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

OFFICE OF THE GENERAL COUNSEL

SEP 16 2008

MEMORANDUM FOR: Anthony Morton
Deputy Regional Administrator
National Marine Fisheries Service (NMFS)
Southwest Region

Anthony Spina
Fishery Biologist
NMFS, Southwest Region

Stan Glowacki
Fishery Biologist
NMFS, Southwest Region

FROM: Joel La Bissonniere
Assistant General Counsel
for Ocean Services

SUBJECT: Request for Comments in Consistency Appeal of Foothill/Eastern Transportation Corridor Agency

I am writing to provide the Protected Resource Division of the Southwest Regional Office 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 June 20, 2008, you expressed views regarding the project that is the subject of this appeal. Among other things, you stated that "the project as proposed is not likely to adversely affect the Southern California [District Population Segment] of steelhead," but a project location further from the San Mateo Creek Estuary, in your view, would be preferable for the steelhead. At the time that you submitted these comments, we understand that federal agency review of the project was ongoing, and various project alternatives were still under

[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.*

consideration. In light of this, we would appreciate any additional comments your agency may have with respect to the project and the project alternatives as the result of 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 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.