

Ralph Faust

Consulting Attorney
P. O. Box 135
Bayside, CA 95524
707-499-3069
ralph.faust@gmail.com

MEMORANDUM

To: Coastal Commissioners
From: Ralph Faust
Date: February 4, 2008
Re: Balancing Conflicts under the Coastal Act

I. Introduction

The California State Parks Foundation has requested that I prepare this memo analyzing the assertion by the Foothill-Eastern Transportation Corridor Agency (“TCA”) that its project is approvable under the Coastal Act using the conflict resolution procedures of Coastal Act Section 30007.5. (All statutory references in this memo are to the Coastal Act, Public Resources Code Section 30000, et. Seq.). As the analysis below demonstrates, there is no legal or precedential basis for the Commission to approve this project through the conflict resolution procedures.

TCA has submitted a Consistency Certification, (No. CC-018-07), for its proposed Foothill-South Toll Road (“Toll Road”) project. Commission staff, in their Revised Staff Report and Recommendation, has recommended that the Commission object to the Consistency Certification, because of the project’s inconsistencies with Coastal Act policies regarding ESHA (Section 30240), Wetlands (Section 30233), Public Access and Recreation (Sections 30210-30214, 30220 and 30240 (b)), Public Views (Section 30251), Water Quality (Sections 30230 and 30231), Archeology (Section 30244), and Energy and Vehicle Miles Traveled (Section 30253 (4)). In the face of these overwhelming inconsistencies, TCA has argued that the Toll Road should nonetheless be approved through the Commission’s use of balancing, pursuant to the conflict resolution procedures of Section 30007.5. This memo has been prepared to address that contention, the Coastal Act context in which the Coastal Commission can approve a project through the use of conflict resolution, and the cases put forth by the TCA in support of its argument.

II. The Statutory Basis for Resolving Conflicts under the Coastal Act

The Legislature anticipated that the Coastal Commission would occasionally be required to resolve conflicts between the various policies of Chapter 3 of the Coastal Act in its implementation of the law. It provided for this situation in two sections of the Act.

Section 30200 (b) provides:

Where the commission or any local government in implementing the provisions of this division identifies a conflict between the policies of this chapter, Section 30007.5 shall be utilized to resolve the conflict and the resolution of such conflicts shall be supported by appropriate findings setting forth the basis for the resolution of identified policy conflicts.

Section 30007.5 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 that 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.

Thus the Commission's use of the conflict resolution provisions requires four separate things. First, the Commission must identify a conflict between the policies of Chapter 3 of the Act. Second, the conflict must arise in the Commission's implementation of the law. Third, the Commission must resolve the conflict in a manner that on balance is the most protective of significant coastal resources. Finally, the Commission must support that resolution of the identified policy conflicts by appropriate findings.

One case that has specifically interpreted the conflict provision of section 30007.5 is Bolsa Chica Land Trust v. Superior Court ("Bolsa Chica") 71 Cal. App. 4th 493 (1999). In that case the Court of Appeal held that in order for a conflict to exist there must be a policy or interest of the Coastal Act which directly conflicts with the application of another policy or interest of the Coastal Act. To paraphrase the Court, there must be evidence that failure to protect a specific policy or interest of the Act is a prerequisite to fulfillment of or compliance with another policy or interest of the Act. The Commission in subsequent decisions has interpreted this to mean that in order for a conflict to exist, the benefits of a project that are to be balanced against its impacts "must be inherent in the essential nature of the project." Unless this kind of conflict can be found, where the benefits and the impacts are both inherent in the "essential nature" of the project, there is no conflict within the meaning of Section 30007.5, and the Commission cannot utilize that section to approve a project.

The Commission spoke to this issue in its Tilch decision (CDP No. 1-06-033):

“The benefits of a project must be inherent in the essential nature of the project. If the rule were to be otherwise, project proponents could regularly ‘create conflicts’ and then demand balancing of harms and benefits simply by offering unrelated ‘carrots’ in association with otherwise unapprovable projects. The balancing provisions of the Coastal Act could not have been intended to foster such an artificial and manipulatable process.”

Additionally, the extent of the Commission’s authority to address both the impacts and the benefits of a project is bounded by the scope of the Chapter 3 policies against which development is reviewed. Just as the Commission has no authority to impose mitigation for impacts that are unrelated to the coastal resource protection policies of Chapter 3, so too is it inhibited from considering purported benefits of a project that do not relate to those coastal resource policies. If the suggested benefit is beyond the scope of the Commission’s jurisdiction, then it does not create a conflict under Section 30007.5, because it does not implicate a Chapter 3 policy that is part of the Commission’s implementation of “the provisions of this division”, as is specifically required by both Sections 30200 (b) and 30007.5. Without this statutory nexus between conflicting policies and the Commission’s jurisdiction, the Commission has no authority to approve a project otherwise inconsistent with the policies of Chapter 3, because there is no conflict to be resolved.

With this background in mind, we can consider the case for conflict resolution presented by the TCA for its proposed Toll Road.

III. TCA’s Argument for Approval of the Project Using Conflict Resolution

It is not seriously disputed that the Toll Road project is inconsistent with numerous provisions of the Coastal Act. The Staff Report and Recommendation lists significant inconsistencies with Chapter 3 policies in seven different policy areas. Recognizing this, TCA argues that the Commission should approve the project using the conflict resolution provisions of Section 30007.5. TCA asserts that the Commission should recognize benefits of the project in four separate respects: 1] by providing “public safety benefits” including the provision of an alternate major evacuation route for the San Onofre Nuclear Generating Station (SONGS) and for local area residents, the public, and coastal recreation users during a wild fire or flooding by tsunami; 2] by improving water quality; 3] by offering to provide up to \$100 million to the Department of Parks and Recreation, ostensibly to provide public access and recreation benefits; and 4] by relieving congestion on I-5 in Orange County and providing a new route from inland areas of Orange, Riverside and San Bernardino counties to coastal recreational areas in San Diego County. In support of this position, TCA asserts that the Commission has “repeatedly approved

such projects” as this Toll Road using the conflict resolution provisions of Section 30007.5, and lists twelve Commission decisions as examples of the Commission’s resolution of conflicting coastal policies.

This memorandum will discuss each of the four bases for approval through conflict resolution suggested by TCA, as well as the twelve cases they cite in support of that theory of approval. In short, none of the four suggested bases for approval through conflict resolution even present a conflict within the meaning of Section 30007.5, and even if they did, resolution of the conflicting coastal policies “in a manner that on balance is the most protective of significant coastal resources” requires that the Commission object to the consistency certification and deny the project. Concurring in this consistency certification to approve a project with impacts of this magnitude and such incidental benefits would be unprecedented in the history of the Commission.

IV. The Toll Road Provides No Public Safety Benefits That Create a Conflict Under Section 30007.5.

TCA argues that the Toll Road would provide several public safety benefits including the provision of an alternate major evacuation route for the San Onofre Nuclear Generating Station. It claims that these benefits are addressed directly by the policy in Section 30253 of the Coastal Act which requires that new development “minimize risk to life and property in areas of high geologic, flood and fire hazard”.

As discussed in the prior letters submitted by the State Parks Foundation and other resource organizations, the TCA has not demonstrated that the Toll Road would create any safety benefit at all, much less a benefit that would not be equaled or exceeded by feasible project alternatives. However, there is no basis in the Coastal Act for this assertion of benefit in the first place. Section 30253 applies only to the impacts caused by the new development being presently reviewed by the Commission.

The Commission has never approved a project using conflict resolution based upon a conflict with Section 30253 such as is being suggested by TCA. The reasons for this are obvious. As was noted above, the Commission is limited in its authority. It may review the impacts of a project, and it may evaluate those impacts against the standards of the Coastal Act. Here, TCA suggests that the Commission can consider impacts entirely unrelated to the project, and weigh them using a policy that instead specifically limits the Commission’s authority to review impacts to those of the new development being reviewed. This is simply wrong. The Commission has no authority to deny or condition new development being reviewed under Section 30253 based upon alleged pre-existing risks of geologic, flood or fire hazard to other existing development, including nuclear generator development (the risks of which, as this Commission is well aware, may be legally evaluated solely by the Nuclear Regulatory Commission), that is completely unrelated to this proposed development. The Commission has never interpreted Section 30253 in the manner suggested by TCA.

As the Commission has indicated in its conflict resolution decisions, it can resolve conflicts only between or among statutory directives brought into conflict by the development proposal itself. For example, in the UCSB Long Range Development Proposal (No. 1-06), one of the Commission decisions cited by TCA, the Commission found that “[I]n order for the Commission to use the conflict resolution provision of Section 30007.5, the Commission must first establish that the proposal presents a substantial conflict between two statutory directives contained in Chapter 3 of the Coastal Act.” But there is no statutory directive for TCA to build this Toll Road to mitigate the risks of other’s pre-existing development or of nature’s hazards. Nor is mitigation of these risks “inherent in the essential nature” of this project. They are legally irrelevant to the project and must be disregarded.

Because the Commission does not have the authority to consider these circumstances that are unrelated to the development being proposed by TCA, neither does the Commission have the authority to consider any purported benefits related to these circumstances. For this reason, there is no legal basis for the Commission to find that any Section 30007.5 conflict exists with respect to these circumstances. Under the facts of this proposal, Section 30253 (1) does not conflict with the many sections of the Coastal Act with which this project is not consistent, and provides no basis even for the consideration of conflict resolution. This argument is a pretext.

Treating Runoff from Interstate 5 Is Unrelated to This Project and Provides No Basis for Approval through Conflict Resolution.

TCA asserts that it will augment its project by treating currently untreated runoff from Interstate 5 through a water quality treatment system that includes vegetated swales and vegetated strips, media filters both inside and outside the coastal zone, and design pollution prevention Best Management Practices. TCA further asserts that the project will result in a net benefit to water quality within the coastal zone, and on this basis provides a benefit that the Commission should consider in conflict resolution. TCA supports this assertion by claiming that the Commission has repeatedly employed “balancing” where a project, as here, will significantly improve water quality. For a number of reasons this assertion is wrong.

As is discussed elsewhere, the Toll Road, examined in the entirety of its effects, does not improve water quality in the coastal zone, and is in fact inconsistent with the water quality provisions of Sections 30230 and 30231 of the Coastal Act. The proposed I-5 improvements will affect waters that are not impaired. Moreover, the Toll Road itself will worsen water quality conditions in the coastal zone. More important, even if there were a water quality benefit, the Commission has no legal basis to use these water quality augmentations as a basis for even finding that a conflict exists, and there is no Commission or judicial precedent for a finding that a conflict exists.

First, as was discussed above, the proposed water quality improvements are far outside of the scope, or essential nature, of the project. These augmentations are intended to improve the water quality of the runoff of a separate pre-existing road from that proposed in this project. The proposed I-5 improvements are not dependent on the Toll Road and can (and ultimately will) be constructed without it. The Commission does not have the authority to review the runoff from Interstate 5 in relation to this proposed project and does not have the authority to deny or condition the Toll Road in order to improve the water quality of the runoff from Interstate 5. Because the Commission does not have the authority to review these impacts or exercise authority with respect to them, these impacts, whatever they may be, do not create a conflict with other Coastal Act policies within the meaning of Section 30007.5. Because they are not “inherent in the essential nature” of the Toll Road project, they do not create a conflict, they are legally irrelevant, and they must be disregarded in any possible conflict resolution.

Second, there is neither Commission nor judicial precedent for a finding that a conflict exists based upon these water quality augmentations. TCA has listed twelve Commission decisions that it implies provide a precedent for conflict resolution and approval in this matter. Eight of these projects relied in whole or in part upon the Coastal Act policies related to marine resources and water quality to resolve conflicts and to approve projects otherwise inconsistent with the Coastal Act. An analysis of those decisions demonstrates that none of them support approval of the Toll Road.

In five of the eight Commission decisions listed by TCA, water quality improvements were the fundamental purpose of the project. For example, in Tilch (CDP No. 1-06-033), the project was to replace a failed sewage disposal system that violated health codes because it was polluting groundwater. The project could not be completed without some wetland fill, but the Commission approved the project because the elimination of contamination from raw sewage was found to be more protective of coastal resources than the impacts to wetlands from leach field construction. The essential purpose of the project, which was to benefit coastal water quality resources, could not be accomplished without violating the Coastal Act wetland policies. Thus a conflict existed that the Commission resolved by balancing. This case is nothing like TCA’s toll road, the purpose of which is to move vehicles from eastern Orange County to I-5. The water quality improvements proposed for I-5 by TCA, unlike those of Tilch, are a “carrot” proposed in an attempt to create a conflict, not an essential feature of the project.

Similarly, in O’Neil (CDP No. 1-98-103) the project was to construct a barn to contain cattle and their waste during the winter rainy season. The project was located in the Eel River floodplain near Loleta, and because all of the property not already developed was wetland, the barn could not be constructed without fill of wetlands. The fundamental purpose of the project, a BMP for dairy cattle funded by the NRCS, was to improve water quality by containing animal waste, preventing it from contaminating wetlands and watercourses. The Commission found a conflict between the water quality policies, which could not be fulfilled if the project were to be denied, and the wetland policies. The Commission resolved that conflict by finding that approval of the project, to achieve the water quality benefits, was more protective of coastal resources than preserving

approximately 0.5 acres of wetland. Again, the Toll Road does not present any similar conflict because water quality improvement is not its essential purpose.

The construction of the Los Osos Sewage Treatment Plant (San Luis Obispo County LCP Amendment No. 3-01), as proposed, was inconsistent with Section 30240 because it was to be placed on approximately 11 acres of ESHA. There was no feasible alternative site for the project. The area to be served by the plant was an antiquated subdivision with approximately 5000 small lots just uphill from Morro Bay, a National Estuary. The current population of the community of about 15,000 all used septic systems, many of which were failing, polluting the groundwater and surface water flow into Morro Bay. The RWQCB had determined that a treatment facility was necessary to solve the problem because the density and separation standards of the Basin Plan were not being met. Again, the water quality improvements resulting from the treatment plant were the essential purpose of the project, and created a conflict with Section 30240 that was inherent in the project. The Commission approved the project by balancing the benefits to be achieved under Sections 30230 and 302331 against the unavoidable impacts under Section 30240. Once more this is completely unlike the water quality 'carrot' added on to TCA's toll road project.

In a supplemental permit involving the Newport Coast Planned Community, (Appeal/De Novo CDP No. A5-IRC-99-301) part of a master plan development of the Irvine Community Development Co., the Commission considered the potential fill of a newly discovered isolated wetland. As part of this phase of the much larger development, that area was to become a sediment control basin that was a part of a system of water quality enhancements for the larger project. The Commission approved the fill of the wetland because it had previously approved the larger planned community of which this was a part based upon the concentration of development policies. Not to approve this project was to undo the water quality enhancements central to the larger project. The Commission approved the project by balancing the concentration of development (Section 30250) and water quality (Section 30231) benefits against the loss of wetland (Section 30233). The basic purpose of the wetland fill in this matter was the completion of the water quality improvements that were a part of the larger master plan development on the Newport Coast. No similar purpose exists in the TCA toll road project.

Finally, in the LCP amendment for the North Shore of Mandalay Bay project (City of Oxnard LCP Amendment No. OXN-MAJ-1-00) the Commission considered policies for a newly annexed area of the City of Oxnard. The area had for thirty years been used as an oil field waste disposal facility, with more than 8 million barrels of oil waste severely contaminating the site. Left alone, the contamination would reach the aquifer that is the source of water both for local agriculture and for the City of Oxnard. The amendment proposed remediation, with the site remediation being paid for, in part, by residential development. The project involved the dredge and fill of about 4.2 acres of wetlands. Under Section 30233 residential development is not an allowable use and thus could not be permitted. The Commission found a conflict between Sections 30230 and 30231, since project approval would directly improve marine resources and water quality, and Section 30233, because of the wetland fill. The Commission resolved the conflict by

finding that remediation of the soil and groundwater contamination in combination with wetland and sensitive resource mitigation was most protective of coastal resources. Again, the basic purpose of the project was the water quality improvements, unlike TCA's toll road.

Thus all five of these cases cited by TCA in support of approval of their project in fact draw a clear distinction between what the Commission has done in the past in weighing conflicts between the water quality benefits of the project and other impacts and what TCA proposes that the Commission do here. In all of these cases water quality improvements were a central purpose of the project, whereas here the basic purpose of the toll road is to increase vehicular capacity, and the water quality amenity on an entirely different highway is a "carrot", proposed to attract the Commission's attention but beyond the scope of the Commission's jurisdiction. The add-on of this amenity does not create a conflict under Section 30007.5; it does not implicate a Chapter 3 policy that is part of the Commission's implementation of "the provisions of this division", as is specifically required by both Sections 30200 (b) and 30007.5. Without this statutory nexus, the Commission has no authority to approve a project otherwise inconsistent with the policies of Chapter 3.

Nor are the other three water quality improvement cases cited by TCA helpful to their argument for approval through conflict resolution. The North County Transit District consistency certification (No. CC-004-05) involved the addition of a second track for a commuter railroad line within an existing right of way that would result in permanent impacts to 2.96 acres of natural habitat, including 2.18 acres of ESHA and 0.65 acres of wetlands. Among the fundamental purposes of the project were "facilitating the provision...of transit service" (Section 30252 (1)) and minimizing "energy consumption and vehicle miles traveled" (Section 30253 (4)). In addition to these project purposes the Commission cited potential adverse impacts to water quality and air quality, and the frustration of access policies if the project was not approved. Water quality was a net benefit because of reduced vehicle traffic resulting from the project but it was not the principal basis for approval through balancing.

The Dana Point Headlands project (City of Dana Point LCP Amendment No. 1-03) was a planned development district on a 121 acre site with residential and visitor serving commercial uses as well as 68 acres of public parks, coastal trails and open space/preservation area. The proposal re-divided an antiquated subdivision that could have allowed up to 310 units, many in an area that is ESHA. Approval required that 11.3 acres of ESHA be lost to uses that are not resource dependent, so the project was not consistent with Section 30240. The Commission found conflicts between that section and the provisions of the Coastal Act related to concentration of development, access and water quality. The Commission found that approving the proposal was most protective of coastal resources because the elimination of the antiquated subdivision and concentration of development protected more ESHA, because the water quality improvements of the project itself treated runoff through the project site from outside the area that otherwise would have remained untreated and because the project's sewage treatment system allowed the conversion of 31 existing septic systems in the project area, because the

development provided access dedications to and along the coast that could not otherwise have been obtained, and because the area was already part of an approved NCCP/HCP that provided for some development on this site in conjunction with the preservation of higher quality habitat inland. The principal factors for conflict resolution were the policies on concentration of development and access, as well as the existence of the approved NCCP/HCP. The water quality improvements were of less significance but were also inherent in the project proposal itself.

Finally, the SR 56 project (CDP No. 6-98-127) discussed at length by TCA, is clearly distinguishable from this project. In that decision, as part of the development of the “middle segment” of that freeway, the Commission allowed the fill of 0.427 acres of wetlands for a use not allowable under Section 30233. The project included the retrofit of existing SR 56 in two places in the coastal zone with units that deflect and filter out contaminants and sediments from road runoff. The water quality improvements were intended to prevent the continuing degradation of Los Penasquitos Lagoon an “impaired water body”, to enhance the water quality of the lagoon for wildlife and human use. The Commission approved the project by balancing the water quality improvements against the wetland fill. This decision is distinguishable from the toll road project in two important respects. First, the water quality improvements on SR 56 were on the same road and intended to improve an “impaired water body.” There is no similar impaired water body to benefit from the water quality improvements proposed by TCA for I-5. More important, however, the Commission had made previous commitments to the road in prior permit and LCP decisions, and felt constrained not to deny the “middle segment” of a road they had already specifically endorsed. This factor was clearly the driving force behind the Commission’s decision. As it stated in its findings:

“If this project did not represent completion of a partially-constructed highway that has been identified in formal planning documents for decades, and that has also been endorsed by the Commission in several prior LCP and permit actions, the Commission could not permit the wetland fill through the use of Section 30007.5, and would accept that ongoing water quality concerns would remain.”

In conclusion, none of the Commission decisions put forth by TCA support the use of Section 30007.5 conflict resolution to approve their toll road proposal based upon water quality improvements. The enhancement they propose to add to I-5 is not part of the essential purpose of their project, and consequently does not even create a conflict with the numerous inconsistencies that the toll road itself has with the Coastal Act. As is shown in the discussion above, the decisions instead demonstrate circumstances in which the Commission has properly used Section 30007.5 to approve projects with genuine conflicts between Coastal Act policies, and clearly illustrate why this project is not suitable for approval through that section and must be denied.

VI. Offers of Money Do Not Create Conflicts

In perhaps the most cynical ploy ever devised to attempt to create a conflict in order to approve a project, TCA has offered to provide \$100 million, presumably from its construction bond funds, to State Parks for unspecified access and recreation benefits. TCA argues that this sum provides “significant coastal resource benefits, which far outweigh any impact on wetlands or ESHA that the project may create.”

As discussed elsewhere, TCA has not identified any potential use of the money that will mitigate the Toll Road’s impacts, much less create a coastal access “benefit”. Indeed all of the projects suggested by TCA have already been planned or completed, and will be carried out with or without the Toll Road. But more fundamentally, this is exactly the ploy, taken to its most generic and contemptuous extreme, that the Commission contemplated in its Tilch decision. To repeat what the Commission said in those findings:

“The benefits of a project must be inherent in the essential nature of the project. If the rule were to be otherwise, project proponents could regularly ‘create conflicts’ and then demand balancing of harms and benefits simply by offering unrelated ‘carrots’ in association with otherwise unapprovable projects. The balancing provisions of the Coastal Act could not have been intended to foster such an artificial and manipulatable process.”

This may be the biggest ‘carrot’ offered thus far, but it is still only a carrot. There is no Commission or judicial precedent even to suggest that this offer provides a benefit under the Coastal Act. The only connection between the project and this offer is that the source of the funds is the same. It has nothing to do with the essential nature of the project. If the conflict resolution provisions of the Coastal Act can be invoked based upon this created conflict, then the careful language of the Coastal Act, its weighing of impacts and specification of process for decision, has no more meaning. An applicant cannot be allowed to buy compliance with the Coastal Act. Section 30007.5 cannot “have been intended to foster such an artificial and manipulatable process.”

VII. Easing Traffic Congestion in Eastern Orange County Does Not Create a Conflict That Can Be Resolved By Approving This Toll Road

Section 30210 of the Coastal Act provides:

“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”.

Article X of the California Constitution deals with water, with the beneficial use of water, with water rights, with tidelands, and in Section 4 with access to the tidelands and navigable waters of the state. Article X, Section 4 provides:

“No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.”

The clear purpose of this section of the Constitution is to prevent the privatization of access to navigable water, and this is the foundation of the access policies of the Coastal Act. The Commission has always interpreted the access provisions of the Act broadly, but nevertheless those interpretations have always been grounded in Article X, Section 4, in access to the sea. In a few cases the Commission has weighed the access provisions on the scales of balancing to approve projects through conflict resolution under Section 30007.5. TCA emphasizes several of these cases in its argument for approval under that section, but these cases do not support the conclusion that TCA seeks. Instead, they indicate how desperately TCA grasps at the straw of balancing in its attempt to support its case.

Three of these cases have already been discussed above, and can be dealt with shortly because they provide no support for TCA’s argument. The Dana Point Headlands decision discussed above balanced its habitat impacts against multiple Coastal Act policies, particularly the concentration of development policies. More important for this discussion however, the access considerations in that case had nothing to do with traffic, but rather fit precisely the Article X, Section 4 mandate because they involved the specific dedication of pedestrian access to and along the shoreline.

In the North County Transit District decision discussed earlier, the Commission found conflicts between the allowable use policies of Sections 30240 (a) and 30233 (a) on the one hand, “and the water quality/air quality/energy conservation/reductions in vehicle miles traveled/public access and transit policies (Sections 30231/30253(4)/30252) on the other.” The Commission discussed the traffic congestion benefits of the project in relation to the access policies, but the fundamental purpose of the project fulfilled several goals of the Coastal Act in relation to energy consumption, vehicle miles traveled and facilitating transit service, and the relatively small habitat impacts required to put in the second rail line (less than 6 % of those for the toll road) were balanced against multiple Coastal Act policy benefits.

Finally, the SR 56 decision, also discussed above, balanced its small wetland impacts against the proposed water quality improvements for runoff into Los Penasquitos Lagoon, an “impaired water body”. Although the Commission discussed the improved access to the coast that would result from completion of the middle segment of this road, the Commission did not balance against the access policies, and the critical factor in the decision was, as the findings specifically noted, the Commission’s previous endorsement in prior LCP and permit actions of this segment of this highway.

The only remaining case that TCA cites in support of its balancing argument is the Commission decision on the SR 73 (Transportation Corridor Agency (CC-63-92 and CDP 5-92-232)). In that case, the Commission found that the project impacted about 0.33 acres of wetlands and 10 acres of ESHA, in part on access grounds.

However, despite the conceptual similarity, the SR 73 decision is different in several very important respects from this TCA project. Most important, the traffic congestion impacts relied upon by the Commission in SR 73 were all in the coastal zone and pertained to Pacific Coast Highway and its effects upon access and recreation along the coast. The Commission found that not to approve the project would result in “a significant overload of the transportation system capacity of Pacific Coast Highway or significant adverse impacts to coastal communities and public recreation areas necessitated by future widening of PCH.” The impacts in that case related to the principal artery paralleling the coast, providing direct vehicular access to the coast-side recreational parking areas and pedestrian access points. Moreover, the alternative to the project was the widening of PCH, which could have resulted in far greater impacts to coastal resources.

In stark contrast, the main purpose of the Toll Road is to benefit inland drivers, far from the coastal zone, and the alternatives to the Toll Road would result in much smaller impacts to the coast. Providing traffic relief to inland Orange County, or even, as TCA elsewhere argues, to such desert communities as Victorville, Joshua Tree or Palm Springs, hours from the area in San Diego County’s coastal zone impacted by this project, is to stretch the nexus between roadways and coastal access beyond recognition, and well beyond any reasonable interpretation of the Coastal Commission’s jurisdiction. The Legislature’s implementation of Article X, Section 4 in the access policies of the Coastal Act does not reach to those inland traffic benefits.

For these reasons, whatever alleviation of traffic congestion may result in inland areas from this project is irrelevant to the Commission’s consideration of this consistency certification under the Coastal Act. Coastal access is not the purpose of this Toll Road project, and any benefit to inland drivers is far too removed from coastal access to provide any basis for finding a conflict with the many policies with which this project is inconsistent. There is no judicial nor any Commission precedent for TCA’s argument here. The only case TCA cites that balances access against habitat impacts does so based upon access impacts within the coastal zone, along the shoreline, where the alternative would have had much greater impacts to the coast and where the project’s impacts were tiny compared to those threatened by this Toll Road. The access policies of the Coastal Act do not provide a basis for approval of the consistency certification.

VIII. Even if There Were a Conflict Between Coastal Act Policies Inherent in This Project, Objecting to Consistency and Denying the Project Is Most Protective of Coastal Resources

As noted earlier, the Revised Staff Report and Recommendation points to significant inconsistencies of the toll road project with Coastal Act policies regarding ESHA, Wetlands, Public Access and Recreation, Public Views, Water Quality, Archeology and Energy and Vehicle Miles traveled. Moreover, these are overwhelming inconsistencies. The ESHA impacts alone, for example, are almost five times more extensive than any ever allowed by the Commission pursuant to balancing. The water quality impacts of increased sedimentation to San Mateo Creek from cutting across numerous sub-watersheds near the mouth of San Mateo Creek are not only much more significant than any purported water quality benefits from the I-5 augmentation, they also threaten the integrity of Trestles, one of the most important and internationally recognized surfing locations in California. The Toll Road would directly impact Panhe, the ancestral home of the Acjachemen/Juaneno people, and would pass within feet of its cemetery, causing irreparable damage to this sacred site. And the Commission has *never* approved the evisceration of a State Park under any circumstances.

Against the weight of these impacts TCA throws up a series of pretexts and “carrots” to create the appearance of a conflict that simply does not exist in the essential nature of the project. But even if these “carrots” were weighed in the balance, the enormous impacts far outweigh the alleged benefits. The hazard “benefits” are illusory, and indeed the road will create a new fire hazard; the water quality “benefits” do not even balance against the water quality impacts and risks of the Toll Road project; the traffic “benefits” are far inland from the coastal zone and unrelated to any coastal zone impacts or to the specific access and recreation policies of the Coastal Act; and alternatives to the Toll Road (such as the AIP-R alternative) would provide greater benefits than the Toll Road in terms of safety, water quality, and public access, all without the corresponding impacts to coastal resources.

Finally, the \$100 million offer is just money, not the coin of the realm when assessing Chapter 3 impacts. This point deserves elaboration. The money offered may appear substantial in the context of the economic challenges facing the State in general and State Parks in particular. But the suggested improvements to other parks in other places, or, as the Secretary for Resources appears to suggest, the use of the money as a possible addition to the operating budget of State Parks, bears no relation to the impacts caused by this project. State Parks has no authority to sell its parklands to developers, and the Commission has no authority to do it for them. To allow the destruction of parkland in exchange for a cash payment to a different state “pocket” is a conversion of state resources held in trust for the people. Whether or not the State can convert its precious parklands in exchange for developer cash may be a question for the Legislature, but it is not an option for the Commission. The Commission has no authority to allow this brazen conversion of state resources under the pretext of balancing coastal resources under Section 30007.5

For all of these reasons, even if one or more of the asserted benefits of this toll road were considered to create a conflict between Coastal Act policies, there is no basis for balancing this conflict to approve the project as being most protective of coastal resources. This project does not balance.

IX. There Is No Basis In Fact or Law to Approve This Project Using Conflict Resolution

The Staff Report and Recommended Findings for the Commission detail the many significant ways in which this project is inconsistent with the Chapter 3 policies of the Coastal Act. Measured strictly against those policies, this proposal may have greater inconsistencies than any project ever proposed to the Commission that was not reviewed under the separate, more development-friendly standards specifically applicable to ports or coastal dependent industrial facilities. Its impacts would destroy ESHA, endanger species, encroach upon wetlands, threaten a renowned surfing area, impair water quality and shatter one of the most popular state parks in California. Against this, TCA argues that the project should nonetheless be approved using balancing; in support, they cite twelve cases in which the Commission has previously resolved conflicts to approve a project, as if numbers alone could carry the argument. Analysis of these cases demonstrates the confusion TCA spreads between the fact of balancing and the reasons for balancing. The decisions they cite in support of their conclusion do not in fact support it. As has been discussed in detail above, TCA's arguments do not even cite benefits that create a conflict between Coastal Act policies, much less one that could conceivably be resolved in favor of approval of the project. The Commission should reject that faulty balancing proposal, object to the consistency certification and send the project back to the design table.