

Master Response 1

Relationship of CEQA and NEPA Environmental Review Processes with Respect to the TMV Project

Master Response 1 addresses comments that generally speak to the differences between the environmental analysis of the proposed action provided in this Environmental Impact Statement (EIS), and those provided by other state and local agencies for the Tejon Mountain Village Project (TMV Project), one of the proposed developments considered in the Tehachapi Uplands Multiple Species Habitat Conservation Plan (TU MSHCP). This master response also describes consideration of potential effects on cultural resources in this EIS, and how that analysis relates to the analysis of the effects of the TMV Project on cultural resources in the *Tejon Mountain Village Environmental Impact Report* (TMV EIR) (Kern County 2009). Finally, this Master Response summarizes the outcome of the California Environmental Quality Act (CEQA) lawsuit specific to the TMV Project.

Table MR1-1 provides a list of commenters and a reference to the individual comment addressed by this master response. Refer to Chapter 4, Individual Responses to Public Comments, for a copy of each comment letter and responses to other substantive comments not addressed by a master response.

Table MR1-1. Comments Addressed in Master Response 1

Comment	Commenter
S-1-3	California Department of Fish and Game
S-1-4	California Department of Fish and Game
S-1-5	California Department of Fish and Game
N-2-1	Wishtoyo Foundation
N-2-2	Wishtoyo Foundation
N-2-3	Wishtoyo Foundation
N-2-4	Wishtoyo Foundation
N-2-5	Wishtoyo Foundation

Overview

As indicated in Chapter 1, Introduction, of this Final EIS, Tejon Ranchcorp (TRC) has submitted an application to the Service for an incidental take permit (ITP) pursuant to Section 10(a)(1)(B) of the Federal Endangered Species Act (ESA), as amended, for activities covered under the TU MSHCP. TRC has requested an ITP from the U.S. Fish and Wildlife Service (Service) to authorize the incidental take of 27 species, including four federally listed species and 23 other species that may become federally listed in the future (Table 1-1). Activities proposed to be covered by the ITP (Covered Activities) include most ongoing ranch operations (excluding hunting and mineral extraction), as well as limited ground-disturbing activities in Open Space areas, referred to as Plan-Wide Activities, and planned future community development in development areas, referred to as Commercial and Residential Development Activities. Commercial and Residential Development Activities would consist of land disturbance development activities on up to 5,533 acres in and adjacent to the

Interstate 5 (I-5) corridor. One of the Commercial and Residential Development Activities proposed under the TU MSHCP is the TMV Project.

Issuance of an ITP is a Federal action subject to compliance with National Environmental Policy Act (NEPA). The purpose of NEPA is to promote analysis and disclosure of the environmental issues surrounding a proposed Federal action, provide for public participation in the review process to reach a decision that reflects a careful consideration of the environmental implications of a proposed action, and help the agency make a decision on the proposed action. When a proposed action is determined to have potential significant effects on the environment, the agency is required to complete an EIS which includes a more rigorous analysis of effects. However, an EIS is not required to include the type of project details and effects analysis that are typical of a project-specific CEQA document prepared as part of the development entitlement and approval process. NEPA compliance relative to the issuance of an ITP pursuant to the ESA is generally more programmatic in scope compared to a project-specific CEQA compliance document. For example, CEQA requires the lead agency to reach significance conclusions and mitigate project effects to a less-than-significant level unless the project benefits are affirmatively found to outweigh the environmental effects. In contrast, NEPA is an informational and analytical statute requiring disclosure of potential effects on the human environment and a decision as to the environmentally preferred alternative, but does not require an agency to mitigate to achieve certain significance criteria analogous to CEQA.

On October 5, 2009, the Kern County Board of Supervisors approved the TMV Project. The County's approval was based, in part, on the environmental analysis presented in the TMV EIR (Kern County 2009). Unlike the proposed action considered in this EIS, the TMV EIR considered a specific development project, based on the approval of specific development plans. Further, the EIR only addressed the effects of the TMV Project, and did not consider the effects of the other Commercial and Residential Development Activities or Plan-Wide Activities included as Covered Activities in the TU MSHCP. The EIR was also prepared pursuant to state law (i.e., CEQA), which has different standards and scope than NEPA. Although the TMV EIR was used to supplement the setting and data information for this EIS, the TMV EIR analysis does not substitute for the EIS analysis, and the information presented in both documents is different, based on the scope and nature of the actions considered.

Cultural Resources

Several comments generally request that the Supplemental Draft EIS provide an analysis of preservation in place for archaeological sites that may be affected by the proposed action, and state that the preservation in place analysis provided in the EIS is inadequate under CEQA Guidelines Section 15064.5 (14 California Code of Regulations [CCR] Section 15064.5) and 15126.4(b)(3) (14 CCR Section 15126.4(b)(3)), as well as the recent court decision that clarifies the requirements of these sections (*Madera Oversight Coalition v. County of Madera* (2011 Cal. App. LEXIS 1187)).

Section 21080(a) of the California Public Resources Code identifies the scope of CEQA applicable to discretionary projects by public agencies. Public agencies include any state agency, board, or commission and any local or regional agency, as defined in the guidelines. It does not include agencies of the Federal government (14 CCR Section 15379). The proposed action considered in this EIS is the issuance of an ITP to TRC for activities covered under the TU MSHCP. Notably, no action by

an agency of the State of California or a local agency is identified; therefore, the Service is not expected to fulfill CEQA requirements as part of completing the EIS.

The Service is required to consult with the State Historic Preservation Officer (SHPO) under Section 106 of the National Historic Preservation Act (NHPA) to ensure the proposed action minimizes effects on cultural resources eligible for listing in the National Register of Historic Places (NRHP). To this end, as discussed in Section 3.5, Cultural Resources, in Volume I of the Supplemental Draft EIS, the Service has supplied the SHPO with technical inventories for cultural resources as well as evaluations of the eligibility of cultural resources sites within the TMV Planning Area, the Lebec/Existing Headquarters Area, and the areas previously considered for communications towers. The analysis also included proposed avoidance measures for sites within known historic or archaeological resources (i.e., methods to preserve in place). These measures were based on and consistent with the measures proposed in the TMV EIR. The Service also prepared findings of effect of the proposed action on cultural resources relative to each surveyed area, which found that the issuance of an ITP would not result in adverse effects on cultural resources. The findings of effects for the proposed action were sent to the SHPO by the Service (Clark pers. comm.).

The SHPO has concurred with the Service's determination of eligibility and the findings of no effect on cultural resources because known sites in the surveyed areas would be avoided and preserved in place (Donaldson pers. comm.). The SHPO further noted that in the event that disturbance of potentially eligible sites could not be avoided, further consultation would be required. For example, Phase III data recovery was proposed for Site CA-KER-6727 as an option for mitigation if effects on the site could not be avoided. Since that time, TRC has committed to avoid Site CA-KER-6727 (Marshall pers. comm.). Nevertheless, the Service concurred with the SHPO and stated its commitment to reinitiate consultation should data recovery be proposed in the future (Clark pers. comm.).

Mitigation provided in Section 4.5.3.2 of the Supplemental EIS also reiterates the Service's commitment to consult with the SHPO in the future if disturbance in Open Space areas has the potential to disturb cultural resources (Clark pers. comm.). Specifically, as described in Section 4.5, Cultural Resources, in Volume I of the Supplemental Draft EIS, 200 acres within Open Space areas may be affected by Plan-Wide Activities. Where Plan-Wide Activities may occur in unsurveyed areas, mitigation has been identified consistent with the Service's obligations under NEPA and the NHPA requiring that pre-ground disturbance surveys be conducted in areas that were not previously surveyed and appropriate measures be developed in consultation with the SHPO, if necessary.

For all areas of the Covered Lands, contractor employees conducting earthmoving and excavation will attend a "tailgate" session informing them of the potential for inadvertently discovering cultural resources or human remains and the protection measures to be followed to prevent destruction of any and all cultural resources, including resources not previously known, in the Covered Lands. Paleontological resource monitoring will also be conducted during excavations around Castac Lake, and all development in the Covered Lands will comply with Federal, state, and local requirements, including completion of SHPO consultation, as relevant, and compliance with CEQA and other state and local laws. Further consultation with the SHPO will occur if it is subsequently determined that currently known significant cultural resources cannot be avoided, or if additional resources are identified through future surveys. If data retrieval is necessary, specific methods will be developed in consultation with the SHPO during future consultation.

The Service is also required to consult with recognized Native American tribes under Section 106 of NHPA (16 United States Code [USC] 470(d)(6)) and to engage in a good faith effort to obtain information from individuals or organizations likely to have knowledge of possible historic properties that could be affected by the undertaking (36 CFR 800.4(a)). This consultation process began in 2007 with a request to the Native American Heritage Commission (NAHC) for records in its Sacred Lands File pertaining to the site and contacts for tribes and groups located near the site. Initial consultation to identify sites was requested in 2007 in letters to the representatives of record of the Chumash, Fernandeano, Tataviam, Kitanemuk, San Miguel Band of Mission Indians, Tubatulabal, Kawaiisu, Koso, and Yokuts.

During the planning process associated with the TMV Project, the Kern Valley Tribal Council, Tejon Indian Tribe, Kitanemuk and Yowlumne Tejon Indians, Chumash Council of Bakersfield, Santa Rosa Rancheria, Tule River Indian Tribe, and the Tubatulabals of Kern County were continually provided information on the progress of the TMV Project and received copies of each of the cultural resource surveys through TRC and Kern County. Additionally, Tejon Indian Tribe and Chumash representatives were involved with site archeological surveys conducted between 2005 and 2010, which formed the basis for the Service's analysis in the EIS. In January 2012, the Tejon Indian Tribe achieved Federal recognition, wherein the Service promptly initiated a government-to-government consultation with the tribe to provide official notice of the TU MSHCP and solicit information regarding cultural resources in the area. The Tejon Indian Tribe responded by letter dated January 29, 2012, stating the tribe had reviewed the available information and determined that it had no knowledge of any cultural resources that may be affected by the Covered Activities.

In July 2012, the Service sent updated letters to 16 tribes to inform them of revisions and updates to the proposed action and environmental review process, and to ensure that interested parties who may have special knowledge of the area had ample opportunities to review the data compiled to date and share their knowledge. This consultation was intended, in part, to ensure that any traditional cultural properties (TCPs) that could be affected were identified. The Service received no further indication of any TCPs within the Covered Lands from the tribes.

TMV Project Lawsuit

The TMV Project Approvals and TMV EIR were challenged in state court on November 12, 2009, by the Center for Biological Diversity, Wishtoyo Foundation, TriCounty Watchdogs, and the Center for Race, Poverty & the Environment ("Petitioners"). Petitioners broadly alleged violations of CEQA and the California Water Code, based on the TMV EIR's project description and analysis of environmental impacts related to air quality, climate change, water supply, water quality, biological resources, cultural resources, and wildfires. Petitioners also raised other claims in their petition, but waived those during briefing. The superior court denied the petition on December 8, 2010, finding the TMV EIR's project description and environmental analysis sufficient under CEQA and the California Water Code. Petitioners then appealed to the Fifth District Court of Appeals on February 8, 2011, challenging the superior court's judgment. In their appeal, Petitioners dropped several claims presented to the trial court, but maintained that the TMV EIR violated CEQA and the California Water Code by failing to properly describe the project and adequately analyze environmental impacts related to water supply, water quality, biological resources, cultural resources, and air quality. On April 25, 2012, the Court of Appeals denied the petition and affirmed the Superior Court's Judgment, holding that the TMV EIR was sufficient under applicable law. The

statute of limitations to petition for review to the California Supreme Court has passed with no petition filed by the Petitioners/Appellants in this case. Therefore, the TMV EIR and County approvals have been upheld on judicial review.