



August 4, 2008

Via email: gcos.comments@noaa.gov

Thomas Street
NOAA Office of General Counsel for Ocean Services
1305 East-West Highway
Room 6111
Silver Spring, MD 20910

Re: Supplemental Comments on Appeal of Foothill/Eastern Transportation Corridor Agency Pursuant to the Coastal Zone Management Act

Dear Mr. Street,

Our May 28, 2008 letter and accompanying materials demonstrated that there is no basis in law or fact for the Secretary of Commerce to override the California Coastal Commission's (CCC's) objection to the Foothill/Eastern Transportation Corridor Agency's (TCA's) federal consistency certification under the Coastal Zone Management Act (CZMA) for the proposed Foothill-South Toll Road. The CCC properly exercised its CZMA jurisdiction in issuing a painstakingly researched and exhaustively documented objection to the Toll Road based on its fundamental inconsistency with California's certified coastal management program.

As shown in our prior letter, and described in additional detail below, the Toll Road is similarly inconsistent with the objectives of the CZMA. The Toll Road does not significantly or substantially further the national interest. Moreover, any conceivable national benefit of the Toll Road is vastly outweighed by the project's devastating and irremediable impacts on endangered species, cultural resources, water quality, and the irreplaceable coastal recreational resources of San Onofre Beach State Park. Due to these tremendous negative impacts, several federal agencies have recently encouraged further exploration of the reasonable

and available alternatives. Finally, the United States Marine Corps has concluded that this project is *not* necessary to national security, flatly contradicting TCA's vociferous contention to the contrary.

TCA's appeal lacks any factual or legal merit, and the Secretary should sustain the CCC's objection.

I. The Toll Road Does Not Further the National Interest in a Significant or Substantial Manner.

A. Rising Gas Prices, Decreasing Toll Road Use, and Stalled Residential Development Undermine TCA's Claim that the Toll Road Will Reduce Congestion on I-5.

As discussed in both our prior letter and the CCC's principal brief on appeal, the Toll Road does not serve the national interest. The project is locally driven and is intended to accommodate residential and commercial development in southern Orange County – development resulting from local land use decisions made by officials of the same local jurisdictions that comprise TCA. TCA claims that the project will serve the national interest by attracting drivers from I-5, thereby reducing freeway congestion. As we have discussed previously, the limited I-5 congestion relief claimed by TCA does not rise to the level of a “significant” furtherance of the “national interest” under the CZMA by any measure. But even those purported benefits of the project are in serious doubt in light of recent trends that TCA has never considered. The modeling TCA used to forecast future I-5 congestion and the effects of the Toll Road on that congestion was developed years ago, when gasoline was much cheaper and residential development was booming. The results of that modeling depended on numerous questionable assumptions, many of which are now proving false.

For example, the price of gasoline has risen dramatically since the DEIS was first released. The trip generation, trip distribution, and mode choice models used in the SOCTIIP traffic analysis were adopted by the Orange County Transportation Authority in June, 2001.¹ Since that time, however, average gasoline prices in California have *more than doubled*, from \$1.93 to \$4.32 per gallon.² Unsurprisingly, people in Orange County have begun to change their driving habits. For example, the average number of weekday toll transactions (an indicator of the number of drivers using the road) on the Foothill/Eastern toll roads has fallen by more than 20,000 in the past year – from 209,018 in July 2007 to 188,486 for the week ending July 27, 2008.³ Across the entire TCA system, toll transactions have fallen four percent over the last year, and total revenues have declined by almost the same amount.⁴ According to Caltrans data,

¹ TCA App. 41/42-65 at 1-7 (PDF p. 117).

² California Energy Commission, *California Average Weekly Retail Gasoline Prices*, available at http://energyalmanac.ca.gov/gasoline/retail_gasoline_prices.html (last visited August 2, 2008) (attached as Exhibit B). The prices cited are for a gallon of regular gasoline; super, premium, and diesel prices are substantially higher.

³ TCA, Transaction Tables, available at http://www.thetollroads.com/home/about_investor_transaction.htm (last visited August 2, 2008) (attached as Exhibit C).

⁴ *Id.*

freeway traffic is also down on roads throughout San Diego and Orange Counties.⁵ The trip generation models used to evaluate alternatives in the DEIS are thus predicated on assumptions about driving that are several years – several very critical years – out of date. The assumptions about driving choices contained in these models are no longer applicable, and TCA’s claims concerning the traffic benefits of the Toll Road are no longer reliable.

TCA’s analysis of the Toll Road’s traffic benefits also relied on outdated projections of Orange County growth. These projections, based on land use designations in local jurisdictions’ general plans, drove the TCA’s assumptions regarding Orange County traffic levels in 2025 for all of the SOCTIIP alternatives, including the Toll Road.⁶ The single specific factor considered in the traffic analysis was the Rancho Mission Viejo development, a large residential subdivision anticipated to generate 14,000 new dwelling units in the area through which the Toll Road and a number of other potential toll “corridor” alternatives would pass.⁷ Since Rancho Mission Viejo was approved, however, credit markets for both builders and buyers have tightened considerably. Nationwide, new residential construction has plummeted, falling more than 60 percent since its peak in 2006.⁸ TCA’s claims regarding the amount of traffic that will be generated by future local land use decisions in the vicinity of the Toll Road – and by extension its claims concerning the Toll Road’s alleged benefit to I-5 – are therefore based on outdated assumptions that do not take into account current economic conditions.

In short, the main benefit claimed by TCA for the Toll Road – the promise of reduced congestion on I-5 – lacks a firm factual foundation. TCA has thus failed to show that the Toll Road significantly and substantially furthers the national interest.

B. Projects Found to Further the National Interest in Recent Decisions of the Secretary Stand in Sharp Contrast to the Toll Road.

The Secretary has issued two recent CZMA appeal decisions – in the *Consistency Appeal of AES Sparrow’s Point LNG, LLC and Mid-Atlantic Express, LLC* (“AES”), and in the *Consolidated Consistency Appeals of Weaver’s Cove Energy, LLC and Mill River Pipeline, LLC* (“Weaver’s Cove”) – subsequent to our May 28, 2008 letter. These decisions further highlight the deficiencies of TCA’s argument, including its argument under the national interest prong.

Unlike the Toll Road, the LNG terminals at issue in both *AES* and *Weaver’s Cove* are coastal-dependent. As stated by the Secretary, “NOAA identified the siting of coastal-dependent energy facilities as an example of an activity that furthers the national interest in a

⁵ Steve Schmidt, *Steering Off S.D. Roads*, San Diego Union-Tribune (July 21, 2008), available at http://www.signonsandiego.com/uniontrib/20080721/news_1n21carflow.html (last visited August 4, 2008) (attached as Exhibit D). Statistics gathered by the Freeway Performance Measurement System (“PeMS”) at the University of California, Berkeley, available at <https://pems.eecs.berkeley.edu/>, show a 15% drop in afternoon peak hour travel time on I-5 northbound in Orange County. A printout of the PeMS data as of August 4, 2008, is attached as Exhibit I.

⁶ See TCA App. 41/42-65 at ES-8 to ES-11, 1-10 to 1-12 (PDF pp. 35-38, 120-22).

⁷ See *id.* at 1-10 to 1-11 (PDF pp. 120-21).

⁸ See, e.g., Martin Crutsinger, *Construction Spending Falls 0.4 Percent in June* (Associated Press Aug. 1, 2008) (attached as Exhibit A).

significant or substantial manner.” *AES* at 10. The Secretary also noted that the “Nation’s interest in developing LNG facilities was recently articulated in the White House National Economic Council’s Advanced Energy Initiative,” and that, “at the President’s direction, Federal agencies are working to accelerate the development and expansion of LNG terminals to improve natural gas availability and supply.” *Id.* at 14. In contrast, the Toll Road is not coastal-dependent; nor is there any federal policy comparable to the Energy Initiative that would be advanced by construction of the Toll Road. The Toll Road, is a quintessentially local project – except for the fact that it would usurp a State Park in San Diego County in order to provide purported relief from traffic caused by development in southern Orange County. This is precisely the type of endeavor that NOAA targeted in its 2000 regulatory revision narrowing the circumstances in which the national interest prong may be satisfied.

II. The Toll Road’s Severe and Unmitigated Environmental Impacts Outweigh its Negligible Contribution to the National Interest.

A. The Toll Road Will Cause Significant Harm to Endangered and Threatened Species.

Based on a Biological Opinion (BiOp) prepared by the United States Fish & Wildlife Service (USFWS), TCA and its supporters have misleadingly suggested that the Toll Road will not harm endangered and threatened species. As discussed in our prior letter, this is false – as acknowledged in the BiOp itself.

The BiOp acknowledges that the Toll Road will adversely affect a number of threatened and endangered species and their habitats, and further reveals that TCA’s proposed mitigation measures are either unlikely to work or insufficient to fully offset the road’s effects. For example, new bridges at San Mateo and San Onofre creeks will impact heavily used habitat for the least Bell’s vireo. A small amount of vireo habitat is proposed for restoration between San Onofre and San Mateo creeks, but this restoration is not anticipated to offset impacts to these two populations.⁹ Dewatering and flow diversion in San Onofre Creek – potentially necessary for bridge construction – could result in death or injury of tidewater gobies and temporarily eliminate goby breeding, feeding, and sheltering habitat.¹⁰

The Toll Road also will create a barrier to arroyo toad dispersal through the upland environment immediately north and south of San Juan Creek. For toads on the west side of the creek, the toll road will create a substantial barrier to north/south dispersal through the upland environment. Loss of upland areas for foraging, aestivation, and dispersal could affect toad populations through increased competition for limited resources or increased predation risk. There is no mitigation proposed for the Toll Road’s fragmentation and isolation of upland arroyo toad habitat.¹¹ The Toll Road similarly will increase fragmentation of gnatcatcher habitat by creating a road through the Habitat Reserve and through remaining habitat west of San Mateo Creek. Connectivity between the large gnatcatcher populations on Camp Pendleton and southern

⁹ TCA Supp. App. 6-50 at 107.

¹⁰ *Id.* at 47.

¹¹ *Id.* at 65-66.

Orange County will also be reduced. The Toll Road also could increase fire frequency in habitat surrounding the road, which could, in turn, lead to habitat degradation over the long term. TCA's proposed mitigation measures for gnatcatcher impacts are concentrated in inland areas, and will not directly offset the Toll Road's impacts to the coastal gnatcatcher population at Camp Pendleton or to connectivity between Camp Pendleton and southern Orange County.¹²

Moreover, the Toll Road will harm the critically endangered Pacific pocket mouse. As described in our previous letter, and in the draft BiOp prepared by USFWS, the Toll Road's most lasting and devastating effect will be to destroy more than half of the remaining high-quality suitable pocket mouse habitat within the action area.¹³ According to USFWS's own Recovery plan for the species, loss of this kind of habitat greatly increases the possibility that this population will be extirpated.¹⁴ The only mitigation proposed by TCA for this tremendous impact – an untested “management” regime – is untested, experimental, and relies heavily on trapping activities that may further harm the species. The Toll Road also will isolate the San Mateo North population of the pocket mouse from the other population on Camp Pendleton permanently, forever preventing any natural genetic interchange between the two populations. The BiOp concludes that TCA's proposed mitigation measure for this impact – a long, dark culvert running for hundreds of meters under the road – will be ineffective.¹⁵ The BiOp also concedes that vehicles using the Toll Road could kill pocket mice directly, and that a roadside barrier curb proposed by TCA will not eliminate the potential for road kill.¹⁶ Finally, the BiOp acknowledges that the Toll Road could further harm pocket mice by increasing fire risk and concentrating predation.¹⁷

The BiOp even contains a specific count of the threatened and endangered species that USFWS expects will be killed or harmed by the Toll Road. Dewatering of San Mateo Creek during construction will result in the deaths of an unknown number of tidewater gobies, including up to 50 gobies that may be killed during capture and translocation.¹⁸ An unknown number of arroyo toads also are expected to be killed during construction and operation of the Toll Road.¹⁹ Up to 27 pairs of California gnatcatchers will be harmed by loss of habitat along the Toll Road's alignment through San Onofre State Beach; some of these birds are “expected to die,” while others “may suffer a reduction in fitness and productivity.”²⁰ Brush fires and vehicle strikes are expected to kill gnatcatchers as well.²¹ Five pairs of Least Bell's vireos will be

¹² *Id.* at 89-90.

¹³ See U.S. Fish & Wildlife Service, Draft Biological and Conference Opinion, Proposed Toll Road Corridor (Alignment 7 Corridor- Far East Crossover-Modified; A7C-FEC-M) Initial Alternative for the South Orange County Transportation Infrastructure Improvement Project (“*Draft BO*”) at 83 (attached Exhibit 18 to May 28, 2008 letter of California State Parks Foundation, et al.).

¹⁴ P. Brylski, PhD, et al., *Pacific Pocket Mouse Recovery Plan* (USFWS 1998) at 37 (“*PPM Recovery Plan*”) (attached as Exhibit 12 to May 28, 2008 letter of California State Parks Foundation, et al.).

¹⁵ *Id.* at 158-59.

¹⁶ *Id.* at 156.

¹⁷ *Id.* at 161-62.

¹⁸ TCA Supp. App. 6-50 at 166.

¹⁹ *Id.* at 166-67.

²⁰ *Id.* at 167.

²¹ *Id.* at 168.

harmful by loss of riparian habitat.²² Pacific pocket mice also could be “stressed, injured, or die” as a result of Toll Road construction; indeed, of the two pocket mice that the BiOp expects to be trapped and removed from the Toll Road footprint during construction, one will probably die²³ – and the BiOp does not even discuss whether additional members of this rare and secretive species not found during construction will be killed as the road is built. Even the untested “active management” of pocket mouse habitat offered by TCA as a mitigation measure – management relying heavily on trapping for survey and relocation – is expected to kill a number of the creatures.²⁴ Contrary to TCA’s assertions, therefore, USFWS fully expects the Toll Road to cause considerable harm to endangered and threatened species.

Moreover, as discussed in our previous letter, the USFWS’s conclusion that the adverse impacts of the Toll Road on threatened and endangered species will not jeopardize the continued existence of those species is unsupported, particularly with respect to the Pacific pocket mouse. The BiOp itself recognizes that TCA’s proposed mitigation and management measures for the pocket mouse are either entirely untested or unlikely to work at all.²⁵ This species is so critically imperiled that there is no room for such uncontrolled experimentation. In addition, the BiOp inappropriately relies on mitigation and management plans that have not even been written yet in concluding that the Toll Road will not place even more species in jeopardy.²⁶

The National Marine Fisheries Service, as the federal agency responsible for protection of steelhead trout and other ocean-going fish, submitted comments that raise troubling questions about both the Toll Road and the Endangered Species Act consultation process that produced the BiOp. In the letter, NMFS reiterates its concurrence with the Federal Highway Administration’s determination that the Toll Road is not likely to adversely affect steelhead – and then immediately proceeds to describe the possible adverse effects of crossing San Mateo Creek just above the estuary:

[F]rom the perspective of what would be best for steelhead, the highway connector bridge superstructure (HCBS) would be better positioned someplace other than just upstream of the estuary and directly over San Mateo Creek. There is a risk of accidental fuel spills which could occur from traffic on the HCBS, which could result in adverse effects on the creek and estuary. Estuaries in particular have been found to be important for the rearing of juvenile steelhead, and are necessary for the acclimation of all adult and juvenile steelhead migrating in and out of the watershed. NMFS believes that the biological integrity of the San Mateo Creek estuary and vicinity is essential for the survival and recovery of

²² *Id.*

²³ *See id.* at 168-69.

²⁴ *Id.* at 169.

²⁵ *See id.* at 156-59 (stating that effectiveness of barrier curb to prevent pocket mice from crossing Toll Road cannot be evaluated, and finding that undercrossing proposed to connect pocket mouse populations separated by Toll Road “will be ineffective”).

²⁶ *See, e.g., id.* at 13-14 (discussing future development of “Biological Resources Management Plan” and “Arroyo Toad Resource Management Plan” that will outline “specific design and implementation features” of proposed mitigation measures).

steelhead within this watershed, therefore, a bridge location further from the estuary would have been preferred.²⁷

The NMFS letter confirms that San Mateo Creek and its estuary are critical to the survival and recovery of steelhead in this watershed. The NMFS letter also clearly states that the San Mateo Creek crossing “could result in adverse effects on the creek and estuary,” seemingly contradicting its conclusion that no adverse effect will occur.²⁸ As detailed in our previous letter, in addition to the bridge crossing, the Toll Road’s massive disruptions of sub-watersheds immediately upstream of the estuary pose a *profound* threat to steelhead – a threat that NMFS has never fully addressed in light of the rigorous scientific criticism of TCA’s proposed mitigation measures for these effects, which we summarized in our previous letter. NMFS’ belated acknowledgment in its June 20 letter that the Toll Road actually could pose a threat to steelhead also underscores the agency’s failure to participate in the Endangered Species Act consultation process that produced the BiOp. As a result of this failure, the BiOp does not mention steelhead at all.

Even TCA has admitted that the Toll Road will harm threatened and endangered species. TCA’s own final Environmental Impact Report – despite numerous scientific flaws understating the Toll Road’s true effects, especially concerning the Pacific pocket mouse and Southern steelhead – admitted that the Toll Road would have significant, adverse effects on thread-leaved brodiaea, California gnatcatcher, and arroyo toad even after mitigation.²⁹ Before the Secretary, however, TCA has misleadingly and contradictorily suggested otherwise, selectively quoting passages of the BiOp to imply that the project will actually benefit the gnatcatcher and the arroyo toad. TCA Reply at 14-16. These suggestions not only contradict TCA’s own environmental documents, but also misrepresent the BiOp’s conclusions regarding the sufficiency and adequacy of mitigation, as discussed above. It is obvious that the Toll Road will significantly harm threatened and endangered species – and disingenuous for TCA to claim otherwise in this proceeding.

This is one of many points on which the Toll Road stands in stark contrast with the LNG terminal and pipeline project considered in the Secretary’s recent *AES* decision. In that decision, the Secretary overrode Maryland’s objection to the project partly on the ground that expert wildlife agencies did not identify *any* adverse effects to wildlife, including threatened and endangered species. *See AES* at 33. In contrast, the *Weaver’s Cove* decision sustained Massachusetts’ objection in part because, as here, wildlife agencies found that the project’s impacts to wildlife (in that case, winter flounder and anadromous fish) were not *fully* mitigated. *See Weaver’s Cove* at 23-25, 27.

USFWS has expressly concluded in its BiOp that the Toll Road (a) will fragment high quality habitat for one of the handful of remaining populations of the critically imperiled

²⁷ Rodney R. McInnis, Regional Administrator, NMFS, Letter to Thomas Street, NOAA (June 20, 2008) at 1-2.

²⁸ As a result of NMFS’s unexplained delay in acknowledging that adverse effects are possible, steelhead were not considered in the BiOp; accordingly, the impacts of the Toll Road and the effectiveness of proposed mitigation remain unexplored by the agency responsible for conservation of the species.

²⁹ TCA App. 24-52 at 7-33 (PDF. Pp. 402).

Pacific pocket mouse; (b) will disturb almost 50% of the aquatic habitat for the endangered tidewater goby in San Mateo and San Onofre Creeks; (c) will destroy hundreds of acres of upland habitat for two populations of the endangered arroyo toad; (d) will eliminate more than 300 acres of the coastal sage scrub habitat occupied by up to 50 breeding pairs of the threatened Coastal California gnatcatcher; (e) will destroy more than 22 acres of the remaining habitat for the endangered Least Bell's vireo; and (f) will wipe out at least one of the limited number of remaining populations of the threatened thread-leaved brodiaea.³⁰ In addition, USFWS also acknowledged substantial additional threats posed to these species by the Toll Road, including: increased fire risks; noise, light and dust impacts from construction and operation of the road; habitat fragmentation; and mortality risks for species that may attempt to cross the road.³¹ Also, as previously discussed, USFWS found that a number of TCA's proposed mitigation measures will be ineffective or incomplete – a fact conceded in TCA's own final Environmental Impact Report, which concluded that endangered species impacts will remain significant even *after* mitigation. Like the project proponent in *Weaver's Cove*, TCA has failed to fully mitigate the impacts of the Toll Road.

It is therefore indisputable that the Toll Road will cause significant harm and damage to endangered and threatened species and their habitat. Considered in conjunction with the other environmental and cultural impacts outlined in our previous letter, it is clear that these impacts – which will remain even after mitigation measures are implemented, and which literally could drive one of California's rarest species over the brink of extinction – vastly outweigh any contribution that the Toll Road might make to the national interest.

B. The Toll Road Could Devastate Irreplaceable Coastal Recreational Resources.

Our previous letter detailed the devastating impact that the Toll Road would have on coastal recreational opportunities at San Onofre State Beach. The loss of hundreds of acres of state park land and displacement of one of the state's most popular campgrounds will have a profound impact on the tens of thousands of visitors that frequent the park each year. This impact alone far outweighs the project's minimal contribution to the national interest. The severe impacts of the Toll Road on the natural setting and aesthetic experience of visitors to the beach – and the potential threat to the famous Trestles surf break itself³² – only add to the project's overwhelming effects on coastal recreational resources.

As the Secretary recently recognized in the *Weaver's Cove* decision, a project's significant disruption of coastal recreational activities is of serious concern in balancing environmental impacts against the national interest. *See Weaver's Cove* at 31-33 (finding that

³⁰ *See generally* TCA Supp. App. 6-50.

³¹ *Id.*

³² Subsequent to our last letter, TCA commissioned a "peer review" by Richard J. Seymour of studies analyzing the Toll Road's potential impacts on Trestles. As discussed in the PWA memorandum dated August 4, 2008 (attached as Exhibit J), the Seymour report provides no support for the conclusion that the Toll Road will not impact Trestles. Among other things, the report fails to fully consider the potential impacts of major sedimentation increases on in-stream cobble movement and misinterprets the conclusions of key studies suggesting that increased sediment discharges can affect nearshore features and thus surf conditions.

LNG tanker traffic would cause substantial delays to recreational and commercial boats). In *Weaver's Cove*, the LNG terminal's combined effects on navigational safety, fisheries habitat, and coastal recreation outweighed the project's acknowledged contribution to the national interest. In this case, the balancing is far more decisive: Toll Road's combined effects on listed fish and wildlife species, unique cultural resources, irreplaceable recreational resources, water quality, and wetlands even more convincingly combine to outweigh the Toll Road's negligible national significance.

III. Reasonable Alternatives to the Toll Road Are Available.

A. EPA and the Army Corps Have Identified Practicable, Reasonable Alternatives to the Toll Road.

TCA – having essentially decided on its preferred route for this project nearly two decades ago – unsurprisingly continues to insist that there are no reasonable alternatives to the Toll Road. As set forth in our previous letter, however, and in the materials accompanying the CCC's objection to TCA's consistency certification, there are a number of reasonable alternatives available that are consistent with California's coastal management program.

The federal agencies responsible for environmental review and permitting for this project have made similar statements. For example, Army Corps of Engineers Col. Thomas Magness "submit[ted] for the administrative record that based on the 2004 Draft EIS/SEIR the Corps holds the opinion there are other practicable alternatives available to TCA that would achieve the overall project purpose."³³ Nothing in the Corps' subsequent comment letter on the project contradicts this statement; indeed, the second letter confirms that several alternatives to the Toll Road were both practicable and "available to TCA."³⁴ The EPA similarly clarified that its 2005 "preliminary" identification of the Toll Road as the least environmentally damaging practicable alternative did not render other alternatives impracticable.³⁵ EPA also pointed out that new information has become available since 2005 "that may affect analysis of project alternatives."³⁶

The USFWS has also urged consideration of alternatives due to the project's severe impacts on endangered species and their habitat. Deferring to the regulatory jurisdiction of its sister agencies, the Army Corps and EPA, the USFWS did not weigh in on the practicability of alternatives in its formal comment letter on this appeal. However, in its BiOp, the agency expressly recommended that TCA, FHWA, and Caltrans "continue to explore the feasibility of alignment alternatives that are further west than the proposed project as we believe that such alignments will have less impact on federally listed species."³⁷

³³ Col. Thomas Magness, District Commander, Army Corps of Engineers, Letter to Thomas Street, NOAA (Apr. 7, 2008) at 5.

³⁴ Steven L. Stockton, P.E., Director of Civil Works, Army Corps of Engineers, Letter to Joel La Bissonniere, NOAA (May 28, 2008) at 1.

³⁵ Wayne Nastri, Regional Administrator, EPA, Letter to Thomas Street, NOAA (May 28, 2008) at 4.

³⁶ *Id.*

³⁷ TCA Supp. App. 6-50 at 173.

B. FHWA's Comments on this Appeal Contain No New Analysis And Are Demonstrably Inaccurate.

FHWA's May 23, 2008 comment letter to the Secretary suggesting that there is no reasonable alternative to the Toll Road contains no new argument or analysis on the feasibility of alternatives. Rather, the letter simply reiterates the unfounded contentions of TCA and Caltrans that there is no feasible way to design needed improvements to I-5. As discussed in detail in our prior letter, Caltrans' criticisms of non-toll road alternatives – criticisms repeated without additional support in the FHWA letter – are undermined by Caltrans' contractual commitment with TCA to support the Toll Road. We also demonstrated in our prior letter and related materials the feasibility of at least one alternative – the AIP-R – and the complete lack of evidence to support TCA's and Caltrans' claims to the contrary. However, the FHWA letter is itself so rife with factual error, inconsistencies, and misleading statements that it warrants further response here.³⁸

1. FHWA's Description of the Location and Coastal Effects of Toll Road Alternatives Contradict the Agency's Own EIS.

The FHWA either does not know or refuses to accurately describe the true location and coastal impacts of the alternatives it purports to find unreasonable and unavailable. The letter incorrectly states that all "build alternatives," except the "AIO" (Arterial Improvements Only) alternative, "adversely affect the coastal zone."³⁹ This assertion is not only factually wrong, but also contradicts FHWA's own Draft EIS. According to that document, the CC-ALPV and A7C-ALPV alternatives also "are not located within the Coastal Zone and, therefore, have no impacts related to the Coastal Zone."⁴⁰

FHWA also misses or obscures the critical legal point at issue here. An alternative cannot be rejected from analysis merely because it "encroaches" on the Coastal Zone, as FHWA suggests throughout its letter. If this were true, FHWA would have rejected the Toll Road long ago, along with every other alternative that requires some construction in the Coastal Zone. The issue, rather, is whether a reasonable alternative is available that can be found consistent with the enforceable policies of California's coastal management program. *See* 15 C.F.R. 930.121(c). According to the CCC, various tolled alternatives described in the EIS/EIR for the SOCTIIP project – including the CC, CC-ALPV, and A7C-ALPV alternatives – *could* be found consistent with the California Coastal Act regardless of whether they "encroach" on the Coastal Zone.⁴¹ The fundamental basis for the CCC's objection, of course, is that *this* Toll Road route *cannot* be found consistent with these policies.

³⁸ It is an axiom of federal administrative law that courts need not defer to an agency's clearly erroneous or inconsistent interpretations of governing statutes. *See, e.g., Valley Camp of Utah, Inc. v. Babbitt*, 24 F.3d 1263, 1267-68 (10th Cir. 1994); *Ruangswang v. Immigration and Naturalization Service*, 591 F.2d 39, 43 (9th Cir. 1978). The same principles should apply here; because FHWA's letter is replete with factual errors, inconsistent interpretations of agency policy, and misleading statements, it should be given little weight.

³⁹ James D. Ray, Acting Administrator, Federal Highway Administration, Letter to Vice Adm. Conrad C. Lautenbacher, Jr., Ret., NOAA (May 23, 2008) ("*FHWA Comments*") at 3, 7.

⁴⁰ TCA App. 35/36-62 at 4.15-3, 4.15-4, Figs. 4.15-1 to 4.15-6 (PDF pp.277-84).

⁴¹ *See* TCA App. 1-1 at 1; TCA App. 1-2 at 117-127; TCA App. 21/22-50 at 4.15-3, 4.15-4 (PDF pp. 379-80).

2. FHWA's Criticisms of the AIP-R Alternative Are Baseless.

FHWA's suggestion that the Toll Road is the only reasonable alternative depends entirely on its criticism of the "Arterial Improvements Plus I-5 Widening – Refined" or "AIP-R" alternative described by Smart Mobility, Inc. FHWA has not yet prepared its "peer review" of the AIP alternative or completed its environmental review of the alternatives, yet the agency in its letter appears to have accepted uncritically the unfounded conclusions of TCA and Caltrans that the alternative would result in the displacement of hundreds of residences, and cannot be modified to avoid those impacts. As with the TCA and Caltrans documents upon which it is based, the FHWA letter fails to describe or evaluate this alternative accurately and points to no evidence to support its conclusions.⁴²

Central to the letter's conclusion is its assumption that the AIP-R recommendations are "based on the use of non-standard geometrics and interchange configurations that would be unacceptable or impractical for use on a highway of I-5's national importance."⁴³ This is flatly wrong. *The AIP-R alternative does not introduce any new non-standard design features, and in fact improves the existing facilities in most cases.* The key components of the AIP are typical for highway improvement projects that are constrained by an existing urban context. For example:

- Use of different, yet standard, interchange types, such as single point or tight urban interchanges.
- Use of retaining walls on sections of widened freeway or arterials to avoid the need to take property.

There are only few instances where the AIP proposes to leave in place existing features that do not meet full standards for new facilities. The fact that every existing interchange cannot be brought up to new-road standards is not an argument for rejecting an alternative such as the AIP that both meets traffic objectives and achieves substantial *improvement* of existing interchange designs. *FHWA is essentially asserting that the existing substandard interchanges on this segment of I-5 cannot be – and should not be – improved, despite the "national importance" of this highway.* Such a position is plainly untenable and groundless.

Indeed, as described in our previous letter, SMI's design concepts proposed for the I-5 corridor are similar to interchange designs already in place along other urban interstate highways – *including both I-5 and I-10 in Southern California.* The design concepts presented in the SMI report are intended to show that there are design approaches that could result in dramatically reduced property takings while improving existing interchange designs.

⁴² FHWA also erroneously claims that the alternative on which Smart Mobility based its AIP-R proposal – the so-called "AIP" alternative – was "evaluated" in the agency's 2004 Draft EIS. *FHWA Comments* at 4. In fact, the AIP alternative was "eliminate[d] . . . from consideration in the EIS/SEIR." TCA App. 33-60 at ES-16 (PDF p. 39).

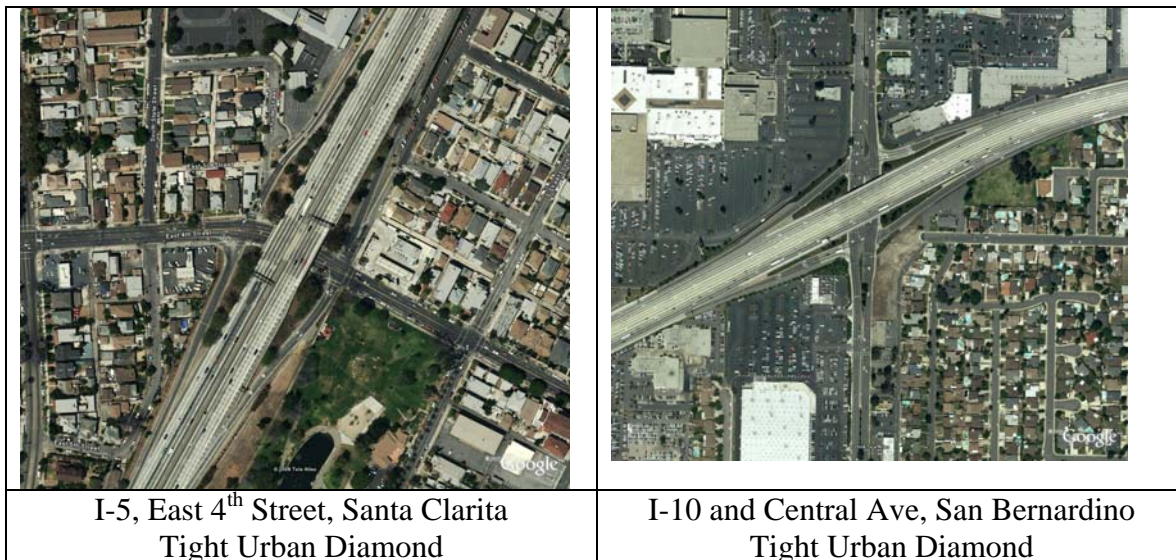
⁴³ *FHWA Comments* at 4.

In other projects in southern California, Caltrans proposes using many of the same design techniques that SMI is proposing for the AIP-R alternative, specifically to reduce property impacts. These include shifting the highway centerline, using retaining walls to reduce the highway footprint, and using tight urban diamond interchanges to provide needed interchange capacity safely and efficiently. The following are examples of how Caltrans and other transportation agencies have applied these design techniques to reduce property takings:

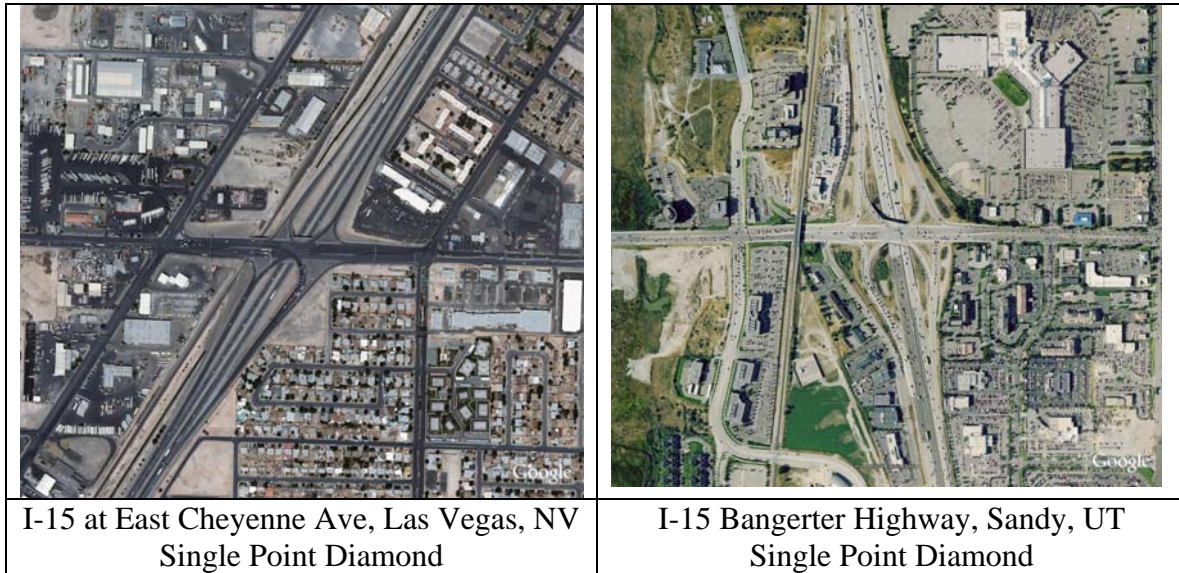
Example from Caltrans showing how retaining walls can be used to allow highway widening in constrained urban areas without requiring property takings (I-5 at Beach Blvd, Orange County, existing and simulated future design):⁴⁴



Examples of interchange design techniques on urban interstate highways in California and other states:



⁴⁴ The Beach Boulevard interchange images and supporting data are available at [http://www.octa.net/i5gateway\(6\).aspx](http://www.octa.net/i5gateway(6).aspx) (last visited August 4, 2008). Other images are actual images from Google Earth.



Unlike the examples above, neither TCA, Caltrans, nor FHWA has even attempted to apply a flexible design approach to address the urban constraints of improving I-5 as an alternative to the Toll Road. The FHWA letter wrongly states that the agencies analyzed a total of 43 alternatives “to the same level of detail.”⁴⁵ This is simply untrue. TCA developed extensive design-level refinements for its own “preferred alternative.” Neither TCA nor any other agency ever undertook anything even approaching that level of review for the AIP or other alternatives based on improving I-5 or arterials, and never meaningfully explored whether the design refinements suggested by SMI for the AIP-R alternative could reduce socioeconomic impacts and property displacements.

3. FHWA’s Designation of I-5 as a “Corridor of the Future” Demands Improvement of I-5 Itself, Not Construction of a Different Road.

FHWA’s comment letter takes great pains to demonstrate that I-5 is an important highway.⁴⁶ Yet FHWA fails to evaluate fairly the alternatives that would provide even better traffic relief by improving I-5 itself.

FHWA highlights its designation of I-5 as a “Corridor of the Future” – but fails to explain in any detail what the designation means.⁴⁷ The Department of Transportation in 2007 selected six interstate routes as “Corridors of the Future” following a competitive application process and awarded discretionary funding for specific congestion relief projects along each corridor.⁴⁸ The designation of I-5 resulted in an award of \$15 million in Interstate Maintenance

⁴⁵ *FHWA Comments* at 3.

⁴⁶ *See id.* at 2. Even on this point, FHWA is prone to exaggeration. For example, trucks leaving the ports of San Diego and Long Beach can access I-10 and I-8, both “east-west Interstates to supply goods . . . throughout the Nation,” *id.*, without taking a long detour through southern Orange County.

⁴⁷ *FHWA Comments* at 2.

⁴⁸ *See generally* U.S. Dept. of Transportation, *Corridors of the Future: Overview*, available at <http://www.corridors.dot.gov> (last visited August 3, 2008) (attached as Exhibit E).

Discretionary funds for the Columbia River Bridge Crossing project between Oregon and Washington.⁴⁹ Nothing in the designation mentioned the need to improve I-5 by building other, non-interstate corridors.

The application materials for the designation specific to California, however, show that “[t]here is increasing interest and momentum in regional and legislative discussions to allow increased tolling and expand public-private partnership authority.”⁵⁰ As “immediate examples” of these efforts, the materials cited a “26-mile managed lane facility in the north coastal section of I-5” and a potential conversion of high-occupancy vehicle (HOV) lanes to high-occupancy toll (HOT) lanes in Los Angeles County to facilitate construction of “new managed lanes.”⁵¹ These are exactly the kinds of proposals that Smart Mobility and others have advanced during environmental review of the Toll Road project: proposals that would allow tolling of high-occupancy lanes on I-5 in order to fund construction of needed improvements to I-5 itself. FHWA’s designation of I-5 as a “Corridor of the Future” relied specifically on this kind of proposal.

In light of what the “Corridor of the Future” designation actually means for I-5 in Southern California, FHWA is incorrect to insist that funding for I-5 improvements is simply “unavailable.” As discussed in our previous letter, federal legislation would allow HOT lanes on I-5 as a demonstration project.⁵² Interest in HOT lanes is currently so strong that the Southern Orange County Major Investment Study (“SOCMIS”) is evaluating HOT lanes in I-5 through southern Orange County.⁵³ Nowhere in this OCTA study are HOT lanes described as “unavailable” due to a lack of funding or any other reason. If FHWA and TCA have been unable to find a funding mechanism for alternatives to this project, in the midst of this groundswell of interest in using HOT lanes to fund highway improvements, it can only be because the agencies are not trying very hard.

Indeed, if FHWA, Caltrans, and TCA were seriously willing to consider standard design modifications for interchanges and roadways routinely used to avoid property impacts in urban areas, they could develop an alternative that would be not only reasonable but also available to TCA. The AIP-R alternative could include HOT lanes rather than non-tolled HOV lanes to provide a funding source for the improvements. The AIP-R alternative’s combination of arterial, interchange, and freeway improvements would improve operational safety and reduce congestion on I-5.

⁴⁹ See FHWA, *Corridors of the Future Fact Sheet, Corridor: Interstate 5 (I-5) – Washington to California*, available at <http://www.fhwa.dot.gov/pressroom/fsi5.htm> (last visited August 3, 2008) (attached as Exhibit F).

⁵⁰ Caltrans, Oregon Dept. of Transportation, and Washington State Dept. of Transportation, *Corridors of the Future: Interstate 5, A Roadmap for Mobility* (addendum July 13, 2007) at 15 (attached as Exhibit G.)

⁵¹ *Id.*

⁵² See, e.g., Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, § 1604(b) (Aug. 10, 2005); FHWA, *Express Lanes Demonstration Program*, 73 Fed. Reg. 6549 (Feb. 4, 2008).

⁵³ See Orange County Transp. Auth., SOCMIS Project Sheet (describing a HOT lane alternative) (attached hereto as Exhibit H).

In sum, FHWA has prematurely and inaccurately rejected I-5 improvement alternatives, including the AIP-R, as “unavailable” to TCA. This is incorrect. TCA could participate in a project using HOT lanes as a funding mechanism for I-5 improvements. FHWA’s refusal to consider this possibility here contradicts its active pursuit of HOT lane partnerships and possibilities in other parts of the region, including along its own designated “Corridors of the Future.” As FHWA seemed to recognize in awarding it, the “Corridor of the Future” designation entails development of innovative and creative improvements to I-5 in Orange County, not building an entirely separate Toll Road to somewhere else.

5. FHWA’s Invocation of the Section 4(f) Exemption for this Project is Irrelevant and Misleading.

Not content to rely on factual misstatements about Toll Road alternatives and incomplete descriptions of its own programs, FHWA goes further, claiming that Congress’s decision to exempt the Toll Road from 49 U.S.C. § 303 (known as “Section 4(f)”) should factor into the Secretary’s evaluation of whether the Toll Road affects the coastal zone. The claim is beyond spurious. Neither Section 4(f), nor the congressional exemption cited by FHWA, has anything to do with the coastal zone. Congress did not exempt this project from the CZMA or modify the coastal zone in any way. Moreover, as discussed in our previous letter, Congress recently clarified that the Toll Road must comply with State law⁵⁴ – including the California Coastal Act policies that the CCC relied upon in objecting to TCA’s consistency certification. FHWA’s contentions regarding the Section 4(f) exemption are simply wrong, and have no bearing on this appeal.

C. TCA Has Improperly Rejected the CC and CC-ALPV Alternatives.

TCA claims that the CC and CC-ALPV alternatives “would have much more significant adverse environmental impacts” than the Toll Road, resulting in “large-scale destruction of wetlands and endangered species habitat,” and accuses the Commission of being “selectively oblivious” to these impacts. TCA Br. at 46. It is TCA, however, that is “selectively oblivious” – and its argument is actively misleading – concerning the impacts of the Toll Road.

TCA fails to disclose that *the Toll Road will impact nearly 400 acres of coastal sage scrub habitat* – nearly *twice* the amount of coastal sage scrub habitat impacted by either the CC or CC-ALPV alternatives.⁵⁵ Coastal sage scrub is critical to a number of threatened and endangered species, including the coastal California gnatcatcher, arroyo toad, and Pacific pocket mouse.⁵⁶ Moreover, while the CC and CC-ALPV alternatives result in somewhat greater

⁵⁴ See Pub. L. No. 108-110, § 2841, 112 Stat. 3, 552-53 (Jan. 28, 2008).

⁵⁵ The initial CC alternative would impact a total of 192.79 acres of Venturan-Diegan Coastal Sage Scrub habitat and 36.73 acres of Coastal Sage Scrub/Grassland habitat, for a total of 229.52 acres, while the initial CC-ALPV alternative would impact 177.34 acres of Venturan-Diegan Coastal Sage Scrub and 30.4 acres of Coastal Sage Scrub/Grassland, for a total of 207.74 acres. TCA App. 21/22-50 at 4.11-95 (Table 4.11-4) (PDF p. 263). The Toll Road (“Preferred Alternative”) would impact 385.32 acres of Venturan-Diegan Coastal Sage Scrub and 8.14 acres of Coastal Sage Scrub/Grassland habitat, for a total of 393.46 acres. TCA App. 21/22-50 at 4.11-96 (Table 4.11-4A) (PDF pp. 264).

⁵⁶ See TCA App. 21/22-50 at 4.12-6 to 4.12-8 (PDF pp. 303-05).

riparian and wetlands impacts than the Toll Road, the difference is nowhere near as dramatic. For example, according to TCA's own analysis, the "initial" CC, CC-ALPV and Toll Road ("Preferred") alternatives directly impact 10.3, 8.4, and 8.9 miles, respectively, of non-wetland stream channels classified as waters of the United States; in this respect, the Toll Road is actually *more* damaging than the CC-ALPV.⁵⁷ The initial configuration of the Toll Road also would directly impact about 43 acres of riparian ecosystems, while the CC would impact nearly 54 acres and the CC-ALPV nearly 50 acres – again, not a dramatic contrast.⁵⁸ Finally, while the Toll Road will permanently impact about 6 fewer acres of wetland and non-wetland water under the jurisdiction of the Army Corps of Engineers than the CC-ALPV (and about 8 fewer acres than the CC), the Toll Road will permanently impact about 8 *more* acres of streambed under the jurisdiction of the California Department of Fish and Game than the CC-ALPV (and about 5.5 more acres than the CC).⁵⁹ Depending on the criterion considered, it is not only inaccurate, but actually dishonest, to say that the CC and CC-ALPV alternatives "have much more significant adverse environmental impacts" to important endangered species habitat. Indeed, the Toll Road is uniquely damaging to the gnatcatcher and arroyo toad, and will forever fragment and isolate one of the few extant populations of the Pacific pocket mouse – a critically endangered species that would not be affected *at all* by the CC or CC-ALPV.

TCA's main objections to the CC and CC-ALPV alternatives are based on community disruption.⁶⁰ Yet TCA's estimates of the displacement attributable to these alternatives have never been supported by even a shred of analysis. TCA's numbers are just that – numbers – contained in a chart that was published without any description of methodology, any supporting technical study, or even a footnoted reference.⁶¹ As the Smart Mobility reports have shown time and again, TCA has at best neglected to substantiate its estimates of displacements from the non-Toll Road alternatives, has failed to explore design modifications that might reduce those displacements, and at worst has intentionally designed alternatives so as to maximize projected displacements.

IV. The Toll Road Is Not Necessary to National Security.

The United States Marine Corps has submitted comments to the Secretary stating that neither the Toll Road itself, nor the "enhancements" TCA intends to construct at Camp Pendleton, are essential to adequate security at Camp Pendleton.⁶² The Department of Homeland Security, moreover, had no comments on the appeal at all.⁶³ Accordingly, the federal agencies with the greatest expertise and responsibility in this area agree that this project does not

⁵⁷ TCA App. 21/22-50 at 4.10-26 (Table 4.10-13) (PDF p. 135).

⁵⁸ *Id.* at 4.10-28 (Table 4.10-15) (PDF p. 137).

⁵⁹ *Id.* at 4.10-48 (Table 4.10-33A) (PDF p. 157).

⁶⁰ TCA App. 20-49 at 2-12 to 2-13 (PDF pp. 66-67).

⁶¹ TCA App. 21/22-50 at 4.4-8 to 4.4-9 (PDF pp. 446-47). TCA never provided an updated appendix with a list of addresses supposedly affected by these alternatives. Nor did TCA ever offer any analysis or methodology to support its estimates of the increased cost of construction attributable to these displacements. *See* TCA App. 26-54 at Attachment 6 (PDF p. 111).

⁶² Col. J.B. Seaton, Commanding Officer, Marine Corps Base Camp Pendleton, Letter to Thomas Street (May 22, 2008) at 1, 4.

⁶³ Sonnita Neal, Dept. of Homeland Security, e-mail to Thomas Street, NOAA (May 28, 2008).

implicate national security concerns. In light of this agreement, TCA's already strained argument that the Toll Road is somehow necessary to national security within the meaning of the CZMA lacks any merit whatsoever.⁶⁴

In sum, there is no basis in fact or law for overriding the CCC's well-reasoned objection to TCA's consistency certification for this ill-conceived and destructive project. The CCC's objection should stand. Thank you very much for your consideration of our supplemental comments in this appeal.

Very truly yours,

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WiLDCOAST-COSTASALVAjE

⁶⁴ The speculative assertions concerning national security listed in FHWA's May 23, 2008 comment letter similarly deserve no deference, as these assertions are not within the agency's expertise and are not supported by any comments from an agency with relevant expertise.