



U.S. Department
of Transportation
Federal Highway
Administration

MAR 08 2010

1200 New Jersey Avenue, SE
Washington, D.C. 20590

In Reply Refer To: HCR-40
DOT #2009-0270

(b) (6)

Dear (b) (6)

The Federal Highway Administration (FHWA) has completed the investigation of the complaint of discrimination you filed on behalf of (b) (6)

(b) (6) (complainants) against the Texas Department of Transportation (TxDOT), the Capital Area Metropolitan Planning Organization (CAMPO), and the Central Texas Regional Mobility Authority (CTRMA) alleging violations of Title VI of the Civil Rights Act of 1964 (Title VI). Specifically, you allege that the United States Highway 290 East (US 290) project will have a disproportionate impact on the low-income and minority communities that surround and use the highway.

BACKGROUND

The complaint involves an improvement project on US 290. The existing US 290 is a four-lane divided with traffic signals and intersections along the five-mile stretch that runs from US 183 to State Highway (SH) 130. It has two lanes running in each direction (east-west) and currently serves as a major arterial for local trips to and from work, school, shopping, etc. It also serves as a regional commuter route connecting the City of Austin with the developing communities to the east, is a primary route for trucks and other vehicles, and is one of the two primary highways



linking the Austin region to the Houston and Gulf Coast area. The proposed improvements will replace the existing five-mile, four-lane roadway with a continuous highway comprised of six tolled main lanes and six non-tolled frontage road lanes. All new lanes will be 12-foot wide except for outside frontage lanes which will be 14-foot wide to accommodate both automobile and bicycle traffic.

The National Environmental Policy Act of 1969 (NEPA) requires the examination and consideration of potential impacts on sensitive social, economic, and environmental resources when considering the approval of a proposed transportation project. The NEPA's regulation identifies three classifications of actions, defining the way that compliance with the NEPA is documented in terms of the action's impacts. The three classifications are defined below.

- Environmental Impact Statement--prepared for projects where it is known that the action will have a significant effect on the environment;
- Categorical Exclusions--for actions that do not individually or cumulatively have a significant environmental effect;
- Environmental Assessment (EA)--prepared for actions in which the significance of the environmental impact is not clearly established.

The planning process for Federal-aid highway projects requires the States to manage the preparation of appropriate environmental studies and documents. The State Highway Agency must ensure that the project is constructed in accordance with and incorporates all committed environmental documents. The TxDOT prepared an EA for the US 290 project, concluding that the project will not cause any significant social, economic, and environmental effects.

The complainants live in the 290 East corridor area and currently use the freeway on a daily basis for local trips and to commute to work. The complainants allege that the 290 East toll project will adversely and directly affect the low-income and minority population.

DISCUSSION OF THE ISSUES

Issue #1: Whether the project will increase noise, air, water, and light pollution in the operation and construction of the project.

Noise Concerns

The EA states that the analysis of noise levels within the US 290 project area was completed in accordance with TxDOT's Guidelines for Analysis and Abatement of Highway Traffic Noise, a document approved by the FHWA. A total of 16 noise receivers were identified along the length of the project and analyzed for noise impacts. The traffic noise analysis typically includes the following elements:

- Identification of land use activity areas that might be impacted by noise traffic;
- Determination of existing noise levels;
- Prediction of future noise levels;
- Identification of possible noise impacts; and,
- Consideration and evaluation of measures to reduce noise impacts.

The FHWA traffic noise modeling software was used to calculate existing and predicted noise levels. The model primarily considers the number, type, and speed of vehicles; highway adjustment and grade; cuts, fills, and natural berms; surrounding terrain features; and, the locations of activity areas likely to be impacted by the associated traffic noise.

The EA states that noise barrier construction would be incorporated into the project design if the polled adjacent homeowners are found to want a barrier and the affected homeowners would provide input into the aesthetic design of the barrier.

Air Concerns

The Environmental Protection Agency (EPA) regulates air pollutants termed air toxics. Mobile Source Air Toxics (MSAT) are a subset of air toxics; specifically, those emitted from highway vehicles and non-road equipment. Some MSATs are present in fuel and are emitted when the fuel evaporates or passes through the engine unburned.

The EPA is the lead Federal agency for administering the Clean Air Act and has certain responsibilities regarding the health effects of MSATs. The EPA issued a Final Rule regarding MSAT in 2001. The rule examined the impacts of the EPA's existing and newly promulgated MSAT control programs, including its reformulated gasoline program, its national low emission vehicle standards, its Tier 2 motor vehicle emissions standards and gasoline sulfur control requirements, and its proposed heavy duty engine and vehicle standards and on-highway diesel fuel sulfur control requirements. The FHWA projects that even with a 64 percent projected increase in vehicle miles of travel between 2000 and 2020, these programs will reduce on-highway emissions of benzene, formaldehyde, 1, 3-butadiene, and acetaldehyde by 57 percent to 65 percent and on-highway diesel particulate matter emissions will be reduced by 87 percent.

The EA states that because of uncertainties, a quantitative assessment of the effects of air toxic emissions impacts on human health cannot be made at the project level. The relevance of the unavailable or incomplete information is that it is not possible to make a determination of whether any of the alternatives would have significant adverse impacts on the human environment.

The EA also states that a qualitative assessment has been provided relative to the various alternatives of MSAT emissions and has acknowledged that all of the alternatives may result in increased exposure to MSAT emissions in certain locations. Although concentrations and duration of exposures are uncertain, and because of this uncertainty, the health effects from these emissions cannot be estimated.

Water Quality Concerns

The EA thoroughly analyzed the project's potential impact on water resources and concludes no substantial impacts will occur. The analysis shows that the project will have minimal impacts on eight of the nine jurisdictional waters located within the project area. As the project proceeds into the design and construction phase, it will fully comply with any permits and requirements that may be required under Sections 401 and 404 of the Clean Water Act. Pending final roadway

design, a permit from the U.S. Army Corps of Engineers may be required at the culverted crossing to West Decker and East Walnut Creek tributaries. Impacts to wetlands will be mitigated in accordance with guidelines published by the U.S. Army Corps of Engineers.

During construction, the project will fully comply with the Texas Commission on Environmental Quality's General Permit for Construction Activities, and the required Stormwater Pollution Prevention Plan will be implemented. Best Management Practices (BMPs) such as the use of silt fences, rock berms, and/or detention-retention ponds will be utilized during construction for erosion and sedimentation control. Permanent BMPs such as vegetative filter strips will also be employed to control sediment.

Light Concerns

Investigation disclosed that the NEPA does not explicitly require an evaluation of the possibility of impacts from light pollution. However, appropriate steps where warranted and feasible will be taken to reduce ambient light by shielding safety lighting.

Issue #2: Whether tolling the project will impose economic hardship for the low-income and the minority community.

Socio-Economic Character

Investigation disclosed that several factors were analyzed to determine the impact of US 290 improvements on the social character of the surrounding area. These factors included community cohesion, traffic diversion, level of service on adjacent streets, toll rate impacts to low-income populations, and transit usage. Under the no-build alternative, no immediate impacts are anticipated to occur. However, the assessment found that as US 290 becomes more congested due to anticipated growth along the corridor, mobility along the corridor would decrease. The facility would become more difficult to cross; thereby, discouraging interaction between the communities on either side of US 290. For each build alternative, the analysis concluded that vehicle access, transit services availability, or local community cohesion in the area of the proposed project would not be affected. Residential displacements would be required, but would affect less than 1 percent of total housing units within the area. Additionally, no traffic diversion would be anticipated, since the proposed US 290 frontage roads would provide a direct, non-tolled alternative to the US 290 tolled mainlanes, as well as more non-toll roadway capacity along the corridor than that which currently exists.

Census data reveals that approximately 15.2 percent of individuals living in the census tracts adjacent to US 290 have incomes that are at or below the poverty level. Frequent users with annual household incomes equal to the median family income of Travis County (\$58,555) would spend less than 1 percent (0.64 percent) of the household income on tolls.

Under the same toll usage and toll rate assumptions, households with incomes at the 2008 poverty level (i.e., \$21,200 for a family of four) would spend approximately 1.8 percent of annual household incomes on tolls, approximately 1.16 percentage points more than the average household.

Environmental Justice (EJ)

Investigation disclosed that the requirements of Executive Order 12898, Federal Actions to Address Environmental Justice in Minority and Low-Income Populations; Title VI of the Civil Rights Acts of 1964; the Civil Rights Restoration Act of 1987; and the Federal-Aid Highway Act of 1970 were evaluated.

The EA states that seven block groups (BG) in the US 290 project area were identified as EJ communities. These BGs are primarily located south of US 290, except Census Tract (CT) 18.11, BG 3, which is located in the northwest quadrant of US 183 and US 290. Since tolling is the funding mechanism proposed for the improvements, several elements related to tolling US 290 were identified and analyzed for potential impacts to the adjacent EJ communities.

The EA also states that the proposed US 290 project would benefit all users of the roadway, including those from the adjacent EJ neighborhoods, by improved mobility, public safety, and congestion relief. Though low-income households would spend a higher proportion of income on tolls, when considering the totality of the effects of this project (i.e., updated design and safety standards, additional roadway capacity, etc.), the overall benefits provided for the entire community (including low-income and minority populations) outweigh the specific concerns about EJ that are discussed in the EA.

Economic Effects

Investigation disclosed that all of the build alternatives, including the preferred alternative, would have direct effects on local, regional and State employment, output, and income, by generating jobs directly related to the construction and operation of the project.

The project includes three-lane non-tolled frontage roads in each direction that provide an alternative to paying tolls. The existing roadway has two lanes in each direction. The additional capacity that will be available on frontage roads, combined with anticipated shifts in traffic from frontage roads to the tolled main lanes, should maintain frontage road mobility over time. The availability of non-tolled frontage roads alongside US 290 offer a non-tolled option within the corridor.

Issue #3: Whether the project will cause adverse health and safety impacts for those who live, work, and go to school in the corridor.

Adverse Health Impacts

The EA states that an initial site assessment to identify potential hazardous material concerns was performed and the field survey revealed no surface evidence of contamination that would impact the project.

The TxDOT also completed a hazardous materials database search to check for the presence of existing facilities such as landfills, Superfund sites, hazardous waste corrective action locations, petroleum storage tanks, and other potential places where hazardous materials might be located in the project area.

Investigation disclosed that there is an operating solid waste landfill in the project area but its boundaries are not close enough to cause impacts. The project will require the removal and/or relocation of three underground petroleum storage tanks, which will be accomplished during construction. Construction and operation of the project will not create new hazardous materials sites and will not exacerbate any existing locations.

Safety

Investigation disclosed that detailed analysis of crash data within the project area during the period 1992 – 2001 was conducted to evaluate major types of collisions, locations, and factors involved. Rear-end collisions were the most prominent, comprising more than half of the total (452 of 848, or 53.3 percent). The majority were intersection-related, occurring at or near signalized intersections and associated with stopped or slowing traffic along the travel lanes of US 290. There were also substantial frequencies of right-angle collisions (145 or 17.1 percent) and left-turn collisions (66 or 7.8 percent) mostly at signalized intersections. Additionally, there were 128 (15.1 percent) run-off-the-road/fixed object and overturn collisions.

The EA states that while there is a need for additional travel lanes on US 290 to accommodate increases in traffic volume, safety improvement needs should also be considered with respect to the recent crash history of this roadway. Primarily, separating through traffic from local movements by the provision of grade-separated interchanges would reduce the frequency and severity of rear-end and other intersection-related collisions which comprise a large portion of the demonstrated crash history.

Issue #4: Whether the project will increase traffic congestion and cut-through traffic.

The EA states that the need for the project is evidenced by decreasing mobility and safety as a result of population and traffic growth in the area. Since 1980 the population of Travis County has increased 110 percent while the populations of the cities of Austin and Manor have increased 104 percent and 35 percent, respectively. Additionally, traffic volumes on US 290 have more than doubled during the last 25 years and are expected to double again by 2031. The proposed facility would improve safety, mobility, accessibility and accessibility in and around the study area, and provide the transportation infrastructure necessary to support local public policies that encourage the growth east of Interstate Highway 35.

The EA states that the purpose of US 290 improvements is to effectively and expeditiously respond to increased transportation demand while embracing mobility and improving safety within the US 290 corridor.

Investigation disclosed that traffic will increase whether the project is built or not.

Regarding cut-through traffic, the EA states that traffic diversion is not anticipated to result from the proposed project, since non-tolled parallel frontage roads would be provided as an alternate route for drivers who are unwilling to or unable to afford to pay the toll.

The EA states that equivalent east-west alternatives do not exist within the adjacent areas and the frontage roads would offer the most reasonable non-tolled option, eliminating the need for motorists to cut through adjacent neighborhoods to access local arterials.

Issue #5: Whether the project will diminish community cohesion.

The EA states that the project will not create new impediments to interaction among residents within the community. The US 290 is an established transportation corridor and improvements will not create any new barriers. The improvements could serve to improve interaction by providing improved access for drivers and pedestrians with interchange improvements and/or modifications at US 183, Tuscany Way, Springdale Road, Johnny Morris/Giles Road, Harris Branch Parkway, Farm-to-Market 734, and SH 130. In addition, these interchange modifications will improve safety along the corridor by allowing residents to cross the facility where US 290 intersects these north-south arterials. The addition of shared use lanes and sidewalks will also enhance connectivity for non-drivers.

Issue #6: Whether the project will provide a substantially inferior option for travel on US 290 East in the form of the frontage roads.

Investigation disclosed that because the project adds capacity to the existing roadway, relieving congestion, the level of service on the frontage roads will show improvement over what driving conditions would have been if the project was not built. Even under the worst case analysis, the frontage roads would have less traffic congestion compared with the existing facility in the future. This improvement is a result of the additional roadway capacity provided by four new travel lanes in each direction in the ultimate build out.

The EA states that even under the worst case level of service analysis, the non-tolled frontage lanes along the primary commute direction will show overall improvement over the condition in 2031 if the project were not built. When compared to the existing facility—four travel lanes, two in each direction—motorists will have access to two additional non-tolled lanes and six new main lanes within the 290 East corridor.

The EA further states that for all build alternatives, access to the US 290 tolled main lanes would be limited to those who pay the toll. As an alternative, the proposed US 290 frontage roads would remain non-tolled. Motorists using the frontage roads may experience longer travel times due to a lower posted speed limit and traffic signals along the frontage roads than those who use the tolled main lanes. However, the additional capacity on the adjacent frontage roads, as well as anticipated shifts in traffic from the frontage roads to the tolled main lanes is expected to maintain frontage road mobility over time.

Issue #7: Whether the project will harm businesses adjacent to the highway and depress real estate values in the area.

Investigation disclosed that the US 290 serves as the major link between the Austin and Manor/Elgin communities in eastern Travis County. It is located within the City of Austin's Desired Development Zone which encompasses the eastern two-thirds of the city and it is where the city wants future growth to occur.

The Summary of Demographic Forecasts compares the projected population and employment totals in 2000, 2007, 2017, and 2030 for the US 290 study area. According to this data, the US 290 study area is expected to experience a greater percent increase in both population and

employment than the Capital Metropolitan Planning Organization area as a whole. According to this data the US 290 study area is expected to more than double in population and almost triple in employment by 2030 with or without the project.

Investigation disclosed that because the US 290 corridor east of US 183 has fewer environmental constraints and fewer development costs than in other parts of the City of Austin metropolitan area, this area is conducive to new development. Currently, this area of US 290 is primarily designated for industrial, commercial, civic, single-family, multi-family, and rural development and the proposed improvements are consistent with local plans for development. It is expected that this area will be a major growth node for the region with a substantial amount of new development, transportation improvements, rail extensions, and road construction both ongoing and planned for the future. Additionally, the area's proximity to central Austin and the University of Texas campus, the amount of developable land, as well as lower development costs when compared to areas further west, make it attractive for new development.

Issue #8: Whether the project will contribute to the destruction or impairment of farmland, rural quality of life, native vegetation, water quality, wildlife, and wildlife habitat in the area.

Farmlands

Investigation disclosed that the project will not have a significant impact on farmlands, as documented and explained in the EA. The Farmland Protection Policy Act was passed to address increased conversion of farmlands to other uses and to minimize the impacts of Federal programs on the conversion of farmland. A Farmland Conversion Impact Rating form is specifically designed for corridor projects like linear transportation projects, and a score of 160 or more on Part VI requires coordination with the National Resource Conservation Service. The project scored between 33 and 36. Therefore, coordination is not required. The low score also demonstrates that the project's impacts to farmlands will not be significant. Further, no farms will be displaced by the project.

Research completed as part of the EA shows that planned development rather than the proposed US 290 improvements is the catalyst for land use changes within the study area. Because these land use changes will occur with or without the project, indirect impacts to soil and geologic resources from the project will be insubstantial.

Rural Quality of Life

The EA thoroughly examined the following resources that might affect the rural quality of life, finding no significant impact to any of them: soils and geology, water resources, vegetation, wild life, migratory birds, threatened and endangered species, socioeconomics, hazardous materials, noise impacts, air quality and cultural resources. Because no significant impact was found, it is safe to say that the project will not contribute to the destruction or impairment of rural quality of life. It is also noteworthy that US 290 is an existing roadway. The project will upgrade the design and expand the capacity of US 290, but it will not extend the length into any new areas.

Native Vegetation

Investigation disclosed that the project will require the removal of 13.4 acres of parks/woods (vegetation community with tree canopy coverage greater than 30 percent) within the project area. The project will impact 59.1 acres of rangelands and grasslands.

Water Quality

Water quality concerns were discussed under Issue number 1.

Wildlife

Investigation disclosed that because of the lack of suitable habitat and the absence of known occurrences of threatened or endangered species near the project area, the proposed project will have no effect on federally listed endangered species. In addition, State listed threatened and endangered species are unlikely to occur within the project area.

Investigation disclosed that migratory bird nesting will be temporarily disrupted during the project activities as a result of the loss of nesting structures (culverts and bridges). The conversion of woodlands, grasslands, and riparian habitats will also reduce the nesting habitats for migratory birds. Although once completed, additional bridge structures will increase nesting opportunities for barn and cave swallows, existing natural nesting habitats converted to transportation uses might be lost. However, those potential impacts—when considered within the context of the entire project—are insignificant.

Wildlife Habitat

The EA found minor impacts in wildlife habitat, but none of the impacts are significant. Five stock ponds that are not associated with jurisdictional waters of the U.S. and that occur in the project area will be partly to completely filled during construction. These ponds provide habitat for wetland animal species. However, due to their small size and the existence of more than 25 other ponds within 0.25 mile of the project area, this will represent loss of only a very small proportion of the available stock pond habitat on the local landscape. In some portions of the project area, the proximity of major roadways and residential and commercial development makes it unlikely to any significant degree that wildlife species will occupy the project area.

THEORIES OF DISCRIMINATION AND ELEMENTS OF PROOF

Title VI prohibits discrimination on the basis of race, color, or national origin under any program or activity receiving Federal financial assistance. The purpose of Title VI is to ensure that public funds are not spent in a way which encourages, subsidizes, or results in discrimination.

Title VI claims may be proven under two primary theories: intentional discrimination/disparate treatment and disparate impact/effects. Under intentional discrimination, the recipient engages in intentional discrimination based on race, color, or national origin. Under the disparate

impact/effects theory, the recipient uses a neutral procedure or practice that has a disparate impact on individuals of a particular race, color, or national origin, and such practice lacks a “substantial legitimate justification.”

The complaint under investigation involves the disparate impact theory of discrimination.

Disparate Impact

In a disparate impact case, the focus of the investigation concerns the consequences of the recipient’s practices, rather than the recipient’s intent. To establish discrimination under the disparate impact theory, the following must be determined:

1. Whether the respondent has utilized a facially neutral policy or practice that had a disproportionate impact on a group protected by Title VI;
2. Whether the respondent can articulate a “substantial legitimate justification” for the challenged policy or practice;
3. Whether the justification proffered by the respondent is actually a pretext for discrimination; and,
4. Whether the complainant can demonstrate that there was a less discriminatory alternative.

The elements of proof are discussed below.

1. Whether the respondents utilized a facially neutral policy or practice that had a disproportionate impact on a group protected by Title VI.

The respondents have proposed improvements to US 290. The respondents have articulated that the improvements will:

- Provide sufficient additional capacity to more safely and efficiently accommodate existing and projected traffic volumes;
- Provide the safety and mobility benefits associated with separating local trips from through trips; and,
- Provide the safety and mobility benefits associated with a continuous freeway system connecting SH 130 to existing freeways in the Austin metropolitan area.

The complainants contend the project will adversely and directly affect the low-income and minority population. Specifically, the complainants are concerned with the toll that will be required as part of the project.

The record shows that families at the poverty level will spend a higher percentage of household income on tolls than the average household.

Conclusion

The record shows that the respondents have articulated the neutrality of their actions by demonstrating that the improvement project is needed to enhance safety and mobility in the area that the project will serve. The record further shows that the project will impact on the low-income and minority community because of the toll involved in the project.

2. Whether the respondents can articulate a “substantial legitimate justification” for the challenged policy or practice.

The respondents state the proposed US 290 project will improve mobility, public safety, provide congestion relief, and include the latest design and safety standards. It will separate directions of travel with a grassy median, and provide several lanes of additional roadway capacity, including two additional non-tolled travel lanes. The additions and modifications proposed for US 290 will improve the current traffic conditions along the corridor to a level greater than what currently exists and accommodate future traffic growth along the corridor.

The proposed improvements to US 290 would cost approximately \$459.63 million and would be funded through a combination of Federal, State, and local funds supplemented with the sale of bonds to be repaid by toll receipts.

The respondents state that leveraging available tax dollars with toll revenues would allow the project to be built sooner rather than piecemealed over many years.

The project includes a non-tolled frontage road to accommodate those who do not wish to pay the toll.

Conclusion

The respondents have articulated a substantial legitimate justification for the proposed improvement project. The respondents have provided a reason for tolling the project. The respondents have also provided an alternative to the payment of the toll with the availability of a frontage road that is non-tolled.

3. Whether the justification proffered by the respondent is actually a pretext for discrimination.

There is no evidence to show that the reasons offered by the respondents are a pretext to discriminate. The respondents have offered safety and mobility justifications for the improvement project, conducted analyses of all potential impacts to the community and the environment, provided a reason for tolling the project, and provided an alternative to the use of the toll road with a non-tolled frontage road.

4. Whether the complainant can demonstrate that there was a less discriminatory alternative.

One of the main concerns raised by the complainants involves the payment of a toll. The evidence shows that there is a non-tolled frontage road that can be used by those not wishing to pay the toll.

The complainants allege that the non-tolled frontage road does not provide adequate service. However, there is no evidence to support this allegation. The evidence shows that the respondents will add additional lanes to the non-tolled frontage road as part of this project.

Conclusion

The complainants want the improvement project to be designed without the use of tolls. However, the record shows the respondents have provided a non-tolled frontage road as an alternative to using the toll road. The complainants' allegation that the non-tolled frontage road does not provide the same level of service is not supported by the evidence. The evidence shows that the project will make improvements to the non-tolled frontage road as part of the project.

OTHER ALLEGATIONS—PUBLIC INVOLVEMENT—RESPONDENT CAMPO

Regarding public involvement, the investigation disclosed that three of the four complainants did not attend any of the public hearings regarding this project because of age and health reasons. One complainant attended the December 1, 2008, CAMPO board meeting and stated that he was denied the opportunity to speak although he was signed-up.

Evidence provided by the complainant supports his allegation that he was denied the opportunity to speak at the December 1, 2008, CAMPO board meeting.

Respondent CAMPO acknowledges that the complainant was not allowed to speak at the CAMPO board meeting on December 1, 2008. The respondent stated that CAMPO's bylaws prohibit public comment at board meetings where "action is required on an item which has already been the subject of a public hearing."

A review of the respondent CAMPO's Bylaws and Operating Procedures, Section III, E., supports respondent CAMPO's assertion that public comments are not addressed on items which have already been discussed at public hearings. Record evidence shows that respondent CAMPO held four public hearings on the project in question.

DECISION

Based on the information obtained and reviewed during the investigation of this complaint, the FHWA concludes that the evidence does not support the complainants' allegations that Title VI was violated by the respondents in the development of the US 290 project.

The evidence also does not support the complainant's allegation that respondent CAMPO violated Title VI by not allowing the complainant to speak at the CAMPO board meeting.

This concludes processing of this complaint and no further action will be taken by the FHWA.

Sincerely yours,

A handwritten signature in black ink, reading "Brenda F. Armstead". The signature is written in a cursive style with a large initial "B" and a stylized "F".

Brenda F. Armstead
Director, Investigations and Adjudications