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CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SHUDDE FATH, SAVE BARTON CREEK ASSOCIATION, FRIENDS OF THE WILDFLOWER CENTER, CAROLE KEETON, FRANK CLOUD COOKSEY, SUSAN AND JERRY JEFF WALKER, DR. LAURIE DRIES, SAVE OUR SPRINGS ALLIANCE, INC., MOPAC CORRIDOR NEIGHBORS ALLIANCE, THE FRIENDSHIP ALLIANCE OF NORTHERN HAYS COUNTY, INC., AND CLEAN WATER ACTION,	§	CAUSE NO. 1:16-CV-234-LY
PLAINTIFFS,	§	
V.	§	
TEXAS DEPARTMENT OF TRANSPORTATION AND CENTRAL TEXAS REGIONAL MOBILITY AUTHORITY,	§	
DEFENDANTS.	§	

ORDER ON APPLICATION FOR PRELIMINARY INJUNCTION

Before the court are Plaintiffs' Application For Preliminary Injunction and memorandum in support filed September 27, 2016 (Clerk's Doc. Nos. 68 and 69), Defendants' Joint Response in Opposition To Plaintiffs' Application for Preliminary Injunction filed October 7, 2016 (Clerk's Doc. No. 80), and Plaintiffs' Reply in Support of Application for Preliminary Injunction filed October 11, 2016 (Clerk's Doc. No. 85). The court held a hearing on the application on October 12, 2016, at which all parties were represented by counsel.

Having reviewed the application, memorandum in support, response, reply, argument of counsel, and applicable law, the court will deny the application for preliminary injunction for the reasons to follow.

I. BACKGROUND

Plaintiffs are various environmental organizations and associations and individuals (collectively, "Plaintiffs") who seek injunctive and declaratory relief against Texas Department of Transportation ("TxDOT") and Central Texas Regional Mobility Authority ("Central Texas") (collectively, "Defendants") with respect to planned freeway construction in Austin, Texas. Two existing freeways in southwest Austin are pertinent to this case: the southern part of Texas State Highway Loop 1, known as MoPac, running north-to-south from Cesar Chavez Street to State Highway 45 West ("MoPac South"); and State Highway 45 West, which runs west-to-east from FM 1826 to MoPac South ("SH 45"). MoPac South has traffic intersections at Slaughter Lane and at La Crosse Avenue. In 2013, TxDOT and Central Texas began the current plans to (1) expand MoPac South by adding tolled lanes from Cesar Chavez Street to just north of Slaughter Lane (the "Express Lanes project"); (2) expand MoPac South by adding new lanes from the southern end of the Express Lanes project to just south of La Crosse Avenue, and by adding crossing bridges at the Slaughter Lane and La Crosse Avenue intersections (the "Intersections project"); and (3) extend SH 45 by constructing a new, tolled freeway from just north of the intersection of SH 45 and MoPac South to FM 1626 (the "SH 45SW project").

Defendants have pursued the SH 45SW project as a non-federal project and have completed a state environmental-impact statement without following the National Environmental Policy Act. *See* 42 U.S.C. §§ 4321-70h ("NEPA"). TxDOT has pursued the Intersections project as a federal project and has issued a Final Environmental Assessment under NEPA in December 2015 (the "Intersections Environmental Assessment"). Defendants have pursued the Express Lanes project as a federal project and have initiated environmental review under NEPA. Each of the three environmental reviews has considered the impact of and alternatives to the

three projects individually, without considering the impact of or alternatives to the projects collectively.

Plaintiffs contend that Defendants have improperly segmented the projects, and the Intersections, SH 45SW, and Express Lanes projects should have been analyzed under a single NEPA environmental-impact statement. Plaintiffs also contend that TxDOT failed to address the cumulative impacts of the Intersections project in its environmental analysis, and that the SH 45SW project is properly considered a federal project and therefore subject to NEPA. Plaintiffs ask the court to enjoin construction on the SH 45SW and Intersections projects until the court renders a final judgment in this action.

II. APPLICABLE LAW

A preliminary injunction is an "extraordinary remedy." *See Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 536 (5th Cir. 2013). To secure a preliminary injunction, the movant must establish *each* of the following: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury that would result if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. *See Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011). This extraordinary remedy should not be granted unless the party seeking it has "clearly carried the burden of persuasion on *all* four requirements." *Bluefield Water Ass'n, Inc. v. City of Starkville, Miss.*, 577 F.3d 250, 252-53 (5th Cir. 2009) (emphasis added) (quoting *Lake Charles Diesel, Inc. v. General Motors Corp.*, 328 F.3d 192, 195-96 (5th Cir. 2003)).

A reviewing court shall hold unlawful and set aside the action of a federal agency[1] if the court determines the action to be to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Marsh v. Or. Natural Res. Council,* 490 U.S. 360, 375-76 (1989); *Kleppe v. Sierra Club,* 427 U.S. 390, 412 (1976). In making this determination, "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706(2)(A). Generally, agency action is arbitrary and capricious if the agency has relied on factors which Congress did not intend it to consider, entirely failed to consider an important aspect of the issue before it, 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. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The standard of review is highly deferential to the action of the agency, and a reviewing court "may not use review of an agency's environmental analysis as a guise for second-guessing substantive decisions committed to the discretion of the agency." *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 678 (5th Cir. 1992). However, in conducting a NEPA inquiry, the court "must 'make a searching and careful inquiry into the facts and review whether the decision ... was based on consideration of the relevant factors and whether there has been a clear error of judgment.'" *City of Dallas v. Hall*, 562 F.3d 712, 717 (5th Cir. 2009) (citing *Marsh,* 490 U.S. at 378). The agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43.

[1] In December 2014, TxDOT and the Federal Highway Administration entered into a Memorandum of Understanding ("MOU") providing that TxDOT assumed the United States Department of Transportation's NEPA responsibilities for certain projects. Under the MOU, TxDOT's assumption of responsibilities applies to highway projects "requiring EAs, both on the [State Highway System] and local government projects off the [State Highway System] that are funded by FHWA or require FHWA approvals." The MOU encompasses the Intersections project.

A court may uphold agency action only on the bases articulated by the agency at the time of the action and "may not accept appellate counsel's *post hoc* rationalizations for agency action." *Id.* at 50.

This standard of review applies to an agency's decision *not* to prepare an environmental-impact statement, as well as the scope of an environmental-impact statement. *See Kleppe v. Sierra Club*, 427 U.S. at 412 (explaining that plaintiffs must show that agency's decision not to prepare comprehensive environmental-impact statement was arbitrary); *City of Dallas*, 562 F.3d at 717.

III. ANALYSIS

A. Segmentation

Segmentation is an attempt by an agency to divide artificially a "major Federal action" into smaller components to escape the application of NEPA to some of its segments. *Save Barton Creek Ass'n v. FHWA*, 950 F.2d 1129, 1140 (5th Cir. 1992). "As a general rule under NEPA, segmentation of highway projects is improper for purposes of preparing environmental impact statements." *Piedmont Heights Civic Club, Inc. v. Moreland,* 637 F.2d 430, 439 (5th Cir. 1981).

Plaintiffs argue the court must analyze segmentation under the regulations promulgated by the Council on Environmental Quality ("CEQ"). Federal Highway Administration ("FHWA") regulations supplement the CEQ regulations and provide the requirements under NEPA for the processing of highway and public transportation projects. See 23 C.F.R. 771.101. Other courts have analyzed the question of which regulations to look to in segmentation analysis in the context of highway projects and determined that FHWA regulations control. In *Coalition on Sensible Transportation, Inc. v. Dole*, the Court of Appeals for the District of Columbia Circuit analyzed segmentation in the context of a highway project and stated that "[i]n

considering the proper scope of the I-270 project, the district court quite properly referred to Federal Highway Administration regulations." 826 F.2d 60, 68 (D.C. Cir. 1987). The District of Columbia Circuit later looked back on *Dole* and confirmed that the court's reliance on the FHWA regulations was proper, because "an agency's consideration of the proper scope of its NEPA analysis should be guided by the governing regulations." *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304, 1315 (D.C. Cir. 2014); *see also Black Warrior Riverkeeper, Inc. v. Al. Dep't of Transp.*, No. 2:11-CV-267-WKW, 2016 WL 233672, at *15 (M.D. Ala. Jan. 19, 2016) ("FHWA regulations, based on CEQ guidelines, set forth the standard for segmentation in the context of a highway project."); *see also Senville v. Peters*, 327 F. Supp. 2d 335, 353 (D. Vt. 2004) ("FHWA regulations, based on CEQ guidelines, set forth the standard for segmentation."). Further, the Fifth Circuit has consistently relied on the factors in the FHWA regulations in segmentation analyses of highway projects. *See O'Reilly v. U.S. Army Corps of Engineers,* 477 F.3d 225, 236 (5th Cir. 2007); *Save Barton Creek,* 950 F.2d at 1140; *Piedmont Heights,* 637 F.2d at 440. This court concludes that FHWA regulations provide the proper regulatory context in which to conduct its segmentation analysis.

FHWA's NEPA implementation regulations provide:

> In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the action evaluated in each [environmental-impact statement] 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 C.F.R. § 771.111(f). The Fifth Circuit expounded on this standard in *Save Barton Creek*, adding that the project also must not irretrievably commit federal funds for closely related projects. 950 F.2d at 1140; *see also O'Reilly,* 477 F.3d at 236. In the context of a highway

project within a single metropolitan area—as opposed to projects joining cities—courts have focused more on the project's independent utility. *See, e.g., Save Barton Creek*, 950 F.2d at 1140; *Piedmont Heights,* 637 F.2d at 440; *see also Dole,* 826 F.2d at 69. This court's analysis will focus primarily on the independent-utility factor while assigning the other factors modest weight. *See Save Barton Creek*, 950 F.2d at 1140; *see also Aquifer Guardians in Urban Areas v. Fed. Highway Admin.*, 779 F. Supp. 2d 542, 567 (W.D. Tex. 2011) ("Because the interchange improvements at issue here certainly have independent utility, plaintiff's segmentation claim does not have a substantial likelihood of success on the merits.")

Segmentation analysis functions "to weed out projects which are pretextually segmented, and for which there is no independent reason to exist." *Save Barton Creek*, 950 F.2d at 1139. "When the segmentation project has no independent justification, no life of its own, or is simply illogical when viewed in isolation, the segmentation will be held invalid." *Id.* (citation omitted).

The Intersections project[2] would add overpasses where MoPac intersects with La Crosse Avenue and Slaughter Lane to allow MoPac to pass under those respective roadways without stopping at a signalized intersection. The Intersections Environmental Analysis states that the benefits of the project "include enhanced safety and more effective signal operation (resulting in more 'green time')." The Intersections Environmental Analysis goes on to conclude that the project "would improve access and safety to and from the neighborhoods and businesses in the proposed projects area and could contribute to reduced commute times." Additionally, the Intersections project would include new sidewalks, crosswalks, and bike lanes at the affected

[2] The parties argue the segmentation factors with regard to the SH 45SW project as well as the Intersections project. The regulation states: "the action evaluated in each [environmental-impact statement] or finding of no significant impact (FONSI) shall...." 23 C.F.R. § 771.111(f). The Intersections project is the only project evaluated in an environmental-impact statement or FONSI. The court will therefore address only the Intersections project, but will analyze the project in the context of its relation to the SH 45SW and Express Lanes projects.

intersections. The Intersections Environmental Analysis states that the "proposed pedestrian and bicycle facilities would be safer and provide better pedestrian and bicycle access than the existing condition." Also, the record reflects that that the project would increase safety for persons travelling by car, bike, or on foot from the east side to the west side of MoPac, or vice versa, by eliminating the need to cross a four-lane highway.

The Intersections Environmental Analysis concludes that the "proposed project has independent utility without the benefit of other transportation improvements." The court agrees. If pursued independently of the other projects at issue in this cause, the Intersections project would increase safety and traffic efficiency at the affected intersections and have significant utility to persons living and working near the project site. The court does not find it difficult to recognize the utility of raising a roadway to avoid having a signalized intersection with traffic on a four-lane highway. The court concludes that the Intersections project has independent justification in the increased safety and efficiency for traffic on La Crosse Avenue and Slaughter Lane and is not "illogical when viewed in isolation." *See Save Barton Creek*, 950 F.2d at 1139.

The Intersections project also satisfies the logical termini requirement. The termini of the Intersections project are 3700 feet south of the intersection of MoPac and La Crosse Avenue and 2500 feet north of the intersection of MoPac and Slaughter Lane. The Intersections Environmental Analysis concludes that construction limits of the project "allow the intersection improvements to tie back into the existing MoPac facility north of Slaughter Lane and south of La Crosse Avenue." The court agrees. The termini of the Intersections project allow for the objectives of the project to be met without involving portions of road that are not incidental to the improvement of the Slaughter Lane and La Crosse Avenue intersections.

Moreover, the termini of the Intersections project prevent the project from restricting consideration of alternatives. The Intersections Environmental Analysis states that the termini of the project "allow for the consideration of alternatives, including a no build alternative." The construction of the Intersections project does not dictate that any other segment must be built, nor does it dictate the size or features of any other project. *See Save Barton Creek*, 950 F.2d at 1142. Finally, Plaintiffs present no evidence showing the project will irretrievably commit federal funds to any other project. Because the Intersections project is a stand-alone project that does not dictate the requirement of any other construction, it does not commit federal funds to any related projects. *See id.*

Plaintiffs' segmentation claim is factually unsupported by the record and foreclosed by controlling precedent. *See Save Barton Creek*, 950 F.2d at 1142 (rejecting claim that construction of Austin Outer Loop was improperly segmented where segments at issue would "serve a highly useful urban traffic purpose even if no other segments of the Outer Loop are ever constructed" and did not "dictate that any other segment must be built."); *O'Reilly,* 477 F.3d at 237 (finding no improper segmentation where first phase of three-phase development plan could "stand alone without requiring" implementation of other phases, even though all three phases had originally been planned as a single project); *see also Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1184 (10th Cir. 2002) (finding no segmentation where "[e]ach component can serve its transportation purpose whether or not the other projects are built. The components, although interrelated as part of an overall transportation plan, should individually contribute to alleviation of the traffic problems."); *Dole,* 826 F.2d at 69 (finding interstate widening project was not improperly segmented from interchange improvements because improvements served legitimate purposes "in the absence of the I–270 expansion, and thus are sufficiently

independent. They are expected to result in less congestion at interchanges, facilitate local traffic, and provide access to mass transit."). Accordingly, the court concludes Plaintiffs have not shown a likelihood of success on the merits of their segmentation claim.

B. Cumulative Impact

Plaintiffs argue that Defendants violated CEQ[3] regulations by failing to address cumulative impact of the Intersections project. CEQ regulations define a project's cumulative impact as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7; *see also* 40 C.F.R. § 1508.25 (requiring that agencies take cumulative impact into consideration during NEPA review). The regulation states that "[c]umulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7. "[A] consideration of cumulative impacts must also consider '[c]losely related and proposed or reasonably foreseeable actions that are related by timing or geography.'" *O'Reilly*, 477 F.3d at 234 (5th Cir. 2007) (quoting *Vieux Carre Prop. Owners, Residents, & Assocs., Inc. v. Pierce*, 719 F.2d 1272, 1277 (5th Cir. 1983)). "NEPA does not require an agency to restate all of the environmental effects of other projects presently under consideration." *See Piedmont Heights,* 637 F.2d at 441 (holding district court did not abuse its discretion in finding

[3] FHWA regulations supplement the CEQ regulations to provide the requirements under NEPA for the processing of highway and public-transportation projects. See 23 C.F.R. 771.101. FHWA regulations provide the proper factors for segmentation analysis, but there is no similarly apt FHWA regulation with regard to cumulative-impact analysis. The court will therefore look to the CEQ regulations to analyze cumulative impact. *See O'Reilly*, 477 F.3d at 236 (analyzing segmentation under factors from FHWA regulations and cumulative impact under CEQ regulations; noting that segmentation "presents a different problem" than issue of cumulative impact).

that no violation of NEPA occurred from failure to explicitly state all cumulative effects of related highway projects).

The Intersections Environmental Analysis concludes that "[t]he proposed project is not anticipated to result in direct or indirect impacts to at-risk resources." To support this conclusion, the Intersections Environmental Analysis cites the Indirect and Cumulative Impacts Technical Memorandum compiled by TxDOT in June 2015 (the "Cumulative Impacts Memorandum"). The Cumulative Impacts Memorandum provides:

> In order to thoroughly assess the potential cumulative impacts to a resource, minor direct or indirect impacts to a resource considered to be at risk or in poor or declining health should be evaluated along with the effects of past, present, or reasonably foreseeable future actions to determine if such actions, when taken together, would pose a threat to the sustainability or health of that resource.

The memorandum "considers the potential of any direct or indirect impacts that could occur during construction as well as the protections in place for these at-risk resources" and concludes that "cumulative effects are not anticipated."

The court concludes that TxDOT adequately considered the cumulative impact of the Intersections project and its decision not to incorporate a full analysis of the SH 45SW or Express Lanes projects into its assessment of the Intersections project was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706(2)(A); *Piedmont Heights,* 637 F.2d at 441 ("NEPA does not require an agency to restate all of the environmental effects of other projects presently under consideration."). Plaintiffs have therefore failed to establish a likelihood of success on the merits with regard to their cumulative-impact claim.

C. TxDOT's decision not to conduct a NEPA analysis of the SH 45SW Project

The purpose of NEPA is "to require that federal decision-makers consider the

environmental consequences of their actions before deciding to proceed." *Save Barton Creek*, 950 F.2d at 1134 (quoting *Swain v. Brinegar*, 542 F.2d 364, 369 (7th Cir. 1976)). Accordingly, NEPA requires that federal agencies consider the environmental consequences of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *Save Barton Creek,* 950 F.2d at 1133. The CEQ has issued regulations defining "major Federal action." These regulations are entitled to substantial deference. *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979). The regulations provide that "major Federal action" encompasses not only actions by the federal government, but also actions by nonfederal actors "with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. The federal agency must possess "actual power to control the nonfederal activity." *Save Barton Creek,* 950 F.2d at 1135 (quoting *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988)). *See, e.g., Atlanta Coalition on the Transp. Crisis, Inc. v. Atlanta Regional Comm'n*, 599 F.2d 1333, 1347 (5th Cir. 1979) (concluding federal funding assistance for local planning process does not alone constitute "major Federal action" where all decisions are entrusted to state and local agencies). "[F]ederal involvement can in some circumstances be so massive, so pervasive, that 'the acts of the state are in reality federal actions.'" *Save Barton Creek,* 950 F.2d at 1135 (citing *Atlanta Coalition*, 599 F.2d at 1346).

Plaintiffs fail to show evidence of any significant federal involvement, much less "massive" involvement. The Record of Decision issued by TxDOT in March 2015 (the "Record of Decision") states that the project "is being developed, and will be constructed, without Federal-aid funding." The SH 45SW project has been funded to this point with grants from Travis County and Hays County, and the Texas Transportation Commission has approved a $60,000,000 loan and a $28,920,000 grant from TxDOT to continue to fund the project. No

federal funds or approvals have been requested or given for the SH 45SW project. Furthermore, state and local funding of these projects can never be reimbursed by the FHWA because the state did not obtain prior authorization from the FHWA for the expenditure of funds, did not obtain FHWA approval of plans, specifications and estimates, and did not obtain concurrence from the FHWA before awarding the construction contracts. *See* 23 U.S.C. §§ 106, 112(d); 23 C.F.R. § 1.9(a); *Save Barton Creek*, 950 F.2d at 1135.

Plaintiffs argue the Interlocal Agreement between Central Texas, Hays County, and Travis County (the "Interlocal Agreement") binds Central Texas to the judgment of the United States Fish and Wildlife Service, a federal entity, on the development of the project. The Interlocal Agreement states that "before design of the Project is complete, there shall be consultation with U.S. Fish and Wildlife Service to determine what is necessary to fulfill" the requirement that Travis County enter into an arrangement to preserve the environmental integrity of Flint Ridge Cave, and that Central Texas shall develop the project in a manner that does not "result in Travis County's noncompliance with the Endangered Species Act or the [Endangered Species Act] Permit, as determined by the U.S. Fish and Wildlife Service." Consultation with a federal agency on compliance with federal law does not amount to "Federal control and responsibility." 40 C.F.R. § 1508.18; *see also Save Barton Creek,* 950 F.2d at 1135 ("'[T]he federal agency must possess actual power to control the nonfederal activity.'") (citation omitted).

The court concludes the SH 45SW project is not a "major Federal action" and is therefore not subject to NEPA's environmental-impact-statement requirement. Plaintiffs have failed to establish a substantial likelihood of success on the merits with regard to their claim that Defendants violated NEPA by failing to perform an environmental analysis of the SH 45SW project that complies with NEPA and its implementing regulations.

IV. CONCLUSION

Employing the appropriate standard of review, the court concludes that Defendants have not artificially divided the proposed construction into smaller components to escape the application of NEPA. The court further concludes that Defendants have complied with all applicable federal regulations governing the construction. Therefore, because Plaintiffs have failed to establish a substantial likelihood of ultimate success on the merits of their asserted claims, their request for immediate relief must fail. The court therefore need not and does not reach the remaining requirements for granting a preliminary injunction. *Bluefield*, 577 F.3d at 253 ("[A] preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has 'clearly carried the burden of persuasion' on all four requirements."). Accordingly,

IT IS ORDERED that Plaintiffs' application for preliminary injunction (Clerk's Doc. No. 68) is **DENIED**.

SIGNED this 19th day of October, 2016.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE