



## **B. Jurisdiction**

3. This court has jurisdiction over this lawsuit because the action arises under 28 U.S.C. §§2201-2202 and FED. R. CIV. PROC. 57. TxDOT is seeking a declaratory judgment and the court's protection from a general litigation hold request, initiated by a letter sent by the City requesting TxDOT to generally preserve all electronic data, presumably under Rules 26 and 34 of the Federal Rules of Civil Procedure. The letter refers to potential litigation regarding the Environmental Re-Evaluation of the State Highway ("SH") 121 toll project from Dallas County North Tollway to US 75, in Collin County, Texas. (Ex. A) The City, if challenging the environmental documents, would sue pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 ("NEPA") and the Administrative Procedure Act, 5 U.S.C. § 552 et seq. ("APA"), as suits alleging NEPA violations must also bring suit under the APA. TxDOT seeks protection from the broad scope and undue burden of the litigation hold and requests a declaratory judgment releasing TxDOT from the City's requested litigation hold as it violates the Federal Rules of Civil Procedure discovery provisions and as the City would not be entitled to such overbroad and general discovery were a case filed under NEPA and the APA.

4. The Defendant is a Home Rule City created under the laws of the State of Texas, and is located in Collin County, Texas. Therefore, venue is proper in the Sherman Division for the Federal District Court in the Eastern District of Texas. 28 U.S.C. §1391(a)(1).

## **C. FACTS**

5. On or about April 13, 2007, the City through its attorney Mr. Blackburn, sent a notice of potential litigation to Robert Jackson, TxDOT General Counsel. (Ex. A) The notice requested that TxDOT preserve all electronic data associated with the SH 121 toll project from Dallas County North Tollway to US 75, in Collin County, Texas.

6. The City requested all electronic data associated with the SH 121 toll project, as described by Mr. Blackburn's letter, including all electronic documents, emails, history files, system preferences, logs of email history and usage, and any graphical image files; all communications between TxDOT and the company Cintra; all communications with the City of Frisco; all communications related to the SH 121 toll project, as described by Mr. Blackburn's letter, between TxDOT and the Regional Transportation Council, the Texas Transportation Commission, the Office of Governor Rick Perry or any member or staff member of the Texas Legislature. (Ex. A). However, since this request, the City and its attorney has failed to respond to requests from TxDOT to meet and confer, as required under Rule 26(f) of the Federal Rules of Civil Procedure, on the specific subject matter or specific claims that it might assert in litigation and to attempt to reach an agreement on the extent and scope of the requested litigation hold. The State has attempted to comply with this general litigation hold, but it is extremely burdensome and expensive without specific guidance as to the documents and information that it would encompass.

**D. COUNT ONE - REQUEST FOR DECLARATORY RELIEF**

7. Under 28 U.S.C. §§2201-2202 and FED. R. CIV. PROC. 57, TxDOT requests the court to enter a declaratory judgment ruling that the City's letter violates the Federal Rules of Civil Procedure and is contrary to rules governing a NEPA/APA claim in federal court. TxDOT requests this court's protection from a general litigation hold request, initiated by a letter sent by the City requesting TxDOT to generally preserve all electronic data regarding the State Highway ("SH") 121 toll project from Dallas County North Tollway to US 75, in Collin County, Texas. (Ex. A) The letter refers to potential litigation regarding the Environmental Re-Evaluation of the State Highway ("SH") 121 toll project from Dallas County North Tollway to US 75, in Collin County, Texas. (Ex. A) TxDOT seeks protection from the broad scope and undue burden of the litigation hold and

requests a declaratory judgment releasing TxDOT from the litigation hold as it violates the Federal Rules of Civil Procedure discovery provisions and as the City would not be entitled to such overbroad and general discovery were a case filed under NEPA and the APA.

8. The City's litigation hold request, and consequently TxDOT's request for declaratory relief, come as a direct result of the recent implementation of the new federal rules governing electronic discovery. Federal Rule of Civil Procedure 26(b)(2)(B) and 34 control discovery of electronically stored information. If this matter was in litigation, TxDOT would likely rely on those provisions and also request a conference under Federal Rule of Civil Procedure 26(f). TxDOT recognizes that its claim, brought as a declaratory judgment action seeking protection from the enforcement of Rules 26 and 34, is one for relief from discovery even though litigation has not yet commenced. If the City had actually brought suit under NEPA and the APA, TxDOT would have the ability to object to questionable discovery requests and seek protective relief from the Court for undue burden and expense. However, because no suit has been filed at this point, TxDOT is without the remedy of objection, a motion for a protective order, or a request for a Rule 26(f) conference. Therefore, despite the pre-litigation status of this matter and the lack of case law on this topic, TxDOT urges the Court to consider TxDOT's claim for declaratory relief because the litigation hold has already caused, and will continue to cause, an extreme undue financial and human resource burden to TxDOT.

9. A Plaintiff seeking to challenge a decision under NEPA and the APA must wait until an agency has taken final action. 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (For agency action to be final, action must mark "consummation" of agency's decision-making process, and action must be one by which rights or obligations have been determined or from which legal consequences will flow.) A court will not decide NEPA questions until an agency has made

its final decision on a project under consideration. *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004). When the April 13, 2007, litigation hold request was sent, a Re-evaluation of an Environmental Assessment was being prepared to analyze potential effects of tolling SH 121 from the Dallas North Tollway to US 75 in Collin County, TX. A final agency action has not yet been taken, therefore, the City cannot sue under NEPA and the APA and, therefore, the City is not entitled to any discovery. Notably, even if the final decision had been rendered as of April 13, 2007, the most Plaintiff would be entitled to is the Administrative Record as compiled by the agency in preparing the Re-evaluation. Plaintiffs raising NEPA and APA violations in federal court are generally not entitled to discovery under NEPA because courts limit their review to the agency record. 5 U.S.C. § 706; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971) (administrative record is the “whole” record and constitutes basis of judicial review under the APA); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (focal point for judicial review should be the record already in existence), *see also Woods v. Federal Home Loan Bank Bd.*, 826 F.2d 1400, 1408 (5<sup>th</sup> Cir. 1987). Only in limited circumstances, the court may go outside the record to determine whether the agency adequately analyzed and addressed all potential environmental effects. *Overton Park*, 401 U.S. at 420; *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep’t of Energy*, 485 F.3d 1091, (10<sup>th</sup> Cir. 2007) (courts may go outside the record on strong showing of bad faith or improper behavior), *see also Stewart v. Potts*, 126 F.Supp 2d 428, 435 (S.D. Tex. 2000), *aff’d*, 34 Fed.Appx. 152 (5<sup>th</sup> Cir. 2002). The City has made absolutely no showing that TxDOT has acted improperly or in any other manner that would entitle Plaintiff to discovery beyond the administrative record. Even so, the City is requesting that TxDOT, which also includes its consultants working on the SH 121 toll project, to generally hold all electronically stored information and documents. Given that Plaintiffs would not be entitled to information outside of the Administrative Record even

in a properly filed NEPA and APA lawsuit, TxDOT is now entitled to relief from this premature, overbroad and burdensome request.

10. TxDOT's specific concern in this matter relates to the overbreadth and lack of specificity of the City's requested litigation hold. Such broad discovery requests are unreasonably cumulative or duplicative and the costs will outweigh the likely benefit. FED. R. CIV. P. 26. The new discovery rules provide a means for conferences between the parties to avoid potential disputes, such as requiring a conference for discovery of electronically stored information. FED. R. CIV. P. 26(f). In the instant matter, the City has made a very broad request that TxDOT save virtually all documents, data and materials of any kind related in any way to the SH 121 toll project from Dallas County North Tollway to US 75 in Collin County, Texas, while failing to notify TxDOT as to what claims the City intends to assert if it actually files a lawsuit.

11. The SH 121 toll project has several phases and sections, and the City's request is in no way limited to any specific subject matter or any specific claims that it might assert in litigation. TxDOT identifies its projects using Control-Section-Job ("CSJ") numbers.<sup>1</sup> No CSJ numbers have been identified by the City in its request, so TxDOT cannot determine if all phases and sections of SH 121 are included in the City's request. Because the City will not discuss the scope of its request, TxDOT is forced to preserve every item related to every portion of the SH 121 toll project from Dallas County North Tollway to US 75 in Collin County, Texas. This creates an extenuating circumstance insofar as it creates a great financial and human resource burden for TxDOT.

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<sup>1</sup> Control-section-job numbers are numbers assigned to all on-system public highways in Texas. The control number is assigned to a stretch of highway that often breaks at a county line or a major highway intersection, river or stream, but can also break at any convenient location. The section number is a number within a specific control and is usually assigned sequentially from the beginning of the control. The job number is the sequential number for any type of construction project (bridge, paving, etc) that may have ever occurred on that section of highway. The CSJ is a unique, identifying nine-digit number for a project. TxDOT Glossary, available online at <ftp://ftp.dot.state.tx.us/pub/txdot-info/gsd/manuals/glo.pdf>.

12. TxDOT has taken extraordinary actions to ensure protection of all possibly relevant information, including the sequestration and storage of tapes containing electronically stored information. The backup tapes are used for disaster recovery purposes only, and they are not used for archival purposes. The court may make any order that protects a party or person from annoyance, embarrassment, oppression, or undue burden or expense. FED. R. CIV. P. 26(c); *Coughlin v. Lee*, 946 F.2d 1152, 1160 (5th Cir. 1991) (stating that a district court may determine an appropriate limit of the scope of discovery on grounds of burdensomeness, guided by the principle that the more important the information sought in discovery is to the case, the greater the burden the opposing party can be legitimately required to shoulder); *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588, 592 (5th Cir.1978).

13. As of the date of filing of this Motion, TxDOT has already spent hundreds of hours working to ensure that the documents listed in the litigation hold notice have been preserved. As noted above, TxDOT received the City's request on April 13, 2007. On April 16, 2007, TxDOT Office of General Counsel ("OGC") advised all TxDOT District Offices and Divisions, and all TxDOT contractors, consultants and agents, that all information (including all digitally stored information) concerning the SH 121 project, as defined by Mr. Blackburn's letter, must be preserved using a litigation hold protocol to be developed by TxDOT. (Ex. B) On April 27, 2007, TxDOT responded to the City's request indicating that TxDOT received the notice and would work to preserve all relevant data, and asked that the City of Frisco do the same. (Ex. C) TxDOT never received a response to its April 27, 2007, letter.

14. On May 4, 2007, TxDOT OGC sent a follow-up email to TxDOT offices and contractors, consultants and agents, requesting that each of those entities submit to TxDOT OGC by May 9, 2007, its activities performed to date to comply with the litigation hold. (Ex. D) In an

effort to provide further guidance to TxDOT and its contractors, consultants and agents, TxDOT OGC sent out a one-page protocol entitled "Litigation Hold for SH 121." (Ex. E) Also, TxDOT's Information Systems Division prepared a "how-to" guide called "Process for Preservation of Data," which incorporated computer screen shots for easy reference when creating email files. (Ex. F)

15. On June 4, 2007, TxDOT, through outside counsel, contacted Mr. Blackburn to arrange a meeting or telephone conference so that Mr. Blackburn could clarify the potential litigation issues and the information that would be relevant to those issues. (Ex. G) Mr. Blackburn declined to meet in person because he was out of town and in trial but indicated that a telephone conference was a possibility. On June 20, 2007, a follow-up email was sent to Mr. Blackburn to again try to arrange a meeting to define the scope of the issues and relevant information. (Ex. H) On June 29, 2007, outside counsel again sent a letter requesting a meeting. (Ex. I) On July 9, 2007, Charles Irvine of Blackburn Carter P.C. sent an email to outside counsel indicating that Mr. Blackburn did not feel that a meeting is necessary at this time because TxDOT has taken steps to preserve electronic data and because litigation has not yet commenced. (Ex. J) On July 11, 2007, TxDOT wrote a letter to Mr. Blackburn stating the reasons TxDOT continues to believe a meeting is needed. (Ex. K) No response was received. Therefore, TxDOT's only recourse against this expensive and undue burden is now through this declaratory judgment action in this Court.

#### **PRAYER**

WHEREFORE PREMISES CONSIDERED, for the reasons stated above, in order to avoid the continued undue financial and human resource burden, TxDOT respectfully prays that this Court issue a declaratory judgment releasing TxDOT from the City's litigation hold as it violates the Federal Rules of Civil Procedure discovery provisions and as the City would not be entitled to such overbroad and general discovery were a case filed under NEPA and the APA. TxDOT also requests

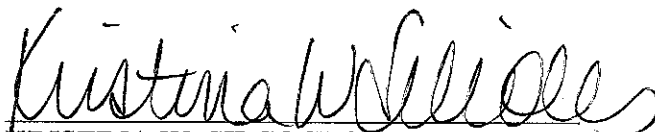
this Court to enter a protective order relieving TxDOT of any further compliance with the City's litigation hold. In the event that this court rules that TxDOT must comply with the litigation hold to preserve the requested items, TxDOT asks the court to require a Rule 26(f) conference pending clarification and specificity of the City's requests and to require the City to compensate TxDOT for the costs incurred as a result of the litigation hold. TxDOT requests an immediate hearing on this action because the undue burden and expense must be remedied. Finally, TxDOT requests any other and further relief to which TxDOT may show itself to be entitled.

Respectfully submitted,

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**AFFIDAVIT**

STATE OF TEXAS

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COUNTY OF TRAVIS

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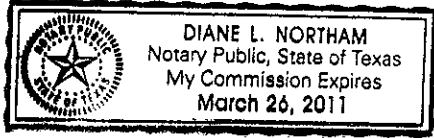
Before me, the undersigned authority, personally appeared Sharon Alexander, Assistant General Counsel for the Texas Department of Transportation, who, being by me duly sworn, deposed as follows:

My name is Sharon Alexander, Assistant General Counsel for the Texas Department of Transportation, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated;

I am the custodian of the records of the Texas Department of Transportation, Office of General Counsel, for the entire case file relating to the Litigation Hold requested on the SH 121 toll project by the City of Frisco on behalf of their attorney, James Blackburn. Attached hereto are 31 pages, marked as Exhibits A through K, records of Correspondence, including emails and letters, between TxDOT and James Blackburn, attorney for the City of Frisco, and between TxDOT employees and consultants pertaining to the requested SH 121 toll project Litigation Hold. These said 31 pages of records, marked as Exhibits A through K, are kept by the Texas Department of Transportation, Office of General Counsel, in the regular course of business, and it was the regular course of business of the Texas Department of Transportation, Office of General Counsel, for an employee or representative of the Texas Department of Transportation, Office of General Counsel, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

SD Alexander  
AFFIANT

SWORN TO AND SUBSCRIBED before me on the 9<sup>th</sup> day of July, 2007.



Diane L. Northam  
Notary Public in and for the State of Texas