

September 15, 2014

Via Email and U.S. Mail

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State Water Resources Control Board
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Re: Comments to A-2259—September 23 Board Meeting

Dear Ms. Townsend:

The Save San Onofre Coalition, a coalition of leading regional, state and national environmental organizations representing millions of members, submits this letter in support of the August 15, 2014 Draft Order prepared by staff of the State Water Resources Control Board (“State Board”).

For over a decade, the Coalition’s member organizations have been united in opposition to one of the most environmentally damaging public projects facing California today: the proposed extension of State Route 241 from its current terminus at Oso Parkway to the I-5. Variously described by its proponent, the Foothill/Eastern Transportation Corridor Agency (“TCA”), as the “Foothill South” toll road or the “241 Completion Project,” the toll road extension has been denied approvals by the Coastal Commission, the U.S. Secretary of Commerce, and the

San Diego Regional Water Quality Control Board (“Regional Board”). The late Peter Douglas remarked that since the passage of the Coastal Act in 1976, he knew of no other project “so demonstrably inconsistent with the law,” and that “[t]his toll road is precisely the kind of project the Coastal Act was intended to prevent.”¹

Despite these rejections, the TCA has repeatedly indicated its determination to pursue the “241 Completion Project” in some form. To that end, TCA has sought to obtain approvals for the project in “segments,” starting with the first segment, the “Tesoro Extension.” TCA’s aim is to begin constructing the 241 Completion Project before identifying the toll road’s ultimate route, analyzing the impacts of that route, and determining how or whether those impacts can be avoided or mitigated.

The Regional Board, in denying TCA’s application for WDRs for the Tesoro Extension, put a halt to the TCA’s improper segmentation of the project. After considering all of the evidence—including TCA’s application materials, multiple later submissions, and testimony at two lengthy public hearings focusing on the segmentation issue—the Regional Board concluded that the “entire project” TCA intends to build is larger than the Tesoro Extension and that the Board must have the ability to evaluate the water quality impacts of the entire project before approving WDRs for the first segment.

The Draft Order, after a thorough discussion of applicable law, properly concludes that the Regional Board’s decision was consistent with the Porter-Cologne Water Quality Control Act, which does not require the Regional Board to “put on blinders” regarding the full extent of a proposed project when it is considering WDRs. (Draft Order at 10.) The Draft Order also correctly states that there is substantial evidence in the record demonstrating that “the Tesoro Extension is part of a larger project.” (Draft Order at 13 n.66.) In other words, the Draft Order recognizes that both the facts and the law support the Regional Board’s decision.

The only fault the Draft Order finds with the Regional Board’s action is the lack of formal written findings accompanying the decision. Because, as recognized in the Draft Order, the Regional Board’s decision was consistent with the law and supported by the evidence, the absence of formal findings was not prejudicial error. The State Board would be well within its authority to uphold that decision on the grounds set forth in the Draft Order. However, the Coalition

¹ Reporter’s Transcript of Proceedings, California Coastal Commission Consistency Certification No. 018-07, TCA, Southern Orange County & Northern San Diego County, at 62–63 (February 6, 2008) (testimony of Peter Douglas).

does not object to a remand to the Regional Board for the sole purpose of providing written findings articulating the factual and legal basis for the decision.

I. The Draft Order Correctly Recognizes that Porter-Cologne Grants the Regional Board Independent Authority to Deny WDRs on Improper Segmentation Grounds.

The Draft Order, in discussing the applicable law, identifies a critical distinction between the Regional Board's authority as a "responsible agency" under CEQA and its independent authority under Porter-Cologne—a distinction that the TCA fails to grasp in its petition. Whatever deference a responsible agency may owe to a lead agency's determinations regarding compliance with CEQA are irrelevant to the Board's authority—and indeed its duty—to ensure the mandates of Porter-Cologne are met.

As discussed in the Draft Order, Porter-Cologne mandates the State and Regional Boards to exercise their authority to broadly protect water quality in California. The Regional Board has express authority to "prohibit, postpone, or condition the discharge of waste . . . for any project . . . to protect against environmental damage to water resources, to minimize adverse environmental impacts on water resources, or to ensure long-term protection of water resources." (23 Cal. Code Regs., § 3742(a).) The Draft Order correctly emphasizes that "the discharge of waste is a privilege, not a right." (Draft Order at 9 (citing Wat. Code §§ 13263(b), (g)).)

In considering whether to adopt WDRs, the Regional Board must comprehensively consider potential effects on water quality, including "water quality conditions that could reasonably be achieved through the *coordinated control of all factors which affect water quality in the area.*" (*Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.*, 210 Cal. App. 4th 1255, 1263 (2012) (emphasis added) (citing Water Code §§ 13263, subd. (a), 13241).) The Legislature has declared "that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, *considering all demands being made and to be made on those waters and the total values involved*, beneficial and detrimental, economic and social, tangible and intangible." (Water Code, § 13000 (emphasis added).) Consequently, the Regional Board must "[e]ncourage coordinated regional planning and action for water quality control," which is broadly defined as "the regulation of any activity or factor which may affect the quality of the waters of the state." (Water Code, §§ 13225(j), 13050(i).)

The comprehensive approach to protection of water quality required by Porter-Cologne is frustrated when projects like TCA's 241 Completion Project are

improperly segmented into smaller pieces for permitting purposes. Courts have repeatedly observed that segmentation precludes meaningful consideration of a project's true impacts, because subsequent completion of the project as a whole will have foreseeable effects that extend beyond the first segment. This is especially the case for linear road projects like Tesoro, in which a proposed segment "would 'stand like gun barrels pointing into the heartland'" of natural resources artificially excluded from regulatory review. (*Maryland Conservation Council, Inc. v. Gilchrist*, 808 F. 2d 1039, 1042 (4th Cir. 1986) (citations omitted); see also *Florida Wildlife Federation v. U.S. Army Corps of Engineers*, 401 F. Supp. 2d 1298, 1316 (S.D. Florida 2005) (such segments "should not be evaluated apart from later connectors that will be necessary to make the initial segment useful" (citation omitted)).

For all of these reasons, the Draft Order is correct in concluding that when "deciding whether to issue WDRs . . . it is appropriate for the regional water board to consider whether that project will likely lead to additional, future discharges of waste or other related impacts." (Draft Order at 9.) The State Board and Regional Board "are not required to put on blinders when making a decision concerning . . . a discharge of waste that will likely lead to additional discharges of waste or other water quality impacts in the future." (Draft Order at 10.) This authority stems from Porter-Cologne and is separate from and independent of CEQA. (*Save San Francisco Bay Ass'n v. San Francisco Bay Conservation and Development Commission*, 10 Cal. App. 4th 908, 932 (1993); *Sierra Club v. State Bd. of Forestry*, 7 Cal. 4th 1215, 1228 (1994).)

Accordingly, the Regional Board's denial of WDRs for improper segmentation of a larger project, if supported by substantial evidence, was legally proper under Porter-Cologne, and TCA's objections, which are based entirely on CEQA, are irrelevant. As discussed below, the evidence in the record demonstrating that the project is larger than the Tesoro Extension is substantial.

II. The Draft Order Is Correct that Substantial Evidence Supports the Regional Board's Determination that Tesoro Is Only Part of a Larger Project.

The Draft Order makes clear that the Regional Board's decision is not only authorized by the law, but is supported by the evidence. As stated in the Draft Order, the Regional Board's "factual conclusion that the Tesoro Extension is part of a larger project" is supported by "substantial evidence in the record." (Draft Order at 13 n.66.) The Draft Order cites to several examples of that evidence, such as statements and figures in the CEQA Addendum that TCA adopted for

Tesoro, as well as the statements of TCA's own legal counsel at one of the hearings before the Regional Board. (Id.)

The examples cited in the Draft Order are certainly sufficient to support the Regional Board's decision, but they are only the tip of the iceberg. The record is replete with evidence that Tesoro is not a standalone project but merely the first phase of the TCA's 241 Completion Project. Examples include the following:

- **TCA's Own Statements.** In addition to the statements cited in the Draft Order, TCA initially described Tesoro as the "Initial Segment of the 241 Completion Project" and described its origin as arising from "the idea of constructing the project in segments," beginning with Tesoro.²
- **Federal Review.** Staff at the U.S. Army Corps of Engineers, in reviewing the project, observed that:

TCA is proposing to segment the project, starting with constructing the first approximately 4 miles and terminating at SR-74 in Orange County. That would present a major NEPA problem considering the previous environmental document had them evaluating all approximately 16 miles and they still intend ultimately (through construction of future segments) to build all the way to I-5.³

Other Army Corps staff summed up the problem as follows: "it is beginning to look like a classic case of segmenting under NEPA."⁴

- **Truncated Design.** The footprint of the "Initial Segment" makes plain TCA's desire to sidestep environmental issues but still get shovels in the ground. It follows the alignment of Foothill-South but abruptly stops short of the federal jurisdictional wetlands along San

² TCA, Staff Report No. 16, Initial Segment of the 241 Completion Project (October 13, 2011); *see also* TCA, Board of Directors Agenda (October 13, 2011) at 3-4, Items 6 & 7 (e.g., recommending the Board "develop financing options to construct a segment of the 241 completion project. The initial segment includes extending the existing SR 241 from Oso Parkway to the vicinity of Ortega Highway").

³ Email from Spencer MacNeil, Chief of the Army Corps' Transportation and Special Projects Branch, to David Castanon et al. (Oct. 19, 2011).

⁴ Email from Susan Meyer, Senior Project Manager, to Spencer MacNeil, Corice Farrar (November 28, 2011); *see also* email from Susan Meyer to Richard Beck, RBF Consulting (undated) (copied in email from Beck to Meyer (Oct. 25, 2011)) ("[t]he new proposal would segment the environmental evaluation, permitting and construction of the 16-mile toll road project into several phases").

Juan Creek.⁵ By building right up to, but not through, the wetlands, TCA was able to evade Army Corps environmental review⁶ and the environmental issues associated with the remainder of the project. Tesoro thus “stands like [a] gun barrel[]” pointed at San Juan Creek—the hallmark of improper segmentation. (*Maryland Conservation Council, Inc.*, 808 F. 2d at 1042.)

- **No Independent Utility.** TCA’s purported rationale for Tesoro as a standalone project—to serve future development at Rancho Mission Viejo (“RMV”)—was shown to be baseless. The road traverses lands that are currently undeveloped, and it will likely be decades—if ever—that future development will reach the level that would require a major north-south access road. The uncertainty of future development caused the Army Corps’ Regulatory Division Chief to observe that Tesoro “could be a ‘road to nowhere.’”⁷ But even if future development does require access, that access would be provided by “F Street”—which is a required condition of the later phases of the RMV project in the absence of Foothill South. TCA’s own traffic data shows that building Tesoro instead of F Street would worsen traffic.⁸
- **Tesoro Approval Process.** The TCA initially proceeded with the Tesoro project based solely on its 2006 approval of the Foothill South, without further approval by its Board. The Board decided to separately approve Tesoro only after the Regional Board raised questions about its approach.⁹ In making that approval on 48 hours public notice, TCA relied on the 2006 Foothill South EIR, and never complied with CEQA’s requirements for findings, notice, recirculation, and public comment that apply when a project is

⁵ See Tesoro Extension Figure 1, Proximity of Terminus to Waters of the United States.

⁶ See Letter from David Castanon, U.S. Army Corps of Engineers, to Valerie McFall, Environmental Services Director, TCA (November 5, 2012).

⁷ David Castanon, Chief, Regulatory Division, U.S., Army Corps of Engineers, Memorandum for Record (Nov. 4, 2011) at 5.

⁸ Addendum, at 1-5; Ranch Plan Development Agreement, Section 4.1(f); The F-Street scenario was analyzed as the “Toll Free Project” alternative in the TCA’s traffic study. (Stantec Consulting Services Inc., *Tesoro Extension Project Traffic Analysis: Final Report* (October, 2012) (“TCA Traffic Study”) at 5.3.) Under the Toll Free Project, the circulation network would operate the same as under the Tesoro Extension, except that it would eliminate an intersection deficiency that Tesoro would not. (TCA Traffic Study, figs. 4-5, 4-6, 5-1.) The study’s so-called “No Project” scenario, which TCA relied upon to show the “benefit” of Tesoro, was based on full buildout of the RMV project, but omitting the F Street arterial that is required well before buildout is reached—in other words, a wholly fictional scenario.

⁹ See Letter from Catherine Hagan, Regional Board, Questions for Written Response Regarding Tentative Order No. R9-2013-0007 (March 15, 2013).

separate from, rather than a phase of, a previously approved larger project.¹⁰ (14 Cal. Code Regs. § 15153(b).)

- **TCA's Prior Finding of Infeasibility.** When it approved the Foothill South in 2006, TCA rejected as infeasible alternative project alignments that, like Tesoro, did not connect to the I-5. TCA determined these alternatives “performed poorly for the traffic measures” because they terminated “at Ortega Highway and do[] not provide a connection to I-5.”¹¹
- **Foothill South Approval.** The TCA's 2006 approval of the Foothill South and related EIR remains in effect, and TCA relied on that action for the Tesoro Extension. When Regional Board staff requested that TCA provide “the CEQA findings and statement of overriding considerations” for the project, TCA staff forwarded the findings for the 2006 Foothill South approval.¹² Even as federal agencies have abandoned their consideration of the Foothill South, TCA has kept its approval of the project in effect.

This evidence provides overwhelming additional support for the Regional Board's conclusion that Tesoro is simply the first phase of the larger and far more environmentally damaging 241 Completion Project. In contrast, the record is devoid of evidence supporting TCA's bald assertion that Tesoro is a project that stands alone.

III. Any Remand Should Be for the Sole Purpose of Adopting Written Findings.

Based on the Draft Order's conclusion that the Regional Board's decision was within its authority under the Porter-Cologne Act, and was supported by substantial evidence in the Record, the State Board has the authority to affirm the decision without remand. (See Water Code § 13320; 23 Cal. Code Regs. § 2052(a).) It is undisputed that the Board's decision was based on its conclusion that the project included more than the Tesoro Extension.¹³ (Draft Order at 12.)

¹⁰ See TCA, Addendum to the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP) Final Subsequent Environmental Impact Report SCH # 2001061046: Tesoro Extension Project (“Addendum”), at 3-22; TCA Resolution 2013F-05 Approving Addendum to Final Subsequent Environmental Impact Report (April 18, 2013).

¹¹ Foothill-South EIR at ES-31, ES-32.

¹² Email from Valerie McFall, TCA, to Darren Bradford (November 6, 2012) attaching 2006 approval resolutions.

¹³ June 19, 2013 Transcript at 198 (Board member Kalemkarian: “I do not believe that the project is Tesoro, and I think that the project [that] has been presented is the entire highway”), 203 (Chair Morales: Tesoro Extension is “a five and a half mile . . . portion of the overall project.”).

We also believe that the Regional Board's deliberations make clear that the Board pursuant to its independent authority to approve WDRs under Porter-Cologne, not as a responsible agency under CEQA.¹⁴ Further, because the action was supported by Porter-Cologne, the State Board may affirm on that basis, regardless of any lack of clarity on the part of the Regional Board. (Water Code, § 13320 ("the state board is vested with all the powers of the regional boards"); 23 Cal. Code Regs. § 2052(a) ("The state board may . . . modify the regional board order").)

However, if the State Board prefers to direct the Regional Board to adopt written findings setting forth the basis for its decision, the Coalition is not opposed to a remand provided that any such remand is limited in scope to the adoption of findings. Any reopening of the Regional Board's decision or proceedings on the TCA's application would be inappropriate. The Regional Board provided TCA ample opportunity to present evidence and argument on the issue at hand. In addition to its application, TCA submitted numerous comment letters and documents, provided written responses to specific questions raised by the Board, and presented testimony and evidence at two public hearings. The issue of segmentation of the project was central in both hearings and was raised by the Coalition in all five of its letters to the Regional Board. At every juncture, TCA failed to make its case.

Any evidence relevant to the issue of segmentation was or could have been presented in the nearly two-year public process afforded by the Regional Board. TCA should not be permitted now to reopen the evidentiary hearing and submit material generated after the Board's decision (and indeed, after TCA's own approval of Tesoro).

Nor have any circumstances changed that would warrant a new look at Tesoro. If anything, events since the Board's decision have only reinforced its correctness. The TCA has continued to maintain to regional planning authorities that it intends to complete the 241 all the way to the I-5, stating in a recent letter to the Southern California Association of Governments ("SCAG") that:

[T]imely implementation of Tesoro Extension also advances timely implementation *of the portion south of Cow Camp Road. Tesoro extension*

¹⁴ Transcript at 201-02 (Board member Abarbanel: "I think our obligation here is not to be blinded by a representation of part of the project, but to recognize that the entire project impacts water quality in a way that this board should not support"). Nothing in the deliberations suggests that the Board Members were basing their decision on CEQA. If they had, the Board's action would have been to order proper CEQA review rather than deny the WDRs. The Board Member's references to the Attorney General's CEQA lawsuit challenging Tesoro suggests only their agreement with the Attorney General that the project has been segmented, not that the Board was acting under CEQA.

*must be completed so that the portion south of Cow Camp Road can connect.*¹⁵

And in testimony before the U.S. Congress just last week, TCA's executive director proposed amending virtually all the federal environmental laws affecting the Foothill South project—including NEPA, the Endangered Species Act, the Clean Water Act, and the Coastal Zone Management Act—in manner that would effectively exempt Foothill South from their requirements.¹⁶ Completing the extension of the 241 to the I-5 remains the overriding objective of the TCA and the primary purpose of the Tesoro Extension.

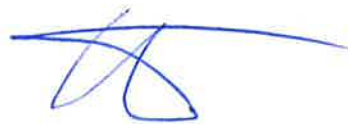
For all of the reasons stated above, the Save San Onofre Coalition requests that the State Board adopt the August 15 Draft Order and, if the matter is remanded to the Regional Board, restrict the scope of the remand to the adoption of findings in support of its decision.

IV. Request for Hearing Testimony Allocation.

The Coalition requests that it be given the opportunity at the Board's September 23 hearing to consolidate its testimony into a single presentation (15 to 25 minutes, or whatever amount of time is allocated to TCA) with additional time for rebuttal.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



William J. White

¹⁵ Letter from Michael Kraman, TCA, to Rich Macias, SCAG re ORA052/SR 241 TCM Timely Implementation Documentation (April 21, 2014), at 17.

¹⁶ Written Statement of Michael Kraman Acting Chief Executive Officer Transportation Corridor Agencies Before the House Committee on Transportation and Infrastructure Subcommittee on Highways and Transit United States Congress "Surface Transportation Infrastructure Projects: Case Studies of the Federal Environmental Review and Permitting Process" (September 9, 2014), at 6-7.

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