



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

**75 Hawthorne Street
San Francisco, CA 94105**

May 28, 2008

**OFFICE OF THE
REGIONAL ADMINISTRATOR**

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

Subject: Comments on the Federal Consistency Appeal by Foothill/Eastern Transportation Corridor Agency for the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP), Southern Orange County and Northern San Diego County, California

Dear Mr. Street:

This letter responds to the May 1, 2008 letter from your office requesting comments on the Federal Consistency Appeal by Foothill/Eastern Transportation Corridor Agency (TCA). The Environmental Protection Agency (EPA) has reviewed the Federal Register Notice dated March 17, 2008 (Volume 73, No. 52, pp. 14225-14266) concerning the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP) and the appeal by the TCA of the decision to deny federal consistency with the Coastal Zone Management Act (CZMA). EPA has also reviewed the principal briefs prepared by the Appellants and the Respondent California Coastal Commission (CCC) and filed pursuant to 307(c)(3)(A) of CZMA and 15 CFR 930.127.

The EPA, Department of the Army Corps of Engineers (Corps), Department of Interior Fish and Wildlife Service (USFWS), Federal Highway Administration (FHWA), and the California Department of Transportation (Caltrans) have been coordinating the development of the project's environmental impact statement (EIS) by following integration procedures in a 1994 environmental streamlining process for transportation projects titled the "National Environmental Policy Act and Clean Water Act Section 404 Integration Process for Surface Transportation Projects in Arizona, California, and Nevada Memorandum of Understanding" (NEPA/404 MOU). The purpose of the NEPA/404 MOU is to integrate NEPA review and Clean Water Act (CWA) Section 404 considerations into the transportation planning, programming and

implementation stages. Notably, the NEPA/404 MOU is clear on its face that “Regulatory/resource agency participation in this process does not imply endorsement of all aspects of a transportation plan or project. Nothing in this MOU is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities of the agencies involved.” NEPA/404 MOU at I.B. Through this NEPA/404 MOU process, EPA has provided early input on the development of the EIS as a member of an interagency group, known as the “SOCTIIP Collaborative”, which includes the NEPA/404 MOU agencies, as well as the project proponent TCA and Marine Corps Base Camp Pendleton.

Through this letter, EPA provides information for the Secretary of Commerce to consider in the decision on whether or not to override CCC’s objection on grounds that the project is consistent with the objectives or purposes of the CZMA or otherwise necessary in the interest of national security.

Conformity and Compliance with Clean Air Act

Generally, in the context of roadway project proposals, EPA’s role under the federal Clean Air Act (CAA) is to act on submittals of related State Implementation Plans revisions (“SIPs”), to review and comment on related environmental impact documents, and to participate in the interagency consultation process for transportation conformity. See CAA sections 110(k), 176(c), and 309(a). The following information clarifies the process that is available to Southern California Association of Governments (SCAG) regarding air quality conformity as it relates to this project.

As noted above, under the CAA, EPA is responsible for review and action on SIPs that demonstrate how areas will improve air quality. Those air quality plans may include Transportation Control Measures (TCMs), which under Section 108 of the CAA, support the air quality plans by providing emission reductions by reducing vehicle use or changing traffic flow or congestion conditions. The SOCTIIP project originally included High Occupancy Vehicle (HOV) lanes, which are approved into the SIP as a type of TCM to provide emissions reductions for the South Coast ozone nonattainment area. The project was later modified to remove the HOV lanes, but included pricing mechanisms designed to maintain similar traffic conditions as HOV lanes on the facility. Therefore, the project continues to be classified as a TCM.

Section 176(c) of the CAA requires Metropolitan Planning Organizations, such as SCAG, to show that federally supported highway and transit projects conform to the purpose of the SIP. As a part of these conformity analyses, SCAG must show TCMs in the South Coast SIP are implemented on schedule. In TCA’s brief to the Secretary of Commerce, (pages 5, 25; see also page 29), TCA states that “*The Commission’s Objection jeopardizes Southern California compliance with the Clean Air Act and threatens federal funding for all transportation projects in Southern California*”. However, as discussed during a recent interagency call with SCAG and TCA on April 30th, any emission shortfall from a TCM that does not proceed can be remedied by substituting another TCM with equivalent emissions reductions.

Section 176(c) of the CAA includes procedures that allow areas to substitute TCMs for projects that do not go forward without the need for a full rulemaking process. EPA can now

concur on a replacement TCM through a letter from the Regional Administrator. The replacement TCM must achieve equal or greater emission reductions; be implemented on a consistent schedule; and be supported by adequate resources and authority to be implemented, monitored and enforced. In recent discussions regarding the SOCTIIP project, SCAG shared with EPA that estimated emissions reductions from implementing the SOCTIIP project are not yet known, but are expected to be modest.¹ Thus, if SOCTIIP cannot be completed, SCAG would need to carry out the interagency consultation process and replace the existing TCM with a new TCM with the same emission reductions. SCAG has already initiated the process, which has generally taken six months, to replace other projects that have been delayed or modified in the past. Most recently, EPA concurred on SCAG's request to replace the 8-mile Centerline light rail project in July of 2006. EPA strongly supports measures to achieve and maintain air quality conformity in the South Coast Air Basin and is available to assist SCAG in finding replacement emissions reductions.

Clean Water Section 404

The following information highlights EPA's involvement with the project as it relates to our CWA authority and the current status of our coordination.

Under the CWA, EPA and the Corps share responsibility for the Section 404 Program which regulates the discharges of dredged or fill material into waters of the United States, helping to protect wetlands and other aquatic resources. Although the Corps is responsible for the day-to-day administration of the CWA Section 404 program, including reviewing permit applications and deciding whether to issue or deny permits, EPA has a number of important CWA Section 404 responsibilities. In consultation with the Corps, EPA developed the CWA Section 404(b)(1) Guidelines (Guidelines), which are the environmental criteria that the Corps must apply when deciding whether to issue permits. To comply with the Guidelines, the applicant must clearly demonstrate that the "preferred" alternative is the Least Environmentally Damaging Practicable Alternative (LEDPA) that achieves the basic project purpose. The Guidelines describe a series of independent tests against which a proposed discharge must be evaluated [40 CFR 230.10(a)-(d)].

Although the Corps is ultimately responsible for identifying the LEDPA and ensuring the project complies with the Guidelines, Section 404(c) of the CWA, authorizes EPA to restrict, prohibit, deny or withdraw the use of an area as a disposal site for dredged or fill material if the discharge will have unacceptable adverse effects.

In accordance with procedures set forth in the NEPA/404 MOU, in November 2005, EPA and the Corps provided concurrence to FHWA that the A7C-FEC-M Initial Alignment (also referred to as the "Green Alignment") appeared to be the alternative most likely to represent the LEDPA. This preliminary LEDPA determination was based on best information available at the time. However, this preliminary determination does not constitute EPA's or the Corps' final

¹ We note that substitution of TCMs depends upon identification of alternate or additional TCMs that provide equivalent or greater emissions reductions of applicable "criteria air pollutant" emissions (i.e., those for which national ambient air quality standards have been established), not greenhouse gas emissions. See CAA 176(c)(8)(A).

determination as to what constitutes the LEDPA for purposes of regulatory decisionmaking under CWA Section 404. The Corps is required to develop its own administrative record analyzing, among other things, the availability of alternatives and the impacts of such alternatives. Information developed through the SOCTIIP Collaborative process will help inform that decision. Furthermore, the Corps will also need to consider information developed following the preliminary LEDPA determination in making its permit decision, including, but not limited to, all public comments. Similarly, when EPA provides its comments to the Corps with regard to this project's compliance with the Guidelines, we will consider the information developed through the Collaborative process and will also consider any newly developed information pertinent to compliance with these regulations.

It is also important to note that, identification of the preliminary LEDPA through the NEPA/404 MOU and Collaborative process does not render other toll road alternatives considered in the Draft EIS impracticable for purposes of CWA Section 404 permitting. The Guidelines define "practicable" as available and capable of being done, taking into account cost, existing technology, and logistics, in light of the overall project purpose [40 CFR 230.10(a)(2)].

The Draft EIS was issued four years ago and our 2005 concurrence on the preliminary LEDPA was based on then available information. New information is now available that may affect analysis of project alternatives. We will continue to review this information internally and have asked FHWA, as lead federal agency, to consider this information, as well as other factors that may influence the LEDPA determination in their reevaluation of the Draft EIS (as required under 23 CFR 771.129). FHWA Headquarters has offered to provide technical assistance in addressing potential new information and is currently coordinating with our agency.

EPA has not yet provided final formal review comments for the project, and will do so once the Final EIS is published. EPA will continue to coordinate on the project pursuant to the NEPA/404 MOU and pursuant to our authorities under the CWA and NEPA, Council on Environmental Quality (CEQ) regulations (40 CFR Parts 1500-1508), Section 309 of the Clean Air Act.

Thank you for considering the above comments during the appeal process. If you have any questions or comments, please feel free to contact me at 415-947-8702 or your staff may contact Enrique Manzanilla, Director of the Communities and Ecosystems Division, at 415-972-3843.

Sincerely,

/s/

Wayne Natri
Regional Administrator

CC: Gene Fong, Federal Highway Administration
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