

BEFORE THE FEDERAL HIGHWAY ADMINISTRATION OF THE UNITED STATES

In re: The Eastern Central Texas Sub Regional Planning Commission
Petition to Reject the DEIS Prepared by and Submitted by the
Texas Department of Transportation for the Trans Texas Corridor Projects;
To Require a New Environmental Impact Study Before Any Further Study
Or Action Is Planned For the Same Corridor Projects or Any Similar Project
Relating to a Green Route for a Federal Highway

I. INTRODUCTION

A. THIS ADMINISTRATION SHOULD REJECT THE CURRENTLY FILED DEIS BECAUSE THE TEXAS LEGISLATURE HAS ACTED TO TERMINATE THE COMPREHENSIVE DEVELOPMENT AGREEMENT AUTHORIZING THE CORRIDOR STUDIED BY THE DEIS.

The Draft Environmental Impact Statement (DEIS) currently before this Administration is invalid for all the reasons stated in this Petition and in the prior Request (June 10, 2008) for a decision ordering a Supplemental Environmental Impact Statement. Additionally, it is not a valid Statement because it does not relate to any project which is currently feasible or lawful in the State of Texas.

The DEIS relates to a study corridor based upon a plan developed for choosing a route for construction of an I-35 superhighway. The entire project is reliant upon a contract for development authority (hereinafter "CDA") entered into under a Texas statute, the validity of which terminates in August 31, 2009 (SB 792 passed in 2007). The Texas legislature does not meet again for two years, thus cannot reconsider the sunset termination of the statute, thus cannot reconsider the validity of the CDA which authorizes the study corridor covered by the DEIS.

Under sunset provisions of Texas law, the Texas Department of Transportation (TXDOT) was scheduled to go out of existence in August 2009, unless reauthorized by the legislature. During the 2009 session, a sunset advisory commission issued a damning report on the performance of TXDOT, and legislators promised some extreme reforms of the Department.

As the session wore on, it appeared that the legislature was not going to agree on any reforms, and finally during the last hours of the session, the Senate Bill which reauthorized the

Department and all the provisions which allowed the Trans Texas Corridor projects to proceed died on the floor of the Senate. When the legislature adjourned sine die, there was no bill which reauthorized any of the provisions that allowed construction of Trans Texas Corridor I-35 (TTC I-35). The bill authorizing CDA's under which the EIS was written, sunsets August 31, 2009. As of that time, there is no authority for TXDOT to proceed with any plans for ever constructing TTC I-35. The CDA's end August 2009, and no others can be entered into. That means that no "facility" contracts for construction of even segments of TTC I-35 can be lawfully entered into.

At the last hour before adjournment, the House passed a resolution extending the life of your NEPA agent TXDOT for two more years, until 2011, but that Resolution had no extension affect on the statute under which TTC I-35 was authorized. That statutory authority is terminated August 31, 2009.

The Resolution temporarily saving TXDOT became part of a Resolution authorizing expenditure of stimulus funds, so that the Senate could not fail to pass it. As a result TXDOT is alive temporarily until 2011, the year that the Texas legislature next meets.

But, even if your NEPA agent, TXDOT, still faintly breathes, its project for TTC I-35 does not.

The DEIS which is currently pending before you now relates to a corridor for which there can be no project. Thus, there is no lawful, actual reason for the DEIS to even exist. If you approve this DEIS, it will probably be the first time that a federal agency ever approved an DEIS for NO PROJECT. Under Texas law as it now stands, and the legislature has adjourned for two years, there can be no TTC I-35 project planned or constructed. So, there is no "need" at all for the DEIS.

TXDOT has repeatedly said that the DEIS was only a study from a 30,000 foot vantage point, because more specific environmental studies would be done as segments were ready for planning and construction. Now, there can be no such segment planning and construction. So, the 30,000 foot study is needless, useless, and is a study grounded in futility.

The Sunset Advisory Commission recommended that the Texas Transportation Commission be disbanded and replaced by a single Commissioner. The commission also recommended major reformation of the department and establishment of a legislative oversight committee.

The recommendations resulted from evidence of illegal activities by personnel of the Department, and of evidence that the Department was "out of control" in "advancing its own agenda against objections by both the Legislature and the public." (Sunset Advisory Commission Report re Texas Department of Transportation, January 2009)

Therefore, the DEIS which is before this Administration now relates to a project which has no active life. The corridor which is the subject and object of the DEIS cannot be pursued under the CDA which is terminating in August. As a result of the legislative action, there can be no more CDA's entered into to "re-new" or "re-activate" the Cintra focused Trans Texas corridors.

So, as of the sine die adjournment of the legislature, the DEIS relates to a phantom project.

It would be ludicrous for this Administration to review, approve and allow the DEIS to advance to a Final Environmental Impact Statement public review. It would be nothing but bureaucratic nonsense to permit this process to proceed when there is no way the Department could implement the project described in the DEIS.

The National Environmental Policy Act (NEPA) was not designed to pursue studies of phantom projects, projects that had been rendered meaningless by legislative action. 42 U.S. Section 4332 requires that this agency, along with all other federal agencies, follow a process that insures “the integrated use of the natural and social sciences and the environmental design arts in ***planning and decision making*** which may have an impact on man’s environment.” That process requires a study that states the “environmental impact of the ***proposed action,***” “any adverse environmental effects which cannot be avoided should the ***proposal be implemented,***” and “alternatives to the ***proposed action.***” There no longer can be a proposed action, or decision involving TTC I-35 under the comprehensive development agreement which formed its base, because that agreement ends in two months, and cannot be revived prior to the next legislative session in 2011.

It is clear from the actual language of NEPA that the environmental impact process is not intended to be focused on projects that are not lawful, not authorized, and not possible for implementation. The regulations issued by the Council on Environmental Quality also make that clear. 40 CFR Section 1500.1 provides in subsection (b) that “NEPA procedures must insure that environmental information is available to public officials and citizens ***before decisions are made and before actions are taken.***” It is clear that the procedures are not intended to be wasted on subjective projects where there can be no “decisions...made” and “actions...taken.” When the Texas legislature left Austin, there are no decisions which can be made or actions taken by the Department of Transportation under the comprehensive development agreement forming the base for TTC-I-35. The same subsection states that NEPA documents “must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.” There is no longer any “action in question,” and the entire DEIS now contains nothing more than “needless detail” since there cannot be any implementation of the project described therein.

Petitioner will not belabor the point, but each and every regulation issued by CEQ implies and relates to existence of an actual project which can be lawfully pursued and implemented. One of the specific rules imposed on agencies is that contained in 40 CFR Section 1500.4 is that they “shall reduce excessive paperwork [through several measures including] (f) emphasizing the portions of the environmental impact statement that are ***useful to decisionmakers and the public....***” There is nothing in the DEIS now before this Administration that would be “useful to decisionmakers” because they can make no decision to implement any part of the corridor studied after the month of August. It would be totally futile for this Administration to review and allow issuance of a Final Environmental Impact Statement for the TTC I-35 corridor.

The action by the Texas legislature is not just symbolic. It states the public policy of the state of Texas that there is no implementation of the comprehensive development agreement forming the base for TTC I-35. NEPA calls for this agency, and all federal agencies to cooperate with state governments to use all practicable means to “create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans.” This Administration, under that mandate, cannot pursue an administrative environmental review inconsistent with a decision of the Texas legislature.

“Cooperation” with state government as mandated by 42 USC Section 4331 requires that this Administration take into account and comply with the decision of the state of Texas that the agreement forming the base for TTC I-35 be terminated.

So, if for no other reason at all, the Administration should reject the DEIS submitted to it by the Texas Department of Transportation prior to the action of the Texas legislature. Even if the Texas legislature were to reverse its decision in its 2011 session, the current DEIS would not be a valid study of the conditions which would exist at that time.

B. THIS ADMINISTRATION IS RESPONSIBLE FOR THE ACTIONS OF TXDOT

You have designated the Texas Department of Transportation as your agent to conduct a vital environmental study of the originally called Trans Texas Corridors I-35 and I-69. It is your responsibility to see that your agent complies with every aspect of the National Environmental Policy Act. As a matter of general and government ethics, it is also your legal and moral responsibility to see that your agent complies with all state and federal laws, and to avoid actionable deceptiveness, in the development of the NEPA studies.

It is your responsibility because the legislative body of the People of the United States, the Congress, made you responsible for the necessary pre-decision environmental studies for federal highway projects. Even though you are an executive agency, you are bound to uphold and follow the law. That duty and obligation cannot be evaded by simply handing off the preparation of the necessary pre-decision environmental studies to a state department.

NEPA provides in 42 USC Section 4332 (D) that this Administration, as the responsible agency for a major highway action must “furnish guidance” to any state agency designated to do the NEPA work, and mandates that you “participate(s) in [the] preparation” of the EIS. It also allows such designation to a state only if your agency “independently evaluates such statement [EIS] prior to its approval and adoption.” The statute also states that designation does not “relieve the Federal official of his responsibilities for the scope, objectivity, and contents of the entire statement of any other responsibility under this chapter.”

The petitioner presumes that you have observed closely the actions of your agent, TXDOT. You are already aware of the nose-dive of credibility of TXDOT -- resulting from matters revealed to the public only through court proceedings, inadvertent public statements, misleading public statements, and coordination proceedings forced on them by local government officials.

But, to date, you have taken no responsible action to cure the deficiencies and illegalities of your agent. You have refused requests to set aside Draft Environmental Impact Statements for both TTC I-35 and 69, and require supplemental studies. You have allowed Draft EIS documents to remain pending in your possession, presumably studying them, even while TXDOT has claimed, erroneously and in a deliberate mode to deceive the public, that it abandoned the corridor concept upon which the two DEIS documents are in your possession for action.

Your refusal to act in the face of clear evidence of TXDOT’s failures and violations, is certainly not consistent with the strict code of governmental ethics which President Obama promised the American people and ordered all federal agencies to follow.

So, as we again offer you one last, administrative, opportunity to right the wrongs done by your agent, TXDOT, we will send copies of this Petition to the President, who has promised a new approach to ethics and law compliance, and to the Secretary of Transportation he has designated. We also are sending copies to your Solicitor and to the Assistant Attorney General in charge of Environmental and Natural Resource litigation.

Petitioner will not stand by and allow the citizens within the geographical bounds of our Planning Commission to be run into the ground, to allow their property rights, their economic and social stability, their valid community and personal interests in life, to be ripped apart by a rogue agency. The people of Texas have made their statement about your agent. That statement has been made in rallies of thousands of people, in the testimony presented to the Sunset Advisory Commission, in the Report of that Commission, and in the refusal of the Texas legislature to continue the validity of CDAs which form the base for TTC I-35.

This Petition provides you the administrative avenue to make right the TXDOT, and your, wrongs which have been committed in the preparation of the two DEIS statements as to 35 and 69 corridors.

C. STATUS OF THE PARTIES AND PROJECT

The Texas Department of Transportation has filed with you a Draft Environmental Impact Statement for the Trans-Texas Corridor I-35 Project and a Draft Environmental Impact Statement for the Trans-Texas Corridor I-69 Project.

This Eastern Central Texas Sub-Regional Planning Commission, the Petitioner, has exercised its Texas statutory authorization to insist that TXDOT coordinate with it regarding the TTC I-35 DEIS. This demand on TXDOT was made well before the DEIS was approved by TXDOT and referred to you. In fact, at one of our coordination meetings with TXDOT officials, the Petitioner was told that our recommendations would be carefully considered, and we would be told of how our recommendations would be handled PRIOR TO THE FILING OF ANY DEIS WITH YOU.

During the coordination process which had to be forced on to TXDOT, an official of TXDOT advised Petitioner that our input through the coordination process had been very important because without it the state would not know of school bus route displacements, emergency service obstacles caused by geographical separations of the towns which are represented on Petitioner, and specific community economic and social issues.

TXDOT officials did not keep their word. They did not even notify the Petitioner when the TTC I-35 DEIS was submitted to you. Petitioner learned of the submission through means other than notification by TXDOT. That is a statutory violation because it was a failure, actually a deliberate refusal to coordinate. That refusal violates Section 391 of the Texas Local Government Code. As the responsible agency, you are responsible for that statutory violation.

The Petitioner raises the issue here regarding the unlawfulness of the TTC I-69 corridor as well as the TTC I-35 because of the cumulative impact which results from planning and constructing these two superhighways. It is not possible to even think of building two such grandiose

superhighways without the impact of one cumulating with the impact of the other. The cumulative impact of the two on the agricultural production in Texas will be disastrous, the impact on the taxpayers of thrusting these two toll highways on them is cumulatively burdensome, the cumulative impact of the two on the wildlife and natural landscape and ecosystem is not fixable, and the cumulatively destructive impact on rural towns is disgraceful.

As to the status of the TTC I-35 DEIS, according to TXDOT's regulations, the time for completing the study has expired, and TXDOT should begin the study over. Title 43, Rule 2:13(b)(2) of the Texas Administrative Code requires that a reevaluation of the project is to occur "If the district has not submitted an acceptable FEIS to the environmental division within three years from the date of circulation of the DEIS." The DEIS was first circulated on April 4, 2006, now more than three years ago. Although we have heard that the Final Environmental Impact Statement (FEIS) has been submitted to you, we have yet to receive a copy of this so that we can review and continue to coordinate our position with your agent. If an FEIS has been sent to you without us being provided a copy, then TXDOT has violated their duty to coordinate the Study with this Commission. If instead, they have not sent the FEIS for your review, then they have violated the Texas Administrative Code (TAC) and must reevaluate the study. Even if they sent the FEIS to you, it is not "acceptable" as required by the Texas Administrative Rule. It is not acceptable for all the reasons stated in our earlier submission and in this Petition. So, regardless of whether you have the FEIS for study, the Texas rule requires a new study. It would ill behoove you to ignore the timeliness rule of your own agent, and give favorable consideration to an untimely FEIS.

In either regard, however, because the project has changed significantly since the study began, the study should be started anew. TAC requires further at section 2:13(c)(2) that "If the reevaluation shows that changes substantially change the scope of the project or extend the limits of the project, the district shall conduct additional environmental studies and public involvement." Since this study was initiated, substantial changes to the scope of the project have been made by the department. One of many is that at the first of this year, TXDOT changed the name of the project to "Innovative Connectivity" in order to demonstrate that it had made major changes to the initial idea and to quiet the mounting public opposition. In making this announcement, the Executive Director of TXDOT spoke of the old TTC project as "It was ambitious – and preliminary. A first step, not a finished product. It was meant to change."

One of these changes was reducing the amount of right of way necessary from 1200 feet (which is the current scope of the right of way that has been studied and presented in all the alternatives in the DEIS) to 600 feet. Cutting the amount of landmass that would be taken for a project in half that spans approximately 550 linear miles is a significant change that surely impacts the scope of the project. This detail alone should cause FHWA to require that this current study be thrown out, and a new study started in its place.

Another significant change is that this Commission was assured by TXDOT officials in a coordination meeting that existing facilities would be considered "first" for the TTC project where possible, before a new corridor path was pursued. The problem, however, is that existing facilities are not even studied or considered in the current DEIS. How is this department going to justify using existing facilities to build portions of the TTC if this option was not even studied in the current DEIS? They cannot. To do so would make the NEPA process a farce, and for you to allow your

agent to proceed with this study while making promises they cannot keep to the local communities directly impacted is a dereliction of your duty.

There can be no doubt that significant changes to the scope and nature of this project have been made. It is no longer the same grand superhighway vision that was to connect Canada to Mexico for international trade. Rather, the department is now pursuing a much different plan as was best articulated by TXDOT Executive Director January 6, 2009 before the Texas Legislature:

“To be clear: the Trans-Texas Corridor as it was known will no longer exist. It will, however, take some time before we can completely transition away from the name. There are lots of legal documents, studies and sections of state law that currently refer to the Trans-Texas Corridor. That concept has diminished and in its place a new plan. A plan that calls for corridor widths to be limited to 600 feet. A plan where the corridor modes, locations and sizes will depend heavily on guidance from Corridor Advisory Committees and Corridor Segment Committees. A plan that will consider improving existing transportation resources, whenever possible, rather than breaking new ground.”

The “new plan” details as so well articulated by the Executive Director make the current DEIS unrecognizable from TXDOT’s new and improved “Innovative Connectivity” agenda. Not only has the time expired for the current DEIS to be finalized, but so too has the project itself, by TXDOT’s own admission.

D. PETITIONER’S REQUEST FOR A SUPPLEMENTAL TTC I-35 DEIS AND THE “BRUSH OFF” RESPONSE BY THE FEDERAL HIGHWAY ADMINISTRATION

On June 10, 2008, the Petitioner submitted a Request to Require that TXDOT undertake development of a supplemental TTC I-35 DEIS. In that Request we outlined the flaws in the study conducted by TXDOT, the statutory violations evident in the TTC I-35 DEIS, and the complete failure by TXDOT to satisfy NEPA and implementing regulations issued by this Administration and by the Council on Environmental Quality.

Our Request was carefully set forth factually and legally, and was documented.

The FHWA Texas Division Administrator, Janice Brown (hereinafter referred to as “FHWA Brown”) did not grant our Request. Rather she attempted to “explain” to us the NEPA process and the tier one and tier two processes being inappropriately and unlawfully applied by TXDOT in the TTC I-35 DEIS. This Petitioner, obviously, understands the NEPA process or we would not be able to participate as we have.

We requested relief from a federal agency charged specifically and statutorily with overseeing the work of a state department working as its agent in performing a NEPA highway study. We requested relief on the basis that statutory and regulatory violations had occurred and were continuing to occur.

But, we got only a condescending “pat on the head” letter which thanked us for our “interests and concerns.” as though we were a third party by-stander observing the process from a grandstand.

We did not state “interests and concerns.” We stated statutory and regulatory violations that were impacting our citizens, the very existence of our members. We asked your agency, established by Congress and mandated by Congress to comply with statutes such as NEPA, to remedy a factual and legal wrong being committed by your state agent, TXDOT.

The same “head pat” letter, dated August 6, 2008, told us that FHWA Brown would send a copy of our formal Request to TXDOT for “their consideration and ask that it be included in the TTC I-35 Project record.” So, in response to our urgent Request that TXDOT be required to develop a Supplemental TTC I-35 DEIS to remedy the unlawful approach taken in that document, FHWA Brown said she would send TXDOT a copy and ask that it be included in a final record. In other words, for future years, bureaucrats who reviewed the manner in which NEPA should be observed would see that complaints about unlawful violations would be included in the final record, but otherwise ignored.

E. RESPONSE TO FHWA BROWN’S ‘BRUSH OFF’ OF THE PLANNING COMMISSION’S FORMAL REQUEST

The Petitioner formally pursued the relief requested, and by inaction denied. On November 11, 2008, the Petitioner responded to FHWA Brown’s August “brush off” letter. In that response, the following points were made:

1. An associate of the Petitioner had learned that an employee of the Environmental Protection Agency (hereinafter referred to as the “EPA”) stated that the TTC I-35 DEIS was final and simply awaiting forwarding to the FHWA. In polite terms, the Petitioner observed that this was “curious” in that: Our Request for a Supplemental TTC I-35 DEIS had been sent to TXDOT and they advised that it had to be sent to you. Of course, we knew that it had to be filed with both, so had already done so. But, it is significant that TXDOT acknowledged that it, in fact, is only your agent -- thus, their violations are yours.
2. Credibility of TXDOT had suffered so drastically as a result of discovery in the lawsuits filed by Texans Uniting For Freedom and Reform (which will be referred to at much greater length later in this Petition), public knowledge (and your DIRECT knowledge) that TXDOT withheld critical documents FROM YOU, public knowledge (AND YOUR DIRECT KNOWLEDGE) that TXDOT in bad faith promoted a Finding of No Significant Impact (which would mean no environmental impact study was necessary) decision, that there could be no public or official confidence in or reliance on the objectivity and scientific accuracy of the DEIS documents in your possession.
3. We gave your agency an opportunity to comply with NEPA and avoid the legal complications and liability findings connected with failure to require an agent conducting the TTC I-35 DEIS to comply with the law.
4. We raised with you the issue of compliance with the Data Quality Act which virtually prohibits you from proceeding with a decision on the TTC I-35 DEIS on the basis of the flawed data and analysis presented in TTC I-35 DEIS by your agent, TXDOT.

5. An absence of further action on our Request, and any further action to require an environmental study in compliance with NEPA shows proof of INTENT TO VIOLATE THE LAW ON YOUR PART AND YOUR AGENT, TXDOT'S, PART.

TXDOT, your NEPA agent, has made a mockery of NEPA. TXDOT's failure to comply with the purpose for, the letter of, and the spirit of NEPA has been pointed out to you in full.

Substantive and significant comments were submitted by other concerned organizations and citizens to the TTC I-69 DEIS which pointed out the inadequacies of, and flaws in, the study for the 69 portion of the TTC project. The Lone Star Chapter of the Sierra Club filed a specifically detailed, line by line description of errors, flaws and failures to comply with NEPA. The Texas Farm Bureau filed a comment pointing out factually and legally how NEPA was being violated in the study.

To this date, your agency has neither ordered a supplemental DEIS for either 35 or 69, or a new DEIS for study needed to achieve compliance with NEPA.

FOR REASONS STATED HEREIN, IT IS NOW TOO LATE TO ORDER A SUPPLEMENTAL DEIS. In order to comply with lawful duties, you and TXDOT must now begin anew with the study even for TTC I-69 that has been so terribly flawed.

F. THE CREDIBILITY OF TXDOT HAS DETERIORATED TO THE POINT AT WHICH RELIANCE ON ANY REPORT PREPARED BY TXDOT IS ILL PLACED

Brand new studies are necessary not only because so much time has elapsed without remedial action to cure the problems of non-compliance, and because the three year study period for the TTC I-35 DEIS has now expired, but because the credibility of TXDOT has been so drastically undercut that no responsible federal decision agency can rely on the factual findings or conclusions sent forward by TXDOT.

One of the reasons for a federal decision agency to even allow a state agency to conduct an EIS for an important federal highway project is that the state agency has more knowledge, information, and instinct for local economic factors, environmental concerns specific to the locale, social structure important to the locale, state and local governmental constraints, and community concerns and constraints.

So, expertise as to the local environment -- human and non-human -- should play a huge part in the confidence with which the public and then you can rely upon the DEIS and resulting Final EIS.

But, when the credibility of the studying agency is destroyed, then reliance on the local expertise presented by that agency is misplaced. For, when the credibility of the preparing agency -- the agency making factual statements and analysis -- is undermined, then there can be no rational reliance on the study statement made by the offending agency.

In the NEPA arena, a failure of credibility -- lies, deceptions, misdirection, cover-ups, failures to be forthcoming as required by federal and state laws, failures to follow legislative mandates of coordination, failures to stay within the bounds of its discretion set by LAW -- is as fatal

to confidence in the truth, accuracy and soundness of a DEIS as it is in a trial court proceeding where the judge and jury has to discern the truth of compliance with the law, a congressional or legislative hearing where the committee members SHOULD BE discerning the truth of compliance with the law, or a simple elementary school essay turned in for grading.

Every day, decision makers have to rely, or not rely, on studies, statements and representations by “witnesses” designated with the duty to bring forth the facts. Every day those decision makers determine whether the information received is credible. The teacher has to discern the credibility of the student as to whether the writing is really his/hers. The judge/jury has to discern whether the reporting witness is telling the truth, or even has enough knowledge to speak intelligently to the issue. The members of the legislature SHOULD BE DISCERNING whether the witness is telling the truth, or is shading and blending the truth to serve a particular agenda.

Discerning credibility may be difficult. But, it is a MUST in every day life. For you, in making decisions that affect people, real human people, and their environment (economic and natural), that affect the future of the nation and a continuing impact and affect on those real human people, the decision as to whether your NEPA agent is credible IS OF THE UTMOST IMPORTANCE.

Often, the decision as to whether to rely on a witness, is difficult, and sometimes must be made on instinct, on such things as watching a witness twist and turn, refuse to make eye contact, sweat, drink water incessantly, answer simple questions with convoluted ramblings. For that reason, most often, appellate courts leave credibility decisions to the trial court (judge and/or jury) which can “SEE AND OBSERVE” the witness.

In this case, your decision as to credibility is made much easier by the evidence TXDOT has provided as to its lack of credibility. But, in case you have overlooked the public nose-dive of TXDOT’s credibility, we herein provide you with a complete re-cap of the evidence. Your review of the re-cap of evidence will no doubt persuade you that TXDOT’s lack of credibility would strain the credulity of a judge listening to a witness, a legislator listening to a banker, or a teacher grading an essay. Any executive officer over an agency with has produced such destructive evidence against itself would not ignore the evidence unless the agency agenda complied with his.

You have a higher duty to the people of Texas than any of the examples. You have the duty, specifically imposed by law, to see that NEPA is complied with -- NEPA, a law whose purpose is to allow the public within a community to review full and credible evidence before determining whether a major action should be taken.

II. NEPA VIOLATIONS REQUIRE REJECTION OF TTC I-35 AND TTC I-69 DEIS

A. PURPOSE AND REQUIREMENTS OF NEPA

The National Environmental Policy Act (NEPA) was authorized by Congress “to create and maintain conditions under which man and nature can exist in productive harmony...” and calls for

the study of major federal actions *before* actions are taken so the public can determine whether the project should be pursued.

The purpose of NEPA is simple, straightforward and necessary. It requires the benefits and consequences of projects that will alter the human and natural environment to be fully considered. While NEPA may only be a process, it is a critically important process that guides the decision making of public policy as it affects the environment now and in the future.

NEPA requires at 42 USC 4332 that all agencies shall “include in every recommendation or report ... for ... actions significantly affecting the quality of the human environment, a detailed statement by the responsible official.” What is to be included in this report was not left to the agencies to decide. Congress decided this and set forth five analyses by statute that were to be made:

- (1) the environmental impact;
- (2) any adverse environmental effects which cannot be avoided;
- (3) alternatives to the proposed action;
- (4) the relationship between local short term uses of man’s environment and the maintenance and enhancement of long-term productivity, and;
- (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action.

The Tier One TTC35 DEIS arrogantly shifts the analysis mandated by congress to a second tier study level, causing the tier one analysis to be a catalog of meaningless information which adds nothing to the decision making process.

The decision as to where to place the superhighway had been predetermined before the study began. The report claims to have looked at three environmental impacts: direct, indirect and cumulative. It concludes that there were no indirect or cumulative impacts found which would cause the selection of one of the 12 resource corridor alternatives or the no action option to be selected. Keep in mind these corridor study areas are 4 to 18 miles wide and 486 to 521 miles long. It is inconceivable that there are no distinguishing human or natural environmental indirect or cumulative impacts between any of the proposed corridors.

The report then attempts to convince the reader that it has taken a hard look at the direct impacts, however, for those issues which may provide compelling arguments against their predetermined route, they have created a standard, frequently repeated phrase; “If the Tier One decision results in the selection of a corridor alternative as the Preferred Alternative, (insert issue) would not be directly affected, because no construction related activities will be authorized as a result of the Tier One decision.”

They have taken this position in regards to noise and vibration, cultural resources, parklands, historical sites, prime farmland soils, river basins, impaired stream basins, existing reservoirs, major and minor aquifers, flood prone areas, wetlands, mineral resources and mining activities, publicly owned or privately held terrestrial and aquatic habitat areas, neighborhood and community cohesion, population, environmental justice, relocations, air quality, and potentially occurring threatened, endangered and candidate species.

The only major direct impact they have distinguished in the Tier One DEIS is threatened, endangered and candidate species. They concluded that they must avoid placement of the corridor on the west side of the existing I-35 interstate highway because of federally listed species in that areas. They have selected this singular issue to be more important than all the others listed above.

There is a reason why they have done so. The west side of I-35 is of hilly, rocky terrain. The east side of I-35 is flat open farm ground, much more conducive to road building. However, TXDOT is using the NEPA study to appear as if they have thoroughly analyzed and compared the impacts of all 13 alternatives, and the overwhelming conclusion from this analysis is that the preferred corridor is also conveniently the most suitable for road building.

They have used the NEPA process to justify a predetermined decision. Coincidentally, prior to the completion of the Draft DEIS, TXDOT had also contracted with developers to determine the cost of the potential project. Within this contract is a series of aerial maps which show placement of a quarter of a mile wide right of way down the middle of their selected preferred corridor. Even though they have expended public funds to prepare this analysis for “planning purposes,” and did it in tandem with the NEPA process, they have excluded it from the NEPA study. They have asked the public to believe the preferred alternative was independently selected through the NEPA process and not selected for cost and profit purposes.

Had the five criteria mandated by Congress, or the specific three impacts directed by regulation been properly analyzed in this NEPA report, there is no doubt a different alternative could have been selected, if any. A proper NEPA study would have changed the agencies predetermined route.

So, without having completed any substantive analysis as to the environmental impacts, adverse effects, alternatives, short and long term use of resources, irretrievable or irreversible commitment of resources, TXDOT is asking the FHA to approve this Tier One NEPA study and with it approving the building of a quarter of a mile wide superhighway that is larger than any other transportation project considered in our nation.

The only decision left to be made at the Tier Two level of study is *where* to place the highway. Although TXDOT must consider a no option alternative during tier two, there is little confidence held by this Commission that this option will be seriously considered, especially since they have indicated in this study as well as in person that the less stringent categorical exclusion or environmental assessment may be used instead of a full Environmental Impact Statement at this second level of study.

B. THE TIERING PROCESS UTILIZED BY TXDOT IS NOT ACCURATE

TXDOT’s slight-of-hand to push substantive NEPA analysis to the tier two studies is a violation of not only the statute but the regulations as well.

Federal Highway Administration (FHWA) regulations for tiering follow the same guidance given by the Council of Environmental Quality (CEQ). Section 771.111(g) states “for major transportation actions, the tiering of EIS’s as discussed in the CEQ regulation (40 CFR 1502.20) may be appropriate. The first tier EIS would focus on broad issues such as general location, mode choice,

and area wide air quality and land use implications of the major alternatives.” The CEQ regulations require that the subsequent statement “summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action.”

Tiering was not intended to be a method by which agencies could avoid analyzing the five criteria Congress set forth, however, that is precisely how TXDOT has misused the rules. If read correctly, the FHA and CEQ regulations require the second study to look back and summarize the detailed analysis of the first study which considers the broader issues such as the direct, indirect and cumulative impact of the entire project, which the TTC 35 tier one study has failed to do.

This broad tier one study would logically include those issues that several or all of the smaller segment projects will face, so that each segment study does not have to rehash and restudy an impact better reviewed with the full project in mind. For instance, the impact to a valuable and irreplaceable resource, such as prime farmland soil, that several of the tier two segments will impact should not be left to the second tier study before being analyzed.

The Blacklands Prairie is one such example. This valuable farmland is considered a national treasure because of its unique soil composition which produces bountiful crops year after year, without irrigation. It is specifically identified as having the highest priority for protection in the Texas Parks and Wildlife Department’s Comprehensive Wildlife Conservation Strategy, funded in part by the Department of the Interior.

The TTC 35 DEIS preferred corridor alternative identified in the DEIS travels the entire length of the Prairie. In fact, the executive summary points out that this area of land was deliberately selected because the terrain is flat, and of course, because endangered species were identified in the hilly route. However, the Prairie itself is mentioned only by reference deeper in the tier one study, and no substantive analysis is ever made as to the value or impact on the Prairie.

It makes sense that the Blacklands Prairie be one of the “broad” issues to be analyzed in the tier one study and then specific local impacts be thoroughly addressed during the second tier using the broader study as a reference. But this correct analysis did not fit with TXDOT’s agenda.

We have raised this issue in every meeting held with TXDOT officials and have even enlisted the help of the Texas Natural Resource Conservation Agency to conduct a study under the Farmland Protection Act (FPA) whereby the amount of prime and unique farmland can be quantified. They have completed their portion of the study and concluded that 69% of the land to be taken by the superhighway in the Commission’s jurisdiction is classified as unique farmland and should be afforded the highest protection.

We have asked TXDOT to complete the remainder of the study as is their obligation. However they have refused. Instead they have informed us that they will only consider studying the impact to the farmland during the tier two processes.

By waiting until tier two to study the impact under NEPA and FPA, the opportunity to avoid the Blacklands Prairie has been lost. In most places, the ten mile wide study area of the preferred corridor is contained *entirely* within the Prairie. It will simply be too late to study and potentially

avoid the Prairie if analysis and public opinion calls for this result. Studying the impact on the Blacklands Prairie at tier one could very well cause the entire project to be moved away from TXDOT's predetermined route, which is the reason TXDOT has refused to study this impact in the Tier One DEIS and specifically refused our request to study the impact. On this issue alone, the spirit of NEPA has been grossly violated.

The FHWA and CEQ tiering regulations were not designed to create a way for agencies to avoid studying the full impact of a project as directed by Congress through NEPA. If that were the case, then the rules themselves would be unconstitutional. We instead believe that it is not the rules that pose the problem, but rather the way TXDOT and the FHWA have allowed these to be applied in order to avoid fully studying a superhighway project greater than any other transportation project considered in our nation's history.

So, even if TXDOT could continue to pursue development of I-35 under the CDA, the DEIS would be so flawed as to require rejection. But, as already pointed out the CDA on which the I-35 study is based terminates in two months.

III. TXDOT HAS PROVIDED ITS OWN EVIDENCE OF COMPLETE LACK OF CREDIBILITY

A. IT TOOK LAWSUITS BY TEXANS TO FORCE TXDOT TO REVEAL IT'S DUPLICITOUS, UNETHICAL AND ILLEGAL ACTIVITIES.

As you are well aware, TXDOT developed a project to expand U.S. Highway 281 (hereinafter referred to as "281") and to expand Loop 1604, but also convert of 36.4 miles of Loop 1604 from a simple tax supported highway to a toll road. In spite of the huge environmental impacts which would result from these projects, TXDOT cynically issued and filed with you a Finding of No Significant [environmental] Impact (hereinafter referred to as "FONSI"). You approved that FONSI and allowed TXDOT to substitute an Environmental Assessment for the NEPA requirement of a full blown Environmental Impact Statement.

You took this action in spite of public outcry against the environmental short-cut (which allowed evasion of the requirements of NEPA). Organizations like Texans Uniting for Reform and Freedom (hereinafter referred to as "TURF"), and the Aquifer Guardians in Urban Areas (hereinafter referred to as "AGUA") specifically pointed out the NEPA violation which was occurring under your very eyes.

The FONSI asserted that TXDOT could determine no significant impact on the environment. Yet, the project would expand a four lane highway 281 to 12 lanes, with 6 tolled lanes and 6 lanes of frontage roads. This expansion would occur across the recharge and contributing zones of the Edwards Aquifer, which is one of the most environmentally sensitive areas in Texas. It defies even the most elementary common sense to say that such a massive undertaking would create no significant impact WITHOUT EVER HAVING STUDIED THE IMPACT. Yet, that is what TXDOT did and you approved it.

Moreover, the EA and the FONSI ignored the economic, socio-political and traffic impacts of such a monstrously expensive project on the environment -- human and non-human. Impacts on businesses, commuters, local government, lower-income (environmental justice and due process concerns) and middle-income households, social cohesiveness of communities, land use, property values, and on the natural wild environment were completely ignored and rendered irrelevant by the scandalously blasé manner of treatment given in the EA and FONSI by TXDOT.

TXDOT also reported that there would be no indirect effects/impacts on water quality, air quality, vegetation, endangered and threatened species, and all forms of wildlife. As a result, TXDOT reported that it would do no cumulative effects analysis even though the EA points out that the endangered and threatened species are in “poor or declining health.” (Page 27, paragraph 102, Complaint filed in Aquifer Guardians In Urban Areas and Texans Uniting for Reform and Freedom v. US Federal Highway Administration, Amadeo Saenz, Jr., Executive Director of Texas Department of Transportation, and Terry Brechtel, Executive Director of Alamo Regional Mobility Authority, in the United States District Court for the Western District of Texas, San Antonio Division, the case is referred to hereinafter as “the 281 case”; the complaint is hereinafter referred to as the “complaint”)

All these nonsensical conclusions and omissions by TXDOT you are of course familiar with, because you reviewed their scanty work and approved it. You are also familiar with it because you were burned by the fraudulent recommendation that a FONSI was appropriate, and because you were a defendant in the lawsuit and saw all the pleadings.

So, failing to get the attention of your agency and TXDOT through town hall meetings, public meetings, comments and all other forms of communication available to the general public, absent the process of coordination which is now being used by local governments, the plaintiffs Agua and TURF filed the 281 lawsuit.

Terri Hall, Executive Director and founder of TURF, made it quite clear before the lawsuit was filed that TXDOT was in fact evading the law. She made that clear in public appearances and in written comments to your agency and to TXDOT, as well as to local government officials. All to no avail, so the 281 suit was filed. You know the sad results of that lawsuit.

Through discovery, ordered by the Court, TXDOT began to collect documents to be delivered up which would show law violations, deception and fraud. So, TXDOT asked for a 60 day stay so that it could try to rectify and cover up its unlawful conduct.

The documents which TXDOT could no longer suppress proved violations of conflict of interest laws by TXDOT employees to secure a “scientific” basis for an EA which claimed a FONSI. The facts showed that a TXDOT biologist, Valerie Collins, was involved in the 281 project study which was being performed for TXDOT by a consulting company for which her husband worked. It was the work of her husband’s company that formed the base for the EA and the FONSI. The conflict of interest would never have seen the light of day but for the 281 lawsuit and the plaintiffs’ dogged pursuit of discovery.

The documentation that led to the damning discoveries did not come through Freedom of Information responses. Another evidence of TXDOT’S duplicity lies in the fact that court ordered

discovery revealed many telling documents that were not produced in response to Freedom of Information requests.

As the conflict of interest was “discovered,” TXDOT reputedly conducted an internal self audit. During that time Plaintiff TURF’s Terri Hall received an apparent email by mail which purported to be initiated by Judith Friesenhahn, Transportation Planning Director for TXDOT. It stated: “pls do whatever you need and make sure this handled...based on the emails I have seen so far we have a problem. We have been directed to get a FONSI and get this project on its way...nothing else will work per David. Something like this could send us into an eis per [name scratched out on the mailed copy].”

The apparent email was addressed to Collins whose husband was in the contracting firm doing the EA and subsequently the FONSI. It is HIGHLY SIGNIFICANT, from a credibility standpoint, to note that the TXDOT audit as to these developments did not deny that the message to Collins was delivered. The audit report concluded that TXDOT’s own internal investigators could not find proof that the email ever existed.

Explanation for TXDOT’s internal auditors not being able to find the email is not hard to come by. Hall has received statements from two former TXDOT employees that reveal that wholesale deletions of emails and hard drive information were ordered by TXDOT supervisors. One of the employees asserts that a series of “embarrassing” emails had made their way into the press, and that TXDOT supervisors initiated a new email memo and policy which provided for deletion of emails. One former employee states that at staff meetings, employees were encouraged to use telephone calls instead of emails, presumably so that “outsiders” would not be able to gain access to the information.

When, the conflict of interest, and the obvious reliance on that conflict to encourage a FONSI, came to light, TXDOT also revealed that it had withheld from you a significant technical report that had critical bearing on whether an EIS should have been prepared for the 281 and Loop 1697 projects.

At that point, which must have been an embarrassing time for your agency, you had to rescind your approval of the EA and FONSI. **THE OUTCOME OF THE 281 LAWSUIT SURELY MUST DEMONSTRATE TO YOU THAT THE CREDIBILITY OF TXDOT IS NOT SUCH AS TO JUSTIFY YOUR RELIANCE ON THE OBJECTIVITY OF THE I-35 AND I-69 DEIS DOCUMENTS NOW PENDING BEFORE YOUR AGENCY.** These documents were prepared during the same time that TXDOT’S unethical, illegal activities related to 281 and the Trans Texas Corridor were going on.

The discovery of the unlawful conflict and the NEPA violations resulted in the termination of the biologist, and reprimands and transfers of other employees involved. It also resulted in training of TXDOT employees as to conflicts of interest. But, those results do not benefit the public and the responsible local officials who represent the public. They punish for wrong doing, but they do not rectify the untrustworthy nature of DEIS documents developed by an agency obviously committed to doing what it wants, regardless of the law.

You can now give the Petitioner, for its constituents, the relief needed -- rejection of the I-35 and I-69 DEIS documents and a requirement that neither project be returned to you except accompanied by an environmental study completely re-initiated by your agency. It is no longer acceptable to have the important NEPA work on the critical I-69 study, which cumulatively affects the Petitioner, prepared by an agency so distrusted by its own creating legislature that it was barely retrieved for two more years, and saw its authority for I-35 be terminated in August, 2009. What more proof would you need to conclude that you cannot delegate NEPA work to TXDOT.

You, as an agency of the United States of America, working within the Department of Transportation, were sued as a defendant in the case involving TXDOT's violations of law regarding its project for expanding U.S. Highway 281 and expanding Loop 1604 and converting it from simple tax supported road to a tolling status. That conversion from tax supported to toll has been called a violation of Texas law by several lawmakers, and by members of the Sunset Advisory Commission.

Your agency was sued because you provided funding and other federal assistance to the expansion, and because you approved the TXDOT 281 project, you approved the Environmental Assessment which was completed by TXDOT in lieu of a full Environmental Impact Statement as required by NEPA, and because you approved the Finding of No Significant Impact filed by TXDOT in order to have you excuse the failure to develop a full Environmental Impact Statement.

Petitioner finds it difficult to understand why you have not taken the lead in displacing TXDOT as the NEPA agent for the projects in view of its shoddy public performance. Petitioner has no doubt that if the TXDOT shameful performance had been turned in by a private company or project leader, you would have been quick to take corrective action. TXDOT's actions have made you culpable, and it would seem to be incumbent on you to correct the mistakes and deliberate violations of law as soon as possible.

B. TXDOT HAS VIOLATED TEXAS LAW PROHIBITING HIRING OF A PROFESSIONAL LOBBYIST

TXDOT'S credibility for developing an objective environmental impact statement is nil. How can a department with a specific roadway agenda, which spends enormous amounts of money on professional lobbyists to push that agenda, be counted on to develop an objective environmental study of the area where it intends to put the roadway? The question is rhetorical, because the answer is obvious. It can't. It simply can't. And, your agency is well aware of that fact.

In spite of early protestations by top TXDOT officials that the Department was not pushing a specific agenda but merely providing information to the public, opponents of TXDOT'S disingenuous plans filed a lawsuit seeking an injunction to stop unlawful spending for lobbyists to promote TXDOT's "Keep Texas Moving" promotion which promoted toll roads. The suit also sought a declaratory judgment that the expenditures by TXDOT had in fact been illegally made to lobbyists for lobbying. With the filing of the lawsuit, TXDOT's house of cards began to fall.

TXDOT, as a duly created state agency was and is subject to two statutes which forbid the actions and expenditures that tie TXDOT to professional lobbyists and to an attempt to persuade the public to support the TTC project.

Section 556.06 of the Texas Government Code provides that a state agency can not use appropriated money to attempt to influence passage of a bill. Section 556.005 of the same Code provides that a state agency may not employ, as a regular or part time employee or as a contractor, a person required to register as a lobbyist in Texas.

Discovery provided by TXDOT only after a court order, proves that TXDOT violated both statutes.

Armando Saenz, Executive Director of TXDOT, admitted under oath during deposition that he as a state administrator did not know whether 556.005 applied to TXDOT, in spite of the clear language of the statute which applies to “any” state agency. This attitude of “not knowing” what law applies, thus moving ahead without regard for the law demonstrates a rogue agency which puts itself above the law. Together with the attitude of pure arrogance demonstrated continually by TXDOT Commissioner Ted Houghten, it is an attitude which puts the agency above the very people it should be objectively informing through development of an EIS as your agent.

In the world of private business, if you had designated an agency which was caught violating the law, and arrogantly putting itself above the law and the people to be served, you would fire the agent, and cause the work to begin anew, un-skewed by the arrogance. Surely no less can be expected from an agency of the people, an agency of the United States Government, now led by a president who has issued an executive order demanding ethically high standards. In the opinion of this Petitioner, you cannot ethically continue to rely on a product created by an unethical agent.

Discovery disclosed that TXDOT paid under contract one Gary Bushell to perform activities which TXDOT employees themselves could perform and should perform. According to sworn testimony, Bushell was hired to set up appointments with local leaders along the corridor route for I-69 to talk about transportation needs and plans -- the local leaders included county judges (chairman of the county board of commissioners is called the county judge in Texas), mayors, and city councilmen. TXDOT officials also testified that Bushell and other lobbyists helped plan and organize the “town meetings” held along the I-69 corridor.

Gary Bushell is listed by the Texas Ethics Commission as a lobbyist. Thus, paying him violated Section 556.005 prohibiting the employment, as employee or contractor, of a person required to register as a lobbyist. Bushell is and was required to register as a lobbyist.

The violations of TXDOT regarding these statutory provisions are much broader than just hiring Bushell to do what TXDOT employees could have done. TXDOT Commissioner Houghten, in defiant manner, defended the hiring of lobbyists, at Town Hall meetings and in depositions.

During a Town Meeting Hank Gilbert, member of the Piney Woods Sub Regional Planning Commission created under Section 391 of the Texas Local Government Act, as is the Petitioner, asked how TXDOT could justify expenditures on public relations and lobbyists in the District of Columbia. TXDOT Commissioner Houghten stated that TXDOT hires “lobbyists in DC to protect Texas interests.” He then admitted that “lobbyists are very important to Texas.” What were Texas interests at that time, particular to DC lobbyists? TXDOT was seeking federal legislation that would allow a state to buy federal freeways and then turn them into toll roads. So, the “Texas interests” being protected by lobbyists paid for with appropriated money involved proposed legislation. That

admission by Houghten evidences a clear violation of Section 556.06 which prohibits a state agency from using appropriated money to attempt to influence the passage of legislation.

In depositions, taken under oath, TXDOT Commissioner Houghten, administrator Saenz, and chief fiscal officer Toby Chase admitted hiring lobbyists, which they chose to call “consultants.” Chase disclosed, when confronted with invoices and claims produced under court order, that during the time from late 2006, through 2007, and to February, 2008, TXDOT had spent **FOUR AND HALF MILLION DOLLARS** to lobbyists to serve as “consultants,” mainly to work with local officials and to coordinate town hall meetings.

Does it not cause you, as Federal Highway Administration officials and commissioners, real concern that your agent, charged with producing an objective EIS, hired, at exorbitant cost, lobbyists to do a job that regular employees could do? Why didn't regular managers and engineers of TXDOT meet with local officials to discuss the corridor plans, if all that was sought was to provide information to the officials? When TXDOT began coordination with this Petitioner, it did not send lobbyists, it sent regular management personnel. So, what distinguishes the lobbyists who were hired? Their professional distinction is that they persuade, they argue for, they push, a particular agenda for their client. Does anyone at the Federal Highway Administration believe that lobbyists were hired at a cost of **FOUR MILLION DOLLARS** to simply provide “accurate information” as to the project? Under NEPA, isn't it the job of your agent in preparing the EIS to “find” the accurate information itself through its employees? These questions are all rhetorical. You know your duty. You only have to do it.

When TXDOT'S administrator and fiscal officer say that the job of the lobbyists (“consultants”) was to perform “outreach,” to provide information, and not to change the dynamics of the EIS work, they admit that they hired professional “persuaders” to work with the public. And, the hiring of those persuaders, and the work of those persuaders, violated the law.

The documentary “Truth be Told,” prominently featuring Terri Hall, executive director of TURF, chosen San Antonio's woman of the year, contains filmed evidence that demonstrates that TXDOT was engaged in a persuasion oriented campaign to gain support for their toll road I-69 corridor. It demonstrates proof of unlawful activities that you should have known about, and that you did know about after the lawsuits were filed.

As Hall points out in the documentary, the advertising campaign (bill boards, ads, performance of the lobbyists, “consultants,” with local officials) paid for by TXDOT promoted toll roads such as I-69. The ad campaign did not at any time, at any place, mention the alternatives to toll roads as proposed in the I-69 DEIS: such as higher gasoline taxes to provide money for highway construction, public transportation, and expansion of existing “in place” highway facilities. The ad campaign did not even promote the concept of NEPA, but a specific agenda, contrary to NEPA'S purpose and requirements.

When documents disclosed by TXDOT under a court order showed that one of the assignments of the lobbyists was to train TXDOT employees to perform on radio talk shows, Chase was questioned as to why that was necessary, if TXDOT was simply trying to inform the public. (To an outsider, or members of the general public which are considered “outsiders” by TXDOT, it would appear that if TXDOT employees were to simply tell the truth and provide accurate information, no

particular training would be necessary. Personal and departmental ethics should cover the matter quite nicely).

Chase's answer was that TXDOT had never had to really "engage the public on so many levels." Since radio shows provided a "great way" to conduct that engagement, it was necessary to train the TXDOT employees to perform on the radio professionally. Why not just instruct them to tell the truth, unless the objective was to persuade the public to support a particular agenda of the department. Once again the question is rhetorical. The answer is obvious.

The invoices from the marketing "consultants," again produced in court forced discovery, show the nature of the "training." It was training to persuade, to overcome objections. The statements in support of billings show that the radio training was to help employees steer the conversations back to the positive of the department's position. One statement said that is "far better to sell the TXDOT story and let the adversaries attack." The agent you picked to conduct an objective NEPA study considered members of the public who opposed tolls "adversaries," and considered it their duty to "Sell the TXDOT story." You know that such an agency is not capable of developing an objective, unbiased study of the environmental impacts of super toll highways.

The DEIS documents now pending your review were produced by this agent which was in the business of confronting "adversaries" when it should have been simply collecting the information furnished by those "adversaries" and placing it in the DEIS record, and answering its content in the DEIS.

Chase admitted that when the "trouble" started, when the lawsuit was filed, he met with TXDOT general counsel, and the decision was made to stop paying the lobbyists. So, at the end of the month in which the deposition was taken, the last monthly payment of over \$117,000 was not to be renewed. Yet, you are expected to rely upon the factual statements and analysis developed by this agency that spent over \$100,000 per month illegally for lobbyists. The Petitioner believes that you will have a hard time squaring that with NEPA, and the implementing regulations you have issued for NEPA compliance, and with the high ethical standards now demanded by the President.

C. TXDOT OFFICIALS PRESENTED FALSE STATEMENTS TO THE PUBLIC IN THEIR ATTEMPT TO PERSUADE THE PUBLIC TO SUPPORT A TXDOT POSITION.

Once TXDOT's scheme, plan, to persuade the public to support its agenda for a toll road corridor for I-69 had been successful, it would have been simple then to construct a DEIS which clearly demonstrated public support for a "preferred alternative," and which contained factual information to remind that same public that it should prefer the "preferred."

In an effort to persuade the public, TXDOT officials did not always tell the truth. At one town meeting, TXDOT Commissioner Houghten stated that the proposed corridor "doesn't connect to Mexico." When hundreds in attendance hooted, laughed, and scorned the falsehood, he said "it stops in the city of Brownsville" or somewhere near the border, but doesn't reach the border. In fact, maps produced by TXDOT show the corridor connecting to Mexico. Documents produced by TXDOT relate to the connection as being desirable for moving trade. The I-69 and I-35 DEIS both demonstrate that the corridors connect to Mexico in order to facilitate commerce.

Why try to mislead the public unless the motive was to persuade the public to support a TXDOT proposal, instead of simply gathering public information at the meeting? Perhaps the more disturbing ethical question is why try to mislead the public when your own documents and maps refute your statement? That question should bother you immensely as you review a supposedly objective, scientifically accurate and professional set of DEIS's.

TXDOT Commissioner Houghten told the same town meeting that the proposed corridor was designed to "meet the needs of Texas" not to help international trade. That statement flies in the face of the recognition of the Congress which oversees your actions that I-69 was designated to serve international trade. It is that same I-69 which forms the I-69 TTC corridor.

In an earlier portion of this Petition, the Petitioner pointed out the false statements, false conclusions, and false analysis contained in the I-35 DEIS, and you have been pointed to the same in the I-69 DEIS by the Texas Farm Bureau, the Lone Star chapter of the Sierra Club, and the comments of Texans Uniting for Reform and Freedom.

You are aware of the facts brought forward in the 281 lawsuit which forced TXDOT to withdraw the EA which requested a FONSI which you were agreeable to issue. How can you blindly consider validity of the DEIS as to I-35 and I-69 in view of the going of the truth and the law which has been done by TXDOT? Unless you remedy this travesty, your reputation will sink as low as that of TXDOT.

The Petitioner can see no reason why you should not reach the same result as to the I-35 and I-69 DEIS pending before you. The same law-breaking, conflict of interest operating, misleading, deceptive TXDOT has prepared the I-35 and I-69 documents as the TXDOT that committed the acts discovered in the 281 lawsuit.

Moreover, the violations of law regarding use of lobbyists, and the false and misleading information provided to the public by a TXDOT Commissioner -- not just an employee, but a governing Commissioner -- occurred with respect to the Trans Texas Corridor which referred to both the I-35 and I-69 corridors.

D. A MEMBER OF THE TXDOT GOVERNING COMMISSION MAKES IT CLEAR THAT HE GIVES NO CREDENCE TO ANY INPUT FROM THOSE WHO OPPOSE THE TTC.

During depositions, TXDOT Commissioner Houghten made it quite clear, in arrogant, above the law, testimony that he gave no credence to public input from those who oppose the Trans Texas Corridor concept.

When questioned by counsel for TURF as to the marketing documents that stated that it would be "far better to sell the TXDOT story and let the adversaries attack," he was asked who his adversaries were. He said he didn't know. Then he acknowledged that there were lots of adversaries, and finally he answered that adversaries were the "*anti immigration people, people who don't like Mexicans.*"

He pursued this course by saying that according to these anti immigration adversaries TXDOT is “supposedly building a road for illegal aliens, immigrants, according to them.” And, then he finalized his diatribe against those who oppose the TTC by saying “**those folks that are against illegal immigration, or Mexicans coming across the border, that’s an adversary.**”

This Commissioner, who reduces the thousands of Texans who oppose the I-35 and I-69 corridors to racists, is one of the five top supervisors of the Department you are asked to rely on for objectivity in the I-35 and I-69 DEIS documents.

His testimony, under oath, was not just a slip of the tongue, or an unfortunate lapse of good judgment. On March 5, 2009, at a public meeting of the TXDOT Commission to hear public comments about use of the federal stimulus money for the Trans Texas Corridor, Houghten interrupted Hank Gilbert, who was opposing the use of tax dollars, whether stimulus or Texas tax revenue, to construct highways which would then be sold or leased for private property to foreign companies. As Gilbert finished his statement, Houghten, smirking as shown by the camera, said “oh, don’t go away.” Then, he turned not to the chair of the Commission, but a fellow commissioner and said “Bill, with your permission,” and then started questioning Gilbert WITHOUT EVER SEEKING PERMISSION OF THE CHAIR. This was a curious interchange between Houghten and Commissioner Meadows, making it appear as though the two had talked of this, and Houghten needed permission to go ahead with the questions. No other apparent need to seek a co-commissioner’s permission is known under any parliamentary procedure followed by any legislature.

Houghten then repeatedly asked Gilbert who he thought was going to pay down the debt of the United States. Gilbert, in very professional manner, attempted several times to say that the issue was irrelevant to the issue before the Commission. But, Houghten was unyielding, coming back time and again to “who do you think is going to buy our debt?” Referring alternately to China and Japan, and “our friends south of the Rio Grande,” Houghten continued to press Gilbert as to whether foreign interests were not going to be necessary to buy the U.S. debt.

Finally, refusing to listen to Gilbert’s analysis of the question actually before the Commission, he snapped out that he wanted to make sure that the people of Texas know what “**you really and your group are really about. Your group are a bunch of bigots is what you are.**”

Again, this is one of the five overseers of the Department that has given you supposedly objective, scientific reports in I-35 and I-69 DEIS documents.

Perhaps more staggering than Houghten’s outburst, was the fact that neither the Chairman, the Department Administrator, nor any other member of the Commission said a word to Houghten about his comment, which demeans every Texan who opposes the Trans Texas Corridor. It demeans them, and it shows just exactly what importance is given to their input by this Commissioner, and the silent rest of the Commission and Administrator. To this date, no one in TXDOT or on the Commission has said a word of reprimand or rescission, or encouragement to the public that TXDOT does in fact pay attention to public comments and does not consider all comments opposing the I-35 and I-69 DEIS projects as being racist in nature.

Under a myriad of laws and executive orders, you should give no credence to any input from racists regarding a federal project. So, if Houghten is stating TXDOT’S and your agency’s view of

comments made against the TTC concept, then you are violating the law. If he is stating TXDOT'S position, then your agent is violating the law. And, if he isn't stating your and TXDOT's position, then where is the denial, where is the mea culpa to the public? **YOU HAVE MADE NO EFFORT TO DISASSOCIATE YOURSELF FROM TXDOT'S POSITION.** Yet, you surely are aware of the March 5 incident because of the extensive news coverage it received. Since you are responsible for TXDOT in their NEPA work, we are sure you keep apprised of news events as dramatic as the references to opponents of the NEPA focused project being racists. As a party to the federal law suit, you surely are aware of the contents of the TXDOT depositions in the state lawsuit. Again, as the responsible party in the NEPA process, it would be unreasonable to believe that you aren't aware of the deposition testimony in the state court lawsuit. It is significant that as an agency of the United States, you have not taken action to disassociate yourselves from the statements of such a rogue commissioner.

How can you give any credence to objectivity of a NEPA study performed by an agency which believes that all public opposition to its preferred action is racist based? Again, the question is rhetorical, and some members of your agency, at least, must be shocked that you have not already taken corrective action.

Terri Hall has advised an associate of Petitioner that one of the former employees of TXDOT who is prepared to testify at an appropriate trial or hearing, says that after a public meeting at which Houghten admitted to hiring lobbyists, he was asked about it by a departmental official and Houghten "simply laughed it off."

The attitude of Commissioner Houghten, which you can observe by watching his deposition testimony on the DVD "Truth Be Told," is one of arrogance, of the above the law view of TXDOT'S status which seems to permeate every activity under NEPA undertaken by TXDOT. A simple survey of the news reports and a review of the Sunset Advisory Commission Report makes it clear that TXDOT has the same disdain for the Texas legislature that it has for the people of Texas.

When asked in deposition about the "controversy" over the TTC, Houghten snidely, and with a smirk said he was not aware of a controversy, and asked counsel "there is?" when counsel said there was controversy. Houghten himself had participated in several loud, contentious Town Meetings, and knew from personal knowledge as well as institutional knowledge the extent of the controversy. But, the oath meant no more to him than to say that he was not aware of a controversy. He committed perjury, but no prosecutor would probably charge him because the perjured answer was so ridiculous that the truth was obvious and the lie could not mislead. He also openly and clearly denied doing anything to try to persuade the public to support a pre-determined course by TXDOT. But, he is shown at a Town Meeting saying to the crowd, that he knew that the people would not be "converted" that night. (Dictionaries define the term "convert" in various ways but all include "rehabilitated, transformed, changed, renewed, new, improved.") All definitions of "converted" refer to changing and persuading a change, not just providing accurate information to the public.

Houghten also told the crowds at a Town Meeting that "no" is not an option, thus making it clear that TXDOT will give no meaningful attention to the "no action" alternative. He also said that the people could not put "the genie back in the bottle" in reference to there being no TTC projects as proposed by TXDOT.

Now, you have to take this outrageous conduct into consideration. You must consider this conduct, and the fact that it has been consistent on the part of this Commissioner, without any attempt by the Chairman or the Administrator to curb his attitude, his public statements, or his arrogance toward the public. His conduct and his attitude is representative of that of the entire Department according to the Sunset Advisory Commission Report. You cannot in good conscience, in compliance with NEPA, your own regulations implementing NEPA, and the ethical standards now imposed on you by the President, rely on the I-35 and I-69 DEIS documents submitted the Department overseen by this Commissioner, with the apparent acquiescence of the rest of the Commission and its Administrator.

E. THE TEXAS SUNSET ADVISORY COMMISSION REPORT DEMONSTRATES THE LACK OF CREDIBILITY OF TXDOT.

In 1977 the Texas legislature created the Sunset Advisory Commission to identify and eliminate waste, duplication and inefficiency in government agencies. This past year, the Commission studied TXDOT. The Report of the Commission, after public hearings, is a scathing indictment of the credibility of TXDOT.

F. THE PATTERNS OF CONDUCT BY TXDOT DEMONSTRATE AN ENTERPRISE WHICH INTERFERES WITH INTERSTATE COMMERCE THROUGH ACTIONS VIOLATIVE OF LAW.

For purposes of this final point in this Petition, it has to be clearly understood that the NEPA process in this case affects interstate commerce. Not only does it focus on interstate highway systems, and on international trade, it focuses on the status of endangered and threatened species, as well as various commercial and economic services. All connect this process, and thus TXDOT, to interstate commerce. The Endangered Species Act, for example, is justified only because of the impact on interstate commerce, and the U.S. Supreme Court has so ruled.

So, illegal conduct on the part of TXDOT relating to the NEPA process, and/or use of federal money, and/or violations of other federal laws, which interferes with or involves interstate commerce, must be looked at very seriously by you in deciding whether to let the I-35 and I-69 projects continue onward under the DEIS documents which have been filed. If you do not solve this obvious unlawful problem involving your agent at this point, then it may become more difficult for you if a civil enterprise RICO action is brought against TXDOT, Cintra and other entities such as consultants involved with the process.

Perhaps your agency could escape trial under such a lawsuit on the ground of sovereign immunity, but that is a risk you would have to run in a highly publicized and embarrassing lawsuit. One would think that the embarrassment to your agency arising just from the 281 lawsuit would be enough to cause you to try to avoid exposure of at least your agent to far more serious consequences in an action focusing on an enterprise interfering in interstate commerce through illegal, possibly fraudulent, means including, but not limited to, possible wire and electronic messaging fraud.

The evidence being reviewed right now as to such a lawsuit shows the following:

1. TXDOT officials violated Texas law prohibiting paying lobbyists;
2. TXDOT officials violated Texas law prohibiting using appropriated funds to support a department's position on legislation or action;
3. TXDOT may well have, and probably did, violate the federal Hatch Act by paying lobbyists to further the state's interest in federal legislation that would allow buying freeways to convert them to toll roads;
4. TXDOT intentionally withheld an important document from your agency in order to influence your decision in approving a FONSI on the 281 project;
5. TXDOT officials knowingly violated a conflict of interest law in order to have a consultant paid by TXDOT prepare an EA supporting a FONSI on the 281 project;
6. TXDOT officials may well have committed perjury in testifying that they did not use lobbyists to persuade the public, but rather as information providers, when its own documents show services designed to influence public reaction;
7. TXDOT officials, or at least one Commissioner, made false and misleading statements at public meetings where the obvious departmental purpose was to persuade the public to support its pre-determined concept;
8. TXDOT officials made attempts to delete public records in the form of electronic messages in order to avoid public detection of its pre-determined agendas, and being researched now is any potential federal liability for electronic or wireless deception;
9. TXDOT officials may have made the deliberate attempt to avoid public detection of damaging documents which proved payments to lobbyists in violation of Texas law, by returning the documents to the contractors who submitted them ;
10. TXDOT has engaged in a pattern of evading the legal requirements of Texas law with regard to converting tax supported highways to toll roads, of evading adequate oversight by the Texas legislature, of evading the requirements of NEPA, of deceiving your agency, of engaging in inaccurate and irresponsible accounting and self audit functions, and of misleading the public.

Case decisions, including in the Fifth Circuit Court of Appeals, have made it clear that governmental agencies can be considered enterprises for the purpose of determining whether they are engaging in patterns of illegality in violation of federal law.

The time is now for you to put an end to the travesty that has been done by TXDOT in trying to manipulate you into approving a NEPA product for I-35 and I-69 that is clearly inadequate, and in fact is unlawful as being in clear violation of NEPA, its purposes and requirements.

IV. CONCLUSION

All the contents of this Petition, your agency is aware of, and has been for some time. The records as to I-35 and I-69 contain specific pointers to the various flaws and inadequacies of the DEIS documents.

When you examine the flaws, the inadequacies, the attempt to inappropriately use the tiering system to hide evasions of the law, and all the evidence of illegal activities and falsehoods of TXDOT officials which destroy the credibility of the author of the I-35 and I-69 documents, and the

evidence of the complete disdain shown for public comments by the most outspoken of the TXDOT Commissioners, a disdain not in any way lessened by any action or public pronouncement by the Administrator or other commissioners, you must be convinced that the totality of the circumstances in this case screams for you to reject the I-35 and I-69 documents and insist on a new study to be performed under strict scrutiny by your agency, or by your agency itself.

So, the contents of this Petition could have been greatly shortened for your review, because you have been provided with all this information, either as the overseeing agency or as a party in the 281 lawsuit. But, the contents are very necessary in order to tell the full story of this sordid attempt to evade NEPA and to evade the will of the people of Texas. The full story is thus told, so that those cabinet level officials, Department of Justice officials, members of Congress interested right now in seeking out extravagances in government spending, as well as the President and his counsel, to whom this Petition is being copied, will have the facts upon which to judge your actions.

Again, and finally, this petitioner requests that you reject the I-35 and I-69 DEIS documents pending before you, and direct that no further project activity take place other than the initiation of new, complete, accurate and lawful studies.

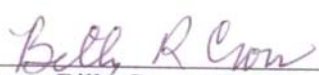
RELIEF REQUESTED:

1. Rejection of the DEIS for TTC I-35 Because It Relates to a Project That Is Not Viable Because The Texas Legislature Terminated the CDA forming the base for the Project as of August, 2009;
2. Rejection of the DEIS for TTC I-35 Because of the Flaws and Defects In Its Environmental Impact Statement, an Incorrect Use of Tiering and Non Compliance with NEPA and the Regulations of FHWA and CEQ;
3. Rejection of the DEIS for TTC I-35 Because Texas Administrative Code Requires the Study to be Completed Within Three Years, a Time Which has Already Elapsed, and Substantial Changes to the Scope of the Project Have Been Made Since the Study Began;
4. Rejection of DEIS for TTC I-35 Because the Complete Loss of Credibility of TXDOT Through its Violations of Law, Its use of Fraudulent Documents and False Statements Makes It Impossible to Rely on Objectivity of the DEIS;
5. Rejection of DEIS for TTC I-69 for All Reasons above except #1, the Petitioner Having Standing to Object to the TTC I-69 DEIS Because of the Cumulative Impact of the two Corridors;
6. Requirement that No Further Projects for Green Routes Be Accepted for Review Unless DEIS is Prepared by the FHWA or with Close Supervision of TXDOT.

Respectfully submitted, this 16th day of June, 2009.



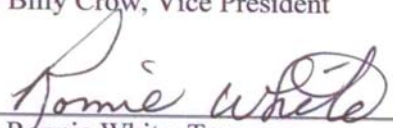
Mayor Mae Smith, President



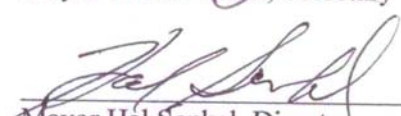
Mayor Billy Crow, Vice President



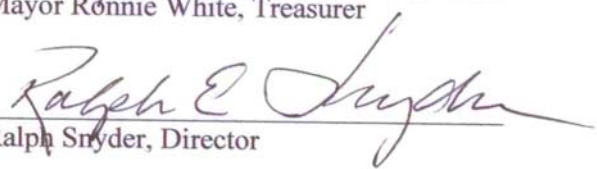
Mayor Arthur White, Secretary



Mayor Ronnie White, Treasurer



Mayor Hal Senkel, Director



Ralph Snyder, Director