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Transportation Corridor Agencies

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Mister Chairman, Members of the Committee. My name is Michael Kraman and I am the Acting Chief Executive Officer for the Transportation Corridor Agencies, or TCA. TCA consists of two joint power authorities, the San Joaquin Hills Transportation Corridor Agency and the Foothill/Eastern Transportation Corridor Agency, formed by the California legislature to plan, design, finance, construct, and operate a toll road network as part of the state highway system in Southern California through Orange County and a portion of northern San Diego County, California. Thank you for the opportunity to speak before the House Committee on Transportation and Infrastructure's Subcommittee on Highways and Transit about our Agencies' on-going challenges with securing the federal approvals necessary to complete our toll road network.

Background

In 1986, at a time when federal and state resources were no longer adequate to fund the construction of planned state highways in Orange County, California, the Transportation Corridor Agencies, or TCA, were formed by the state legislature as joint powers authorities. TCA's role is to plan, design, finance and build the roads. Authority to collect tolls to pay for the construction of the roads was given by the state legislature in 1987. It was a time that called for imagination and innovation to deliver critical transportation infrastructure.

- Since these were new roads and new agencies, TCA had no credit upon which to base its financings. FHWA provided a loan guarantee in the form of a federal line of credit which enabled TCA to obtain a credit rating sufficient to sell the initial toll revenue bonds for construction of The Toll Roads. Although TCA never had to draw on that federal line of credit, the concept continued to evolve into today's TIFIA program.

- To provide non-stop, open road tolling, TCA developed the FasTrak brand for electronic toll collection – FasTrak is now the interoperable standard used throughout California and a partner in the discussion for national interoperability.

- The Toll Roads are a state-local partnership. As portions of the road are constructed and opened to traffic, ownership is transferred to the California Department of Transportation (Caltrans). Caltrans maintains the roadways.

Because of this unique public-private partnership, TCA has constructed fifty-one miles of new highways within the State of California. These highways include State Routes (SR) 73, 133, 241 and 261. With more than 250,000 customers per day, The Toll Roads generate over $220 million in annual toll revenue.

In addition to its toll roads, TCA has invested $224.6M in environmental programs which include over 2,000 acres of restored, revegetated and preserved habitat, as well as wildlife safety and movement protection.

As joint power authorities, elected officials from surrounding cities and county supervisorial districts are appointed to serve on each agency's board of directors. Public oversight ensures that the interests of local communities and drivers are served and that TCA continues to meet its mission to enhance mobility in Orange County and Southern California by developing and operating publicly-owned toll facilities as part of the regional transportation system.

Project Conception and Planning

Orange County first recognized the need for an alternative to Interstate-5 in the 1970s as it began planning for expansion of the state highway network to address planned residential and commercial development. Because of federal and state funding constraints, the County and surrounding local governments decided to pay for the construction of the road network with revenues generated from tolls.

TCA financed the construction of 51 miles of new regional toll highways -- The San Joaquin Hills (SR-73), Foothill (SR-241), and Eastern (SR-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 highways 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 toward retiring the construction debt. Over a 12 year time period (1987 to 1999), TCA was able to construct 51 miles of toll roads.

Recent Chronology

While TCA completed the first 51 miles of the system in 12 years, we have spent the last 25 years trying to complete the final portion of the toll road network. As part of this path, TCA has exhaustively followed the evolving federal and state regulatory processes to deliver complex transportation projects.

TCA fully embraced the new policies introduced under ISTEA and TEA-21 including the NEPA/CWA Section 404 collaborative process and the Major Investment Study (MIS) process.

The NEPA/CWA Section 404 collaborative process was intended to be a model for streamlining the complex environmental review 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 a "Collaborative" under a Memorandum of Understanding (NEPA/404 MOU) between the California Department of Transportation, Federal Highway Administration (FHWA), Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers (Corps), and the U.S. Fish and Wildlife Service (USFWS). The Collaborative was a voluntary process and as such, the National Marine Fisheries Service (NMFS) declined to participate because of what they cited as de minimis impacts of the project to the coastal zone. The invitation was also extended to the California Coastal Commission, but they too declined to participate.

The intent of the Collaborative was to bring together the participating agencies, including the state agencies, so that we could address any issues regarding environmental impacts in a coordinated fashion.

The parties spent nearly 10 years reviewing alternatives before agreeing preliminarily on an alignment, only to have certain MOU signatory agencies retract their prior concurrence after opponents objected to the project when it was before the California Coastal Commission in 2008. The NEPA/404 memorandum of understanding (NEPA/404 MOU) was agreed to in 1993.

The Collaborative carefully followed the process agreed to in the NEPA/404 MOU. The Collaborative members 1) reached concurrence on the project's purpose and need (1996-1999); 2) agreed on alternatives to be evaluated (1999-2000); 2) refined the alternatives for detailed evaluation (2000-2004); 3) agreed on criteria to use for identification of the Preliminary Least Environmentally Damaging Practicable Alternative or Preliminary LEDPA (2004); and 4) agreed on the Preliminary LEDPA that would be identified in the Final EIS as the project's preferred alternative (2005).

The NEPA/404 MOU contemplated that, concurrently with the identification of the Preliminary LEDPA, USFWS would complete a biological opinion under the ESA and determine whether the Preliminary LEDPA is not likely to jeopardize the continued existence of federally listed species or adversely modify critical habitat. Since USFWS 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 USFWS eventually did produce a biological opinion, it did so nearly THREE YEARS AFTER the Collaborative agencies had identified the Preliminary LEDPA/preferred alternative (2005-2008).

Concurrently, from 2006 to 2008 a major investment study was conducted by the Orange County Transportation Authority (OCTA) as the county's primary transportation planning agency and designated metropolitan planning organization (MPO). The South Orange County MIS (SOCMIS) assessed various alternatives for improving north-south travel from SR-55 south to the Orange/San Diego County border, and east west from the Cleveland National Forest to the Pacific coastline. The SOCMIS identified eight key objectives for the study:

- Freeway Congestion
- Arterial (street) Roadway Congestion
- Weekend Congestion
- Lack of Transit choices (need more/better options)
- Rail Corridor Constraints (need to double track or re-route Metrolink rail lines)
- Economic Growth and Quality of Life
- Maximize Utilization of Existing Infrastructure (do better with what we have)
- System Gaps (complete unfinished road extensions, etc.)

The SOCMIS process included comprehensive public participation. The study resulted in the development of a locally preferred strategy (LPS) that was approved by the OCTA Board of Directors in November 2008. The approved LPS reaffirmed the completion of the 241 Toll Road as a key transportation feature of the South Orange County transportation system.

The next step in the project development process was for TCA to obtain a consistency certification for the LEPDA/preferred alternative under the Coastal Zone Management Act.

When TCA applied for the consistency certification, certain 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. At the first hint of controversy, federal agency members of the Collaborative (with the exception of FHWA), abandoned the unanimous selection of the project's Preliminary LEDPA/preferred alternative, asserting the need for additional environmental studies and reopening the debate concerning other alternatives.

The U.S. Army Corps of Engineers, the U.S. EPA, the National Marine Fisheries Service and the U.S. Fish and Wildlife Service all submitted comments in the Coastal Zone Management Act process that criticized the Preliminary LEDPA/preferred alternative previously identified by these very same agencies.

The California Coastal Commission sided with project opponents and denied TCA's request for a consistency certification under the California Coastal Management Act in February 2008. The U.S. Department of Commerce affirmed that decision in December 2008.

While a draft CEQA and NEPA environmental document was prepared and circulated in 2004, and the CEQA document finalized in 2006, all work was stopped after the 2008 Coastal Commission and Department of Commerce denials regarding the southernmost portion of the 16-mile project that comes within one-half mile of the California coastal zone.

The 2008 Department of Commerce decision states that "This decision, however in no way prevents TCA from adopting the alternative discussed in this decision, or other alternatives determined to be consistent with California's program. In addition, the parties are free to agree to other alternatives, including alternatives not yet identified or modifications to the project that are acceptable to the parties."

Citing the Department of Commerce decision, TCA decided to proceed with a 5.5 mile extension of SR-241. The pursuit of this shorter 5.5 mile extension is critical to providing congestion relief for the growing economy, especially as Southern California continues to recover from the Great Recession. Despite the fact that this project, which we call the Tesoro Extension, has negligible environmental impacts, federal and state agencies are delaying their review and approval of the project because of pressure from project opponents, including environmental groups who were opposed to the original 16-mile project.

The Tesoro Extension Project has independent utility, a logical termini, provides economic benefit and does not preclude other future alternatives; factors which will be confirmed in the ongoing NEPA process for the project. To alleviate the potential confusion between the original 16-mile project and the shorter 5 ½-mile Tesoro Extension, FHWA, in cooperation with TCA, rescinded the 2001 Federal Notices of Intent (NOIs) for the original 16-mile project. This rescission informs the public that FHWA and TCA are no longer preparing an Environmental Impact Statement under NEPA for the original project and that any project beyond the 5 ½-mile Tesoro Extension will need to go through new and

complete CEQA and NEPA environmental processes and permitting. Also, with the rescission of the NOIs for the original project, FHWA has assigned NEPA responsibility for the Tesoro Extension project to Caltrans.

USFWS was again tasked with completing a biological opinion (BO) for the Tesoro Extension project under Section 7 of the ESA. In November of 2012, the requisite biological assessment that provides the biological data and potential project impacts was prepared and submitted by FHWA to USFWS for their review and use in preparing the project BO. Since USFWS had previously issued a biological opinion for the original 16-mile project, which lies within the same vicinity and contains the same biological resources, USFWS should have been able to prepare a biological opinion for the shorter 5 ½-mile Tesoro Extension within the 135-day deadline established by the ESA.

In 2013, USFWS notified TCA that they did not have sufficient resources to work on FHWA's and TCA's request; therefore, TCA provided $75,000 in funding to aid in this effort. After several months and review, USFWS staff notified FHWA and TCA that they would be unable to issue the BO unless FHWA could provide written documentation that the project had independent utility from the larger 16-mile project. With the rescission of the NOIs and the NEPA assignment from FHWA to Caltrans, Caltrans requested USFWS to not issue the BO while they reevaluate the type of environmental document that should be prepared for the 5 ½-mile project.

In addition to the above-mentioned challenges, TCA has also had difficulties with state resource agencies, which, while not directly relevant to Congress, further demonstrate the ability of project opponents, including environmental groups to influence what should be a legal and factual review process. TCA is in the appeal process with the State Water Resources Control Board over the denial by the San Diego Regional Water Quality Control Board for a Waste Discharge Requirements permit. The denial was not due to any concerns related to the project's water quality impacts, but rather over confusing speculation that the Tesoro Project should somehow represent future discharges associated with the original 16-mile project. While still in process, the draft order from the State Water Board recommends remanding the matter back to the San Diego Regional Water Board because the State Water Board is unable to find any factual and legal basis for the decision of the regional board.

As TCA continues to expend resources to advance a critical transportation project, we are struggling with navigating through an ill-defined and cumbersome environmental review process at both the federal and state level.

TCA has committed to working with stakeholders, including the environmental groups that oppose the extension of SR-241 into the California coastal zone. The result of this commitment is to find a viable solution for SR-241, but one that still meets the region's need for traffic relief. Any project south of the Tesoro Extension will be a result of this outreach and be required to complete new state and federal environmental documents.

We recognize that Congress made reforms to the environmental review process in MAP-21, but believe that further changes are needed to ensure that there are procedures for resource agencies to efficiently and cost effectively evaluate and permit transportation projects.

Recommendations for Improving the Environmental Review and Project Approval Process

TCA has the following proposals for improving the environmental review process in light of its experiences with extending State Route 241. Many of these recommendations were included in the House 2009 surface transportation bill, but were not included in MAP-21.

1. Allow projects in states with stringent environmental review laws, including "mini-NEPA's" as they are sometimes called, such as California, to meet federal environmental review requirements through compliance with state laws; in those instances, allow the state law process to provide compliance with NEPA and other federal laws such as the Clean Water Act, Endangered Species Act and National Historic Preservation Act. While this provision was in the House bill in 2009, it was relegated to a study in MAP-21.

2. Require that all federal agencies responsible for funding, permitting or approving a project collaborate on, use and adopt a single NEPA document for that project.

3. Require each federal agency to carry out obligations under applicable laws concurrently and in conjunction with the NEPA review unless doing so would impair the ability of the federal agency to carry out those obligations.

4. Deem participating agency concurrence in lead agency determinations where that participating agency fails to object in writing within 30 days following a lead agency's determination or request for concurrence. Upon concurrence of or failure to object within a defined period, require that a participating agency adopt the lead agency's determination in all subsequent project reviews, approvals or other participating agency actions.

5. Prohibit an agency from changing its position where that agency concurred or made a finding as part of a coordinated review process absent new developments or the discovery of critical and relevant new information.

6. Authorize federal agencies to eliminate an alternative from detailed consideration in an EIS regarding a project if (1) the federal lead agency furnished guidance to the state or local transportation agency regarding analysis of alternatives; (2) the applicable metropolitan planning process or a state or local transportation agency environmental review process included an opportunity for public review and comment; (3) the state or local transportation agency rejected the alternative after considering public comment; and (4) the federal agency independently reviewed the alternatives evaluation approved by the state or local agency.

7. Establish NEPA Safe-Harbor Rules. NEPA and the (Council on Environmental Quality) CEQ regulations authorize FHWA to adopt NEPA implementing regulations. Congress should direct FHWA to implement "safe harbor" rules that provide a safe harbor for environmental documents that incorporate

FHWA-approved approaches to environmental review (e.g., growth-inducement, cumulative effects, alternatives, project purpose and need). Alternatives analysis could be deemed adequate if it includes two alternatives that minimize significant effects of the project. Project growth-inducement analyses could be deemed adequate if they utilize the growth projections approved by the metropolitan planning organization.

8. Adopt Tiering Regulations. Tiering of NEPA documents provides an opportunity to expedite environmental review by avoiding duplication of the analyses of regional and programmatic issues (e.g., mode alternatives, growth-inducement) during preparation of subsequent tiers. Currently, tiering often does not expedite environmental review (and may result in delays) because NEPA regulations do not provide assurances to project sponsors that FHWA and the resource agencies will not revisit tier 1 issues during subsequent environmental review tiers. Congress should direct the CEQ and FHWA to revise their NEPA regulations to provide that subsequent tiered NEPA documents shall not reconsider issues addressed in prior NEPA documents concerning the project or action.

9. Impose Limitations on Scope of Resource Agency Review. Many delays occur as a result of disputes between FHWA and the resource agencies. Often, these disputes involve issues that are outside of the jurisdiction of the resource agencies (e.g., scope of traffic analysis; construction cost estimates; engineering feasibility). Legislation could limit resource agency comments to issues within the jurisdiction and expertise of the resource agency and could require resource agencies to accept the evaluation of the FHWA on traffic, engineering and cost issues.

10. Speed up deadlines. Amend NEPA to speed up deadlines for the NEPA review process and add requirements to render timely decisions including technical studies, environmental impact statements and permits. Include administrative procedures that allow project sponsors to escalate disputes between federal agencies for timely adjudication of issues.

11. Combat bogus challenges and delaying tactics. Environmental opponents want to be able to indefinitely stall projects subject to NEPA reviews and federal permits. NEPA should be amended to require challengers to prove an agency did not use the best available information and science; require that opponents exhaust their administrative remedies; and require new rules for standing and impose a 180-day statute of limitations.

TCA also recommends the following change to the Coastal Zone Management Act, recognizing that it is outside the jurisdiction of the House Transportation and Infrastructure Committee:

1. Restrict the applicability of the Coastal Zone Management Act to projects that have a direct impact on resources within the coastal zone. The law and implementing regulations require a CZMA consistency determination for projects that affect land or water uses of a coastal zone even if the project is not in the coastal zone if the project has any foreseeable effect on the coastal zone or coastal resources, including direct, indirect, or cumulative effects. This standard allows the coastal agency to deny a consistency permit based on unsubstantiated and amorphous claims.

2. Require that the state coastal agency, in certifying consistency with the Coastal Zone Management Act, consider as a reasonable alternative only those alternatives which: (a) meet the project purpose and need, (b) the project sponsor is authorized to carry out, and (c) there are funds available for the project, or, there is a reasonable expectation that funds can be obtained (such as through public-private partnerships or bonds).

3. In evaluating consistency certifications, the Department of Commerce should be required to defer to the determinations of reasonableness of alternatives made by departments of transportation or by federal transportation agencies. The regulations state that Commerce "should" defer to those agencies' determinations, but such deferral should be mandated.

We thank you for the opportunity to provide testimony and look forward to answering your questions.