UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

SEP 16 2008

Mr. James D. Ray
U.S. Department of Transportation
Federal Highway Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: Federal Consistency Appeal
Foothill/Eastern Transportation Corridor Agency

Dear Mr. Ray:

I am writing to provide your agency the opportunity to submit additional comments on the administrative appeal pending before the Secretary of Commerce (Secretary) concerning the Foothill/Eastern Transportation Corridor Agency (TCA) appeal of the California Coastal Commission's objection to the construction of TCA's proposed extension of California State Route 241 in Orange County, California. The appeal was filed under the Coastal Zone Management Act (CZMA).[1] The CZMA requires that interested or involved Federal agencies be afforded an opportunity to comment on the appeal. *See* 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.128(b).

In a letter dated May 23, 2008, your agency expressed views regarding the project that is the subject of this appeal. At that point, we understand that federal agency review of the project was ongoing, and that project alternatives were still being analyzed. Specifically, your letter stated that the Federal Highway Administration and other federal agencies "are continuing the [National Environmental Policy Act (NEPA)] review of project impacts" and though the process is not complete the FHWA is "optimistic that further collaboration with the [California Coastal Commission] and others could lead us to an appropriate alternative." In light of this, we would appreciate any additional comments your agency may have as the result of the ongoing review referenced in your letter with respect to the project and the project alternatives and any additional information or analysis that has been developed since your previous comments to us.

As you may recall, TCA has requested the Secretary override the California Coastal Commission's objection on two substantive grounds: (1) the proposed activity is consistent with the objectives of the CZMA, 16 U.S.C. § 1456(c)(3)(A); and (2) the proposed activity is necessary in the interest of national security, 16 U.S.C. § 1456(c)(3)(A). To conclude that an

[1] Section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended, (CZMA), 16 U.S.C. § 1451 et seq. The Department of Commerce's implementing regulations for CZMA appeals are found at 15 C.F.R. Part 930, Subpart H. For additional background on TCA's proposed project, please refer to the appeal record made available via the Internet at *http://www.ogc.doc.gov/czma.htm*.

activity is "consistent with the objectives of the CZMA," the Secretary must find: (1) the proposed activity furthers the national interest as articulated in section 302 or 303 of the CZMA, in a significant or substantial manner; (2) the national interest furthered by the proposed activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively; and (3) no reasonable alternative is available that would permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the California's coastal zone management program.

Where project alternatives are at issue, as they are in this case, the Secretary examines the alternatives that the state asserts are consistent with its coastal zone management program to determine if these alternatives are reasonable and available. Under the CZMA, an alternative is "available" if the appellant is able to implement an alternative that achieves the primary or essential purpose of the project. Relevant tests for availability include whether there is a technical or legal barrier to implementing the alternative and whether the resources to implement the alternative exist. An alternative is "reasonable" if its advantages to the resources and uses of the state's coastal zone exceed the alternative's increased costs, if any.

I am requesting any additional views your agency may wish to provide on the substantive grounds and criteria identified above, including the specific findings the Secretary must make in support of a decision that a project is consistent with the objectives of the CZMA.

In order for this appeal to be decided in a timely fashion, it is respectfully request that your views be submitted no later than **October 7, 2008**. Please forward any comments to: Thomas Street, Attorney-Advisor, Office of the General Counsel for Ocean Services, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, 1305 East-West Highway, Suite 6111, Silver Spring, Maryland 20910.

Should your staff have questions concerning this letter, please contact Mr. Thomas Street at (301) 713-7390 or by email at thomas.street@noaa.gov.

Sincerely,

Joel La Bissonniere
Assistant General Counsel for Ocean Services