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

SAVE OUR SPRINGS ALLIANCE, Inc., a non-profit organization, *Plaintiff*, v. **TEXAS DEPARTMENT OF TRANSPORTATION**; **UNITED STATES FISH AND WILDLIFE SERVICE**, *Defendants*.	§ § § § § § § § § § § § § §	Case No. 19-CV-762

PLAINTIFF'S ORIGINAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff Save Our Springs Alliance, Inc. ("SOS") challenges Defendant U.S. Fish and Wildlife Service's ("the Service") and Defendant Texas Department of Transportation's ("TxDOT") compliance with Section 7 of the Endangered Species Act and its implementing regulations in their consultation on the Oak Hill Parkway Project ("the Project")—a highway expansion and grade separation project in Travis County, Texas. Specifically, SOS challenges Defendants' determination and concurrence that the Project is not likely to adversely affect the federally endangered Austin Blind Salamander or Barton Springs Salamander. SOS also challenges TxDOT's failure to ensure that the Project does not jeopardize the survival of the Austin Blind Salamander or the Barton Springs Salamander through its reliance on the Service's unlawful concurrence, and the Defendants' failure to reinitiate consultation in light of new information about the Project's impacts.

2. The Endangered Species Act ("ESA") requires that each federal agency consult with the Service to ensure that any federal action undertaken is not likely to jeopardize the survival of threatened or endangered species or adversely modify critical habitat. Interagency consultation is a central feature of the ESA's framework for protecting

endangered and threatened species. In fulfilling these requirements, each agency must use the best scientific and commercial data available.

3. Through this Complaint, Plaintiff Save Our Springs Alliance seeks injunctive and declaratory relief, including an order enjoining construction on the Project pending Defendants' full compliance with the law.

JURISDICTION

4. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); 23 U.S.C. § 327(c)(3)(B) and Tex. Transp. Code § 201.6035 (consent to federal jurisdiction and waiver of sovereign immunity); 16 U.S.C. § 1540(g)(1)(A) (ESA citizen suit provision); and 5 U.S.C. § 702 (Administrative Procedure Act).

5. Plaintiff provided TxDOT and the Service with at least sixty (60) days' notice of the ESA violations alleged herein as required by 16 U.S.C. § 1540(g)(2)(A). Defendants have not remedied the violations set out in the 60-day written notice letter.

6. Venue is proper in this Court because Defendant TxDOT resides here, and the violations giving rise to the claims occurred in this judicial district. *See* 28 U.S.C. § 1391(b) & (e); 16 U.S.C. § 1540(g)(3)(A). Defendant the Service also has an office within this district, the Austin field office, which sent the letter unlawfully concurring with TxDOT's conclusions. Thus, venue is also proper because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district. *See* 28 U.S.C. § 1391(e)(1).

PARTIES

7. Plaintiff Save Our Springs Alliance, Inc. is a nonprofit charitable corporation established in 1992 to protect the land, water, and wildlife of the Edwards Aquifer region and the natural and cultural heritage of the Texas Hill Country, with a special emphasis on Barton Springs. SOS and its members engage in a range of outdoor education, conservation-oriented research, and conservation advocacy activities—including, among others, filing written comments in the environmental study process for the Project. SOS members

regularly swim in Barton Springs and Barton Creek downstream of Backdoor Springs; hike and bike on the Barton Creek greenbelt and the Williamson Creek Greenbelt trails directly adjacent to U.S. 290 in the proposed project area; and enjoy the heritage trees and natural setting of the Oak Hill area near the "Y." SOS members include scientists and citizen scientists who study and work to protect the endangered Barton Springs Salamander and Austin Blind Salamander. SOS members petitioned to list the Barton Springs Salamander as endangered in 1992, and SOS brought successful legal action that led to the listing of the Barton Springs Salamander as endangered.

8. SOS members include those who have studied the Austin Blind Salamander and Barton Springs Salamander, visited the areas where they are known to occur, and evaluated their habitat requirements. They use these areas to observe the quality of endangered salamander habitat and the habitat of other wildlife; for research; for photography; for aesthetic enjoyment; and for recreational and other activities. SOS members derive professional, aesthetic, spiritual, recreational, economic, scientific, and educational benefits from these listed species and their habitats. Those members have concrete plans to continue to travel to and recreate in areas where they can observe Austin Blind Salamander and Barton Springs Salamander habitat and potentially the salamanders as well, and they will continue to maintain an interest in these species and their habitats in the future.

9. Some SOS members also live within one mile of the Project area and would be harmed by water, air, and noise pollution and visual intrusion caused by the construction and operation of the Project. Some SOS members regularly drive through the "Oak Hill Y," where they enjoy the historical cliffs, heritage trees, and parks within and alongside the US 290 and SH 71 right-of-ways.

10. As proposed, the Oak Hill Parkway Project will cause direct harm to SOS and its members' interests in conservation, outdoor education, aesthetic, and natural and cultural heritage values of the Oak Hill area, Williamson Creek and its tributaries, the

Barton Springs segment of the Edwards Aquifer, and the springs that flow from the Aquifer. In addition, public health interests of SOS and its members will be harmed by the planned construction and operation of the Oak Hill Parkway Project.

11. The Service's arbitrary concurrence and TxDOT's reliance on this unlawful concurrence results in a failure to ensure that the survival and recovery of the Austin Blind Salamander and the Barton Springs Salamander are not jeopardized; this failure has adversely affected and continues to adversely affect SOS and its members' interests.

12. Unless the requested relief is granted, SOS's interests will continue to be adversely affected and injured by Defendants' failure to comply with the ESA and the Administrative Procedure Act, as well as the resulting harm to the Austin Blind Salamander and Barton Springs Salamander and their habitats if TxDOT is allowed to begin construction of the Project. These are actual, concrete injuries from which SOS and its members presently suffer, and they are directly caused by Defendants' violation of the ESA's mandate to ensure the Project is not likely to jeopardize the listed species. SOS's injuries will be redressed by the relief sought. SOS has no other adequate remedy at law.

13. Defendant Texas Department of Transportation is a state agency with its principal executive offices located at 125 East Eleventh Street, Austin, Texas, 78701. In December 2014, the State of Texas and TxDOT entered into a formal memorandum of understanding with the Federal Highway Administration ("FHWA") establishing that, for transportation-related actions that are the subject of this lawsuit, TxDOT is acting in the capacity of a federal agency, specifically as FHWA.

14. Defendant U.S. Fish and Wildlife Service is an agency within the U.S. Department of the Interior. It and its officers are responsible for administering the ESA, particularly regarding potential impacts to freshwater fish and wildlife species that have been listed as threatened or endangered with extinction pursuant to the ESA.

LEGAL BACKGROUND

15. Congress enacted the ESA, in part, "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved … [and] to provide a program for the conservation of such endangered species and threatened species…" 16 U.S.C. § 1531(b).

16. The ESA vests primary responsibility for administering and enforcing the statute with the Secretaries of Interior and Commerce. The Secretaries of Interior and Commerce have delegated this responsibility to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, respectively.

17. When a species has been listed as threatened or endangered under the ESA, all federal agencies—including TxDOT as a delegate of FHWA—must ensure that their programs and activities comply with the ESA.

18. To this end, Section 7(a)(2) of the ESA requires that "each federal agency shall, in consultation with and with the assistance of [the Service], insure that any action authorized, funded, or carried out by such agency (hereinafter … "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by [the Service] … to be critical." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14. In fulfilling these requirements, agencies must use "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2).

19. An action would "jeopardize the continued existence" of a species if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02.

20. An agency must initiate consultation under Section 7 whenever its action "may affect" a listed species or critical habitat. 50 C.F.R. § 402.14(a). Conversely, an agency is relieved of the obligation to consult on its actions only where the action will have "no

effect" on listed species or designated critical habitat. "Effects determinations" are based on the direct, indirect, and cumulative effects of the action when added to the environmental baseline and other interrelated and interdependent activities. 50 C.F.R. § 402.02 (definition of "effects of the action").

21. "Cumulative effects" are "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. § 402.02.

22. "Action area" means "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02. Delineating the appropriate action area is fundamental to conducting a lawful assessment of a project's impacts during consultation.

23. Section 7(d) of the ESA provides that, once a federal agency initiates consultation on an action under the ESA, the agency "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures" which would avoid violating Section 7(a)(2). 16 U.S.C. § 1536(d). This section's purpose is to maintain the environmental status quo pending the completion of consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of its critical habitat. 50 C.F.R. § 402.09.

24. To initiate consultation, the action agency (here, TxDOT) must assess the impacts of the action on listed species and their habitat and provide all relevant information about such impacts to the expert wildlife agency (here, the Service). 50 C.F.R. § 402.14(c)-(d). If the action agency determines that an action "may affect" but is "not likely to adversely affect" a listed species or its critical habitat, it may undergo informal consultation with the Service, defined as "an optional process that includes all discussions,

correspondence, etc., between the Service and the Federal agency" that is "designed to assist the Federal agency in determining whether formal consultation or a conference is required." 50 C.F.R. §§ 402.13(a), 402.14(b). If the Service concurs in writing with an action agency's "not likely to adversely affect" determination, the agency does not have to undergo formal consultation. *Id*. §§ 402.13(a), 402.14(b).

25. If the Service does not concur, or if the action agency has determined that the action is "likely to adversely affect" a listed species, the agencies must conduct a formal consultation. *Id*. § 402.14(a).

26. Formal consultation concludes with the Service's issuance of a biological opinion in which it determines whether the agency action will jeopardize the survival and recovery of listed species or will destroy or adversely modify the species' critical habitat. 16 U.S.C. § 1536(b). In making this determination, both the Service and the action agency must use the best available scientific information available. *Id*. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8). The Service must review all relevant information and provide a detailed evaluation of the action's effects, including the cumulative effects of federal and nonfederal activities in the area, on the listed species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)-(h). If the Service determines that the action is likely to jeopardize the species, the biological opinion must specify "reasonable and prudent alternatives" that will avoid jeopardy. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). The Service must also formulate discretionary conservation recommendations to reduce or eliminate the action's impacts on listed species or critical habitat. 50 C.F.R. § 402.14(g)(6).

27. "Reasonable and prudent alternatives" are alternative actions that: (1) can be implemented in a manner consistent with the action's intended purpose; (2) can be implemented consistent with the scope of the action agency's legal authority; (3) are economically and technologically feasible; and (4) would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. 50 C.F.R. § 402.02.

28. Not only does a Section 7(a)(2) consultation assist the action agency in discharging its duty to avoid jeopardy, but the biological opinion also affects the agency's obligation to avoid "take" of listed species. Under ESA Section 9, it is illegal for any person—including governmental entities—to "take" any endangered species of fish or wildlife. 16 U.S.C. § 1538(a)(1)(B). "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct." *Id*. § 1532(19). The Service defines "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3.

29. During formal consultation, the Service determines whether to authorize the take of listed species through the issuance of an incidental take statement. An incidental take statement may be issued only if the action can proceed without jeopardizing the affected species. 16 U.S.C. § 1536(b)(4). An incidental take statement must specify: (1) the impact of the incidental take on the listed species; (2) non-discretionary "reasonable and prudent measures"; and (3) mandatory terms and conditions that the Service considers necessary to minimize and reduce impacts to listed species and avoid jeopardy. *Id*.

30. An incidental take statement insulates the action agency from liability for take of an endangered or threatened species, provided the agency complies with the statement's terms and conditions. 16 U.S.C. § 1536(o)(2).

31. Reinitiation of consultation is required under certain circumstances, including "if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered, or if the action is modified in a manner that causes an effect to the listed species or critical habitat that was not considered" during consultation. 50 C.F.R. § 402.16.

32. The Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, provides for judicial review of federal agencies' and officials' compliance with the ESA and with the APA's own procedural requirements. Under the APA, courts "shall hold unlawful and set

aside" agency action, findings, or conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

FACTUAL BACKGROUND

a. The Setting

33. The Oak Hill "Y" traverses the recharge zone of the highly vulnerable Barton Springs segment of the Edwards Aquifer, one of the most environmentally sensitive and significant areas in the State of Texas. The endangered Barton Springs and Austin Blind Salamanders depend on these underground waters.

34. The Edwards Aquifer is a karst limestone aquifer characterized by open chambers such as caves, fractures, and other cavities that were formed either directly or indirectly by the dissolution and fracturing of subsurface rock formations. These large openings in the ground and streambeds allow water to enter the Edwards Aquifer without filtration, where it can move relatively rapidly to springs. Groundwater in the aquifer moves in a northeastern direction along the fault zone.

35. The Project crosses over and adds concrete to the watersheds for Williamson Creek and Devil's Pen Creek, a tributary of Slaughter Creek. Just east of the Project, Williamson Creek flows into the Recharge Zone of the Edwards Aquifer. Studies have demonstrated a known connection between Williamson Creek and Slaughter Creek to Barton Springs. Devil's Pen Creek is approximately four miles upstream of the confluence with Slaughter Creek, and studies from the closest recharge feature along Slaughter creek suggest fluids entering this feature discharge at Barton Springs in seven to eight days.

b. The Endangered Salamanders

36. The Austin Blind Salamander (*Eurycea waterlooensis*) and Barton Springs Salamander (*Eurycea sosorum*) are federally listed endangered species that depend on the Barton Springs portion of the Edwards Aquifer. The salamanders are endemic to a small area of Travis and Hays Counties, Texas—meaning they are found nowhere else in the world. Both are neotenic (do not transform into terrestrial form) and spend their entire

lives in aquatic habitats such as spring outlets and subterranean water-filled caves and cavities. The Austin Blind Salamander is thought to be more subterranean than the Barton Springs Salamander, which is found at and near the spring openings . Similar to other cave-adapted species, both salamanders are pale in color and have poor to non-existent vision.

37. The salamanders use interstitial spaces (empty voids between rocks) within the springs or subsurface streambed, which provide foraging habitat and protection from predators and drought conditions. They feed primarily on small aquatic invertebrates and insect larvae.

38. The Barton Springs Salamander was listed as an endangered species under the ESA in 1997. 62 Fed. Reg. 23,377 (Apr. 30, 1997). The Austin Blind Salamander was listed as an endangered species in 2013. 78 Fed. Reg. 51,278 (Aug. 20, 2013). Critical habitat has only been designated for the Austin Blind Salamander, concurrent with its listing and encompassing the four Barton Springs spring outlets. 78 Fed. Reg. 51,328 (Aug. 20, 2013).

39. Both salamander species rely on groundwater with high oxygen levels that is free of pollutants, as well as subsurface voids free of sediment. Sediment is of particular concern because it can impede respiration by clogging salamanders' gills. Sediment can also settle in, fill up, and smother the subsurface spaces that salamanders use for shelter, to find food, and to avoid predators.

40. Changes in water quality and flow patterns can render aquatic habitat unsuitable for the salamanders. Both salamander species are threatened by reduced habitat quality due to urbanization and increased impervious cover (paved surfaces). The normal hydrologic regime is altered when natural vegetation and topsoil are cleared and replaced with impervious cover. The Project would cause increased sediment loading during the construction phase when soil is exposed, as well as increased erosion post-construction, due to altered flow paths and more intense rainfall runoff from the newly paved highway surfaces. Increased impervious cover and the resulting increased sediment

loading, both during and after construction, degrades water quality, and may reduce the quantity of recharge in the salamanders' habitat. Because salamander prey species are also highly sensitive to pollution, including sediment and petroleum hydrocarbons from increased automobile traffic, contamination can also reduce the salamanders' food supply, indirectly impacting the salamanders' ability to survive.

41. The primary threat identified in the final listing rules for both the Austin Blind Salamander and Barton Springs Salamander is habitat modification from urban expansion, including specifically from highway projects, in the form of degraded water quality and quantity and the disturbance of spring sites. 78 Fed. Reg. at 51,297; 62 Fed. Reg. at 23,384.

42. In addition to their eponymous habitat, Barton Springs Salamanders have been found in several other spring outlets of the Edwards Aquifer, including Cold Springs (in 2004) and Backdoor Springs (in 2017). Both of these springs are downgradient (downstream, in underground flow paths) from the proposed Project. Dye trace studies conducted by hydrogeologists at the Barton Springs Edwards Aquifer Conservation District found that the Project largely lies in the Cold Springs groundwater basin, which is significantly smaller than the larger groundwater basins that flow mainly into Barton Springs.

43. The Project would reduce the quality of water recharging the Edwards Aquifer by increasing impervious cover, increasing the probability of a hazardous material spill, and increasing sediment and other pollution loading. This reduced water quality would directly impact both surface and subsurface watersheds, salamander habitat at spring outlets, and the salamanders living there. These reductions in water quality and altered flows, and likely reduced quantity of recharge waters, would harm the Austin Blind Salamander and Barton Springs Salamander.

c. TxDOT's Oak Hill Parkway Project

44. The project involves proposed widening improvements at and around the intersection of US Highway (US) 290 and State Highway (SH) 71, locally known as "the Y," in southwestern Travis County, Texas. The project extends along US 290, from MoPac to Farm-to-Market (FM) 1826 for a distance of approximately 6.16 miles with a transition to the west. The project also includes the interchange on SH 71 from US 290 to Silvermine Drive, a distance of approximately 1.31 miles, and includes two isolated detention ponds located on either side of SH 71.

45. The proposed widening would make the Project footprint ten to twelve lanes of at-grade and below grade pavement through the length of the project, in addition to the ramps and overpasses. The number of highway mainlanes would vary from four (the majority of the length) to two lanes at its western edged, flanked by two to three-lane frontage roads running continuously alongside the mainlanes. The Project includes elevated ramps (or "direct connectors") at the intersection of US 290 and SH 71. New roadway construction would begin on US 290 just east of Joe Tanner Lane, approximately by the Boomerz Bar in the Oak City shopping center, where the 290 mainlanes would begin to become elevated and pass over William Cannon Drive. The westbound mainlanes and frontage road would be located just north of Williamson Creek. The mainlanes would be depressed under SH 71 and direct connectors would be provided, connecting eastbound SH 71 with US 290, and westbound US 290 to SH 71. Grade-separated intersections would be constructed at Convict Hill Road, RM 1826, Scenic Brook Drive, and Circle Drive (Southview Road), with US 290 mainlanes running underneath the ground level cross streets. Along SH 71, the direct connector ramps would extend past Scenic Brook Drive, where the mainlanes would then transition to a five-lane (three lanes northbound, two lanes southbound) highway.

46. The Project is a federal project subject to the ESA's consultation requirements.

47. The stated purpose of the Project is "to improve mobility and operational efficiency, facilitate long-term congestion management in the corridor by accommodating the movement of people and goods for multiple modes of travel, and improve safety and emergency response throughout the project area." Record of Decision at 4.

48. Current design indicates that the Project would require the placement of up to 723 columns, 167 columns of which would be located within the recharge zone, with depths ranging from 19 to 40 feet below grade, directly into the Edwards limestone overlaying the aquifer where fissures and fractures in the rock can quickly pull water down into the Edwards Aquifer.

49. The Project would involve 2.65 miles of below-grade mainlanes, requiring the excavation and removal of 1,968,000 cubic yards of soil and rock in the Project area, and digging 25 feet into the cave-forming Edwards limestone that is exposed at the surface. For comparison, the Houston Astrodome measures 1,600,000 cubic yards in total volume; thus, the excavated earth from this project could fill up the Astrodome 1.3 times.[1]

50. The Project would increase the amount of impervious cover by around 74 acres, thus increasing the total suspended solid pollutant loads generated by the project. This increase in total suspended solids would be significant, from an estimated 87,000 pounds produced under existing conditions, to an estimated 162,163 pounds under proposed conditions.

51. TxDOT claims that it will have engineered methods to reduce the load of total suspended solids to levels below existing conditions, but nowhere gives specifics as to how it will achieve this. As explained above, the endangered salamanders are sensitive to impervious cover and suspended solids because they require clean, clear water from the Edwards Aquifer.

[1] *See* "The Measure of Things," *available at* http://www.bluebulbprojects.com/MeasureOfThings/results.php?amt=1968000&comp=volume&unit=cy&searchTerm=3+cubic+yards,+a+measure+of+volume (last accessed July 26, 2019).

52. The Oak Hill Parkway is just one of several highway projects being built or planned in in the Barton Springs Edwards Aquifer watershed in southwest Travis County. Less than three miles south and west of the Project are three additional new or expanded roadways that lay entirely or nearly entirely within the recharge zone of the Barton Springs portion of the Edwards Aquifer: the recently completed State Highway 45 toll road, the under-construction MoPac Intersections project, and the proposed MoPac South Express Lanes Project from Lady Bird Lake to Slaughter Lane. These three connected projects were devised and are undergoing evaluation at the same time, will overlap in construction time, are directed at altering operations of the same corridor, and overlap in the same geographic locale, affecting the same unique, vulnerable environmental area. Yet Defendants failed to consider the cumulative impacts the Project would have on the salamanders when combined with these and other projects when carrying out the informal consultation that is the subject of this action.

53. In addition to the ongoing and future highway projects, several private developments and state construction activities are planned in areas close to the project and/or in the recharge and contributing zones of the Barton Springs segment of the Edwards Aquifer.

d. Consultation and the Environmental Review Process

54. On September 1, 2017, TxDOT submitted a letter to the Service initiating informal consultation under the ESA Section 7(a)(2). TxDOT requested that the Service concur with its determination that the Project "may affect, is not likely to adversely affect" the endangered salamanders. TxDOT included a Biological Assessment (dated Sept. 2017) proposed schematic designs, documents from the 2006 informal consultation for the previously approved US 290/SH 71 Project (that was never built), a Biological Resources Technical Report, a Preliminary Water Quality Analysis and Design Report (dated Mar. 2017), and a short memo describing best management practices to protect water quality during construction and operation.

55. The memo on best management practices does not actually state that TxDOT will use any particular practice to reduce the project's effects, nor does it evaluate the efficacy of proposed measures. Instead, the memo uses hedging, non-committal language identifying measures that "have been recommended" to be used "where practicable," "where feasible," or "to the degree obtainable." The memo does not provide any specifics as to the performance level of these potential best management practices nor the degree of meditation,

56. In reaching its "not likely to adversely affect determination," TxDOT relied upon the anticipated implementation of "Best Management Practices" associated with a Water Pollution Abatement Plan ("Water Pollution Plan" or "WPAP") required by the Texas Commission on Environmental Quality's ("TCEQ") Edwards Aquifer rules ("TCEQ Rules"). However, there is no TCEQ-approved water pollution plan to date. At the time of the Service's Concurrence in December 2017, as well as the issuance of the Record of Decision and Final EIS in December 2018, TxDOT had yet to submit an application for a water pollution plan to TCEQ.

57. Under TCEQ Rules, TxDOT is only required to remove 80 percent of the increase in the total suspended solids load leaving the project area. Final EIS at 151. TxDOT has repeatedly asserted its "commitment" to exceed these standards, but it has failed to provide detailed plans to support its claims. Moreover, TCEQ Rules do not regulate any other water quality pollutants that are associated with highway construction and road runoff. Nor do the TCEQ Rules address land use, impervious cover limitations, many sources of non-point source pollution, use of fertilizer or pesticides, or chemical spills that may result from the Project. The TCEQ Rules were not designed, nor intended, to protect listed salamanders, their prey species, or their habitats.

58. In 2005, TCEQ published a manual identifying "Optional Enhanced Measures" to supplement the TCEQ Rules with recommended pollution control measures that can

avoid potential harm to salamanders. The Service concurred that implementation of these measures will protect endangered and candidate species from impacts due to water quality degradation and reaffirmed this Concurrence in 2007 when the Optional Enhanced Measures were revised. The optional measures, developed collaboratively by the Service and TCEQ, are expected to result in "no take" of Barton Springs Salamanders and four other endangered Edwards Aquifer species. The development of this separate set of advanced measures reinforces the point that the Edwards Rules alone are not sufficient to protect either the Barton Springs or Austin blind Salamanders at risk from this Project. TxDOT does not plan to implement these enhanced measures.

59. In its 2013 listing for the Austin Blind Salamander, the Service specifically identified the TCEQ Rules as inadequate to prevent past and ongoing impacts to the Austin Blind Salamander and its habitat from water quality degradation and reduction in water quality. The Service further found that the TCEQ Rules are unlikely to prevent further impacts to the species in the future. 78 Fed. Reg. 51,278, 51,315 (Aug. 20, 2013).

60. In its EIS, TxDOT explains roadway excavation could disrupt voids in the limestone, where endangered salamanders live. If these voids are encountered, the water quality could be impacted through introduction of silt, fuels, lubricants, and other pollutants to the subsurface, and groundwater flow may be disrupted. Rather than analyze how to prevent and mitigate the possible impacts of disrupting such key habitat of endangered salamanders, TxDOT delays creation of a mitigation plan for the impacts until after such a void is encountered.

61. Despite its reliance on future, unspecific measures to protect water quality, TxDOT's track record is one of failing to operate and maintain water quality controls on roadways over the Edwards Aquifer.

62. On December 20, 2017, the Service issued a letter concurring with TxDOT's "may affect, not likely to adversely affect" determination ("December 2017 Concurrence" or

"Concurrence Letter," attached as Exhibit A). The concurrence letter heavily relied on TxDOT's statement that proposed measures would result in a net reduction of total suspended solids leaving the project area as compared to existing conditions.

63. The Service's Concurrence Letter failed to identify an "action area" for the Project, thus obscuring what and where effects of the Project were analyzed in relation to the endangered salamanders.

64. In the Concurrence Letter, the Service ignored its own conclusions from the Austin Blind Salamander listing and the peer-reviewed science referenced therein. Specifically, the listing concluded that highways and impervious cover, and the resulting sedimentation, were a major factor in the species' endangered status. Nowhere do Defendants explain how a giant project like the Oak Hill Parkway—a project that involves paving over dozens of acres and excavating huge amounts of earth in the recharge and contributing zone—can be found "not likely to adversely affect" the salamanders. Defendants disregard the Service's previous conclusions and well-established scientific literature in favor of one unpublished, non-peer reviewed study without explaining how the studies previously endorsed by the Service no longer apply.

65. The Service's December 2017 consultation letter acknowledges that excavation will occur, but it does not give any indication as to the scope of this excavation and thus fails to consider the impacts of such a large amount of excavation on the salamander.

66. On May 4, 2018, the Environmental Protection Agency published a Notice of Availability of Draft Environmental Impact Statements, including the Oakhill Parkway draft EIS, establishing a public comment deadline of June 18, 2018. 83 Fed. Reg. 19,758. In an email dated May 31, 2018 sent to a public list-serve, TxDOT extended the comment period to June 29, 2018.

67. A Public Hearing was held on the project at May 24, 2018. A representative from SOS gave oral comment at the hearing.

68. On June 29, 2018, SOS submitted written comments on the Draft EIS.

69. On December 21, 2018, TxDOT finalized the EIS and issued a Record of Decision under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-51.

70. On February 4, 2019, the U.S. Department of Transportation published a Notice of Final Federal Agency Actions on Proposed Highway Projects in Texas regarding several projects, including the Oak Hill Parkway. 84 Fed. Reg. 1,528, 1,530. That notice provided that a claim seeking judicial review of the federal agency actions on the Project, including claims under the ESA, would be barred unless the claim is filed "on or [*sic*] July 11, 2019." *Id.* at 1,528. However, because federal highway law requires that such claims be brought within 150 days of the notice, this notice erroneously provided an extra week to file a claim. *See* 23 U.S.C. § 139(l)(1).

71. On March 1, 2019, the U.S. Department of Transportation published another Notice of Final Federal Agency Actions on Proposed Highway Projects in Texas, regarding several projects, including the Oak Hill Parkway. 84 Fed. Reg. 7,162-63. This notice provides that a claim seeking judicial review of the federal agency actions on the Project, including claims under the ESA, will be barred unless the claim is filed on or before July 29, 2019. *Id*. at 7,162.

72. On May 30, 2019, SOS sent TxDOT and the Service a 60-day Notice of Intent to Sue, which detailed the failures of TxDOT and the Service to support a "not likely to adversely affect" determination for the Austin Blind Salamander and Barton Springs Salamander (Attached as Exhibit B).

73. On July 3, 2019, Defendant TxDOT sent SOS a letter responding to SOS's Notice of Intent to Sue, disagreeing with each of SOS's points and standing by the "not likely to adversely affect" determination. TxDOT referenced a "44-page Biological Resources Technical Report Addendum" dated May 2019 and described it as "publicly available," but

did not provide a copy of the report. After submitting a request under the Texas Public Information Act, SOS received this report from TxDOT on July 29, 2019, the deadline to file suit on this Project.

e. New Information on Effects Arising After the December 2017 Consultation Letter

i. New Salamander Occurrences at Backdoor Springs

74. In March 2018, the City of Austin published a report documenting that Barton Springs Salamanders inhabit Backdoor Springs. Backdoor Springs is within the Recharge Zone located northeast of and thus downgradient from the Project site.

75. Backdoor Springs discharges into Barton Creek about six miles upstream of Barton Springs pool, in the Edwards Aquifer Recharge Zone within the City of Austin's Barton Creek greenbelt parkland. These springs constantly flow at a rate of about 10 gallons per minute (0.02 cubic feet per second), except during periods of extended drought, which indicates a diffuse flow source—that is, groundwater flows to the springs via a vast network of tiny fractures, rather than one large direct conduit.

76. Other minor seeps and springs discharge within a few hundred feet upstream of Backdoor Springs. Combined flow from the seeps and springs near Backdoor Springs sustains a large pool of water in Barton Creek even during drought periods, providing suitable salamander habitat.

77. The Project's Final EIS states that Backdoor Springs is located approximately 1.68 miles north of the MoPac/US 290/SH 71 interchange. Final EIS at 105. In this same paragraph, TxDOT acknowledges the 2018 report that Barton Springs Salamanders live in Backdoor Springs.

78. According to the Final EIS, "no recent flow-path modeling or groundwater basin delineation maps for this spring are available; however, in 1997 the [City of Austin] estimated that the Backdoor Spring groundwater basin roughly included all of the area between the spring on Barton Creek and US 290, which is approximately two square miles in size (COA, 1997)."

79. In a short email dated December 10, 2018, the Service stated that "[S]ince the proposed project has no net increase in TSS and the new salamander site is approximately 7 miles in distance away, I agree that our concurrence letter remains unchanged."

80. On December 11, 2018, TxDOT sent another email to the Service, correcting its earlier statement and clarifying that the distance from the project to Backdoor Springs is approximately three miles, not seven miles as originally stated by TxDOT. TxDOT acknowledged that "while a small portion of the project area may occur upgradient from the subsurface drainage to Back Door Springs," it stressed that the net reduction of total suspended solids leaving the site would continue to support a "not likely to adversely affect" determination. Again, the Service summarily concluded in a short email response containing no explanation, that the new information did not affect the December 2017 concurrence.

ii. TxDOT's Erroneous Total Suspended Solid Load Calculations

81. During the original consultation, on November 29, 2017, TxDOT had sent the Service an email stating that:

> The total suspended solids load being discharged from the project area in existing conditions is 979 pounds, and the load that is proposed to be discharged after the Project is constructed is negative 45,674 pounds. There is a net reduction in the amount of TSS leaving the project area under the proposed condition.

82. The Service's December 20, 2017 Concurrence letter heavily relied on TxDOT's assertion that the Project would have no net reduction in total suspended solids.

83. Nearly one year after presenting its original figures on total suspended solids, TxDOT informed the Service in a November 19, 2018 email that it had erred in its calculations. The corrected calculations showed that the Project would not result in a net reduction of total suspended solids, but rather a net addition of total suspended solids from the Project. The original calculations included a coefficient in the formula that should not have been there.

84. On November 29, 2018, TxDOT sent the Service an email with more information about total suspended solids, including an attachment comparing estimated TSS concentrations in Project runoff with existing stormwater concentrations in area creeks. This document incorrectly states that "Williamson Creek flows into Barton Creek," and does not include any information about Devil's Pen Creek or Slaughter Creek, which TxDOT elsewhere acknowledges will be affected by the Project.

85. TxDOT sent the Service a letter dated December 4, 2018 documenting the correspondence regarding the erroneous total suspended solids and requesting that the Service maintain its original conclusions in the December 2017 concurrence. TxDOT explained that although it had not determined precisely how it would achieve this, it was committed to a "final design" of the Project "that will result in a net decrease in [total suspended solids' loading compared with the existing condition."

86. The Service responded on December 7, 2018, stating that "If the proposed project does not result in a net increase in TSS loading as was described in the original BA, the Dec. 20, 2017 concurrence letter still applies."

87. In so stating, the Service has shirked its duty under the ESA to insure that the Project is not likely to jeopardize the continued existence of the salamanders, essentially throwing up its hands and saying, "If TxDOT says it will protect the salamander, then we concur that the salamander is protected."

CLAIMS FOR RELIEF

First Claim: In Concluding that the Project is "Not Likely to Adversely Affect" the Endangered Salamanders, Defendants Failed to Use the Best Scientific Data Available.

88. SOS incorporates by reference all preceding paragraphs.

89. In concluding that the Project "may affect, is not likely to adversely affect" the Austin Blind Salamander and Barton Springs Salamander, Defendants failed to rationally consider and explain a number of relevant factors, including but not limited to: (1) the

potential impacts of void encounters on the endangered salamanders; (2) the broad range of likely pollutants other than total suspended solids; (3) the increased probability of occurrence of hazardous material spills; (4) the erosion and sedimentation impacts from "best management practices" that fail due to extreme weather, improper installation, and/or inadequate maintenance; and (5) the highly probable increase in loadings to the Edwards Aquifer during construction within the channel of Williamson Creek, a major recharging creek, that no amount of erosion and sedimentation controls can adequately prevent, even in the absence of failure.

90. During the consultation, Defendants failed to use the best available scientific evidence regarding the effectiveness of sediment controls and the impacts of highways on the endangered salamanders, in violation of their duties under the ESA. 16 U.S.C. § 1536(a)(2).

91. Because the Service concurred with TxDOT's "not likely to adversely affect" determination for the Austin Blind Salamander and Barton Springs Salamander, no biological opinion was prepared for the Project. Therefore, no incidental take statement was prepared that would have specified mandatory terms and conditions to minimize impacts to these species, including monitoring and reporting requirements. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.

92. The Service's concurrence that a proposed action is not likely to adversely affect listed species, or is not likely to destroy or adversely modify critical habitat, is final agency action reviewable under Section 706(2)(A) of the APA.

93. TxDOT's determination and the Service's letter of concurrence that the Project is not likely to adversely affect the Austin Blind Salamander, the Barton Springs Salamander, or the Austin Blind Salamander's critical habitat are arbitrary, capricious, an abuse of discretion, and not in accordance with Section 7 of the ESA. *See* 5 U.S.C. § 706(2). TxDOT's determination and the Service's letter of concurrence should be held unlawful and set aside. *Id*.

Second Claim: Defendants Failed to Consider All, Direct, Indirect, and Cumulative Effects of the Project on the Endangered Salamanders.

94. SOS incorporates by reference all preceding paragraphs.

95. The Project is likely to harm the endangered Austin Blind Salamander and Barton Springs Salamander through negative impacts to water quality and quantity and altered flow regimes in the Edwards Aquifer. These harms, when taken together with baseline conditions and cumulative impacts of other ongoing and foreseeable activities, are likely to jeopardize the continued existence of the Austin Blind Salamander and the Barton Springs Salamander, and to adversely modify the Austin Blind Salamander's critical habitat.

96. TxDOT and the Service failed to analyze the cumulative effects of the Project on the endangered salamanders in conjunction with effects of future State and private activities that are reasonably certain to occur within the action area, in violation of the ESA.

97. TxDOT and the Service are therefore violating, and will continue to violate, Section 7(a)(2) of the ESA and its implementing regulations by failing to analyze the direct, indirect, and cumulative effects of this Project and thus failing to ensure that the Project will not jeopardize the continued existence of the Austin Blind Salamander and Barton Springs Salamander. 16 U.S.C. § 1536(a)(2); 50 C.F.R. Part 402.

98. The APA provides the standard of review for this claim. 5 U.S.C. § 706(2)(A). Defendants' failure to analyze the cumulative effects of the Project is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. *Id*.

Third Claim: TxDOT Failed to Ensure Against Jeopardy Through Reliance on the Service's Arbitrary and Capricious Concurrence.

99. SOS incorporates by reference all preceding paragraphs.

100. TxDOT did not properly consider the Project's impacts on the Austin Blind Salamander or the Barton Springs Salamander in their "not likely to adversely affect" determination, and TxDOT has not adequately mitigated the Project's harmful impacts.

101. Rather than take measures to avoid jeopardy of these endangered species through formal consultation with the Service, TxDOT unreasonably relied on the Service's unlawful concurrence.

102. In relying on the Service's unlawful concurrence, TxDOT failed to use the best available scientific evidence regarding effectiveness of sediment controls and impacts of highways on the endangered salamanders, in violation of its duties under the ESA. 16 U.S.C. § 1536(a)(2).

103. TxDOT is therefore violating, and will continue to violate, Section 7(a)(2) of the ESA and its implementing regulations by failing to ensure that the Project will not jeopardize the continued existence of the Austin Blind Salamander and Barton Springs Salamander. 16 U.S.C. § 1536(a)(2); 50 C.F.R. Part 402.

104. The APA provides the standard of review for this claim. 5 U.S.C. § 706(2)(A). TxDOT's failure to ensure against jeopardy is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id*.

Fourth Claim: Defendants Violated the ESA by Failing to Reinitiate Consultation in Light of New Information Regarding the Project's Impacts.

105. SOS incorporates by reference all preceding paragraphs.

106. Events triggering the duty to reinitiate consultation have occurred since the Service's December 2017 concurrence. These events include TxDOT's recognition of its egregious errors in calculating the total suspended solids resulting from the Project, as well as new information regarding recently discovered occurrences of the Barton Springs Salamander in spring sites close to the Project.

107. Both the Service and TxDOT, as the action agency, have an ongoing duty to reinitiate consultation if events triggering the need for consultation occur after the consultation has concluded.

108. By allowing and authorizing the Project to proceed, prior to the re-initiation and completion of an adequate consultation with the Service, TxDOT is failing to protect the

Austin Blind and Barton Springs Salamanders from jeopardy, in violation of Section 7(a)(2) of the Act. 16 U.S.C. § 1536(a)(2).

109. Subsequent to SOS sending the Notice of Intent to Sue, SOS learned that additional changes were made to the Project, including increased bridge lengths, to accommodate the new rainfall and floodplain data encompassed in a federal rainfall study known as Atlas-14. To the extent that Atlas-14 rainfall data or other information reveals effects of the Project that may affect the endangered salamanders to an extent not previously considered, or leads to project changes that cause effects to the species not previously considered, Defendants are in violation of the ESA by not reinitiating consultation.

110. Defendants are therefore violating, and will continue to violate, Section 7(a)(2) of the ESA and its implementing regulations by failing to reinitiate consultation in light of new information showing the Project may affect the endangered salamanders and critical habitat in a manner or to an extent not previously considered. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16.

111. The APA provides the standard of review for this claim. 5 U.S.C. § 706(2)(A). Defendants' failure to reinitiate consultation is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id*.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Declare that Defendant the Service violated the ESA and APA by arbitrarily and capriciously concurring with TxDOT's "not likely to adversely affect" determination for the Austin Blind Salamander and the Barton Springs Salamander, and critical habitat for the Austin Blind Salamander;

2. Declare that Defendant TxDOT has violated and is violating Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and its implementing regulations, 50 C.F.R. Part 402, by

failing to ensure that the Project does not jeopardize the continued existence of the Austin Blind Salamander or the Barton Springs Salamander;

3. Order Defendants to comply with the ESA and APA;

4. Set aside the Service's December 2017 ESA concurrence for the Project.

5. Enjoin Defendants TxDOT and their agents from proceeding with implementing the Project unless and until the violations of federal law set forth herein have been corrected to the satisfaction of this Court;

6. Award Plaintiff its reasonable fees, costs, and expenses associated with this litigation under 16 U.S.C. § 1540(g)(4) and 28 U.S.C. § 2412; and

7. Grant Plaintiff such other and further relief as the Court deems just and equitable.

Respectfully submitted and dated this 29th day of July, 2019, by:

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