CASE NO. 4:18-cv-00466-JM

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

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

Vs.

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

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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BRIEF IN SUPPORT OF PLAINTIFFS'
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INTRODUCTION

Plaintiffs have filed this Motion for Summary Judgment with the case in an unusual posture. The widening of Interstate 630 between University Avenue and the Baptist Hospital complex entrance/exit ("the Project') has, for all practical purposes, been completed and is in use. As a result, Plaintiffs anticipate that the Defendants will claim that the case is now moot (an issue that will be refuted herein).

However, this case was originally and continues to be about the use and abuse by the Defendants of a Categorical Exclusion in lieu of the National Environmental Policy Act's requirement that Federal agencies prepare a detailed environmental statement (*i.e.*, an environmental assessment or an environmental impact statement) of the potential environmental impacts of major federal actions prior to undertaking that action. That issue is still alive in this case, and after a review of the Administrative Record (AR) lodged by the Defendants, the issue

has taken on added force and significance. The AR shows that the Defendants did not conduct even a perfunctory review of the potential environmental issues necessary to making the determination to use a categorical exclusion. This Brief will review the relevant portions of the Administrative Record (AR), and demonstrate that Defendants are using the categorical exclusion as a license to circumvent NEPA's requirement that agencies take a "hard look" at potential environmental impacts of agency actions.

Before addressing the subject of Defendant's misuse of the categorical exclusion, Plaintiffs will review the issue of whether this case is moot, as it will surely be raised by the Defendants.

1. THE CASE IS NOT MOOT

Assuming that all of the work on the Project has been completed, the Defendants are not thereby automatically entitled to have the case dismissed as moot. In order to render a case moot, there must no longer be any issues remaining for decision, *i.e.,* "live" issues.

What constitutes a "live" issue was discussed in the U.S. Supreme Court decision of *Powell v. McCormack*, 395 U.S. 486, 496-97, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), in which that court stated:

> Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. See E. Borchard, Declaratory Judgments 35—37 (2d ed. 1941). Where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy. See United Public Workers of America v. Mitchell, 330 U.S. 75, 86—94, 67 S.Ct. 556, 562, 566, 91 L.Ed. 754 (1947); 6A J. Moore, Federal Practice 57.13 (2d ed. 1966).

The Eighth Circuit further expanded on that ruling in *Missouri ex rel. Nixon v. Craig*, 163 F.3d 482 (C.A.8,1998), in which it stated:

> A case becomes moot "'when the issues presented are no longer 'live' or parties lack a legally cognizable interest in the outcome.'" *County of Los Angeles v.*

> *Davis,* 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979) (quoting *Powell v. McCormack,* 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)). In other words, a case becomes moot only when subsequent events make it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* The heavy burden of demonstrating mootness rests on the party claiming mootness. *Id.*

See also, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693 (2000); *Gibson v. DuPree,* 664 F.2d 175 (C.A.8, 1981) ("In individual actions "(w)here one of several issues presented becomes moot, the remaining issues supply the constitutional requirement of a case or controversy.").

Even If Work Is Completed, the Case Is Not Moot If The Court Can Fashion A Remedy

A case remains "live" if the Court can fashion a remedy. The completion of activity is not the hallmark of mootness. Rather, a case is moot only where no effective relief for the alleged violation can be given. *Coal for Gov't Procurement v. Federal Prison Industries, Inc.,* 365 F. 3d 435, 458 (CA 6, 2004), *citing McPherson v. Mich. High Sch. Athletic Ass'n, Inc.,* 119 F.3d 453, 458 (6th Cir.1997); *Buck Mountain Community Organization v. Tennessee Valley Authority,* 629 F.Supp.2d 785 (M.D.Tenn., 2009). As federal courts possess broad discretion to fashion equitable remedies, they may craft declaratory and injunctive relief designed to preclude a federal agency from acting in contravention of its statutory and regulatory authority. *West v. Secretary of Dept. of Transp.,* 206 F.3d 920 (C.A.9, 2000) (in deciding a mootness issue, the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be *any* effective relief.); Wright & Miller, 13A FEDERAL PRACTICE AND PROCEDURE § 3533.3 at 268 (1984): ("The central question of all mootness problems is whether changes in the circumstances that prevailed at the

beginning of litigation have forestalled any occasion for meaningful relief.... [C]ourts must be careful to appraise the full range of remedial opportunities.")

The power of the Federal courts to fashion a broad range of potential remedies is discussed in a number of cases similar to the case now before this Court. In *Columbia Basin Land Protection Ass'n v. Schlesinger,* 643 F.2d 585 (CA 9,1981), an association of landowners sued the Bonneville Power Authority (BPA) to enjoin the construction of a 500-kilovolt power transmission line across their lands, alleging numerous flaws in BPA's compliance with NEPA. The district court denied plaintiffs the injunction, and they appealed to the Ninth Circuit. While the case proceeded to that court, all 191 towers required for the line were erected and the line had been in operation for several years. BPA asserted that the case was now moot, and the Ninth Circuit answered:

> This case is not moot … . That the towers have been erected and the power line has been in operation since 1978, does not moot the claim that it should not be operating in its present location.
>
> …
> In the case at hand, were this Court to find the EIS inadequate, or the decision to build along Route D-1 arbitrary and capricious, the agency would have to correct the decision-making process, and ultimately could be required to remove the line from this route. Clearly, therefore, this case presents a live controversy with concrete facts, and parties with adverse interests. The building of the towers has not made the case hypothetical or abstract the towers still cross the fields of the Landowners, continually obstructing their irrigation systems and this Court has the power to decide if they may stay or if they may have to be removed.
> …
> If the fact that the towers are built and operating were enough to make the case nonjusticiable, … , then the BPA (and all similar entities) could merely ignore the requirements of NEPA, build its structures before a case gets to court, and then hide behind the mootness doctrine. Such a result is not acceptable.

In *Airport Neighbors Alliance, Inc. v. U.S.,* 90 F.3d 426 (C.A.10,1996), the Tenth Circuit fashioned a remedy in a NEPA case for an airport runway that had already been completed:

> [C]ourts still consider NEPA claims after the proposed action has been completed when the court can provide some remedy if it determines that an agency failed to comply with NEPA. *See National Parks and Conservation Ass'n v. FAA,* 998 F.2d 1523, 1524 n. 3 (10th Cir.1993) (finding case challenging airport construction not moot after construction was completed when restrictions could be placed on the use of an airport); *Burbank Anti-Noise Group v. Goldschmidt,* 623 F.2d 115, 116 (9th Cir.1980) (holding action challenging already completed sale of airport not moot when the actions could be "undone"), *cert. denied,* 450 U.S. 965, 101 S.Ct. 1481, 67 L.Ed.2d 614 (1981).
> (90 F. 3d at 428-29)

> [I]f we find that the Respondents failed to comply with NEPA, we could order that the runway be closed or impose restrictions on its use until Respondents complied with NEPA. ... [A]lthough the fact that the upgrade of Runway 3-21 has been completed renders moot any claim relating to the *construction* of the runway, we still may consider whether Respondents complied with NEPA by adequately addressing the environmental impacts resulting from the enhanced *use* of the runway.

See also, *Pyramid Lake Paiute Tribe v. Hodel,* 882 F.2d 364, 368-69 (CA 9, 1989) (challenge to water diversion not mooted after diversion took place where impacts on fishery could be remedied by storing more water in reservoir for use in future spawning seasons); *Kirby v. U.S. Dept. of Housing & Urban Dev.,* 745 F.2d 204, 207 (CA 3, 1984) (challenge to construction of public housing project not mooted by construction of project where part of relief sought still available; "Although emphasis on the efficacy of the remedy is appropriate, changed circumstances will frequently moot only some forms of relief, leaving other useful forms available."); *Montana v. Johnson,* 738 F.2d 1074, 1077 (CA 9, 1984) (action not moot where challenged power lines could be removed); *Richland Park Homeowners Association v. Pierce,* 671 F.2d 935 (5th Cir.1982) (if the violations of NEPA have been blatant, and if the public interest will not be irreparably harmed, an injunction may be ordered even if the project has proceeded to an advanced stage of completion, citing *Environmental Defense Fund v. Marsh,* 651 F.2d 983, 1005-06 (5th Cir. 1981) and *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Com'n*, 606 F.2d 1261, 1272-73 (D.C.Cir., 1979); *Lake Wylie Water*

Resources Protective Ass'n v. Rogers Builders, Inc. et al, 621 F.Supp. 305 (D.C.S.C., 1985) (notwithstanding that the dredging and construction activities may have reached an advanced stage of completion, the court retains the equitable power to order the removal of all offending materials should plaintiff prevail on its motion for a preliminary injunction).

Thus, there is ample authority for this Court to fashion a broad range of remedies if it finds that the Defendants violated the requirements for reliance on a Categorical Exclusion in this case.

Potential remedies that might be available to this Court to address issues raised by the Plaintiffs cover a broad range of options from ordering Defendants to prepare a new and more comprehensive review of the environmental aspects of the Project as required by NEPA; requiring modification of the highway or portions thereof to reduce environmental impacts, and enjoining the Defendants from further abuses of the Categorical Exclusion exemption by strictly adhering to the regulations allowing its use.

The testimony offered by ArDOT at the hearing on Plaintiffs' Motion for Preliminary Injunction indicates that the Categorical Exclusion process used by ArDOT in the I-630 Project is the same or similar to one that was used by it in other recent highway construction or expansion projects, and appears to be common practice for ArDOT. For example, in the hearing on the Motion for Preliminary Injunction, ArDOT's counsel made a point to elicit testimony from Ms. Wylie and other witnesses that the Big Rock Interchange at the intersection of I-430 and I-630 was developed by use of a CE. Mr. Looney also testified to that effect. (Looney Testimony, p. 6, lines 2-16)

Categorical Exclusions are very enticing for ArDOT to use because (i) public notice of the commencement of the environmental review process does not have to be given; (ii) the

environmental review process is much shorter; and (iii) the process is much less expensive. If ArDOT is successful the use of a CE in the incomplete manner that was done in this case, it will continue to do so in future projects, resulting in the dissemination of the least amount of information possible to the public regarding the potential environmental impacts of these very large and environmentally disturbing projects. It is reasonable to expect that the public will be subjected to the same procedure used by ArDOT in this case in the future, as evidenced by the fact that ArDOT has done so in major highway construction projects in the past, and has recently indicated its intention to use CEs in projects that it has planned.

Plaintiffs Challenge to the Defendants' Procedure That Gave Rise To the Complaint Is Not Moot

Courts have long recognized that a challenge to a government procedure that gives rise to a particular act or omission is not mooted simply because the government agency ceases the particular act that gives rise to the alleged injury. In *Better Government Ass'n v. Department of State,* 780 F.2d 86 (C.A.D.C., 1986) the D.C. Circuit stated:

> There is ... no question that the appellants' other arguments concerning the facial validity of the DOJ guidelines and the Interior regulation are *not* moot. The challenge to the fee waiver denials was but one claim in the appellants' complaints; *the additional counts were directed at the legality of the standards utilized by the appellees.* The Government incorrectly assumed that the mootness of the former led inexorably to the mootness of the latter. The satisfaction of the claims for reversals of the individual fee waiver denials did not render moot the facial challenges to the guidelines and regulation. (citing *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115, 121–22, 94 S.Ct. 1694, 1697–98, 40 L.Ed.2d 1 (1974) (proper to award declaratory relief when need for injunction has been removed but challenged governmental practice continues). (Italics supplied)

See also, Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122, 94 S.Ct. 1694, 1698, 40 L.Ed.2d 1 (1974) (although the settlement of a strike mooted the claim for injunctive relief, the request for a declaratory judgment was not moot because the challenged state policy of

paying striking workers was not contingent and had not disappeared, but might have an adverse effect on the interests of the parties); *City of Houston, Tex. v. Department of Housing and Urban Development,* 24 F.3d 1421(C.A.D.C., 1994) ("It is well-established that if a plaintiff challenges both a specific agency action and the *policy* that underlies that action, the challenge to the policy is not necessarily mooted merely because the challenge to the particular agency action is moot. *See, e.g., Payne Enters. v. United States,* 837 F.2d 486 (D.C.Cir., 1988); *Better Gov't Ass'n v. Department of State,* 780 F.2d 86 (D.C.Cir., 1986)") (Italics in original); and *Allen M. Campbell Co. v. Lloyd Wood Construction Co.*, 446 F.2d 261, 264 (5th Cir. 1971) (the fact that construction on a government contract was "well underway" was not sufficient to moot the challenge to the appropriateness of the contract award),

The Plaintiffs in this case challenge the Defendants' implementation of the FHWA's Categorical Exclusion. The Defendants appear to claim that they are not required to perform <u>any</u> analysis and studies of environmental impacts of the Project simply because they were using the Categorical Exclusion. This is a "bootstrap" argument, and overlooks the basic requirement that, in order to use the Categorical Exclusion, there must first be *some assessment* of the potential environmental impacts of the Project in order to determine, with some degree of reasonable scientific certainty, that there are no environmental impacts and that the Categorical Exclusion can be used. In addition, *an administrative record must be made of the assessment justifying use of the Categorical Exclusion.*

No record of such basic assessment exists in this case, and the Defendants have failed to fully and clearly explain and justify their decision to use the Categorical Exclusion in lieu of preparing an EA or and EIS.

2. THE DEFENDANTS FAILED TO COMPLY WITH THE REQUIREMENTS OF THE FEDERAL HIGHWAY ADMINISTRATION REGULATIONS IMPLEMENTING NEPA REGARDING THE DETERMINATION TO USE A CATEGORICAL EXCLUSION

Standard of Review

The Administrative Procedure Act ("APA"), 5 U.S.C. §706(2)(A), provides an "arbitrary and capricious" standard in judicial review of agency actions. Courts – including the Eighth Circuit – have equated the arbitrary and capricious standard to one of "reasonableness." "As with judicial review of other NEPA actions under the APA, the standard of review for determining whether an agency's reliance on a categorical exclusion was proper is the "arbitrary and capricious standard." *Florida Keys Citizens' Coalition v. U.S. Army Corps of Engineers*, 374 F. Supp.2d 1116, 1139 (S.D., Fla., 2005).

The "arbitrary and capricious standard," requires the reviewing court to conduct a "thorough, probing, in-depth review" and a "searching and careful" inquiry into the record to ensure that agency has taken a "hard look" at the environmental consequences of the proposed action. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16, 28 L.Ed.2d 136, 91 S.Ct. 814 (1971); *DuBois et al v. U.S. Department of Agriculture et al*, 102 F.3d 1273 (1st Cir. 1996). The court must carefully review the record to ascertain whether the agency decision is founded on "reasoned evaluation of relevant factors." *Oregon Natural Desert Ass'n v. Green,* 953 F. Supp. 1133 (D. Or. 1997). Thus, while the standard is nominally "arbitrary and capricious," the court plays an important oversight role in determining whether the agency followed the correct procedures, carefully made its determinations and was reasonable. The United States Supreme Court in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) commented that *there is no substantial difference in an "arbitrary and capricious" standard and a "reasonableness" standard*:

> Respondents note that several Courts of Appeals ... have adopted a "reasonableness" standard of review, *see, e.g., Sierra Club v. Froehlke*, 816 F.2d. 205, 210 (CA5 1987); *Enos v. Marsh*, 769 F.2d 1363, 1373 (CA9 1985); *National Wildlife Federation v. Marsh*, 721 F.2d 767, 782 (CA11 1983); *Massachusetts v. Watt*, 716 F.2d 946, 948 (CA1, 1983); *Monarch Chemical Works, Inc. v. Thone*, 604 F.2d 1083, 1087-1088 (CA8, 1979), and argue that we should not upset this well-settled doctrine. This standard, however, has not been adopted by all of the Circuits. See, e.g., *Wisconsin v. Weinburger*, 745 F.2d 412, 417 (CA7 1984) (adopting "arbitrary and capricious" standard). Moreover, as some of these courts have recognized, *the difference between the "arbitrary and capricious" and "reasonableness" standards is not of great pragmatic consequence.* See *Manasota-88, Inc. v. Thomas*, 799 F.2d 687, 692, n. 8 (CA11 1986) ("As a practical matter, ... the differences between the 'reasonableness' and 'arbitrary and capricious' standards of review are often difficult to discern"); *River Road Alliance, Inc. v. Corps of Engineers of United States Army,* 764 F.2d 445, 449 (CA7 1985) ("We are not sure how much if any practical difference there is between 'abuse of discretion' and 'unreasonable"), cert. denied, 475 U.S. 1055 (1986). Accordingly, our decision today will not require a substantial reworking of long-established NEPA law.
> 490 U.S. at 377, note 23. (Italics added)

Courts have been unwilling to provide a mere cursory review of agency action, or to act as a simple rubber stamp for agency action. In reviewing this issue (in the context of reviewing a decision not to supplement an EIS), the Supreme Court stated:

> ...[C]ourts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance – or lack of significance – of the new information. A contrary decision would not simply render judicial review generally meaningless, but would be contrary to the demand that courts ensure that agency decisions are founded on a reasoned evaluation of relevant facts.
> *Marsh*, 490 U.S. at 378

See also, *Audubon Society of Central Arkansas et al v. Daily et al*, 977 F.2d 428, 434 (8th Cir. 1992). The Courts have clearly retained a meaningful review of agency actions to ensure that agency decisions are founded on a reasoned evaluation of relevant factors and did not make clear errors of judgment. *Marsh*, 490 U.S. at 378 & n.9; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). In *Minnesota Center for Environmental Advocacy v. U.S.*,

914 F.Supp. 2d 957 (D. Minn. 2012), the court observed that "The agency must 'articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made," and "Deference to an agency's decision has not come so far that we will uphold regulations whenever it is possible to 'conceive a basis' for administrative action," citing *Bowen v. American Hosp. Ass'n.*, 476 U.S. 610, 626, 106 S.Ct. 2101, 90 L.Ed.2d 584 (1986).

Requirements for Use of Categorical Exclusions

NEPA requires an agency to consider the environmental impacts of any "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The responsible agency may first prepare an Environmental Assessment to "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1) (1997) Or, an agency may omit preparation of an environmental assessment and proceed with preparation of an environmental impact statement.

In some cases, however, neither an EA nor an EIS is required. *See* 23 C.F.R. § 771.115. The Council of Environmental Quality ("CEQ") NEPA regulations authorize an agency to use a "categorical exclusion" for a "category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations." 40 C.F.R. § 1508.4; *see also* 40 C.F.R. § 1500.4(p). Neither an EIS nor an EA is required for actions categorically excluded from NEPA review. *See, e.g.,* 40 C.F.R. § 1507.3(b)(2)(ii); 23 C.F.R. § 771.117.

Pursuant to CEQ regulations, each agency develops criteria to determine the appropriate level of environmental review for different types of actions. *See* 40 C.F.R. § 1507.3(b)(2); *see*

also 23 C.F.R. § 771.115 (FHWA regulation describing three classes of reviews—an EIS, EA, or categorical exclusion — each requiring different levels of NEPA documentation. Under the FHWA's NEPA regulations, a categorical exclusion may be used for actions that do not involve significant environmental impacts and do not induce significant impacts to, among other things, air, noise, or water quality or travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts. *See* 23 C.F.R. § 771.117(a).

However, an agency must make an initial determination whether a project is suitable for use of a categorical exclusion, and that determination must be based on something more objective and scientific than the agency's or a contractor's intuition. There must be some assessment of the impact <u>and</u> documentation of that assessment. *Florida Keys Citizens' Coalition, supra.* (a categorical exclusion may be used even in environmentally sensitive areas *so long as* the applicable criteria and documentation are satisfied," citing *Krichbaum v. United States Forest Service*, 17 F.Supp.2d 549, 558 (W.D. Va., 1998) (Italics added); *Southwest Center for Biological Diversity v. United States Forest Service*, 100 F.3d 1443, 1450 (9th Cir., 1996) (an agency may invoke a categorical exclusion where endangered or threatened species are present *if* the agency determines the project will not negatively impact on species). (Italics added)

Council on Environmental Quality Regulations
Regarding Categorical Exclusions

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

> "Categorical exclusion" means a category of actions *which do not individually or cumulatively have a significant effect on the human environment* and which have been found to have no such effect in procedures adopted by a federal agency in

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

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

(b) Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements and shall include:

...

(2) Specific criteria for and identification of those typical classes of action:

(i) Which normally do require environmental impact statements.

(ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§1508.4)).

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

The FHWA Regulations Regarding Categorical Exclusions

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

23 CFR §771.115 (Classes of actions) provides:

There are three classes of actions which prescribe the level of documentation required in the NEPA process.

(a) *Class I (EISs).* Actions that significantly affect the environment require an EIS (40 CFR 1508.27). The following are examples of actions that normally required an EIS:

(1) A new controlled access freeway.
(2) A highway project of four or more lanes on a new location.
(3) Construction or extension of a fixed transit facility (e.g., rapid rail, light rail, commuter rail, bus rapid transit) that will not be located within an existing transportation right-of-way.
(4) New construction or extension of a separate roadway for buses or high occupancy vehicles not located within an existing highway facility.

(b) *Class II (CEs)*. Actions that do not individually or cumulatively have a significant environmental effect are excluded from the requirement to prepare an EA or EIS. A specific list of CEs normally not requiring NEPA documentation is set forth in §771.117(c) for FHWA actions or pursuant to §771.118(c) for FTA actions. When appropriately documented, additional projects may also qualify as CEs pursuant to §771.117(d) for FHWA actions or pursuant to §771.118(d) for FTA actions. (Emphasis added)

(c) *Class III (EAs).* Actions in which the significance of the environmental impact is not clearly established. All actions that are not Class I or II are Class III. All actions in this class require the preparation of an EA to determine the appropriate environmental document required.

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

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

It appears clear from this definition that, in order for an agency to use a categorical exclusion, there must first be a finding by the agency that the proposed action does not involve significant air, noise or water quality impacts, among others. The mere listing of a category of proposed actions does not automatically exempt the action from some environmental review to confirm that there will be no significant environmental impact. There must be an assessment of the potential impacts and a finding by the agency that the project would have no significant cumulative impacts. In order to make that finding, an agency must, of necessity, conduct some inquiry into those issues and make the results of that inquiry a part of the Administrative Record so that a reviewing court can determine what, if any, analysis was done.

Subpart (c) of 771.117 provides examples of actions that normally meet the criteria for a categorical exclusion and do not require further NEPA procedures, such as an EA or EIS. There are more than thirty (30) such categorical exclusions, many of which are not applicable to circumstances in this case. This is supported by Subsection (b) of §771.117, which addresses the further restriction upon the use of categorical exclusions for any action that could involve "unusual circumstances." That subsection provides:

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

Thus, even though those 30 categories of projects described in §771.117(c) are subject to being categorically exempt from an EA or EIS, there must be some assessment of the potential environmental impacts of that particular project to determine whether the project has extraordinary conditions that would require performance of an EA or EIS.

Defendants Were Required To Take An Appropriate "Hard Look" At the Potential Environmental Impacts Of the Project As A Condition of Their Use Of A Categorical Exclusion

In order to justify the use of a categorical exclusion, Defendants were required to conduct an assessment through generally accepted scientific means as to whether there would be no significant impacts on air, water, traffic, and other parts of the human environment. 23 C.F.R. 771.117(a). Apparently, ArDOT and FHWA agree with that interpretation, because ArDOT prepared and uses as part of the preparation for its projects a form entitled "AHTD Environmental Impacts Assessment Form" that was used in this case and submitted to FHWA for approval in the package entitled "Tier 3 Categorical Exemption." **(AR FHWA- 471)**[1]

However, the Administrative Record shows that the categorical exclusion was defective in that, in completing the Assessment Form, the Defendants (including their contractor, Kimley Horn & Associates) failed to conduct any investigation or assessment of the potential impact of the Project on a number of the major areas of environmental concern in order to make an initial determination of whether there would be significant environmental impacts before approving use of a categorical exclusion.

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1 References to documents in the Administrative Record are indicated by "**AR FHWA – [document number]**. Please note that the AR is indexed by documents (regardless of size), not by individual page numbers on each page. The references to the document numbers herein omit the "0s" that appear before the document number in the AR (e.g., FHWA000471 is FHWA-471).

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

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

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

When an agency decides to apply a categorical exclusion and proceed with an action in the absence of an EA or EIS, that agency must adequately explain its decision. An agency cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment. (quoting *Jones v. Gordon,*792 F.2d 821, 827 (9th Cir.1986)). It is the very definition of "arbitrary and capricious" for the agency to not generate or produce data or a rationale to support its denial under these circumstances. If agencies could avoid conducting any investigation into the potential for their projects to have significant environmental impacts by simply claiming that a categorical exclusion applies, NEPA

would become meaningless. "Resorting to the [categorical] exclusion as a post hoc rationalization for the challenged action is insufficient." *Florida Keys Citizen's Coalition, supra,* citing *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1095 (11th Cir. 2004).

Perhaps the leading case on the obligation of federal agencies to fully and clearly explain their decisions is that of *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 103 S.Ct. 2856, 2867, 77 L.Ed.2d 443 (1983) in which that court explained:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and *articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." Burlington Truck Lines v. United States,* 371 U.S. 156, 168, 83 S.Ct. 239, 245–246, 9 L.Ed.2d 207 (1962). In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transp. Inc. v. Arkansas-Best Freight System, supra,* 419 U.S., at 285, 95 S.Ct., at 442; *Citizens to Preserve Overton Park v. Volpe, supra,* 401 U.S., at 416, 91 S.Ct., at 823.
>
> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, *entirely failed to consider an important aspect of the problem*, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: "We may not supply a reasoned basis for the agency's action that the agency itself has not given." *SEC v. Chenery Corp.,* 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947).
>
> 463 U.S. at 43, 103 S.Ct. 2856.

The Agency's Determination That Use of a Categorical Exclusion Is Appropriate Must Be Included In The Administrative Record

In order to facilitate adequate review by the courts, an agency must provide a written decision that provides a satisfactory explanation of the grounds which form the basis of its action. *Motor Vehicle Mfrs. Ass'n, supra*; *Friends of Boundary Waters Wilderness v. Bosworth,*

437 F.3d 815 (8TH Cir. 2006) ("Even where an agency is accorded deference, the "agency must provide a satisfactory explanation for its actions based on relevant data." *Niobrara River Ranch, L.L.C. v. Huber*, 373 F.3d 881, 884 (8th Cir., 2004). This requires an analysis of whether the decision was based upon consideration of the relevant factors and whether there has been a clear error of judgment. *National Wildlife Federation v. Harvey*, 574 F.Supp.2d 934 (E.D. Ark. 2008) ("Deference is given to an agency's choice of methodology so long as it has a proper foundation. The agency must provide a satisfactory explanation for its actions based on relevant data."); *Choate v. U.S. Army Corps of Engineers,* Not Reported in F.Supp.2d 2008 WL 4833113 (E.D. Ark. 2008) (The agency must provide a satisfactory explanation for its actions based on relevant data, citing *Niobrara River Ranch, L.L.C. v. Huber*, supra.)

The Eighth Circuit has recently reaffirmed this requirement in the case of *Organization for Competitive Markets v. U.S. Department of Agriculture,* 912 F.3d 455 (2018) holding that, under the arbitrary and capricious standard, "[W]e insist that an agency 'examine the relevant data and *articulate a satisfactory explanation for its action.*' " (Italics added) citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009), quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

Defendants Failed to Examine Important Environmental Issues In the ArDOT Environmental Impacts Assessment Form

The question presented by this Brief is whether the Defendants took the required "close look" at the potential environmental impacts of the I-630 Project in their decision to use a Categorical Exclusion in lieu of an environmental assessment or environmental impact statement. Even though the Defendants may have used categorical exclusions on large projects in

the past, or may have intuitively believed that the Project was qualified for use of a categorical exclusion, or that the FHWA regulations allowed use of a categorical exclusion, in order to provide a scientific and factual basis for the use of a categorical exclusion some analysis must be conducted, analyzed and adopted, and the Defendants' decision to use that categorical exclusion must be explained and justified by some data and other scientific information in the Administrative Record. That explanation and justification is totally absent from the Administrative Record.

At the hearing on the Motion for Preliminary Injunction filed by Plaintiffs in this case, Plaintiffs contended that the I-630 Project did not qualify for the use of a categorical exclusion and that the Defendants failed to reasonably and adequately determine whether the I-630 Project will likely have any significant environmental impacts. At the time of that hearing, the parties and Court did not have the benefit of the Administrative Record in which the Defendants were required to document and explain their official determination that a categorical exclusion was an appropriate environmental assessment tool. In the absence of the Administrative Record, and based on the evidence that was introduced at that hearing, the Court found that the Defendants' use of the categorical exclusion contained in 23 C.F.R. § 771.117(c) was appropriate for this Project. That ruling did not reach the issue of whether the Defendants had adequate support and foundation for the use of that categorical exclusion.

The challenge to the use of the categorical exclusion that is presented in this Brief, after having the benefit of reviewing the Administrative Record, is similar to but different from the challenge presented at the hearing. At the hearing, the Defendants' witnesses (Kelli Wylie and Randall Looney) were asked by Plaintiffs' counsel about whether they had seen and reviewed the data, studies and other information that were the basis for the finding in the document entitled

"Tier 3 Categorical Exclusion" that there would be no significant environmental impact from the Project. They answered that they had not, but had based their decisions on the "AHTD Environmental Impacts Assessment Form" (a form completed by an employee of a subcontractor of ArDOT) that is part of the Tier 3 Categorical Exclusion. There was no opportunity at that time to go behind the findings contained in the Tier 3 Categorical Exclusion to further question the legitimacy of the conclusions contained therein. The Administrative Record sheds significant light on this subject.

This issue centers on two documents appearing in the Administrative Record that were prepared in the early stages of the I-630 Project: a "Preliminary Environmental Constraints Memorandum" **(AR FHWA-45)**; and the aforementioned "AHTD Environmental Impacts Assessment Form" **(AR FHWA- 320-003)**. Those documents are the only documents in the Administrative Record, aside from the studies and analysis conducted on the noise impacts, relative to the potential environmental impact of the Project.

Both of these documents were prepared – not by ArDOT or FHWA – but by a subcontractor of a contractor for ArDOT named Kimley Horn & Associates. See **AR FHWA-7**, Subconsultant Agreement between Bridgefarmer & Associates (Contractor) and Kimley Horn & Associates (Subcontractor) ("Kimley Horn") dated June 27, 2013, attached to this Brief as **Exhibit No. 1.**

Under that contract, Kimley Horn was to collect and assess preliminary environmental data associated with the Project, including but not limited to air quality, noise quality, hazardous materials, wetlands, water quality, economic, community, environmental justice and other areas of the human environment that may be affected by the Project; to prepare environmental documents relative to that data and those potential impacts, and otherwise assist in the

environmental aspects of the Project. Based on a review of the Administrative Record filed by Defendants, it appears that Kimley Horn prepared virtually all of the environmental documents for this Project, including the Categorical Exclusion. (See **AR FHWA-378**; email between Azad Sharhriar of Bridgefarmer Inc. to Drake Danley of Kimley Horn dated April 19, 2016 stating: "KHA [Kimley Horn] is responsible for the CE, ...") Indeed, Kimley Horn's name appears on the "Tier 3 Categorical Exclusion" dated October 4, 2016, as the preparer. **(AR FHWA-471)**

A review of the Administrative Record shows that the vast majority of the environmental review, analysis and assessment work done by Kimley Horn and the Defendants related to the potential for increases in the noise levels on I-630 as a result of the expansion, and if so, whether sound-barriers in the form of walls, berms or a combination of the two could be constructed to mitigate the increases in sound under the ArDOT Policy for Noise Barriers. The Administrative Record also discloses some discussion of the creeks that flow under I-630, and avoidance of impairment of those creeks.

The first of the two documents was the Preliminary Environmental Constraints Memorandum **(AR FHWA-45)** dated March 21, 2014. A copy of that document is attached to this Brief as **Exhibit No. 2**. This document was prepared at a relatively early stage in the Project's development, and the purpose of the document was apparently to identify physical conditions in and near the Project area that would "constrain" or affect the project from an environmental perspective. The Memorandum discusses classes of potential areas, or receptors, that were considered as potential "constraints," including Natural Resources (primarily Rock Creek and Coleman Creek), Cultural Resources (only within the right-of-way), Community Resources (schools, public facilities, but only relative to public involvement), Physical Resources (underground storage tanks, hazardous waste sites), and Section 4(f) (parks, recreation

areas) and Section 6(f) (land, facilities purchased or built with Land and Water Conservation Act Funds) areas.

This report does not mention either the potential for either air or noise emissions from the use of I-630. Subsequently, the potential noise impacts of the Project were extensively investigated, modeled and analyzed, and a comprehensive Noise Impacts Assessment was issued. However, there was only one document in which potential air impacts of the Project was even mentioned, and then only by checking a box on a form.

That document is the AHTD Environmental Impacts Assessment Form **(AR FHWA – 320-003)** ("the Assessment Form"), which is attached to this Brief as **Exhibit No. 3**. That Form was apparently developed by ArDOT for use in justifying its use of categorical exclusions on highway projects. The Assessment Form contains 28 subjects for which environmental impacts of a project are to be assessed and rated as "None", "Minor", and "Significant." The first subject for assessment of impacts is "Air Quality," and other subjects include "Cultural Resources," "Economic," and "Environmental Justice/Title V." Plaintiffs do not quarrel with the Form. It is how the Form was used – or more specifically, not used – with which Plaintiffs have a quarrel.

The Assessment Form was prepared by Mr. Drake Danley of Kimley Horn and signed by him on September 27, 2016. The checkbox for Air Quality impacts is marked "None", and the same was done for most of the other subjects that were to be reviewed. However, the Administrative Record shows absolutely no information, data or other materials indicating that any assessments or analysis of potential impacts on air quality, cultural resources, economics of the area, and environmental justice/Title V were done to support Mr. Danley's conclusions that there would be no impact on those parts of the human environment. There is nothing on the Assessment Form or elsewhere in the Administrative Record regarding cumulative impacts. The

purpose of this Assessment Form, if supported by empirical data, would presumably be to inform a reviewing court that, before approval of the action, the Defendants did, in fact, consider whether the categorical exclusion applied, and determined that it applied to the action to be undertaken. *Florida Keys Citizens' Coalition, supra.*

While, as noted above, the Administrative Record shows considerable development and analysis of data on potential noise impacts and actions taken by ArDOT and FHWA to minimize those impacts, it is completely devoid of even the most basic preliminary information regarding potential impacts of the Project on air quality, cultural resources, economics, environmental justice, potential cumulative impacts or other possible environmental impacts.

23 CFR § 771.117, as discussed above, states that CEs are actions which meet the definition contained in 40 CFR 1508.4, and are actions which *do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.* There is absolutely no data, documentation or other evidence in the Administrative Record to show a reviewing court that Defendants had any basis to support their conclusion that there would be none of those significant impacts, and that it would be appropriate to use a categorical exception.

The Defendants admitted at the hearing on the Motion for Preliminary Injunction in this case that, in determining there would be no potential significant environmental impacts from the I-630 Project, they relied solely on the Assessment Form prepared by Kimley Horn.

Ms. Kelli Wylie, the Program Administrator for Defendant ArDOT's Connecting Arkansas Program (of which the I-630 Project is a part), testified regarding the development of the Assessment Form (Wylie Testimony, p. 29, commencing line 16):

[Questioning by Mr. Mays]

Q You've testified that your consultant that also did the noise assessment filled out this environmental impacts assessment form; is that right?

A Correct.

Q And did you see it when it was completed?

A I've looked at it, yes, sir.

Q Did anybody at Arkansas Department of Transportation

approve the form?

A Yes, sir.

Q Who?

[Page 30]

A Our environmental division.

Q Who is that?

A He's sitting right there. He's going to talk to you about noise.

Q Okay. What's his name?

A John Fleming.

Q Did you see anything that supported this, that supported these checks that went into these individual boxes? Did you see any information to back that up?

A I've just seen this document, all the attachments and the document that you have.

Q Whatever is here is what you based your decisions on?

A Correct.

Mrs. Wylie's complete *verbatim* testimony from the July 23, 2018 hearing is attached as **Exhibit No. 4** to this Brief.

Further, Mr. Randall Looney, Environmental Coordinator for the Arkansas Division of the Defendant Federal Highway Administration, likewise testified that he based his decision to approve the categorical exclusion solely on the information contained in the Assessment Form (Looney Testimony, p. 19):

[Questioning by Mr. Mays]:

Q. Mr. Looney, the document also says that documentation sufficient to demonstrate that the project qualifies as a categorical exclusion will suffice -- and/or exempt will suffice.

What documentation did you get other than the fact that we're not in an attainment area here in Arkansas?

A. The fact that it is a categorical exclusion?

Q. Yes.

A. The 39-page document that we had to perform the categorical exclusion, the analysis that went into it.

Q. Did it contain anything about air toxins?

[Page 20]

A. No, it didn't. But the project -- it further goes on --

Q. Wait. Wait. The answer is no?

A. The answer is no.

Q. And I noticed in a checklist that's included in the categorical exemption that you signed off on -- do you know what I'm talking about?

A. Yes, sir.

Q. The categorical exclusion that's dated --

A. October 2016.

Q. -- October 2016. There was a box checked on the very first item of the environmental impact assessment air impacts that said no. *What documentation did you have that supported that conclusion?*

A. (*No response.*)

Q. You didn't fill that out, did you?

A. No, sir.

Q. Somebody with the State of Arkansas did, I suppose; is that right?

A. I think their consultant did.

Q. Who?

A. Their consultant did.

Q. He checked it. *Was there anything that you saw that supported that conclusion?*

[Page 21]

A. *No hard data or anything.* Again, it was a categorical exclusion in the MSAT analysis, or an air toxin study of that level was not required.

(Italics added)

A complete transcript of Mr. Looney's testimony taken at the July 23, 2018 hearing is attached to this Brief as **Exhibit No. 5.**

Mr. Looney admits that he approved the categorical exclusion based on the 39-page package of documents entitled "Tier 3 Categorical Exclusion" prepared by Kimley Horn & Associates dated October 4, 2016 **(AR FHWA-471)**, and nothing more. That Report contains the Environmental Assessment Form that Mr. Drake Danley of Kimley Horn signed on September 27, 2016 **(AR FHWA-471-003)**. Mr. Looney admits that he never saw any data or analysis to support the "finding" that the Project would cause no air impacts.

This is remarkable, especially when considered in light of the purpose of the Project to increase highway capacity to enable an additional 30,000 vehicles per day to drive over the

Project area; that the Administrative Record shows multiple residences and schools adjacent to the Project area; and that FHWA's own regulations and guidance documents require at least some preliminary investigation to determine whether there are likely to be impacts. The mere checking of a box on a form by a contractor sitting at a desk will not suffice.

Defendants' Failure to Examine Important Environmental Issues In the ArDOT Environmental Impacts Assessment Form Was Arbitrary and Capricious

It is well settled that an agency decision is arbitrary and capricious if the agency has entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Nebraska v. U.S. EPA*, 812 F.3d 662 (8th Cir. 2016); *South Central Dakota Co-Op Grazing Dist. v. Secretary of U.S. Dept. of Agriculture,* 266 F.3d 889 (8th Cir., 2001); *Friends of Boundary Waters Wilderness v. Dombeck, supra*; *National Wildlife Fed. v. Harvey, supra.*

The complete absence in the Administrative Record of any evidence that ArDOT or FHWA considered the potential impact of the Project on air quality of the area, compels the conclusion that the Defendants were arbitrary and capricious in approving the Tier 3 Categorical Exclusion.

3. THE COURT CAN FASHION A REMEDY FOR THESE VIOLATIONS OF NEPA NOTWITHSTANDING THAT THE HIGHWAY CONSTRUCTION IS COMPLETED

As noted in the introductory portion of this Brief, federal courts possess broad discretion to fashion equitable remedies, and may craft declaratory and

injunctive relief designed to preclude a federal agency from avoiding or acting in contravention of its statutory and regulatory authority.

In *Calderon v. Moore*, 518 U.S. 149, 116 S.Ct. 2066,135 L.Ed.2d 453 (1996), the U.S. Supreme Court discussed the exception to mootness when there is an "available remedy," and the extent to which the remedy must exist, explaining:

> [A]n appeal should therefore be dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant "any effectual relief whatever" in favor of the appellant," citing *Mills v. Green,* 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895). "The available remedy, however, does not need to be 'fully satisfactory' to avoid mootness. *Church of Scientology of Cal. v. United States,* 506 U.S. 9, 13, 113 S.Ct. 447, 450, 121 L.Ed.2d 313 (1992). To the contrary, even the availability of a "partial remedy" is "sufficient to prevent [a] case from being moot." *Ibid.*
> 518 U.S. at 150

Thus, if the Court finds that the Defendants failed to determine by generally accepted scientific methodology that the Project would not cause adverse impacts to air quality and other environmental components that they were required to consider, or failed to "articulate a satisfactory explanation for its action (including a rational connection between the facts found and the choice made), the Court has the authority to, and should, order relief that is appropriate to the current circumstances of this case.

Plaintiffs believe that it is important that an appropriate relief be granted to impress upon the Defendants that, even if they perceive that a categorical exclusion applies, they must still fulfill their obligations under NEPA and the FHWA regulations to make objective and scientifically defensible findings and decisions, and to document those decisions for the administrative record. That includes doing whatever is necessary to establish in an objective and scientific way the underlying basis for the categorical exclusion that the proposed project will cause no environmental impact.

The Administrative Record in this case cannot be denied or explained away by the Defendants. That Record shows that they failed to observe the requirements of the applicable FHWA regulations, and did not take a "hard look" at the potential environmental consequences of the Project to assure that the categorical exemption applied. Instead, they delegated the responsibility for environmental compliance to a subcontractor, and did not bother to determine whether that subcontractor had any objective and scientific justification for his conclusions that there were no impacts from air emissions.

The circumstances in this case are similar to those in *West v. Secretary of Dept. of Transp., supra.* That court found that the Federal Highway Administration did not properly use a categorical exclusion for development of a highway interchange that was completed and operational, and then addressed the issue of the appropriate remedy as follows:

> The conclusion that the FHWA erred in using a documented categorical exclusion, leaves the difficult question of what is the appropriate remedy. The interchange is open to traffic, and was opened at the time the district court dismissed West's claims. Although the FHWA conducted some environmental review of the project, it failed to comply with NEPA's review requirements. While we recognize that it may be too late to correct problems that the requisite environmental review might have identified, we are not convinced that all the problems identified by such a review would be immune from all mitigation measures. There may be ways to modify the operation of the interchange or to mitigate its effects by altering plans for stage 2 or by other transportation planning measures for the existing structure. Thus, there are likely other available remedial measures short of tearing the interchange down.
> 206 F.3d at 929.

Plaintiffs do not suggest that the Project that cost some $90 million to construct be removed or closed. However, the Plaintiffs and other persons living, working or attending school in the I-630 corridor have every reason to be concerned about the impact on their health from air toxins generated by increased traffic on I-630. The Defendant FHWA acknowledges this legitimate public concern about air toxics from highway expansion projects in its guidance

documents on "Mobile Source Air Toxics Analysis in NEPA Documents" (FHWA, 2016, p. 4), in which it states:

> Air toxics analysis is a continuing area of research. While much work has been done to assess the overall health risk of air toxics, many questions remain unanswered. … Nonetheless, air toxics concerns continue to arise on highway projects during the NEPA process. Even as the science emerges, the public and other agencies expect FHWA to address MSAT impacts in its environmental documents.

There are several actions that the Court could order Defendants to take that would provide valuable information to the Plaintiffs and other people in the I-630 corridor, as well as to ArDOT and FHWA, and that might suggest actions, if any, that could be taken at this late date to mitigate or eliminate potentially harmful exposure to air toxics.

Plaintiffs propose that the Court order the Defendants to conduct an assessment of the current air quality conditions in that portion of the I-630 corridor that was included in the Project, and conduct modeling for the potential air quality for the corridor in an area 1,500 feet from the edges of the outside travel lanes in the design year of 2039 using the average daily traffic count of 141,000 vehicles. Based on such modeling, the Defendants should be ordered to also develop options and proposals for mitigation of any air toxins that violate applicable standards or guidelines for exposure to humans, and to implement an option approved by the Court after opportunity for hearing. This is the same type of information collected by the Defendants (through their subcontractor) for the potential impacts of *noise* on the I-630 Project, and resulted in several noise barriers being erected to mitigate the increase in sound. Why such an assessment was not also done for air emissions is inexplicable.

Finally, the evidence shows that the ArDOT and FHWA have made frequent use of categorical exclusions as a means of avoiding a more time-consuming and expensive form of environmental assessments. At the hearing on July 23, 2018, ArDOT's attorney proudly elicited

testimony from witnesses about how the Big Rock Interchange – a huge intertwinement of two interstate highways and several city streets that covers approximately 100 acres of land, cost $150 million, and required six years to construct – was developed under a categorical exclusion notwithstanding the significant impact that it had on the surrounding area and on the public.

ArDOT has other projects that it has recently completed or planned for construction in which a categorical exclusion is the form of environmental review. Those projects – particularly of the size and magnitude of interstate or four-lane highway construction or expansion – have high potential for impacting the environment, and their impacts should be carefully analyzed if NEPA is to have any meaning. Federal funds contribute to most of those projects, and FHWA usually approves those projects.

The Plaintiffs propose that the Defendants be permanently enjoined from any use of a categorical exemption for a highway project without having first: (1) developed within a specified time an agency policy on procedures, together with updated forms and guidelines, for use in determining whether a categorical exclusion provided by current or future FHWA regulations is applicable to a project, such policy to be submitted to the Court and counsel for review, comment and approval of the Court; (2) conducted prior to commencement of any construction in accordance with such policy any and all tests, data collection, assessments or development of other information necessary to determine whether the project will affect the environmental categories contained in ArDOT's Environmental Impacts Assessment Form or other form containing the categories for assessment; and (3) that such data, assessments or collection be included in the administrative record for such project.

CONCLUSION

This case is not moot. There remain "live" issues in this case, the principal issue being whether the Administrative Record shows that the Defendants performed the necessary analysis of potential impacts of the Project to serve as a predicate for the use of a categorical exclusion. That issue was not involved in the Motion for Preliminary Injunction or by the District Court's Opinion of October 27, 2010. If the Administrative Record does not show that information – and it does not – then the Defendants acted arbitrarily and capriciously by failing to make that analysis and, in addition, by failing to clearly and sufficiently explain their use of the categorical exclusion.

Finally, the Court can still fashion remedies for the violation of NEPA by the Defendants in at least two ways: First, by ordering the Defendants to perform an analysis of current air quality conditions in the I-630 corridor that was included in the Project; to conduct modeling for the air quality for the corridor in the design year of 2039 using the average daily traffic count of 141,000 vehicles; and to develop options and proposals for mitigation of any air toxins that violate applicable standards or guidelines for exposure to humans, and to implement options approved by the Court after opportunity for hearing. Second, by permanently enjoining Defendants from future use of categorical exclusions for a highway project without having first conducted collection and analysis of data and information necessary to determine whether the project will affect the human environment, and that such data, assessments and information be included in the administrative record for such project.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Brief is being served on counsel of record for the parties through the Court's ECF notification system. Counsel for Plaintiff is not aware of any party or attorney who requires service by other means.

Dated: May 26, 2020.

/s/ Richard H. Mays
Richard H. Mays

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

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

v. **No: 4:18-cv-00466-JM**

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

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Come the Plaintiffs, George Wise, Matthew Pekar, Uta Meyer, David Martindale and Robert Walker, and for their Motion for Summary Judgment against the Defendants, United States Department of Transportation, Federal Highway Administration; and the Arkansas State Department of Transportation, state:

1. Pursuant to the Order of this Court, Defendants have lodged with the Clerk of the Court the Administrative Record compiled by the Defendants in this case, and upon which Record the Defendants purported to determine to utilize a categorical exclusion as the form of environmental assessment for the I-630 construction project that is the subject of this case.

2. Based upon the contents of the Administrative Record, the Plaintiffs are entitled to a Summary Judgment that the Defendants violated the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §4231 et seq., and its implementing regulations contained in 40 C.F.R. §1508.4 and §1507.3, and the regulations of the Federal Highway Administration contained in 23 C.F.R §§771.115 and 771.117 promulgated in further implementation of NEPA,

Such violations render the Defendants' issuance of a categorical exclusion to be arbitrary and capricious.

3. That the Court should declare the Categorical Exclusion approved by Defendants and dated October 4, 2016 to be null and void.

4. That the Court should further Order the Defendants to perform and produce to the Court and counsel for the parties a sampling and analysis of current air quality conditions in the I-630 Project corridor; to conduct modeling by an independent contractor other than one used in the Project of air quality for the corridor (including surrounding neighborhoods) for the design year of 1939, using the anticipated average daily traffic count of 141,000 vehicles; to develop options and proposals for mitigation of mobile source air toxins in that corridor; and to implement any such options approved by the Court after opportunity for hearing.

5. That the Court should permanently enjoin Defendants from future use of categorical exclusions for highway projects undertaken with Federal funds in the State of Arkansas without first having conducted collection and analysis of data and information necessary to determine whether the proposed project will affect the human environment, and that such data, assessments and information be included in the administrative record for such project.

6. A Brief in Support of this Motion for Summary Judgment is filed herein contemporaneously with this Motion. A Statement of Facts is not filed herewith because the Administrative Record is deemed to be the statement of the facts in cases based upon review of such record. However, a separate Statement of Facts will be filed should the Court deem such Statement to be appropriate.

WHEREFORE, Plaintiffs pray that their Motion for Summary Judgment be granted, and that the Court grant the relief set forth above and in the accompanying Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Motion is being served on counsel of record for the parties through the Court's ECF notification system. Counsel for Plaintiff is not aware of any party or attorney who requires service by other means.

Dated: May 26, 2020.

/s/ Richard H. Mays
Richard H. Mays