IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

GEORGE WISE, MATTHEW PEKAR, UTA MEYER, DAVID MARTINDALE AND ROBERT WALKER **PLAINTIFFS**

Vs.

UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION; and ARKANSAS STATE DEPARTMENT OF TRANSPORTATION **DEFENDANTS**

COMPLAINT FOR DECLARATORY JUDGMENT, FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

Come the Plaintiffs, George Wise, Matthew Pekar, Uta Meyer, Davis Martindale and Robert Walker, and for their cause of action against the defendants, United States Department of Transportation, Federal Highway Administration, and the Arkansas Department of Transportation, state:

NATURE OF THE CASE

1. This Complaint seeks declaratory and injunctive relief against the Defendants, United States Department of Transportation, Federal Highway Administration (FHWA), and the Arkansas State Transportation Department (ArDOT) (collectively "Defendants") for their failure to comply with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§4321 – 70a; the implementing regulations for NEPA issued by the White House Council on Environmental Quality ("CEQ" and "the CEQ Regulations"), 40 C.F.R. §§1500 – 08; the Department of Transportation Act ("DOTA"), 49 U.S.C. §303; the Federal-Aid Highway Act ("FAHA"), 23 U.S.C. §138; the Safe, Accountable, Flexible, Efficient Transportation Act of 2005 (SAFETA), 109 Pub. L. 59, 119 Stat. 1144 (variously codified), and regulations

implementing those acts, particularly those contained at 40 CFR §1508.4, 23 CFR §771.115 and 23 CFR §771.117.

2. The action arises from the Defendants' commencement of construction for the widening of Interstate Highway 630 (I-630, herein "the I-630 Project") within the City of Little Rock, Arkansas, between the area identified on the western terminus as the Baptist Hospital exit, and on the eastern terminus as University Avenue; the demolition and replacement of all bridges on I-630 between those termini; and other activities more particularly described herein, without having complied with the requirements of NEPA, DOTA, FAHA, SAFETA and their implementing regulations as more particularly described herein. A "Project Location Map" showing the geographic area of the Project is attached hereto as **Exhibit No. 1**.

3. The action of the Defendants in commencing such construction activities was based upon a document entitled "Tier 3 Categorical Exclusion" dated October 4, 2016, issued by the Defendant FHWA and prepared by a contractor, Kimley-Horn and Associates, Inc., of Memphis, Tennessee, in which it is stated that AHTD had determined that the I-630 Project fell within the definition of "the Tier 3 Categorical Exclusion" as defined in a certain Memorandum of Agreement between ArDOT and FHWA on the processing of Categorical Exclusions.

4. A "categorical exclusion" ("CE") is an exemption from the requirements of NEPA and its implementing regulations that the potential for environmental impacts of proposed significant Federal actions by Federal agencies be determined by preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS). Categorical exclusions are those actions which meet the definition contained in 40 CFR 1508.4, and based on past experience with similar actions, do not involve significant environmental impacts. 23 C.F.R. 771.117(a).

5. The I-630 Project does not qualify for the use of a categorical exclusion to exempt it from the requirements of NEPA to assess potential environmental impacts of a proposed Federal action by preparation of an EA or and EIS. In approving the use of a categorical exclusion as a substitute for an EA or EIS, the Defendants failed to adequately determine whether the I-630 Project will likely involve significant air, noise or water quality impacts, whether it will have significant impacts on travel patterns, or will otherwise, either individually or cumulatively, have any significant environmental impacts, as more fully described herein.

6. The Defendants' failure to make the determinations described in the preceding paragraph, and their procedures, findings, conclusions, and actions in approving the CE were arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law (5 U.S.C. §706(2)(A)), as more fully described herein.

7. The Plaintiffs are persons who regularly and consistently use or live in or near I-630, and who will be exceptionally and severely damaged, prejudiced and aggrieved by the implementation of the Project, in that the Project would inflict permanent and irreparable change and damage upon the project area's ecosystem; upon traffic usage and patterns; and adversely affect the ability of the plaintiffs and their members to use I-630 in their daily commutes, and to enjoy their homes and neighborhoods.

8. That upon hearing on the Motion for Temporary Restraining Order filed contemporaneously herewith, the status quo ante should be maintained and Defendants should be temporarily restrained and enjoined from conducting or allowing any work on the I-630 Project that would alter or modify I-630 unless and until such time as a hearing on a permanent injunction may be conducted in this matter; that upon such hearing, a permanent injunction should be issued and the Defendants permanently enjoined until they have fully complied with

the requirements of NEPA and its implementing regulations as described herein.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action under 28 USC §1331 (Federal Question); 28 USC §1361 (Mandamus); 28 U.S.C. §1651 (Writs); 28 U.S.C. §§2201-02 (Declaratory Judgment Act); and 5 U.S.C. §§701 *et seq*. (Administrative Procedure Act).

10. This Court has a right of review of administrative actions by the Defendant, U.S. Department of Transportation, Federal Highway Administration pursuant to 5 U.S.C. §702, et seq. (Administrative Procedure Act).

11. Venue of this action is proper in this Court under 28 U.S.C. §1391(e), in that a substantial part of the events or omissions giving rise to the claims occurred, and the property that is the subject of the action, is situated in this District and Division.

PARTIES

Plaintiffs

12. The Plaintiff, George Wise, is a resident and citizen of Little Rock, Arkansas. Mr. Wise resides in a residential area in the eastern portion of the City of Little Rock south of I-630, and works in a business in west Little Rock. He commutes daily on I-630 between his residence and place of employment in west Little Rock. His daily commute will be dramatically altered, inconvenience and extended by the alterations to I-630 proposed by the Defendants. He is also concerned about the increases in noise and air pollution and their effects on the human environment, the proliferation of multilane highways through the center of cities, and the negative effect that widening of I-630 will have on the social and economic environment of Little Rock. Having been a long-time resident of the area south of I-630, he is acutely aware of

the impact I-630 has had in dividing the City, and believes that more lanes will only add to the divisiveness.

13. The Plaintiff, Matthew Pekar, is a resident and citizen of Little Rock, Arkansas. Mr. Pekar is a computer programmer who resides in the Quapaw Historic District in downtown Little Rock, and works in facilities on Colonel Glenn Road in southwest Little Rock. His daily commute between his residence and place of employment includes driving on I-630 from its intersection with Main Street to its western terminus at I-430. His daily commute would be dramatically altered, inconvenience and extended by the alterations to I-630 proposed by the Defendants. He is also concerned about the potential for increase in noise and air pollution caused by increase traffic, and the further division on the social and economic environments in Little Rock.

14. The Plaintiff, Uta Meyer, is a resident and citizen of Little Rock, Arkansas. Ms. Meyer resides in a residential area immediately north of the I-630 Project area, and works in an organization located in southeast Little Rock. Her daily commute between her residence and place of employment includes driving on I-630 through the proposed work area to its eastern terminus at I-30. Her daily commute would be dramatically altered, inconvenience and extended by the alterations to I-630 proposed by the Defendants. She is also concerned about the increase in levels of noise and air contamination as a result of increased traffic on I-630 on her health and the health of others in the area.

15. The Plaintiff, David Martindale, is a resident and citizen of Little Rock, Arkansas. Mr. Martindale also resides in a residential area immediately north of the proposed I-630 Project area, and works in a business in west Little Rock. His daily commute between his residence and place of employment includes driving on I-630 through the Project work area to its western

terminus at I-430. His daily commute would be dramatically altered, inconvenience and extended by the alterations to I-630 proposed by the Defendants. He is also concerned about the increase in levels of air contamination as a result of increased traffic on I-630 on his health and the health of others in the area.

16. The Plaintiff, Robert Walker, is a resident and citizen of Little Rock, Arkansas. Mr. Walker resides in a residential area immediately north of the I-630 Project area. He hears the noise from the highway inside and outside of his home. He is concerned that those noise levels will increase significantly during construction of the proposed I-630 Project and thereafter with the increased number of lanes and traffic. He is also concerned that the levels of air contaminants from automobiles using I-630 will significantly increase and impinge upon his health and upon the health of persons in the area, particularly children in a nearby school. Mr. Walker also drives frequently on I-630, in part to obtain medical services, and he is concerned that his driving patters will be dramatically altered, inconvenience and extended by the alterations to I-630 proposed by the Defendants.

Defendants

17. Defendant, United States Department of Transportation, Federal Highway Administration ("FHWA") is an agency of the Executive Department of the United States of America. The FHWA has been delegated responsibility for, among other things, construction, management, administration, regulation and oversight of various highways and transportation facilities and their development and funding, and for conducting environmental assessments and environmental impact statements to determine the impact of proposed highway and transit development on the human environment prior to construction according to the mandates of NEPA, the Department of Transportation Act ("DOTA"), the Federal-Aid Highway Act

("FAHA"), the Federal Transit Act ("FTA"), and the Safe, Accountable, Flexible, Efficient Transportation Act of 2005 (SAFETA),

18. The Arkansas State Transportation Department (formerly named Arkansas State Highway and Transportation Department) is an agency of the State of Arkansas with its principal offices in Little Rock, Pulaski County, Arkansas. ArDOT has the responsibility, among others, to plan, design, construct and maintain highways and roads in the State of Arkansas; to enter into agreements with the FHWA regarding Federal funding for highway construction; and to coordination with other agencies of the state and federal government, including FHWA, having transportation responsibilities (Ark. Code Ann. § 27-1-102).

FACTUAL BACKGROUND

19. Plaintiffs incorporate herein all previous allegations set forth above.

20. During the 1970s, I-630 was constructed in an east-west direction through the City o**f** Little Rock, Arkansas, amid considerable controversy and litigation. (See *Arkansas Community Organization for Reform Now v. Brinegar*, 398 F.Supp. 685 (E.D. Ark. 1975). The highway has, since its construction, consisted of six (6) lanes, three (3) in each direction, with entrance and exit ramps at major street intersections.

21. The Defendants, FHWA and ArDOT now propose to modify I-630 in increments to widen the roadway to eight (8) lanes (four in each direction), replace bridges crossing or overpassing Little Rock city streets and other highways, and adding auxiliary lanes, and storage and turning lanes. The portion of I-630 that is proposed to be so modified immediately by the Defendants is located between the Baptist Hospital exit/entrance (approximately one (1) mile east of the I-630/I-430 interchange), and the intersection of I-630 with University Avenue, a total distance of

approximately 2.2 miles. A Project Location Map showing the extent of the Project is attached to this Complaint as Exhibit No. 1.

22. According to a "Tier 3 Categorical Exclusion" document prepared for this project, the work to be performed within the Project Location is more specifically described as:

> Proposed improvements include eight 12-foot wide paved travel lanes (four in each direction) with 10-foot wide shoulders. A fifth auxiliary lane will be added in several locations between successive entrance and exit ramps. All existing bridges within the project limits (Bridge Numbers A5582/B5582, A5583/B5583, and 5584) will be replaced. A new 14-foot wide bicycle and pedestrial bridge will be installed north of bridge A5582. … Storage and turning lanes will be added to the westbound I-630 exit ramps at John Barrow and Rodney Parham Road. Traffic signals will be improved at John Barrow and the westbound Interstate 630 ramps, at Rodney Parham Road and Mississippi Street, and at Rodney Parham Road and the eastbound Interstate 630 ramps. The westbound entrance ramp between University Avenue and Hughes Street will be removed.
> (Tier 3 Categorical Exclusion, October 4, 2016, p. 1)
> Such work is referred to herein as "The Project."

The "Tier 3 Categorical Exclusion dated October 4, 2016 is attached to this Complaint as **Exhibit No. 2**.

23. According to an Information Release from the Defendant ArDOT dated July 13, 2018, work was to commence on construction of the Project on Monday, July 16, 2018, and, according to ArDOT, will have the following immediate impacts on traffic flows, speeds and patterns:

> Eastbound and westbound center and outside lanes within the work zone will be closed between 8:00 p.m. and 6:00 a.m. Monday through Friday to allow the contractor to set temporary barrier walls, place pavement markings, erect safety platforms at the Hughes Street overpass and remove pavement corrugations along the shoulders. One lane of traffic in each direction will remain open, and interstate ramps will remain accessible except the westbound on-ramp from the old Sears parking lot. During the daytime travel peak hours, all six lanes on I-630 will be open to traffic. Neighborhoods adjacent to the interstate will experience noise impacts during nighttime hours.

> Beginning Friday night, July 20, the Hughes Street overpass will be temporarily closed for approximately three months as crews perform bridge demolition and reconstruct the overpass. Detours will direct Hughes Street traffic to Mississippi Avenue to bypass the closure. A detour map is attached.
>
> Within the construction zone, the posted speed will be 50 mph. Nightly lane closures will occur throughout the life of the construction project from Sunday night through Saturday morning 8:00 p.m. to 6:00 a.m., and Saturday night from 8:00 p.m. to midnight.

A copy of the ArDOT Information Release dated July 13, 2018 is attached hereto as **Exhibit No. 3**, consisting of two (2) pages, including a map of a detour through streets of Little Rock that will be caused by the destruction/rebuilding of the Hughes Street overpass.

APPLICABLE LAWS

Administrative Procedure Act

24. 5 U.S.C.A. § 702 provides in relevant part that "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

25. 5 U.S.C. § 706, authorizes a reviewing court to decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of a federal agency action. The court must compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1). The court must also hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2).

Declaratory Judgment Act

26. The United States Declaratory Judgment Act, 28 U.S.C.A. § 2201, authorizes a Federal District Court, in a case of actual controversy within its jurisdiction, with certain exceptions not

here relevant, to declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

27. The Plaintiffs seek a declaratory judgment that the categorical exemption used by the Defendants in this case to commence construction of modifications and expansions to I-630 are not applicable to the I-630 Project, and that the Defendants should have prepared an environmental assessment or environmental impact statement on the potential effects of such modifications and expansion.

The National Environmental Policy Act

28. In 1969, Congress, "recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth…, resource exploitation … and new and expanding technological advances, and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man," enacted NEPA, declaring it to be "the continuing policy of the Federal Government … to use all practical means and measures … to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans." (NEPA §101(a), 42 USC §4331(a)).

29. NEPA is our basic national charter for protection of the environment. It establishes policy, sets goals, and provides means for carrying out the policy. Section 102(2) of NEPA contains "action-forcing" provisions to ensure that Federal agencies act according to the letter and spirit of the Act. The President, the Federal agencies and the courts share responsibility for

enforcing the Act so as to achieve the substantive requirements and goals of the Act. 40 CFR §1500.1(a)

30. Among the goals set forth in §101(b) of NEPA are to:

a fulfill the responsibilities of each generation as trustee of the environment for each successive generation;

b. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

c. preserve important historic, cultural and natural aspects of our national heritage, and maintain wherever possible, an environment which supports diversity and variety of individual choice; and

d. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

31. To achieve those goals and policies, NEPA requires that all agencies of the Federal Government shall include in every recommendation for or report on major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on:

(i) the environmental impact of the proposed action,

(ii) the adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

(NEPA, §102(C), 42 USC §4332(C)).

The CEQ Regulations

32. Pursuant to NEPA and Executive Orders Nos. 11514 and 11991, the White House

Council on Environmental Quality ("CEQ") promulgated regulations implementing and expounding upon the provisions of NEPA requiring that, as the "detailed statement" required by Section 102 of NEPA, all Federal agencies prepare an Environmental Assessment ("EA") and/or an Environmental Impact Statement ("EIS") to determine the potential environmental effects of proposed major Federal actions. Those regulations are promulgated at 40 C.F.R. Part 1500 *et seq*. ("the CEQ Regulations")

33. Under the CEQ regulations, the process of assessing the environmental impact of a proposed major Federal action is normally divided into three major steps (40 C.F.R. §1501.4):

A. Preparation of an **environmental assessment** ("EA"), which is defined as a "concise public document that serves to briefly provide sufficient evidence and analysis for determining whether the proposed Federal action may significantly affect the quality of the human environment; (40 CFR §1508.9). The preparation of an EA may be omitted if the agency decides that the proposed action merits preparation of an EIS. (40 CFR §1501.3, 1501.4).

B. If the EA determines that the proposed federal action will not significantly affect the environment, prepare a Finding of No Significant Impact ("FONSI"), which is defined as a document briefly presenting the reasons why an action will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. (40 CFR §1508.13)

C. If the agency determines that the proposed federal action may significantly affect the environment, commence the scoping process to prepare an **environmental impact statement**. (40 CFR §1501.4)

34. Regulations promulgated by the CEQ address the issue of the scope of a NEPA analysis. Such regulations require, among other things, that all reasonable and feasible alternatives to the proposed action be considered; that the direct, indirect and cumulative effects of a proposed action that may reasonably be anticipated be included in the EA or EIS; that measures to mitigate unavoidable adverse environmental impacts be developed and implemented; and prohibit the

"segmentation" of various components of a planned action into smaller projects to avoid studying the cumulative impacts of the entire action or development. (40 CFR §§ 1508.25, 1508.27(b)(7))

35. Notwithstanding the foregoing provisions, 40 CFR §1508.4 provides for the development by Federal agencies of Categorical Exclusions as exceptions to the more detailed environmental assessment and environmental impact statements described above. That section defines a "categorical exclusion" as:

> "Categorical exclusion" means a category of 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 (§1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in §1508.9 even though it is not required to do so. Any procedures under this section shall provide for *extraordinary circumstances* in which a normally excluded action may have a significant environmental effect. (Emphasis added)

36. Further, 40 CFR §1507.3(b), regarding agency procedures for development of their individual procedures to implement the CEQ regulations (including development of categorical exclusions), provides:

> (b) Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements and shall include:
>
> (1) Those procedures required by §§1501.2(d), 1502.9(c)(3), 1505.1, 1506.6(e), and 1508.4.
>
> (2) Specific criteria for and identification of those typical classes of action:
>
> (i) Which normally do require environmental impact statements.
>
> (ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§1508.4)).
>
> (iii) Which normally require environmental assessments but not necessarily environmental impact statements.

The FHWA Regulations

37. Pursuant to the requirements of 40 CFR §1507.3(b) (quoted above), the FHWA has developed regulations relevant to categorical exclusions that are embodied in 23 CFR §771.115 and §771.117.

38. 23 CFR §771.115 (Classes of actions) provides:

> There are three classes of actions which prescribe the level of documentation required in the NEPA process.
>
> (a) *Class I (EISs).* Actions that significantly affect the environment require an EIS (40 CFR 1508.27). The following are examples of actions that normally required an EIS:
> (1) A new controlled access freeway.
> (2) A highway project of four or more lanes on a new location.
> (3) Construction or extension of a fixed transit facility (e.g., rapid rail, light rail, commuter rail, bus rapid transit) that will not be located within an existing transportation right-of-way.
> (4) New construction or extension of a separate roadway for buses or high occupancy vehicles not located within an existing highway facility.
>
> (b) *Class II (CEs). Actions that do not individually or cumulatively have a significant environmental effect are excluded from the requirement to prepare an EA or EIS.* A specific list of CEs normally not requiring NEPA documentation is set forth in §771.117(c) for FHWA actions or pursuant to §771.118(c) for FTA actions. When appropriately documented, additional projects may also qualify as CEs pursuant to §771.117(d) for FHWA actions or pursuant to §771.118(d) for FTA actions. (Emphasis added)
>
> (c) *Class III (EAs).* Actions in which the significance of the environmental impact is not clearly established. All actions that are not Class I or II are Class III. All actions in this class require the preparation of an EA to determine the appropriate environmental document required.

39. Plaintiffs claim that the I-630 Project does not meet the criteria for a Class II (CE) as it is an action whose impacts, individually or cumulatively, have a significant environmental effect on the human environment, and meet the requirement to prepare an EA or EIS

40. The foregoing Section 771.115 (b)(CEs) refers to §771.117 for "a specific list of CEs normally not requiring NEPA documentation. Subsection (a) of 771.117 defines to a greater degree of specificity than that contained in 40 CFR 1508.4 of the CEQ Regulation what generally constitutes a categorical exclusion:

> (a) Categorical exclusions (CEs) are actions which meet the definition contained in 40 CFR 1508.4, and, based on past experience with similar actions, do not involve significant environmental impacts. They are actions which: do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; *do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts. (Emphasis added)*

41. Subsection (b) of §771.117 addresses the further restriction upon the use of categorical exclusions for any action that could involve "unusual circumstances." That subsection provides:

> (b) Any action which normally would be classified as a CE but could involve unusual circumstances will require the FHWA, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper. Such unusual circumstances include:
>
> (1) Significant environmental impacts;
> (2) Substantial controversy on environmental grounds;
> (3) Significant impact on properties protected by section 4(f) of the DOT Act or section 106 of the National Historic Preservation Act; or
> (4) Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

42. Subpart (c) of 771.117 then provides examples of actions that normally meet the criteria for a categorical exclusion and do not require further NEPA procedures, such as an EA or EIS.

There are more than thirty (30) such categorical exclusions. The "Tier 3 Categorical Exclusion" document **(Exhibit 2)** issued by FHWA does not identify which, if any, of the Section 771.117(c) categorical exclusions are relied upon by Defendants to exempt the I-630 Project from the usual requirements for preparation of an environmental assessment or environmental impact statement. It merely refers to a categorical exclusion.

43. The alterations to I-630 proposed by the Defendants do not meet the requirements of the categorical exclusions contained in 23 CFR §771.115 and §771.117, nor have Defendants conducted an environmental assessment or environmental impact statement to determine the potential effect of such proposed alterations. As a result, the actions of the Defendants to perform substantial and significant highway alterations to I-630 without having complied with the requirements of NEPA and its implementing regulations and the regulations of the FHWA, are arbitrary, capricious and not in accordance with law, and should be enjoined.

The ArDOT – FHWA Memorandum of Agreement and
The "Tier 3 Categorical Exclusion" Findings

44. 23 CFR 771.117(g) provides that the FHWA may enter into programmatic agreements with a State, such as the Defendant, ArDOT, to allow a State DOT to make a NEPA Categorical Exclusion certification or determination and approval on FHWA's behalf, for CEs specifically listed in paragraphs (c) and (d) of Section 771.117 and that meet the criteria for a CE under 40 CFR 1508.4, and are identified in the programmatic agreement. Such agreements, however, must be subject to the following conditions:

> …
> (2) The agreement may not have a term of more than five years, but may be renewed;
> …

23 CFR 771.117(g)(3)

45. The ArDOT (through its predecessor ADHT) and the FHWA entered into a Memorandum of Agreement (MOA) in November, 2009, providing for the determination by ArDOT of the applicability of categorical exclusions on Federally-funded projects undertaken in the State of Arkansas. A copy of the Memorandum of Agreement is attached to this Complaint as **Exhibit No. 4**.

46. Pursuant to that Memorandum of Agreement, the ArDOT determined that the "Tier 3 Categorical Exclusion" applied to the I-630 Project, and that categorical exclusion determination was approved by FHWA on October 4, 2016 by issuance of the "Tier 3 Categorical Exclusion" document **(Exhibit No. 2)**.

47. However, under 23 CFR 771.117(g)(2), agreements between FHWA and ArDOT such as the Memorandum of Agreement may not have a term of more than five (5) years. The MOA under which ArDOT and the FHWA approved the Tier 3 Level Categorical Exclusion for the I-630 project was executed in November, 2009, and expired in November, 2014 and, upon information and belief of Plaintiffs, has not been renewed. Consequently, such determination occurred two years after the expiration date of the MOA, is invalid and ineffective, and any action taken by the Defendant pursuant thereto is arbitrary, capricious and contrary to law.

LEGAL CLAIMS

Count 1.
The Project Does Not Qualify For a Categorical Exclusion Because It Involves Significant Air, Noise or Water Quality Impacts Or Will Have Significant Impacts on Travel Patterns.

48. Plaintiffs incorporate herein all allegations contained in the previous paragraphs.

Defendants Did Not Adequately Assess Whether Significant Environmental Impacts Would Result From the I-630 Project

49. 23 CFR Section 771.117(a) defines a categorical exclusion as "actions which meet the definition contained in 40 CFR 1508.4 (quoted above, p.13) and, based on past experience with similar actions, *do not involve significant environmental impacts*. They are actions which: … do not involve *significant air, noise or water quality impacts*; *do not have significant impacts on travel patterns*; or do not otherwise, either individually or cumulatively, have any significant environmental impacts." (Emphasis added)

50. To determine whether the proposed action is eligible for a categorical exclusion, a determination must be made by the agency or its delegatee (here, ArDOT) that the proposed project meets the requirements of Section 771.117(a) that the proposed action does not involve significant air, noise or water quality impacts; does not have significant impacts on travel patterns; or does not otherwise, either individually or cumulatively, have any significant environmental impacts. That determination must be adequately explained.

51. When an agency decides to proceed with an action in the absence of an EA or EIS, the agency must adequately explain its decision. *Alaska Center for the Environment v. U.S. Forest Service*, 189 F.3d. 851 (9th Cir. 1999). *Reed v. Antwerp*, 2009 WL 2824771 at headnote 6 (D. Neb. 2009) ("In determining that a categorical exclusion applies, the agency must simply explain its decision in a reasoned manner (citing *Alaska Center for the Environment*, supra)); *Arkansas Nature Alliance, Inc. v. United States Army Corps of Engineers*, 266 F. Supp.2d 876 (E.D. Ark. 2003) (question is whether the threshold decision to proceed without preparation of an EIS is reasonable).

52. As part of the Defendants' "Tier 3 Categorical Exclusion" determination dated October 4, 2016, ArDOT completed a summary "Environmental Impacts Assessment Form" in which it

"assessed" the environmental impacts of the Project by checking boxes on a one-page form, with perfunctory and conclusory comments by the person or persons conducting the assessment on various environmental components. **(See Exhibit 2, Attachment B)** There is no supporting documentation for the assessments contained therein, or the basis for such assessments. Such Assessment is inadequate to satisfy the requirement that the ArDOT took a "hard look" at the potential environmental consequences of the proposed Project. The decision of ArDOT and FHWA to use a categorical exclusion for the I-630 Project was not adequately explained, and is arbitrary and capricious and contrary to law.

53. However, the Environmental Assessment Form did find that "significant' impacts from increased noise from the Project would occur in five (5) "impacted" areas, with noise barriers planned for three of those areas as part of the Project. A Final Noise Study Report prepared for ArDOT by a contractor, Kimley-Horn, stated that eight (8) noise study areas (NSAs) were identified along the Project corridor. Based on projections for traffic volume for the year 2039 peak hours, it was estimated that exterior residential and recreational activities would be impacted out to a distance of approximately 500 feet from the centerline of the nearest travel lane of I-630, depending on terrain and other conditions at the location, and that four (4) of the eight (8) study areas would be adversely impacted and meet the criteria for the establishment of noise barriers. However, the study recommended that noise barriers be constructed at only three of the four impacted areas.

54. Pursuant to 23 CFR Section 771.117(a), the Project does not meet the requirements for a categorical exclusion because the Noise Study conducted by ArDOT shows that the Project will have significant environmental impact from noise along the I-630 corridor; that persons who live within 500 feet of the center line of the closest travel lane of I-630 may be impacted; and that

ArDOT does not plan to take action to mitigate the potential effects of such sound at all areas along the I-630 corridor that may be impacted from noise.

The I-630 Project Will Cause Significant Impacts on Travel Patterns

55. 23 CFR Section 771.117(a) also requires that a categorical exclusion be an "action which does not have significant impacts on travel patterns. There is no mention of potential impacts on travel patterns in the Environmental Impacts Assessment Form prepared by ArDOT to support the Tier 3 Categorical Assessment, and no statement in that Categorical Assessment that the Project will not have a significant impact on travel patterns. To the contrary, the ArDOT's own statements and official documents compel the inescapable conclusion that there will be serious and ongoing disruptions and forced changes to traffic patterns.

56. As noted on Page 8 of this Complaint, ArDOT issued an Information Release on July 13, 2018, announcing the forthcoming commencement of construction on the Project, and stating the changes, restrictions and detours that will result. Without repeating *verbatum* the text of that Information Release set forth earlier herein, those changes can be summarized as follows:

(i) Eastbound and westbound center and outside lanes within the work zone will be closed between *each night* from 8:00 p.m. and 6:00 a.m. Monday through Friday**;** *one lane* of traffic in each direction will remain open;

(ii) Speed limit will be 50 mph in the construction zone;

(iii) During the daytime travel *peak hours*, all six lanes on I-630 will be open to traffic; (*but see the information re: demolition and replacement of the Hughes Street overpass below*); however, periodic lane closures, in addition to some lane shifts, are expected to happen at off-peak times (see

interview of Danny Straessle with Arkansas Democrat-Gazette, July 2, 2018.

(iv) Neighborhoods adjacent to the interstate will experience noise impacts during nighttime hours. (This is presumably in addition to the impact of increased noise that the ArDOT's Noise Study found would occur as a result of traffic.)

(v) Beginning Friday, July 20, the Hughes Street overpass will be closed for approximately three months for bridge demolition and reconstruction of the overpass.

(vi) **The Bridge demolition/reconstruction will close I-630 to through traffic in that section**. Detours will direct Hughes Street traffic to Mississippi Avenue to bypass the closure. According to the detour map attached to the Information Release, westbound (incoming) traffic on I-630 will be required to exit I-630 at Mississippi Street, go north to West Markham, east along Markham to Hughes, and south on Hughes back to I-630. That process would be reversed for westbound (outgoing) traffic on I-630. (**See Exhibit 3, p.2**, Detour Plan for Hughes Street Bridge Construction.)

ArDOT Did Not Discuss The Disruption of Traffic Patterns From the Closure of Two Other Bridges On I-630

57. The ArDOT Information Release of July 13 only discusses the closure of the Hughes Street overpass. The Project also includes the demolition and replacement of two other bridges within the Project area of I-630. See quotation from the Tier 3 Categorical Exclusion document

issued by FHWA on October 4, 2016. **(Exhibit 2)**. ("All existing bridges within the project limits … will be replaced.") The Information Release issued by ArDOT on July 13, 2018, does not mention the closure of the other two bridges. Assuming that those demolition/replacement projects are conducted in the same manner as the Hughes Street bridge, it is clearly inevitable that there will be major traffic disruptions and changes in traffic patterns throughout the projected two-year life of the Project.

58. Markham, Mississippi, Rodney Parham, Cantrell Road (Highway 10) and other major arteries from west Little Rock to and from downtown Little Rock are already heavily traveled. There is no analysis contained in the Tier 3 Categorical Exclusion document approved by Defendant FHWA, nor any other document prepared by or for the Defendants and reviewed by Plaintiffs that analyzes the effect of the potential impacts of the I-630 Project on traffic patterns, travel time, the capacity of other major streets to handle overflow from I-630, safety hazardous from the diversion of such traffic, or other considerations.

The Impact of Closure of I-630, or Portions Thereof,
On Emergency Services Was Not Considered by Defendants

59. An important consideration of the impact of the Project on public health and safety is that the Baptist Medical Center ("the Center") complex is located at the west terminus of the Project, and the CHI St. Vincent medical complex (St. Vincent) is located at the east terminus. Both of these facilities are major medical providers in Arkansas, including the providing of emergency medical services. Those facilities and services are frequently needed on a 24-hour basis.

60. While the Project may not impact routine and emergency medical services at the Center that originate from those parts of Little Rock that are north and south of I-630 and west of the Center, it will severely impact the access of persons needing routine and emergency medical

services from those portions of Little Rock located east of the Center and that would otherwise use I-630 as a rapid and convenient means of accessing the Center.

61. Likewise, persons who may be in need of such care and who are located west of St. Vincent and who would normally use I-630 as a rapid and convenient means of accessing it will be subject to delays and inconvenience in going there.

62. In cases involving emergencies, the loss of time in arriving at either Baptist or St. Vincent could be critical to the patient's survival or recovery. These same considerations were a major factor in Judge J. Smith Henley's decision to not enjoin construction of this same portion of I-630 in his decision in *Arkansas Community Organization for Reform Now v. Brinegar*, 398 F. Supp. 685, 699 (E.D. Ark. 1975).

Indirect and Cumulative Impacts of the I-630 Project, The "30 Corridor" Project And Other Highway Projects In the Little Rock Area Were Not Considered

63. NEPA also requires that, in the assessment of the environmental impacts of proposed Federal actions, the indirect and cumulative impacts of such action in connection with other past, current and future actions be considered. 23 CFR Section 771.117(a) also requires that cumulative impacts of a proposed categorical exclusion be considered.

64. There are other actions occurred or planned in the Little Rock area that could indirectly or cumulatively have impact on the driving public, particularly those persons who customarily use I-630 to commute to work. Those other actions include the proposed "30 Corridor" project that will, if executed according to the schedule announced by the ArDOT and FHWA, be constructed simultaneously with the work planned for the I-630 Project. The 30 Corridor project has particular relevance because I-630 has its eastern terminus at I-30, and traffic issues on one highway impacts traffic on the other. Another proposed highway project that could indirectly or

cumulatively impact the I-630 Project, and vice versa, is the planned reworking and modification of the interchange of I-430 and Highway 10 (Cantrell Road).

65. If the two additional projects mentioned above (30 Corridor and I-430/Highway 10) occur simultaneously with or significantly overlap construction on the I-630 Project, traffic patterns could be affected in that (i) traffic wishing to use Highway 10 as an alternative to I-630 would potentially be delayed or denied access to Highway 10 from I-430 during work on that interchange; and (ii) persons who are able to use I-630 to its intersection with I-30 may be delayed or denied access to I-30 due to work on that interchange.

Count 2.
The Categorical Exclusions Contained in
23 CFR § 771.115 and 771.117 Do Not Apply To the I-630 Project
Because the Project Has the Potential for Significant Environmental Impacts

66. Plaintiffs ratify, affirm and adopt all allegations contained in the previous paragraphs.

67. As noted above, categorical exclusions are intended to be used only in projects that do not involve significant air, noise or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.

68. In *Arkansas Nature Alliance, Inc. v. U.S. Army Corps of Engineers*, 266 F. Supp.2d 876, 886-887, the Court found it instructive to review the examples provided by the Corps of Engineers in its regulations on use of categorical exclusions and found that the environmental impacts of the project in that case far exceeded the magnitude of the examples contained in the categorical exclusions. Such is the case here. An examination of the list of specific categorical exemptions contained in 23 CFR 771.117(c) illustrates that the type of projects in which categorical exclusions may be used are limited to small projects on the existing roadway or the

facilities that adjoin them, and not to a major increase in the number of lanes, auxiliary lanes and bridge replacements, to name a few of the modifications.

69. The I-630 Project that is the subject of this suit is a part of what is nothing less than a major overhaul of that expressway. The cost of the Project is estimated at $87.4 million. As noted earlier, it will expand the highway from six lanes to eight, with additional fifth auxiliary lanes to be added between successive entrance and exit ramps, amounting in some places to a highway width of 10 lanes. Three bridges will be replaced over which most of the traffic utilizing I-630 passes, causing slowdowns, lane changes and detours. Other storage and turning lanes will be added at various ramps.

70. Defendant ArDOT conducted a study of the potential noise effects of the Project on the residential areas adjacent to the I-630 corridor, and found that there will be significant impacts for persons within 500 feet of the nearest lane, and that noise increases in four of the study areas merited construction of sound barriers.

71. ArDOT apparently did not conduct a study of any of the potential impacts of the Project on air quality in the area. It is scientifically well-established that areas adjacent to expressways and other highly-traveled roads suffer impacts to air quality, and that vulnerable persons, such as children and the elderly, are especially impacted by pollutants from vehicles.

72. In light of these obvious and well-accepted circumstances that support the conclusion that the I-630 Project will have significant environmental impacts, the Defendants do not explain their decision to utilize a categorical exclusion in a reasoned manner. Their failure to make such explanation is arbitrary, capricious and contrary to law.

Count 3.
Unusual Circumstances Exist In This Case
That Prohibit The Use of Categorical Exclusions

73. Plaintiffs ratify, affirm and adopt all allegations contained in the previous paragraphs.

74. Subsection (b) of 23 CFR §771.117 addresses the further restriction upon the use of categorical exclusions for any action that could involve "unusual circumstances." That subsection provides:

> (b) Any action which normally would be classified as a CE but could involve unusual circumstances will require the FHWA, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper. Such unusual circumstances include:
>
> (1) Significant environmental impacts;
> (2) Substantial controversy on environmental grounds.

Both of those unusual circumstances exist in this case.

75. Plaintiffs have previously discussed in detail the significant environmental impacts that are likely to result from the I-630 Project, and the Court is referred to the discussion of those impacts in the foregoing sections. In addition, there is substantial controversy about the Project on environmental grounds.

76. In the "Tier 3 Categorical Exclusion" document, there is an attachment entitled "Public Involvement Synopsis" **(Exhibit 2, Attachment E)**. That Attachment illustrates the public concern about this project on environmental grounds solely from one open-forum public involvement meeting held at a church in Little Rock from 4:00 to 7:00 p.m. on February 3, 2015. According to the meeting synopsis (Table 2), 150 people attended the meeting (including ArDOT and Connecting Arkansas Program staff). A total of 50 comments on the Project were received. Of those, 28 comments were made regarding existing and increased noise resulting

from the Project, and 18 expressed the desire for noise abatement to be included in the Project. Nineteen comments related to the removal of basketball courts currently beneath the I-630 bridge at Kanis Park; 15 of those comments listed Kanis Park and/or the basketball courts as an environmental constraint. (The City is "exploring options" for relocating the basketball courts, but there are no plans for their replacement.) Seven comments were made about concerns during construction, including noise, dust, damage from heavy vehicles and proximity of staging areas to homes. Four comments expressed concern that the Project would increase congestion on other roads in the community.

77. There is no record in the "Tier 3 Categorical Exemption" document of other meetings held by the Defendants to permit the public to express their comments on the proposed Project.

78. It should be noted that the Noise Study prepared for ArDOT was not completed until June, 2016, after the aforementioned public meeting. Nor was there information available to the public regarding closure of portions of I-630 due to bridge demolition/replacement, and detouring of traffic from I-630 through city streets. It is likely that, in view of the knowledge now available to the public regarding the potential for noise, air quality impacts, displacement of community recreational resources, and detours of traffic through city streets due to bridge closings, that the public would be even more vocal and generate more controversy about the Project.

79. In addition, unusual circumstances exist in that the streets to which traffic would go as an alternative to I-630 are already crowded during peak drive times, and the diversion of traffic from I-630 (either from detours or drivers' voluntary decision to use an alternate route) to Markham, Rodney Parham, or Highway 10 (Cantrell) will add to the congestion and present

safety hazards. There is no indication that either ArDOT or FHWA assessed the impact of diversion of traffic from I-630 to those or other streets.

WHEREFORE, Plaintiffs pray that the Court grant the following relief:

A. Issue a Temporary Restraining Order directing the Defendants to cease and desist any work that they or their contractors may be performing on the I-630 Project, and to maintain the status quo in the Project area subject to further order of the Court;

B. After reasonable time for briefing and response, conduct a hearing on Plaintiffs' Motion for Preliminary and Permanent Injunction; and

C. Issue an Order permanently enjoining further construction on or development of the I-630 Project until the Defendants have assessed the environmental impacts of the Project in accordance with the requirements of NEPA and other applicable laws and regulations.

Respectfully submitted,

WILLIAMS & ANDERSON PLC

By:_____

Richard H. Mays (AR Bar No. 61043)
Heather Zachary (AR Bar No. 2004216)
Stephens Building – 22nd Floor
111 Center Street
Little Rock, AR 72201
(501) 372-0800
rmays@williamsanderson.com
hzachery@williamsanderson.com