

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA**

Pegasus Equine Guardian Association

Plaintiff,

v.

U.S. Army and Brigadier General Gary M.
Brito, in his official capacity as
Commanding General, JRTC and Fort Polk,
Louisiana

Defendants.

Division: Lake Charles

Case No. 2:17-CV-00980

Judge: Unassigned

Magistrate Judge: Kathleen Kay

Ref. 137-002.2

Plaintiff's Opposition to Defendant's Motion in Limine

Plaintiff Pegasus Equine Guardian Association submits this memorandum in opposition to the Federal Defendants' Motion to Exclude Expert Testimony and Any Unproduced Evidence from the Preliminary Injunction Hearing (ECF No. 57). This Court excluded the photographs at issue in the motion during the preliminary injunction hearing, so the only issue remaining is whether this Court may consider the expert witness testimony. For the reasons stated in the Plaintiff's Motion to Submit Extra Record Evidence (ECF No. 49), Reply at page 3 (ECF No. 54), and Opposition to Motion to Defendants' Motion to Strike (ECF No. 55), this Court can and should consider Pegasus's expert testimony, and should deny the Defendants' motion.

The Defendants argue that "expert testimony is not permitted in a APA case to challenge the agency's decision" (ECF No. 57-1 at 2), but this statement is plainly contradicted by Fifth Circuit precedent as described at length in the Plaintiff's briefing (ECF Nos. 49 & 55). Pegasus incorporates these arguments here and will not repeat them. More specifically, in this motion the Defendants misinterpret both Pegasus's case and the *Aquafer Guardians* decision to argue that "permitting expert testimony to second guess the substantive decision of the agency would subvert the entire administrative review process..." Def.'s Mot. in Limine 3, ECF No. 57-1.

I. Pegasus’s expert testimony is relevant to show that the Army failed to meet its procedural requirements and to prove the preliminary injunction elements.

Pegasus is asking that their experts be admitted for two broad purposes, neither of which are to “second guess the *substantive* decision of the agency.” First, Pegasus’s lawsuit on the merits challenges the *procedure* by which the government Defendants made their decision. And Pegasus’s expert testimony speaks to the likelihood that Pegasus will win on the merits, because the Defendants failed to consult stakeholders and to consider negative impacts to historic properties as required under the National Historic Preservation Act, and also failed to consider baseline information, failed to consider significant harm to the horses and the environment that is likely to be caused by the total elimination alternative/s, failed to consider reasonable alternatives, and failed to perform a necessary environmental impact statement, among other procedural failures, as required by the National Environmental Policy Act. The expert testimony and other evidence on the merits further prove that the information and alternatives at issue exist, they were available to the government and the government arbitrarily and capriciously failed to consider them, and they are material. Second, the expert evidence goes to the other three prongs of the preliminary injunction: irreparable harm, public interest, and balance of harms. Therefore, the Government’s argument that the expert evidence is inadmissible to attack the substance of the Army’s decision is inapposite.

II. The Defendants misapply the *Aquafer Guardians* case.

In *Aquafer Guardians*, the court admitted the extra-record evidence at issue. *Aquifer Guardians in Urban Areas v. Federal Highway Admin.*, 779 F. Supp. 2d 542, 566 (W.D. Tex. 2011). Further, *Aquafer Guardians* involves a plaintiff who challenged a decision where “an agency is acting within its ‘own sphere of expertise.’” *Aquifer Guardians in Urban Areas v. Federal Highway Admin.*, 779 F. Supp. 2d 542, 562–63 (W.D. Tex. 2011). But there is a

significant distinction between decisions within an agency's sphere of expertise and those outside of the agency's particular expertise. Courts are generally more deferential when an agency makes a decision about something within its particular sphere of expertise. In *Aquafer Guardians*, the plaintiff challenged the Federal Highway Administration's determination on a "categorical exclusion," that the Council for Environmental Quality "encouraged agencies to identify...using 'broadly defined criteria...characteriz[ing] actions that, based on the agency's experience,' normally 'do not cause significant environmental effects.'" F. Supp. 2d at 562–63. In "categorical exclusion cases" like this, courts generally grant an agency a higher level of deference when the agency relies on its documented "experience" to reach opinions about the effects of actions on which it has expertise and in which it has repeatedly engaged in. *See id.* But here, the Army is not an expert in the National Historic Preservation Act, NEPA, horse relocation in Louisiana, equine veterinary medicine, or the impacts of a horse elimination plan on horses or other aspects of the environment. The Army cannot claim this special category of higher deference for agency opinions or decisions outside of its own areas of expertise. But even when such decisions are at issue, courts can admit extra-record evidence, just as the *Aquafer Guardians* court did.

III. The Pegasus expert testimony supplements rather than contradicts any expert testimony in the administrative record.

Further, Pegasus did not submit its expert testimony for the purpose of contradicting a qualified expert whose testimony appears in the record. The Adolphus memo is the closest document the Army cites to, but there are two reasons why the Adolphus memo does not disqualify Pegasus's expert testimony. First, Adolphus is not a qualified expert – there is no evidence in the record as to his experience, education, methodology, or expertise that qualifies him to give an expert opinion. JRTC-E-003206-08. Second, Dr. King testified that, while the

Adolphus document should be *considered* as part of the National Historic Preservation Act

Section 106 consultation process, it cannot substitute for actual consultation with stakeholders:

Well, documents cannot comply with Section 106 because Section 106 is not about documents. It's about people consulting and trying to reach agreement, and that's what we don't see here. So would this be a document that would be entered into a Section 106 consultation? Sure.

PI Hr'g Tr. 30. In other words, the point of King's testimony is not that the Government's expert is wrong and King's opinion is better, but rather that the administrative record, including the memo by the museum director, reflects that the Government failed to fulfill its responsibilities under Section 106.

The Fifth Circuit has articulated eight situations in which courts have "considered extra-record evidence":

1. When agency action is not adequately explained in the record before the court;
2. When looking to determine whether the agency considered all relevant factors;
3. When a record is incomplete;
4. When a case is so complex that a court needs more evidence to enable it to understand the issues;
5. When evidence arising after the agency action shows whether the decision was correct or not;
6. In certain NEPA cases;
7. In preliminary injunction cases; and
8. When an agency acts in bad faith.

La Union del Pueblo Entero v. Fed. Emergency Mgmt. Agency, 141 F. Supp. 3d 681, 694 (S.D. Tex. Sept. 30, 2015) (citing *Davis Mountains Trans-Pecos Heritage Ass'n v. U.S. Air Force*, 249 F. Supp. 2d 763, 776 (N.D. Tex. 2003), *vacated on other grounds sub nom. Davis Mountains*

Trans-Pecos Heritage Ass'n v. Fed. Aviation Admin., 116 F. App'x 3, 16 (5th Cir. 2004) (confirming that “the district court correctly stated the law regarding extra-record evidence in NEPA cases”)); *Independent Turtles Farmers of La. v. U.S.*, 703 F. Supp. 2d 604, 612 (W.D. La. 2010) (applying the factors to allow the admission of extra-record evidence under factors 1, 2, and 3). The expert testimony of Dr. Batt, Stacey Alleman-McKnight, and Dr. King should be admitted under these six of the eight exclusions:

1. When agency action is not adequately explained in the record before the court;
2. When looking to determine whether the agency considered all relevant factors;
4. When a case is so complex that a court needs more evidence to enable it to understand the issues;
5. When evidence arising after the agency action shows whether the decision was correct or not;
6. In certain NEPA cases;
7. In preliminary injunction cases.

Conclusion

For the reasons stated above, the Court should grant Plaintiff's Motion for Partial Preliminary Injunction.

Respectfully submitted on February 19, 2018

s/ Allison Skopec
Allison Skopec, Student Attorney

s/ Ashlyn Smith-Sawka
Ashlyn Smith-Sawka, Student Attorney

s/ Machel Lee Hall
Machelle R. L. Hall, La. Bar. 31498
Tulane Environmental Law Clinic

6329 Freret Street
New Orleans, LA 70118-6321
Phone: (504) 862-8819
Fax: (504) 862-8721
Email: mhall@tulane.edu
Counsel for Pegasus Equine Guardian Association

Certificate of Service

I hereby certify that on February 19, 2018, this pleading was filed and transmitted to all counsel of record via the Court's CM/ECF electronic filing system.

s/ Machel Lee Hall
Machelle R. L. Hall