



U.S. Department
of Transportation
**Federal Highway
Administration**

Office of the Administrator

1200 New Jersey Avenue, SE.
Washington, DC 20590

May 23, 2008

In Reply Refer To:
HEPE

Vice Admiral Conrad C. Lautenbacher, Jr., USN, Retired
Undersecretary of Commerce for Oceans
and Atmosphere and Administrator
National Oceanic and Atmospheric Administration
Washington, DC 20230

Dear Admiral Lautenbacher:

On May 1, 2008, your agency wrote to Secretary of Transportation Mary Peters and to me requesting the views of the U.S. Department of Transportation and the Federal Highway Administration (FHWA) on an administrative appeal pending before the Secretary of Commerce pursuant to the Coastal Zone Management Act (CZMA). I have been asked to reply to your requests.

The FHWA is pleased to offer our views on the consistency appeal by the Foothill/Eastern Transportation Corridor Agency (TCA) regarding the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP, also known as Foothill-South), a proposed toll road project in southern Orange County and northern San Diego County, California. As requested, we are focusing on the two substantive grounds for an override of the determination of the California Coastal Commission (CCC). To provide necessary context, we begin by providing information regarding FHWA's role in this project and relevant information relating to the decision-making process to date. For the reasons described below, we recommend that the Secretary of Commerce (Secretary) overturn the CCC determination that certain alternatives are not consistent with the objectives of the CZMA.

FHWA's Role in Transportation Project Development

The FHWA must approve new access points to the Dwight D. Eisenhower System of Interstate and Defense Highways (23 U.S.C. §111). Because the proposed SOCTIIP toll road would connect to Interstate 5 (I-5) near San Clemente, California, and may involve FHWA funding assistance, the project is subject to Federal requirements, including the National Environmental Policy Act (NEPA), 42 U.S.C. §4332 *et seq.* The FHWA is the lead Federal agency for the NEPA environmental impact statement (EIS) being prepared for the project and for work undertaken to comply with other Federal environmental laws. The FHWA issued a draft EIS (DEIS) in May 2004. Based on comments received from agencies and the public and further analysis, the FHWA (with the assistance of the California Department of Transportation [Caltrans] and TCA) continues to undertake studies necessary to issue a final EIS.

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Under the Federal-aid Highway Program, State and local project sponsors select projects to construct with Federal assistance (23 U.S.C. §145). The FHWA's role is to encourage prudent transportation planning and decision-making and to ensure that Federal-aid highway projects comply with all applicable laws and regulations. As part of the NEPA analysis, the FHWA must consider a proposed project within a regional and statewide transportation planning context under Federal law (23 U.S.C. §134 and §135; 23 CFR Part 450). This includes regional air quality improvement and financial constraint issues. The FHWA also has an independent statutory responsibility to ensure that project decisions are made in the best overall public interest, taking into account a broad set of social, environmental, and economic considerations, in addition to meeting the needs for safe and efficient transportation (23 U.S.C. §109(h)). By regulation we have established that the NEPA process is the mechanism for arriving at these public interest decisions (23 CFR Part 771.105). The same regulation provides that the NEPA process also assures compliance with other Federal environmental requirements, such as the CZMA and Section 404 of the Clean Water Act (23 CFR Part 771.105; 23 CFR Part 771.133).

SOCTIIP Background and the NEPA Review Process

FHWA has a particular interest in this project because Southern California faces some of the worst traffic congestion and air quality in the nation and the I-5 corridor is one of the Nation's most important transportation corridors for the movement of freight and passenger vehicles.

Congestion

A recent report ranked the Los Angeles area first and the San Diego area 13th in the Nation for travel time delay (2007 Annual Urban Mobility Report, Texas Transportation Institute). In 2006, Orange and San Diego counties alone accounted for 24 percent of all daily vehicle-hours of delay and 28 percent of all congested miles on California urban freeways (2006 State Highway Congestion Monitoring Program, Caltrans). Moreover, between 1999 and 2006, vehicle miles traveled in Orange County increased 13 percent and in San Diego County 11 percent (2006 Annual Average Daily Traffic, Caltrans). This congestion delay cost approximately \$710 per traveler annually in 2005 (2007 Annual Urban Mobility Report, Texas Transportation Institute).

I-5 is a critical Interstate route connecting the largest port facilities for goods imported to the U.S. (Los Angeles/Long Beach) to east-west Interstates to supply goods by truck throughout the Nation. On average, over 10,000 trucks use I-5 at the San Diego-Orange County line on a daily basis (2006 Annual Average Daily Truck Traffic on the California State Highway System, Caltrans). If nothing is done to alleviate traffic conditions in the area the situation will continue to deteriorate, with average daily traffic volumes increasing by up to 30 percent by 2025.

In September 2007, the U.S Department of Transportation selected I-5 as one of six Interstate routes nationwide to participate in a new Federal initiative to develop multi-state corridors to help reduce congestion. This Federal designation as a Corridor of the Future recognizes the importance to the Nation of the entire I-5 corridor from Mexico to Canada, and focuses attention and resources on ensuring the reliability of the corridor as a nationally significant element of our transportation system.

Air Quality

Based on its non-attainment status under the Clean Air Act, this region has some of the worst air quality in the U.S. The Los Angeles-South Coast Air Basin is designated as nonattainment for PM-2.5, PM-10, and the 8-hour ozone standards. The SOCTIIP project was included in the State Air Quality Implementation Plan for the South Coast Air Basin as a transportation control measure (TCM) to provide emissions reductions to help the region in achieving its air quality goals. As such, the Clean Air Act requires TCMs to be implemented on schedule. If a TCM such as SOCTIIP is delayed or not implemented, a replacement TCM with equivalent or higher emissions reductions must be substituted for the existing TCM.

Project Need, Purpose, and Alternatives

In 1996, the FHWA, Caltrans, and TCA, along with the U.S. Environmental Protection Agency (EPA), the U.S. Fish & Wildlife Service (USFWS), and the U.S. Army Corps of Engineers (USACE), formed a group known as “the Collaborative” to jointly address environmental analysis for the proposed project for both NEPA and Section 404 of the Clean Water Act (33 U.S.C. §1344). The Department of Navy, Marine Corps Base Camp Pendleton, also participated in the Collaborative process and is a cooperating agency for purposes of NEPA. The National Marine Fisheries Service participated in this process to a more limited extent.

In 1999, the members of the Collaborative agreed to a statement of the need and purpose for the SOCTIIP that stated in pertinent part:

The purpose of the SOCTIIP is to provide improvements to the transportation infrastructure system that would help alleviate future traffic congestion and accommodate the need for mobility, access, goods movement and future traffic demands on I-5 and the arterial network in the study area.

The Collaborative participated in the development of the project alternatives to be evaluated based on their ability to meet this need and purpose and their environmental impacts. The FHWA, Caltrans, TCA, and the other Collaborative agencies studied a total of 43 alternate routes, including 2 different “No Build” scenarios and 3 non-toll alternatives. All 43 were analyzed to the same level of detail, thereby enabling the Collaborative agencies to make an “apples-to-apples” comparison for purposes of narrowing the range of alternatives to be studied in further detail in the DEIS. The EPA, USACE, and USFWS studied the environmental impacts of the alternatives pursuant to their independent statutory authorities under the Clean Water Act, the Clean Air Act, and the Endangered Species Act (ESA). After this nearly 3-year screening process (from November 2000 to August 2003), a total of 10 of these alternatives were carried forward for more detailed analysis in the DEIS: 6 toll corridor alternatives; 2 “non-corridor” alternatives (i.e., improvements to I-5); and 2 different no-build scenarios. TCA has identified one of the toll road corridors (A7C-FEC-M) as its locally preferred alternative.

The additional detailed analysis undertaken of the 10 alternatives carried forward into the 2004 DEIS showed that the two no-build scenarios would fail to meet the need and purpose of the project. In addition, the analysis demonstrated that, with the exception of the Arterial Improvements Only (AIO) alternative, all build alternatives would encroach into coastal areas, a

result of their need to connect to or expand I-5. Those that would connect to I-5 at the western end of the project area were also shown to have other deficiencies. For example, the Central Corridor alignment would involve very high construction costs, cause serious operational problems, impacts to important aquatic resources, and serious community disruption. The analysis also indicated that a variation on the Central Corridor, the A7C-ALPV alignment, would likewise cause serious environmental impacts and community disruption. The AIO alternative, which would not encroach into coastal areas, would be located just west of the Central Corridor and the A7C-ALPV alignment. The NEPA analysis to date has shown that this alternative would cause substantial community disruption along with other social and economic impacts, and also involve very high construction costs. The AIO alternative would also suffer from serious logistical and technical constraints, which would limit its effectiveness in meeting the need and purpose of the project.

One of the alternatives the Collaborative evaluated in the 2004 DEIS was a non-toll alternative to improve I-5 and related roads: the “Arterial Improvements Plus HOV and Spot Mixed-Flow Lanes on I-5 Alternative” (AIP). The agencies’ analysis to date has found the AIP alternative would cost far more than the TCA’s locally preferred alternative (approximately \$2.8 billion compared to the current estimate of \$875 million for TCA’s locally preferred alternative); have a higher cost per hour of travel time saved; perform well in terms of traffic operating in congestion on I-5; perform moderately well for hours of travel time savings; and perform well in impacts to riparian ecosystems, coastal sage scrub, and impacts to the federally listed Coastal California Gnatcatcher. However, the AIP alternative would result in the displacement of up to 898 residences, compared to no residential displacements for TCA’s locally preferred alternative. The AIP alternative also would impact the coastal area.

Over the past year, an organization known as Smart Mobility, Inc. (SMI), has submitted to FHWA three versions of a study intending to show that a “refined” AIP alternative would result in far fewer displacements than the alternative analyzed in the DEIS. The FHWA’s, Caltrans’, and TCA’s independent reviews of the SMI submissions indicate that while such a “refined” AIP alternative could potentially reduce some of the adverse impacts shown by the AIP alternative analysis undertaken by the Collaborative, no substantial changes would be expected once the SMI alternative was itself “refined” to include minimum acceptable road design and safety standards. Many of SMI’s recommendations were 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. In addition, the FHWA, Caltrans, and TCA analyses of the SMI report found that it did not take other important information into account, such as existing and future traffic volumes for arterial roads and interchange capacity. It also overlooked the topography challenges of the project area in locating and accommodating interchanges, detention basins and mainline widening. SMI’s “refined” alternative would also encroach on the coastal zone, just as the originally proposed AIP alternative does. FHWA is currently conducting a peer review of the SMI refined AIP alternative to ensure that our evaluation of this alternative appropriately considered all relevant design and environmental factors.

At this time, there is neither funding nor a project sponsor for any SOCTIIP alternative on I-5. In August 2004, the EPA and USACE issued a joint memorandum finding the I-5 alternatives not practicable within the meaning of the two agencies’ Clean Water Act §404(b)(1) Guidelines, because they were “unavailable” to TCA (40 CFR Part 230). In November 2005 both the EPA and USACE made preliminary findings that TCA’s locally preferred alternative represented the

Least Environmentally Damaging Practicable Alternative (LEDPA) within the meaning of the Clean Water Act.

Turning to the other alternatives studied in the DEIS, three of them would connect to I-5 within San Onofre State Beach Park (SOSB), including the TCA's preferred alternative. All three would traverse land currently leased from the Department of Navy, Marine Corps Base Camp Pendleton (Camp Pendleton). The SOSB lease reserved to the Department of Navy the right to grant future rights-of-way across the leasehold. As discussed more fully below, Congress has enacted legislation authorizing the Department of the Navy to grant an easement to TCA over a parcel of real property at Camp Pendleton for construction, operation, and maintenance of a restricted access highway, and also exempted any such future highway from the requirements of "Section 4(f)," an important Department of Transportation statute, 49 U.S.C. §303.

With all of this in mind, the Collaborative agencies are continuing the NEPA review of project impacts and balancing the many considerations necessary to reach an informed Federal project decision. This balancing includes fully evaluating options for avoidance, minimization, and mitigation of adverse impacts relative to the beneficial outcomes of the proposed project.

As part of this continuing review process, the environmental impacts of TCA's preferred alternative as well as the other alternatives were reviewed by the USFWS and the USACE. Although their review covered many of the same environmental concerns, these two agencies reached somewhat different conclusions under Federal law than the conclusions reached by CCC. On April 30, 2008, the USFWS issued a Biological Opinion (BO) for the project pursuant to § 7 of the ESA (16 U.S.C. §§1531-1544). Although the USFWS found that some of the other alternatives might have less impact, it nonetheless concluded that TCA's preferred alternative is not likely to jeopardize the continued existence of any species protected by the ESA. In developing its BO, the USFWS took into account a number of conservation strategies committed to by TCA that would reduce the impacts on protected species. As indicated above, the USACE preliminarily determined that the TCA preferred alternative would be the LEDPA under the Clean Water Act.

Congressional Action

Congress clearly recognized and addressed the difficult trade-offs that would be required in advancing this project. In 1991 U.S. Department of Transportation (DOT) legislation, Congress exempted the SOCTIIP from a law (referred to as "Section 4(f)," 49 U.S.C. §303) that provides protection to parklands, recreational areas, refuges, and historic sites when determining proposed transportation project locations. The exemption covered, *inter alia*, any public park, recreation area, wildlife and waterfowl refuge affected by the SOCTIIP project where the planning or acquisition documents for the parklands specifically referred to or reserved the specific location of the highway. As noted previously, this includes the proposed project area within Camp Pendleton. The purpose of this Section 4(f) exemption is stated in the legislation: "This section is adopted in recognition of unique circumstances in Orange County, California, including a comprehensive land use planning process; the joint planning of thousands of acres of parklands with the locations of the proposed highway improvement;...the use of toll financing, which will discourage excessive automobile travel; and the inclusion of a county-wide growth management element...." (Pub. L. 102-240, §1065).

Congress has also included provisions in Department of Defense authorization acts expressly permitting the Navy to grant an easement to TCA to construct, operate, and maintain a restricted access highway across Camp Pendleton and exempting any future approval by the Secretary of Transportation of the use by SOCTIIP of "parkland" within Camp Pendleton from the provisions of Section 4(f). (Pub. L. 105-261, §2851, as amended).

The FHWA believes the Secretary must give these congressional actions substantial consideration in determining whether to override the CCC determination. First, the CCC did not fully consider this legislation in its consistency review of the SOCTIIP project, despite the significant effect of the legislation on a determination of which alternatives can be found consistent with the Coastal Zone Management Program. Second, the legislation is a necessary part of a determination as to whether land within the limits of Camp Pendleton is part of the coastal zone within the meaning of 16 U.S.C. §1453(1), and whether the CCC may consider impacts on those lands as a part of its consistency determination under 16 U.S.C. §1456.¹

Consistency with the Objectives of the Coastal Zone Management Act

As lead Federal agency under NEPA, the FHWA has endeavored to integrate consistency with the objectives of the CZMA into the decision-making process utilized for the project. We maintain that the record substantiates that the project satisfies the three-part national interest test articulated in your letter:

The Proposed Activity Furthers the National Interest as Articulated in Section 302 and Section 303 of the CZMA

Section 302(a) recognizes that effective management and development of the coastal zone are component parts of the national interest under the CZMA. Similarly, the declaration of national policy in section 303(1) includes development of the coastal zone along with other objectives such as protection and preservation. Section 303(2)(D) speaks to the need for an orderly process for siting major facilities, including transportation facilities, with priority consideration given to coastal dependent uses.

As described above, the existing and future transportation needs affecting the I-5 corridor through the San Diego and Los Angeles regions make it imperative that steps be taken to improve the capacity and operations of the transportation system in those areas. In developing transportation plans at the metropolitan and statewide levels, the regions and the State have identified the importance of improvements in this corridor. The FHWA has also designated this corridor as having the highest national importance to interstate travel and international trade, affecting freight flows and passenger travel essential to our economy and quality of life.

The national interest in orderly processes for siting major transportation facilities is supported by the collaborative NEPA process described above. Governmental agencies and the public have had extensive opportunities to provide input and to help shape the project alternatives. The process has been conducted in a well-established manner defined in Federal law and regulation. The FHWA, as lead Federal agency, has guided this process, with review by Federal agencies

¹ Cf., *Manchester Pacific Gateway v. California Coastal Comm'n.*, No. 07cv1099, 2008 U.S. District LEXIS 34703 (S.D. Cal. April 25, 2008).

with independent statutory responsibilities to evaluate the environmental impacts of the project. A critical element of the review process was to work with the agencies to identify measures to minimize and mitigate the adverse coastal effects of the project. These measures are reflected in commitments by TCA and were incorporated into the decisions of the Collaborative agencies.

The National Interest Furthered by the Proposed Activity Outweighs the Activity's Adverse Coastal Effects

Given the national interest in a safe and efficient transportation system outlined above, the critical importance of Southern California's transportation viability and air quality improvement, the orderly process undertaken for this project, and the commitment to minimize and mitigate adverse effects, we believe that the national interest outweighs the activity's adverse coastal effects.

In cooperating to implement an orderly process for siting this new transportation facility, FHWA and the Collaborative agencies recognized the possible effects of the project on the coastal zone and have worked to minimize and mitigate these effects. We are not yet at the end of the review process. Continuing collaboration will allow us to further minimize and mitigate adverse coastal effects.

No Reasonable Alternative Is Available That Would Permit the Proposed Activity to be Conducted in a Manner Consistent with the Enforceable Policies of the CCC's Coastal Zone Management Program.

All project build alternatives, except the AIO alternative,² adversely affect the coastal zone. In its decision, the CCC finds that with additional design and mitigation work some alternatives could be consistent with the CZMA, while others, including TCA's preferred alternative, are not consistent. However, during the alternatives analysis conducted by FHWA and the Collaborative agencies (described more fully above), the alternatives cited by the CCC as potentially consistent were found by the Federal agencies to be impracticable due to unreasonably high costs and/or extraordinarily high community impacts. Furthermore, by enacting the SOCTIIP-related laws described above, Congress has implicitly determined that alternatives found unacceptable to CCC are indeed acceptable.

Funding is currently available for some alternatives but not for others. As discussed previously, the EPA and USACE determined that funding is not available for the I-5 alternatives and that the I-5 alternatives are unavailable to TCA. We agree.

A number of Federal, State, and local statutes affect project decision-making. All of these factors play into what alternatives are reasonably available to be conducted in a manner that is consistent with the enforceable policies of the CCC's coastal zone management program. We believe that as lead agency with broadest statutory authority with respect to the proposed activity, FHWA's view on the reasonableness and viability of alternatives should be given significant weight. Although the NEPA process is not yet complete, we are optimistic that further collaboration with the CCC and others could lead us to an appropriate alternative.

² See p. 4, above, for a discussion of problems associated with the AIO alternative.

National Security Interest

While SOCTIIP was not fundamentally conceived as a national security undertaking, that does not mean it would not have substantial national security benefits. Since the terrorist attacks of September 11, 2001, the FHWA has begun to take a new look at how our national system of highways should operate in times of emergency. As a result, we are beginning to develop more sophisticated concepts of system redundancy and resiliency that can overcome the constraints imposed by current infrastructure limitations. The goal is to have a highway network able to accommodate temporary reconfiguration and rerouting to address emergency situations. For example, following the 2007 collapse of the I-35W Bridge in Minnesota, we cooperated with the Minnesota Department of Transportation to temporarily upgrade a non-Interstate highway to a freeway to serve as a detour route to accommodate traffic that would normally have used I-35W in Minneapolis.

Strategies such as this require the existence of a suitably robust network of alternative routes to allow for the short-term or long-term rerouting of traffic. Such a system is grossly lacking in southern Orange County. This condition subjects the region surrounding the I-5 corridor to considerable risks in the event that I-5 is unable to function for any reason. Among the national security risks are those associated with Department of Defense transportation needs and risks associated with civil defense and homeland security. For example, evacuation plans for the San Onofre Nuclear Generating Station rely heavily on I-5. This project would offer another major evacuation route. The benefits derived would impact both defense-related security and economic and commercial security through the alternative route.

Less obvious are the national security risks associated with interruptions to economic activities critical to the Nation. As mentioned earlier, I-5 is a major corridor of national significance and the severe congestion in the Southern California region makes it the area with the least ability to accommodate even temporary losses in highway capacity.

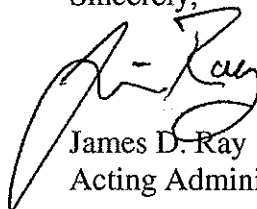
Conclusion

Since 1993, the FHWA has served as lead Federal agency in the SOCTIIP NEPA process. We have coordinated, collaborated, and sought input in determining the transportation need, and continue to collect data, conduct analysis, and evaluate mitigation options in determining the best transportation decision for this increasingly congested region. The FHWA is committed to meeting the Nation's transportation needs with solutions which satisfy our statutory mandate to make project decisions that are in the best overall public interest, taking into account the need for safe and efficient highways and a broad range of social, economic, and environmental factors. We will continue to work with our partners to bring transportation and air quality relief to the people of Orange and San Diego counties while respecting the remarkable environment in which they live. Our nation deserves no less.

We therefore respectfully recommend that the Secretary override the CCC CZMA consistency objection and allow continuing collaboration under the auspices of the NEPA process to lead us to a workable solution, which we believe is close at hand and would be consistent with

Congressional intent. Thank you for the opportunity to comment on this matter. If you have any questions or require additional information, please do not hesitate to contact Carol Braegelmann at (202) 366-1701 or Brett Gainer at (916) 498-5891.

Sincerely,

A handwritten signature in black ink, appearing to read "James D. Ray". The signature is stylized with a large, sweeping initial "J" and "R".

James D. Ray
Acting Administrator

cc: Mr. Thomas Street
Attorney-Advisor