Volusia County
FLORIDA

Jeff Brower, Chairman
Volusia County Council

July 27, 2022

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State of Florida
The Capitol
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Florida Department of Transportation
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John E. Tyler. P.E.
Secretary
District 5
Florida Department of Transportation
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Re: Request for Investigation into Improper use of Categorical Exclusion for the I-95 Pioneer Trail Interchange—Volusia County, Florida

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Gentlemen:

In my capacity as Chair of the Volusia County Council, I hereby request a formal inquiry into the Categorical Exclusion issued on January 27, 2021, by the Florida Department of Transportation ("FDOT") for the I-95 Pioneer Trail Interchange ("Interchange"). (This Categorical Exclusion is attached.) This Categorical Exclusion was issued pursuant to the December 14, 2016 "Memorandum of Understanding Between Federal Highway Administration ("FHWA") and FDOT" ("MOU"). (The MOU is attached.)

Pursuant to the MOU, to the Florida Division of the FHWA is empowered to investigate FDOT's assumption of FHWA's obligations under the National Environmental Policy Act of 1969, 42 U.S.C. §4321, et seq. ("NEPA"). FHWA NEPA regulation 23 CFR § 771.117(g) also provides for FHWA review of FDOT use of a Categorical Exclusion. I ask for review and investigation into the issuance of this Categorical Exclusion.

As my letter demonstrates, the I-95 Pioneer Trail Interchange Categorical Exclusion was improperly issued by FDOT in violation of NEPA and FHWA's implementing NEPA regulations. Significantly, I note that the Categorical Exclusion was issued in direct violation of an opinion issued by District Court Judge Paul Byron of the Middle District of Florida (Orlando Division): in RB Jai Alai, LLC v. Secretary of Florida Department of Transportation, et al., 112 F.Supp.3d (MD Fla. 2015). (The ruling is attached.) In his ruling, Judge Byron held that the construction of a highway interchange cannot avoid full environmental review under NEPA through designation as a Categorical Exclusion. I have to assume FDOT is aware of this case, since FDOT was the defendant. At any rate, this federal court ruling is binding authority upon FDOT in the Middle District of Florida, which includes Volusia County.

Nearly all constituents I speak with oppose the construction of this interchange, which will facilitate intense development into an area of Volusia County now recognized as part of the Florida Wildlife Corridor. The Florida Wildlife Corridor Act, section 259.1055, Florida Statutes was adopted *unanimously by the Florida Legislature in 2021.* The act recognizes that Florida is being paved over at such a fast rate that our state's ecological diversity is facing obliteration:

> (2) LEGISLATIVE FINDINGS.—The Legislature finds that this state's population is growing rapidly and that lands and waters that provide this state's green infrastructure and vital habitat for wide-ranging wildlife, such as the Florida panther, need to be preserved and

> protected. The Legislature further finds that the Florida wildlife corridor is an existing physical, geographically defined area consisting of more than 18 million acres of land, 10 million of which are conservation lands.

A stated FDOT purpose for building the I-95 Pioneer Trail Interchange is to provide access for the development of those very lands designated by the Florida Wildlife Corridor as "Opportunity Areas" needing permanent protection in order to achieve permanent biodiversity connectivity throughout the state:

> "Opportunity area" means those lands and waters within the Florida wildlife corridor which are not conserved lands and the green spaces within the Florida wildlife corridor which lack conservation status, are contiguous to or between conserved lands, and provide an opportunity to develop the Florida wildlife corridor into a statewide conservation network.

Section 259.1055(4)(e), Florida Statutes. (The statute is attached hereto.)

It is axiomatic in Florida that development follows road construction. There are ambitious, politically connected developers who seek the construction of this interchange in order to enable development. These developers *need* the Interchange because, if FDOT builds it, development will rush in, like the tide. The Categorical Exclusion itself makes this obvious at page 3 of 130:

> The project also aims to support economic development associated with existing and approved developments, including three Developments of Regional Impact (Farmton, Restoration, and Pavilion at Port Orange).

Both Farmton and Restoration are "opportunity areas" designated as Zone 1-critical linkage priority within the Florida Wildlife Corridor by the Florida Department of Environmental Protection. This critical fact *has not been considered or mentioned by FDOT in its decision to categorically exclude the I-95 Pioneer Trail Interchange from federal environmental review.*

I am on record opposing the misuse of taxpayer funds (federal, state, county and municipal) to fund new infrastructure projects in undeveloped areas that enable developers to inject their sprawl into our remaining undeveloped/agricultural and wetlands, as well as critical watersheds. The I-95 Pioneer Trail Interchange constitutes just such a misuse of taxpayer funds. The property rights of every Volusia County resident, indeed the rights of

every Floridian, must be considered before the destruction of the Indian River Lagoon, St. Johns River Water Management District, our common aquifer, and the fin fish population of our offshore fishing areas continues. We are all the stewards of our unique ecosystems.

Please be aware that the I-95 Pioneer Trail Interchange is very unpopular among my constituents. Volusia County residents see the I-95 Pioneer Trail Interchange as an example of prioritizing politically connected developers over residents. This Interchange will also be seen as an example of "privatizing the profits and socializing the costs" at the expense of taxpayers. It will further degrade our already destroyed water quality and quantity. It will intentionally inject unwanted sprawl, congestion and pollution into lands designated for Florida Wildlife Corridor protection. It will further degrade the quality of life of Volusia County residents. The I-95 Pioneer Trail Interchange Project illustrates an abuse and misuse of government funds for the purpose of facilitating politically connected developer profit seeking at the expense of the public good. I am staunchly opposed to this project and am confident that I speak for a majority of Volusia voters.

Description of the Pioneer Trail Interchange Project

This proposal is for a new cloverleaf interchange on I-95 to access a completely undeveloped area in Volusia County that is the subject of intense developer desire. FDOT states that the immediate project area comprises 296.63 acres. According to the Clean Water Act dredge and fill application, the construction of the interchange will destroy 64.86 jurisdictional acres of wetlands and surface waters. As we all know, wetlands that are deemed a "jurisdictional wetland" merely comprise a small, legally construed sliver of the actual wetland landscape. "Jurisdictional wetlands" is a constrained legal construct subject to political and court battles. It does not fully reflect the scope of hydrological impacts to the greater landscape, water quality and quantity.

Environmental Impacts Resulting from the Pioneer Trail Interchange Project

The purpose of this letter is not to itemize the myriad harmful, degrading direct, indirect, and cumulative impacts that will result to the Florida Wildlife Corridor, Spruce Creek, the Doris Leeper Preserve, the Indian River Lagoon, the aquifer, etc.…. not to mention the quality of life of my constituents and future generations. Suffice it to say, the FDOT documents I reviewed relating to "environmental review" gives the impression that in 2016 the FDOT was a bureaucracy that did not care about Florida's ecological health. I know for a fact this is not the case with you Governor DeSantis, nor is it the feeling or intent of Secretary Jarod Purdue.

The documents do not provide an accurate, honest, much less comprehensive analysis of anything, other than building the Interchange will result in little to no degrading

impacts. For an understanding of the genuine degrading impacts that will result from the construction of the Interchange, I am attaching for your review an eloquent, compelling letter in opposition to the Interchange written by my constituent Derek LaMontagne, PhD, co-President of the Sweetwater Coalition of Volusia County, Inc. Of particular importance, Dr. LaMontagne states:

> *We believe that the proposed highway interchange at Interstate-95 and Pioneer Trail in New Smyrna Beach is* ***not in the public's best interest****, and that the "No Build" alternative is the one that should be implemented. Our concerns stem mainly from cost, reduction in quality of life, worsening of traffic, increased flood risk, and most importantly, negative impacts to the environment that such a development would bring. During the most recent public comment period, the FDOT received at least* ***375 comments in opposition to only 49 in favor****, but yet the FDOT proceeded anyway, contrary to the public's wishes. It is unclear why.*
>
> *The area on which the interchange is being proposed is land that is critical to the health and well-being of the Doris Leeper Spruce Creek Preserve (DLSCP, the Preserve) and Spruce Creek itself, an Outstanding Florida Waterbody (OFW). Leaving land undeveloped allows for more plant and animal species, including endangered and/or threatened species like the scrub jay and gopher tortoise, to have habitat to survive. Wetlands and forests themselves serve important ecological functions that are of benefit to people and nature alike, cleaning our air, water, and soil. Manatees also reside in Spruce Creek, so any negative affects to the area nearby could drastically hurt this imperiled species.*
>
> *Part of the land where this construction is potentially slated to occur is on land that has been (and still is) desired to be purchased for conservation by state and/or local government agencies [see: https://floridadep.gov/sites/default/files/FLDEP_DSL_OES_FF_BOT_SpruceCreek.pdf]. The 2021 Florida Forever Five-Year Plan for Spruce Creek calls that piece an "****essential parcel****," and places a cost of the remaining 366 acres at just ~$6 million, which is less*

than 10% of the total Interchange budget of $80+ million.

Improper Application of Categorical Exclusion to the I-95 Pioneer Trail Interchange

After receiving many negative comments from Volusia County citizens regarding the I-95 Pioneer Trail Interchange Project, I reviewed its Federal Register Notice, "Notice of Final Federal Agency Actions on Proposed Transportation Project in Florida" 86 Fed. Reg. 11822 (February 26, 2021). This Notice declares that the Project is subject to a Type 2 Categorical Exclusion that was issued January 27, 2021. Accordingly, no NEPA review was conducted.

In RB Jai Alai, LLC v. Secretary of Florida Department of Transportation, et al., Federal District Court Judge Byron of the Middle District of Florida eloquently addressed the importance of proper NEPA review in government decision making:

> **A. NEPA: Our National Charter for Protecting the Environment**
> Following nearly a century of rapid economic expansion, population growth, industrialization, and urbanization, it had become clear by the late 1960s that American progress had an environmental cost. *See* 42 U.S.C. § 4331(a); 115 Cong. Rec. 26,571 (1969) (remarks of Rep. John Dingell). A congressional investigation into the matter yielded myriad evidence indicating a gross mismanagement of the country's environment and resources, most notably at the hands of the federal government. S.Rep. No. 296, 91st Cong., 1st Sess. 8 (1969); Thomas O. McGarity, *The Courts, the Agencies, and NEPA Threshold Issues,* 55 Tex. L.Rev. 801, 805 (1977) (noting "a remarkable consensus of opinion" that the federal agencies contributed substantially to the country's degraded environmental state). As a result, lawmakers and the general public alike called for an urgent and sweeping policy of environmental protection. Congress answered these calls by enacting the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4370h, which has now served for forty-five years as "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). With NEPA, Congress mandated that federal agencies take a "hard look" at the environmental consequences of their actions and to engage all practicable measures to prevent environmental harm when engaging in agency action. *Kleppe v. Sierra Club,* 427 U.S. 390, 409, 410 n. 21, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976) (citing 42 U.S.C. § 4331(b)). Furthermore, to remedy the widespread mistrust of the federal agencies,

> Congress incorporated within NEPA "action-forcing" provisions which require agencies to follow specific procedures in order to accomplish any federal project. *Id.* at 409 & n. 18, 96 S.Ct. 2718. The cornerstone action-forcing provision within NEPA is the environmental impact statement ("EIS"). As an agency plans a major federal action, it is required to consider the environmental impacts of that action. 40 C.F.R. § 1500.1. Projects that are generally known by the agency through its experience to significantly affect the quality of the human environment necessitate the preparation of an EIS, which describes in detail both the positive and negative environmental impacts of the action and analyzes other alternatives that might provide the same benefits at a lower environmental cost. *See id.* §§ 1502.1–1502.25. Conversely, projects that are known by the agency through its experience to not significantly affect the human environment (either individually or cumulatively) can be classified as categorical exclusions ("CEs"), relieving the agency of the EIS requirement. *Id.* § 1508.4; *see also id.* § 1501.4(a). Finally, where an agency's regulations do not classify a major federal action as a CE or as one requiring an EIS, or where an agency is unsure of how a particular project should proceed, the agency will prepare an environmental assessment ("EA") to briefly and concisely determine whether an EIS is necessary. *Id.* §§ 1501.4(b), 1508.9. An EA will result in the agency either deciding to prepare a full EIS or filing a "finding of no significant impact," which, like a CE, dispenses with the EIS requirement. *Id.* § 1508.13.

112 F.Supp. 3rd at 1307-1308.

As set forth in NEPA implementing regulation 40 CFR § 108.1(d), a Categorical Exclusion is defined as:

> Categorical exclusion means a category of actions that the agency has determined, in its agency NEPA procedures (§ 1507.3 of this chapter), normally do not have a significant effect on the human environment.

Like all federal agencies, FHWA must comply with its statutory obligations under NEPA through application of its own in-house NEPA regulations. FHWA NEPA regulation 23 CFR §771.117 sets forth the use of the Categorical Exclusion in FHWA projects.

In its Administrative Action dated January 27, 2021, FDOT published that the I-95 Pioneer Trail Interchange is a "Type 2 Categorical Exclusion." FDOT's June 14, 2017 "Project Development and Environment Manual Type 2 Categorical Exclusions," establishes that Type 2 Categorical Exclusions are governed by 23 CFR §771.117(a), which provides in relevant part:

> (a) CEs are actions that meet the definition contained in 40 CFR 1508.4, and, based on FHWA's past experience with similar actions, do not involve significant environmental impacts. They are actions that: Do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.

The I-95 Pioneer Interchange clearly does not meet the categorical exclusion criteria set forth in 23 CFR §771.117(a). My cursory review of FDOT's documents produced to justify and rationalize the Categorical Exclusion for the I-95 Pioneer Trail Interchange admit that this Interchange will have "significant impacts to planned growth or land use for the area" as well as other significant impacts. I now set forth a short, admittedly incomplete list of FDOT's own statements taken from FDOT's own documents relating to this project. See:
https://www.cflroads.com/project/436292-1
These FDOT documents relating to the I-95 Pioneer Trail Interchange illustrate the undeniable error of invoking the Categorical Exclusion for this proposed Interchange. For example:
*a deliberate goal of the Interchange is to "induce significant impacts to planned growth." The FDOT 2020 "Indirect and Cumulative Effects Evaluation Technical Memorandum" for the I-95 Pioneer Trail Interchange makes it crystal clear that "The project also aims to support economic development associated with existing and approved developments, including several Developments of Regional Impact (Farmton, Restoration and Pavilion at Port Orange) as shown on Figure 1-2." (page 3)
*FDOT's own Indirect and Cumulative Impacts Memorandum provides this statement with respect to impacts to wetlands:

> 2.3.3.2 Indirect Effects on Wetlands A total of 20 individual wetlands and 11 other surface waters (OSW) were located within the direct impacts project study area. Seventeen wetlands and eight OSWs would be directly

> affected by the recommended alternative evaluated in the study. A UMAM analysis of each wetland impacted by the preferred alternatives results in an estimated functional loss of 27.53 UMAM units associated with the project. Additionally, development associated with induced growth could potentially affect wetlands and surface waters in the indirect effects study area. These potential indirect effects to wetlands include placement of fill that could produce degradation/ changes in wetland functions. The total estimated wetlands in the indirect effects study area as shown on Figure 2-11 is approximately 7,500 acres (25.5%). The wetlands within the potential growth parcels within the Indirect Effects Study Area shown on Figure 2-12 is approximately 3,700 acres (30.3%). The amount of wetlands within the Induced Growth Area (Figure 2-13) is approximately 1,000 acres (25%). Of these, approximately 600 acres (30%) are within the boundaries of the No Build planned future development growth areas (those areas with planned developments at the current time unrelated to this project) as shown on Figure 2-14. Wetlands in the induced development parcels identified in the Build forecasted growth area (Figure 2-15) include approximately 200 acres (22.2).

And yet this Memorandum blithely goes on to say not to worry, just keep building--there will not be many negative impacts.

*The October 2020 “Natural Resource Update Report” for the I-95 Pioneer Trail Interchange issued October 2020 makes this statement in connection with water quality impacts:

> ***2.3-A Water Resources***
> Comments from the FDOT’s Efficient Transportation Decision Making (ETDM) screening were received from the SJRWMD, Florida Department of Environmental Protection (FDEP), and the U.S. Environmental Protection Agency (EPA) regarding water quality and quantity. SJRWMD and the FDEP assigned a degree of effect of “none”, while the EPA assigned a “moderate” degree of effect for the project.

The EPA noted that the project is located within a 500’ buffer of a principal aquifer, surficial aquifer system, and recharge area. In addition, the EPA noted that the project is approximately five miles south of Spruce Creek, an Outstanding Florida Water (OFW).

The project is actually less than two miles from Spruce Creek at its closest point, without even considering tributaries. The project is also adjacent to and has the potential to involve wetland areas that are directly connected to Spruce Creek.

I take exception to these claims finding the I-95 Pioneer Interchange has no significant impacts and thus categorically excluded from NEPA review when absolutely no honest investigation was made?

Pursuant to the December 14, 2016, the MOU entered between FHWA and FDOT, FHWA transferred and assigned NEPA compliance to the Florida DOT. This MOU is referenced as authority for the issuance of the Pioneer Trail Interchange Categorical Exclusion. In relevant part for the purposes of this letter, the MOU provides:

> 3.2.2. This provision shall not be interpreted to abrogate FDOT's responsibilities to comply with the requirements of any federal environmental laws that apply directly to FDOT independent of FHWA's involvement (through federal assistance or approval).

Honest, transparent application of 23 CFR §771.117 to the Pioneer Trail Interchange demonstrates that a Categorical Exclusion is completely inappropriate and unlawful. As the facts demonstrate, the Interchange:

*has "[s]ignificant environmental impacts…" (§771.117(b)(1)) including, but not limited to: facilitating sprawl into areas designated as lying within the Florida Wildlife Corridor; admitted destruction of 64.86 acres of jurisdictional wetlands; degradation of Spruce Creek Preserve and the Indian River Lagoon; harmful impacts to the Doris Leeper Preserve.

* "Substantial controversy on environmental grounds…" (§771.117(b)(2)) as demonstrated by the turnout at public hearings on the Project; the comments and conversations I have with constituents regarding their fear of how the Interchange will be the proverbial nail in the coffin for Spruce Creek and surrounding rural lands; the citizen opposition to the Project that is ignored and stymied by FDOT and other involved agencies. I am happy to provide more evidence of this opposition and urge review of all letters of objection.

*No 4(f) analysis was conducted despite proximity to the Doris Leeper Preserve and the fact that part of the project area for the Interchange is slated for public acquisition and addition to the Preserve! (§771.117(b)(3))

The Pioneer Trail Interchange Project Must Be Rejected as a Categorical Exclusion under RB Jai Alai, LLC v. Secretary of Florida Department of Transportation, et al, 112 F.Supp.3d (M.D. Fla. 2015)

Review and reconsideration of the Categorical Exclusion of the I-95 Pioneer Trail Interchange is further mandated because it is completely contrary to Judge Paul Byron's ruling in RB Jai Alai, LLC v. Secretary of Florida Department of Transportation, et al., 112 F.Supp.3d (MD Fla. 2015). Judge Byron ruled that a Florida DOT elevated highway overpass called the "Flyover Project" in Casselberry, was improperly classified as a

Categorical Exclusion. Review of the I-95 Pioneer Trail Interchange establishes it is much, much more environmentally significant than the Flyover Project and is not the type of construction appropriate for application of a Categorical Exclusion. As Judge Byron ruled in RB Jai Alai:

> Specifically, upon review of the Administrative Record and the applicable law, the Court concluded that the Flyover Project is not the type of project that may be categorically excluded under NEPA and [FHWA]. 112 F.Supp.3d at 1310.

Conclusion

I hope this letter provides you with sufficient documentation and binding legal authority to revisit and reconsider the Categorical Exclusion issued by FDOT for the I-95 Pioneer Trail Interchange. At a minimum, compliance with NEPA requires the preparation of a comprehensive Environmental Impact Study ("EIS"). The best course is to end consideration of this project.

Beyond that, FDOT and all state, local and federal agencies, including but not limited to the Florida Governor and cabinet, state water management districts, the Florida Department of Agriculture, the Florida Department of Environmental Protection, the Florida Fish and Wildlife Conservation Commission, the U.S. Environmental Protection Agency, the U.S. Department of Interior, the U.S. Fish & Wildlife Service, the US Army Corps of Engineers, FHWA, the Federal Emergency Management Agency, county and municipal governments, and any other government actors that guide and control land and water use, must coordinate and incorporate the Florida Wildlife Corridor into their rules, policies and decision making The Florida Wildlife Corridor Act is not a self-executing statute. Creative, deliberate, long-term commitment to the Corridor must be codified into binding law at every level of government in order to ensure the Corridor is a reality for future generations.

I look forward to discussing this with you further. Please do not hesitate to contact me.

Sincerely yours,

Jeff Brower
Volusia County Chair

Attachments

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