
**UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF COMMERCE**

**Foothill/Eastern Transportation Corridor Agency;
Board of Directors of the Foothill/Eastern Transportation Corridor Agency**

Appellants,

vs.

California Coastal Commission

Respondent.

**APPELLANTS' PRINCIPAL BRIEF OF APPEAL
UNDER THE COASTAL ZONE MANAGEMENT ACT
[CORRECTED]**

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INTRODUCTION

The Foothill/Eastern Transportation Corridor Agency (“TCA”) requests that the Secretary of Commerce override the objection (“Objection”) by the California Coastal Commission (“Commission”) to the TCA’s Consistency Certification (No. CC-018-07) for the State Route 241 Project (“Project”). In making its Objection to the Consistency Certification, the Commission did not comply with the provisions of the Coastal Zone Management Act (“CZMA”; 16 U.S.C. § 1451, *et seq.*) and the regulations issued thereunder, thereby justifying summary dismissal of the Objection. As an independent and alternative ground, the Secretary should override the Objection for substantive reasons, because the Project is consistent with the objectives of the CZMA and, in addition, is otherwise necessary in the interest of national security.

The TCA proposes to construct the completion of California State Route 241, known as the Foothill Transportation Corridor – South, in southern Orange County and northern San Diego County, California. The Project is an important component of the approved Southern California Regional Transportation Plans and California’s federal Clean Air Act Implementation Plan. The Project is critically necessary to the relief of existing and future congestion on Interstate-5 (“I-5”) in southern Orange County – the lone north-south route between Los Angeles and San Diego. Existing traffic on this portion of I-5 is dominated by gridlock conditions during weekdays and on weekends – greatly restricting mobility and goods movement in the nation’s second-largest metropolitan area and restricting recreational access to the coast. Traffic forecasts for the year 2025 predict a sixty percent increase in traffic on the I-5 at the Orange/San Diego County line, adding 75,000 more vehicles each day, and 200 million pounds of additional greenhouse gas emissions each year. Final Subsequent Environmental Impact Report (December 2005) (“Final SEIR”), App. 20-49 at p. 3-15; TCA Response to Commission’s Staff Report (“Response to Staff Report”), Executive Summary (Jan. 9, 2008),

App. 8-20(A) at p. 2,¹ Greenhouse Gas Emission/Global Climate Change (Dec. 20, 2007),

App. 10-23(B).

As California Governor Arnold Schwarzenegger explained in his January 15, 2008 letter to the Commission advocating approval of the Project:

Many parts of Southern California are becoming known for traffic gridlock and crumbling roads, rather than for the magic of our coastline. That is unacceptable to me. Our freeways were built for a population of 18 million, and today these critical arteries are clogged with cars and trucks serving a population of 37 million. Every mile of stopped traffic poisons our air with tons of carbon and pollution, undermining all the great work we've done to clean our air and reduce greenhouse gas emissions.

For the last few years, my administration has conducted an extensive review of the proposed southern extension of State Route 241 in Orange and San Diego Counties. I personally visited the project site . . . I have concluded that this project is essential to protect our environment and the quality of life for everyone in Southern California. I am convinced that, with the extensive mitigation and avoidance measures proposed by the TCA, the project can be built in a manner that will enhance and foster use of the coast and protect coastal resources.

App. 1-3(KK) at p. 1.

The Project as proposed by the TCA reflects the unanimous recommendation of the federal transportation and environmental agencies with jurisdiction over the Project (Federal Highway Administration (“FHWA”), U.S. Environmental Protection Agency (“EPA”), U.S. Army Corps of Engineers (“ACOE”), and the U.S. Fish and Wildlife Service (“USFWS”)). These federal agencies evaluated a wide range of project alternatives under the National Environmental Policy Act (“NEPA”), the Clean Water Act (“CWA”) and the Endangered Species Act (“ESA”), and concluded that the Project proposed by the TCA is the Least Environmentally Damaging Practicable Alternative (“LEDPA”). EPA Letter to FHWA (Nov. 8, 2005), App. 72-99 at pp. 1-2; Army Corps Letter to FHWA (Nov. 1, 2005), App. 72-100 at pp. 1-2. The federal agencies made this determination in accordance with

¹ Citations to the Appendix to Appellants’ Principal Brief are in the following format: App. ___ - ___, with the first number before the dash indicating the binder/volume and the number/letter following the dash indicating the tab number.

a Memorandum of Understanding to integrate federal agency environmental reviews of transportation projects. App. 73-104.

None of the land on which the Project would be constructed is located within the “coastal zone,” either as defined by the CZMA (16 U.S.C. § 1453(1)) or by California’s federally-approved Coastal Management Program (“CCMP”), the California Coastal Act (“Coastal Act”), Cal. Pub. Res. Code § 30000 *et seq.*; *see also* Combined Coastal Management Program, App. 4-9. Of the 16-mile Project, only 2.2 miles would be within the state-defined “coastal zone boundary,” as defined for purposes of state law only (1.7 miles of which consists of improvements along the existing I-5).² The total Project footprint in the state-defined “coastal zone” area is 138 acres, of which 80 acres consist of the existing I-5 and other existing transportation facilities. Response to Staff Report (Jan. 9, 2008), App. 8-20(B) at pp. 2, 14, 79. This **entire** portion of the Project is on land owned by the U.S. Department of the Navy (“Navy”) and operated as U.S. Marine Corps Base Camp Pendleton (“Camp Pendleton”) – the Marine Corps’ major base on the west coast. Congress authorized the Navy to grant the TCA an easement to construct and operate the Project in this precise portion of Camp Pendleton. Pub. L. No. 105-261 § 2851, 112 Stat. 1920, 1931, as amended by Pub. L. No. 107-107 § 2867, 115 Stat. 1012, 1334 (2001), as amended by Pub. L. No. 110-181 § 2841 (2008).

The Project includes infrastructure and other improvements to Camp Pendleton that will assist the Marine Corps in training marines and sailors to defend the Nation and will complement mandates under the Anti-Terrorist/Force Protection (“AT/FP”) program in support of the Marines’ Global War on Terrorism (“GWOT”). *See* Department of Defense Directive 2000.12, App. 76-131.

Development of the Project requires a federal permit from the ACOE under Section 404 of the Clean Water Act (33 U.S.C. § 1344) to construct four columns to support a bridge connecting the Project to I-5 within an ephemeral creek and to relocate a Marine Corps access road. Jurisdictional

² The definition of the “coastal zone” in the Coastal Act excludes federal lands (such as Camp Pendleton) that have been ceded by California to the United States. “Coastal zone” is defined as including designated “land and water area of the State of California.” Cal. Pub. Res. Code § 30103.

Determination, App. 13–31(C) at pp. 1-5. The permit is required because these activities will permanently disturb 0.16 acre (sixteen hundredths of an acre) of “waters of the United States.” Letter to TCA from Glenn Lukos Assoc. (Aug. 31, 2007), App. 12-27(C) at pp. 1, 10. The Section 404 permit, the only federal permit for the Project that is a listed permit under the CCMP, triggered consistency review by the Commission. CCMP, App. 4-9 at p. 144; 15 C.F.R. § 930.50 *et seq.*

The Project includes extensive mitigation and minimization measures developed in close coordination with the state and federal environmental agencies. A partial list of these measures includes: permanent protection and restoration of 814.9 of acres of coastal sage scrub habitat; creation and enhancement of 33.4 acres of new wetlands; fifteen wildlife crossings; a state-of-the-art stormwater runoff treatment system (including treatment of five million gallons of the untreated runoff annually from the existing I-5); and a contribution of \$100 million for park protection and restoration. App. 8-8, 9-9(G), 11-25, 12-27(B) and 29(D), 21-50.

The national interests advanced by the Project, combined with the extensive mitigation and minimization measures, more than outweigh the minor impacts of the Project within the coastal zone. There are no reasonable and available alternatives to the Project. Alternatives cited by the Commission would cause massive environmental impacts on coastal communities, violate state engineering and safety standards, and have no funding source.

FACTUAL AND PROCEDURAL BACKGROUND

Regional Transportation Planning And State Environmental Review.

The Project has been the subject of regional transportation planning and state and federal environmental analysis for thirty years. Beginning in the 1970s, regional transportation planning organizations evaluated alternatives to address the transportation needs of southern Orange County and northern San Diego County. App. 20-49 at pp. 1-1 – 1-2. In 1981, the County included the Project on its Master Plan of Arterial Highways. App. 20-49 at pp. 1-1 – 1-3. The Southern California Association of Governments (“SCAG”) and the San Diego Association of Governments (“SANDAG”) likewise

evaluated alternative transportation solutions, and included the Project in the approved regional transportation plans and transportation improvement programs for Southern California. App. 20-49 at pp. 1-1 – 1-5. SCAG and SANDAG are the designated federal Metropolitan Planning Organizations in Southern California and have the responsibility under federal law to approve federal transportation plans and transportation programs. 23 U.S.C. § 134(a)-(c). These transportation plans and transportation program are a critical element of California’s compliance with the federal Clean Air Act. 42 U.S.C. § 7506(c)(2); 40 C.F.R. Part 93.100 *et seq.* The Commission’s Objection jeopardizes Southern California’s compliance with the Clean Air Act and threatens federal funding for all transportation projects in Southern California. *Id.*; Letter from SCAG to R. Dixon (March 3, 2008), App. 72-97 at pp. 1–2.

The TCA, a joint powers agency comprised of the County and twelve cities in Orange County, was established in 1986 to plan, design, finance, and build regional transportation facilities. In 1991, after evaluating numerous alternatives to the Project, the TCA certified an environmental impact report (“EIR”)³ for the Project and approved a locally-preferred alignment. App. 20-49 at pp. 1-1 – 1-3.

In 1988, the California Legislature designated the Project as a component of the State Highway System. Cal. Sts. & High. Code §§ 300, 541; Cal. Stats. 1988, Ch. 1363, § 2.

Federal Environmental Review Of The Project.

In the 1990s, FHWA initiated analysis of the Project and alternatives under NEPA. In the mid-1990s, the federal and state transportation and environmental agencies (FHWA, EPA, USFWS, ACOE, California Department of Transportation (“Caltrans”), and the TCA) agreed to a collaborative process (the “Collaborative”) to agree on the purpose and need for the Project and to evaluate the Project and a wide range of alternatives pursuant to NEPA, the CWA, the ESA and other applicable laws. The federal and state agencies convened the Collaborative in accordance with a memorandum of

³ An EIR is the California equivalent of a federal environmental impact statement (“EIS”). *See* Cal. Pub. Res. Code § 21061.

understanding between the agencies integrating federal agency review of transportation projects under NEPA, the CWA and the ESA. *See* MOU re NEPA and CWA 404 (Jan. 1, 1994), App. 73-104.

The alternatives evaluated by the Collaborative included alternative transportation modes, the widening of I-5, improvements to local streets, combinations of alternatives, and many alternative alignments of the Project and no action alternatives. The U.S. Marine Corps also participated in the collaborative process with regard to issues concerning Camp Pendleton. App. 20-49 at p. 2-8.

During a six-year process involving over 50 meetings, the federal and state agencies in the Collaborative identified, screened, and evaluated possible project alternatives. During Phase I of its process (August 1999-November 2000), the Collaborative developed a list of twenty-four alternatives for evaluation in the Draft EIS/Subsequent EIR (“Draft EIS/SEIR”), nineteen toll road alternatives, three non-toll road alternatives, and two no-action alternatives. App. 20-49 at pp. 2-1 – 2-77.

During Phase II (January 2001-2006), the Collaborative further refined the alternatives to minimize impacts to sensitive environmental resources. The Collaborative’s efforts substantially reduced the Project’s environmental impacts compared to the preferred alignment identified in 1991. The refinements developed by the Collaborative agencies reduced impacts to the ACOE jurisdictional wetlands from 17 acres to 0.82 acre. The Collaborative refinements reduced the Project’s impacts by approximately thirty percent. App. 20-49 at p. 2-7.

After comparing all other alternatives addressed by the Draft EIS/SEIR, the Collaborative unanimously determined that the Project described in the Consistency Certification is the LEDPA.⁴ The USFWS also issued a preliminary conclusion that the Project is not likely to jeopardize the continued existence of any endangered or threatened species or to adversely modify any critical habitat. USFWS Letter to FHWA (Sept. 30, 2005), App. 72-102 at p. 1–2. National Oceanic and Atmospheric Administration (“NOAA”) Fisheries concurred in the determination of the FHWA that the Project is not

⁴ The NEPA/404 Memorandum of Understanding requires the EPA and ACOE to identify a “Least Environmentally Damaging Practicable Alternative” as part of the integrated process for reviewing transportation projects under NEPA and the Clean Water Act. App. 73-104.

likely to adversely affect the steelhead trout. NOAA Letter to FHWA (May 23, 2007), App. 8-19(C) at pp. 1–3.

Consistent with the unanimous recommendation of the Collaborative, in February 2006, the TCA certified the Final Subsequent Environmental Impact Report (“Final SEIR”) for the Project and approved the Project alternative recommended by the Collaborative. Resolution No. F2006-01, App. 18-36.

Importance Of Project To National Security.

The Project incorporates both national security and enhanced training improvements on Camp Pendleton, which were coordinated closely with Camp Pendleton’s senior staff. The improvements include (i) redesign of the main northern entrance to Camp Pendleton (San Onofre Gate), (ii) improved access points from the northern amphibious landing beach (Green Beach), (iii) improved access to deployment routes to possible debarkation points and other training bases throughout California, and (iv) construction of a security fence along the northern boundary of Camp Pendleton. Larry Rannal email (April 18, 2006) App. 73-106 at pp. 1–3.

In 1998, Congress enacted legislation authorizing the Navy to grant an easement to the TCA to construct and operate the portion of the Project proposed to be located on Camp Pendleton. Pub. L. No. 105-261 § 2851, 112 Stat. 1920, 1931, as amended by Pub. L. No. 107-107 § 2867, 115 Stat. 1012, 1334 (2001), as amended by Pub. L. No. 110-181 § 2841 (2008). The area of the easement authorized by Congress includes land leased by the Navy to the State of California until 2021 for the operation of San Onofre State Beach Park. The Navy reserved out of the leasehold the right of the United States to grant additional easements and rights-of-way over the property. *Id.*; Agreement of Lease between California and United States, App. 76-133.

The legislation requires the TCA to compensate for the easement by funding or constructing national security improvements at Camp Pendleton. Pub. L. No. 105-261 § 2851, 112 Stat. 1920, 1931, as amended by Pub. L. No. 107-107 § 2867, 115 Stat. 1012, 1334 (2001), as amended by Pub. L.

No. 110-181 § 2841 (2008). If selected by the Navy, one possible use of the TCA right-of-way funds identified by Camp Pendleton senior staff is the construction of a land bridge from Camp Pendleton's main amphibious landing beach (Red Beach) across both the I-5 and adjacent railroad track and into their tactical training areas. Larry Rannal email (Oct. 26, 2006) App. 73-106 at p. 1. The existing I-5 presents a major barrier to realistic Marine Corps amphibious landing operation. The Marines want to train the way they will be required to fight. The Red Beach Land Bridge would provide a major improvement to amphibious training operations at Red Beach by enabling more realistic training operations and maneuver access to occur from the beach area to the inland areas of the Base. *Id.*

I-5 also presents a major barrier to effective use of the Green Beach – the northern most amphibious landing beach at Camp Pendleton. Larry Rannal email to Edmund Rogers (April 18, 2006), App. 73-106 at pp. 1–2. The Green Beach improvements included in the Project provide a new access point that is large enough to accommodate all Marine Corps tactical vehicles and allow access from the ocean to inland training areas. *Id.*

The Consistency Certification Process.

On March 23, 2007, the TCA filed its Consistency Certification with the Commission.⁵ App. 13-31. On May 31, 2007, the TCA agreed to a one-month extension of the six-month time period for review of the Project. App. 76-134. The Commission initially scheduled consideration of the Consistency Certification for its October 11, 2007 meeting. On September 25, 2007, however, Commission staff (“Staff”) included within its Staff Report a list of requested additional information. App. 1-2 at pp. 25-26. Staff also issued a Staff Report and Recommendation (“2007 Staff Report”) which asserted, *inter alia*, that five alternatives that the Collaborative had determined to be infeasible, were feasible. The 2007 Staff Report further claimed that another alternative proposed by Project opponents, the widening of the I-5 and local streets, also was feasible, despite the fact that this alternative (i) was a variation on an alternative already studied and rejected as infeasible; (ii) would have

⁵ The Final SEIR and technical reports were provided to the Commission in 2006. App. 17-35.

massive adverse environmental impacts; (iii) would put the region out of conformity with the federal Clean Air Act implementation plan; (iv) had no foreseeable funding source; and (v) was rejected by Caltrans as “not supported by adequate engineering and technical analysis” and not meeting Department standards or meeting “applicable engineering standards of care.” Caltrans letter to FHWA (Jan. 7, 2008), App. 10-22 at p. 1. The TCA requested a postponement to respond to the 2007 Staff Report, and agreed to extend the six-month review period to late February 2008.

On October 4, 2007, TCA amended the project description of its Consistency Certification to add a \$100 million package to fund public access, recreation, and habitat improvements to the California State Parks System, which currently is subject to substantial budget cuts that threaten closure of approximately 48 California state parks, or curtailment of services within those parks. App. 11-25.

Thereafter, the TCA furnished the Commission with all information requested by Staff. On January 17, 2008, Staff released a revised staff report (“2008 Staff Report”) (App. 1-2), followed by two addenda. The TCA, in turn, submitted three additional responses to the staff recommendation. *See* Response to Staff Report (Feb. 5, 2008), App. 5-11; Response to Staff Report (Jan. 9, 2008), App. 8-20(B); Requested Items for Consistency Certification (Dec. 20, 2007), App. 10-23. On February 6, 2008, despite support for the Project from Governor Schwarzenegger, the California Secretary for Resources, and the Director of Caltrans, the Commission voted to object to the Consistency Certification. On February 13, 2008, the TCA received a letter from the Commission formally advising the TCA of the Objection. App. 1-1 at p. 1.

ARGUMENT

I. THE SECRETARY HAS JURISDICTION TO HEAR THE APPEAL.

NOAA General Counsel has asked the parties 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.

The CZMA provides that an appeal may be filed by “the applicant.” 16 U.S.C. § 1456(c)(3)(A). The CZMA regulations, in turn, define the “appellant” as “the **applicant**, person or **applicant agency** submitting an appeal to the Secretary pursuant to this subpart.” 15 C.F.R § 930.123(a) (emphasis added). The regulations contemplate the possibility of an “applicant agency,” as here, and otherwise are unqualified.⁶ *Id.* California law does not provide any state-level mechanism that might serve to mediate and resolve the instant dispute. There is a mediation process for land use disputes that arise from a public agency’s approval or denial of a development project. Cal. Gov’t Code §§ 66030-66037. This process is limited, however, to “any action brought in the superior court,” and California courts have held that an applicant must first pursue the CZMA appeal process **before** an action may be filed in superior court. Cal. Gov’t Code § 66031(a); *Acme Fill Corp. v. San Francisco Bay Conservation and Dev. Comm’n*, 187 Cal. App. 3d 1056, 1064-65 (1986). This dispute, moreover, is not limited to the TCA and the Commission. The Governor of California, the California Secretary for Resources, and Caltrans all support the Project. Yet there is no state process for resolving their disputes with the Commission. The Governor has no power to override a Commission decision. There also is no process for mediating a dispute between the Commission and another state agency such as Caltrans, or even a dispute between the Commission and the umbrella agency of which the Commission is a part, the California Resources Agency. Cal. Pub. Res. Code § 30300 *et seq.* Thus, the sole remedy available to the TCA is the appeal process under the CZMA.

II. THE SECRETARY SHOULD OVERRIDE THE OBJECTION BECAUSE IT FAILS TO COMPLY WITH THE CZMA AND THE CZMA REGULATIONS.

The CZMA regulations provide: “If the State agency’s consistency objection is not in compliance with Section 307 of the Act and the regulations contained in subparts D, E, F, or I of this part [15 C.F.R. Part 930], the Secretary **shall override** the State’s objection.” 15 C.F.R. § 930.129(b)

⁶ The TCA is not a subdivision of the State. The TCA is a local public agency, with its own inherent powers. *See e.g., City of Burbank v. Burbank-Glendale-Pasadena Airport Auth.*, 72 Cal. App. 4th 366, 375 (1999). The Commission is a state agency. Cal. Pub. Res. Code § 30330.

(emphasis added). The Secretary may make this determination as a preliminary matter before reaching the merits. *Id.* As demonstrated below, the Secretary should override the Objection because the Commission failed to comply with Section 307(c)(3)(A) of the Act, 16 U.S.C. § 1456(c)(3)(A), and the regulations in subpart D of 15 C.F.R. Part 930 (“Subpart “D”).

A. The Commission Has No Federal Consistency Jurisdiction Over The Project.

The Commission exceeded its federal consistency review jurisdiction over any portion of the Project for three reasons: (1) the Project is not located in the “coastal zone,” as defined by the CZMA; (2) the Commission has not complied with the requirements of the CZMA and its implementing regulations in order to exercise consistency review inland of the coastal zone boundary; and (3) the federally-approved CCMP does not provide the Commission with the authority to exercise consistency authority inland of the coastal zone, as defined by the Coastal Act. For each of these reasons, the Secretary should override the Objection.

1. The Project Is Not Located In The “Coastal Zone,” As Defined By The CZMA.

The southernmost portion of the Project, where it connects to I-5, is on Camp Pendleton – land owned in fee by the Navy. *See United States v. Jenkins*, 734 F.2d 1322, 1325 n.2 (9th Cir. 1983) (“In 1942 the United States condemned land in San Diego County, California, for the Camp Pendleton Marine Corps Training Base”); *See United States v. Fallbrook Pub. Util. Dist.*, 110 F. Supp. 767, 771 (S.D. Cal. 1953). California ceded exclusive jurisdiction to the United States and the Secretary of the Navy accepted the cession. *See id.*; *see also California v. United States*, 235 F. 2d 647, 655 (9th Cir. 1956).

The Navy leased the area of the Project alignment to the California Department of Parks and Recreation (“State Parks”) until 2021, while reserving full rights in the lease to conduct military training and to approve roads on the property. Agreement of Lease between California and United States, App. 76-133. A lease is subject to existing or future easement or rights of way on the leasehold. *See 7*

Miller & Starr, Cal. Real Estate, Landlord and Tenant, § 19:1 (Rev. Ed. 2001). Thus an easement or right of way may be carved out of the leasehold estate. The property interest to which the easement attaches is the dominant tenement, while the property interest on which the burden or servitude is imposed is the servient tenement. When an easement or right of way is created by a reservation in the original instrument, those interests expressed in the reservation and those necessarily incident thereto are excluded from the lessee's interest. *City of Los Angeles v. Howard*, 244 Cal. App. 2d 538 (1966).

Congress expressly recognized the right of the Navy to approve the Project within this precise portion of Camp Pendleton when it authorized the Navy to grant an easement to the TCA to construct and operate the Project in this area. Pub. L. No. 105-261 § 2851, 112 Stat. 1920, 1931, as amended by Pub. L. No. 107-107 § 2867, 115 Stat. 1012, 1334 (2001), as amended by Pub. L. No. 110-181 § 2841 (2008).

Because the reserved right to approve roads on Camp Pendleton is solely under the control of the federal government, the Project alignment within Camp Pendleton is not part of the coastal zone. The CZMA provides that a consistency certification applies to “any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone” 16 U.S.C. § 1456(c)(3)(A). The CZMA notably excludes from the definition of “coastal zone” “lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.” 16 U.S.C. § 1453(1). The exclusion squarely applies to Camp Pendleton.

Camp Pendleton is a “federal enclave” subject to exclusive federal jurisdiction. Exclusive legislative jurisdiction over federal military installations is one of the powers enumerated to Congress under the United States Constitution. U.S. Const., art. I, § 8, cl. 17.

The Commission claims that the United States does not have exclusive jurisdiction over Camp Pendleton because the United States retroceded the leasehold area at the time of the State lease. However, the United States limited the retrocession to the terms of the lease. App. 1-4(L), Calendar Item 18 at pp. 1-2. Since the United States reserved the right in the lease to grant easements to third

parties, the right of the Navy to grant an easement to the TCA and to approve the construction of the Project within Camp Pendleton remains within the exclusive jurisdiction of the United States.

Therefore, the Project is not within the “coastal zone” as defined in the CZMA. For this reason, the Commission lacked federal consistency jurisdiction to review impacts of the Project within Camp Pendleton.

When activities on a federal enclave have spillover effects on resources “of the coastal zone,” NOAA regulations provide that the consistency provisions apply to these effects. 15 C.F.R § 923.33(b). The federal enclave itself is not part of the coastal zone. Therefore, the only spillover effects over which the Commission could conceivably assert jurisdiction would have to occur seaward of Camp Pendleton. The Project’s impacts do not occur seaward of Camp Pendleton – in fact, the Project connects to I-5 approximately one-half mile inland of the beach and comes no closer to the beach than existing Old Highway 101. The Commission did not limit its Objection to impacts seaward of Camp Pendleton. Because the Objection violates Section 307 of the CZMA by exceeding the Commission’s jurisdiction, it should be overturned.

2. The Commission Has Failed To Comply With The Requirements Of The CZMA And The Implementing Regulations For Exercise Of Consistency Review Inland Of The Coastal Zone.

The Coastal Commission not only asserted jurisdiction over the limited 2.2-mile portion of the Project in the state-defined coastal zone, but also purported to assert jurisdiction over the entire alignment of the 16-mile project.⁷ Staff Report, App. 1-2 at p. 1. The Commission lacks jurisdiction, however, to exercise federal consistency review inland of the state coastal zone boundary because its efforts to do so did not comply with regulations adopted by NOAA to implement the CZMA.

⁷ The Commission, for example, asserted jurisdiction over the entire Project in order to address the greenhouse gas emissions associated with the entire 16-mile alignment, impacts to San Mateo Campground (which is located on Camp Pendleton inland of the state-defined coastal zone), and impacts to archaeological resources. While objecting to the Commission’s assertion of expanded jurisdiction, the TCA nonetheless demonstrated that the Project would not create unacceptable impacts on coastal zone resources. See Response to Staff Report (Jan. 9, 2008), App. 8-20(B) at pp. 95-99.

Specifically, the NOAA regulations do not permit a state coastal management agency to exercise consistency authority inland of the coastal zone boundary unless the state's management program specifies the **geographical location** in which such authority would be exercised. California's program does not.

The pertinent NOAA regulation specifies, in relevant part:

(a) [I]n the event the State agency chooses to review federal license and permit activities, with reasonably foreseeable coastal effects, outside of the coastal zone, it must generally describe the geographic location of such activities.

(1) The geographic location description should encompass areas outside of the coastal zone where coastal effects from federal license or permit activities are reasonably foreseeable. The State agency should exclude geographic areas outside of the coastal zone where coastal effects are not reasonably foreseeable. Listed activities may have different geographic location descriptions, depending on the nature of the activity and its coastal effects. For example, the geographic location for activities affecting water resources or uses could be described by shared water bodies, river basins, boundaries defined under the State's coastal nonpoint pollution control program, or other ecologically identifiable areas. . . . **State agencies do have to describe the geographic location of listed activities occurring on federal lands beyond the boundaries of a State's coastal zone.**

15 C.F.R. § 930.53 (emphasis added).

Despite this directive, California's federally-approved CCMP does not contain any such geographic designation. The CCMP instead refers only to a consistency certification generally "on excluded federal lands or **on uplands beyond the coastal zone boundary**. . . ," and it provides for Commission review "on a case-by-case basis." CCMP and Final EIS, App. 4-9 at p. 93 (emphasis added). The indiscriminate reference to "uplands beyond the coastal zone," however, could refer to virtually any upland area (as opposed to waters of the United States, transitional lands, or the air) in the entire State of California. This is inconsistent with both the plain language of the regulation and its obvious intent that the area of possible review be geographically designated in order to avoid unnecessary review of private actions authorized by federal permits.

Because the CCMP does not specify the geographic location, which is the prerequisite to exercise of consistency review authority inland of the coastal zone boundary, the Commission lacked jurisdiction to exercise that power here.

3. The CCMP Does Not Provide The Commission With Authority To Exercise Consistency Review Inland Of The Coastal Zone.

The final reason that the Commission lacks authority to exercise consistency review over the Project inland of the coastal zone boundary is that the CCMP does not authorize such review. The Coastal Act provides that it “shall constitute California’s coastal zone management program within the coastal zone for purposes of the CZMA.” Cal. Pub. Res. Code § 30008. The text and the legislative history of the CCMP, which has been approved by the Secretary of Commerce, establish that the Commission’s jurisdiction is limited to mapped areas, that excludes the Project.

The Commission is a creation of state law and the extent of its jurisdiction is defined by state law and the California Legislature. Under state law, “an administrative agency has only such authority as has been conferred on it.” *Ass’n for Retarded Citizens v. Dept. of Dev. Servs.*, 38 Cal. 3d 384, 391-392 (1985). The geographic scope of the Commission’s regulatory authority is set forth in the definition of the “coastal zone,” in California Public Resources Code Section 30103.⁸ Section 30103 defines the inland boundary of the coastal zone in terms of specific boundary lines shown on maps on file with the California Secretary of State. *Rosco Holdings, Inc. v. California*, 212 Cal. App. 3d 642, 647 (1989). By contrast, the definition of the seaward boundary is “extending seaward to the state’s outer limit of jurisdiction.” Cal. Pub. Res. Code § 30103; CCMP and Final EIS (August 1977), App. 4-9 at p. 31. Thus, the California Legislature intended the Commission to exercise its seaward jurisdiction to the

⁸ The “coastal zone” is defined as the “land and water area of the **State of California**” as “specified on the maps identified and set forth in Section 17 of that chapter of the Statutes of the 1975-76 Regular Session enacting this division, extending seaward to the state’s outer limit of jurisdiction . . . and extending inland generally 1,000 yards from the mean high tide line of the sea.” Cal. Pub. Res. Code § 30103(a) (emphasis added). Camp Pendleton is not “land . . . of the State of California . . .,” and for that reason it is excluded from the coastal zone.

maximum extent legally permissible under either state or federal law, but the Commission's inland jurisdiction was defined and limited by specifically-mapped boundaries.

The Commission's jurisdiction inland of the coastal zone was extensively discussed by the California Legislature leading up to the enactment of the Coastal Act in 1976. The bill's principal author, State Senator Jerry Smith, included a statement of legislative intent in the California State Senate Journal, reflecting statements made before the State Senate and Assembly Committees, and during Assembly floor debate:

The planning and regulatory requirements of this bill do not apply inland of these boundaries of the coastal zone. The coastal commission has no direct permit or planning controls, pursuant to SB 1277, over any area or the activities of any other public agency outside the coastal zone (i.e., the commission may only deal with those activities occurring within the coastal zone.) The area outside the specifically mapped coastal zone remains under the exclusive jurisdiction of existing units of local and state government⁹

Sierra Club v. California Coastal Comm'n, 35 Cal. 4th 839, 853 (2005), quoting 9 Cal. Sen. J., pp. 16967-16968 (1975-1976) (Reg. Sess.).

In *Sierra Club*, the California Supreme Court held that the Commission does not have jurisdiction inland of the coastal zone. The Court held that the Commission did not have the authority to deny or condition a permit request based on impacts within the coastal zone from a proposed housing development straddling the coastal zone. The Supreme Court relied upon the legislative history of the Coastal Act, as reflected in State Senator Smith's letter, and two provisions of the CCMP, California Public Resources Code Sections 30200 and 30604(d)¹⁰. Section 30200 specifies, in pertinent part:

[E]xcept as may be otherwise specifically provided in this division, the policies of this chapter shall constitute the standard by which the adequacy of local coastal programs . . .

⁹ The California Supreme Court recently noted that this explanation from Senator Smith was a strong indication that the California Legislature's intent in enacting the Coastal Act was that the Commission would not exercise regulatory jurisdiction inland of the defined coastal zone boundary. *Sierra Club v. California Coastal Comm'n*, *supra*, 35 Cal. 4th at 853 n.8.

¹⁰ The Supreme Court noted that the California Legislature specifically amended the then-pending Coastal Act legislation (SB 1277) in response to an Attorney General opinion holding that the prior version of SB 1277 would allow the Commission to exercise its jurisdiction outside of the defined coastal zone. *Sierra Club v. California Coastal Comm'n*, *supra*, 35 Cal. at 853-854 (2005).

and the permissibility of proposed developments subject to the provisions of this division are determined. **All public agencies carrying out or supporting activities outside the coastal zone that could have a direct impact on resources within the coastal zone shall consider the effect of such actions on coastal zone resources in order to assure that these policies are achieved.**

Cal. Pub. Res. Code § 30200 (emphasis added).

Section 30200 thus assigned the responsibility for “considering” the policies of the Coastal Act for development proposed outside the coastal zone to **other** public agencies, such as cities and counties, **not the Coastal Commission**. This is reinforced in Section 30604(d), which further specifies that “[n]o development or any portion thereof which is outside the coastal zone shall be subject to the coastal development permit requirements” of the CCMP. Cal. Pub. Res. Code § 30604(d).

Federal law cannot confer jurisdiction that the State has not otherwise established in the first instance. Nothing in the CZMA compels coastal states to review federal permits or licenses for consistency. The CZMA merely permits consistency review, if a State has an approved coastal management program that contains enforceable policies and specifies both the types of permits it wishes to review **and** the geographical location in which consistency review will be exercised. In short, the California Legislature, in specifying in Section 30008 of the CCMP that the Coastal Act “shall constitute California’s coastal zone management program within the coastal zone,” expressly did not extend the Commission’s jurisdiction inland of the coastal zone boundary. Cal. Pub. Res. Code § 30008. The Project is not within the Commission’s jurisdiction.

B. The Secretary Should Override The Objection Because It Is Impermissibly Based On An Assertion Of Insufficient Information.

The Commission also objected to the Consistency Certification on the asserted basis that it “did not supply sufficient information to determine the project’s consistency with enforceable water quality, wetlands, and archaeology policies of the CCMP.” App. 1-1 at p.1. The CZMA regulations provide that such a finding may be made **only** if the Commission has waived the requirement that “all necessary data

and information . . . be submitted before commencement” of its six-month consistency review.

15 C.F.R. § 930.60(a)(2).

The Commission did not waive the sufficient information requirement, and thus it was foreclosed from objecting to the Consistency Certification on this basis. Indeed, the Commission’s continuous requests for additional data and information (which the TCA timely provided whenever requested) were based on the Commission’s apparent objection to the substance of the information, not on the sufficiency of the information. Subpart D distinguishes between the two. 15 C.F.R. § 930.60(c). Only “insufficient” information, not requests for clarifications or concerns about substance, may form a basis for a finding of insufficient information under Subpart D. The flaw in the Commission’s determination with respect to the sufficiency of the information provided is further illustrated by the fact that its findings are inconsistent. The Commission stated that it did not have sufficient information to evaluate effects on wetlands and archaeology, but then also stated that impacts on wetlands and archaeology were inconsistent with CCMP policies. App. 1-1 at p. 1. If the Commission did not have sufficient information, it could not, of course, find a conflict. Subpart D does not provide for such internally contradictory conclusions, and the Secretary should override the Objection on this basis. 15 C.F.R. § 930.60(a)(2). That circumstance does not occur here, and therefore the Commission’s objection on this ground was in error.

III. THE PROJECT IS CONSISTENT WITH THE OBJECTIVES OF THE CZMA.

The Secretary should also override the Objection because the Project is consistent with the objectives of the CZMA. *See* 16 U.S.C. § 1456(c)(3)(A). Under the CZMA regulations, a project is consistent with the objectives of the Act if it satisfies the following three elements: (1) the activity furthers the national interest, as articulated in Section 302 or 303 of the CZMA, in a significant or substantial manner (“Element 1”); (2) the national interest furthered by the activity outweighs the activity’s adverse coastal effects, whether those effects are considered separately or cumulatively (“Element 2”); and (3) there is no reasonable alternative available that would permit the activity to be

conducted in a manner consistent with the enforceable policies of the state's coastal zone management program ("Element 3"). 15 C.F.R. § 930.121. As demonstrated below, the Project readily satisfies each of these elements.

The Secretary's review of consistency is a *de novo* review that does not focus on the correctness of the rationale underlying the Objection. Rather, "the consistency appeals process is this agency's first look at the evidence presented by the parties with regards to whether the grounds for secretarial override of a state objection have been met." Decision and Findings in the Consistency Appeal of Union Exploration Partners, Ltd., Sec. of Commerce, Jan. 7, 1993 at p. 9 ("Union Exploration Decision") (citation omitted); *see also* 58 Fed. Reg. 12,028 (March 3, 1993). Accordingly, the Secretary sits "not as a reviewing body but rather as the initial administrative finder of fact and law." Union Exploration Decision at p. 9.

A. Element 1: The Project Furthers The National Interest In A Significant And Substantial Manner.

The Project furthers the national interest in a significant and substantial manner for six reasons, each of which is sufficient in itself for the Secretary to find that the Project meets the first element: (1) it furthers the national interests in the development of the coastal zone; (2) it involves the priority consideration given to orderly processes for siting major regional transportation facilities and in improving mobility on the Interstate Highway System; (3) it furthers the national interest in providing access to the coast for recreational purposes; (4) it furthers the national interest in improving, safeguarding, and restoring the quality of coastal waters; (5) it furthers the national interest by assisting the State in complying with federal Clean Air Act requirements; and (6) it furthers the national interest by providing improvements to enhance the training mission of Camp Pendleton. Because Congress has broadly defined the national interest in the coastal zone in Sections 302 and 303, this first element of the consistency standard "normally will be satisfied on appeal." Decision and Findings in the Consistency

Appeal of Amoco Production Co., Sec. of Commerce, July 20, 1990, at p. 14; *see also* 55 Fed. Reg. 33,948 (Aug. 20, 1990).

The “significant and substantial” modifier is intended to reduce the likelihood that an override will be sought “for projects which are essentially local government land use decisions.”¹¹ Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77,124, 77,150 (Dec. 8, 2000). A project is of both significant and substantial national interest if it will benefit large metropolitan areas, as here.

The Project will benefit 21 million residents of Southern California, over half of California’s residents, who live in the second-largest metropolitan area in the country. App. 8-20(A) at pp. 2–3. As stated by California Governor Schwarzenegger in his letter to the Commission urging concurrence with the TCA consistency certification, “this project is essential to protect our environment and the quality of life for **everyone in Southern California.**” App. 1-3(KK) at p. 1 (emphasis added). Because of its significance to all of Southern California, and for all of the reasons set forth below, the Project furthers the national interest in a significant and substantial manner.

1. The Project Significantly And Substantially Furthers The National Interest In The Development Of The Coastal Zone.

The Project furthers the national interest in “develop[ing] . . . the resources of the Nation’s coastal zone.”¹² 16 U.S.C. § 1452(1). Its purpose is to “provide improvements to the transportation infrastructure system that would help alleviate future traffic congestion and accommodate the need for mobility, access, goods movement, and future traffic demands on I-5 and the arterial network in the

¹¹ “Substantial” means that a project “must contribute to the national achievement of [CZMA Section 302 or 303] objectives in an important way or to a degree that has a value or impact on a national scale.” 65 Fed. Reg. 77,150. “Significant” establishes that “a project can be of national import without being quantifiably large in scale or impact on the national economy.” *Id.*

¹² For purposes of Element 1 analysis, “development” of the coastal zone is considered a benefit that does not have to be weighed against adverse coastal effects. This weighing process is the primary focus of Element 2. Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc., Sec. of Commerce, June 20, 1995, p. 12 (“Mobil Pensacola Decision”); *see also* 60 Fed. Reg. 41,873 (Aug. 14, 1995).

action area.” App. 20-48 at p. ES-9; App. 33-60 at pp. ES-3 – ES-4. The link between circulation and development is spelled out by the Project objectives, which state that the Project will “[p]rovide benefits to the traveling public and more efficient movement of goods through a reduction in the amount of congestion and delay in southern Orange County” and will “[p]rovide an alternative access route between south Orange County and central and northeastern Orange County to serve existing and developing employment centers and major attractions.” App. 20-48 at p. ES-23; App. 33-60 at p. ES-5.

As Governor Schwarzenegger observed in his letter to the Commission urging concurrence in the consistency certification: “Rebuilding our critical infrastructure is one of the single most important steps we can take to keep California strong and prosperous.” App. 1-3(KK) at p. 1. The Project is essential to the national interest in the economic development of California’s coastal zone.

2. The Project Significantly And Substantially Furthers The National Interest In Orderly Processes For Siting Major Facilities Related To Transportation.

The Project furthers the national interest in “priority consideration being given to . . . orderly processes for siting major facilities related to . . . transportation.” 16 U.S.C. § 1452(1)(D). In finding that the rehabilitation of a railroad bridge in the coastal zone met this objective, the Secretary stated that “the CZMA encourages coastal states to provide for orderly processes for siting major activities related to transportation that are coastal dependent (Section 303(2)(c)).” Decision and Findings in the Consistency Appeal of Southern Pacific Transportation Co., Sec. of Commerce, Sept. 24, 1985, at p. 10 (“Southern Pacific Decision”); *see also* 50 Fed. Reg. 41,722 (Oct. 15, 1988). It would be impossible to implement a more “orderly process” for siting transportation facilities than here: (i) the Project has been the subject of continuing transportation planning efforts for approximately 30 years; (ii) it is an important component of the approved regional transportation plans and federal Clean Air Act implementation plans; and (iii) the federal agencies with regulatory jurisdiction unanimously determined that the Project is the Least Environmentally Damaging Practicable Alternative.

As stated in the previous section, the primary goal of the Project is to “alleviate future traffic congestion and accommodate the need for mobility, access, goods movement, and future traffic demands on I-5 and the arterial network in the action area.” App. 20-48 at p. ES-9. The action area includes the coastal zone. In a previous decision interpreting the national interest in the orderly siting of transportation facilities, the Secretary found that the rehabilitation of a railroad bridge met Element 1 because “the goals of the CZMA include both development and protection of coastal resources, as well as siting of transportation facilities . . .” Southern Pacific Decision at p. 11. Similarly, the orderly process for siting the Project is in the national interest.

3. The Project Significantly And Substantially Furthers The National Interest In Providing Public Access To The Coast For Recreation Purposes.

The Project also furthers the national interest in providing “public access to the coasts for recreation purposes.” 16 U.S.C. § 1452(1)(E). The Project will provide congestion relief on the I-5 and complete the connection between State Route 241 and I-5, thus providing significant, new, and more direct public access for residents in inland areas to coastal recreational areas in southern Orange County and San Diego County. Final SEIR, App. 20-49 at pp. 1-18 – 1-19. Coastal access areas that will benefit from improved public access range from Crystal Cove State Beach to the north, Salt Creek Beach, Dana Point Harbor, Doheny State Beach, San Clemente State Beach, and San Onofre State Beach, and extend as far south as the coastal recreational destination points in the City of San Diego. App. 8-20(B) at p. 132. Access to and along this portion of the coast is currently restricted because of severe traffic congestion on I-5, a condition that only will worsen as the projected future traffic increases. *Id.*, pp. 132-133. As the Coastal Commission itself recently emphasized, concurring in a consistency certification for a North County Transit District passing railroad track extension project:

[T]raffic congestion interferes with access to the coastal recreational opportunities within north San Diego County (including travelers from Los Angeles and Orange Counties) . . . When congestion increases, non-essential trips such as those for recreational purposes tend to be among the first to be curtailed The ability of the public to get to the coast

will become more difficult, which would result in a condition that would be inconsistent with the access policies of the Coastal Act.¹³

Commission Consistency Certification No. CC-008-07; App. 5-12, Attachment 4, at p. 26.

Moreover, the TCA dramatically augmented the substantial coastal access benefits provided by the Project, amending its Consistency Certification to provide \$100 million to State Parks to improve and expand access and recreation improvements in the coastal zone portion of California's state parks system. App. 11-25 at pp. 1–2. This State Parks package would fund an array of potential access and recreation opportunities, including extending the San Onofre State Beach lease (which otherwise will expire in 2021) and providing new campsites and other improvements at San Onofre State Beach, San Clemente State Beach, and/or Crystal Cove State Park (App. 8-20(B) at pp. 60–61), and restoring habitat in the State Park System within the coastal zone. This is an especially important project feature since, owing to California's current fiscal crisis, approximately forty-eight California state parks, or services within those parks, are currently threatened with closure or curtailment because of the State's severe deficit and resulting budget cuts.

Through the provision of congestion relief on the I-5, direct public access to the coast from inland areas, and additional access and recreation opportunities created by the \$100 million California State Parks package, the Project would significantly and substantially further the national interest in providing public access to the coast for recreation purposes.

4. The Project Significantly And Substantially Furthers The National Interest By Providing For The Management Of Coastal Development To Improve, Safeguard, And Restore The Quality Of Coastal Waters.

The Project furthers the national interest by providing for “the management of coastal development to improve, safeguard, and restore the quality of coastal waters, and to protect natural

¹³ This impact to coastal access is even further exacerbated when there is a disruption of service on the I-5. As the Commission explained in approving Caltrans' I-5 bridge stabilization project in San Mateo Creek, located within the Project footprint of the FTC-S: “. . . I-5 is a major coastal access route and provides the major vehicular access into San Diego County from the north. Disruption of service on the I-5 would have a significant impact on coastal access.” Balancing Under Coastal Act, Section I, App. 5-12 at p. 10.

resources and existing uses of those waters.” 16 U.S.C. § 1452(1)(C). Currently, coastal waters are degraded by untreated runoff from several miles of the I-5 freeway. The Project would treat approximately five million gallons of runoff water each year that currently flows untreated from the existing I-5 into San Onofre and San Mateo Creeks, and ultimately into the Pacific Ocean. Final SEIR App. 20-48 at pp. ES-13 – ES-14; App. 8-20(B) at p. 133; App. 5-11 at pp. 5–6. Roadway, or “on-site,” drainage along the existing I-5 would be retrofitted with a state-of-the-art water quality treatment system for approximately two miles to provide treatment to on-site runoff. App. 20-49 at p. 2–15. Further, the same water quality treatment system would be implemented inland on the Project for approximately 10 miles. App. 8-20(B) at p. 133.

The water quality treatment system features sand media filters which will be installed at all locations within the San Mateo and San Onofre Creek watersheds. App. 8-20(B) at pp. 51, 87–90. This will provide a net benefit for surface water quality within the coastal zone, and specifically a net annual benefit in terms of load reduction for constituents commonly found in highway runoff. Response to Staff Report (Jan. 9, 2008), App. 8-20(B) at p. 88; App. 5-11 at p. 12. Further, these facilities will act as a hazardous spill containment site if an accidental hazardous material release occurs along this segment of I-5, an improvement that presently does not exist. *Id.* There is no funding or other Caltrans strategy to make these water quality improvements, other than the Project. App. 8-20(B) at pp. 87–90; App. 5-11 at pp. 5–6.

5. The Project Furthers The National Interest By Assisting California In Complying With Federal Clean Air Act Standards.

The Project furthers the national interest because it is an important component of the strategy to comply with the National Ambient Air Quality Standards established under the federal Clean Air Act. The Project is a Transportation Control Measure in the South Coast Air Quality Management District Air Quality Management Plan – a part of California’s State Implementation Plan. Letter from SCAG to Richard Dixon (Mar. 3, 2008), App. 72-97 at pp. 1–2; Final SEIR, App. 21-49 at pp. 4.7-35 – 4.7-37.

The Project is also a key component of the federal transportation plans and transportation programs adopted for Southern California. *Id.*; Final SEIR, App. 20-49 at pp. 1-1 – 1-5. These transportation plans and transportation programs implement the mobile source emissions component of the State Implementation Plan. The timely implementation of the projects in these transportation plans and programs is essential for California to comply with the National Ambient Air Quality Standards. Letter from SCAG to Richard Dixon (Mar. 3, 2008), App. 72-97 at pp. 1–2, Final 2006 RTP (June, 2006), App. 75-126 at Section I. The Commission’s Objection jeopardizes Southern California’s compliance with the Clean Air Act and threatens federal funding for all transportation projects in Southern California. *Id.*

6. The Project Furthers The National Interest By Providing Important Training and Infrastructure Improvements At Camp Pendleton.

As described in greater detail in Section II.B.2, below, the Project furthers the national interest by providing important new training and infrastructure improvements. The improvements will enhance greatly the ability of the Marine Corps to train marines and sailors in the defense of the nation and will provide important national security improvements to Camp Pendleton.

B. Element 2: The National Interest Furthered By The Project Outweighs All Adverse Coastal Effects.

The Project’s benefits to the national interest also outweigh its limited, mitigated direct and cumulative impacts to the federal coastal zone. The extensive environmental record developed by the Collaborative agencies establishes that the Project’s effects are avoided, reduced, and mitigated to the maximum extent feasible. *See* App. 20-48 – App. 32-57. Any remaining impacts must be weighed against the Project’s importance to the national interests discussed under Element 1, above, as well as the national interests discussed below in improving military security, improving public safety, and assisting the region in complying with the Clean Air Act National Ambient Air Quality Standards. Further, the Project provides substantial additional environmental benefits to the coastal zone through the Project’s commitment to provide \$100 million for major access and recreation improvements to the

State's parks along the coast, as well as the restoration of 150 acres of coastal sage scrub habitat at Crystal Cove State Park. Based on all of these factors, the Project's contribution to the national interest clearly outweighs coastal impacts.

Because the Project's contributions to the national interest are substantial, while the adverse effects of the Project are minimal and mitigated, the national interest in the Project outweighs its adverse effects on the coastal zone.

1. The Project Contributes To The National Interests In Economic Development Of The Coastal Zone, The Orderly Siting Of Transportation Facilities, The Provision Of Public Access To The Coast, The Improvement Of Air Quality And The Improvement Of Water Quality, On The Coast.

Section II.A, above, establishes the importance of the Project to the national interests in economic development of the coastal zone, the orderly siting of transportation facilities, the provision of public access to the coast, the improvement of air quality and the improvement of water quality on the coast. All of these vitally important interests, in addition to those discussed below, are appropriately balanced against the Project's minimal adverse impacts to the coast. In particular, the Project's importance to economic development weighs strongly against the Project's minimal environmental impacts. *See* Decision and Findings in the Consistency Appeal of Virginia Electric and Power Co., Sec. of Commerce, May 19, 1994, at p. 35 ("VEPCO Decision") ("[T]he project will contribute significantly to the national interest in part because of the extent to which it will further and support economic development in the coastal zone."); *see also* 59 Fed. Reg. 28,061 (May 31, 1994).

2. The Project Contributes To The National Interest In Military Security By Providing Facilities Important To The National Defense.

Benefits to military facilities vital to the national defense are an important factor in assessing the national interest served by the Project. *See* VEPCO Decision at p. 35 (the national interest in a proposed drinking water pipeline outweighed the project's adverse environmental effects, in part because "[t]he building of a large infrastructure project to provide potable water for human consumption to a major

metropolitan area, which includes numerous military (Navy) facilities vital to the national defense, represents a very high priority use”).

After extensive coordination with Camp Pendleton, the TCA incorporated a number of national security improvements into the Project, including the redesign and reconstruction of the primary northern entrance and exit points on the Base (the San Onofre Gate) to meet the most current Homeland Security and Anti-Terrorist Force Protection Program guidelines and access improvements to the primary northern amphibious landing beach (Green Beach). FTC-S Roadway Description, App. 12-27(D) at p. 15.

The San Onofre Gate is the primary northern entrance to Camp Pendleton. The current configuration of the San Onofre Gate does not leave sufficient space and queuing distances to comply with Anti-Terrorism and Force Protection Requirements (“AT/FP”). Larry Rannals email to John M. Carretti (March 22, 2006), App. 73-106 at p. 2. The current design does not meet AT/FP requirements, and the resultant delays in the inspection process often cause traffic backups that could be a serious safety concern. The TCA agreed to redesign the San Onofre Gate to meet the most stringent national security requirements. *Id.*; Communications between TCA and Marine Corps, App. 73-106 at pp. 5, 7, 12, 19. For example, the new design includes adequate sight lines and distances and adequate room to facilitate security inspections and protect against possible terrorist attacks. Communications between TCA and Marine Corps, App. 73-106 at p. 7.

Green Beach is the primary amphibious landing area on the northern portion of Camp Pendleton. Realistic training exercises are impaired greatly because there is extremely limited access to move more Marine amphibious forces and tactical vehicles from Green Beach under the I-5 and into the northern training area of operations. The only existing capability to move inland with modern equipment is to move along a two-lane road into a busy commercial area and then across a busy network of roads into the training area. Such movement is unsafe, and causes untimely delays, and fails to provide realistic training for tactical movement of forces. The Project will provide enhanced access capability from

Green Beach into the northern training area, thereby providing realistic training conditions for the marines and sailors. App. 15-31(H) at p. 2.16-3; App 73-106 at p. 1.

The Project will also provide a vital alternative route for deployment of U.S. Marine Corps forces and tactical equipment from Camp Pendleton to their point of debarkation (March Air Force Base in Riverside County). This is critical if other exit points on the base are blocked, restricted or impacted due to fire, terrorist attack, or national disasters. The provision of military facilities vital to the national defense outweighs coastal impacts.

3. The Project Contributes To The National Interest In Public Safety By Providing Alternate Evacuation Routes And Increased Emergency Vehicle Access.

The construction of an alternate route between Orange and San Diego Counties provides significant public safety benefits. Currently, the I-5 is the sole evacuation route for the San Onofre Nuclear Generating Station (“SONGS”), and is the only non-signalized evacuation route between SONGS and the Interstate 405 freeway to the north. Should an emergency evacuation of SONGS be required, it is estimated that it will take vehicles 9-1/2 hours to completely vacate the 10-mile radius from SONGS. App. 8-20(B) at pp. 134–135. A disruption on the I-5 could increase evacuation time by nearly two hours, and an earthquake could increase evacuation time to up to eighteen hours. Evacuation Time Evaluation for the San Onofre Nuclear Generating Station, App. 74-108 at pp. 9–12. Southern California Edison’s evacuation time evaluation report concludes: “Evacuation time is a function of available roadway capacity.” *Id.* at p. 12. By providing an additional evacuation route, the Project will increase the speed at which evacuations could be completed and would provide an alternate route in the event that the I-5 was impassable. App. 20-49 at pp. 2–15; App. 20-48 at pp. ES-14, ES-102, ES-103. The Project also will provide an important evacuation route for residents during wildfires (the need for which was so clearly demonstrated during the recent fires in San Diego), or flood by tsunami. It will provide firebreak opportunities and will increase accessibility for emergency vehicles. Finally, it will provide an additional hospital access route and will improve local emergency response times.

App. 8-20(B) at pp. 134–135; Comment Letter from Saddleback Memorial Medical Ctr., App. 11-24(WW) at p. 1; Comment Letter from Orange County Fire Chief, App. 11-24(EE) at p. 1; PowerPoint Presentation, App. 5-10 at slide 142. Gridlock and a lack of alternative evacuation routes endanger the lives of citizens in the coastal area. The Project’s significant contribution to the strong national interest in public safety outweighs coastal impacts.

4. The Project Is Necessary To Meet National Air Quality Standards.

The timely implementation of the Project is important to the region’s compliance with the Clean Air Act and the ability of the region to remain in conformity with the State Implementation Plan and maintain eligibility to receive federal transportation funds.¹⁴ The Metropolitan Planning Organization, SCAG, has expressed its serious concern that the Coastal Commission’s Objection will put the region out of compliance with the Clean Air Act and will jeopardize federal funding for all transportation projects in Southern California. SCAG Letter to Councilmember Richard Dixon, App. 72-97 at pp. 1-3; *Los Angeles Times* article re FTC-S, App. 72-96. The Project would reduce greenhouse gas emissions. Because the Project would reduce daily vehicle hours traveled (“VHT”) by 31,580 hours, there would be a commensurate reduction in greenhouse gas emissions of approximately 200 million pounds per year.¹⁵ App. 8-20(B) at p. 95. Greenhouse gas emissions reductions from the operation of the Project would offset construction emissions in less than five years, generating a net benefit thereafter. App. 8-20(B) at p. 97. The Project would also reduce other criteria pollutants regulated under federal law. App. 21-49 at

¹⁴ As explained above in the “Facts and Procedural Background,” SCAG and SANDAG, after evaluating alternative transportation solutions, included the Project in the approved regional transportation plans and the transportation improvement programs for Southern California. The U.S. Department of Transportation then approved the regional transportation plans and the transportation improvement programs that include the Project. Similarly, the South Coast Air Quality Management District included the Project as a Transportation Control Measure in the South Coast Air Quality Management Plan. Final SEIR, App. 20-48 at p. ES-28; Final SEIR, App. 21–49 at pp. 4.7–37.

¹⁵ Ultimately, the project will reduce greenhouse gas emissions by more than 200,000,000 pounds per year, or the equivalent of: (1) annual CO₂ sequestration of more than 25,000 acres of forest (approximately 17 million trees); or (2) conversion of more than 489,000 incandescent light bulbs to compact fluorescent lamps; or (3) CO₂ generated by the consumption of 10,500,000 gallons of gasoline. App. 11-26 at pp. 55-56.

pp. 4.7–62. The air quality benefits of reduced congestion in Southern California outweigh coastal impacts.

5. The Project’s Impacts On The Coastal Area Are Temporary, Mitigated To The Maximum Extent Feasible, And Outweighed By Substantial National Interests.

The Coastal Commission ignored or distorted decades of studies, data, and research generated during the environmental review of the Project. As described more fully in TCA Response to Staff Report (Jan. 9, 2008), App. 8-20(B), TCA Response to Staff Report Addendum (Jan. 25, 2008), App. 5-11, FTC-S Briefing Book, App. 7-17, the Commission has vastly overstated the Project’s minimal impact on the coastal zone and overlooked or downplayed mitigation measures that will reduce all remaining impacts to the maximum extent feasible. In previous cases, the Secretary has determined that the existence of a low risk of harm to an endangered species does not automatically outweigh any contribution to the national interest. Decision and Findings in the Consistency Appeal of Union Oil Co. of California, Sec. of Commerce, Nov. 9, 1984 at p. 19 (“Union Oil Decision”); *see also* 50 Fed. Reg. 872 (Jan. 7, 1985). Furthermore, the Secretary has found the national interest in transportation to outweigh wetland impacts. Southern Pacific Decision, at p. 15. In this case as well, the national interest in the Project substantially outweighs its relatively minor impacts on the coastal area.

a) Environmentally Sensitive Habitat Areas And Endangered Species.

The Commission based its Objection, in part, on alleged impacts upon Environmentally Sensitive Habitat Areas¹⁶ (“ESHAs”) and endangered species. The Commission’s finding, however, is contradicted by the considered determinations of the federal agencies with jurisdiction over endangered species, namely, USFWS and NOAA Fisheries. These federal environmental agencies determined that the Project, with mitigation, will not jeopardize **any** species’ survival and will not adversely modify **any**

¹⁶ For purposes of the State Coastal Act, “[e]nvironmentally’ sensitive area means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.” Cal. Pub. Res. Code § 30107.5.

critical habitat. App. 7-17 at pp. 31–32; USFWS Letter to FHWA (Sept. 30, 2005), App. 72-102 at pp. 1–3; NOAA Letter to FHWA, App. 8-19(C) at pp. 1–2. These determinations by USFWS and NOAA Fisheries address coastal impacts as well as cumulative impacts, and are based on data collected and analyzed by more than fifty professional biologists over a period of more than twenty years – including thousands of hours spent in the field.

(1) Tidewater Goby.

The Project includes the construction of four bridge columns in the ephemeral portions of San Mateo and San Onofre Creeks, upstream of the lagoon occupied by the tidewater goby. No construction will occur during any time that there is water in the Creeks. App. 5-11 at pp. 23–24. Contrary to the Commission’s claims, no portion of the Project area is within goby critical habitat. Final Rule Designating Critical Habitat for Tidewater Goby, 73 Fed. Reg. 5919, 5925 (Jan. 31, 2008). Without any supporting data, the Commission asserted that the Project would impact approximately 24 acres of the tidewater goby critical habitat. The Project design includes lengthy bridge spans at both the San Mateo and San Onofre Creek crossings to avoid these areas to the greatest extent feasible. App. 8-20(B) at pp. 19–20. As a result, the Project will result in permanent loss of only 0.011 acre (0.006 in San Mateo Creek and 0.005 in San Onofre Creek) of the 130 acres. App. 8-20(B) at p. 13. Ignoring the bridge design refinements and the location of the main goby population downstream of the permanent structures, the Commission concluded that there would be “significant disruption” of goby habitat. Staff Report, App. 1-2 at p. 49. This conclusion is directly contradicted, however, by USFWS’s conclusion that the Project will not jeopardize the goby or adversely modify its critical habitat. App. 8-20(B) at p. 21. The record contains substantial evidence supporting USFWS’s opinion: (a) very small direct impacts to the goby are limited to bridge construction activities at the two creeks; construction will occur outside the goby spawning season, thus avoiding impacts to goby reproduction; (b) gobies in the area of potential dewatering activities will be captured by seining and released away from the construction footprint; (c) gobies are expected to remain in the creeks during and following construction

and no appreciable reduction in the number of fish or their distribution is expected; and (d) gobies are most plentiful in the lagoons, over 700 feet from the impact area; these off-site lagoons are sufficient to support existing goby populations and to provide the necessary conservation function for this species. Response to Staff Report (Jan. 9, 2008), App. 8-20(B) at pp. 21–22.

(2) Pacific Pocket Mouse.

The Commission similarly ignored and distorted the record in finding that the Project will impact the San Mateo North Pacific Pocket Mouse (“Pocket Mouse”). The Commission’s conclusion stands in stark contrast to the determination reached by USFWS that construction of the Project will not jeopardize the continued existence of the Pocket Mouse. Indeed, the record demonstrates that **no** Pocket Mice have been documented in the coastal zone despite 65,000 trap nights conducted over 10 years on both sides of the coastal zone boundary. App. 8-20(B) at p. 17. Five trapping efforts were conducted for the Project in accordance with USFWS-approved survey protocols. Independent qualified/permitted biologists, under the authority of USFWS and not associated with the Project, conducted seven additional trapping efforts.

Based on a single parameter (soil), the Commission staff ecologist claimed that 12 acres of Pocket Mouse “essential habitat” occurs within the coastal zone portion of the project disturbance limits. The record demonstrates, however, that after examining the four parameters known to contribute to habitat suitability for the Pocket Mouse (soil, topography, historical agricultural disturbance, and vegetative cover), there is no high quality Pocket Mouse habitat in the coastal zone and only 0.6 acre of habitat considered of moderate suitability, which explains why no Pocket Mouse has ever been trapped within the coastal area. App. 8-20(B) at p. 17.

The record further demonstrates that the Project is likely this Pocket Mouse population’s remaining opportunity to reestablish and recover. In consultation with the USFWS, the TCA has committed to implementing an ambitious Management Plan for the Pocket Mouse that would include

long-term management, funding, and recovery initiatives on a 71-acre Pocket Mouse reserve area. App. 8-20(B) at p. 18.

(3) Arroyo Toad.

The Commission likewise grossly exaggerated its claim that the Project would result in the loss of the only remaining coastal population of the arroyo toad. The record demonstrates that with the addition of four bridge supports totaling 0.011 acre (eleven hundredths of an acre), the Project would result in the permanent loss of only 0.006 acre of **potential** habitat – and extensive surveys (from 1987 through 2001) have not identified **any** toads within the coastal zone portion of the Project. App. 8-20(B) at p. 22. Moreover, USFWS again concluded in its preliminary opinion that with mitigation measures, which the Commission ignored, the Project is not likely to jeopardize the continued existence of the toad. App. 72-102 at pp. 1-3. The record contains substantial evidence supporting this conclusion: (a) the breeding habitat will only be impacted temporarily by construction or suffer a minor permanent loss, and toad reproduction will only be minimally affected during bridge construction due to phasing of project impacts outside the toad breeding season; (b) no permanent structures will be placed in creeks that could be a barrier to upstream or downstream movement; (c) the loss of upland habitat will not significantly limit the toad’s distribution since substantial acreage will remain to support the species; (d) the number of toads harmed will be minimized through trapping and relocation; (e) measures to reduce predators will increase toad numbers; and (f) impacts to water quality will be addressed through the Project water quality implementation measures. App. 8-20(B) at pp. 26–27.

(4) Coastal California Gnatcatcher.

The Commission mischaracterized the extent of potential impact to the coastal California gnatcatcher, and ignored or discounted the substantial regional conservation measures that will be implemented for the very limited impacts on this species. App. 8-20(B) at pp. 27–32. The portion of the Project within the state-defined “coastal zone” will impact approximately fifty acres of coastal sage scrub (“CSS”) habitat of the gnatcatcher. The CSS in this area is fragmented by I-5, Christianitos Road

(a major entrance to Camp Pendleton), and former agricultural development; residential development in San Clemente. Dr. Dennis Murphy Letter to CCC (Jan. 7, 2008), App. 8-20(B) (Attachment 1 to Response to Staff Report) at p. 5. There are **only three** gnatcatcher territories in the state-defined “coastal zone.” Focused Summary of Environmental Impacts, App. 15-35(H) at pp. 2.8-14 and Figure 2.80-5 (Birds).

In its preliminary opinion, USFWS concluded that the Project is not likely to jeopardize the continued existence of the gnatcatcher. USFWS reached this conclusion because of the extensive gnatcatcher conservation measures included in the Project. These measures include (i) protection and restoration of one of the most important gnatcatcher breeding areas in Southern California (Upper Chiquita Canyon), App. 21-50 at pp. 4.11–43; App. 74-117 at p. 6-3; (ii) restoration of 150 acres of gnatcatcher habitat at Crystal Cove State Park, App. 8-20(B) at p. 28 and Attachment 6 (vegetation types at Crystal Cove Canyon State Park); (iii) the design of the Project to minimize impacts on gnatcatcher habitat (e.g., by locating the Project in Camp Pendleton immediately adjacent to residential development); App. 20-21 – 49 at p. 4.1-5; (iv) design of the Project to be compatible with the Southern Orange County Habitat Conservation Plan approved by USFWS (e.g., by locating the Project in areas approved for development in the Habitat Conservation Plan); and (v) fifteen wildlife crossings to insure continued habitat connectivity. App. 21 – 50 at pp. 4.11-46 – 4.11-47.

The USFWS has recognized that an important aspect of gnatcatcher recovery is the conservation of “key locations.” The TCA has entered into an agreement with USFWS to protect over 1,182 acres within the Upper Chiquita Canyon Conservation Area – one of the most important gnatcatcher breeding sites in Southern California – including restoration of 333 acres to support overall species survival and recovery. App. 8-20(B) at p. 32. The TCA further amended its Consistency Certification to fund the State Parks package, which includes restoration of an additional 150 acres of CSS in Crystal Cove State Park. App. 11-25 at pp. 1–2; App. 5-11 at pp. 60–61. As the California Secretary for Resources explained: “We have determined that the very limited impact of the project on coastal sage scrub is

more than offset by these additional conservation commitments.” Letter from California Resources Secretary to Commission (Feb. 1, 2008), App. 5-13(D) at p. 2.

(5) Southern Steelhead.

In its analysis of impacts on the Southern Steelhead, the Commission simply ignored the May 23, 2007 NOAA Fisheries finding that the Project is “not likely to adversely” affect the Southern Steelhead. NOAA Fisheries explained that the creek channels are expected to be dry for the majority of the construction period, the bridge piers will be spaced 200 feet apart and therefore will not decrease the function value of steelhead migratory habitat, and water quality within San Mateo Creek will not be reduced but instead will treat currently untreated runoff from I-5. App. 8-19(C) at p. 2.

(6) Conclusion.

The Commission’s decision is rife with assertions that mitigation measures will not be implemented or that the TCA is somehow attempting to “get around” species protection. Through all of the Commission’s rhetoric, the important fact remains that the federal agencies charged with protection of threatened and endangered species have found that the Project will not jeopardize those species and will not adversely modify critical habitat. The national interest in the Project outweighs any impacts on habitat areas.

b) Wetlands.

The Commission also grossly misstated and mischaracterized the Project’s impacts on wetlands. The Project will have direct permanent impacts on 0.16 acre (sixteen hundredths of one acre) of wetlands in the coastal area and temporarily will impact 7.70 acres of wetlands. App. 13-31(B) at pp. 47–51; Letter to TCA from Glenn Lukos Assoc. (Aug. 31, 2007), App. 12-27(C) at pp. 1, 10.

Permanent impacts on wetlands have been minimized to the maximum extent practicable and the remaining impacts to wetlands are unavoidable. The Project includes two bridge structures connecting State Route 241 to I-5. In order to reduce wetland impacts, the TCA increased the length of the connector structures to safe engineering limits. *See An Evaluation of Alternative Designs for FTC-S*

Connectors to I-5 (April, 2006), App. 16. As a result, the TCA reduced the number of support columns within San Mateo Creek to four columns with a total impact of 0.006 acre (six thousandths of an acre). In addition, the North to North Connector Structure for the Project requires the TCA to relocate a Marine Corps training road adjacent to I-5 – resulting in slightly less than additional 0.15 acre (fifteen hundredths of an acre) of wetland impacts. App. 8-20(B) at p. 52; App. 10-23(A) at Exhibits 4A, 4B.

The impacted 0.16 acre of wetland impact is not a contiguous area. Rather, the impact areas are located over a distance of approximately two miles, and are fragmented by existing physical features including the I-5, two I-5 interchanges, local roadways, and trails. App. 13-31(B) at pp. 43-46; App. 8-20(B) at p. 47.

All feasible mitigation measures will be applied to reduce adverse effects, including the creation of 15.9 acres of new wetland areas within the San Juan Creek watershed and the creation of one acre of new wetlands in the San Mateo Creek watershed. Coastal Consistency Certification and Analysis, App. 13-31(B) at pp. 51–54. The created, enhanced, and restored habitat would be of far higher habitat value than that provided by the fragmented and scattered areas which will be permanently impacted by the Project. App. 13-31(B) at pp. 13, 51–54; *see also* App. 8-20(B) at pp. 47–54.

In a previous decision involving a transportation facility, the Secretary found that transportation interests outweigh the loss of a small quantity of wetlands. In the Southern Pacific Decision, the Secretary weighed the direct loss of 2.5 acres of mudflat habitat, approximately three acres of sand and dune vegetation, and less than one acre of lagoon habitat against the national interest in the rehabilitation of a railroad bridge. The Secretary found that the wetland and habitat losses did not outweigh “the national interest in safe and efficient rail transportation, including the transportation of materials to VAFB [Vandenberg Air Force Base].” Southern Pacific Decision, at pp. 15, 35. The habitat loss at issue in the present case is less than one-fifth as great as in the Southern Pacific case, and the human population benefited by the Project is far larger. The national interest in the Project outweighs the minor, mitigated impacts on wetlands.

c) Public Access And Recreation.

The Project traverses “Subunit” 1 of San Onofre State Beach (“SOSB”) – a temporary park within Camp Pendleton (but that is still subject to active military training activities). The Navy leased SOSB to the State of California through the year 2021. App. 8-20(B) at pp. 55–56; Agreement of Lease between California and United States, App. 76-133. San Mateo Campground is located in Subunit 1, **outside of the coastal zone**. State Parks decided to build this campground in 1989 – five years **after** its own General Plan for SOSB described the location of a tollroad in the general location of the Project. App. 76-132; App. 8-20(B) at p. 59. As State Parks foresaw, construction of the Project would not prevent the use of the campground.

The California Resources Agency (the parent agency of the California Department of Parks and Recreation) acknowledged that the State temporarily leased SOSB with the express understanding that the Lease will expire in 2021 and that the Navy reserved the right to approve roads within SOSB:

It is also important for the Coastal Commission members to recognize that San Onofre State Beach is not owned by the State of California. It is owned by the U.S. Navy and is part of a very active Marine Corps base. Indeed, the Marine Corps is currently processing plans for active combat training operations on the former agricultural areas immediately adjacent to the San Mateo Campground. The Navy has the right to conduct activities within the leased area at any time and the lease expires by its terms in 2021. There is no guarantee that the Navy will agree to extend the lease – especially those portions of the leasehold that are inland of Interstate-5. Because the State obtained the lease with knowledge that the federal government reserved the right to approve roads in this area, the approval of SR 241 does not establish any precedent regarding roads within parks owned by the State.

Letter from California Resources Secretary to CCC (Feb. 1, 2008), App. 5-13(D) at p. 2 (emphasis added).

At no time will construction or operation of the Project eliminate the availability of coastal access to any coastal facility; nor will it eliminate any trails, campsites, or any other facilities within the SOSB, as claimed in the Objection.

The closest travel lane will be located 380 feet from the nearest campsite at San Mateo Campground, located in SOSB “Subunit 1” (outside the coastal zone), and will be further separated by

both elevation and a sound wall. App. 8-20(B) at p. 58. Current campsites within the same park at the Bluffs Campground in the coastal zone are located immediately adjacent to the I-5 freeway, with no soundwall to reduce noise or views. App. 8-20(B) at p. 59.

The California Resources Agency has concluded that the Project is entirely compatible with the continued operation of the San Mateo Campground. The California Secretary of Resources, Mike Chrisman, stated the following to the Commission:

Toll road opponents have specifically cited impacts on San Mateo Campground. However, the current popular camping facilities are actually closer to Interstate 5 than the San Mateo Campground is to the 241 project. And, given the strong measures adopted by the Transportation Corridor Agencies (TCA) to minimize noise impacts we believe the campground will remain enjoyable, accessible and open. There is no reason to believe San Mateo campground will be negatively impacted by the SR 241 project any more than passing trains or the movements of tens of thousands of cars and trucks on Interstate-5 have impacted the popularity of the Bluffs Campground.

App. 5-13(D) at p. 2.

The Project will provide significant public access to the coast, outweighing the minor and mitigated impacts on coastal resources.

d) Surfing, Public Views, And Water Quality.

Much of the controversy surrounding the Project focuses on alleged impacts on the “aesthetics” and “high quality surfing waves” of the Trestles surfing beach. App. 8-20(B) at pp. 70-80, 81-86. The extent to which the allegation of “aesthetic” impact is based on sheer propaganda rather than fact is succinctly expressed by a December 31, 2007 letter from the U.S. Department of Transportation, following a site visit:

I was truly surprised to see how far away from our project [the Trestles Surfing Area] is. It is not close enough to be within the area of potential effect. . . . The proposed [Project] will not impose visual, auditory, or atmospheric elements on the Greater San Onofre Surfing Area. . . . The [Project] would be located on the inland side of existing old Highway 101, and the improvements on the I-5 (for the connector and merging of the Preferred Alternative with the I-5) end a short distance after the existing San Onofre Bridge. Therefore, the study area is wholly outside the Trestles area.

Response to Staff Report (Jan. 9, 2008) Letter from U.S. Dept. of Trans. to SHPO, Attachment 17, App. 8-20(B) at p. 2; App. 8-20(B) at pp. 70–80.

To conclude that the “aesthetics” of Trestles will be affected, the Commission had to resort to the claim that the experience of surfers who would walk on a paved sidewalk rather than a dirt trail would be “degraded,” and the an incorrect statement that surfers would be able to see the Project while in the water. App. 1-2 at p. 205. The Commission’s claims are not only unsubstantiated, they are contrary to California law holding that the Commission does not have the authority to regulate development in the coastal zone because of alleged impacts on offshore views.¹⁷ These unsupported claims of minuscule “aesthetic” impacts do not outweigh the national interest in the Project.

The Commission also concluded that wave quality will be affected by changes in sedimentation. Because the evidence in the record did not support this conclusion, the Commission stated that it took a “preactionary” approach in concluding that adverse impacts would occur. App. 1-2 at p. 206. In fact, voluminous evidence in the record clearly establishes that the Project will **not** have any impact whatsoever on wave quality at Trestles. App. 26 at Attachment 8 (Sediment Transport Study); *see also* App. 8-20(B) at pp. 81–86; Letter from GeoSoils to TCA, App. 12-29(F) at pp-. 1–4. The Commission’s “precautionary” approach, which assumes damage when none will occur, does not outweigh the evidence in the record or the national interest in the Project.

The Project’s substantial benefit to water quality has been described in Section III.A.4, above. To summarize, without the Project, untreated water from the I-5 Freeway flows into the two Creeks and ultimately to the Trestles Beach area; with the Project, this water be will treated through state-of-the art sand media filters, which also will act as a hazardous spill containment site in the event of an accidental hazardous materials release along the I-5. App. 8-20(B) at pp. 87–90. The Commission’s claim to the

¹⁷ In *Schneider v. California Coastal Comm'n*, 140 Cal. App. 4th 1339, 1341 (2006), the court held that the Coastal Commission is not empowered under the Coastal Act (i.e., the CCMP) to regulate development based on views from offshore areas.

contrary is simply another example of its determination to ignore the Project's elements and mitigation measures that benefit the environment.

e) Archaeology.

The CCMP provides that impacts on archaeological resources must be addressed by "reasonable mitigation measures." Cal. Pub. Res. Code § 30244. The Project was specifically designed to avoid the two sites within the San Mateo Archaeological District that are listed on the Sacred Lands Files of the Native American Heritage Commission, and to avoid a ceremonial use area that was designated by Camp Pendleton. App. 8-20(B) at p. 92. The Project's "Area of Direct Impact" ("ADI") was further designed to be on slope areas with little intact cultural resource deposits, and on deflating topographic high spots where the Miocene bedrock is exposed. App. 8-20(B) at p. 92. These avoidance measures are augmented by compliance with Section 106 of the National Historic Preservation Act of 1966, including the preparation of a Historic Property Treatment Plan with detailed mitigation requirements. App. 8-20(B) at p. 93. While complete avoidance of archeological resources is not possible, these reasonable mitigation measures will reduce impacts to the maximum extent feasible. App. 18-37 at pp. 63–67.

The Commission also claims that Trestles surfing beach should be evaluated as a Traditional Cultural Property. As discussed in Section III.B.5(d), above, the Project will have no impact on Trestles beach. An Amtrak rail line and old highway bridges separate the proposed Project connectors and the Trestles property. App. 8-20(B) at pp. 93–94; Final SEIR, App. 22-51 at pp. 4.18-36 – 4.18-37. There are no impacts on Trestles to weigh against the national interest.

f) Energy And Greenhouse Gas Emissions.

The Commission rejected the TCA's data (and the conclusions of the regional air quality agencies) establishing that the Project will reduce air emissions, including greenhouse gas emissions (discussed in Section III.B.4(d), above). The Commission instead preferred its own conjecture and speculation, claiming, for example, that the lengthy analyses of growth inducement, energy use, traffic,

and air pollution contained in the Final SEIR should be discarded in favor of its own declaration that “the project will ultimately foster continued growth (outside the coastal zone and its area of jurisdiction), low density housing and inefficient transit patterns and the overall traffic system will be equally or more congested than it is currently.” Staff Report, App. 1-2 at p. 261. The Commission has no evidence to support this conclusion except some general studies, not prepared in the geographic or planning context of the Project, which state a policy preference that “highways must be allowed to become congested.” Staff Report, App. 1-2 at p. 259.

The Commission’s policy preference is in direct conflict with the federally-approved regional transportation plans and air quality plans for Southern California. The regional transportation plans of SCAG and SANDAG both include the Project as an important component of the adopted State and Federal policy of improving mobility and air quality in Southern California. While the Commission may prefer that I-5 be congested, **all** of the state and federal transportation and air quality agencies have decided that new transportation improvements are essential to the environment and to the economy of Southern California.

Regional and local roads are an integral part of the region’s infrastructure. The vast majority of trips rely on the highway network. . . . The regional and local highway system faces mounting congestion, which affects personal mobility, freight movement and air quality. The preservation, management and selective expansion of this system are crucial to the region’s economic vitality and the quality of life for the region’s residents.

SCAG RTP (April, 2004), App. 76-127 at D-1-1.

C. Element 3: Twenty Years Of Study, Input By USMC Base Camp Pendleton, And Six Years Of Interagency Cooperation Have Established That There Is No Reasonable And Available Alternative To The Project.

The Project clearly satisfies the third element of consistency with the objectives of the CZMA, which states that there must be no reasonable alternative available that would permit the activity to be conducted in a manner consistent with the enforceable policies of the state’s coastal zone management program. 15 C.F.R. § 930.121. The development and analysis of Project alternatives, involving realignments, redesigns, and impact reductions over a thirty-year planning period, is exhaustively

described in the Final SEIR. After six years of analysis (and a \$20 million EIS), the federal and state transportation and environmental agency members of the Collaborative unanimously determined the Project to be the Least Environmentally Damaging Practicable Alternative. App. 8-20(B) at p. 4.

Remarkably, the Commission asserts in its Objection that almost any other alternative discussed in the Final EIR/EIS, as well as an “alternative” hastily concocted by project opponents, would be “environmentally less damaging” and “feasible.” Staff Report, App. 1-2 at pp. 123–124. The Objection lists **all** of the following alternatives: the Central Corridor (CC), Central Corridor-Avenida La-Pata (CC-ALPV), Alignment 7 Corridor-Avenida La Pata (A7C-ALPV), Arterial Improvements Only (AIO), the I-5 Widening Alternative (I-5), and the Arterial Improvements Plus-Refined (AIP-R) alternative described in “An Alternative to the Proposed Foothill South Toll Road (“Smart Mobility Report”) Revised January 2008, with accompanying Peer Review (Bergmann Associates, January 23, 2008). App. 1-2 at p. 124.

The Commission’s analysis and support of these alternatives is wholly conclusory. Moreover, the Commission selectively used evidence in reaching this conclusion. The Commission’s bias may be most clearly demonstrated in a section of the Objection that simply reprints, at great length, critical letters from Project opponents. There are no corresponding reprints – nor summaries, nor even descriptions – of the responses by Caltrans, FHWA or the TCA to the points raised by these letters. The Commission merely refers to the TCA website and states: “In its responses, TCA defends its analysis and methodology, and concludes that the proposed project is the [LEDPA].” App. 1-2 at p. 122. This dismissive reference is the Commission’s **entire discussion** of the extensive body of evidence directly refuting opponents’ claims that there are reasonable alternatives to the Project. The Commission’s refusal to address the evidence in the record resulted in the insupportable conclusion that the listed alternatives are “reasonable” and “available.”

As a threshold matter, the Commission’s alternative analysis fails for lack of specificity. The Commission has the burden of identifying, with sufficient specificity, an alternative that is

consistent with its coastal management program. “Specificity” does not mean “providing a list of alternatives.” Rather, “[t]he objecting state must describe the proposed alternatives with enough detail for the project’s proponent and the Secretary to . . . evaluate whether the alternative is reasonable and available.” VEPCO Decision at p. 39.

The Objection should be overruled because the Commission does not address the reasonableness and availability of alternatives in sufficient detail to meet the specificity standard. As discussed below, the Objection provides no clear metrics or standards against which the TCA can argue; the Commission merely “does not agree” with the Final SEIR, or “concludes” that other alternatives would be preferable. These assertions are entirely insufficient to establish that “reasonable” alternatives are “available,” especially in light of the careful and exhaustive analysis of these issues contained in the record as a whole.

1. The Alternatives Listed In The Objection Are Not “Available.”

The Secretary has established that, “[f]or a proposed alternative to be ‘available,’ the proponent of the proposed project must be able to implement the alternative and the alternative must achieve the primary purpose of the project. An alternative is not available, for instance, if the [appellant] is unable to implement it because of a technical or legal barrier, **or the resources do not exist.**” VEPCO Decision at p. 38 (emphasis added). An alternative is also “unavailable” if it does not meet the capacity requirements of the original project. *Id.* at pp. 49–50 (water conservation and reuse are not an “available” alternative when they would add 14 million gallons per day (“mgd”) of water when the project’s purpose was to provide 60 mgd). Finally, an alternative is unavailable if its effectiveness in meeting project needs has not been verified. *Id.* at p. 47 (aquifer storage and recovery not a proven alternative to a drinking water pipe).

These tests eliminate **all** of the alternatives listed in the Objective. There are insurmountable legal and technical barriers to the implementation of the Arterial Improvements Plus-Refined (AIP-R)

alternative described in the “Smart Mobility Report,” prepared by an unlicensed¹⁸ consultant hired by Project opponents. Caltrans concluded that the Smart Mobility plan is “not supported by adequate engineering and technical analysis” and “does not meet Department standards” or “applicable engineering standards of care.” Caltrans letter to FHWA (Jan. 7, 2008), App. 10-22 at p. 1.

In characteristic fashion, however, the Staff Report failed to mention or address these concerns by the State agency in charge of transportation. This alternative is also “unavailable” because its effectiveness in meeting the Project needs has not been verified, and because it does not comply with state standards. As noted below, it also fails to meet the Project capacity objectives.

The CC, I-5 Widening, A7C-ALPV, and AIO Alternatives are not “available” because they are excessively costly and resources are not available to construct them. App. 21-49 at p. 2-12.

The Commission’s dismissal of cost concerns was based **entirely** on the following statements:

The Commission does not agree that the CC, I-5 Widening, A7C-ALPV, and AIO Alternatives are infeasible due to cost, and, based on the evidence before it of a substantially lower cost I-5 alternative, as described in the “Smart Mobility” Reports, the Commission does not agree that TCA’s costs estimates provide realistic cost and social disruption comparisons. . . .

Opponents also point out that availability of funding should not be considered a constraint and recommend that TCA explore with the state financing solutions for such an alternative, including but not limited to a toll lane concept for use in I-5. . . .

Economic costs can be recaptured by tolls

App. 1-2 at pp. 126–127. The Commission’s mere conclusion that it “does not agree” with financial analyses provides no basis for its determination of availability. The claim that “availability of funding should not be considered a constraint” overtly conflicts with the CZMA standard for availability. Moreover, the unsupported assertion that economic costs could simply be recaptured by tolls is simply wrong. The so-called alternatives advocated by the Commission all entail improvements to existing free

¹⁸ Smart Mobility, Inc. does not include any engineers licensed to practice civil or traffic engineering in California. The preparation of the reports by Smart Mobility, Inc. violated the California Professional Engineers Act, which makes it a misdemeanor for anyone to practice engineering in California without a license or to suggest that they are licensed in California. See Cal. Bus. & Prof. Code §§ 6704, 6787(a); Complaint Against Smart Mobility, App. 72-98 at pp. 6–8.

roads and freeways. It is legally and technically infeasible to toll these existing free facilities. App. 20-49 at pp. 2-74 – 2-76. The Commission ignored relevant and contrary evidence, including Caltrans’ blunt and overarching explanation that the State “has no programmed funding for any capacity enhancement project for the I-5 in southern Orange County.” Also, it does not anticipate any funding from the federal government. Response to Staff Report (Jan. 9, 2008), Attachment 20, Caltrans letter (June 21, 2006), App. 8-20(B) at p. 2. As the Director of Caltrans stated during the Commission meeting: “That alternative [I-5 widening] cost is \$2.5 billion, which we do not have.” App. 3-8 at p. 363.

Alternatives that are unavailable because they do not meet the capacity needs of the Project include (i) the CC-ALPV and A7C-ALPV Alternatives, which performed poorly in improving traffic conditions, (ii) the AIO Alternative, which was the alternative with the least capacity to meet Project objectives, and (iii) the AIP-R alternative, which, in addition to its engineering flaws, proposes fewer lanes and deficient interchanges. App. 20-49 at pp. 2-12, 2-77 - 2-87. The Objection ignored all of these deficiencies; the full extent of the Commission’s reasoning was that “any of these alternatives would improve the region’s traffic congestion problems.” App. 1-2 at p. 124.

While each of these factors would, individually, be sufficient to determine “unavailability,” it is important to note (as the Commission did not) that these alternatives were rejected on the basis of multiple factors. For example, the AIO alternative was rejected both because of cost and because of its poor performance. The state and federal transportation and environmental agencies rejected other alternatives because of “availability” factors in conjunction with impacts discussed in the following section on “reasonableness.” App. 20-49 at pp. 2-10 – 2-13, 2-20, 2-77 – 2-87. For example, the I-5 widening alternative was rejected **both** because funding is not available and because of the extremely severe community and socioeconomic impacts it would create. App. 20-49 at pp. 2-12 – 2-13, 2-58. It would devastate coastal communities as thousands of residences, institutions, and businesses (scores of low and moderate income housing, and low-cost visitor serving uses, including hotels, motels,

restaurants, surf shops, and visitor-serving convenience stores) would be condemned. Because the Project is the only “available” alternative, the Objection should be overruled.

2. The Alternatives Listed In The Objection Are Not “Reasonable.”

The Secretary has stated that “[w]hether an alternative will be considered ‘reasonable’ depends upon its feasibility and upon balancing the estimated increased costs of the alternative against its advantages.” Southern Pacific Decision at p. 18. The weighing process involves assessing the differences in environmental impacts and cost between the proposed project and the alternatives. *Id.* at p. 18.

The Objection completely ignores the fact that two of its preferred alternatives, the CC and CC-ALPV, would have much more significant adverse environmental impacts than the Project, resulting in the large-scale destruction of wetlands and endangered species habitat. App. 3-20(B) at pp. 103–104; App. 20-49 at pp. 2–12. Although the Commission did not explain its reasoning, it apparently was selectively oblivious – for purposes of this particular finding - to impacts outside of the Project’s footprint in the coastal area. The federal agencies in charge of natural resources do not share this perspective, however, which was a significant factor in the selection of the Project as the LEDPA. App. 20-49 at pp. 2-10 – 2-13. When the differences in environmental impacts between the Project and these alternatives are weighed, it is clear that the Project is the only “reasonable” choice and was appropriately determined to be the LEDPA.

If the Commission ignored the impacts of alternatives on the natural environment, it was downright flippant about the alternatives’ impacts on humans and the economy. The Objection repeatedly belittles concerns over “community disruption,” claiming that concerns over the condemnation of thousands of homes, businesses, and institutions had been overweighted. App. 1-2 at pp. 126–127. The standard for “reasonableness,” however, requires consideration of the fact that the economic benefits of the Project would be greatly diminished by the massive condemnations of homes,

businesses, and institutions that would result from the CC, CC-ALPV, A7C-ALPV, and, especially, I-5 Widening alternatives.

In addition to downplaying the genuine human and economic costs of condemnations and community disruption, the Commission was also disingenuous in its representations that these impacts were the TCA's sole reason for preferring the Project. In every case in which community disruption was cited as a factor, there were additional reasons to determine that the alternative was unavailable or unreasonable. The Project is the only reasonable and available alternative, as is amply supported by the record.

IV. THE PROJECT IS NECESSARY IN THE INTEREST OF NATIONAL SECURITY.

A third and sufficient basis for the Secretary to override the Objective is that the Project is necessary in the interest of national security. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.122. The CZMA regulations provide that a federal license or permit activity is "necessary in the interest of national security" if a national defense or other national security interest would be significantly impaired if the activity were not permitted to go forward as proposed. *Id.* Under this standard, the Secretary should find that the Project is necessary in the interest of national security.

As detailed above in Section III.B.2, the Project will provide significant improvements to Camp Pendleton, planned and designed in consultation with the U.S. Marine Corps.

In addition, the Project will also provide an alternative route for deployment of U.S. Marine Corps forces from Camp Pendleton to their point of debarkation (March Air Force Base in Riverside County). An alternate route would be vital in the event of catastrophic loss to the southern Base exit points when Marine forces are being deployed to overseas bases or traveling to the Air Ground Combat Center at 29 Palms and Logistic Base at Barstow, California. Travel to these bases is cumbersome and time consuming. This project will provide a tactically safer, shorter route. App. 18-37 at p. 15. Camp Pendleton, an irreplaceable military training installation, is the Marine Corps' only amphibious training center for the west coast of the United States, where Marines are trained to meet the Marine Corps

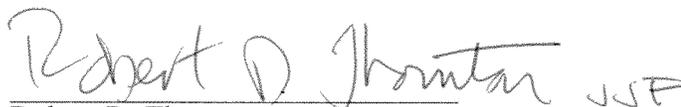
Mission as described in the Marine Corps Strategy 21. The task of maintaining and upgrading the Marine Corps' capability to effectively train Marines is an ongoing effort as facilities and procedures must be continually evaluated to ensure that the Marine training is commensurate with the skills the Marines will require to meet and defeat any potential hostile challenges to the nation's security and vital interests. The Project's contribution to this mission will increase the Marine Corps' ability to maintain and upgrade its training capabilities. The Project will contribute to the national defense and is necessary in the interest of national security.

CONCLUSION

For all of the foregoing reasons, the TCA respectfully requests that the Secretary override the Coastal Commission's Objection, and find that the Commission failed to comply with the CZMA and the CZMA regulations, that the Project is consistent with the objectives of the CZMA, and that the Project is necessary in the interests of national security.

Respectfully submitted,

Dated: March 17, 2008



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CERTIFICATE OF SERVICE

The undersigned declares:

I am employed in the County of Orange, State of California. I am over the age of 18 and am not a party to the within action; my business address is 18101 Von Karman Avenue, Suite 1800, Irvine, CA 92612.

Consistent with 15 C.F.R. § 930.127, on **March 18, 2008**, I served the foregoing **Appellants' Principal Brief of Appeal Under the Coastal Zone Management Act [CORRECTED]** on parties to the within action as follows:

Via Federal Express: One hard copy of the Appellant's Principal Brief of Appeal Under the Coastal Zone Management Act and Appendix to:

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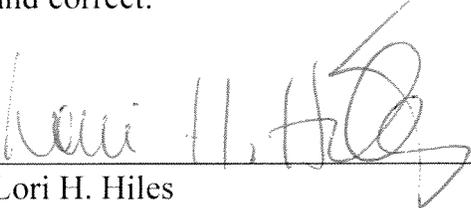
Via Federal Express: One electronic copy of the Appellant's Principal Brief of Appeal Under the Coastal Zone Management Act and Appendix to:

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- (By Overnight Service) I served a true and correct copy by overnight delivery service for delivery on the next business day. Each copy was enclosed in an envelope or package designated by the express service carrier; deposited in a facility regularly maintained by the express service carrier or delivered to a courier or driver authorized to receive documents on its behalf; with delivery fees paid or provided for; addressed as shown on the accompanying service list.
- (FEDERAL) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.
- Executed on March 18, 2008.



Lori H. Hiles

CERTIFICATE OF PERSONAL SERVICE

I, the undersigned, declare:

I am over the age of 18 years, employed in the District of Columbia, and am not a party to the above-entitled cause. My business address and place of employment is: **Same Day Process Service**, 1322 Maryland Ave. NE, Washington, DC 20002.

Consistent with 15 C.F.R. § 930.127, on March 18, 2008, I served the following document(s) **Appellants' Principal Brief of Appeal Under Coastal Zone Management Act [CORRECTED]** on the person(s) hereinafter mentioned by personally delivering a true copy thereof to a person accepting service as follows:

**U.S. Secretary of Commerce
Herbert C. Hoover Building
14th Street and Constitution Avenue,
NW
Washington DC 20230**

Executed on March _____, 2008.

(FEDERAL) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

(Printed Name)

(Signature)

CERTIFICATE OF PERSONAL SERVICE

I, the undersigned, declare:

I am over the age of 18 years, employed in the District of Columbia, and am not a party to the above-entitled cause. My business address and place of employment is: **Same Day Process Service**, 1322 Maryland Ave. NE, Washington, DC 20002.

Consistent with 15 C.F.R. § 930.127, on March 18, 2008, I served the following document(s) **Appellants' Principal Brief of Appeal Under Coastal Zone Management Act [CORRECTED]** on the person(s) hereinafter mentioned by personally delivering a true copy thereof to a person accepting service as follows:

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Executed on March _____, 2008.

(FEDERAL) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

(Printed Name)

(Signature)