



Transportation Corridor Agencies

**Written Statement of
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before the
House Committee on the Judiciary
Subcommittee on Courts, Commercial and Administrative Law
United States Congress
The Responsibly and Professionally Invigorating Development (RAPID) Act
of 2012
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Mister Chairman, Members of the Subcommittee, my name is Tom Margro and I am the Chief Executive Officer of the Transportation Corridor Agencies, two joint powers authorities formed by the California legislature to plan, finance, construct, and operate toll roads in Orange County, California. Thank you for the opportunity to speak before the House Committee on the Judiciary's Subcommittee on Courts, Commercial and Administrative Law to discuss our agency's ongoing challenges over more than 15 years to secure the federal approvals needed to build the 241 toll road. Not only is this project critical to alleviating congestion in Orange County, but it is a project that will: (1) create over 17,000 jobs and (2) that requires no government funding. Funding is provided through non-recourse tax-exempt municipal bonds via private investment.

TCA recently retained Beacon Economics to do an economic benefits analysis of the project for the purposes of highlighting the importance of the project to the region and state. The report found that designing and building the road will create more than 13,600 jobs in Orange County and an additional 3,800 jobs statewide. It will also generate more than \$3 billion in economic output in California and create almost \$160 million annually in local and state tax revenues. The recession has severely impacted our local economy and the LA Building and Construction Trades Council is reporting unemployment rates of 40 to 65 percent for their members.

Based on our experiences with the 241 project, we agree with the recommendations in HR 4377 for improving the environmental review process to expedite project delivery and reduce costs on projects around the United States.

Introduction

The 241 toll road in Orange County has been in the planning process since 1981. It is designed to provide an alternative north-south route to Interstate 5 in southern Orange

County and northern San Diego County – one of the most congested Interstate Highways in the nation. While the TCA completed the first 51 miles of the toll road system in 12 years, the last 16 miles has been mired in the federal environmental review and permitting process for 15 years. The project was intended to be a model for improving the complex federal environmental process by integrating reviews under the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), the Endangered Species Act (ESA) and other federal environmental laws. The state and federal agencies formed what is known as the “Collaborative” under a Memorandum of Understanding (MOU) among the Federal Highway Administration (FHWA), the Environmental Protection Agency (EPA), the Army Corps of Engineers (Corps) and the U.S. Fish and Wildlife Service (F&W). FHWA served as the lead agency.

Rather than serving as a model for how to make the federal environmental process more efficient, the experience with the Collaborative demonstrates that the federal environmental process needs fundamental reform. Despite over a decade of effort by these agencies, and the expenditure of over \$20 million by the project sponsor, TCA, the process failed.

Project Conception and Planning

Orange County completed initial studies of the need for an alternative to Interstate-5 in the 1970s and 1980s. After approving a conceptual corridor in the early 1980s, local government realized that traditional state and federal funding sources would not be adequate to fund the construction of new regional transportation facilities. In 1986, the California State Legislature established the Transportation Corridor Agencies, public joint-powers agencies, with the task of financing, constructing and operating the 241 and other toll roads.

TCA financed the construction of 51 miles of new regional toll highways -- The San Joaquin Hills (73), Foothill (241), and Eastern (241/261/133) by issuing non-recourse bonds -- backed solely by toll revenues and development impact fees collected from new development in the area of the projects. No federal highway dollars were used to construct the projects. Since the bonds are not backed by the government, taxpayers are not responsible for repaying the debt if future toll revenues fall short. Instead, toll and development impact fee revenue go towards retiring the construction debt. **TCA was able to construct 51 miles of toll roads in 12 years.**

The NEPA/404 Collaborative Process

TCA conducted further studies and environmental evaluation of the 241 between 1989 and 1991 and the TCA completed an Environmental Impact Report (EIR) under the California Environmental Quality Act -- the state version of NEPA -- and, in 1991, adopted a locally-preferred alternative. TCA then embarked on the federal environmental process, including the preparation of a federal Environmental Impact Statement (EIS) and other studies required to comply with the federal Endangered Species Act, the Clean Water Act, the National Historic Preservation Act, the Coastal Zone Management Act and several other federal laws. FHWA acted as the lead federal agency.

The TCA and FHWA initiated the Collaborative process to implement a 1993 agreement (the NEPA/404 Memorandum of Understanding, or NEPA/404 MOU) among the FHWA, the Corps, F&W and the EPA. The stated purpose of the MOU is to improve interagency coordination and integrate environmental permitting and analysis procedures. It attempts to do this by giving all of the federal environmental agencies a seat at the table, and decision-making authority, throughout the federal environmental process. A key aspect of the MOU is the commitment by all agencies to reach consensus on key decision points throughout the environmental process, including agreement on purpose and need, alternatives to be evaluated in the draft EIS, selection of the preferred alternative that

would comply with NEPA, the Clean Water Act and the ESA, and, finally, agreement on mitigation measures. **These key decision points document the collective agreements that the information was adequate for that stage and the project may proceed to the next stage without modification. The MOU includes language preventing agencies from re-visiting their concurrence except in limited circumstances relating to significant new information or other significant changes.**

For the SR 241 Completion, the NEPA/404 MOU included 2 stages. An outside facilitator was hired to assist the Collaborative in their deliberations, and the Collaborative developed the Purpose and Need statement and the Alternatives for initial evaluation. This first stage took four years. In the second stage, the technical studies were prepared, alternatives were developed and evaluated; and decisions were made about which alternatives to carry forward for full analysis in the EIS. The last steps of Stage 2 included the identification of an environmentally preferred alternative and agreement on mitigation measures.

The Collaborative agencies and the TCA worked together for an additional six years (over 10 years in total) on the second stage. After release of the draft EIS, the Collaborative evaluated and screened 10 alternatives to identify a practicable alternative that would comply with the requirements of section 404 of the Clean Water Act (the "Least Environmentally Damaging Practicable Alternative" or "LEDPA"). In November 2005, the Collaborative agencies **confirmed in writing** their earlier agreement on a preliminary LEDPA, referred to as the "Green Alignment." The Collaborative found that other alternatives, including widening I-5 and only making arterial improvements, were not practicable or would have greater environmental impacts than the Green Alignment. Subsequently, the National Marine Fisheries Service concurred with FHWA that the project would not likely adversely affect endangered or threatened fish species (the steelhead trout).

The NEPA/404 MOU contemplated that, concurrently with the identification of the LEDPA, F&W would complete a biological opinion under the ESA and determine whether the LEDPA is not likely to jeopardize the continued existence of federally listed species or adversely modify critical habitat. Since F&W had been at the table throughout the Collaborative process, the NEPA/404 MOU contemplated that the Service would be able to prepare a biological opinion within the 135-day deadline established by the ESA. While F&W eventually did produce a biological opinion, with a finding of No Jeopardy, it did so nearly THREE YEARS AFTER the Collaborative agencies had identified the environmentally preferred alternative.

The next step in the process was for TCA to obtain a consistency certification for the preferred alternative under the Coastal Zone Management Act. While none of the preferred alternative is within the federal coastal zone, a small portion of the project comes within about a half-mile of the coastal zone.

When TCA applied for the consistency certification, project opponents, including environmental groups, objected to the project despite the fact that they offered no credible evidence that the project would impact the coastal zone. Project opponents produced a study by Smart Mobility Inc. (SMI) with recommendations disputing the previous 10 years of analysis by the Collaborative. In the face of this controversy, EPA and Army Corps abandoned the unanimous selection of the Green Alignment as the preferred alternative, asserted the need for additional environmental studies and reopened the debate concerning other alternatives. Subsequent analysis of the SMI study by TCA, CALTRANS and FHWA found the report to be flawed. FHWA then issued a letter dated October 24, 2008 stating, "We have determined in our technical design review that the SMI recommendations...are not reasonable and feasible."

Conclusion

TCA committed 10 years and \$20 million to the Collaborative process. Despite extraordinary efforts to reach agreement with the federal environmental agencies, the process failed. The “streamlined” process envisioned in the NEPA/404 MOU worked initially as intended. The Collaborative agencies developed and evaluated alternatives and eventually agreed on a preliminary LEDPA. But, the federal environmental agencies failed to carry through on the requirements of the MOU or on the decisions reached through the Collaborative process. In the face of controversy over the project, the federal environmental agencies refused to defend the process that they themselves developed and touted as the solution to the lengthy environmental approval and permitting process. Not only did they refuse to defend the process, but EPA and Army Corps backtracked from their prior agreements regarding the identification of a preferred alternative. And, rather than resolving differences through the Collaborative process, some of the federal agencies publicly questioned the project during the Coastal Zone Management Act process.

TCA is committed to working with all stakeholders to complete the project in an environmentally responsible manner while creating new jobs. The current process, however, serves as a disincentive for project opponents to work cooperatively with project sponsors to address issues since opponents can delay or stop projects under the current environmental review process without any repercussions.

Based on our experience with the 241 toll road we strongly support the following reforms in the bill:

1. Allow states like California with stringent environmental review laws to provide the compliance with NEPA.
2. Prohibit a federal agency from rescinding its previous concurrence or approval if the decision was made as part of a coordinated environmental review. If new facts come to light then a supplemental environmental impact statement may be prepared.

3. Require the lead agency to identify the Reasonable Range of Alternatives and do not require cooperating agencies to evaluate options that the project sponsor cannot feasibly undertake.
4. Prohibit agencies from reconsidering issues addressed in prior NEPA documents concerning the project or action.
5. Limit resource agency determinations to issues within their own jurisdiction and expertise.

We have appended to the testimony a chronology of events associated with this project and certain relevant letters and documents. We thank you for the opportunity to provide testimony and look forward to answering your questions.