

SAVE SAN ONOFRE COALITION

Contact:

Matt Klink, 310-283-6267, matt@cerrell.com

Sarah Paulson Sheehy, 323-466-3445, sarahp@cerrell.com

FOR IMMEDIATE RELEASE

October 15, 2008

ENVIRONMENTALISTS AND PARK ADVOCATES OPPOSE \$1.1 BILLION FEDERAL BAILOUT FOR ORANGE COUNTY TOLL ROADS

Request of Taxpayer Funds Would Shift Risk of Default From Private Bondholders to Taxpayers

LOS ANGELES – The Save San Onofre Coalition today released a letter to Secretary of Transportation Mary Peters outlining significant concerns with the Transportation Corridor Systems' (TCS) unprecedented request for a \$1.1 billion federal loan to bail out its existing network of toll roads in Orange County.

The loan application, submitted under the Transportation Infrastructure Finance and Innovation Act (TIFIA), is now pending at the U.S. Department of Transportation.

The Coalition was formed to oppose the extension of one toll road, the 241, through San Onofre State Beach, the 5th most popular state park in California. The Coalition has become the TCS's primary watchdog as part of its fight to stop the toll road extension and save the park.

The Coalition strongly criticized the TIFIA loan application and expressed the following concerns:

1. The TCS's loan request would pay for the consolidation of two underperforming toll road agencies and allow them to refinance their \$4.6 billion in existing debt. Contrary to the purpose of the TIFIA program, the loan has no direct connection to and would not require the agencies to construct any new transportation facilities.

2. The \$1.1 billion loan, if approved, would be the largest in the TIFIA program's 10-year history, would consume roughly half of the annual loan capacity for the program and would divert funding from other projects here in California and throughout the nation that are a high priority for producing new transportation infrastructure and jobs.

-MORE-

Save San Onofre Coalition Oppose TCS's \$1.1 Billion Bailout Request

2-2-2

3. The TCS has mislead the public regarding its toll roads by claiming that they would support themselves financially, and that taxpayers would never be asked to assume the risk of their failure. Now it is clear that the toll roads are falling far short of projected usage and revenues. TCS has responded by seeking a massive federal bailout that would put more than a billion dollars of taxpayer money at risk.

The Coalition's letter follows an October 7, 2008 letter from U.S. Senator Barbara Boxer (D-CA), where the Senator raises serious concerns about the TCS's loan request. Boxer wrote:

"It is my understanding that the funding provided by this loan would be used to stabilize the finances of the TCS's existing toll roads, a purpose that was not originally intended by the TIFIA loan program. With limited financing available for the many existing highway projects, I believe it would be more prudent at this time to focus on projects that provide new improvements to the nation's surface transportation system."

"The Bush Administration should not approve this loan to a toll road agency that has boasted that it does not depend on public funds," stated Elizabeth Goldstein, president of the California State Parks Foundation. "Serious questions surround this request for a bailout. The brakes need to be applied to this billion dollar boondoggle immediately."

"Now, as TCA's existing toll roads have failed to perform as promised and sharply declining revenues raise the possibility of a default, the toll road agencies are turning to taxpayers to pay off existing private bondholders and have the public assume a substantial portion of the risk of the toll roads' failure," added Goldstein.

The TIFIA loan program is designed to provide limited financial assistance to help with the construction of critical new transportation facilities. To minimize federal exposure to risk, the TIFIA statute requires that loan proceeds not exceed 33 percent of the "eligible project costs," which are limited to the cost of constructing and financing new transportation facilities. The Coalition's letter highlights that nowhere in the TIFIA statute's definition is the refinancing of existing debt listed as an eligible project cost.

"Even with the combined cost of all TCS's proposed projects over the next 40 years, TCS's \$1.1 billion request far exceeds the TIFIA program's one-third requirement," commented Michael Fitts, staff attorney with the Endangered Habitats League. "Congress never intended that TIFIA funds be used to bail out private investors in failed toll roads."

-MORE-

Save San Onofre Coalition Oppose TCS's \$1.1 Billion Bailout Request

3-3-3

The \$1.1 billion loan, if approved, would be the largest in the TIFIA program's history and consume already scarce transportation funds. TIFIA loans are subsidized by the Highway Trust Fund, which faces imminent depletion due to declining federal gas tax revenues. The TCS's proposed loan would substantially deplete the TIFIA funds available for new transportation construction projects in California and nationwide.

"Under the TIFIA program's current annual subsidy limits, it has approximately \$2 billion per year available for project assistance," concluded Fitts. "The \$1.1 billion request by TCS would consume more than half of a year's total loan amount."

Background:

The San Joaquin Hills Transportation Corridor Agency (SJHTCA) operates State Route 73 and the Foothill/Eastern Transportation Corridor Agency (FETCA) operates State Routes 241, 261 and 133. Both are joint powers agencies under California law with overlapping but distinct local government members. In 2003, the two agencies formed a third joint powers agency, the TCS, for the purpose of exercising common powers.

About the Save San Onofre Coalition & the Toll Road Issue:

The Save San Onofre Coalition is a diverse coalition of individuals and groups that includes four former state parks commissioners, local, regional, state and national environmental organizations, cities, counties and elected officials statewide. For more information about the Save San Onofre Coalition, visit www.savesanonofre.com.

The Foothill-South Toll Road is a proposed multi-lane highway that would run through the heart of San Onofre State Park, one of California's most popular state parks. Home to the world famous surfing spot, Trestles Beach, the park encompasses the last pristine watershed in Southern California and receives roughly 2.5 million visitors a year. San Onofre State Beach was created by former President Richard Nixon and Governor Ronald Reagan more than 30 years ago with the intent that it would be preserved as a park in perpetuity.

The Toll Road project was denied Coastal Certification by the California Coastal Commission in February 2008, but this denial is currently under appeal by the FETCA. The project cannot move forward unless the Department of Commerce, under Secretary Carlos Gutierrez "overrides" the Coastal Commission's decision. The decision will be made during the current Bush Administration with a statutory window of October 24, 2008 to January 7, 2009.

###

Editor's Note: To receive an electronic press kit or to speak with Elizabeth Goldstein or Michael Fitts, contact Matt Klink at matt@cerrell.com or by telephone at 323-466-3445.

United States Senate

HART SENATE OFFICE BUILDING
SUITE 112
WASHINGTON, DC 20510-0505
(202) 224-3553
<http://boxer.senate.gov/contact>

October 7, 2008

The Honorable Mary E. Peters
Secretary of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Mark Sullivan
TIFIA Joint Program Office (HCFT-1)
U.S. Department of Transportation
1200 New Jersey Avenue, SE, Room E64-302
Washington, DC 20590

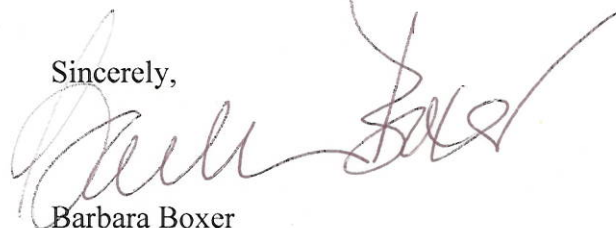
Dear Secretary Peters and Mr. Sullivan:

I write to express my concerns over the possible approval of a loan application by the Transportation Corridor Systems (TCS) on behalf of itself and its two affiliated agencies, the San Joaquin Hills Transportation Corridor Agency (SJHTCA) and the Foothill/Eastern Transportation Corridor Agency (FETCA) in Orange County, California, for a \$1.1 billion loan of federal funds under the Transportation Infrastructure Finance and Innovation Act (TIFIA).

It is my understanding that the funding provided by this loan would be used to stabilize the finances of the TCS's existing toll roads, a purpose that was not originally intended by the TIFIA loan program. With limited financing available for the many existing highway projects, I believe it would be more prudent at this time to focus resources on projects that provide new improvements to the nation's surface transportation system.

Thank you for your attention to this matter.

Sincerely,



Barbara Boxer
United States Senator



October 14, 2008

Mary E. Peters
Office of the Secretary
US Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Mark Sullivan
TIFIA Joint Program Office (HCFT-1)
US Department of Transportation
1200 New Jersey Avenue, SE
Room E64-302
Washington, DC 20590

Re: Opposition to \$1.1 Billion TIFIA Loan Sought by Orange County Toll Road Agencies

Dear Secretary Peters and Mr. Sullivan,

We write to express our opposition to an application by the Transportation Corridor Systems (TCS) on behalf of itself and its two affiliated agencies, the San Joaquin Hills Transportation Corridor Agency (SJHTCA) and the Foothill/Eastern Transportation Corridor Agency (FETCA) in Orange County, California. TCS is seeking a \$1.1 billion direct loan of federal funds under the Transportation Infrastructure Finance and Innovation Act (“TIFIA”) to shore up the deteriorating finances of its existing toll roads.

Today, the people of California and the nation are facing the worst economic crisis in memory. Hundreds of billions of scarce federal dollars have been committed to stabilize failing financial markets. Just last week, the Governor of California requested a \$7 billion federal loan

to keep the state solvent. Taxpayers are being asked to shoulder enormous risk to prevent collapse of the nation's financial system.

The nation's transportation funds have not escaped the crisis. The Highway Trust Fund, which funds TIFIA loan subsidies, is facing insolvency due to declining federal gas tax revenues. Last month, Congress passed and the President signed legislation transferring \$8 billion from the general fund to shore up the depleted Highway Trust Fund.

Under the current dire circumstances—including mounting job losses nationwide—it is imperative that remaining federal transportation funds be dedicated to the provision of critical new infrastructure, and to investments that create jobs for Americans. Yet amidst this crisis, TCS is seeking a staggering \$1.1 billion loan that would accomplish neither goal. The primary purpose of the proposed loan is to refinance existing infrastructure—not finance new roadway improvements—and it is thus unlikely to create any new jobs.

The public money sought by the agencies would be used to bail out these existing toll roads from their financial difficulties by refinancing their existing privately held bond debt and shifting a substantial portion of the current bondholders' financial risk to taxpayers. This proposal flies in the face of TCS's repeated assurances that taxpayers would not be responsible if the toll roads were to fail financially.

Nor is TCS's proposal an appropriate use of the TIFIA program. In authorizing the TIFIA program, Congress clearly intended that federal loan proceeds be used to leverage the construction of *new* transportation facilities. Congress was also careful to impose specific conditions to limit the exposure of taxpayers, including limiting federal participation to a third of the total cost of the new transportation facilities. The primary purpose of the proposed loan, however, is to bail out TCS and its private investors for debt incurred to finance roads that are *already built*, and the incidental benefit that might accrue to TCS's wish list of future projects is highly speculative at best. There is no assurance that any—much less all—of the future improvements presently contemplated by TCS will ever be built. And even under the most generous assumptions, the requested loan amount exceeds the statutory limits on federal participation. There is no basis in policy or the law for allowing TCS to deviate from these statutory requirements.

In addition, the proposed \$1.1 billion loan would be the largest loan in the history of the TIFIA program, and would drastically reduce the annual TIFIA funds available nationwide for new transportation projects—all without providing any assurance of new transportation infrastructure or jobs.

Finally, the refinancing proposal for which the TIFIA loan is requested—which involves TCS's acquisition of the assets and liabilities (debt) of both the SJHTCA and FETCA—raises serious legal questions under California law, which prohibits the use of toll revenues paid by users of one toll road to subsidize another.

It is simply unacceptable that American taxpayers be asked to use limited transportation funds to bail out existing local toll roads and their private investors. We join Senator Barbara

Boxer in urging you to reject this application and to ensure that scarce transportation funds be applied to more worthwhile projects in California and elsewhere that will create new infrastructure and jobs during this difficult economic time.

I. Bailing Out an Existing, Financially Struggling Toll Road System With Taxpayer Funds Is Not An Appropriate Use of the TIFIA Program.

A. The Requested TIFIA Loan Would Make Taxpayers Responsible if the Toll Roads Fail.

The SJHTCA (operator of State Route 73) and the FETCA (operator of State Routes 241, 261, and 133) are joint powers agencies under California law with overlapping but distinct local government members. In 2003, the two agencies formed a third joint powers agency, the TCS, for the purpose of exercising common powers. However, while the two agencies share certain staff functions, they are separate and distinct legal entities with separate debt. TCS is seeking the TIFIA loan to allow the two separate toll road agencies to consolidate and refinance their combined \$4.6 billion of existing debt.

For years, the toll road agencies have justified the construction and operation of the toll roads on the grounds that the roads would be funded *solely* by private parties and would not require the expenditure of any taxpayer dollars. The agencies and their supporters have repeatedly emphasized this point in their public statements:

“TCA is funded by the sale of bonds to both private individuals and institutional investors. The bonds can only be repaid by future tolls and development fees. Since the bonds are not backed by the government, *taxpayers are not responsible for repaying the debt if future toll revenues fall short.*”¹

“The only way to fund construction was to sell bonds to private investors—bonds that would be backed, not by the government but by future toll revenue *so taxpayers would not be liable for repayment.*”²

“Orange County’s Toll Road System also *uses no taxpayer dollars*, and TCA’s existing public toll roads have provided the state of California with \$3 Billion of infrastructure at *no cost to the taxpayer.*”³

“*Are the taxpayers responsible if The Toll Roads fail? No. . . . In fact, The Toll Roads were one of the first major transportation facilities in the nation to be financed with zero federal dollars.*”⁴

¹ http://www.thetollroads.com/home/about_history.htm (as of July, 2008) (emphasis added).

² William Woollett, CEO of TCA from 1989 to 1999, Los Angeles Times, Letters, December 23, 2001 (emphasis added).

³ TCA Press Release, April 24, 2007 (emphasis added).

⁴ http://www.thetollroads.com/home/about_news_common.htm (emphasis added).

But now—as the existing toll roads have failed to perform as promised and sharply declining revenues raise the possibility of a default—the toll road agencies are turning to taxpayers to pay off the existing private bondholders and to have the public assume a substantial portion of the risk of the toll roads' failure.

When the SR-73 was built in the early 90s, grossly overestimated traffic projections were used to justify its financing. As a result, the SJHTCA has struggled financially from the beginning; it has consistently recorded net losses⁵ and has missed toll revenue projections at a steadily increasing rate (off 15 percent in 1997 and off 25 percent in 2008).⁶ It is anticipated that this failure to meet projections will only worsen. The latest monthly reports for the San Joaquin Hills Toll Road indicate that monthly transactions have declined from a year ago in each of the last 12 months. Transactions on the 73 in August 2008 fell by nearly fourteen percent compared to August of 2007.⁷ A major credit rating agency noted in 2006 that to prevent default, SJHTCA will need to maximize revenue for the foreseeable future, thus limiting its ability to deal with the loss of traffic.⁸ This appears increasingly unlikely as traffic declines and the agency continues to substantially miss revenue projections.⁹

Recently, the FETCA has also shown signs of a downturn. According to FETCA's Fiscal Year 2009 budget, total actual revenue (including development impact fees and tolls) for FY 2008 is projected to be \$25 million below budgeted numbers.¹⁰ And this trend is projected to continue into 2009—revenues budgeted for 2009 are almost \$33 million less than the 2008 budget.¹¹ It appears that fewer people choose to use the toll roads as gas prices rise and economic conditions worsen, and the most recent evidence confirms that usage of the Foothill-Eastern is on the decline. The average number of weekday toll transactions on the FETCA system fell by 20,000 in both July and August compared with the same months in 2007.¹² Overall, both total toll transactions and revenues fell over 12 percent in August 2008 as compared with the previous year.¹³ And even more recently, average weekday transactions on the FETCA system for the first two weeks of September, 2008 were 10 to nearly 20 percent below the average for September, 2007.¹⁴

With the toll roads faltering, the toll road agencies are now seeking to make taxpayers liable in the event they cannot repay their debt. The proposed \$1.1 billion loan would not require

⁵ 2003-2007 SJHTCA Audited Financial Statements.

⁶ http://www.thetollroads.com/home/about_investor_transaction.htm (last visited Sept. 15, 2008).

⁷ *Id.*

⁸ [http://www.thefreelibrary.com/Fitch+Affirms+San+Joaquin+Hills+Transp+Corridor+Agency+\(California\)...-a0154406955](http://www.thefreelibrary.com/Fitch+Affirms+San+Joaquin+Hills+Transp+Corridor+Agency+(California)...-a0154406955)

⁹ SJHTCA was projected to be unable to meet the required coverage ratio of revenue being at least 1.3 x Annual Debt Service as soon as FY 2005 and could begin defaulting on debt payments as early as FY 2012. *See* 2003-2007 SJHTCA Audited Financial Statements ("Debt Administration" section).

¹⁰ 2008 and 2009 FETCA Proposed Budgets – preliminary review of projected revenues and expenditures. http://www.thetollroads.com/home/images/publications/09_FE_BUDGET.pdf at 10.

¹¹ *Id.* at 14. At the same time that revenues are declining, expenditures budgeted for FY 2009 are \$16 million greater than FY 2008. *Id.* at 19.

¹² http://www.thetollroads.com/home/about_investor_transaction.htm (last visited Sept. 15, 2008).

¹³ *Id.*

¹⁴ *Id.*

TCA to construct any new transportation facilities—the purpose of the TIFIA program. Rather, the loan proceeds would be used by TCS to help acquire the assets and refinance the liabilities of the SJHTCA and FETCA, including all of their existing bond debt. Under the agencies' proposal, the existing debt would be paid off and refinanced. TCS hopes to obtain more favorable refinancing terms in large part by subordinating the TIFIA loan to the restructured private debt.¹⁵

In other words, the risk of the toll roads' continued underperformance will be borne first and foremost by the *taxpayer*. This is precisely what TCS has assured the public time and time again would never occur.

To use the TIFIA loan program in this manner—to refinance the debt of an existing, financially troubled transportation facility with only a tenuous connection to construction of a new transportation project—amounts to no less than a federal bailout using taxpayer funds. This is not only at odds with the stated mission of the toll road agencies, but contravenes the intended purpose of the TIFIA program.

B. The Proposed Bailout Would Violate Federal Law.

1. Refinancing Existing Debt Is Not an “Eligible Project Cost” Under the Law; a TIFIA Loan Is Limited To 33 Percent of the Cost of New Transportation Infrastructure.

The taxpayer-funded TIFIA loan program is designed to help finance the construction of new transportation facilities by providing limited federal assistance. Any attempt by TCS to misuse the TIFIA funds to refinance existing debt resulting from poor performance of existing toll roads under their control would violate the terms of the TIFIA statute and should be rejected.

Congress's intent to limit TIFIA loans to the financing of new transportation projects is evident from the statutory eligibility requirements. “Eligible project costs” under the TIFIA statute are limited to the cost of constructing and financing transportation facilities.¹⁶ Nowhere in the statute is refinancing existing debt to bail out investors from failed toll roads defined as an eligible project cost.¹⁷

¹⁵ California Department of Transportation, SEP-15 Application, Transportation Corridor System, at 6 (the TIFIA loan would be expected to improve the private financing terms TCS is able to obtain because the loan would be “a subordinated obligation,” allowing for improved senior lien coverage).

¹⁶ 23 U.S.C. § 601(a)(1). The term “eligible project costs” is defined as “amounts substantially all of which are paid by, or for the account of, an obligor in connection with a project, including the cost of—

(A) development phase activities, including planning, feasibility analysis, revenue forecasting, environmental review, permitting, preliminary engineering and design work, and other preconstruction activities;

(B) construction, reconstruction, rehabilitation, replacement, and acquisition of real property (including land related to the project and improvements to land), environmental mitigation, construction contingencies, and acquisition of equipment; and

(C) capitalized interest necessary to meet market requirements, reasonably required reserve funds, capital issuance expenses, and other carrying costs during construction.” *Id.*

¹⁷ See SEP-15 Application at 6.

Moreover, even for new transportation projects, Congress established requirements to ensure that TIFIA funds were used in a limited, prudent manner. To minimize federal taxpayer exposure to risk, TIFIA law requires that loan proceeds not exceed 33% of the eligible project costs.¹⁸

In its Request for An Early Development Agreement dated March 20, 2008 (“SEP-15 Application”), the California Department of Transportation (“Caltrans”) suggests that the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (“SAFETEA-LU”) of 2005 supports TCS’s loan request because it authorizes the Secretary of Transportation to enter into agreements to refinance long-term project obligations. But the use of loan proceeds to refinance existing debt is permitted *only* in connection with the construction of *new infrastructure*.¹⁹ Moreover, the SAFTEA-LU amendments do not alter TIFIA’s definition of “eligible project costs”—which does not include the costs of “refinancing” debt for existing infrastructure—or the requirement that any TIFIA loan be limited to 33 percent of such costs.

Thus, to the extent refinancing of debt for existing infrastructure is a permissible use of TIFIA loan proceeds under the statute, such use would qualify *only* if it is for the purpose of enabling the construction of new transportation facilities, and *only* if it constitutes no more than 33 percent of that cost. In this case, it is not at all clear that the refinancing will result in the construction of *any* new project—much less a project meeting the federal participation requirements.

To be sure, both the SEP-15 application and TCS’s June 9, 2008 loan application contain a recitation of all of the future improvement projects F/ETCA and SJHTCA hope to build through the year 2045.²⁰ But there is no assurance that any of these projects—which include “long term” projects that would not be completed for nearly 40 years—will *ever* be built, with or without the loan.²¹ And the prospect appears particularly tenuous in light of the agencies’ declining financial situation.

Moreover, the requested loan vastly exceeds the 33 percent participation threshold required by law. The \$1.1 billion loan would be permitted only if TCS were financing \$3.33 billion in new transportation infrastructure. Even if one were to take the absurd position that the “eligible project costs” should include the combined cost of *all* of the proposed near-, mid, and long-term projects that TCS has indicated it wants to build over the next 40 years—including the highly controversial Foothill-South project—TCS would be *hundreds of millions* of dollars short of the statutory minimum.²²

¹⁸ 23 U.S.C. § 603(b)(2) (federal loan assistance “shall not exceed . . . 33 percent of the reasonably anticipated eligible project costs.”).

¹⁹ 23 U.S.C. § 603(a)(1)(C) (refinancing long term project obligations permitted only to provide capacity for “completion, enhancement, or expansion of any project” meeting eligibility requirements).

²⁰ SEP-15 Application at 26-29; TCS June 9, 2008 Application for Federal Credit Assistance (“TCS Application”) at 23.

²¹ *Id.* Caltrans itself states that the future improvements undertaken by TCA “may” include those listed in the application. SEP-15 Application at 4.

²² SEP-15 Application at 26-29 (showing total project costs of \$2.44 billion); TCS Application at 23 (showing \$2.99 billion for same).

But this number is itself way off the mark. It is beyond argument that the Foothill-South project—which is the subject of three separate lawsuits, has been rejected by the California Coastal Commission, is still awaiting NEPA review, and faces overwhelming opposition from the public and their elected representatives, including a majority of the California Congressional delegation, the Lieutenant Governor, the State Treasurer and thirty-eight state legislators—is highly speculative and in no way can be considered a “project” for purposes of determining TIFIA funding levels.²³ Indeed, as Caltrans made clear in its SEP-15 Application, the Foothill South is an uncertain project that was not assumed to occur for purposes of traffic and revenue projections for the refinancing:

“There is no assurance that Foothill South will be constructed, and the Traffic And Revenue Report prepared for the acquisition and restructuring financing does not assume construction of Foothill South.... Foothill South may not be constructed as currently planned or may be financed in an alternative manner with the result that all or a portion thereof may not constitute a part of the project.”²⁴

When Foothill-South is excluded, the cost of all of TCS’s future projects is between \$814 million and \$1.1 billion, using Caltrans’ and TCS’ numbers respectively.²⁵ Moreover, this includes “long term” projects with a time frame up to four decades out—assuming they are ever built. Only about \$230-250 million of the total is attributable to “near term” and “mid-term” projects²⁶—a small fraction (less than 8 percent) of what is required to support a \$1.1 billion TIFIA loan. There is simply no justification for putting the huge sum of taxpayer money sought by TCS at risk for such a minimal and uncertain return in terms of new infrastructure.

2. Nothing in the Law Permits DOT to “Deviate” From the Statutory Requirements Applicable to TIFIA Loans.

TCS and Caltrans have acknowledged that the requested loan does not comport with the statutory requirements of the TIFIA program. In its SEP-15 Application, Caltrans asked the Federal Highway Administration (“FHWA”) to “*deviate from the definition of [TIFIA] ‘eligible*

²³ Indeed, reliance by DOT on the construction of Foothill South to justify approval of a TIFIA loan in advance of the completion of a final EIS for that project would violate both NEPA and Title 23. *See* 23 U.S.C. § 602(c)(2) (NEPA applies to funds made available under TIFIA). Moreover, there is no way the Foothill South could meet the TIFIA selection criteria, which among other things consider the “extent to which the project helps maintain or protect the environment.” 23 U.S.C. section 602(b)(A)(vii). As the California Coastal Commission recently stated in its rejection of the project, “it would be *difficult to imagine a more environmentally damaging alternative* location for the proposed toll road and one which would be *more clearly inconsistent with the environmentally sensitive habitat resource protection requirements* contained within Coastal Act Section 30240.” California Coastal Commission, Revised Staff Report and Recommendation on Consistency Certification, No. CC-018-07 (Feb. 6, 2008) at 4 (emphasis added).

²⁴ SEP-15 Application at 5 (emphasis added).

²⁵ *See* SEP-15 Application at 26-29; TCS Application at 23.

²⁶ *Id.*

project costs” so that TCS’ loan application can be approved.²⁷ On July 31, 2008, FHWA indicated by letter that it would accept this deviation on the ground that the use of loan proceeds to refinance existing debt is an “experimental feature.”²⁸

This remarkable attempt to ignore statutory requirements through the “SEP-15” program appears to be based on section 502 of title 23 of the United States Code.²⁹ But neither section 502 nor any other statute gives FHWA the administrative authority to disregard the statutory mandates of TIFIA. The purpose of section 502 is to promote “[s]urface transportation research and technology development” through “research, development, and technology transfer activities.”³⁰ The statute authorizes the Secretary of Transportation to carry out “collaborative research and development” in order “[t]o encourage innovative solutions to surface transportation problems and stimulate the deployment of new technology.”³¹ Specifically, the Secretary may initiate agreements “to fund . . . State departments of transportation, cities, counties, and their agents to conduct joint transportation research and technology efforts.”³²

There is nothing in section 502 that even remotely authorizes a TIFIA loan in violation of the statutory requirements governing such loans. The requested loan is not a “research” project by any stretch of the imagination. The only thing “innovative” about the loan request is that it violates the TIFIA statute. Any suggestion that this “experimental feature” of the request is grounds for avoiding clear statutory requirements is nonsensical.

The proposal by TCS and Caltrans to unhinge the TIFIA lending requirements from the construction of new transportation facilities, to allow refinancing in and of itself to be an eligible project cost, and to grossly exceed the statutory 33% participation limitation would turn the TIFIA program into a virtually unlimited bailout program for failed projects—and, in this case, a bailout of private investors at taxpayer expense. This is deeply at odds with TIFIA’s purpose of getting new, financially sound projects built by providing needed but limited financial assistance. Nothing in the TIFIA scheme reflects a Congressional intent to use scarce transportation dollars to paper over poorly performing toll road projects of the past.

C. The \$1.1 Billion Loan Would Consume Scarce Transportation Funds.

In addition to running afoul of TIFIA’s purpose and deviating from statutory requirements, issuance of this loan would provide very little public benefit at immense cost—all at the expense of other, more worthy transportation projects.

²⁷ See Letter from Barbara Lewis, Caltrans, to Gene K. Fong, FHWA, dated March 20, 2008, and attached SEP-15 Application at 6 (emphasis added).

²⁸ Letter from James D. Ray, FHWA, to Barbara Lewis, Caltrans, dated July 31, 2008 (“FHWA Letter”).

²⁹ See 69 Fed. Reg. 59983, 59986 (SEP-15 project notice, citing as authority 23 U.S.C. section 502).

³⁰ 23 U.S.C. sections 502(a)(1) and (b)(1).

³¹ 23 U.S.C. section 502(c)(1).

³² 23 U.S.C. section 502(c)(2).

This would be the *largest TIFIA loan ever awarded* in the ten years of the program's existence.³³ Under current annual subsidy limits, the TIFIA program provides capacity for approximately \$2 billion per year in credit assistance.³⁴ The \$1.1 billion requested by TCS would consume more than half of a year's capacity. As you know, the subsidy costs of TIFIA credit assistance are funded out of the imperiled Highway Trust Fund, which just last month received an \$8 billion transfer from the General Fund to restore its solvency. Granting TCS' loan application would divert funds from other, far more critical transportation projects across the nation—projects that are desperately needed to create new infrastructure and generate new jobs.

The TIFIA program is needed to support critical new transportation projects in California and across the nation. Its funds should not be drained to prop up failing toll road agencies in Orange County. The federal government should be able to find a far better return on the taxpayers' money elsewhere.

II. The Proposed Consolidation of the Assets and Liabilities of the Foothill-Eastern and San Joaquin Hills Toll Road Agencies Would Contravene California Law.

Another problem with the requested TIFIA loan is that it would be used in part to fund the proposed acquisition and consolidation by TCS of the assets and liabilities of FETCA and SJHTCA. The California statute authorizing these agencies to collect tolls in Orange County prohibits the use of toll revenues from one thoroughfare to subsidize another—which would effectively result from the proposed acquisition and consolidation.

Both the FETCA and the SJHTCA were formed pursuant to section 66484.3 of the California Government Code. That law authorizes the collection of tolls to support construction of major thoroughfares and improvements in Orange County. Toll charges, however, may be collected “only for paying for the costs of construction of the major thoroughfare *for which the toll is charged* and for the costs of collecting the tolls.”³⁵ The toll roads operated by FETCA and SHJTCA are separate, geographically distinct and unconnected thoroughfares.³⁶ Accordingly, the tolls collected in connection with one thoroughfare cannot be used to pay for the construction or associated financing costs of another thoroughfare.

Yet that seems to be precisely what TCS' TIFIA “project” would accomplish. TCS proposes to acquire the assets and liabilities of both agencies and refinance their combined bond debt. Under the proposed merger, the tolls paid by users of the better performing Foothill/Eastern toll roads would effectively be used to subsidize the poor-performing San Joaquin Hills toll road, thereby enabling SJHTCA to avoid default on its bonds. As TCS has acknowledged, “consolidation was the most viable option to establish long-term financial

³³ See TIFIA Portfolio, <http://tifia.fhwa.dot.gov/projects/approved.cfm> (showing largest approved TIFIA loan of \$916M).

³⁴ U.S. Dep't of Transp., TIFIA Program Guide at 1-2.

³⁵ Cal. Gov. Code § 66484.3(f) (emphasis added).

³⁶ See, e.g., SEP-15 Application at 26 (diagram illustrating State Route 73 as separate from State Routes 241, 261, and 133).

Mary E. Peters and Mark Sullivan

October 14, 2008

Page 10 of 10

stability for the San Joaquin Hills Agency.”³⁷ This kind of financial arrangement—using tolls collected on one thoroughfare to subsidize another—is precisely what section 66484.3 was designed to prevent.

For all of these reasons, we ask your assistance in ensuring that the Department of Transportation adheres to the purpose and statutory mandates of TIFIA—and to responsible transportation and fiscal policies—and rejects this application.

Very truly yours,

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

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

Garry Brown
Executive Director
Orange County Coastkeeper

Serje Dedina, Ph.D.
Executive Director
WiLDCOAST-COSTASALVAjE

Robert Garcia
Executive Director and Counsel
The City Project

Rebecca Robles
Angela Mooney D’Arcy
Co-Coordinators
United Coalition to Protect Panhe

³⁷ See http://www.thetollroads.com/home/news_press_june04.htm.

Transportation Corridor Systems (TCS) Requests \$1.1 Billion Bailout from Federal Government

FACT SHEET

The Issue:

TCS, the proponent of the Foothill South Toll Road, is seeking approval of a \$1.1 billion loan from the federal government to pay for the consolidation of two troubled toll road agencies and refinance their combined \$4.6 billion in existing private bondholder debt. If approved by the Bush Administration, this loan will not guarantee the construction of a single new transportation facility. Instead it will **shift the risk of the existing toll roads' failure from private bondholders to taxpayers. This is a bailout, plain and simple. The loan should not be granted because of the risk to the taxpayer and the need for those loan funds for other transportation purposes.**

Background:

The San Joaquin Hills Transportation Corridor Agency (SJHTCA) operates State Route 73 and the Foothill/Eastern Transportation Corridor Agency (FETCA) operates State Routes 241, 261 and 133. Both are joint powers agencies under California law with overlapping but distinct local government members. In 2003, the two agencies formed a third joint powers agency, the TCS, for the purpose of exercising common powers.

TCS has formally applied for a record \$1.1 billion loan under the Federal Transportation Infrastructure Finance and Innovation Act (TIFIA) program. The loan application is now pending at the U.S. Department of Transportation.

TCS boasts its toll roads are paid for by private funds...then seeks a federal bailout:

TCS's loan request flies in the face of its repeated assertions that the toll roads are self-sufficient and that the taxpayers would never be responsible for their debt:

“TCA is funded by the sale of bonds to both private individuals and institutional investors. The bonds can only be repaid by future tolls and development fees. Since the bonds are not backed by the government, **taxpayers are not responsible for repaying the debt if future toll revenues fall short.**” (Source: TCA Web site, emphasis added)

“**Are the taxpayers responsible if The Toll Roads fail? No. . . .** In fact, the Toll Roads were one of the first major transportation facilities in the nation to be **financed with zero federal dollars.**” (Source: TCA Web site, emphasis added)

Using TIFIA funds for an existing toll road is inconsistent with the program's purpose:

The TIFIA loan program is designed to provide prudent financial assistance to help with the construction of critical *new* transportation facilities. To minimize federal exposure to risk, the TIFIA statute requires that loan proceeds not exceed 33 percent of the “eligible project costs,” which are limited to the cost of constructing and financing new transportation facilities.

Congress never intended that TIFIA funds be used to bail out private investors in failed toll roads.

But the requested loan would not require TCS to construct a single new transportation facility. Even the combined cost of all of TCS's proposed projects over the next 40 years would not come close to the \$3.3 billion in new construction that would be needed to qualify for a \$1.1 billion TIFIA loan.

For this reason, Caltrans has written to the Federal Highway Administration (FHWA) asking permission to “*deviate from the definition of [TIFIA] ‘eligible project costs’*” so that TCS's loan application can be approved. FHWA has indicated its willingness to allow this deviation, **despite the lack of any statutory authority to do so.**

This \$1.1 billion loan, if approved, would be the largest in the program's history and consume already scarce transportation funds:

TIFIA loans are subsidized by the Highway Trust Fund, which faces imminent depletion due to declining federal gas tax revenues. The TCS's proposed loan would substantially deplete the TIFIA funds available for new transportation construction projects in California and nationwide. **TCS's proposed loan, if approved, would be the largest loan ever awarded in the program's 10 year existence.** Under current annual subsidy limits, the TIFIA program has approximately \$2 billion per year available for project assistance. The \$1.1 billion request by TCS would consume more than half of a year's total loan amount.

Senator Barbara Boxer, chair of the Senate Public Works Committee, has expressed concern about TCS's application for a TIFIA loan:

On October 7th, 2008, Senator Boxer sent a letter to the Secretary of Transportation Mary E. Peters and Mark Sullivan of the TIFIA Joint Program Office within the Department of Transportation (DOT) expressing concern about the loan:

“It is my understanding that the funding provided by this loan would be used to stabilize the finances of the TCS's existing toll roads, a purpose that was not originally intended by the TIFIA loan program. With limited financing available for the many existing highway projects, *I believe it would be more prudent at this time to focus resources on projects that provide new improvements to the nation's surface transportation system.*”

(Emphasis added)

Putting the TCS's \$1.1 billion TIFIA loan request in context:

- **Voters need to ask** – why is this loan being requested? If TCS is unable to manage its current finances, why are some politicians supporting TCS's plan to spend more than \$1.6 billion on the proposed Foothill-South – a toll road to nowhere?
- **State Legislators need to ask** – why is Caltrans stepping in on the side of this federal loan application when it could drastically affect other far more critical California transportation infrastructure priorities? Is Caltrans' involvement driven by the Agency's “non-compete” agreement?
- **Congress needs to ask** – What have we learned from the current financial crisis about putting taxpayers at risk? In this time of scarce transportation funds and pressing economic priorities, why would the Bush Administration even consider a massive bailout for a project that has already been built?

TCA Quotes on “No Public Funds” for Toll Roads

“At a time when our Governor and State lawmakers have put rebuilding our highways at the center of the agenda, it doesn’t make sense for Sacramento to try to stop such an important highway project here in Orange County, **particularly when this project doesn’t require state taxpayer dollars or state bond money,**” said Peter Herzog, F/ETCA Board Member and Lake Forest City Councilman.

TCA Press Release, May 11, 2006 (Emphasis added)

“**Orange County’s Toll Road System also uses no taxpayer dollars** and TCA’s existing public toll roads have provided the state of California with \$3 Billion of infrastructure at **no cost to the taxpayer.**”

TCA Press Release, April 24, 2007 (Emphasis added)

Is TCA a private, for-profit company? TCA are two public agencies governed by local elected officials representing cities and county Supervisorial districts. The money collected at the tolls is primarily used to repay the non-recourse bonds that were issued to build the roads. **These bonds were sold to private investors, and state and local taxpayers are not liable for any debt payments.**

http://www.thetollroads.com/home/about_news_common.htm

(Emphasis added)

Are the taxpayers responsible if The Toll Roads fail? No. The majority of funding comes from non-recourse toll revenue bonds. These bonds are backed by future toll revenue, not by the state or any local government, thus **state and local taxpayers have no responsibility to repay the bonds.** In fact, The Toll Roads were one of the first major transportation facilities in the nation to be financed with zero federal dollars and very little state revenue.

http://www.thetollroads.com/home/about_news_common.htm

(Emphasis added)

PUBLIC INFRASTRUCTURE, PRIVATE INVESTMENT: The San Joaquin Hills (73), Foothill (241), and Eastern (241/261/133) Toll Roads were the first public highways to be constructed in Orange County since 1987 when the Costa Mesa (SR-55) Freeway was extended for four miles. **Remarkably, the Toll Roads – which are owned and maintained by the state of California – were built with virtually no taxpayer dollars.**

http://www.thetollroads.com/home/about_history.htm

(Emphasis added)

TCA is funded by the sale of bonds to both private individuals and institutional investors. The bonds can only be repaid by future tolls and development fees. Since the bonds are not backed by the government, **taxpayers are not responsible for repaying the debt if future toll revenues fall short.** Today, all toll and development impact fee revenue go toward retiring the construction debt, funding additional improvements, and covering costs of operating The Toll Roads.

http://www.thetollroads.com/home/about_history.htm

(Emphasis added)

“Saving taxpayer dollars. **The 241 toll road would be built without tax dollars;** users pay their way. It fits with Gov. Schwarzenegger’s call for public-private partnerships to solve infrastructure issues (the governor supports the 241) during our budget crisis.”

Lance MacLean in an opinion piece in the San Diego Union-Tribune Opinion, February 6, 2008 (Emphasis added)

[TCA Spokeswoman Lisa] **Telles said the toll roads are financed privately and the \$100 million would not come out of taxpayer funds.**

City News Service, October 8, 2007 (Emphasis added)

“The *Times* is right about the toll roads easing congestion in Orange County. But criticizing the toll roads for not living up to growth projections is about as productive as beating a dead horse. Whether you agree with projections or not, the fact is **the Transportation Corridor Agencies built \$2 billion worth of new infrastructure - without any new taxes and virtually no taxpayer dollars.**”

[...]

“It wasn’t a matter of building freeways or toll roads; it was toll road or no road. The only way to fund construction was to sell bonds to private investors – bonds that would be backed, not by the government but by future toll revenue **so taxpayers would not be liable for repayment.**”

William Woollett, Aliso Viejo City Manager / TCA CEO (1989 to 1999)
L.A. Times Letters to the Editor, December 23, 2001 (Emphasis added)