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

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

V. **4:18CV00466 JM**

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

ORDER

Pending is the Plaintiffs' Motion for Temporary Restraining Order. The Defendants have responded to the motion and a hearing was held before the Court on Monday, July 23, 2018. For the reasons set forth below, the motion is denied.

On July 18, 2018, Plaintiffs filed suit seeking declaratory and injunctive relief against the Defendants, United States Department of Transportation, Federal Highway Administration (FHWA), and the Arkansas State Transportation Department (ArDOT)[1] (collectively "Defendants"). Plaintiffs allege Defendants failed to comply with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§4321, the implementing regulations for NEPA issued by the White House Council on Environmental, 40 C.F.R. §§ 1500-1508 and other violations of federal law. Plaintiffs contend that the Baptist Hospital University Avenue Widening Project (the "I-630 project") was misclassified by the Defendants as a Categorical Exclusion ("CE") to NEPA's requirement that agencies prepare an Environmental Assessment ("EA") or Environmental Impact Statement ("EIS") of any major federal action, such as a highway or

[1] The Arkansas State Transportation Department, or ArDOT, was previously known as the Arkansas State Highway and Transportation Department. Any reference to the Arkansas State Highway and Transportation Department in the documents associated with this case will be changed to ArDOT for the sake of simplicity.

transit project. On the same day, Plaintiffs filed a Motion for Temporary Restraining Order asking the Court to enjoin construction of the I-630 project.

The I-630 project would widen Interstate 630 from six to eight lanes from Baptist Hospital to University Avenue in Pulaski County within the City of Little Rock. The length of the project is approximately 2.5 miles. On October 4, 2016, the Defendants issued a Tier 3 Categorical Exclusion report (the "CE report") pursuant to 42 U.S.C. § 4332(2) which was approved by Randal Looney, Environmental Specialist for the FHWA. (Defs' Ex. 3 to the Hr'g). The CE report states, "The [ArDOT] Environmental Division has reviewed the referenced project and it falls within the definition of the Tier 3 Categorical Exclusion as defined by the [ArDOT] and Federal Highway Administration (FHWA) Memorandum of Agreement on the processing of Categorical Exclusions." *Id.* at p.1. The ArDOT and FHWA Memorandum of Agreement (the "MOA") sets forth the Defendants' agreement for processing and documenting CEs based upon their "desire to concur in advance with the classification of those types of categorical exclusions in Section [23 CFR] Section 771.117(d) which have no adverse environmental impacts." (Defs' Ex. 4 to the Hr'g).

Plaintiffs challenge the Defendants' determination that the I-630 project qualifies for the use of a Categorical Exclusion to exempt it from NEPA's requirement to prepare an EA or EIS. In the Complaint, Plaintiffs contend that in approving the use of a CE as a substitute for an EA or EIS, the Defendants failed to reasonably and adequately determine whether the 1-630 project will likely involve significant air, noise or water quality impacts, whether it will have significant impacts on travel patterns, or will otherwise, either individually or cumulatively, have any significant environmental impacts. Plaintiffs also contend that the MOA under which ArDOT

and the FHWA approved the CE expired in November 2014 and was not valid at the time the CE was approved.

The Defendants contend that the I-630 project qualifies as a CE under 23 CFR § 771.117(c)(22) because it does not involve any significant environmental impacts and because the project takes place entirely within the existing operational right-of-way. The project also qualifies as a CE based upon the MOA.

I. Standard of Review

Under Eight Circuit precedent, the standard for review of injunctive relief instructs the Court to weigh four factors: (1) the probability of success on the merits; (2) the threat that the movant will suffer irreparable harm absent the restraining order; (3) the balance of the harms; and (4) the public interest. *See Winter v. Natural Resources Defense Council, Inc*., 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."); *Dataphase Sys., Inc. v. C L Sys., Inc.,* 640 F.2d 109 (8th Cir. 1981). Plaintiffs have the burden of proving the injunction should be granted. *See Gelco Corp. v. Coniston Partners,* 811 F.2d 414, 418 (8th Cir. 1987). "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

The standard of judicial review for deciding this question (compliance with NEPA) falls under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*. The Administrative Procedures Act requires the Court to uphold an agency's decision unless the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.A. §

706(2)(A); *see also Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 109 S.Ct. 1851, 1860, 104 L.Ed.2d 377 (1989) (Supreme Court found that an agency's decision not to prepare a supplemental EIS, or an EIS in the first instance, is controlled by the arbitrary and capricious standard of the Administrative Procedures Act.). The scope of judicial review is limited to the administrative record before the decision-maker at the time of its decision, and the administrative decision is entitled to a presumption of validity. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985); *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

II. Discussion of the Law

"NEPA requires all federal agencies . . . to prepare an EIS for all 'major Federal actions significantly affecting the quality of the human environment.'" *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 991 (8th Cir. 2011) (citing 42 U.S.C. § 4332(2)(C)). "NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S. Ct. 1835, 1846, 104 L. Ed. 2d 351 (1989). CEs are actions that based on past agency experience with similar projects, the agency, here FHWA, has determined do not involve significant environmental impacts. CEs were created to reduce excessive paperwork and to utilize administrative institutional knowledge of similar projects.

A. Likelihood of Success

1. The MOA

Plaintiffs contend that the MOA, under which ArDOT and the FHWA approved the CE, expired in November 2014 pursuant to 23 CFR 771.117(g)(2). There is no dispute that the MOA is a "programmatic agreement" allowing ArDOT to make NEPA CE determinations and approvals on FHWA's behalf as long as the project is covered by the conditions listed in the

MOA. *See* 23 CFR 771.117(g); (Defs' Ex. 4 to Hr'g). The MOA was executed on November 4, 2009.

In 2014, Section 771.117(g)(2) was added to the federal regulation covering CEs. Section 771.117(g)(2) restricts these programmatic agreements between the federal and state agencies to a term of no more than five years, with the option to renew. According to Plaintiffs' argument, the MOA expired in November 2014, two years before the CE report approving the I-630 project exclusion was issued.

Defendants argue that the 2009 MOA predates the 2014 change. Defendants rely on a February 4, 2015 memorandum from FHWA's Associate Administrator for Planning, Environment and Realty to the FHWA Directors of Field Services Division Administrators (the "FHWA public memorandum") (Defs' Ex. 6 to Hr'g) and the FHWA's website addressing NEPA and Project Development. (Defs' Ex. 7 to Hr'g). With regard to Programmatic and Categorical Exclusion Agreements, the FHWA website states that "agreements predating this memorandum remain valid until revised to conform with the new requirements and provides that November 6, 2019, five years after the effective date of the regulation, is the deadline for revisions to any pre-existing agreements." (Def. Ex. 7 to Hr'g.).

The Court finds the Defendants' argument to be valid. The CE report documenting the I-630 project as a CE was valid when it was signed and remains valid today because the five-year grace period following the effective date of 771.117(g)(2) has not yet elapsed and because the MOA itself contains no expiration date.

2. CE Criteria

Plaintiffs' main argument in support of an injunction of the I-630 project is that the project does not qualify as a CE. Defendants argue that the project qualifies under 23 CFR

771.117(c)(22). Regulation 771.177(c) provides a list of actions that meet the criteria for a CE. Subsection 22 of 771.117(c) includes:

> Projects, as defined in 23 U.S.C. 101, that would take place entirely within the existing operational right-of-way. Existing operational right-of-way refers to right-of-way that has been disturbed for an existing transportation facility or is maintained for a transportation purpose. This area includes the features associated with the physical footprint of the transportation facility (including the roadway, bridges, interchanges, culverts, drainage, fixed guideways, mitigation areas, etc.) and other areas maintained for transportation purposes such as clear zone, traffic control signage, landscaping, any rest areas with direct access to a controlled access highway, areas maintained for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transit power substations, transit venting structures, and transit maintenance facilities. Portions of the right-of-way that have not been disturbed or that are not maintained for transportation purposes are not in the existing operational right-of-way.

23 C.F.R. § 771.117. At the hearing, Plaintiffs argued that the I-630 project must take place outside ArDOT's existing operational right-of-way because it will enlarge the roadway by a significant amount.

After review of the evidence, particularly the testimony of Keli Wylie, Program Administrator of the Arkansas Department of Transportation's Connecting Arkansas Program, the Court finds that Plaintiffs have failed to establish that any part of the I-630 project construction would go outside of the existing operational right-of-way. Therefore, it was reasonable for the Defendants to conclude that the project qualified as a CE under 23 CFR 771.117(c)(22).

3. MSAT Analysis

Plaintiffs argue that the Defendants violated NEPA by failing to perform sufficient air quality testing, or a Mobile Source Air Toxic ("MSAT") analysis. Plaintiffs introduced research articles finding that living and working near sources of air pollution, including busy roadways, can lead to higher exposure to air contaminants and contribute to reduced lung function, asthma, cardiovascular disease and premature death. (Pls' Ex. 5, 6 to Hr'g). The Court notes that the

research also suggests that roadway design "including noise barriers" may help reduce exposure to air pollutants caused by roadways. (Pls' Ex. 5 to Hr'g at p. 4; Pl's Ex. 7 to Hr'g at p.6).

Defendants contend that they were not required to perform an MSAT study because the I-630 project qualifies as a CE under 23 CFR 771.117(c). Defendants relied upon the Interim Guidance Update on Mobile Air Toxic Analysis in NEPA issued on December 6, 2012. (the "Guidance"). (Pls' Ex. 12 to Hr'g). The Guidance acknowledges a tiered approach to analyzing MSAT in NEPA documents. Tier 1 projects require no analysis because they have no potential for meaningful MSAT effects. The Guidance goes on to explain that Tier 1 projects include "projects qualifying as a categorical exclusion under 23 CFR 771.117(c)." (Pls Ex. 4 to Hr'g). As stated, it was reasonable to find that the project qualified as a CE under 23 CFR 771.117(c)(22) and, therefore reasonable to determine that the I-630 project did not require an MSAT analysis.

For these reasons and others cited at the hearing, Plaintiffs have not shown a likelihood of success on the merits of any of their arguments establishing that the Defendants' decision to classify the I-630 project as a Categorical Exclusion was arbitrary, capricious, an abuse of discretion, or otherwise in violation of the law. Therefore, this factor weighs in favor of the Defendants.

B. Irreparable Harm

At the hearing, Plaintiffs argued that they would suffer irreparable harm if the project were allowed to continue because the I-630 project will disrupt traffic patterns, including the function of emergency vehicles, increase air pollution, and noise pollution. Plaintiffs' evidence regarding irreparable harm focused on air pollution caused by the increased traffic on I-630 following the completion of the project. For purposes of a preliminary injunction, the Court, however, need only consider evidence of irreparable harm caused by allowing the project to

continue until a trial on the merits. There was no evidence that the Plaintiffs would suffer irreparable harm from air pollutants while the project is in process.

Although Plaintiffs argued that the project would disrupt traffic, there was little evidence that the disruption would be substantial. In fact, the evidence showed that there would be no re-routing of I-630 traffic during the construction process. Lane closures will occur only on weekends or during non-peak evening hours. (Defs Ex. 8, 12 to Hr'g).

Defendants introduced the 152-page Noise Study Report conducted by Kimley Horn to evaluate any potential public noise concerns caused by the project. (Defs' Ex. 1 to Hr'g). The report identified eight (8) noise study areas along the project. The study considered noise abatement measures, such as reducing speed limits or prohibiting heavy trucks, but found that the only feasible noise abatement measure for the impacted areas was the placement of noise barriers. *Id.* Noise barriers were studied for "feasibility" and "reasonableness" at all predicted impact areas. "Feasibility' means that a noise barrier will provide at least a five decibel reduction in the one-hour equivalent sound level for at least one impacted residence." *Id.* at p.2. "Reasonableness" is based on a number of factors including the average costs per benefitted residence. *Id.* at p.3. Noise barriers for some areas were not found to be reasonable because the average costs per benefitted residence exceeded the ArDOT threshold criterion of $36,000 per benefitted receiver. *Id.* Noise barriers were found to be warranted in four of the study areas. (Defs' Ex. 3 to Hr'g at p. 2). After public hearings, residents in three of the four areas voted to have noise barriers installed to help alleviate the problem. (Defs' Ex. 3 to Hr'g at p. 2-3).

The Court concludes that the Plaintiffs have failed to demonstrate that they will likely suffer irreparable harm if the I-630 project continues. The Court is aware that a violation of NEPA itself is evidence of a real environmental harm. In this case, however, there has not been a

showing that Plaintiffs are likely to prove Defendants violated NEPA. See Sierra Club v. U.S. Army Corps of Engineers, 645 F.3d 978, 992 (8th Cir. 2011) ("[A] movant seeking injunctive relief must demonstrate that irreparable injury is *likely* in the absence of an injunction." (internal citations omitted) (emphasis in original)). Therefore, this factor weighs in favor of the Defendants.

C. Balance of Harms

With respect to balance of the harms, Defendants argue that halting the construction of the project would cause substantial monetary costs to ArDOT. The contractor for the project, Manhattan Construction Group, would incur significant mobilization and de-mobilization costs by halting the construction. These costs would be borne by ArDOT. In addition, Manhattan would be entitled to additional compensation for costs associated with any delays caused by the issue. Under the contract, ArDOT would be required to pay for idle equipment and personnel. According to testimony, these monetary costs would be significant. Because the Court found Plaintiffs presented little proof of irreparable harm, ArDOT's potential monetary liability tips the balance in favor of the Defendants.

D. Public Interest

Plaintiffs argue and other courts have found that, "[t]he public has an interest in knowing that its government agencies are fulfilling their obligations and complying with laws that bind them." *Sierra Club v. United States Army Corps of Engineers*, 2010 WL 11484334, at *9 (W.D. Ark. Oct. 27, 2010), *aff'd sub nom. Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978 (8th Cir. 2011). This is particularly true when the government agencies are tasked with protecting the environment. It is difficult, however, to acknowledge this ideal without considering the fragility of Plaintiffs' case here. If Plaintiffs had shown a likelihood that they

would succeed on the merits and that Defendants violated NEPA, the public interest factor would be heavily weighted toward the Plaintiffs. However, Plaintiffs failed to make such a showing.

Defendants contend that the I-630 project benefits the public by reducing congestion, enhancing safety, and improving the quality of life for thousands of people who will use the expanded roadway every day. They argue that enjoining the project would not be in the public interest because it would cause a delay in its completion. Based upon this consideration, the Court finds that this factor, also, favors the Defendants.

III. Conclusion

After considering all of the evidence and arguments presented by the parties, the Court finds that all of the factors weigh in favor of the Defendants and against the issuance of an injunction. Therefore, the request for injunctive relief (ECF No. 2) is denied.

IT IS SO ORDERED this 27th day of July, 2018.

James M. Moody Jr.
United States District Judge