



September 11, 2014

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Subject: Comments on Draft Order WQ 2014-xx, Petition of Foothill/Eastern Transportation Corridor Agency (SWRCB/OCC File A-2259)

Dear Ms. Townsend:

The Riverside County Transportation Commission (Commission) appreciates the opportunity to submit comments on the State Water Resources Control Board’s (State Board) Draft Order, WQ 2014-xx, in the matter of the petition of Foothill/Eastern Transportation Corridor Agency (Draft Order). The Commission supports the State Board’s goal of protecting the quality of water within the state. The Commission also supports the Draft Order’s holding, which requires a decision regarding waste discharge requirements to be supported by evidence in the record. This letter requests the removal or correction of a subtle, but consequential, misstatement of the law contained in the Draft Order.

The misstatement appears to arise from a conflation of the regional boards’ obligation under the California Environmental Quality Act (CEQA) to consider the environmental impacts of a proposed “project” with the obligation under Porter-Cologne Water Quality Control Act (Porter-Cologne) to consider the impact of a “proposed discharge.” This apparent confusion expands the regional boards’ authority contrary to Porter-Cologne and establishes an unintelligible standard for applying that expanded authority. For this reason, the Commission requests that the State Board amend the Draft Order by deleting the last paragraph on page 9 and the first paragraph on page 10. These paragraphs are dicta and are not necessary to support the Draft Order’s holding.

CEQA Requires Consideration of a “Project”

An environmental impact report (EIR) prepared pursuant to CEQA must consider “the whole of an action” and cannot piecemeal a large project into multiple smaller projects to avoid consideration of cumulative impacts. (Pub. Res. Code, § 21065; 14 Cal. Code Regs., § 15378, subd. (a).) An EIR for a multi-phase project, such as the

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linear transportation projects undertaken by the Commission and Foothill/Eastern Transportation Corridor Agency, considers the impacts from the whole of a project. A supplemental or subsequent EIR (SEIR) or other tiered document providing greater detail may be prepared for a later phase of a multi-phase project prior to approving that phase.

Porter-Cologne Authorizes Consideration of a “Proposed Discharge”

Water Code section 13263(a) authorizes a regional board to “prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge[.]” Prescribed requirements must implement any relevant and adopted water quality control plans and consider, among other things, “other waste discharges[.]” (*Ibid.*) Porter-Cologne is interpreted consistently with the federal Water Pollution Control Act, which defines a discharge as the “addition” of a pollutant to navigable waters or to waters in a contiguous zone. (33 U.S.C. § 1362, subds. (12), (16).) Discharges are “proposed” when a potential permittee submits a report of waste discharge pursuant to Water Code section 13260(a). A potential permittee is required to submit a separate report of waste discharge for each disposal area. (23 Cal. Code Regs., § 2207.) “Other waste discharges” may include additions of pollutants, proposed or occurring, in disposal sites or by dischargers other than those proposed in a report of waste discharge. (See, Water Code, § 13263, subd. (a).)

When an agency, such as the Commission, undertakes a specific phase of a multi-phase project, it may submit a report of waste discharge for that specific phase. The report of waste discharge proposes discharges accompanying that specific phase, but does not propose discharges from future phases. Future phases may never be approved by the Commission’s Board. Funding may never become available for future phases. Permits may not be granted for future phases. Such future discharges are not “proposed discharges,” as they are not proposed in a report of waste discharge. (Water Code, § 13263, subd. (a).) They are also not “other waste discharges,” because they are not actual additions of pollutants and may never constitute discharges. (*Ibid.*; 33 U.S.C. § 1362, subds. (12), (16).)

Porter-Cologne does not permit regional boards to condition or deny waste discharge requirements based on future phases of a CEQA “project” because the future phases do not constitute additions of pollutants and do not qualify as “proposed discharges” or “other waste discharges.”

Draft Order Expands Regional Board Authority Contrary to Porter-Cologne

The Draft Order expands the regional boards’ authority contrary to Water Code section 13263(a) by authorizing regional boards to prescribe or deny waste discharge requirements based on activities that do not constitute “proposed discharges” or “other waste discharges.” Specifically, the Draft Order authorizes regional boards to “request available information on those future phases in connection with a pending report of waste discharge or application for the current phase” if a future phase is “likely to occur and may have

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water quality impacts[.]” (Draft Order, p. 10.) The Draft Order further authorizes regional boards to consider future phases of a project “when making a decision concerning the authorization of a discharge of waste that will likely lead to additional discharges of waste or other water quality impacts in the future.” (*Ibid.*)

Conditioning or denying waste discharge requirements for a proposed project based on future phases of a CEQA “project” that do not constitute “proposed discharges” or “other waste discharges” violates Water Code section 13262(a). This violation appears to arise from a confusion of an EIR’s consideration of all phases in a multi-phase project under CEQA with a regional board’s authority to consider discharges proposed in a report of waste discharge for one phase of a multi-phase project under Porter-Cologne. As noted above, this confusion impermissibly expands the regional boards’ authority in violation of Porter-Cologne. The last paragraph on page 9 and the first paragraph on page 10 are dicta and are not necessary to support the proposed holding of the Draft Order. For this reason, the Commission requests the deletion of these two paragraphs.

Draft Order Establishes an Unintelligible Standard

If the last paragraph on page 9 and the first paragraph on page 10 are not deleted, not only will the State Board’s Draft Order violate Porter-Cologne, but the Draft Order will establish an unintelligible standard for determining whether a future phase of a multi-phase project is a proper consideration in issuing or denying waste discharge requirements. (Gov. Code, § 11425.60; State Board Order No. WR 96-1, fn. 11 [unless stated otherwise, all State Board Orders adopted at a public meeting are precedential].) Regional boards will be expected to determine whether a future phase is “likely to occur and may have water quality impacts” even though the future phase is not the subject of a report of waste discharge, may never be approved, may never receive funding, and may never obtain relevant permits. A regional board is not in a position to determine the likelihood that a future phase will occur, and Porter-Cologne does not permit such consideration as part of the issuance or denial of waste discharge requirements.

In the event the last paragraph on page 9 and the first paragraph on page 10 are not deleted, they should be revised to clarify that regional boards may only consider future phases of a multi-phased project in the context of CEQA and not for the purpose of issuing or denying waste discharge requirements under Porter-Cologne. The Draft Order should clarify that waste discharge requirements cannot be denied or conditioned based on a future action which does not constitute a “proposed discharge” or “other waste discharge.”

Conclusion

The Draft Order’s apparent conflation of a CEQA “project” and a “proposed discharge” under Porter-Cologne expands the regional boards’ authority contrary to Porter-Cologne and establishes an unintelligible standard for applying that expanded authority. For these reasons, the Commission requests that the State Board amend the Draft Order by deleting the last paragraph on page 9 and first paragraph on page 10.

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In the alternative, these paragraphs should be revised to clarify, consistent with Porter-Cologne, that waste discharge requirements cannot be denied or conditioned based on a future action, which does not constitute a "proposed discharge" or "other waste discharge."

Thank you for your consideration of these comments.

Sincerely,



Anne Mayer
Executive Director

Via email (commentletters@waterboards.ca.gov)