DECISION AND FINDINGS

BY THE

U.S. SECRETARY OF COMMERCE

IN THE CONSISTENCY APPEAL OF THE

FOOTHILL/EASTERN TRANSPORTATION CORRIDOR AGENCY

AND THE BOARD OF DIRECTORS OF THE

FOOTHILL/EASTERN TRANSPORTATION CORRIDOR AGENCY

FROM AN OBJECTION BY THE

CALIFORNIA COASTAL COMMISSION

DECEMBER 18, 2008

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I. INTRODUCTION

The Foothill/Eastern Transportation Corridor Agency, a California joint powers agency,[1] and its Board of Directors (collectively, TCA or Appellant) propose to construct a toll road extending approximately 16 miles in length, beginning at the existing terminus of State Route 241 (SR-241) in southern Orange County, California, and connecting to Interstate 5 (I-5) at Cristianitos Road in San Diego County, California (collectively, the Project). The southernmost portion of the Project would pass through a portion of Marine Corps Base Camp Pendleton, on lands currently leased by the Department of the Navy to the State of California for use as San Onofre State Beach. The primary purpose of the Project 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 of existing roads connecting with I-5.[2]

The California Coastal Commission (Commission)[3] reviewed the Project pursuant to section 307(c)(3)(A) of the Coastal Zone Management Act (CZMA), and implementing regulations of the Department of Commerce (Department) as set forth at 15 C.F.R. Part 930, Subpart D.[4] The Commission objected to the Project, finding it inconsistent with enforceable policies of the California's Coastal Management Program (Program) related to surfing, public access, environmentally sensitive habitat areas, air quality, and wetlands.[5] The Commission also found that TCA had not provided sufficient information for the Commission to determine whether the Project was consistent with enforceable policies related to water quality, wetlands, archeological resources, and greenhouse gas

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[1] The agency is composed of representatives from Orange County and 12 Orange County cities. See Appellant's Principal Brief of Appeal under the Coastal Zone Management Act, at 5 (Mar. 18, 2008) (hereinafter TCA Initial Brief).

[2] Draft Environmental Impact Statement/Final Supplemental Environmental Impact Report (Dec. 2005) (Draft EIS/SEIR), Appendix to TCA Initial Brief (App.) Vol. 20, Tab 49, at 1-16. The area studied encompasses the southeast part of Orange County and the northernmost part of San Diego County, and the ten cities bordering or in the vicinity of I-5 between its confluence with Interstate 405 in central Orange County and its intersection with Basilone Road in San Diego County. App. Vol. 20, Tab 48, at ES-20.

[3] The Commission is designated as California's "coastal zone planning and management agency" and is endowed with "any and all powers [as] set forth in the [CZMA]." Cal. Pub. Res. Code § 30330.

[4] The Commission's review of TCA's consistency certification is triggered by the Project's need for a Clean Water Act permit pursuant to Section 404, 33 U.S.C. § 1344. The Project also requires authorization from the Federal Highway Administration for its interconnection with I-5.

[5] Letter from Mark Delaplaine, Commission, to Thomas E. Magro, TCA (Feb. 13, 2008), App. Vol. 1, Tab 1.

emissions.[6] TCA filed a timely notice of appeal, requesting an override of the Commission's objection as provided in the CZMA.[7]

The Commission's objection is sustained. As explained more fully below, the record establishes that there is an available and reasonable alternative to the Project that would permit the activity to be conducted in a manner consistent with the enforceable policies of California's Program. Further, the record establishes that the Project is not necessary in the interest of national security. Given these findings, it is not necessary to address the other substantive issues raised by the parties in this appeal. In light of this decision, the Commission's objection to the Project operates as a bar under the CZMA to Federal agencies issuing licenses or permits for the Project. This decision, however, in no way prevents TCA from adopting the alternative discussed in this decision, or other alternatives determined by the Commission to be consistent with California's Program. In addition, the parties are free to agree to other alternatives, including alternatives not yet identified, or modifications to the Project that are acceptable to the parties.

II. STATUTORY FRAMEWORK

The CZMA provides states with Federally approved coastal management programs the opportunity to review a proposed project requiring Federal licenses or permits if the project will affect any land or water use or natural resource of the state's coastal zone. A timely objection raised by a state precludes Federal agencies from issuing licenses or permits for the project, unless the Secretary of Commerce finds that the activity is either:

- "consistent with the objectives of [the CZMA];" or
- "necessary in the interest of national security."[8]

A finding that a project satisfies either results in an override of a state's objection. A license or permit applicant may appeal a state's objection and request that the objection be overridden.

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[6] Id.

[7] Notice of Appeal of Foothill/Eastern Transportation Corridor Agency and the Board of Directors of the Foothill/Eastern Transportation Corridor Agency from the Objection of the California Coastal Commission (Feb. 15, 2008).

[8] 16 U.S.C. § 1456(c)(3)(A) ("No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.").

III. PUBLIC INVOLVEMENT

This case was the focus of substantial public interest and input. The public was afforded the opportunity to comment on the appeal during three designated public comment periods totaling 74 days. Comments from interested Federal agencies were also solicited. As of the date of the closure of the decision record, the Department had received comments—both in support of and in opposition to the Project—from over 30 Members of Congress, dozens of state legislators, numerous national and local organizations, and tens of thousands of individuals from across the United States. The Department also held a 10-hour public hearing in Del Mar, California, on September 22, 2008. In its analysis of this appeal, the Department has considered the comments received and the testimony provided at the public hearing.

IV. THRESHOLD ISSUES

Several challenges by TCA to the sufficiency of the Commission's objection must be addressed before the merits of the appeal are considered. TCA argues that the Commission's objection should be dismissed because it is not in compliance with Section 307 of the CZMA.[9] Specifically, TCA argues that: (a) the Project is not located in the "coastal zone," as defined by the CZMA; (b) the California Coastal Act does not authorize the Commission to exercise consistency review of projects located outside of the coastal zone; and (c) the Commission failed to comply with the CZMA and implementing regulations for consistency review of projects located outside of the coastal zone. Further, TCA argues that the Department should override the Commission's objection as procedurally defective because it is grounded in part on insufficient information.

For the reasons set forth below, the Commission's objection is sufficient to withstand dismissal on procedural grounds.

A. Although the Project Is on Federal Land Excluded from the Definition of the Coastal Zone under the CZMA, the Commission Has Consistency Review Jurisdiction over the Project.

TCA argues that the Commission may not review the Project for consistency with its Program because no part of the Project's route runs through the state's "coastal zone," as that term is defined by the CZMA.[10] Specifically, TCA argues that the only portion of the Project located inside the state-defined coastal zone boundary is on lands owned and

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[9] See TCA Initial Brief, at 10-11.

[10] See TCA Initial Brief, at 11-13; Respondent California Coastal Commission's Principal Brief of Appeal under the Federal Coastal Zone Management Act, at 10-11 (Apr. 11, 2008) (hereinafter Commission Initial Brief).

operated by the Federal government as Marine Corps Base Camp Pendleton[11] and this area is excluded from California's coastal zone and outside of the Commission's CZMA-review jurisdiction.

At the outset, it is important to note the distinction between a state's "coastal zone" and its "coastal zone boundary." A state's coastal zone is generally composed of a state's coastal waters and adjacent shorelands.[12] The state's coastal zone boundary generally defines the outer margin of the lands and waters comprising the state's coastal zone. Not all lands inside a state's coastal zone boundary, however, are necessarily considered part of a state's coastal zone. Some lands inside a state's coastal zone boundary may be excluded from a state's coastal zone.

The CZMA provides that "[e]xcluded from the coastal zone are 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."[13] The CMZA implementing regulations provide that "[t]he boundary of a State's coastal zone must exclude lands owned, leased, held in trust or whose use is otherwise by law subject to the discretion of the Federal Government, its officers or agents."[14] These descriptions of Federal lands excluded from a state's coastal zone are further informed by a 1976 opinion by the U.S. Department of Justice's Office of Legal Counsel interpreting the language of the CZMA. The Office of Legal Counsel

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[11] See Letter from Colonel J.B. Seaton, United States Marine Corps, to Thomas Street, National Oceanic and Atmospheric Administration (NOAA), at 1 (May 22, 2008). The land upon which Camp Pendleton sits was acquired by the United States through condemnation in 1942. See United States v. Jenkins, 734 F.2d 1322, 1325 n.2 (9th Cir. 1983). The United States accepted exclusive jurisdiction over the lands in 1943 and 1944. See United States v. Fallbrook Pub. Util. Dist., 110 F. Supp. 767, 771 (S.D. Cal. 1953). In 1971, the United States leased the area in which the Project is proposed to the California Department of Parks and Recreation through 2021 for use as a public park. See Agreement of Lease between the State of California, Department of Parks and Recreation and the United States of America (Sept. 1, 1971), App. Vol. 76, Tab 133. The lease reserved the right of the United States, after consultation with California as to location, to grant future leases and rights of way over, across, in and upon the property, provided, inter alia, that any such easement or right of way be located so as not to unreasonably interfere with the use improvements erected on the leased property by the state. Id. Concurrent jurisdiction over the leased area in question was ceded to California in 1973 and in 1974 for a park and I-5, respectively. See Commission Initial Brief, at 10. In 1998, Congress expressly authorized the Secretary of the Navy to grant an easement through Camp Pendleton to permit the recipient of the easement to construct, operate, and maintain a restricted access highway. See Pub. L. No. 105-261 § 2851 (1998), as amended by Pub. L. No. 107-107 § 2867 (2001), as amended by Pub. L. No. 110-181 § 2841 (2008).

[12] 16 U.S.C. § 1453(1).

[13] Id.

[14] 15 C.F.R. § 923.33(a) (emphasis added). See also NOAA Interim Final Rule Relating to Approval Requirements for State Coastal Zone Management Programs, 43 Fed. Reg. 8,378, 8,388 (Mar. 1, 1978) ("With respect to the commentator's concern about Federal lands leased to private parties, NOAA's position is that the lands themselves, if owned by a Federal agency regardless of whether leased to a private party, are excluded. However, the activities of the private party on those leased lands are subject to the provisions of the State's management program if such activities have effects on the State's coastal zone.").

opined that all lands owned by the Federal government are excluded from the coastal zone.[15] This is true for lands held by the United States as proprietor as well as lands over which the United States and a state exercise concurrent jurisdiction.[16]

In the current case, the Federal government owns in fee all of the land upon which the Project would occur inside the coastal zone boundary. Based on the CZMA and its supporting regulations, this land is excluded from the coastal zone regardless of the lease status upon which the Commission bases its arguments. Accordingly, none of the Project is located in the coastal zone.

While the Project's route is entirely outside California's coastal zone, the Commission properly exercised its right to review the Project for consistency with the enforceable policies of its Program, because the record indicates that the Project affects land or water uses of California's coastal zone.[17] Pursuant to the CZMA, any applicant for a required Federal license or permit to conduct an activity, inside or outside the coastal zone, affecting any land or water use or natural resource of the coastal zone, shall certify to the coastal state that the proposed activity is consistent with enforceable policies of the state's Federally approved coastal management program.[18] A state has six months to review an applicant's consistency certification for compliance with its coastal management program.[19] This review attaches to any "activity" having reasonably

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[15] Memorandum for William C. Brewster, Jr., General Counsel, NOAA, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, re: Lands owned by the United States subject to the state planning and regulatory process under the CZMA (Aug. 10, 1976). The memorandum concludes:

> In short, the plain language of the statute appears to exclude all lands owned by the United States, since the United States has full power over the use of such lands and "sole discretion" with respect to such use. This conclusion is supported by the legislative history of the [CZMA]. Nowhere is there any suggestion that Congress intended to exclude some federal land from the Coastal Zone, and hence from State regulation, while including other such land within the Zone. We might add that the results of such an intent would be whimsical; as the submission of the Department of Defense notes, by way of example, part of the Naval base at Sewells Point in Norfolk is subject to exclusive federal legislative jurisdiction, part is subject to concurrent jurisdiction and part is held in a purely proprietary capacity. * * * Accordingly, it is my opinion that the exclusionary clause excludes all land owned by the United States from the definition of the Coastal Zone.

Id. at 12 (footnote omitted).

[16] Id. at 3.

[17] 16 U.S.C. § 1456(c)(3)(A) (providing that "any applicant for a required Federal license or permit to conduct an activity, in or outside the coastal zone, affecting any land or water use or natural resource of the coastal zone" must provide a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program) (emphasis added).

[18] Id.

[19] 15 C.F.R. § 930.60; 15 C.F.R. § 930.62.

foreseeable coastal effects, regardless of whether it is located "inside or outside the coastal zone."[20]

Although the extent of the Project's effects is in dispute, the record shows that the Project affects coastal uses and resources to some degree. Effects on coastal uses and resources are not limited to direct effects; rather, effects include "any reasonably foreseeable effect," including "indirect (cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable."[21] In the present case, the Project has a reasonably foreseeable effect on coastal uses. For example, the Project will affect coastal recreation by developing a portion of San Onofre State Beach, a popular state park used by beachgoers and surfers at Trestles Surf Break. The Project also will have reasonably foreseeable effects on coastal resources. Coastal resources include biological and physical resources (such as vegetation, minerals, and animals) that are found in the state's coastal zone on a regular or cyclical basis.[22] Here, the Project affects, among other things, several coastal species listed as endangered or threatened under the Endangered Species Act,[23] such as the tidewater goby and the coastal California gnatcatcher, which are found in various locations within the coastal zone, and their habitats.[24]

In sum, while the Project's route is wholly outside of the coastal zone, the record shows that the Project nevertheless affects—directly, indirectly, or cumulatively—coastal uses and resources. Consequently, the Commission properly exercised its consistency review jurisdiction over the Project.

B. The California Coastal Act Does Not Bar Consistency Review of Activities Located Outside of the Coastal Zone.

TCA argues that the California Coastal Act restricts the Commission's consistency review jurisdiction to those projects located wholly within the state's coastal zone.[25] In support of its argument, TCA relies upon a 2005 California Supreme Court decision, Sierra Club v. California Coastal Commission.[26]

In Sierra Club, the California Supreme Court held that the Commission lacked the authority to deny a state permit request based upon impacts within the coastal zone

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[20] 16 U.S.C. § 1456(c)(3)(A).

[21] 15 C.F.R. § 930.11(g).

[22] 15 C.F.R. § 930.11(b).

[23] 16 U.S.C. § 1533.

[24] For a more detailed discussion of the effects of the Project see Section V.A.4, infra.

[25] See TCA Initial Brief, at 15-17.

[26] 111 P.3d 294 (Cal. 2005).

arising from development outside the coastal zone.[27] The project at issue was a housing development and access road that straddled the coastal zone.[28] Relying on the plain language of the California Coastal Act, the California Supreme Court found that California state law expressly limits the Commission's state permitting authority to projects or portions of projects occurring within the coastal zone.[29]

Sierra Club is readily distinguishable from the present appeal. The decision was limited to the Commission's exercise of its state permitting authority, which is explicitly circumscribed in the California Coastal Act[30] and distinct from the Commission's Federal consistency review authority under the CZMA. The California Coastal Act explicitly authorizes the Commission to exercise "any and all powers set forth in the Federal Coastal Zone Management Act,"[31] and, as discussed above, the CZMA does not limit Commission's Federal consistency review authority to activities occurring inside the coastal zone, but rather authorizes it to review Federally licensed or permitted activities "in or outside the coastal zone, affecting any land or water use or natural resource of the coastal zone."[32]

In sum, the Commission is not restricted by the California Coastal Act in its Federal consistency review because the Project's route lies entirely outside of the state's coastal zone boundary.

C. The Commission Properly Exercised Consistency Review over the Portion of the Project Lying Outside of the Coastal Zone Boundary.

TCA argues that the Commission lacks jurisdiction to exercise Federal consistency review over the portion of the Project (approximately 14 miles of the proposed toll road) lying outside of California's coastal zone boundary. Specifically, TCA contends that a state is required to describe in its coastal management program the geographic location of activities outside the coastal zone boundary that the state chooses to review and that the Commission failed to do so here.[33] This argument is unpersuasive. The Commission has

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[27] Id. at 301-10.

[28] Id. at 295.

[29] Id. at 300-06.

[30] See Cal. Pub. Res. Code § 30604.

[31] See Cal. Pub. Res. Code § 30330.

[32] 16 U.S.C. 1456(c)(3)(A).

[33] See TCA Initial Brief, at 13-14 (citing 15 C.F.R. § 930.53(a)(1)). In response, the Commission argues that it need not adhere to the geographic-description regulations because NOAA's approval of California's Program under CZMA regulations in effect in 1977 did not include a requirement to specify geographic locations. See Commission Initial Brief, at 11-12. In support, the Commission cites State of California v. Mack, 693 F. Supp. 821 (1988) (holding that NOAA lacks the authority to revisit the contents of an

Footnote continued on next page

automatic authority to review the Project without the need for a further geographic description in its Program, because a portion of the Project (approximately 2 miles of the proposed toll road) lies inside California's coastal zone boundary on excluded Federal lands. This review authority in turn then extends to all physically connected portions of the Project, regardless of whether they occur inside or outside the coastal zone boundary.

As discussed above, pursuant to the CZMA, states with Federally approved coastal management programs may review activities (inside or outside the coastal zone) requiring a Federal license or permit for impacts to land or water uses or natural resources of the coastal zone.[34] States are required to develop a list of Federal license or permit activities affecting coastal uses or resources, which becomes part of the state management program.[35] For activities that occur inside the coastal zone or inside the coastal zone boundary on excluded Federal land, no further geographic description of the area where these activities occur is required.[36] For activities outside the coastal zone boundary, the state must generally describe in its coastal management program the location of such activities.[37]

TCA contends that—even if the geographic description requirement does not apply to the portion of the Project occurring within the state's coastal zone boundary on excluded Federal land—for the portion of the Project lying outside of the coastal zone boundary, the Commission was required to, and failed to, provide the necessary geographic description in its Program. By this reasoning, TCA concludes that the Commission

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approved coastal management program). The Commission's reliance upon Mack is misplaced. The Mack court was addressing the situation where NOAA conditioned a Federal grant on California's amendment of its Program, which is not the case here. The Mack court acknowledged its decision "does not mean that an approved plan is set in stone." Id. at 825. Even after a coastal management program is approved, later changes to the CZMA regulations apply. The failure of this argument by the Commission notwithstanding, the Commission does have jurisdiction over the Project for the reasons set forth above.

[34] 16 U.S.C. § 1456(c)(3)(A).

[35] 15 C.F.R. § 930.53(a).

[36] 15 C.F.R. § 930.53(a)(1) provides in relevant part:

> 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 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. Federal lands located within the boundaries of a State's coastal zone are automatically included within the geographic location description; State agencies do not have to describe these 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.
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> (Emphasis added).

[37] 15 C.F.R. § 930.53(a).

cannot exercise consistency review authority with respect to the approximately 14-mile portion of the Project outside the coastal zone boundary.

Contrary to TCA's argument, once it is determined that part of an activity is subject to consistency review, the review extends to all physically connected portions of the same activity, even if the activity crosses the coastal zone boundary and continues outside of it. The geographic location description for Federal license or permit activities serves only to notify applicants and Federal agencies that a listed activity located entirely outside of the coastal zone boundary has coastal effects and is subject to Federal consistency review. Where an activity bisects the coastal zone boundary, it would make little sense to divide the activity and subject only that portion of the activity located within the state coastal zone boundary to consistency review. Consistency review attaches to an "activity" with reasonably foreseeable coastal effects regardless of where it occurs,[38] not some piece of an activity that occurs in a specific geographic region.[39]

This holistic approach to consistency review is reflected in recent consistency appeal decisions. Most recently, in the AES Sparrows Point Liquefied Natural Gas, LLC consistency appeal, the Department considered, among other issues, the coastal effects of a terminal and associated pipeline in its entirety, notwithstanding the fact that only a 48-mile portion of the 88-mile pipeline was located in the coastal zone, with the balance situated outside.[40] Notably, this holistic approach is not a vast expansion of a state's jurisdiction, because consistency review of an activity—whether the activity occurs in whole or in part inside or outside the coastal zone—extends only to the activity's reasonably foreseeable effects on coastal uses and resources.

In short, and in accordance with the CZMA and its implementing regulations, if any portion of an activity is subject to Federal consistency review, physically connected portions of the same activity are likewise subject to review to the extent that they impact coastal uses or resources, whether or not the entire project lies in a geographic area described in a state's coastal management program. Here, the Commission has consistency review jurisdiction over the portion of the Project lying inside the coastal zone boundary on excluded Federal land without the need to describe this geographic area in its Program, and the remainder of the Project is a physically connected part of the same activity. Accordingly, the Commission has consistency review jurisdiction over the entire Project.

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[38] 16 U.S.C. § 1456(c)(3)(A) (subjecting to a state's consistency review activities "in or outside the coastal zone" that require Federal permits and affect coastal uses or resources).

[39] This position is consistent with long-standing NOAA policy. See Letter from David W. Kaiser, NOAA, to Mark Delaplaine, Commission (Jan. 26, 2001).

[40] See Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of AES Sparrow Point LNG, LLC and Mid-Atlantic Express, LLC, from an Objection by the State of Maryland, at 28 (June 26, 2008) (hereinafter AES).

D. The Commission Did Not Improperly Base Its Objection on Insufficient Information.

TCA argues that the Commission's objection is procedurally defective because it was based, in part, upon an allegation of insufficient information and included alternative, inconsistent bases for objection. According to TCA, the Commission was barred by the CZMA regulations from objecting based on insufficient information because the Commission did not dispute that "all necessary data and information" had been submitted for purposes of triggering the commencement of its six-month review period.[41] Further, TCA argues that the Commission cannot concurrently raise alternative, inconsistent objections based upon both the lack of information and project inconsistency. TCA's arguments are not persuasive.

In examining this issue, it is not necessary to review the merits of the Commission's objection based on insufficient information. Instead, the Department's inquiry is limited to assessing whether the Commission followed the proper procedures in making its objection.[42] Here, the Commission's objection is procedurally proper.

Under the CZMA regulations, a state is entitled to certain information from applicants in order to evaluate a project for consistency with its coastal management program. This information is defined as "necessary data and information,"[43] and the state's six-month consistency review period does not begin until this information is provided.[44] Contrary to TCA's suggestion, however, a state may also require that an applicant provide it with "other information necessary for the State agency to determine consistency" with the enforceable policies of its coastal management program.[45] If this other information is not provided within the six-month review period, the state may object to the applicant's consistency certification on the basis of insufficient information.[46] To object properly on this basis, the state must describe in its objection the nature of the information requested and the reason such information is necessary to determine consistency.[47]

Based on the foregoing, TCA's argument—that the Commission is barred from objecting based on insufficient information—is rejected. In its objection (and attached Adopted Staff Report), the Commission described the nature of the information that it had

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[41] See TCA Initial Brief, at 17-18 (citing 15 C.F.R. § 930.60).

[42] See AES, at 7.

[43] 15 C.F.R. § 930.58.

[44] 15 C.F.R. § 930.60(a).

[45] 15 C.F.R. § 930.63(c).

[46] Id.

[47] Id.

requested from TCA (related to wetlands, water quality, archeology, and greenhouse gas emissions), as well as the necessity of having such information to determine consistency with California's Program.[48] This description satisfies the requirements for objecting based on insufficient information.[49]

TCA's second argument—that the Commission may not base its objection on alternative, inconsistent bases—is likewise rejected. Specifically, TCA argues that the Commission should not be permitted to object because it lacked sufficient information to evaluate adverse effects, but then also object because Project impacts to resources were inconsistent with the enforceable policies of its Program. Put another way, TCA argues that, if the Commission had enough information to determine that the Project effects were inconsistent with its Program, then by definition the Commission possessed sufficient information. TCA's argument is unpersuasive. The Commission's inconsistency objection related to a number of effects that were not the subject of an insufficient information objection (e.g., surfing, public access, recreation, public views, and environmentally sensitive habitat areas). Additionally, even for those effects covered by both objections, the CZMA regulations explicitly allow a state to "assert alternative bases for its objection."[50] This allows a state agency to object based on inconsistency with the state's coastal management program, as well as insufficient information.[51]

Based on the foregoing, the Commission's objection was proper.

V. THE PROJECT IS NOT CONSISTENT WITH THE OBJECTIVES OF THE CZMA

Pursuant to the CZMA, a state's objection must be sustained unless the activity at issue is consistent with the objectives of the CZMA or otherwise necessary in the interest of national security.[52] These grounds are independent and an affirmative finding on either is sufficient to override. For reasons set forth below, the record establishes that the Project is not consistent with the objectives of the CZMA.

The Project is consistent with the objectives of the CZMA if it satisfies all three regulatory elements required for such a finding: (1) the activity furthers the national interest, as set forth in CZMA sections 302 or 303, in a significant or substantial manner

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[48] See Adopted Staff Report, App. Vol. 1, Tab 2, at 25-26, 127-30.

[49] 15 C.F.R. § 930.63(c).

[50] 15 C.F.R. § 930.63(a); see also AES, at 6-7.

[51] 15 C.F.R. § 930.63(a) ("A state agency may assert alternative bases for its objection, as described in paragraphs (b) [program inconsistency] and (c) [insufficient information] of this section."); see also AES, at 6.

[52] 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.120.

(Element 1); (2) the national interest furthered by the activity outweighs the activity's adverse coastal effects, when 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 management program (Element 3).[53] As described in detail below, the Project fails to satisfy Element 3.

A. A Reasonable Alternative to the Project Is Available.

In determining whether Element 3 is satisfied, an alternative is evaluated with regard to the following criteria: (1) consistency with the state's coastal management program; (2) specificity; (3) availability; and (4) reasonableness.[54] The burden of proof for the first two criteria rests with the state; once they have been satisfied, the burden shifts to the appellant to demonstrate that the alternative identified is either unavailable or unreasonable.[55]

In this case, the Commission identified a number of potential alternatives to the Project. TCA raises three challenges to the alternatives identified by the Commission: (1) the alternatives identified lack sufficient specificity; (2) certain alternatives are not available because they would not achieve the Project's primary or essential purpose or they have a financial, legal, or technical barrier; and (3) certain alternatives are not reasonable because coastal use and resource advantages do not outweigh increased cost. TCA's arguments are rejected for the reasons set forth below.

1. The Commission Identified Alternatives Consistent with Its Program.

As previously stated, the initial burden of identifying an alternative rests with the state. A state may identify alternatives during an appeal or the state may adopt alternatives proposed by others in lieu of identifying alternatives itself.[56] In either instance, the state must submit a statement that each alternative would permit the activity to be conducted in a manner consistent with the enforceable policies of the state's coastal management program.[57]

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[53] 15 C.F.R. § 930.121(a) – (c).

[54] Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Millennium Pipeline Company, L.P. from an Objection by the State of New York, at 23 (Dec. 12, 2003) (hereinafter Millennium); Decision and Findings in the Consistency Appeal of the Virginia Electric and Power Company, at 38 (May 19, 1994) (hereinafter VEPCO)).

[55] Millennium, at 23; VEPCO, at 39.

[56] Millennium, at 21-22 n.62.

[57] 15 C.F.R. § 930.121(c); VEPCO, at 39.

In this case, the Commission identified six alternatives that, if implemented, would permit the activity to be conducted in a manner consistent with the enforceable policies of California's Program.[58] One of those alternatives—the Central Corridor-Avenida La Pata (CC-ALPV) alternative—is discussed in detail in this decision. Because the record shows that this alternative is both available and reasonable, it is unnecessary to examine the remaining alternatives proposed by the Commission.[59] A single available and reasonable alternative is sufficient to render the Project inconsistent with the objectives of the CZMA.

2. The Commission Described the CC-ALPV Alternative with Sufficient Specificity.

A state must describe an alternative with sufficient specificity to show how the proposed alternative could be implemented consistent with the state's coastal management program and to permit evaluation of whether the alternative is available and reasonable.[60] In the current case, the record contains substantial information on the CC-ALPV alternative, and this information is sufficiently specific to show the alternative is both available and reasonable.

The CC-ALPV alternative would be approximately 8.7 miles long and extend the existing State Route 241 south from Oso Parkway to Avenida La Pata in San Clemente.[61] Unlike the Project as proposed by TCA, the CC-ALPV alternative does not intersect with I-5; rather, traffic traveling along the CC-ALPV alternative route would use existing arteries

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[58] Commission Initial Brief, at 37-46.

[59] This decision does not make any determination on the availability or reasonableness of the remaining alternatives, and is made without prejudice to the other alternatives identified by the Commission.

[60] VEPCO, at 39 (citations omitted). In VEPCO, the State of North Carolina objected to a proposal to construct a pipeline that would withdraw up to 60 million gallons a day of potable water from Lake Gaston for the City of Virginia Beach. As an alternative, North Carolina recommended that the City of Virginia Beach obtain the water from another source. Through the course of the appeal, North Carolina identified sixteen alternatives, several of which failed for lack of specificity. For example, the state proposed a "program which balances Virginia Beach's [water] needs against those of other users" without explaining how this balancing approach might work, how the purpose of the project would be achieved, or how the alternative would be consistent with the enforceable policies of North Carolina's coastal management program. Likewise, North Carolina proposed an alternative of expanding the water capacity at an existing reservoir and establishing a "well-designed and regulated program" to ensure the downstream capacity needs were met, but did not describe the program, or what was meant by "well-designed and regulated." Both of these alternatives failed for lack of specificity.

[61] Commission Initial Brief, at 44 n.21.

for several miles in order to connect with I-5.[62] Consequently, the entire route of the CC-ALPV alternative occurs more than a mile outside of the coastal zone boundary.[63]

The CC-ALPV alternative is one of the alternatives examined in detail in the Draft EIS/SEIR, prepared jointly by TCA and the Federal Highway Administration as part of the Federal- and state-level environmental review processes.[64] The record also contains input on the CC-ALPV alternative from the parties,[65] interested Federal agencies,[66] and the public.

Overall, the record provides ample technical, performance, effects, and cost information to evaluate how the CC-ALPV alternative could be implemented consistent with California's Program and whether this alternative is available and reasonable.

3. The CC-ALPV Alternative Is Available.

Because the Commission identified with sufficient specificity an alternative that is consistent with California's Program, the burden now shifts to TCA to demonstrate that the alternative is unavailable or unreasonable.

TCA raises two objections to the CC-ALPV alternative. First, TCA argues that the CC-ALPV alternative is unavailable because it does not adequately improve traffic

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[62] These arteries include Avenida Vista Hermosa (a primary arterial with four travel lanes) and Avenida La Pata (a major arterial with six travel lanes). Draft EIS/SEIR, App. Vol. 20, Tab 49, at 2-46.

[63] A map of various alternatives is provided as Attachment A to this decision. On the map, the CC-ALPV alternative appears in gold. The Project, as proposed by TCA, appears in green and is labeled the A7C-FEC-M alternative.

[64] TCA finalized the state-level SEIR in December 2005, after TCA's board of directors certified the report. App. Vols. 20-32. Until that time, the document was being prepared in conjunction with the EIS pursuant to the National Environmental Policy Act. The EIS is being coordinated by the Federal Highway Administration with input from the Army Corps of Engineers (Corps), the Environmental Protection Agency (EPA), the Fish and Wildlife Service (FWS), TCA, and the California Department of Transportation (Caltrans), following integration procedures in a 1994 environmental streamlining document entitled 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), App. Vol. 73, Tab 104. Letter from Wayne Nastri, EPA, to Thomas Street, NOAA, at 1 (May 28, 2008). Unlike the SEIR, the Federal environmental review process and the EIS were still not final at the time the appeal record closed in this case.

[65] TCA Initial Brief, at 42, 44-47; Commission Initial Brief, at 37, 43-44; TCA's Reply Brief of Appeal under the Coastal Zone Management Act, at 19 (May 5, 2008); TCA's Supplemental Brief under the Coastal Zone Management Act, at 15-16 (Oct. 14, 2008); Commission's Supplemental Brief on Appeal under the Federal Coastal Zone Management Act, at 13 (Oct. 11, 2008);

[66] See, e.g., Letter from Steven L. Stockton, Corps, to Joel La Bissonniere, NOAA, at 1 (May 28, 2008); see also TCA Supplemental App. (Supp. App.) Vol. 5, Tab 37; Letter from Thomas J. Madison, Jr., Federal Highway Administration, to Conrad C. Lautenbacher, Jr., NOAA, at 3 (Oct. 7, 2008).

conditions. Second, TCA argues that the CC-ALPV alternative is unreasonable due to community disruption and wetland impacts.[67] Both of these arguments are unpersuasive.

"Availability" refers to the ability of the appellant to implement an alternative that achieves the primary or essential purpose of the project.[68] If an appellant fails to argue or provide evidence that an alternative is "unavailable," the alternative is presumed to be "available."[69]

The primary or essential purpose of the Project in this case 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 study area."[70] This is the purpose articulated in the Draft EIS/SEIR, and the record shows TCA, together with the Federal Highway Administration and California Department of Transportation, prepared this document.[71]

The record reflects that the CC-ALPV alternative achieves this purpose by substantially reducing congestion on I-5 and the arterial network. The Draft EIS/SEIR includes an analysis of the amount of traffic relief afforded by each alternative, including the CC-ALPV alternative. Traffic relief is measured in various ways. Table 1 below shows several measures of traffic relief, and compares performance of the CC-ALPV alternative to the projected traffic conditions on I-5, the arterial networks, and the entire system in the year 2025 if no action is taken. All of the information in the table is from the Draft EIS/SEIR.

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[67] TCA Initial Brief, at 46-47.

[68] Millennium, at 24 (citing VEPCO, at 38).

[69] See, e.g., Decision and Findings in the Consistency Appeal of Exxon Company, USA to an Objection from the California Coastal Commission, at 14 (Nov. 14, 1984) (hereinafter Exxon).

[70] Draft EIS/SEIR, App. Vol. 20, Tab 49, at 1-16. The "study area" encompasses the southeast part of Orange County and the northernmost part of San Diego County. See supra note 2.

[71] TCA is identified as the lead agency in the state-level environmental review process leading to the development of the SEIR. App. Vol. 20, Tab 48, at ES-1. TCA's Board of Directors adopted and certified the SEIR upon its completion. See TCA Board of Directors' Resolution, No. F2006-01 (Feb. 23, 2006), App. Vol. 18, Tab 36, at 4 (stating the SEIR "reflects the independent judgment and analysis of the Foothill/Eastern Transportation Corridor Agency."); see also Letter from Thomas Magro, TCA, to Colonel Thomas Magness, Corps, at 6 (Apr. 15, 2008), Supp. App. Vol. 5, Tab 37.

Table 1. Estimated traffic relief for the CC-ALPV alternative compared to projected traffic conditions on I-5 in 2025.

Parameter	Projected Traffic Conditions in 2025	CC-ALPV Alternative
I-5 congestion (percent of traffic experiencing congestion)	15.9	7.8
Arterial congestion (hours of vehicle delay per day)	9,900	8,200 to 8,300
System-wide Travel Time Savings (vehicle hours saved per day)	None	8,000

These data show that the CC-ALPV alternative reduces traffic congestion on I-5 by over 50 percent and arterial delay by approximately 17 percent and creates substantial (8,000 vehicle hours per day) travel time savings on a system-wide basis. TCA argues that this alternative compares unfavorably to the Project, which would reduce I-5 congestion by over 75 percent, reduce arterial delay by approximately 22 percent, and save up to 21,000 vehicle hours per day system-wide.[72]

The standard for availability under the CZMA, however, does not require that an alternative be the top performing alternative or that the alternative perform better than the applicant's proposal. An alternative is available under the CZMA even though it is less ambitious than a proposed project so long as the primary or essential purpose can be

[72] According to data in the Draft EIS/SEIR, the Project would reduce traffic on I-5 experiencing congestion to 2.4 to 3.4 percent, would reduce arterial congestion to approximately 7,700 to 7,900 hours of vehicle delay per day, and would lead to system-wide time savings of approximately 18,000 to 21,000 hours. Draft EIS/SEIR, App. Vol. 20, Tab 48, at ES-46 to ES-47.

achieved.[73] This principle is well-established by Department precedent. For example, in an appeal involving a proposed dock, the Department found that the state's alternative, which would have involved the construction of a small dock of eight slips, was available, even though the developer proposed a larger 18-slip structure.[74] Similarly, in an appeal involving a proposed grocery store complex, the Department found that the state's alternative to the developer's grocery store, strip mall, and adjacent parking lot development was available, even though it would be restricted to a smaller upland area with a smaller footprint than the developer desired.[75] The Department explained that an alternative may be available even though it includes "a less ambitious project."[76] Finally, in a case involving a proposed golf-course irrigation and improvement project, the Department found the state's alternative, involving the construction of an upland lake for golf-course irrigation, was available despite the fact that the alternative would not provide the same level of benefits as the developer's proposal, including run-off filtration and water quality and aesthetic improvements.[77] At bottom, the Department looked to the primary purpose of the project (i.e., golf course irrigation) and found the state's alternative met this purpose. The Department explained that if secondary purposes or site-specific benefits were considered as part of the analysis of availability, it "would likely make site alternatives for all projects unavailable."[78]

TCA relies upon the Department's VEPCO decision to argue that an alternative that does not perform as well as the preferred alternative is not considered available. VEPCO, however, is distinguishable. In VEPCO, the purpose of the project was to supply 60 million gallons of water per day for Virginia Beach to meet a projected water deficit in the year 2030.[79] Thus, the project needed to meet a specific volume threshold in order to meet the primary or essential purpose, and the Department found that an alternative that could not meet this threshold either individually or in combination with other alternatives was unavailable.[80] In the present case, the record does not reflect that a specific threshold of traffic relief is required in order to achieve the primary or essential purpose. Rather, the purpose and need statement adopted by TCA in the Draft EIS/SEIR defines a general need for infrastructure improvement for the purpose of congestion relief and

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[73] Decision and Findings in the Consistency Appeal of Davis Heniford from an Objection by the South Carolina Coastal Council, at 14 (May 21, 1992) (hereinafter Heniford).

[74] Decision and Findings in the Consistency Appeal of Robert E. Harris from an Objection by the New York State Department of State, at 6, 18-26 (Dec. 2, 1992).

[75] Heniford, at 13-15.

[76] Id. at 14.

[77] In the Consistency Appeal of Yeamans Hall Club from an Objection by the South Carolina Coastal Council, at 5 (August 1, 1992) (hereinafter Yeamans Hall Club).

[78] Id. at 6.

[79] VEPCO, at 46.

[80] Id.

accommodation of the need for mobility on I-5 and the arterial network that is not linked to any specific, quantified threshold of performance.[81]

Further, the Draft EIS/SEIR explicitly states that the CC-ALPV alternative meets the Project's purpose and need.[82] The Draft EIS/SEIR examines a number of alternatives and concludes that eight alternatives, including the CC-ALPV alternative, meet the Project's purpose and need. These alternatives were selected from a much broader array of alternatives that was ultimately narrowed based on a technical evaluation and analysis that took into account the relative performance of the alternatives in relieving traffic congestion, as well as environmental effects and costs. The CC-ALPV alternative was one of those ultimately retained for more detailed analysis in the Draft EIS/SEIR "because of [its] ability to address the purpose and need of the project."[83]

In short, the record shows that the CC-ALPV alternative, although less ambitious than the Project, nevertheless meets the primary or essential purpose of the Project.

There are other reasons that an alternative may not be available, such as whether there is a technical or legal barrier to implementing the alternative and whether the resources to implement the alternative exist.[84] However, TCA bears the burden of demonstrating that an alternative is not available, and TCA has not argued or presented evidence that a technical or legal barrier to the CC-ALPV alternative exists. Nor has TCA argued or presented evidence that it lacks the resources to implement the CC-ALPV alternative.

For the foregoing reasons, the record shows that the CC-ALPV alternative is available.

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[81] The following is the detailed purpose and need statement from the Draft EIS/SEIR, App. Vol. 20, Tab 49, at 1-15, 1-16:

> Need for the Project. Transportation infrastructure improvements are necessary to address the needs for mobility, access, goods movement and projected freeway capacity deficiencies and arterial congestion in south Orange County. Freeway capacity deficiencies and arterial congestion are anticipated as a result of projected traffic demand, which will be generated by projected increases in population, employment, housing and intra- and inter-regional travel estimated by the Southern California Association of Governments (SCAG and San Diego Association of Governments (SANDAG).
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> * * *
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> Purpose of the Project. The purpose of the SOCTIIP 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 study area.

[82] Draft EIS/SEIR, App. Vol. 20, Tab 49, at 1-23 (Table 1.7-1).

[83] Id. at 2-10.

[84] VEPCO, at 38.

4. The CC-ALPV Alternative Is Reasonable.

In addition to determining whether an alternative is "available," the Department also must decide whether an alternative is "reasonable." An alternative is reasonable if the alternative's advantages to the resources and uses of the state's coastal zone exceed the alternative's increased costs, if any.[85] In the present case, the record demonstrates that the CC-ALPV alternative is reasonable, and TCA has not met its burden to demonstrate that it is not.

The CC-ALPV alternative is less costly than the Project. The CC-ALPV alternative has a total cost of $609 million,[86] while the Project would cost $715 million.[87] Neither party has disputed these cost estimates. Consequently, when applying the CZMA's standard for reasonableness, the CC-ALPV alternative does not present any increased costs that need to be offset by advantages to the resources and uses of California's coastal zone.

Nevertheless, the CC-ALPV alternative does present advantages to the resources and uses of California's coastal zone. The record demonstrates that the Project would result in a number of reasonably foreseeable effects to the uses and resources of California's coastal zone. In contrast, the Commission has identified no adverse effects associated with the CC-ALPV alternative, and TCA has failed to demonstrate that the impacts it attributes to the CC-ALPV alternative constitute reasonably foreseeable effects on coastal uses or resources.[88]

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[85] Millennium, at 24; VEPCO, at 38; Yeamans Hall Club, at 6.

[86] The Draft EIS/SEIR originally reported that the CC-ALPV alternative would cost even less. However, subsequent to the Draft EIS/SEIR's publication, new construction occurred in a subdivision in the vicinity of the CC-ALPV alternative's footprint. Thus, TCA added approximately $97 million to the estimated cost of the CC-ALPV alternative to cover the cost of compensating those displaced by the construction. App. Vol. 26, Tab 54, Attachment 6. Even with these added costs, the CC-ALPV alternative remains over $100 million less costly in total costs than the Project.

[87] Supp. App. Vol. 5, Tab 37, at Attachment D (Table 1.1). In examining cost, it is the total cost that is relevant to the Department's analysis. Derivative measures, such as cost-effectiveness, are not considered in the Department's examination of reasonableness. Rather, to the extent effectiveness is relevant, it is considered when determining an alternative's availability. To be "available," an alternative must meet a project's primary or essential purpose and is therefore effective to that extent. Thus, the determination that an alternative is available provides the effectiveness benchmark that is relevant to the Department's determination, and separate measures of effectiveness do not factor into the analysis of reasonableness. See Millennium, at 30 n.96 ("This issue [of reduced efficiency of operations] is not relevant to determining whether a route modification is available unless the inefficiency is of such magnitude as to make construction of the entire project financially infeasible.").

[88] When comparing the relative effects of alternatives, reasonably foreseeable direct, indirect, and cumulative effects to coastal uses and resources are germane to the Department's analysis. See 15 C.F.R. § 930.11 (defining "[e]ffect on any coastal use or resource."). TCA argues that the Department's consideration should not be limited to effects on coastal uses and resources, and cites the Department's

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The Project would have a reasonably foreseeable adverse impact on coastal uses such as recreation and public views. Specifically, the Project would result in the permanent loss of more than 35 acres of the San Onofre State Beach (Park), with over 100 additional acres occupied during construction.[89] The Commission has explained that users of the Park are users of the Trestles Surf Break as well as other coastal recreational resources, such as swimming.[90] Accordingly, adverse impacts to the Park have an indirect, but nevertheless reasonably foreseeable, impact on an important coastal recreational use.[91] The Project would also have a reasonably foreseeable adverse impact on public views—a coastal use—by diminishing the visual quality of trails within the Park, including those leading to the beach.[92] TCA has proposed mitigation for the Project's impacts on the

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Millennium decision for the proposition that the "complete route" of an alternative must be found to be reasonable and available. Millennium, however, explicitly states that "'[r]easonableness' refers to the conclusion that an alternative's advantages to the resources and uses of the state's coastal zone exceed the alternative's increased costs, if any." Millennium, at 24 (emphasis added). The Millennium formulation is a precise articulation of the balancing test. Some consistency appeal decisions have used the vaguer phrase "environmental advantages" as shorthand for the precise formulation, but the application is the same. This scope of review is also consistent with the general standard for consistency review. See Section IV.A, supra.

[89] South Orange County Transportation Infrastructure Improvement Project Recreation Resources Final Technical Report, Vol. 1, at 5-253 (Dec. 2003), App. Vol. 50, Tab. 73. The Park is among the five most visited parks in California, and received approximately 2.4 million visitors in fiscal year 2005-2006. See Adopted Staff Report, App. Vol. 1, Tab 2, at 132.

[90] See Adopted Staff Report, App. Vol. 1, Tab 2, at 135-36 ("[California Department of Parks and Recreation] data suggests that the annual number of campground users during fiscal year 2006-2007 was approximately 108,446 and anecdotal evidence has suggested that many of these users chose to stay at the San Mateo Campground because of its affordability, peaceful and serene natural setting and its proximity to the Panhe Trail which provides easy access to the beach, ocean, and world renowned surf breaks located within the coastal subunits of [the Park].").

[91] See 15 C.F.R. § 930.11(g) ("'[E]ffect on any coastal use or resource' means any reasonably foreseeable effect . . . includ[ing] both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative or secondary) effects which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable."). The Commission also argues that the Project will negatively affect the quality of the Trestles Surf Break by physically altering the delivery of near shore sediment/cobble deposits from the San Mateo Creek watershed that forms the surf break. The parties provided competing expert reports on whether the Trestles Surf Break would be altered, and, on balance, the record shows that the likelihood that the Project will impact the Trestles Surf Break is low. See Letter from Bob Battalio, P.E., Philip Williams & Associates, Ltd., to Mark Rauscher, Surfrider Foundation (Aug. 31, 2007), App. Vol. 1, Tab 3(U); Richard J. Seymour, Ph.D., Review of Documentation Relevant to the Impact of the Foothill-South Project on Surfing Conditions in the Vicinity of San Mateo Creek (May 26, 2008), Supp. App. Vol. 6.3, Tab 72(A); Derrick Coleman, Ph.D., Review and Assessment of Documents Related to the Final Runoff Management Plan, State Route 241 Proposed Extension (July 10, 2008), Id. at Tab 72(B); Howard Chang, Ph.D., P.E., Supplemental Comments on Sediment Issues for San Mateo Creek (Sept. 27, 2008), Supp. App. Vol. 6.1, Tab 56(O). Neither party has claimed the CC-ALPV alternative would have any adverse impact on the Trestles Surf Break.

[92] Under the CZMA, "scenic and aesthetic" qualities are a coastal use. See 15 C.F.R. § 930.11(b); 65 Fed. Reg. 77,124, 77,129 (Dec. 8, 2000). The Commission also claims the Project will be visible from the waters offshore, citing visual simulations provided in the Draft EIS/SEIR. See Adopted Staff Report, App.

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Park,[93] but has not shown that reasonably foreseeable effects on coastal uses can be eliminated. By comparison, neither party has argued or presented evidence demonstrating that the CC-ALPV alternative would have any adverse impact on the coastal recreation or public views.

The Project also would have reasonably foreseeable effects on coastal resources, including impacts to Federally listed species such as the tidewater goby, steelhead trout, and coastal California gnatcatcher.[94] The FWS determined that the Project would likely affect the endangered tidewater goby as a result of project construction and operation, including the permanent loss of 0.07 percent of suitable goby habitat from San Mateo Creek and 0.10 percent of suitable habitat from San Onofre Creek.[95] The FWS take authorization for the Project anticipates up to 50 tidewater goby deaths could occur from the capture and relocation of gobies during construction dewatering at San Mateo and San Onofre Creeks.[96] With respect to the endangered steelhead, although the National Marine Fisheries Service (NMFS) found the Project was unlikely to adversely affect steelhead, it nevertheless voiced concern that the connection of the Project to I-5 occurs directly over San Mateo Creek, just 300 meters upstream of the San Mateo Estuary, which is steelhead critical habitat.[97] Finally, with respect to the threatened coastal

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Vol. 1, Tab 2 at 167-80. TCA admits the Project would be visible to Park visitors, but argues it "would not substantially alter the Trestles 'experience' and surrounding atmosphere." TCA's Response to Staff Report, App. Vol. 8, Tab 20(B), at 74 and Attachment 15.

[93] TCA has proposed avoiding campgrounds, trails, and other facilities for those portions of the Project passing through the Park. TCA Response to Staff Report, App. Vol. 8, Tab 20, at 60-70. TCA also committed to pay $100 million for improvements to the Park and other nearby state parks. See Letter from Maria Levario, TCA, to Mark Delaplaine, Commission (Oct. 4, 2007), App. Vol. 11, Tab 25. This $100 million is not included in the total costs TCA reported in the Draft EIS/SEIR. TCA argues that this park improvement payout constitutes an advantage to coastal uses and resources that the other alternatives cannot match. However, TCA has not demonstrated that a similar payout could not be added to the CC-ALPV alternative, or to any other alternative. To the extent the payout results in benefits to coastal uses and resources, these benefits would appear to be equal if applied to each alternative, and thus does not provide a basis for comparison among alternatives. TCA's decision only to offer the $100 million payout for its preferred alternative does not alter this analysis. To find otherwise would allow an appellant to skew the comparison of alternatives by providing expensive (but fungible) mitigation to only its preferred option.

[94] The FWS Biological Opinion explains that members of each of these species may be found in California's coastal zone on a regular or cyclical basis. See FWS Biological Opinion, Supp. App. Vol. 6, Tab 50, at 28; 40; 51; 68-69; 92; and 112-17; see also 15 C.F.R. § 930.11(b) (explaining that coastal resources include biological resources that are "found within a State's coastal zone on a regular or cyclical basis."). The Project may also affect the Pacific pocket mouse, arroyo toad, and thread-leaved brodiaea (a plant), but the record is less clear on whether the Project's impacts on these species – due to their limited range and, in certain instances, modest level of anticipated Project-related impacts – would have a reasonably foreseeable effect on coastal resources, and these species are not discussed further herein.

[95] FWS Biological Opinion, supra note 94, at 46.

[96] Id. at 166.

[97] NMFS detailed its concern in its comment letter:

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California gnatcatcher, the Project would impact nine observed use areas and approximately 385 acres of Venturan-Diegan coastal sage scrub, which is considered prime gnatcatcher habitat.[98]

By comparison, neither party has identified any adverse effect on the tidewater goby resulting from the CC-ALPV alternative. With respect to steelhead, the record shows that the CC-ALPV alternative crosses one drainage (the San Juan Creek) that steelhead may occupy, but neither party has identified any reasonably foreseeable adverse effect resulting from this crossing.[99] With respect to the coastal California gnatcatcher, the CC-ALPV alternative impacts fewer use areas (seven) and less coastal sage scrub habitat (approximately 178 acres) than the Project, and these impacts would generally occur farther from the coastal zone.[100]

Finally, TCA argues that the CC-ALPV alternative would alter more wetlands (approximately 12 acres) than the Project (less than one acre), and would displace 172 residences and 3 active agricultural operations as opposed to no displacements for the Project.[101] These effects, however, occur outside the coastal zone, and TCA has failed to

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> Under ideal circumstances, and with respect to what is best for the steelhead, the highway connector bridge superstructure * * * would be better positioned someplace other than just upstream of the estuary and directly over San Mateo Creek. There is a risk of accidental fuel spills and/or toxic material spills which could occur from traffic on the [highway connector bridge superstructure], which could result in adverse effects on the creek and estuary. Estuaries in particular have been found to be important for rearing of juvenile steelhead, and are necessary for the acclimation of all adult and juvenile steelhead migrating in and out of the watershed. NMFS believes that the biological integrity of the San Mateo Creek Estuary and vicinity is essential for the survival and recovery of steelhead with the watershed, therefore, a bridge location further from the estuary would have been preferred.

Letter from Rodney McInnis, NMFS, to Thomas Street, NOAA (June 20, 2008).

[98] Draft EIS/SEIR, App. Vol. 25, Tab 53, at 2-9, 2-19.

[99] Supp. App. Vol. 5, Tab 37, at Attachment D (Table 1.1). The CC-ALPV alternative does not cross near the San Mateo Creek Estuary, which caused the general concern with the Project voiced by NMFS.

[100] Draft EIS/SEIR, App. Vol. 20, Tab 48, at ES-232; App. Vol. 20, Tab 49, at 2-161. The FWS recommended that TCA, the Federal Highway Administration, and the California Department of Transportation "continue to explore the feasibility of alignment alternatives that are further [sic] west than the proposed project as we believe that such alignments will have less impact on Federally-listed species, primarily arroyo toad and gnatcatcher." FWS Biological Opinion, at 173. The CC-ALPV alternative is situated farther west than the Project as proposed by TCA.

[101] TCA Response to Staff Report, App. Vol. 8, Tab 20(B), at 103; Draft EIS/SEIR, App. Vol. 20, Tab 48, at ES-16; App. Vol. 21, Tab 49, at 4.4-9, 4.4-10, 4.4-33. The displacements attributed to the CC-ALPV alternative were initially lower. At the time the SEIR analysis was developed only 2 residential displacements resulting from implementation of the CC-ALPV alternative were reported, but the number of displacements subsequently increased due to recent construction in Talega, a subdivision near San Clemente. App. Vol. 21, Tab 49, at 4.4-8, 4.4-9, 4.4-37. Notably, there is no evidence in the record that TCA has attempted to refine the alignment of the portion of the CC-ALPV alternative that currently goes through Talega to avoid or reduce the potential for displacements resulting from this new construction, nor

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demonstrate that any of them would result in a reasonably foreseeable effect on a coastal use or resource.[102] Thus, these purported impacts are not germane to the Department's effects analysis in this appeal.[103]

In sum, not all of the impacts alleged by the parties would result in reasonably foreseeable effects on coastal uses or resources, but for those that do, the record shows the CC-ALPV alternative has fewer effects than the Project. When combined with the CC-ALPV alternative's lower cost, this clearly indicates that the CC-ALPV alternative is reasonable.

B. Conclusion on the Consistency of the Project with the Objectives of the CZMA.

Based on the foregoing, the record establishes that the Project is not consistent with the objectives of the CZMA because a reasonable alternative is available—namely, the CC-ALPV alternative. The Commission stated that the CC-ALPV alternative can be implemented in a manner consistent with California's Program, and has described the alternative with sufficient specificity. The CC-ALPV alternative is available because it satisfies the Project's primary or essential purpose and presents no financial, legal, or technical barrier to implementation. The CC-ALPV alternative is reasonable because it costs less than the Project and presents a net advantage to coastal uses and resources.

This decision in no way prevents TCA from adopting other alternatives determined by the Commission to be consistent with California's Program. In addition, the parties are free to agree to other alternatives, including alternatives not yet identified, or modifications to the Project that are acceptable to the parties.[104]

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has TCA alleged in its briefs that these displacements could not be at least partially mitigated. The Draft EIS/SEIR explains that TCA's preferred alternative was refined to avoid 56 residential displacements, Draft EIS/SEIR, App. Vol. 20, Tab 48 at ES-39, and explains that some effort was made to refine the other alternatives as they were being developed, but it does not appear that additional refinement was attempted in order to avoid the new development in Talega, which occurred after the analysis in the Draft EIS/SEIR. At least one organization prepared a study concluding that the CC-ALPV alternative's impacts on the Talega subdivision could be largely reduced by refining the alignment. See Smart Mobility, Alternatives to the Foothill South Toll Road, at 22.

[102] TCA notes that, in light of such effects, the Corps has preliminarily determined that the Project is the "least environmentally damaging practicable alternative" (LEDPA). TCA Initial Brief at 2, 46-47. That preliminary finding, however, is based on the Corps' Clean Water Act § 404 standard and includes the consideration of non-coastal effects not applicable to this appeal. See Letter from Steven L. Stockton, Corps, to Joel La Bissonniere, NOAA, at 1 (May 28, 2008); see also Supp. App. Vol. 5, Tab 37; 40 C.F.R. § 230.10. Thus, contrary to TCA's suggestion, the preliminary LEDPA determination is not controlling of the Department's decision in this case.

[103] Potential right-of-way costs associated with taking of residences and businesses were taken into account when comparing the total project cost of the CC-ALPV alternative.

[104] See Millennium, at 38 n.125.

VI. THE PROJECT IS NOT NECESSARY IN THE INTEREST OF NATIONAL SECURITY

The second ground for overriding a state's objection to a proposed project is a finding that the activity is "necessary in the interest of national security."[105] A proposed activity is necessary in the interest of national security if "a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed."[106] The burden of persuasion on this ground rests with the appellant.[107] General statements do not satisfy an appellant's burden.[108]

TCA asserts the Project is necessary in the interest of national security because it will provide a number of national security improvements to Camp Pendleton Marine Corps Base, including redesign and reconstruction of entrance and exit points at the San Onofre Gate to meet current Homeland Security and Anti-Terrorist Force Protection Program guidelines and access improvements to Green Beach, an amphibious landing area. TCA also claims that the Project will provide an alternate route for the Marines to access March Air Force Base, a point of debarkation.

In this analysis, considerable weight is given to the views of the Department of Defense and other Federal agencies with national defense or other essential national security interests.[109] Comments were solicited from the Departments of Defense, Navy, Homeland Security, Transportation, State, Energy, Justice, and the Interior, as well as from the Homeland Security Council, National Security Council, Marine Corps, Nuclear Regulatory Commission, Army Corps of Engineers, Environmental Protection Agency, Federal Highway Administration, and Federal Transit Administration.

None of these Federal agencies raised any national defense or other national security concerns with the possibility that the Project might not go forward. Indeed, the Marine Corps stated that "[it] does not agree that [the Project] is necessary in the interest of national security. From the Marine Corps' perspective, neither the toll road nor its associated infrastructure enhancements are necessary to ensure that a proper security posture exists at Camp Pendleton."[110]

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[105] 16 U.S.C. § 1456(c)(3)(A).

[106] 15 C.F.R. § 930.122.

[107] VEPCO, at 53.

[108] Millennium, at 38-39.

[109] 15 C.F.R. § 930.122.

[110] Letter from Colonel J.B. Seaton, U.S. Marine Corps, to Thomas Street, NOAA, at 4 (May 22, 2008).

Based on the foregoing, the record establishes that the Project is not necessary in the interest of national security.

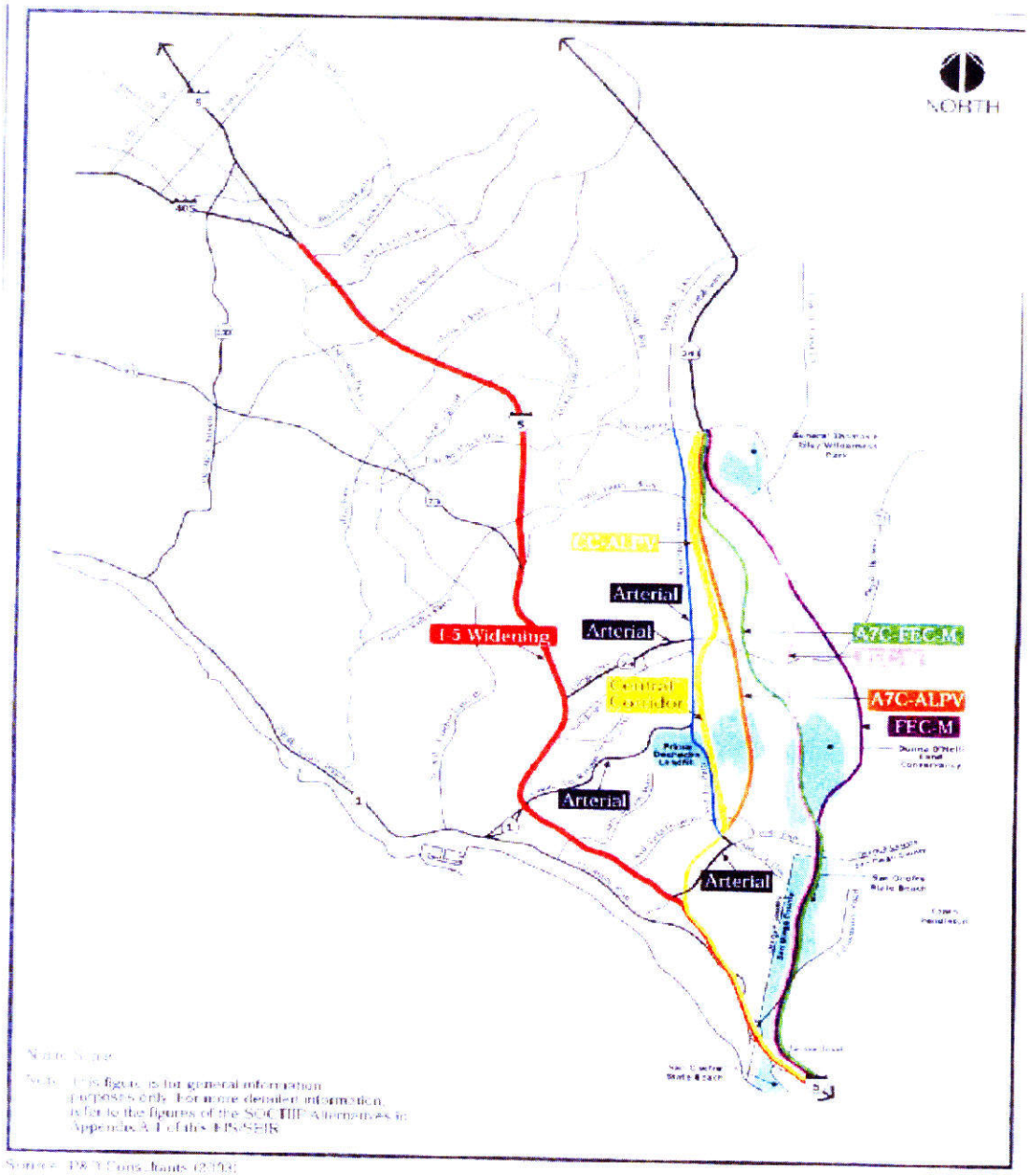
VII. CONCLUSION

The Commission's objection to the Project is sustained. For the reasons set forth above, the record establishes that the Project is not consistent with the objectives of the CZMA. California has identified an available and reasonable alternative that would be consistent with California's Program. The record also does not establish that the Project is necessary in the interest of national security. Given this decision, California's objection to the Project operates as a bar under the CZMA to Federal agencies issuing licenses or permits necessary for the construction and operation of the Project. This decision, however, in no way prevents TCA from adopting the alternative discussed in this decision, or other alternatives determined by the Commission to be consistent with California's Program. In addition, the parties are free to agree to other alternatives, including alternatives not yet identified, or modifications to the Project that are acceptable to the parties.

Carlos M. Gutierrez

ATTACHMENT A

Map of Project alternatives.[111]



Alignments of the Build Alternatives

[111] Draft EIS/SEIR, App. Vol. 20, Tab 49, at Fig. 2.5-1.