



January 17, 2008

Chairman Patrick Kruer
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105

**Re: Foothill Transportation Corridor-South (San Onofre State Beach):
Opposition to Coastal Consistency Certification (CC-018-07)**

Dear Chairman Kruer and Honorable Commissioners:

On behalf of Audubon California, California Coastal Protection Network, California State Parks Foundation, Defenders of Wildlife, Endangered Habitats League, Laguna Greenbelt, Inc., Natural Resources Defense Council, Sea and Sage Audubon Society, Sierra Club, Surfrider Foundation, and the millions of members whom they represent, we write in opposition to the Consistency Certification for the proposed Foothill-South Toll Road ("Foothill-South," "Toll Road," or "Project").

This uniquely destructive project, more than any other along the southern California coast in recent memory, is antithetical in numerous significant respects to the letter, the implementing policies, and the underlying spirit of the California Coastal Act, and there is, therefore, no legitimate legal or factual basis for the consistency certification requested.

As appears in detail below, the Project, if constructed as designed and at the location proposed, would unquestionably degrade California's coastal resources, including, but not limited to, devastation of one of California's most popular state parks – the state park at San Onofre State Beach ("San Onofre") – a recreational and natural resource that serves over 2.4 million visitors each year. Indeed, if the intended purpose of the Foothill-Eastern Transportation Corridor Agency ("TCA") was to harm this irreplaceable coastal parkland, it could scarcely have done so more effectively than the Project now before the Commission. The proposed Toll Road – referred to by TCA as the "green" alternative – would bisect San Onofre through its entire four mile length, literally down its center from top to bottom, requiring closure, according to state park officials, of as much as 60% of the park. TCA takes issue with this, contending incredibly that a massive sound wall along the Toll Road's right-of-way can prevent significant harm to the park's recreational or natural values.

The Toll Road would violate numerous Coastal Act provisions and policies, including those relating to protection of environmentally sensitive habitat areas (“ESHAs”), recreational and cultural resources, wetlands, biological resources, and water quality. Among other things, the Toll Road would:

- Destroy important habitat for eleven threatened or endangered species found within the park or the surrounding San Mateo Creek watershed.
- Irreparably damage sites sacred to the Acjachemen/Juaneño people, including a village that is listed in the state Sacred Lands file, used for ceremonies and reburials, and eligible for inclusion on the National Register of Historic Places.
- Threaten the water quality of the watershed and the coastal waters to which it drains, including the world-class surfing beach known as Trestles.
- Cause the permanent loss of coastal wetlands.
- Destroy over 50 acres of undisputed ESHAs in and around the coastal zone.
- Ruin San Onofre’s most popular low-cost visitor-serving recreational area – the San Mateo Campground. The campground is a critically important coastal recreational resource that *the Commission itself* required be created in the 1970s to offset the coastal impacts of the San Onofre Nuclear Generating Station.

There is simply no way to mitigate this kind of harm, no way to balance away the extent of the Project’s destruction.

TCA seeks to justify its project by denying there are feasible alternatives capable of addressing the Toll Road’s central purpose – i.e., relieving traffic congestion on Interstate 5 (“I-5”) and in southern Orange County. Not only is this purpose immaterial to the Coastal Act, but TCA has failed to come forward with evidence demonstrating that other alternatives are infeasible.

To take just one example, TCA’s own data show that a widening of the existing I-5 and selected adjacent arterials would provide congestion relief similar to the Toll Road. But this alternative was never seriously pursued by TCA. Instead, the agency proposed a footprint for the alternative that was designed to fail. Right-of-way, interchanges and detention basins were placed and designed to *maximize* residential and business displacements, which TCA has used to dismiss the alternative ever since. But TCA has never provided a single document to show that its design cannot be refined to avoid most displacements. Indeed, no report, no study, no analysis produced to date evidences any attempt by TCA to modify its design. Instead, TCA has directed its efforts at criticizing studies by others that show alternative designs do in fact exist. As discussed in this letter, these studies have been updated to address TCA’s criticisms, yet they continue to show that the overwhelming majority of the purported displacements can likely be avoided by employing standard concepts of urban-context highway design.

Regardless of the existence of alternatives, however, the Project's inconsistency with Coastal Act policies is unavoidable. Faced with this problem, TCA has sought to manufacture a "conflict" among Coastal Act policies, asserting that the Toll Road would produce benefits for the coast that outweigh its impacts under the "balancing" provisions of section 30007.5. But both the conflict and benefits are illusory. The Toll Road is not being constructed to benefit the coast. It is a highway project seeking to address the traffic consequences of land use and transportation decisions made over the years in Orange County. The people of California cannot be required to sacrifice their coastal resources to address this problem. No policy of the Coastal Act favors construction of major new thoroughfares in the coastal zone. Accordingly, there is no "conflict" to even trigger section 30007.5 in the first instance. But even if the section were applied, it is beyond question that *not* constructing the Toll Road is by far the course of action "most protective" of coastal resources.

The Commission's September 21, 2007 Staff Report and recommendation that the Commission object to the consistency certification are supported by exhaustive and detailed analysis. The Report correctly concludes that the Toll Road is fatally inconsistent with the Coastal Act on numerous grounds, including:

- Destruction of environmentally sensitive habitat areas ("ESHA")
- Fill of wetlands
- Loss of San Mateo Campground and public access to San Onofre State Beach
- Potential water quality impacts to San Mateo Creek and Trestles Beach
- Loss of public views
- Potential impacts to the Village of Panh  and other cultural resources
- Availability of feasible alternatives that are consistent with the Coastal Act

Each of these conclusions would independently require a finding of inconsistency with the Coastal Act. In combination, they illustrate that the Toll Road is one of the most environmentally destructive proposals threatening California's coast today.

We have recently received a copy of TCA's January 9, 2008 response to the Staff Report. Using unusually shrill and florid language, the response appears designed more to intimidate than enlighten, and directly attacks the credibility of Commission staff without substantiation. Based on our initial review, the response document appears to be largely a rehash of the points previously made by TCA and effectively rebutted in the Staff Report. We will provide more detailed comments on the document after we have had a full opportunity to review it, but three of the more egregious misrepresentations warrant a response and are addressed in this letter:

- **Scope of Commission Jurisdiction.** TCA wrongly asserts that the Commission is limited to considering the impacts of the 2.2 mile portion of the Toll Road within the coastal zone. The Commission has clear authority to review activities outside the coastal zone that may foreseeably affect coastal resources and uses within the coastal zone.
- **Feasibility of I-5 widening.** Indulging in scare tactics, TCA continues to claim – without evidentiary support – that I-5 widening cannot occur without displacing hundreds of residences. Smart Mobility, Inc. has prepared an updated report – to

be submitted under separate cover – that addresses TCA’s critiques yet continues to show that the vast majority of alleged displacements can likely be avoided.

- **Offer of Money to State Parks Department.** TCA’s offer to pay \$100 million to the State Parks Department will not mitigate the Project’s impacts. TCA’s assertion that most of the money will be needed to keep San Onofre open after 2021 is baseless. And its list of possible uses for the remainder is simply an attempt by TCA to obtain mitigation credit for improvements and restoration efforts that are already planned and underway.

Given the unmitigable harm that this Project would inflict on our coastal resources, the Commission cannot legally approve TCA’s request for a consistency certification on any basis without ignoring the Coastal Act, its policies, and decades of its application by this Commission and the courts.

Requested Action: The Commission should object to the proposed consistency certification.

CONSISTENCY REVIEW JURISDICTION

The Commission has jurisdiction to review the Foothill-South Toll Road under the federal Coastal Zone Management Act (“CZMA”). 16 U.S.C. § 1456. The CZMA requires that “any applicant for a Federal license or permit, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency 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.” *Id.* at §1456(c)(3)(A). The applicant must also submit this certification to the state’s reviewing agency – in this case, the Commission. *Id.*; *see also* § 1455(d)(6); 15 CFR § 930.11(o).

The Commission reviews projects for consistency with the California Coastal Management Program, which includes the Chapter 3 policies of the Coastal Act. *See* Pub. Res. Code §§ 30008, 30330. It is the applicant’s burden to provide the Commission with all of the data and information necessary to support the certification. *See* 15 C.F.R. §§ 930.57(a), 930.58(a)(1)(ii). It is also the applicant’s burden to “demonstrate that the activity will be consistent with the enforceable policies of the management program.” 15 C.F.R. § 930.58(a)(3). It is the Commission’s responsibility to determine whether the applicant has met these burdens and, if not, to lodge a proper objection. *See* Pub. Res. Code § 30330; 15 C.F.R. § 930.63.

Contrary to TCA’s repeated, erroneous assertions, the Commission’s jurisdictional responsibility is not limited to reviewing the impacts of the 2.2-mile portion of the Toll Road within the coastal zone. The law is absolutely clear that the Commission has the authority to consider the impacts of the portion of the Toll Road *outside* the coastal zone that will foreseeably affect resources or uses within the coastal zone. The CZMA defines the Commission’s jurisdiction to include any “activity, *in or outside of the coastal zone*, affecting any land or water use or natural resource of the coastal zone” 16 U.S.C. § 1456(c)(3)(A) (emphasis added).

Federal courts construe the term “affecting . . . the coastal zone” to include “indirect effects which may be caused by the activity and are later in time or farther removed in distance but are still reasonably foreseeable.” *California ex rel. California Coastal Comm’n v. Norton*, 150 F.Supp.2d 1046, 1052 (N.D.Cal. 2001) (citation omitted). The Department of Commerce’s CZMA implementing regulations mirror this language. See 15 C.F.R. § 930.11(g). Accordingly, federal activities “within or outside the coastal zone” that affect coastal-zone resources must be consistent with coastal laws pursuant to CZMA. *California ex rel. California Coastal Comm’n*, 150 F. Supp. 2d at 1052; see also *Millennium Pipeline Co., L.P. v. Gutierrez*, 424 F. Supp. 2d 168, 177-78 (D.D.C. 2006).

Thus, by statute, the Commission is given a broad mandate to protect the integrity of coastal resources, whether or not the action in question actually takes place in the coastal zone. As documented throughout this letter and the Commission’s Staff Report, moreover, it is reasonably foreseeable that the Project as a whole – including portions of the Project located outside the coastal zone boundary – will have numerous significant and unmitigable indirect impacts on resources and uses in the coastal zone. There is no question that the Commission is required to consider such impacts.¹

BACKGROUND

The Foothill-South Toll Road was initially proposed in 1981 as an option for alleviating existing and anticipated congestion on Interstate 5 in southern Orange County. In its present configuration, the Project would involve the construction of a six-lane highway² through sixteen miles of largely undeveloped lands in one of the most environmentally sensitive areas in California. The road would run through lands that are currently set aside for open space, recreational, and preservation purposes, including four miles of San Onofre as well as the inland Donna O’Neill Land Conservancy.

San Onofre State Beach, created in 1971, is one of California’s most popular state parks. It receives over 2.4 million visitors per year, provides habitat for 11 endangered or threatened species, and offers low-cost recreational opportunities, including camping and surfing, for working-class families. In addition, certain recreational facilities in the park, including the San Mateo Campground, were developed as a condition of the coastal development permit for the

¹ In a footnote at the end of its January 9 response to the Staff Report, TCA declares that it “reserves” the argument that the Commission lacks jurisdiction over the Toll Road altogether. TCA reasons that Camp Pendleton is “subject solely to the discretion of . . . the Federal Government” for purposes of 16 U.S.C. section 1452(1), and is therefore not within the coastal zone. However, the *San Onofre* portion of Camp Pendleton is *not* a “federal enclave” subject to “exclusive federal jurisdiction,” as TCA claims. To the contrary, the federal government has expressly ceded to the State *concurrent* jurisdiction over the park. See California State Lands Commission, Minute Item No. 20, *Acceptance by State of California of Retrocession of Concurrent Jurisdiction from the United States of 2,945 Acres, More or Less, of Land at Camp Pendleton Marine Base, San Diego County* (Nov. 29, 1973). Accordingly, section 1452(1) is inapplicable.

² TCA repeatedly mischaracterizes the project as a 4-lane highway. It is true that, initially, only 4 lanes of the facility will be operational, but it will be sized to accommodate 6 lanes, and will therefore have the footprint of a 6-lane roadway. See Transportation Corridor Agencies, *South Orange County Transportation Infrastructure Improvement Project (SOCTIIP): Final Subsequent Environmental Impact Report* (December 2005) (hereafter “FSEIR”) at 2-3.

San Onofre Nuclear Generating Station (“SONGS”) project to offset the significant loss of coastal access.

The legality of TCA’s approval of the Project is being challenged in pending litigation, including two lawsuits filed by the California Attorney General. The first of these, brought on behalf of the People of California and the California State Parks Commission, is one of two lawsuits contending that TCA violated the California Environmental Quality Act (“CEQA”) in approving the project. *People ex rel. Attorney General Bill Lockyer and State Park and Recreation Commission v. Foothill/Eastern Transportation Corridor Agency et al.*, No. 06-GIN051371 (S.D. Super. Ct. filed March 23, 2006). The second was filed on behalf of the Native American Heritage Commission – at the request of Acjachemen people – for violation of laws protecting Native American resources. *Native American Heritage Commission v. Foothill/Eastern Transportation Corridor Agency et al.*, No. 06-GIN051370 (S.D. Super. Ct. filed March 23, 2006). These lawsuits spotlight TCA’s failure to adequately disclose to the public the environmental and cultural impacts of the Project, including impacts to a range of coastal resources.

The pending CEQA litigation also challenges TCA’s failure to seriously consider alternatives to the Toll Road that would achieve similar traffic benefits without any of the impacts to San Onofre and coastal resources. These include alternatives focused on the widening of I-5. TCA has continually insisted that widening the I-5 would cause hundreds of residential and business displacements, and is therefore infeasible. But its design for these alternatives makes no effort whatsoever to minimize displacements – to the contrary, it appears to intentionally maximize them. As discussed in Section II below, and in the revised report by Smart Mobility, the overwhelming majority of the purported displacements can likely be avoided by redesigning interchanges and other needed improvements in a way that takes into account the roadway’s urban location.

The conservation community has made the protection of San Onofre State Beach from the Toll Road a top priority. The Project not only threatens irreplaceable coastal resources, *but would represent the first time in California that state park lands were taken by a local governmental entity for a major infrastructure project.* Allowing this project to proceed would set a dangerous precedent, threatening coastal parks and open space everywhere in the State. Further, as discussed below, the Project stands in direct conflict with the requirements of the Coastal Act. Accordingly, the Commission must object to TCA’s consistency certification.

DISCUSSION

I. THE PROJECT IS INCONSISTENT WITH THE CALIFORNIA COASTAL ACT

The proposed project would result in significant and unmitigable impacts to coastal zone resources in violation of the Coastal Act. The Toll Road poses a severe threat to the coastal environment and to the State’s coastal park resources. The chosen alignment would run primarily through open space that has been set aside for preservation purposes, including four miles through San Onofre State Beach. As a result, the Project would have devastating effects on coastal resources. Among other things, the Project would:

- **Permanently Eliminate ESHA.** Most of the coastal-zone land impacted by the Project is ESHA, including nearly 50 acres of coastal sage scrub. The Project would jeopardize numerous endangered and threatened species including the coastal California gnatcatcher, Pacific pocket mouse, arroyo toad, southern steelhead, and tidewater goby.
- **Destroy San Mateo Campground.** The Project would irrevocably destroy the quiet, natural camping experience provided by this extremely popular, low-cost coastal recreational facility – an experience that is irreplaceable anywhere in the region. The Commission mandated the creation of the campground as beach access mitigation for SONGS, and today it enables over 100,000 visitors annually to access Trestles and the other coastal areas within San Onofre.
- **Harm Trestles Beach.** The Project would threaten wave formation at this world-famous surfing beach and would degrade and diminish public access to the beach.
- **Fill Wetlands and Degrade Water Quality.** The Project would directly and indirectly impact wetlands associated with San Mateo Creek – one of the last remaining high-integrity watersheds along Southern California’s coast – and degrade the creek and its estuary through erosion.

These impacts give rise to inconsistencies with Coastal Act policies in virtually every resource category. Each of these inconsistencies is an independent ground for objecting to the consistency certification.

A. Environmentally Sensitive Habitat Areas

Environmentally Sensitive Habitat Areas. Coastal Act § 30240: (a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed in those areas. (b) Development in areas adjacent to environmentally sensitive habitat areas . . . shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat . . . areas.

Section 30240 affords environmentally sensitive habitat areas (“ESHAs”) three levels of heightened protection. First, section 30240(a) strictly prohibits any uses within an ESHA except those that are “dependent” on the resource. *See Bolsa Chica Land Trust v. Superior Court*, 71 Cal. App. 4th 493, 506-07 (1999) (“*Bolsa Chica*”); *Sierra Club v. Cal. Coastal Comm’n*, 12 Cal. App. 4th 602, 611 (1993) (“*Pygmy Forest*”) (“[D]evelopment in ESHA areas themselves is limited to uses dependent on those resources . . .”). Second, even if a use is dependent on the resources in an ESHA, section 30240(a) prohibits any significant disruption of the ESHA’s habitat values. Finally, section 30240(b) requires that development outside but adjacent to ESHAs be sited and designed to prevent impacts that would significantly degrade those areas.

As discussed below, the Foothill-South is not a use that is dependent on any ESHA resources, and is therefore a prohibited use within an ESHA. Moreover, regardless of how the use is characterized, the Toll Road's direct occupation, destruction, and disruption of habitat values in the ESHAs within San Onofre render it inconsistent with section 30240(a).

ESHAs Within San Onofre. It is not disputed that the Foothill-South project will directly occupy and thereby destroy ESHAs within the coastal zone. Section 30107.5 of the Coastal Act defines an ESHA as “any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed by human activities and developments.”

Habitat within San Onofre meets both elements of this statutory definition and therefore must be designated as ESHA. *See Pygmy Forest*, 12 Cal. App. 4th at 617. Indeed, TCA effectively concedes in its application materials that the coastal sage scrub and gnatcatcher habitat impacted by the Project is ESHA.³ Nor does TCA dispute that habitat within the project area occupied by or suitable for steelhead trout, tidewater goby, least bell's vireo, and arroyo toad similarly must be considered ESHA.⁴ Moreover, as detailed herein, crucial expansion habitat for the critically endangered Pacific pocket mouse within the coastal zone also must be considered ESHA.

Numerous plants, animals, and habitats within the coastal areas of San Onofre are both rare and especially valuable due to their roles in the coastal ecosystem and thus satisfy the first element of the ESHA definition in section 30107.5. These areas contain a rare, largely intact coastal assemblage of riparian habitat, wetlands, marsh vegetation, estuarine environs, coastal sage scrub, and other upland areas which indisputably qualify as ESHA. Coastal sage scrub provides essential habitat for the threatened California gnatcatcher, provides potential recovery habitat for the critically endangered Pacific pocket mouse, and is used for upland foraging, dispersal and wintering habitat by the endangered arroyo toad.⁵ Riparian and wetland areas are also vital for the toad. The southernmost known population of the endangered steelhead trout inhabits San Mateo Creek and its estuary, and the endangered tidewater goby makes its home in the San Mateo lagoon.

This particular ESHA complex is especially biologically valuable and unique because coastal wetland-upland mosaics, like the area along San Mateo Creek, are highly depleted in Southern California. It lies at the mouth of the most pristine – and the only undammed – major coastal watershed in California south of Ventura. According to an analysis by the Conservation Biology Institute of watersheds between Los Angeles and the Mexican border, the San Mateo Creek and San Onofre Creek watersheds have the highest ecological integrity,⁶ as measured by

³ See Transportation Corridor Agencies, *Coastal Consistency Certification and Analysis for the Foothill Transportation Corridor – South (FTC-S)*, March 23, 2007 (hereafter “*Consistency Application*”) at 59.

⁴ See *Consistency Application* at 63-64.

⁵ See W.D. Spencer, Ph.D., *Letter to California Coastal Commission*, August 17, 2007 at 2-3.

⁶ Ecological integrity refers to the degree to which the natural characteristics and functions of a watershed are intact or unmodified by humans.

the amount of land cover changes from development and roads, of any coastal watersheds.⁷ Thus, these two watersheds have the highest level of natural watershed functions in the region. A map of critical habitat previously designated by the United States Fish and Wildlife Service for endangered and threatened species shows an amazing confluence of these designations in and around the coastal zone at lower San Mateo Creek, making it a true “hotspot” of biological diversity.⁸ All of these characteristics are indicative of rare and valuable habitat that must be protected as ESHA. *See, e.g., Pygmy Forest*, 12 Cal. App. 4th at 613-15.

These ESHAs would be directly occupied and significantly impacted by the loss of almost 50 acres of coastal sage scrub, encroachment into wetlands, and irreversible habitat fragmentation and edge effects from the Toll Road structure and operations. Furthermore, as detailed below, it is reasonably foreseeable that Toll Road construction and operation upstream from and adjacent to the coastal zone will degrade ESHA within the coastal zone.

1. The Toll Road Is Not a Resource-Dependent Use and Is Therefore Absolutely Prohibited in ESHA, Regardless of Off-Site Mitigation.

The Foothill-South is not a resource-dependent use. Accordingly, its construction through ESHA in San Onofre is prohibited under section 30240(a). TCA does not even attempt to address this requirement and presents no argument for why the Project might be a resource-dependent use. The Project is not, for example, a restoration-type project that would depend on coastal resources. *See, e.g., Sierra Club v. California Coastal Com. (“Batiquitos Lagoon”)*, 19 Cal. App. 4th 547 (1993). Accordingly, no part of the Toll Road may be constructed within an ESHA.

Yet it is undisputed that the Project would directly occupy and destroy ESHA. TCA concedes that nearly 50 acres of coastal sage scrub habitat and three gnatcatcher use areas will fall “within the project’s disturbance limit” – that is, these areas will be physically occupied and destroyed by the project.⁹ Indeed, as discussed in more detail below, virtually all of the coastal-zone lands disturbed by the Project qualify as ESHA.

TCA is apparently taking the position that it can construct the project in ESHA because it will provide off-site mitigation (in the form of a conservation bank located some 15-20 miles inland in another watershed, and, just recently, an offer to help fund mostly completed restoration efforts at Crystal Cove State Park, more than 20 miles away). The California courts, however, have flatly rejected TCA’s approach. In *Pygmy Forest*, for example, the court clearly stated that the resource-dependent use requirement is independent of, and in addition to, any

⁷ Figure 9, Ecological integrity of watershed basins in the region, *Conservation Significance of Rancho Guejito*, Conservation Biology Institute, 2005, <http://www.consbio.org/cbi/projects/show.php?page=ranchoguejito/guejito-pdf.htm> (last visited January 16, 2008).

⁸ *Critical Habitat for Species within San Onofre State Beach*, GreenInfo Network, 2007. As a legal matter, the federal resource agencies have determined that the Integrated Natural Resources Management Plan for Camp Pendleton has superseded previous designations of critical habitat under the Endangered Species Act. *See* 16 U.S.C. § 1633(a)(3)(B)(i). As a biological matter, however, this same habitat remains critical to the survival and recovery of the species.

⁹ *Consistency Application* at 59.

requirement to prevent significant disruption of habitat. See *Pygmy Forest*, 12 Cal. App. 4th at 617. Non-resource-dependent uses simply are not allowed in ESHAs, even where mitigation measures that provide habitat protection have been formulated. *Id.* TCA’s failure to show how the Toll Road qualifies as a resource-dependent use is absolutely fatal to its consistency application.

The court in *Bolsa Chica* likewise held that direct impacts to coastal ESHAs cannot be mitigated through identification of replacement habitat or “habitat values” elsewhere. Section 30240 “does not permit a process by which the habitat values of an ESHA can be isolated and then recreated in another location. Rather, a literal reading of the statute protects *the area* of an ESHA from uses which threaten the habitat values which exist in the ESHA.” *Bolsa Chica*, 71 Cal. App. 4th at 507 (emphasis in original). The court observed that while section 30240 is intended to protect the habitat values of ESHAs, “the express terms of the statute do not provide that protection by treating those values as intangibles which can be moved from place to place to suit the needs of development.”¹⁰ *Id.*

Like the developer in *Bolsa Chica*, what TCA proposes here is essentially “the isolation and transfer of ESHA habitat values to more economically convenient locations.” *Id.* at 508. Such a system, of course, is “completely contrary to the goal of the Coastal Act, which is to protect *all* coastal zone resources and provide enhanced protection to ESHA’s.” *Id.* (emphasis in original). The habitat values of the coastal sage scrub ESHA in San Onofre cannot simply be moved to a more convenient location 15 or 20 miles inland or up the coast. The Coastal Act requires that these resources be treated as unique and irreplaceable, not fungible and portable. The failure of the Project to avoid ESHA renders it inconsistent with the Coastal Act.

2. The Project Would Significantly Disrupt Habitat Values in ESHA.

As discussed above, the Project’s physical occupation of ESHA is enough to render it inconsistent with section 30240(a). Moreover, the Project is also inconsistent with that section’s mandate to avoid “any significant disruption of habitat values” of ESHA. The purported mitigation measures offered by TCA do not come close to replacing the loss of habitat values caused by the Project.

a. Habitat For Numerous Sensitive Species Will Be Destroyed Or Severely Impacted By the Project.

TCA wrongly claims that a number of sensitive species do not have habitat within the coastal zone or will not be significantly affected by the Toll Road. In fact, the Project would occupy and significantly disrupt the coastal-zone habitat of several species key to the biological diversity of the California coast, and would even push one critically endangered species – the

¹⁰ This is true even if the ESHA has been compromised or degraded. See *Bolsa Chica*, 71 Cal. App. 4th at 508 (“There is simply no reference in section 30240 which can be interpreted as diminishing the level of protection an ESHA receives based on its viability. Rather, under the statutory scheme, ESHA’s, whether they are pristine and growing or fouled and threatened, receive uniform treatment and protection.”) (citing *Pygmy Forest*, 12 Cal. App. 4th at 617).

Pacific pocket mouse – to the verge of extinction. These species include, but are not limited to, the following:

Coastal California Gnatcatcher. Coastal sage scrub is breeding habitat for the coastal California gnatcatcher, a threatened species under the federal Endangered Species Act (“ESA”), 16 U.S.C. §§1531-1544. TCA concedes that the Toll Road will impact at least 49.75 acres of coastal sage scrub ESHA in the coastal zone alone, including three California gnatcatcher use areas of undefined acreage.¹¹ This area plainly qualifies as an ESHA under section 30107.5, and its loss would constitute a highly significant disruption of the biological value of the ESHA. In addition, the permanent loss of high-quality habitat immediately adjacent to the coastal zone will foreseeably affect the value of any remaining gnatcatcher habitat within the coastal zone.

The primary mitigation TCA offers to offset the loss of this ESHA is the utilization of coastal sage scrub “credits” in the agency’s Chiquita Canyon Conservation Bank, located in a conservation area far inland of the coastal zone.¹² As discussed above, TCA’s attempt to recreate the lost biological value of this habitat elsewhere does not cure the inconsistency with the Coastal Act. *Bolsa Chica*, 71 Cal. App. 4th at 507-08.

But in any event, Chiquita Canyon’s inland location cannot replace the unique values to the gnatcatcher which derive from a maritime location. These values include higher reproductive rates, lower winter mortality, and greater resistance of the coastal sage scrub to “type conversion” to weedy species as a result of drought, fire, and exotic species invasions.¹³ Thus, even if habitat preservation and restoration occurred inland, it would not compensate for the elimination of distinctive *coastal* resources nor change the fact that a major disruption of the coastal sage scrub ESHA had occurred.¹⁴

TCA’s last-minute offer to fund restoration of 150 acres of coastal sage scrub habitat at Crystal Cove State Park is similarly ineffective. Most of the coastal sage scrub restoration that is biologically appropriate for this state park – and all that located in a maritime location – has already been completed. The remainder – only tens of acres – will occur irrespective of TCA’s offer.¹⁵ This restoration would also be in a more inland location, in the El Moro Valley, about a mile from the ocean.¹⁶

Neither the Crystal Cove site nor the Chiquita Canyon site can reproduce the rich mosaic of coastal estuary, marsh, lush riparian woodland, sandy soils, and associated uplands that makes San Onofre so ecologically unique. Neither site has the watershed integrity of San Onofre. Indeed, Crystal Cove contains only narrow riparian strips and is surrounded by dense development. Piecemeal actions directed at only one component of a complex

¹¹ *Consistency Application* at 59.

¹² *Id.* at 60.

¹³ W.D. Spencer, Ph.D., *Letter to California Coastal Commission*, August 17, 2007 at 3.

¹⁴ *Id.*

¹⁵ D. Pryor, District Ecologist, California Department of Parks and Recreation (pers. comm. Jan. 7, 2008).

¹⁶ W.D. Spencer, Ph.D., *Letter to California Coastal Commission*, Jan. 10, 2008 at 2-3.

ecosystem will never restore the values lost.¹⁷ Thus, even if off-site mitigation were legally permissible, which it is not, the loss of coastal sage scrub ESHA could not be mitigated in these locations.

Pacific Pocket Mouse. TCA’s analysis of potential impacts on the Pacific pocket mouse (“PPM”) is deeply flawed. This species is listed as “endangered” under the ESA and as “critically endangered” – the highest threat rating short of extinct in the wild – on the International Union for the Conservation of Nature’s “Red List.”¹⁸ A quintessential coastal species, its habitat is restricted to sandy soils near the Pacific Ocean. It was once thought extinct but was rediscovered in 1993. It now has documented populations at only three limited locations along the coastline, two of which are on Camp Pendleton.¹⁹ One of these sites – San Mateo Creek – supports two small and precarious populations, one north of the creek adjacent to the coastal zone, and the other south of the creek.

The Foothill-South would directly impact the San Mateo-North population and the ESHA upon which it depends. Indeed, it would have a devastating effect on the Pacific pocket mouse, and, according to a mammalogist with extensive field experience with this species, would substantially increase its risk of actual extinction.²⁰ This is because the health of *each* remaining population is of critical importance. According to the Recovery Plan for the PPM prepared by the United States Fish and Wildlife Service:

- “Loss or degradation of any of the populations at the three known extant locales could irretrievably diminish the likelihood of the subspecies’ survival. All extant populations are essential. These populations should be protected and secured from significant potential impacts.”²¹
- “[F]urther losses of occupied *or potential* habitat would seriously reduce the probability of the persistence of the subspecies.”²²
- “Population persistence and expansion should be maintained by precluding actions which result in physical barriers to movement, habitat fragmentation, or an increase in edge effects.”²³

¹⁷ *Id.*

¹⁸ USFWS Threatened and Endangered Species System, http://ecos.fws.gov/tess_public/SpeciesReport.do?kingdom=V&listingType=L (last visited January 16, 2008) (“USFWS Endangered Species List”) and <http://ecos.fws.gov/speciesProfile/SpeciesReport.do?spcode=A0BY> (last visited January 16, 2008) (“Species Profile”); 2007 IUCN Red List of Threatened Species, <http://www.iucnredlist.org> (last visited January 16, 2008).

¹⁹ Wayne Spencer, Ph.D. & Robert Hamilton, *Review of Biological Resources Analysis in SOCTIIP Draft Environmental Impact Statement/ Supplemental Environmental Impact Report*, prepared for Shute, Mihaly & Weinberger (August 2004) (hereafter “*Biological Resources*”) at 3.

²⁰ W.D. Spencer, Ph.D., *Review of Impacts to the Endangered Pacific Pocket Mouse by Eastern Alignments of the Proposed Southern Orange County Transportation Improvement Project*, Letter to US Fish and Wildlife Service, August 11, 2005 (hereafter “*Spencer 2005 Letter*”) at 9.

²¹ P. Brylski, Ph.D., et al., *Pacific Pocket Mouse Recovery Plan* (USFWS 1998) at 37, available at http://ecos.fws.gov/docs/recovery_plans/1998/980928c.pdf (last visited January 17, 2008).

²² *Id.* at 34 (emphasis added).

²³ *Id.* at 21.

Critical to the biology of the Pacific pocket mouse is the ability to expand its numbers in good years, as this is vital to ensuring *bare survival* in bad years. Yet flying in the face of all scientific recommendations, the Toll Road would trap the San Mateo-North population in a highly constrained area between urban San Clemente and the highway. It would physically *eliminate* some currently occupied habitat, as well as a large amount of the *suitable* habitat needed for population expansion – both termed “essential” by the Recovery Plan. In addition to the direct taking, virtually all the rest of the expansion habitat would be degraded by fragmentation, loss of connectivity, and edge effects such as noise and light pollution.²⁴ *A significant portion of this essential expansion habitat – which qualifies as ESHA due to its special and valuable role in the ecosystem – lies within the coastal zone.*²⁵

This absolute reduction in available habitat, and the resultant inability of the population to adapt to changing circumstances, severely increases the risk of extirpation of the San Mateo-North population. The number of individuals captured in different years at San Mateo-North has ranged from just 4 to 37, showing how susceptible this fluctuating population is to extirpation. In addition, the Toll Road would permanently sever connectivity between the San Mateo-North and the San Mateo-South populations. These populations are now primarily separated by two-lane Cristianitos Road and old agricultural fields, which would be difficult, but not impossible, to cross.²⁶ The Toll Road, however, would place an 18-inch barrier curb along the western disturbance limit of the road, permanently isolating these populations from one another.²⁷ It would block mice from these different groups from interbreeding and reduce the propagation of genetic diversity essential to the species’ survival.²⁸

TCA claims that an undercrossing will mitigate this impact, but such measures are completely experimental with respect to small mammals such as mice and there is no evidence that it would result in any mitigation of impacts to this species.²⁹ TCA has acknowledged elsewhere that while larger mammal species are more capable of finding and using undercrossings, smaller wildlife species may simply attempt to cross deadly road alignments directly.³⁰ The experimental undercrossings proposed by TCA would require these tiny creatures to find their way through culverts ranging from 95 to 525 feet in length.³¹ One proposed undercrossing also seemingly leads to a detention basin for polluted runoff.³² In addition, the Toll Road would block the PPM from accessing the former agricultural fields in Camp Pendleton, which are partially within the coastal zone and, if restored, would greatly enhance connectivity between populations.

²⁴ *Spencer 2005 Letter* at 8, Attachment A.

²⁵ *Id.* at Attachment A.

²⁶ *See id.* at 8-9.

²⁷ BonTerra Consulting, *Pacific Pocket Mouse Resource Management Plan for the San Mateo North Population* (“PPM Management Plan”) (Sept. 2007) at 7-8.

²⁸ *Spencer 2005 Letter* at 8-9.

²⁹ *Id.* at 9.

³⁰ FSEIR, vol. VI (Response to Comments) at 3-344.

³¹ *PPM Management Plan* at 8.

³² Transportation Corridor Agencies, *General Layout Plan*, Exhibit 3A, March 2007.

Small, precarious populations like that of San Mateo-North are vulnerable under best of circumstances. This is why, referring to San Mateo Creek, the Recovery Plan states, “All further actions in this area should improve ecosystem function and habitat linkage/connectivity.”³³ To the contrary, the loss of *essential* habitat – which cannot be compensated for by mere management measures – plus the addition of edge effects and fragmentation, would jeopardize the very existence of this on-the-brink species.³⁴

Finally, TCA’s recent proposal to restore sage scrub habitat at Crystal Cove State Park will do nothing for the Pacific pocket mouse. The pocket mouse is not present at Crystal Cove, and in any event, the coastal sage scrub habitat identified for restoration at Crystal Cove lacks the sandy soils required by the pocket mouse.³⁵ This site could never qualify as mitigation.

Arroyo Toad. TCA fails to account for impacts to the southwestern arroyo toad, another severely endangered species. San Mateo Creek is home to one of the most important remaining populations of the arroyo toad, which breeds in gravel terraces and uses adjacent riparian habitat and uplands for aestivation and foraging. On Camp Pendleton, the species has been documented to range at least 1.2 kilometers from the streamcourse as it forages for food.³⁶

Contrary to TCA’s assertions, the arroyo toad *does* occupy significant habitat within the coastal zone. Indeed, according to an arroyo toad expert with extensive field experience in this very area, “Occupied and known arroyo toad habitat would be directly and significantly disrupted within the coastal zone of lower San Mateo Creek. Arroyo toads are well known as inhabiting the lower portions of San Mateo Creek, even west of I-5 (Griffin and Case 2001, Holland and Goodman 1998).”³⁷ This includes significant areas of coastal sage scrub in the uplands along the creek that would be lost.³⁸

The coastal sage scrub uplands in the coastal zone of lower San Mateo Creek clearly qualify as ESHA due to their occupancy by this endangered species. As discussed above, the Project’s grading and occupation of this ESHA is absolutely prohibited by section 30240. In addition to this direct loss of ESHA, the Project would block arroyo toad access to areas of ESHA on the other side of the highway, causing further significant disruption to its biological value.³⁹

These effects continue upstream, where access to vital uplands would be blocked along important drainages in the San Mateo Creek and San Juan Creek watersheds. At the same time, the Toll Road would interfere with the necessary interbreeding between

³³ *Pacific Pocket Mouse Recovery Plan* at 52.

³⁴ *Spencer 2005 Letter* at 9.

³⁵ See W.D. Spencer, Ph.D., *Letter to California Coastal Commission*, January 10, 2008 at 2.

³⁶ R.E. Lovich, *Letter to California Coastal Commission*, August 16, 2007 (hereafter “*Lovich 2007 Letter*”) at 2.

³⁷ *Lovich 2007 Letter* at 2.

³⁸ R.E. Lovich, *Occupied Arroyo Toad Habitat in the Coastal Zone*, Sept. 2007 (based on FSEIR Fig. 4.11-1j).

³⁹ See *Lovich 2007 Letter* at 4.

populations.⁴⁰ The end result would a loss in population viability for arroyo toads both within and without the coastal zone.⁴¹

In general, the arroyo toad is highly sensitive to habitat fragmentation, as occurs with highways. It has reliably disappeared from watersheds throughout Southern California where habitat contiguity has been lost. Only in the most intact watersheds – like San Mateo Creek and its tributaries – does it still survive.⁴² “The tollroad in this location would degrade and fragment this extraordinary relict of a once-larger functional ecosystem in Southern California.”⁴³

As previously discussed, the arroyo toad’s coastal habitat indisputably qualifies as ESHA. Foothill-South is not a resource-dependent use, and its construction will cause serious long-term loss of habitat and connectivity, substantially disrupting this ESHA’s habitat value in violation of the Coastal Act. *See* Pub. Res. Code § 30240(a); *Bolsa Chica*, 71 Cal. App. 4th at 506-07. Nor does the Coastal Act permit TCA to mitigate for this disruption by creating “habitat value” elsewhere. *Id.* at 507-08. Even if it did, TCA’s proposed mitigation would be woefully inadequate. TCA’s measures are largely limited to temporary construction impacts and fail to address more serious long-term threats to the species. Mitigation measures referenced in the consistency application include construction management plans, mapping of arroyo toad habitat areas, fencing, surveys, relocation, and recreation of habitat after construction.⁴⁴ None of these measures, however, addresses habitat fragmentation and loss of population viability. They are “insufficient.”⁴⁵ Nor does the newly proposed Crystal Cove restoration site contain the gravel terraces and intact hydrologic regimes required by the arroyo toad.⁴⁶ This restoration proposal cannot contribute to this species’ viability. TCA’s application thus completely fails to address a significant impact to California’s coastal resources.

Southern Steelhead and Tidewater Goby. Both of these species are federally endangered,⁴⁷ and their habitats would be degraded by the Toll Road. Research on historic population sizes suggests that San Mateo Creek may have once been one of the most populated steelhead streams in the region.⁴⁸ TCA’s consistency certification states that the probability of impacts on southern steelhead is extremely low because they are predicted to occur in low numbers.⁴⁹ But the San Mateo watershed is the only watershed south of Malibu Creek to support a breeding population of southern steelhead and is considered critical to recovery of this listed species.⁵⁰

⁴⁰ *Id.* at 3-4.

⁴¹ *Id.* at 5.

⁴² *Id.* at 4-5.

⁴³ *Id.* at 4.

⁴⁴ *See Consistency Application* at 64; FSEIR at 4.10-17 to 4.10-20, 4.12-32 to 4.12-34.

⁴⁵ *Lovich 2007 Letter* at 3.

⁴⁶ *See* W.D. Spencer, Ph.D., *Letter to California Coastal Commission*, Jan. 10, 2008 at 2.

⁴⁷ *See* 71 Fed. Reg. 833 (January 5, 2006) (listing southern California coast steelhead as “endangered”); 59 Fed. Reg. 5494 (February 2, 1994) (listing tidewater goby as “endangered”).

⁴⁸ Wayne Spencer, et al., *On the Global and Regional Ecological Significance of Southern Orange County: Conservation Priorities for a Biodiversity Hotspot*, Prepared for Endangered Habitats League (2001) (“*Spencer Conservation Priorities*”) at 26.

⁴⁹ *Consistency Application* at 63.

⁵⁰ *Spencer Conservation Priorities* at 36.

Young steelhead (fry) are especially sensitive to fine sediments and turbidity,⁵¹ both of which may be multiplied many times over by road construction projects.⁵² Over the long term, the area of disturbance (from impervious surface and cut and fill) to the upstream portion of each of the eight subwatersheds near the mouth of the creek will be around 40% on average, which will lead to destabilization and erosion of channels.⁵³ The combination of disturbance of watersheds and concentration of flow in culverts is likely to cause erosion of fine sediments and destabilization of stream channels. The proposed BMPs (energy dissipation at culvert outlets and revegetation along cut and fill slopes) will not fully address impacts associated with flow concentration, increased runoff, and the potential for significant soil erosion.⁵⁴ As a result, siltation of the creek system may occur, degrading water quality and habitat conditions.⁵⁵

Tidewater gobies are found only in the coastal wetlands and estuaries of California, and are now restricted to a fraction of their former range.⁵⁶ TCA concedes that the San Mateo Creek Lagoon is habitat for the tidewater goby, but insists that the species will not be affected by Foothill-South, either during construction or afterwards. This is inaccurate. The subwatersheds and tributaries to San Mateo Creek, including its estuary and lagoon, play a special role in the aquatic ecosystem on which both steelhead and tidewater goby depend for their survival and recovery. As described above, due to extensive degradation of subwatersheds by the Toll Road and inadequate mitigation measures, erosion and fine sediment delivery to the lagoon at the creek mouth has the potential to change its ecology over time.⁵⁷ This would be highly detrimental to the tidewater goby, which is threatened by both siltation and urban development leading to loss of coastal saltmarsh habitat.⁵⁸

The Commission has not only the authority, but also the responsibility, to review both immediate coastal zone impacts and upstream activities that may affect coastal resources for consistency with the Coastal Act. 16 U.S.C. § 1456(c)(3)(A); *see also Millennium Pipeline Co.*, 424 F. Supp. 2d at 177-78 (because potential pipeline rupture at inland location could interrupt water flow of aqueduct to New York City and thereby impact coastal resources, finding of inconsistency was proper); *California ex rel. California Coastal Comm'n*, 150 F. Supp. 2d at 1052. Toll Road construction both within and directly upstream of the coastal zone will not only affect, but also significantly degrade, ESHA within the coastal zone. This entire portion of the Toll Road project is therefore inconsistent with the Coastal Act.

⁵¹ K.B. Suttle, et al., *How Fine Sediment in Riverbeds Impairs Growth and Survival of Juvenile Salmonids*, *Ecological Applications*, Vol. 14 No 4, August, 2004 at 969-974.

⁵² A.P. Wheeler, et al., *Impacts of New Highways and Subsequent Landscape Urbanization on Stream Habitat and Biota*, 13 *Reviews in Fisheries Science* 141, 144-45 (2005).

⁵³ Philip Williams & Associates, Ltd., *Letter to Surfrider Foundation*, August 31, 2007 (“PWA 2007 Analysis”) at 2-3.

⁵⁴ M. Lindley, Philip Williams & Associates, Ltd. (pers. comm. January 17, 2008).

⁵⁵ *PWA 2007 Analysis* at 3.

⁵⁶ Ventura Fish & Wildlife Office: Tidewater Goby, http://www.fws.gov/ventura/sppinfo/profiles/details_fish.cfm?speciesid=122 (last visited January 16, 2008).

⁵⁷ *PWA 2007 Analysis* at 3.

⁵⁸ Ventura Fish & Wildlife Office: Tidewater Goby, http://www.fws.gov/ventura/sppinfo/profiles/details_fish.cfm?speciesid=122 (last visited January 16, 2008).

b. The Project's Impacts on Habitat Values Are Not Mitigated by Regional Conservation Plans.

TCA relies heavily on the existence of the Natural Communities Conservation Plan/Habitat Conservation Plan (“NCCP/HCP”) for the southern Orange County area and the Integrated Natural Resource Management Plan (“INRMP”) for Camp Pendleton⁵⁹ to attempt to mitigate for the loss of habitat values caused by the Project. But the Toll Road is not part of, nor is it covered by, either of these conservation plans. Its impacts were not addressed or mitigated through the NCCP/HCP.⁶⁰ Indeed, the impacted portion of the coastal zone – and the entirety of San Onofre State Beach – are located in San Diego County and are entirely *outside* of the NCCP/HCP Planning Area.⁶¹ Furthermore, the Integrated Natural Resources Management Plan (“INRMP”) for Camp Pendleton simply recognizes the Toll Road as a potential *future* project and states that any adverse environmental impacts that result from the Project must be fully and properly mitigated; the INRMP itself does not provide any mitigation for the project's impacts.⁶² TCA's numerous references to these plans are therefore irrelevant.

But even if this mitigation plan were relevant, the Toll Road cannot be found consistent with the Coastal Act. No mitigation compensates for the fact that the Toll Road would not just significantly disrupt, but would completely destroy, critical portions of ESHAs as defined in § 30107.5 of the Act. The razing of dozens of acres of this rare mosaic of riparian habitat, wetlands, marsh and estuarine vegetation, and coastal sage scrub – and the resulting damage to the suite of protected species found there – would flagrantly violate the policies and purposes of the Coastal Act. Section 30240(a) of the Act unqualifiedly prohibits such disruption of protected ESHAs.

Even under the untenable assumption that no “significant disruption” of an ESHA would occur, a highway project such as the Toll Road intended to address county transportation issues is a not “resource dependent use” under any reasonable interpretation of the term. Accordingly, the Act prohibits any part of the use from occupying an ESHA. TCA concedes that the Toll Road will occupy ESHA. The Toll Road is therefore *per se* inconsistent with the § 30240(a) of the Coastal Act.

B. Parks, Recreation and Public Access

Access to recreational opportunities. Coastal Act § 30210: In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

⁵⁹ See *Consistency Application* at 59-61.

⁶⁰ Southern Subregion Natural Community Conservation Plan (“SSNCCP”), EIR/EIS at 1-26 to 27, http://www.ocplanning.net/docs/ssnccp/EIR-EIS/nccp_eir_ch_01.pdf (last visited January 16, 2008).

⁶¹ SSNCCP, Figure 3-M, http://www.ocplanning.net/docs/ssnccp/Mapbook/figure003_m.pdf (last visited January 16, 2008).

⁶² See Marine Corps Base Camp Pendleton, *Integrated Natural Resources Management Plan* (March 2007) (hereafter “2007 INRMP”) at 2-49, available at <http://www.cpp.usmc.mil/base/environmental/inrmp.asp> (last visited January 16, 2008).

Lower cost visitor and recreational facilities. Coastal Act § 30213: *Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred.*

Protection of certain water-oriented activities. Coastal Act § 30220: *Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.*

Oceanfront land; protection for recreational use and development. Coastal Act § 30221: *Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.*

Protection of upland areas for recreational uses. Coastal Act § 30223: *Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.*

Protection of Parklands. Coastal Act § 30240(b): *Development in areas adjacent to . . . parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those. . . recreation areas.*

The Coastal Act contains strong policies mandating maximum coastal access and protection of coastal park and recreational areas. Tellingly, there is not a single policy in the Act which recognizes new development within park or recreation lands. Section 30240(b) of the Act requires that any development in areas *adjacent* to park and recreation areas shall be compatible with and prevent impacts to those areas. The legislature apparently assumed that park lands within the coastal zone would remain permanently protected.

The Foothill-South would not only severely impact but would *run right through* one of California's most popular parklands, the state park at San Onofre State Beach. The massive six-lane highway would directly occupy approximately *four miles* and over *320 acres* of the park, and fragment and degrade the remaining lands, including those within the coastal zone.⁶³ The highway would literally run through the center of the Park's entire inland subunit (Subunit 1) splitting the park along its spine. The California Department of Parks and Recreation ("Parks Department") – in a study commissioned by TCA itself – concluded that it would likely be forced to abandon nearly all of Subunit 1, over 1,000 acres (approximately 60% of the park). This could ultimately result in the closure and abandonment of San Mateo Campground, the park's most popular campground, and the trails that lead from the campground to Trestles Beach.⁶⁴

⁶³ California Department of Parks and Recreation, *Map of Area Impacted by the Foothill-South*, Jan. 9, 2006.

⁶⁴ California Department of Parks and Recreation, *Mitigation Assessment of FTC-South Impacts on San Onofre State Beach* (Aug. 1997) ("*Parks Dept. Mitigation Assessment*") at 6; California Department of Parks and Recreation, *Comment Letter to TCA*, January 10, 2006 ("*Parks Dept. Comment Letter*") at 5.

Never before in California has a local governmental entity like TCA sought to take state parkland to develop a major infrastructure project, much less a project of this scale. The loss of state parkland and major coastal access facilities inflicted by this Project, as well as its indirect impacts on coastal and water recreational resources, is unprecedented and in direct violation of the Coastal Act's public access and recreation provisions. The Project's impacts on San Mateo Campground and Trestles Beach are discussed in more detail below.

1. San Mateo Campground

a. San Mateo Campground Is an Irreplaceable Coastal Resource

San Mateo Campground – located just outside the coastal zone and connected by a trail to Trestles Beach – is one of the most important coastal recreational resources in the region.

The creation of San Mateo Campground was mandated by this Commission as a condition to amending the Coastal Development Permit for the San Onofre Nuclear Generating Station (SONGS) in 1982. SONGS had sought new restrictions on public access to the beach near the station. The Commission required the development of the campground with a trail to the beach, to mitigate for the loss of beach access.⁶⁵ As recited in the Permit, the condition was necessary to ensure conformance with the Coastal Act.⁶⁶ Due to the Commission's action, San Mateo Campground is by definition a coastal resource, and one that was expressly created by the Commission to further the purposes of the Act.

The campground was intended to expand public access to the park's beaches. As the Commission stated in its findings on the SONGS permit:

Opening a new segment of the park [in San Mateo Canyon] will serve one important segment of the general population affected by the lost access at SONGS – those from upland and inland areas who gain access to the beach by camping nearby. There is a great demand for additional camping facilities in the area. Development of new facilities is restricted because of the 15-mile long expanse of Camp Pendleton to the south. During the warm months, campgrounds in the area must turn away tens of thousands of persons. ***The Commission expects the new facility at Parcel 1 to significantly increase and enhance public access to the beach segments of the State Beach.***⁶⁷

The Commission's expectations have come to pass. Today, San Mateo Campground receives over 100,000 visitors a year.⁶⁸ The San Mateo Campground's popularity comes from its relatively isolated location in an undeveloped coastal canyon along San Mateo Creek.⁶⁹ In addition, the campground provides increasingly rare low-cost accommodations for the region's coastal visitors. San Mateo Campground accounts for more than 10% of coastal campsites

⁶⁵ CDP # 183-73, Amendment # 6-81-330-A.

⁶⁶ *Id.*, Exh. 2 at 8 (Condition E.)

⁶⁷ *Id.* at 14 (emphasis added).

⁶⁸ *Parks Dept. Comment Letter* at 6.

⁶⁹ *Id.*

within a 50 miles radius.⁷⁰ As the Parks Department has stated about the campground, “the affordability of this coastal resource for middle and lower income visitors makes it even more important that it be kept intact and undiminished.”⁷¹

The Campground not only provides public access to the coast, but it is an intrinsic and essential part of what makes Trestles Beach a unique experience for visitors. Trestles is one of the only remaining beaches in Southern California that is not directly accessible by automobile and must be hiked into. One of the beach’s primary attractions is the highly scenic trail linking it to San Mateo Campground, which runs through “a relatively unspoiled wetlands area” down to the beach, allowing visitors to experience the natural transition of the native landscape.⁷² The Campground itself is also part of the coastal experience. Visitors who camp or picnic in the inland portions also walk to the coast to swim, surf, relax on the beach, and explore the Park’s successive habitats, including surf, reef, beach, coastal bluff, wetland, grassland, sycamore groves, scrub, hills, arroyos, and valleys, along with abundant wildlife, all of which together make San Onofre unique.

The campground is not only an essential coastal resource – it is irreplaceable. Aside from a long-planned facility at Crystal Cove State Beach that will replace an existing trailer park,⁷³ the Parks Department has been unable to add a single campground along California’s coast in the 16 years since San Mateo Campground was constructed. And there are no sites left in the region that would be capable of providing comparable public access and recreational value. According to the Parks Department, “the existence and convenient availability of such an increasingly rare resource and experience to the large Southern California population serves an important societal function which once lost cannot be replicated in whole elsewhere in this region.”⁷⁴

b. The Toll Road Would Destroy the Campground

San Mateo Campground would be effectively shut down by the Toll Road. According to TCA, the Project footprint would avoid the campsites themselves. However, the Toll Road would come within 200 feet of the campsites. The Project would place the Campground – now located in a quiet, undeveloped coastal canyon – in the shadow of a major highway, with a view of massive soundwalls on engineered hillsides. Campers, hikers and picnickers would be plagued by construction noise in the short term, and traffic noise permanently.⁷⁵ In short, the Campground’s “spirit of place” – a term used by the Parks Department – would be destroyed.⁷⁶

Indeed, this is such a serious loss that the Department ultimately may have to abandon nearly all of Subunit 1, including all 161 sites in the campground and over 1,000 acres of surrounding parkland.⁷⁷

⁷⁰ Figure, *Southern California Campgrounds*, California State Parks Foundation and GreenInfo Network, 2007.

⁷¹ *Parks Dept. Mitigation Assessment* at 2-3.

⁷² *Parks Dept. Mitigation Assessment* at 2.

⁷³ See Crystal Cove State Park General Plan (March 1982) at 43-44.

⁷⁴ *Parks Dept. Comment Letter* at 5.

⁷⁵ *Parks Dept. Mitigation Assessment*, Appendix B.

⁷⁶ *Id.* at 2; see also *id.*, Appendix A at A-3 to A-4.

⁷⁷ *Parks Dept. Comment Letter* at 5; *Parks Dept. Mitigation Assessment* at 6.

Several years ago, the Department convened a “San Onofre Mitigation Assessment Team” to evaluate possible mitigation measures in the event that TCA approved a toll road alignment through San Onofre. After reviewing the team’s recommendations, the Department reached some dramatic conclusions:

[T]he fragmentation of Subunit #1 by the proposed highway corridor will severely restrict the use of the property for recreation purposes, as well as significantly and irrevocably altering its environmental setting, that of San Mateo Campground, and other recreational opportunities provided for in the unit’s General Plan. The linear nature and split elevation of the arterial and any retaining walls, soundwalls, and their landscaping will reduce the site’s attractiveness to the public, as well as being a wildlife barrier and a management obstacle. These unnatural and discordant visual elements will intrude upon previously open vistas, high volume noise will impose on normal recreation activities, day activities at the campground as well as its existing night quiet, and the amphitheater campfire area will be forever altered and rendered unusable.⁷⁸

As a result of these impacts, the mitigation assessment team concluded that the proposed toll road alignment “will result in a take of the functional use of the majority of Subunit #1” of the park, and recommended that “[w]ith the exception of the support parking for the trail to Trestles, all of Subunit #1 be abandoned to the lessor.”⁷⁹ In its comment letter to TCA on the FSEIR, the Department reiterated its concerns about the destruction of San Mateo Campground:

It does not take an expert to understand that locating a multi-lane, limited access highway within a few hundred feet of a secluded campground will so destroy the recreational value of the campground and sense of place as to render it valueless. . . . [P]eople who use San Mateo Campground do so because of its relative quiet and seclusion. They do not go camping to be next to a multi-lane highway and have their views truncated by a 16’ high soundwall.⁸⁰

The letter also reported the grave concern of Department staff that “the result of these impacts will be the eventual loss of San Mateo Campground.”⁸¹

The Toll Road thus very likely spells destruction of a major coastal resource – a resource that was mandated by this Commission in order to achieve compliance with the Coastal Act. The 100,000 annual State Beach visitors who use the Campground – including working families and other users who rely on this affordable facility – would be severely impacted. The expanded public access to the coast that the Commission required as compensation/mitigation for the significant loss of access caused by SONGS would be lost.

⁷⁸ *Parks Dept. Mitigation Assessment* at 5.

⁷⁹ *Id.* at 5, 6.

⁸⁰ *Parks Dept. Comment Letter* at 4-5.

⁸¹ *Id.* at 6.

In addition, the existing highly scenic trail connecting San Mateo Campground to Trestles Beach – which runs under the interstate but is an essential natural experience, traversing the native landscape – would be destroyed and replaced by an urban pedestrian overpass that follows the Toll Road and actually requires crossing *over* it.⁸² This highway-dominated route would constitute a fundamental change in the unique visitor experience of Trestles.

TCA fails to acknowledge that the Project will have any impacts to the Campground or the public access and coastal recreational opportunities it provides. TCA appears to rely in part on the fact that the Campground “is not located within the coastal zone.”⁸³ TCA’s position misrepresents the law. The Coastal Zone Management Act expressly extends the Commission’s jurisdiction over consistency review to activities outside the coastal zone that will have foreseeable direct or indirect impacts on resources or uses within the coastal zone. *See* 16 U.S.C. § 1456(c)(3)(A) (consistency certification required for projects outside coastal zone that affect resources within); *Millennium Pipeline Co.*, 424 F. Supp. 2d at 177-78; *California ex rel. California Coastal Commission*, 150 F.Supp.2d at 1052 (federal activities “within or outside the coastal zone” that affect coastal-zone resources shall be consistent with coastal laws pursuant to CZMA); San Mateo Campground provides a perfect case in point: the loss of the Campground will have a major, adverse effect on the ability of the public to access, use and enjoy Trestles Beach. Accordingly, the Commission has both the authority and the responsibility to review impacts to the Campground for consistency with the Coastal Act.

TCA also repeatedly cites the fact that the park is situated on federal land not owned by the State, but the ownership of the land is immaterial. The park provides the same benefits to the public whether leased or owned by the State. Moreover, since its inception, it has been understood that the park is permanent. President Nixon, Governor Reagan, and the California Legislature have all made clear that San Onofre is to forever remain a state park. When President Nixon presided over the creation of the state park at San Onofre, he declared that, as soon as it is possible for the federal government to declare the property surplus, the lease will be terminated and the property “will be *deeded* to the State of California for park purposes.”⁸⁴ Governor Reagan agreed: “This expanse of acreage, San Onofre Bluffs [*sic*] State Beach, *now has its future guaranteed* as an official state park.”⁸⁵ The intent to permanently preserve the land as a park is reflected in California law, which provides that “if the Camp Pendleton Marine Base in the County of San Diego ceases to be used as a federal facility, *it shall be converted to an open-space area or greenbelt* that shall be administered by the [Parks] [D]epartment.” Pub. Res. Code § 5096.400 (emphasis added). State law further provides that “[a]ll real property acquired for park and recreation purposes by the state which was formerly part of Camp Pendleton *shall be used solely for park and recreation purposes and no part thereof shall be declared surplus or disposed of.*” Gov. Code §11011.7 (emphasis added).

TCA also improperly relies on a right-of-way reservation in the State’s lease with the Navy. Contrary to TCA’s assertions, that provision in no way authorizes a six-lane highway through the park. The lease allows the Navy to grant *only* those easements or rights-of-way that

⁸² FSEIR at 4.25-27; TCA, *Trail Location*, Exh. 3, March 2007.

⁸³ *Consistency Application* at 15.

⁸⁴ President Richard Nixon, *Press Statement*, March 31, 1971.

⁸⁵ California Governor Ronald Reagan, *Press Statement*, April 3, 1971 (emphasis added).

will not “unreasonably interfere with the use of [State Parks] improvements.”⁸⁶ The six-lane toll road, which would interfere with (and indeed likely shut down) the entire San Mateo Campground, would plainly violate this lease restriction. But in any event, the lease provision is a red herring. Even if the road were allowed under the lease (which it is not), that fact would in no way lessen the Project’s impacts on coastal access or its inconsistency with Coastal Act policies.

c. TCA Has Not Proposed Adequate Mitigation for the Campground, Nor Is Such Mitigation Available.

TCA’s failure to acknowledge any public access or recreational impacts from the Project is mirrored by its failure to provide any meaningful mitigation for those impacts. For years, TCA’s only approach to the issue of mitigation was to defer it. The FSEIR never identified any specific measures to replace lost park lands or provide substitute recreational resources. Rather, TCA merely promised to “consult” and “negotiate” with owners or operators of affected recreational resources at some unspecified point in the future.⁸⁷ As the Parks Department itself put it in a letter to TCA regarding the FSEIR, these “promises to talk” mitigate nothing and commit TCA to nothing.⁸⁸ Indeed, as discussed above, these resources are unique in the region and are literally irreplaceable.⁸⁹ TCA’s consistency application likewise offers no mitigation and takes the approach that impacts to San Onofre are not an issue – an attitude the Parks Department correctly identified as “simply not grounded in reality.”⁹⁰

Then, less than two weeks before the hearing, TCA came up with a new approach to parks mitigation: offer money. TCA has offered to pay the Parks Department \$70 million that, according to TCA, could be used to renew the SOSB lease in the year 2021, and another \$20 million to restore cottages at Crystal Cove or construct campsites in that park or at San Onofre. As detailed in Section IV of this letter, however, none of this money would mitigate the impacts of the Toll Road. There is no basis for concluding that *any* money (much less \$70 million) will be required to renew the San Onofre lease 14 years from now. And the other expenditures identified by TCA are for projects that are *already planned and will occur with or without the Toll Road*.

Moreover, none of the projects identified by TCA could mitigate the loss of San Mateo Campground, which offers low-cost, quiet, relatively undeveloped coastal camping accommodations that are impossible to duplicate – and therefore irreplaceable – in the region. As the Parks Department has stated:

The existence and convenient availability of such an increasingly rare resource and experience to the large Southern California population serves an important societal function which once lost ***cannot be replicated in whole elsewhere in the region.***

⁸⁶ See Agreement of Lease Between State of California Department of Parks and Recreation and United States of America (No. NF(R) 13233) (Aug. 31, 1971), Part II at 2.

⁸⁷ FSEIR at 4.25-28 to 4.25-29.

⁸⁸ *Parks Dept. Comment Letter* at 7.

⁸⁹ *See id.* at 8.

⁹⁰ *Id.* at 4.

California State Parks asserts that the fragmentation of the park by the proposed preferred alternative leaves no real opportunities for on-site mitigation for the values, resources and recreational opportunities for which this park was established. Our knowledge of the region leads us to conclude that *losses to the existing unit cannot be fully mitigated.*⁹¹

There is simply no conceivable rationale under which a major coastal recreational facility created at the insistence of the Coastal Commission to satisfy the requirements of the Coastal Act can now be eliminated consistent with the Act. The severe loss of public access and coastal recreational opportunities that would be caused by the loss of San Mateo Campground renders the Project inconsistent with the Act's policies requiring maximum public access, protection of lower cost coastal recreational opportunities, and avoidance of impacts to parks.

2. Trestles Beach.

The Foothill-South also directly impacts Trestles Beach – a world-class surfing destination.⁹² Trestles Beach is known among surfers as the “Yosemite of surfing” and has attracted the likes of some of the world's most famous surfers, including Kelly Slater, who won a surfing competition there in 1990. It is the *only* beach in the continental United States where the Association of Surfing Professionals' World Championship Tour holds a competition,⁹³ and is host to numerous other professional and amateur surfing competitions throughout the year, including the National Scholastic Surfing Association's national championships. This is not your average surf spot – so many people visit Trestles that there is a “crowd in the water” for just about any given swell.⁹⁴ Trestles Beach was first discovered by pioneering local surfers in 1933 and is now historically recognized as having played a significant role in the evolution of surfing as a sport. In fact, Trestles is potentially eligible for nomination as a State Historic District, as a California State Point of Historic Interest (on the California Register of Historic Resources), and to the National Register of Historic Places.⁹⁵

In addition to the public access impacts to Trestles that would be caused by the loss of San Mateo Campground, the Toll Road threatens to impact the internationally renowned surfing conditions found at Trestles. These conditions are created and maintained by sediment influx from San Mateo Creek and its tributaries, including Cristianitos Creek. Cobblestone rocks are carried down the creek and deposited in a delta, which leads to the world class waves that break left and right year-round.⁹⁶

⁹¹ Parks Dept. *Comment Letter* at 8.

⁹² The Trestles beach includes several surfing hot spots in the coastal zone that would be affected by the project, including Cotton's Point, Upper Trestles, and Lower Trestles. See M. Hagemann, SWAPE, *Comments on the EIR/SEIS for the SOCTIIP* (July 28, 2004) (hereafter “SWAPE”) at 17, reproduced in FSEIR, vol. IX, comments O21-351 to O21-423.

⁹³ ASP World Tour,

<http://64.78.18.131/asp2005/2006news.asp?rView=w&rEventName=&rEvent=trestles06&rCode=5943> (last visited January 16, 2008).

⁹⁴ Phillip Williams & Associates, Ltd., “Potential Toll Road Impacts on San Mateo Creek Watershed Processes, Mouth Morphology and Trestles Surfing Area,” January 11, 2006 (“PWA 2006 Report”) at 3.

⁹⁵ California State Parks and Recreation Department, *Letter from Historian A. Bevil to M. Rauscher*, dated Aug. 31, 2007.

⁹⁶ SWAPE at 18.

TCA refuses to acknowledge the potentially drastic effect the Toll Road could have on Trestles, claiming that no significant permanent adverse effects would damage coastal surfing. TCA asserts that the supply of sediment from inland would not be significantly changed and that, therefore, the cobblestone delta which supports wave formations would remain stable.⁹⁷ However, TCA's analysis is flawed.

TCA erroneously focuses on the amount of new impermeable surface relative to the entirety of a large watershed, and fails to account for the devastating effects of the Toll Road on 20 subwatersheds proximate to the mouth of San Mateo Creek, which have a disproportionate effect due to proximity.⁹⁸ These steep canyons are sources of fine sediments. An engineering study, which included field reconnaissance, shows that paving and cut and fill from the Toll Road – over 40 million cubic yards⁹⁹ – will “result in massive hydrological changes” to these fragile subwatersheds.¹⁰⁰

The erosion impact to a stream channel is exponentially proportional to the percentage of upstream watershed that is impermeable or disturbed.¹⁰¹ The upstream portion of the eight subwatersheds closest to the mouth of the creek would be disturbed 40% on average,¹⁰² a level associated with severe erosion and channel degradation in the vicinity of the Project.¹⁰³ Within many of the destabilized canyons, the sediment transport and hydrology of streamcourses will be “highly altered.”¹⁰⁴ The combination of disturbance of watersheds and concentration of flow in culverts is likely to cause erosion of fine sediments and destabilization of stream channels. The proposed BMPs (energy dissipation at culvert outlets and revegetation along cut and fill slopes) will not fully address impacts associated with flow concentration, increased runoff, and the potential for significant soil erosion.¹⁰⁵

This is not the first time TCA has relied on BMPs to support a claim that its projects will not cause erosion. It made precisely the same claim for the San Joaquin Hills Transportation Corridor. Yet a fill constructed to similar standards by TCA failed in upper Deer Creek canyon, causing severe erosion that was dumped into Crystal Cove State Park.¹⁰⁶ TCA claims to have learned “lessons” from that project. But the state's pristine watersheds and coastal parks are not the place to conduct major erosion control experiments. Optimistic claims that BMPs will prevent erosion for major roadway projects have been repeatedly proven wrong.¹⁰⁷ It is simply

⁹⁷ *Consistency Application* at 24.

⁹⁸ *PWA 2006 Report* at 12.

⁹⁹ TCA's insistence that the Commission should consider only the 1.4 million cubic yards of cut and fill that would occur within the coastal zone is illustrative of TCA's repeated attempts to downplay the impacts of the Project. The Commission has clear authority to consider any of the Project's sedimentation impacts within the San Mateo Creek watershed that will flow into and impact the coastal zone.

¹⁰⁰ *PWA 2006 Report* at 13.

¹⁰¹ Philip Williams & Associates, Ltd., *Letter to California Coastal Commission*, January 17, 2008 (“*PWA 2008 Letter*”) at 1, 2.

¹⁰² *PWA 2007 Analysis* at 1.

¹⁰³ *PWA 2006 Report* at 2.

¹⁰⁴ *Id.* at 21.

¹⁰⁵ M. Lindley, Philip Williams & Associates, Ltd. (pers. comm. January 17, 2008).

¹⁰⁶ *Parks Dept. Comment Letter* at 14.

¹⁰⁷ *See id.* at 13-14 (describing Caltrans roadway project that caused “tons of sediment” to overwhelm drainages in a northern California State Park).

disingenuous to claim that a cut and fill project of this magnitude in a highly erosion-prone area will not have an impact on creek sedimentation.

Increased delivery of silty sediments has the potential to affect cobble deposition, and thereby alter wave formation. This can occur in two ways. First, a sediment mix richer in fine materials will tend to deposit gravel and cobble in the creek bed, and carry the finer sediments out to the mouth, reducing delivery of cobble to Trestles.¹⁰⁸ Second, once exposed to wave action, the changes in the relative amounts of fine and coarse sediments will alter the “porosity” of the mix, resulting in cobble moving onshore or offshore.¹⁰⁹ These changes in cobble transport and deposition may change the morphology of the delta and alter wave formation.¹¹⁰ Although we have been unable to review all of the materials submitted by TCA in response to the Staff Report, TCA’s prior analyses looked only at hydrologic effects related to the flows discharged from the proposed best management practices for the impervious highway corridor rather than effects related to *total* sediment delivery and changed sediment *composition*. Based on these analyses, there is simply insufficient basis for TCA’s conclusion that wave form will not be altered by the Toll Road.¹¹¹

The waves at Trestles are one of California’s unique and historic natural treasures. If the sediment regime of San Mateo Creek is altered by the Toll Road, the wave formations that make Trestles the “Yosemite of surfing” could be irreparably lost. The irreplaceable value of Trestles as one of the world’s greatest surfing resources requires the utmost caution in assessing any potential threat to its continued viability. TCA’s assurances that Trestles will not be harmed are not adequately supported. Accordingly, the Project is inconsistent with the Coastal Act’s requirement that parks, areas suited for water-oriented recreational activities, and lower cost recreational facilities be protected.

C. Wetlands

Filling and Dredging of Wetlands. Coastal Act § 30233. Section 30233(a) of the Coastal Act prohibits diking, filling, or dredging of coastal wetlands unless all of the following requirements are met: (1) the project falls into one of seven listed categories; (2) “there is no feasible less environmentally damaging alternative”; and (3) “feasible mitigation measures have been provided to minimize adverse environmental effects.” The Foothill-South fails **all three** parts of this test.

TCA’s description of the acreage of impacted wetlands has fluctuated since the submittal of its consistency application,¹¹² but the most recent delineation indicates that approximately 7.9 acres of wetlands will be subject to temporary or permanent impacts.¹¹³ Focusing on the acreage of wetlands permanently occupied by the project (0.16 acres), TCA has sought to portray the

¹⁰⁸ PWA 2006 Report at 11-12.

¹⁰⁹ PWA 2007 Analysis at 2.

¹¹⁰ *Id.* at 3.

¹¹¹ PWA 2006 Report at 12.

¹¹² Compare *Consistency Application* at 43 with Glenn Lukos Associates, *Letter to Transportation Corridor Agencies*, Aug. 31, 2007 at 1.

¹¹³ See Glenn Lukos Associates, *Jurisdictional Delineation for the Foothill Transportation Corridor – South Orange County, California* (Dec. 2007).

Project's wetland impacts as minor and mitigable through the creation of one acre of new wetland directly adjacent to a proposed detention basin and the Toll Road structure.

In fact, the impacted wetlands are part of a "highly diverse, intact, and regionally significant complex of habitats supporting special status species" – one of the increasingly rare functional ecosystems remaining in Southern California – and as such have a high ecological value largely ignored by TCA.¹¹⁴ TCA's proposed mitigation "cannot mitigate either the direct or indirect impacts" of the Toll Road on this important coastal wetland habitat.¹¹⁵

But as discussed below, even if the Toll Road did not fail the mitigation test, it would be inconsistent with the Coastal Act, both because it is not one of the allowable uses enumerated in the Act and because it does not meet the Act's least damaging feasible alternative test. Each of these three tests precludes a consistency finding.

1. The Foothill-South is not an allowable use for fill of wetland resources under Section 30233(a)(1)-(7).

TCA claims that the Toll Road serves an "incidental public service purpose" under section 30233(a)(4) and is therefore not absolutely prohibited in coastal-zone wetlands.¹¹⁶ This claim is baseless.

The plain language of this provision lists "burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines" as examples of the types of projects that are properly considered "incidental public service purposes." Clearly, a new six-lane highway is of a much different character than burying cables or maintaining outfall lines. Such a project would create much more extensive environmental harm than the type of projects contemplated by the statutory language and can in no way be considered "incidental."¹¹⁷ See *Barrett v. Superior Court*, 222 Cal. App. 3d 1176, 1190-91 (1990) (where specific examples follow a general term in a statute, application of the general term is limited to things of the same type as the specific examples).

Both the Commission and the courts have made clear that new roadways cannot be considered an "incidental public service purpose" within the meaning of section 30233(a)(4). As the court stated in *Bolsa Chica*:

[W]e accept Commission's interpretation of sections 30233 and 30240... In particular we note that under Commission's interpretation, incidental public services are limited to temporary disruptions and do not usually include permanent roadway expansions. *Roadway expansions are permitted only when no other alternative exists and the expansion is necessary to maintain existing traffic capacity.*

¹¹⁴ M.D. White, *Letter to M. Delaplaine*, Jan. 16, 2008 at 4.

¹¹⁵ *Id.* at 2.

¹¹⁶ *Consistency Application* at 42, 47.

¹¹⁷ See *Bonnie's Random House Webster College Dictionary* (1991 Ed.) at 880 (the term incidental is defined as "happening or likely to happen in an unplanned or subordinate conjunction with something else.") The Toll Road exists as an independent project and clearly is not happening in an "unplanned or subordinate conjunction" with anything else.

71 Cal. App. 4th at 517 (emphasis added). Thus, only the expansion of an *existing* road to accommodate *existing* capacity may be an incidental public service purpose.¹¹⁸

Foothill South is a new six-lane highway designed to provide *increased* roadway capacity to handle traffic from future development. It does not expand an existing road, nor is it limited to accommodating existing capacity. As TCA stated in the FSEIR, the project’s purpose is to “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.”¹¹⁹ This is exactly the kind of road expansion that cannot qualify as an “incidental public service purpose.” *Bolsa Chica*, 71 Cal. App. 4th at 517.

In contrast, as the Staff Report correctly points out, the prior Commission matters cited by TCA¹²⁰ do not support its argument that the Toll Road is an incidental use. In those matters, the Commission found either that the transportation facilities at issue would not increase existing capacity, or that the facilities were *not* an incidental use.¹²¹ This is consistent with the *Bolsa Chica* and longstanding Commission precedent, which has never considered a new road to be an incidental use.¹²² The Foothill-South is a new road designed specifically to increase roadway capacity to accommodate future development. There is no precedent or persuasive rationale to allow the Foothill-South to qualify as an incidental public use. Accordingly, fill of wetlands for the Project is not permitted.

2. There Are Feasible, Less Damaging Alternatives to the Toll Road.

Even if it qualified as an incidental public service purpose, the Project is not consistent with Section 30233 because there are *feasible less environmentally damaging alternatives*. The problem of traffic congestion in Orange County can be addressed just as well by alternative solutions that have not been meaningfully examined by TCA. The most obvious of these alternatives center on improvements to the County’s *existing* I-5 corridor and arterial network. TCA’s rejection of this alternative as infeasible is not based on any substantial evidence. To the contrary, as discussed below in Section II.A, the evidence shows that such alternatives – which would not substantially impact the coastal zone and are environmentally superior by TCA’s own admission – are feasible.

3. Even if Mitigation Criteria Were Relevant, TCA Failed to Identify Effective Mitigation Measures.

As discussed above, TCA is barred from filling wetlands for the Project regardless of any mitigation offered. Where – as here – a project impacting coastal wetlands is not an

¹¹⁸ See California Coastal Commission, *Procedural Guidance for the Review of Wetland Projects in California's Coastal Zone*, ch. 1, § III.B.1.iii, available at <http://www.coastal.ca.gov/wetrev/wetch1.html> (last visited January 16, 2008).

¹¹⁹ FSEIR at 1-16. In this light, the statement in TCA’s consistency application that Foothill-South “will maintain current levels of capacity to alleviate existing congestion” is both nonsensical and fundamentally misleading.

¹²⁰ See *Consistency Application* at 47.

¹²¹ *Staff Report* at 86-89.

¹²² *Id.* at 88.

allowable use under section 30233(a), mitigation measures cannot make the use consistent with the Coastal Act. *See Dunn v. County of Santa Barbara*, 135 Cal. App. 4th 1281, 1297 (2006)

Even if mitigation measures could resolve this conflict as a legal matter, which they cannot, TCA's proposals would be biologically and functionally inadequate. TCA proposes to "create" 15.9 acres of wetlands and riparian habitat in the San Juan Creek watershed.¹²³ The wetlands taken by the Toll Road, however, would be lost from a rare and irreplaceable coastal complex of wetlands, estuary, marsh, and adjacent uplands, all part and parcel of an undammed and relatively pristine watershed. Riverine and estuarine resources at the broad ocean mouth of a creek cannot be replaced by "recontouring uplands"¹²⁴ in a canyon 15 to 20 miles inland – well outside the coastal zone and in a different watershed. The species compositions and biological functions and values are all different, and even if successful, would result in a *net loss* of coastal wetland resources.¹²⁵

Following submission of its original consistency certification, TCA identified an acre of fallow agricultural land adjacent to I-5 that it proposes to restore to "southern willow woodland" in mitigation for impacts to wetlands within the coastal zone. This proposed mitigation area is within the Project right-of-way in the same location as one of the extended detention basins ("EDBs") that TCA has proposed to treat surface runoff from I-5.¹²⁶ This location cannot replace the lost functions and values of the natural channels of San Mateo Creek and its wetland-upland complex.¹²⁷ The hydrology of the proposed mitigation area, located around a storm water detention basin, cannot possibly mimic the hydrology of the natural floodplain.¹²⁸ Also, because the entirety of the mitigation area is so close to I-5 and the merging Toll Road,¹²⁹ it would *all* be subject to adverse edge effects. With a maximum width of 200 feet, it is well within the range of such effects.¹³⁰

In its most recent submittal, TCA provided a functional assessment of the impacted wetlands and "restored" mitigation site that suffers from numerous deficiencies. The metrics used in the assessment to measure functional capacity are statistically biased to disfavor certain critical functions of the impacted wetlands (such as landscape context and connectivity) without any substantiation.¹³¹ Nor does the assessment even consider any indirect impacts, such as noise and vibrations, lights, altered runoff, generation of dust and contaminants, or air quality impacts.¹³² Michael White, an aquatic biologist with 20 years of experience, has conservatively estimated that indirect impacts would permanently degrade roughly 5 to 7 additional acres of wetland and riparian habitat within the Coastal Zone (excluding wetlands inside of the existing Interstate-5 indirect impact zone).¹³³ In addition, another 2 to 40 acres of wetland and riparian

¹²³ *Consistency Application* at 54.

¹²⁴ *Id.* at 54.

¹²⁵ W.D. Spencer, PhD, *Letter to California Coastal Commission*, August 17, 2007 at 3.

¹²⁶ Compare Glenn Lukos Associates, SOCTIIP Mitigation Area D, Ex. 8, with DSEIR Appendix A.1, Route Plan for A7C-FEC-M Initial at 6 (Sheet 5).

¹²⁷ M.D. White, *Letter to Endangered Habitats League*, Sept. 13, 2007 at 3.

¹²⁸ *Id.* at 3.

¹²⁹ Trail Location, Exhibit 3, March 2007, Transportation Corridor Agencies.

¹³⁰ M.D. White, *Letter to Endangered Habitats League*, Sept. 13, 2007 at 3.

¹³¹ M.D. White, *Letter to M. Delaplaine*, Jan. 14, 2008 at 3.

¹³² *Id.* at 2-3.

¹³³ *Id.* at 3.

habitat currently lying within the existing indirect impact zone of I-5 will be even further degraded by the Toll Road.¹³⁴ Finally, TCA's assessment gives temporary impacts from construction a zero score, without providing any evidence that the impacted lands are capable of being restored to their prior condition.¹³⁵

These deficiencies grossly distort the relative benefits of the proposed mitigation – despite the lack of a detailed mitigation plan. “It is hard to envision how the proposed mitigation site could have about the same Functional Capacity Score as the existing habitats (e.g., Table 1 vs. Table 5), particularly without the details of the wetland creation plan.”¹³⁶

The technical efficacy of creating new wetlands is itself questionable, particularly for the high resource values affected by this project.¹³⁷ The US Department of the Interior has stated that a big problem with mitigation projects is that often “the quality of the resulting mitigation wetland is not equal to the wetland that was destroyed.”¹³⁸ The DOI also states that “wetland scientists are becoming aware that the many unknowns make it virtually impossible to provide definitive guidelines for successful wetland assessment and design.”¹³⁹ In addition, a recent review of mitigation projects in California permitted from 1991-2002 (Ambrose et al. 2006) found that mitigation wetlands are not similar to those impacted by the permitted project.¹⁴⁰ TCA has not explained how the proposed wetland creation would overcome these problems.

Aquatic biologist Michael White, drawing on his specific expertise in assessing watershed integrity within the area of the project, has concluded that:

The proposed FTC-S project would produce a much greater level of impact to these resources than is acknowledged by the project proponents, and these impacts are not adequately mitigated by their proposed mitigation measures. There would clearly be a net loss of wetland functions and values and “significant disruption of habitat values” as a result of the FTC-S project, which is at odds with National and State policies on wetlands protection.¹⁴¹

In sum, because the Toll Road does not serve an “incidental” public service purpose, and, independently, because there are feasible, less damaging alternatives, section 30233(a) flatly prohibits any filling of coastal wetlands for the Toll Road, regardless of any mitigation provided. Moreover, none of mitigation offered by TCA would replace the coastal wetland values that would be destroyed by the Toll Road. For each of these reasons, the Project's proposed fill of wetlands is inconsistent with the Coastal Act.

¹³⁴ *Id.*

¹³⁵ *Id.* at 4.

¹³⁶ *Id.* at 4.

¹³⁷ *Id.*

¹³⁸ Randall J. Hunt, *Do Created Wetlands Replace the Wetlands that are Destroyed?* US Department of the Interior-US Geological Survey, available at http://wi.water.usgs.gov/pubs/FS-246-96/FS_246-96.pdf (last visited January 16, 2008).

¹³⁹ *Id.*

¹⁴⁰ M.D. White, *Letter to Endangered Habitats League*, Sept. 13, 2007 at 3.

¹⁴¹ *Id.* at 3-4.

D. Water Quality

Biological productivity; water quality. Coastal Act § 30231: *The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.*

Marine resources. Coastal Act § 30230: *Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance.*

Water quality would be significantly impacted by the proposed six-lane toll road. Currently the San Mateo watershed is one of the healthiest watersheds remaining in Southern California, with San Mateo Creek being the last undammed and undiverted major drainage basin south of Ventura.¹⁴² The Toll Road would cut, fill and pave over miles of “the core of the relatively less-disturbed and naturally functioning portions of the San Mateo watershed.”¹⁴³ This includes 12 subwatersheds that drain into the tributary Cristianitos Creek (five of which are within the undisturbed Donna O’Neil Land Conservancy), and eight that drain to the lower San Mateo Creek mainstem, immediately upstream of Trestles.¹⁴⁴ Water from these subwatersheds ultimately reaches that portion of San Mateo Creek within the coastal zone, including the lagoon, estuary, and Trestles.¹⁴⁵ Thus, Toll Road-related disturbances both within the coastal zone, and in the subwatersheds upstream of the coastal zone, will impact coastal resources. All of the activities causing these disturbances therefore must be evaluated for consistency with the Coastal Act’s water quality policies. 16 U.S.C. § 1456(c)(3)(A); *see also Millennium Pipeline*, 424 F. Supp. 2d at 177-78.

The construction of the Toll Road through the steep, natural terrain of the San Mateo watershed will result in massive changes to the hydrology of the subwatershed drainages, causing stream destabilization and a significant increase in erosion and sediment production.¹⁴⁶ As discussed earlier, the increase in fine sediment delivery would adversely impact fish habitat in San Mateo Creek and lagoon, particularly for the federally endangered southern steelhead and tidewater goby.

TCA seeks to minimize the severity of these impacts by comparing the area of disturbance caused by the Project against the entire 136 square mile San Mateo Creek watershed, and concluding that the change in peak runoff *for the watershed as a whole* would be less than

¹⁴² *Spencer Conservation Priorities* at 36.

¹⁴³ *PWA 2006 Report* at 13.

¹⁴⁴ *Id.* at 2, 15-17 (Figs. 5-7), 21.

¹⁴⁵ *Id.* at 2, 4 (Fig. 1).

¹⁴⁶ *Id.* at 13.

3%.¹⁴⁷ But this approach masks the true impacts of the Project, which will have enormous impacts on the 20 subwatersheds within and just upstream of the coastal zone. The erosion impact to a stream channel is exponentially proportional to the percentage of upstream watershed that is impermeable or disturbed.¹⁴⁸ The Project's disturbance (i.e., cut and fill) limits would occupy over 40% on average (and up to 100% in some cases) of the upstream land area of the eight subwatersheds closest to the creek mouth.¹⁴⁹ Impermeable surfaces would cover up to 29% of the upstream area of individual subwatersheds.¹⁵⁰ These are very large percentages.¹⁵¹ Impacts on this level are associated with destabilization of canyons, highly altered hydrology, and severe erosion.¹⁵² Erosion and siltation impacts therefore could affect the ecology of the San Mateo Creek mouth and lagoon.¹⁵³

TCA's proposed mitigation consists of revegetating the disturbed hillsides and placing energy dissipaters at culverts.¹⁵⁴ The combination of disturbance of watersheds and concentration of flow in culverts is likely to cause erosion of fine sediments and destabilization of stream channels. The proposed BMPs (energy dissipation at culvert outlets and revegetation along cut and fill slopes) will not fully address impacts associated with flow concentration, increased runoff, and the potential for significant soil erosion.¹⁵⁵ And there is a history of failed BMPs for highway projects (including TCA's) that have harmed State parks.¹⁵⁶ It is highly unlikely that the impacts of silt delivery to San Mateo Creek and lagoon can be mitigated with the proposed BMPs.¹⁵⁷

TCA has also proposed constructing treatment facilities for an existing stretch of I-5, in an effort to portray the Project as having a net "benefit" to water quality. The I-5, however, crosses only a *single* subwatershed within the San Mateo Creek watershed, over a distance of less than half a mile. In contrast, the Toll Road would run approximately seven miles through 20 largely undisturbed subwatersheds of San Mateo Creek.¹⁵⁸ It is this massive *new* disturbance in one of the last high-integrity watersheds anywhere in Southern California that poses the real threat to water quality, not the existing I-5. Indeed, there is no evidence of any significant water quality problem in the Creek today.¹⁵⁹ The "benefit" provided by TCA's proposed mitigation is illusory. And as discussed in Section III below, providing new treatment facilities for the I-5 in no way depends on the construction of the Toll Road. Such facilities can be constructed as part of any alternative to the Toll Road (including the AIP-R alternative described in Section II

¹⁴⁷ PWA 2006 Report at 2.

¹⁴⁸ PWA 2008 Letter at 1, 2.

¹⁴⁹ See *id.* at 3 & Revised Table 1; see also PWA 2007 Analysis at 3; PWA 2006 Report at 2, 16-17 (figs. 6-7), 18 (Table 1).

¹⁵⁰ PWA 2008 Letter.

¹⁵¹ PWA 2006 Report at 12.

¹⁵² PWA 2007 Analysis at 3; PWA 2006 Report at 1, 21.

¹⁵³ *Id.*

¹⁵⁴ Consistency Application at 35-37; TCA Response, Jan. 9, 2008 at 85

¹⁵⁵ M. Lindley, Philip Williams & Associates, Ltd. (pers. comm. January 17, 2008).

¹⁵⁶ See Section II.B.2, *supra*.

¹⁵⁷ PWA 2007 Analysis at 1-3.

¹⁵⁸ PWA 2006 Report at 15, Figure 5, *Subbasins Disturbed within the San Mateo Creek Watershed*.

¹⁵⁹ No water bodies at San Onofre have been identified by the Regional Board as impaired. See San Diego Regional Water Quality Control Board, 2006 Clean Water Act Section 303(d) List of Water Quality Limited Segments, http://www.waterboards.ca.gov/tmdl/docs/303dlists2006/final/r9_final303dlist.pdf (last visited January 17, 2008).

below), or indeed can be mandated by the Regional Board as a condition of Caltrans' stormwater permit.

The Toll Road, by devastating some of the most important watershed land left in the region, will increase fine sediments in the creek system and the lagoon, significantly reducing water quality and threatening two endangered fish species. The Project is inconsistent with the Coastal Act's requirement that water quality, biological productivity, and marine resources be maintained, and that special protection be given to areas and species of special biological significance. Coastal Act §§ 30231, 30230.

E. Cultural Resources

Native American Resources. Coastal Act § 30244: When development adversely impacts archaeological or paleontological resources identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.

The ancient Acjachemen/Juaneño Village of Panhé, located on the banks of San Mateo Creek in San Onofre State Beach, is the ancestral home of the Acjachemen/Juaneño people, whose history in the area dates back 10,000 years. It plays a central role in the people's heritage and is actively used as a ceremonial and burial site.¹⁶⁰ Three of the Tribal Councils of the Juaneño Band of Mission Indians, Acjachemen Nation have adopted resolutions opposing the Toll Road based on the severe and irreparable damage that the Project will cause to the Village of Panhé.¹⁶¹

According to State Archaeologists, Panhé was the largest Indian village in this region in prehistoric and early historic times. Today, evidence of the village includes midden deposits, aboriginal artifacts, human burials, relics of houses and fire hearths, other cultural remains, as well as the memory of living Acjachemen people.¹⁶² This site also is listed on the Sacred Lands file at the Native American Heritage Commission¹⁶³ and likely qualifies as a Traditional Cultural Property under the federal National Historic Preservation Act. 16 U.S.C. §§ 470, *et seq.* It is currently one of seven sites included within the San Mateo Archaeological National Register District and is eligible for listing on the National Register of Historic Places.¹⁶⁴

Portions of the Village and its cultural resources are, according to State Archeologists,

¹⁶⁰ See Juaneño Band of Mission Indians, Acjachemen Nation, Resolution 116, *A Resolution of the Tribal Council Supporting the Protection of Panhe and the Tribe's Full Sovereign Participation in Any and All Land and Water Use Decisions Likely to Impact the Ancient Acjachemen/Juaneño Village of Panhe* (July 10, 2007).

¹⁶¹ *Id.*; see also Juaneño Band of Mission Indians, Acjachemen Nation, *Resolution Supporting the Protection of Panhe and the Tribe's Full Sovereign Participation in Any and All Land and Water Use Decisions Likely to Impact the Ancient Acjachemen/Juaneño Village of Panhe* (May 19, 2007); Juaneño Band of Mission Indians, Acjachemen Nation, *Resolution Supporting the Protection of Panhe and the Tribe's Full Sovereign Participation in Any and All Land and Water Use Decisions Likely to Impact the Ancient Acjachemen/Juaneño Village of Panhe* (July 21, 2007) (collectively "*Tribal Council Resolutions*").

¹⁶² Associate State Archeologist Michael Sampson, *Letter to Endangered Habitats League*, Sept. 7, 2007.

¹⁶³ *Id.*

¹⁶⁴ See FSEIR at 4.16-16; FSEIR, vol. IX, Comment Letter O-26 (from Christopher A. Lobo, Secretary/Treasurer and CEO, Juaneño Band of Mission Indians, Acjachemen Nation, Aug. 6, 2004).

within the coastal zone and would be impacted by the Toll Road.¹⁶⁵ The Foothill-South would run adjacent to and through the Village of Panhé and its construction would pass within feet of the village's cemetery and interfere with traditional ceremonial uses.¹⁶⁶ In addition, if the road is built, increased scavenging and damage by relic collectors are anticipated. On February 15, 2006, the Native American Heritage Commission held a public hearing on the Toll Road, and determined – based on testimony from Acjachemen community leaders and tribal members – that the Project would cause severe and irreparable damage to important cultural resources within San Onofre State Beach.¹⁶⁷ Following approval of the Toll Road, the State of California filed a lawsuit against TCA on behalf of the Native American Heritage Commission, challenging the legality of these impacts.

According to TCA's own EIR, there will be “substantial adverse impacts related to archaeological and historic resources that cannot be fully mitigated.”¹⁶⁸ Nevertheless, TCA fails to recognize the overwhelming spiritual importance of this area, which is a profoundly sacred site currently used for ceremony, song, and education by the living descendants of the people who once lived there.¹⁶⁹ The Toll Road's impacts on these values will be tremendous, permanent, and impossible to mitigate.¹⁷⁰ In particular, “[t]he known presence of burials at this site elevates its importance beyond any possibility for impact mitigation.”¹⁷¹

The mitigation measures outlined in the consistency application, such as monitoring, cannot begin to compensate for such severe impacts. There is no “reasonable mitigation” that can address impacts to these ongoing cultural values. As a result, the project is inconsistent with section 30244 of the Coastal Act.

F. Scenic and Visual Impacts

Coastal Act § 30251: The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.

Visitors to San Mateo Creek, including hikers, picnickers, and campers, presently enjoy a quiet, relatively unobstructed wilderness experience. But if the Foothill-South is built, they will find themselves below a massive concrete soundwall that would irrevocably destroy the sense of

¹⁶⁵ Associate State Archeologist Michael Sampson, *Letter to Endangered Habitats League*, Sept. 7, 2007.

¹⁶⁶ See Native American Heritage Commission, *Complaint for Injunctive Relief*, No. 06-GIN051370 (S.D. Super. Ct. filed March 22, 2006).

¹⁶⁷ *Id.*

¹⁶⁸ SOCTIIP Final EIS/SEIR, Executive Summary at 110.

¹⁶⁹ See *Tribal Council Resolutions*; see also FSEIR, vol. IX, Comment Letter O-26 (from Christopher A. Lobo, Secretary/Treasurer and CEO, Juaneño Band of Mission Indians, Acjachemen Nation, Aug. 6, 2004).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 4.

place and only partially block the traffic sounds that visitors are trying to escape. The Parks Department has concluded that “these unnatural and discordant visual elements will intrude into previous open vistas and impose high volume noise on normal recreation activities, as well as on night quiet.”¹⁷² The Parks Department also provided striking visual depictions of the changes that would occur if the Toll Road were constructed through the park.¹⁷³ In short, the Project would take one of the last remnants of large coastal open space left in Southern California and replace it with the incessant noise and visual blight of a six-lane highway and its infrastructure.

TCA identifies seven viewsheds in the park, but concludes that only one viewshed will experience adverse visual impacts of substantial magnitude. For six of the viewsheds, TCA claims that “the impact is not considered substantial because the difference in quality of existing and proposed conditions is minimal.”¹⁷⁴ For the viewshed that TCA concedes would be substantially adversely affected, mitigation procedures would involve retaining walls and landscape requirements.

People visit San Onofre for the relatively unobstructed views of nature. The imposition of a massive six-lane toll road would cause a loss of scenic beauty that cannot be mitigated with a soundwall, which is itself an eye-blight. Instead of looking at trees and open space, the public will see massive slabs of concrete. The Parks Department has identified numerous visual impacts affecting the park, including damaged views from the beach caused by the flyway at Basilone Road, and ultimately it concluded that the Foothill-South would likely force them to close the entire inland portion of the park due to the noise and visual blight.¹⁷⁵ Thus, the Foothill-South’s impact on park views would be dramatic and inconsistent with the scenic protections of the Coastal Act.

A massive interchange and new highway in the midst of a state park and within an undeveloped coastal refuge is the paradigm case of development that is fundamentally “incompatible with the character of surrounding areas” within the meaning of § 30251.

II. THERE ARE SEVERAL LIKELY FEASIBLE AND EFFECTIVE ALTERNATIVES TO THE TOLL ROAD THAT WOULD DRASTICALLY REDUCE OR ELIMINATE IMPACTS TO COASTAL RESOURCES.

TCA in its application insists that the traffic congestion relief the toll road would provide can only be carried out by building a massive highway down the spine of a state park, connecting with the I-5 in the middle of one of the region’s last unspoiled watersheds. This massively destructive project, TCA insists, is the *least* environmentally destructive way to address South Orange County’s traffic congestion problem.

But TCA never did the work required to back up its claim that there is no other way. Had it done so, it would have to concede that better traffic solutions potentially exist that, if

¹⁷² Parks Dept. Comment Letter at 5.

¹⁷³ Parks Dept. Mitigation Assessment, Appendix C1 (before-and-after analysis showing severe visual disruption from Toll Road).

¹⁷⁴ Consistency Application at 75.

¹⁷⁵ Parks Dept. Comment Letter at.6; Parks Dept. Mitigation Assessment, Appendix C1.

implemented, will both protect our environment and expedite traffic relief.

Coastal Commission staff, in its September report, showed that several toll road alignments that avoid coastal resources have the potential to be implemented. Moreover, strategic improvements to the Interstate 5, including adding one High Occupancy Vehicle (HOV) lane to either side from the San Diego County line north to Lake Forest, Orange County, as well as adding improvements to some parallel arterials, *could relieve projected traffic congestion to a similar extent as the proposed Toll Road.*

These improvements can be done at a cost roughly comparable to the Toll Road, with a minimum of social and economic dislocation. This alternative would dramatically reduce if not completely eliminate impacts to coastal resources and environmentally sensitive habitat and wetlands. Unlike the Foothill-South, this alternative would not obliterate open space and would not destroy a state park. The existence of this feasible and environmentally superior alternative precludes granting a consistency certification to the Foothill-South.

A. Improving I-5 and Existing Arterials Could Provide Similar Traffic Benefits While Avoiding the Environmental Impacts of the Toll Road

The potential to achieve similar traffic relief by improving existing infrastructure has been described in detail by experts at Smart Mobility, Inc. (“Smart Mobility”) and Phillip Williams & Associates in a newly revised study dated in January, 2008 (“Revised Smart Mobility 2008 Study” or “Revised Study”),¹⁷⁶ as well as in two earlier Smart Mobility studies.¹⁷⁷

The Revised Smart Mobility 2008 Study supersedes the Smart Mobility study dated September 17, 2007, previously submitted to the Commission. The revised study incorporates amendments and responds to criticisms from TCA and the Orange County Department of Public Works, as well as comments from independent highway engineers. The revised study:

- Incorporates analysis of the potential impacts of a planned HOV lane on 3 of the 20 I-5 segments addressed, between the SR 1 and Avenida Pico interchanges;
- Incorporates analysis of planned auxiliary lanes on I-5 in San Juan Capistrano, near the SR 73 interchange;
- Revises the Ortega I-5 Interchange plan to be consistent with the ongoing San Juan Capistrano/Caltrans planning effort to improve this interchange;
- Revises the design of the Oso/Antonio and Crown Valley/Antonio arterial intersections in response to reviewer comments;

¹⁷⁶ Smart Mobility, Inc., *An Alternative to the Proposed Foothill South Toll Road: The Refined AIP Alternative: Design Modifications to Reduce Displacements*, January 2008 (hereafter, “Revised Smart Mobility 2008 Study”).

¹⁷⁷ Smart Mobility, Inc., *AIP Alternative Refinement for the San Clemente I-5 Interchanges*, Feb. 2006; Smart Mobility, Inc., *A Practical, Cost Effective, and Environmentally Superior Alternative to a New Toll Road for the South Orange County Infrastructure Improvement Project*, July 2005 (hereafter, “Smart Mobility 2005 Study”).

- Revises the design of the Crown Valley/I-5 interchange based on reviewer comments;
- Revises a small number of detention basins in San Clemente due to recent changes in conditions (new development), and reviewer comments;
- Provides additional explanation and clarification of displacement issues on arterials raised by the County of Orange; and
- Provides additional explanation of Smart Mobility’s background and the methodology for the Study.

The above revisions address the issues raised in response to the September 17, 2007 study, but importantly ***they do not substantially change that study’s conclusion***: improvements to the I-5 and to parallel surface streets can feasibly provide similar traffic benefits to the Toll Road with a minimum of displacements, and without the sacrifice of an irreplaceable state park and unique coastal zone resources.

The AIP-Refined alternative (“AIP-R”), as it is described in the revised study, is based on the Arterial Improvements Plus alternative (“AIP”) that TCA itself developed in a 2003 traffic study (the “Austin-Foust Study”).¹⁷⁸ The Austin-Foust Study showed, *using its own data and assumptions*, that the AIP alternative *met project purposes as well as the Foothill-South*.¹⁷⁹ The AIP-R alternative is comparable to the AIP alternative in all respects relevant to the measurement of its regional-scale traffic performance.

But the biggest benefit of the AIP-R alternative relevant to the CZMA consistency process is that it provides all of the regional traffic benefits of the Foothill South *without its devastating impacts on biological and recreational resources*. By improving an existing road in urbanized areas, the AIP-R completely avoids impacts to San Onofre State Beach, including the loss of San Mateo Campground, impacts to Trestles, and all of the impacts to habitat and water quality associated with the Toll Road’s route through the San Mateo Creek watershed. TCA’s own FSEIR for the Project concluded that the AIP alternative was environmentally superior to all the Toll Road alternatives, including the proposed project.¹⁸⁰

Moreover, as part of the AIP-R alternative, the current stretch of the I-5 that crosses the San Mateo Creek watershed within the coastal zone could be retrofitted with extended detention basins like those included in the Toll Road project, thus providing the same level of treatment for this segment without the corresponding degradation of the entire lower reaches of San Mateo Creek.

¹⁷⁸ Austin-Foust Associates, *South Orange County Transportation Infrastructure Improvement Project Traffic and Circulation Technical Report*, December 2003 (hereafter “*Austin-Foust Report*”).

¹⁷⁹ See *Smart Mobility 2005 Study* at 2-4, 5-11 (discussing and citing results of Austin-Foust Report).

¹⁸⁰ FSEIR, Executive Summary at 32 (the AIP alternative performed “well in impacts to riparian ecosystems, CSS and gnatcatchers”); see also FSEIR at Table 2.6-1 (summarizing comparative impacts; none of the Toll Road alternatives, including the selected alternative, performed as well as the AIP alternative in these categories).

B. The AIP-R Alternative Would Likely Avoid Virtually All Property Displacements and Is Feasible.

TCA summarily rejected the AIP alternative, and refused to analyze it in detail in the CEQA process, because TCA concluded that its construction would require the costly displacement of well over 1,200 residences and businesses, and was therefore infeasible. Notably, this conclusion was not supported by any meaningful analysis. TCA's displacement figures originated in a document entitled "Relocation Impacts Technical Report" (December 2003), but that document provided no analysis showing that any effort was made to reduce these impacts through design modifications.

On the contrary, TCA's design effort – of which, apparently, there exists no written record – produced a project footprint that at best completely disregarded the issue of displacements, and appears more likely to have been geared toward maximizing them. The right of way take along the mainline extends well beyond what is needed to construct new lanes. Interchange designs are selected with no regard to adjacent development, ignoring standard alternative designs commonly used throughout the country. Detention basins are placed on top of residential subdivisions. TCA did make an effort, however, to document all of the homes and businesses that would be displaced by its design.

In response to a Public Records Act request asking for all other documents relating to TCA's evaluation of displacement impacts for the AIP and other alternatives involving the improvement of the I-5 or existing arterials,¹⁸¹ TCA produced only two studies – both relating to *toll road* alignments (the B and BX alternatives) – and stated that it had *no other documents* responsive to the request.¹⁸²

Nor are TCA's displacement figures based on any analysis by Caltrans. Caltrans has acknowledged it had no substantive involvement with TCA's alternatives analysis. The Endangered Habitats League recently sought all information in the possession of Caltrans relating to the evaluation of alternatives during the environmental review process for the Toll Road. On February 15, 2006, Caltrans responded as follows:

Your California Public Records Act request also requested any documents showing Caltrans review of I-5 improvement alternatives evaluated by the Transportation Corridor Agencies for the South Orange County Transportation Infrastructure Improvement Project.

*Caltrans District 12 office has no review documents for the South Orange County Transportation Infrastructure Improvement Project, as the Transportation Corridor Agencies were responsible for evaluation of the proposed project.*¹⁸³

¹⁸¹ Letter from William J. White, Esq. to Carolyn LeBail of TCA, dated Nov. 10, 2005 (request III, Item 6(d)) at 3.

¹⁸² Letter from Carolyn LeBail of TCA to William J. White, dated Dec. 23, 2005 at 1.

¹⁸³ Letter from Pam Gorniak of Caltrans to Dan Silver of EHL, dated Feb. 15, 2006 (emphasis added).

TCA and Caltrans have failed to produce any documentation showing why TCA's AIP design could *not* have been revised to reduce the claimed displacements. The Revised Smart Mobility 2008 Study now affirmatively demonstrates that the vast majority of those displacements can potentially be avoided through design techniques applied by highway engineers throughout the United States in urban settings. By applying context sensitive engineering refinements, such as replacing partial cloverleaf interchanges with more land-efficient single point and tight diamond interchanges, *displacements can potentially be reduced an order of magnitude from TCA's estimates.*

Thus, the AIP-R alternative would potentially result in a nearly \$1 billion reduction in TCA's estimated cost for the alternative, meaning that the AIP-R alternative is roughly cost-competitive with the Foothill-South project (which is now likely to exceed the \$1 billion mark).

C. The AIP-R Alternative Improves Interchange Safety

With no design studies of their own, TCA and Caltrans have nevertheless expended considerable effort critiquing the earlier version of the Smart Mobility Study. Most recently, a January 7, 2008 Caltrans letter and TCA's January 9 Response document raise a number of specific issues with the design of certain interchanges and detention basins in that study. Ironically, several of the design concepts criticized – e.g., locating a detention basin (EDB-7B) on a hillside 20 feet above the highway – were in fact *designed by TCA itself*, and were not modified in the Smart Mobility Report. Nevertheless, most of the issues raised have already been addressed in the Revised Study, and additional responses will be provided to the Commission under separate cover.

One point does warrant brief mention here, however. A general theme of TCA's and Caltrans' objections is that the interchange designs do not meet all of Caltrans' standards and that, therefore, they are "unsafe." These arguments are flawed in at least two important respects. First, they misrepresent the nature and function of the study designs, which are intended to show first-level concepts, not engineering-level designs ready for Caltrans approval. The development and design of interchange projects is necessarily iterative, and it is through the review and revision process that designs evolve and are improved.

Second, TCA and Caltrans wrongly claim that Smart Mobility's interchanges are by definition "unsafe" because they appear, at first blush, to be inconsistent with Caltrans design standards. TCA and Caltrans have also used the terms "controlling criteria" or "mandatory standards" to imply that full compliance is an absolute requirement for approval by FHWA. This is not correct. When a proposed geometric feature does not comply with a mandatory standard, it is considered non-standard. Both FHWA and Caltrans have procedures for obtaining approval to use non-standard features. In built-up areas such as those along I-5, the approval for non-standard features is often a practical trade-off for severe right-of-way impacts. The presence of such features does not by itself make a roadway "unsafe" nor does it preclude approval.

Indeed, Caltrans has recently approved a number of alternative designs for the I-5 and Ortega Highway Interchange Project that would maintain existing distance between ramps and local road intersections (60 and 110 meters) despite inconsistency with the minimum standard

(125 meters).¹⁸⁴ This is the *same* inconsistency in the *same* intersection that, in critiquing the Smart Mobility Study, TCA described as a “serious safety issue.”¹⁸⁵

TCA and Caltrans also fail to point out that, as the example above illustrates, many of the *existing* interchanges along this portion of I-5 do not presently meet minimum Caltrans criteria. Even if all criteria could not be met, *the interchange designs in the Revised Smart Mobility 2008 Study could potentially provide a safety improvement over present conditions.*

Indeed, even if the Toll Road is built, the existing operational and safety problems that the AIP would have resolved will remain and will eventually need to be addressed. Caltrans will then be faced – albeit in piecemeal fashion – with many of the very same issues it has raised with the AIP alternative. The costs of resolving those issues – whether in the form of nonstandard features or greater number of displacements – eventually will have to be incurred *with or without the Toll Road*. TCA’s attempt to attribute these costs solely to the AIP or other Toll Road alternatives is thus fundamentally misleading.

D. Financing and Governmental Authority to Construct the AIP-R Alternative Can Be Obtained.

TCA has asserted that the AIP-R alternative is infeasible because no funds are currently available to construct it. As discussed above, TCA has been assuming a cost for the alternative that is in the range of \$1 billion too high. In terms of financing, the Foothill-South is in the same position; the Toll Road also has not yet secured the necessary funding.

More fundamentally, the lack of current funding for the AIP alternative is not due to a shortage of funds, but rather to the fact that funding for alternatives to the Toll Road has not been sought to date by regional transportation authorities. If the Foothill South ceases to become viable, real efforts to identify funding for an alternative such as the AIP-R will begin in earnest.

Notably, OCTA has already begun long-range planning efforts that include consideration of most of the elements of the AIP-R.¹⁸⁶ If the improvements contemplated by OCTA had already been demonstrated to be infeasible or were not capable of being funded, then the County’s transportation planning authority would not be considering these options. But OCTA *is* considering them, because in fact they *are* feasible.

Indeed, much of what TCA summarily and without analysis dismisses as infeasible has long been planned by regional transportation authorities. These authorities concede that these improvements are needed *regardless of whether the Toll Road is built*. Since at least 2004, in the Southern California Association of Governments’ Regional Transportation Plan, and in the Orange County Transportation Authority’s 2006 Long Range Transportation Plan, many of the interchange improvements TCA attributes to an *alternative* to the toll road – the AIP-R – have already been deemed necessary. Because these improvements need to be built anyway according

¹⁸⁴ See <http://www.sanjuancapistrano.org/Index.aspx?page=398> (last visited January 16, 2008).

¹⁸⁵ TCA, *Response to Coastal Commission Staff Report*, January 9, 2008.

¹⁸⁶ Orange County Transportation Authority Stakeholders Working Group, *South Orange County Major Investment Study*, July 25, 2007, Alternative E – Alt C+HOT Lane Freeway Widening + High Transit (showing interchange upgrades and additional HOV lanes along I-5 in South OC).

to regional plans, TCA erroneously attributes their impacts on existing communities to *alternatives* to the Toll Road. In fact, they should be included in the baseline.

Finally, TCA has previously claimed that it lacks the authority to implement improvements on the I-5. TCA is a special entity created specifically to construct new thoroughfares funded by toll revenues, but it is made up of the County of Orange and nearly a dozen Orange County cities. Orange County and some of these same cities within the County also make up the governing board of the Orange County Transportation Authority (“OCTA”), the organization responsible for proposing and seeking funding for I-5 improvements in Orange County. It is therefore disingenuous for TCA to claim that it lacks authority to implement anything other than a new toll road, when its governing entities are key decision-makers on the OCTA Board of Directors.

Indeed, as of January 2007, the following jurisdictions were currently directly represented on both the TCA and OCTA Boards: Orange County, Tustin, Lake Forest, and Anaheim. But because *all* Orange County cities are in effect represented on the OCTA Board at some time, there is a complete overlap in jurisdiction between TCA and OCTA. *See* Pub. Utilities Code §§ 130050, 130052 (providing eligibility for all Orange County cities on the OCTA Board). Even if there were no complete overlap, OCTA and TCA have the legal ability to enter into partnerships to accomplish projects jointly, including improving arterials and the I-5, or even creating a new entity. *See* Pub. Utilities Code § 130240.1 (providing broad authority for OCTA to enter into partnerships). There is thus no basis for TCA to claim that its constituents have no ability to implement the AIP-R alternative.

In short, neither TCA nor Caltrans has ever seriously investigated the feasibility of providing the needed additional capacity on existing roads with minimal environmental damage, and with virtually no impacts on the coastal zone. The revised Smart Mobility study shows that it likely can be done with a minimum of displacements and at a roughly comparable cost. The existence of this environmentally superior, feasible alternative thus precludes a finding of consistency under the CZMA for the Foothill-South project.

III. THE BALANCING PROVISION OF THE COASTAL ACT DOES NOT ALLOW FOR APPROVAL OF THIS PROJECT

The Foothill-South Toll Road is clearly inconsistent with numerous sections of the Coastal Act that protect ESHA, parklands, wetlands, water resources, and public access and recreation. *See* Section I, *supra*. Yet TCA claims that these serious impacts are justified because, on balance, they are outweighed by the Toll Road’s purported benefits to coastal resources. *See* Pub Res. Code § 30007.5. These benefits, TCA alleges, are increased public access, improved water quality, and needed emergency evacuation routes in case of a nuclear melt-down at San Onofre Nuclear Generator Station.¹⁸⁷

TCA’s assertions are baseless. The Staff Report correctly concludes that the Toll Road cannot be found consistent with the Coastal Act based on a balancing of conflicting Coastal Act policies under section 30007.5.

¹⁸⁷ *Consistency Application* at 8-10.

The California courts have applied this section only to projects that were necessary to advance a particular Coastal Act policy but could not be accomplished without violating another policy. *See, e.g., Sierra Club v. California Coastal Commission*, 19 Cal. App. 4th 547 (1993). In stark contrast, where a particular project is *not* necessary to advance any Coastal Act policy – or where the purported benefits will result only from measures offered in mitigation of a project’s damage to other coastal resources – the courts have held section 30007.5 inapplicable. *See, e.g., Bolsa Chica Land Trust v. Superior Court*, 71 Cal. App. 4th 493, 506-09 (1999).

The Toll Road project falls squarely into the latter category. The purpose of the Toll Road is not to benefit coastal resources. It is a transportation project that, at best, is designed to provide congestion relief to the drivers of southern Orange County, mostly during peak hours. The benefits of the project would thus be received far from where the impacts would be felt on the coastal zone – indeed, in an entirely different county. State coastal and park resources would be sacrificed for the purpose of dealing with a problem created by the short-sighted land use decisions of local Orange County decisionmakers.

To the extent the Project would have any benefits to the coastal zone at all, those benefits are incidental at best. In fact, the purported benefits claimed by TCA all arise from measures that can be implemented without the Toll Road or attained with less destructive alternatives to the Toll Road. In short, there is no conflict to analyze here, and no competing policies to balance.

Even if the Toll Road project did present a conflict between Coastal Act policies, nothing supports a finding that construction of the Toll Road is, on balance, “most protective of significant coastal resources,” as required by the Coastal Act. Pub. Res. Code § 30007.5. The Staff Report correctly finds that the Toll Road would result in environmental damage and irreversible impacts to coastal resources that would far outweigh any conceivable benefit it could produce.

A. The Balancing Provision Is Triggered Only When the Project Is a Prerequisite to Advancing the Policies of the Coastal Act

In certain limited circumstances, a project may raise conflicts between two or more policies in a manner that warrants the balancing test prescribed in Coastal Act section 30007.5. That section provides:

The Legislature further finds and recognizes that conflicts may occur between one or more policies of the division. The Legislature therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner which on balance is the most protective of significant coastal resources. In this context, the Legislature declares that broader policies which, for example, serve to concentrate development in close proximity to urban and employment centers may be more protective, overall, than specific wildlife habitat and other similar resource policies.

Pub. Res. Code § 30007.5. This Section has been interpreted to apply only when there is no way to advance the Coastal Act policy at issue without creating a conflict with another Coastal Act policy. *Sierra Club v. California Coastal Com.* (“*Batiquitos Lagoon*”), 19 Cal. App. 4th 547 (1993).

In *Batiquitos Lagoon*, the project at issue was a fish-habitat restoration project at a lagoon in Carlsbad that involved “conflicting interests of fish and fowl.” *Id.* at 550. The primary purpose of the project was to provide a benefit to the coastal zone by opening the lagoon to tidal flows and thereby improving fish habitat. *Id.* at 553-554. A conflict arose because while increased tidal flows would restore fish populations in the lagoon in the long term, it would also reduce bird habitat in the short term. *Id.* at 552, 554 (noting a direct conflict between Coastal Act section 30230 (marine resources) and section 30233 (prohibiting dredging which would significantly disrupt marine life and wildlife habitats). Because enhancement of the fish habitat could not be achieved without impacting bird habitat, the court held that the Commission properly sought to balance these considerations under Section 30007.5. *Id.* at 559-540.

However, the courts have rejected attempts to stretch the application of the balancing test under Section 30007.5 beyond the narrow circumstances present in *Batiquitos Lagoon*. In *Bolsa Chica Land Trust v. Superior Court* (“*Bolsa Chica*”), 71 Cal. App. 4th 493, 509 (1999), the court sharply distinguished the housing development at issue from the habitat restoration project in *Batiquitos Lagoon*. The project proponent argued that notwithstanding the project’s occupation of an ESHA in violation of the Act, the project was permissible under the balancing provision of section 30007.5 because it would create better raptor habitat offsite. *Id.* at 506-09. The court rejected this argument, ruling that there was no conflict in the first instance because “nothing in the record or briefs of the parties suggests there is such an acute need for development of residential housing in and around the eucalyptus grove that it cannot be accommodated elsewhere.” *Id.* at 509. The court held that while the Commission may have a legitimate interest in preserving raptor habitat over the long term, there was no indication that building the project in an ESHA was the only way to effectuate that interest:

[T]here is no evidence in the record that destruction of the grove is a prerequisite to creation of the proposed [off site] habitat. In the absence of evidence as to why preservation of the raptor habitat at its current location is unworkable, we cannot reasonably conclude that any genuine conflict between long-term and short-term goals exists.

Id. at 509.

Unlike the habitat restoration project in *Batiquitos Lagoon*, the Toll Road is not a project whose purpose is to effectuate an important public policy under the Coastal Act. It is a transportation project designed to benefit drivers in southern Orange County. TCA’s claim that the project will also have incidental benefits to coastal resources is not enough to create a “conflict” that would trigger balancing under Section 30007.5. That section would apply only if the purported benefits could only be attained by constructing the Toll Road. This is plainly not the case.

Like the project proponent in *Bolsa Chica*, TCA seeks to create a policy “conflict” by offering to construct mitigation – in this case, facilities to treat stormwater from the I-5 – that will allegedly improve existing environmental conditions. However, as in *Bolsa Chica*, there is no evidence that the project is a prerequisite to the mitigation. It is not necessary to build a six-lane toll road through the San Mateo Creek watershed in order to add stormwater treatment

facilities to I-5. Such facilities could just as easily be made part of the I-5 widening alternative described in Section II above, or indeed could simply be constructed as a stand-alone project.

TCA asserts that neither TCA nor Caltrans can be “legally required” to construct these detention basins unless the Toll Road is built. This assertion is not only wrong (as discussed in Section B below), but also irrelevant. In *Bolsa Chica*, there was no legal requirement to create the new raptor habitat offered by the developer, yet the court held that the balancing provision was inapplicable because there was no evidence the new habitat could *only* be created via the proposed project. *Bolsa Chica*, 71 Cal. App. 4th at 509. Likewise, the proposed I-5 detention basins are not in any way dependent upon the construction of a toll road through coastal resources. Accordingly, the proposed basins cannot be used to justify the Project’s inconsistency with Coastal Act policies.

The only other alleged benefits of the Toll Road – public access and public safety – are primarily based on the Project’s traffic-related benefits, all of which could be attained through other alternatives while also avoiding impacts to coastal resources, including the loss of San Mateo Campground. As discussed in Section II above, widening I-5 and arterials is feasible and would provide equal or better congestion relief. In addition, alternative egress routes will also be provided by the planned extension of La Pata to Antonio Parkway.¹⁸⁸ Nor does TCA’s eleventh-hour offer to write a check to the Parks Department create any conflict that warrants balancing of Coastal Act policies.

Because there is no evidence that the Toll Road must be built to attain the alleged coastal benefits of the project, the balancing provisions of Section 30007.5 are not applicable.

B. The Project’s Benefits to Coastal Resources Are Insubstantial and Are Not Comparable to the Severe and Irreparable Damage the Project Would Inflict on Those Resources.

Even if the Coastal Act balancing provision were applicable, the Foothill-South would fail to provide significant benefits that outweigh its destructive impact. One of TCA’s claimed benefits – improvements to water quality – seeks to solve a problem that does not exist in the relatively unspoiled San Mateo watershed. The other two alleged benefits – increased public access and the provision of an emergency evacuation route – are not only illusory, but are not recognized by the Coastal Act as benefits that could justify destruction of fragile coastal resources. The Project therefore cannot be considered “on balance... most protective of significant coastal resources.” Pub. Res. Code § 30007.5.

1. Public Access Claims.

As noted above, the purpose of the Toll Road Project is to relieve peak hour congestion, not to provide access to the coast. TCA nevertheless argues that, it should be able to degrade ESHA, wetlands, and park resources so that those driving to the park can realize incidental traffic benefits. But the Coastal Act does not promote “public access” at all costs. The provision of public access must be consistent with environmental protection:

¹⁸⁸ See *Austin-Foust Report*, Figure 2-15; *Smart Mobility 2007 Study* at p 6.

[T]he basic goals of the state for the coastal zone are to . . . [m]aximize public access to and along the coast and maximize public recreational opportunities in the coastal zone *consistent with sound resources conservation principles*.

Pub. Res. Code § 30001.5 (emphasis added). Other provisions of the Act likewise make clear that public access is not to be developed at the expense of fragile coastal resources. For example, Public Resources Code section 30212, in pertinent part, states:

Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) *it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources*.

Similarly, section 30210 provides “In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access . . . and recreational opportunities shall be provide for all the people *consistent with . . . the need to protect . . . natural resource areas from overuse*.”

Here, TCA’s proposal for increasing public access is to run a highway through the coastal lands at issue – including ESHA, wetlands, and parklands – in a manner that is clearly not consistent with “sound resources conservation principles” or “the protection of fragile coastal resources.”

Moreover, TCA has not shown the Toll Road will provide any meaningful public access benefit. Public access routes already exist from inland areas to San Onofre (e.g., SR 91 to 55 or 57 to I-5), and TCA presents no evidence that the park, which gets over 2.4 million visitors per year, has public-access problems due to traffic congestion. TCA’s own application materials show that I-5 segments in the vicinity of San Onofre generally are at or below 50% of capacity during peak hours (i.e., at LOS B and C).¹⁸⁹ Segments of I-5 north of San Onofre are currently experiencing some deficiencies, but only in peak hour travel directions and locations that do not affect access to the park.¹⁹⁰

With respect to projected future increases in traffic, weekday peak hour conditions on the segments of I-5 nearest San Onofre are projected in the FSEIR to remain “uncongested” even under the “No Action” alternative reflecting the most likely development scenario for the year 2025.¹⁹¹ Outside the immediate vicinity, there is only one “deficient” mainline segment of I-5 (between Avenida Pico and El Camino Real) that could conceivably affect southbound visitors attempting to reach the park, and then only during peak AM and PM hours.¹⁹² TCA has provided no data or analysis regarding the travel patterns of San Onofre users or the extent to which they are affected by peak-hour travel conditions. There is simply no evidence that the projected level of future congestion poses any barrier to public access to the park, or that any significant number of park users would consent to pay a toll when free routes are available.

¹⁸⁹ TCA Submittal 5, Response to Coastal Staff Questions of April 30, 2007, Item 2, Memo: Traffic on I-5 South of Orange County/San Diego County Border, Table A.

¹⁹⁰ See FSEIR Figs. 3.4-1, 3.4-2.

¹⁹¹ FSEIR at 3-19 (describing “Scenario 3” – buildout of circulation system plus development of 14,000 dwelling units at Rancho Mission Viejo – as most likely future scenario); Fig. 3.4-5 (showing weekday peak hour conditions for “No Project” alternative).

¹⁹² FSEIR Fig. 3.4-4.

Moreover, as discussed in Section II above, any traffic benefits provided by the Toll Road can also be provided by environmentally superior alternatives such as widening the I-5.

Far from improving public access to the coast, the Foothill-South would in fact vastly *diminish* such access. As discussed in Section I above, the alignment of the Toll Road virtually assures the abandonment of the San Mateo Campground, a facility that enables *over 100,000 visitors per year* to access the park's shoreline at low cost, and was itself created as *Commission-mandated mitigation to offset lost coastal access and ensure compliance with the Coastal Act*. Under no conceivable interpretation of the Act can the destruction of this vital coastal access resource be justified by the desire to shave a few minutes off travel time to the park.

Even if the Toll Road did result in an increase in park visitors, those visitors would have far fewer facilities – and much less park – to enjoy. To eliminate these resources, while at the same time adding visitors, would greatly exacerbate the trend of increased visitation that the Parks Department believes “will stress park resources and diminish the quality of park visitor experience.”¹⁹³

Finally, TCA's proposal to pay millions of dollars to the Parks Department cannot be used to balance away the Toll Road's dramatic adverse effects on public access to coastal recreational resources. As detailed in Section IV of this letter, there is no evidence that the State will be required to pay anything to renew the lease for San Onofre. Indeed, given the Department's conclusion that the Toll Road will force abandonment of the entire subunit in any event, it is likely most of the park would be gone by the time the current lease is up. Moreover, the restoration of a handful of cottages at Crystal Cove – which currently rent for an average of \$175 per night for a family of four¹⁹⁴ – will do nothing to offset the loss of significantly less expensive camping opportunities at the San Mateo Campground. Once again, TCA's attempt to manufacture a conflict between Coastal Act policies should be rejected.

This Project does not come close to meeting the Coastal Act's policies regarding public access. Congestion relief can be provided as well or better by other alternatives and, in any event, cannot outweigh the Project's impacts on coastal access – much less the combined loss of public access, sensitive habitat, wetlands, and other coastal resources described in Section I.

2. Water Quality Claims.

TCA claims that the Foothill-South will advance Coastal Act policies relating to water quality by constructing new facilities that will treat pollution runoff from the existing I-5 corridor. But the San Mateo Creek, estuary, and beach have no known water-quality problem.¹⁹⁵ TCA fails to present any evidence that runoff from I-5 is having a significant impact on the water quality at San Mateo or Cristianitos Creeks or Trestles Beach. Indeed, the regional water quality

¹⁹³ *Parks Dept. Mitigation Assessment* at A-3 to A-4.

¹⁹⁴ See California Department of Parks & Recreation, *News & Views* (Spring 2007), at 6.

¹⁹⁵ See San Diego Regional Water Quality Control Board, *2006 Clean Water Act Section 303(d) List of Water Quality Limited Segments*, http://www.waterboards.ca.gov/tmdl/docs/303dlists2006/final/r9_final303dlist.pdf (last visited January 17, 2008).

control board has not identified any water bodies at San Onofre State Beach as impaired (i.e., failing to meet water quality standards).¹⁹⁶ The benefits to water quality would be insubstantial.

Moreover, contrary to TCA's assertion, Caltrans *can* be legally required to install treatment facilities on existing portions of I-5 by the Regional Board as a condition of its stormwater discharge permit, to the extent runoff is ever found to be causing a violation of a water quality standard.¹⁹⁷ In addition, according to staff at the San Diego Water Board, Caltrans' existing permit already requires the installation of the very measures offered by TCA in the event that *any* improvements are made to the affected segment of I-5. The Caltrans Stormwater Permit explicitly requires "Storm Water Drainage System Retrofitting." Specifically, "Caltrans shall seek opportunities to retrofit the Storm Water Drainage System for water quality improvement *whenever a section of the rights-of-way undergoes significant construction or reconstruction.*"¹⁹⁸

Moreover, the Coastal Act's balancing provision simply does not permit a conflict to be created by the applicant's offer of mitigation, particularly where (as here) that mitigation has no connection with the project itself. Otherwise *any* project would be able to invoke the balancing provision simply by offering some form of coastal mitigation, in contravention of the specific provisions of the Act that prohibit this.

As discussed in Section I above, the water quality problem facing San Onofre is not the lack of detention basins for the small segment of I-5 that crosses the San Mateo Creek watershed. The real problem is the threat of an entirely *new* highway constructed along *miles* of this relatively undisturbed watershed. As discussed earlier, there is no evidence that the detention basins for the Toll Road are capable of mitigating the significant impacts of the Toll Road on the water quality of San Mateo Creek. The Project will not provide any benefits to coastal water resources; it will only degrade those resources.

3. Evacuation Route Claims.

One of the most specious arguments presented by TCA is that the Foothill-South will provide an alternative evacuation route in case of a nuclear accident at SONGS or other disaster, and is therefore needed to promote a policy set forth in Section 30253 of the Coastal Act.

Section 30253 is inapplicable. That section states only that new development shall "minimize risks to life and property in areas of high geologic, flood and fire hazard." This simply requires that coastal-zone projects in high-hazard areas be designed to minimize *their own* safety risks. It in no way establishes a policy favoring development projects in the coastal zone that purport to have some alleged safety benefit.

¹⁹⁶ *See id.*

¹⁹⁷ *See* State Water Resources Control Board, *Caltrans Stormwater Permit*, Section C.1-1 at 10 ("[t]he discharge of storm water from a facility or activity that causes or contributes to the violation of water quality standards or water quality objectives (collectively WQs) is prohibited").

¹⁹⁸ *Id.* at 15 (emphasis added); *see also* State Water Quality Control Board, *Fact Sheet for National Pollutant Discharge Elimination System for Storm Water Discharges*, Jul. 15, 1999, available at <http://www.swrcb.ca.gov/stormwtr/docs/caltrans/caltranspmt.pdf> (last visited January 16, 2008).

Even if section 30253 were relevant, there is simply no evidence that construction of the Toll Road is required to address safety concerns at SONGS. Neither the owner and operator of SONGS (Southern California Edison, Inc.) nor the agencies responsible for assuring the plant's safety (the Nuclear Regulatory Commission and the Federal Emergency Management Agency) even submitted comments during the Project's environmental review, much less identified the Toll Road as necessary to ensure public safety.

Moreover, alternatives such as the AIP-R alternative discussed in the Smart Mobility Study would also provide significant alternative egress in the event of an I-5 closure. The AIP-R calls for the completion of Avenida La Pata to Antonio Parkway, an improvement that has been independently planned by the City of San Clemente.¹⁹⁹ In addition to providing this alternative route, the AIP-R alternative would significantly expand the capacity of the *primary* evacuation route for southern Orange County – the I-5 – a benefit the Toll Road would clearly not provide.

Section 30253 does not apply to the Toll Road. Even if it did, there is no demonstrated public safety need for the Toll Road. Improved emergency egress, to the extent that it is relevant at all to the Coastal Act, can be provided by feasible alternatives to the Project without the need to destroy irreplaceable coastal resources. Public safety, like the other purported “benefits” of the Project, is another manufactured rationale designed to justify the Toll Road. It does not alter the Project's fundamental and fatal inconsistencies with the Coastal Act.

IV. TCA's Monetary Offer Cannot Make the Toll Road Consistent with the Coastal Act, Nor Would It Mitigate the Impacts of the Project.

Following the release of the Staff Report, and less than two weeks before the scheduled Commission hearing on the project, TCA announced that it would pay \$100 million to “benefit” the state park system if the Toll Road is built.²⁰⁰ According to TCA, the vast majority of this payment – \$70 million – would be used to pay the U.S. Navy to extend its lease with the State for San Onofre after 2021. The remaining \$30 million would be used for “improvements to recreational facilities at San Onofre and Crystal Cove State Park,” and for “coastal sage scrub restoration within Crystal Cove.”²⁰¹

TCA's eleventh-hour attempt to buy its way out of compliance with the Coastal Act is not only disingenuous, but is unsupported by law. As discussed in Section I.A.1, above, the cases are clear that no amount of money or off-site “restoration” can be used to avoid the prohibition on destruction of ESHA.

But even if the law were otherwise, there is simply no merit in TCA's suggestion that the money will mitigate the impacts of the Project. There is no evidence that the State will be forced to pay the Navy to renew the lease for San Onofre, much less the exorbitant sum TCA claims.

¹⁹⁹ See *Smart Mobility 2008 Study* at 8; see also Figure 4-2, City of San Clemente 1992 General Plan Circulation Element showing La Pata Extension, <http://san-clemente.org/sc/Inf/Plans/General/Wd04.pdf> (last visited January 16, 2008).

²⁰⁰ TCA, “Toll Road Agency Announces \$100 Million Offer to California State Parks” (Sept. 28, 2007), available at http://www.thetollroads.com/home/news_press_sept07a.htm (last visited January 16, 2008); Letter from M. Levario, TCA, to M. Delaplaine, CCC, Re: Amendment to Project Description for Consistency Certification No. CC-018-07 (Oct. 4, 2007).

²⁰¹ TCA, letter of October 4, 2007.

Nor is there any evidence that the proposed restoration money would create any new recreational facilities or habitat beyond what is already planned by the State. The proposal is merely an offer to finance what will occur with or without the Toll Road. It is not mitigation.

Compliance with the Coastal Act may not be purchased. TCA's offer in no way alters the Commission's findings that the Toll Road is inconsistent with the Act.

A. The Law Forbids Destruction of ESHA Regardless of Whether Off-Site Mitigation Is Provided.

No amount of mitigation can make the Toll Road consistent with key Coastal Act policies. Most importantly, the Project would destroy more than 50 acres of coastal sage scrub habitat and other ESHA lands within the coastal zone in violation of section 30240 of the Public Resources Code. The Staff Report has concluded, and TCA has not denied, that the Toll Road is not a resource-dependent use, which is the only type of use that would allow the project's construction through ESHA. Pub. Res. Code § 30240. The courts have clearly held that off-site mitigation, like that proposed by TCA, cannot legally be used to permit the destruction of ESHA by a non-resource-dependent use, regardless of how extensive the proposed mitigation. *See Pygmy Forest*, 12 Cal. App. 4th at 617. TCA cannot attain consistency with this policy by promising to restore habitat elsewhere.

B. The Money Offered by TCA Would Not Provide Mitigation.

1. There Is No Evidence that the State Will Need to Pay the Navy to Extend the San Onofre Lease.

The cornerstone of TCA's monetary offer is a \$70 million payment that, according to TCA, would be used to renew the San Onofre lease in 2021. TCA and its supporters have gone so far as to suggest that the continued existence of the park would be in jeopardy without TCA's payment.²⁰²

But the basic premise behind the offer – TCA's assertion that changes in federal law will compel the Navy to obtain "fair market value" from the State – is faulty. In fact, federal law expressly authorizes the Secretary of the Navy to convey surplus military land for park or conservation purposes *without* charging the fair market value of the property. For example:

- 10 U.S.C. § 2694a authorizes the Secretary of the Navy to convey to a state non-excess property "to be used and maintained for the conservation of natural resources in perpetuity," at a price that takes into account the public benefit of the use of the property for conservation.
- 16 U.S.C. § 667b allows any federal agency to transfer property under its control for "wildlife conservation purposes" to a state wildlife agency "without reimbursement or transfer of funds."

²⁰² Letter from Thomas E. Margro, CEO, TCA, to Maidie Oliveau dated October 8, 2007; Letter from Richard T. Dixon and Peter Herzog to Governor Arnold Schwarzenegger dated October 17, 2007.

- 40 U.S.C. § 550(e) authorizes the sale or lease of surplus federal lands to a state “for use as a public park or recreation area” at a sale or lease value that accounts for the public benefit of the use of the property.

These provisions are reflected in the General Services Administration’s property disposal regulations, which provide that federal property may be disposed of “at up to 100 percent public benefit discount for public benefit purposes,” including “park and recreation . . . and wildlife conservation” purposes. 41 C.F.R. § 102-75.350.

Moreover, even if the Navy were to decide in 2021 not to declare the Park surplus property and instead sought fair market value for the lease renewal, there is no indication that this would require payment of more than a nominal rent by the State. It is unlikely the Navy would permit development of private commercial or residential structures within the base, which could conflict with its military mission. Accordingly, the Navy could reasonably determine that the land’s highest and best use is retention as open space, and therefore has a low fair market value.

The Navy is also expressly authorized to accept in-kind consideration – including “[m]aintenance, protection, . . . or restoration (including environmental restoration)” – for its market value leases. 16 U.S.C. § 2667(b)(4), (c)(1)(A). The value of these services – which the State already provides at San Onofre, at no cost to the Navy – could further reduce any monetary rent paid for a market value lease. Indeed, the *annual* budget for maintenance and operations at San Onofre is roughly \$2 million.²⁰³ Over a 50-year lease term, the value of this annual in-kind contribution from the State could easily equal or exceed the fair market value of the land even assuming TCA’s baseless figure of \$70 million.

The most that can be said at this point in time is that the question of whether, when, and on what terms the federal government will convey a future lease, fee or other interest in the San Onofre property to the State is entirely speculative. But even under present federal law, there is nothing that would preclude the long-term operation of San Onofre at little or no cost to the State. Nor is there a shred of evidence to suggest that the state and federal governments would allow San Onofre – after a half century as a state park – to shut down over the issue of land rent. To the contrary, as discussed in Section I.B, above, it has always been the clear intent of both the state and federal governments that the land be preserved in perpetuity as park.

The primary threat to the park’s continued existence is the Toll Road itself. Indeed, if the Toll Road were built, the resulting abandonment of most of the park and degradation of the remainder would largely moot the issue of lease renewal. The idea that we must destroy the park to save it is simply nonsensical. A contribution to future rent will do nothing to mitigate for the devastating and permanent loss of coastal park resources inflicted by the Toll Road.

2. TCA Has Not Identified Any New Recreational Facilities to Replace Those Impacted by the Toll Road.

²⁰³ R. Rozzelle, Orange Coast District Superintendent, California Department of Parks and Recreation (pers. comm. Jan. 10, 2008).

TCA has suggested that \$20 million of its offer could be used to construct recreational improvements at San Onofre or at Crystal Cove. But the State has already constructed or planned for recreational improvements in all appropriate locations in those parks. Providing a subsidy to the state for existing or programmed improvements does nothing to mitigate the additional loss of the San Mateo Campground and other recreational impacts of the Toll Road.

The only areas within San Onofre suitable for new campsite developments, as identified in the San Onofre General Development Plan, are within Subunit 1 of the Park²⁰⁴ – the very subunit that the Parks Department concluded would be rendered *incompatible* with recreational use and need to be abandoned if the Toll Road were built. Indeed, the Toll Road would run directly adjacent to – and in some cases *through* – the very areas designated for future campsite development in the Park.²⁰⁵ As discussed in Section I.B, above, the entire Subunit would likely be abandoned if the Toll Road is built, so it offers no opportunity for mitigation.

TCA has also suggested in at least one letter that the Bluffs Campground could be “enhanced” using the funds.²⁰⁶ But the San Onofre General Development Plan states that the development of Subunit 4 (which includes the Bluffs Campground) is “completed” and “does not recommend any additional camping, day-use parking, or trails.”²⁰⁷ The Bluffs Campground, moreover, is situated in a highly developed location within a few hundred feet of I-5; additional campsites at the Bluffs will not even approximate the recreational experience afforded by the San Mateo Campground. In short, there is simply no way to replace at San Onofre the campsites impacted by the Toll Road.

Nor does Crystal Cove – 25 miles to the north of San Onofre – provide an opportunity for mitigation. The Parks Department has planned construction of a 60-site campground on the former site of the El Moro Mobile Home Park at Crystal Cove since at least 1982.²⁰⁸ Late last year, the Parks Department finally was able to put the project out to bid; according to the California State Contracts Register, responses were due on January 11, 2008.²⁰⁹ Now that the El Moro Mobile Home Park conversion project is underway, all campsite development called for by the Crystal Cove General Development Plan either has been or soon will be developed, regardless of whether the Toll Road is ever built.

Most recently, TCA has proposed that the Parks Department use the money to expand the campground at San Clemente State Beach. This option, however, would require relocation of the Parks Department’s Orange Coast District Offices, many of which are currently housed in

²⁰⁴ See San Onofre State Beach General Development Plan Amendment (March 1984) at 34-36.

²⁰⁵ Compare California Department of Parks and Recreation, *Mitigation Assessment of FTC-South Impacts on San Onofre State Beach* (Aug. 1997) (“*Parks Dept. Mitigation Assessment*”) at 6 (showing location of proposed improvements) with South Orange County Transportation Infrastructure Improvement Project Final Supplemental Environmental Impact Report (“*FSEIR*”) (Dec. 2005) at Figs. 2.2-5, 2.2-6 (showing Preferred Alternative alignment).

²⁰⁶ Letter from Thomas E. Margro, CEO, TCA, to Maidie Oliveau dated October 8, 2007.

²⁰⁷ San Onofre State Beach General Development Plan Amendment (March 1984) at 36.

²⁰⁸ Crystal Cove State Park General Plan (March 1982) at 43-44.

²⁰⁹ Department of General Services, California State Contracts Register, available at <http://www.cscr.dgs.ca.gov> (last visited January 10, 2008).

historic buildings.²¹⁰ Furthermore, any new campsites at San Clemente State Beach would be located in an intensively developed urban environment at the edge of I-5, providing future visitors with a recreational experience dramatically different from that offered at the quiet, still-rural San Mateo Campground.²¹¹ Again, mitigation for the loss of San Mateo Campground cannot be measured in a mere number of campsites. As the Parks Department itself has observed, “a certain quantity of recreation facilities . . . should not be forced into an available relocation site at the expense of providing a quality recreation experience or facility.”²¹² The experience of San Mateo Campground will be irrevocably lost, and TCA has proposed nothing comparable to replace it.

Finally, TCA has recently suggested that the money could be used to finance the restoration of the historic cottages at Crystal Cove, misleadingly citing the Crystal Cove Alliance (the official Cooperating Association at Crystal Cove) in connection with the proposal.²¹³ In fact, the Crystal Cove Alliance has condemned TCA’s offer: “TCA’s proposal is not the right answer for restoring Crystal Cove. We look forward to endorsing a plan that ensures that Californians can reach and enjoy every State Park, intact.”²¹⁴ The 46 cottages at Crystal Cove provide a completely different – and far more expensive – recreational experience than the San Mateo Campground. For example, the Crystal Cove cottages rent for an average of \$175 per night for a family of four, while a campsite at San Mateo Campground costs between \$20 and \$34 per night.²¹⁵ Moreover, a substantial portion of the Crystal Cove restoration effort is already completed, and fundraising efforts for its completion are underway. The cottages likely will be restored with or without the Toll Road.

In short, despite having years to consider the matter, TCA has never been able to identify any opportunities for creating new recreational facilities comparable to those that would be impacted by the project. TCA’s last-minute monetary proposal would do nothing but subsidize the State’s existing operations or planned projects. It is not mitigation. As the Commission’s Staff Report correctly concludes, the San Mateo Campground and Trestles Beach are irreplaceable coastal resources, and the impacts of the Toll Road on these resources cannot be mitigated.

3. Funding Existing Coastal Sage Scrub Restoration Efforts Does Not Mitigate the Loss of Habitat.

TCA’s offer to pay \$10 million toward coastal sage scrub restoration at Crystal Cove would do nothing to offset the permanent loss of 50 acres of coastal sage scrub habitat at San

²¹⁰ See *Parks Dept. Mitigation Assessment* at 6-7, Appendix B at 4; see also California Department of Parks & Recreation, *Relocation Preplanning Letter Report for San Onofre State Beach* (Aug. 1998) (“*Relocation Preplanning Report*”) at 2, 5-7.

²¹¹ See *Parks Dept. Mitigation Assessment* at Appendix C-2 (noise analysis describing “long periods of relative quiet” at San Mateo Campground).

²¹² *Relocation Preplanning Report* at 8.

²¹³ TCA, “Toll Road Agency Announces \$100 Million Offer to California State Parks” (Sept. 28, 2007), available at http://www.thetollroads.com/home/news_press_sept07a.htm (last visited January 16, 2008).

²¹⁴ See Crystal Cove Alliance, Press Release, “Crystal Cove Alliance Rejects Toll Authority Offer As Damaging to State Park System” (Oct. 1, 2007).

²¹⁵ Compare California Department of Parks & Recreation, *News & Views* (Spring 2007) at 6 with California Department of Parks & Recreation, *California State Parks Camping Fees*, available at http://www.parks.ca.gov/pages/737/files/web_camping.pdf (last visited January 10, 2008).

Onofre. According to a Parks Department ecologist, however, most of the restoration opportunities at Crystal Cove – and all those in the immediate coastal vicinity – have already been implemented. Any additional restoration will occur irrespective of TCA’s proposal.²¹⁶ Furthermore, piecemeal coastal sage scrub restoration at Crystal Cove does not replicate the maritime complex of estuary, marsh, well-developed riparian habitat, and uplands that makes the coastal zone at San Onofre State Beach so rare and valuable. Thus, even if it were legally permissible to mitigate for the loss of ESHA with off-site restoration – which it is not – TCA’s proposed monetary contribution would not provide any such mitigation.

In sum, the payment offered by TCA, however appealing from a financial standpoint, will not mitigate the impacts of the Toll Road in the slightest. And in any event, the Coastal Act prohibits the construction of the Toll Road through ESHA regardless of how much “mitigation” is offered.

CONCLUSION

The Foothill-South Toll Road is one of the most destructive proposals in the State of California today. It would pave over ESHA, parklands, and wetlands; it would harm endangered and threatened species; it would irreparably damage Native American sacred sites; and it would so degrade the surrounding areas as to render the San Mateo Campground unusable and threaten the water quality and surf conditions at world-famous Trestles Beach. This is exactly the type of project that the California legislature enacted the Coastal Act to prevent.

San Onofre State Beach is irreplaceable. But the Foothill-South is just one option – a bad one – for solving future traffic congestion. Feasible alternatives exist that would both resolve traffic issues and protect our coastal resources. San Onofre was meant to be preserved in perpetuity for future generations to enjoy.

On behalf of our organizations, and millions of members and activists they represent, we therefore urge the Commission to object to the consistency certification for the Foothill-South Toll Road.

Joel Reynolds
Senior Attorney
Director, Urban Program
Natural Resources Defense Council

Elizabeth Goldstein
President
California State Parks Foundation

Susan Jordan
Director
California Coastal Protection Network

Dan Silver, MD
Executive Director
Endangered Habitats League

²¹⁶ D. Pryor, District Ecologist, California Department of Parks and Recreation (pers. comm. Jan. 7, 2008).

Elizabeth Lambe
Regional Representative
Sierra Club

Mark Rauscher
Assistant Environmental Director
Surfrider Foundation

Brian Segee
Staff Attorney
Defenders of Wildlife

Scott Thomas
Conservation Director
Sea and Sage Audubon Society

Elisabeth M. Brown, Ph.D.
President
Laguna Greenbelt, Inc.

Glenn Olson
Executive Director
Audubon California

cc: California Coastal Commission Staff