



DEPARTMENT OF THE ARMY
LOS ANGELES DISTRICT, CORPS OF ENGINEERS
P.O BOX 532711
LOS ANGELES, CALIFORNIA 90053-2325

January 8, 2009

REPLY TO

ATTENTION OF:

Office of the Chief,
Regulatory Division

Ms. Cathy Bechtel
Riverside County Transportation Commission
4080 Lemon Street, 3rd Floor
P.O. Box 12008
Riverside, California 92502-2208

Mr. Tay Dam
Senior Project Development Engineer
Federal Highway Administration
650 Capitol Mall, Suite 4-100
Sacramento, California 95814-4708

Dear Ms. Bechtel and Mr. Dam:

This letter transmits our comments on the Draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS) prepared for the *Mid-County Parkway Project* (MCP) located in western Riverside County, California.

As you know, our participation in the project planning and development for the MCP has been governed by the procedures set forth in the 1994 *Memorandum of Understanding (MOU) for the NEPA/CWA 404 Integration Process for Surface Transportation Projects in California*. Under the auspices of this MOU and our statutory authorities pursuant to 33 U.S.C. §1344, the U.S. Army Corps of Engineers' (Corps) role is to ensure consideration of the aquatic ecosystem throughout the environmental review process. More specifically, we are responsible for providing section 404 of the Clean Water Act (CWA) technical and policy guidance to the applicant on the overall project purpose and need, range of alternatives to be studied, the evaluation of impacts, measures to avoid adverse impacts to waters of the United States whenever practicable, and appropriate compensatory mitigation for unavoidable impacts.

The Corps has participated in the MCP Small Working Group (SWG) meetings since the project's inception and has provided feedback on various aspects of the federal environmental review process, including the development of the Draft EIR/EIS. A number of our earlier comments have been incorporated into the Draft EIR/EIS. It appears, however, some of our concerns relating to the waters of the U.S. impact assessment, 404(b)(1) Guidelines, and proposed mitigation remain inadequately addressed. In light of our involvement vis-à-vis the SWG, we suggest the following comments be vetted and resolved, as appropriate, by the SWG prior to the next formal step in the NEPA/404 integrated process.

Affected Environment & Environmental Consequences

The National Environmental Policy Act (NEPA) of 1969 requires that the lead agency take a hard look at alternatives and the resultant environmental consequences to enable informed agency decisions. Environmental consequences may be beneficial or adverse, but in all cases, the direct, indirect and cumulative impacts must be assessed and disclosed within the NEPA document. We found the MCP cumulative impact analysis for waters of the U.S. to lack sufficient analytical detail and robustness for purposes of public disclosure and agency decision-making. A meaningful cumulative impact assessment includes an evaluation of the historic and current conditions of the environmental resource of interest, a thorough accounting of past, present and reasonably foreseeable future projects and how such projects affect a given environmental resource when assessed in the aggregate.

Impacts resulting from the locally preferred alternative (Alternative 9 TWS DV) and all other proposed MCP build alternatives must be compared to the No (Federal) Action alternative to understand the overall intensity and magnitude of impacts. To compare build alternatives relative to one another is not sufficient nor is it reasonable to compare the total impacts of a given MCP build alternative to the total project footprint of disturbance in determining the cumulative effect.

The cumulative impacts to waters of the U.S. must be considered in the context of the pre-established geographic boundaries for the wetlands/waters cumulative effects analysis—in this case, the San Jacinto and Santa Ana River watersheds. The impacts that would result from the MCP build alternatives must be evaluated in comparison to the quantity and quality of aquatic resources occurring within the geographic study area and in consideration of other stressors or impacts resulting from past, present and reasonably foreseeable projects. That is, it may be that the resulting impacts from the MCP alternatives are, individually, deemed minimal when compared to the overall MCP project footprint of disturbance, but when the MCP project impacts are compared to the already diminished extent and health of wetlands existing within the two watersheds, such impacts could be considerably more substantial. No quantitative or qualitative data are incorporated into the analysis to indicate the health or extent of aquatic resources occurring within the study area. One general reference is provided which states: “Currently, the health of this resource is determined to a large extent by the effectiveness of federal restoration efforts.” This description of the status of the baseline (current) conditions for wetlands and other waters is inadequate to enable a fair and objective evaluation of cumulative impacts.

Step number five of your cumulative impact assessment methodology (page 3.25-3) indicates you “identify a set of other current and reasonably foreseeable future actions or projects and their associated environmental impacts...” [emphasis added]. We were unable to find any estimate of associated impacts on wetlands and other waters resulting from the current and reasonably foreseeable projects. According to page 3.25-42, sixty (60) percent of western

Riverside County will be developed. When combined with past development within the San Jacinto and Santa Ana River watersheds, the cumulative effects associated with the MCP could be sizeable.

Section 3.18.3.1 (*Permanent Impacts to Waters of the U.S.*) discusses the impacts to waters of the U.S. relative to the *Western Riverside County Multi-Species Habitat Conservation Plan* (MSHCP) and asserts:

“...[D]irect and indirect impacts on sensitive vegetation communities and covered species, including species and habitats associated with wetlands and other waters, are reduced through implementation of the MSHCP...The finding in the analysis in 3.17 is that Alternative 9 TWS DV, including the mitigation lands that are available to demonstrate consistency with the MSHCP, provides an equivalent or superior level of conservation compared with what was anticipated and analyzed in the MSHCP EIR/EIS. Therefore, an amendment to the MSHCP to provide coverage for Alternative 9 TWS DV would not result in impacts on wetlands or other waters beyond that previously analyzed in the MSHCP EIR/EIS” (p. 3.18-19).

Other statements further emphasize the MSHCP as the vehicle for establishing mitigation ratios. For example, Section 3.18.4 (Avoidance, Minimization and/or Mitigation Measures) states:

“[M]itigation to ensure that impacts to riparian/riverine areas (which encompass CDFG and USACE jurisdictional areas) are mitigated sufficiently pursuant to Section 6.1.2 of the MSHCP will also sufficiently mitigate for impacts to jurisdictional areas... Prior to the initiation of construction, the RCTC will obtain a Determination of Biologically Equivalent or Superior Preservation (DBESP), as required under the MSHCP.”

The MCP project Draft EIR/EIS relies heavily upon the MSHCP and the associated Conservation Area (CA) to conclude impacts to wetlands and other waters of the U.S. under the Corps' purview would be reduced to less than significant (under CEQA guidelines). While we have no authority to comment on CEQA determinations, we continue to disagree with the notion that the MSHCP would serve as the primary mitigation measure for wetlands and other waters of the U.S. for direct, indirect and/or cumulative losses attributed to the MCP project. The Corps was not a party to the development or approval of the MSHCP nor does the Corps possess any legally binding authority to approve, disapprove or enforce MSHCP mitigation measures that may be necessitated by future impacts “covered” under the MSHCP umbrella and the DBESP process. Furthermore, the Corps has embarked on a multi-agency effort to approve a Special Area Management Plan (SAMP) for the San Jacinto and Santa Margarita River watersheds. The SAMP and its attendant documents are more appropriate watershed planning tools for guiding compensatory mitigation efforts associated with Department of the Army (DA) authorized impacts. The SAMP prioritizes areas for aquatic resource restoration, establishment, enhancement and preservation based on myriad scientific studies. In the Draft EIR/EIS the

RCTC has begun to utilize and consider aquatic resource information contained within the SAMP documents to help identify potential mitigation sites. That effort is commendable and the RCTC should continue to utilize the SAMP documents in conjunction with the functional assessment to determine impacts and appropriate mitigation.

With respect to Section 3.18 (*Environmental Consequences*), we suggest the text provide a discussion on the total number of ephemeral, intermittent and perennial streams impacted/crossed and the general location or juxtaposition of the aquatic features relative to the proposed alignments. This will provide the reader with a basic understanding of the extent of aquatic resources existing within the study area.

Specific to Section 3.18.3.1 (*Permanent Impacts*) the text should better clarify that the results from the *Potential Impacts of Alternative Corridor Alignments to Waters of the U.S., Riparian Ecosystems, and Threatened and Endangered Species: Mid-County Parkway Project, Riverside County, California* (Smith 2008; herein referred to as the “functional assessment”) are actually estimates of the change in hydrologic integrity, water quality integrity and habitat integrity as a result of project implementation (i.e., changes in functional capacity). The analysis was performed by ERDC scientists to gain a better understanding of the quality—or integrity—of the aquatic resources that would be impacted by the MCP build alternatives and to help quantify the functional losses attributed to direct and indirect project impacts at three different spatial scales. The changes in integrity for each of the 15 criteria examined in the analysis help distinguish between high quality integrity impacts and low quality integrity impacts for each of the build alternatives. The integrity scores displayed in Table 3.18E are intended to be used in conjunction with the impact acreages that were calculated from the Jurisdictional Delineation (JD) report to provide a more holistic evaluation of the aquatic resource functional losses, rather than relying on solely on the acreages of impact. Although we recognize the ERDC technical study itself uses the term “impacts” throughout the report, we suggest when referring to the functional assessment impacts, the term “impact” be clearly defined and explained. Impacts (scores) are reported for each individual criterion as well as the sum of normalized rank scores, each representing a change in functional capacity (e.g., loss or gain in hydrologic integrity, water quality integrity and/or habitat integrity).

The Corps recognizes that large-scale transportation projects often have a phased implementation schedule due to funding constraints and general constructability issues. In addition, the identification of source locations for certain construction materials (e.g., borrow sites) and the designation of construction features (e.g., equipment staging areas) are commonly deferred to the bidding process or subsequent to contract award and left to the discretion of the contractor. To ensure all construction impacts are accounted for and adequately addressed, we request that forthcoming detailed engineering and design documents clearly delineate all needed construction features, such as temporary staging areas, temporary haul routes, construction access ramps/roads, and borrow and disposal sites.

Compensatory Mitigation for Unavoidable Impacts to Waters of the U.S.

For projects evaluated under Section 404 of the CWA, no discharge of dredged or fill material into waters of the U.S. can be approved that does not meet the requirements of the Environmental Protection Agency's (EPA) 404(b)(1) Guidelines. Guidance for implementing the 404(b)(1) Guidelines is provided through the joint Corps-EPA 1990 Mitigation Memorandum of Agreement (MOA) and the new compensatory mitigation rule¹ that supersedes certain provisions of the MOA. The MOA states that compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternatives for the purposes of requirements under 40 C.F.R. Section 230.10(a).

The Corps anticipates providing feedback on the draft 404(b)(1) alternatives analysis (Appendix I) as the environmental process moves forward. In general, however, the following sequence of determinations will be used in evaluating the MCP project:

- A determination that potential impacts have been avoided to the maximum extent practicable;
- A determination that remaining unavoidable impacts will be mitigated to the extent appropriate and practicable by requiring measures to minimize impacts through project modifications and permit conditions; and
- A determination that appropriate and practicable compensatory mitigation has been provided for unavoidable adverse impacts.

The functional assessment is germane to understanding the baseline functional capacity of the existing aquatic ecosystem as well as the future with-project functional capacity under each of the build alternatives. As we previously noted, substantial deference and weight will be given to the results of the MCP project functional assessment when determining reasonable and practicable mitigation for unavoidable losses to the aquatic environment. Defaulting to ratios for determining replacement values and mitigation type is acceptable only when other functional assessment methodologies are not available. Since a functional assessment was performed for the MCP, the results from that evaluation should be used to calculate appropriate compensation, rather than the use of straight ratios. One of the primary purposes of the MCP project functional assessment is to help RCTC propose effective mitigation measures to ensure a no net loss of functional capacity.

In consideration of the historical degradation of wetlands across southern California and the biological, chemical and physical values the existing wetlands provide to the semi-arid region of Riverside County, the Corps would generally require a higher mitigation ratio than 1.5:1 for the permanent loss of wetlands. RCTC should note that pursuant to federal regulation

¹ Final Rule, Compensatory Mitigation for Losses of Aquatic Resources (Corps and EPA 2008; 73 FR 19594 – 19705).

“wetlands” are considered a type of special aquatic site [40 C.F.R. § 230.3(q-1) and § 230.41]. Based on the findings of the MCP functional assessment, the Corps is not able to agree that the proposed mitigation ratio of 1.5:1 is appropriate or adequate for the projected wetland losses. As detailed below, there should be an explicit and transparent link between project impacts and proposed mitigation.

Under the new compensatory mitigation rule, greater flexibility exists for permittee-responsible mitigation through on-site and off-site mitigation. The same holds true for out-of-kind mitigation. In general, however, implementation of compensatory mitigation should occur on-site unless it is demonstrated there is no practicable opportunity for on-site mitigation or if off-site mitigation provides greater ecological benefits. Compensatory mitigation should also occur within the same watershed of impact whenever possible. If compensatory mitigation is recommended to occur outside the watershed of impact, a sound ecological rationale must be presented as to why it is the most practicable choice.

In our February 6, 2008 comment letter regarding the administrative Draft EIR/EIS, we cautioned RCTC about deferring specific mitigation planning to the permitting stage of this project. We note several locations in the Draft EIR/EIS include the statement: “...detailed mitigation requirements will be negotiated with each agency during the permit process”. In our view, it is imperative that detailed discussions with key regulatory and resource agencies related to compensatory wetlands mitigation begin at this phase of the NEPA-Section 404 integration process and continue throughout the permit process. Also, it is noteworthy to point out that the NEPA-Section 404 MOU procedures require a relatively comprehensive mitigation plan be submitted and approved by the Corps (and EPA) prior to the release of the Final EIS. Similarly, the new compensatory mitigation rule requires our Public Notice (PN) for the preferred alternative contain a statement explaining how impacts associated with the proposed action are to be avoided, minimized and compensated for and a final mitigation plan be approved by our district engineer prior to issuance of an individual permit. The Corps recognizes there might be legitimate planning, engineering and/or local policy constraints that either partly or wholly preclude site-specific mitigation recommendations at this point in the environmental process. Regardless, it is important that at the time of issuance of our final PN the mitigation proposal is specific enough for the public to offer meaningful comments on its appropriateness and effectiveness.

Although Appendix Q provides a discussion of conceptual mitigation measures for unavoidable losses of waters of the U.S., the draft plan fails to: 1) provide a direct correlation between project impacts and proposed mitigation to offset the loss in functional value; 2) describe the specific functions and values expected to be gained through the proposed establishment, restoration, enhancement and preservation efforts; 3) outline a schedule for implementation; and 4) provide an adequate evaluation and monitoring plan.

Appendix Q, Section Q.5 (*Elements of Detailed Mitigation Plan*) discusses the potential for the use of a mitigation bank or an in lieu fee program. That being the case, it is worth reiterating the Corps-approved *Santa Ana River Watershed Trust Fund for Arundo Eradication and Habitat Enhancement In-Lieu Fee Mitigation Program* may be an appropriate in-lieu fee program for RCTC to pursue, especially for temporary impacts. However, the use of this particular in-lieu fee program is limited to mitigation for: 1) permanent impacts to aquatic resources authorized by a nationwide or regional general permit, 2) permanent impacts to aquatic resources authorized by an individual permit after compensatory mitigation is first performed at a 1:1 ratio using enhancement, restoration, or creation, 3) for temporary impacts to aquatic resources, and 4) unauthorized impacts to wetlands and other waters of the U.S. in conjunction with a restoration order. As a general cautionary note, all mitigation banks and in lieu fee programs must have an approved instrument signed by the Corps' district engineer and the sponsor *prior to* being used to provide compensatory mitigation for DA permits.

We note there is no inclusion of buffers in the conceptual mitigation plan. Based on current policy and what is known of their ecological importance to protecting and/or enhancing wetlands and other waters of the U.S., we recommend RCTC give meaningful consideration to adjacent land uses that can be used or acquired for riparian or wetland buffers.

The absence of a detailed construction schedule and a lack of information on how the implementation of the 32-mile-long project may be phased, makes it difficult to determine whether 1:1 replacement of temporary impacts is reasonable and acceptable in terms of accounting for temporal losses. That is, a number of possible construction scenarios could occur, including one in which grubbing and clearing activities for multiple segments occur well in advance of mitigation implementation. It may be prudent and feasible for RCTC to implement certain components of the compensatory mitigation plan in advance of the impacts occurring, which may then reduce the temporal losses associated with project implementation.

Section 7 consultation under the Endangered Species Act (ESA) of 1972

Table 2.10.A (*Permits and Approvals Needed*) of the Draft EIR/EIS indicates that there is, or will be, a Section 7 consultation between the U.S. Fish and Wildlife Service (USFWS) and the Corps regarding the Section 404 permit. This is incorrect and contrary to the ESA consultation procedures set forth in the *Endangered Species Consultation Handbook* (USFWS & NMFS 1998). The lead Federal action agency is required to consult with USFWS, informally and/or formally, depending on the action agency's determination of effects. In the case of the MCP project, Federal Highway Administration (FHWA) is the lead Federal action agency. Though the Corps is a Federal permitting agency, FHWA is the lead under NEPA and is therefore responsible for compliance with all applicable federal laws that stem from NEPA, including the ESA. Prior to the Corps' Record of Decision and final Section 404 permit decision, we will need evidence from FHWA that the Section 7 consultation process with the USFWS is satisfactorily complete. The same is true of the Section 106 of the National Historic Preservation Act

coordination and consultation between FHWA, RCTC, its agents and the State Historic Preservation Office (SHPO) and Native American Tribes.

Public Interest Review

In our project evaluation process, we must balance the MCP project purpose against the public interest. The public benefits and detriments of all factors relevant to this transportation project will be carefully reviewed and considered. Relevant factors may include, but are not limited to, conservation, economics, aesthetics, wetlands, cultural values, fish and wildlife values, water quality, and any other factors judged important to the needs and welfare of the people. The following general criteria will be considered in evaluating the MCP project application:

- The relevant extent of public and private needs
- Where unresolved conflicts of resource use exist, the practicability of using reasonable alternative locations and methods to accomplish project purposes; and
- The extent and permanence of the beneficial and/or detrimental effects the proposed project may have on public and private uses to which the area is suited.

No DA permit can be granted if the MCP project is found to be contrary to the public interest. We anticipate working with RCTC, FHWA and others in the documentation of our public interest review.

As a courtesy, I am providing copies of this correspondence to EPA, Region IX, Attn: Mr. Eric Raffini, 75 Hawthorne Street (WTR-8), San Francisco, California 94105; EPA Region IX, Attn: Ms. Susan Sturges, 75 Hawthorne Street (CED-2), San Francisco, California 94105; and U.S. Fish and Wildlife Service, Carlsbad Office, Attn: Ms. Doreen Stadtlander, 6010 Hidden Valley Road, Carlsbad, California 92011.

We appreciate your coordination efforts and the opportunity to submit comments on the MCP project Draft EIR/EIS. Our agency looks forward to continuing an open dialogue with your respective offices to ensure this environmental review process remains comprehensive,

technically sufficient and transparent for the purposes of public disclosure and informed agency decision-making. Should you have any questions relating to our comments, please contact Ms. Susan A. Meyer of my staff at (808) 438-2137 or at susan.a.meyer@usace.army.mil.

Sincerely,

A handwritten signature in cursive script that reads "Mark D. Cohen".

Mark D. Cohen
Deputy Chief, Regulatory Division