

LAW OFFICE OF MARC CHYTILO

ENVIRONMENTAL LAW

June 15, 2001

Ms. Susan Simpson
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Mr. C. Glenn Clinton
Team Leader
Project Delivery Team – North
Federal Highway Administration
980 9th Street, Suite 400
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RE: NOP/NOI, Marin-Sonoma Narrows Project

Dear Ms. Simpson and Mr. Clinton:

This office represents Transportation Solutions Defense and Education Fund (TRANSDEF) in this matter. TRANSDEF is a public interest organization dedicated to regional transportation planning in the San Francisco Bay Area. TRANSDEF has been requested by Marin Advocates for Transit (MAT), an active participant in the Marin-Sonoma Narrows Policy Advisory group, to provide its legal and technical expertise in this regional issue.

TRANSDEF believes that your agency is proceeding down an inappropriate and potentially impermissible path in processing this project. Failure to properly describe the project and alternatives at this stage will prejudice the adequacy of the CEQA and NEPA review processes and could lead to legal action. We implore your agency to carefully consider our concerns and ensure that the requirements of these environmental review processes are met and this project is given adequate scrutiny. You are required to consider TRANSDEF's comments at this point in the CEQA process. Public Resources Code § 21082.1.

For purposes of this scoping comment letter, reference is made to both state and federal authority under CEQA and NEPA. Parallel state and federal legal authority generally exists for each legal and regulatory point made in this letter, even though only state or federal authority is cited. See, generally, *City of Carmel-by-the-Sea v. DOT*, 123 F.3d 1142, 1150 (9th Cir. 1997).

Adequacy of NOP

The CEQA Guidelines § 15082(a)(1) mandates that a NOP include a statement of the project's probable environmental effects. The NOP lacks this information. The state clearinghouse lists project issues, but this does not qualify as a statement of the project's "probable environmental effects." This information must be provided and the scoping/NOP process re-initiated.

Project Purpose and Need

TRANSDEF is concerned that the failure to accurately and completely identify the project's purpose and need will cause the disclosure of project impacts and consideration of alternatives to be incomplete. The Guidelines provide: "A clearly written statement of the objectives will help the lead agency to develop a reasonable range of alternatives to evaluate in the EIR and will aid decisionmakers in preparing findings . . . The statement of objectives should include the underlying purpose of the project." Guidelines § 15124(b). "An EIR may not define a purpose for a project and then remove from consideration those matters necessary to the assessment whether the purpose can be achieved." *County of Inyo v. City of Los Angeles* (3d Dist. 1981) 124 Cal.App.3d 1,9.

Marin Advocates for Transit has introduced evidence that a rail alternative would be comparable, if not superior, to achieving the project purpose and objective, yet the lead agency appears intent on excluding that alternative through manipulation of the project's purpose. On December 15, 2000, in response to a request by Marin Advocates for Transit, the Policy Advisory Group (PAG) added the phrase "increase capacity in the corridor" to the purpose and need statement. On March 16, 2001, Caltrans reported to the PAG that this language had been deleted, allegedly because Caltrans, Federal Highway Administration and Metropolitan Transportation Commission did not support increasing the capacity in the corridor. Since these agencies have historically and in this instance supported expansion of the highway's capacity, the action forcing deleting reference to generically "increased capacity" has the effect of precluding consideration and environmental analysis of other modes, such as rail, which could provide the desired transportation capacity, potentially with lesser adverse environmental effects. This affects the adequacy of any future alternatives analysis. "[A]n 'impermissibly truncated' project description severely distorted not only the critical project *but the alternatives to the project*" (emphasis in original), *id.*, citing *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 Cal.App.3d 185. The attempts to constrain the project's environmental review through manipulation of the project's purpose and need is plainly inappropriate and taints the legitimacy and adequacy of the environmental review document under both CEQA and NEPA.

Further, TEA-21 itself proscribes prejudicing a project's analysis and comparative review at this stage through an overt modal preference. Federal transportation planning regulations establish specific processes which prevent avoidance of alternative strategies for congestion management, require analysis and management of projects that increase single occupancy vehicle carrying capacity, and interfere with the development and implementation of an integrated intermodal transportation system.

See generally 23 C.F.R. Part 450. Governing federal authority requires that the capacity language be re-inserted in the purpose and need statement.

Inadequate Identification of Alternatives

“When a federal agency prepares an Environmental Impact Statement (EIS), it must consider “all reasonable alternatives” in depth. 40 C.F.R. § 1502.14. No decision is more important than delimiting what these “reasonable alternatives” are. That choice, and the ensuing analysis, forms “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. To make that decision, the first thing an agency must define is the project's purpose. See *Citizens Against Burlington, Inc. v. Busey*, 290 U.S. App. D.C. 371, 938 F.2d 190, 195-96 (D.C. Cir. 1991). The broader the purpose, the wider the range of alternatives; and vice versa. The “purpose” of a project is a slippery concept, susceptible of no hard-and-fast definition. One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing “reasonable alternatives” out of consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act. 42 U.S.C. § 4332(2)(E).” *Simmons v. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997)

Project alternatives derive from an EIS’ “Purpose and Need” section, which briefly defines “the underlying purpose and need to which the agency is responding in proposing the alternatives to the proposed action.” *City of Carmel-by-the-Sea, infra*, 123 F.3d at 1155. Review of the discussion and minutes of the Marin-Sonoma Narrows Policy Advisory Group (PAG) meetings between November 2000 to early in 2001 discloses considerable discussion of the project purpose issue. The state clearinghouse project description evidences that the project is “an important component of a comprehensive multi-modal transportation plan.” This language is ignored in several other elements of the NOP/NOI process, leading TRANSDEF and MAT to contend that the purpose and need statement has been intentionally manipulated to avoid evaluation of rail improvements as an alternative to increasing capacity in the corridor and thereby defeating any consideration and evaluation of a multi-modal approach.

During the debate on adoption of TEA-21, a number of proposals to amend the purpose and need element of NEPA for transportation projects were considered by Congress, yet none of these amendments were adopted into law. FHWA and Caltrans are bound by the current rule of law and must carefully and fully address the issue of the project’s stated purpose and need and not seek to bias the outcome of the environmental review process through manipulation of the project need and purpose.

The project is intended to address commute hour congestion and a resultant lack of capacity in the Highway 101 corridor in the project reach. Capacity inadequacies are manifested during peak commuting hours. A substantial majority of commuters employ a single occupancy vehicle and commute from established and developing residential areas into defined employment centers. Federal

law directs that congestion, public transportation and intermodal management systems must be part of the metropolitan transportation planning process, with a prohibition of the use of federal funds on any project that will result in a significant increase in the carrying capacity for single occupancy vehicles (SOV) unless the project incorporates all reasonably available strategies to manage the SOV facility effectively. 23 C.F.R. Part 450.320. TRANSDEF advises that these prohibitions were intended to prevent the type of mode manipulation that has been attempted in this matter.

Additionally, eliminating a relatively small percentage of the current and future commuters during peak hours through alternative transportation strategies, such as a rail-based public transit system, would alleviate traffic congestion and restore the highway's use to below capacity. Importantly, a rail-based alternative would be capable of accommodating future increased needs, and reduce adverse induced and cumulative environmental impacts associated with sprawling land use patterns. In short, it has many advantages over the proposed project.

While the rail alternative may not comport with Caltrans' and the Federal Highway Administration's principal purposes of building and maintaining highways and is not currently in favor with the management of the Metropolitan Transportation Commission, this nevertheless is a viable alternative approach to meeting the purpose and need. The agencies involved have plainly sought to avoid an environmental review process and alternatives analysis that would compete with favored, highway-based solutions. NEPA, CEQA and TEA-21 do not sanction the narrow view sought by the agencies, and any attempts to evade the requirements of law and thwart the public's ability to demonstrate a preferable approach to decisionmakers will not be tolerated.

The 1997 Sonoma/Marin Multimodal Transportation and Land Use Study, funded by Caltrans, determined that a rail system was more cost-effective than the project proposed in the NOP/NOI. For the same cost as the highway segment capacity expansion, a sub regional rail system can be built, with broad and long-term benefits. TRANSDEF requests that an alternative be studied using the Calthorpe land use assumptions with the smart rail plan in a manner similar to Portland, Oregon's LUTRAQ (land use, transportation and air quality) study. A rail program alternative must be allowed to compete for funds on equal (or preferential, see 23 C.F.R. Part 450.320) footing with the highway project.

Environmental Setting

The environmental setting requires consideration of applicable laws and policy determinations in addition to physical environmental factors. A cornerstone of TEA-21 and its predecessor ISTEA was elevation of multi-modal strategies in transportation planning and implementation. While the project description acknowledges this requirement, the environmental review process is directed away from the rail alternative. TEA-21, the Clean Air Act, CEQA and NEPA all demand that the lead agencies consider a range of modal options and different modal choices. This is not the direction that this process is going, and it is clear that now is the time for the agencies to recognize their responsibilities to affected communities not only in project design but also through the conduct of a fair and non-

biased environmental review process that fully considers issues of transportation equities and environmental justice.

Impact Issues

The environmental review document(s) must address the issue of induced growth, construction delays versus congestion relief, cumulative impacts and identify the term of any congestion relief benefit from the proposed highway widening project.

Induced VMT

“A growing body of research has shown that widening highways is only a temporary solution at best to the complex problem of traffic congestion. Indeed, research has pointed to a phenomenon known as "induced traffic" that suggests new and wider highways actually create additional traffic, above and beyond what can be attributed to rapid population increases and economic growth.”

<http://www.transact.org/Ca/congestion2.htm>. See *Sierra Club v. DOT*, 962 F.Supp. 1037 (N.D. Ill., 1997)

Construction Delays

Studies show that gains in congestion relief from highway expansion may not always exceed the additional congestion associated with construction delays. See

<http://www.transact.org/Reports/woes/default.htm>.

Cumulative Impacts

The environmental review document must comprehensively address the cumulative effect of this project, including the impacts associated with expanding the region where sprawl is induced as a result of additional long-distance SOV commuting.

Term of Benefits

Studies show that the benefits gained from highway capacity expansion are often short in duration, and necessitate further future expansion to meet additional demand. The environmental review document must identify how long this project will benefit the congestion issue and when diminishing returns are expected to be encountered.

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Conclusion

TRANSDEF recognizes that this scoping stage is early in the environmental review process, but is gravely concerned that recent efforts to manipulate the purpose and need aspect of the project description will infect the entire environmental review process and lead the process to court rather than to construction. TRANSDEF implores your agencies to recognize and correct this problem immediately.

Sincerely,

Marc Chytilo

CC: Jeff Morales, Caltrans Director
Harry Yahata, Caltrans District 4 Director
David Schonbrunn, President, TRANSDEF