



March 2, 2009

Jack Gilbert  
Special Assistant U.S. Attorney  
Federal Highway Administration  
Atlanta, Georgia

VIA EMAIL

Re: *AGUA et al v. FHWA et al.*

Mr. Gilbert:

Following up on our recent emails, we urge you and your client to take control of the NEPA process for US 281/Loop 1604 and put an end to piecemeal review of this project. Specifically, we ask FHWA to direct the preparation of a single EIS for 281/1604, including the interchange, so as to give the community the comprehensive and honest evaluation of project impacts and alternatives that NEPA requires.

Plaintiffs AGUA and TURF seek to have the 281/1604 “starter toll system” studied in one EIS because of, among other things, the integrated financing recognized in Judge Biery’s February 5, 2009 order. Like Judge Biery, we think it is commonsensical to view the improvements to 281 and 1604 as an “Aristotelian whole.” On the law and the facts of this case, it has become even less defensible to exclude Loop 1604 from the pending EIS.

It is also arbitrary, under the circumstances, to pull out the 281/1604 interchange as a separate project. Notwithstanding the pending EIS and ongoing litigation concerning 281/1604, the Alamo Regional Mobility Authority is trying to construct the interchange within the next year, relying on a 2005 Categorical Exclusion. FHWA should not allow this end run around the NEPA process for 281/1604, as the interchange is an unseverable part of the 281/1604 project.

Immediate construction of the 281/1604 interchange would invariably control subsequent development and unfairly prejudice consideration of alternatives for 281/1604 in the pending EIS. In fact, the March 2005 CE is distinctly geared to the implementation of the “starter toll system,” stating on the first page that “improvements to this interchange described in this document would conform to other planned improvements to both Loop 1604 and US 281 in this area.” As part and parcel of the “starter toll system” that is currently under environmental review and subject to ongoing litigation, we urge FHWA to consider whether constructing the interchange under this CE is a prudent and unbiased course of action.

**Save Our Springs Alliance**

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While an EIS is being prepared, “[a]gencies shall not commit resources prejudicing selection of alternatives before making a final decision.” 40 C.F.R. § 1502.2(f). FHWA has a duty to see that no action is taken that would “limit the choice of reasonable alternatives.” *Id.* at § 1506.1(a)(2). “Interim action prejudices the ultimate decision when it tends to determine subsequent development or limit alternatives.” *Id.* at § 1506.1(c)(3).

Whether the interchange is itself tolled or non-tolled, funded with stimulus money or not, it will be the centerpiece of the financially and operationally interdependent 281/1604 project. It is impossible to build the interchange without determining future development and without prejudicing the consideration of more environmentally-sound, sensible alternatives in the pending EIS.

A Categorical Exclusion, in any case, is not an appropriate level of NEPA documentation for the five-level interchange proposed for 281/1604. FHWA regulation 23 C.F.R. § 771.117(a) states that CEs are for actions that:

do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.

Nowhere is it suggested in the CEQ regulations, FHWA regulations, or even TxDOT’s Environmental Manual, that it is normal to approve a five-level interchange with a Categorical Exclusion. On its face, the interchange’s impacts and effect on travel patterns are distinguishable from typical CE projects involving safety or non-capacity improvements. Reliance on a CE is further undermined by potentially significant noise impacts, the interchange’s environmentally-sensitive location over the Edwards Aquifer, and the history of litigation and controversy surrounding 281/1604.

In sum, we ask FHWA to revoke the CE for the interchange and to help the Alamo RMA engage the community in an open and honest EIS process covering the entire 281/1604 project. We hope you and your client will give serious thought to our proposal, as we believe a single EIS would best serve the community’s transportation needs and protect San Antonio’s sole source of drinking water.

Thank you for your consideration. We look forward to hearing from you.

Sincerely,

/s/ Bill Bunch and Andrew Hawkins  
Attorneys for Plaintiffs AGUA and TURF

Cc: Linda Amidon, FHWA

Terri Hall, TURF  
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