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

AQUIFER GUARDIANS IN URBAN AREAS, *Plaintiff*,	)	
vs.	)	CIVIL ACTION NO. SA-08-CA-0154-FB
FEDERAL HIGHWAY ADMINISTRATION; UNITED STATES FISH AND WILDLIFE SERVICE; AMADEO SAENZ, JR., Executive Director, Texas Department of Transportation; TERRY BRECHTEL, Executive Director, Alamo Regional Mobility Authority. *Defendants*.	)	

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND REQUEST FOR HEARING

Plaintiff Aquifer Guardians in Urban Areas (AGUA), pursuant to F.R.C.P. 65 and Local Rule CV-65, moves for a preliminary injunction barring clearing, construction, and related activities for the proposed highway "US 281 at Loop 1604 Interchange Improvements" against Defendants Federal Highway Administration (FHWA), and the above-named Executive Directors of the Texas Department of Transportation (TxDOT) and the Alamo Regional Mobility Authority (ARMA) in their official capacities.[1]

Urgency. Plaintiff's best information indicates that ARMA currently intends to start construction in January 2011.[2] As set forth in this motion and the four attached

[1] Due to the nature of the relief requested and page limits, this motion focuses on Plaintiff's NEPA claims. Plaintiff is not seeking to enjoin the U.S. Fish and Wildlife Service and intends to brief its Endangered Species Act claims in its motion for summary judgment.

[2] Exh. 1, November 2010 report from ARMA's December board meeting packet at pg. 2.

affidavits,[3] allowing construction activities to proceed during the course of this case would result in irreparable harm to Plaintiff, the environment, the public interest, and the ability of this Court to fashion an effective remedy upon final hearing of this case. The preliminary injunction would be for a relatively short period of time—that is, until the Court's ruling on the parties' summary judgment motions or trial on the merits.

This motion and supporting evidence establishes a *prima facie* case for preliminary injunction. Plaintiff requests that an evidentiary hearing be set promptly following Defendants' time for response. Because the announced start of construction date is rapidly approaching, Plaintiff did not delay filing this application pending its review of the administrative records, which were just filed. However, Plaintiff expects that its briefing and evidence upon hearing will include additional references to the administrative records now on file with the court.

Conference: Plaintiff conferred with all Defendants and they indicated that they are opposed to the issuance of a preliminary injunction.

Plaintiff's NEPA Claims

In broad strokes, Plaintiff's NEPA claims are that (1) the proposed project, approved as a documented Categorical Exclusion[4] ("CE") from NEPA and misleadingly labeled "operational" improvements to the 281/1604 "interchange," is wholly inconsistent with the CE regulations given the project's size, context, likely environmental impacts, and substantial controversy; (2) the CE project has been illegally

[3] Att. A, Declaration of D. Lauren Ross, Ph.D., P.E., environmental engineer and water resources expert; Att. B, Declaration of Bob Sartor; Att. C, Declaration of Reid Ewing, Ph.D., nationally-recognized expert on transportation; Att. D, Declaration of Richard Alles, AGUA member, board member, and former AGUA technical research director.

[4] FHWA Administrative Record Doc. No. 338 (Final CE document).

segmented from the other 281 and 1604 improvements to avoid the Environmental Impacts Statements ("EIS") being prepared for 281 and 1604,[5] and building the CE project will impermissibly prejudice the EISs; and (3) independent of segmentation, it is impossible to conclude that the CE project, added to the other 44.5 miles of improvements proposed for US 281 and Loop 1604, mainly over the Edwards Aquifer recharge zone, does not add up to a significant cumulative impact.

In Plaintiff's view, this case can be resolved on basic, incontrovertible facts about the project, its history and context, and its clear inconsistency with NEPA and the CE regulations. Put plainly, it defies common sense to conclude that a $145 million highway project extending six miles along Loop 1604 and three miles along US 281 over the recharge zone of San Antonio's sole-source, karstic Edwards Aquifer water supply, passing through and over the head of existing businesses and neighborhoods, and requiring more than two years of construction will not have any significant direct, indirect or cumulative impacts on travel patterns or the human environment. Similarly, it defies common sense to state that the proposed project is not part of, and has no relation to, the rest of the proposed 281 and 1604 improvements, or to say that there is no controversy concerning the project. Yet this is what Defendants have concluded in approving the "Categorical Exclusion" from the National Environmental Policy Act.

As this Court knows, controversy is well-established in this case and was a reason for requiring an EIS on US 281.[6] That controversy continues to this day, surrounding

[5] Currently, an EIS is being prepared on a 7.5 mile stretch of US 281 (Loop 1604 to Borgfeld Rd.), and a separate EIS is being prepared for a 37 mile stretch of Loop 1604 (US 90 West to IH-35 North).

[6] *See* Doc. No. 99-2 at pg. 1, November 2008 FHWA letter requiring an EIS for future projects on US 281 "due to the level of environmental controversy in the subject area."

both highway expansion over the Edwards Aquifer in general, and specifically over the CE project's impacts to the environment and surrounding communities, such as the Town of Hollywood Park.[7]

Under FHWA's regulations on Categorical Exclusions, found at 23 C.F.R. § 771.117, (Exh. 2, attached) all CE projects must meet the following primary criteria:

> They are actions which: do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.

23 C.F.R. § 771.117(a). When CE approval is sought pursuant to a documented CE, such as the case at hand, it is the applicant's burden to "submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result." *Id.* at § 771.117(d). The types of projects listed in § 771.117(d) are small-scale, minimally-invasive transportation-related improvements such as modernization, rehabilitation, and maintenance projects, installation of lighting or utilities, and adding roadside facilities such as storage buildings or sidewalks, to name a few examples.[8] While the list in § 771.117(d) states that it is a list of "examples," the courts have looked to the list for guidance.[9]

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[7] Alles Dec. at at ¶¶ 18-27; Sartor Dec. at ¶¶ 7-20.

[8] Even projects normally classified as CEs, may not be appropriate if there are "Significant environmental impacts," or "Substantial controversy on environmental grounds" (23 C.F.R. § 771.117(c)), which are factors that certainly apply in this case.

[9] *See, e.g,. West v. Secretary of the Department of Transportation*, 206 F.3d 920, 928 (9th Cir. 2000) (noting the dissimilarity in the "magnitude" of an already built interchange project quite like the one proposed in this case, to the examples listed in the regulation). The project in this case is more than 7 times the cost of the interchange project in *West*.

Into these narrowly drawn CE regulations, Defendants are attempting to drive a $145 million project that, by Defendants' own reckoning, covers 9 miles along US 281 and Loop 1604, adds at least 20 acres of impervious cover, and crosses 13 waterways in the Edwards Aquifer recharge zone. A major part of the project, but by no means the only part, will be the construction of four new elevated, high-speed highway lanes ("direct connectors") that will add a fourth and fifth level to the interchange up to 95 feet above the depressed 281 main lanes. Nowhere in the CE regulations are there provisions that cover a new "interchange" or "direct connectors," nor do the provisions in any way support the idea that a CE is appropriate for highway projects of this cost and scale.

Equally important, the label of "interchange" improvements is grossly misleading. The CE project involves far more than construction at the interchange. The CE refers to adding six different types of lanes in the 281 and 1604 corridors: "direct connector" lanes; "merge and diverge" lanes; "auxiliary lanes"; "non-through traffic lanes;" "acceleration and deceleration" lanes; and "turn-around" lanes. The project will also widen bridges and cross street structures; remove, add, and change ramps; alter frontage roads; add ancillary facilities; and sink piers for elevated structures into unpredictable, sensitive karst topography. In reality, this is a major highway construction and expansion project (as the price-tag indicates) that incontrovertibly adds capacity and is designed to impact travel patterns.[10] Even TxDOT's own classification system for federal stimulus

[10] Ewing Dec. at ¶¶ 19-29; Exh. 3, letter from Bruce Melton, P.E., environmental engineer at pgs.1-2.

projects, puts the project in the "Added Capacity / Mobility" category, rather than "Maintenance / Preservation" or "Enhancement."[11]

All of this major construction, excavation, and highway operation, will occur: (1) mainly over the recharge zone of the Edwards Aquifer, an area "for which degrees of vulnerability are really a futile attempt" according to an expert on the Aquifer;[12] (2) within habitat for endangered karst invertebrates; and (3) in close proximity to residential areas such as the Town of Hollywood Park, which will suffer the brunt of the construction delays and cut-through traffic (for which there has been no study), business impacts, and noise, air, and light pollution impacts.[13] It simply does not make sense to classify this project with other projects that categorically do not "either individually or cumulatively, have any significant environmental impacts." 23 C.F.R. § 771.117(a).

Preliminary Injunction Standards

The standards for obtaining a preliminary injunction, which is an "extraordinary remedy," are well-known. Four factors must be established by the moving party: 1) a substantial likelihood of success on the merits, 2) a substantial threat that failure to grant the injunction will result in irreparable injury, 3) the threatened injury to the moving party outweighs any damage that the injunction may cause the opposing party, and 4) the issuance of a preliminary injunction will not disserve the public interest. *Allied Mktg.*

[11] Exh. 4 at pg. 8. The proposed project, which is one of the most expensive on TxDOT's list, is described as "Construct Interchange," and not "Repair," "Restore," or even "Rebuild," which are terms used for other projects on the list.

[12] Exh. 5, Deposition of Geary Schindel taken in this case, at pg. 80 lns. 13-14. Mr. Schindel is employed as the Chief Technical Officer of the Edwards Aquifer Authority.

[13] Sartor Dec. at ¶¶ 14-20; Alles Dec. at ¶¶ 18-25.

Group, Inc. v. CDL Mktg., Inc., 878 F.2d 806, 809 (5th Cir. 1989). The purpose of a preliminary injunction is to prevent irreparable injury so as to preserve a court's ability to render a meaningful decision on the merits. *Canal Auth. v. Callaway*, 489 F.2d 567 (5th Cir. 1974). Irreparable injury has been defined as an injury for which monetary damages are inadequate or difficult to ascertain. *Glasco v. Hills*, 558 F.2d 179 (3rd Cir. 1977).

The Supreme Court has noted: "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). At the same time, a balancing of the competing interests must still be made, and environmental harm does not always justify a preliminary injunction. *Winter v. N.R.D.C.*, 129 S.Ct. 365, 377 (2008).

Plaintiff Has a Strong Likelihood of Success on the Merits

For a Categorical Exclusion from NEPA, the initial burden is on FHWA and the State Defendants to demonstrate that the criteria for CEs are satisfied and that "significant environmental effects will not result." 23 C.F.R. § 771.117(d). Plaintiff's burden under the Administrative Procedure Act is to show that the decisions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accord with the law." 5 U.S.C. § 706(2)(A). There are very few reported decisions in the Fifth Circuit involving CEs from NEPA but other Circuits have noted that: "an agency's interpretation of the meaning of its own categorical exclusion should be given controlling weight unless plainly erroneous or inconsistent with the terms used in the regulation." *Alaska Center for the Environment v. U.S. Forest Service*, 189 F.3d 851, 857 (9th Cir. 1999). In general, the

"arbitrary and capricious" standard is met if "the agency entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

As set forth above, the proposed project is plainly inconsistent with the terms and tenor of the CE regulations. In addition, there are multiple "important aspects" of the problem that were not considered, conclusions that run counter to the evidence, and internal, contradictory conclusions on the face of the CE. As just one important example, the CE recognizes on pg. 65 that "the type, timing, and intensity of development could be influenced by the project; it is plausible the improvements will hasten the development of developable land," and later, on pg. 92: "if development rates increase in intensity, recharge water quality could degrade over time." Yet the CE illogically concludes that the Edwards Aquifer will not suffer any individual or cumulative impacts.

The ultimate conclusion of "no significant impacts" is utterly implausible and cannot be ascribed to agency expertise or legitimate differences of opinion. As most clearly evidenced in the affidavits of Plaintiff's Ph.D. experts on transportation and water resources, there is no support for the CE's conclusions that the proposed project will not significantly impact, either individually or cumulatively: 1) water quality (during the construction phase and operation); 2) travel patterns; and 3) induced growth and land use, to name three examples and independent reasons that would prohibit the use of CE a under § 771.117(a). As discussed in detail in those affidavits, the scientific data, studies, and the available project and site-specific information actually establish the opposite.

Plaintiff and its Members Will Suffer Irreparable Harm Absent a Preliminary Injunction, and the Public Interest Favors Granting a Preliminary Injunction

All four of the affidavits submitted with this motion establish that irreparable harm to the environment and critical natural resources is likely, if not certain. Moreover, Plaintiff's standing in this matter is established through concrete and particularized injuries detailed in the affidavit of AGUA member, Richard M. Alles. Mr. Alles, a Hollywood Park resident who lives less than a mile from the CE project and relies on an Edwards Aquifer well, is directly threatened by air and noise pollution, water quality degradation, safety and health impacts, and diminished community cohesion that would be caused by construction and operation of the proposed highway project.

As the First Circuit has succinctly stated, a NEPA violation entails more than just procedural harm: "[T]he risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation." *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989). In this case, Defendants have dropped to an even lower level of NEPA review than the 2007 Environmental Assessment/Finding of No Significant Impact that was challenged in this case and revoked. Defendants' indefensible backsliding to a Categorical Exclusion for a $145 million major highway expansion project (masquerading as "interchange" improvements) poses an extreme risk of irreversible damage to the environment and the public interest. This is because the upshot of relying on a CE is that Defendants are proceeding without accurate, scientific information about the project's impacts, without any analysis of alternatives, and without meaningful input from public officials, expert, agencies, and citizens. Perhaps most importantly, Defendants are proceeding without the agency expertise of the Edwards Aquifer Authority, and without meaningful coordination with the highly impacted cities

of Hollywood Park and Hill Country Village. By doing so, Defendants are jeopardizing San Antonio's sole source drinking water supply and the health, safety, and livelihood of thousands of San Antonio residents.

In addition, by advancing the CE project, Defendants will irreparably damage the EIS processes currently being conducted for 281 and 1604, which is yet another violation of NEPA (i.e. illegal segmentation and prejudice to ongoing EISs) and a threat to the public interest. FHWA regulations require that an action "[n]ot restrict consideration of alternatives for other reasonably foreseeable transportation improvements. 23 C.F.R. § 771.111(f); *see also* 40 C.F.R. § 1506.1(a). By locking in the highway design at the 281/1604 interchange, and making significant investments in additional capacity at the interchange and along several miles of the 281 and 1604 corridors, building the CE project will invariably prejudice the alternatives being considered under the current EISs for 281 and 1604. *See* Ewing Dec. ¶ 29; Exh. 3; Melton letter at pgs. 1-2.

Defendants may argue that any injunction would prolong congestion for local commuters and residents. To the contrary, the start of construction will greatly exacerbate, not ease, the travel headaches of the local public, especially for Hollywood Park residents. Alles Dec. at ¶¶ 18-20, Sartor Dec. at ¶¶ 11-13. Studies have shown that for major highway projects the additional time that commuters spend stuck in construction traffic takes many years to be made up for through the ostensible increased traffic movement after construction is completed. Ewing Dec. ¶ 44. As before, haste makes waste, and any delay in the start of construction will only benefit the public interest by allowing time to reconsider the project and to improve coordination, design, management, and mitigation of the proposed project.

WHERFORE, Plaintiff AGUA respectfully requests that the Court set a hearing on Plaintiff's motion for preliminary injunction, and upon hearing, enter an order enjoining Defendants from clearing, construction, and related activities, and from any further financial commitments to such activities, pending resolution of this case on the merits. Plaintiff requests that only a nominal bond be required to secure the injunction.[14]

DATED: December 20, 2010

Respectfully submitted,

/s/ Andrew Hawkins

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Attachments

A) Declaration of D. Lauren Ross, Ph.D., P.E.
B) Declaration of Bob Sartor.
C) Declaration of Reid Ewing, Ph.D.
D) Declaration of Richard Alles.

Exhibits

1) Construction date, from ARMA December Board Meeting Packet.
2) FHWA regulation on Categorical Exclusions, 23 C.F.R. § 771.117.
3) Letter from Bruce Melton, P.E.
4) TxDOT's list of projects receiving federal stimulus funds.
5) Deposition of Geary Schindel.

[14] *See Davis v. Mineta*, 302 F.3d 1104, 1126 (10th Cir. 2002) ("[o]rdinarily, where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered").

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Lisa Marie McClain, P.O. Box 12548, Austin, Texas 78711-2548; Ken Ramirez, 111 Congress Ave., Suite 1400, Austin, TX 78701; Clayton Diedrichs, Assistant United States Attorney, 601 N.W. Loop 410, Suite 600, San Antonio, Texas 78216; Jack Gilbert, Federal Highway Administration, 300 East 8th Street - Room 826, Austin, TX 78701; C. Brian Cassidy, 100 Congress Avenue, Suite 300, Austin, TX 78701; James W. Checkley, Jr., 100 Congress Avenue, Suite 300, Austin, TX 78701; Elizabeth E. Mack, 2200 Ross Avenue, Suite 2200, Dallas, Texas 75201; Jonathan D. Pauerstein, 755 East Mulberry Avenue, Suite 200, San Antonio, Texas 78212; Lawson Fite, U.S. Department of Justice, Environment and Natural Resources Division, Ben Franklin Station, P.O. Box 7369, Washington, D.C. 20044-7369; and Kevin W. McArdle, U.S. Department of Justice, Environment and Natural Resources Division, Ben Franklin Station, P.O. Box 7369, Washington, D.C. 20044-7369.

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