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

THE LITTLE ROCK DOWNTOWN NEIGHBORHOOD ASSOCIATION, INC., THE PETTAWAY NEIGHBORHOOD ASSOCIATION, THE HANGER HILL NEIGHBORHOOD ASSOCIATION, THE FOREST HILLS NEIGHBORHOOD ASSOCIATION, INC., THE COALITION OF LITTLE ROCK NEIGHBORHOODS, INC., THE DARK HOLLOW COMMUNITY DEVELOPMENT CORPORATION, ARKANSAS COMMUNITIES ORGANIZATION, INC., JOSHUA SILVERSTEIN, DALE PEKAR, JOHN HEDRICK, DENISE ENNETT, ROHN MUSE, BARBARA BARROWS and KATHY WELLS **PLAINTIFFS**

Vs. **Case No. 4:19-cv-362-JM**

FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION; ANGEL L. CORREA, DIVISION ADMINISTRATOR, ARKANSAS DIVISION, FEDERAL HIGHWAY ADMINISTRATION; and ARKANSAS DEPARTMENT OF TRANSPORTATION and LORIE TUDOR, DIRECTOR, ARKANSAS DEPARTMENT OF TRANSPORTATION **DEFENDANTS**

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER, AND FOR PERMANENT INJUNCTION

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I. TABLE OF ACRONYMS AND TERMS

ArDOT	**Arkansas Department of Transportation**
APA	**Administrative Procedure Act**
AR	**Administrative Record**
ArDOT	**Arkansas Department of Transportation**
CARTS	**Central Arkansas Regional Transportation Study**
C/D	**Collector/Distributor (lanes in highway)**
CEQ	**White House Council on Environmental Quality**
COE	**U.S. Army Corps of Engineers**
CWA	**Clean Water Act**
EA	**Environmental Assessment**
EO	**Executive Order**
EIS	**Environmental Impact Statement**
EPA	**U.S. Environmental Protection Agency**
FHWA	**Federal Highway Administration**
FONSI	**Finding of No Significant Impact**
IMPLAN	**Impact Analysis for Planning**
NEPA	**The National Environmental Policy Act**
PEL	**Planning and Environmental Linkages**
TIP	**Transportation Implementation Plan**

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II. INTRODUCTION

This is one of the most significant cases brought under NEPA in the State of Arkansas. It involves the largest, most costly and complicated public works project undertaken in the State of Arkansas; one that encompasses many legal and technical issues, some of which are without precedent.

If constructed, the 30 Crossing Project ("the Project") will thereafter profoundly affect not only transportation, but many other aspects of the human environment, life and society in central Arkansas on a daily basis. More immediately, the now-thriving social, tourism and business areas along both banks of the Arkansas River – all elements of the human environment – will be stifled by the Project. Considering these ramifications, the Project needs and the public deserves the ultimate in critical review of the planning and analysis that have gone into the potential environmental aspects of the Project.

Plaintiffs contend that the Defendants' Environmental Assessment (EA) and the subsequent Reevaluation of the EA have not adequately considered those and other impacts; that the Defendants have single-mindedly and doggedly promoted a preconceived plan for development of a gargantuan swarth of concrete through Little Rock and North Little Rock that will halt development of the thriving downtown areas in both cities and further racially divide the communities. These and other issues to be discussed herein are sufficiently important to merit a more in-depth, impartial and objective analysis in the form of an environmental impact statement.

Procedural History

This action seeks review by the Court of the final action of the Federal Highway Administration (FHWA) in issuing a Finding of No Significant Impact (FONSI) dated February 26, 2019, based upon an Environmental Assessment (EA) prepared by the Arkansas Department of Transportation (ArDOT) in conjunction with the FHWA and issued on June 8, 2018. The United States Army Corps of Engineers (ACOE) and the United States Coast Guard (USCG) were "cooperating agencies" (EA, p. 24), and provided information and assistance in their areas of jurisdiction.

The EA consisted of over 7,000 pages of documents, including 18 Appendices. The public was invited to submit comments on the draft EA, and Plaintiffs, or their representatives, submitted timely comments. After receiving comments, the Defendants did not issue another draft of the EA, but instead issued the FONSI, constituting final agency action taken by the FHWA in the environmental analysis. As "final agency action," an appeal from the FONSI to the U.S. District Court is authorized by Section 704 of the Administrative Procedure Act, 5 U.S.C. §704.

This suit was filed on May 20, 2019, and on July 3, 2019 Plaintiffs filed a Motion for a Preliminary Restraining Order and Permanent Injunction (ECF 7) with an accompanying Brief (ECF 8), which were subsequently withdrawn without prejudice based upon the Joint Motion of the parties due to Defendants' assurance that construction was not scheduled to commence immediately. Defendants filed their respective Answers to the Complaint, and on October 10, 2019, the parties filed a Joint Proposal for Briefing Schedule (ECF 13) that would have required, among other things, Defendants to file the Administrative Record by December 31, 2019.

However, on December 23, 2019, the parties filed a Joint Motion for Stay of Proceedings and Motion to Withdraw the Joint Proposal for Briefing Schedule (ECF No. 25)[1] to allow Defendants the opportunity "to complete a Re-evaluation of the I-30 Project to determine whether the approved Finding of No Significant Impact (FONSI) for the project remains valid in light of the agreed-upon project scope." (ECF No. 25, p. 1) The Defendants estimated that they would complete the re-evaluation by late February/early March, 2020. As a condition of the withdrawal of the Plaintiffs' Motion for TRO/Preliminary Injunction, the Defendants agreed to provide Plaintiffs with a written notice forty-five (45) days in advance of Defendants' intention to commence construction on the Project.

The Reevaluation was filed by the Federal Defendants on June 1, 2020 (ECF 38, 38-1—38-8), finding that no additional environmental assessment was required due to the changes in scope/design of the Project. It also stated that the scope of the Project would be generally as follows: The Project will include only that part of the I-30 corridor between the I-30/I-630 interchange, and the I-30/I-40 interchange, as more fully described herein ("the Revised Project), unless an amendment to the Arkansas Constitution (proposed as Issue No. 1 on the November, 2020 ballot) is adopted, in which case the Project as originally proposed will be constructed (subject to certain modifications contained in the Reevaluation). Reevaluation, ECF 38-1, p.8.

The parties have filed two Joint Status Reports and Proposals for Briefing Schedule (ECF 35 and ECF 39). Pursuant to the Proposed Schedule contained in ECF 39, the Federal Defendants lodged the Administrative Record on or about June 3, 2020. The

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[1] At the time of the preparation of this Brief, the Administrative Records upon which the EA and the Reevaluation were based had not been lodged by the Defendants with the Clerk. References to relevant documents herein will, where possible, refer to the ECF document and page numbers.

Administrative Record for this case includes that compiled for the EA/FONSI, and also a separate Record for the Reevaluation. Together, both Records will consist of approximately 15,000 pages.

On June 5, 2020, Defendants notified Plaintiff's counsel via email that utility relocation work for the Project is planned to begin on July 21, and telecommunications relocation work will begin on July 28. In addition, other pre-construction work will be commenced at the same time on the grounds of the Clinton Center and other areas near the I-30 bridge. Because commencement of construction would constitute an irretrievable commitment of resources to the Defendants' preferred alternative, possibly frustrating judicial review, Plaintiffs are now refiling their Motion for Temporary Restraining Order/Permanent Injunction and this Brief.

Pursuant to the Administrative Procedure Act, 5 U.S.C. § 706, the Court's review on the merits is to be based upon the Administrative Record compiled by the ArDOT and the FHWA during their processing of the EA and FONSI. However, on a Motion for Preliminary Injunction, evidence outside the record may be allowed to establish elements of Plaintiffs' Motion as in any other Motion for Injunction.

An EA is not intended by NEPA to be an exhaustive document or a substitute for an EIS. An EA is defined in 40 CFR §1508.9 as:

> (a) … a *concise* public document for which a Federal agency is responsible that serves to:
>
> (1) *Briefly* provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.
>
> (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.
>
> (3) Facilitate preparation of a statement when one is necessary.

The extraordinary lengths of the EA[2], the Reevaluation, their appendices and administrative records, and the many issues contained in them, are strong signs that the Project is highly controversial and complex, and that there is likely harm to the environment that should be subjected to the scrutiny of an environmental impact statement. A lengthy EA indicates that an EIS is needed. (See CEQ's *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations* (hereafter, "*40 Questions")*,[3] Question/Answer 36(b); *Sierra Club v. Marsh,* 769 F.2d 868 (1st Cir. 1985); *Curry v. U.S. Forest Service*, 988 F. Supp. 541 (W.D. Penn. 1997)).

Aside from the length of those documents signifying the need for an EIS, there are many omissions and faults in the EA that constitute violations of NEPA and other statutes, regulations and Executive Orders applicable to this case that require the voiding of the EA and FONSI, and remanding this matter to the FHWA and ArDOT for preparation of an environmental impact statement in accordance with the requirements of NEPA.

III. FACTUAL BACKGROUND

Plaintiffs recognize that the "facts" upon which the Court is to base its review are contained in the administrative records submitted by the Defendants. (APA, 5 U.S.C. § 706). However, to aid the Court in gaining a perspective of the major events and milestones

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[2] The Court should not be influenced by the length of the EA. Much of the EA consists of general background repetitive information and other general, non-substantive materials. As stated in 40 CFR §1500.1(c), "NEPA's purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action."

[3] Although guidance, "40 Questions" is entitled to some deference based on agency experience and expertise. *U.S. v. Mead Corp.*, 533 U.S. 218, 234, 121 S. Ct. 2164, 150 L. Ed.2d 292 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944)

constituting the background of the Project, and their sequence, the Plaintiffs offer herein their version of those events.

Adoption of Amendment 91

In 2012, through Amendment 91 to the Constitution of Arkansas, the citizens of Arkansas approved a 10-year, half-cent sales tax for construction of a state Four-Lane Highway system. It was anticipated that an estimated $1.8 billion would be raised by the tax and 70% of that would be spent on design and construction of four-lane highway projects, with the other 30% to be allocated to counties and cities for use on their roads and streets. The Defendant, ArDOT, developed a list of highway projects on which the money would be expended, and named it the "Connecting Arkansas Program." (Source: Connecting Arkansas Program - https://connectingarkansasprogram.com/overview#.XOmItIhKhPY) Collectively it is the largest highway construction program ever undertaken by the Department. (Ibid.)

The "30 Corridor Project"

The 30 Corridor Project, which is a part of the "Connecting Arkansas Program," proposes to completely redesign, reconstruct and widen approximately 7.3 miles of I-30 and I-40 that transect Little Rock and North Little Rock. As generally described in the EA, it originally was designed to encompass the following area:

> A portion of Interstate 30 (I-30) from Interstate 530 (I-530) and Interstate 440 (I-440) to Interstate 40 (I-40), including the Arkansas River Bridge, and a portion of I-40 from Highway 365 (MacArthur Drive) to Highway 67; and a portion of I-40 from its intersection with I-30 to its intersection with 67/167.
> (see Project Map, **Exhibit No. 1**, Exhibits Accompanying Plaintiffs' Motion for Preliminary Injunction)

The "PEL Process"

Beginning in about April 2014, ArDOT, in conjunction with the Federal Highway Administration, began conducting a process referred to as "Planning and Environmental

Linkages ("PEL") Process" that purportedly covered various aspects of the 30 Corridor Project. While authorized by FHWA guidelines (regulations), the PEL process and documents engendered during it are not authorized or recognized by NEPA or its implementing regulations at 40 C.F.R. 1500 – 1508. The NEPA's CEQ regulations, §1508.10, defines "Environmental document" as including the documents specified in §1508.9 (environmental assessment), §1508.11 (environmental impact statement), §1508.13 (finding of no significant impact), and §1508.22 (notice of intent). Thus, the PEL reports that were assembled from those meetings *were not part of the NEPA environmental review conducted by the Defendants relative to the 30 Crossing Project*, but are referred to in the Environmental Assessment and in the FONSI as justification for the decisions made in those documents. This is important for the following reasons.

ArDOT has, from the inception of the 30 Crossing Project, been dedicated to and fixated upon their proposed 10-lane version of the Project. During the PEL process, various alternatives to the proposed Project were proposed by the public and by Metroplan – a coalition of city and county governments in central Arkansas that are required by federal law to review and approve proposed federal-aid highway projects – but were discarded by ArDOT in the PEL Process and, consequently were not given consideration during the development and approval of the draft and final Environmental Assessment.

In fact, the PEL process resulted in recommending *only one* alternative to be considered in the NEPA review. That alternative was ArDOT's preferred "Ten-lane" proposal, later renamed the "6-lane with C/D ("Collector/ Distributor")." Only as a result of the insistence of Metroplan that its eight-lane alternative be also considered did the FHWA direct ArDOT to add that alternative to the NEPA process, an alternative that ArDOT gave only cursory consideration.

Consequently, the public's proposals for reasonable and feasible alternatives to ArDOT's preferred alternative were not given meaningful consideration during preparation of the EA.

The Draft and Final Environmental Assessment

ArDOT prepared and issued the draft Environmental Assessment (EA) for public comment on June 8, 2018, which, with Appendices, consisted of approximately 3,800 pages.[4] Most of the Plaintiffs herein or their representatives and many other members of the public submitted timely comments upon the draft EA.

As noted above, a number of comments proposed alternatives other than the two covered by the EA, but Defendants refused to give any meaningful consideration to them, claiming that they had already been considered and rejected in the PEL process, were too expensive, or would not relieve congestion on I-30. Ironically, the proposed 30 Crossing Project will be twice as expensive as originally thought, and Defendants acknowledge that it will not relieve congestion.

Defendants claim that the EA covers four alternatives. However, on reading the EA, it is obvious that there are only two alternatives – the ArDOT "6-lane with C/D proposal, and Metroplan's proposed 8-lane proposal – with each proposal having two sub-alternatives that relate primarily with the configuration of the I-30 Highway 10 interchange. This does not qualify as four separate alternatives.

After the close of public comments on the draft EA, no additional drafts of the Environmental Assessment were issued for public review and comment by the Defendants. Instead, the draft EA was approved by FHWA through the issuance of its Finding of No

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4 The draft EA issued for public comment consisted of approximately 3,800 pages, including appendices. However, the FONSI issued by FHWA refers to the EA it approved as consisting of 7,100 pages of which the EA is said to consist of 123 pages. The inconsistency is not explained in the FONSI.

Significant Impact (FONSI) with a two-page EA "Errata Sheet" on February 26, 2019. A copy of the Environmental Assessment upon which the FONSI was issued, consisting of 123 pages without appendices, is found at **Exhibit 2** in the Exhibits Accompanying Plaintiffs' Motion for Preliminary Injunction.

The FONSI

Likewise, the FONSI was not made available in draft for public review prior to its issuance in final form by the FHWA, contrary to 40 CFR §1504(e)(1). The FONSI adopted and approved ArDOT's preferred "build" alternative that was designated in the EA as Alternative 2B, originally known as the "10-lane Downtown C/D," but renamed "the 6-lane with Collector/Distributor Lanes with Split-Diamond Interchange Alternative." A copy of the FONSI dated February 26, 2019 (including the Errata Sheet) is found at **Exhibit No. 3** in Exhibits Accompanying Plaintiffs' Motion for Preliminary Injunction.

The Reevaluation

After the closure of the public comment period on the draft EA, but prior to issuance of the FONSI by FHWA, ArDOT retained a consortium of highway design/construction consultants to bid on the Project as described in the EA. That consortium estimated the cost to be approximately One Billion Dollars.

ArDOT announced after issuance of the FONSI that it did not have sufficient funds available or budgeted with which to construct the Project as described in the EA, and that it had requested its design/construction consultants to develop a plan for construction of as much of the Project as could be done with available funds.

The contractor consortium redesigned the Project to accommodate the amount of funds available ("the Revised Project) that essentially consisted of constructing the original Project

from the I-30/I-630 intersection north to the I-30/I-40 intersection, with entrance/exit ramp design changes in that area. As a result, Defendants requested in the parties' Joint Motion for Stay of Proceedings and Motion to Withdraw Joint Proposal for Briefing Schedule filed December 23, 2019 (ECF No. 25), that this case be stayed indefinitely until a Reevaluation of the EA could be completed. That Reevaluation, with Exhibits, was completed and filed on June 1, 2020. (ECF 38 – 38-8)

The Reevaluation made matters even more confusing and difficult to address. While it purported to evaluate the current efficacy of the EA that was issued in 2018 (based upon the original Project design), it instead revised the scope of the Project to be the construction of the Project between the I-30/I-630 Interchange north to the I-30/I-40 interchange (including replacement of the I-30 bridge) (the "Revised Project"), a different project from the original.

However, the Reevaluation also added that, **if** Issue No. 1 on this year's general election ballot (a constitutional amendment to make the Amendment 91 one-half cent sales tax permanent) was adopted, then the Plaintiffs would construct the entire I-30 Project as originally proposed (with certain changes). Consequently, nobody at this time (including the Defendants) knows for certain which Project is proposed to be constructed, and it is not clear from the Reevaluation which version of the Project (original or revised) was being reevaluated. This is important because changes in highway design and construction can make significant differences in traffic flow, safety and environmental impacts. It is also important in reviewing this case in that both the EA/FONSI and the Reevaluation must be analyzed separately as well as in conjunction with each other.

The Defendants' failure to propose one and only one project and analyze it, with the resulting confusion, is in itself a basis for a preliminary injunction until the Defendants are in a position to identify the project that they propose to construct.

Regardless of whether the Project consists of the original design described in the EA, or the Revised Project described in the Reevaluation, there are a large number of facts that argue for performance of an EIS: A summary of those facts are:

1. The Project (either version) is the most costly and most complex road construction project ever undertaken by ArDOT by far. This increases the likelihood of environmental issues related to the Project.

2. The Defendants are also taking a new "first-time" approach to the bidding and construction of the Project, called the "Design-to-Build" or "Design-Build to a Budget" method. (FONSI, p. 6) According to the FONSI, that means that "the design-build contractor will work to maximize the amount of project scope that can be delivered for a fixed budget of $535 million.[5]" (Id.) *This method delegates to the design-build contractor the ultimate scope and extent of the Project by giving it the power to modify the Project during construction in order to "stretch" the budget.* This constitutes an illegal delegation to the contractors of the authority of the Defendants to determine the design of the Project, and further increases the likelihood of alterations, modifications and additions to the Project during construction that would impact the Plaintiffs without Plaintiffs being able to object or comment.

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5 As noted earlier in this Brief, that figure is the amount that ArDOT has available to spend on the Project. However, the estimate by the contractors of the cost of the Project described in the EA is approximately $1 billion.

3. The Project as described in the EA potentially includes the complete and total reconstruction and widening of I-30 and I-40 from the I-530/I-440/I-30 Interchange on the southern edge of Little Rock for 7.3 miles along I-30 and I-40 to the Interchange of I-40 and Highway 67-167 on the northeast, and to the intersection of I-40 and MacArthur Boulevard in North Little Rock on the northwest. On the other hand, the Revised Project includes only the I-30 Corridor between the I-30/I-630 interchange on the south, and the I-30/I-40 interchange on the north. These are two different projects, with different impacts and ramifications for the remainder of the interstate highways outside of their respective boundaries. The environmental impacts of the Revised Project have not been separately analyzed. Instead, the Defendants have assumed that the analysis conducted for the original Project suffices for the Revised Project, although there are major differences and changes that raise separate environmental issues.

4. According to ArDOT, the 30 Crossing corridor is unique compared to the rest of the regional freeway system in the following ways:

a. It consists of six major interstate or highway interchanges that directly serve the downtown business districts of the cities of Little Rock and North Little Rock;

b. There are more access points per mile than any other location in the region;

c. There is more traffic than on any other interstate highway in Arkansas;

d. It serves regional travel as well as local access to two downtowns; and

e. I-30 is the central backbone of the regional freeway network.

Source: https://connectingarkansasprogram.com/know-the-facts-i30/#q3-1

5. All of the interchanges and access/exit points will undergo destruction and/or substantial reconstruction, which will add immeasurably to the complexity, length, and difficulty of the Project, and its impact on the Plaintiffs. This is particularly true of the I-30/I-630, the I-30/Highway 10, and the I-30/I-40 Interchanges, which will be a focal point of congestion, and are in close proximity to the Plaintiffs' properties or places of employment.

6. Over 11 acres of new right-of-way, almost 20 acres of wetland fill, and extensive lateral expansion of the existing roadway of I-30 and I-40 is required for the Project. The Project will almost double the size of the I-30 roadway in many places, increasing the isolation and perception of separation from Little Rock and North Little Rock of those persons and communities east of I-30.

7. According to the EA, five commercial establishments and six families will be displaced as a result of the Project. The number of people living in close proximity to the roadway who will be affected by the increased and unmitigated noise and toxic fumes from the increase in traffic are difficult to determine, but number in the thousands.

8. The Project also includes the destruction and replacement of the I-30 bridge over the Arkansas River. This, along with the other reconstruction and alterations to I-30 mentioned above, will add immeasurably to traffic congestion, delay and inconvenience.

9. The work will involve significantly increased levels of noise to the adjoining residents and neighborhoods, including the Plaintiffs, both during and after construction from destruction of existing pavement and structures and from equipment and traffic, dust, odors and fumes, nighttime lighting, traffic congestion from closed or limited lanes, and other disruptions and inconveniences on a 24 hour, 7 day a week basis. Plaintiffs' ability

to sleep, enjoy their properties without disturbance, and commute to their places of employment will be substantially interfered with.

10. The Project is predicted to require four years to complete, but the EA provides that construction may stretch well beyond that period and be constructed in a non-contiguous fashion. After completion, the Plaintiffs will be left with additional vehicle traffic, noise, odors and toxic fumes, more limited access to I-30 and I-630, greater separation of their properties and residences from the remainder of the City of Little Rock, less community cohesion and loss of property values.

11. Traffic congestion in the Plaintiffs' neighborhoods in eastern Little Rock will increase dramatically; long-standing traffic patterns in those neighborhoods will be significantly changed; and scores of free on-and-off-street parking spaces will be lost.

12. Unmitigated noise impacts will be inflicted to over 100 households in the 30 Corridor area and to MacArthur Park.

13. There will be an increase in the emission of air toxics that have been demonstrated to cause a variety of respiratory problems or cancers to a wide variety of receptors, especially young children and persons afflicted with asthma. The EA's assessment of those air toxic emissions consisted of reference to a FHWA guidance document that claims that air emissions will decline as a result of regulations requiring future reductions in automobile air emissions. Those regulations have been repealed.

Under NEPA, the Federal Highway Act, and their implementing regulations, this project should have been subject to an environmental impact statement from the outset, instead of an EA. The proposed Project will have a lasting and highly significant impact on the Cities of

Little Rock and North Little Rock, and others in the central Arkansas area, and the Court should issue a preliminary injunction prohibiting the commencement of construction until a hearing can be held on whether the Defendants should be ordered to prepare an EIS.

IV. PLAINTIFFS HAVE STANDING TO SUE

The Defendants have not challenged the standing of the Plaintiffs to sue in this case to date. The standing would appear to be obvious, but as standing is jurisdictional, Plaintiffs will address it as briefly as possible herein.

There are two categories of Plaintiffs in this case. The first are "organizational plaintiffs" consisting generally of neighborhood associations in and near downtown Little Rock in the immediate vicinity of the 30 Corridor Project and Interstate 630, which will be indirectly impacted by the Project or that are interested in neighborhood development and community cohesion. The other category are individual plaintiffs who live and/or work in the immediate vicinity of the Project.

The standard for establishing standing of plaintiffs in NEPA cases was discussed by the Eighth Circuit in *Sierra Club et al v. United States Army Corps of Engineers et al.*, 645 F.3d 978 (8th Cir. 2011), in which that court stated:

> Article III establishes three elements as a constitutional minimum for a party to have standing: (1) "an injury in fact," meaning "the actual or imminent invasion of a concrete and particularized legal interest"; (2) a causal connection between the alleged injury and the challenged action of the defendant; and (3) a likelihood that the injury will be redressed by a favorable decision of the court. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).
> 654 F.3d at 985-986.

Regarding representation by organizational plaintiffs such as the neighborhood associations, the Eighth Circuit, in the same opinion, stated that:

> Organizations like the Sierra Club, the National Audubon Society, Audubon Arkansas, and the Hunting Club "can assert the standing of their members," *Summers v. Earth Island Inst.*, 555 U.S. 488, 129 S.Ct. 1142, 1149, 173 L.Ed.2d 1 (2009), so long as (1) the individual members would have standing to sue in their own right; (2) the organization's purpose relates to the interests being vindicated; and (3) the claims asserted do not require the participation of individual members. *Save Our Sonoran, Inc. v. Flowers,* 408 F.3d 1113, 1119 (9th Cir.2005); *see Cent. S.D. Coop. Grazing Dist. v. Sec'y of the U.S. Dep't of Agric.,* 266 F.3d 889, 895 (8th Cir.2001); *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).
> 654 F.3d at 986

The individual Plaintiffs, Joshua Silverstein, Dale Pekar, John Hedrick, Denise Ennett, Rohn Muse, Barbara Barrows and Kathy Wells are all residents of Little Rock in the immediate vicinity of the 30 Corridor Project and Interstate 630 (including the area designed in the EA as the 30 Corridor Study Area), who will be indirectly impacted by the Project and who are interested in neighborhood development and community cohesion.

In addition, Denise Ennett, at the time of filing of this suit, was the President of the organizational Plaintiff, The Pettaway Neighborhood Association, Inc. The individual Plaintiff, Rohn Muse, was and continues to serve as President of the The Forest Hills Neighborhood Association, Inc.; individual Plaintiff Barbara Barrows was and continues to serve as President of The Hanger Hill Neighborhood Association; and individual plaintiff Kathy Wells was and continues to serve as President of The Coalition Of Little Rock Neighborhoods, Inc.

The organizational Plaintiffs named above and The Pettaway Neighborhood Association, The Dark Hollow Community Development Corporation; and Arkansas Communities Organization, Inc. are non-profit organizations that are located in or near the 30 Corridor Project in Little Rock or North Little Rock. All of the organizational Plaintiffs represent persons who reside and/or own property in neighborhoods adjacent to or affected by I-30 and who are concerned about the impact of the Project upon their environment, their lives and property.

Attached to the Motion for Preliminary Injunction as Exhibits 13 through 19 are Declarations of the Plaintiffs in this case containing the 'injury in fact" that they allege will occur to them in the event the proposed 30 Corridor Project is undertaken, the causal connection between the alleged injury and the challenged action of the defendants, and the likelihood that the injury will be redressed by a favorable decision of the court. The Declarations of the organizational Plaintiffs also address the three issues in the quotations from the cases cited above.

All of the Plaintiffs will have immediate, concrete harm to their interests if the Project is developed, and have standing to bring this action. However, only one (1) plaintiff need show standing to support the Court's subject matter jurisdiction of this case. *Sierra Club v. U.S. Army Corps of Engineers,* 645 F.3d. at 986; *Watt v. Energy Action Educ. Found.,* 454 U.S. 151, 160, 102 S.Ct. 205, 70 L.Ed.2d 309 (1981); *Village of Arlington Heights v. Metro. Hous. Deve. Corp.*, 429 U.S. 252, 264 & n. 9, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Sierra Club et al v. United States Army Corps of Engineers et al,* 654 F.3d 978, 986 (2011).

V. LEGAL ANALYSIS AND ARGUMENT

A. Test For Granting Of Preliminary Injunction

The granting of a preliminary injunction depends upon "a flexible' consideration of whether (i) the applicant is likely to succeed on the merits; (ii) he is likely to suffer irreparable harm in the absence of preliminary relief; (iii) the balance of equities tips in his favor, and (iv) an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.* 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); *Richland/Wilkin Joint Powers Authority v. United States Army Corps of Engineers,* 826 F.3d 1030 (2016); *Sierra Club et al v. United States Army Corps*

of Engineers et al, 654 F.3d 978, 986 (2011); *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds,* 530 F.3d 724 (8th Cir. 2008); *Dataphase Systems, Inc. v. CL Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). The grant of preliminary relief is largely within the discretion of the District Court. *Richland/Wilkin Joint Powers Authority v. United States Army Corps of Engineers,* 826 F.3d 1030 (8th Cir., 2016); *Dataphase Systems*, 640 F.2d at 114; *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).

The decision to issue or not issue preliminary relief is said by the courts to be "flexible" because it 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. A 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*, 640 F.2d at 112. "[W]here 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." *Dataphase,* 640 F.2d at 113; *Planned Parenthood Minnesota, North Dakota, supra; South Dakota v. Rounds,* 530 F.3d 724 (8th Cir. 2008)

As the Eighth Circuit stated in *Dataphase Systems*:

> 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.

640 F.2d at 113.

There is an exception 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 (fn. 7) (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."); *Sierra Club v. U.S. Army Corps of Engineers,* 645 F.3d. at 987 ("[W]hen plaintiffs seek to enforce procedural requirements "the disregard of which could impair a separate concrete interests of theirs," they 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)). A number of the claims asserted by Plaintiffs herein relate to deprivation of their procedural due process rights to propose and have meaningful review by the Defendants of proposals for alternatives to ArDOT's preferred alternative, and to comment upon those documents.

Plaintiffs will apply these principles to the facts of this case to show that Plaintiffs satisfy each of them, and that, under the circumstances of this case, a Temporary Restraining Order or Preliminary Injunction should be issued to the ArDOT and FHWA to prohibit any construction work being done on the 30 Corridor Project or any other project that may constitute an irretrievable commitment of resources or that could influence or limit the alternatives for the Project or cause environmental harm pending briefing on the full administrative record and a hearing on the full merits of the case.

1. THREAT OF IRREPARABLE HARM

A. Guiding Principles

For an injunction to be appropriate, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief. However, "the alleged harm need not be occurring or be certain to occur before a court may grant relief." *Richland/Wilkin Joint Powers Authority v. United States Army Corps of Engineers,* 826 F.3d 1030 (8th Cir., 2016); *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 788 (7th Cir. 2011).

The U.S. Supreme Court, the Eighth Circuit and numerous other Federal Courts have held that failure to comply with NEPA, "causes harm itself, specifically the risk that real environmental harm will occur through inadequate foresight and deliberation." *Sierra Club v. U.S. Army Corps of Eng'rs,* 645 F.3d 978, 995 (8th Cir. 2011); *Richland/Wilkin Joint Powers Authority v. United States Army Corps of Engineers,* 826 F.3d 1030 (8th Cir., 2016). *Sierra Club v. U.S. Army Corps of Eng'rs,* 645 F.3d 978, 995 (8th Cir. 2011); *Richland/Wilkin Joint Powers Authority v. United States Army Corps of Engineers,* 826 F.3d 1030 (8th Cir., 2016); *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, 1115 (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,* 564 F.2d 447 (D.C. Cir. 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. at 545, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987); *Arkansas Wildlife Federation*, 791 F.Supp. at 783-84.

In *Sierra Club v. United States Army Corps of Engineers,* 654 F.3d 978, 986 (2011), the Eighth Circuit stated:

> We agree with the district court's conclusion that the failure to comply with NEPA's requirements causes harm itself, specifically the risk that "real environmental harm will occur through inadequate foresight and deliberation." *Marsh,* 872 F.2d at 504; *see Sierra Club v. U.S. Army Corps of Eng'rs,* 446 F.3d 808, 816 (8th Cir.2006) (injury under NEPA includes "failing to issue a required environmental impact statement"); *Davis,* 302 F.3d at 1114.

The Plaintiff must additionally show irreparable harm to themselves, which can be accomplished through demonstrating "injury to their specific environmental interests," created by the actions taken with "inadequate foresight and deliberation." *Id.* This may be established by showing that not only will the environment suffer harm, but that the plaintiff in the case will be negatively impacted by the environmental harm. For example, injury to a Plaintiff's "aesthetic, educational and ecological interests" and enjoyment of an area may suffice. *Id.* In *Sierra Club,*

the court concluded that absent an injunction, the effects of constructing a plant would necessarily harm the plaintiffs' environmental interests because they inhibited the plaintiffs' abilities to engage in hunting, bird-watching, and nature-indulging. *Id.* at 994–995; *see also*, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 25, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (considering the harm to ecological, scientific, and recreational interests caused by injuring marine mammals as "harms").

In further discussing the likelihood of environmental harm, the Eighth Circuit in *Sierra Club* cited with approval the case of *Davis v. Mineta,* 302 F.3d 1104, 1120 (10th Cir.2002), in which the Tenth Circuit held that a district court abused its discretion in failing to enjoin construction of a highway that would have bisected a public park. The Tenth Circuit held that harm to the environment "may be presumed when an agency fails to comply with the required NEPA procedure." 302 F.3d at 1115. While the plaintiffs were still required to show irreparable harm to themselves under NEPA, they could do so by showing "injury to their specific environmental interests." *Id.* The Eighth Circuit in *Sierra Club* followed that reasoning by stating that, "in this case irreparable harm to the environment *necessarily means harm to the plaintiffs' specific aesthetic, educational and ecological interests.* The record discloses both procedural and concrete, substantive environmental harms."

Also, the U.S. Supreme Court, in defining "irreparable injury" in the environmental context, has said that term does <u>not</u> 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. "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. v. Village of Gambell, AK,* 480 U.S. 531, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987)

In addition, the Supreme Court does not require that the moving party demonstrate the absolute certainty of irreparable harm, but only that it be "*likely*" that such harm will occur. *Winter,* 555 U.S. at 22; *Amoco Production, supra.*

There is a threat of irreparable harm, in part, by the Defendants having violated the procedural rights of the Plaintiffs in failing to provide Plaintiffs the opportunity to comment on the scope and extent of the Project that may actually be constructed (as distinguished from that contained in the EA), and (ii) by not being given the opportunity to comment on a full range of alternatives and impacts in the EA that was issued. In addition, Plaintiffs will show that there is a likelihood of irreparable harm in that Defendants failed to comply with NEPA's requirements for conducting an EA, such as a proper analysis of all reasonable and feasible alternatives, direct, indirect and cumulative impacts, and appropriate mitigation measures.

The analysis of Defendants' failure to comply with the procedural requirements of NEPA overlaps to a considerable extent with the elements of the Plaintiffs' likelihood of success on the merits that will be addressed in Section 3 of this Brief entitled "Plaintiffs' Likelihood of Success on the Merits."

Facts Presenting Threat of Irrevocable Harm If Injunction Not Granted

The facts that present a threat of irreparable harm to Plaintiffs are relatively obvious considering the size and scope of the Project as described in the EA, as potentially modified by the Reevaluation. [See discussion of the scope of the Project at pages 6 (for original Project) and 10 (for Revised Project, above]. If construction is allowed to proceed without the benefit of an EIS, Plaintiffs will suffer irreparable harm, including:

i. Rerouting of and increases in traffic along streets in their neighborhoods and removal of parking spaces on those streets and nearby areas;

ii. Increased isolation of those areas of Little Rock east of I-30, and increased difficulty of persons living in those areas in access to the downtown area, markets, medical services and other necessities of life;

iii. Increased noise levels from automobiles, fumes, air toxics, etc. as a result of increased levels of vehicle traffic;

iv. Increased noise, fumes, dust and other effects of prolonged construction on the Project;

v. Change in the character of the neighborhoods.

vi. Other impacts and effects as described herein.

If construction on the Project is commenced, it will be too late to prevent these harms from occurring to the Plaintiffs because the Defendants will claim that they have irrevocably committed resources to the Project and that it will be prohibitively expensive and inequitable to them and the State of Arkansas to halt the project. Defendants will claim millions of dollars in the form of mobilization and de-mobilization costs and penalties that would have to be paid to contractors. Defendant may claim that sections of I-30, the bridge or on- and off-ramps are being or have been modified or demolished and present a threat to the safety of the public if the Project is stopped.

These facts, combined with the irrevocable harm that numerous courts have held arises from the violation of NEPA's requirements, discussed above, firmly establish that Plaintiffs will

likely sustain irrevocable harm in the event that this Motion for Preliminary Injunction is not granted.

2. POTENTIAL HARM TO THE DEFENDANTS IF A PRELIMINARY INJUNCTION IS GRANTED

Compared to the threat of serious imminent harm to the environment and to the Plaintiffs' environmental and other interests that results from Defendants' violation of NEPA's requirements, there will be no harm to the Defendants if the preliminary injunction is granted and the status quo preserved.

The only interest of the Defendant FHWA in the 30 Corridor Project is to oversee the activities of the Defendant ArDOT to ensure that ArDOT complies with the applicable FHWA regulations. FHWA will sustain no harm whatsoever by the granting of a preliminary injunction.

While ArDOT has a more direct interest in promoting, contracting for and overseeing construction of the Project, it has not yet authorized construction of the Project to begin. Defendants agreed at the time of withdrawal of Plaintiffs' previous Motion for Preliminary Injunction to give Plaintiffs 45-day written notice of Defendants' intent to commence construction. A preliminary notice was given by Defendants on June 5, 2020, of proposed utility relocation work to begin on July 21, with actual highway construction to commence in mid-October. Therefore, there are no costs that have been expended for mobilization for construction that would be lost nor penalties that will be incurred for interruption of construction should an injunction be granted.

Equally important, the Defendants have not, even now, settled on the final scope of the Project. In the Reevaluation, it is stated that Defendants propose to initially start construction on the Revised Project, but will switch to construction of the original Project if Issue No. 1 is

adopted in the November 2020 election, a plan that adds immeasurable confusion and uncertainty to this case. It is a plan that argues for the delay of construction until no earlier than after the November election, and after the conclusion of this case, if later. Thus, there is no reason to expect that an injunction of any construction on the Project, while the Court hears arguments and reviews the record in this case, will cause any significant harm to either FHWA or ArDOT.

The 30 Corridor Project is an enormous undertaking, requiring the reconstruction of all of I-30 through Little Rock and North Little Rock. Defendants acknowledge that Environmental harm will occur during construction of the Project, and alternatives to the proposed Project will be foreclosed by commencing construction. It would be highly prejudicial to the Plaintiffs' interests and position to permit ArDOT and FHWA to commence construction before the issues presented by this lawsuit are resolved. In keeping with *Amoco Production Co., supra,* and the Eighth Circuit cases cited herein, the balance of harms in this case favors the issuance of an injunction to protect the environment.

3. PLAINTIFFS' LIKELIHOOD OF SUCCESS ON THE MERITS

A party seeking a preliminary injunction is not required to prove its claims at this stage of the proceedings; only that it is likely to succeed on the merits. *Amoco Production Co.* 480 U.S. at 545. "[A]t the early stage of a preliminary injunction motion, the speculative nature of this particular ['likelihood of success'] inquiry militates against any wooden or mathematical application of the test. Instead, a court should flexibly weigh the case's particular circumstances to determine 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." *United Indus. Corp. v.*

Clorox Co., 140 F.3d 1175, 1179 (8th Cir.1998) (internal citations and quotation marks omitted). As the Eighth Circuit stated in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981):

> [T]he court ordinarily is not required at an early stage to draw the fine line between a mathematical probability and a substantial possibility of success. This endeavor may, of course, be necessary in some circumstances when the balance of equities may come to require a more careful evaluation of the merits. 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.*
> Dataphase, 640 F.2d at 113. (Italics added)

Due to the size and complexity of the Project, and some of the novel issues raised, Plaintiffs have asserted numerous claims in their Amended Complaint. Plaintiffs will focus on only a few of those claims to show that they have merit and that Plaintiffs are likely to succeed on the merits at final hearing.

A number of Plaintiffs' claims involve violations of Plaintiffs' procedural rights to participate in the permitting process, while others involve the Defendants' violation of the analytical and documentary requirements of NEPA, and other statutes and regulations relative to this case. The failure to discuss any claim in the Amended Complaint in this Brief does not indicate a lack of confidence by Plaintiffs in that claim, or constitute a waiver of any such claim, but is only to achieve as much brevity in this Brief as possible.

A. Plaintiffs' Procedural Rights Have Been Denied

The White House Council on Environmental Quality ("CEQ") promulgated regulations found in 40 C.F.R. Parts 1500-1508 that are binding on federal agencies in their NEPA review of

proposed actions. (NEPA Sec. 102(C), 42 USC §4332(C); 40 CFR §1500.3). The FHWA itself has adopted those regulations at 23 CFR §771.101 ("This part [Right of Way and Environment] prescribes the policies and procedures of the Federal Highway Administration (FHWA), … and the NEPA regulations of the Council on Environmental Quality (CEQ), 40 CFR parts 1500 through 1508 (CEQ regulations)"). These regulations provide the public with a significant and meaningful role in reviewing and commenting upon key environmental documents that are prepared before decisions are made by agency officials involving projects that could have a significant impact upon the environment.

Federal courts have consistently held that public involvement lies at the center of NEPA's procedural requirements and that public involvement is critical to NEPA's function. *See, e.g.*, *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 371 (1989) ("NEPA ensures that [an] agency will not act on incomplete information, at least in part *by ensuring that the public will be able to analyze and comment on [an] action's environmental implications*.") (emphasis added); *California v. Block*, 690 F. 2d 753, 770 (9th Cir. 1982) ("NEPA's public comment procedures are at the heart of the NEPA review process."); *National Audubon Society v. Dep't of Navy*, 422 F.3d 174, 184 (4th Cir. 2005); *Hodges v. Abraham*, 300 F. 3d 432, 445-46 (4th Cir. 2002).

The public's right to submit meaningful comments on proposed agency action requires the agency to make available to the public the following general categories of materials: (1) the underlying data or evidence reviewed and relied upon by the agency; (2) the methodology used to collect and analyze such data or information; and (3) expert judgments or predictions used by an agency to link its analysis to the ultimate conclusions drawn by the agency. *Portland Cement Association v. Ruckelshaus,* 486 F.2d 375, 392-95 (D.C. Cir. 1973), cert. denied 423 U.S. 1025

(1975); *U.S. Lines Inc. v. Federal Maritime Comm'n*, 584 F. 2d 519, 533 (D.C. Cir. 1978). The FHWA and ArDOT failed to meet this requirement in the EA, and will continue to fail to meet that obligation if the Project is significantly altered without opportunity for public comment.

1. Plaintiffs Will Be Denied The Right To Comment On The 30 Crossing Project Actually Constructed Rather Than the One Proposed for Construction

ArDOT prepared and issued a draft EA for public comment on June 8, 2018, consisting of approximately 3,800 pages. The draft EA proposed and examined only two (2) alternatives, each with two (2) sub-alternatives relative to the configuration of the I-30/Highway 10 Interchange. Each alternative covered the same area of the I-30 Corridor, with the major differences in the alternatives being in the configuration of the I-30 and Highway 10/Cantrell Road interchange. At the time of the issuance of the Draft EA by ArDOT in June, 2018, construction of each of the two alternatives with each sub-alternative was estimated to cost approximately $650 million. There were no studies or assessments done of the environmental effects of performing *only a portion* of the proposed Project.

Earlier this year, Defendants performed a Reevaluation of the EA to determine whether changes to the Project could affect the prior determination of potential environmental impacts of the Project. (Reevaluation, ECF 38-1, p. 7). The "changes" to the Project were that ArDOT now proposes to construct the Project in phases, rather than in a continuous process.

Essentially, Phase 1 could consist of work on and widening an expanse of approximately 1.6 miles of I-30 between the I-30/I-630 interchange in Little Rock and the I-30/East Broadway Street interchange in North Little Rock from the existing six lanes to 10 lanes (depending on the location within that area), with the I-30 Arkansas River bridge to be widened to 12 lanes.

Phase 2 will consist of constructing the remaining areas of the "30 Corridor" Project according to the original plan with some modifications. The timing of the construction would depend on whether Issue 1 is adopted in the November election. If so, Phase 2 would be constructed at the same time as Phase 1. If Issue 1 is not adopted, it would be constructed as money for the construction (approximately $400-500 million or more) becomes available. Until Phase 2 is constructed, the number of lanes in the highway included in that phase would remain at six (6).

Plaintiffs contend that the division of the construction of the Project into two phases is in violation of Section 102 of NEPA (42 USC §4332) in that it would authorize a major Federal action that may significantly affect the environment without having prepared an environmental assessment or EIS of the project that is actually to be constructed. Furthermore, use of the "Design-Build" method of contracting also constitutes an unlawful delegation of FHWA's authority and responsibilities under NEPA to the design/construction team, as further discussed herein.

Regarding the construction of the highway project in two phases, with the final product and its completion date uncertain, violates the basic concept of NEPA. "Major federal action," for which an EA or EIS must be prepared, includes "specific projects, such as construction or management activities located in a defined geographic area." (40 C.F.R. §1508.18) In order to prepare a meaningful EA or EIS, it is necessary to identify and define a specific geographic area that the proposed action is to affect. Without that, the agency and the public would not know the geographic limits of the project and the areas likely to be affected.

The Reevaluation purports to review the EA's assessment, but only as to the matters contained in the EA. The EA does not address the environmental impacts of the Revised Project described in the Reevaluation, nor does the Reevaluation purport to constitute an EA of the Revised Project. Even though the more condensed area covered by the Revised Project is included within the area studied by the EA, the EA does not study the environmental impacts of the Revised Project. Terminating Phase 1 of the Revised Project at points different from those in the original Project will have different environmental consequences that are not contained in the EA.

There is no analysis of the potential effects of building a 1.6 mile-long highway of 10 to 12 lanes flanked on each end by 6-lane highways. Nothing in the EA or the Reevaluation addresses the bottlenecks that will inevitably occur when 10 lanes of vehicles traveling at high rates of speed attempt to squeeze into a six-lane highway. The construction of only the Revised Project will necessarily result in significant adverse consequences, effects and impacts not foreseen or analyzed by the current EA and the FONSI, *and on which the public (including Plaintiffs) has not been provided an opportunity to comment.* Highways are dynamic and even slight changes in them may directly and indirectly affect other portions of the same highway and those that intercept it. As the Court in *Patterson v. Exon*, 415 F. Supp. 1276 (D. Neb., 1976) described it:

> In many instances, construction of one segment will affect more than just the immediate area through which that segment is built. It may cause an increase in traffic through another area. (Citation omitted) Placement of one highway segment tends to limit the range of alternatives for placement of succeeding segments. (Citation omitted) As a practical matter, commitment of resources in one section tends to make further construction more likely. (Citation omitted)
>
> 415 F. Supp. at 1282

The Defendants have adopted a "No-Commitment-To-Complete" approach to the Project that requires the performance of a separate EA or EIS to determine the environmental impact of that portion of the Project that is certain to be performed with available funding, and on which other agencies *and the public (including Plaintiffs) should be given an opportunity to comment, not only on the proposed segment, but also the appropriate prioritization of the separate components.*

2. The EA and FONSI Allow ArDOT's Contractors To Make Final Decisions On Contract Design and Construction, And is an Illegal Delegation of Authority

The documents developed by Defendants make clear that the manner in which the 30 Crossing Project is to be constructed is through a New-to-ArDOT "Design-Build to a Budget" process. Defendants' documents variously describe the process as follows:

> **EA Chap. 1, p. 1:** The identified method of delivery of the project is Design-Build. In Design-Build, *the design-builder is permitted to incorporate innovation into final design*, as long as the project purpose and need, environmental commitments and contractual obligations are met. This allows for innovation and cost efficiency.

> **FONSI, p. 6:** The Preferred Alternative is 7.3 miles in length with an estimated cost of between $615 and $700 million. The identified method of delivery of the project is design-build to a budget. The design-builder will work to maximize the amount of project scope that can be delivered for a fixed budget of $535 million. *In the event the Design-Build firm cannot provide the full project scope for the fixed budget, additional construction projects will be programmed and contracts will be let at a future date to complete the project scope*.

> **30 Crossing FAQs from website:** The first phase of the 30 Crossing project will be delivered using the Design-Build to a Budget delivery method. This method will maximize the amount of project scope that can be delivered under the existing available funding of $631.7 million. *The remaining scope of the 30 Crossing project will be delivered under future projects as funding becomes available*. …

> This project will initially be delivered using a fixed budget/variable scope design-build delivery contract. Design-Builders will compete to provide the most project scope for the fixed budget. ***In the event that none of the Design-Build firms are able to provide the full project scope, additional projects will be programmed to complete the project scope at a future date***. Any work postponed to a future date will include additional costs for inflation.

This Project is the first in which ArDOT has used the Design-Build process, and it raises a number of questions about whether it is compatible with the requirements of NEPA. Among those are: (i) how would members of the public know if a contractor elects to make changes in design or construction of a project, especially while it is underway? (ii) if there is a change in the design or construction of a portion of the Project, how will the determination be made regarding the environmental consequences of that change? (iii) who will make the final determination of whether a change in the design or construction of the Project is environmentally significant? (iv) what restraints or incentives will there be to consider environmental impacts of changes in design or construction on contractors, project sponsors and government agencies, all of whom have great incentives for the form of contractual deadlines and penalties to by-pass additional environmental analysis and public involvement, especially during construction of a project.

Those issues are not covered, nor anticipated, in NEPA or its regulations and guidelines. It was certainly not the intent or in the spirit of NEPA to allow contractors, government agencies or project sponsors to make *ad hoc* decisions regarding such important matters without analysis of the environmental consequences and opportunity for public participation. To allow that to happen would nullify NEPA.

Equally important, allowing a contractor to make decisions regarding changes in a major project such as the 30 Crossing Project, that could easily and undoubtedly have an impact on the

environmental consequences of the Project, is an illegal delegation of the Federal agency's responsibility to ensure that the NEPA obligations regarding the Project are met.

In *State of Idaho By and Through Idaho Public Utilities Com'n v. I.C.C.*, 35 F.3d 585, U.S.App.D.C. 268 (D.C Cir. 1994), the D.C. Circuit was confronted with the issue of whether one agency (the Interstate Commerce Commission) was entitled to rely upon the judgment of another agency and, as in this case, of a company regulated by that agency to meet its obligations under NEPA. In finding that it was not so entitled, the D.C. Circuit stated:

> We found this attempt to rely entirely on the environmental judgments of other agencies "in fundamental conflict with the basic purpose of [NEPA]" (citing *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n,* 449 F.2d 1109 (D.C.Cir.1971):
>
> > NEPA mandates a case-by-case balancing judgment on the part of federal agencies. In each individual case, the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be considered which would affect the balance of values.... The point of the individualized balancing analysis is to ensure that, with possible alterations, the optimally beneficial action is finally taken.
> >
> > Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment. Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect *596 **279 of the problem.... Certifying agencies do not attempt to weigh [environmental] damage against the opposing benefits. Thus the balancing analysis remains to be done.
>
> *Id.* at 1123; *see also North Carolina v. FAA,* 957 F.2d 1125, 1129 (4th Cir.1992) (agency does not satisfy NEPA "by simply relying on another agency's conclusions about a federal action's impact on the environment").
>
> The Commission's order constitutes a more blatant departure from NEPA than the rule we struck down in *Calvert Cliffs'* because the Commission has deferred not only to the judgments of other agencies, *but also to that of Union Pacific*, the licensee. (Emphasis added)
>
> 35 F.3d *at 595*-596

Equally relevant is *Illinois Commerce Com'n v. I.C.C.*, 848 F.2d 1246 270 U.S.App.D.C. 214 (D.C. Cir. 1988), in which the D.C. Circuit addressed a case in

which a Commission relied on private parties to raise environmental issues for consideration under NEPA. Ruling that to be illegal, that court stated:

> We agree with RTC that, under the regulation as originally promulgated, the Commission's reliance on private parties to raise environmental concerns was unlawful. The Commission may not delegate to parties and intervenors its own responsibility to independently investigate and assess the environmental impact of the proposal before it. *Harlem Valley Transp. Ass'n v. Stafford,* 500 F.2d 328, 336 (2d Cir.1974); *see also Steamboaters v. FERC,* 759 F.2d 1382, 1394 (9th Cir.1985); *Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n,* 449 F.2d 1109, 1118-19 (D.C.Cir.1971).

The Defendants' proposal to contractually authorize its contractors to make changes in design or construction on a project with the scope and magnitude of the 30 Crossing, which changes are likely to have significant and adverse environmental impacts, is even more egregious and illegal than the illegal delegations of authority that were involved in the cases cited above. The purpose of such changes would be to save money and allow for greater expansion of the Project. The temptation on the part of the contractor and ArDOT to make such changes, without the delay or additional expense that would be required from public review of and participation in those decisions, would be irresistible, and would make a mockery of the goal of NEPA that agency decisions be well-informed and transparent to the public.

The Design-Build Contract, as used by Defendants in this case, is an illegal delegation of FHWA's responsibility to independently investigate and assess the environmental impact of its major federal action, and is illegal.

3. ***Defendants Failed To Make a Final Draft of The FONSI Available to the Public for Comment***

There is no dispute that the Defendant FHWA did not issue a draft of the FONSI prior to the final version dated February 26, 2019,

40 CFR §1501.4(e)(2) (Whether to prepare an environmental impact statement) states:

In determining whether to prepare an environmental impact statement the federal agency shall:
...

(e) Prepare a finding of no significant impact (§1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in §1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under §1507.3, the agency shall make the finding of no significant impact available for public review (including state and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to §1507.3, or

(ii) The nature of the proposed action is one without precedent.

(underlining supplied)

The FHWA regulation on issuance of Findings of No Significant Impact is contained in 23 CFR §771.21 (Finding of no significant impact). That section, which supplements but does not replace the CEQ regulations, does not contain a provision for the issuance of a FONSI for

public review for 30 days before the agency makes it final determination as allowed in 40 CFR §1501.4(c)(2), quoted above.

The CEQ regulations are binding on all agencies, and, in the absence of such provision in the regulations of the FHWA applicable to issuance of FONSIs, the provisions of 40 CFR §1501.4(e)(2) are applicable to FONSIs issued by FHWA, requiring that the FHWA shall make the FONSI available for public review … for 30 days before the agency makes its final determination where (i) the proposed action is, *or is closely similar to*, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to §1507.3, or (ii) the nature of the proposed action is one without precedent.

FHWA regulation 23 CFR §771.115 (Classes of actions), which was adopted by the FHWA pursuant to the directive contained in 40 CFR §1507.3, provides three typical "classes" of actions that generally prescribe the level of documentation required in the NEPA process. The first of those three classes is Class I, relating to actions that "normally" require preparation of an EIS. With regard to that Class, the relevant portions of 23 CFR §771.115(a) read as follows:

> **(a)** *EIS (Class I).* Actions that significantly affect the environment require an EIS (40 CFR 1508.27).
>
> The following are examples of actions that normally require an EIS:
>
> (1) A new controlled access freeway.
>
> (2) A highway project of four or more lanes on a new location.
>
> . . .

The 30 Corridor Project is closely similar to the descriptions of subsections (1) and (2) of §771.115(a). The 30 Corridor Project is a complete reconstruction and expansion of I-30, with new controlled accesses and exits, and increased capacity by more than one-third. *Over 11 acres*

of new right-of-way, almost 20 acres of wetland fill, and extensive lateral expansion of the existing roadway of I-30 and I-40 is required for the Project. The Project will almost double the size of the I-30 roadway in many places. It is, without question, *closely similar to* the projects described in 23 CFR §771.115(a) that normally require the preparation of an environmental impact statement under the procedures adopted by the FHWA. Therefore, under 40 CFR §1501.4(c)(2)(i), the Defendant FHWA should have made the draft FONSI available for public comment.

Finally, CEQ's *40 Questions* guidelines, relative to the subject of public access to draft EAs and FONSIs, provide the following:

> Question/Answer 37(b):
>
> Q. What are the criteria for deciding whether a FONSI should be made available for public review for 30 days before the agency's final determination whether to prepare an EIS?
>
> A. Public review is necessary, for example, (a) if the proposal is a borderline case, i.e., where there is a reasonable argument for preparation of an EIS; (b) if it is an unusual case, a new kind of action, or a precedent setting case such as a first intrusion of even a minor development into a pristine area; (c) when there is either scientific or public controversy over the proposal; or (d) when it involves a proposal which is or is closely similar to one which normally requires preparation of an EIS. Sections 1501.4(c)(2), 1508.27. Agencies also must allow a period of public review of the FONSI if the proposed action would be located in a floodplain or wetland. E.O. 11988, Sec. 2(a)(4); E.O. 11990, Sec. 2(b).

The FONSI for the 30 Crossing Project meets virtually all of the criteria contained in the Answer to Question 37(b). CEQ's "40 Questions," while not regulations, are entitled to some deference and added persuasive force. *U.S. v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944); *Godinez-Arroyo v. Mukasey*, 540 F.3d. 848 (8th Cir. 2008) ("Even if Chevron deference is inappropriate, however, the BIA opinion would nevertheless be eligible for a lesser form of

deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)").

In addition, the FONSI qualifies for the 30-day public review under 40 CFR §1501.4(c)(2)(i) as a proposed action that is without precedent. The precedent-setting features of the 30 Corridor Project are detailed in the foregoing descriptions of the extensive scope of the Project, and the discussion on the irreparable harm that would be caused if an injunction is not issued (see pp. 18 to 21) and will not be repeated here. However, they are equally applicable to this issue.

The FONSI should have been issued for public comment pursuant to 40 CFR §1501.4(e)(2), and Plaintiffs have been denied their right and opportunity to comment on the FONSI prior to its becoming final.

4. *The Defendant's Responses to Public Comments Contain New Information Not Included in the Draft EA And On Which The Public Was Not Given Opportunity to Comment*

The Defendants' Responses to the public comments contain information that was not included in the draft EA upon which the public submitted comments, and on which the public has not been given the opportunity to comment. For example, the Defendants' Responses to public comments on the draft EA discloses for the first time that an IMPLAN analysis was conducted (page 2386/7100) which showed the potential effects of the respective alternatives on jobs and income. The effects identified in that IMPLAN analysis contradict statements in the EA on the same subject, and the IMPLAN analysis should have been in the EA. Because it was not, Plaintiffs were not given an opportunity to comment on this important subject.

Regarding the potential impacts of the Project on proposed development plans in Little Rock and North Little Rock downtown area, the original EA states:

> Most of the proposed development plans are underway *and are not dependent upon the construction of the proposed project*, nor would they be limited should the proposed project not be built; however, there is potential for the proposed project to accelerate the rate of the development/redevelopment projects."
> (Italics added)

However, the IMPLAN analysis results for the No-Action Alternative referred to in the Defendants' Response to Comments indicate that not doing the project could cost the study area 1,800 jobs and will result in reduction of labor income by $84.5 million." EA, page 2386/7100. This is a significant inconsistency in the content of the draft EA and the Response to Comments. The EA does not contain an IMPLAN analysis regarding the potential effects of the respective alternatives on jobs and income, and was apparently added after the issuance of the EA for comment, or perhaps in response to comments. In any event, the public, (including Plaintiffs) have been denied the opportunity to comment on it and other changes or additions to the EA.

There is also an inconsistency between the possibility of lost jobs ("could cost the study area 1,800 jobs") and the statement in the Response to Comments that there will be a definite loss in labor income ("will result in reduction of labor income by $84.5 million"). However, because the IMPLAN analysis report was not included in the 3992-page-Draft EA it was impossible for the reader to comment as to the validity of the imputed loss of "labor income" of some $47,000 per lost job. This is but one example of supplemental information included in the Defendants' Response to the public comments that was not included in the Draft EA, and on which the public has been denied the opportunity to comment.

5. Defendants Failed To Respond to Significant Public Comments

40 CFR 1502.9(b) provides that "Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised." This requirement also applies to preparation of responses to environmental assessments.

There has been no appropriate response to numerous comments made by the public and public officials, nor has the EA otherwise addressed or even acknowledged these concerns. There were many substantive, well-reasoned comments that ArDOT ignored or chose to respond to with gross generalizations. Examples of this violation include:

The CARTS[6] Study Director (Casey Covington, P.E.) pointed out the EA's failure to address the I-30 eastbound/I-40 eastbound bottleneck in the 8-Lane Alternative (1874/7100). The comment reads:

> Consistent Treatment of Corridor Bottlenecks (North Interchange v. I-30 Widening to 65th Street): The I-30 study team correctly identified two primary bottlenecks impacting traffic exiting the I-30 corridor; (i) the two lane ramp from I-30 Eastbound to I-40 Eastbound and (ii) the merge of I-30, I-440 and I-530 west of and outside the study corridor. However, the two bottlenecks were treated very differently.
>
> The bottleneck within the study corridor was ignored in the 8 lane alternative, and the bottleneck outside the study corridor was widened. It should not be acceptable to refuse to fix an identified bottleneck completely within the study corridor (the two lane ramp as part of the eight lane alternative) *but at the same time fix a bottleneck on I-30 outside the study corridor for which there is no identified funding and which has not been subjected to environmental review.* It is even more unacceptable to compare alternatives as if it were an apple to apple

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6 "CARTS" is an acronym for Central Arkansas Regional Transportation Study, the metropolitan planning area for Metroplan. The study area covers Faulkner, Pulaski, Saline, and northwestern Lonoke counties, the area for which transportation projects are planned and listed in the Transportation Improvement Program and the area for which Metroplan focuses the majority of its planning efforts, including the long-range plan.

comparison. Until an eight lane option is presented that fixes the two lane ramp bottleneck, the results are incomplete and insufficient for consideration.
(Italics added)

In the remainder of the comment, Mr. Covington informs ArDOT how "to present a complete picture of alternatives and their impacts." However, a review of the response codes (F-4, G-4, G-5, G-6, F-1, F-7, J, and I-12) shows no response to this particular point.

Nor was any response made to the CARTS Study Director's comment on page 1875/7100 regarding the Highway 10/I-30 Interchange, which stated in part:

> "*This intersection has a high pedestrian accident rate and has been mentioned as critical to the City and the health of the River Market.* None of the alternatives has yet proposed an acceptable solution to this problem. To insure pedestrian safety, options should be considered that decrease through vehicle traffic at this intersection, eliminate pedestrian and vehicle conflicts, and incorporate a pedestrian all-walk phase into the signal timing. … ."
> (Italics added)

Equally important, Mr. Covington commented on the potential impact that CARTS' own modeling of the Project design had on traffic in the streets in Little Rock that were not shown in ArDOT's modeling nor addressed in the EA:

> The urban grid works best in diffusing and distributing traffic when the number of connections to the grid is maximized. The current design of the split diamond focuses traffic on a few roads which reduces the effectiveness of the grid. … [O]ur modeling shows 4th Street collecting an overwhelming amount of traffic in the PM commute. At major cross streets the potential for significant conflicts exist. *Once again, the utility of a new bridge over the river at Chester Street and providing additional options for traffic leaving downtown becomes evident.* Performing another connection over the river west of Broadway diverts traffic from the west side of downtown off of Broadway and Main Street Bridges and will allow 4th Street to perform much more efficiently in connecting to the I-30 Bridge.
> (Italics added)

This last example demonstrates that, not only did Defendants not respond to Mr. Covington's highly informed and cogent comments, but that it is likely that Defendants'

modeling was, accidentally or deliberately, skewed to achieve results that supported Defendants' preferred alternative No. 2(b). Plaintiffs will expound on that latter matter in greater detail in this Brief.

"A Court may properly be skeptical as to whether an [EA's] conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent expertise." *Strycker's Bay Neighborhood Council, Inc. v. Karlen,* 444 U.S. 223, 227, 100 S. Ct. 497, 62 L. Ed.2d 433 (1988). *Sierra Club v. U.S. Army Corps of Engineers,* 701 F.2d 1011, 1030 (2nd Cir. 1983); *City of South Pasadena v. Stater,* 56 F. Supp. 2d 1106 (C.D. Cal. 1999).

In the case now before the Court, ArDOT has consistently ignored the conflicting views of both Metroplan and Rock Region Metro, two agencies with considerable knowledge and expertise – especially regarding traffic and transportation issues in central Arkansas. Instead, ArDOT has persisted in insisting on its preferred 10-lane alternative with dogged and irrational determination to the exclusion of all other reasonable alternatives.

6. Defendants' Notice of Availability of the EA For Public Comment Was Misleading And Defective

In its notice of issuance of the EA for public comment, the ArDOT stated that *it invited public comments only on the preferred alternative – not other alternatives*. ArDOT's notice to the public of the availability of the draft EA for comment reads as follows:

> The proposed preferred alternative is the 6-lane with Collector/Distributor (C/D) Lanes with Split Diamond Interchange (SDI) at the Highway 10 Interchange.
> ***Please provide comments on the preferred alternative.***
> (Emphasis added)
> **See Exhibit 4 of Plaintiffs' Exhibits**

As a result of this wrongful instruction to the public to limit their comments to the preferred alternative, members of the public may have been misled about the acceptable scope of their comments, and not submitted comments that included other alternatives or impacts or other subjects that might have otherwise been submitted.

The procedural due process afforded to Plaintiffs by NEPA and the FHWA regulations through being given the opportunity to comment to government decision-makers on these matters of extreme importance to their neighborhoods, the Central Arkansas area, and the State of Arkansas, is a valuable and protected right. Plaintiffs have been actively involved in the 30 Crossing Project from its inception because they will be profoundly affected by it, and they have shown that, at a hearing on the merits they are likely to succeed in their claim that those procedural due process rights have been violated by the Defendants. A preliminary injunction should be issued based upon their showing of likelihood of success on the merits of Plaintiffs' procedural due process claims.

Plaintiffs will now proceed to a discussion of their likelihood of success on the merits of Defendants' violations of the procedural and analytical requirements of NEPA.

B. THE DEFENDANTS FAILED TO COMPLY WITH THE MANDATORY PROCEDURAL REQUIREMENTS OF NEPA

Plaintiffs have a likelihood of success on showing that the Defendants failed to comply with the mandatory procedural requirements of NEPA.

1. The Draft EA Did Not Properly Define The Purposes and Needs Section

An EA must "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13.

The agency conducting the EA or EIS "bears the responsibility for defining at the outset the objectives of an action" and "must look hard at the factors relevant to the definition of purpose." *Citizens Against Burlington, Inc. v. Busey,* 938 F.2d 190, 196 (D.C.Cir.1991); *Sierra Club v. Clinton*, 746 F.Supp.2d 1025 (D. Minn. 2010). Further, what NEPA requires is action and study based on good faith objectivity rather than subjective impartiality. An EA or EIS is more than merely a "disclosure document," but serves as the means of assessing the environmental impact of proposed agency actions rather than justifying decisions already made. 40 CFR § 1501.2 and 1502.2(g).

There is a direct correlation between the "purposes and needs" portion of an EA or EIS, and the scope of alternatives that may be relevant for analysis.

The District of Columbia Circuit, in *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 290 U.S.App.D.C. 371 (1991), elaborated upon the agency's obligation to fully consider the needs and goals of all interested parties to the action, and to define the purposes and needs of the project that falls somewhere within the range of reasonable choices, stating:

> We have held before that an agency bears the responsibility for deciding which alternatives to consider in an environmental impact statement. *See North Slope Borough v. Andrus,* 642 F.2d 589, 601 (D.C.Cir.1980). We have also held that an agency need follow only a "rule of reason" in preparing an EIS, *see Natural Resources Defense Council, Inc. v. Morton,* 458 F.2d 827, 834, 837 (D.C.Cir.1972), and that this rule of reason governs "both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them," *Alaska v. Andrus,* 580 F.2d at 475; *see Allison v. Department of Transp.,* 908 F.2d 1024, 1031 (D.C.Cir.1990). It follows that the agency thus bears the responsibility for defining at the outset the objectives of an action. *See City of Angoon v. Hodel,* 803 F.2d at 1021;
>
> *Deference, however, does not mean dormancy, and the rule of reason does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them.* Environmental impact statements take time and cost money. Yet *an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's*

> *action, and the EIS would become a foreordained formality. See City of New York v. Department of Transp.,* 715 F.2d at 743. Nor may an agency frame its goals in terms so unreasonably broad that an infinite number of alternatives would accomplish those goals and the project would collapse under the weight of the possibilities.
>
> Instead, agencies must look hard at the factors relevant to the definition of purpose. When an agency is asked to sanction a specific plan, *see* 40 C.F.R. § 1508.18(b)(4), *the agency should take into account the needs and goals of the parties involved in the application. ... Once an agency has considered the relevant factors, it must define goals for its action that fall somewhere within the range of reasonable choices.*
> 938 F.2d at 195-196 (Emphasis added)

In the 30 Crossing EA, the "Purpose and Need" section covers the first 25 pages in the EA. It consists largely of general background information about the Little Rock-North Little Rock area, and is very broad, vague and imprecise. It is only at page 22 of the EA that a discussion of the purposes of the Project begins. There, it is stated that the purposes are primarily (i) to improve the condition of I-30 by "modernizing" infrastructure; (ii) improve "navigational safety" on the Arkansas River, and to (iii) increase speeds and reduce traffic congestion to and from downtown Little Rock-North Little Rock. The first two purposes listed are "so narrow that only one alternative from among the environmentally benign ones in the agencies' power would accomplish those goals, and the EA would become a foreordained formality." *Citizens Against Burlington v. Busey, supra*, at page 196.

The statement of "purposes and needs" of the Project is important in that it influences the remainder of the scope of the EA. For example, the consideration of alternatives is determined, in part, upon their ability to meet those purposes and needs. "An agency's definition of a project's purpose and need is closely related to and arguably inseparable from whether appropriate alternatives were considered. *Pacific Coast Federation of Fishermen's Associations v. U.S. Dept. of Interior*, 996 F.Supp.2d 887 (E.D. Cal. 2014).

The terminology used in the Purposes and Needs Section of the EA is designed to be biased in favor of the Proposed Alternative, which is to funnel all traffic from outside Little Rock-North Little Rock through the 30 Corridor, rather than to encourage a broad examination of alternatives and options for resolving traffic congestion and safety. This is evidenced by ArDOT's rejection of all alternatives proposed during the PEL Process as well as those proposed by the public and Metroplan during the NEPA EA process except its own preferred alternative. If relief of traffic congestion and safety were really the Defendants' primary goals, they would have seriously considered a number of the alternatives that would promote commuter traffic to use other routes into and out of the metropolitan business districts. Instead, those proposed alternatives were ignored or brushed aside.

The "Purposes and Needs" of the Project are based upon a number of assumptions that are not justified or appropriate and unduly narrow the scope of the EA. Among those assumptions are:

(i) that the purpose and need of the Project should be to increase speeds and reduce traffic congestion *to and from downtown Little Rock-North Little Rock*, rather than to relieve congestion on I-30 by decreasing traffic *through* downtown Little Rock-North Little Rock on I-30 through development of alternative routes of access to those downtown areas and alternative routes around the metropolitan area.

(ii) for the next twenty (20) years, people will commute on a daily basis from areas in the metropolitan area (Pulaski, Saline, Faulkner, and Lonoke Counties) to downtown Little Rock-North Little Rock, thereby causing increases in traffic congestion on I-30;

(iii) those people will, and should, make that commute largely in private automobiles with only one occupant, rather than in high-occupancy vehicles (HOVs) or some form of public transit.

To support those assumptions, the EA states that the four-county Central Arkansas region has grown by 5.5% since the 2010 census. However, of those counties, each has grown faster during that period than Pulaski County. The EA assumes that rate of growth will continue, mostly in the counties *other than Pulaski*, and that drivers will continue to commute to downtown Little Rock-North Little Rock from those surrounding counties.

Those assumptions dictate the findings of the EA, resulting in a self-fulfilling prophesy of continued congestion regardless of the number of lanes that are added to I-30. The assumptions are predictions without basis or consideration of other factors that could change the assumptions dramatically.

No consideration was given in the Environmental Assessment to the premise that it is desirable to decrease traffic *through* downtown Little Rock-North Little Rock on I-30 by development of alternative routes of access to those downtown areas and development of alternative routes around the metropolitan area. The development of alternative routes by which drivers or truckers could gain access to and from downtown Little Rock-North Little Rock, or, if only passing through the area, could entirely by-pass the downtown area, would help to relieve congestion on I-30 and possibly eliminate the necessity of a complete and total reconstruction of the 30 Corridor.

Further, the "purposes and needs" section of the EA fails to consider the experiences of other metropolitan areas showing that growth of suburbs usually leads to the development of retail, professional, commercial and industrial complexes in the suburban areas, resulting in

people working in the communities where they live, thereby reducing the necessity for travel from the suburbs to the downtown metropolitan area. An example of this is the recent announcement of Bank OZK that it is to build a new $98 million headquarters in West Little Rock where approximately 500 employees will work. Instead, Defendants have presumed in the EA that the main location for employment growth in the foreseeable future will be in downtown Little Rock-North Little Rock even though the studies and statistics relied upon by Defendants in the EA show that the major growth areas are in Saline, Faulkner, and Lonoke Counties.

The EA is defective in failing to provide a purpose and need for the EA that (i) allows for consideration of the purpose of the 30 Crossing Project being to decrease traffic *through* downtown Little Rock-North Little Rock on I-30 by development of alternative routes of access to those downtown areas and development of alternative routes around the metropolitan area, and (ii) provides an assumption that traffic in the 30 Corridor will not increase over the next 20 years but may decrease due to changes in locations in employment and residential patterns that are currently occurring in the Pulaski, Saline, Faulkner, and Lonoke County area.

The fallacy of using the assumptions in the EA for development of the purposes and needs for the EA is demonstrated by that portion of the Reevaluation entitled "Exhibit 2 -0 Traffic Analysis." Section 2.1 of that Analysis (Reevaluation, ECF 38-2, p. 2) states:

> By December, 2018, Metroplan adopted new demographic data based on new information and trends in Little Rock. In summary, new demographic data, and ultimately traffic forecasts, were lowered from what was previously provided and used to develop the I-30 EA.

The new Metroplan data is referred to in the Reevaluation as "the Metroplan 2050 CARTS Demand Model," which will be referred to herein as the "2050 Demand Model."

The 2050 Demand Model predicted a decrease in the annual growth rate of induced demand for vehicle use at 3 points on I-30: A-1 (I-40 west of U.S. 67/167; a reduction of 11,614

ADT (Average Daily Traffic); A-2 (I-30 north of the Arkansas River; a reduction of 15,319 ADT); and A-3 (I-30 north of I-440; a reduction of 15,444 ADT).

These reductions call into question the basis of the stated purposes and needs for the Project as contained in the EA, a part of which was to "increase speeds and reduce traffic congestion to and from downtown Little Rock – North Little Rock." Obviously, the assumptions used by Defendants in developing the original purposes and needs for the Project are changing, indicating a trend in changing driving patterns and habits in the public.

2. The Project's Impacts on the Environment Are Likely To Be "Significant," and an EIS Should Be Performed.

An agency's decision to not prepare an EIS has been described as a matter "of profound importance," and should be closely scrutinized because:

> As a practical matter, a threshold decision not to prepare an EIS may represent the last comprehensive environmental consideration a project receives. It is certainly the last opportunity for other agencies and the public to challenge the formal adequacy of environmental planning. *The threshold determination, thus, is of profound importance.*
> *Citizens for Responsible Area Growth v. Adams*, 477 F. Supp. 994 (D. N.H. 1979) (citing *Mount Vernon Preservation Society v. Clements*, 415 F. Supp. 141 (D. N.H. 1976). (Italics added)

In the Eighth Circuit, review of an agency's determination not to prepare an impact statement should be measured by its reasonableness in the circumstances, not as to whether it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Minnesota Public Interest Research Group v. Butz*, 498 F. 2d 1314 (8th Cir. 1974); *Arkansas Nature Alliance, Inc. v. U.S. Army Corps of Engineers,* 266 F. Supp. 2d 876 (E.D. Ark. 2003).

The CEQ regulation by which the Defendants are obligated to assess whether an action is "significant" is 40 C.F.R. § 1508.27. *See Lockhart v. Kenops*, 927 F. 2d 1028 (8th Cir. 1991), in which the Court stated:

> NEPA requires that an EIS be done for all "major federal actions significantly affecting the environment. 42 U.S.C. §4332(2)(C). "Affecting" is defined as "will or may have an effect on." 40 C.F.R. §1508.3. *To determine whether the proposed action "significantly" affects the environment requires consideration of a variety of factors under 40 C.F.R. §1508.27.* (Italics and underlining provided)

It is important to remember that it is not necessary for the Plaintiffs to establish a violation of NEPA by Defendants that the proposed federal action will definitely have an effect on the environment, but only that it *may have* a significant effect. *M.P.I.R.G. v. Butz*, 498 F.2d at 1321-22 (8th Cir. 1974); *City of Davis v. Colement*, 521 F. 2d 661, 673 (fn.15) (9th Cir. 1975); *McDowell v. Schlesinger*, 404 F.Supp. 221, 6 ELR 20224, 20237 – 40 (W.D. Mo. 1975). If it is likely that the proposed project may have a significant impact, then an EIS must be prepared.

3. The 30 Crossing Project Is Likely To Have a Significant Effect on the Environment Because It Has "Context" and "Intensity"

40 C.F.R. § 1508.27(a) provides that whether a proposed action of a Federal agency may have a "significant effect" on the environment requires considerations of both "context" and "intensity." "Context" means that the significance of an action must be viewed in terms of the setting of the proposed action, *i.e.,* local, regional, national. "For instance, in the case of a site-specific action [such as the one in this case], significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant."

The "context" of the 30 Crossing Project is that it is the major highway artery running through Little Rock-North Little Rock, the central Arkansas metropolitan area, and is a major southwest-northeast national traffic corridor. The Project undeniably has "context" and is

"significant" in terms of its importance to and potential impacts on the two cities, the State and southwest United States.

40 C.F.R. § 1508.27(b) defines "intensity" as referring to the severity of impact, and involves weighing of ten factors listed in § 1508.27(b), including:

> (i) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
>
> (ii) The degree to which the proposed action affects ***public health or safety***;
>
> (iii) *Unique characteristics of the geographic area, including proximity to historic or cultural resources, park lands, prime farmlands,* ***wetlands, or ecologically critical areas.***
>
> (iv) ***The degree to which the effects on the quality of the human environment are likely to be highly controversial;*** ["Controversial" in this context refers to the existence of a substantial dispute as to the size, nature or effect of the major federal action, rather than to the existence of opposition to a use. *Lockhart v. Kenops*, 927 F. 2d 1028 (8th Cir. 1991).
>
> (v) The degree to which the possible effects on the human environment are ***highly uncertain or involve unique or unknown risks***;
>
> (vi) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration;
>
> *(vii)* Whether the proposed action is related to other actions with individually insignificant but cumulatively significant impacts. ***"Significance" exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.***
>
> (viii) The degree to which the proposed action may cause loss or destruction of significant scientific, cultural, or historic resources.
>
> (Italics and bolding provided)

If any one or more of the above-listed factors bearing on the "intensity" of the action are present, an Environmental Impact Statement should be prepared. *Pub. Citizen v. Dep't of*

Transp., 316 F.3d 1002, 1023 (9th Cir. 2003) ("If agency's action is environmentally 'significant' according to *any* of these criteria [set forth in 40 C.F.R. 1508.27(b)], then DOT erred in failing to prepare an EIS."); *Anderson v. Evans,* 314 F.3d 1006, 1021 (9th Cir. 2002) (holding, after consideration of a single "significance factor," that an EIS was required); *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 72251 (9th Cir. 2001); *Sierra Club v. United States Forest Serv.,* 843 F.2d 1190, 1193 (9th Cir.1988); *Fund For Animals v. Norton,* 281 F.Supp.2d 209 (D.D.C. 2003); *Pub. Serv. Co. of Colo. v. Andrus,* 825 F.Supp. 1483, 1495 (D. Idaho 1993); *Oregon Wild v. U.S.*, 107 F. Supp. 3d 1102, 1111 (D. Or. 2015).

Many of the criteria contained in 40 C.F.R. § 1508.27(b) described above are met by the facts of this case as will be discussed. The 30 Crossing Project clearly contains "intensity," based on the following analysis of factors listed in 40 C.F.R. § 1508.27:

(a) Impacts that may be both beneficial and adverse. A significant effect may exist even if the federal agency believes that on balance the effect will be beneficial.

The weight and significance of the impacts that this Project will have in the Little Rock-North Little Rock metropolitan region depends on who is making the assessment and their particular interests that are being served or trampled. There can be no dispute that this Project will have both beneficial and adverse impacts. However, in reading the EA, one is left with the definite impression that it contains a significant amount of "boosterism" of the benefits and a minimalization of the negative impacts, rather than a rigorous exploration and objective analysis of reasonable and feasible alternatives and indirect and cumulative impacts, such as the environmental and socio-economic impacts on minority and low-income

populations. Without that objective analysis, it is impossible for an agency to determine whether, "on balance", the effects of the Project will be beneficial or harmful, and if so, to what degree. An EIS would provide a "hard look" into those and other issues that are present in this Project and that is absent from the EA.

(b) The degree to which the proposed action affects public health or safety.

One of the major justifications by the Defendants for the Project is their oft-repeated contention that public safety will be improved by implementing the preferred alternative. The EA is replete with alleged statistics regarding car crashes, personal injuries and property damage that were allegedly attributable to the current configuration of the 30 Corridor, and allegations that the proposed preferred alternative would alleviate those conditions. Public safety is a universal goal, but there are serious issues and disputes between the proponents and opponents of the Project about whether the proposed action - particularly the goal of increasing speed in the 30 Corridor, and building a ten-lane highway flanked by six-lane roadways at each end - is the best way to protect public health or safety, and if so, to what degree. An EIS would lend greater clarity to this issue.

(c) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, or ecologically critical areas.

The geographic area included in the 30 Corridor Project includes a complex diversity of characteristics, including urban residential,

commercial and industrial properties, park lands, schools and ecologically critical areas, including wetlands. Significantly, the residential neighborhoods in the 30 Corridor contain largely minority and/or low-income populations. Thirty-three percent of the households are considered low-income by Federal standards, and *59% of the total project study area are minority population.* (FONSI, p. 12). There will be displacements of commercial businesses and residential buildings (most of which are in minority areas), and fill of approximately 20 acres of wetlands and ecologically sensitive areas in North Little Rock that could result in increased flooding. In addition, the Project is adjacent to or directly affects seven historic districts (some of which are represented by Plaintiffs) and 136 properties that are listed on or eligible for the National Registry of Historic Places. (FONSI, pp. 12-13).

(d) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

"Controversial" in the context of this regulation means that substantial public controversy exists about whether "substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor, or the size, nature, or effect of the major Federal action rather than the mere existence of opposition to a use. *Native Ecosystems Council v. United States Forest Serv.,* 428 F.3d 1233, 1240 (9th Cir. 2005); *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 72251 (9th Cir. 2001).

There is a fine line between controversy about the purpose, size, nature, alternatives and effects of the proposed action, and mere "opposition to a use." In this case, there is a bona fide dispute between a substantial body of the public in central Arkansas and the Defendants about the purpose, necessity, size, design, nature, alternatives and effect of the 30 Corridor project as proposed; the lack of alternatives studied; and the immediate and long-term impacts of the Project on downtown Little Rock and North Little Rock, population growth, racial relations, community cohesion and socio-economic disparity (particularly on low-income and minority groups), among other issues.

The Plaintiffs' opposition is not merely a knee-jerk reaction to change, but a scientifically-supported and rational opposition to ArDOT's knee-jerk solution to congestion by simply building a wider highway in a highly urbanized area. Plaintiffs and their supporters sincerely propose viable alternatives and solutions to which Defendants have given slight consideration. The substantive public comments received by the Defendants on the proposed EA, the large majority of which opposed the Project[7], illustrate that controversy.

It is also noteworthy that the former Regional Planning Advisory Council, comprised of approximately 40 citizens of the 5-county Central

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[7] Approximately 351 comments were received by ArDOT on the draft EA. A 261 page Response to those comments was prepared by ArDOT. See Appendix E to the EA. The FONSI acknowledged that "Numerous commenters were opposed to the project." (FONSI, p. 11) Approximately 175 of those opposed the Project with individualized comments, while approximately 91 submitted supporting comments, many of them in a form apparently provided to them for signature.

Arkansas Metro area and representing a broad spectrum of interests and perspective appointed to advise Metroplan on this project, overwhelmingly opposed the Project and formally recommended to Metroplan that it not support the 30 Corridor Project. In addition, Rock Region Metro, the public transit authority, opposed the project. See **Exhibit 5** in Plaintiffs' Exhibits Accompanying Motion for Preliminary Injunction.

(e) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

ArDOT acknowledges in the Reevaluation that it does not have sufficient funds with which to construct the 30 Corridor Project as proposed by the EA, and that it proposes to construct Phase 1, followed by construction of Phase 2 *when funds become available*. The possible long period of time between completion of Phase 1 and commencement of Phase 2, if ever, renders the possible effects of the Project on the human environment to be highly uncertain and risky.

In addition, ArDOT acknowledges that:

(i) this is the largest and most ambitious project that it has ever undertaken;

(ii) this is the first highway project in the state to utilize the "design-build to a budget" method;

(iii) this is the first project to use the Planning and Environmental Linkage (PEL) study process to determine possible alternatives that can be carried forward into the NEPA study for the Project;

(iv) there are many indirect and cumulative impacts of the Project that are not addressed in the EA and the Reevaluation (*e.g.*, traffic

"bottlenecks" caused by the Project in areas outside the 30 Corridor that will require further construction);

(v) the Project contains six major interstate or highway interchanges that directly serve the downtown business districts of the cities of Little Rock and North Little Rock;

(vi) there are more access points per mile than any other location in the region;

(vii) there is more traffic on the 30 Corridor area than any other interstate in Arkansas;

(viii) the 30 Corridor serves regional travel as well as local access to two downtowns;

(ix) the I-30 is the "central backbone of the regional freeway network."

With so many "firsts," complexities, contingencies and uncertainties that exist in how and when the Project is to be constructed and the impacts it will cause, it seems foolhardy to risk the waste of over $1 Billion on unresolved problems that are very foreseeable and that could be partially or completely addressed through development of an Environmental Impact Statement.

(f) The degree to which the action may establish a precedent for future actions with significant effects.

The Defendant ArDOT has, in recent years and recent projects, demonstrated a willingness to avoid the time and expense to conduct meaningful environmental assessments prior to construction of its major projects. For example, ArDOT used a "categorical exclusion" to avoid conducting an environmental assessment or EIS before construction of the Big Rock Interchange at the intersection of I-430 and I-630. It also used a categorical exclusion in lieu of a more extensive study to commence the

major widening of I-630. The 30 Corridor Project is the largest project ever undertaken by ArDOT and the largest public works project ever undertaken in Arkansas. Failure to conduct an EIS on a project of the scope, size and cost of the 30 Corridor Project would set a precedent for not performing an EIS on any future project.

(g) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts

The 30 Corridor Project is inextricably connected with future planned expansions of I-30 south of the proposed "southern terminus" of the 30 Corridor Project, future planned expansions of I-630, and other future projects on I-40 and Highway 67/167. Any work of major significance (*i.e.,* widening of roadways, modification of interchanges, access ramps, *etc.*) on any of those roads has direct, indirect and cumulative impacts on the others. The EA itself states that the 30 Crossing Project will have cumulatively significant impacts in relation to the on-going I-630 project and segments of I-30 south of the southern terminus of the 30 Corridor. The Reevaluation also recognizes the necessity of such future projects to relieve bottlenecks on I-30.

These impacts will be discussed in greater detail herein.

This case is very similar to that of *Patterson v. Exon*, 415 F. Supp. 1276 (D. Neb. 1976), in which a landowner abutting the right-of-way of a 4.1 mile portion of highway proposed to be expanded filed suit to require an EIS be prepared. The court in that case described the project – which is strikingly similar to the 30 Crossing Project, except in smaller scale – and held that an EIS should be required:

> The project in question is *not merely a resurfacing* of Highway 31—*it is a total reconstruction which will deviate in some places from the alignment of the existing road.* Although the reconstruction will have only a minimal effect on the farmland through which the highway passes, *the plans call for a modification of the channel of a stream, construction of a relatively large bridge, and considerable grading and tree removal in a wooded area through which the last mile of the project passes.* That area is rich in scenic beauty and the extent of the construction, grading and clearing would seriously impair the natural beauty of that area.[3] There was also some evidence that the project would have an adverse effect on the wildlife in the area which, in turn, would adversely affect the quality of the human environment. Under these circumstances, the Court concludes that the project would have a significant effect on the quality of the human environment and the agency's decision to the contrary was unreasonable.
> 415 F. Supp. at 1282

Evaluating the 30-Corridor Project against the criteria provided by 40 C.F.R. § 1508.27, it is clear that the characteristics of the Project meet the vast majority – not merely one or two – of the criteria for preparation of an EIS, and the Court should order an EIS to be prepared.

In addition, the sheer size, scope and cost of the 30 Crossing Project clearly call for the Defendants to conduct an environmental impact statement on the Project. This Project officially qualifies under FHWA regulations as a "project of regional or national significance" pursuant to 23 CFR §505, due to its costing in excess of $500,000,000. The Project will cover approximately seven (7) miles of an approximately 200 foot wide swath of interstate highway through downtown Little Rock and North Little Rock; displace at least six (6) families and five (5) businesses; heavily impact countless other families and businesses who live or work in the 30 Corridor or who commute daily on I-30, I-630 and Highway 10 and will be highly affected by construction noise and dust, increased traffic, and changes in location of access/egress ramps; further isolate low-income and minority neighborhoods from the vibrant development in the area west of the 30 Corridor (*e.g.*, River Market, South of Main, etc.) and north of I-630; and, not least, cost over One Billion Dollars – the largest highway project in the State of Arkansas by far. If this Project does not require an EIS, then no project will.

The Court should set aside and void the FONSI and remand this matter to the Defendants for preparation of an EIS in accordance with NEPA and applicable regulations.

4. The Environmental Assessment "Piggy-Backs" Onto Documents That Have Not Been Subjected To NEPA Review And Are Not Part Of The Environmental Assessment

The EA frequently refers to documents that were created as a result of a process known as the "PEL Process" ["PEL" is an acronym for "Planning and Environmental Linkages"] that involved a series of approximately 15 reports prepared by Defendant ArDOT and its contractor prior to the development of the EA that purported to identify "the purpose and need for improvements to I-30 and I-40, and evaluated possible viable alternatives to carry forward into this NEPA study (the EA)." See EA, Chapter 1, page 1, Purpose & Need Section.

"Environmental documents" are defined in 40 CFR §1508.10 as environmental assessments, environmental impact statements, finding of no significant impacts and notices of intent. The documents included in the PEL Study were not NEPA-documents, nor are they claimed as such by the Defendants. Numerous documents prepared by Defendants for the EA distinguish between the PEL Process and the NEPA process. For example, in an Application for a Tiger VII 2015 Grant to the FHWA, ArDOT refers to the PEL Study process, and acknowledges that the PEL process is separate from the NEPA environmental assessment process by stating:

> It will be the first project in the state to utilize the design-build to a budget method, and is the first to incorporate the Planning and Environmental Linkage (PEL) study process into the overall development, in order to determine possible viable alternatives for a long-range solution, and recommended alternatives that *can be carried forward seamlessly into the National Environmental Policy Act (NEPA) study for this Project.*
> (I-30 Corridor Project: Tiger VII 2015 Grant Application, Section A, p. 3) (Italics added)

See also the EA, Chap. 1, Sec. 1.1, p. 1; ("This National Environmental Policy Act (NEPA) Study incorporates the results of the Planning and Environmental Linkages (PEL) Study begun in April 2014 by ARDOT. The PEL Study identified the purpose and need for improvements to I-30 and I-40 and evaluated possible viable alternatives to carry forward into this NEPA Study."); Reevaluation, Doc. 38-1, Chap. 1, Sec. 1.1, p. 1.

Notwithstanding that the PEL documents were not documents that were subject to NEPA scrutiny, the Defendants attempted to include or incorporate them into the EA by means of reference to various Appendices. For example, in the EA, Chapter 2 (Alternative Development), page 25, the following text appears:

> 2.2 What Alternatives Were Evaluated in this EA?
>
> Detailed information on the development of project alternatives can be found in the Alternatives Technical Report **(Appendix C)**. *The alternatives development process began in 2014 with the PEL Study conducted by ArDOT.* The PEL Study involved evaluation of a wide range of potential solutions to the congestion and safety issues along I-30 and I-40. Among those were bypass routes to the west of I-30 along Pike Avenue and Chester Street. *It was determined that these alternatives would not divert enough traffic from I-30 to resolve the congestion and safety issues and would have extensive impacts to residences and buildings along those routes.* … . (Italics added. Bold appears in original)

This is but one example, among others, of alternatives and other issues that were considered and rejected or otherwise prejudged and determined by Defendants in the PEL Process but not included in the draft EA that was issued for public review and comment. Consequently, the public reviewing the EA was deprived of an opportunity to consider and comment upon those alternatives and other issues decided by ArDOT during the PEL Studies. Yet, by tiering upon the PEL Study, the EA represents to the public that such alternatives had previously been considered, rejected, and further consideration of them foreclosed.

An agency cannot piggy-back or "tier" upon an environmental assessment or other form of impact statement on documents that have not previously been subjected to NEPA review. *Northern Plains Resource Council, Inc. v. Surface Transp. Bd.* 668 F.3d 1067 (9th Cir. 2011); *Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062 (9th Cir., 2002) (tiering to a document that has not itself been subject to NEPA review is not permitted, for it circumvents the purpose of NEPA); *Oregon Natural Res. Council v. U.S. Bureau of Land Mgmt.,* 470 F.3d 818, 823 (9th Cir.2006) (citing *Idaho Conservation League v. U.S. Forest Service*, D. Idaho. August 29, 2012 Not Reported in F.Supp.2d., 2012 WL 3758161.

In addition, the Council on Environmental Quality addresses this issue in its *40 Questions,* where CEQ explains:

> 21. **Combining Environmental and Planning Documents.** Where an EIS or an EA is combined with another project planning document (sometimes called "piggybacking"), to what degree may the EIS or EA refer to and rely upon information in the project document to satisfy NEPA's requirements?
>
> A. Section 1502.25 of the regulations requires that draft EISs be prepared concurrently and integrated with environmental analyses and related surveys and studies required by other federal statutes. In addition, Section 1506.4 allows any environmental document *prepared in compliance with NEPA* to be combined with any other agency document to reduce duplication and paperwork. However, *these provisions were not intended to authorize the preparation of a short summary or outline EIS, attached to a detailed project report or land use plan containing the required environmental impact data.* ***In such circumstances, the reader would have to refer constantly to the detailed report to understand the environmental impacts and alternatives which should have been found in the EIS itself.***
>
> *The EIS must* ***stand on its own*** *as an analytical document which* ***fully informs*** *decisionmakers and the public of the environmental effects of the proposal and those of the reasonable alternatives. Section 1502.1.* But, as long as the EIS is clearly identified and is self-supporting, it can be physically included in or attached to the project report or land use plan, and may use attached report material as technical backup. (Emphasis added)
> (*40 Questions*, Question/Answer 21)

The tiering of the EA on the documents resulting from the PEL Studies is improper in that such documents were not subject to NEPA public review and comment, but yet are treated in the EA as documents upon which official decisions have been made. As such, they foreclose the opportunity of the public to comment during the NEPA process upon the subject matter of those documents and decisions contained therein.

Further, the Defendants violated the guidance provided in Question/Answer 21 of the *40 Questions* guidance quoted above by issuing a draft EA that contained only a short summary or outline of the alternatives analysis, impact analysis and other provisions of the EA, and, in all parts of the EA, referred the reader to the Appendices (of which there were 18) for the more detailed analysis of the subjects. The result of this is that the reader of the EA must refer constantly to the detailed 18 Appendices to understand the environmental impacts and alternatives which should have been found in the EA itself – a problem that the CEQ 40 Questions guidance was devised to avoid.

Defendants may argue that they are allowed to incorporate PEL documents into an EA or EIS by virtue of 23 USC §168, relating to integration of planning and environmental review by the FHWA. That statute provides in general that, subject to certain exceptions, the FHWA may adopt or incorporate by reference and use a planning product in proceedings relating to any class of action in the environmental review process of a project, including EAs, EISs, and categorical exclusions. However, the incorporation of planning documents into an EA or EIS depends on the condition contained in 23 USC §168(d)(5) that "during the environmental review process, the relevant agency has … "provided notice of the intention of the relevant agency to adopt or incorporate by reference the planning document," and "considered any resulting comments."

In conducting the PEL process on the 30 Crossing project, neither ArDOT nor FHWA provided notice to the public of its intent to adopt or incorporate by reference the documents generated during that process into the EA. Included in the Plaintiffs' Exhibits in Support of this Motion for Preliminary Injunction as **Exhibit 6** are copies of the public notices that were issued for the public meetings that were held. None of them mention such intent. Consequently, the condition of 23 USC §168(d)(5) was not met, and the PEL documents are not eligible for inclusion in the EA.

5. The EA, Including the Appendices, Does not Meet The Requirements of NEPA

The U.S. Supreme Court has stated in *Department of Transp. v. Public Citizen*, 541 U.S. 752, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004), that NEPA's requirement for preparation of an EA or EIS serves two purposes:

> First, "[i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson,* 490 U.S., at 349, 109 S.Ct. 1835. Second, it "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Ibid.*
> 541 U.S. at 768.

Thus, one of the two major purposes of NEPA is to ensure that the public has a meaningful opportunity to provide meaningful input into the process of making environmental decisions on major projects.

NEPA defines an "Environmental Assessment" as meaning a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

The emphasis on brevity is purposeful. An EA is intended to be a "concise" document that the public can easily navigate and understand. Cross-references to a myriad of appendices, reports and other documents referenced in the EA that have the potential to confuse and discourage the public and other agencies from reviewing the entire document are not appropriate.

This subject was discussed at length in *Oregon Environmental Council v. Kunzman*, 817 F.2d 484 (9th Cir., 1987), in which that court instructed:

> In order to achieve the purpose of informing decisionmakers and the public of potential environmental consequences of a proposed agency action, the CEQ regulations require:
>
> > Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.
> > 40 C.F.R. § 1502.8 (1986)
>
> *See also id.* § 1500.2(b) (stating that an EIS "shall be concise, clear, and to the point"); *id.* § 1502.1 (same); *id.* § 1502.2(a) (stating that an EIS "shall be analytic rather than encyclopedic"); *id.* § 1500.4(e) ("clear format"); *id.* § 1502.10 ("clear presentation"). Appellants argue that neither the main text of the 1985 EIS nor the worst case analysis in the 1986 Addendum meets this requirement.
>
> ...
>
> The scant case law indicates that an EIS must translate technical data into terms that effectively disclose environmental impacts to its "intended readership," including "interested members of the public," *National Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n,* 685 F.2d 459, 487 n. 149 (D.C.Cir.1982), *rev'd on other grounds sub nom. Baltimore Gas & Elec. Co. v. NRDC,* 462 U.S. 87, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983), that an EIS should be written "in clear, concise, easily readable form so as to provide a reasonably

> intelligent non-professional an understanding of the environmental impact," *Warm Springs Dam Task Force v. Gribble, *494* 378 F.Supp. 240, 252 (N.D.Cal.1974), *aff'd,* 621 F.2d 1017 (9th Cir.1980); *see also Upper West Fork River Watershed Ass'n v. Corps of Eng'rs, United States Army,* 414 F.Supp. 908, 930 (N.D.W.Va.1976), *aff'd mem.,* 556 F.2d 576 (4th Cir.1977), *cert. denied,* 434 U.S. 1010, 98 S.Ct. 720, 54 L.Ed.2d 752 (1978), and that an EIS must be "organized and written in language understandable to the general public and at the same time contain sufficient technical and scientific data to alert specialists to particular problems within their expertise," *Alabama ex rel. Baxley v. Corps of Eng'rs of the United States Army,* 411 F.Supp. 1261, 1267 (N.D.Ala.1976); *see also Sierra Club v. Froehlke,* 359 F.Supp. 1289, 1342–43 (S.D.Tex.1973) (" 'understandable to non-technical minds' "), *rev'd on other grounds sub nom. Sierra Club v. Callaway,* 499 F.2d 982 (5th Cir.1974) (quoting *Environmental Defense Fund, Inc. v. Corps of Eng'rs of the United States Army,* 348 F.Supp. 916, 933 (N.D.Miss.1972), *aff'd,* 492 F.2d 1123 (5th Cir.1974)).
>
> We hold that § 1502.8 imposes a requirement that an EIS must be organized and written so as to be readily understandable by governmental decisionmakers and by interested non-professional laypersons likely to be affected by actions taken under the EIS. The main text of an EIS will routinely include some scientific data and reasoning necessary to apprise decisionmakers and the public of potential environmental consequences. The more complicated the science underlying those consequences is, the more challenging the preparer's task will be to convey the information clearly. Overly technical material and supporting data, however, should ordinarily appear in appendices. *See* 40 C.F.R. § 1502.18 (1986).

See also, *Tongass Conservation Soc. v. Cheney*, 924 F.2d 1137, 288 U.S.App.D.C. 18021 (D.C. Cir. 1991) ("The main text of an EIS must disclose information in terms intelligible to "interested members of the public, public servants, and legislators." *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n,* 685 F.2d 459, 487 n. 149 (D.C.Cir.1982), *rev'd on other grounds sub nom. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.,* 462 U.S. 87, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983)"); *Oregon Natural Desert Ass'n v. Bureau of Land Management*, 625 F.3d 1092 (9th Cir, 2010) (An EIS, to fulfil its role as an "action-forcing device," *id.* § 1502.1, conducive to public analysis and agency reflection, must "be written in plain language ... so that decisionmakers and the public can

readily understand [it]." *Id.* § 1502.8, citing *Earth Island Inst.,* 442 F.3d at 1160 (characterizing § 1502.8 as requiring that NEPA documents be organized so as to be "readily understandable").

The EA in this case is a total departure from the CEQ definition of an EA. Further, it is of such length and complexity of parts that it discourages members of the public from reviewing and commenting on it. What Defendants refer to as "the EA" is actually an "executive summary" consisting of 123 pages, but it is impossible to determine the analysis that may have been given to any particular issue without referring to the 18 Appendices that accompany the EA executive summary, *and that consist (according to the FONSI) of approximately 7,000 pages*. Many of the Appendices have several Addendums within them, further adding to the complexity of attempting to navigate the entire EA. The reader is constantly moving back and forth between the various parts. It is a task that the average citizen, however interested he/she may be in the Project, would find discouraging.

The EA prepared by the Defendants is overly complicated, poorly organized, and misleading. It does not pass the "readability test" discussed above, and, at a minimum, it should be remanded to the Defendants for rewriting.

6. The Alternatives Analysis Is Inadequate.

NEPA §102 [42 USC §4332) requires that all agencies of the Federal Government shall include in every recommendation for or report on major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on, among other issues, alternatives to the proposed action, including the no-action option.

That provision in NEPA is implemented by 40 CFR §1502.14, relative to the

assessment of alternatives. The Alternatives Analysis requirement is referred to therein as "the heart" of an EA or EIS. 40 CFR §1502.14 provides that the environmental impacts of the proposal and the alternatives to the preferred alternative should be presented in comparative form, sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.

Among other things, the agency is to:

(a) *Rigorously explore and objectively evaluate all reasonable alternatives*, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated; (emphasis added)

(b) Devote *substantial treatment to each alternative considered* in detail including the proposed action so that reviewers may evaluate their comparative merits; (emphasis added)

(c) *Include reasonable alternatives not within the jurisdiction of the lead agency*; and

(d) Include the *alternative of no action.*

(i) Only One Alternative to the Preferred Plan Was Adequately Considered

The EA essentially considers only ArDOT's preferred plan and one alternative, each with the same two sub-alternatives relative to the configuration of an interchange (I-30/Highway 10-Cantrell Road) and collection/distribution lanes.[8] In an effort to increase the number of alternatives, the two alternatives with their sub-alternatives were divided into four alternatives by ArDOT, and are referred to as:

---

[8] At the conclusion of the PEL Process, ArDOT presented only <u>one</u> alternative to the Defendant FHWA for approval, which was ArDOT's then- and currently-preferred Alternative 1(B). Recognizing that an EA with only one alternative would not pass judicial muster, FHWA insisted that ArDOT also consider an 8-Lane General Purpose Alternative proposed by Metroplan. ArDOT then proposed that as Alternative 2. See Letter of FHWA to ArDOT dated August 18, 2015 found as **Exhibit 7** to Plaintiff's Exhibits Accompanying this Motion.

Alternative 1A: 8-Lane General Purpose with Single Point Urban Interchange (SPUI) at Hy. 10;

Alternative 1B: 8-Lane General Purpose with SPUI at Hy. 10;

Alternative 2A: 6-lane with C/D with Split Diamond Interchange (SDI) at Hy. 10; and

Alternative 2A: 6-lane with C/D with SDI at Hy. 10.

Comments were submitted by members of the public proposing a number of other reasonable and feasible alternatives that would lessen the volume of traffic on I-30 by creation of new routes to downtown Little Rock-North Little Rock, diversion of traffic onto existing streets and roads other than I-30, and the greater use of public transit. Those comments were given only passing reference in the EA, usually stating that they had been considered during the PEL process and rejected. In addition, the No-Action alternative, which NEPA requires to be "rigorously explored and objectively evaluated," was summarily dismissed as unthinkable.

(ii) The Alternative of "Reduced Scale" Modifications To the 30 Corridor Was Not Adequately Considered

The EA is based upon the assumption that, because the I-30 Bridge over the Arkansas River must be replaced, the entire 30 Corridor (over 7 miles of roadway) must be widened to 8- to 10-lanes, with entrance and exit ramps relocated and four major interchanges reconstructed. It did not propose and consider an alternative for public comment that would include replacement of the bridge, but limit the lanes to the present six-lane configuration (with resurfacing and widening). However, numerous public comments proposed that alternative, or a version thereof.

The following is a sampling of the hundreds of comments contained in the Appendix to the EA entitled "NEPA Public Involvement Summary" relative to the specific alternative of replacing the bridge but not widening I-30, and of generally considering other alternatives:

Commentor	EA Page	Comment Excerpts

Beth Cook ***D-1*** This is now an urban area where residents can live, eat, enjoy downtown attractions and walk to all these attractions. ... By widening our city streets, freeways and taking away the trolley to the most desired locations you are changing the downtown area and all that the redeveloping has created.

Laura Redden ***D-2*** Replace the Ark. River bridge, but save downtown. ... Under the offered plan, curbside parking will be eliminated along the new Highway 10 sections on Second, Fourth, Chester and State, hurting businesses.

Rachel Furman ***D-5*** I am saddened by the short term thinking of the options presented. It is necessary to replace the bridge and address safety issues, but it is not necessary to invite more, higher speed traffic through the heart of two downtowns that up to now have been progressing towards revitalization.

Neil Sealy ***D-6*** The project will cause harm to downtown and to adjacent neighborhoods. The AHTD should replace the bridge and find alternative routes to move traffic and relieve congestion. This includes investing in public transportation.

Coreen Frasier ***D-7*** Congestion and crashes will just move down the road from this area and add to an already costly project. ... We need to be moving away from a car-centric city and toward public transportation. Let's do something innovative and not just stay the course with urban sprawl and more of the same.

Rebecca Cato ***D-8*** I would be happy for the bridge to be fixed, but not expanded. I would be happy for safety to be increased, but there are better ways. The hundreds of millions of dollars proposed in this project could be better used (and less of it] to create mass transit to reduce congestion.

James Henry ***D-10*** I think we need to plan for the 21st century and take public transit into account. I am 24 years old, and people from my generation don't like living in the cities where driving a car is the only option. We need to make Central Arkansas more attractive by adding a dedicated bus rapid transit corridor in the middle lane of the highway functions like a metro train but takes less money to build.

Boyd Maher ***D-11*** I submit that the proposals for bridge rehabilitation, traffic management, alternative modes, etc., [were] removed from consideration far too soon. I'd propose that some combination of these 6-lane alternatives could accomplish most of the goals and objectives for this project at a fraction of the cost.

Kathy Wells D-13 We do not want a project that shifts the problem down the road – literally. If I-30 is widened to 10 lanes, then that flow chokes at the I-630 junction and pressure arises to widen I-630. .... We also want to learn about the other alternatives the second consultant provided: only one has been made public. Let's look at all the options under discussion.

Larry Benefield D-20 [A]lthough I certainly want a safer and better I-30 bridge across the Arkansas River, I am very much opposed to a project that would widen the road, take away valuable land from an urban setting, and divide the downtown area into an east and west that cannot easily be bridged. ... To focus only on what is good for automobiles is shortsighted and reflects traffic policies that are fifty years old.

Carol Lockard Worley D-22 I have recently located my law firm downtown. While I understand the necessity of maintaining the structural integrity of the Arkansas River Bridge, I am against the proposed plan to widen I-30 at the River and at the I-540/I-440 split. Much effort and expense has gone into revitalizing, redeveloping and unifying the River Market, the area around the Clinton Presidential Center, Main Street's Creative Corridor, and the South Main area of Little Rock over the past 20 years. ... The current design for the I-30 expansion would decimate these areas, not to mention the adverse effect it would have on the surrounding historic neighborhoods that border the proposed expansion to the east and the west.

To the same effect, see also comments of Bradley H. Walker (D-27); Scott Schallhorn (D-28); Kerry Brooks (p. 1784); Skip Harris (p. 1786); Mark Gibson (p. 1786) Marsh Guffey (p. 1788); Dale Pekar (p. 1791); Susan Day (p. 1793); Darrell Heuck (p. 1796); Andrea Wills (p. 1796); Martha Delancy (p. 1796) and Daniel Smith (p. 1796), and many others contained in the 117 pages of public comments in the NEPA Public Involvement Summary of the EA.

A substantial majority of the comments submitted were opposed to the Defendants' Preferred Alternative, and also dissatisfied with the lack of alternatives discussed in the EA. (See footnote 8, above).

Defendants' "Revised Project" design – although created due to lack of funds to construct the entire Project as originally proposed, and not from a desire to accommodate public preferences – is an acknowledgement that the entire interstate highway system in central Arkansas does not have to be completely redesigned and widened in order to replace the I-30

bridge. However, Defendants' Revised Project would make congestion even worse than currently exists by creating bottlenecks by merging 12 lanes into six.

(iii) Alternative Routes Were Not Considered

A number of comments were submitted by members of the public who are experienced in the design, construction and operation of highway and other public transportation systems that proposed the development of alternative routes into and through Little Rock and North Little Rock for automobile and truck traffic from I-30, I-40, I-630, and other major traffic arteries. Among such proposals were bypass routes to the west of I-30 along Pike Avenue and Chester Street, and other routes to the east of I-30 that would provide alternate routes into North Little Rock from I-40, known as "the Boulevard plan," the "Pike Avenue Extension Alternative," and the "Chester Street Extension Alternative."

40 CFR §1502.14 (a) requires that the agency "rigorously explore and objectively evaluate ***all reasonable alternatives***, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated. In violation of that regulation, ARDOT summarily dismissed with little to no consideration alternatives proposed by third parties during the PEL Process. ARDOT cryptically explained in the EA that it dismissed these alternatives at that time because of the costs and environmental impacts of the potential bypass routes, and the fact that they would not provide an "efficient connection" between 1-630 and 1- 40. (page 9 of the Alternative Analysis Technical Report, indicated epage 708/3992) With ArDOT's preferred alternative costing approximately $1 Billion dollars, creating new bottlenecks and having numerous environmental impacts, that objection rings hollow.

The Defendants failed to "rigorously explore and objectively evaluate" the reasonable and feasible alternatives that were proposed by the public or their advisors and consultants. The Defendants failed to discuss in any meaningful manner the reasons for no alternatives being seriously considered and analyzed other than the Preferred Alternative proposed by ArDOT and the 8-Lane Alternative that FHWA required ArDOT to consider.

(iv) Use of HOV/Public Transit Lanes Were Not Considered

Alternatives such as the creation and use of high-occupancy lanes or lanes for use of automobiles, buses and other public transit vehicles during specific times of the day on the existing I-30, I-40, I-630 and other major highways were not given serious consideration. Instead, the EA states that ArDOT considered those options in the PEL Study, but rejected them for reasons that are perfunctorily stated in the EA. No opportunity was provided by the alternatives contained in the Environmental Assessment for public comment on any proposal for HOV or public transit lanes on I-30 or other highways feeding into I-30.

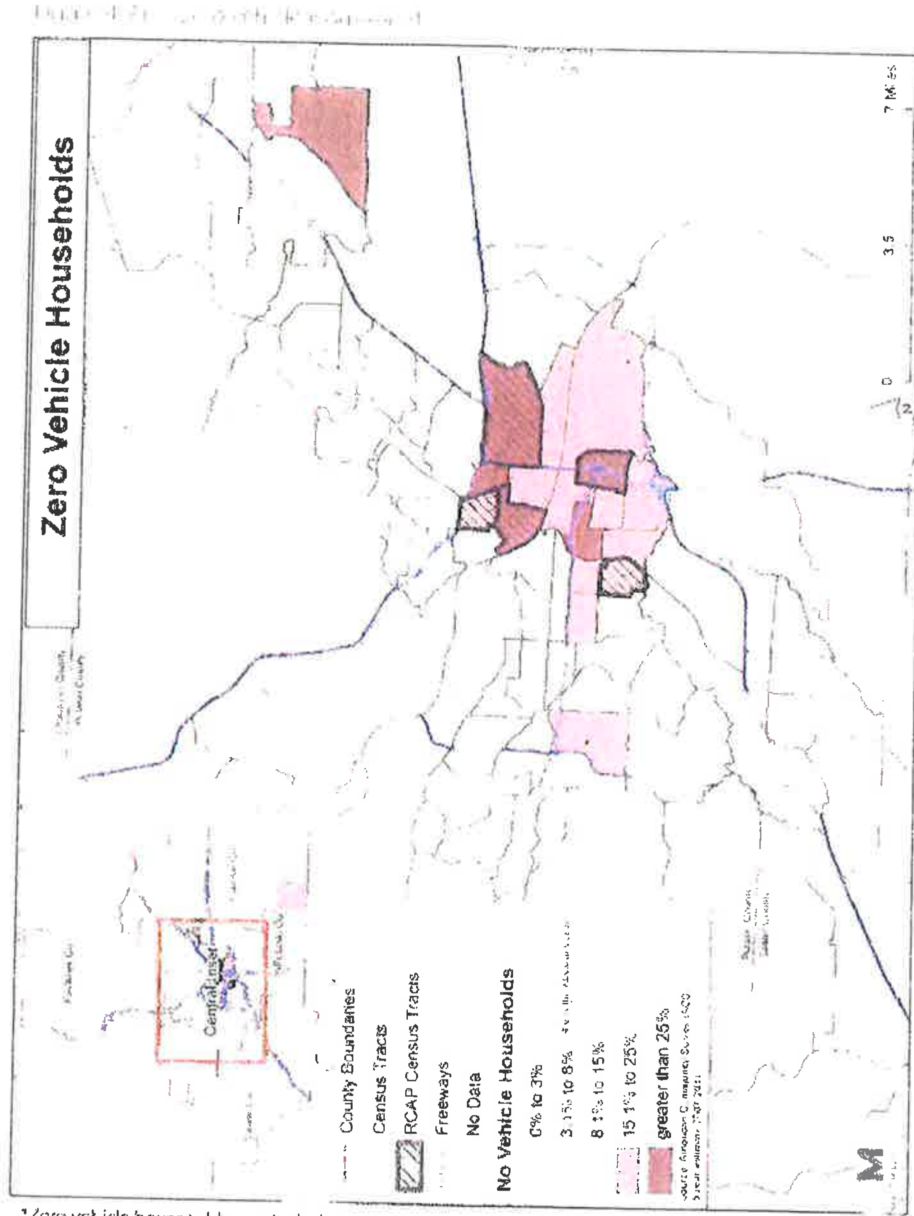
(v) The EA Completely Ignores Public Transit

The Project does nothing for the large number of people in Little Rock and the surrounding area who have no means of dependable and safe privately-owned transportation, many of whom reside in the neighborhoods represented herein by the organizational Plaintiffs.

According to facts developed by Imagine Central Arkansas, *over 25% of the households who live south of the River Market District in Little Rock, including those south of I-630, do not own automobiles.* This is a startling figure. Many of those households contain elderly or low-

income persons who must depend on public transit to commute to and from work, for medical appointments, and for their shopping needs. Persons with those transportation needs are not limited to the geographic area mentioned above, but exist throughout Pulaski County and in surrounding areas. A large percentage of those households are located in the 30 Corridor area. (See Figure 3):

Figure 3



*Zero vehicle households may include group quarter housing, like retirement homes.

23 U.S.C. §134, relative to Metropolitan Transportation Planning, which applied to the development of the EA prepared by the Defendants, provides:

> (c) General requirements.—
>
> > (1) Development of long-range plans and TIPs.--To accomplish the objectives in subsection (a), metropolitan planning organizations designated under subsection (d), in cooperation with the State and public transportation operators, shall develop long-range transportation plans and transportation improvement programs through a performance-driven, outcome-based approach to planning for metropolitan areas of the State.
> >
> > (2) Contents.--The plans and TIPs for each metropolitan area *shall provide for the development and integrated management and operation of transportation systems and facilities (including accessible pedestrian walkways, bicycle transportation facilities, and intermodal facilities that support intercity transportation, including intercity buses and intercity bus facilities and commuter vanpool providers) that will function as an intermodal transportation system for the metropolitan planning area and as an integral part of an intermodal transportation system for the State* and the United States.
> >
> > (3) Process of development.--The process for developing the plans and TIPs shall *provide for consideration of all modes of transportation* and shall be continuing, cooperative, and comprehensive to the degree appropriate, based on the complexity of the transportation problems to be addressed.
> > (Emphasis added)

Notwithstanding the directives in NEPA and in 23 U.S.C. §134(c), the EA does not contain any alternatives for the use or expansion of public transit or discuss in any meaningful way any plan or program for meeting the needs of this considerable portion of the population. Instead, ArDOT states in the EA that public transit is not within the statutory responsibilities of the Department of Transportation, but is instead the responsibility of Rock Region Metro, and for that reason Defendants did not take a hard look at alternatives that included public transit. The "look" that Defendants did take was much too narrow, requiring that the use of the alternative

solve the congestion problems by itself, or claiming that the alternative was the responsibility of another agency:

> The transit alternatives were considered as complementary rather than as a solution that could meet the congestion relief component of the project purpose and need *on their own*. A transit study conducted during the PEL Study indicated that *transit would not divert sufficient trips from auto to transit on I-30 in 2040 to improve driving conditions*. In addition, transit alternatives would *not address roadway and bridge deficiencies or navigational safety*, all of which are components of the project purpose and need. ARDOT supports these transit alternatives, but *their implementation is the responsibility of regional transit agencies*.
>
> EA, Alternative Analysis Technical Report, Sec. 3.3, p. 12

Essentially the same treatment was given to alternative routes proposed by commenters. This is ironic as the Defendants' proposed Project will not address the congestion – indeed it appears to exacerbate it – and is far more expensive than the alternatives proposed by the public or by including elements of mass transit in the Project.

Rock Region Metro, in its comments on the draft EA, pointed out the shortsightedness of ArDOT's approach to the 30 Crossing Project, stating:

> From the outset of this project, METRO has not endorsed the widening of I-30, which will require enormous amounts of investment in one mode of transportation, leaving other modes, transit included, with fewer opportunities for investment.
>
> . . .
>
> [W]e understand that the I-30 bridge is not at the end of its useful life and, therefore, there is time to allow the 30 Crossing "no build" option to move forward and explore the many alternative options for maintaining adequate highway and interstate access in central Arkansas before addressing the reconstruction of the bridge. These alternative options include flexing more transportation funding to mass transit to further incentivize more sustainable transportation choices. Letter from Rock Region Metro to ArDOT dated April 10, 2018 **(Exhibit 5, Plaintiffs' Exhibits Accompanying Motion for Preliminary Injunction)**

NEPA requires that reasonable alternatives *not within the jurisdiction of the lead agency* be considered in the alternatives presented in the EA. 40 CFR §1502.14(c). By failing to consider alternatives that include public transit, Defendants violate the requirement of §1502.14(c).

In addition, ignoring public transit is clearly against the trend in most cities brought about by increasing populations, urban sprawl and a growing segment of people who do not own automobiles. Most major cities rely heavily upon clean, safe and efficient public transit to accommodate the transportation needs of all components of the public – not just the elderly and low-income – and at the same time reduce the demands on the capacity of the existing highways. One bus that holds 60 passengers consumes far less space than 60 cars. As noted above, the 30 Corridor Project is designed primarily to accommodate the needs of the single-passenger private automobile user, and the EA violates 40 CFR §1502.14(c) by failing to include an alternative that fully considers and analyzes incorporating public transit as a means of meeting the needs and purposes of the EA.

(vi) New and Developing Transportation Technology Was Considered, But No Alternatives Were Analyzed

The EA recognized that this is an age of rapidly developing technology in every area of our lives, including automobile design and operation, and in the design and construction of highways to assist drivers in making intelligent choices. An entire chapter of the EA was dedicated to a discussion of existing and emerging technology. The Federal Highway Administration itself has a separate division and a website that focuses on the development and promotion of advanced automobile and highway technology that is already available. In June 2019, FHWA announced a funding opportunity for states, cities and other agencies to compete for

$60 million in Advanced Transportation and Congestion Management Technologies Deployment Program (ATCMTD) grants to fund new technologies that improve transportation efficiency.

Yet, there is no consideration given in the EA to the incorporation of developing technology into either of the alternatives proposed for the 30 Corridor Project, or of an alternative of only conducting necessary maintenance work on I-30 and the Arkansas River Bridge to address traffic flow and safety concerns in the near term, and deferring more extensive, radical and expensive expansion until the existing and emerging technology is readily available. Such technology is currently being used in other states with more complex traffic problems than those presented by the Project, and in other countries.

In addition, the EA does not consider and discuss the current developments in alternative means of transporting people, and the potential effect that those alternative means of transport may have on the highways. The use of "for hire" vehicles, such as Uber or Lyft, is rapidly increasing and has the potential to reduce the number of privately-owned vehicles on the highways. This trend is already apparent in the new traffic volume figures for the 30 Corridor developed by Metroplan, in which traffic in the 30 Corridor has decreased substantially since the issuance of the EA by the Defendants in February 2019.

The EA gives lip service to this, stating that "Technology is advancing at a tremendous rate and is expected to have a significant impact on our society's lives in the future. … Emerging technologies such as connected and autonomous vehicles will dramatically change how we view transportation." It quotes Bill Ford, Jr. stating that "Transportation will change more *over the next 10 years* than it has over the last 100 years." (EA Interchange Justification Report, Appendix B6-Emerging Technologies, p. 1) The EA further states:

> *… thoughtful planners work now with elected officials, specific stakeholders and the public to consider and plan for the eventual*

> *widespread use of CAVs* (Connected and Autonomous Vehicles) within their local transportation systems. They confront the reality that CAVs already are fundamentally altering traditional infrastructure planning horizons, issues and approaches across a broad range of topic; … "
> (Italics added)

Yet, rather than develop and present alternative proposals incorporating technological advances for public review and comment in the EA (as "thoughtful planners" are said in the EA to be doing), the EA changes course and states instead that "history is littered with bold predictions of a world revolutionized by new and emerging technologies – some of which come true, often with unimagined consequences, and others that never materialize in the face of social, economic and technological challenges that could not be easily overcome."

This pessimistic position taken by ArDOT in the EA ignores the current production by the automobile industry of electric vehicles (of which fifty models are currently being commercially produced by automakers), vehicles with electronic safety and assisted-driving features, and autonomous (self-driving) vehicles (AVs) that are currently being developed and used in some areas of the United States. It also ignores the special efforts being made by the Department of Transportation to promote that technology, including the giving of grants to States to incorporate technology into its highway projects. Predictions are that AVs, currently in testing, will be perfected and commercially sold in the U.S., within a very few years.

However, the EA does not propose for public consideration <u>any</u> alternative that incorporates technological advances in transportation. Neither does the EA propose for public consideration <u>any</u> alternative that would limit the work to be conducted on I-30 to that necessary for continued traffic flow and safety (resurfacing, etc.) (with possible replacement of the Arkansas River Bridge), but without extensive expansion, to allow for the continued development of the technology that the EA itself predicts will occur. ArDOT cautions against

constructing a highway based on emerging technologies, but it is equally unwise (if not more so) to spend a billion dollars on a highway that may be obsolete by the time it is finished, and will have to be retrofitted for AVs and other vehicles of the not-too-distant future.

For this reason, the alternative of limiting the work on the 30 Corridor Project to the basic amount required for meeting average demand rather than peak demand, at a far lower cost than the Preferred Alternative, and in conjunction with other alternative routes into and from the metropolitan business area, would appear to be the most prudent course. However, that alternative was not given consideration.

(vii) The Analysis Of Effects Is Flawed Through Faulty Assumptions and Computer Modeling

The EA contains several flaws in its computer modeling of the likely traffic scenarios for Alternatives 1 and 2 and for the No-Action Alternative. Those flaws are that it was assumed in the modeling for Alternatives 1 and 2 that additional lanes would be added to the I-30 segment south of the south terminus of the 30 Corridor Project (i.e., from the intersection of I-30 with I-440 and I-530 to 65th Street). This results in achieving a faster rate of travel and less congestion in the 30 Corridor for the "Action Alternatives", but in more congestion in that area for the No-Action Alternative. In other words, the computer modeling was manipulated to achieve the result that it wanted.

In Metroplan's Comments to ArDOT dated June 9, 2016 **(Exhibit 8 in Plaintiffs' Exhibits),** this discrepancy was pointed out in detail:

> The I-30 study team correctly identified two primary bottlenecks impacting traffic exiting the I-30 Corridor: (1) the 2-lane ramp from I-30 Eastbound to I-40 Eastbound and (2) the merge of I-30, I-440, and I-530 west of and outside the study corridor. However, the two bottlenecks were treated very differently. The bottleneck within the study area was ignored in the 8-lane alternative, and the bottleneck outside the study area was widened. It should not be acceptable to

> refuse to fix an identified bottleneck completely within the study corridor (2-lane ramp as part of the 8-lane alternative) but at the same time fix a bottleneck on I-30 outside the study corridor for which there is no identified funding and which has not been subjected to environmental review....

This is not merely a minor error or oversight on the part of ArDOT. It is a deliberate effort to shore-up its Preferred Alternative at the expense of showing a fair analysis of all the alternatives. Accurate scientific evidence remains essential to an EA or an EIS. *City of Carmel-by-the-Sea v. U.S. Dep't of Transportation*, 123 F.3d 1142 (9th Cir. 1997).

The EA assumes that lanes will be added "on 1-30 in each direction from the South Terminal to 65th Street" in the Action Alternatives only. If adding a lane is the most-likely future condition in the Action Alternatives, then it should be the most-likely future condition in the No-Action Alternative as well. On the other hand, if the addition of lanes "on 1-30 in each direction from the South Terminal to 65th Street" is unneeded in the No-Action Alternative, then the estimated cost of adding these lanes needs to be disclosed and identified as either a dollar-quantified benefit to the Action Alternative or a dollar-quantified cost to the Action Alternatives.

In either event, the presentation of the No-Action Alternative in the EA is skewed to make the Action Alternatives more desirable. In fact, the No-Action Alternative enjoys faster peak hour average speeds on roads connecting to 1-30 than the Action Alternatives as shown in Figures 14 and 15 of Appendix B of Appendix A, page 31, indicated epage 307/3992. One example of the misrepresentations is the statement, "The No-Action Alternative does not relieve congestion or improve mobility," when, in fact, the Action Alternatives do not relieve congestion either.

When an agency relies on a number of findings, one or more of which are erroneous, the court must reverse and remand when there is a significant chance that but for the errors

the agency might have reached a different result. *National Parks and Conservation Ass'n v. FAA*, 998 F.2d 1523, 1533 (10th Cir. 1993). But for the errors and omissions in the computer modeling by ArDOT that distorted the advantages and disadvantages of each alternative, it and FHWA should have reached a different result regarding the performance of an EIS.

This deficiency was pointed out in the Motion for Preliminary Injunction and Brief filed herein on July 3, 2019, which was withdrawn by agreement of the parties. Apparently Defendants believed this to be a serious problem for the EA, because the Reevaluation, Exhibit 3, Sec. 2, p. 1 (ECF 38-3, p. 6), notes in a section entitled "Changes from the Original IJR" that "The changes that led to the request for the re-evaluation included: … "A new capacity project on I-30 between the South Terminal interchange (I-440 & I-530) and 65th Street was added to the Metroplan Transportation Improvement Program (TIP) in 2018. As a result, this capacity project was included in the analysis for the No-Action alternative." However, that does not solve the problem that Plaintiffs have pointed out in the EA and Reevaluation regarding the congestion that will remain in the 30 Corridor as a result of the Project or the Revised Project, nor does it excuse the intent of the Defendants to mislead the public and other reviewers of the EA by "cherry-picking" assumptions for use in their computer modeling to make their preferred alternative look better.

The Reevaluation (Id., p. 3, ECF 38-3, p. 8) shows that, even assuming that if the capacity of I-30 between the South Terminal interchange (I-440 & I-530) and 65th Street is widened by one lane in each direction, the congestion that the modeling showed that existed before those lanes are assumed to exist still largely remains. The Reevaluation states that "slightly less" congestion exists than without the assumed added lanes.

As to other portions of the 30 Corridor, the Reevaluation does not address the effect of increasing the number of lanes up to 12 between the I-630/I-30 interchange in Little Rock northward to E. Broadway Street in North Little Rock (approximately 1.6 miles), with only 6 lanes at each end of that stretch. It appears clear that serious bottlenecks will occur in traffic entering the six lane areas from the wider stretch.

7. *The EA Fails To Adequately Analyze Direct And Indirect Impacts Of The Proposed Action*

40 CFR §1502.16, relative to potential environmental consequences of a proposed project, states that the EA must include discussions of:

(a) Direct effects and their significance (§1508.8).

(b) Indirect effects and their significance (§1508.8).

The EA failed to discuss many of these issues.

(a) Direct Impacts

"Direct impacts" are those that are caused by the action and occur at the same time and place. 40 CFR §1508.8. Among those could be the effects of the project on noise, air toxics, dust, nighttime lighting and other effects on people and things in the immediate area of the project.

Many people, particularly minorities and low-income persons, live in the immediate vicinity of the 30 Corridor Project, and – as much of the work on the 30 Corridor Project will be done on a 24-hour basis – will be directly and constantly affected by the noise, air and light emissions from the Project. The EA failed to adequately assess the impacts of those emissions on people (or, as termed in the EA, "receptors") who live within close proximity to the I-30 corridor, particularly the areas of interchanges with other highways such as I-630, Highway 10 and I-40.

(b) Indirect Impacts

One of the stated purposes and needs of the Project is to reduce traffic congestion and improve speeds of driving into and through Little Rock-North Little Rock. However, the EA acknowledges that one effect of each of the alternatives proposed by ArDOT and FHWA will be to shift the congestion and traffic impediments to other portions of the interstate and other highways in the central Arkansas area. (See discussion of this issue in the section on improper modeling of the project by ArDOT.) It is difficult to find that acknowledgment in the EA because ArDOT and FHWA are attempting to "segment" the interstate system in Pulaski County to avoid addressing all of the congestion issues comprehensively. The subject of impermissible "segmentation" of the I-30 and I-630 highways for purposes of the EA is addressed further below.

(i) The EA Recognizes That Traffic Congestion Will Remain or Be Shifted to Portions of the Interstate System Outside the 30 Corridor Area, But Does Not Analyze the Impacts of That Congestion

The defining geographical limits of the 30 Crossing Project and the EA are shown in Figure 1 at page 4 of this Complaint. Generally, they are where I-30 intersects on the south with I-530 and I-440; on the northwest end at I-40 and State Highway 365 (MacArthur Drive); and at the intersection of I-40 and Highway 67-167 on the northeast end. In addition, I-630 intersects with I-30 in the middle of the corridor. Four interchanges are included in the Project and are critical areas for congestion.

Thousands of vehicles enter the 30 Corridor area each day from each of the terminus points mentioned above. Studies and computer modeling conducted by ArDOT and others have clearly shown (and the EA admits) that, if the 30 Crossing Project is constructed, it will shift

congestion from the 30 Corridor area to other areas outside of the arbitrary boundaries of the 30 Corridor Project.

Those areas include portions of I-30 between the south terminus of the Project, 65th Street, University Street and I-430. ArDOT's modeling also shows that the 30 Corridor Project would immediately cause a bottleneck at the exits to I-630, causing slowing and extensive backup on I-30 North of the I-30 interchange, and onto Highway 67/167 and portions of I-40. The EA does not discuss or attempt to analyze the impacts of those shifts of congestion to those areas outside the 30 Corridor study area.

(ii) The EA "Segments" The Highway System To Avoid An Analysis of All Affected Areas.

The following discussion of segmentation of the highway system by Defendants to avoid a comprehensive analysis of indirect impacts of the 30 Corridor Project also relates to the discussion in this Brief on cumulative impacts contained herein, and should be considered in conjunction with that section.

40 CFR §1508.25, relative to the scope of an EA or EIS provides:

> "Scope" consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) ***Actions*** (other than unconnected single actions) which may be:

(1) ***Connected actions***, which means that they are closely related and *therefore should be discussed in the same impact statement*. Actions
are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) ***Cumulative actions***, which when viewed with other proposed actions have cumulatively significant impacts *and should therefore be discussed in the same impact statement*.

(3) ***Similar actions***, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. *An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.*
(Emphasis added)

The 30 Corridor Project, when considered with I-630, that part of I-30 that extends southward from the Project's southern terminus at I-530 and I-440, and the terminus of I-30 and Highway 67/167 are all connected, cumulative and similar actions as contemplated by 40 CFR §1508.25(a)(1), (2) and (3). As such, those projects and their individual and collective impacts should be considered in the same Environmental Impact Statement.

Evidence that the 30 Corridor Project meets the criteria of 40 CFR 1508.25 for "connected," "cumulative" and "similar" actions is contained in a letter from Scott Bennett of

ArDOT to Metroplan dated April 14, 2017 **(Ex. 9 in Plaintiffs' Exhibits accompanying Motion for Preliminary Injunction),** stating:

> ...Metroplan staff has asked for a statement from the Department regarding future improvements that may be needed on adjacent freeways in order to maximize the improvements being proposed for the 30 Crossing Corridor. These areas of possible future improvement are Interstate 30 from the South Terminal to 65th Street and Interstate 630 from Interstate 30 to the West. Please accept the following statements as the Department's response to this request by Metroplan staff.
>
> - Interstate 30 from the South Terminal to 65th Street-
>   The Department currently has a project programmed (Job BBO619) to reconstruct Interstate 30 from 65th Street to the South Terminal. The Department is also currently studying the Interstate 30 Corridor from the South Terminal to Benton to determine what modifications can be made to improve mobility on that corridor. The development of construction plans for BBO619 has been placed on hold pending the results of the Interstate 30 Corridor study.... [9]
>
> - Interstate 630 from Interstate 30 to the West-
>   The Department does not currently have plans to improve Interstate 630 from Interstate 30 to the West. Due to current and anticipated mobility concerns on the Corridor, the Highway Commission has provided approval for a future study of this portion of Interstate 630; however, a date has not yet been set for this study to commence. Upon completion of this future study and completion of any project specific NEPA processes resulting from the findings of the study, the Department may implement improvements on Interstate 630 as funding becomes available.

(iii) The 30 Crossing Project, the I-30 South of the 30 Crossing Project, And I-630 Are All "Connected" Actions

(a) *Actions are connected if they automatically trigger other actions which may require environmental impact statements. 40 CFR §1508.25(a)(1)*

[9] The Reevaluation, ECF 38-3, p. 6, states that I-30 between the South Terminal Interchange [I-30/I-440/I-530] was added to the Metroplan TIP in 2018.

The EA and documents in the record acknowledge that construction of the 30 Crossing Project will cause bottlenecks within the 30 Corridor, in I-30 south of the 30 Crossing Project area and in I-630, according to ArDOT's modeling. Those bottlenecks require expansion of that part of I-30 to its intersection with I-430, and expansion of I-630 west from its intersection with I-30. This should require the performance of an EIS due to the size of these expansions, their impacts on urban communities, adjacent wetlands and environmentally sensitive areas, and other considerations.

(b) *Actions are connected if they are interdependent parts of a larger action and depend on the larger action for their justification. 40 CFR §1508.25(a)(2)*

Interstate 30 south of the 30 Crossing Project area and I-630 are interdependent parts of the entire interstate system that are centered at the 30 Corridor Project area. Those segments are all in relatively close proximity to each other, and an obstacle or bottleneck affecting one segment usually affects all segments in that area.

(iv) The 30 Crossing Project, the I-30 South of the 30 Crossing Project And I-630 Are All "Cumulative" Actions

There can be little dispute that the 30 Corridor Project, when viewed with the current and proposed actions relating to I-630 and I-30 south of the 30 Corridor Project area have cumulatively significant impacts and should therefore be discussed in the same impact statement. ArDOT's Mr. Bennett, in his April 14, 2017 letter to Metroplan **(Ex. 9)** admits as much by stating that "future improvements… may be needed on adjacent freeways in order to maximize the improvements being proposed for the 30 Crossing corridor." When major highways are interconnected, any significant change in one area of one of the highways could, and usually does, have impacts on the other interconnected highways. The impacts are "cumulatively significant" and should be discussed in the same impact statement or EA.

(v) The 30 Crossing Project, the I-30 South of the 30 Crossing Project, And I-630 Are All "Similar" Actions

These three highway segments are undeniably "similar" within the meaning of 40 CFR §1508.25(a)(3) quoted above. The criteria for "similarity" set forth in that regulation is that they have a basis for evaluating their environmental consequences together, such as common timing, geography and interdependence. These three areas of interstate highways have both. Work is currently being planned for the 30 Corridor section of I-30 and for the section of I-30 immediately south of the 30 Corridor (see ArDOT letter to Metroplan of April 14, 2017 **(Ex. 9),** stating: "The Department currently has a project (Job BB0619) to reconstruct Interstate 30 from 65th Street to the Smith Terminal"). Reconstruction of a portion of I-630 is actually being conducted, and the reconstruction of I-630 east to I-30 is under consideration. All of these projects are "reasonably foreseeable." In addition, I-630 and the section of I-30 immediately south of the 30 Corridor have the common element of each being directly or indirectly affected by the proposed 30 Crossing Project.

The failure to consider all of these highway segments in the 30 Corridor EA or EIS not only violates 40 CFR §1508.25(a), but it constitutes an impermissible segmentation of the 30 Corridor Project from those other segments of interstate highways in an effort to avoid considering them in the same environmental analysis. The argument against that "segmentation" is made in the section of this Brief on Cumulative Impacts, and the Court is requested to consider the arguments made in that section on this issue.

Assuming the modeling of predicted congestion on I-30 and I-630 is correct, it will be necessary to continue to widen I-30 south to I-430 and I-630 westward from its intersection with I-30, as well as other highways that feed into the 30 Corridor area. ArDOT's analysis shows that to prevent bottlenecks caused by the flow of cars through the expanded I-30 on other portions of

interstates in Central Arkansas, those freeways will have to be widened to eight lanes, at a cost of $4 billion.[10] Those are projects that ArDOT currently has under review and in planning, and as ArDOT used the addition of lanes to I-30 south of the Project and I-630 west of the Project in its assumptions, it must be planning on such construction occurring.

Notwithstanding these obvious problems and inconsistencies, ArDOT and FHWA have attempted to isolate the 30 Corridor Project into a separate segment in an attempt to avoid determining the environmental impacts of resolving the traffic problems that will be created or be exacerbated in other connecting segments. NEPA does not allow Defendants to subdivide projects that do not have independent utility or logical termini simply to expedite the NEPA process or avoid addressing environmental impacts.

Regulations adopted to implement the FHWA's compliance with NEPA address improper segmentation and provide that "the action evaluated in each EIS or finding of no significant impact (FONSI) shall:

> (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
>
> (2) Have independent utility or independent significance, *i.e.* be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
>
> (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements."
> 23 F.R. § 771.111(f).

Because of the interdependence of each segment of I-30 from at least the intersection of I-430 through the 30 Corridor, the 30 Corridor Project sector of I-30 has no logical terminus at

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10 Comments of ArDOT's Connecting Arkansas Program manager Jerry Holder (director of Garver Engineers) that to prevent bottlenecks caused by the flow of cars through the expanded I-30 onto other portions of interstates in Central Arkansas would require those other freeways to be widened to eight lanes, at a cost of $4 billion (Arkansas Times Blog, October 15, 2015)

any of the points used in the EA, nor does it have "independent utility." The proposed terminus points are simply arbitrary points selected by the ArDOT to avoid assessing the acknowledged environmental consequences of the Project on other areas of I-30 and I-630. Further, the construction of the 30 Corridor Project would clearly restrict consideration of alternatives for reasonably foreseeable alterations required for I-630 and I-30 south of the I-30/I-440/I-530 interchange.

The failure to include the segment of I-30 south of the Project boundary to I-430, and the segment of I-630 west from its intersection with I-30 does not meet the requirements of 23 CFR §771.111(f), or the criteria contained in 40 CFR §1508.25. The segmentation of the 30 Corridor Project from other portions of I-30 not within the Project geographic area, and from I-630 was improper.

8. The EA Does Not Address the Indirect Impact Of The Project On Minority and Low-Income Residential Areas

The declaration of policy contained in NEPA, Section 101, recognizes "the profound impact of man's activity on the interrelations of all components of the natural environment," particularly the profound influences of population growth, high-density urbanization, and industrial expansion.

40 CFR §1508.14 further defines the "human environment" as including "the natural and physical environment and the relationship of people with that environment. ... When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment." Thus, NEPA applies to urban environmental effects

and effects on the quality of life for citizens of neighborhoods affected by a proposed project, including economic and social impacts as well as those affecting the natural environment.

This is a subject that directly affects the organizational Plaintiffs in this case and their members. According to the EA, Thirty-Three percent (33%) of the households in the study area are considered to be low-income, and 59% of the population in the Project Study Area are majority non-white and Hispanic. Twenty-two of the 62 census block groups in the Project Study Area have median incomes below the poverty guideline. The Project Study Area and the census blocks referred to in the EA include those of the organizational Plaintiffs' neighborhoods.

Defendants purported to analyze the effects of the Project on "Community Cohesion." The EA (CITR) defines "Community Cohesion" as:

> a term that refers to an aggregate quality of a residential area. Cohesion is a social attribute that indicates a sense of community, common responsibility, and social interaction within a limited geographic area. It is the degree to which residents have a sense of belonging to their neighborhood or community or a strong attachment to neighbors, groups, and institutions because of continual association over time." (EA e-page 1944/3992).

The EA concludes that "...the project would have a beneficial effect on communities due to...increased community cohesion..." without providing any substantiation whatsoever. EA, page115, Indicated e-page 132/3992. It continues:

> The proposed improvements would not further separate, divide, or isolate these neighborhoods or other adjacent neighborhoods, ethnic or other specific groups, because the 1-30 facility is an existing interstate and no new alignment or location is proposed for the alternatives.

There is no support cited for that statement, and history has shown that the construction or widening of an interstate in an urban area will further divide communities in a city. It happened in Little Rock with the construction of I-30 and I-630. While I-30 is an existing facility, the proposed Project would substantially enlarge and expand it, making the

divide between the communities east of I-30 and south of I-630 even more visibly, commercially and politically remote from the rest of Little Rock.

The Reevaluation adds nothing to this component of the EA except that it mentions that this Project would result in "potential green spaces that local neighborhoods could use to improve east-west connectivity." Reevaluation, ECF 38-8, p. 10. While "potential green spaces" sound attractive and promising, the residents of the neighborhood organizations have little, if any, ability or funding to "improve east-west connectivity," and ArDOT and the City of Little Rock have indicated that they will not be responsible for doing so. Consequently, those green spaces may not realize their "potential."

There is a long history of the construction of I-30 and I-630 causing disproportionately high and adverse environmental effects on the citizens who reside on the east side of the 30 Corridor Project and west of I-30 and south of I-630. The EA acknowledges that the people who reside in those areas consist of a high proportion of minorities, and the evidence is strong that they have suffered economically and socially by being separated from the remainder of the City. For example, after construction of I-30 and I-630, the market values of property south of those highways fell dramatically, and today remain far below those of property north of I-630. See comments of Little Rock Mayor Frank Scott at transportation conference. **(Exhibit 10)**

As a result, many members of the organizational Plaintiffs who live east of I-30 and south of I-630 feel isolated from the City of Little Rock, and neglected by the City relative to services provided to the City west of I-30 and north of I-630. There is little "community cohesion" or "social interaction" relative to other parts of Little Rock, and many of those residents do not have a sense of belonging or strong attachment to neighbors, groups or the institutions of the City.

Neither the EA or the Reevaluation made any effort to examine this sense of alienation, or how the Project would impact it.

The EA discusses a few benefits that it claims the largely minority, low-income citizens in those areas will derive from the 30 Corridor Project (such as sidewalks and bike paths over or under I-30), but it fails to discuss the disadvantages that those same citizens will sustain by being further separated from the City by an even wider and more complicated I-30 Corridor and its intersection with I-630, to say nothing of increased noise and toxic fumes as a result of the projected increased traffic. Twenty-five percent (25%) of the people who live in those areas do not have automobiles, and it is a safe assumption that an even greater percentage do not ride bicycles or walk across, under or over I-30 or I-630 to go to the market, their doctors, jobs or other places on the other side of I-30 or I-630 from where they live. Bike paths, sidewalks and potential green spaces will not be of significant benefit to the people who live east of I-30. They would benefit more from public transit, which was not substantively addressed in the EA or Reevaluation.

The EA fails to adequately assess the socio-economic impact of the proposed 30 Corridor Project upon the minority non-white and Hispanic populations and communities who reside in or have businesses in the vicinity of the 30 Corridor. Instead, it essentially states that the Project will not have a disproportionately high impact on those populations and communities because most of the inhabitants of the area are minority and low-income – a "bootstrap" argument. NEPA and Executive Order 12898 require agencies to "identify[] and address[], as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." It is a cynical

perversion of those lofty requirements for the EA to find that there is no such effect because the minority and low-income populations make up the majority of people affected.

9. ***The EA Fails to Sufficiently Identify and Analyze the Health Effects of Mobile Source Air Toxics That Would Be Produced by This and Other Projects***

The EA does not fully address the potential indirect and cumulative impacts of the 30 Crossing Project on persons who reside in the vicinity due to Mobile Source Air Toxics (MSATs). It is widely accepted and recognized through medical and scientific studies that vehicular traffic on interstates and other high-traffic roads emit a number of MSATs that are harmful to human health, particularly the elderly and children. (See *30 Crossing Strategies: White Paper*, Nelson/Nygaard Consulting Associates, Inc. report prepared for City of Little Rock June 6, 2016, in which it is stated that "Freeways are essentially toxic areas.") The U.S. Environmental Protection Agency and Defendant FHWA also recognize the risk of MSATs in their official publications.

The EA states that one of the needs and purposes of the proposed Project is to accommodate an even greater volume of traffic on the I-30 Corridor, and at higher speeds. FHWA claims that the volume of vehicles on the 30 Corridor will increase to approximately 165,000 vehicles per day by 2040, but, at the same time, remarkably maintains that the volume of MSATs that will be emitted by those vehicles will be lower than current levels.

The reason for this seemingly contradictory conclusion is because ArDOT claims that proposed new emissions regulations proposed by the Obama Administration would require more

efficient automobile engines that would reduce emission of air toxics substantially.[11] Whether that was true is irrelevant because those regulations proposed during the Obama Administration to lower the emission levels of automobile and light truck engines were withdrawn by the Department of Transportation in 2018. In fact, in April 2020, the DOT and EPA published final rules amending the Corporate Average Fuel Economy (CAFÉ) and greenhouse gas emission standards for passenger cars and light trucks to less stringent standards for model years 2021 through 2026 (85 Fed. Reg. 24174, April 30, 2020) which will increase emissions, not reduce them. As a result, there is no scientific study or calculation in the EA to support Defendant's claim that the volume of MSATs emitted by the predicted increased number of vehicles in the future will be less than those currently emitted.

The Defendants' continued reliance on the premise that MSATs will decline as a result of more stringent automobile and truck emissions standards is disingenuous and even dangerous because, without sampling and analysis of air toxic emissions in the 30 Corridor, persons in that area – including elderly, children and asthmatics – will unknowingly be exposed to those toxic chemicals.

To make the EA's inadequate analysis of air toxics in the EA even more significant, there are two large schools on the edge of the 30 Corridor and the intersection of I-630. There is also a small school and a college immediately adjacent to the 30 Corridor in North Little Rock.

The EA did not give adequate consideration to the presence of those schools near the 30 Corridor, nor whether they had ventilation systems that could filter the pollutants that will be emitted from the vehicles on the Interstate. The U.S. EPA is sufficiently concerned with the

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11 See, Updated Guidance on Mobile Source Air Toxic Analysis in NEPA Documents, U.S. Department of Transportation, Federal Highway Administration, October 18, 2016. ("The MSAT Guidance")

MSAT problem that is issued a document entitled "Best Practices for Reducing Near-Road Pollution Exposure at Schools" (EPA, Nov. 2015), the purpose of which is to "help school communities identify strategies for reducing traffic-related pollution exposure at schools located downwind from heavily traveled roadways (such as highways) along corridors with significant trucking traffic, or near other traffic or vehicular pollution sources.

The EPA publication begins with the following opening paragraph:

> Exposure to traffic-related air pollution has been linked to a variety of short- and long-term health effects, including asthma, reduced lung function, impaired lung development in children, and cardiovascular effects in adults. Children's exposure to traffic-related air pollution while at school is a growing concern because many schools are located near heavily-traveled roadways.... Studies show that concentrations of traffic-related air pollutants can be elevated inside classrooms, and that traffic is one of the most significant sources of air pollution in both the indoor and outdoor school environments. (The "Best Practices" document is found as **Ex. 11** in Plaintiffs' Exhibits Accompanying Motion for Preliminary Injunction.)

Finally, EPA's own MSAT Guidance Document provides, notwithstanding the level of vehicle emissions, that in "specific project circumstances," sampling and analysis of the nine priority MSAT chemicals *should be conducted.* One of those "specific project circumstances" is in "Projects with Higher Potential MSAT Effects." The Guidance states that, to fall into this category, a project should:

- Create <u>new capacity or add significant capacity</u> to urban highways such as <u>interstates</u>, urban arterials, or <u>urban collector-distributor routes</u> with traffic volumes where the AADT (Average Annual Daily Traffic) is projected to be in the range of 140,000 to 150,000 or greater by the design year;

And also

- Be proposed to be located in <u>proximity to populated areas</u>.

(Underlining provided)

The Guidance provides that "Projects falling within this category should be more rigorously assessed for impacts. … This approach would include a quantitative analysis to forecast local-specific emission trends of the priority MSAT for each alternative, to use as a basis of comparison. This analysis also may address the potential for cumulative impacts, where appropriate, based on local conditions."

The 30 Corridor Project fits neatly within the description contained in FHWA's MSAT Guidance for sampling and analysis of MSATs that currently exist and are projected for the design year. Defendants violated their own Guidance document by failing to conduct a quantitative analysis of the potential impacts of MSATs for the Project, and should be required to do so.

10. The EA Fails to Adequately Assess the Indirect Impacts of the Project On Wetlands, Water Quality and Flooding

In addition to NEPA's requirement for analysis of indirect impacts, the Corps of Engineer's regulations at 40 CFR §230.10(a), relative to the placement of fill in wetlands as part of a project development, states:

> [N]o discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

Furthermore, EPA Guidelines developed in conjunction with the U.S. Army Corps of Engineers further provide that, where a project is not "water dependent "(*i.e.*, must have access or proximity to water or the special aquatic site to fulfill its basic purpose, such as a wharf or harbor), *a presumption exists* that practicable alternatives <u>are</u> available that do not involve special aquatic sites (*i.e.*, wetlands), *unless clearly demonstrated otherwise*. 40 C.F.R. §230.10(a)(3)

The EPA Guidelines also provide that a presumption exists that where a discharge is proposed for a special aquatic site (*i.e*., wetlands), all practicable alternatives to the proposed discharge that do not involve a discharge into a special aquatic site *have less adverse impact* on the aquatic ecosystem, unless clearly demonstrated otherwise. *Id.*

Executive Order (EO) 11988 (1977) relative to Floodplain Management, directs federal agencies to "provide leadership and take action to reduce the risk of flood loss, to minimize the impacts of floods on human safety, health and welfare, and to restore and preserve the natural and beneficial values served by floodplains." This EO was authorized to assist in furthering the National Environmental Policy Act (NEPA), the National Flood Insurance Act of 1968 (amended), and the Flood Disaster Protection Act of 1973.

Changes in the floodplain, such as adding fill material from highway construction and widening, constructing buildings or bridges, or constricting a channel, can cause a rise in the water surface elevation. This increase in the water surface elevation can subsequently impact properties not previously affected and are consequently regulated by FEMA. Floodplain impacts are measured by the change in the water surface elevation or Base Flood Elevation (BFE). (EA, Appendix O, page 4, Sec. 3.0, lines 11-15)

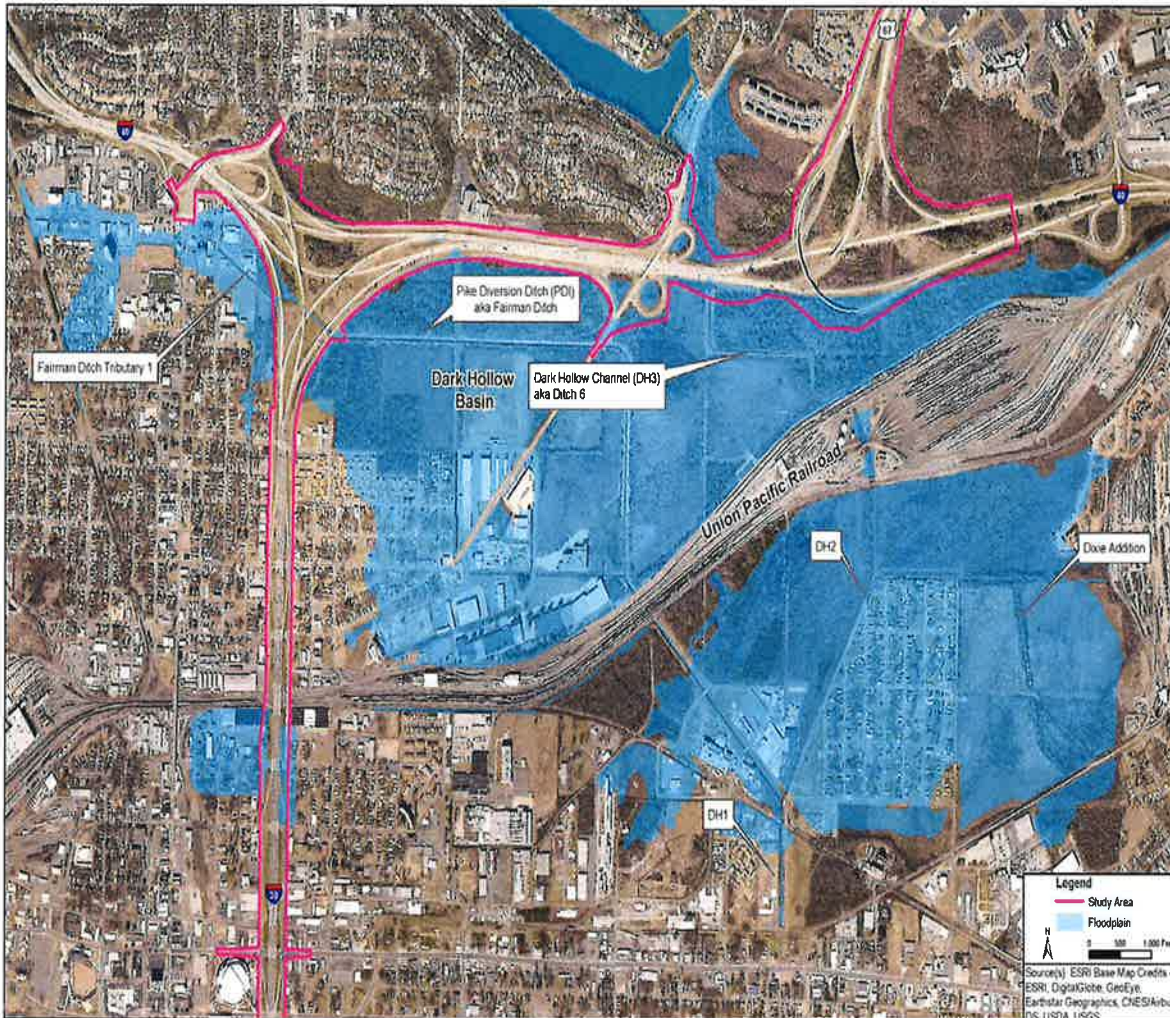
This is of particular concern to the residents of organizational Plaintiff Dark Hollow Community Development Corporation, who have been plagued with frequent flooding for many years. Appendix O to the EA states that, in the Dark Hollow area of North Little Rock, approximately 18.01 acre-feet (Ac-ft) of permanent fill would be placed below elevation 252 (the base flood elevation) with the 8-Lane GP Alternative, and 17.43 Ac-ft of permanent fill would result from the 6-lane with C/D Alternative (Figures 4 and 5).

Appendix O to the EA further states:

> Mitigation in the form of compensatory storage would be created to replace the storage lost in the Dark Hollow floodplain due to permanent roadway fill. In the I-30/I-40 interchange, three areas were identified as contiguous and hydraulically connected to the Fairman Ditch, which passes through the interchange from west to east. These flood storage areas are shown on Figure 6. As flood surface elevations rise in Fairman Ditch, flood waters would spill out of the channel and fill the contiguous flood storage areas. The areas would be graded to allow flood waters to drain to the Fairman Ditch (Attachment B). The exact method of making this connection would be the responsibility of the Design Builder. The volume able to be created in these three areas is 11.57 Ac-ft, 3.67 Ac-ft, and 10.85 Ac-ft, for a total of 26.09 Ac-ft. This is an excess of 8.08 Ac-ft over the worst case amount of fill that would result from any of the Action Alternatives in the Dark Hollow floodplain.

The Dark Hollow area (a/k/a the Dark Hollow Basin) of North Little Rock covers approximately 6,000 acres in North Little Rock, generally bound on the west by I-30, on the north by I-40, on the east by high ground in the Rose City Dixie area, and on the south by the Arkansas River. The northern and western portions of the area consists of relatively steep, hilly terrain north of Interstate 40 and west of Interstate 30. During storm events, those hilly areas drain into Dark Hollow, which contains a large area of wetlands. The wetlands serve as holding areas for the storm water, filter out pollutants and debris from upstream and from the Interstate highways; and provide sanctuary and breeding grounds for birds, small mammals, certain fish and amphibians. The wetlands in the Dark Hollow Basin contribute directly to water quality of the Arkansas River and flood control in areas adjacent to Dark Hollow.

The extensive flood plain in the Dark Hollow area of North Little Rock is shown in the following Figure 2. The flood plain is in the blue color, which covers the vast majority of the North Little Rock area south of I-40 and east of I-30.



The Fairman Ditch (also denominated the "Pike Diversion Ditch") referred to in the above-quoted excerpt from Appendix O, is a large ditch that transverses the Dark Hollow area. The Ditch begins in the southwest of the quadrant I-30/I-40 interchange, and runs under the south part of the interchange in an East-West direction for approximately 4700 feet before turning south through and under the Union Pacific Railroad yards, through North Little Rock east of I-30, and ultimately through the Redwood Tunnel ("the Tunnel") and into the Arkansas River. Several other drainage ditches flow into the Ditch from other areas in the northeast section

of Dark Hollow, significantly increasing the flow of storm waters through the southeastern part of North Little Rock.

Flooding frequently occurs in North Little Rock as a result of rain events in which water is channeled through the Fairman Ditch and into areas of North Little Rock south of Dark Hollow, into the Redwood Tunnel. The Tunnel was constructed in 1911; is concrete-lined; is approximately 6.5 feet wide by 7.5 feet high; is approximately 2,640 feet long; and is in a terrible state of repair. The Corps of Engineers has determined on numerous occasions that the entire Dark Hollow drainage system, including the Fairman Ditch and the Tunnel, is inadequate to handle rainfall in excess of a *five-year* flood. See Appendix O, Section 4.0, p. 5), which provides in part:

> The Redwood Tunnel was identified in the *North Little Rock, Dark Hollow Limited Re-Evaluation Report (USACE, 2012)* as undersized with respect to the flow it carries.
>
> In an effort to evaluate alternatives to alleviate flooding in the Dark Hollow Basin, the *North Little Rock, Dark Hollow Limited Re-Evaluation Report (USACE, 2012)* analyzed conveyance and storage improvements using HEC-HMS and HEC-RAS. The *North Little Rock Dark Hollow Limited Re-Evaluation Report (USACE, 2011)* recommended conveyance improvements focused on the existing channels and the Redwood Tunnel, as well as storage improvement located in the Dark Hollow floodplain.

A number of additional assessments of the Tunnel have been conducted by the Corps of Engineers in connection with the City of North Little Rock since 1975 with a view to reworking the channels and replacing or repairing the Tunnel. However, no work has been performed pursuant to those studies. As a consequence, the Dark Hollow area and portions of North Little Rock south of Dark Hollow continue to be subject to frequent flooding following heavy rains.

In addition, a major residential apartment development known as The Pointe at North Hills is under construction on the northeast corner of the intersection of I-40, Highway 67/167,

and Park Hill Road in North Little Rock. The development has involved the leveling of approximately 70 acres of a hilltop upgradient of the Dark Hollow basin, and the permanent filling of over 500 feet of ephemeral and intermittent streams and 6.7 acres of wetlands in the drainage area of Dark Hollow. The leveling, clearing and paving over of the 70-acre development site, the fill of the 6.7 acres of wetlands and diversion of water from that site into the Dark Hollow area will increase the flow of stormwaters into the Fairman Ditch and the Redwood Tunnel, exacerbating the flood problems in North Little Rock east of I-30.

Furthermore, the Dark Hollow area and areas south of it in North Little Rock are predominantly occupied by minority and low-income populations. No analysis appears in the EA of the impacts on such populations resulting from changes in flood levels in NLR due to the elimination of the 26 acres of wetlands from the Dark Hollow, the addition of flood waters from the Pointe at North Hills Project immediately upgradient of the Dark Hollow basin, and the grading of the proposed wetlands fill area to direct drainage of storm waters into the Fairman Ditch (and from there to the Redwood Tunnel and the Arkansas River). This omission is a serious violation of NEPA's requirements for assessment of indirect and cumulative impacts and also EO 12898.

Furthermore, the Defendant FHWA has promulgated regulations found at 23 CFR §650.111, relative to location hydraulic studies to be conducted prior to construction of highways to determine the potential impact of the construction on the human environment. That regulation provides in relevant part:

> (a) National Flood Insurance Program (NFIP) maps or information developed by the highway agency, if NFIP maps are not available, shall be used to determine whether a highway location alternative will include an encroachment.
>
> (b) Location studies shall include evaluation and discussion of the practicability of alternatives to any longitudinal encroachments.

(c) Location studies shall include discussion of the following items, commensurate with the significance of the risk or environmental impact, for all alternatives containing encroachments and for those actions which would support base flood-plain development:

(1) The risks associated with implementation of the action,

(2) The impacts on natural and beneficial flood-plain values,

(3) The support of probable incompatible flood-plain development,

(4) The measures to minimize flood-plain impacts associated with the action, and

(5) The measures to restore and preserve the natural and beneficial flood-plain values impacted by the action.

(d) Location studies shall include evaluation and discussion of the practicability of alternatives to any significant encroachments or any support of incompatible flood-plain development.

(e) The studies required by §650.111 (c) and (d) shall be summarized in environmental review documents prepared pursuant to 23 CFR part 771.

(f) Local, State, and Federal water resources and flood-plain management agencies should be consulted to determine if the proposed highway action is consistent with existing watershed and flood-plain management programs and to obtain current information on development and proposed actions in the affected watersheds.

There appear to be no location studies conducted of the impact of the 30 Corridor Project on the Dark Hollow area to meet the requirements of 23 CFR §650.111.

Defendants were fully aware of the flooding problems in the Dark Hollow area of North Little Rock and the inadequacies of the Redwood Tunnel during preparation of the EA. At least two meetings were held between the 30 Corridor Project Team commissioned by ArDOT and representatives of the City of North Little Rock regarding "floodplain impacts on Dark Hollow." The development of the "Pointe at North Hills" Project was also discussed in one of the meetings.

The first meeting was held on October 11, 2016, in which the following subjects were discussed:

(a) potential impacts of the Project on floodplains in the Dark Hollow;

(b) discharge of waters into the Fairman Ditch (which leads to the Redwood Tunnel);

(c) a "new development" being constructed in the northeast quadrant of the I-40/North Hills Boulevard Interchange that may have floodplain impacts. [That "new development" is a large apartment complex known as the Pointe at North Hills, which has filled an extensive amount of stream and wetlands.]

According to the Minutes of that meeting, the Project Team's response to the latter information (in (c), above) was that "*the project team is only responsible for floodplain impacts related to the I-30 Project*." That is obviously wrong. The Project Team was obligated to consider the indirect and cumulative impacts of the Pointe at Park Hill project on the Dark Hollow area in conjunction with projected impacts of the 30 Crossing Project and any other past, current or reasonably foreseeable future projects that might impact that area. However, the EA does not mention or analyze such indirect and cumulative impacts.

A copy of the Minutes of the meeting of October 11, 2016 is included as **Exhibit 12** in Plaintiffs' Exhibits Accompanying Motion for Preliminary Injunction.

As noted above, the EA does not discuss the indirect and cumulative impacts of the Pointe at North Hills project and the 30 Crossing on the Dark Hollow area and North Little Rock. However, the FONSI, in summarizing the cumulative impacts analysis of the EA, states:

> *Since the time the [indirect and cumulative impacts] analysis [in the EA] was performed*, other considerations have been included in the cumulative impacts analysis and reflected in the EA in response to public comments. This includes the proposed developments for Amazon and the Pointe at North Hills apartments as well as planned transportation projects. [The FONSI includes a table of planned transportation projects within the Resource Study Areas] Projects along I-40 and

> I-30 are being studied; however, scope and plans for these projects have not yet been determined at this time.
> (FONSI, p. 23)

From this, we ascertain that several specific projects (Amazon's locating a distribution center in the Dark Hollow area and the Pointe at North Hills Project) were added to the EA after the EA cumulative impacts analysis was completed, and apparently as a result of public comments about their omission, but before the FONSI was prepared. This is another reason why the draft FONSI, or a revised draft EA should have been issued for public review and comment.

Also, the FONSI refers to certain "planned transportation projects" listed in the FONSI. It is not clear from the FONSI whether those transportation projects were included in the EA or not. Regardless, it is highly significant that *the EA issued to the public for comment did not include the Amazon and Pointe at North Hills projects or any of the planned transportation projects* so that the public could, prior to issuance of the FONSI, review the analysis, if any, of the cumulative impacts that those projects and the 30 Corridor would have on the environment of Dark Hollow and North Little Rock.

Further, the FONSI states that "Projects along I-40 and I-30 are being studied; however, scope and plans for those projects have not yet been determined at this time." (FONSI, p. 23) The FONSI does not identify those projects so it is impossible to determine whether any likely impacts of those projects are required to be analyzed. *The test for including future projects in an EA cumulative impact analysis is not necessarily the stage of their development, but whether they are "reasonably foreseeable." Sierra Club v. Marsh,* 976 F.2d 763, 767 (1st Cir. 1992); *Western North Carolina Alliance v. North Carolina Dept. of Transp.*, 312 F. Supp. 2d 765 (E.D., N.C. 2003).

Defendants should, at a minimum, identify the future projects so that some projection could be made about possible cumulate impacts. The CEQ document "Considering Cumulative Effects under the National Environmental Policy Act (CEQ, 1997) states that agencies must consider the potential cumulative impacts of future projects even if their precise scope and design are not known:

> "NEPA litigation (*Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission,* 481 F.2d 1079 (D.C. Cir. 1973) has made it clear that "reasonable forecasting is implicit in NEPA and that it is the responsibility of federal agencies to predict the environmental effects of proposed actions before they are fully known. CEQ's regulations provide for including these uncertainties in the environmental impact statement where the foreseeable future action is not planned in sufficient detail to permit complete analysis," citing 40 CFR §1502.22 (the agency shall include the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.)

Defendants cannot issue an EA for public comment, and then, after closure of the public comment period, add elements and significant information to the EA, and then issue a FONSI based on that modified and changed EA. 40 CFR §1502.9 requires that "agencies shall prepare supplements to either draft or final environmental impact statements if … (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." The EA as originally issued was already defective in its analysis of cumulative impacts on the Dark Hollow/North Little Rock area, but when additional information is added to the EA after the public comment period is closed without providing the public an opportunity to review the revised EA before a decision is made, NEPA is violated even more.

11. *The EA Fails To Address Direct and Indirect Impacts On The River Market, Clinton Presidential Park, Heifer International, North Little Rock Riverfront Park/Argenta Areas And the Rock Region Metro System*

Some of the most rapidly developing and thriving areas of the Little Rock – North Little Rock metropolitan area are along or near the banks of the Arkansas River in both cities. The existing easy access to those areas from Interstate 30 and a relative abundance of on-street parking or conveniently-located parking lots has been instrumental in that development. The Project may well have an adverse impact on that growth and the future of those areas.

The proposed 30 Corridor Project will significantly affect the River Market, Clinton Library Park, Heifer International, the Central Arkansas Library, and other areas and institutions by:

(i) changing the points of entry and exit to and from I-30 in Little Rock by moving them south approximately four to six city blocks, making it more difficult and time-consuming for persons to gain access to those areas, and limiting direct access from the River Market area west of I-30.

(ii) The I-30/Highway 10 interchange will be eliminated, and traffic patterns will be changed. Persons who visit the River Market District, or reside in those areas and in the historic neighborhoods immediately to the south of the River Market District in Little Rock will experience loss of scarce on-street parking, creation of one-way streets and increased traffic. This loss of parking will, in turn, affect the numerous merchants, restaurants, bars, museums and other attractions in that area.

(iii) The area currently beneath the I-30/Highway 10 interchange is proposed to be "green space," but neither ArDOT nor the City of Little Rock have agreed to

develop it. Second Street will be closed, and vehicular and pedestrian access to those major tourist attractions will be much more restricted.

(iv) The Rock Region Metro's streetcar trolley will no longer be able to run to either the Clinton Center or Heifer International, and Rock Region Metro will be required to bear the cost of removing the poles on which the electrical lines that power the trolley are strung. The impact of discontinuing this trolley route on Rock Region Metro's financial condition has not been assessed. Equally important, the inability to carry tourists from the hotels in the downtown/River Market district to the Clinton Center/Heifer International could have a significant indirect impacts on the hotels, restaurants, offices and other attractions in the downtown/River Market area.

These concerns were voiced by Mr. Walter Malone, Planning Manger of the City of Little Rock, in response to questions presented to him by the Defendants' contractor during the Reevaluation of the EA about the potential impact of the Project on the City. Some of those questions, and Mr. Malone's answers, were:

4.Q. In your opinion, would the proposed project prohibit development in your jurisdiction or planning area, and if so, why?

4.A. Could negatively impact immediate area [River Market] which is developing as an entertainment residential area where walkability is of high value. There are concerns on how the parallel roads as well as 4th Street, Capitol Avenue and 6th Street will all work for non-vehicle modes of transportation – foot and bike primarily. This area needs to be walkable to continue the existing development pattern.

5.Q. In your opinion, would the proposed project affect or change the type of development within your jurisdiction, and if so, why?

5.A. It could, the connections across the project to link the areas east and west of the freeway as well as the walkability of the streets adjacent to I-30 will be critical.

(Reevaluation, ECF 38-7, p. 16.)

The indirect impacts of these changes in access, parking, traffic patterns and public transportation modes, including the Rock Region Metro, to connect the areas east and west of I-30 has not been sufficiently analyzed in the EA. The importance of the continued prosperity of that area to Little Rock and Central Arkansas merits the preparation of more intense examination in an EIS.

12. The Environmental Assessment Failed To Adequately Assess Cumulative Impacts

40 CFR §1508.12 defines "cumulative impacts" as "the impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable actions regardless of what agency (federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."

The obligation of agencies to include an analysis of the cumulative impact of the proposed project with other past, present and reasonably foreseeable future actions has been frequently confirmed by the Supreme Court and the various Circuit Courts. *See Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Mid-States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003); *Kern v. U.S. Bureau of Land Management*, 284 F. 3d 1062 (9th Cir. 2002); *City of Carmel-By-The-Sea et al v. U.S. Dept. of Transportation,* 123 F.3d 1142 (9th Cir. 1997) ("The

duty to discuss cumulative impacts in an Environmental Impact Statement is mandatory."); *Natural Resources Defense Council v. Callaway,* 524 F. 2d 79 (2d Cir. 1975); *Colorado Environmental Coalition v. Dombeck,* 185 F.3d 1162 (10th Cir. 1999).

An EA fails to satisfy the requirements of NEPA if it does not contain an adequate evaluation of the cumulative impacts of a project. *See Natural Resources Defense Council, Inc. v. United States Army Corps of Engineers,* 457 F.Supp.2d 198, 230-31 (S.D.N.Y.2006); *Sierra Club v. Bosworth,* 352 F.Supp.2d at 925-27; and *Wyoming Outdoor Council Powder River Basin Resources Council v. United States,* 351 F.Supp.2d 1232, 1243 (D. Wyo. 2005). "Evidence is increasing that the most devastating environmental effects may result not from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time." CEQ, "Considering Cumulative Effects Under the National Environmental Policy Act", p. 1.

A "reasonably foreseeable action is one that is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Mid-States Coalition for Progress* 345 F.3d at 549; *Dubois v. United States Dep't of Agriculture,* 102 F. 3d 1273, 1287 (1st Cir. 1996)

Regarding future projects, those projects that are in the "study stage" of development are sufficiently likely to occur that their cumulative impacts should be analyzed. *City of Carmel-By-The-Sea*, 123 F.3d at 1160; *Marsh*, 832 F.2d 1489; and *Natural Resources Defense Council v. Callaway*, 524 F. 2d 79 (2d Cir. 1975).

Callaway, for example, involved the proposed establishment of an ocean dumping site in Long Island Sound. In rejecting the Department of the Navy's EIS study of cumulative impacts,

which failed to analyze the cumulative impacts of dumping spoil wastes at the site from projects other than the Navy's proposed project, the Second Circuit stated:

> It is clear that there are at least several other major federal and private dredging projects that are likely to produce colossal amounts of polluted spoil for disposal in this particular area of Long Island Sound: the Corps' further deepening of the Thames River channel, the maintenance of that channel, the dredging of the Thames by the Electric Boat Division of General Dynamics and the Coast Guard's Thames River dredging projects. *While none of these projects have gained final approval, all are well beyond the stage of mere speculation and should have been included in the Navy's analysis of environmental impacts. ... [A]ll are to occur in the same geographical area, all are related in that they involve dredging and disposal of spoil, all present similar problems of pollution, and the spoil from each project is likely to be dumped in the New London area.* Clearly, the projects are closely enough related so that they can be expected to produce a cumulative environmental impact which must be evaluated as a whole. See *Jones v. Lynn*, supra, 477 F. 2d at 890-91. (Italics added)

The general rule under NEPA is that, in assessing cumulative impacts, the EA or EIS must give a sufficiently detailed catalogue of past, present and reasonably foreseeable future projects, and provide an adequate analysis about how those projects, and differences among them, are thought to have impacted the environment. *Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir. 2005); *City of Carmel-By-The-Sea, et al v. U.S. Dept. of Transportation,* 123 F.3d 1142 (9th Cir. 1997); *Natural Resources Defense Council v. Hodel*, 856 F. 2d 288, 298 (D.C. Cir. 1988); *Humane Society of the U.S. v. Dept. of Commerce*, 432 F. Supp. 2d 4 (D.D.C. 2006); *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 138 (D.D.C.2001).

The agency cannot simply offer conclusions. Rather, it must identify and discuss the impacts that will be caused by each successive project, including how the combination of those various impacts is expected to affect the environment. *Great Basin Mine Watch v. Hankins*, 456 F. 3d 955 (9th Cir. 2006).

A. *The EIS' Geographic Scope of Cumulative Impacts is Too Restrictive*

In analyzing cumulative impacts, It is first necessary for an agency to identify the geographic area within which a project's cumulative impact on environmental resources may occur, and that is a task assigned to the special competency of the appropriate agencies. *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976); *Neighbors of Cuddy Mountain v. Alexander*, 303 F. 3d 1059 (9th Cir. 2002); *Habitat Education Center, Inc. v. Bosworth*, 381 F.Supp. 2d 842 (E.D. Wis. 2005). Nevertheless, the choice of an analysis scale must represent a reasonable decision and cannot be arbitrary. *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F. 3d 957, 973 (9th Cir. 2002); *Habitat Education Center*, 381 F.Supp. 2d at 849. An agency must provide support for its choice of analysis area and must show that it considered the relevant factors. *Native Ecosystems Council v. Dombeck*, 304 F. 3d 886, 902 (9th Cir. 2002); *Habitat Education Center*, 381 F.Supp. 2d at 849.

In *Habitat Educ. Center, Inc. v. Bosworth*, 363 F.Supp.2d 1090 60 ERC 1421 (E.D. Wis., 2005), that Court explained the importance of determining the scope of a cumulative impacts analysis and of developing a catalogue of past, current and reasonably foreseeable project whose own impacts may, together with the proposed project's impact, be cumulative, stating:

> [R]egardless of the degree of environmental harm that a proposed action may cause, the cumulative impacts analysis must satisfy a minimum standard, i.e., it must provide sufficiently specific information to assure the court and the public that the agency took a hard look at a project's potential cumulative environmental effects. *Lands Council v. Powell,* 379 F.3d 738, 745 (9th Cir.2004) (noting that "the general rule under NEPA is that in assessing cumulative effects, the [EIS] must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment"). In other words, the EIS must "provide decisionmakers with sufficiently detailed information to aid in determining whether to proceed with the action in light of its environmental consequences and to provide the public with information and an opportunity to

> participate in the information gathering process." *Nothwest Res. Info. v. Nat'l Marine Fisheries Serv.,* 56 F.3d 1060, 1064 (9th Cir.1995); *see also Young v. Gen. Serv. Admin.,*99 F.Supp.2d 59, 67 (D.D.C.2000) (holding that "[i]n addition to providing crucial information to the agency, NEPA also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision. This larger audience includes ... the public, which receives the assurance that the agency has indeed considered environmental concerns in its decision making process as well as the opportunity to comment").

The EA in this case did not make clear the geographic area within which it chose to conduct the cumulative impacts analysis nor the criteria by which the geographic area used in the EA was selected. The EA attempts to limit the cumulative impact analysis to only the immediate area of the 30 Corridor or the "study area" around the Corridor. The 30 Corridor Project will have potentially significant impacts throughout Little Rock and central Arkansas, and even in south-southwestern United States. Such a narrow designation of geographic area for analysis of cumulative impacts defeats the purpose of a cumulative impact analysis and renders the EA and the resulting FONSI to be invalid.

B. ***The EA Failed To Provide A Detailed Catalogue of Past, Current and Future Projects That Have Or Could Combine With The Intermodal Project To Cause Cumulative Impacts***

A starting point for assessment of cumulative impacts in an EA is for the preparer to prepare a catalogue of past, current and future projects or sources reasonably certain to occur as a source of information regarding the environmental impacts from those sources that currently exist, under development, or that may be developed.

An EA's analysis of cumulative impacts must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment. General statements about "possible effects" and "some risk" do not constitute a "hard look" absent a justification regarding why more

definitive information could not be provided. Some quantified or detailed information is required. See, *Native Village of Nuiqsut v. Bureau of Land Management,* 432 F.Supp.3d 1003 (D. Alaska, 2020), in which that court stated:

> "An EA's analysis of cumulative impacts 'must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment.'(Footnote omitted) "General statements about 'possible effects' and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." (Footnote omitted)
>
> To prevail on a claim that an EA should have analyzed the cumulative impacts of a certain project, *a plaintiff "must show only the potential for cumulative impact."*
>
> 432 F.Supp.3d at 1036

The EA provides no catalogue of past, current and future projects or sources of impacts reasonably certain to occur as a source of information regarding the environmental impacts, and failed to take a "hard look" at the cumulative effects of those projects and sources that were identified with the effects of the proposed 30 Corridor Project. A few projects of the Defendant ArDOT were identified in the final EA (apparently in response to comments received from Defendants on the Draft EA, and were mentioned in the Reevaluation. However, those mentioned were, by no means, a "catalogue" of past, current and reasonably certain highway projects. For example, proposed (and nearly completed) I-57 between St. Louis and Little Rock) and the proposed East-West North Pulaski Corridor that would by-pass Little Rock-North Little Rock by connecting I-40 at Mayflower and I-67/167 along existing Arkansas Highway 89 were not mentioned, although they are definitely in various stages of development.

These facts are similar to those in *Western North Carolina Alliance v. North Carolina Dept. of Transp.*, 312 F.Supp.2d 765 (E.D. North Carolina, 2003), in which that court discussed four separate projects that were in various stages of development and held that their cumulative

impacts must be analyzed in the EA prepared by the North Carolina Department of Transportation.

> Plaintiffs contend that the other projects along the I–26 corridor were reasonably foreseeable future actions and therefore, NEPA requires Defendants to include a discussion of the cumulative impacts of the overall expansion of the 40 miles of highway in the EA for I–4400. Defendants … contend that I–4700, I–2513, and FS–0113B were not reasonably foreseeable. They argue that the EA for I–4400 should not have to consider the other projects because they are at different points in the planning process and geographically removed. They argue that Plaintiffs are proceeding on the faulty premise that each of the projects will be constructed and note that no construction funds had been programmed for I–4700 or FS–0113B as of January 18, 2002. Defendants further contend that because no environmental documents have been completed for I–4700, FS–0113B, and I–2513, their final configuration has not been determined and cannot be meaningfully evaluated.
>
> [T]he term "reasonably foreseeable future action" has not been defined in the regulations. [R]easonably foreseeable is "properly interpreted as meaning that the impact is sufficiently likely to occur that a person or ordinary prudence would take it into account in reaching a decision." *Sierra Club v. Marsh,* 976 F.2d 763, 767 (1st Cir.1992). "Effects that are highly speculative or indefinite" are not reasonably foreseeable. *Id.* at 768. Applying this interpretation to the facts of the case, the Court finds that the other projects were foreseeable so as to be required in the consideration of the cumulative impacts of project I–4400.
>
> At the time the EA and FONSI were being prepared, Project I–4700 was in the preliminary stages of NCDOT's formal planning process, but the internal documents reflect that the expansion was not only reasonably foreseeable, but in fact, considered inevitable. AR, vol. 1 at 375. Project A–10, the upgrade of 15 miles of roadway north of Asheville to interstate standards, was planned and proceeding to construction. The EA stated that project I–2513 is "scheduled for right of way acquisition beginning February, 2003. Construction is set to begin in April, 2005." EA at 4. Finally, the record reflects that at *772 the time the EA and FONSI were being prepared money had been allocated for a feasibility study for improvements to FS–011B.
>
> [I]n their final environmental document, Defendants considered and characterized the other related projects to be reasonably foreseeable. Unfortunately, despite referring to these projects as "reasonably foreseeable," Defendants failed to consider the potential for cumulative impacts from the massive proposed expansion to the I–26 corridor.

In addition, Defendants limited the limited cumulative impacts analysis primarily to past and current highway projects. They did not give any consideration to past, current and reasonably foreseeable private, semi-public or public developments, in the locality and in the State, such as the recently developed SWEPCO Turk Power Plant (the emissions of which are blown to central Arkansas by prevailing winds); Entergy's White Bluffs and Independence power plants, the Port of Little Rock, the Bill and Hillary Clinton Airport, Union Pacific Railroad (UP), Burlington Northern Santa Fe (BNSF); ArBest, UPS, Amazon, other freight haulers, the UAMS Medical Center, and other major medical centers, the Dillard's national headquarters, or any other significant developments that impact the human environment in central Arkansas. Obviously, little thought was given to the sources from which cumulative impacts might occur.

C. *Defendants Failed to Analyze Cumulative Impacts of Replacement of the I-30 Bridge*

Each alternative in the EA assumes that the existing I-30 Bridge will be demolished and replaced. Aside from its age and deteriorating condition, the major objection to the existing bridge is that it contains a pier or support that is located in the middle of the shipping channel in the Arkansas River, and presents a hazard for barges and other vessels navigating the Arkansas River.

However, there is nothing in the EA or any of its Appendices that discusses indirect and cumulative impacts of the demolition and reconstruction of the bridge. It is apparently assumed in the EA that such action will have no impacts.

The demolition and replacement of the bridge will have its own significant indirect and cumulative impacts on the use of the Arkansas River. The physical destruction and replacement

of the bridge will have obvious direct impacts, but, as one of the purposes of replacement of the bridge is to remove one of the piers that obstructs the navigation channel, the replacement will have indirect and cumulative impacts through increased barge traffic, the possible development of additional barge terminals on the River, and on noise, air quality, employment and safety of persons in central Arkansas. Those potential impacts have been ignored in the EA.

D. *The Defendants Failed To Consider the Cumulative Effects Of The 30 Corridor Project In Connection With Past, Present and Reasonably Foreseeable Emissions of Greenhouse Gases In The Region.*

"The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct." *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172, 1217 (9th Cir. 2008). As Judge Wald of the D.C. Circuit so aptly stated in a 1990 dissenting opinion in *City of Los Angeles v. National Highway Traffic Safety Administration*, 912 F.2d 478 (9th Cir. 1990):

> [T]he evidence in the record suggest that we cannot afford to ignore even modest contributions to global warming. If global warming is the result of the cumulative contributions of myriad sources, any one modest in itself, is there not a danger of losing the forest by closing our eyes to the felling of the individual trees? [E]vidence in the record points out that international policymakers and scientists are calling for drastic reductions in carbon dioxide emissions to curb global warming. In the face of that evidence, how can we be sure without more explanation that increases of the magnitude of over 50 billion pounds of carbon dioxide over 20 years are really insignificant?
>
> 912 F.2d at 501.

In view of the potential impact of the high volume of emissions from the 30 Corridor Project (including increased diesel emissions from trucks and towboats), it is unreasonable, arbitrary and capricious for the Defendants to limit the universe of other past, present and reasonably foreseeable actions against which to analyze the cumulative impacts of the Project

merely to local activities. Instead, such actions should include past, present and reasonably foreseeable emitters of carbon monoxide, oxides of nitrogen and benzene and other pollutants that will be emitted from motor vehicles and current and planned manufacturing facilities in the south and central Arkansas area.

4. *THE PUBLIC INTEREST WILL BE BEST SERVED BY ISSUANCE OF A PRELIMINARY INJUNCTION.*

The fourth element that plaintiffs must establish is that the public interest will be best served by issuance of a 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 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)

714 F. Supp. at 592-93.

In the 1988 case of *Fund for Animals 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)

Id. at 14.

A decade later, the District Court Illinois, in *Heartwood, Inc. 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. 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)
>
> 73 F. Supp. 2d at 979.

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)

Finally, in *Sierra Club v. United States Army Corps of Engineers*, 645 F.3d 978 (8th Cir., 2011), the Eighth Circuit overruled the objection of an electrical generating company that it would be against the public interest to enjoin the construction of the water discharge system of a large generating plant because to do so would cause potential job losses, cost overruns and loss of electrical generating capacity. Instead, the Eighth Circuit upheld the district court's finding that an injunction was in the public interest because "it would convey to the public the

importance of having the government agencies fulfill their obligations to comply with the laws that bind them." The Court ruled:

> The district court's analysis on this element is sound. We agree that, just as important as the public interest in potential economic gains is 'the public's confidence that its government agencies act independently, thoroughly, and transparently when reviewing permit applications.' The "environmental dangers at stake in this case are serious," *see Davis,* 302 F.3d at 1116, and the public interests that might be injured by a preliminary injunction, such as temporary loss of jobs or delays in increasing energy output in the region, "do not outweigh the public interests that will be served." *Alliance for the Wild Rockies,* 632 F.3d at 1138.

645 F.3d at 997-998

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 preliminary injunction to prohibit further activities pursuant to the FONSI issued by the FHWA and the EA issued by ArDOT upon which the FONSI is based.

The Project Violates the FHWA Regulatory Requirements That This Project Have Anticipated Full Funding

Federal Highway Administration statutes and regulations require that, before construction of alterations or changes in interstate highways shall commence, the funding for such work shall be committed and budgeted; *i.e.*, "financially constrained." See 23 U.S.C. §134(j)((3)(d), which provides:

> **(D) Requirement of anticipated full funding.**—The program shall include a project, or an identified phase of a project, only if full funding can reasonably be anticipated to be available for the project or the identified phase within the time period contemplated for completion of the project or the identified phase.

In addition, 23 U.S.C. §135(g)(5)(I), relative to Statewide transportation improvement planning, states:

> **(I)** **Requirement of anticipated full funding.**—The transportation improvement program shall include a project, or an identified phase of a project, only if full funding can reasonably be anticipated to be available for the project within the time period contemplated for completion of the project.

As of the filing of this Complaint, ArDOT has not developed a final plan for the construction of an I-30 Corridor Project that is within the financial constraints of ArDOT. The Reevaluation contained a "contingency" plan, which, as described above, is also a "No Commitment to Complete Plan" based upon the unlikely adoption by the voters of Arkansas of a permanent one-half cent sales tax in the November, 2020 general election.

The conditional nature of the Project, the failure to conduct a separate EA on Phase 1 of the Revised Project, and the lack of ready and available funding renders the entire Environmental Assessment unreliable because all the proclaimed benefits may be illusory; the deferred components may not be completed before the project design year, if ever; and agency decision-makers cannot make an informed decision if they do not know to when components of the Project may be deferred due to lack of funds.

VI. CONCLUSION

The Plaintiffs have demonstrated in this Brief that they have a probability of success on the merits, and possible irreparable injury if the preliminary injunction is not granted, or (2) have shown 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*, 640 F.2d at 112.

It is clear that either version of the proposed Project will be the largest, most complicated and most expensive highway construction project undertaken by ArDOT or its predecessors; it

involves many "firsts" of construction procedures used by ArDOT; it will impact the human environment of virtually every person currently (and in the future) living in central Arkansas or who travels through that area; it will further negatively impact the racial relations in Little Rock and North Little Rock; and it involves a number of legal issues that are without precedent. These are serious consequences that demand close scrutiny before being implemented.

Based on the shortcomings of the EA and the failure of the Defendants to conduct an in-depth analysis of the issues that they were required to evaluate, the public of Arkansas deserve a judicial review of the EA and the Reevaluation by this Court, and a more comprehensive analysis that would be produced by an environmental impact statement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on the date set forth below, he served a copy of the above and foregoing Brief in Support of Plaintiffs' Motion for Preliminary Injunction on counsel of record for the parties through the Court's ECF system. Plaintiffs' counsel is unaware of any party or attorney for a party who requires service through alternative means.

Dated: July 10, 2020.

/s/ Richard H. Mays
Richard H. Mays