

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

Dec 2 12 01 PM '05

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AQUIFER GUARDIANS IN URBAN )  
AREAS, and PEOPLE FOR )  
EFFICIENT TRANSPORTATION, INC.)

Plaintiffs,

v.

US FEDERAL HIGHWAY )  
ADMINISTRATION, and MICHAEL W.)  
BEHRENS, Executive Director, Texas )  
Department of Transportation, )

Defendants.

No. **\$A05CA1170 XR**  
Complaint For Declaratory And  
Injunctive Relief

INTRODUCTION

1. In this action, Plaintiffs, Aquifer Guardians in Urban Areas, and People For Efficient Transportation, Inc. (collectively "AGUA"), challenge the failure of the Federal Highway Administration ("FHWA") and the Texas Department of Transportation ("TxDOT") to comply with the requirements of the National Environmental Policy Act ("NEPA") for the proposed expansions of United States Highway 281 ("US 281") and Loop 1604. US 281 bisects the Edwards Aquifer recharge zone from north to south as it extends north of Loop 1604. Loop 1604 in this vicinity runs east to west through the recharge zone. These projects are "being proposed as . . . part of the 'starter toll system' for Bexar County."
2. The highway expansions will contribute to the ongoing degradation of the Edwards Aquifer, the region's primary water supply, as well as subject nearby

residents to noise pollution above federal standards, exacerbate harmful air pollution levels that already exceed federal standards for ground level ozone, diminish community cohesion, increase the cost of travel, increase congestion and travel times during the construction phase, increase the cost of commuting and through urbanization contribute to the ongoing fragmentation of wildlife habitat, including for endangered species such as the golden cheek warbler.

3. As recently described in a San Antonio Express News article entitled “Law Lets Developers Ignore Growth Controls,” local communities are being overwhelmed by uncontrollable and unplanned residential growth, which is largely out of local governmental control because of grand-fathering legislation. As the San Antonio Express News recently editorialized, the “Aquifer faces peril as a city grows wrong way.” The proposed toll roads will greatly accelerate these harmful trends and the highway agencies are moving forward without taking any meaningful look at the implications of their actions. Neither the original environmental assessment prepared in 1984 nor two subsequent “reevaluations” prepared in 2000 and 2004 provide adequate documentation, individually or collectively, of the environmental impacts of the proposed action. Most egregiously, and patently illegal under NEPA, the agencies have utterly failed to ever consider any alternatives to the proposed massive toll road projects.

#### **JURISDICTION AND VENUE**

4. 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).

5. Venue lies properly in this judicial district by virtue of 28 U.S.C. § 1391(e) because this is a civil action in which officers or employees of the United States or an agency thereof are acting in their official capacity or under color of legal authority, a substantial part of the events or omissions giving rise to the claim occurred in this judicial district, and plaintiff AGUA resides here.

### PARTIES

6. Plaintiff, Aquifer Guardian in Urban Areas, is a non-profit organization with approximately 400 members, whose mission is to strengthen the regulations designed to protect the aquifer, ensure enforcement of existing laws, alert the public to impending threats, and mobilize public opinion to support efforts to protect the Edwards Aquifer.
7. Aquifer Guardians in Urban Areas brings this action of behalf of its members, including many who live in the area and will be adversely affected by water quality degradation, wildlife habitat loss, traffic and construction noise, additional traffic, aesthetic impairment, air pollution, costs of tolls and urbanization of the area.
8. Aquifer Guardians in Urban Areas 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.
9. Plaintiff, People For Efficient Transportation, Inc., is a non-profit organization with over 5000 members, formed to increase public awareness and understanding

of the dramatic negative effects Freeway Tolls and the Trans Texas Corridor will have on Texans. People for Efficient Transportation, Inc. seeks to provide resources to assist the public as well as local governments in identifying and addressing the negative economic, social, political and ecological impacts of toll highways.

10. People For Efficient Transportation, Inc. brings this action on behalf of its members, including many who live in the area and will be adversely affected by water quality degradation, wildlife habitat loss, aesthetic impairment, construction noise, additional traffic, air pollution, costs of tolls, and urbanization of the area.
11. People For Efficient Transportation, Inc. 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.
12. Defendant FHWA is an agency of the federal government within the Department of Transportation that is providing funding or other federal assistance for the expansion of U.S. 281 and Loop 1604 and repeatedly approved this project, including as recently as November 2005.
13. Defendant Michael W. Behrens is sued in his official capacity as executive director of TxDOT in order to enjoin construction on this project.

## **BACKGROUND**

### **Relevant Statutes and Regulations**

#### **National Environmental Policy Act**

14. "NEPA . . . makes environmental protection a part of the mandate of every federal agency and department," Calvert Cliffs' Coordinating Committee v. United States

Atomic Energy Commission, 449 F.2d 1109, 1112 (D.C.Cir. 1971). Perhaps the greatest importance of NEPA is to require...agencies to consider environmental issues just as they consider other matters within their mandates." Id. (Emphasis in the original.) NEPA's essential purpose 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. See 40 C.F.R. §§ 1500-1508.

15. To accomplish its purpose, NEPA requires that all agencies of the federal government must prepare a "detailed statement" regarding all "major Federal actions significantly affecting the quality of the human environment . . ." 42 U.S.C. § 4332(2)(C). This statement, known as an Environmental Impact Statement ("EIS"), must describe (1) the "environmental impact of the proposed action," (2) any "adverse environmental effects which cannot be avoided should the proposal be implemented," (3) any "alternatives to the proposed action," and (4) any "irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented." Id.
16. "Major Federal actions" requiring preparation of an EIS include "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies . . ." 40 C.F.R. § 1508.18(a).
17. Whether an agency action "significantly" affects the environment takes into account both 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.* § 1508.27(b)(2)-(10).

18. CEQ regulations provide for the preparation of a document known as an environmental assessment ("EA") so that agencies may determine whether a particular action may have a significant impact on the quality of the human environment and thus require preparation of an EIS. 40 C.F.R. § 1501.4(b),(c). An EA also serves the additional purpose of "aid[ing] an agency's compliance with the Act when no [EIS] is necessary." *Id.* § 1508.9(a)(2). For example, CEQ regulations specify that every EA, as well as every EIS, must include a discussion of "alternatives as required by section 102(2)(E)" of NEPA. *Id.* § 1508.9(b).

19. Section 102(2)(E) of NEPA requires that every agency must also "study, develop, and describe alternatives to recommended courses of action . . ." 42 U.S.C. § 4332(2)(E).
20. Regulations promulgated by the CEQ to implement NEPA describe the consideration of alternatives as "the heart of the environmental impact statement." 40 C.F.R. § 1502.14.
21. The purpose of the requirement to consider alternatives is "to insist that no major federal project should be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means." Environmental Defense Fund v. Corps of Engineers, 492 F.2d 1123, 1135 (5th Cir. 1974).
22. "No decision is more important than delimiting what these 'reasonable alternatives' are [since] [o]ne obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence)." Simmons v. United States Army Corps of Engineers, 120 F.3d 664, 666 (7th Cir. 1997).
23. NEPA also requires the consideration of the cumulative impacts of actions. CEQ regulations define "cumulative impact" at 40 C.F.R. 1508.7: "Cumulative impact is 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. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."

24. CEQ has emphasized the importance of considering cumulative impacts. In its 1997 report entitled "Considering Cumulative Effects Under the National Environmental Policy Act," CEQ notes that "[e]vidence is increasing that the most devastating environmental effects may result not from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time." CEQ Report at 1.

25. CEQ has determined that unintended consequences on the human environment continue to occur from federal agency decision-making and that "is largely attributable to this incremental (cumulative) impact." *Id.*

26. According to CEQ:

The passage of time has only increased the conviction that cumulative effects analysis is essential to effectively managing the consequences of human activities on the environment. The purpose of cumulative effects analysis, therefore, is to ensure that federal decisions consider the full range of consequences of actions. Without incorporating cumulative effects into environmental planning and management, it will be impossible to move towards sustainable development, i.e., development that meets the needs of the present without compromising the ability of future generations to meet their own needs (World Commission on Environment and Development 1987; President's Council on Sustainable Development 1996). To a large extent, the goal of cumulative effects analysis, like that of NEPA itself, is to inject environmental considerations into the planning process as early as needed to improve decisions. If cumulative effects become apparent as agency programs are being planned or as larger strategies and policies are developed then potential cumulative effects should be analyzed at that time."

CEQ Report at 3; see also 40 C.F.R. § 230.7.

27. In addition to highlighting the need for cumulative impacts analysis, the CEQ report provides a primer on the methods, techniques and tools for analyzing cumulative effects. *Id.* at 49, et seq.

28. CEQ regulations also require that agencies “[s]hall prepare supplements to either draft or final environmental impact statements if: (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c).
29. FHWA regulations direct that an EIS shall be supplemented whenever the FHWA determines that “[c]hanges to the proposed action would result in significant environmental impacts that were not evaluated in the EIS,” 23 C.F.R. § 771.130(a)(1), or “[n]ew information or circumstances relevant to environmental concerns and bearings on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS.” Id. at § 771.130(a)(2). “After approval of the EIS, [or] FONSI..., the applicant shall consult with the Administration prior to requesting any major approvals or grants to establish whether or not the approved environmental document ... remains valid for the requested Administration action.” 23 C.F.R. § 771.129(c).
30. FHWA regulations also provides that “[w]here the Administration is uncertain of the significance of the new impacts, the applicant will develop appropriate environmental studies, or, if the Administration deems appropriate, an EA to assess the impacts of the changes, new information, or new circumstances.” Id. § 771.130(c). “If, based upon the studies, the Administration determines that a supplemental EIS is not necessary, the Administration shall so indicate in the project file.” Id.

## Facts

### **A. Proposed Expansion of U.S. 281 and Loop 1604 In The Environmentally Sensitive Recharge Zone Of The Edwards Aquifer.**

31. The initial environmental documentation for expansion of U.S. 281 consisted of an environmental assessment and a finding of no significant impact issued on August 8, 1984 (1984 EA).
32. The 1984 EA covered the expansion of a 4.9 mile stretch of U.S. 281 “from 0.8 miles north of Bitters Road to 2.5 miles north of Loop 1604” into a “six lane divided freeway with access roads and grade separations.” 1984 EA at 2.
33. The 1984 EA identifies the “Purpose And Need For The Proposed Project” as resulting from “[s]evere congestion [that] has been caused by traffic back-ups at signalized intersections which provide movement across this expressway.” 1984 EA at 4 (emphasis added).
34. The initial heading in the 1984 EA is entitled “I. Description of Project and Reasonable Alternatives,” however there is no mention of any other alternatives that were identified, considered or analyzed. 1984 EA at 2-4.
35. The 1984 EA contains slightly over two pages of “Discussion of the Potential Social, Economic and Environmental Effects” and summarily dismisses any environmental and socioeconomic concerns. 1984 EA at 4-6. The 1984 EA concludes that the project: “will have no significant impact on the traditional trend of northward development,” *id.* at 4, “will not involve any park, recreation, wildlife or historic preservation lands, nor any flowing streams or lakes falling under any federal, state or local statute, *id.* at 5; “will [cause it to] be easier, safer and less expensive to travel [and] cause no disruption of existing community

cohesiveness, id.; “has no inconsistencies involving federal, state, or local laws relating to the environment” involving air, noise and water pollution, id.; and “will create no negative impacts on any elements in the aquatic area,” id. at 6.

36. The 1984 EA does not contain any section entitled secondary and cumulative impacts nor any discussion or analysis of potential indirect and cumulative impacts. The 1984 EA fails to identify any other past, present or reasonably foreseeable highway projects – or other types of development – in the area that might result in cumulative impacts along with the proposed project on environmental resources in the area, such as the Edwards Aquifer and endangered species.
37. The 1984 EA fails to describe in any detail the environmental baseline for the natural resources in the area. For example, there is no discussion of the then existing water quality conditions in the Edwards Aquifer, including whether any pollutants potentially caused by highway infrastructure have been detected in the aquifer.
38. On August 8, 1984, the Assistant Division Administrator for the FHWA signed a determination “that this project will not have any significant impact on the human environment.” The finding of no significant impact (“FONSI”) was based solely on the FHWA’s review of the 1984 EA submitted by the Texas State Department of Highways and Public Transportation. According to FHWA’s FONSI, the 1984 EA “provide[d] sufficient evidence and analysis for determining that an environmental impact statement is not required.”

**B. The Inadequate 2000 and 2004 Environmental Assessment Reevaluations**

**1. 2000 Reevaluation**

39. An environmental assessment reevaluation was issued in March 2000 (“2000 Reevaluation”).
40. The 2000 Reevaluation states that the “overall design has remained the same as described in the original EA.” 2000 Reevaluation at 1.
41. The 2000 Reevaluation states that the only change in the project area is that “there has been extensive commercial/retail development at the intersection of US 281 and Loop 1604 and several commercial developments on the east side and a new residential subdivision constructed on the west side of US 281 at Evans Road.” Id. at 1.
42. The 2000 Reevaluation concludes that there “should not be any negative economic impacts,” id., there “will not be any significant degradation of existing environmental considerations due to this proposed work and it is not expected to cause any contamination to or effect upon any public water supply,” id. at 2, “the project will not have a substantial impact on air quality,” id. at 5, no “noise abatement measures are both feasible and reasonable,” id. at 9, and “no adverse impacts to the Golden-cheeked Warbler and the Black-capped Vireo are expected,” id. at 11.
43. The 2000 Reevaluation concludes “that there have not been any significant changes to the assessed area [and c]oncurrence that this project remains a FONSI is anticipated.” Id. at 14.

44. The 2000 Reevaluation does not contain any description of the environmental baseline. Under the “Water Quality” section, the 2000 Reevaluation states that “[t]here will not be any significant degradation of existing environmental considerations due to the proposed work and it is not expected to cause any contamination to or effect upon any public water supply.” 2000 Reevaluation at 2. Nowhere in the 2000 Reevaluation is there any description of what the “existing environmental [conditions]” are in relation to water quality of the Edwards Aquifer. The 2000 Reevaluation does not contain any discussion of whether or not any pollution of the Edwards Aquifer has occurred or whether any pollutants potentially related to transportation infrastructure have been found in the Edwards Aquifer.
45. As with the 1984 EA, the 2000 Reevaluation does not contain any discussion of alternatives to the proposed action.
46. As with the 1984 EA, the 2000 Reevaluation does not contain any discussion of indirect and cumulative impacts. Also, the 2000 Reevaluation fails to identify any other past, present or reasonably foreseeable highway projects – or other types of development – in the area that might result in cumulative impacts along with the proposed project on environmental resources in the area, such as the Edwards Aquifer and endangered species.
47. The 2000 Reevaluation does acknowledge that post-project noise levels will increase and that the projected noise levels will exceed FHWA established Noise Abatement Criteria. 2000 Reevaluation at 8, Table III. The 2000 Reevaluation concludes that Noise Abatement measures are not feasible and “therefore, no

noise abatement measures are proposed for this project.” The 2000 Reevaluation fails to consider whether noise levels that exceed federal Noise Abatement Criteria for adjacent residential and business development are “significant” impacts requiring the preparation of an environmental impact statement, since there are not feasible mitigation measures.

48. The 2000 Reevaluation dismisses traffic management devices that could moderate the speed of traffic and thereby reduce noise (as well as smooth the overall flow of traffic during times of congestion) because they might “increase congestion and air pollution.” 2000 Reevaluation at 9. However, there is no quantification of to what extent traffic management devices would increase congestion or air pollution. Elsewhere, the 2000 Reevaluation states that carbon monoxide (“CO”) concentrations are below National Ambient Air Quality Standards (“NAAQS”) “and therefore, the project will not have a substantial impact on air quality.” *Id.* at 5. So even though noise pollution will exceed federal standards and air pollution (at least for the only pollutant, CO, analyzed in the 2000 Reevaluation) does not exceed federal standards, TxDOT dismisses reductions in noise levels without any quantification of the air pollution trade-off or whether the increased air pollution would result in the exceedance of air pollution standards.
49. The 2000 Reevaluation fails to discuss any air pollutants besides CO, such as ground level ozone. TxDOT notes that “[t]his project is located in Bexar County, which is currently classified as being in attainment status of the NAAQS and therefore, conformity [with Clean Air Act state implementation plan] does not apply” *Id.* at 4-5

