

Despite these wide-ranging and obviously significant impacts, it has been evident for many years that CTRMA anticipates preparing only an EA for the MoPac South project resulting in a FONSI determination, rather than elevation to an EIS. CTRMA has devoted substantial resources to justifying why no EIS will be necessary, even before preparing an EA to analyze the significance of the project's effects.

As early as August 2015, in a letter to the City of Rollingwood, TxDOT made clear that “[a]t this time, the MoPac South project is anticipated to be classified as requiring only an EA, not an EIS,” and as such TxDOT declined to designate any other entities as a “participating agency,” which it stated was only normally used in the context of projects requiring an EIS. TxDOT letter to Thom Farrell, Mayor of Rollingwood, August 17, 2015, https://www.rollingwoodtx.gov/sites/default/files/fileattachments/city_council/page/8807/5_08132015_txdot_to_rw.pdf.

More recently, in a March 2023 presentation to its Board of Directors, CTRMA went to great lengths to explain why the MoPac South Environmental Study would not require an EIS and to downplay any advantage to conducting a full EIS in lieu of an EA. Specifically, CTRMA claims that the study as it stands will meet or exceed the less rigorous requirements of an EA and be substantively comparable to an EIS, while dismissing any need for additional analysis. *See* CTRMA March 2023 Presentation at 45, https://www.mobilityauthority.com/wp-content/uploads/2024/01/CTRMA_BOD_FINALv2.1_3.29.23.pdf (hereinafter “March 2023 Presentation”).

For example, CTRMA portrays an EIS as being much more time-intensive, asserting that average time to completion is three years for an EA and seven years for an EIS. *Id.* at 42.⁵ As an initial matter, these figures are not consistent with those made available on the CEQ website, which identify an average of only 4.5 years, a median of 3.5 years, to complete an EIS process and only one quarter of projects taking longer than 6 years. *See* CEQ, Environmental Impact Statement Timelines: 2010-2018 (June 12, 2020, https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf). Moreover, these figures were compiled *before* Congress amended NEPA in 2022 and *before* CEQ recently updated its NEPA regulations to mandate that EIS processes—even the most complex ones—should not take more than a maximum of two years to complete. *See* 42 U.S.C. § 4336a(g)(1)(A); *see also* 40 C.F.R. § 1501.10.

⁵ To support these figures, CTRMA cites an outdated report titled the “Federal Center on Environmental Quality Report 2020,” but CTRMA does not provide further information for this citation and it is unclear if CTRMA intended to refer to the White House Council on Environmental Quality. In any event, the three- and seven-year timeframes they cite are not consistent with—and, indeed, directly contradict—other publicly available data. *See, e.g.*, CEQ, Environmental Impact Statement Timelines: 2010-2018 (June 12, 2020, https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf) (finding that between 2010-2018 the average time to complete an EIS was 4.5 years, with a median of 3.5 years and with a quarter of projects taking less than 2.2 years; indeed, only one quarter of projects took longer than 6 years).

CTRMA also asserts that EAs are intended for projects involving “[r]oad widening; added capacity,” while EISs are for projects involving, for example, “[n]ew road alignment; more than 4 new lanes,” implicitly suggesting that the MoPac South project does not belong in this latter category. *See* March 2023 Presentation at 42. However, the FHWA regulations actually identify highway projects of “*four or more lanes on a new location*” as normally requiring an EIS, *see* 23 C.F.R. § 771.115(a) (emphasis added), in contrast to CTRMA’s incorrect claim that EISs are only for projects with *more than four* new lanes. *See* March 2023 Presentation at 42. And in fact, three of the six express lane alternatives carried forward by CTRMA would incorporate two added express lanes in each direction which, by definition, would involve *four additional lanes*. CTRMA also asserts that the technical studies being conducted would be the same for both an EA and an EIS. *Id.* at 42-43 (listing the technical studies and claiming they “Meet[] EIS Requirements”). CTRMA similarly states that the opportunities for public comment have and/or are expected to exceed the requirements of an EA and will be “equivalent to an EIS.” *Id.*

In the end, CTRMA strongly suggests that the currently proposed EA is as good as an EIS in this instance and that the only differences in comparison to an actual EIS would be administrative:

Administrative formatting, review, and filing methods differ between EA and EIS requirements. Technical studies and public involvement efforts have been completed or will be completed with the Draft EA to the rigor of an EIS with the deviation of not following specific formatting of materials, review by TxDOT Environmental Division and General Counsel Division, and filing with specific systems.

March 2023 Presentation at 43.

Likewise, CTRMA implies that the impact of switching to an EIS at this point would only cause administrative headaches with no substantive benefit: “[n]o additional technical studies [would be] required, however, rework will be required for most studies”; an EIS would “[r]equire a restart from the beginning to follow administrative procedures only”; it would also mean “[a]dditional funds spent,” “[l]ikely cost escalation,” and “[a]dditional years added to schedule.” *See* March 2023 Presentation at 44-45.

Indeed, CTRMA baldly predicts that because “[t]he EA process focuses on resolving environmental concerns,” it is “highly unlikely to require an EIS at the end of the process because receiving a FONSI means the EA already provides solutions/mitigations to environmental issues.” *Id.* at 45. In effect, CTRMA appears to have predetermined the outcome of the NEPA process—including by prejudging the paramount question of whether the proposed action will have significant effects and thus requires preparation of an EIS—before even completing an EA process to analyze the proposed action and test its hypothesis that the project’s effects on all resources will be insignificant.

Discussion

A. The MoPac South Project Requires a Full EIS

Given the breadth of potential environmental impacts from the MoPac South project, described above, and the likelihood that the eventual alternative will encompass two express lanes in each direction (four lanes in total), there is clearly “a reasonably foreseeable significant effect on the quality of the human environment,” 42 U.S.C. § 4336(b)(1), that warrants preparing an EIS in the first instance.

First, under the revised NEPA regulations, which will apply here, both the context and intensity parameters weigh strongly in favor of requiring a more robust EIS for the MoPac South project, rather than a less rigorous EA. Regarding context, the MoPac South project would be constructed in an iconic part of Austin—including construction of new highway lanes over Lady Bird Lake and alongside both Zilker Park and the Austin Nature and Science Center. It would also run adjacent to Austin High School and a number of youth sports fields. Continuing south, MoPac runs through the Barton Creek Greenbelt and the environmentally sensitive Edwards Aquifer Recharge Zone, which is important both for water quality and supports habitat for numerous endangered species.

In other words, not only is the proposed action considering four new highway lanes (which ordinarily requires an EIS under FHWA’s regulations), but this also is *not* your average four-lane highway project. It runs through and over a number of unique geographic landmarks at its northern-most end and then continues south for 8 miles through a highly ecologically sensitive area, including lands that have been set aside specifically to protect water quality, habitat for endangered species, and recreational uses. There can be no serious dispute that the context here weighs strongly in favor of finding that there will likely be significant environmental impacts to many different types of resources that fall within the scope of analysis under NEPA and its implementing regulations.

The intensity inquiry only reinforces this finding—a number of the representative intensity factors enumerated by the CEQ to inform whether there are likely to be significant effects on the environment are present here to a significant degree: “[t]he degree to which the action may adversely affect public health and safety”; “[t]he degree to which the action may adversely affect unique characteristics of the geographic area such as historic or cultural resources, parks, Tribal sacred sites, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas”; and “[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat, including habitat that has been determined to be critical under the Endangered Species Act of 1973.” 40 C.F.R. § 1501.3(d)(2)(ii)-(iii), (viii). Here, the potentially serious impacts to air and water quality outlined above, alongside impacts to locally present endangered species and their habitat, as well as critical ecological and geographic resources including Zilker Park, Lady Bird Lake, karst features within the right-of-way, and Barton Creek and its tributaries that receive runoff from the project site, all highlight the significant environmental effects of intensified development from the MoPac South project.

CTRMA is thus obligated to prepare a full EIS based on compelling evidence that the project is likely to have significant effect on many different aspects of the human environment. See *Fritiofson v. Alexander*, 772 F.2d 1225, 1238–39 (5th Cir. 1985), *abrogated on other grounds by Sabine River Auth. v. U.S. Dep’t of Interior*, 951 F.2d 669 (5th Cir. 1992).

Importantly, at this stage it is enough to require an EIS that the proposed MoPac South project is *likely* to cause a significant environmental impact; it need not be certain to do so. *See Citizen Advoc. For Responsible Expansion, Inc. (I-Care) v. Dole*, 770 F.2d 423, 438–39 (5th Cir. 1985) (holding that “when determining the propriety of an agency’s decision not to prepare an EIS, the reviewing court need not determine whether the contemplated project *would* affect some human environmental factor Rather, the court should require the filing of an impact statement if the court finds that the project *may* cause a significant degradation of some human environmental factor.” (internal citation and quotations omitted)). It is therefore enough to require an EIS here that the proposed addition of up to two express lanes in each direction over sensitive parkland and Lady Bird Lake, among other important resources, is *likely to significantly affect* the surrounding environment.

Second, preparing an EIS for the MoPac South project is also consistent with the FHWA NEPA regulations, which emphasize that the primary measure of whether or not to complete an EIS is, as it should be, whether or not the project will “significantly affect the environment,” 23 C.F.R. § 771.115, as has been detailed above. By way of illustrating this fundamental threshold, one of the enumerated examples of an action that would “normally require an EIS” is “[a] highway project of four or more lanes on a new location.” *Id.* § 771.115(a)(2). While the FHWA examples are meant to be illustrative, it is yet another indicator that an EIS is appropriate here, where three of the express lane alternatives to be studied will entail *four additional lanes of traffic*. To the extent the CTRMA March 2023 Presentation incorrectly identified only projects with *more than* four new lanes of traffic as requiring an EIS, that is not consistent with the current FHWA regulations, *see id.*, or the many four-lane highways in Texas and elsewhere that *have* routinely resulted in an EIS by FHWA, a state department of transportation acting in FHWA’s shoes, or a regional or local government doing so. As such, to preliminarily insist on an EA under such circumstances and without clear reasoning demonstrating the insignificance of the proposed action runs afoul of CTRMA’s duty to establish why an EIS should not be prepared when one normally would be. *See Davis v. Mineta*, 302 F.3d 1104, 1117 (10th Cir. 2002), *abrogated on other grounds by Dine Citizens Against Ruining Our Env’t v. Jewell*, 839 F.3d 1276 (10th Cir. 2016)) (explaining that where the FHWA presumes an EIS will *normally* be prepared, it does not create a mandatory duty to do so, but it does “impos[e] on the FHWA the burden of establishing why that presumption should not apply in this particular case”; “[i]f FHWA arbitrarily and capriciously failed to follow its own regulation, its decision must be reversed”).

Finally, the unique role of Travis County in these circumstances (and other nearby counties and municipalities such as Hays County and the City of Rollingwood) is yet an additional factor weighing in favor of preparing an EIS rather than a shorter, less detailed EA. When other governmental entities weigh in with specialized insights as to whether an EIS is required—and Travis County and its in-house technical staff certainly have specialized knowledge as to resources within its jurisdiction and expected impacts to those resources—that unique role demands that “their criticisms be treated with appropriate solicitude.” *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 985 F.3d 1032, 1044 (D.C. Cir. 2021) (holding that Tribe, with its unique role and government-to-government relationship with the Corps should be treated as such during the NEPA process); *see also National Parks Conservation Ass’n v. Semonite*, 916 F.3d 1075, 1084–85 (D.C. Cir. 2019) (emphasizing the important role played by

entities other than the federal government, particularly “highly specialized governmental agencies and organizations,” in evaluating whether an action’s impacts would be significant and thus whether an EIS was required).

B. CTRMA’s Arguments Against Preparing an EIS are Legally Flawed

CTRMA’s arguments against conducting a full EIS also fail to withstand scrutiny. As an initial matter, it is inappropriate for any federal agency, including CTRMA here as it stands in place of FHWA, to prejudge the outcome of an EA before completing the required analysis. *See, e.g.*, March 2023 Presentation at 45 (CTRMA claiming that it is “highly unlikely to require an EIS at the end of the process because receiving a FONSI means the EA already provides solutions/mitigations to environmental issues”). “An agency cannot merely assert that its decision will have an insignificant effect on the environment, but must adequately explain its decision.” *Cal. Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1097 (9th Cir. 2011) (internal citation omitted). It must instead “supply a convincing statement of reasons why potential effects are insignificant.” *Id.*⁶

In addition, CTRMA’s dogged insistence that its EA here is effectively equivalent or perhaps better than an EIS, *see* March 2023 Presentation at 43, is also highly suspect, legally problematic, and conveniently overlooks the substantially different purposes that EAs and EISs serve under NEPA. As the CEQ regulations make clear, whereas an EA is designed only to identify whether there may be significant environmental effects, an EIS is intended to actually explore those effects and any variation in impacts among the proffered alternatives with the goal of informed public participation and transparent decision-making in selecting an alternative. By its very definition, an EA cannot do this because an EA is only appropriate for projects that do *not* “have a reasonably foreseeable significant effect on the quality of the human environment.” 42 U.S.C. § 4336(b). The different treatment of the alternatives analysis for the respective documents underscores this. *Compare* 40 C.F.R. § 1502.14 (requiring agency to “[r]igorously explore and objectively evaluate reasonable alternatives to the proposed action” in an EIS, and “sharply define the issues for the decision maker and the public and provide a clear basis for choice among options,” *with id.* § 1501.5(c)(ii) (requiring only a “brief discussion[]” of alternatives in an EA).

Indeed, as courts have repeatedly found, an EA cannot legally stand in for an EIS when a full EIS is required under the law because the action’s effects will be significant—no matter how

⁶ NEPA and its implementing regulations specifically *prohibit* agencies from prejudging the NEPA process, including the all-important question of whether to prepare an EIS. *See, e.g.*, 40 C.F.R. § 1502.5 (stating that the EIS process must “serve as an important practical contribution to the decision-making process and will not be used to rationalize or justify decisions already made”); *Metcalf v. Daley*, 214 F.3d 1135, 1142-45 (9th Cir. 2000) (NEPA review “must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made,” and rejecting an EA because “[i]t is highly likely that because of the Federal Defendants’ prior written commitment to the Makah and concrete efforts on their behalf, the EA was slanted in favor of finding that the Makah whaling proposal would not significantly affect the environment” in order to avoid preparation of an EIS).

long or how detailed the EA may be or how many technical studies the EA may include. As the Ninth Circuit has explained, “[n]o matter how thorough, an EA can never substitute for preparation of an EIS, if the proposed action could significantly affect the environment.” *Anderson v. Evans*, 371 F.3d 475, 494 (9th Cir. 2004) (emphases added; internal citation omitted). This is because:

We stress in this regard that an EIS serves different purposes from an EA. An EA simply assesses whether there will be a significant impact on the environment. An EIS weighs any significant negative impacts of the proposed action against the positive objectives of the project. Preparation of an EIS thus ensures that decision-makers know that there is a risk of significant environmental impact and take that impact into consideration. As such, an EIS is more likely to attract the time and attention of both policymakers and the public.

Id.; see also *Env’t Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 872 (9th Cir. 2022) (“an EA is intended to help an agency decide if an EIS is warranted; an EA is not meant to replace or substitute for an EIS”).

Likewise, in rejecting a functionally-identical argument that a 350-page EA rendered an EIS unnecessary, then-Judge Breyer explained that “under NEPA and its implementing regulations, we cannot accept the EAs as a substitute for an EIS—despite the time, effort, and analysis that went into their production—because an EA and an EIS serve very different purposes.” *Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985). Describing the fundamentally different functions served by an EIS and an EA, the First Circuit explained that an EA’s focus is on determining whether impacts are sufficiently significant to warrant consideration in an EIS, whereas an EIS is designed to “weigh negative environmental impacts against a project’s other objectives.” *Id.*; see also *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 58, 64 (D.D.C. 2010) (*aff’d in part, rev’d in part on other grounds*, 661 F.3d 1147 (D.C. Cir. 2011) (noting that an EA may be employed to “determin[e] whether to prepare an [EIS],” not to substitute for an EIS when such a document is required to address significant impacts); *Citizens Advisory Comm. on Priv. Prisons, Inc. v. U.S. Dep’t of Just.*, 197 F. Supp. 2d 226, 261 (W.D. Pa. 2001), *aff’d*, 33 F. App’x 36 (3d Cir. 2002) (“[L]ength and complexity tell us nothing about the ultimate question that we must answer in the present case: whether the project will have a significant effect on the environment.”); *cf. Morris v. Slater*, No. CIV. A. 398-CV-2092L, 1998 WL 959658, at *4 (N.D. Tex. Jan. 15, 1998) (“An Environmental Assessment is a ‘concise’ document which ‘briefly’ discusses the relevant issues, and concludes that either an EIS is necessary or makes a finding of no significant impact.”).

Accordingly, no level of assurances by CTRMA that an EA would be as good as an EIS answers the legally relevant question—will *this* action have significant impacts on affected resources. Because that answer is a resounding “yes,” CTRMA has but one lawful option under NEPA—to prepare an EIS to evaluate those significant effects and consider feasible alternatives.

C. Practical Considerations Also Support Preparing an EIS as this Time

Much like the flawed legal reasoning discussed above, as a practical matter, the purported reasons for not conducting an EIS are also deeply flawed.

CTRMA's assertion that an EIS takes an average of seven years to complete and its subsequent assumption that preparing an EA instead would lead to opening the roadway *five years earlier* cannot withstand scrutiny. *See* March 2023 Presentation at 42, 44. First, the figure of seven years appears to be highly inaccurate. *See supra* note 5. Furthermore, it is wildly out of step with both NEPA itself, as updated in 2022, and the revised implementing regulations, effective July 1, 2024, which require an EIS to be completed in *two* years, notwithstanding the complexity of the project. As such, there is every reason to think that the difference in time between preparation of an EIS versus an EA will be within the one-year variation expressly contemplated by the statute and regulations.

Indeed, as a practical matter, given that an EIS is warranted here and that any comprehensive and fair EA would find that the MoPac South project will entail significant environmental impacts, the more prudent and efficient course of action is to simply prepare an EIS now. By completing an EA first under these circumstances, CTRMA is needlessly prolonging the process. As then Judge Breyer admonished in *Sierra Club v. Marsh*:

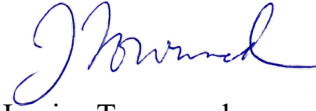
We should not give conclusive weight, one way or the other, to the simple *facts* of EA length, complexity, and controversy. These facts do not by themselves show that the EAs' conclusion—"no significant impact"—is correct, nor do they show it is incorrect. At most they show the *practical* wisdom of CEQ's advice: the agencies would have saved time in the long run had they devoted their considerable effort to the production of an EIS, instead of the production of documents seeking to prove that an EIS is not needed.

769 F.2d at 875. CTRMA should heed this admonition and start the EIS process *now*. That will save substantial time and resources and reduce the legal vulnerability of CTRMA's decision and accompanying NEPA analysis.

Conclusion

The Travis County Commissioners Court has a strong interest in ensuring that CTRMA and TxDOT produce a comprehensive and accurate environmental analysis of the impacts from the MoPac South project both to give the public a meaningful opportunity to participate and comment on this project and to accurately and adequately inform the decision-making process, including through the consideration of feasible alternatives. The most sensible choice—as outlined above—is to prepare an EIS in the first instance, which, when completed within the two years as required by statute and regulation, will in fact be completed far more quickly than the seven years currently projected by CTRMA. More importantly, only by preparing an EIS can CTRMA and TxDOT meet their NEPA obligations to actually weigh the alternatives before them and the respective impacts of each option under consideration. This EIS approach will ultimately minimize cost and delay, while promoting sound, lawful decision-making on how best to proceed on the MoPac South project.

Respectfully submitted,



Jessica Townsend
William S. Eubanks II
Eubanks & Associates, PLLC

CC Via Email:

Jose Campos
FHWA Planning Team Leader
jose.campos@dot.gov

Tucker Ferguson, P.E.
TxDOT Austin District Engineer
tucker.ferguson@txdot.gov

Judge Andy Brown
andy.brown@traviscountytexas.gov

Travis County Commissioners Court
commissioners-court@traviscountytexas.gov

Leslie Dippel
Deputy Chief County Attorney, Travis County
leslie.dippel@traviscountytexas.gov

Cynthia McDonald
County Executive, Transportation & Natural Resources
cynthia.mcdonald@traviscountytexas.gov