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

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

v. **No:**

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

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER, AND FOR PRELIMINARY AND PERMANENT INJUNCTIONS AND REQUEST FOR EXPEDITED HEARING

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EXHIBITS

TABLE OF ACRONYMS AND TERMS

ArDOT	**Arkansas Department of Transportation**
CE	**Categorical Exemption**
CEQ	**White House Council on Environmental Quality**
EA	**Environmental Assessment**
EIS	**Environmental Impact Statement**
FHWA	**Federal Highway Administration**
FONSI	**Finding of No Significant Impact**
I-630	**Interstate 630 in Little Rock, Arkansas**
I-30	**Interstate 30 in Little Rock, Arkansas**
I-430	**Interstate 430 in Little Rock, Arkansas**
NEPA	**The National Environmental Policy Act**
DEFENDANTS	**Federal Highway Administration and the Arkansas Department of Transportation**

I. INTRODUCTION

This case involves the imminent construction of modifications to Interstate 630 (I-630) in Little Rock, Arkansas, between the area identified on the western terminus as the Baptist Hospital exit, and on the eastern terminus at University Avenue (herein "the 630 Project") in the City of Little Rock, Arkansas, a distance of approximately 2.2 miles. Interstate 630 is the major east-west traffic artery in the City of Little Rock, carrying in excess of 100,000 vehicles/day, according to the Defendant, Arkansas Department of Transportation (ArDOT)[1].

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)

The action of the Defendants in commencing such construction activities was based upon a document entitled "Tier 3 Categorical Exclusion" dated October 4, 2016, (**Exhibit No. 2** attached to Plaintiffs' Motion for TRO) issued by the Defendant FHWA and prepared by a contractor, Kimley-Horn and Associates, Inc., of Memphis, Tennessee,

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[1] The Arkansas Department of Transportation was formerly named the Arkansas Highway and Transportation Department. "ArDOT" as used herein refers to both.

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.

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 either 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 individually or cumulatively involve significant environmental impacts to the human environment. 23 C.F.R. 771.117(a).

Plaintiff contends that the I-630 Project does not qualify for the use of a categorical exclusion to exempt it from the usual requirements of NEPA that potential environmental impacts of a proposed Federal action be assessed by preparation of an EA or and EIS; that in approving the use of a categorical exclusion as a substitute for an EA or EIS, the Defendants failed to reasonably and 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.

Need For Temporary Restraining Order

The need for a Temporary Restraining Order is brought about because the Defendant ArDOT has, as of yesterday, July 16, commenced work on the 630 Project. It has announced plans to demolish the I-630 overpass over Hughes Street **on Friday, July 20**. According to an Information Release from the Defendant ArDOT dated July 13, 2018, work commenced 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.
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> *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. (Emphasis added)
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> 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.

The demolition of the I-630 overpass over Hughes Street will, for all practical purposes, prevent the use of I-630 as a rapid and efficient means of commuting from and to West Little Rock, Benton, Bryant, and other areas west of downtown Little Rock for the duration of the entire Project. Two other bridges/overpasses on I-630 are also planned

for demolition and reconstruction during the Project. Alternative routes are, at peak traffic times, already crowded, and there is no indication that the Defendants have analyzed the changes in traffic pattern that will occur when I-630 is taken out of service for through traffic. As a result, Defendants have not informed the public who use I-630 that the removal of the bridges during the Project will necessitate their finding alternative routes, or suggesting what those alternative routes may be.

There was no environmental assessment or environmental impact statement prepared by ArDOT or FHWA – only the issuance of a categorical exception, which provided no notice or other warning to the public that the Defendants planned to commence construction this week. Thus, Plaintiffs have not been able to file suit prior to the date of the filing of their Complaint.

Plaintiffs assert that the CE was defective in that 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.

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.

II. FACTUAL BACKGROUND

The Defendants, FHWA and ArDOT propose to modify I-630 in increments to widen the roadway from six (6) (three in each direction) to eight (8) lanes (four in each direction), replace bridges crossing or overpassing Little Rock city streets and other highways, add auxiliary lanes between exit and entrance ramps, and storage and turning lanes. The portion of I-630 that is proposed by Defendants to be modified immediately is located between the Baptist Hospital exit/entrance (approximately one (1) mile west 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 the Motion for Temporary Restraining Order as **Exhibit No. 1**.

As context for this action, 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 the Motion for Temporary Restraining Order as **Exhibit No. __**.

Pursuant to that Memorandum of Agreement, in 2016 ArDOT determined that a "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 a "Tier 3 Categorical Exclusion" document (**Exhibit No. 2** to Motion for Temporary Restraining Order).

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 Plaintiffs contend that any action taken by the Defendant pursuant thereto is arbitrary, capricious and contrary to law.

As part of the Defendants' "Tier 3 Categorical Exclusion" determination dated October 4, 2016, ArDOT completed a summary "Environmental Impacts Assessment Form" a one (1) page document in which ArDOT "assessed" the environmental impacts of the Project by checking boxes on the form, with perfunctory and conclusory comments by the person or persons conducting the assessment on various environmental components. (See **Exhibit 2, Attachment B** to Motion for Temporary Restraining Order.) There is no supporting documentation for the assessments contained therein, or the basis for such assessments. With one notable exception, such Assessment is inadequate to satisfy the requirement that the ArDOT took a "hard look" at or made a reasonable attempt to assess 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.

The notable exception to the failure to assess potential environmental impacts is that the Environmental Assessment Form did find that "significant' impacts from increased noise from the Project would occur in four (4) "impacted" areas, with noise barriers planned for three (3) 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. That recommendation was apparently based on whether the residents in the area voted to accept the barriers.

Thus, while ArDOT did perform what appears to be a comprehensive noise study, the study 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 unless the residents "vote" to accept the barriers. There

being significant environmental impacts show to result from the Project, an EA, at a minimum, should be conducted.

III. STANDARD OF REVIEW

A. The Test For Whether an EA or EIS Should Have Been Prepared Is Whether the Decision Was Reasonable

An initial decision not to prepare an EIS precludes the full consideration directed by Congress. In view of the concern for environmental disclosure present in NEPA, the agency's discretion as to whether an impact statement is required is properly exercised only within narrow bounds. An action which could have a significant effect on the environment should be covered by an impact statement. The threshold decision as to whether or not to prepare an EIS should be reviewed not on the arbitrary and capricious standard used to test a substantive decision which entails a balancing and weighing of alternatives already studied, but on the grounds of its reasonableness. *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314 (8th Cir. 1974); *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).

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));

Granted, the Plaintiff has the burden of establishing that "a substantial environmental issue" exists. To establish a substantial environmental issue, the "(p)laintiff must allege facts (omitted from consideration in the administrative record) which, if true, would constitute a 'substantial' impact upon the environment." *Hiatt Grain & Feed, Inc. v. Bergland*, supra, 446 F.Supp. at 490 (citations omitted). The alleged deficiency must be of sufficient significance to warrant shifting the burden of proof. *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (1980). Upon such showing, the burden shifts to the agencies to show that they complied with NEPA.

B. Test For Granting Of TRO/ Preliminary Injunction

The test for a District Court's review of a Motion for a Temporary Restraining Order is the same as that for a Preliminary Injunction in the Eighth Circuit, and involves a weighing of the following four factors:

1. The threat of irreparable harm to the movant absent the granting of the TRO/injunction;

2. The harm that granting the TRO/injunction will inflict upon the adverse party;

3. Whether there is a substantial probability that movant will succeed on the merits; and

4. The public interest.

Dataphase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981); *Local Union No. 884, United Rubber, Cork, Linoleum, and Plastic Workers of America v. Bridgestone/Firestone, Inc.*, 61 F.3d 1347, 1355 (8th Cir. 1995); *Arkansas Wildlife Federation v. Bekaert Corp*., 791 F. Supp. 769 (W.D. Ark. 1992).

The grant of preliminary relief is largely within the discretion of the District Court. *Dataphase Systems, supra; Aaron v. Target Corp.*, 357 F. 3d 768 (8th Cir. 2004); *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action,* 558 F. 2d 861 (8th Cir. 1977); *Chicago Stadium Corp. v. Scallen,* 530 F.2d 204, 206 (8th Cir. 1976). A temporary restraining order or preliminary injunction should issue upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting preliminary relief. *Dataphase Systems, supra*.

However, the decision to issue or not issue preliminary relief should not be made upon mechanical application of these four factors, but upon whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined. *Wood Manufacturing Co. v. Schultz,* 613 F. Supp. 878 (W.D. Ark. 1985)

As the Eighth Circuit stated in *Dataphase, supra:*

> In balancing the equities no single factor is determinative. … If the chance of irreparable injury to the movant should relief be denied is outweighed by the likely injury to other parties litigant should the injunction be granted, the moving party faces a heavy burden of demonstrating that he is likely to prevail on the merits. Conversely, where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less.
>
> It follows that the court ordinarily is not required at an early stage to draw the fine line between a mathematical probability and a substantial possibility of success. … But where the balance of other factors tips decidedly toward plaintiff a preliminary injunction may issue if movant has raised questions so serious and difficult as to call for more deliberate investigation.

There is an exception, however, to the requirement that "redressability" and "immediacy" be shown in every case. That exception is where a person's or organization's "procedural rights" are being violated by the failure of the agency to comply with the requirements of law benefiting that person. In such case, the "redressability" and "immediacy" requirements are relaxed. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-573 (ftn. 7)112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."); *Rector v. City and County of Denver*, 348 F. 3d 935, 943 (10th Cir. 2003) ("When asserting procedural rights, Article III standing does not require plaintiffs to demonstrate that they would obtain concrete relief from the desired process." Citing *Lujan* and *Catron County Bd. Of Comm'rs v. U.S. Fish & Wildlife Serv.*, 75 F. 3d 1429, 1433 (10th Cir. 1996). The actions of the Defendants in this case to substitute a categorical exclusion for the usual preparation of an environmental assessment or environmental impact statement as required by NEPA constitute a deprivation of the Plaintiffs' procedural due process rights to review environmental documents being considered by the Defendants, and to comment upon those documents.

Plaintiffs will discuss these criteria to show that plaintiffs satisfy each of them, and that, under the circumstances of Defendants' imminent demolition of the I-630 overpass at Hughes Street and additional activities in demolishing certain portions of I-630, resulting in permanent and on-going environmental harm, a Temporary Restraining Order and/or Preliminary Injunction should be issued to the Defendants to

order immediate suspension of work on the Project pending briefing and a hearing on the full merits of the case.

There is no official Administrative Record in this matter, at least not at this point in the proceeding. There are, however, several major documents created by the Defendants to memorialize their decisions, including a Memorandum of Agreement (MOA) dated November, 2009, a "Tier 3 Categorical Exclusion" document issued by the Defendant FHWA approving a determination by the ArDOT that the Project falls within the MOA on the processing of categorical exclusions; a Final Noise Study Report" issued by ArDOT on June 16, 2016; an Information Release of the ArDOT dated July 13, 2018.

IV. LEGAL ANALYSIS AND ARGUMENT

1. Threat Of Irreparable Harm

The Supreme Court of the United States has held that if an environmental harm is likely, the balanced of harms will favor issuance of an injunction.

> Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Production Co. et al v. Village of Gambell, Alaska, et al*, 480 U.S. 531, 545 (1987).

See also, *Winter v. Natural Resources Defense Council, Inc*., 129 S. Ct. 365, 375, 172 L.Ed 2d 249 (2008) (harm flows from a violation of NEPA itself, in that failure to comply with NEPA requires cause a risk that "real environmental harm will occur through inadequate foresight and deliberation." Winter, 129 S.Ct. at 374-75); *Sierra Club et al v. United States Army Corps of Engineers et al,* 645 F.3d 978, (8th Cir. 2011) (harm to the environment can seldom be adequately remedied by money damages and is often

permanent or at least of long duration; irreparable harm to the environment necessarily means harm to the plaintiffs' specific aesthetic, educational and ecological interests).

The Supreme Court, in defining "irreparable injury" in the environmental context has said that term does not mean an injury that would last forever, but instead means damage that may be of a long duration, as is often the case with environmental insult. In addition, the Supreme Court does not require that the moving party demonstrate the absolute certainty of irreparable harm, but only that it be "*sufficiently likely*" that such harm will occur. *Winter, supra*.; *Sierra Club et al v. United States Army Corps of Engineers et al*, 645 F. 3d 978 (8th Cir., 2011).

In *Sierra Club v. Marsh*, 714 F. Supp. 539 (D. Maine, 1989), the District Court was faced – as this Court may be – with an argument from the project owner that an injunction would result in increased project costs. In response, that Court cited the above quotation from *Amoco Production Co*., and then added:

> The court may consider increased project costs which would result from a preliminary injunction, where, as here, it does not appear that "adequate compensatory relief will be available in the course of the litigation." *California ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1316, 1319 (9th Cir. 1985). On the other hand, environmental harm, by its nature, is long-lasting and seldom adequately remedied by monetary damages. *See Village of Gambell*, 480 U.S. at 545. Therefore, if environmental harm appears sufficiently likely, the balance of harms usually weighs in favor of an injunction. *Id*.
>
> *Under NEPA, unless defendants assert that an injunction will cause imminent harm to national defense, Weinberger, 745 F.2d at 433, the impending bankruptcy of an entire industry, Louisiana ex rel Guste v. Lee, 635 F. Supp. 1107, 1128 (E.D. La. 1986), or the bankruptcy of innocent third parties, Sierra Club v. Penfold, 664 F. Supp. 1299, 1306 (D. Alaska 1987), the balance of harms usually favors the issuance of an injunction to protect the environment.* (Italics added)

See also, *Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989), in which now-Supreme Court Justice Breyer wrote for that Court:

> … [T]he risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation. The difficulty of stopping a bureaucratic steam roller, once started, still seems to us, after reading *Village of Gambell*, a perfectly proper factor for a district court to take into account in assessing that risk, on a motion for preliminary injunction. And, it does not surprise us that, since *Village of Gambell*, other courts have reach the same conclusion. See *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1156-58 (9th Cir. 1988); *Sierra Club v. United States Forest Service*, 843 D,2d 1190 (9th Cir. 1988); *Save the Yaak Committee v. Block*, 840 F.2d 714, 722 (9th Cir. 1988); *Friends of the Earth v. Hall*, 693 F. Supp. 904, 912-13, 949 (W.D. Wash. 1988).

Not only does the balance of irreparable harm favor issuance of an injunction in environmental cases, but numerous courts have held that there is a presumption of irreparable harm in the violation of NEPA requirements. See, *National Parks and Conservation Assn. v. Babbitt, Sec. of Interior*, 241 F.3d 722 (9th Cir. 2001); *Davis v. Mineta, Sec. of Transp*., 302 F.3d 1104 (10th Cir. 2002) ("harm to the environment may be presumed when an agency fails to comply with the required NEPA procedure. … The size and scope of this project supports a conclusion that the injury is significant"); *Realty Income Trust v. Eckerd*, 183 U.S. App. D.C. 426 (1977) (Ordinarily, when an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the action until the agency brings itself into compliance). *Foundation on Economic Trends v. Weinberger*, 610 F. Supp. 829 (D. D.C. 1985) (a presumption exists in favor of injunctive relief following a finding of violation of NEPA); *Southern Utah Wilderness Alliance et al v. Thompson*, 811 F.Supp. 635 (D. Utah 1993). If environmental injury is sufficiently likely, balance of harms will favor issuance of an injunction to protect the environment. *Amoco Production Co. v. Village of*

Gambell, 480 U.S. 531, 545, 107 S.Ct. 1396, 94 L. Ed 2d 542 (1987); *Arkansas Wildlife Federation v. Bekaert Corp*., *supra*.

Consequently, if the Plaintiffs can show that the Defendants have, or may have, violated one or more requirements of NEPA, there is a presumption of irreparable harm, and an injunction should issue.

Aside from that presumption, however, one need look only at the description of activities proposed in the Tier 3 Cumulative Impact document **(Exhibit 2)** to be conducted by the Defendants in the I-630 Project to appreciate the potential for environmental harm. Those actions 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 Detour Plan for Hughes Street Bridge Construction, **Exhibit 1, p.2**)

(vii) Other detours will inevitably occur as a result of the demolition and replacement of the remaining two bridges on I-630 in the construction area. The Defendants have not yet issued public information on those detours. Like the one described above, they will, of necessity, be through streets of Little Rock that are already heavily traveled and are not of the size or configuration to handle the large increase of traffic that will be forced upon them by these detours.

It should be noted that two of the major medical facilities in the State of Arkansas are located at each end of the section of I-630 that constitutes the Project area. Baptist Medical Center is located at the west end, and CHI St. Vincent medical center is at the east end. Access to routine and emergency medical services at both of those facilities will likely be adversely affected by the demolition and replacement of three bridges in that portion of I-630, lane closures, rerouting and other disruptions in traffic patterns.

Further, there are other highway construction projects planned for construction by ArDOT and FHWA in Little Rock that will potentially impact the I-630 project, and vice versa. A planned “30 Corridor” project to substantially widen and reconfigure I-30 which runs in a north-south direction through downtown Little Rock, and with which I-630 intersects at its eastern terminus, is scheduled for construction to commence in late 2018

or early 2019, which will significantly overlap with the reconstruction of I-630. There is also a planned reconstruction of the intersection of State Highway 10 (Cantrell Road) and I-430 for the near future. Highway 10 is a possible alternative route to I-630 to access downtown Little Rock from western Little Rock, and vice versa, and the cumulative impacts of the two construction projects overlapping have not been considered.

While the presumption of irreparable harm from violation of NEPA's requirements is alone sufficient to carry the day for plaintiffs on the issue of irreparable harm, there is a demonstrable threat of irreparable injury from all of the above described site work to be done if an injunction is not issued pending a hearing on the merits of this case. Plaintiffs have shown that the Defendants have, by authorizing the I-630 Project on the basis of a "categorical exclusion," failed to reasonably and adequately assess the potential for significant environmental impacts to the human environment as a result of the Project. If and when the I-630 overpass at Hughes Street is demolished, the potential harm to that environment will be done, as traffic passage through the I-630 corridor will

2. Potential Harm To The FHWA and ArDOT if An Injunction Is Granted

Compared to the threat of imminent harm to the environment that is presumed from violation of NEPA's requirements, what harm will there be to the Defendants if the injunction is granted and the status quo preserved? The FHWA has no direct involvement in construction of the Project, and there is no reason to expect that a delay of reasonable length, while the Court hears arguments and reviews the record in this case, will cause any significant harm to the COE.

The ArDOT, on the other hand, is expected to protest that, if an injunction is granted staying the Permit, it will lose large sums of money in contract delays, and that its contractors' workers will be laid off. ArDOT, however, should have anticipated that there was considerable controversy about this project (see Public Involvement Synopsis, Attachment E to Tier 3 Categorical Exclusion document – **Exhibit 2**). It should have not relied upon a categorical exclusion in a project of this magnitude when ArDOT and FHWA should have known that the categorical exclusions available under 23 CFR §§ 771.115 and 771.117 were not designed to apply to a project of this magnitude.

ArDOT and FHWA assumed the risk of being put in the position of having to defend a challenge to the categorical exclusion by using it to avoid preparation of an environmental assessment or environmental impact statement, which requires more public participation and public knowledge of the agencies' plans and approaches. Instead, ArDOT and FHWA, through use of the categorical exclusion, avoided public scrutiny, and abruptly announced the commencement of construction a week before it was to start.

If there is to be a balancing of potential harms, that balance should favor the public and the environment, because the Defendants brought the possibility of delay on themselves through trying to avoid a more thorough but public environmental review process.

3. *Probability Of Plaintiffs' Success On The Merits*

A party seeking a preliminary injunction does not have to prove its claims at this stage of the proceedings; only that it is likely to succeed on the merits. *Amoco Production Co. et al v. Village of Gambell, Alaska, supra.* Plaintiffs will show that they

have meritorious claims and that it is likely they will succeed on the merits at final hearing.

Federal court cases interpreting NEPA and the CEQ Regulations require that the agencies take a "hard look" at various environmental aspects of a proposed action. See, *Friends of Boundary Waters Wilderness v. Dombeck*,164 F.3d 1115 (8th Cir. 1999), which held:

> NEPA requires "that the agency take a 'hard look' at the environmental consequences" of a project before taking a major action. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983). The statute requires a "detailed statement," 42 U.S.C. § 4332(2)(C), "from which a court can determine whether the agency has made a good faith effort to consider the values NEPA seeks to protect." *Minnesota Pub. Interest Research Group v. Butz*, 541 F.2d 1292, 1299 (8th Cir.1976), *cert. denied*, 430 U.S. 922, 97 S.Ct. 1340, 51 L.Ed.2d 601 (1977). "[T]he statement must not merely catalog environmental facts, but also explain fully its course of inquiry, analysis and reasoning." *Id.*

See also, *National Audubon Society v. Dept. of Navy*, 422 F. 3d 174 (4th Cir. 2005) ("An agency's 'hard look' should include neither researching in a cursory manner nor sweeping negative evidence under the rug.") A critical issue before the Court is, therefore, judged by the standards provided by NEPA and its implementing regulations, whether the Defendants in this case took a "hard look" at the potential environmental impact of the I-630 Project.

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)

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

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.

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.

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.

The foregoing Section 771.115 (b)(CEs) refers to §771.117 for "a specific list of CEs normally not requiring NEPA documentation. Subpart (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)*

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.

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, many of which are applicable only to circumstances not applicable in this case. The "Tier 3 Categorical

Exclusion" document (**Exhibit 3**) 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.

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

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)

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**.

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**).

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.

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.

A. As An Initial Matter, Defendants Did Not Adequately Assess Whether Significant Environmental Impacts Would Result From the I-630 Project

23 CFR Section 771.117(a) defines a categorical exclusion as "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 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)

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.

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).

As part of the Defendants' "Tier 3 Categorical Exclusion" determination dated October 4, 2016 **(Exhibit 2)**, 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.

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.

Under the criteria contained in 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.

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

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.

ArDOT issued an Information Release on July 13, 2018 **(Exhibit 3)**, 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:

(viii) 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;

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

(x) 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.

(xi) 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.)

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

(xiii) **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 Detour Plan for Hughes Street Bridge Construction, **Exhibit 1, p. 2**)

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

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.

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.

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

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 is located at the east terminus. Both of these facilities are major medical providers in Arkansas, including the providing of emergency medical services. Those services are frequently needed on a 24-hour basis.

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.

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.

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).

E. 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

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.

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).

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.

F. 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

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.

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.

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 9 or 10 lanes. Three bridges over which most of the traffic utilizing I-630 will be replaced, causing slowdowns and detours. Other storage and turning lanes will be added at various ramps.

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.

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

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.

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

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.

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.

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.

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.

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.

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.

H. The MOA Between FHWA and ArDOT Regarding Categorical Exemptions Expired Two Years Before the Tier 3 Categorical Exemption Was Issued, And the Exemption is Void

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. Based on information made available to Plaintiffs, that Memorandum of Agreement between those agencies has not been renewed. Consequently, the Categorical Exemption determination in this case 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.

Based upon what constitutes the record in this case – composed of the documents prepared and issued by ArDOT and FHWA, there is no evidence that those agencies took a "hard look" at the environmental consequences of the proposed I-630 Project – except in one notable exception: the Noise Report issued by ArDOT on June 16, 2016. However, that Report found that there was a significant likelihood of increase in noise pollution in areas as much as 500 feet from the outer lanes of the highway, and that in some areas, sound buffers would be recommended. That, in itself, should have been a signal to the Defendants that the substantial widening of the Interstate, and the predicted significant increase in traffic on that Interstate would result in potentially significant environmental harm, warranting the preparation of a more expansive environmental assessment or environmental impact statement.

4. The Public Interest Will Be Best Served By Issuance of a Temporary Restraining Order and a Preliminary Injunction

The fourth element that plaintiffs must establish is that the public interest will be best served by issuance of a TRO or preliminary injunction. Numerous courts have consistently held from the earliest decisions regarding compliance by Federal agencies with NEPA that, when an agency violates the requirements of NEPA, it is in the public interest to issue an injunction until those violations are remedied.

One of the earliest cases to address this issue was *Sierra Club et al v. Marsh*, 714 F. Supp. 539 (D. Maine, 1989), in which the Court made the following definitive statement on the importance to the public interest of compliance with NEPA:

> ***[T]he finding that irreparable harm is likely to result from bureaucratic bias plainly affects the public interest analysis***. NEPA is intended to strike a balance between man's social, economic and technical needs and the nation's environmental resources. *See* 42 U.S.C. § 4331(a) (congressional declaration of national environmental policy). NEPA implements a *legislative determination* that the public interest is served by ensuring that agency decisionmakers have before them "an analysis (with prior public comment) of the likely effects of their decision upon the environment," *Sierra Club III*, at 500. Absent a showing that environmental harm is likely if an injunction *does* issue, *see American Motorcyclist Association v. Watt*, 714 F.2d 962, 966-67 (9th Cir.1983); *Alpine Lakes Protection Society v. Schlapfer*, 518 F.2d 1089, 1090 (9th Cir.1975), or that an injunction would cause other public hazards, *see Piedmont Heights Civil Club, Inc. v. Moreland*, 637 F.2d 430, 443 (5th Cir.1981) (serious traffic and safety hazards from overcrowded highway), or that significant irreparable harm would be caused to innocent third parties, *see Penfold*, 664 F.Supp. at 1306, ***the public interest is not adversely affected by enjoining actions likely to cause irreparable environmental harm,*** *see Conservation Law Foundation v. Watt, 560 F.Supp. 561, 583 (D.Mass.)* ("It is plain that the public interest calls upon the courts to require strict compliance with environmental statutes"), *aff'd sub nom. Commonwealth of Massachusetts v. Watt*, 716 F.2d 946, 953 (1st Cir.1983) ("The district court's weighing of the public interest and its conclusions thereon were ... well within its sound discretion."); *Manatee County v. Gorsuch*, 554 F.Supp. 778, 795-96 (M.D.Fla.1982) ("The public has an interest in seeing that Government officials carry out their [environmental] responsibilities"). *See Sierra Club III*, at 503-504

> ("Congress, in enacting NEPA explicitly took note of one way in which governments can harm the environment (through inadequately informed decisionmaking); ... courts should take account of this harm and its potentially 'irreparable' nature"). (Italics, bolding and underlining supplied)

In the 1988 case of *Fund for Animals et al v. Clark*, 27 F. Supp. 2d 8 (D. D.C. 1998), the courts continued to stress the importance to the public interest of full compliance with the requirements of NEPA. The District Court in the District of Columbia there held:

> The record in this case reveals at least two reasons showing that the public interest would be served by the court enjoining the federal defendants from going forward with the bison hunt. First, ***the public interest expressed by Congress' was frustrated by the federal defendants not complying with NEPA. Therefore, the public interest would be served by having the federal defendants address the public's expressed environmental concerns, as encompassed by NEPA, by complying with NEPA's requirements.*** *See Fund For Animals,* 814 F.Supp. at 152. Second***, the public has a general interest in "the meticulous compliance with the law by public officials***." *See id.* Therefore, after considering the totality of the circumstances and conducting a balancing of the equities the court concludes that it is in the public interest for the court to issue the injunctive relief sought by plaintiffs. (Bolding and italics added)

A decade later, the District Court Illinois, in *Heartwood, Inc. et al v. United States Forest Service*, 73 F. Supp. 2d, 962 (S.D. Ill. 1999), revisited this issue. It first addressed an argument by the agency and the private party in that case that they would be put to great expense by the granting of an injunction requiring that NEPA procedures be complied with by the agency – an argument that this Court will undoubtedly hear from the Defendants. In rejecting that argument, the *Heartwood* court stated:

> The harm to the defendants in this case involves agency time, effort and resources to fashion a lawful timber harvest CE. The Court believes that that ***time, effort and resources is merely the price to pay for correctly implementing the FS' NEPA obligations***. Additionally, the Court recognizes that there will be costs, both in time and finances, to reformulate or postpone timber harvest contracts that have been entered

> into since September, 1998, when the plaintiffs first filed suit. It was partly this consideration-that the private parties involved as well as the FS would not have to re-draft or re-frame contracts that are already several years old-that persuaded the Court to limit this injunctive relief to the most recent time period. ***All parties have been on notice, however, since September 16, 1998, that any timber harvest contracts issued under this particular CE potentially could be declared void. The Court considers any resulting prejudice to be a natural and unavoidable outcome and finds that it does not weigh against granting the injunction.*** (Italics and bolding supplied)

The Court in *Heartwood* then went on to make the following statement regarding the important public interest in assuring compliance with NEPA's requirements:

> NEPA established a national policy of protecting the environment as a way of promoting human health. 42 U.S.C. § 4321. In any balancing of harms, the public's interest must be considered as the underlying purpose for these regulations. ***The Court believes that the public interest is naturally harmed when agencies act arbitrarily to implement NEPA policy***. In this case, the harm to public interests merges with both the plaintiffs' and the defendants' positions somewhat but weigh more toward granting the injunction. ***NEPA protects the public interest, and in fact, was promulgated to do just that***. The Court finds that it is not even arguable that violations by federal agencies of NEPA's provisions as established by Congress harm the public as well as the environment. (Italics and bolding added)

See also, *San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Service*, 657 F. Supp. 2d 1233 (D. Col. 2009).

Consequently, the public interest in this case favors the issuance of a TRO or preliminary injunction to prohibit further activities pursuant to the Categorical Exemption determined by the Defendants to allow construction of the I-630 Project.

CONCLUSION

The question of whether the Defendants failed to comply with the requirements of NEPA and its implementing regulations by issuance of a categorical exclusion for the I-630 Project is not whether it acted arbitrarily and capriciously, but whether it acted reasonably. Actions which could have a significant effect on the environment should be covered by an impact statement, and if there is doubt about whether there could be a significant impact, an environmental assessment should be prepared. Neither of those were done in this case.

As noted in the body of this Brief, when an agency decides to proceed with an action in the absence of an EA or EIS, the agency must adequately explain its decision. The agencies in this case have totally failed to offer a reasonable explanation for use of the Categorical Exclusion. All Plaintiffs must do in this case is to allege facts which, if true, would constitute a 'substantial' impact upon the environment," following which the burden of proof shifts to the Defendants. *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (1980).

Plaintiffs have shown that the "Environmental Assessment Form" contained in the "Tier 3 Categorical Exclusion" dated October 4, 2016 did not constitute a "hard look" at the environmental consequences of the I-630 Project, and that, in fact, the Project is totally inappropriate for use of a categorical exclusion. Categorical exclusions are intended to apply to relatively small projects that occur frequently but that have little or no environmental impacts. This is an $87 million project that will result in a one-third increase in the size of I-630, and a replacement of all of its bridges. The traffic disruptions will be enormous, and the increase in noise and air pollution will be

significant. These matters deserve a closer and more comprehensive assessment of their impact on our environment.

Respectfully submitted,

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