

Via Electronic Mail and FedEx

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RE: Notice of Intent to Sue the Texas Department of Transportation and the Federal Highway Administration Regarding Violation of Section 7 of the Endangered Species Act for the MoPac (State Loop 1) Intersections, Austin District Project

On behalf of the Center for Biological Diversity (the "Center") and Save Our Springs Alliance ("SOS") we hereby provide notice, pursuant to Section 11(g) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), that the Texas Department of Transportation ("TxDOT") and Federal Highway Administration ("FHWA") are in violation of Section 7 of the ESA, 16 U.S.C. § 1536, and the ESA's consultation regulations, 50 C.F.R. Part 402.

Alaska . Arizona . California . Florida . Minnesota . Nevada . New Mexico . New York . Oregon . Vermont . Washington, DC

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Specifically, the Center and SOS intend to file a lawsuit challenging TxDOT's and FHWA's: (1) failure to timely initiate and complete consultation with the U.S. Fish and Wildlife Service ("FWS") regarding the impacts of the MoPac (State Loop 1) Intersections Project (hereinafter "Intersections Project") on the Barton Springs salamander (*Eurycea sosorum*), the Austin Blind Salamander (*Eurycea waterlooensis*) and the Golden-cheeked Warbler (*Setophaga chrysoparia*); and (2) failure to insure that this project is not likely to jeopardize the continued existence of the aforementioned ESA-listed species.¹ The TxDOT and FHWA's Biological Evaluation was inadequate and failed to support the agencies' "no effect" determination and decision not to consult with the U.S. Fish and Wildlife Service.²

The Center for Biological Diversity is a national, nonprofit conservation organization with more than 1 million members and online activists dedicated to the protection of endangered species and wild places. The Center and its members are concerned with the conservation of imperiled species and the effective implementation of the ESA.

Save Our Springs Alliance is an environmental nonprofit using education, advocacy, and litigation to protect the Edwards Aquifer, its springs and contributing streams, and the natural and cultural heritage of the Hill Country, with special emphasis on Barton Springs. Since 1992, SOS Alliance has combined science and economics with legal expertise to advocate for preserving Barton Springs and managing Austin's urban development.

STATUTORY BACKGROUND

When a species has been listed or critical habitat designated under the ESA, all federal agencies – including TxDOT as a delegate of the Federal Highway Administration ("FHWA")³ – must ensure through consultation with the FWS that their programs and activities are in compliance with the ESA. 16 U.S.C. § 1536(a)(2). Through consultation under Section 7 of the ESA, federal agencies work with FWS to determine whether their actions will jeopardize listed species' survival or adversely modify designated critical habitat, and if so, to identify ways to modify the action to avoid that result. 50 C.F.R. § 402.14. An agency is required to review its actions "at the earliest possible time" to determine whether the action may affect listed species or critical habitat. 50 C.F.R. § 402.14(a).

Section 7 applies to all actions in which there is discretionary Federal involvement or control. 50 C.F.R. § 402.03. The scope of agency actions subject to consultation are broadly

¹ The Center and SOS are specifically challenging the MoPac Intersections Project at this time because there has been final agency action and construction is expected to proceed. Neither party concedes that the Intersections Project is a separate, stand-alone project from SH 45 SW and MoPac South Express Lanes.

² TxDOT and FHWA's "no effect" determination and decision not to initiate consultation with the U.S. Fish and Wildlife Service were also arbitrary and capricious under the Administrative Procedure Act. 5 U.S.C. § 706(2)(a).

³ TxDOT carries out environmental review, consultation, and other actions required by federal environmental laws for federally funded or approved projects under 23 U.S.C. § 327 and a Memorandum of Understanding dated December 16, 2014, and executed by FHWA and TxDOT.

defined to encompass “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02 (definition of “action”).

For each federal action, the agency must ask the FWS whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, the agency must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *Id.* The biological assessment must generally be completed within 180 days. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(i).

If an agency determines that its action “may affect” but is “not likely to adversely affect” a listed species or its critical habitat, the regulations permit “informal consultation,” during which FWS must concur in writing with the agency’s determination. 50 C.F.R. § 402.14(a)-(b). If the agency determines that its action is “likely to adversely affect” a listed species or critical habitat, or if FWS does not concur with the agency’s “not likely to adversely affect” determination, the agency must engage in “formal consultation,” as outlined in 50 C.F.R. § 402.14 (“General Formal Consultation”). 50 C.F.R. §§ 402.02, 402.14(a). An agency is relieved of the obligation to consult on its actions only where the action will have “no effect” on listed species or designated critical habitat. Effects determinations are based on the direct, indirect, and cumulative effects of the action when added to the environmental baseline and other interrelated and interdependent actions. 50 C.F.R. § 402.02 (definition of “effects of the action”). Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration. *Id.*

To complete formal consultation, the FWS must provide the agency with a “biological opinion” explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. Consultation must generally be completed within 90 days from the date on which consultation is initiated. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(e).

If the FWS concludes that the proposed action “will jeopardize the continued existence” of a listed species, the biological opinion must outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A). If the biological opinion concludes that the action is not likely to jeopardize the continued existence of a listed species, and will not result in the destruction or adverse modification of critical habitat, the FWS must provide an “incidental take statement,” specifying the amount or extent of such incidental taking on the listed species, any “reasonable and prudent measures” that the FWS considers necessary or appropriate to minimize such impact, and setting forth the “terms and conditions” that must be complied with by TxDOT and FHWA to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). Taking of listed species without the coverage of an incidental take statement is a violation of Section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B).

Until completion of consultation, the TxDOT and FHWA are prohibited from making any irreversible or irretrievable commitment of resources with respect to the Intersections Project which may foreclose the formulation or implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d). The purpose of Section 7(d) is to maintain the status

quo pending the completion of consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of its critical habitat.

FACTUAL BACKGROUND

A. Texas Department of Transportation

TxDOT carries out environmental review, consultation, and other actions required by federal environmental laws for federally funded or approved projects under 23 U.S.C. § 327 and a Memorandum of Understanding dated December 16, 2014, and executed by FHWA and TxDOT. This Memorandum of Understanding states that TxDOT is acting in the capacity of a federal agency, in place of FHWA for the transportation-related activities that are the subject of this lawsuit.

B. MoPac (State Loop 1) Intersections Project

The Intersections Project would provide “operational improvements” to the Slaughter Lane at MoPac and La Crosse Avenue at MoPac intersections in Travis County, Texas. Final Environmental Assessment (“EA”) at 1. It would extend approximately 2 miles in length, from 2500 feet north of Slaughter Lane to 3700 feet south of La Crosse, adding six new travel lanes, two each way as express lanes and 1 each way as an additional “auxiliary” lane. *Id.* at 1-2. For a substantial part of the distance, construction of the new lanes will require digging down twenty-three feet below grade and directly into the cave forming Edwards Aquifer limestone that is exposed at the surface. Final EA at 6.

In December, 2015 TxDOT finalized the EA, along with a Finding of No Significant Impact that purported to be in accordance with federal National Environmental Policy Act (“NEPA”) standards. In February 2016, FHWA and TxDOT published a notice of final federal actions for the Intersections Project. 81 Fed. Reg. 8587 (Feb. 19, 2016).

TxDOT and FHWA completed a Biological Evaluation form as part of the NEPA process, in which they determined that the Intersections Project would have “no effect” on protected species and their habitat and that consultation with the FWS would not be required. The Intersections Project is part of a large effort to construct and expand highways in southwest Travis County. The Intersections Project is one piece in the middle of a four segment, 17-mile freeway/toll loop project that includes two other planned projects: State Highway 45 Southwest (“SH 45 SW”) and MoPac South. The proposed SH 45 SW would be a new 3.5 mile toll road seeking to connect FM 1626 to MoPac South just .8 miles south of the Intersection’s Project terminus. The proposed MoPac South Express Lanes Project would add four toll lanes stretching

eight miles from the northern terminus of the Intersections project to Cesar Chavez. Both of these other pieces are currently undergoing environmental review.⁴

C. *Golden-cheeked Warbler*

The golden-cheeked warbler (*Setophaga chrysoparia*) is a small insectivorous songbird that breeds only in central Texas where mature Ashe juniper-oak woodlands occur. Due to accelerating loss of breeding habitat, the warbler was emergency listed as federally endangered in 1990. The principle threats to the warbler and the reasons for its listing are habitat destruction, modification, and fragmentation from urbanization and some range-management practices. Because of the warbler's narrow habitat requirements, and its habit of returning to the same area every year, habitat destruction leads to elimination of populations. *Final Rule to List the Golden-Cheeked Warbler as an Endangered Species*, 55 Fed. Reg. 53,153, 53,159 (Dec. 27, 1990). Importantly, the final rule listing the warbler expressly states, in discussing section 7(a)(2) consultation, that “[p]rojects authorized, funded, or carried out by the Federal Highway Administration that may affect the golden-cheeked warbler, such as clearing of golden-cheeked warbler habitat. . . would be subject to Section 7 consultation.” 55 Fed. Reg. 53,153, 53,159 (Dec. 27, 1990).

Golden-cheeked warbler habitat lies within the project boundaries and surrounding zones, with approximately 7.4 acres of golden-cheeked warbler habitat occurring within the Intersections Project's footprint. Biological Evaluation Form at 4. It is likely that some or all of this habitat will be cleared for this Intersections project; however, the Biological Evaluation does not assess the impacts that the project will have on these 7.4 acres. *Id.* Only a single year of presence/absence surveys was conducted for this Project to determine that there would be no effect on the warbler. *Id.* The golden-cheeked warbler is a highly mobile, migratory species whose long-term use of an area cannot be properly analyzed with a single year of surveys. U.S. Fish and Wildlife Service Comment Letter on CSJs 1200-06-004 & 1200-07-001 (August 12, 2014).

D. *Barton Springs Salamander and Austin Blind Salamander*

The Barton Springs Salamander (*Eurycea sosorum*) and Austin Blind Salamander (*Eurycea waterlooensis*) are federally listed endangered species that inhabit Barton Springs and the Edwards Aquifer. Both are neotenic (do not transform into a terrestrial form) and spend their entire lives in aquatic habitats such as springs, wet caves, and groundwater. Both salamanders rely on clean, well oxygenated spring water with substrates that are free of sediment.

Eurycea species have been found in springs and caves near the proposed Intersections Project, although it is still an open question as to what species they are (*E. sosorum* or *E. waterlooensis*). The Austin Blind Salamander is thought to be more subterranean than the primarily surface-dwelling Barton Springs Salamander.

⁴ A “state” Environmental Impact Statement on SH 45 SW Phase I was completed in early 2015, and a subsequent reevaluation of the state EIS remains pending at this time. An Environmental Assessment for the MoPac South Express Lanes project is ongoing.

The major threat to both salamander species is reduced habitat quality due to urbanization and increased impervious cover. The EA acknowledges that the Intersections Project will increase the amount of impervious cover and will increase the amount of total suspended solid pollutant loads. Final EA at 16. However, the planned, or to be planned, best management practices (“BMPs”) and water quality controls are only intended to remove 80 percent of the increase of total suspended solids (“TSS”). *Id.* at 29. This purported 80 percent removal only applies to TSS and ignores a range of other water quality pollutants that are associated with highway construction and road runoff. *See* Final EA at 22. It only applies to post-construction conditions, ignoring the massive amount of sedimentation that is likely to plunge directly down into salamander habitat, with no meaningful controls. *Id.* TxDOT only broadly discusses measures that will be taken to *minimize* water quality impacts in the EA, and does not foreclose the possibility that water quality impacts will occur. Final EA at 29. The U.S. Fish and Wildlife Service has previously expressed concern about the potential for impacts to the Barton Springs and Austin blind salamanders from water quality degradation linked to TxDOT projects.⁵ Increased impervious cover will also reduce diffuse recharge of the Edwards aquifer, negatively affecting the Barton Springs and Austin blind salamanders.

There is also a high risk for harmful water quality impacts associated with intersection of voids during roadway excavation. Final EA at 29. TxDOT does not purport to be capable of preventing the possibility of void encounters, but plans to ensure that void discoveries are reported immediately and to implement protection measures once they are discovered, and then to create a mitigation plan for the impacts. *Id.* TxDOT acknowledges in the EA that habitat for a federally-listed species may be encountered within a discovered void and that if this happens there *may be an effect* on those species. *Id.*

Subsurface flows are another avenue for contaminants to reach endangered salamander habitat. Readily available science from research by the City of Austin, Dr. Nico Hauwert and others shows that dye placed very near the Intersections project alignment (both at adjacent Wildflower Cave and at the proposed Mopac/SH 45 SW interchange location) flowed a short distance to Blowing Sink Cave and on to Barton Springs. Endangered salamanders are known to live in the aquifer at Blowing Sink Cave.

The effects analysis in the Biological Evaluation also relied on an as yet unwritten Water Pollution Abatement Plan to ensure that there will be no water quality impacts to endangered salamanders. Biological Evaluation Form at 3. The Intersections Project will negatively impact the quantity and quality of water recharging the Edwards Aquifer by increasing impervious cover, increasing the probability of occurrence of hazardous material spills, and causing increased sedimentation that will directly impact surface drainage areas and subsurface drainage

⁵ “The Service has repeatedly expressed our concern about the potential for water quality degradation to occur in the Barton Springs Segment of the Edwards Aquifer associated with TxDOT projects located within the aquifer's Recharge Zone and the effects that degradation could have on the Bartons Springs and Austin blind salamanders.” U.S. Fish and Wildlife Service Comment Letter RE: CSJs 1200-06-004 & 1200-07-001 (August 12, 2014, commenting on TxDOT's dEIS for the proposed construction on SH 45 SW).

areas of karst features. This has a direct negative impact on endangered salamanders at Barton Springs.

VIOLATIONS OF THE ESA

TxDOT and FHWA began to comply with their ESA section 7 requirements, as discussed above, by requesting a list of protected species from FWS and completing a Biological Evaluation (“BE”) and effects determination under the ESA. However, the agencies reached the unreasonable conclusion that the Intersections Project would have “no effect” on listed species, and therefore the agencies have not complied with the requirements of the ESA. The BE and effects determination were too narrow in scope, and TxDOT failed to use the best scientific and commercial data available, as required by Section 7(a)(2), in making its decision not to initiate consultation with FWS.

Effects determinations are based on the direct, indirect, and cumulative effects of the action when added to the environmental baseline and other interrelated and interdependent actions. 50 C.F.R. § 402.02 (definition of “effects of the action”). Despite this requirement, the agencies failed to conduct a thorough analysis in the Biological Evaluation, which resulted in the unreasonable determination that there would be “no effect” to species protected under the ESA. For example, the analysis was focused primarily on the immediate project site area, despite the Intersections Project’s location on top of the environmentally sensitive Barton Springs Edwards Aquifer recharge zone, which makes it likely to have impacts well beyond its obvious physical bounds.

The BE and effects determination made no mention of the TxDOT and FHWA’s adjacent Proposed Toll Road Projects State Highway 45 Southwest and MoPac South in the BE, nor anywhere in the Biological Studies Technical Memorandum, even though those projects are likely interrelated and interdependent actions to the Intersections Project. These three projects were devised and are undergoing evaluation at the same time, will overlap in construction time, are directed at altering operations of the same highway, and overlap in the same geographic locale, affecting the same unique, vulnerable environmental area. Regardless of whether the transportation agencies agree that these projects are interrelated, they must consider these known projects and other ongoing and planned projects, in the Barton Springs Edwards Aquifer recharge zones, such as Oak Hill Parkway and Bee Cave Road, when looking at the cumulative effects of the Intersections Project in their effects determination.

The BE does not support a “no effect” determination because even its minimal analysis recognizes that endangered wildlife will be impacted. When effects to the ESA-listed species are expected to be discountable, or insignificant, the appropriate conclusion, according to the FWS and National Marine Fisheries Service, is a determination of “may affect, but is not likely to adversely affect species.” Endangered Species Consultation Handbook at B-55. According the Consultation Handbook, “[i]nsignificant effects relate to the size of the impact (and should never reach the scale where take occurs), while discountable effects are those that are extremely

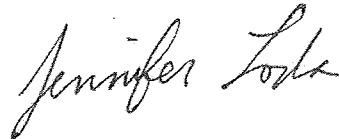
unlikely to occur.” *Id.* The BE refers to both “insignificant effects”⁶ and effects that are “extremely unlikely to occur,”⁷ and relies on “minimization measures”⁸ that still allow for new impacts, yet TxDOT and FHWA determined there would be “no effect” on ESA-listed species. As explained above, in the EA the TxDOT also recognized the possibility of effects on federally-listed endangered species during the construction of the Intersections Project.⁹ Final EA at 29.

A “no effect” conclusion is only reached “if the proposed action and its interrelated and interdependent actions will not directly or indirectly affect listed species or destroy/adversely modify designated critical habitat.” *Id.* Because TxDOT and FHWA failed to consider all direct, indirect and cumulative effects to listed wildlife and did not rely on the best available science, they created an inadequate BE that cannot be relied upon to avoid consultation under the ESA.

CONCLUSION

If the TxDOT and FHWA do not act within 60 days to correct their ongoing violations of the ESA, the Center for Biological Diversity and Save Our Springs Alliance will pursue litigation in federal court against them. We will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact Jennifer Loda (jloda@biologicaldiversity.org, 510-844-7100 x336).

Sincerely,



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⁶ “[T]he proposed project would result in *minimal and discountable impacts* to water quantity and possible, but *negligible impacts* to water quality.” Biological Evaluation Form at 2 (emphasis added).

⁷ “Potential impacts to federally-threatened *Eurycea* sp. salamanders in Blowing Sink Cave or Barton Springs are *highly unlikely* due to existing and proposed water quality BMPs...” Biological Evaluation Form at 2 (emphasis added).

⁸ “[W]ater quality controls and BMPs will *remove 80 percent of the increase* in total suspended solids from stormwater runoff.” Final EA at 29 (emphasis added).

⁹ In discussing the possibility of the intersection of voids during roadway excavation, TxDOT explains that if a void is encountered during construction “a Section 10(A)(1)(a) permitted scientist will inspect the site as soon as possible to evaluate potential for species habitat. If habitat for federally-listed endangered species is encountered, there may be an effect on those species. Construction will cease and coordination with USFWS will occur.” Final EA at 29.

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