



2. Specifically, Plaintiff challenges Defendants' decisions to classify and approve the 281/1604 improvements as a "Categorical Exclusion" ("CE") from NEPA—an exception that only applies to projects "which do not individually or cumulatively have a significant effect on the human environment," 40 C.F.R. § 1508.4. The February 2010 document prepared for the Categorical Exclusion (the "281/1604 CE"), and FHWA's approval of that document, is arbitrary, capricious, and otherwise not in accordance with the law, including FHWA's own NEPA regulations on CEs.
3. By categorically excluding the 281/1604 improvements from NEPA requirements, Defendants are recklessly forging ahead with major highway construction and expansion in the US 281 and Loop 1604 corridors 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. In doing so, Defendants are threatening San Antonio's sole source drinking water supply (the Edwards Aquifer), jeopardizing endangered karst invertebrates, and harming the health of the many people who live and work in the 281/1604 area.
4. Defendants are also back-sliding in their level of NEPA review and improperly avoiding the expert input of the Edwards Aquifer Authority ("EAA"), given that previous litigation and substantial, ongoing controversy over 281 and 1604 have already established the necessity of EIS review and expert input for the sensitive resources located in this area of San Antonio.

5. Defendants describe the proposed project as “operational” improvements to the “interchange” that will not add capacity. Basic project facts disclosed in the CE, however, establish that the action is an extensive and invasive project that will expand and disturb the US 281 and Loop 1604 corridors for several miles beyond the interchange. The true nature of this project is flatly inappropriate for a CE and impossibly at odds with Defendants’ conclusions that the improvements will neither significantly impact the environment nor have significant effects on travel patterns. The precise intent of the project is to have significant impacts on travel patterns.
6. The 281/1604 improvements will cost about \$145 million, take at least 2 ½ years to build, and extend for approximately 6 miles along Loop 1604, and 3 miles along US 281. Defendants will construct 4 new elevated highway lanes, or “direct connectors,” that will add a fourth and fifth level to the 281/1604 interchange. The new fourth and fifth levels—climbing to a height of 95 feet above the depressed 281 main lanes and 45 feet above the 1604 main lanes—will dramatically impact noise, air quality, and aesthetics in the area. The direct connectors will involve extensive excavation and the sinking of large concrete supports into karst topography containing sensitive flow paths to the Edwards and riddled with voids that provide karst invertebrate habitat.
7. Far beyond the interchange, many new miles of merge and diverge lanes, auxiliary lanes, and ancillary transportation facilities will be built in the 281 and 1604 corridors. Ramps and access will be added, removed, or otherwise altered in

ways that will diminish community cohesion. The construction impacts alone, and associated traffic delays, will significantly impact the environment.

8. The proposed improvements will cross 13 waterways in the Edwards Aquifer recharge zone (including Salado Creek, a 303(d)-impaired water body) and require the widening of bridges on Loop 1604. The project will add approximately 20 acres of impervious cover to the recharge zone of the Edwards Aquifer, the most vulnerable major aquifer in the state of Texas. When added to other reasonably foreseeable future actions, Defendants predict that the 281/1604 improvements will have a cumulative effect of 15,120 acres of development in the Edwards Aquifer resource study area and 19,558 acres of development in the endangered karst invertebrate study area.
9. Even more troubling than what Defendants have disclosed, however, is what Defendants have not disclosed, studied, or even estimated—such as pollutant loadings to the area’s sensitive water bodies, air quality analyses in a region on the brink of non-attainment, and how many cubic yards of cut and fill is proposed for this highly fractious karst region. The paucity of quantified impacts in both the CE and Biological Assessment indicate that Defendants are proceeding under an approach of build first, ask questions later. NEPA mandates the opposite approach.
10. Compounding the NEPA violations, Defendants have improperly segmented the 281/1604 improvements from planned expansion in the US 281 and Loop 1604 corridors that is the subject of ongoing Environmental Impact Statements that will not be completed until 2012. By advancing and funding construction of

improvements at the interchange and in the 281 and 1604 corridors before the EISs are completed, Defendants will impermissibly limit and prejudice the alternatives being considered for 281/1604.

11. In addition to its NEPA claims, Plaintiff challenges Defendants' failure to enter into formal consultations under section 7 of the ESA regarding endangered karst invertebrates inhabiting much of the 281/1604 area. Specifically, AGUA seeks a declaration that the Biological Assessment ("BA") submitted by FHWA and TxDOT, and FWS's concurrence in the finding that the 281/1604 improvements are "not likely to adversely affect" endangered karst invertebrates, are arbitrary, capricious and otherwise not in accordance with law. Given the high likelihood, indeed near certainty, that the 281/1604 improvements will directly, indirectly, and cumulatively harm endangered karst invertebrates, Plaintiff seeks to enjoin Defendants' unlawful "take" under section 9 of the ESA.
12. Unless and until Defendants fully comply with all of their statutory duties under NEPA, the ESA, and the APA, Plaintiff seeks injunctive relief prohibiting financial assistance and construction activity for the 281/1604 improvements.

#### **JURISDICTION AND VENUE**

13. The Court has subject matter jurisdiction over the claims for relief in this action pursuant to 5 U.S.C. §§ 701 et seq. (actions under the APA); 28 U.S.C. § 1331 (actions arising under the laws of the United States); 28 U.S.C. § 1361 (actions to compel an officer of the United States to perform a duty); and 28 U.S.C. §§ 2201-02 (power to issue declaratory judgments in cases of actual controversy).

14. Venue is proper in this judicial district under 28 U.S.C. § 1391(e) because Plaintiff's causes of action arise in this district.

### **PARTIES**

15. Plaintiff Aquifer Guardians in Urban Areas “(AGUA)” is a non-profit, conservation organization whose mission is to educate about and take action to protect the Edwards Aquifer and the quality of life of residents and the sustainability of businesses in the Edwards Aquifer region, including but not limited to, protecting the natural and cultural heritage and public health and safety of the region, and for other charitable natural and cultural resource conservation purposes.
16. AGUA brings this action on behalf of its members, including members living in the area who will be adversely affected by water quality degradation, wildlife habitat loss, traffic and construction noise, additional traffic, aesthetic impairment, increased air pollution, loss of community cohesion, and urbanization of the area. These are actual concrete injuries, traceable to Defendants' conduct that would be redressed by the requested relief. AGUA also brings this action on behalf of itself, since it suffers informational and procedural injuries from the failure of the Defendants to comply with NEPA. AGUA and its members have no adequate remedy at law.
17. Defendant Federal Highway Administration (“FHWA”) is an agency of the federal government within the Department of Transportation responsible for overseeing compliance with NEPA, the Federal Aid Highway Act, and other federal statutes. FHWA approved the Categorical Exclusion from NEPA for the

281/1604 improvements and the February 2010 document prepared for the Categorical Exclusion (the “281/1604 CE”).

18. Defendant U.S. Fish and Wildlife Service (“FWS”) is an agency of the federal government with principal responsibility for implementing the ESA. FWS approved the December 2009 Biological Assessment submitted by FHWA and TxDOT, and concurred in the conclusion that the 281/1604 improvements “may affect but are not likely to adversely affect” endangered karst invertebrates.
19. Defendant Amadeo Saenz is Executive Director of the Texas Department of Transportation (“TxDOT”) and is sued in his official capacity to enjoin construction of the project. TxDOT is the state agency that oversees the construction and maintenance of the highway system in Texas.
20. Defendant Terry Brechtel is Executive Director of the Alamo Regional Mobility Authority (“ARMA”) and is sued in her official capacity to enjoin construction of the project. ARMA is an independent governmental agency created in 2003 to implement transportation projects in Bexar County.

## **LEGAL FRAMEWORK**

### **NEPA and Implementing Regulations**

21. The essential purpose of the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 et seq., is “to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” 40 C.F.R. § 1500.1(c). The Council on Environmental Quality (“CEQ”)—an agency within the Executive Office of the

President—has promulgated regulations implementing NEPA at 40 C.F.R. §§ 1500-1508.

22. As emphasized in the CEQ regulations, “[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). In addition, “NEPA procedures must insure that environmental information is available to public officials *before* decisions are made and actions are taken.” *Id.* (emphasis added).
23. Specifically, NEPA requires preparation of an Environmental Impact Statement (EIS) for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). An EIS must detail the proposed action’s environmental impacts, any alternatives, and any adverse environmental effects or irreversible commitment of resources which would be involved should the proposed action be implemented. *Id.*
24. A “significant” impact may be direct, indirect, or cumulative in nature. 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 regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7. CEQ regulations state that “[s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” 40 C.F.R. § 1508.27(b).

25. Whether an agency action "significantly" affects the environment also takes into account the "context" and "intensity" of a proposed action. 40 C.F.R. § 1508.27. The intensity of an action's impacts implicates numerous factors, including: "[t]he degree to which the proposed action affects public health or safety"; "[u]nique characteristics of the geographic area such as proximity to . . . park lands . . . wild and scenic rivers, or ecologically critical areas"; "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial"; "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks"; "[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration"; "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts"; "[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat"; and "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." *Id.* at § 1508.27(b)(2)-(10).
26. In addition to detailed analysis of impacts, the CEQ regulations emphasize that consideration of alternatives is at "the heart of the environmental impact statement," and that agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14.
27. While an EIS is being prepared, "no action concerning the proposal shall be taken which would (1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives." 40 C.F.R. § 1506.1. Similarly, NEPA does not allow

- agencies to “commit resources prejudicing selection of alternatives before making a final decision. 40 C.F.R. § 1502.2(f).
28. The CEQ regulations further protect the integrity of the NEPA process by requiring analysis of “cumulative,” “connected,” or “similar” actions to be analyzed in the same EIS. 40 C.F.R. § 1508.25(a)(1)-(3). Fifth Circuit precedent and FHWA regulations similarly forbid arbitrary division of a single project into multiple parts to evade NEPA scrutiny, which is often referred to as improper “segmentation.”
29. FHWA’s regulation concerning segmentation provides: “To ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the proposed action to be evaluated must (1) connect logical termini and be of sufficient length to address environmental matters on a broad scope; (2) have independent utility or independent significance; and (3) not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.” 23 C.F.R. § 771.111(f).

#### **Categorical Exclusion Regulations**

30. In appropriate cases, agencies may forego preparation of an EIS and comply with NEPA by (1) preparing a less extensive Environmental Assessment (“EA”) and making a finding of no significant impact on the environment (“FONSI”); or (2) documenting that the action falls within an established Categorical Exclusion. *See* 40 C.F.R. § 1501.4.

31. Under CEQ regulations, a Categorical Exclusion may only be used for actions “which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations.” 40 C.F.R. § 1508.4.
32. Similar in substance to the CEQ regulations, FHWA has promulgated regulations to guide its determinations of what actions do and do not require the preparation of an EIS or EA. *See* 23 C.F.R. § 771.117. The FHWA regulations define three classes of actions, and depending on the class, define the level of NEPA documentation required: Class I actions significantly affect the environment and require an EIS, 23 C.F.R. § 771.115(a); Class II actions are “categorical exclusions” that do not require an EA or EIS, 23 C.F.R. § 771.115(b); and Class III actions are actions in which the significance of the environmental impacts is not clearly established and an EA needs to be prepared, 23 C.F.R. § 771.115(c).
33. A Categorical Exclusion may only be granted if the action will not cause significant environmental impacts. Under 23 C.F.R. § 771.117(a), CEs are further defined as actions that:
- 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*; and do not otherwise, either individually or cumulatively, have any significant environmental impacts.

(Emphasis added).

34. A specific list of CEs that normally do not require any NEPA documentation or further FHWA approval following CE classification is set forth in 23 C.F.R. § 771.117(c). Examples of this class of actions are the installation of bicycle and pedestrian lanes, paths, and facilities, the installation of noise barriers, and the installation of fencing where no substantial land acquisition or traffic disruption will occur. *See* 23 C.F.R. § 771.117(c)(3), (6), (8).
35. Even with actions that would normally be classified as a categorical exclusion, FHWA regulations caution that the presence of “unusual circumstances” may make application of a CE inappropriate. 23 C.F.R. § 771.117(b). Among the circumstances that might be considered unusual for the purposes of this regulation are that the action has “significant environmental impacts” or that there are “inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.” 23 C.F.R. §§ 771.117(b)(1), (b)(4). In cases of unusual circumstances, FHWA will require further study to determine if the CE classification is proper. 23 C.F.R. § 771.117(b).
36. Other projects, pursuant to 23 C.F.R. § 771.117(d), may also qualify as CEs if appropriately analyzed, documented, and approved by FHWA at the Division level. In order to receive a CE in these cases, an “applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result.” 23 C.F.R. § 771.117(d). FHWA has listed several actions under this section for which the application of a documented CE is appropriate.

### Endangered Species Act

37. Congress enacted the Endangered Species Act, 16 U.S.C. §§ 1531-1544, “to halt and reverse the trend toward species extinction, whatever the cost.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). The purpose of the ESA is to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved...[and] a program for the conservation of such endangered species and threatened species...” 16 U.S.C. § 1531(b).
38. Under Section 7(a)(2) of the ESA, federal agencies must ensure that any federal action does not “jeopardize” a listed species or “result in destruction or adverse modification” of its critical habitat. 16 U.S.C. § 1536(a)(2). The ESA section 7 formal consultation process is triggered whenever a federal agency’s action “may affect” a listed species or critical habitat. 50 C.F.R. § 402.14(a). While informal consultation with FWS concurrence is provided for in the regulations, an action that is “likely to adversely affect” a listed species or its critical habitat must undergo formal consultation, which culminates with FWS’s issuance of a Biological Opinion that complies with the ESA and regulatory requirements. *Id.* at §§ 402.02, 402.14(a).
39. The end product of formal consultation is a Biological Opinion in which FWS determines whether the action will jeopardize the survival and recovery of listed species or will adversely modify the species’ critical habitat. 16 U.S.C. § 1536(b). In making that determination, FWS must review all relevant information and provide a detailed evaluation of the action’s effects, including the cumulative

- effects of federal and nonfederal activities in the area, on the listed species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)-(h). FWS also has a statutory duty to use the best available scientific and commercial information in ESA consultations. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).
40. If FWS determines that the action is likely to jeopardize the species, the Biological Opinion must specify reasonable and prudent alternatives that will avoid jeopardy. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(h)(3). FWS must also formulate discretionary conservation recommendations to reduce or minimize the action's impacts on listed species or critical habitat. 50 C.F.R. § 402.14(g)(6).
41. Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency initiates (or reinitiates) consultation on an action under the ESA, the agency, as well as any applicant for a federal permit, "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would" ensure against the likelihood of jeopardy to the species.
42. Under Section 9 of the ESA, it is illegal to "take" an endangered species. "Take" is broadly defined to include harassing, harming, pursuing, wounding or killing such species, 16 U.S.C. § 1532(19). The term "harm" is further defined to include "significant habitat modification or degradation where it ... injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. "The take prohibition applies to any "person,"

16 U.S.C. § 1538(a)(1), including state agencies and/or state officials in their official capacity, 16 U.S.C. § 1532(13).

43. The courts have made clear that government actions authorizing third parties to engage in harmful actions can constitute an illegal taking under Section 9 of the ESA. *See, e.g., Strahan v. Cox*, 127 F.3d 155, 163 (1st Cir. 1997).

## **FACTS**

### **281/1604 Litigation History and Procedural Background**

44. Expanding US 281 and Loop 1604 across the recharge and contributing zones of the Edwards Aquifer has for several years been a controversial proposal in the San Antonio region.
45. Beginning in 2003, ARMA and TxDOT began pursuing a “starter toll system” for northern San Antonio that would expand more than 40 miles of 281 and 1604 (including the construction of a fully-directional interchange at 281/1604) and cost somewhere between 1 and 2 billion dollars.
46. In late 2005, AGUA and another citizens’ group, People for Efficient Transportation, Inc. (“PET”), filed a complaint for declaratory and injunctive relief challenging a 1984 EA (and associated re-evaluations) that had been prepared for the expansion of US 281 north of Loop 1604 to Marshall Road. AGUA and PET also filed a preliminary injunction to stop clearing and construction for the US 281 project.
47. In early 2006, shortly before the hearing set for the preliminary injunction, TxDOT requested concurrence from FHWA to proceed with a new EA that would replace older studies and cover a larger 7.4 mile segment of US 281 extending

- from Loop 1604 north to Borgfeld Road. FHWA withdrew prior environmental clearances and construction on the US 281 project ceased. FHWA then approved resuming the NEPA compliance process with a new EA, leaving the decision to prepare an EIS to a later day.
48. Based on FHWA's withdrawal of approval of the US 281 project, the ceasing of construction of the project, and the reinitiation of NEPA procedures, AGUA and PET entered into settlement discussions with FHWA and TxDOT. The parties then settled the dispute with a joint motion to dismiss without prejudice, which was approved by the Honorable Xavier Rodriguez, U.S. District Judge, in January 2006.
  49. As the EA for US 281 proceeded, FHWA also allowed for initiation of an EA for the proposed tolled expansion of a 36.4 mile stretch of Loop 1604. The Loop 1604 EA covered improvements to the 281/1604 interchange.
  50. In 2007, TxDOT completed the EAs for US 281 and Loop 1604 and recommended Findings of No Significant Impact for both. FHWA issued a FONSI for US 281 in August of 2007.
  51. In February 2008, AGUA and another citizens' group, Texans Uniting for Reform and Freedom, filed a complaint for declaratory and injunctive relief challenging the FONSI issued for the US 281 project. Plaintiffs also challenged the decision to allow separate EAs for US 281 and Loop 1604, alleging that the projects were connected, cumulative and/or similar actions (as those terms are used in applicable NEPA regulations) that ARMA was planning, developing, financing, and constructing as a single "starter toll system" for San Antonio.

52. Following court-ordered limited discovery and supplementation of the Administrative Record, FHWA requested, and was granted, a stay in the proceedings to review documents produced by TxDOT, which FHWA stated that it had not reviewed during preparation of the 2007 EA. Near the end of the stay, TxDOT formally requested that FHWA withdraw the 2007 FONSI challenged by Plaintiffs.
53. In October of 2008, FHWA revoked the August 2007 FONSI for US 281 and filed a motion to dismiss, arguing mootness based on the agency's withdrawal of the 2007 FONSI.
54. In November 2008, FHWA filed an amended motion to dismiss. The amended motion made clear that FHWA was committing itself and TxDOT to preparing an EIS for future federally-funded projects in the US 281 corridor, with FHWA to provide "full and comprehensive oversight" of the EIS. The amended motion also established that the San Antonio office of TxDOT would be prohibited from supervising the EIS given the "discrepancies in the award of scientific services contracts for the 2007 EA."
55. Plaintiffs opposed the motions to dismiss, in particular to pursue its live claim that NEPA required any EIS to include the entire planned expansion of US 281 and Loop 1604 and not just the segment of 281 from 1604 to Borgfeld.
56. In February 2009, the Honorable Fred Biery, U.S. District Judge (now Chief U.S. District Judge), issued an Order denying FHWA's amended motion to dismiss and administratively closing the case. The Court noted of Plaintiffs' outstanding claim: "it seems commonsensical that two intersecting parts costing billions

- would be connected to create an Aristotelian whole.” The Court concluded, however, that the “issue is effectively in neutral gear until FHWA makes its assessment of whether a full environmental impact statement is appropriate for the Loop 1604 project as it has done for the US Highway 281 project.”
57. On July 8, 2009, Defendants published a Notice of Intent to prepare an EIS for improvements to US 281 (Loop 1604 to Borgfeld Rd.). 74 Fed. Reg. 18941.
  58. On July 31, 2009, Defendants published a Notice of Intent to prepare an EIS for improvements to Loop 1604 (FM 1957 to IH 35 North). 74 Fed. Reg. 38260.
  59. As of the date of this filing, Defendants are working on separate EISs for US 281 and Loop 1604, with Alamo RMA leading both studies. Neither EIS has been completed.
  60. In comments for the EIS processes, AGUA has continued to object to separating the NEPA processes into two, parallel and simultaneous efforts for a project with integrated funding and design needs, and in a common location over the Edwards Aquifer recharge zone, as illegal, illogical, and fiscally irresponsible.
  61. Notwithstanding the initiation of EIS processes for US 281 and Loop 1604, Alamo RMA and TxDOT, with approval from FHWA, decided to forge ahead in early 2009 with the 281/1604 improvements challenged herein and seek federal funding through the American Recovery and Reinvestment Act (“ARRA”) of 2009. Eventually some \$80 million in ARRA funds (allocated through the San Antonio MPO and the Texas Transportation Commission) were awarded for the project, with the other \$60 million in funding coming from state Proposition 14 funds.

62. On March 2, 2009, AGUA sent a letter to FHWA objecting to the segmentation of the so-called 281/1604 interchange improvements from the rest of the 281/1604 expansion undergoing EIS review. AGUA urged FHWA to recognize that a Categorical Exclusion was not appropriate and would prejudice the ongoing EIS processes. As AGUA stated in that letter: “Whether the interchange is itself tolled or non-tolled, funded with stimulus money or not, it will be the centerpiece of the financially and operationally interdependent 281/1604 project. It is impossible to build the interchange without determining future development and without prejudicing the consideration of more environmentally-sound, sensible alternatives in the pending EIS.” AGUA urged FHWA to put an end to continued attempts to piecemeal environmental review, and further urged FHWA to prepare a single EIS covering the entire 281/1604 system (including the interchange) that would finally engage the public in an open and honest process on the proposed 281/1604 expansion.
63. In a July 15, 2009 letter, FHWA approved of TxDOT and ARMA’s preparation of a documented Categorical Exclusion (“CE”) for the US 281/Loop 1604 interchange improvements.
64. For the proposed CE, an open house was held on August 25, 2009, and a public meeting was held on January 11, 2010. Over 400 comments were submitted at these meetings, the majority of which questioned the agencies’ assessment of impacts and the use of \$140 million of scarce transportation funds on the project in light of other, less expensive, more sustainable, higher priority transportation projects.

65. In addition to comments questioning the agencies' assessment (or lack thereof) of air, noise, water quality and other natural resource impacts, several comments from residents (of Hollywood Park, in particular) raised concerns about negative impacts to their communities from changing access to 281 and 1604 and increasing cut-through traffic in their neighborhoods. On other occasions, the current Hollywood Park Mayor and City Council have publicly stated similar concerns and called for greater coordination so as to resolve these issues and prevent negative impacts to their City, which is located adjacent to the 281/1604 interchange and stands to be highly impacted. The controversy over Hollywood Park has not been resolved and continues to this day.
66. AGUA submitted detailed written comments (dated September 4, 2009, and January 21, 2010) discussing the legal deficiencies of the Categorical Exclusion classification and document. As part of the January 2010 comments, AGUA attached technical comments from engineer Bruce Melton and groundwater hydrologist George Rice. Mr. Melton's central conclusions were that the proposed project would add capacity, have significant impacts on travel patterns, and prejudice and limit the consideration of alternatives in the 281 and 1604 EISs by locking in the design of the interchange and adding substantial improvements in the 281 and 1604 corridors. Mr. Melton also detailed fundamental flaws in the CE's air and noise analysis. Mr. Rice's central conclusion was that, given the lack of data and analysis in the CE: "it is not possible to evaluate the effects that the project may have on endangered species that may inhabit the area, or on the quality of water in the Edwards Aquifer."

67. Following revisions to the draft CE, FHWA issued its final approval in a letter dated February 24, 2010.
68. On January 25, 2010, FWS issued a written concurrence for the December 2009 Biological Assessment submitted by TxDOT and FHWA. The BA concludes that the 281/1604 improvements “may affect but are not likely to adversely affect” two endangered karst invertebrate species, *Rhadine infernalis* and *Rhadine exilis*. FWS also concurred that the improvements would not adversely affect designated critical habitat in the area.
69. As may be noted, FWS issued its written concurrence prior to the release of the revised, final February 2010 CE. Significantly, the revised, final CE discloses that the 281/1604 improvements will add 19.8 acres of impervious cover whereas the draft CE released to the public and relied upon by FWS incorrectly estimated it as 10 acres. The revised CE references a February 19, 2010 discussion between FHWA and FWS in which the agencies determined that the increase in impervious cover would not affect the “may affect but not likely to adversely affect” determination. There is no other information, analysis, or written documentation provided with the CE concerning the February 19, 2010 discussion and determination.
70. As required for Endangered Species Act claims, AGUA provided Defendants with written 60-day notice of its intent to sue prior to bringing this action.

**281/1604 Interchange Improvements and the February 2010 CE**

71. The US 281/Loop 1604 interchange is a three level interchange located in northern San Antonio over the Edwards Aquifer recharge zone, with US 281

running north-south and Loop 1604 running east-west. US 281 north of Loop 1604 is typically a 6-lane access controlled, divided roadway with continuous frontage roads. Loop 1604 is typically a 4-lane access controlled, divided roadway with continuous frontage roads.

72. The 281/1604 CE states on pg. 4 that the purpose of the proposed project is “to enhance mobility and safety, improve operational efficiency and reduce delays within the project area.” Despite the attention to quantifying the purported traffic benefits of the project in an operational analysis prepared by Rodriguez Transportation, Defendants still arbitrarily conclude that the 281/1604 will not have significant effects on travel patterns. At the same time, the CE avoids analyzing the negative, substantial construction impacts and delays that will result from construction of the project, which is predicted to take over 2 years.
73. The CE also claims, without support, that no capacity will be added by the 281/1604 improvements. In fact, TxDOT’s own classification of the 281/1604 improvements places the project in the category of “Added Capacity/Mobility.”
74. The operational analysis, moreover, reveals an increase in capacity by approximately 190%. The resulting increase in capacity for the improvements almost triples the existing traffic volume based on existing 2006 at-grade movements.
75. While failing to explain such contradictions, the 2009 CE document also at no point discusses what type of CE, under FHWA regulations, applies to the interchange. The document does not indicate what CE would be appropriate and

- how this project fits within the scope of any documented Categorical Exclusions that have been used in the past.
76. On its face, the scope, magnitude, location, and cost of the 281/1604 improvements show that it is arbitrary and capricious to claim that the project will not have significant impacts. As previously discussed, basic project facts establish significance and include: the addition of 19.8 acres of impervious cover to the Edwards Aquifer recharge zone; construction and excavation in and adjacent to endangered species habitat; the crossing of 13 waterways (including the 303(d) impaired Salado Creek) in the recharge zone; the construction period of over 2 years; the over \$100 million price tag; and the changes to travel patterns, traffic, and community cohesion.
  77. As disclosed in ARMA's official response to comments, the fifth (top) level of the interchange added by the proposed project is anticipated to be approximately 45 feet above the existing Loop 1604 main lane bridge. The existing Loop 1604 main lane bridge is approximately 50 feet above the existing US 281 main lanes.
  78. Scientific data, as well as common sense, establishes that it is arbitrary and capricious for Defendants to conclude that the proposed elevated highway lanes/direct connectors do not have the potential to cause significant noise or air impacts. One study, for instance, found that elevating a highway project caused noise levels in surrounding communities to increase by 77 to 182 percent (a near doubling or tripling) when compared to putting the project at ground level. M. Hadi Baaj et al., "Modeling Noise at Elevated Highways in Urban Areas," 127 *Journal of Urban Planning and Development* 169-80 (2001). While the actual

noise generated remains the same, elevation causes greater noise impacts due to the lack of noise absorption from ground level objects such as buildings, vegetation and trees.

79. Similarly, there is a growing body of literature compiled by EPA and others discussing the hazardous health effects to people who live, work, and/or attend school adjacent to or near highways, that the CE does not meaningfully consider. The CE report says that traditional engineering analysis shows that pollutant concentrations from transportation begin to diminish about 100 meters from the roadway and are indistinguishable from background conditions 500 meters beyond the edge of the roadway. New research from the University of Southern California has shown that, in the early morning hours, pollutant levels can exceed even those found during peak travel times because of light winds that do not disperse the pollutants. The new discoveries also find that in these early morning hours (between 4 am and 7 am) high levels of pollutants can extend five times further than previously understood, to 2,500 meters from the roadway. The study says that these calm weather conditions are very common throughout the country. Clearly, a study of the breadth of an EIS is required to evaluate these new pollutant findings on the impacts of this case, especially considering the many homes, businesses, schools, churches, health and other facilities in close proximity the project.
80. Because of the CE's incorrect assumption (and fatal flaw) that the 281/1604 improvements will not increase capacity, the CE fails entirely to provide either a Traffic Air Quality Analysis or a quantitative analysis of Mobile Source Air

Toxics. The lack of these analyses is made all the more inappropriate considering San Antonio's status as a region recommended for non-attainment, and the above-mentioned body of literature on hazardous roadside health effects.

81. The CE also arbitrarily concludes, without any site-specific analysis, that air quality will actually somehow improve with the addition of the 281/1604 improvements. But general trends in increased fuel-efficiency, and speculative improvements in air quality, cannot satisfy Defendants' specific and current responsibility to mitigate the adverse effects of their actions, nor do the general trends explain why the project's impacts are insignificant. It is also arbitrary to conclude that 281/1604 improvements will help air quality by easing congestion given that the short-term benefits of the project—if any—will be overridden by the air pollution generated by the increased traffic and travel that the project will facilitate.
82. While there is some discussion of noise impacts, the CE's noise analysis is flawed in that it overlooks several points of impact. By failing to include such points of impact, the evaluation of the noise increase from the 281/1604 improvements is compromised and misleading. Nonetheless, the CE identifies noise impacts at five of the seven receiver locations. The CE does not fully commit to mitigating these impacts (on the basis of cost feasibility) nor does it explain why noise impacts that will not be mitigated are somehow insignificant. The CE also fails to adequately explore design changes (e.g. alteration to the vertical and horizontal alignment) that would alleviate noise impacts from the new five-level interchange. NEPA and the Federal Aid Highway Act require more than a single

- paragraph that rejects out of hand any horizontal and vertical design changes that could lessen noise impacts.
83. In addition to noise and air impacts, common sense establishes that residents will suffer negative aesthetic impacts. As stated by one commenter, “[w]e bought recently in this area because it feels like a country atmosphere and now we will potentially see the flyovers from our backyard.” The elevated highway structures, moreover, will harm the value of area residents’ homes. Studies by the Texas Transportation Institute have confirmed that parcels adjacent to elevated highways experience less percentage increases or greater percentage decreases in values from before and after construction relative to parcels adjacent to at-grade or depressed roadways.
84. In terms of water quality, the CE’s “analysis” is severely deficient. The CE does not identify the types of pollutants that would be generated by the project, nor does it provide estimates of the quantities of pollutants that would be generated. Despite there being a body of literature that provides means of estimating runoff water pollution resulting from highways, this literature was not used to estimate storm water runoff and water pollutant loadings from the proposed US 281 project. Thus, the CE fails to estimate direct, indirect, and cumulative pollution loads associated with the proposed highway expansion, and concludes without any support on pg. 37 that “[e]ffects to water quality, if any, are expected to be temporary and minor.”
85. Such a lack of analysis is reckless considering the project’s impacts to San Antonio’s sole-source drinking water supply (the Edwards Aquifer), the aquatic

- and terrestrial endangered species depending on the Aquifer, and the many recharge zone creeks crossed by the project, including a 303(d)-impaired water body (Salado Creek). Due to the highly permeable nature of the recharge zone, the Aquifer is particularly vulnerable to pollution from runoff.
86. Contrary to the CE's unsupported and arbitrary conclusions, effects to water quality based on increased impervious cover, construction phase pollution, and increased traffic will create significant impacts to the Edwards Aquifer and its contributing streams, including 303(d)-impaired Salado Creek.
87. The CE states that "[i]t is impossible to discuss water quality in the region without addressing mitigation" (pg. 89) yet proposes no project-specific mitigation. The CE attempts to put forth standard TCEQ requirements as mitigation, without specifically analyzing the effectiveness of BMPs and disclosing their known shortcomings. Perfunctory descriptions or mere listings of mitigation measures without supporting analytical data cannot support a conclusion that there will be no significant impacts. It is not an acceptable approach to mitigation to simply state that "[i]t is important that all stakeholders fully comply with all applicable regulations and that BMPs are constructed and maintained effectively" (pg. 90).
88. In several places, the CE discusses the City of San Antonio Aquifer Protection ordinance and other requirements governing water quality. First, it is arbitrary and capricious to find that this ordinance and associated requirements will mitigate the secondary impacts of the proposed interchange improvements, especially given the extensive practice of grandfathering. Second, the CE misses the obvious point that the proposed improvements are in conflict with the City's

- protective policy towards the Aquifer that can be seen in these ordinances. If the improvements were subject to the City's ordinance, they would violate the ordinance in light of the high levels of impervious cover and paving over of and impacts to recharge features.
89. Besides the clear direct impacts, significance is also established in the CE's disclosure (in the Indirect Impacts section, pg. 54) that the project indirectly affects 1,061 acres of Karst Zone 1 habitat (known to contain endangered species), as well as 10,071 acres of Karst Zone 2 habitat (high probability of containing endangered species). The study area also overlies 12,403 acres of recharge zone land and 7,429 acres of transition zone. The figures disclosed in the cumulative effects similarly establish significance by highlighting the large amount of highly-sensitive land and resources that stand to be impacted.
90. The CE's conclusion that the proposed improvements will not cause significant impacts with respect to development is based on insufficient data and the conclusory statements of one individual. The CE's admission that the timing and intensity of development will be impacted (pg. 68) is evidence that the proposed improvements will induce growth and not, as the CE seems to suggest, a reason to discount the secondary impacts of the proposed improvements. Impacts to "growth rate" constitute indirect impacts (*see* 40 C.F.R. 1508.8) and here the impacts are likely to be significant given the substantial development and traffic that the improvements will induce.
91. Similar to its treatment of indirect effects, the CE's assessment of cumulative effects is conclusory and arbitrarily underestimates the severity of impacts. In

what has become a pattern for environmental studies conducted for 281/1604, the CE avoids evaluating the cumulative impact by only looking at (and downplaying) the significance of the incremental impact, rather than what the regulation clearly calls for: “the incremental impact of the action when *added* to other past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7 (emphasis added). Nonetheless, the CE’s disclosure that the proposed improvements are part of adding 32,412 acres of development (including past development) to the resource study area is obviously a significant cumulative effect.

92. The CE entirely fails to examine alternatives to the proposed project, which is one of the central purposes of NEPA. The “alternatives analysis” in the CE is limited to one paragraph on pg. 7 regarding the “no build” option. Thereafter, the CE rarely discusses the no build option, providing no baseline against which to measure the impacts of the 281/1604 improvements.
93. Finally, the CE ignores the social and economic impacts to the many residents living and working in the project area who rely on US 281 and Loop 1604 and who will be significantly impacted by changes in access proposed by the project. Hollywood Park residents in particular have repeatedly voiced concerns about how current access to their community and the highways will be negatively affected by the 281/1604 improvements. Instead of analyzing these changes or recognizing that substantial controversy exists in this regard, the CE simply provides the following conclusory statement on pg. 42: “The proposed improvements to this interchange would not fragment neighborhoods within the

project area, and travel patterns and accessibility are not anticipated to be adversely impacted by the proposed project.”

**Endangered Karst Invertebrates and the December 2009 Biological Assessment**

94. On December 26, 2000, the FWS placed nine karst invertebrate species known from Bexar County, Texas, on the ESA’s list of endangered and threatened species. 65 Fed. Reg. 81419. All nine of the species inhabit subterranean voids or caves in the karst terrain of Bexar County.
95. Karst topography is formed by the slow dissolution of calcium carbonate from limestone bedrock by acidic groundwater. This process creates numerous sinkholes, caves and smaller voids, many of which form along cracks, fractures, and faults. Over time, the increasing dissection in the karst terrain caused by faulting and erosion led to the creation of “islands” of karst (probably resulting in speciation) and barriers to dispersal.
96. On August 27, 2002, FWS proposed a total of 9,516 acres to be designated as critical habitat for the Bexar County karst invertebrates. 67 Fed. Reg. 55064. On April 8, 2003, FWS issued a final critical habitat rule for the nine karst invertebrates totaling just 1,063 acres, or nearly 90% less than what was originally proposed. Following a 2009 lawsuit brought by AGUA and others challenging the final critical habitat rule, the parties reached a settlement that includes provisions for the future designation of karst invertebrate critical habitat. While the 1,063 acres of critical habitat will remain in place, FWS is required to submit a new proposed rule to designate critical habitat for karst invertebrates by February 7, 2011.

97. FWS has summarized the conservation requirements of endangered karst species as follows:

The conservation of the endangered karst invertebrates depends on a self-sustaining karst ecosystem; surface and subsurface drainage basins to maintain adequate levels of moisture; and a viable surface animal and plant community for nutrient input and protection of the subsurface from adverse impacts. The area needed to conserve such an ecosystem includes a core area buffered from the impacts associated with fragmentation, isolation, edge effects, and other factors that may threaten ecosystem stability. Depending on the size and shape of these core habitat areas or patches, in order to remain viable, they may also require connections to other habitat patches.

68 Fed. Reg. 17163 (April 8, 2003).

98. In the Federal Register notice of the final regulation listing the Bexar County karst invertebrates as endangered or threatened, FWS provided the following guidance regarding the potential for take of karst species:

If property is adjacent to a known occupied cave and within geohydrologically sensitive zones of influence on that cave, then activities discussed below could lead to take of species on that adjacent property. If you are in or adjacent to zone 1 karst, consultation with us is advisable to determine if you are adjacent to a known occupied cave or within geohydrologically sensitive zones of influence on that cave . . . .

We believe that, based on the best available information, activities in zones 1-4 that could potentially result in take include, but are not limited to:

- (1) Collecting or handling of the species;
- (2) Surface or subsurface activities that may directly result in destruction or alteration of species' habitat (such as trenching for installation of utility or sewer lines, excavation, etc.);
- (3) Alteration of the topography within the surface or subsurface drainage area or other alterations to any cave or karst feature providing habitat for the species that results in changes to the cave environment. This may include, but is not limited to, such activities as filling cave entrances or otherwise reducing airflow, which limits oxygen availability; increasing airflow that results in drying; altering natural drainage patterns with the

result of changing the amount of water entering the cave or karst feature; removal or disturbance of native surface vegetation; increasing impervious cover within the surface or subsurface drainage areas of the cave or karst feature; and altering the entrance or opening of the cave or karst feature in a way that would disrupt movements of raccoons, opossums, cave crickets, or other animals that provide nutrient input, or otherwise negatively altering the movement of nutrients into the cave or karst feature;

(4) Discharge or dumping of chemicals, silt, pollutants, household or industrial waste, or other harmful material into karst features or areas that drain into karst features or that affect surface plant and animal communities that support karst ecosystems;

(5) Pesticide or fertilizer application in or near karst features containing the nine invertebrates or areas that drain into these karst features or that affect surface plant and animal communities that support karst ecosystems. Careful use of pesticides in the vicinity of karst features may be necessary in some instances to control nonnative fire ants. . . .

(6) Activities within caves that lead to soil compaction, changes in atmospheric conditions, abandonment of the cave by bats or other fauna, or direct mortality of the species; and

(7) Activities that attract or increase access for fire ants, cockroaches, or other invasive predators or competitors to caves or karst features (for example, dumping of garbage in or around caves or karst features).

65 Fed. Reg. 81419, 81431-81432 (December 26, 2000).

99. In its 2001 draft “Recommendations for Karst Preserve Design”, FWS further explained how these threats affect sensitive karst species. For example, in regard to altering of drainage patterns, it states:

The drainage patterns of karst features may be altered during construction by altering topography (flattening landscape; adding curbs, berms, drainage ditches, or storm drains) or by increasing impervious cover over the drainage area of the cave. These alterations can lead to either an increase or a decrease in the total amount of water flow into a cave, or they may change the rate or periodicity of flow into the cave. If water is diverted away from the cave, the lost moisture could lead to lower humidity, which is not tolerable to troglobites. Increasing the amount of water to the cave may lead to the cave being flooded, which may result in the loss of the terrestrial karst species. Impervious cover prevents the

natural processes of water percolating into the ground, moving slowly towards aquifers, and being partially taken up by plants. Water instead rushes down its drainage path. If added impervious cover is drained towards the cave, the frequency and magnitude of flooding to the cave may be increased, which would also result in the loss of terrestrial, karst species.

100. The FWS recommendations further note: “Since roads may hinder movement of several species of invertebrates and small mammals, no internal roads or other permanent habitat fragmentation should occur within the karst ecosystem.” *See also* draft FWS 2008 Bexar County Karst Invertebrate Recovery Plan, pg. B-16.
101. In this case, the proposed highway improvements involve the construction of four elevated direct connectors, several miles of “auxiliary” and “merge” lanes, and associated highway improvements at and beyond the 281/1604 interchange. The project is located almost entirely over the Edwards Aquifer recharge zone, one of the most environmentally sensitive areas in Texas, and almost entirely within Zone 1 and Zone 2 endangered karst invertebrate habitat. Zone 1 includes areas known to contain endangered karst invertebrate species and Zone 2 includes areas where there is a high probability of such species being present.
102. Despite the extreme sensitivity of the project area and the magnitude of the action, the BA fails to even describe the proposed action and construction with any precision. As the BA states in the section on project details, “the descriptions . . . are general and are an indication of the type of work that would occur in a typical interchange type project.” The proposed action, however, is not a typical interchange project involving mere retrofitting, rehabilitation, or operational improvements to existing structures.

103. From the general information that has been provided about the project, it is known that that construction of the project will involve adding approximately 20 acres of new pavement (which translates to many new lane miles of highway through the karst ecosystem) and will take over 2 years to complete. The project will require an extensive (but so far unquantified) amount of cut and fill in this highly fractious and unpredictable karst terrain riddled with voids. Significant excavation and pouring of concrete will be required to construct and anchor the entirely new flyovers and supporting structures.
104. As previously mentioned, the BA, and FWS's concurrence with its conclusions, was predicated on the 281/1604 improvements only adding 10 acres of impervious cover, an incorrect figure that was later revised. Yet Defendants have in no way explained or provided written documentation of why the upward revision to 19.8 acres of impervious cover (a near doubling of the previous estimate) does not alter the "may affect but not likely to adversely affect" determination. This fact alone establishes the arbitrary and capricious nature of Defendants' section 7 determination.
105. In terms of section 9 of the ESA, the substantial construction, excavation, and blasting for new lanes and the new interchange at 281/1604, and the cutting into, filling in, and paving over Zone 1 and Zone 2 habitat for endangered karst invertebrates, followed by decades of altered drainage and polluted highway runoff will, to a high level of certainty, result in some take of endangered karst species by direct killing and by destruction of feeding, breeding and sheltering habitat; by disturbing the flow of nutrients and water into and through karst

- habitat; by compacting and disturbing soils and increasing erosion and sedimentation; by introducing fire ants and other exotic species; by increasing pesticides and excessive nutrients that come from highway landscaping; and by the likely periodic spills of toxic pollutants from car and truck accidents.
106. The above examples of unauthorized “take” result directly; indirect effects will likely cause “take” by virtue of increased paving and development of occupied karst habitat made possible by the 281/1604 expansion. The cumulative impacts from past, present and reasonably foreseeable projects (including additional expansion of 281 and 1604 over the Edwards Aquifer) and the urban sprawl facilitated by such highways will further cause unlawful “take” of karst invertebrates.
107. In addition, the project construction will take place next to, and possibly in, areas currently designated as critical habitat or that may be designated as critical habitat in the future. One such area is Critical Habitat Unit 19, which the BA describes as being some 1000 feet from the proposed 281/1604 expansion. CHU 19 is meant to protect Genesis Cave, known to contain *Rhadine Infernalis*. Genesis Cave is the deepest explored cave in Bexar County (extending below the water table, and mapped to a depth of 256 ft) and is a well-developed and especially important karst feature (for both recharge and habitat) with significant and vulnerable surface and subsurface drainage areas.
108. When karst invertebrate critical habitat was originally proposed in 2002, CHU 19 consisted of 146 acres directly adjacent to the Loop 1604 ROW and most likely extending into and under the ROW. *See* 67 Fed. Reg. 55064 *et seq.* The unit was

designed to include all or most of the Zone 1 habitat around Genesis Cave. In the final 2003 rule, CHU 19 inexplicably shrank to about 12 acres. *See* 68 Fed. Reg. 17156 *et seq.* As mentioned above, however, FWS will be proposing a new rule for karst invertebrate critical habitat that may result in the expansion of CHU 19.

109. Negative impacts to CHU 19 provide just one example of how the proposed 281/1604 expansion will violate the ESA by causing “take” of karst invertebrates, destruction or adverse modification of critical habitat, and prejudice to future designations of critical habitat. Three other critical habitat units are located in close proximity to the proposed project (CHU 12 is only 600 feet away), and there is much more habitat that stands to be negatively impacted by this project. As the CE discloses, the project’s indirect effects area overlies 960 acres of Zone 1 habitat and 10,071 acres of Zone 2 habitat.
110. The BA undertakes little analysis of the direct impacts of the 281/1604 expansion on endangered karst invertebrates and critical habitat, and no analysis whatsoever of the indirect and cumulative impacts. Instead of presenting the best scientific data available, the BA focuses on an arbitrary set of karst features with known surface expression that were found in the ROW. The BA’s “action area,” which was defined as the existing ROW and properties within 500 feet, is severely inadequate for assessing the impacts of the project. The selective excavations of karst features do not present complete picture of the features and karst zones affected by the project area, and the data has not been comprehensively and intensively studied as it would in a Biological Opinion. At the same time, the fact that karst species were found within 3.4 meters of the roadway cut on 1604, and

- that significant karst features have been detected in the shallow subsurface in this area, is extremely troubling and further highlights why a Biological Opinion is needed.
111. The BA also fails to provide any site-specific construction conditions or mitigation of any type. Beyond generally applicable TCEQ requirements, there are no measures directed specifically at controlling construction phase impacts as they relate to karst invertebrate habitat. Nor is there any effort to address the effect of paving and inducing further growth in Karst Zones 1 and 2. And even though the proposed project is part of a much larger plan to expand the 281 and 1604 corridors through many more miles of karst habitat, the agencies are not proposing any comprehensive mitigation such as preserve acquisition.
112. Under the current circumstances, the agencies have failed to ensure that the 281/1604 expansion will not jeopardize endangered karst invertebrates and result in the destruction and adverse modification of critical habitat. The ESA violations are all the more egregious considering that there are ongoing EIS processes for the proposed expansion(s) of 281 and 1604, and ongoing efforts to designate critical habitat in the same areas that the proposed project will cross. The only appropriate course of action under the ESA is for the agencies to enter formal consultations, which would provide a Biological Opinion, an incidental take permit, detailed construction conditions, and comprehensive mitigation.

### **CLAIMS FOR RELIEF**

#### **Claim 1 (NEPA—Invalid Categorical Exclusion)**

113. Each allegation set forth in the complaint is incorporated herein by reference.

114. The proposed action in this case, construction of the 281/1604 improvements, is a major federal action that will significantly affect the quality of the human environment.
115. The CE violates CEQ regulation 40 C.F.R. § 1508.4 and FHWA regulation 23 C.F.R. § 771.117 given that the project will (or at a minimum, may) cause significant direct, indirect, and cumulative impacts to the human environment.
116. The 281/1604 improvements are being designed to, and will have, significant impacts on travel patterns.
117. The 281/1604 improvements do not fall within any of the twenty listed actions in 23 C.F.R. § 771.117(c) that normally do not require NEPA documentation and further FHWA approval. Even if the proposed project was an action listed in § 771.117(c), the unusual circumstances present in this case, including significant impacts and substantial controversy, would make a CE inappropriate under § 771.117(d).
118. The interchange improvements do not fit within, and are not similar to, the list of examples of actions in 23 C.F.R. § 771.117(d) for which a documented CE may be used.
119. The February 2010 CE violates 23 C.F.R. § 771.117(d) by failing to demonstrate that the specific conditions or criteria for documented CEs are satisfied and by failing to demonstrate that significant environmental effects will not result.
120. Defendants violated NEPA by not preparing and approving of an Environmental Impact Statement and Record of Decision, or an Environmental Assessment and Finding of No Significant Impact.

121. Defendants' decision to classify and approve the interchange improvements as a Categorical Exclusion violates the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), including applicable CEQ and FHWA regulations, and is arbitrary, capricious, and otherwise not in accordance with the law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

**Claim 2 (NEPA—Improper Segmentation and Prejudice to Ongoing EISs)**

122. Each allegation set forth in the complaint is incorporated herein by reference.
123. The 281/1604 improvements in this case are part of a single, larger project to expand the 281/1604 highway system that is currently undergoing environmental review under Environmental Impact Statements.
124. The 281/1604 improvements are “cumulative,” “connected,” and “similar” actions under NEPA regulations that must be analyzed with the larger 281 and 1604 corridor improvements undergoing EIS review.
125. Alternatively, the 281/1604 improvements in this case must be analyzed and cleared under the Loop 1604 EIS in order to proceed. FHWA documents establish that the agency has always considered the interchange improvements as part of Loop 1604.
126. Defendants segmented the interchange improvements to avoid a meaningful public process and full NEPA analysis of the environmental impacts of the interchange improvements, analysis of alternatives to the interchange improvements, and analysis of alternatives for the larger 281/1604 system.

127. Defendants segmented the interchange improvements to avoid the more stringent NEPA requirements of the EISs currently being prepared for US 281 and Loop 1604.
128. Defendants have designed the interchange improvements to conform to future planned expansion of US 281 and Loop 1604, including specific options being considered for those corridors.
129. Construction of the interchange improvements will, in fact, limit and prejudice the consideration of alternatives in the EISs currently being prepared for US 281 and Loop 1604.
130. Defendants' segmentation of the US 281 North at Loop 1604 Interchange, and the resulting prejudice to ongoing EISs, violates the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), including applicable CEQ and FHWA regulations, and is arbitrary, capricious, and otherwise not in accordance with the law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

**Claim 3 (NEPA—Failure to Consider Cumulative Impacts)**

131. Each allegation set forth in the complaint is incorporated herein by reference.
132. NEPA requires that an EIS include a cumulative impacts analysis, which is an analysis of the project's "incremental impact . . . when added to other past, present, and reasonably foreseeable future [Federal and non-Federal] actions." 40 C.F.R. § 1508.7.
133. Defendants failed to adequately analyze the cumulative impacts to wildlife, air quality, and water quality and from the interchange improvements in combination

- with other past, present, and reasonably foreseeable development and highway projects.
134. Most significantly, Defendants failed to consider the cumulative impact of the interchange improvements in light of the overall proposed expansion of the US 281 and Loop 1604 roadways, most of which will be occurring on the highly-sensitive recharge zone for the Edwards Aquifer, San Antonio's federally-designated sole-source water supply.
  135. Even if this Court were to determine that the interchange improvements could be separated from the rest of the US 281/Loop 1604 system (and therefore properly excluded from the current EIS processes for US 281 and Loop 1604), Defendants would still be in violation of NEPA by failing to prepare an EIS for the interchange improvements on the basis of significant cumulative impacts.
  136. Defendants' failure to adequately consider these cumulative impacts violates the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), including applicable CEQ and FHWA regulations, and is arbitrary, capricious, and otherwise not in accordance with the law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

**Claim 4 (ESA Section 7—Invalid BA and Failure to Enter Formal Consultations)**

137. Each allegation set forth in the complaint is incorporated herein by reference.
138. Defendants' Biological Assessment is not supported by the best scientific and commercial data available, violating the Endangered Species Act, 16 U.S.C. § 1531 et seq., and is arbitrary, capricious, and otherwise not in accordance with the law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

139. Defendants’ determination that the 281/1604 project “may affect but is not likely to adversely affect” endangered karst invertebrates, and failure to enter into and adequately complete consultations with FWS, violate the Endangered Species Act, 16 U.S.C. § 1531 et seq., and are arbitrary, capricious, and otherwise not in accordance with the law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

**Claim 5 (ESA Section 9—Unlawful “Take” of Endangered Karst Invertebrates)**

140. Each allegation set forth in the complaint is incorporated herein by reference.
141. Defendants’ construction and operation of the proposed US 281 project will result in prohibited “take” of endangered Bexar County karst invertebrates in violation of the Endangered Species Act, 16 U.S.C. § 1531 et seq.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for relief as follows:

1. For a declaratory judgment that the documented Categorical Exclusion prepared and approved by Defendants, is unlawful, invalid, arbitrary, capricious, and otherwise not in accordance with the National Environmental Policy Act and the Administrative Procedure Act;
2. For a declaratory judgment that Defendants’ segmentation of the 281/1604 interchange improvements from the planned expansion of US 281 and Loop 1604 currently undergoing EIS review, is prejudicial, unlawful, invalid, arbitrary, capricious, and otherwise in violation of the National Environmental Policy Act and the Administrative Procedure Act;
3. For a declaratory judgment that the Biological Assessment prepared and approved by Defendants, and the decision to not enter into formal consultations, are unlawful, invalid, arbitrary, capricious, and otherwise not in accordance with the Section 7 of the Endangered Species Act and the Administrative Procedure Act;
4. For a declaratory judgment that Defendants’ actions and inactions with regard to endangered karst invertebrates constitute unlawful “take” in violation of Section 9 the Endangered Species Act;

5. For an order setting aside Defendants' decisions to fund and approve the 281/1604 interchange improvements;
6. For an order enjoining Defendants from funding and constructing the 281/1604 interchange improvements pending full compliance with the National Environmental Policy Act, the Endangered Species Act, and the Administrative Procedure Act;
7. For the Court to retain continuing jurisdiction to review Defendants' compliance with all judgments and orders entered herein;
8. For an award of Plaintiff's costs of litigation, including reasonable attorney's fees under the Equal Access to Justice Act and the Endangered Species Act; and
9. For such other and further relief as the Court may deem just and proper to effectuate a complete resolution of the legal disputes between Plaintiff and Defendants.

DATED: August 25, 2010

Respectfully Submitted,

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