



May 28, 2008

Via E-mail: [gcos.comments@noaa.gov](mailto:gcos.comments@noaa.gov) and Hand Delivery

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

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

Dear Mr. Street,

The Foothill/Eastern Transportation Corridor Agency (“TCA”) has appealed an exhaustively researched, carefully considered determination by the California Coastal Commission (“Commission”) that TCA’s proposed Foothill-South toll road project (the “Toll Road” or the “Project”) is fundamentally and fatally inconsistent with California’s approved coastal management program under the Coastal Zone Management Act (“CZMA”).

The proposed Toll Road is the greatest threat facing the California coast today. As Peter Douglas, the Commission’s Executive Director, stated at the Commission’s hearing in this matter, the devastating impact of this project on California’s coast cannot be overstated:

The fact is that [the Toll Road] is unmitigable under the law, that it so clearly fails to meet so many Coastal Act policies, and that it raises profound questions about our environmental and social future in coastal California, and the glaring negative precedent it would set, by among other things, destroying a heavily used state

park . . . . *Since passage of the California Coastal Act in 1976, I know of no other coastal development project so demonstrably inconsistent with the law . . . . This toll road [project] is precisely the kind of project the Coastal Act was intended to prevent.*<sup>1</sup>

As shown in the Commission's briefing in this proceeding, and as further elaborated herein, TCA's appeal is without legal or factual merit. Accordingly, the undersigned organizations –Audubon California, California Coastal Protection Network, California State Parks Foundation, Defenders of Wildlife, Endangered Habitats League, Laguna Greenbelt, Inc., Natural Resources Defense Council, Orange County Coastkeeper, Sea and Sage Audubon Society, Sierra Club, Surfrider Foundation, and WiLDCOAST/COSTASALVAjE – respectfully request that the Secretary of Commerce deny TCA's appeal and uphold the Commission's objection to the Toll Road project.<sup>2</sup>

Despite TCA's repeated acknowledgement in its environmental documents that the Toll Road would be subject to CZMA consistency review, and despite the unprecedented investment of resources on the part of the Commission and the public to review TCA's consistency certification submittal, TCA now argues that the entire review process was a mistake and should be disregarded on various procedural grounds, including the astonishing claim that the Toll Road is not within the coastal zone. These arguments are completely unsupported by the applicable law, which demonstrates that the Commission properly exercised its jurisdiction under the CZMA..

TCA's substantive arguments as to why the Secretary should override the Commission's objection fare no better. TCA has failed to carry its burden of proving that the Toll Road meets the threshold test of substantially and significantly advancing a relevant national interest, let alone that such interest outweighs the Toll Road's adverse impacts on coastal habitats, endangered species, irreplaceable cultural and recreational resources, water quality, and wetlands. Moreover, as the Commission properly determined, there are specific and reasonable alternatives available that could achieve the primary purpose of the project without permanently sacrificing these irreplaceable coastal values. TCA's separate and cursory argument based on national security is likewise completely baseless. The only real threat to national security here – permanent encroachment on Camp Pendleton and unmitigable impairment of its military mission – would come from building the Toll Road, not from denying this appeal.

TCA's appeal thus satisfies neither of the two statutory bases for a determination in its favor. The Toll Road is inconsistent with the CZMA and would have a detrimental impact upon national security. Accordingly, the appeal must be denied.

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<sup>1</sup> TCA App. 3-7 at 62-63 (PDF pp. 69-70) (emphasis added).

<sup>2</sup> The undersigned organizations request that this letter and all exhibits hereto, including the exhibits hand-delivered under separate cover to the offices of NOAA General Counsel by courier, be made part of the decision record in this proceeding. We also understand that the Secretary has ordered a public hearing in this matter, and that the public comment period will be reopened upon publication of the Federal Register notice for the hearing. 15 C.F.R. § 930.128(d). We reserve the right to supplement these comments during the re-opened public comment period.

## **I. The Toll Road Poses the Single Greatest Threat to California's Coast Today.**

The Foothill-South Toll Road was initially proposed in 1981 as an option for alleviating existing and anticipated congestion on Interstate 5 ("I-5") in southern Orange County. It became one of the options studied as part of the South Orange County Transportation Infrastructure Improvement Project ("SOCTIIP"). In 2004, TCA and the Federal Highway Administration prepared a Draft Environmental Impact Statement/Subsequent Environmental Impact Report ("DEIS/SEIR") for the SOCTIIP project. However, without awaiting completion of the final SOCTIIP EIS, TCA forged ahead with a Final Subsequent Environmental Impact Report ("FEIR") and approved its "preferred alternative" in early 2006.<sup>3</sup> The legality of TCA's approval of the Toll Road is being challenged in pending litigation, including two lawsuits filed by the California Attorney General.<sup>4</sup>

As approved by TCA, the Toll Road would involve the construction of a six-lane highway<sup>5</sup> through sixteen miles of largely undeveloped lands in one of the most environmentally sensitive areas in California. The road would run through lands that are currently set aside for open space, recreational, and preservation purposes, including four miles of San Onofre State Beach ("San Onofre") as well as the inland Donna O'Neill Land Conservancy.

San Onofre, created in 1971, is one of California's most popular state parks. It receives over 2.4 million visitors per year, provides habitat for 11 endangered or threatened species, and offers low-cost recreational opportunities, including camping and surfing, for

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<sup>3</sup> See generally Appellant's Appendix ("TCA App.") at binder 18, tabs 36-37. Citations to TCA's Appendix hereafter will use the following form, which is generally the form used by the parties: "TCA App. [binder no.]:[tab no.]," followed by the page number of the document cited, and a parenthetical containing the page number within the PDF document that contains the document cited (e.g., "TCA App. 1-4(L) (PDF pp. 10-54)"). TCA's decision not to provide a complete index of the materials submitted to the Commission makes it difficult to ascertain whether certain documents submitted to the Commission, especially by project opponents, are included in the Appendix. Accordingly, we attach as exhibits certain letters and expert reports that are not indexed in the Appendix.

<sup>4</sup> The first of these, brought on behalf of the People of California and the California State Parks Commission, is one of two lawsuits contending that TCA violated the California Environmental Quality Act ("CEQA") in approving the project. *People ex rel. Attorney General Bill Lockyer and State Park and Recreation Commission v. Foothill/Eastern Transportation Corridor Agency et al.*, No. 06-GIN051371 (S.D. Super. Ct. filed March 23, 2006). The second was filed on behalf of the Native American Heritage Commission – at the request of Acjachemen people – for violation of laws protecting Native American resources. *Native American Heritage Commission v. Foothill/Eastern Transportation Corridor Agency et al.*, No. 06-GIN051370 (S.D. Super. Ct. filed March 23, 2006). These lawsuits spotlight TCA's failure to adequately disclose to the public the environmental and cultural impacts of the Project, including impacts to a range of coastal resources. The Attorney General's CEQA lawsuit, along with a consolidated CEQA case brought by environmental organizations, have been stayed by agreement of all parties pending the outcome of this appeal proceeding.

<sup>5</sup> TCA repeatedly mischaracterized the project in the proceedings below as a 4-lane highway. The "initial" configuration of the facility through San Onofre will have four lanes operational, but the "ultimate" facility will expand to six lanes. See TCA App. 20/21-49 at 2-3 (PDF p. 57). Indeed, TCA's traffic analysis for the Toll Road assumed that the full six lanes would be operational along the entire highway corridor. See TCA App. 41/42-65 at 1-12 (PDF p. 122). TCA's projected Toll Road traffic would exceed the maximum capacity of a four lane facility. See Smart Mobility, Inc., *Capacity Analysis for the Proposed Foothill-South Toll Road* (Jan. 28, 2008) (attached hereto as Exhibit 43).

working-class families. In addition, certain recreational facilities in the park, including the San Mateo Campground, were developed as a condition of the Commission's coastal development permit for the San Onofre Nuclear Generating Station ("SONGS") project to offset the significant loss of coastal access.

TCA's proposal to build the Toll Road through San Onofre is an unprecedented assault on California's state park system. If built, the Toll Road would represent *the first time in California that state park lands were taken by a local governmental entity for a major infrastructure project.*

But the Toll Road would do more than just devastate a coastal state park. The total environmental impact of the Toll Road on the coastal zone, San Onofre, and the surrounding landscape would be immense. Among other things, the Toll Road would:

- Destroy, degrade, or fragment important habitat for eleven threatened or endangered species found within the park or the surrounding San Mateo Creek watershed.
- Irreparably damage sites sacred to the Acjachemen/Juaneño people, including a village that is listed in the state Sacred Lands file, used for ceremonies and reburials, and eligible for inclusion on the National Register of Historic Places.
- Threaten the water quality of the watershed and the coastal waters to which it drains, including the world-class surfing beach known as Trestles.
- Cause the permanent loss of coastal wetlands.
- Degrade or permanently destroy more than 50 acres of undisputed ESHAs in and around the coastal zone.
- Ruin San Onofre's most popular low-cost visitor-serving recreational area – the San Mateo Campground. The campground is a critically important coastal recreational resource that *the Commission itself* required be created in the 1970s to offset the coastal impacts of the San Onofre Nuclear Generating Station.

There is simply no way to mitigate this kind of harm, no way to balance away the extent of the Project's destruction.

TCA seeks to justify its project by denying there are feasible alternatives capable of addressing the Toll Road's central purpose – i.e., relieving traffic congestion on Interstate 5 ("I-5") and in southern Orange County. Yet TCA has failed to come forward with evidence demonstrating that other alternatives are infeasible. To take just one example, TCA's own data show that a widening of the existing I-5 and selected adjacent arterials (the "AIP" alternative) would provide congestion relief similar to the Toll Road. But this alternative was never seriously pursued by TCA. Instead, the agency proposed a footprint for the alternative that was designed to fail: right-of-way, interchanges and detention basins were placed and designed to

*maximize* residential and business displacements, which TCA has used as the sole basis for dismissing this alternative ever since. For these conclusions, TCA relied heavily on standards and opinions of the California Department of Transportation (“Caltrans”). However, as discussed in this letter, Caltrans contractually obligated itself to support the Toll Road 15 years ago – and thus cannot be considered an objective source of information about the feasibility of alternatives.

The overwhelming evidence shows that, with basic modifications to the AIP alternative using standard concepts of urban-context highway design, the vast majority of the purported displacements can be avoided. TCA has never provided a single document -- no report, no study, no analysis -- evidencing any attempt to make such modifications. Instead, TCA has directed its efforts at criticizing the studies showing that alternative designs do in fact exist. These criticisms have been addressed in updated studies that have been reviewed by some of the best and most experienced highway engineers in the nation, and the conclusion remains the same: the I-5 can be fixed without the massive displacements alleged by TCA. There is simply no need to build a toll road through San Onofre State Beach.

TCA’s attempt to characterize this project as necessary for national security -- a claim TCA never made for the project until now -- is beyond disingenuous. In fact, the Navy’s stated preference is that the road not be built in this location at all due to the project’s serious and detrimental encroachment impacts. In a letter that TCA failed to include in its Appendix, General J. L. Jones, Commandant of the Marine Corps, stated as follows:

***Frankly, my preference is that the proposed toll road not be constructed on or near Camp Pendleton.*** If constructed on Camp Pendleton, the Marine Corps loses land needed for training to ensure readiness. If constructed near Camp Pendleton, the road facilitates increased urbanization adjacent to the base, which in turn will lead to noise complaints from new residents. ***This construction is one more encroachment venture that will hinder our ability to prepare for war.***<sup>6</sup>

TCA completely fails to acknowledge these impacts in its briefing here, despite having concluded in its own environmental review of the Toll Road that the project’s effect on Camp Pendleton would be significant, adverse, and largely unmitigable.

In light of the Toll Road’s numerous, irreconcilable conflicts with the California Coastal Act (the State’s coastal management program under the CZMA), the Commission objected to TCA’s consistency certification for the Toll Road.<sup>7</sup> As shown in detail below, the objection was entirely proper, and no basis exists in the CZMA for an override.

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<sup>6</sup> Gen. J.L. Jones, Commandant, U.S. Marine Corps, Letter to Christine Todd Whitman, Environmental Protection Agency (Feb. 9, 2002) at 2 (emphasis added), (attached as Exhibit 1).

<sup>7</sup> Several of the undersigned organizations submitted detailed comments to the Commission concerning the Toll Road’s inconsistency with the California Coastal Act. Those letters, and the exhibits and citations referenced therein, are incorporated by reference as if set forth fully in this letter. The text of these letters can be found at TCA App. 2-5(D) (PDF pp. 32-56) and 2-6(E).

**II. As a California Public Agency, TCA Must Comply with the California Coastal Act by Applying For and Obtaining a Coastal Development Permit from the Commission, Separate and Apart from CZMA Compliance.**

**A. The California Coastal Act Provides a State-Level Mechanism for Resolving Any Dispute Between TCA and the Commission Regarding Compliance with California's Coastal Management Program.**

In its February 28, 2008 briefing order in this matter, the Assistant General Counsel for NOAA ordered TCA to “address whether a dispute between two components of the same state properly forms the basis of an appeal to the Secretary under the CZMA, and what, if any, state-level mechanisms exist to mediate and resolve disputes that arise between California public agencies regarding compliance with California’s coastal management program.”

TCA responded to this question by asserting that “California law does not provide any state-level mechanism that might serve to mediate and resolve the instant dispute.” TCA’s Principal Brief (“TCA Br.”) at 10. TCA is incorrect. There is a state-level mechanism for resolving this dispute, namely the coastal development permit process under the California Coastal Act.

TCA is a local public agency, composed of representatives of Orange County and several Orange County cities, operating pursuant to a specific grant of authority by the California Legislature. *See* Cal. Gov. Code § 66484.3. As a public agency, TCA has an independent and binding duty to comply with the California Coastal Act. Cal. Pub. Res. Code §§ 30003, 30118. Like all public agencies seeking to develop in the coastal zone, TCA must apply for and obtain a coastal development permit from the Commission for the Toll Road project. Cal. Pub. Res. Code § 30600(a). The Coastal Act thus provides a comprehensive “state-level mechanism” for adjudicating and resolving any question as to whether the Toll Road is consistent with California’s coastal management program. *See* Cal. Pub. Res. Code §§ 30620-30627 (establishing application, hearing, and reconsideration procedures). TCA has not yet attempted to avail itself of this process.

TCA’s observation that the Coastal Act does not provide a process by which the Governor or other government officials who support a project can override a decision by Commission (TCA Br. at 10) misses the point entirely. The Coastal Act specifically provides that, to “minimize duplication and conflicts among existing state agencies,” no other state agency may exercise any powers or carry out any duties under the Coastal Act absent specific authorization or an agreement with the Commission. Cal. Pub. Res. Code § 30400. The California Legislature thus has made clear that the Commission – not the Governor or other state officials – is in charge of Coastal Act compliance. The “dispute” at issue is between TCA and the Commission. The Coastal Act spells out exactly how this dispute must be resolved: TCA must seek and obtain a coastal development permit from the Commission.

In this light, the Commission is correct to suggest in its briefing that the Secretary cannot grant TCA the relief it seeks here: authority to construct the Toll Road in its preferred location. The substantive standards of the Coastal Act that govern consistency review are the

same substantive standards that would govern review of any coastal development permit. See Cal. Pub. Res. Code §§ 30200 *et seq.* In objecting to TCA's consistency certification, the Commission has already determined that the Toll Road is fundamentally inconsistent with a number of enforceable Coastal Act policies. In other words, the Toll Road is not a legally feasible alternative under California law, and TCA cannot construct it in the proposed location even if it were consistent with the CZMA.

**B. Congress Has Clarified that the Toll Road Must Comply with California Law.**

Throughout its briefing, TCA relies heavily on an act of Congress authorizing the Secretary of the Navy to grant an easement across Camp Pendleton to accommodate the Toll Road subject to certain limitations. That statute – which is actually a limit on, not an expansion of, the Navy's existing authority to grant easements -- was amended this year to remove any doubt that the Toll Road must fully comply with California law.

The Strom Thurmond National Defense Authorization Act for 1999 placed certain limitations on the authority of the Secretary of the Navy to convey an easement through Camp Pendleton “to permit the recipient of the easement to construct, operate, and maintain a restricted access highway.” Pub. L. No. 105-261, § 2851(a), 112 Stat. 1920, 2219 (Oct. 17, 1998).<sup>8</sup> In 2002, language was added to state that the Navy could grant an easement under the statute “notwithstanding any provision of State law to the contrary.” Pub. L. No. 107-107, § 2867, 115 Stat. 1012, 1334 (Dec. 28, 2001). But this language was repealed earlier this year amid suggestions by TCA that the statute exempted the Toll Road from state law requirements. Pub. L. No. 108-110, § 2841, 112 Stat. 3, 552-53 (Jan. 28, 2008).

Congress has thus made absolutely clear that the Toll Road project must fully comply with California law. *See* H.R. Rep. No. 110-477, at 1251 (2008) (explaining that purpose of amendment was to “remove language that limited the effect of State law with respect to this road.”). This includes compliance with the California Coastal Act and its coastal development permit requirements. As discussed above, the Toll Road has been found by the Commission to be inconsistent with the Coastal Act, and therefore any coastal development permit application for the Project would have to be denied.

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<sup>8</sup> The Secretary of the Navy already has general statutory authority to grant easements, not only for roads, but for any purpose the Secretary deems advisable. *See* 10 U.S.C. § 2668(a)(9), (13). The statute in question imposes additional conditions on any grant of a roadway easement through Camp Pendleton, including limits on use of proceeds, and in no way requires or promotes the grant of such an easement. Compare 10 U.S.C. § 2668(e) (permitting in-kind consideration and discussing general uses of proceeds from easements) with Pub. L. No. 105-261, § 2851(b), (c), (e).

### **III. TCA's Jurisdictional and Procedural Arguments Lack Merit.**

#### **A. The Commission Properly Exercised its Jurisdiction to Review the Toll Road for Consistency with the CZMA.**

The Commission has jurisdiction to review the Toll Road for consistency with the State's coastal management program pursuant to the CZMA. 16 U.S.C. § 1456. Specifically, the CZMA requires that

any applicant for a Federal license or permit, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program.

16 U.S.C. § 1456(c)(3)(A).

After seeking the Commission's concurrence in its consistency certification, submitting tens of thousands of pages of materials for the Commission to review, and participating in the largest public hearing in the Commission's history, TCA now contends, incredibly, that the Commission never had any authority to make a consistency determination in the first place. TCA asserts that the Coastal Zone simply does not exist within San Onofre. TCA further asserts that, to the extent the Toll Road does lie within the coastal zone, the Commission improperly considered impacts of portions of the project outside of the coastal zone. None of these arguments has merit.

#### **1. The Toll Road Is Within the Coastal Zone as Defined by the CZMA.**

The CZMA excludes from the Coastal Zone "lands the use of which is by law subject *solely to the discretion of . . . the Federal Government*, its officers or agents." 16 U.S.C. § 1453(1) (emphasis added). This exclusion does not apply here, because the use of the land over which the Toll Road would run is not "by law subject solely to the discretion of" the federal government. To the contrary, the federal government has expressly ceded legislative jurisdiction over this land to the State of California.

#### **a. San Onofre State Beach Is Not a "Federal Enclave" and Is Not Subject "Solely" to Federal Jurisdiction.**

According to TCA, the Toll Road is outside the coastal zone as defined by the CZMA because Camp Pendleton is a "federal enclave"<sup>9</sup> subject to the exclusive legislative

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<sup>9</sup> TCA uses the term "federal enclave." However, that concept applies when determining the applicability of *state* law to federal property. Because the CZMA is federal law, the issue is not whether the property is a federal enclave, but whether it falls within the CZMA's definition of "coastal zone." In any case, the property at issue is under the jurisdiction of the State of California and is therefore neither a federal enclave nor excluded from the coastal zone.

jurisdiction of the federal government. However, the entire portion of Camp Pendleton in which the Toll Road would be located – San Onofre State Beach -- is subject to state jurisdiction. Accordingly, it is neither a federal enclave nor excluded from the coastal zone under the CZMA.

A “federal enclave” is an area in which legislative jurisdiction has been ceded to the federal government by consent of the state. *See Paul v. United States*, 371 U.S. 245, 264-65 (1963); *Taylor v. Lockheed Martin Corp.*, 78 Cal. App. 4th 472, 481-82 (2000). However, “[f]ederal jurisdiction, once properly obtained, does not necessarily persist in perpetuity. The federal government may surrender jurisdiction over state lands back to the state” through a process known as “retrocession.” *Atlantic Marine Corps Communities, LLC v. Onslow County, North Carolina*, 497 F. Supp. 2d 743, 755 (E.D.N.C. 2007). California has adopted retrocession statutes allowing the State to reacquire jurisdiction over lands formerly within a federal enclave. *See* Cal. Gov. Code § 113; Cal. Str. & Hwys. Code § 77.5. Indeed, all jurisdiction ceded to the United States by the State of California is expressly “limited by the terms of any retrocession of jurisdiction heretofore *or hereafter* granted by the United States and accepted by the State.” Cal. Gov. Code § 115 (emphasis added).

When Camp Pendleton was acquired by the federal government in the 1940s, jurisdiction over the property was ceded by California to the federal government, and it became a federal enclave. *United States v. Jenkins*, 734 F.2d 1322, 1325 & n.2 (9th Cir. 1983). However, the federal government has since offered, and California has accepted, a retrocession of jurisdiction over San Onofre and the I-5 corridor to the State of California.<sup>10</sup> The State accepted concurrent jurisdiction over San Onofre in November 1973, consistent with California Government Code section 113.<sup>11</sup> The State also assumed legislative jurisdiction over the parcels underlying I-5 in September 1974 pursuant to California Streets and Highways Code section 77.5.<sup>12</sup> These areas are, therefore, by definition no longer “federal enclaves.” More importantly, because they are no longer “solely” subject to federal jurisdiction of the federal government, they are not excluded from the coastal zone under the CZMA.

The cases cited in TCA’s briefs for the proposition that Camp Pendleton is a “federal enclave” are irrelevant, since they either pre-dated the retrocession of San Onofre or involved other portions of the base. *See California v. United States*, 235 F.2d 647, 655-56 (9th Cir. 1956); *United States v. Fallbrook Pub. Util. Dist.*, 110 F. Supp. 767, 771-72 (S.D. Cal. 1953); *United States v. Jenkins*, 734 F.2d 1322, 1324, 1325 n.2. Whatever these cases may have to say about the history of Camp Pendleton, or the enclave status that may still exist on other parts of the base, they are inapposite to San Onofre.

TCA attempts to sidestep the plain fact of retrocession with a convoluted argument as to why it does not apply to the Toll Road. According to TCA, the retrocession of jurisdiction over San Onofre was “limited . . . to the terms of the lease” between the United States and the State of California. The lease, TCA claims, reserved to the Navy the exclusive right to grant easements for roads through the park, and therefore, the easement that the Navy

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<sup>10</sup> TCA App. 1-4(L) (PDF pp. 10-54).

<sup>11</sup> *Id.* (PDF pp. 14-21).

<sup>12</sup> TCA App. 1-4(L) (PDF p. 28).

might someday grant to TCA for the Toll Road “is not part of the leasehold subject to the retrocession.” *id.* No part of this argument, however, stands up to scrutiny.

First, contrary to TCA’s contention, the retrocession of concurrent jurisdiction over San Onofre is not limited to the “terms of the lease.” The state accepted concurrent jurisdiction over San Onofre upon finding that doing so “would be in the best interest of the State in connection with the operation and administration of San Onofre Bluffs State Beach as part of the State park system.”<sup>13</sup> Nothing in the retrocession documents suggests that the state’s concurrent jurisdiction covered anything less than the entire leased area, or that the Navy’s reserved rights in the lease in any way limited the geographic scope of the state’s jurisdiction. Indeed, the only jurisdictional limitation tied to the lease is the *duration* of the retrocession.<sup>14</sup>

The Department of Parks and Recreation memoranda cited in TCA’s Reply Brief is not to the contrary. Such memoranda have no legal effect under California law, under which only the resolution adopted by the State Lands Commission gives effect to retrocession. See Cal. Gov. Code § 113(c). But in any event, the Parks Department memoranda support a broad interpretation of the scope of the retrocession.<sup>15</sup> The State of California accepted concurrent legislative jurisdiction “in connection with the operation and administration” of San Onofre as part of the State park system.<sup>16</sup> And in any event, the issue under the CZMA is not whether the State has complete control over the land, but whether it has *any* control. Here, the State’s broad concurrent jurisdiction over the entire park precludes any argument that the land is “solely” within federal control.

TCA’s next assertion -- that the lease for San Onofre reserved an exclusive and absolute right in the United States to grant future easements – is also groundless. Part I, Article 3 of the lease expressly confers on the State of California the power to use, maintain, protect, and preserve San Onofre “in accordance with good management practices as a public park and not otherwise, such use to include any incidental uses that arise out of or are related to public recreation.”<sup>17</sup> There is no limitation in the lease on the State’s land use and management authority (other than a prohibition against discrimination in the operation of park facilities).<sup>18</sup> The Parks Department has exercised its land use authority liberally, including by enacting a comprehensive “general plan” for San Onofre and by developing a number of popular improvements, including the San Mateo Campground.<sup>19</sup>

The reservation of the federal government’s right under the lease to grant future easements, moreover, is expressly limited by the State’s right under the lease to operate, maintain, and improve the park. Specifically, any future easement may be granted only “after

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<sup>13</sup> TCA App. 1-4(L) (PDF p. 24).

<sup>14</sup> *See id.* (PDF pp. 23-24).

<sup>15</sup> *See* Supplemental Appendix to Appellant’s Reply Brief (“TCA Supp. App.”) 6-51 (seeking retrocession of “State’s formal legislative jurisdiction . . . necessary for effective administration of this land as part of the State Park System”), 6-52 (identifying one example of the benefits of concurrent jurisdiction to the State).

<sup>16</sup> TCA App. 1-4(L) (PDF p. 24).

<sup>17</sup> TCA App. 76-133 (PDF p. 5).

<sup>18</sup> *Id.*

<sup>19</sup> *See generally* TCA App. 76-132.

consultation with Lessee as to location,” and even then only if it is located “so as not to unreasonably interfere with the use of Lessee’s improvements erected on the Leased Property.”<sup>20</sup> The lease did not give the United States carte blanche to grant a future easement for a road in any location whatsoever. Rather, the lease gives the State a right to use the land for park purposes and to install incidental improvements, and limits the federal government’s right to grant easements that would unreasonably interfere with these improvements. In other words, the lease allows the improvements erected in the park to take precedence over the reserved right to grant easements.

Even if an easement over retroceded property had been relevant to the question of exclusive federal control over the land, such an easement has not been granted through San Onofre and may never be. An enclave is a piece of property, acquired for specific purposes by the federal government, exclusive legislative jurisdiction over which has been ceded by consent of the state government. TCA cites no authority in support of its theory that a reserved right to grant an easement at some point in the future creates a “free-floating” federal enclave. Put simply, San Onofre is presently within the control of the State, and is therefore not excluded from the coastal zone under the CZMA.<sup>21</sup>

**b. The Recent *Manchester Pacific* Decision Is Inapposite.**

In a “Notice of Supplemental Authority,”<sup>22</sup> TCA cites an unpublished interlocutory District Court decision in *Manchester Pacific Gateway LLC v. California Coastal Commission*, 2008 U.S. Dist. LEXIS 34703, No. 07cv1099JM(RBB) (S.D. Cal. April 25, 2008) as supporting its argument that the path of the Toll Road is excluded from the coastal zone. That non-final and non-binding opinion is clearly distinguishable: the outcome in the *Manchester Pacific* ruling turned on the fact that, unlike the Toll Road, the challenged activity was a *federal* project.

The project at issue in *Manchester Pacific* involved the mere participation of private parties in a “federal project” undertaken for the “express purpose” of providing facilities for the Navy’s use. *Id.* at \*13-14. The federal project enlisted the assistance of private parties “to accomplish the federal objective to construct Navy administrative facilities,” and did not “in any way undermine the Federal Government’s exercise of sole discretion over the use of federal lands.” *Id.* at \*16-17. There was no retrocession to the State, no shared jurisdiction, no state park land. The only question is whether involvement of a private party in a federal project

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<sup>20</sup> *Id.* (PDF p. 10).

<sup>21</sup> Moreover, none of TCA’s arguments relating to the park lease apply to the substantial portion of the project within the I-5 corridor, over which California also has accepted retrocession. TCA App. 1-4(L) (PDF pp. 28-54). TCA’s statement that I-5 is “already developed as an interstate freeway” (TCA Reply at 4 n.12) is immaterial. The portion of the Toll Road within the I-5 corridor is not within exclusive federal control (indeed, it is within exclusive state control), and therefore it is not excluded from the coastal zone.

<sup>22</sup> TCA’s “Notice of Authority” is actually a late-filed supplemental reply brief consisting of several pages of argument. TCA does not attempt to explain why it could not have submitted the *Manchester Pacific* decision, which was issued a week before TCA filed its Reply brief, at a proper time. Nor does TCA attempt to explain why it attached and filed an additional exhibit from 1976 with this so-called “Notice of Authority.” For these reasons alone, TCA’s belated attempt to submit an additional brief should be rejected, and the “Notice” should be stricken from the record.

eliminated the Navy's "sole discretion" over the land for purposes of the CZMA's definition of the coastal zone, and the court held it did not.<sup>23</sup>

The Toll Road, in contrast, is not a "federal project" at all. It is a *local* project undertaken by a *local* public agency on land within the concurrent jurisdiction of the State of California that is devoted to state park use. There is simply no way to describe the Toll Road as a federal project – indeed, if it was, the Navy rather than TCA would have been responsible for determining consistency in the first instance under a different provision of the CZMA. Compare 16 U.S.C. § 1456(c)(1)(A), (C) with 16 U.S.C. § 1456(c)(3)(A). Nor can the use of San Onofre be characterized as within the "sole discretion" of the Navy. *Manchester Pacific* is easily distinguishable.<sup>24</sup>

## **2. The Commission Has Authority – and Is Required -- to Review the Coastal Impacts of the Portion of the Toll Road Located Outside the Coastal Zone.**

The Commission's jurisdictional responsibility is not limited to reviewing the impacts of the 2.2-mile portion of the Toll Road within the coastal zone. The law is absolutely clear that the Commission has the authority to consider the impacts of the portion of the Toll Road *outside* the coastal zone that will foreseeably affect resources or uses within the coastal zone. The CZMA defines the Commission's jurisdiction to include any "activity, *in or outside of the coastal zone*, affecting any land or water use or natural resource of the coastal zone . . . ." 16 U.S.C. § 1456(c)(3)(A) (emphasis added). The California Coastal Act, in turn, authorizes the Commission to "exercise any and all powers set forth" in the CZMA. Cal. Pub. Res. Code § 30330.

Federal courts have construed the term "affecting . . . the coastal zone" to include "indirect effects which may be caused by the activity and are later in time or farther removed in distance but are still reasonably foreseeable." *California ex rel. California Coastal Comm'n v. Norton*, 150 F.Supp.2d 1046, 1052 (N.D.Cal. 2001) (citation omitted). The Department of

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<sup>23</sup> In fact, the issue in the *Manchester Pacific* ruling was not whether CZMA consistency review was required – the Navy had undertaken such review in that case, which indicates the Navy at least believed the project was within the coastal zone. Rather, at issue was whether the private developer was required to obtain a coastal development permit under the California Coastal Act. See 2008 U.S. Dist. LEXIS 34703 at \*5. And the court's ruling on this issue is in direct conflict with controlling law. See, e.g., *Granite Rock v. California Coastal Commission*, 480 U.S. 572 (1986) (Commission had authority to require a coastal development permit on federal lands); *Friends of the Earth v. United States Navy*, 841 F.2d 927, 936 (9th Cir. 1988) (rejecting argument that coastal agency's permitting authority was inapplicable on federal military lands). The Commission has filed a motion for reconsideration with the district court pointing out these obvious conflicts.

<sup>24</sup> Moreover, the unpublished ruling is in no way binding precedent, much less "controlling authority" as TCA claims. An unpublished district court decision is not even binding on other district courts. See, e.g., *Threadgill v. Armstrong World Industries*, 928 F.2d 1366, 1371 & n.7(3d Cir. 1991); *Starbuck v. City and County of San Francisco*, 556 F.2d 450, 457 n.13 (9th Cir. 1977). The 1976 letter from the Department of Justice is likewise non-binding. Indeed, the letter's suggestion that all federal land is excluded from the coastal zone is not only in direct conflict with the plain language of the statute, but, as the letter itself points out, is in conflict with NOAA's own interpretation of the statute. TCA Supp. App., Tab 57 at 2.

Commerce's CZMA implementing regulations mirror this language. *See* 15 C.F.R. § 930.11(g). Accordingly, federal activities "within or outside the coastal zone" that affect coastal-zone resources must be consistent with coastal laws pursuant to CZMA. *California ex rel. California Coastal Comm'n*, 150 F. Supp. 2d at 1052; *see also Millennium Pipeline Co., L.P. v. Gutierrez*, 424 F. Supp. 2d 168, 177-78 (D.D.C. 2006).

Thus, by statute, the Commission is given a broad mandate to protect the integrity of coastal resources, whether or not the action in question actually takes place in the coastal zone. Here, it is well documented that the Toll Road as a whole – which is located both within and outside the coastal zone boundary – will have numerous significant and unmitigable indirect impacts on resources and uses in the coastal zone. There is no question that the Commission was not only authorized, but also affirmatively required by law, to consider such impacts under the CZMA.

Despite the clarity of the statute and the uniformity of decisions interpreting it, TCA nonetheless insists that the Commission lacks this authority. In its principal brief, TCA relies on *Sierra Club v. California Coastal Commission*, 35 Cal. 4th 839 (2005). *See* TCA Br. at 15-17. But nothing in *Sierra Club* purports to define or limit the consistency review jurisdiction conferred on the Commission under the CZMA. The case addressed only the Commission's permit authority under California law, and is thus irrelevant here, as correctly stated in the Commission's brief. Respondent California Coastal Commission's Principal Brief on Appeal ("Comm'n Br.") at 12-13. TCA's further suggestion that the Coastal Act does not affirmatively confer on the Commission any authority to perform consistency review under the CZMA for any coastal zone impacts of projects outside the coastal zone is simply wrong. *See* TCA Br. at 16-17. The Act designates the Commission "as the state coastal zone planning and management agency for any and all purposes," including exercising "*any and all powers*" granted under the CZMA. Cal. Pub. Res. Code § 30330 (emphasis added).

TCA also argues that the Commission failed to comply with regulations requiring identification of areas outside the coastal zone that might trigger the need for a consistency determination, and that therefore the Commission may not consider the impacts on the coastal zone of the portions of the Toll Road outside the coastal zone. *See* TCA Br. at 13-15 (citing 15 C.F.R. § 930.53), TCA Reply at 4-6 (same). But TCA ignores the guidance that it sought and received from NOAA on this very matter, and fundamentally misconstrues the plain purpose of the regulation on which it relies.

TCA and the Army Corps of Engineers sought guidance from NOAA in 1992 regarding the application of 15 C.F.R. § 930.53 to a separate toll road project that the Commission also wished to review for consistency with the CZMA. In two separate letters, NOAA responded that the purpose of 15 C.F.R. § 930.53 was to provide "constructive notice" that a project outside the coastal zone might trigger consistency review.<sup>25</sup> These letters concluded that the Commission had properly substituted *actual* notice of its intent to review the

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<sup>25</sup> *See* J. Burgess, Chief, Coastal Programs Division, NOAA, Letter to J. Gleason, U.S. Army Corps of Engineers (May 19, 1992) ("Burgess letter") at 2 (attached as Exhibit 4); W. S. Wilson, Assistant Administrator, NOAA, Letter to W. Woollett, Jr., TCA (Oct. 6, 1992) ("Wilson letter") at 2 (attached as Exhibit 5).

Toll Road proposal for the constructive notice that would have been provided by describing the geographic area.<sup>26</sup> Because the Commission had “adequately fulfilled the intent of the regulatory requirements of 15 C.F.R. § 930.53(b),” the Commission was entitled to review the toll road proposal for consistency with the CZMA.<sup>27</sup>

The Commission also sought guidance from NOAA in 2001 as to the application of 15 C.F.R. §§ 930.53 and 930.54 to a project, like the Toll Road, that is “partially located within the coastal zone and partly located outside the coastal zone.”<sup>28</sup> NOAA clarified its regulations as follows:

[F]or CZMA Federal Consistency purposes, an activity that is located in the coastal zone and continues, physically, across the coastal zone boundary, is an activity that is in the coastal zone. If the activity requires a federal approval that is listed, pursuant to section 930.53(a), in the State’s Coastal Management Program (CMP), then the entire project is subject to the State’s consistency review. The part of the activity that is located outside the coastal zone would not have to be located in a geographically described location, pursuant to section 930.53, in order for the State to review the activity. Thus, section 930.53(a)(2) is not applicable.<sup>29</sup>

The Kaiser letter further confirms that the purpose of the geographic location description requirement is to “notify applicants and federal agencies” that consistency review will be required.<sup>30</sup> Such notice “would be superfluous when the activity is located within the coastal zone and it would make no sense to subjectively divide the project into two parts merely because the coastal zone boundary bisects the project. It is the entire activity that will have coastal effects, not just the part on the coastal zone side of the boundary.”<sup>31</sup>

The Toll Road is just such a project: it physically crosses the coastal zone boundary, and the portion of the road outside the boundary will have dramatic coastal effects. TCA’s complaint – essentially that it did not receive the “superfluous” notice provided by a geographic location description, when its own project was located at least partly within the coastal zone – is preposterous.<sup>32</sup>

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<sup>26</sup> Burgess letter at 1-2; Wilson letter at 2.

<sup>27</sup> Wilson letter at 2.

<sup>28</sup> See M. Delaplaine, California Coastal Commission, Letter to D. Kaiser, NOAA (Jan. 18, 2001) at 1 (“Delaplaine letter”) (attached as Exhibit 6).

<sup>29</sup> D. Kaiser, Federal Consistency Coordinator, NOAA, Letter to M. Delaplaine, California Coastal Commission (Jan. 26, 2001) at 1 (“Kaiser letter”) (attached as Exhibit 7).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Mr. Kaiser’s conclusions are entirely consistent with NOAA’s discussion of the 2000 amendments to 15 C.F.R. § 930.53, as published in the Federal Register. First, NOAA confirmed that the express purpose of 15 C.F.R. § 930.53 remains the same. “The geographic location requirement is a means of notifying applicants and Federal agencies of activities with reasonably foreseeable coastal effects and are, subject to consistency review [sic].” Dept. of Commerce, Nat’l Oceanic and Atmospheric Admin., *Coastal Zone Management Act Federal Consistency Regulations*, 65 Fed.Reg. 77,124, 77,145 (Dec. 8, 2000). Therefore, “[b]ecause a State’s coastal zone boundary is a

Moreover, even though the Toll Road was located within the coastal zone, and no further notice was necessary, the Commission still took care to provide ample, *actual* notice that the Toll Road would be subject to consistency review, as shown by the comments submitted by the Commission on the 2004 draft Environmental Impact Report (“DEIR”) for the Toll Road.<sup>33</sup> TCA’s response to these comments directed readers to section 4.15 of the final Environmental Impact Report (“FEIR”), which expressly discusses the need for both consistency review and a coastal development permit.<sup>34</sup> TCA cannot seriously contend that it did not know consistency review would be required for this project.

TCA’s suggestion that it was deprived of notice that the Toll Road would require consistency review is frivolous. TCA has known and acknowledged since 1992 that its project would be subject to CZMA consistency review, and there is no basis in fact or law for avoiding review of the *entire* project’s impacts on the coastal zone, as the CZMA requires.

**B. The Commission Properly Objected to the Toll Road Based on Insufficient Information.**

Incredibly, TCA attempts to manufacture a procedural violation on the part of the Commission out of TCA’s own failure to provide the Commission with sufficient information to fully evaluate the impacts of the Toll Road. The attempt fails.

First, TCA misreads NOAA’s regulations governing the submission of information in support of a consistency certification. TCA Br. at 17-18. The Commission’s brief correctly identifies TCA’s errors and describes the authority supporting the Commission’s insufficient information objection. Comm’n Br. at 13. In fact, NOAA itself rejected a version of TCA’s argument when it amended 15 C.F.R. § 930.63 in 2000. *See* Dept. of Commerce, Nat’l Oceanic and Atmospheric Admin., *Coastal Zone Management Act Federal Consistency Regulations*, 65 Fed. Reg. 77,124, 77,147 (Dec. 8, 2000) (hereafter “2000 Final Rule”) (rejecting argument that state should not be able to object on basis of insufficient information, where that information is in addition to that required under 15 C.F.R. § 930.58).

TCA argues in reply that the Commission’s insufficient information objection was internally contradictory and thus procedurally defective. TCA Reply at 6-7. TCA once again misreads the relevant regulation, which allows a state to assert both inconsistency with coastal management policies and insufficient information as “alternative” grounds for an objection. *See*

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geographic location description, Federal lands located within the boundaries of a State’s coastal zone are sufficiently described for federal license or permit activities occurring on those federal lands.” *Id.*

<sup>33</sup> *See* TCA App. 30/31-56, comment letter S-3 (PDF pp. 547-54) (letter from M. Delaplaine, California Coastal Commission, to M. Cleary-Milan, TCA (July 30, 2004) at 3-4, enclosing similar letter from M. Delaplaine to N. Lucast, TCA (Sept. 25, 1996).)

<sup>34</sup> TCA App. 25-53 at 3-72 (PDF p. 154), referring to TCA App. 21/22-50 at 4.15-3 (PDF p. 379) (section 4.15, stating that “[a] CDP application for construction of the Preferred Alternative, including utility relocations, will be submitted to the CCC, and all requirements of the Federal Coastal Zone Management Act will be met.”); *see also* TCA App. 25-53 at 3-65 (PDF p. 147) (“A federal consistency certification and state CDP will be processed for the Preferred Alternative by the TCA F/E Board of Directors.”).

15 C.F.R. § 930.63(a). TCA reads “alternative” to mean “exclusive” – in other words, to mean its opposite – a counterintuitive and illogical reading for which TCA offers no support,<sup>35</sup> and which would conflict with the plain meaning of the word “alternative” as used in other legal contexts. *See, e.g.*, Fed. R. Civ. P. 8(a)(3), (d)(2) (permitting pleadings to seek “relief in the alternative” and to “set out 2 or more statements of a claim or defense alternatively”). If anything, 15 C.F.R. § 930.63 affirmatively authorized the Commission to do exactly what it did here.

TCA’s assertion also lacks the force of logic. There is nothing inherently contradictory about finding, based on what is known about a project’s impacts, that it is inconsistent with coastal policies, while at the same time objecting to the applicant’s refusal to supply all information necessary for a complete evaluation. The express authorization of “alternative” objections set forth in 15 C.F.R. § 930.63(a) appears to contemplate this very situation.

**C. The CZMA Does Not Authorize the Secretary to Override the Commission’s Objection on Non-Statutory Grounds.**

As discussed in the Commission’s principal brief, Comm’n Br. at 13 n.5, there are only two statutory bases for overriding the state’s objection on appeal: the project is consistent with the objectives of the CZMA or necessary for national security. The regulation requiring the Secretary to override an objection on jurisdictional or other procedural grounds has no foundation in the statute itself.

TCA’s reply brief completely fails to respond to this argument. In circular fashion, TCA claims that the Secretary has statutory authority to override an objection on non-statutory grounds because the Secretary has adopted a regulation purporting to create this authority. *See* 15 C.F.R. § 930.129(c). The Commission’s point, however, is that the CZMA itself – the sole *statutory* source of the Secretary’s authority – does not authorize that regulation. Neither of the sections of the CZMA addressing appeals to the Secretary evince any intent to allow applicants to seek a remedy from the Secretary regarding perceived jurisdictional or procedural defects. *See* 16 U.S.C. §§ 1456(c)(3)(A) (prohibiting issuance of federal permits following state’s objection unless Secretary finds that activity “is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security”), 1465 (establishing deadlines for appeals process).

It is well settled that a regulation cannot confer a right of action that is not authorized by statute. *See Alexander v. Sandoval*, 532 U.S. 275 (2001). In *Alexander*, the Supreme Court found that a regulation adopted pursuant to a statute authorizing promulgation of regulations to “effectuate the provisions” of a federal anti-discrimination law could not create a private remedy for types of discrimination not addressed in the statute itself. *See id.* at 288-89. Here, the Secretary has been granted similar authority to promulgate “such rules and regulations

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<sup>35</sup> TCA’s sole citation in support of this contention provides no support at all. The Secretary’s decision in the *Millennium Pipeline* appeal merely distinguishes between the two types of objections, and does not hold that a state must choose between them. *See Millennium Pipeline*, 2003 NOAA LEXIS 17 at \*9.

as may be necessary to carry out the provisions of this chapter.” 16 U.S.C. § 1463. The grounds for an appeal of the Commission’s objection are carefully defined and strictly limited. The regulations governing the appeal process must be consistent with those statutory grounds.

#### **IV. TCA’s Appeal Does Not Satisfy the Statutory and Regulatory Standards for an Override of the Commission’s Objection.**

A state’s objection to a consistency certification under the CZMA may be overturned only if the Secretary finds “that the activity is consistent with the objectives of [the CZMA] or is otherwise necessary in the interest of national security.” 16 U.S.C. § 1456(c)(3)(A). According to the Secretary’s past decisions, the Secretary must “conduct a de novo inquiry of whether the activity is consistent with the objectives of the CZMA or necessary in the interest of national security.” *Consistency Appeal of the Virginia Electric and Power Company*, 1994 NOAA LEXIS 31, at \* 33 (May 19, 1994) (“*VEPCO*”); *see also Consistency Appeal of Chevron, U.S.A, Inc.*, 1990 NOAA LEXIS 47, at \*18-19 (Oct. 29, 1990) (“*Chevron I*”) at \*19.

In this consistency appeal, TCA bears the burden of producing evidence, as well as the burden of persuading the Secretary that the statutory criteria for an override have been satisfied. *See Chevron I* at \*18. TCA has not carried its burdens here.

##### **A. Ground I: The Toll Road Is Inconsistent with the Objectives of the CZMA.**

Under regulations adopted by NOAA, the Toll Road can be found “consistent with the objectives” of the CZMA only if it satisfies all of the following criteria:

- (1) It furthers the national interest, as articulated in § 302 or § 303 of the Act, “in a significant or substantial manner.”
- (2) The national interest furthered by the activity outweighs the activity’s adverse coastal effects, when those effects are considered separately or cumulatively.
- (3) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program.

15 C.F.R. § 930.121. TCA’s failure to meet any one of these criteria would require denial of the appeal. *See Millennium Pipeline* at \*44-45. As shown below, TCA has satisfied *none* of them.

##### **1. Element 1: The Toll Road Does Not Advance the National Interest in Any Significant or Substantial Manner.**

The first factor for the Secretary to consider on appeal is whether “[t]he activity furthers the national interest as articulated in § 302 or § 303 of the [CZMA], in a significant or substantial manner.” 15 C.F.R. § 930.121(a). The qualifying phrase “in a significant or substantial manner” was added in 2000, in an attempt to conform the regulations to Congress’

intent under the CZMA that states retain primary decision-making authority over local coastal projects. As stated by the agency,

Congress acknowledged a national objective in the ‘effective management, beneficial use, and development of the coastal zone’ and specifically chose the States as the best vehicle to further this national interest . . . The Secretarial review function is not intended to upend the State management structure by replacing the State agency’s decision with the Secretary’s *for projects which are essentially local government land use decisions and which do not significantly or substantially further the national interest of the CZMA’s objectives* . . . [Prior applications] of the regulations has created the appearance that the Secretary overlooked the intent of the Act to support the States’ use of section 307 to require that federal license or permit activities be consistent with federally approved management programs. In other words, the activity must be more than related to one of the category of objectives . . . it must contribute to the *national achievement of those objectives in an important way or to a degree that has a value or impact on a national scale.*

*2000 Final Rule*, 65 Fed. Reg. at 77,149-50 (emphasis added).

NOAA specified three criteria for consideration in deciding whether this amended standard has been met: (1) The degree to which the activity furthers the national interest; (2) the nature or importance of the national interest furthered as articulated in the CZMA; and (3) the extent to which the proposed activity is coastal dependent. *Id.* at 77,150.

In light of this significant amendment, TCA’s reliance on pre-2000 Secretarial decisions finding that the “national interest” factor “normally will be satisfied on appeal” is misplaced. *See* TCA Br. at 19-20 (citing *Consistency Appeal of Amoco Production Co.*, 1990 NOAA LEXIS 49 (July 20, 1990)). The plain language of this amendment, especially when read in light of NOAA’s accompanying explanation, strongly indicates that this factor can no longer be taken for granted.

TCA acknowledges that the amendment was adopted “to reduce the likelihood that an override will be sought ‘for projects which are essentially local government land use decisions,’” TCA Br. at 20 (quoting *2000 Final Rule*, 65 Fed. Reg. at 77, 150). Yet TCA seeks an override for exactly this type of project. TCA is a local government agency composed of local government officials from within Orange County. TCA itself has claimed that the Toll Road is needed to relieve traffic that will be caused by continued residential, industrial, and commercial development in “south Orange County,” and has relied on local jurisdictions’ general plans, in addition to regional population projections, in reaching this conclusion.<sup>36</sup> The stated purpose of the Toll Road is to alleviate traffic congestion along I-5 and the arterial network in “the study area” – a small portion of only one of California’s many counties.<sup>37</sup> The Toll Road would also facilitate access to areas of Orange County currently planned for increased

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<sup>36</sup> TCA App. 20/21-49 at 1-10, 1-15 (PDF pp. 40, 45).

<sup>37</sup> *See id.* at 1-16 (PDF p. 46.)

residential development.<sup>38</sup> The project is plainly designed to address the detrimental traffic impacts of past – and to facilitate future -- land use decisions made by the same local governments that comprise TCA.

The Toll Road's affect on the national interest is, if anything, detrimental. The project would devastate coastal access, harm water quality, increase greenhouse gas emissions, increase risk of wildfires, and result in a permanent encroachment on Camp Pendleton. The purported "benefits" of the project are incidental at best and serve only to partially offset the project's adverse impacts. Moreover, not one of these "benefits" is dependent upon construction of the Toll Road – they are merely add-ons that can be incorporated into any of the less damaging alternatives to the Toll Road. There is nothing about the Toll Road that significantly or substantially furthers the national interest as articulated in the CZMA.

**a. Development of the Nation's Coastal Zone.**

The Toll Road does not further the national interest in coastal zone development in any significant or substantial manner. TCA fails to produce any meaningful evidence of a significant or substantial contribution to development in the coastal zone. Rather, TCA relies on general citations to the purpose of the Toll Road – providing traffic relief in the southern portion of a single California county – without ever even attempting to demonstrate that this will lead to further development in Orange County's already highly developed coastal areas. TCA Br. at 20-21. Confronted with this lack of evidence, TCA in its Reply cites a string of irrelevant pages from the Coastal Element of the San Clemente General Plan, none of which even mention the Toll Road, much less show that it will lead to coastal development in San Clemente.<sup>39</sup> The last document cited by TCA, the General Plan's circulation element, mentions the Toll Road's possible existence, but says nothing about its contribution to development in the coastal zone.<sup>40</sup> TCA has the burden of producing evidence to show that the elements necessary for an override have been met. Here, TCA has chosen to rely solely on insinuations and assumptions, and thus has completely failed to meet its burden.

TCA's reliance on the *Islander East* and *VEPCO* decisions is misplaced. The *Islander East* pipeline project advanced national interests by enhancing the nation's energy infrastructure and providing natural gas to energy markets in two states and three large metropolitan areas (New York City, Long Island, and Connecticut). *Islander East* at 7. In addition, the Secretary noted that NOAA had specifically listed coastal-dependent energy facilities as a project that typically would meet the "significant and substantial" test. *Id.* at 5 (citing *2000 Final Rule*, 65 Fed. Reg. at 77,150). By contrast, the Toll Road is neither an interstate project nor an energy facility, and in fact is intended only to alleviate local and regional traffic congestion in south Orange County.

TCA also mischaracterizes the Secretary's decision in *VEPCO*. That case involved providing a safe source of drinking water for human consumption in a coastal area,

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<sup>38</sup> See TCA App. 20/21-49 at 1-6 to 1-7 (PDF pp. 37-38.)

<sup>39</sup> See TCA Reply Br. at 8; TCA Supp App. 4-20 at pp. 2-1, 3-24 to 3-27, 3-38 to 3-40, 4-7.

<sup>40</sup> See TCA Supp. App. 4-19 at 4-2.

which the court pointed out is “necessary in order to sustain the quality of life, as well as future economic growth and development.” See *VEPCO*, 1994 NOAA LEXIS at \*75-76. This is not, as TCA claims, a general statement that every project that might conceivably improve someone’s quality of life is automatically in the national interest. TCA Reply at 7. In any event, TCA has failed to produce any actual evidence that the Toll Road – unlike the municipal water supply project considered in *VEPCO* – will actually advance the national interest in coastal development in a significant and substantial manner.

**b. Coastal-Dependent Uses and Orderly Processes for Siting Major Transportation Facilities.**

The Toll Road fails a threshold test with respect to this element in that it is not a coastal-dependent project. The CZMA identifies an interest in “coastal-dependent uses and orderly processes for siting major [transportation] facilities” (16 U.S.C. § 1452(2)(D)). The Secretary has held that in determining whether a project is “coastal-dependent,” the main inquiry is “whether [the project’s] location in or near the coastal zone is required to achieve the primary goal of the project in question.” *Islander East* at 9. For example, because the *Islander East* pipeline needed to cross coastal waters to reach Long Island, the Secretary concluded that project was coastal-dependent. *Id.* The Toll Road, however, is not coastal-dependent because it can achieve its primary goal – the alleviation of traffic congestion in Southern California – without being located in or near the coastal zone.

Non-coastal alternatives for alleviating congestion in south Orange County exist. The U.S. Fish and Wildlife Service (“FWS”) has urged its fellow federal agencies to explore alternative routes to the west of the Toll Road, including alternatives that do not encroach upon the coastal zone at all.<sup>41</sup> The U.S. Army Corps of Engineers has made very clear – contrary to false and misleading assertions advanced in TCA’s principal brief – that the agency continues to consider the practicability of other alternatives, again including routes that do not impact the coastal zone.<sup>42</sup> Finally, as discussed in detail in Section IV.A.3 of this letter, reasonable alternatives that would be consistent with the State’s coastal management program are available here. There is nothing about the Toll Road’s purpose – alleviating traffic in south Orange County – that requires its location in the coastal zone. The Toll Road is not coastal-dependent, and an orderly process for its siting does not require that it be placed in the coastal zone.

TCA’s reliance on the *Southern Pacific* decision is misplaced. The project at issue in *Southern Pacific* – much-needed repairs to a railroad bridge along a coastal rail line – was found to further the national interests of development and protection of coastal resources, as well as the siting of transportation facilities. See *Southern Pacific* at \*19-20. The decision did not address whether the bridge was “coastal-dependent” (*see id.*), presumably because the bridge’s fixed location within the coastal zone made this a non-issue.. Comm’n Br. at 16. Unlike the rehabilitation of an existing railroad bridge, the location of which necessarily must remain fixed, the Toll Road can attain its goal of reducing traffic congestion by means of an

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<sup>41</sup> See TCA Supp. App. 6-50 at 173.

<sup>42</sup> See Col. T. Magness, Army Corps of Engineers, Letter to T. Street, NOAA (April 7, 2008) at 3 (attached as Exhibit 8).

alternative route outside of the coastal zone. *Id.* at 15-16. Nor does the *VEPCO* decision provide support for TCA's argument, as that case does not involve the siting of a major transportation facility. *See VEPCO* at \*76 (finding water pipeline project furthered national interest in development of coastal zone).

TCA improperly ignores the fact that the Toll Road is not coastal-dependent, and thus fails to show that it advances the national interest in siting coastal-dependent transportation facilities.<sup>43</sup>

**c. Coastal Recreational Access.**

TCA wholly fails to support its claim that the Toll Road will further the national interest in coastal recreational access. The main support offered by TCA – a recitation of the purpose and need statement for the project – does not discuss recreational coastal access at all. *See* TCA Br. at 22 (citing TCA App. 20-49 at 1-18, 1-19). Another purported source of support consists of merely the same conclusory, unsubstantiated claim in another self-serving document prepared by TCA. *See id.* (citing TCA App. 8-20(B) at 132).

What is lacking is any *evidence* that the Toll Road will provide a meaningful public access benefit. Free public access routes already exist from inland areas to San Onofre (e.g., SR 91 to 55 or 57 to I-5), and TCA presents no evidence that the park, which gets over 2.4 million visitors per year, has public access problems due to traffic congestion. Indeed, the entire traffic analysis for the project is based on peak hour commuter travel. TCA has provided no data or analysis regarding the travel patterns of San Onofre or other park users or the extent to which they are affected by peak-hour travel conditions. There is simply no evidence in the record that the projected level of future congestion poses any barrier to public access to the park, or that any significant number of park users would consent to pay a toll when free routes are available.<sup>44</sup>

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<sup>43</sup> *See, e.g.,* TCA Reply at 8-9 (citing *Islander East* at 9). Even if Congress “broadly construed the CZMA to include both preservation and development objectives” (TCA Reply at 8 [citing unpublished District Court ruling]), the project still must be coastal-dependent. Moreover, even if projects that merely pass through the coastal zone “can” be found to further the national interest (TCA Reply at 8), it does not mean that they do; a project still must be shown to be coastal-dependent and meet all other requirements under the CZMA.

<sup>44</sup> Even with respect to peak hour travel, TCA's own application materials show that I-5 segments in the vicinity of San Onofre generally are at or below 50% of capacity during peak hours (i.e., at LOS B and C). TCA App. 12-29(C) at 2, Table A Segments of I-5 north of San Onofre are currently experiencing some deficiencies, but only in peak hour travel directions and locations that do not affect access to the park. TCA App. 20/21-49, Figs. 3.4-1, 3.4-2 (PDF pp. 279-80) With respect to projected future increases in traffic, weekday peak hour conditions on the segments of I-5 nearest San Onofre are projected in the FSEIR to remain “uncongested” even under the “No Action” alternative reflecting the most likely development scenario for the year 2025. *Id.* at 3-19 (PDF p. 235) (describing “Scenario 3” – buildout of circulation system plus development of 14,000 dwelling units at Rancho Mission Viejo – as most likely future scenario); Fig. 3.4-5 (PDF p. 289) (showing weekday peak hour conditions for “No Project” alternative). Outside the immediate vicinity, there is only one “deficient” mainline segment of I-5 (between Avenida Pico and El Camino Real) that could conceivably affect southbound visitors attempting to reach the park, and then only during peak AM and PM hours. *Id.* at Fig. 3.4-4 (PDF p. 288),

TCA claim that its eleventh-hour proposal to pay millions of dollars to the California State Parks Department furthers the national interest in coastal access is also meritless. This payment – which would not be earmarked for any specific project and could be spent on non-coastal facilities – is nothing more than partial (and inadequate) mitigation for the project’s massive impacts on San Onofre. Mitigation measures are not “benefits” of a project and cannot be divorced from the impacts they purport to offset.

Moreover, as discussed in greater detail in Section IV.A.2.a.iv, below, the purported benefits of TCA’s monetary offer to the coast are entirely illusory. TCA anticipates that the vast majority of the funds (70%) would go toward paying the federal government for a future San Onofre lease – despite the lack of any evidence the park will need the money to remain open, and that most of the park will be lost if the Toll Road is built. The improvements TCA has identified as possible uses of the remainder money were planned long before TCA made its offer – indeed, several are largely completed already. TCA has not identified a single meaningful opportunity to replace the coastal recreational resources that will be lost to the Toll Road.

TCA cannot point to any evidence that the Toll Road would benefit coastal access, much less outweigh the project’s devastating impacts on access described below. The project advances no national interest in coastal access.

**d. Quality of Coastal Waters.**

TCA’s assertion that the Toll Road would improve the quality of coastal waters is also baseless. As with the proposed parks mitigation payment, the proposed treatment of existing runoff from Interstate 5 is mitigation measure designed to offset the Toll Road’s water quality impacts, and not a “benefit” of the project. Indeed, the quality of the affected coastal waters is not currently impaired, nor is it threatened by any proposed project -- *other than the Toll Road itself*. Creating a problem and then attempting to mitigate it does not advance the national interest.

But even as mitigation, the proposed measure falls short. As discussed in section IV.A.2.a.vi below, not only are the estimated roadway pollutant reductions overstated, they fail to account for the significant potential impacts from the untreated *off-site* runoff that would result from TCA’s massive proposed cut and fill operations along the San Mateo Creek Watershed. The Regional Water Quality Control Board has repeatedly denied water quality certification for the project due to TCA’s failure to demonstrate these impacts can be avoided.

The proposed retrofit of I-5, moreover, has no inherent connection to the Toll Road and can be undertaken with or without the Project. The fact that Caltrans chose not seek funding for this treatment in 2006 (TCA Br. at 24) does not mean that it could never seek such funding. Indeed, as explained below, state water quality officials have the legal authority to *require* Caltrans to address any violation of water quality standards. Moreover, the retrofit can (and would) be included in *any* alternative to the Toll Road. Indeed, the proposed AIP-R alternative (discussed below) would provide new treatment for *15 miles* of I-5 that is presently untreated – 7 times the

area TCA proposes for the Toll Road – all without the 6 miles of disturbance to the San Mateo watershed the Toll Road would cause.

Far from furthering the national interest in improving the quality of coastal waters in any “significant” or “substantial” way, the Toll Road would provide no water quality benefits whatsoever.

**e. Clean Air Act Compliance.**

As a preliminary matter, “assisting California in complying with federal clean air standards,” while a laudable goal, is not a policy objective identified in sections 302 or 303 of the CZMA, and is therefore not a factor to be considered in the national interest element. 16 U.S.C. §§ 1452, 1453. Consequently, TCA’s arguments on this point are irrelevant.

TCA’s arguments also fail on their merits. TCA asserts that because the Toll Road is cited as one of the Transportation Control Measures (“TCMs”) listed in the region’s Air Quality Management Plan (“AQMP”), the Commission’s objection “jeopardizes Southern California’s compliance with the Clean Air Act” and “threatens funding for all transportation projects in Southern California.” TCA Br. at 25. TCA is wrong.<sup>45</sup>

According to David P. Howekamp, the former director of air quality programs at U.S. EPA Region 9 and the individual in charge at the regional level of overseeing Air Quality Management Plan submissions for federal approval, TCA “has greatly overstated the importance of the [Toll Road] Project to air quality progress as well as the air quality implications of the California Coastal Commission’s Objection to the Project.”<sup>46</sup> According to Mr. Howekamp, “TCMs provide extremely small emission reductions and are not relied upon in the AQMP for substantial reductions.”<sup>47</sup> Indeed, the more than 200 TCMs listed in the AQMP *collectively* provide only 0.05% and 1.5% of the reductions for NO<sub>x</sub> and ROG, respectively, that are needed to attain the ozone standard by the deadline.<sup>48</sup> The Toll Road is *only one* of the more than 200 TCMs listed in the AQMP. Thus, removal of the TCM component of the Toll Road from the AQMP would at most have an infinitesimally small impact on the region’s ability to attain its air quality goals.

Moreover, even if removal of this TCM would perceptibly alter the region’s progress toward air quality attainment, TCA’s alarmist claims would still be unfounded. Federal law provides a readily available TCM substitution process to address a situation where, for

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<sup>45</sup> TCA misleadingly claims that the *Toll Road itself* “is a Transportation Control Measure” in the AQMP. TCA Br. at 24. This is, at best, an overstatement. While carpool (HOV) lanes may qualify as TCMs, new, mixed-flow vehicle lanes like those provided by the Toll Road do not. Rather, the only component of the Toll Road that qualifies as a TCM is TCA’s agreement to use differential pricing in its toll structure to achieve an average vehicle occupancy equivalent to that which would have been achieved with HOV lanes (which were originally planned for this corridor, but are not part of the initial Toll Road design). See TCA App. 20/21-49 at 4.7-37 (PDF p. 629) (describing toll road corridor alternatives as “priced HOV alternative[s]”).

<sup>46</sup> D. Howekamp, Letter to NOAA General Counsel (May 27, 2008) at 1 (attached as Exhibit 9).

<sup>47</sup> *Id.* at 3.

<sup>48</sup> *Id.* at 5.

whatever reason, a TCM becomes infeasible – in other words, exactly the situation presented here. Under the Clean Air Act, TCMs such as the Toll Road’s differential pricing commitment may be replaced with an alternate transportation control measure that (1) has equivalent or greater emissions reductions, (2) is implemented in accordance on a schedule consistent with the State Implementation Plan; (3) has adequate funding, (4) is developed through a collaborative process; and (5) EPA and the California Air Resources Board concur. *See* 42 U.S.C. § 7506(c)(8)(A).

As Mr. Howekamp points out, “such substitutions have been routinely made with the concurrence of State and Federal air quality agencies” to account for changing circumstances in the South Coast Air Basin, including in Orange County.<sup>49</sup> Further,

After SCAG has quantified the emissions benefits of the TCA project (which are likely to be quite small if not overwhelmed by induced demand from increased capacity), the representatives of all affected jurisdictions should begin the collaborative process to identify and adopt replacement measures. As in the case of prior substitutions, adequate time is available under Federal law for a thorough and thoughtful process to occur.<sup>50</sup>

Thus, the Commission’s objection will not, as TCA claims, create a significant Clean Air Act compliance issue.

TCA’s general claim that the Toll Road will provide a necessary air quality benefit is even more specious. As even TCA acknowledges, total Vehicle Miles Traveled (VMT) in the sub-region will *increase* over no-project conditions if the toll road is built.<sup>51</sup> Thus, while some incremental benefit in air quality from congestion relief may occur in the short term, eventually this marginal benefit will be overwhelmed by the increased travel demand induced by the increase in road capacity (supply) that the toll road would provide.

This same increase in VMT also undermines TCA’s claims that the toll road will somehow reduce greenhouse gas (“GHG”) emissions. Obviously, GHG emissions are a function of fuel consumption, and total VMT is a key determinant of the amount of fuel consumed.<sup>52</sup> Congestion reduction is also a factor, *but only to the extent it can be achieved without offsetting increases in VMT*. Once the potential for a long-term increase in VMT is taken into account, the TCA cannot demonstrate any GHG emissions benefit. To the contrary, the perpetuation of auto

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<sup>49</sup> *Id.* at 5. Indeed, TCA itself took advantage of this substitution process when it replaced the originally planned HOV lane TCM with its current differential pricing strategy.

<sup>50</sup> *Id.*

<sup>51</sup> *See* TCA App. 25-53 at 2-56 to 2-59 (PDF p. 76-79).

<sup>52</sup> *See* the California Air Resources Board’s Draft Report from the Land Use Subgroup of the California Climate Action Team (LUSCAT) May 8, 2008 Report at p. 8 [“The effectiveness of efforts to provide transportation alternatives to the automobile and TDM can be measured in terms of reductions in vehicle miles traveled (VMT) or expected growth in VMT. VMT reductions correlate directly with reductions in GHG emissions.”]. Indeed, the report notes that “VMT is roughly equivalent to GHG” (*Id.* at p. 30.)

The Report is found on the web at [http://www.climatechange.ca.gov/luscat/documents/2008-05-14\\_meeting/DRAFT\\_LUSCAT\\_Submission\\_to\\_CARB.pdf](http://www.climatechange.ca.gov/luscat/documents/2008-05-14_meeting/DRAFT_LUSCAT_Submission_to_CARB.pdf)

dependency the Toll Road would cause will make the single largest source of GHG emissions (the private auto at 36%) even more difficult to address.<sup>53</sup>

For these reasons, there is simply no basis to conclude, as the TCA urges, that the Toll Road advances any national interest in air quality. If anything, the nation's interest in these areas would be better served if the Toll Road – a traffic “solution” conceived almost 30 years ago – were not built. Southern California communities and officials need to move forward toward finding transportation and air quality solutions more appropriate to this century.

**f. National Security.**

National security is dealt with by the CZMA as a separate ground for appeal and is not a policy identified in section 302 or 303 of the Act. 16 U.S.C. §§ 1452, 1453. Accordingly, the Secretary must disregard TCA's arguments regarding the purported “training and infrastructure improvements at Camp Pendleton” for purposes of the national interest element of Ground I.<sup>54</sup>

But even if TCA's national security arguments could be entertained here, they fail on numerous grounds. First, the so-called “important national security improvements” were never part of the project approved by TCA to begin with. They were not even mentioned – much less analyzed -- in the NEPA or CEQA documentation for the Toll Road. Nothing in the final EIR's description of the project or its purposes and objectives refers to these “improvements.”<sup>55</sup> The final EIR's description of the changes made by TCA to the Toll Road in designating the alignment through Camp Pendleton as the “preferred alternative” make no mention of these “improvements.”<sup>56</sup> The portion of the project description discussing Camp Pendleton similarly makes no reference to the improvements.<sup>57</sup> Put simply, TCA's 2006 approval of the Toll Road did not even contemplate – much less require TCA to construct – the purported national security improvements.

TCA complains bitterly about the portion of the Commission's brief that points out these obvious facts, TCA Reply at 13, but these complaints are meritless. TCA's only evidence on this point – a handful of emails discussing meetings with Camp Pendleton officials –

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<sup>53</sup> See LUSCAT Report at 13 [“The amount of miles traveled by California residents increased at a rate of over 3 percent a year between 1975 and 2004, outpacing population growth which grew at less than 2 percent annually over the same time period. This increase in VMT directly correlates to an increase in petroleum use and GHG production. Passenger vehicle (cars and light trucks) emissions of 136 million metric tons of CO<sub>2</sub> equivalent (MMT<sub>CO2e</sub>) per year represented, in 2004, about 30 percent of the state's total GHG emissions. That makes passenger vehicles the biggest GHG emitters in California. It also results in the transportation sector as whole being the largest emitters of GHGs in the State – 38 percent of the 2004 inventory. On-road vehicles emit the vast majority of California's transportation related GHG emissions – 172 MMT<sub>CO2e</sub> or 30 percent of the state's approximately 475 MMT<sub>CO2e</sub> total. Other transportation sources—mostly trains, planes, and ships—emit just 2 percent of the total.”]

<sup>54</sup> TCA apparently seeks to avoid the stringent standard for overriding an objection on national security grounds, discussed in Section IV.B below. In either case, TCA arguments are meritless.

<sup>55</sup> See TCA App. 20-48 at ES-20 to ES-23 (PDF pp. 35-38); TCA App. 20/21-49 at 1-15 to 1-17, 2-5 to 2-7, Figs. 2.2-5 and 2.2-6 (PDF pp. 45-47, 59-61, 146-47).

<sup>56</sup> TCA App. 20/21-49 at 2-95 to 2-97 (PDF pp. 149-51).

<sup>57</sup> TCA App. 20/21-49 at 2-19 (PDF p. 73).

is not contrary at all. Rather, it confirms that TCA has proposed adding some additional, unrelated improvements for Camp Pendleton only *after* approving a project that did not include those improvements.<sup>58</sup> TCA has not committed to constructing those improvements, and indeed cannot without additional CEQA compliance. The “improvements” are nothing more than a post hoc contrivance to paint a national security veneer over a project that never had anything to do with national security.

Indeed, TCA’s proposal to use its funds to construct facilities on a United States military reservation exceeds the scope of its limited powers under California law. The use of toll and fee revenues collected by TCA is strictly limited by TCA’s enabling statute. Fees can be used only “for purposes of defraying the actual or estimated cost of constructing bridges over waterways, railways, freeways, and canyons, or constructing major thoroughfares,” and tolls “only for paying for the costs of construction of the major thoroughfare for which the toll is charged and for the costs of collecting the tolls.” Cal. Gov. Code § 66484.3(a) and (f).<sup>59</sup> TCA has expressly denied that any of its so-called “improvements” to Camp Pendleton are mitigation measures intended to offset the Toll Road’s significant and unmitigable encroachment impacts. TCA Reply at 13. Thus, there is no legal basis for TCA’s use of toll or fee revenues to pay for the construction of a new gate and two highway overcrossings for Camp Pendleton, absent reimbursement from the federal government. In other words, even if it wanted to, the Navy could not get a free ride from TCA for national security improvements.<sup>60</sup>

Far from providing a national security benefit, the Toll Road would if anything *undermine* national security. Tellingly, TCA omits from its briefs any mention of the analysis of impacts to Camp Pendleton included in its own EIR for the project, which concluded that such impacts would be *significant and unmitigable*. As discussed in section IV.B below, these impacts include an increased threat to base security, disruption of nighttime training activities, and the permanent loss of several hundred acres of land that could have been used to support the Marines’ mission.

TCA also omits from its appendix years of correspondence with the Marine Corps in which Camp Pendleton officials expressed concerns about the Toll Road’s negative encroachment impacts on the base.<sup>61</sup> As the Commandant of the Marines put it in one of the documents omitted by TCA: “Frankly, my preference is that the proposed toll road not be

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<sup>58</sup> See TCA App. 73-106.

<sup>59</sup> The one exception to this limitation on expenditure of toll proceeds – irrelevant here – allows the agency to lend money to another joint powers agency for the purpose of constructing major thoroughfares. Cal. Gov. Code § 66484.3(f).

<sup>60</sup> Contrary to TCA’s assertion (Reply Br. at 14), the Commission’s argument that the Navy was supposed to fund these improvements (Comm’n Br. at 47 n.24) is neither wrong nor an accusation of “malfeasance” on the part of the Navy. As discussed earlier, federal law conditions the Navy’s ability grant the easement requested by TCA on, among other things, applying the monies received therefore to the construction of the improvements. *Id.* (citing Pub. Law No. 105-261, § 2851(c); 112 Stat. 2220).

<sup>61</sup> See generally Exhibit 2 (attached). This long correspondence reflects the Marines’ continuing concerns about encroachment on Camp Pendleton – including both environmental and operational issues – as well as the Marines’ imposition of strict conditions on consideration of an alternative located on the Base.

constructed on or near Camp Pendleton. . . . This construction is one more encroachment venture that *will hinder our ability to prepare for war.*<sup>62</sup>

For all of these reasons, TCA has not shown (and cannot show) that the Toll Road would provide a significant and substantial contribution to the national interest.

**2. Element 2: The Toll Road's Adverse Effects on the Natural Resources of the Coastal Zone Vastly Outweigh its Negligible Contribution to the National Interest.**

The second element of Ground I requires the Secretary to determine whether the national interest furthered by the Toll Road outweighs its adverse coastal effects, when those effects are considered separately or cumulatively. 15 C.F.R. § 930.121(b). In evaluating this element, the Secretary must (1) identify the Toll Road's adverse effects on the natural resources of the coastal zone; (2) assess the cumulative adverse effects of the Toll Road on those same resources in combination with other activities affecting the coastal zone; and (3) weigh those impacts against the Toll Road's contribution to the national interest. *See Mobil Exploration*, 1993 NOAA LEXIS 4 at \*33-34.

The "national interests" to be balanced against adverse effects under this element, moreover, are limited to those recognized in or defined by the objectives or purposes of the CZMA. *Chevron I*, 1990 NOAA LEXIS 47 at \*126-27. "In other words, while a proposed activity may further (or impede) a national interest beyond the scope of the national interests recognized in or defined by the objectives or purposes of the [CZMA], such a national interest may not be considered in the balancing." *Id.* at \*127 (quoting *Decision in the Consistency Appeal of the Korea Drilling Company, LTD. from an Objection by the California Coastal Commission*, 1989 NOAA LEXIS 34 at \*37).

The environmental documentation prepared by TCA, the exhaustive analysis of the Toll Road project by the Commission, and the independent expert analyses in the record all demonstrate that the project will cause extraordinarily severe adverse impacts on coastal resources. Specifically, the Toll Road will disrupt and degrade a unique assemblage of coastal areas providing habitat for numerous threatened and endangered species, fill wetlands and degrade water quality, and destroy a significant portion of a State Park, among many other impacts. The likely impacts of the Toll Road on listed species, unique ecosystems, protected lands, and wetlands appear to exceed those of any project ever considered by the Commission, or in a Secretarial appeal. These adverse effects dwarf the Toll Road's negligible contribution to the national interest.

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<sup>62</sup> Gen. J.L. Jones, Commandant, U.S. Marine Corps, Letter to Christine Todd Whitman, Environmental Protection Agency (Feb. 9, 2002) at 2 (emphasis added) (attached as Exhibit 1).

**a. The Toll Road Will Severely Impact Coastal Resources.**

**i. The Toll Road Will Destroy and Degrade Habitat for Threatened and Endangered Species.**

TCA attempts to downplay the Toll Road's impacts on threatened and endangered species and their habitat, asserting that federal wildlife agencies have determined that "the Project, with mitigation, will not jeopardize any species' survival and will not adversely modify any critical habitat." TCA Br. at 30-31; TCA Reply at 16. The assertion is doubly misleading.

First, as discussed in greater detail below, TCA distorts the significance of the Biological Opinion ("BO") recently released by the U.S. Fish and Wildlife Service ("FWS"). The BO found only that the Toll Road would not "jeopardize" any species – in other words, that the project would not actually drive any species to extinction. This does not mean that the Toll Road will not have severe, adverse impacts on endangered species within the coastal zone. *See, e.g., Nat. Res. Def. Council v. Winter*, 518 F.3d 658, 691-92 (9th Cir. 2008) (rejecting argument that "no jeopardy" finding in biological opinion supported claim that project had no significant environmental impacts, and noting that "[a]n agency action can have 'significant effects' on the environment short of threatened extinction."). Indeed, the BO expressly acknowledges that the Toll Road will adversely affect endangered and threatened species. Moreover, the BO's finding that the Toll Road will not drive any of those species to extinction is itself questionable.

Second, TCA asserts that the Toll Road will not adversely affect any "critical habitat," implying that there is no important habitat within the project area. This statement is also misleading. As biological matter, the project is within and would destroy critical habitat for a startling number of endangered and threatened species. And until recent changes to the law took effect, that habitat was designated "critical habitat" for those species as a legal matter under the federal Endangered Species Act ("ESA"). What has changed is not the importance of the habitat, but the legal definition of "critical habitat" as it pertains to military bases. Where an Integrated Natural Resources Management Plan ("INRMP") has been prepared for a military base, the INRMP supersedes previous designations of critical habitat under the ESA. *See* 16 U.S.C. § 1633(a)(3)(B)(i). The absence of "critical habitat" on Camp Pendleton is solely the result of this change in the law. The habitat impacted by the Toll Road remains "critical" to the survival and recovery of the threatened and endangered species on the property, and TCA's attempt to suggest otherwise is dishonest.

The record conclusively demonstrates that the actual, real-world impacts of the Toll Road on threatened and endangered species and their habitat – the impacts that matter for purposes of the CZMA – will be tremendous. The area affected by the Toll Road contains a rare, largely intact coastal assemblage of riparian habitat, wetlands, marsh vegetation, estuarine environs, coastal sage scrub, and other upland habitat areas. Coastal sage scrub provides essential habitat for the threatened California gnatcatcher, provides potential recovery habitat for the critically endangered Pacific pocket mouse, and is used for upland foraging, dispersal and

wintering habitat by the endangered arroyo toad.<sup>63</sup> Riparian and wetland areas are also vital for the toad. The southernmost known population of the endangered steelhead trout inhabits San Mateo Creek and its estuary, and the endangered tidewater goby makes its home in the San Mateo lagoon.

This particular habitat complex is especially biologically valuable and unique because coastal wetland-upland mosaics, like the area along San Mateo Creek, are highly depleted in Southern California. It lies at the mouth of the most pristine – and the only undammed – major coastal watershed in California south of Ventura. According to an analysis by the Conservation Biology Institute of watersheds between Los Angeles and the Mexican border, the San Mateo Creek and San Onofre Creek watersheds have the highest ecological integrity,<sup>64</sup> as measured by the amount of land cover changes from development and roads, of any coastal watersheds.<sup>65</sup> Thus, these two watersheds have the highest level of natural watershed functions in the region. A map of critical habitat previously designated by the United States Fish and Wildlife Service for endangered and threatened species shows an amazing confluence of these designations in and around the coastal zone at lower San Mateo Creek, making it a true “hotspot” of biological diversity.<sup>66</sup> The Commission correctly and unequivocally concluded that these features warranted designation as “environmentally sensitive habitat areas” (“ESHA”), which are entitled to the strongest possible protection under the California Coastal Act.<sup>67</sup>

The Secretary has recognized the importance of such rare and valuable habitat in balancing the national interest against adverse environmental impacts. For example, in *Consistency Appeal of Union Exploration Partners*, 1993 NOAA LEXIS 3 (Jan. 7, 1993), the Secretary rejected an appeal involving proposed offshore oil and gas leasing on balancing grounds, finding risk to an “extremely unique and valuable” portion of the Florida coast. Similarly, in *Consistency Appeal of Mobil Oil and Exploration*, 1993 NOAA LEXIS 4 (Jan. 7, 1993), also involving offshore oil and gas, the Secretary rejected the appeal on balancing grounds, based on potential impacts to the Florida keys Marine Sanctuary, and its “spectacular, unique and nationally significant marine environments, including seagrass meadows, mangrove islands, and extensive living coral reefs.” Here, the Commission’s designation of the affected habitat as ESHA demonstrates its similar uniqueness and importance. The Toll Road will directly occupy or significantly degrade more than 50 acres of ESHA within the coastal zone, and it is reasonably foreseeable that Toll Road construction and operation upstream from and adjacent to the coastal zone will further degrade this crucial habitat.

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<sup>63</sup> See W.D. Spencer, Ph.D., *Letter to California Coastal Commission*, August 17, 2007 at 2-3 (attached as Exhibit 10).

<sup>64</sup> Ecological integrity refers to the degree to which the natural characteristics and functions of a watershed are intact or unmodified by humans.

<sup>65</sup> Figure 9, Ecological integrity of watershed basins in the region, *Conservation Significance of Rancho Guejito*, Conservation Biology Institute, 2005, <http://www.consbio.org/cbi/projects/show.php?page=ranchoguejito/guejito-pdf.htm> (last visited January 16, 2008).

<sup>66</sup> TCA App. 1-4(O) (PDF p.9).

<sup>67</sup> TCA App. 1-4 at 2-3 (PDF pp. 2-3); see Cal. Pub. Res. Code § 30107.5, *Sierra Club v. Cal. Coastal Comm’n*, 12 Cal. App. 4th 602, 613-15, 617 (1993).

Specifically, the Project would occupy and significantly disrupt the coastal-zone habitat of several species key to the biological diversity of the California coast, and would even push one critically endangered species – the Pacific pocket mouse – to the verge of extinction. These species include, but are not limited to, the following:

**Coastal California Gnatcatcher.** Coastal sage scrub is breeding habitat for the coastal California gnatcatcher, a threatened species under the federal Endangered Species Act. TCA has conceded that the Toll Road will impact at least 49.75 acres of coastal sage scrub ESHA in the coastal zone, including three California gnatcatcher use areas of undefined acreage.<sup>68</sup> A leading ornithologist with gnatcatcher expertise recently visited the site identified *at least 27 acres* of the directly impacted sage scrub is “high quality” and suitable for nesting, and observed and photographed gnatcatchers in areas where TCA’s experts had suggested they would not be.<sup>69</sup>

The permanent loss of high-quality habitat immediately adjacent to the coastal zone will also foreseeably affect the value of any remaining gnatcatcher habitat within the coastal zone.

The primary mitigation TCA offers to offset the loss of this habitat is the utilization of coastal sage scrub “credits” in the agency’s Chiquita Canyon Conservation Bank, a 327-acre proposed restoration site located in a conservation area far inland of the coastal zone.<sup>70</sup> But this site is supposed to provide mitigation for the *385 acres of sage scrub impacted by the entire 16-mile Toll Road project*.<sup>71</sup> TCA provides no explanation as to how it will compensate for this *net loss* of habitat, much less how such a net loss could possibly make up for the ESHA destroyed by the project.

Moreover, Chiquita Canyon’s inland location cannot replace the unique values to the gnatcatcher which derive from a maritime location. These values include higher reproductive rates, lower winter mortality, and greater resistance of the coastal sage scrub to “type conversion” to weedy species as a result of drought, fire, and exotic species invasions.<sup>72</sup> Thus, even if habitat preservation and restoration occurred inland, it would not compensate for the elimination of distinctive *coastal* resources nor change the fact that a major disruption of this coastal sage scrub habitat had occurred.<sup>73</sup>

TCA’s last-minute offer to fund restoration of 150 acres of coastal sage scrub habitat at Crystal Cove State Park is similarly ineffective. Most of the coastal sage scrub restoration that is biologically appropriate for this state park – and all that located in a maritime location – has already been completed. The remainder – only tens of acres –

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<sup>68</sup> TCA App. 13-31(B) at 59 (PDF p. 62).

<sup>69</sup> R. Hamilton, *Letter to California Coastal Commission*, January 16, 2008 at 6-7.

<sup>70</sup> *Id.* at 60.

<sup>71</sup> See TCA App. 21/22-50 at 4.11-96, Table 4.11-4A (PDF p. 264).

<sup>72</sup> W.D. Spencer, Ph.D., *Letter to California Coastal Commission*, August 17, 2007 at 3.

<sup>73</sup> *Id.*

will occur irrespective of TCA's offer.<sup>74</sup> This restoration would also be in a more inland location, in the El Moro Valley, about a mile from the ocean.<sup>75</sup>

Neither the Crystal Cove site nor the Chiquita Canyon site can reproduce the rich mosaic of coastal estuary, marsh, lush riparian woodland, sandy soils, and associated uplands that makes San Onofre so ecologically unique. Neither site has the watershed integrity of San Onofre. Indeed, Crystal Cove contains only narrow riparian strips and is surrounded by dense development. Piecemeal actions directed at only one component of a complex ecosystem will never restore the values lost.<sup>76</sup> The Toll Road's impacts on coastal sage scrub have not been, and cannot be, mitigated at these other locations.

**Pacific Pocket Mouse.** TCA's analysis of potential impacts on the Pacific pocket mouse ("PPM") is deeply flawed. This species is listed as "endangered" under the ESA and as "critically endangered" – the highest threat rating short of extinct in the wild – on the International Union for the Conservation of Nature's "Red List."<sup>77</sup> A quintessential coastal species, its habitat is restricted to sandy soils near the Pacific Ocean. It was once thought extinct but was rediscovered in 1993. It now has documented populations at only three limited locations along the coastline, two of which are on Camp Pendleton.<sup>78</sup> One of these sites – San Mateo Creek – supports two small and precarious populations, one north of the creek adjacent to the coastal zone, and the other south of the creek.

The Toll Road would have a devastating effect on the Pacific pocket mouse, and, according to one of the world's leading experts on the mouse, would substantially increase its risk of actual extinction.<sup>79</sup> This is because the health of *each* remaining population is of critical importance. According to the Recovery Plan for the PPM prepared by the United States Fish and Wildlife Service:

- "Loss or degradation of any of the populations at the three known extant locales could irretrievably diminish the likelihood of the subspecies' survival. All extant populations are essential. These populations should be protected and secured from significant potential impacts."<sup>80</sup>

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<sup>74</sup> D. Pryor, District Ecologist, California Department of Parks and Recreation (pers. comm. Jan. 7, 2008).

<sup>75</sup> TCA App. 1-4(B) at 2-3 (PDF pp. 8-9).

<sup>76</sup> *Id.*

<sup>77</sup> USFWS Threatened and Endangered Species System, [http://ecos.fws.gov/tess\\_public/SpeciesReport.do?kingdom=V&listingType=L](http://ecos.fws.gov/tess_public/SpeciesReport.do?kingdom=V&listingType=L) (last visited May 26, 2008) ("USFWS Endangered Species List") and <http://ecos.fws.gov/speciesProfile/SpeciesReport.do?spcode=A0BY> (last visited January 16, 2008) ("Species Profile"); 2007 IUCN Red List of Threatened Species, <http://www.iucnredlist.org>.

<sup>78</sup> TCA App. 31/32-57 at 3 (PDF p. 7) (Wayne Spencer, Ph.D. & Robert Hamilton, *Review of Biological Resources Analysis in SOCTIIP Draft Environmental Impact Statement/ Supplemental Environmental Impact Report*, prepared for Shute, Mihaly & Weinberger (August 2004)).

<sup>79</sup> W.D. Spencer, Ph.D., *Review of Impacts to the Endangered Pacific Pocket Mouse by Eastern Alignments of the Proposed Southern Orange County Transportation Improvement Project*, Letter to US Fish and Wildlife Service, August 11, 2005 (hereafter "*Spencer 2005 Letter*") at 9 (attached as Exhibit 11).

<sup>80</sup> P. Brylski, Ph.D., et al., *Pacific Pocket Mouse Recovery Plan* (USFWS 1998) at 37 ("*PPM Recovery Plan*") (attached as Exhibit 12).

- “[F]urther losses of occupied *or potential* habitat would seriously reduce the probability of the persistence of the subspecies.”<sup>81</sup>
- “Population persistence and expansion should be maintained by precluding actions which result in physical barriers to movement, habitat fragmentation, or an increase in edge effects.”<sup>82</sup>

Critical to the biology of the Pacific pocket mouse is the ability to expand its numbers in good years, as this is vital to ensuring *bare survival* in bad years. Yet flying in the face of all scientific recommendations, the Toll Road would trap the San Mateo-North population in a highly constrained area between urban San Clemente and the highway. It would physically *eliminate* some currently occupied habitat, as well as a large amount of the *suitable* habitat needed for population expansion – both termed “essential” by the Recovery Plan. In addition to the direct taking, virtually all the rest of the expansion habitat would be degraded by fragmentation, loss of connectivity, and edge effects such as noise and light pollution.<sup>83</sup> *A significant portion of this essential expansion habitat – which qualifies as ESHA due to its special and valuable role in the ecosystem – lies within the coastal zone.*<sup>84</sup>

This absolute reduction in available habitat, and the resultant inability of the population to adapt to changing circumstances, severely increases the risk of extirpation of the San Mateo-North population. The number of individuals captured in different years at San Mateo-North has ranged from just 4 to 37, showing how susceptible this fluctuating population is to extirpation. In addition, the Toll Road would irrevocably sever the historic connectivity between the San Mateo-North and the San Mateo-South populations. These populations are now primarily separated by two-lane Cristianitos Road and old agricultural fields, which would be difficult, but not impossible, to cross.<sup>85</sup> The Toll Road, however, would place an 18-inch barrier curb along the western disturbance limit of the road, permanently isolating these populations from one another.<sup>86</sup> It would block mice from these different groups from interbreeding and reduce the propagation of genetic diversity essential to the species’ survival.<sup>87</sup>

TCA claims that an undercrossing will mitigate this impact, but such measures are completely experimental with respect to small mammals such as mice and there is no evidence that it would result in any mitigation of impacts to this species.<sup>88</sup> TCA has acknowledged elsewhere that while larger mammal species are more capable of finding and using undercrossings, smaller wildlife species may simply attempt to cross deadly

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<sup>81</sup> *Id.* at 34 (emphasis added).

<sup>82</sup> *Id.* at 21.

<sup>83</sup> *Spencer 2005 Letter* at 8, Attachment A.

<sup>84</sup> *Id.* at Attachment A.

<sup>85</sup> *See id.* at 8-9.

<sup>86</sup> TCA App. 8-20(C) at 7-8 (PDF pp. 15-16).

<sup>87</sup> *Spencer 2005 Letter* at 8-9.

<sup>88</sup> *Id.* at 9.

road alignments directly.<sup>89</sup> The experimental undercrossings proposed by TCA would require these tiny creatures to find their way through culverts ranging from 95 to 525 feet in length.<sup>90</sup> One proposed undercrossing also seemingly leads to a detention basin for polluted runoff.<sup>91</sup> The FWS agreed in its BO for the Toll Road project that the undercrossing would not provide any effective mitigation.<sup>92</sup> In addition, the Toll Road would block the PPM from accessing the former agricultural fields in Camp Pendleton, which are partially within the coastal zone and, if restored, would greatly enhance connectivity between populations.

The BO for the Toll Road suggests that “management measures” proposed by TCA could avoid driving the species to extinction. However, as explained below, the conclusion is more than questionable, and ignores the permanent loss of crucial expansion habitat for the species. Small, precarious populations like that of San Mateo-North are vulnerable under best of circumstances. This is why, referring to San Mateo Creek, the Recovery Plan states, “All further actions in this area should improve ecosystem function and habitat linkage/connectivity.”<sup>93</sup> To the contrary, the loss of *essential* habitat – which cannot be compensated for by mere management measures – plus the addition of edge effects and fragmentation, could jeopardize the very existence of this on-the-brink species.<sup>94</sup>

Finally, TCA’s recent proposal to restore sage scrub habitat at Crystal Cove State Park will do nothing for the Pacific pocket mouse. The pocket mouse is not present at Crystal Cove, and in any event, the coastal sage scrub habitat identified for restoration at Crystal Cove lacks the sandy soils required by the pocket mouse.<sup>95</sup> Restoration of this site could never qualify as mitigation.

**Arroyo Toad.** TCA fails to account for impacts to the southwestern arroyo toad, another severely endangered species. San Mateo Creek is home to one of the most important remaining populations of the arroyo toad, which breeds in gravel terraces and uses adjacent riparian habitat and uplands for aestivation and foraging. On Camp Pendleton, the species has been documented to range at least 1.2 kilometers from the streamcourse as it forages for food.<sup>96</sup>

The Toll Road would destroy and disrupt significant arroyo toad habitat within the coastal zone. Indeed, according to an arroyo toad expert with extensive field experience in this very area, “Occupied and known arroyo toad habitat would be directly and significantly disrupted within the coastal zone of lower San Mateo Creek. Arroyo toads

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<sup>89</sup> TCA App. 25-53 at 3-344 (PDF p. 426).

<sup>90</sup> TCA App. 25-53 at 8 (PDF p. 16).

<sup>91</sup> TCA App. 14-31(E), Exhibit 3A (PDF p. 31).

<sup>92</sup> TCA Supp. App. 6-50 at 159.

<sup>93</sup> *PPM Recovery Plan* at 52.

<sup>94</sup> *Spencer 2005 Letter* at 9.

<sup>95</sup> See TCA App. 1-4(B) at 2 (PDF p. 8).

<sup>96</sup> TCA App. 1-4(H) at 2 (PDF p. 6) (R.E. Lovich, *Letter to California Coastal Commission*, August 16, 2007 (“*Lovich 2007 Letter*”).

are well known as inhabiting the lower portions of San Mateo Creek, even west of I-5 (Griffin and Case 2001, Holland and Goodman 1998).<sup>97</sup> This includes significant areas of coastal sage scrub in the uplands along the creek that would be lost.<sup>98</sup>

The Toll Road would degrade and physically occupy coastal sage scrub uplands in the coastal zone of lower San Mateo Creek. The Toll Road also would block arroyo toad access to habitat areas on the other side of the highway, causing further significant disruption to its biological value.<sup>99</sup> These effects continue upstream, where access to vital uplands would be blocked along important drainages in the San Mateo Creek and San Juan Creek watersheds. At the same time, the Toll Road would interfere with the necessary interbreeding between populations.<sup>100</sup> The end result would be a loss in population viability for arroyo toads both within and without the coastal zone.<sup>101</sup>

In general, the arroyo toad is highly sensitive to habitat fragmentation, as occurs with highways. It has reliably disappeared from watersheds throughout Southern California where habitat contiguity has been lost. Only in the most intact watersheds – like San Mateo Creek and its tributaries – does it still survive.<sup>102</sup> “The tollroad in this location would degrade and fragment this extraordinary relict of a once-larger functional ecosystem in Southern California.”<sup>103</sup>

TCA’s proposed mitigation measures for the arroyo toad are woefully inadequate. TCA’s measures are largely limited to temporary construction impacts and fail to address more serious long-term threats to the species. Mitigation measures referenced in the consistency application include construction management plans, mapping of arroyo toad habitat areas, fencing, surveys, relocation, and recreation of habitat after construction.<sup>104</sup> None of these measures, however, addresses habitat fragmentation and loss of population viability. They are “insufficient.”<sup>105</sup> Nor does the newly proposed Crystal Cove restoration site contain the gravel terraces and intact hydrologic regimes required by the arroyo toad.<sup>106</sup> This restoration proposal cannot contribute to this species’ viability.

**Southern Steelhead and Tidewater Goby.** Both of these species are federally endangered,<sup>107</sup> and their habitats would be degraded by the Toll Road. Research on historic population sizes suggests that San Mateo Creek may have once been one of the

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<sup>97</sup> *Id.* at 2.

<sup>98</sup> R.E. Lovich, *Occupied Arroyo Toad Habitat in the Coastal Zone* (Sept. 2007) (based on TCA App. 21/22-50, Fig. 4.11-1j, (PDF p. 233)) (attached as Exhibit 13).

<sup>99</sup> See TCA App. 1-4(H) (*Lovich 2007 Letter*) at 4 (PDF p. 8).

<sup>100</sup> *Id.* at 3-4.

<sup>101</sup> *Id.* at 5.

<sup>102</sup> *Id.* at 4-5.

<sup>103</sup> *Id.* at 4.

<sup>104</sup> See TCA App. 13-31(B) at 64 (PDF p. 67); TCA App. 21/22-50 at 4.10-17 to 4.10-20 (PDF pp. 126-29), 4.12-32 to 4.12-34 (PDF pp. 329-32).

<sup>105</sup> TCA App. 1-4(H) (*Lovich 2007 Letter*) at 3 (PDF p. 7).

<sup>106</sup> See TCA App. 1-4(B) at 2 (PDF p. 8).

<sup>107</sup> See 71 Fed. Reg. 833 (January 5, 2006) (listing southern California coast steelhead as “endangered”); 59 Fed. Reg. 5494 (February 2, 1994) (listing tidewater goby as “endangered”).

most populated steelhead streams in the region.<sup>108</sup> TCA has argued that the probability of impacts on southern steelhead is extremely low because they are predicted to occur in low numbers.<sup>109</sup> But the San Mateo watershed is the only watershed south of Malibu Creek to support a breeding population of southern steelhead and is considered critical to recovery of this listed species.<sup>110</sup>

Young steelhead (fry) are especially sensitive to fine sediments and turbidity,<sup>111</sup> both of which may be multiplied many times over by road construction projects.<sup>112</sup> As discussed in section IV.A.2.a.vi below, the massive cut and fill needed for the Toll Road will significantly disturb 20 natural subwatersheds of San Mateo Creek. Sediments and turbidity may be multiplied many times over by road construction projects.<sup>113</sup> The natural watersheds through which the Toll Road would run are presently in equilibrium, but are fragile and “prone to instability and rapid degradation with relatively minor changes in runoff patterns caused by changes in land use. Introducing a new highway through these undeveloped watersheds is likely to result in drastic impacts to both sediment production and channel habitat structure.”<sup>114</sup> Approximately 40% of the upstream portion of each of the eight subwatersheds near the mouth of the creek will be disturbed on average, which will lead to destabilization and erosion of channels.<sup>115</sup> The combination of disturbance of watersheds and combined with the concentration of flow in culverts is likely to cause major erosion of fine sediments and destabilization of stream channels.

The proposed BMPs (energy dissipation at culvert outlets and revegetation along cut and fill slopes) are inadequate to address impacts associated with flow concentration, increased runoff, and the potential for significant soil erosion.<sup>116</sup> As a result, siltation of the creek system will occur, degrading water quality and habitat conditions.<sup>117</sup>

Tidewater gobies are found only in the coastal wetlands and estuaries of California, and are now restricted to a fraction of their former range.<sup>118</sup> TCA concedes that the San

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<sup>108</sup> Wayne Spencer, et al., *On the Global and Regional Ecological Significance of Southern Orange County: Conservation Priorities for a Biodiversity Hotspot*, Prepared for Endangered Habitats League (2001) (“*Spencer Conservation Priorities*”) at 26 (attached as Exhibit 14).

<sup>109</sup> TCA App. 13-31(B) at 63 (PDF p. 66).

<sup>110</sup> *Spencer Conservation Priorities* at 36.

<sup>111</sup> K.B. Suttle, et al., *How Fine Sediment in Riverbeds Impairs Growth and Survival of Juvenile Salmonids*, *Ecological Applications*, Vol. 14 No 4, August, 2004 at 969-974 (attached as Exhibit 15).

<sup>112</sup> A.P. Wheeler, et al., *Impacts of New Highways and Subsequent Landscape Urbanization on Stream Habitat and Biota*, 13 *Reviews in Fisheries Science* 141, 144-45 (2005) (attached as Exhibit 16).

<sup>113</sup> A.P. Wheeler, et al., *Impacts of New Highways and Subsequent Landscape Urbanization on Stream Habitat and Biota*, 13 *Reviews in Fisheries Science* 141, 144-45 (2005).

<sup>114</sup> PWA Letter dated January 22, 2008 at 2.

<sup>115</sup> Philip Williams & Associates, Ltd., *Letter to Surfrider Foundation*, August 31, 2007 (“*PWA 2007 Analysis*”) at 2-3 (attached as Exhibit 17).

<sup>116</sup> M. Lindley, Philip Williams & Associates, Ltd. (pers. comm. January 17, 2008).

<sup>117</sup> *PWA 2007 Analysis* at 3.

<sup>118</sup> Ventura Fish & Wildlife Office: Tidewater Goby, [http://www.fws.gov/ventura/sppinfo/profiles/details\\_fish.cfm?speciesid=122](http://www.fws.gov/ventura/sppinfo/profiles/details_fish.cfm?speciesid=122) (last visited May 26, 2008).

Mateo Creek Lagoon is habitat for the tidewater goby, but insists that the species will not be affected by Foothill-South, either during construction or afterwards. This is inaccurate. The subwatersheds and tributaries to San Mateo Creek, including its estuary and lagoon, play a special role in the aquatic ecosystem on which both steelhead and tidewater goby depend for their survival and recovery. As described above, due to extensive degradation of subwatersheds by the Toll Road and inadequate mitigation measures, erosion and fine sediment delivery to the lagoon at the creek mouth has the potential to change its ecology over time.<sup>119</sup> This would be highly detrimental to the tidewater goby, which is threatened by both siltation and urban development leading to loss of coastal saltmarsh habitat.<sup>120</sup>

TCA relies very heavily on a short letter from the National Marine Fisheries Service stating the agency's opinion that the Toll Road is not likely to adversely affect either the steelhead or the goby. *See* TCA Br. at 30-31. That letter, written in May 2007, briefly recites TCA's proposed BMPs and water quality mitigation measures. However, the NMFS letter did not consider the critique of TCA's Runoff Management Plan ("RMP") conducted by independent experts and submitted to the Commission, including noted hydrological engineers Philip Williams & Associates ("PWA").<sup>121</sup> PWA showed that the steep cut and fill slopes necessary to route the Toll Road through the San Mateo Creek watershed – slopes up to 20 stories high – were likely to fail, despite the proposed revegetation efforts. Because there are no facilities to catch the eroded earth before it reaches San Mateo Creek, siltation would degrade water quality in a stream considered critical to the species' recovery. Young steelhead (fry) are especially sensitive to fine sediments and turbidity.<sup>122</sup> The Regional Water Quality Control Board has also found that the RMP submitted by TCA "was not adequate to demonstrate that the project would not cause degradation of receiving waters."<sup>123</sup> In short, NMFS appears to have reached its conclusion based on incomplete and inadequate information, and without considering important information, now before the Secretary, concerning the tremendous risk that the Toll Road will destabilize lower San Mateo Creek and thus risk harm to both the steelhead and the goby.

The record thus shows that the Toll Road's impacts on these species and their unique and irreplaceable coastal habitats will be immense even after mitigation.

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<sup>119</sup> *PWA 2007 Analysis* at 3.

<sup>120</sup> Ventura Fish & Wildlife Office: Tidewater Goby, [http://www.fws.gov/ventura/sppinfo/profiles/details\\_fish.cfm?speciesid=122](http://www.fws.gov/ventura/sppinfo/profiles/details_fish.cfm?speciesid=122) (last visited May 26, 2008).

<sup>121</sup> See, e.g., TCA App. 1-4(E) (PDF pp. 1-5), 1-4(F) (PDF pp. 6-13).

<sup>122</sup> K.B. Suttle, et al., *How Fine Sediment in Riverbeds Impairs Growth and Survival of Juvenile Salmonids*, 14 *Ecological Applications* 4 (August, 2004) at 969-974 (attached as Exhibit 14).

<sup>123</sup> J.H. Robertus, Regional Water Quality Control Board, Letter to R. Beck, RBF Consulting, Re: South Orange County Transportation Infrastructure Improvement Project Foothill-South Toll Road (Feb. 6, 2008) (attached as Exhibit 42).

**ii. The Biological Opinion for the Toll Road Demonstrates the Severity of the Project's Impacts on Listed Species.**

In its reply brief, TCA implies that the BO recently issued by FWS demonstrates that the Toll Road's harm to listed species and their habitats would be minimal. This is not the case. First, simply because a species does not go extinct does not mean that major damage has not occurred. And second, key conclusions of the Biological Opinion are undermined by the Service's own prior analyses.

The ESA requires federal agencies to "consult" on the impacts of federal actions that may adversely affect listed species. *See* 16 U.S.C. 1536(a)(2). The purpose of consultation is to ensure that the action will not jeopardize endangered species or adversely modify their designated critical habitat. *Id.* The purpose of a BO is to express the FWS's opinion, based on the best available scientific information, regarding whether the action will do so. *See generally* 50 C.F.R. § 401.14. The definition of "jeopardy" under the ESA – "to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild," 50 C.F.R. § 402.02 – means an impact so severe as to reduce the likelihood of a species' *very survival over its entire range*, or, put another way, to increase the likelihood of actual extinction. *See generally Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059, 1069-70 (9th Cir. 2004) (distinguishing government's duty under ESA to avoid jeopardy, defined as mere survival, from corresponding duty to ensure conservation and recovery of endangered species).

Thus, even where a project may not drive a species over the brink of disappearance, it may nonetheless have significant adverse impacts. *See, e.g., Nat. Res. Def. Council v. Winter*, 518 F.3d 658, 691-92 (9th Cir. 2008) ("An agency action can have 'significant effects' on the environment short of threatened extinction."); *Makua v. Rumsfeld*, 163 F. Supp. 2d 1202, 1218 (D. Hawai'i 2001) ("Clearly, there can be a significant impact on a species even if its existence is not jeopardized."). The Coastal Zone Management Act is concerned with all coastal impacts of a project, not just those that might drive a species out of existence. *See* 16 U.S.C. § 1451(d), (e), (k).

The BO for the Toll Road reveals that the project will have a number of adverse, unmitigated impacts on listed species and their habitats. For example, with respect to the arroyo toad, the BO finds that individual toads present in the Toll Road area will be crushed and killed during construction.<sup>124</sup> Even more seriously, "[l]oss of upland areas for foraging, aestivation, and dispersal could affect toad populations through increased competition for limited resources or increased predation risk," and that these "impacts to and isolation of upland arroyo toad habitat are not offset by the proposed project."<sup>125</sup>

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<sup>124</sup> TCA Supp. App. 6-50 at 61-62.

<sup>125</sup> TCA Supp. App. 6-50 at 65. In fact, the impact to the arroyo toad may be considerably worse than recognized in the BO. An expert familiar with the San Mateo population of the toad testified to the Commission that "The tollroad in this location would degrade and fragment this extraordinary relict of a once-larger functional ecosystem in Southern California," with the end result being a loss in population viability for the arroyo toad within and without the coastal zone. TCA App. 1-4(H) (*Lovich 2007 Letter*) at 4-5 (PDF pp. 8-9).

Addressing the California gnatcatcher, the BO similarly finds that “the negative effects of the proposed project on gnatcatchers include loss of habitat for a substantial number of gnatcatcher pairs,” a vast majority of which occur on Camp Pendleton – in other words, close to and within the coastal zone.<sup>126</sup> In addition,

The proposed project 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 Orange County will also be reduced. Finally, the proposed project could increase fire frequency in habitat surrounding the road, which could, in turn, lead to habitat degradation over the long term.

*Id.* The BO also recognizes the unique connectivity value of the maritime habitat affected by the Toll Road and deems TCA’s proposed mitigation measures inadequate:

Other than replanting the cut and fill slopes adjacent to the road with coastal sage scrub species, no restoration or conservation of coastal sage scrub proximal to the impacts on Camp Pendleton is proposed. Thus, the proposed conservation and restoration will benefit the gnatcatcher populations in greater Chiquita Canyon and the coastal subregion of the NCCP/HCP, but due to the distance between the Base and the conservation area, this conservation measure will not directly offset project impacts to the gnatcatcher population at Camp Pendleton or to connectivity between Camp Pendleton and southern Orange County.<sup>127</sup>

Unmitigated impacts to coastal populations of the least Bell’s vireo, an endangered riparian bird, are recognized as well: “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.”<sup>128</sup> In sum, the BO itself identifies significant and unmitigated impacts to these species and their habitats – impacts TCA cannot dismiss as unimportant.

The BO also identifies a number of serious impacts to the critically endangered Pacific pocket mouse (“PPM”), including loss of habitat connectivity, death or injury from capture and relocation, “roadway associated mortality” (in plain English, roadkill), increased predation, and night lighting.<sup>129</sup> The BO also concludes that many of TCA’s proposed mitigation measures for the fragile San Mateo North population, including construction of passages under the road and relocation efforts, are not likely to work.<sup>130</sup> Another mitigation measure proposed by TCA, a barrier to prevent mice from entering the roadway, has not yet been designed, so its effectiveness is impossible to evaluate.<sup>131</sup> The BO paints a grim picture for this population of PPM, which would be forever cut off from another small nearby population on Camp Pendleton and from additional habitat into which it might someday expand. Given the extremely

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<sup>126</sup> TCA Supp. App. 6-50 at 89 (23 to 27 of the 25 to 31 total pairs affected are on Camp Pendleton).

<sup>127</sup> *Id.* at 89-90.

<sup>128</sup> *Id.* at 107.

<sup>129</sup> *See generally id.* at 155-62.

<sup>130</sup> *See id.* at 158-59.

<sup>131</sup> *See id.* at 156-57.

precarious condition of the species, these severe and unmitigated impacts must be given great weight here.

TCA relies on the BO's conclusion that the Toll Road will not directly displace any known, occupied PPM habitat.<sup>132</sup> The conclusion lacks credibility. As one top PPM expert explained to the Commission,

[i]f there is one thing that many years of trapping experience with this species tells us, it is that PPM are exceptionally variable over both space and time in their detectability using live traps (or any other method), and that their frequently low and unpredictable detectability makes it very difficult to prove absence from a site using trapping surveys.<sup>133</sup>

The Commission's own biologist reached much the same conclusion after independently reviewing the trapping and survey results and the materials submitted by TCA's consultants.<sup>134</sup> Yet the BO purports to do exactly what these experts said TCA had failed to do: prove absence from the areas affected by the Toll Road using existing trapping surveys.

Indeed, the Biological Opinion discusses at length the difficulty of locating the pocket mouse, particularly during periods of low abundance, and discusses the intensive methods required to find them. It concludes that the various survey efforts employed at the PPM population site closest to the Toll Road lacked common, consistent methodological features that would allow FWS to make reliable inferences about population size or dynamics at the site.<sup>135</sup> Accordingly, although the BO says that no known, occupied habitat will be directly impacted, it also says that nobody knows exactly what habitat is occupied because adequate survey results do not exist. Properly read, the BO does not support TCA's suggestion that the Toll Road will have no impact on occupied PPM habitat.

On the other hand, the Toll Road indisputably will affect a great deal of potential expansion habitat for the mouse – habitat essential to its long term survival<sup>136</sup> that will be either directly destroyed or forever cut off following construction. The final BO downplays the significance of this impact, but only at the expense of the best available science.

Indeed, a Draft BO prepared by FWS staff reviewed the available literature and documented these impacts, concluding that

*Cumulatively, the direct loss of habitat in the toll road alignment in addition to loss of habitat east of the roadway will result in the loss of 19 of 37 ha (47 of 92 ac), or 51 percent of the habitat ranked as having "high" or "very high" habitat suitability within*

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<sup>132</sup> See *id.* at 164; TCA Reply at 15.

<sup>133</sup> TCA App. 1-4(C) at 6 (PDF p. 15).

<sup>134</sup> See TCA App. 2-5(A) at 3-5 (PDF pp. 3-5).

<sup>135</sup> TCA Supp. App. 6-50 at 148.

<sup>136</sup> *Spencer 2005 Letter* at 4.

*the action area.*<sup>137</sup>

The entire multi-page analysis in the Draft BO documenting the severity and consequences of these impacts, however, *was excised from the final version without any justification or explanation.*

The information included in the Draft BO but omitted from the final underscores the Toll Road's fundamental inconsistency with the adopted recovery plan for the pocket mouse. According to the recovery plan, "[l]oss or degradation of any of the populations at the three known extant locales could irretrievably diminish the likelihood of the subspecies' survival," and "further losses of occupied or *potential* habitat would seriously reduce the probability of the persistence of the subspecies."<sup>138</sup>

But according to the Draft BO, this loss of expansion and restoration habitat – *the very information purged from the final version* – would result in a reduction in the "carrying capacity" of San Mateo North *by over half*, with severe consequences:

In the absence of conservation measures to increase and/or improve habitat remaining after construction of the toll road, the loss would appreciably increase the vulnerability of this population to extirpation by limiting the size the population can achieve during population expansion events and by restricting the ability of animals to shift their use of space over time in response to changes in resource availability, competitors, predators, and structural changes to the plant community.<sup>139</sup>

The final BO, rather than acknowledging this problem, relies entirely on TCA's proposed Pacific Pocket Mouse Resource Management Plan (PPMRMP) for restoring former agricultural fields. This is wishful thinking. Not only is the amount of former agricultural fields only approximately half the size of the potential habitat that will be lost according to the Draft BO,<sup>140</sup> but the restoration of this land to occupied Pacific pocket mouse habitat *has never been attempted, let alone accomplished.* The Service provides not a shred of evidence that the proposed management plan is anything other than experimental.

Moreover, while improved management for the pocket mouse is certainly needed, construction of a toll road through its habitat is not a necessary precondition. Camp Pendleton's Integrated Natural Resource Management Plan (INRMP) calls for management and restoration for the PPM:

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<sup>137</sup> 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 hereto as Exhibit 18) (emphasis added).

<sup>138</sup> *PPM Recovery Plan* at 34 (emphasis added).

<sup>139</sup> *Draft BO* at 83.

<sup>140</sup> *See id.* at 97.

*Chapter 4–Natural Resources Management*

Upland Habitat Studies for Listed Species. The Base contracted the USFWS to develop methodology for identifying upland habitat areas that are important to actively manage for selected listed upland species, including . . . PPM. Development of this methodology will enable the Base to better maintain habitat for listed upland species populations during project planning and will identify sites for potential future mitigation, compensation, or stewardship.

Among other required elements, this research will involve: (1) determining the utility of existing data and imagery for monitoring landscape level habitat changes; (2) mapping of selected areas and field verification of existing GIS layers; (3) locating, designating, and mapping all habitats within selected areas that have the potential to become suitable for federally listed upland species; (4) determining the general restoration approach for potential habitat areas; and (5) prioritizing the importance of selected habitat areas, including consideration of patch size and connectivity/proximity to adjacent populations and habitat (both on and off Base).<sup>141</sup>

The BO also acknowledges this:

The Marine Corps continues to work cooperatively with the Service to conserve PPM on the Base. The Marine Corps is currently in formal consultation with the Service regarding all Marine Corps activities in upland habitats on the Base, and the Marine Corps has committed to continue to conserve and monitor PPM on the Base and promote research and other actions that lead to the recovery of this species.<sup>142</sup>

Consultation between the Marines and FWS thus will result in the specific management and restoration efforts anticipated by the INRMP. Indeed, Camp Pendleton is currently developing a management plan for PPM in conjunction with FWS and USGS.<sup>143</sup> The Toll Road – which will not only permanently destroy a great deal of this habitat, but also encroach on the base and negatively impact its training mission – is not needed for the Marine Corps to steward its land according to federal law.

The California Department of Parks and Recreation, in support of the INRMP, also provides stewardship for the San Mateo North population of PPM, consisting of fencing around the occupied area (with repairs as needed), fuel modification zones designed around the habitat, control of human access, weed control to reduce fire threat, ranger patrols to control mountain bikers and restoration of such damage, signage and public education, and a prescribed burn in 2000 to enhance habitat.<sup>144</sup>

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<sup>141</sup> Marine Corps Base Camp Pendleton, *Integrated Natural Resources Management Plan* (March 2007) (“2007 INRMP”) at 4-34, available at <http://www.cpp.usmc.mil/base/environmental/inrmp.asp> (last visited May 25, 2008).

<sup>142</sup> TCA Supp. App. 6-50 at 145.

<sup>143</sup> Ken Quigley, Environmental Planner, Camp Pendleton, pers. comm. with D. Silver, Endangered Habitats League (May 28, 2008).

<sup>144</sup> D. Pryor, California Department of Parks & Recreation, pers. comm. with D. Silver, Endangered Habitats League (May 23, 2008).

In conclusion, the Toll Road's impacts are flatly incompatible with the guidance set forth in the PPM Recovery Plan:

- “Loss or degradation of any of the populations at the three known extant locales could irretrievably diminish the likelihood of the subspecies’ survival. All extant populations are essential. These populations should be protected and secured from significant potential impacts.”<sup>145</sup>
- “[F]urther losses of occupied or potential habitat would seriously reduce the probability of the persistence of the subspecies.”<sup>146</sup>
- “Population persistence and expansion should be maintained by precluding actions which result in physical barriers to movement, habitat fragmentation, or an increase in edge effects.”<sup>147</sup>

The Toll Road's impacts on the Pacific pocket mouse and other threatened and endangered species will be dramatic. The final BO for the project, despite inappropriate omissions and attempts to downplay these impacts, nonetheless confirms that they will be both severe and unmitigable.

Finally, the BO implicitly recognizes that the ESA demands more than just avoiding approval of projects that will drive endangered species extinct. On the contrary, the ESA requires all federal agencies to use the powers at their disposal for “conservation,” that is, allowing threatened and endangered species to recover to the point that the protections of the ESA are no longer necessary. *See* 16 U.S.C. §§ 1532(3), 1536(a)(1). Given the scope and gravity of these effects, therefore, it is no wonder that the BO offers “conservation recommendations,” foremost among which is a plea for analysis of alternative alignments:

We recommend that FHWA, TCA, 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, primarily arroyo toad and gnatcatcher.<sup>148</sup>

The BO does not support TCA's claim that the Toll Road's impacts will be minor. On the contrary, it supports a strong argument that the Toll Road should not be built in the location proposed at all.

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<sup>145</sup> *PPM Recovery Plan* at 34.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 21.

<sup>148</sup> TCA Supp. App. 6-50 at 173.

### iii. The Toll Road Will Negatively Impact Coastal Wetlands.

Focusing on the acreage of coastal zone wetlands occupied by the project (0.16 acres of permanent impacts and 7.7 acres of temporary impacts), TCA has sought to portray the Project's wetland impacts as minor and mitigable through the creation of one acre of new wetland directly adjacent to a proposed detention basin and the Toll Road structure.

In fact, the impacted wetlands are part of a "highly diverse, intact, and regionally significant complex of habitats supporting special status species" – one of the increasingly rare functional ecosystems remaining in Southern California – and as such have a high ecological value largely ignored by TCA.<sup>149</sup> TCA's proposed mitigation "cannot mitigate either the direct or indirect impacts" of the Toll Road on this important coastal wetland habitat.<sup>150</sup>

TCA's mitigation proposals would be biologically and functionally inadequate. TCA proposes to "create" 15.9 acres of wetlands and riparian habitat in the San Juan Creek watershed.<sup>151</sup> The wetlands taken by the Toll Road, however, would be lost from a rare and irreplaceable coastal complex of wetlands, estuary, marsh, and adjacent uplands, all part and parcel of an undammed and relatively pristine watershed. Riverine and estuarine resources at the broad ocean mouth of a creek cannot be replaced by "recontouring uplands"<sup>152</sup> in a canyon 15 to 20 miles inland – well outside the coastal zone and in a different watershed. The species compositions and biological functions and values are all different, and even if successful, would result in a *net loss* of coastal wetland resources.<sup>153</sup>

Following submission of its original consistency certification, TCA identified an acre of fallow agricultural land adjacent to I-5 that it proposes to restore to "southern willow woodland" in mitigation for impacts to wetlands within the coastal zone. This proposed mitigation area is within the Project right-of-way in the same location as one of the extended detention basins ("EDBs") that TCA has proposed to treat surface runoff from I-5.<sup>154</sup> This location cannot replace the lost functions and values of the natural channels of San Mateo Creek and its wetland-upland complex.<sup>155</sup> The hydrology of the proposed mitigation area, located around a storm water detention basin, cannot possibly mimic the hydrology of the natural floodplain.<sup>156</sup> Also, because the entirety of the mitigation area is so close to I-5 and the merging

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<sup>149</sup> TCA App. 1-4(A) at 4.

<sup>150</sup> *Id.* at 2.

<sup>151</sup> TCA App. 13-31(B) at 54 (PDF p. 57).

<sup>152</sup> *Id.*

<sup>153</sup> W.D. Spencer, Ph.D., *Letter to California Coastal Commission*, August 17, 2007 at 3 (attached as Exhibit 10).

<sup>154</sup> Compare TCA App. 10-23(A), Ex. 6 (PDF p. 25), with DEIS/SEIR Appendix A.1, Route Plan for A7C-FEC-M Initial at 6 (Sheet 5) (attached as Exhibit 19).

<sup>155</sup> M.D. White, *Letter to Endangered Habitats League*, Sept. 13, 2007 at 3.

<sup>156</sup> *Id.* at 3.

Toll Road,<sup>157</sup> it would *all* be subject to adverse edge effects. With a maximum width of 200 feet, it is well within the range of such effects.<sup>158</sup>

TCA's functional assessment of the impacted wetlands and "restored" mitigation site suffers from numerous deficiencies. The metrics used in the assessment to measure functional capacity are statistically biased to disfavor certain critical functions of the impacted wetlands (such as landscape context and connectivity) without any substantiation.<sup>159</sup> Nor does the assessment even consider any indirect impacts, such as noise and vibrations, lights, altered runoff, generation of dust and contaminants, or air quality impacts.<sup>160</sup> Michael White, an aquatic biologist with 20 years of experience, has conservatively estimated that indirect impacts would permanently degrade roughly 5 to 7 additional acres of wetland and riparian habitat within the coastal zone (*excluding* wetlands inside of the existing Interstate-5 indirect impact zone).<sup>161</sup> In addition, another 2 to 40 acres of wetland and riparian habitat currently lying within the existing indirect impact zone of I-5 will be even further degraded by the Toll Road.<sup>162</sup> None of these indirectly impacted wetlands is accounted for in the proposed mitigation.

The functional assessment used by TCA to assess the impact and mitigation areas is, according to Michael White, an aquatic biologist with 20 years of experience in California, "statistically biased and unsubstantiated."<sup>163</sup> For example, the only consideration of landscape context is the metric "Land Use/Land Cover," whose score is swamped by 20 other metrics. "Furthermore, the landscape position and connectivity of the wetlands in the coastal zone, one of the irreplaceable conservation values of these resources, is not adequately quantified in the analysis." As a result, the true functions and values of the marsh-estuarine-riparian complex at San Onofre are greatly underestimated.<sup>164</sup> Finally, TCA's assessment gives temporary impacts from construction a zero score, without providing any evidence that the impacted lands are capable of being restored to their prior condition.<sup>165</sup>

These deficiencies grossly distort the relative benefits of the proposed mitigation – despite the lack of a detailed mitigation plan. "It is hard to envision how the proposed mitigation site could have about the same Functional Capacity Score as the existing habitats (e.g., Table 1 vs. Table 5), particularly without the details of the wetland creation plan."<sup>166</sup>

The technical efficacy of creating new wetlands is itself questionable, particularly for the high resource values affected by this project.<sup>167</sup> The US Department of the Interior has stated that a big problem with mitigation projects is that often "the quality of the resulting

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<sup>157</sup> TCA App. 14-31(E), Ex. 3 (PDF p. 39).

<sup>158</sup> M.D. White, Letter to Endangered Habitats League, Sept. 13, 2007 at 3.

<sup>159</sup> TCA App. 1-4(A) at 3.

<sup>160</sup> *Id.* at 2-3.

<sup>161</sup> *Id.* at 3.

<sup>162</sup> *Id.*

<sup>163</sup> TCA App. 1-4(A) at 3.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 4.

<sup>166</sup> *Id.* at 4.

<sup>167</sup> *Id.*

mitigation wetland is not equal to the wetland that was destroyed.”<sup>168</sup> The DOI also states that “wetland scientists are becoming aware that the many unknowns make it virtually impossible to provide definitive guidelines for successful wetland assessment and design.”<sup>169</sup> In addition, a recent review of mitigation projects in California permitted from 1991-2002 (Ambrose et al. 2006) found that mitigation wetlands are not similar to those impacted by the permitted project.<sup>170</sup> TCA has not explained how the proposed wetland creation would overcome these problems.

Aquatic biologist Michael White, drawing on his specific expertise in assessing watershed integrity within the area of the project, has concluded that:

The proposed FTC-S project would produce a much greater level of impact to these resources than is acknowledged by the project proponents, and these impacts are not adequately mitigated by their proposed mitigation measures. There would clearly be a net loss of wetland functions and values and “significant disruption of habitat values” as a result of the FTC-S project, which is at odds with National and State policies on wetlands protection.<sup>171</sup>

In sum, none of mitigation offered by TCA would replace the coastal wetland values that would be destroyed by the Toll Road.

#### **iv. The Toll Road Will Have Devastating Impacts on Coastal Recreational Resources.**

The Foothill-South would not only severely impact but would *run right through* one of California’s most popular parklands, the state park at San Onofre State Beach. The massive highway would directly occupy approximately *four miles* and over *320 acres* of the park, and fragment and degrade the remaining lands, including those within the coastal zone.<sup>172</sup> The highway would literally run through the center of the Park’s entire inland subunit (Subunit 1) splitting the park along its spine. The California Department of Parks and Recreation (“Parks Department”) – in a study commissioned by TCA itself – concluded that it would likely be forced to abandon nearly all of Subunit 1, over 1,000 acres (approximately 60% of the park). This could ultimately result in the closure and abandonment of San Mateo Campground, the park’s most popular campground, and the trails that lead from the campground to Trestles Beach.<sup>173</sup>

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<sup>168</sup> Randall J. Hunt, *Do Created Wetlands Replace the Wetlands that are Destroyed?* US Department of the Interior & US Geological Survey, Fact Sheet No. FS-246-96 (attached as Exhibit 20).

<sup>169</sup> *Id.*

<sup>170</sup> M.D. White, *Letter to Endangered Habitats League*, Sept. 13, 2007 at 3 (attached as Exhibit 21).

<sup>171</sup> *Id.* at 3-4.

<sup>172</sup> California Department of Parks and Recreation, *Map of Area Impacted by the Foothill-South*, Jan. 9, 2006 (attached as Exhibit 22).

<sup>173</sup> TCA App. 31/32-57, Comment O25, Ex. 1 (California Department of Parks and Recreation, *Mitigation Assessment of FTC-South Impacts on San Onofre State Beach* (Aug. 1997) (“*Parks Dept. Mitigation Assessment*”) at 6 (PDF p. 235); California Department of Parks and Recreation, *Comment Letter to TCA*, January 10, 2006 (“*Parks Dept. Comment Letter*”) at 5 (attached as Exhibit 23).

Never before in California has a local governmental entity like TCA sought to take state parkland to develop a major infrastructure project, much less a project of this scale. The loss of state parkland and major coastal access facilities inflicted by this Project, as well as its indirect impacts on coastal and water recreational resources, is unprecedented and, as found by the Commission, in direct violation of the Coastal Act's public access and recreation provisions. The Project's impacts on San Mateo Campground and Trestles Beach are discussed in more detail below.

### *San Mateo Campground*

San Mateo Campground – located just outside the coastal zone and connected by a trail to Trestles Beach – is one of the most important coastal recreational resources in the region. Today, San Mateo Campground receives over 100,000 visitors a year.<sup>174</sup> The San Mateo Campground's popularity comes from its relatively isolated location in an undeveloped coastal canyon along San Mateo Creek.<sup>175</sup> In addition, the campground provides increasingly rare low-cost accommodations for the region's coastal visitors. San Mateo Campground accounts for more than 10% of coastal campsites within a 50-mile radius.<sup>176</sup> As the Parks Department has stated about the campground, "the affordability of this coastal resource for middle and lower income visitors makes it even more important that it be kept intact and undiminished."<sup>177</sup>

The Campground not only provides public access to the coast, but it is an intrinsic and essential part of what makes Trestles Beach a unique experience for visitors. Trestles is one of the only remaining beaches in Southern California that is not directly accessible by automobile and must be hiked into. One of the beach's primary attractions is the highly scenic trail linking it to San Mateo Campground, which runs through "a relatively unspoiled wetlands area" down to the beach, allowing visitors to experience the natural transition of the native landscape.<sup>178</sup> The Campground itself is also part of the coastal experience. Visitors who camp or picnic in the inland portions also walk to the coast to swim, surf, relax on the beach, and explore the Park's successive habitats, including surf, reef, beach, coastal bluff, wetland, grassland, sycamore groves, scrub, hills, arroyos, and valleys, along with abundant wildlife, all of which together make San Onofre unique.

The campground is not only an essential coastal resource – it is irreplaceable. Aside from a long-planned facility at Crystal Cove State Beach that will replace an existing trailer park,<sup>179</sup> the Parks Department has been unable to add a single campground along California's coast in the 16 years since San Mateo Campground was constructed. And there are no sites left in the region that would be capable of providing comparable public access and

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<sup>174</sup> *Parks Dept. Comment Letter* at 6.

<sup>175</sup> *Id.*

<sup>176</sup> Figure, *Southern California Campgrounds*, California State Parks Foundation and GreenInfo Network, 2007 (attached as Exhibit24).

<sup>177</sup> TCA App. 31/32-57, Comment O25, Ex. 1 (*Parks Dept. Mitigation Assessment*) at 2-3 (PDF pp. 230-31).

<sup>178</sup> TCA App. 31/32-57, Comment O25, Ex. 1 (*Parks Dept. Mitigation Assessment*) at 2 (PDF p. 230).

<sup>179</sup> See Crystal Cove State Park General Plan (March 1982) at 43-44 (attached as Exhibit 25).

recreational value. According to the Parks Department, “the existence and convenient availability of such an increasingly rare resource and experience to the large Southern California population serves an important societal function which once lost cannot be replicated in whole elsewhere in this region.”<sup>180</sup>

TCA continues to ignore the reality that San Mateo Campground would be effectively shut down by the Toll Road. According to TCA, the Project footprint would avoid the campsites themselves. However, the Toll Road would come within 200 feet of the campsites. The Project would place the Campground – now located in a quiet, undeveloped coastal canyon – in the shadow of a major highway, with a view of massive soundwalls on engineered hillsides. Campers, hikers and picnickers would be plagued by construction noise in the short term, and traffic noise permanently.<sup>181</sup> In short, the Campground’s “spirit of place” – a term used by the Parks Department – would be destroyed.<sup>182</sup>

Indeed, this is such a serious loss that the Department ultimately may have to abandon nearly all of Subunit 1, including all 161 sites in the campground and over 1,000 acres of surrounding parkland.<sup>183</sup> Several years ago, the Department convened a “San Onofre Mitigation Assessment Team” to evaluate possible mitigation measures in the event that TCA approved a toll road alignment through San Onofre. After reviewing the team’s recommendations, the Department reached some dramatic conclusions:

[T]he fragmentation of Subunit #1 by the proposed highway corridor will severely restrict the use of the property for recreation purposes, as well as significantly and irrevocably altering its environmental setting, that of San Mateo Campground, and other recreational opportunities provided for in the unit’s General Plan. The linear nature and split elevation of the arterial and any retaining walls, soundwalls, and their landscaping will reduce the site’s attractiveness to the public, as well as being a wildlife barrier and a management obstacle. These unnatural and discordant visual elements will intrude upon previously open vistas, high volume noise will impose on normal recreation activities, day activities at the campground as well as its existing night quiet, and the amphitheater campfire area will be forever altered and rendered unusable.<sup>184</sup>

As a result of these impacts, the mitigation assessment team concluded that the proposed toll road alignment “will result in a take of the functional use of the majority of Subunit #1” of the park, and recommended that “[w]ith the exception of the support parking for the trail to Trestles, all of Subunit #1 be abandoned to the lessor.”<sup>185</sup> In its comment letter to TCA on the FSEIR, the Department reiterated its concerns about the destruction of San Mateo Campground:

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<sup>180</sup> *Parks Dept. Comment Letter* at 5.

<sup>181</sup> TCA App. 31/32-57, Comment O25, Ex. 1 (*Parks Dept. Mitigation Assessment*), Appendix B (PDF pp. 245-49).

<sup>182</sup> *Id.* at 2; *see also id.*, Appendix A at A-3 to A-4 (PDF pp. 241-42).

<sup>183</sup> *Parks Dept. Comment Letter* at 5; TCA App. 31/32-57, Comment O25, Ex. 1 (*Parks Dept. Mitigation Assessment*) at 6 (PDF p. 235).

<sup>184</sup> TCA App. 31/32-57, Comment O25, Ex. 1 (*Parks Dept. Mitigation Assessment*) at 5 (PDF p. 234).

<sup>185</sup> *Id.* at 5, 6 (PDF pp. 234-35).

It does not take an expert to understand that locating a multi-lane, limited access highway within a few hundred feet of a secluded campground will so destroy the recreational value of the campground and sense of place as to render it valueless. . . . [P]eople who use San Mateo Campground do so because of its relative quiet and seclusion. They do not go camping to be next to a multi-lane highway and have their views truncated by a 16' high soundwall.<sup>186</sup>

The letter also reported the grave concern of Department staff that “the result of these impacts will be the eventual loss of San Mateo Campground.”<sup>187</sup> TCA now relies on a generic letter of support from the Secretary of the California Resources Agency, which vaguely promises that the campground will remain both open and “enjoyable,” yet offers nothing to contradict the careful analysis of Department staff. TCA Br. at 38 (citing TCA App. 5-13(D) (PDF p. 43)). Nor does this letter offer any new ideas for preserving the quiet, rural camping experience currently offered at San Mateo Campground – an experience, if TCA has its way, that will soon be replaced by a noisy, industrial camping experience in the shadow of the Toll Road’s sound wall.

The Toll Road thus very likely spells destruction of a major coastal resource. The 100,000 annual State Beach visitors who use the Campground – including working families and other users who rely on this affordable facility – would be severely impacted. In addition, the existing highly scenic trail connecting San Mateo Campground to Trestles Beach – which runs under the interstate but is an essential natural experience, traversing the native landscape – would be destroyed and replaced by an urban pedestrian overpass that follows the Toll Road and actually requires crossing *over* it.<sup>188</sup> This highway-dominated route would constitute a fundamental change in the unique visitor experience of Trestles.

TCA also cites the fact that the park is situated on federal land not owned by the State, but the ownership of the land is immaterial. The park provides the same benefits to the public whether leased or owned by the State. Moreover, since its inception, it has been understood that the park is meant to be permanent. President Nixon, Governor Reagan, and the California Legislature have all made clear that San Onofre is to forever remain a state park. When President Nixon presided over the creation of the state park at San Onofre, he declared that, as soon as it is possible for the federal government to declare the property surplus, the lease will be terminated and the property “will be *deeded* to the State of California for park purposes.”<sup>189</sup> Governor Reagan agreed: “This expanse of acreage, San Onofre Bluffs [*sic*] State Beach, *now has its future guaranteed* as an official state park.”<sup>190</sup> The intent to permanently preserve the land as a park is reflected in California law, which provides that “if the Camp Pendleton Marine Base in the County of San Diego ceases to be used as a federal facility, *it shall be converted to an open-space area or greenbelt* that shall be administered by the [Parks] [D]epartment.” Pub. Res. Code § 5096.400 (emphasis added). State law further provides that “[a]ll real property acquired for park and recreation purposes by the state which was formerly

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<sup>186</sup> *Parks Dept. Comment Letter* at 4-5.

<sup>187</sup> *Id.* at 6.

<sup>188</sup> TCA App. 24-52 at 4.25-27 (PDF p. 28); TCA App. 14-31(E), Ex. 3 (PDF p. 39).

<sup>189</sup> President Richard Nixon, *Press Statement*, March 31, 1971 (attached as Exhibit 27).

<sup>190</sup> California Governor Ronald Reagan, *Press Statement*, April 3, 1971 (emphasis added) (attached as Exhibit 27).

part of Camp Pendleton *shall be used solely for park and recreation purposes and no part thereof shall be declared surplus or disposed of.*” Gov. Code §11011.7 (emphasis added). There is simply no basis for concluding that, after a half century as a public park, the land will not continue as a park following the expiration of the current lease term.

TCA’s failure to acknowledge any public access or recreational impacts from the Project is mirrored by its failure to provide any meaningful mitigation for those impacts. For years, TCA’s only approach to the issue of mitigation was to defer it. The FSEIR never identified any specific measures to replace lost park lands or provide substitute recreational resources. Rather, TCA merely promised to “consult” and “negotiate” with owners or operators of affected recreational resources at some unspecified point in the future.<sup>191</sup> As the Parks Department itself put it in a letter to TCA regarding the FSEIR, these “promises to talk” mitigate nothing and commit TCA to nothing.<sup>192</sup> Indeed, as discussed above, these resources are unique in the region and are literally irreplaceable.<sup>193</sup> TCA’s original consistency certification likewise offered no mitigation, taking the approach that impacts to San Onofre are not an issue – an attitude the Parks Department correctly identified as “simply not grounded in reality.”<sup>194</sup>

Then, less than two weeks before the Commission’s hearing, TCA came up with a new approach to parks mitigation: offer money. TCA has offered to pay the Parks Department \$70 million that, according to TCA, could be used to renew the SOSB lease in the year 2021, and another \$20 million to restore cottages at Crystal Cove or construct campsites in that park or at San Onofre. As detailed below, however, none of this money would mitigate the impacts of the Toll Road. There is no basis for concluding that *any* money (much less \$70 million) will be required to renew the San Onofre lease 14 years from now. And the other expenditures identified by TCA are for projects that are *already planned and will occur with or without the Toll Road.*

Moreover, none of the projects identified by TCA could mitigate the loss of San Mateo Campground, which offers low-cost, quiet, relatively undeveloped coastal camping accommodations that are impossible to duplicate – and therefore irreplaceable – in the region. As the Parks Department has stated:

The existence and convenient availability of such an increasingly rare resource and experience to the large Southern California population serves an important societal function which once lost ***cannot be replicated in whole elsewhere in the region.*** California State Parks asserts that the fragmentation of the park by the proposed preferred alternative leaves no real opportunities for on-site mitigation for the values, resources and recreational opportunities for which this park was established. Our knowledge of the region leads us to conclude that ***losses to the existing unit cannot be fully mitigated.***<sup>195</sup>

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<sup>191</sup> TCA App. 24-52 at 4.25-28 to 4.25-29 (PDF pp. 29-30).

<sup>192</sup> Parks Dept. Comment Letter at 7.

<sup>193</sup> See *id.* at 8.

<sup>194</sup> *Id.* at 4.

<sup>195</sup> Parks Dept. Comment Letter at 8.

There is simply no conceivable rationale under which a major coastal recreational facility created at the insistence of the Coastal Commission to satisfy the requirements of the Coastal Act can now be eliminated consistent with the Act. The severe loss of public access and coastal recreational opportunities that would be caused by the loss of San Mateo Campground renders the Project inconsistent with the Act's policies requiring maximum public access, protection of lower cost coastal recreational opportunities, and avoidance of impacts to parks.

### *Trestles Beach*

The Toll Road also directly impacts Trestles Beach – a world-class surfing destination.<sup>196</sup> Trestles Beach is known among surfers as the “Yosemite of surfing” and has attracted the likes of some of the world's most famous surfers, including Kelly Slater, who won a surfing competition there in 1990. It is the *only* beach in the continental United States where the Association of Surfing Professionals' World Championship Tour holds a competition,<sup>197</sup> and is host to numerous other professional and amateur surfing competitions throughout the year, including the National Scholastic Surfing Association's national championships. This is not your average surf spot – so many people visit Trestles that there is a “crowd in the water” for just about any given swell.<sup>198</sup> Trestles Beach was first discovered by pioneering local surfers in 1933 and is now historically recognized as having played a significant role in the evolution of surfing as a sport. In fact, Trestles is potentially eligible for nomination as a State Historic District, as a California State Point of Historic Interest (on the California Register of Historic Resources), and to the National Register of Historic Places.<sup>199</sup>

In addition to the public access impacts to Trestles that would be caused by the loss of San Mateo Campground, the Toll Road threatens to impact the internationally renowned surfing conditions found at Trestles. These conditions are created and maintained by sediment influx from San Mateo Creek and its tributaries, including Cristianitos Creek. Cobblestone rocks are carried down the creek and deposited in a delta, which leads to the world class waves that break left and right year-round.<sup>200</sup>

TCA refuses to acknowledge the potentially drastic effect the Toll Road could have on Trestles, claiming that no significant permanent adverse effects would damage coastal surfing. TCA asserts that the supply of sediment from inland would not be significantly changed

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<sup>196</sup> The Trestles beach includes several surfing hot spots in the coastal zone that would be affected by the project, including Cotton's Point, Upper Trestles, and Lower Trestles. See TCA App. 31/32-57, comment O21-417 (PDF pp. 85-86).

<sup>197</sup> ASP World Tour, <http://64.78.18.131/asp2005/2006news.asp?rView=w&rEventName=&rEvent=trestles06&rCode=5943> (last visited January 16, 2008).

<sup>198</sup> Phillip Williams & Associates, Ltd., “Potential Toll Road Impacts on San Mateo Creek Watershed Processes, Mouth Morphology and Trestles Surfing Area,” January 11, 2006 (“PWA 2006 Report”) at 3 (attached as Exhibit 28).

<sup>199</sup> California State Parks and Recreation Department, *Letter from Historian A. Bevil to M. Rauscher*, dated Aug. 31, 2007 (attached as Exhibit 29).

<sup>200</sup> TCA App. 31/32-57, comment O21-417 (PDF pp. 85-86).

and that, therefore, the cobblestone delta which supports wave formations would remain stable.<sup>201</sup> However, TCA's analysis is flawed.

As discussed in section IV.A.2.a.vi below, TCA fails to account for the devastating effects of the Toll Road on 20 subwatersheds proximate to the mouth of San Mateo Creek, which have a disproportionate effect due to proximity.<sup>202</sup> These steep canyons are sources of fine sediments. An engineering study, which included field reconnaissance, shows that paving and cut and fill from the Toll Road – over 40 million cubic yards<sup>203</sup> – will “result in massive hydrological changes” to these fragile subwatersheds.<sup>204</sup>

The erosion impact to a stream channel is exponentially proportional to the percentage of upstream watershed that is impermeable or disturbed.<sup>205</sup> The upstream portion of the eight subwatersheds closest to the mouth of the creek would be disturbed 40% on average,<sup>206</sup> a level associated with severe erosion and channel degradation in the vicinity of the Project.<sup>207</sup> Within many of the destabilized canyons, the sediment transport and hydrology of streamcourses will be “highly altered.”<sup>208</sup> The combination of disturbance of watersheds and concentration of flow in culverts is likely to cause erosion of fine sediments and destabilization of stream channels. TCA's proposed BMPs (energy dissipation at culvert outlets and revegetation along cut and fill slopes) will not fully address impacts associated with flow concentration, increased runoff, and the potential for significant soil erosion.<sup>209</sup>

This is not the first time TCA has relied on BMPs to support a claim that its projects will not cause erosion. It made precisely the same claim for the San Joaquin Hills Transportation Corridor. Yet a fill constructed to similar standards on another of TCA's toll roads failed in upper Deer Creek canyon, causing severe erosion that was dumped into Crystal Cove State Park.<sup>210</sup> TCA claims to have learned “lessons” from that project. But the state's pristine watersheds and coastal parks are not the place to conduct major erosion control experiments. Optimistic claims that BMPs will prevent erosion for major roadway projects have been repeatedly proven wrong.<sup>211</sup> It is simply disingenuous to claim that a cut and fill project of this magnitude in a highly erosion-prone area will not have an impact on creek sedimentation. Moreover, as discussed below, hydrology experts and the Regional Board have reviewed TCA's

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<sup>201</sup> TCA App. 13-31(B) at 24 (PDF p. 27).

<sup>202</sup> PWA 2006 Report at 12.

<sup>203</sup> TCA's insistence that the Commission should consider only the 1.4 million cubic yards of cut and fill that would occur within the coastal zone is illustrative of TCA's repeated attempts to downplay the impacts of the Project. The Commission has clear authority to consider any of the Project's sedimentation impacts within the San Mateo Creek watershed that will flow into and impact the coastal zone.

<sup>204</sup> PWA 2006 Report at 13.

<sup>205</sup> TCA App. 1-4(E) at 1, 2.

<sup>206</sup> PWA 2007 Analysis at 1.

<sup>207</sup> PWA 2006 Report at 2.

<sup>208</sup> *Id.* at 21.

<sup>209</sup> M. Lindley, Philip Williams & Associates, Ltd. (pers. comm. January 17, 2008).

<sup>210</sup> Parks Dept. Comment Letter at 14.

<sup>211</sup> See *id.* at 13-14 (describing Caltrans roadway project that caused “tons of sediment” to overwhelm drainages in a northern California State Park).

proposed RMP and have determined that there is no basis for concluding the plan will prevent sedimentation.

The Toll Road thus poses a risk to Trestles. Increased delivery of silty sediments has the potential to affect cobble deposition, and thereby alter wave formation. This can occur in two ways. First, a sediment mix richer in fine materials will tend to deposit gravel and cobble in the creek bed, and carry the finer sediments out to the mouth, reducing delivery of cobble to Trestles.<sup>212</sup> Second, once exposed to wave action, the changes in the relative amounts of fine and coarse sediments will alter the “porosity” of the mix, resulting in cobble moving onshore or offshore.<sup>213</sup> These changes in cobble transport and deposition may change the morphology of the delta and alter wave formation.<sup>214</sup>

TCA’s response to this issue has been to deny that the Toll Road will cause any increase in sediment delivery to the creek in the first place. As discussed above and in section IV.A.2.a.vi below, there is no basis for TCA’s position. Sedimentation delivery to the creek will increase. “If the cobble beds that support Trestles are destabilized through altered sediment delivery, *the resulting impact will likely be irreversible and impossible to mitigate.* While the project proponents may be convinced that there will be no impacts, *we are not convinced and rather expect that the surf break will be substantively degraded over time.*”<sup>215</sup>

The waves at Trestles are one of California’s unique and historic natural treasures. If the sediment regime of San Mateo Creek is altered by the Toll Road, the wave formations that make Trestles the “Yosemite of surfing” could be irreparably lost. The irreplaceable value of Trestles as one of the world’s greatest surfing resources requires the utmost caution in assessing any potential threat to its continued viability. TCA’s assurances that Trestles will not be harmed are not adequately supported. .

#### *TCA’s Monetary Offer*

Less than two weeks before the scheduled Commission hearing on the Toll Road, TCA announced that it would pay \$100 million to “benefit” the state park system if the Toll Road is built.<sup>216</sup> According to TCA, the vast majority of this payment – \$70 million – would be used to pay the U.S. Navy to extend its lease with the State for San Onofre after 2021. The remaining \$30 million would be used for “improvements to recreational facilities at San Onofre and Crystal Cove State Park,” and for “coastal sage scrub restoration within Crystal Cove.”<sup>217</sup>

There is simply no merit in TCA’s suggestion that the money will mitigate the impacts of the Project. There is no evidence that the State will be forced to pay the Navy to renew the lease for San Onofre, much less the exorbitant sum TCA claims. Nor is there any evidence that the proposed restoration money would create any new recreational facilities or

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<sup>212</sup> PWA 2006 Report at 11-12.

<sup>213</sup> PWA 2007 Analysis at 2.

<sup>214</sup> *Id.* at 3.

<sup>215</sup> TCA App. 1-4(F) at 3 (PDF p. 8).

<sup>216</sup> TCA App. 11-25.

<sup>217</sup> TCA App. 11-25.

habitat beyond what is already planned by the State. The proposal is merely an offer to finance what will occur with or without the Toll Road. It is not mitigation.

The cornerstone of TCA's monetary offer is a \$70 million payment that, according to TCA, would be used to renew the San Onofre lease in 2021. TCA and its supporters have gone so far as to suggest that the continued existence of the park would be in jeopardy without TCA's payment.<sup>218</sup>

But the basic premise behind the offer – TCA's assertion that changes in federal law will compel the Navy to obtain "fair market value" from the State – is faulty. In fact, federal law expressly authorizes the Secretary of the Navy to convey surplus military land for park or conservation purposes *without* charging the fair market value of the property. For example:

- 10 U.S.C. § 2694a authorizes the Secretary of the Navy to convey to a state non-excess property "to be used and maintained for the conservation of natural resources in perpetuity," at a price that takes into account the public benefit of the use of the property for conservation.
- 16 U.S.C. § 667b allows any federal agency to transfer property under its control for "wildlife conservation purposes" to a state wildlife agency "without reimbursement or transfer of funds."
- 40 U.S.C. § 550(e) authorizes the sale or lease of surplus federal lands to a state "for use as a public park or recreation area" at a sale or lease value that accounts for the public benefit of the use of the property.

These provisions are reflected in the General Services Administration's property disposal regulations, which provide that federal property may be disposed of "at up to 100 percent public benefit discount for public benefit purposes," including "park and recreation . . . and wildlife conservation" purposes. 41 C.F.R. § 102-75.350.

Moreover, even if the Navy were to decide in 2021 not to declare the Park surplus property and instead sought fair market value for the lease renewal, there is no indication that this would require payment of more than a nominal rent by the State. It is unlikely the Navy would permit development of private commercial or residential structures within the base, which could conflict with its military mission. Accordingly, the Navy could reasonably determine that the land's highest and best use is retention as open space, and therefore has a low fair market value.

The Navy is also expressly authorized to accept in-kind consideration – including "[m]aintenance, protection, . . . or restoration (including environmental restoration)" – for its market value leases. 16 U.S.C. § 2667(b)(4), (c)(1)(A). The value of these services – which the

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<sup>218</sup> Letter from Thomas E. Margro, CEO, TCA, to Maidie Oliveau dated October 8, 2007 (attached as Exhibit 30); Letter from Richard T. Dixon and Peter Herzog to Governor Arnold Schwarzenegger dated October 17, 2007 (attached as Exhibit 31).

State already provides at San Onofre, at no cost to the Navy – could further reduce any monetary rent paid for a market value lease. Indeed, the *annual* budget for maintenance and operations at San Onofre is roughly \$2 million.<sup>219</sup> Over a 50-year lease term, the value of this annual in-kind contribution from the State could easily equal or exceed the fair market value of the land even assuming TCA’s baseless figure of \$70 million.

The most that can be said at this point in time is that the question of whether, when, and on what terms the federal government will convey a future lease, fee or other interest in the San Onofre property to the State is entirely speculative. But even under present federal law, there is nothing that would preclude the long-term operation of San Onofre at little or no cost to the State. Nor is there a shred of evidence to suggest that the state and federal governments would allow San Onofre – after a half century as a state park – to shut down over the issue of land rent. To the contrary, it has always been the clear intent of both the state and federal governments that the land be preserved in perpetuity as park.

Nor does TCA’s offer to pay for recreational improvements elsewhere mitigate for the destruction caused by the Toll Road. TCA has suggested that \$20 million of its offer could be used to construct recreational improvements at San Onofre or at Crystal Cove. But the State has already constructed or planned for recreational improvements in all appropriate locations in those parks. Providing a subsidy to the state for existing or programmed improvements not only does nothing to mitigate the recreational impacts of the Toll Road, but also does nothing to advance the national interest, because the programs touted by TCA will occur with or without TCA’s help.

The only areas within San Onofre suitable for new campsite developments, as identified in the San Onofre General Development Plan, are within Subunit 1 of the Park<sup>220</sup> – the very subunit that the Parks Department concluded would be rendered *incompatible* with recreational use and need to be abandoned if the Toll Road were built. Indeed, the Toll Road would run directly adjacent to – and in some cases *through* – the very areas designated for future campsite development in the Park.<sup>221</sup> As discussed above, the entire Subunit would likely be abandoned if the Toll Road is built, so it offers no opportunity for mitigation.

TCA has also suggested in at least one letter that the Bluffs Campground at San Onofre could be “enhanced” using the funds.<sup>222</sup> But the San Onofre General Development Plan states that the development of Subunit 4 (which includes the Bluffs Campground) is “completed” and “does not recommend any additional camping, day-use parking, or trails.”<sup>223</sup> The Bluffs Campground, moreover, is situated in a highly developed location within a few hundred feet of I-

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<sup>219</sup> R. Rozzelle, Orange Coast District Superintendent, California Department of Parks and Recreation (pers. comm. Jan. 10, 2008).

<sup>220</sup> See San Onofre State Beach General Development Plan Amendment (March 1984) at 34-36 (attached as Exhibit 26).

<sup>221</sup> Compare TCA App. 31/32-57, Comment O25, Ex. 1 (*Parks Dept. Mitigation Assessment*), figure (PDF p. 236) (showing location of proposed improvements) with TCA App. 20/21-49, at Figs. 2.2-5, 2.2-6 (PDF pp. 146-47) (showing Preferred Alternative alignment).

<sup>222</sup> Letter from Thomas E. Margro, CEO, TCA, to Maidie Oliveau dated October 8, 2007 (attached as Exhibit 30).

<sup>223</sup> San Onofre State Beach General Development Plan Amendment (March 1984) at 36 (attached as Exhibit 26).

5; additional campsites at the Bluffs will not even approximate the recreational experience afforded by the San Mateo Campground. In short, there is simply no way to replace at San Onofre the campsites impacted by the Toll Road.

Nor does Crystal Cove – 25 miles to the north of San Onofre – provide an opportunity for mitigation. The Parks Department has planned construction of a 60-site campground on the former site of the El Moro Mobile Home Park at Crystal Cove since at least 1982.<sup>224</sup> Late last year, the Parks Department finally was able to put the project out to bid; according to the California State Contracts Register, responses were due on January 11, 2008.<sup>225</sup> Now that the El Moro Mobile Home Park conversion project is underway, all campsite development called for by the Crystal Cove General Development Plan either has been or soon will be developed, regardless of whether the Toll Road is ever built.

TCA also has proposed that the Parks Department use the money to expand the campground at San Clemente State Beach. This option, however, would require relocation of the Parks Department's Orange Coast District Offices, many of which are currently housed in historic buildings.<sup>226</sup> Furthermore, any new campsites at San Clemente State Beach would be located in an intensively developed urban environment at the edge of I-5, providing future visitors with a recreational experience dramatically different from that offered at the quiet, still-rural San Mateo Campground.<sup>227</sup> Again, mitigation for the loss of San Mateo Campground cannot be measured in a mere number of campsites. As the Parks Department itself has observed, "a certain quantity of recreation facilities . . . should not be forced into an available relocation site at the expense of providing a quality recreation experience or facility."<sup>228</sup> The experience of San Mateo Campground will be irrevocably lost, and TCA has proposed nothing comparable to replace it.

Finally, TCA has suggested that the money could be used to finance the restoration of the historic cottages at Crystal Cove, misleadingly citing the Crystal Cove Alliance (the official Cooperating Association at Crystal Cove) in connection with the proposal.<sup>229</sup> In fact, the Crystal Cove Alliance has condemned TCA's offer: "TCA's proposal is not the right answer for restoring Crystal Cove. We look forward to endorsing a plan that ensures that Californians can reach and enjoy every State Park, intact."<sup>230</sup> Even if the Crystal Cove Alliance had not objected to TCA's offer, restoration of the cottages would not constitute effective

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<sup>224</sup> Crystal Cove State Park General Plan (March 1982) at 43-44 (attached as Exhibit 25).

<sup>225</sup> Department of General Services, California State Contracts Register, available at <http://www.cscr.dgs.ca.gov> (last visited January 10, 2008).

<sup>226</sup> See TCA App. 31/32-57, Comment O25, Ex. 1 (*Parks Dept. Mitigation Assessment*) at 6-7, Appendix B at 4 (PDF pp. 235, 237, 248); see also TCA App. 27/30-55, Ex. 9 (California Department of Parks & Recreation, *Relocation Preplanning Letter Report for San Onofre State Beach* (Aug. 1998) ("*Relocation Preplanning Report*") at 2, 5-7 (PDF pp. 156, 159, 161).

<sup>227</sup> See TCA App. 27/30-55, Ex. 8 (*Parks Dept. Mitigation Assessment*) at C2-1 (PDF p. 146) (noise analysis describing "long periods of relative quiet" at San Mateo Campground).

<sup>228</sup> TCA App. 27/30-55, Ex. 9 (*Relocation Preplanning Report*) at 8 (PDF p. 162).

<sup>229</sup> TCA, "Toll Road Agency Announces \$100 Million Offer to California State Parks" (Sept. 28, 2007), available at [http://www.thetollroads.com/home/news\\_press\\_sept07a.htm](http://www.thetollroads.com/home/news_press_sept07a.htm) (last visited January 16, 2008).

<sup>230</sup> See Crystal Cove Alliance, Press Release, "Crystal Cove Alliance Rejects Toll Authority Offer As Damaging to State Park System" (Oct. 1, 2007) (attached as Exhibit 32).

mitigation for the loss of San Mateo Campground. The 46 cottages at Crystal Cove provide a completely different – and far more expensive – recreational experience than the San Mateo Campground. For example, the Crystal Cove cottages rent for an average of \$175 per night for a family of four, while a campsite at San Mateo Campground costs between \$20 and \$34 per night.<sup>231</sup> In any event, progress on the restoration has been positive and has already generated significant financial support. The cottages likely will be restored with or without the Toll Road.

In short, despite having had years to consider the matter, TCA has never been able to identify any opportunities for creating new recreational facilities comparable to those that would be impacted by the project. TCA's last-minute monetary proposal would do nothing but subsidize the State's existing operations or planned projects. It does not mitigate the Toll Road's impacts, and it does nothing to advance the national interest.

**v. The Toll Road Will Permanently and Irrevocably Degrade Irreplaceable Cultural Resources.**

The ancient Acjachemen/Juaneño Village of Panhé, located on the banks of San Mateo Creek in San Onofre State Beach, is the ancestral home of the Acjachemen/Juaneño people, whose history in the area dates back 10,000 years. It plays a central role in the people's heritage and is actively used as a ceremonial and burial site.<sup>232</sup> Three of the Tribal Councils of the Juaneño Band of Mission Indians, Acjachemen Nation have adopted resolutions opposing the Toll Road based on the severe and irreparable damage that the Project will cause to the Village of Panhé.<sup>233</sup>

According to State Archaeologists, Panhé was the largest Indian village in this region in prehistoric and early historic times. Today, evidence of the village includes midden deposits, aboriginal artifacts, human burials, relics of houses and fire hearths, other cultural remains, as well as the memory of living Acjachemen people.<sup>234</sup> This site also is listed on the Sacred Lands file at the Native American Heritage Commission<sup>235</sup> and likely qualifies as a Traditional Cultural Property under the federal National Historic Preservation Act. 16 U.S.C. §§

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<sup>231</sup> Compare California Department of Parks & Recreation, *News & Views* (Spring 2007) at 6 (attached as Exhibit 33) with California Department of Parks & Recreation, *California State Parks Camping Fees* (attached as Exhibit 34).

<sup>232</sup> See Juaneño Band of Mission Indians, Acjachemen Nation, Resolution 116, *A Resolution of the Tribal Council Supporting the Protection of Panhe and the Tribe's Full Sovereign Participation in Any and All Land and Water Use Decisions Likely to Impact the Ancient Acjachemen/Juaneño Village of Panhe* (July 10, 2007) (attached as Exhibit 35).

<sup>233</sup> *Id.*; see also Juaneño Band of Mission Indians, Acjachemen Nation, *Resolution Supporting the Protection of Panhe and the Tribe's Full Sovereign Participation in Any and All Land and Water Use Decisions Likely to Impact the Ancient Acjachemen/Juaneño Village of Panhe* (May 19, 2007) (attached as Exhibit 36); Juaneño Band of Mission Indians, Acjachemen Nation, *Resolution Supporting the Protection of Panhe and the Tribe's Full Sovereign Participation in Any and All Land and Water Use Decisions Likely to Impact the Ancient Acjachemen/Juaneño Village of Panhe* (July 21, 2007) (attached as Exhibit 37) (collectively "Tribal Council Resolutions").

<sup>234</sup> Associate State Archeologist Michael Sampson, *Letter to Endangered Habitats League*, Sept. 7, 2007 (attached as Exhibit 38).

<sup>235</sup> *Id.*

470, *et seq.* It is currently one of seven sites included within the San Mateo Archaeological National Register District and is eligible for listing on the National Register of Historic Places.<sup>236</sup>

Portions of the Village and its cultural resources are, according to State Archeologists, within the coastal zone and would be impacted by the Toll Road.<sup>237</sup> The Foothill-South would run adjacent to and through the Village of Panhé and its construction would pass within feet of the village's cemetery and interfere with traditional ceremonial uses.<sup>238</sup> In addition, if the road is built, increased scavenging and damage by relic collectors are anticipated. On February 15, 2006, the Native American Heritage Commission held a public hearing on the Toll Road, and determined – based on testimony from Acjachemen community leaders and tribal members – that the Project would cause severe and irreparable damage to important cultural resources within San Onofre State Beach.<sup>239</sup> Following approval of the Toll Road, the State of California filed a lawsuit against TCA on behalf of the Native American Heritage Commission, challenging the legality of these impacts.

According to TCA's own EIR, there will be "substantial adverse impacts related to archaeological and historic resources that cannot be fully mitigated."<sup>240</sup> Nevertheless, TCA fails to recognize the overwhelming spiritual importance of this area, which is a profoundly sacred site currently used for ceremony, song, and education by the living descendants of the people who once lived there.<sup>241</sup> The Toll Road's impacts on these values will be tremendous, permanent, and impossible to mitigate.<sup>242</sup> In particular, "[t]he known presence of burials at this site elevates its importance beyond any possibility for impact mitigation."<sup>243</sup>

Native Americans who continue to use the Village of Panhé for ceremonial purposes have urged the Native American Heritage Commission to protect this sacred site by continue to prosecute its lawsuit against the Toll Road.<sup>244</sup> As the Native American Heritage Commission itself pointed out in a comment letter to the Secretary on this appeal, TCA has never treated this area as truly sacred. TCA has not only failed to analyze Panhe as a Traditional Cultural Property, but also failed even to provide sufficient information to evaluate all potential

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<sup>236</sup> See TCA App. 21/22-50 at 4.16-16 (PDF p. 404); TCA App. 31/32-57, Comment Letter O-26 (PDF pp. 278-81) (from Christopher A. Lobo, Secretary/Treasurer and CEO, Juaneño Band of Mission Indians, Acjachemen Nation, Aug. 6, 2004).

<sup>237</sup> Associate State Archeologist Michael Sampson, *Letter to Endangered Habitats League*, Sept. 7, 2007.

<sup>238</sup> See Native American Heritage Commission, *Complaint for Injunctive Relief*, No. 06-GIN051370 (S.D. Super. Ct. filed March 22, 2006) (attached as Exhibit 39).

<sup>239</sup> *Id.*

<sup>240</sup> TCA App. 20-48 at ES-110 (PDF p. 125).

<sup>241</sup> See *Tribal Council Resolutions*; see also TCA App. 31/32-57, Comment Letter O-26.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 4.

<sup>244</sup> See S. Johnston et al., Juaneño Band of Mission Indians, Letter to L. Myers, Native American Heritage Commission, Re: The traditional village and burial ground of Panhe at San Clemente, California (May 19, 2008) (attached as Exhibit 46); R. Robles, United Coalition to Protect Panhe, Letter to L. Myers, California Native American Heritage Commission, Re: Save Panhe, Save San Onofre, Stop the Toll Road (May 15, 2008) (attached as Exhibit 47).

mitigation options – including selection of an alternative that will avoid this irreplaceable sacred site entirely.<sup>245</sup>

The mitigation measures proposed by TCA will not prevent permanent and irretrievable harm to this sacred site and the surrounding archaeological district. Native Americans have urged every public agency involved in this project – from the Coastal Commission, to the Native American Heritage Commission, to TCA itself – to fairly evaluate and pursue alternatives that will not destroy their sacred lands. TCA has failed to do so.

**vi. The Toll Road’s Overall Impact on Water Quality Will Be Overwhelmingly Negative.**

TCA’s briefing here simply ignores the voluminous evidence presented to the Commission concerning the Toll Road’s tremendous negative impacts on a uniquely sensitive coastal watershed. Instead, TCA focuses exclusively on a few treatment facilities along I-5 that will do nothing to ameliorate the impacts of the Toll Road itself. Indeed, the water quality “benefits” touted by TCA are not unique to or dependent upon the Toll Road, and could be implemented as part of an alternative or required independently as a condition of Caltrans’ water quality permits.

The San Mateo watershed is one of the healthiest watersheds remaining in Southern California, with San Mateo Creek being the last undammed and undiverted major drainage basin south of Ventura.<sup>246</sup> The Toll Road would cut, fill and pave over miles of “the core of the relatively less-disturbed and naturally functioning portions of the San Mateo watershed.”<sup>247</sup> This includes 12 subwatersheds that drain into the tributary Cristianitos Creek (five of which are within the undisturbed Donna O’Neil Land Conservancy), and eight that drain to the lower San Mateo Creek mainstem, immediately upstream of Trestles.<sup>248</sup> Water from these subwatersheds ultimately reaches that portion of San Mateo Creek within the coastal zone, including the lagoon, estuary, and Trestles.<sup>249</sup> Thus, Toll Road-related disturbances both within the coastal zone, and in the subwatersheds upstream of the coastal zone, will impact coastal resources. *All* of the activities causing these disturbances, therefore, must be considered in evaluating the Toll Road’s consistency with the CZMA. 16 U.S.C. § 1456(c)(3)(A); *see also Millennium Pipeline*, 424 F. Supp. 2d at 177-78.

The construction of the Toll Road through the steep, natural terrain of the San Mateo watershed will result in massive changes to the hydrology of the subwatershed drainages, causing stream destabilization and a significant increase in erosion and sediment production.<sup>250</sup> The Toll Road would require 41 million yards of cut and fill. This will create 530 acres of wide

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<sup>245</sup> See Larry Myers, Native American Heritage Commission, Letter to T. Street, NOAA, Re: Comments: Foothill Transportation Corridor South (FTC-S) Toll Road (May 27, 2008) at 3.

<sup>246</sup> *Spencer Conservation Priorities* at 36.

<sup>247</sup> *PWA 2006 Report* at 13.

<sup>248</sup> *Id.* at 2, 15-17 (Figs. 5-7), 21.

<sup>249</sup> *Id.* at 2, 4 (Fig. 1).

<sup>250</sup> *Id.* at 13.

exposed cut and fill slopes and add over 136 acres of impervious surface within the San Mateo Creek watershed alone.<sup>251</sup>

Before the Commission, TCA sought to minimize the severity of these impacts by comparing the area of disturbance caused by the Project against the entire 136 square mile San Mateo Creek watershed, and concluding that the change in peak runoff *for the watershed as a whole* would be less than 3%.<sup>252</sup> But this approach masks the enormous impacts of the Toll Road on the 20 subwatersheds within and just upstream of the coastal zone.<sup>253</sup> These sand and silt dominated watersheds and related stream systems have developed in equilibrium with the existing rainfall-runoff dynamics. They are fragile and prone to instability and rapid degradation with relatively minor changes in runoff patterns caused by changes in land use.<sup>254</sup> The erosion impact to a stream channel is exponentially proportional to the percentage of upstream watershed that is impermeable or disturbed.<sup>255</sup> The Project's disturbance (i.e., cut and fill) limits would occupy over 40% on average (and up to 100% in some cases) of the upstream land area of the eight subwatersheds closest to the creek mouth.<sup>256</sup> Impermeable surfaces would cover up to 29% of the upstream area of individual subwatersheds.<sup>257</sup> These are very large percentages.<sup>258</sup> Impacts on this level are associated with destabilization of canyons, highly altered hydrology, and severe erosion.<sup>259</sup> Erosion and siltation impacts therefore could affect the ecology of the San Mateo Creek mouth and lagoon.<sup>260</sup>

TCA maintains that it has modeled the projected runoff flows and that there will be “virtually no change” at the discharge points.<sup>261</sup> However, the flow duration plots are misleading: they actually represent only the discrete discharge from the flow splitters and EDBs for *onsite* highway runoff – i.e., runoff from the roadway itself. *The modeling does not address offsite flows.*<sup>262</sup> By examining hydrologic modeling results only at the discharge of specific BMPs, the total impacts associated with the entire project including the “offsite” and “onsite” runoff management strategies cannot be determined.<sup>263</sup>

TCA assumes that adjacent slopes will be “stabilized” with native vegetation.<sup>264</sup> However, typical BMPs that may be appropriate in an already developed urban or suburban

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<sup>251</sup> TCA App. 1-4(F) at 2 (PDF p. 7).

<sup>252</sup> PWA 2006 Report at 2.

<sup>253</sup> See TCA App. 1-4(E), Table 1 (PDF p. 4).

<sup>254</sup> TCA App. 1-4(F) at 2 (PDF p. 7)

<sup>255</sup> TCA App. 1-4(E) at 1, 2.

<sup>256</sup> See *id.* at 3 & Revised Table 1; see also PWA 2007 Analysis at 3; PWA 2006 Report at 2, 16-17 (figs. 6-7), 18 (Table 1).

<sup>257</sup> TCA App. 1-4(E).

<sup>258</sup> PWA 2006 Report at 12.

<sup>259</sup> PWA 2007 Analysis at 3; PWA 2006 Report at 1, 21.

<sup>260</sup> *Id.*

<sup>261</sup> TCA Response at 81.

<sup>262</sup> PWA Letter of Jan. 22, 2008 at 6

<sup>263</sup> *Id.* (emphasis added).

<sup>264</sup> TCA Response at 85.

environment are not adequate protect the undeveloped fragile canyons and steep terrain along San Mateo Creek and Cristianitos Creek from erosion.<sup>265</sup>

The cut and fill slopes are extensive including about 530 acres of disturbed land with cuts as wide as 700 to 800 feet from the highway and up to 250 feet high.<sup>266</sup> As one expert testified at the hearing, this is the size of a 20-story building.<sup>267</sup> The RMP does not provide a detailed description of how these large cut and fill slopes will be stabilized. It relies on source control BMPs including: hydroseeding, ground cover, mulch, longitudinal ditches, down drains, all of which are, at best, only moderately effective. Establishing native vegetation through hydroseeding will be difficult, particularly given the steep slopes, top soil removal, and variable local rainfall patterns.<sup>268</sup> As the Commission noted in its Staff Report, the TCA experienced slope failures in connection with the San Joaquin Hills Transportation Corridor, including 10 feet deep cuts in a 35 acre area “stabilized” through revegetation. By comparison, the Foothill South requires revegetation to stabilize about 530 *acres* of cut and fill slopes.<sup>269</sup> TCA’s assumption that revegetation will be 100% effective is simply implausible.

Moreover, *the RMP does not propose any treatment control BMPs* either to control runoff flow rates and volumes or to trap sediments eroded from offsite (i.e., non-road) areas. Without any treatment control BMPs, delivery of fine grained sediments to San Mateo Creek will increase from the cut and fill slopes and runoff discharge.<sup>270</sup>

TCA’s inability to demonstrate that that the Toll Road will not significantly increase sedimentation to San Mateo Creek is confirmed by Regional Water Quality Control Board’s recent denial of TCA’s application for a water quality certification for the Project under the Clean Water Act. TCA’s assertion that the denial was without prejudice misses the point. *See* TCA Reply at 11. The basis for the denial was that, *based on the same information TCA presented to the Commission*, the Board was unable to conclude that the BMPs and other mitigation measures proposed by TCA would avoid adverse impacts on the uniquely important beneficial uses present in San Mateo Creek.<sup>271</sup> Specifically, the Board found that “the RMP does not protect [beneficial uses] in developing specific management measures for work in areas occupied by threatened and endangered species,” expressed lingering concerns with TCA’s conclusions regarding the effectiveness of extended detention basins in reducing pollutant load, and concluded that the RMP as revised in 2007 “was not adequate to demonstrate that the project would not cause degradation of receiving waters.”<sup>272</sup> TCA has offered nothing new in this proceeding to address these deficiencies – which lie at the heart of the Toll Road’s negative water quality impacts.

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<sup>265</sup> PWA Jan. 22, 2008 letter at 2.

<sup>266</sup> *Id.* at 4.

<sup>267</sup> TCA App. 3-7 at 140 (PDF p. 147).

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *See* J.H. Robertus, Regional Water Quality Control Board, Letter to R. Beck, RBF Consulting, Re: South Orange County Transportation Infrastructure Improvement Project Foothill-South Toll Road (Feb. 6, 2008) (attached as Exhibit 42).

<sup>272</sup> *Id.* at 5-6.

Ignoring the evidence that the Toll Road will have a tremendous adverse impact on water quality, TCA embarks on a tortured effort to portray the Project as having a net “benefit” to water quality. Indeed, TCA’s briefs here focus exclusively on its proposal to construct water treatment facilities along the existing I-5. The I-5, however, crosses only a *single* subwatershed within the San Mateo Creek watershed, over a distance of less than half a mile. In contrast, the Toll Road would run approximately seven miles through 20 largely undisturbed subwatersheds of San Mateo Creek.<sup>273</sup> It is this massive *new* disturbance in one of the last high-integrity watersheds anywhere in Southern California that poses the real threat to water quality, not the existing I-5. Indeed, there is no evidence of any significant water quality problem in the Creek today.<sup>274</sup>

Moreover, the purported reductions in pollutants account only for discharges generated on the roadways themselves. As discussed above, increases in sedimentation caused by the Toll Road’s project’s massive cut and fill slopes present a major water quality issue – one that is not addressed at all by the proposed I-5 retrofit.

Even the purported reductions in roadway runoff are questionable. The treatment measures proposed by TCA are not entirely effective at removing pollutants. Based on recent Caltrans numbers, between 42 and 50% of the copper, 10 to 28% of the suspended sediment, and 13 to 28% of the lead washed from the proposed Toll Road would be discharged to San Mateo Creek *after* treatment.<sup>275</sup> TCA provides calculations purporting to show that, despite the addition of these pollutants, building the I-5 retrofit would result in a net decrease in total pollutant loadings from roadway runoff. But these calculations assume unrealistic reduction efficiencies. According to a recent Caltrans BMP Pilot Study, sand filters are prone to clogging and are recommended only for small impervious watersheds such as park and ride lots. TCA is proposing sand filters for watersheds of up to 65 *acres*, far greater than recommended. And extended detention basins have lower and much more variable removal rates than sand filters – as low as 40% for total suspended solids. Using realistic assumptions, the discharges from the Toll Road surface alone would likely be greater than any reductions achieved by the I-5 retrofit.

In any event, providing new treatment facilities for the I-5 in no way depends on the construction of the Toll Road. Such facilities can be constructed as part of any alternative to the Toll Road (including the AIP-R alternative described in Section IV.A.3, below). Moreover, contrary to TCA’s assertions, Caltrans *can* be legally required to install treatment facilities on existing portions of I-5 by the Regional Water Quality Control Board as a condition of the agency’s own stormwater discharge permit, to the extent runoff is ever found to be causing a violation of a water quality standard.<sup>276</sup> In addition, according to staff at the San Diego Water

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<sup>273</sup> PWA 2006 Report at 15, Figure 5, *Subbasins Disturbed within the San Mateo Creek Watershed*.

<sup>274</sup> No water bodies at San Onofre have been identified by the Regional Board as impaired. See San Diego Regional Water Quality Control Board, 2006 Clean Water Act Section 303(d) List of Water Quality Limited Segments (attached as Exhibit 40).

<sup>275</sup> PWA, Letter of Jan. 22, 2008 at 9-10.

<sup>276</sup> See State Water Resources Control Board, *Caltrans Stormwater Permit*, Section C.1-1 at 10 (“[t]he discharge of storm water from a facility or activity that causes or contributes to the violation of water quality standards or water quality objectives (collectively WQs) is prohibited”) (attached as Exhibit 41).

Board, Caltrans' existing permit already requires the installation of the very measures offered by TCA in the event that *any* improvements are made to the affected segment of I-5. The Caltrans Stormwater Permit explicitly requires "Storm Water Drainage System Retrofitting." Specifically, "Caltrans shall seek opportunities to retrofit the Storm Water Drainage System for water quality improvement *whenever a section of the rights-of-way undergoes significant construction or reconstruction.*"<sup>277</sup>

There is no basis for TCA's assertion that building a 16-mile Toll Road through some of the most sensitive habitat in Southern California, including a popular state park, is somehow necessary to improve water quality along a stretch of I-5 that currently suffers from no demonstrated water quality problem. The Toll Road will increase fine sediments in the creek system and the lagoon, significantly reduce water quality, and threaten two endangered fish species. A few new water treatment facilities along I-5 – facilities that are not unique to, and that do not require, this project – cannot possibly offset these adverse impacts.

**b. The Toll Road's Negligible Contribution to the National Interest Does Not Outweigh these Severe Impacts.**

The Toll Road's contribution to any relevant national interest is negligible at best. As discussed in Section IV.A.1, above, TCA has failed to provide any evidence that the Toll Road will contribute to the development of the coastal zone. Nor has TCA shown that the Toll Road project is coastal-dependent; accordingly, TCA has not proved that the Toll Road will further any national interest in the orderly siting of coastal-dependent transportation facilities. TCA also has attempted to describe its ineffective and partial recreational access and water quality mitigation measures as benefits that should weigh in the national interest calculus. These measures, however, fall far short of compensating for – and thus do not outweigh – the Toll Road's severe adverse impacts. In short, TCA has not identified a single national interest articulated in the CZMA that even comes close to outweighing the Toll Road's numerous severe and unmitigable impacts on the coastal zone.

TCA instead relies largely on the Toll Road's contribution to purported areas of the "national interest" that are *not* articulated in the CZMA: military security, evacuation during a nuclear disaster or fire, and air quality. Whatever the importance of these interests might be in the abstract, they are not articulated in the CZMA, and thus have no place in the Secretary's balancing analysis in an appeal under the CZMA. *Chevron I*, 1990 NOAA LEXIS 47 at \*126-27. TCA essentially invites the Secretary to exceed both his statutory authority and the confines of his prior decisions under the CZMA – an invitation the Secretary should decline.

Even if these interests could be considered in the balancing analysis under Element 2, the Toll Road's contribution to these interests would be insufficient to overcome the project's coastal impacts. To the extent that they are truly necessary for national security, TCA's proposed "improvements" to Camp Pendleton could be accomplished with or without the Toll Road, either by the military itself or as part of the other alternatives analyzed as part of the

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<sup>277</sup> *Id.* at 15 (emphasis added); see also State Water Quality Control Board, *Fact Sheet for National Pollutant Discharge Elimination System for Storm Water Discharges* (July 15, 1999) (attached as Exhibit 41).

SOCTIIP process. As previously discussed, TCA lacks the statutory authority to use its toll or fee revenues to construct the improvements, so ultimately, the Navy would be paying for the improvements regardless of who constructs them.

Under any of these possible scenarios, the Toll Road is unnecessary for and makes no contribution to the purported national security improvements, much less a contribution sufficient to outweigh the Toll Road's negative effects.

TCA's claim that the Toll Road will improve public safety by providing an alternative evacuation route in the event of a fire or nuclear disaster is equally specious. TCA makes much of the obvious point that increased road capacity may speed evacuation, but nowhere demonstrates that this particular Toll Road project is necessary for this purpose. As discussed in Section IV.A.3, below, there are a number of reasonable, available alternatives under consideration that also would increase capacity, and thus achieve the same generalized benefit TCA claims for the Toll Road.

TCA also fails to recognize that the Toll Road, as currently proposed, is expected to *increase* the risk of wildland fire – a risk explicitly discussed in the FWS's Biological Opinion for the project:

Roadways provide a ready source for fire ignitions in adjoining native habitat by means of vehicle sparks, discarded cigarettes, and access for arsonists. For example, along the already built northern section of the proposed toll road, a series of four fires have burned the majority of the surrounding open space since 1996. Only one of these fires was directly attributed to operation of the toll road, but the great majority of the recent fires in the area have resulted from human activity.<sup>278</sup>

Far from providing a safety benefit, the Toll Road would actually *create* a major new source of ignitions in fire-prone wildlands.

New highways in brush areas do far more harm than good with respect to wildfires. Roads are a major source of fire ignitions, due to sparks from catalytic converters, accidents, equipment malfunctions, discarded cigarettes, and other factors. According to one of the world's leading fire ecologists, Dr. Jon E. Keeley of the US Geological Survey and UCLA:

In southern California several studies have shown that *fires are overwhelmingly tied to roads*. In many parts of the region a map of where fires ignite is often nearly a carbon copy of a road map . . . It is a well established fact that when new roads are established they bring with them a greatly increased incidence of fires.<sup>279</sup>

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<sup>278</sup> See TCA Supp. App. 6-50 at 21; *see also id.* at 162 (discussing impacts of fire on Pacific pocket mouse).

<sup>279</sup> TCA App. 1-4(J) at 1 (PDF p. 1) (emphasis added).

Data supplied to the Commission showing fire starts in the Cleveland National Forest in San Diego County – an area with scrub vegetation analogous to that surrounding the Toll Road – demonstrates ignitions heavily clustered along the route of Interstate 8.<sup>280</sup>

Moreover, a highway will generally act as a firebreak only in moderate weather conditions; “under the weather conditions that lead to our most destructive fires, *roads and even major highways seldom act as a barrier to fire spread.*”<sup>281</sup> Indeed, the example cited by TCA of the 241 acting as a fire break during the 2007 Santiago fire is belied by the fact that the fire jumped the 241 several times during that event.<sup>282</sup>

The overwhelming historic evidence points to greatly increased fire incidence due to roads like the Toll Road.<sup>283</sup> Various mitigation measures – fencing, signage in construction sites, fuel modification, call boxes – are in standard use elsewhere and yet roads remain a major source of wildfire ignitions.<sup>284</sup> Building new roads through wildlands is simply not a fire prevention strategy. The way to stop fires is to not start them in the first place. The Toll Road will have the opposite effect. In the words of a trained wildland firefighter, “while firefighting resources can certainly use the toll road, the increased fire risk the road brings to the landscape is not an acceptable trade off.”<sup>285</sup>

In sum, TCA has failed to carry its burden of proving that the Toll Road’s negligible contribution to the national interest overall – and its even more paltry contribution to the relevant national interests articulated in the CZMA – even comes close to outweighing the Toll Road’s devastating impacts on endangered species, coastal recreation, water quality and watershed stability, irreplaceable cultural resources, and wetlands. TCA’s appeal must be denied on this element alone.

**3. Element 3: The Commission Properly Determined That Several Reasonable Alternatives Were Available To TCA That Would Accomplish Project Objectives Consistent With California’s Coastal Management Program.**

The Secretary should uphold the Commission’s objection because “[t]here is [a] reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program.” 15 C.F.R. § 930.121(c). The Commission identified with specificity several such alternatives, including improving I-5

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<sup>280</sup> TCA App. 1-4(I) (PDF p. 19).

<sup>281</sup> TCA App. 1-4(J) at 1 (PDF p. 1) (emphasis added).

<sup>282</sup> The OC Sheriff website, November 9, 2007, <http://blog.ocsd.org/post/Santiago-Fire---Evacuating-James-A-Musick-correctional-facility.aspx>; Orange County Fire Authority website, <http://www.ocfa.org/pages/ocfa.asp?filename=canyonfiremap.asp> (Santiago incident map).

<sup>283</sup> “New Maps Emphasize The Human Factor In Wildfire Management,” *Science Daily*, University of Wisconsin-Madison (Dec. 28, 2006), <http://www.sciencedaily.com/releases/2006/11/061116081859.htm>.

<sup>284</sup> “TCA’s argument that the toll road would provide access to firefighters, might act as a fire break, and would include mitigation measures such as warning signs and call boxes, does not mitigate the increased fire risk the road would cause.” TCA App. 1-4(I) at 2 (PDF p. 18).

<sup>285</sup> *Id.*

with carpool lanes and expanding local arterials, which would achieve project objectives as well or better than the TCA's preferred route. These alternatives are technically feasible and could be built with only a fraction of the adverse impacts claimed by TCA. These alternatives also are eligible for funding and federal approval under existing programs. The existence of these reasonable, available alternatives precludes an override of the Commission's objection here.

**a. The Commission Identified Alternatives That Avoid Coastal Impacts While Achieving Project Purposes.**

An alternative "consists of one or more changes to the project that would allow the project, albeit in a somewhat different form, to achieve its primary purpose in a manner consistent with the state's coastal management program." *Millennium Pipeline*, 2003 NOAA LEXIS 17 at \* 45. The primary purpose of the Toll Road is to relieve traffic congestion on I-5 and arterial roadways in southern Orange County.<sup>286</sup> Reasonable, available alternatives exist that can accomplish the primary purpose of the SOCTIIP project.

Foremost among these alternatives is the AIP-R alternative developed by the nationally renowned transportation planning and engineering firm Smart Mobility, Inc. TCA's own analysis of the traffic benefits of an alternative called the AIP alternative – which is functionally identical for traffic purposes to the AIP-R alternative – demonstrated performance equal to or better than TCA's preferred Toll Road alternative in reducing projected delays on I-5 and nearby arterials, and in reducing total vehicle hours traveled.<sup>287</sup> The CC-ALPV alternative considered as part of the SOCTIIP project also showed improvements in these conditions; if combined with limited improvements to the I-5, its performance could be dramatically improved.<sup>288</sup>

**b. The Commission Identified Alternatives that are Consistent with the State's Management Plan, Specific, Available, and Reasonable.**

The Secretary has developed a four-part test for determining whether an alternative is reasonable: (1) consistency with the state's coastal management program; (2) specificity; (3) availability; and (4) reasonableness. *Millennium Pipeline*, 2003 NOAA LEXIS 17 at \*49. "The burden of proof for the first two criteria rests with the state. The burden then shifts to the appellant [] to demonstrate that the alternative is either unavailable or unreasonable." *Id.*

The Commission's analysis rejecting TCA's consistency certification application satisfies each element of this test.

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<sup>286</sup> See TCA App. 20/21-49 at 1-15 to 1-17 (PDF pp. 40-42).

<sup>287</sup> See Smart Mobility, Inc., *An Alternative to the Proposed Foothill South Tollroad: The Refined AIP Alternative; Design Modifications to Reduce Displacements* (January 2008) at 3-4 ("Revised Smart Mobility 2008 Study") (attached as Exhibit 45).

<sup>288</sup> See Smart Mobility, Inc., *Alternatives to the Foothill South Tollroad* (May 24, 2008) at 20 ("Alternatives Report") (attached as Exhibit 3).

**i. Alternatives Specifically Identified By the Commission Would Be Consistent with California's Coastal Management Program.**

The Secretary's past decisions make clear that "[s]ufficient specificity" is satisfied if an alternative is identified with enough details to permit a further evaluation of the alternative's reasonableness and availability." *Millennium Pipeline*, 2003 NOAA LEXIS 17 at \*50. The record developed before the Commission easily meets this standard.

In its consistency objection, the Commission specifically identified six alternatives (three involving improvements to I-5 and arterial streets and three involving alternate toll-road routes). In doing so, it relied on detailed descriptions and analyses submitted into the record, including a detailed description and analysis of the AIP-R developed by Smart Mobility.<sup>289</sup> The record before the Commission also clearly indicates that these alternatives largely avoid the Coastal Zone and are far less environmentally damaging than the Toll Road proposal.<sup>290</sup> Based on this record, the Commission concluded that these alternatives, "if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the CCMP."<sup>291</sup>

**ii. The TCA Cannot Meet Its Burden To Show That Alternatives Identified By The Commission Are Not "Available."**

TCA protests that the AIP-R alternative, which would include adding a high-occupancy vehicle ("HOV") lane to portions of I-5, is "unavailable" because of difficulty in implementation and lack of funding. TCA sums up its position by quoting the Director of Caltrans, who stated at the Commission hearing that the cost of the AIP alternative "is \$2.5 billion, which we do not have." TCA Br. at 45. However, there is absolutely no credible evidentiary support for either the purported cost of the AIP alternative or the non-existence of funding sources.

TCA's cost figures for the AIP and related alternatives are based on its wildly inflated and completely unsupported estimate of the number of residential and commercial structures that would be necessary for that alternative. As shown in the January 2008 Smart Mobility Report on the AIP-R alternative and discussed in the following subsection, design modifications could reduce property takings – by far the most significant cost associated with this alternative – by approximately 95%.<sup>292</sup> Although final engineering study would need to be conducted, Smart Mobility concluded that these modifications could reduce the cost of the AIP-R alternative on the order of a *billion* dollars as compared to TCA's AIP alternative.<sup>293</sup>

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<sup>289</sup> See TCA App. 1-2 at 117-127.

<sup>290</sup> *Id.* at 124; see also TCA App. 21-22-50 at 4.15-3, 4.15-4 (PDF pp. 379-80) (CC-ALPV alternative is not in coastal zone and has no impacts on coastal zone).

<sup>291</sup> TCA App. 1-1 at 1.

<sup>292</sup> *Revised Smart Mobility 2008 Study* at 34.

<sup>293</sup> *Id.*

It is also disingenuous for TCA to claim that no funds for the AIP alternative are “programmed.” Such funds would not be programmed unless and until TCA and Caltrans decide to pursue that alternative. The question is not whether funds have been “programmed,” but whether such funds can be made available. TCA provides no evidence to show that the AIP stands in any different position with regard to funding than the numerous other highway widening projects that have been and are currently being undertaken by Caltrans in Orange County and throughout the State.

Indeed, TCA *has not even tried* to tap readily available sources of funding and special federal programs that could serve to facilitate the approval, funding and construction of this and other alternatives *by TCA*. Its failure to pursue these and other options precludes TCA from persuasively carrying its burden to show that these alternatives are “unavailable.”

For example, Section 1604(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59 (Aug. 10, 2005), authorizes the Secretary of Transportation (Secretary) to carry out 15 demonstration projects to permit States, *public authorities, or public or private entities designated by States*, the authority to collect a toll from a motor vehicle on an eligible toll facility. Known as the Express Lanes Demonstration (ELD) program, it is a new pilot program that permits tolling on selected new and existing Interstate lanes to manage high levels of congestion, reduce emissions in an air quality nonattainment or maintenance area, or finance added Interstate lanes for the purpose of reducing congestion. Its scope is broad: *The ELD program permits tolling on any newly constructed Interstate or non-Interstate lanes*. In addition, existing Interstate or non-Interstate facilities that are modified or constructed to create toll lanes are eligible to collect tolls on the entire facility. Additionally, existing Interstate or non-Interstate HOV facilities are eligible to collect tolls on the entire facility.

This provision was enacted into law well before TCA approved its preferred Toll Road alternative in 2006. Moreover, the Department of Transportation has been actively soliciting applications for this program for several months. *See Federal Highway Admin., Express Lanes Demonstration Program, 73 Fed. Reg. 6549 (February 4, 2008)*. No reason exists why the TCA, either on its own or in partnership with the Orange County Transportation Authority and/or CalTrans, could not seek approval to implement an alternative under this special authorization. *But TCA has not even tried to submit an application.*

TCA’s willful failure to pursue opportunities such as the ELD program points to the real reason why funding for an alternative is not yet available: TCA simply does not want funding for anything other than its preferred project. As a result, the often-lengthy process through which transportation projects are prioritized for federal, state and local funding has not commenced. But this is the fault of the applicant, not an indication that alternatives cannot be funded.

Even if funding is difficult to obtain, that does not mean a project alternative is “unavailable.” Alternatives acknowledged to be “extremely difficult, if not impossible to secure,” “time consuming (taking potentially up to four years to complete),” “expensive,” or

“uncertain,” nonetheless have been found reasonable by the Secretary.<sup>294</sup> Moreover, the need for agreement with a third party will not make an alternative unavailable if there is an established process to obtain the necessary approval. *Millennium Pipeline*, 2003 NOAA LEXIS 17 at \*63, n.97. Here, funding is neither “extremely difficult” nor “impossible” to secure. On the contrary, there is an “established process” underway – the Federal Highway Administration is soliciting applications for projects right now. Nor has TCA identified any reason why a set of I-5 improvements that incorporated tolled lanes (for example, the AIP-R) would be any more time consuming or uncertain than the Toll Road, which has yet to be approved by federal agencies and depends on the sale of bonds in an uncertain market. In short, there are several “established processes” to gain the necessary approval, and the necessary funding, for this type of approach. What is missing is TCA’s willingness to pursue them.

TCA could use the Express Lanes Demonstration Project as a source of funding to construct a less environmentally damaging alternative to the Toll Road. Yet TCA has not attempted to do so. Because TCA has failed to show why this or other more traditional sources of highway funding cannot be obtained, it has not met its burden to show that alternatives are “unavailable,” and its appeal should be denied.

**iii. The TCA Cannot Meet Its Burden To Show That Alternatives Identified By The Commission Are Unreasonable.**

Reasonableness has been defined as “a weighing of the differences in environmental impacts and cost between the alternative and the proposed project.” *Islander East* at 45. It is TCA’s burden to demonstrate the unreasonableness of the alternatives identified by the Commission. *Millennium Pipeline*, 2003 NOAA LEXIS 17 at \*49.

Here, TCA cannot meet its burden because its assessment of the relative costs and benefits of the route it chose versus the alternatives identified by the Commission is fundamentally flawed. For example, the purported benefits of the Toll Road are grossly overstated, and the true costs of the alternatives are grossly inflated.

These flaws were identified and analyzed in detail by Smart Mobility and others in proceedings before the Commission.<sup>295</sup> These shortcomings are further summarized in the new Smart Mobility Alternatives Report.<sup>296</sup> They include:

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<sup>294</sup> See *Millennium Pipeline*, 2003 NOAA LEXIS 17 at \*59-60; see also *Consistency Appeal of Chevron U.S.A.*, 1990 NOAA LEXIS 47 (Oct. 29, 1990) (requiring oil company to obtain emission offsets and on-site emission reductions as reasonable alternatives to proposed exploratory oil and gas drilling rejected as inconsistent based on violations of Clean Air Act). In addition, alternatives do not need to “be immediately available to the appellant.” *Millennium Pipeline*, 2003 NOAA LEXIS 17 at \*63, n. 97 (citing *Consistency Appeal of Exxon Co., U.S.A.*, 1984 NOAA LEXIS 15 (Nov. 14, 1984)).

<sup>295</sup> See TCA App. 2-6(E) at 35-41 (PDF pp. 36-42); see also *Revised Smart Mobility 2008 Study* ((attached as Exhibit 45); see also TCA App. 1-4(K) (PDF pp. 2-9) (peer review of Smart Mobility Report), 1-4(M) (PDF pp. 1-7) (Smart Mobility responses to Caltrans comments).

<sup>296</sup> *Alternatives Report* at 2-3.

- Only a few alternatives considered by TCA during the SOCTIIP process were refined to avoid impacts, while most of the others were not. This results in unequal treatment, and therefore, comparisons between the refined and unrefined alternatives are meaningless.
- There were several major flaws in the transportation modeling used to measure the performance of the alternatives. These flaws serve to overstate the congestion relief benefits of the proposed toll road, and to overstate impacts for the alternatives that included improvements to the I-5 corridor (I-5, AIP and CC alternatives).
- The allocation of construction costs and property impacts was improperly allocated. The alternatives that included improving the I-5 corridor double counted construction costs and property impacts, as there are already other interchange improvement projects underway for these locations. In other cases, improvements are needed with or without the toll road, so the impacts should not be attributed to the toll road alternatives.
- Several alternatives were rejected due to lack of a funding source, which is not an appropriate reason for a project that is still in the conceptual design stage. Funding for projects is generally not identified until much later in the planning and design process.
- HOT lanes, which could provide an important source of funds for the alternatives that include I-5 improvements, were rejected prematurely and improperly. The TCA's own analysis shows that HOT lanes are even more effective at relieving congestion on I-5 (the project's major purpose) than the HOV lanes (as in the AIP Alternative) or the toll road.

By failing to compare the costs and benefits of the various SOCTIIP alternatives in an accurate, unbiased, and meaningful manner, TCA has made it impossible for the Secretary to "weigh . . . the differences in environmental impacts and cost between the alternative and the proposed project." *Islander East* at 45. It necessarily follows that TCA did not meet its burden to show that the alternatives identified by the Commission do not favorably compare with its chosen route.

Even if TCA had not failed to conduct a fair and unbiased analysis, TCA would still not have met its burden here, because the preponderance of the evidence before the Secretary affirmatively shows that reasonable alternatives to the tollroad project in fact exist. These include the AIP-R alternative developed by Smart Mobility and the CC-ALPV alternative as modified in Smart Mobility's Alternatives Report.

As for the AIP-R, the TCA continues to insist that the AIP-R alternative cannot be built without displacing 1,300 existing homes and businesses. This fabrication is premised on a footprint intended to maximize displacements – one that TCA has never backed up with any adequate study or analysis. In fact, Smart Mobility demonstrated that up to 95% of takings estimated by TCA along the AIP could be avoided. Moreover, after the former directors of

highway design for both the New York State Department of Transportation and the New York State Thruway conducted a detailed review and site tour, they concluded that:

Smart Mobility makes a strong case that ***improvements could be made by TCA to the AIP alternative that have solid potential to greatly reduce the displacement of people and businesses while at the same time preserving its operational benefits.*** Their concepts for the various improvements are enhanced by the fact that they build off of traffic information, constraints, and opportunities already presented by TCA in the SEIR and related documents.<sup>297</sup>

TCA has simply never demonstrated that this fundamental conclusion is wrong.

Instead, TCA makes much of the fact that Smart Mobility did not solve every single engineering constraint along every foot and at each interchange of this multi-mile project and did not provide engineering-level specifications. But Smart Mobility did provide specific conceptual solutions to reduce displacement impacts – solutions that neither TCA nor Caltrans has ever fairly considered in detail as applied to this project. These include such “value engineering” techniques as retaining walls, alignment adjustments and innovative interchange designs that Caltrans *regularly* employs when improving highways in other developed areas of the state.<sup>298</sup> TCA has failed to provide any justification for its implicit position that Southern Orange County is somehow unique, or that similar value engineering will not be equally effective there.

TCA cites a March 24, 2008 Caltrans letter critiquing the January 2008 Smart Mobility report as evidence that the AIP-R is not “reasonable.” *See* TCA Br. at 44. The letter concurs with Smart Mobility that design revisions could help avoid displacement impacts.<sup>299</sup> But it characterizes certain aspects of the conceptual design “as not meeting Department standards” and “not meeting applicable engineering standards of care.”<sup>300</sup> This critiques are entirely misplaced. The Smart Mobility alternative was never intended to serve as an engineering-level study.<sup>301</sup>

Moreover, Caltrans’ insistence on rigid consistency with full design standards here – even when following those standards will result in massive residential and business displacements – stands in stark contrast with its approval of non-standard highway and interchange designs elsewhere in Southern California. For example, as described in the Smart Mobility Alternatives Report and in Smart Mobility’s response to the Caltrans letter, Caltrans itself has not rigidly adhered to design standards, but has considered and approved non-standard

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<sup>297</sup> TCA App. 1-4(K) at 3 (PDF p. 4).

<sup>298</sup> *See Alternatives Report* at 2-6.

<sup>299</sup> *See* Smart Mobility, Inc., Memorandum to M. Fitts, Endangered Habitats League, Re: Response to Caltrans Letter of March 24, 2008 (May 28, 2008) (“*SMI Caltrans Response*”) (attached as Exhibit 48); *see also* TCA Supp. App. 1-1 at 2. The Caltrans letter rejects these design revisions on the assumption that they will not adequately handle traffic. *See id.* These objections, however, rely on assumptions about traffic modeling that has not yet been done – modeling that only TCA and Caltrans have the capacity to do. *SMI Caltrans Response* at 1, 3.

<sup>300</sup> TCA App. 10-22 at 1; *see also* TCA Supp. App. 1-1.

<sup>301</sup> *SMI Caltrans Response* at 3.

design solutions in other contexts where necessary to avoid community and property impacts.<sup>302</sup> Just by way of example, Caltrans has shifted the centerline of I-5 in Los Angeles County as part of a “value engineering” process to avoid the substantial property impacts that would have occurred had Caltrans followed its initial design concepts.<sup>303</sup> Caltrans also worked with the City of San Clemente to explore non-standard alternative designs for the Avenida Pico interchange on I-5 – designs that avoided displacements while providing adequate traffic and safety performance.<sup>304</sup>

Caltrans’ inconsistency on the issue of standards may arise from the fact that it is not a neutral party in this project. Its position is affected by its entry into a “Cooperative Agreement” with TCA 15 years ago that legally binds Caltrans to “support” the Toll Road project.<sup>305</sup> Section 2.1.6(a) of the Cooperative Agreement states that the “STATE shall use its best efforts to use its discretionary power to support PROJECT.”<sup>306</sup> “STATE” is defined in Section 4.28 as Caltrans, and PROJECT is defined in Section 4.21 and Recital 2 as a road connecting the SR 241 to the I-5 “in San Diego County.”<sup>307</sup> The only toll road alternatives that link the existing SR 241 to I-5 *in San Diego County* are the alternatives that run through San Onofre State Beach. In effect, therefore, Caltrans committed in 1993 to support an alternative that would run through the park.

Caltrans’ commitment goes beyond mere support for this limited range of alternatives. Specifically, Caltrans contractually committed to

*exercise all discretionary authority under applicable law to persuade [sic] other governmental or private entities, indirectly or directly, from constructing, operating, permitting, assisting or supporting any STATE highway Capital Projects or improvements, realignments or enhancements of STATE highway projects within the Non-Competition Zone.*<sup>308</sup>

In other words, the agreement effectively binds Caltrans to *oppose* any alternative – including reasonable and feasible non-toll road alternatives required to be objectively considered under CEQA, NEPA, the California Coastal Act, the CZMA, and other laws – that Caltrans itself would be responsible for implementing, including the I-5 widening, AIP, and AIO alternatives. This leaves Caltrans in the position of supporting only alternatives that run through San Onofre State Beach – and opposing a wide range of alternatives that could avoid devastating impacts in the coastal zone within the state park.

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<sup>302</sup> See *id.* at 2, 3 (discussing non-standard “interim” improvements and Ortega Highway interchange).

<sup>303</sup> Alternatives Report at 2-3.

<sup>304</sup> *Id.* at 6.

<sup>305</sup> See TCA App. 17-32(Q) (“Cooperative Agreement”).

<sup>306</sup> *Id.* at 10 (PDF p. 13).

<sup>307</sup> *Id.* at 1, 30, 31 (PDF pp. 4, 33, 34).

<sup>308</sup> Cooperative Agreement § 2.1.6(b) (emphasis added), TCA App. 17-32(Q) at 10 (PDF p. 13). The Non-Competition Zone, in turn, is an area running 5-miles on either side of TCA’s chosen route for the Tollroad through the State Park, an area clearly mapped 15 years ago appearing at Exhibit 2 of the 1993 Cooperative Agreement. Notably, the route shown on this map is virtually identical to the route ultimately chosen by TCA 15 years later, as to which Caltrans says there is no other alternative.

This commitment was made years before the commencement of environmental review under NEPA and CEQA, the SOCTIIP Collaborative process, or the CZMA certification process. All of Caltrans' comments on the various alternatives considered in those processes were framed in light of these contractual commitments to support an alternative effectively chosen by TCA 15 years ago.

In sum, TCA cannot rely on its own failure to analyze SOCTIIP alternatives fully and fairly to demonstrate that those alternatives are now unavailable and unreasonable. The Commission and the public are not required literally to design a highway to construction-ready standards in order to present a reasonable alternative. Rather, the Commission must describe the *reasonably available* potential of such an alternative to meet project needs consistent with Coastal Zone Management Act policies. The evidence presented has more than accomplished that task, and TCA has failed to negate it.

For this independent reason, the TCA has not met its burden and its appeal should be denied.

**B. Ground II: The Toll Road Is Not Necessary in the Interest of National Security.**

TCA cursorily argues in its opening brief that the Secretary should override the Commission's objection because the Toll Road is necessary in the interest of national security. TCA Br. at 47; 16 U.S.C. § 1456(c)(3)(A). The argument – which TCA wisely abandons in its reply – has absolutely no merit.

In order to override a state's objection on Ground II, the Secretary must find that “a national defense or other national security interest would be *significantly impaired* were the activity not permitted to go forward *as proposed*.” 15 C.F.R. § 930.122 (emphasis added); *see also Millennium Pipeline*, 2003 NOAA LEXIS 17 at \*79-80. The Secretary has observed that “this appeal standard is very stringent and very difficult to meet,” and that “[t]he regulation establishing the criteria for an override based on Ground II sets up a very difficult test.” *Chevron I*, 1990 NOAA LEXIS 47 at \*166, 168.

As previously discussed, the “improvements” at Camp Pendleton that TCA has touted in this proceeding were never part of the stated purpose and need for the Toll Road project. TCA also may lack the legal authority to construct these facilities on Camp Pendleton; nowhere in the California statutes governing TCA's operations is there any suggestion that the agency's finances can be used to build gates and overpasses for the sole benefit of a federal military installation in a neighboring county. TCA's attempt to cobble together a national security rationale for its project at this late date smacks of contrivance.

The only other evidence cited by TCA in support of its argument on Ground II is a wildly speculative assertion that an alternate route to the Marines' embarkation point at March Air Force Base “would be vital in the even of catastrophic loss to the southern Base exit points when Marine forces are being deployed to overseas bases” or to Twentynine Palms. TCA Br. at

47. TCA does not attempt to define what might cause such a “catastrophic loss” to only the southern access points to the Base, and does not indicate how likely such a mysterious and undefined event might be. In short, TCA’s argument rests on a vague speculation that some combination of unspecified and unlikely circumstances might make the Toll Road desirable for access to the Base at some unknown point. This is a far cry from proving, based on a preponderance of the evidence, that the national defense or another national security interest will be significantly impaired if the project is not carried out as proposed. *See* 15 C.F.R. § 129.122.

The one citation to the record in this section of TCA’s brief references a single sentence in the agency’s CEQA findings of fact and statement of overriding considerations for the Toll Road.<sup>309</sup> This sentence does not discuss the need for alternative access to the Base in the event of possible catastrophes, but rather the more mundane effect on Base access associated with congestion on I-5.<sup>310</sup> Of course, as with so many other putative “benefits” of the Toll Road, other alternatives could improve routine access for the Marines (along with every other driver on I-5) by reducing congestion. Again, TCA offers no evidence to support its claim that national security will be significantly impaired if the Toll Road is not built in exactly this location.

Finally – and most egregiously – TCA simply omits any discussion of the *negative* impacts that the Toll Road will have on Camp Pendleton. If the Toll Road is built “as proposed,” the Base will suffer a number of adverse impacts, including an increased threat to base security, disruption of nighttime training activities due to roadway lighting, and the permanent loss of several hundred acres of land that otherwise could have been used to support the mission of the Marines.<sup>311</sup> TCA itself has concluded that the impacts associated with temporary and permanent loss of this land will remain significant even after mitigation.<sup>312</sup> Accordingly, it is no surprise that the Navy has fought bitterly to keep the Toll Road from encroaching even further into Camp Pendleton, as the voluminous correspondence between TCA and the Base – correspondence disclosed by TCA in other proceedings, but omitted from TCA’s briefing and Appendix here – conclusively demonstrates.<sup>313</sup> Indeed, it is building the Toll Road “as proposed” – not refraining from building it, or building it elsewhere – that genuinely threatens a significant impairment of the national defense here.

TCA’s argument on Ground II thus not only lacks any factual or legal basis, but also lacks the virtue of basic candor and honesty. The Secretary should soundly reject TCA’s disingenuous claim that the Toll Road – a project that TCA itself has admitted will cause great harm to Camp Pendleton – as somehow necessary to national security.

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<sup>309</sup> *See* TCA App. 18-37 at 15 (PDF p. 91).

<sup>310</sup> *Id.*

<sup>311</sup> *See* TCA App. 22/23-51 at 4.21-13 to 4.21-21, 4.21-118 (PDF pp. 233-41, 338).

<sup>312</sup> TCA App. 24-52 at 7-43, 7.22-213 (PDF pp. 412, 585).

<sup>313</sup> *See generally* Exhibit 2 (letters discussing encroachment impacts and objecting to TCA alternatives that would extend further into Camp Pendleton).

**V. Conclusion**

The Commission properly objected to TCA's consistency certification for the Toll Road. TCA has failed to meet its burden of demonstrating that the Toll Road is nonetheless consistent with the CZMA or necessary to national security. The Secretary should reject TCA's appeal.

Very truly yours,

Joel Reynolds  
Senior Attorney  
Director, Urban Program  
Natural Resources Defense Council

Elizabeth Goldstein  
President  
California State Parks Foundation

Susan Jordan  
Director  
California Coastal Protection Network

Dan Silver, MD  
Executive Director  
Endangered Habitats League

Elizabeth Lambe  
Regional Representative  
Sierra Club

Mark Rauscher  
Assistant Environmental Director  
Surfrider Foundation

Brian Segee  
Staff Attorney  
Defenders of Wildlife

Scott Thomas  
Conservation Director  
Sea and Sage Audubon Society

Elisabeth M. Brown, Ph.D.  
President  
Laguna Greenbelt, Inc.

Glenn Olson  
Executive Director  
Audubon California

Garry Brown  
Executive Director  
Orange County Coastkeeper

Serje Dedina  
Executive Director  
WILD COAST-COSTASALVAJE

Encl. Exhibits 1-45 (submitted via hand delivery under separate cover)  
Exhibits 46-50 (submitted concurrently herewith via email)