



DEPARTMENT OF THE ARMY
LOS ANGELES DISTRICT, CORPS OF ENGINEERS
P.O BOX 532711
LOS ANGELES, CALIFORNIA 90053-2325

REPLY TO
ATTENTION OF:
Regulatory Division

April 7, 2008

Mr. Thomas Street
Staff Attorney
National Oceanic and Atmospheric Administration
Office of General Counsel for Ocean Services
1305 East-West Highway, Room 6111
Silver Spring, Maryland 20910

Dear Mr. Street:

By transmittal of this correspondence, I submit the following comments for your consideration on the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP), also known as the Foothill Transportation Corridor South (FTC-S) toll road extension, located in Southern Orange County and Northern San Diego County, California. My comments are in response to Federal Register notice dated March 17, 2008 (Volume 73, No. 52, pp.14225-14226), the California Coastal Commission (CCC) Adopted Staff Report and Recommendation ("staff report"; Consistency Certification No. CC-018-07), and the Appellant's principal brief filed pursuant to 307(c)(3)(A) of Coastal Zone Management Act (CZMA) and 15 C.F.R. § 930.127.

The comments I offer are factual in nature and are intended to clarify and augment the project's administrative record before you in regard to the U.S. Army Corps of Engineers (Corps) technical guidance and preliminary determinations provided during the environmental review process to date for the SOCTIIP. My comments are based on the Corps statutory authorities under Section 404 of the Clean Water Act (CWA) of 1972 and our independent obligations under the National Environmental Policy Act (NEPA) of 1969, as amended, for major Federal actions significantly affecting the quality of the human environment.

Since 1999, our role in the SOCTIIP environmental review process has been that of a participating Federal agency with special expertise and jurisdiction by law. Our on-going involvement has been largely guided by the integration procedures set forth in the State of California's 1994 Memorandum of Understanding (MOU) between Federal Highway Administration (FHWA), California Department of Transportation, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, National Marine Fisheries, and the Corps. This MOU outlines procedural steps and key decision points for integrating NEPA and CWA Section 404 requirements for surface transportation projects in the State of California. While the SOCTIIP applicant, Foothill/Eastern Transportation Corridor Agencies (TCA), is not a signatory agency to the MOU, its members have fully participated in the Federal environmental review process in their role as the State lead agency under the California Environmental Quality Act

(CEQA) and as the applicant for a number of Federal licenses and permits needed for project implementation. The term “Collaborative” was coined by the applicant to refer to the agencies who met regularly during the development of the joint draft NEPA/CEQA document for the SOCTIIP. These agencies included the participating MOU signatory agencies, the Department of the Navy—Marine Corps Base Camp Pendleton (in its capacity as a cooperating agency on the EIS), and TCA representatives.

Foremost, my agency maintains a neutral view on the SOCTIIP, as we are neither a project proponent nor a project opponent. Our responsibility under the CWA to balance the needs of the applicant with the protection of our nation’s aquatic and wetland resources, in consideration of the public’s interest, is of utmost importance. My staff consistently endeavors to render fair and balanced decisions within the bounds of our implementing regulations and based on the best available information. For this reason, I am compelled to highlight a few areas of the public record where I have found inaccurate statements as well as inferences that misrepresent the Corps preliminary determinations within the context of our CWA and NEPA statutory responsibilities.

Pages 110 through 116 of the CC-018-07 staff report provide TCA’s documentation related to the alternatives test of Section 30233(a) of the Coastal Zone Management Act, which requires that the project be the least environmentally damaging feasible alternative. According to the report, much of the information presented in the discussion on pages 110 through 116 was extracted from the applicant’s Final Subsequent Environmental Impact Report (SEIR) Responses to Comments general discussion. In their responses to comments, TCA summarized the Collaborative’s consideration of alternatives as “...[a] *multi-dimensional evaluation of the alternatives in order to identify a Least Environmentally Damaging Practicable Alternative (LEDPA).*” The record goes on to explain that an environmental evaluation matrix was jointly developed and then looked at in the context of regional habitat planning programs, due to the importance of those programs for regional open space and habitat protection. Specifically, the document states:

“The Collaborative then attempted to define what would be a “practicable” alternative, based on U.S. Army Corps of Engineers and EPA guidance documents (Section 404(b)(1) Guidelines). The Collaborative considered “practicable” to mean “as one that is available and capable of being done after taking into consideration: (1) cost; (2) existing technology; and (3) logistics in light of the overall project purposes.” The Collaborative considered an alternative not to be practicable if:

- a. It does not meet the project purpose and need;*
- b. Cost of construction (including mitigation) is excessive;*
- c. There are severe operational or safety problems;*
- d. There are unacceptable adverse, social, economic, or environmental impacts;*
- e. There would be serious community disruption;*
- f. There are unsuitable demographics (for transit Alternatives); and*

g. There are logistical or technical constraints.

The Collaborative applied the seven criteria listed to the eight SOCTIIP Alternatives. Based on that evaluation, the following SOCTIIP Alternatives were determined to be not practicable: Central Corridor (CC) (yellow); Central Corridor-Avenida La Pata (CC-ALPV) (light orange); Alignment 7 Corridor-Avenida La Pata (A7C-ALPV) (dark orange); Arterial Improvements Only (AIO) (blue); the I-5 Widening Alternative (I-5) (red); and the No Action Alternatives.

This left only the three FEC/San Mateo Creek watershed alternatives in contention, as at this point the Collaborative had essentially agreed that: (1) the no project alternative is not practicable because it does not meet the project need; (2) the AIO and I-5 alternatives are not practicable because they lack funding sources; (3) the CC, CC-ALPV, and A7C-ALPV alternatives are not practicable because they would result in “severe community disruption” [emphasis added].

During the Corps 2004-05 deliberation of the abovementioned alternatives, at no time did we determine the Central Corridor Alternative, Central Corridor-Avenida La Pata Alternative, or Alignment 7 Corridor-Avenida La Pata Alternative to be not practicable, as defined in regulation [40 C.F.R. 230.10(a)]. The statement in the applicant’s Final SEIR that these alternatives “...[w]ere determined [by the Collaborative] to be not practicable...” is incorrect and thus misrepresents the Corps’ position. Our official view on the alternatives analysis was articulated in our November 1, 2005 letter to FHWA in which we state the A7C-FEM-C Alternative appears to be the alternative most likely to represent the least environmentally damaging practicable alternative (LEDPA). This “preliminary” LEDPA determination was made in accordance with the NEPA/Section 404 MOU integration procedures and was predicated on the best available information at the time of our evaluation. The Corps made no assertion in our communications that other toll road alternatives considered in the draft EIS/SEIR were not practicable, including the CC, CC-ALPV and A7C-ALPV alternatives. The staff report does, however, correctly acknowledge on page 116 that our agreement on the “preliminary” LEDPA did not constitute a final LEDPA decision nor did it represent the Corps’ overall disposition on the pending Department of the Army (DA) permit decision.

With respect to the Appellant’s (TCA) principal brief filed with your office on February 15, 2008, I noted additional statements that are factually incorrect and in my view mischaracterize our agency’s involvement in the state environmental review process. Specifically, page 6 (paragraph 9) of the brief indicates: “...[t]he Collaborative unanimously determined the Green Alignment of the FTC-S to be the Least Environmentally Damaging Practicable Alternative” [emphasis added]. As I explained above, the Corps provided its “preliminary” LEDPA determination, but did not issue any final LEDPA decision. The omission of the word “preliminary” in the Appellant’s brief is not only misleading, but creates potential misconceptions about the Corps’ ability and willingness to render impartial decisions that are neither arbitrary nor capricious. Throughout our deliberations it was made clear to the

Collaborative that the LEDPA decision (preliminary and final) rests solely with the Corps; it is not a decision that is subject to consensus or unanimity among other federal and state agencies, as is implied by the Appellant's chosen wording: "...*the Collaborative unanimously determined [the LEDPA] ...*" Regulations clearly convey the requirement that the applicant bears the burden of proof to demonstrate to the Corps its compliance with the 404(b)(1) Guidelines and that it is the Corps who is ultimately responsible for identifying the LEDPA. While the SOCTIIP Collaborative is intended to garner varying viewpoints on technical and policy matters, and openly discuss such issues in an effort to streamline multi-agency decision-making, it by no means diminishes, modifies or otherwise affects our statutory authorities and independent regulatory decision-making.

I also wish to correct the implication in the subject brief that the Corps was party to "*unanimous recommendations*" on the applicant's Final SEIR. Page 7 (paragraph 10) of this document states: "...*[w]ith the unanimous recommendations of the Collaborative, the Board of Directors of the TCA certified the Final Subsequent Environmental Impact Report...*" [emphasis added]. Aside from our official public comments issued to FHWA on the 2004 Draft EIS/SEIR, we offered no recommendations on the CEQA document beyond our November 1, 2005 letter pertaining to the "preliminary" LEDPA. As a Federal agency, we have no regulatory jurisdiction with respect to state legal requirements, including the Final SEIR. To be forthright and accurate, the applicant (TCA) unilaterally decided to split the historically combined NEPA/CEQA document and allow the Final SEIR to proceed in advance of the Final EIS. My staff had no prior knowledge or input on this action taken by the TCA Board of Directors nor were they provided the opportunity to review the final CEQA document in advance of its certification. Therefore, it is imperative the record reflect that the Corps was not party to unanimous recommendations that led to the TCA Board of Supervisors certifying their Final SEIR, either in the manner or timeframe they did.

It is noteworthy to mention that unlike the CEQA process, the federal environmental review process remains in-progress. As a federal agency expected to adopt the FHWA Final EIS, the Corps is awaiting the completion of a reevaluation of the draft EIS pursuant to 23 C.F.R. § 771.129 to determine whether FHWA will pursue a supplement to the draft EIS, a new draft EIS, or neither. Under the umbrella of the NEPA/Section 404 MOU, the Corps is engaged in discussions with FHWA and others regarding overall NEPA compliance, the yet-to-be identified federally preferred alternative/final LEDPA, the selection of the environmentally preferable alternative, and how best to view, consider and incorporate new information submitted by non-governmental organizations into the NEPA process.

Page 17 of the Appellant's principal brief reiterates the following, verbatim: "*Flying in the face of thirty years of planning studies by all levels of government and the conclusion reached after six years of study by the federal agencies with jurisdiction over resources affected by this Project, the Commission claims there are other reasonable alternatives. The selection of the FTC-S was the outcome of the Collaborative's six year process of planning and analysis to*

by this Project, the Commission claims there are other reasonable alternatives. The selection of the FTC-S was the outcome of the Collaborative's six year process of planning and analysis to ensure the selection of the LEDPA, a test equivalent to the California Coastal Act the chosen alternative be the 'least environmentally damaging feasible alternative'. The planning process clearly established that there is no other reasonable or feasible alternative" [emphasis added]. These assertions are false. I have not reached a conclusion with respect to the SOCTIIP, not reached a final LEDPA determination, nor have I yet made a public interest determination. Furthermore, my agency has not concurred with TCA that there are no other reasonable or feasible alternatives other than the applicant's preferred alternative. Again, I submit for the administrative record that based on the 2004 Draft EIS/SEIR the Corps holds the opinion there are other practicable alternatives available to TCA that would achieve the overall project purpose.

In the event the CCC's objection to the CZMA consistency certification is overridden, our final regulatory decision-making process would be expected to entail a number of additional procedural and substantive steps. Most apparent would be the resumption of the processing of the applicant's DA permit application (Corps File No. SPL-2000-00392). As part of this effort, we would solicit public and agency comment on TCA's proposed project using our standard Public Notice (PN) procedures. The PN would be posted commensurate with the publication of the Notice of Availability in the Federal Register and dissemination of a new draft, supplemental or final EIS. Any substantive comments received on the PN and EIS would be given full consideration in helping us to determine TCA's compliance with the 404(b)(1) Guidelines and in understanding the nature and scope of potentially significant public interest factors. In conjunction with the public release of the EIS, the Corps would need to approve a draft compensatory mitigation plan for unavoidable impacts to jurisdictional waters of the U.S. In addition, we would require evidence from the applicant that both Section 401 water quality certification (or waiver) and Coastal Zone Management Act consistency certification have been obtained. Similarly, we would need evidence that FHWA, as the NEPA lead Federal agency, has complied with the requirements of Section 106 of the National Historic Preservation Act and Section 7 of the Endangered Species Act.

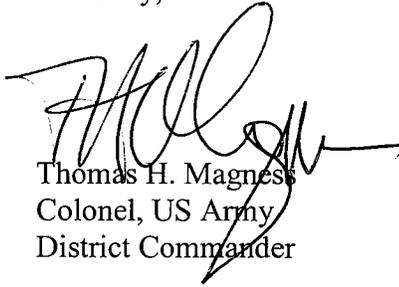
Lastly, but equally important to our final DA permit decision, would be the completion of our public interest review (PIR) pursuant to 33 C.F.R. 320.4(a)(2). The PIR would evaluate whether the applicant's preferred alternative is contrary to the public interest. As is the case with all Section 404 of the CWA standard individual permit decisions, the Corps must determine the applicant's proposed action is the LEDPA and that it is not contrary to the public interest; if either is found to the contrary, then the DA permit would be denied.

I am providing a copy of this correspondence to Mr. Mark Delaplaine, California Coastal Commission, 45 Fremont Street, Suite 2000, San Francisco, California 94105-2219; Mr. Thomas Margro, Foothill/Eastern Transportation Corridor Agencies, 125 Pacifica, Suite 100, P.O. Box 53770, Irvine, California 92619-3770; Mr. David Smith, U.S. Environmental Protection Agency,

California 92011; Mr. Maiser Khaled, Federal Highway Administration, 650 Capitol Mall, Suite 4-100, Sacramento, California 95814; and Mr. Larry Rannals, Attn: CPLO Box 555010, Marine Corps Base Camp Pendleton 92055-5010

I recognize the complexity and importance of this proposed transportation project and remain mindful of its long-standing planning history and competing interests that must be carefully weighed in the final decision-making. For these reasons, I appreciate the opportunity to clarify the project's administrative record. You can contact me directly at (213) 452-3961 should you have any questions. Alternatively, your staff can contact Mr. David J. Castanon, Chief of our Regulatory Division at (213) 452-3406.

Sincerely,



Thomas H. Magness
Colonel, US Army
District Commander