

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – OFFICE OF CHIEF COUNSEL
SEPTEMBER 23, 2014**

ITEM 11

SUBJECT

CONSIDERATION OF A PROPOSED ORDER REGARDING PETITION OF THE FOOTHILL/EASTERN TRANSPORTATION CORRIDOR AGENCY (REVIEW OF DENIAL OF WASTE DISCHARGE REQUIREMENTS REVISED TENTATIVE ORDER NO. R9-2013-0007 FOR TESORO EXTENSION (SR 241) PROJECT, ORANGE COUNTY). SWRCB/OCC FILE A-2259

DISCUSSION

The Foothill/Eastern Transportation Corridor Agency (Petitioner) is a joint powers authority composed of a number of local public entities that manages the financing, construction and operations of several toll roads in Orange County. As part of its ongoing planning and construction efforts, the Petitioner certified the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP) Final Subsequent Environmental Impact Report (FSEIR). The FSEIR identified a preferred alternative that consisted of a sixteen mile extension of State Route 241 from its southern terminus at Oso Parkway to connect to Interstate 5 just south of the Orange County and San Diego County border.

Because the sixteen mile extension of State Route 241 required a Clean Water Act section 404 permit from the Army Corps of Engineers, the Petitioner submitted an application for a Clean Water Act section 401 water quality certification to the San Diego Regional Water Quality Control Board (San Diego Water Board). The Petitioner's request for a water quality certification was denied. Additionally, the California Coastal Commission voted not to approve the Petitioner's request for a consistency determination. The Petitioner appealed the California Coastal Commission's determination to the United States Secretary of Commerce who, in turn, rejected the Petitioner's appeal.

After these rejections, the Petitioner authorized its staff to pursue a shorter extension of State Route 241. This shorter extension, the Tesoro Extension, would extend State Route 241 from its existing southern terminus at Oso Parkway approximately 5.5 miles south to Cow Camp Road. Cow Camp Road is immediately north of San Juan Creek in Orange County, so the Tesoro Extension would avoid the Coastal Zone and all waters subject to federal jurisdiction, thereby obviating the need for a consistency determination from the California Coastal Commission or a Clean Water Act section 404 permit from the Army Corps of Engineers. The Petitioner filed a report of waste discharge for the Tesoro Extension with the San Diego Water Board.

On February 15, 2013, the Petitioner's staff finalized an addendum to the FSEIR for the Tesoro Extension (Addendum) in compliance with the California Environmental Quality Act (CEQA) and submitted it to San Diego Water Board. The Addendum stated that the Petitioner proposed to construct the Tesoro Extension, and identified the Tesoro Extension as the project for the purposes of CEQA analysis. The Addendum concluded that, since the Tesoro Extension generally followed the same alignment as the first 5.5 miles of the sixteen mile extension

preferred alternative that had been analyzed in the FSEIR, the Tesoro Extension would not result in any significant environmental effects that were not already discussed in the FSEIR.

The San Diego Water Board conducted two public hearings on March 13 and June 19, 2013, to hear comments on proposed waste discharge requirements. After reviewing the written comments and listening to the public comments at both hearings, the San Diego Water Board voted not to approve the proposed waste discharge requirements. The Petitioner filed a timely petition with the State Water Resources Control Board alleging, among other things, that the San Diego Water Board improperly denied the proposed order because it believed that the Petitioner's CEQA documents, particularly the description of the Tesoro Extension as the CEQA project in the Addendum, were inadequate.

The proposed order concludes that the administrative record in this matter is unclear as to the precise reasons that the San Diego Water Board members voted as they did. Therefore, the proposed order for State Water Board consideration remands this matter to the San Diego Water Board to provide the factual and legal basis for its decision.

POLICY ISSUE

Should the State Water Board adopt the proposed draft order remanding this matter to the San Diego Water Board?

FISCAL IMPACT

Adoption of the proposed draft order will have a minimal resource impact on the San Diego Water Board.

REGIONAL BOARD IMPACT

Yes, San Diego Water Board.

STAFF RECOMMENDATION

Staff recommends adoption of the draft order.

<p>State Water Board action on this item will assist the Water Boards in reaching Goal 6 of the Strategic Plan Update: 2008-2012 to enhance consistency across the Water Boards, to ensure our processes are effective, efficient, and predictable, and to promote fair and equitable application of laws, regulations, policies, and procedures.</p>

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2014-

In the Matter of the Petition of

FOOTHILL/EASTERN TRANSPORTATION CORRIDOR AGENCY

For Review of the Denial of Waste Discharge Requirements, Revised Tentative Order
No. R9-2013-0007 for the Tesoro Extension (SR 241) Project, Orange County

by the
California Regional Water Quality Control Board,
San Diego Region

SWRCB/OCC FILE A-2259

BY THE BOARD:

In this Order, the State Water Resources Control Board (State Water Board) reviews the San Diego Regional Water Quality Control Board's (San Diego Water Board) denial of Waste Discharge Requirements (WDRs) Revised Tentative Order R9-2013-0007 (Revised Tentative Order) for the Tesoro Extension of State Route 241 in southern Orange County (Tesoro Extension). The Foothill/Eastern Transportation Corridor Agency (Petitioner) alleges that the San Diego Water Board violated the California Environmental Quality Act (CEQA) because it failed to presume that the Petitioner's environmental documents were adequate. Because the basis for the San Diego Water Board's decision to deny WDRs for the Tesoro Extension is not clear from the administrative record, the State Water Board remands the matter to the San Diego Water Board with direction to provide the factual and legal basis for its decision.

BACKGROUND

Formed in 1986, the Petitioner is a joint powers authority composed of a number of local public entities that manages the financing, construction and operations of several toll roads in Orange County. As part of its ongoing planning and construction efforts, the Petitioner is generally the lead agency for purposes of compliance with CEQA.¹ In 1981, Orange County certified an environmental impact report (EIR) which analyzed the establishment of a

¹ Pub Resources Code, § 21000 et seq.

transportation corridor in southeastern Orange County (now designated State Route 241) in the *County Master Plan of Arterial Highways*. In 1991, the Petitioner certified an EIR analyzing various alternatives for an extension of State Route 241.² In February 2006, the Petitioner certified the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP) Final Subsequent Environmental Impact Report (FSEIR). The FSEIR identified a preferred alternative that consisted of a sixteen mile extension of State Route 241 from its southern terminus at Oso Parkway to connect to Interstate 5 just south of the Orange County and San Diego County border.³ On February 23, 2006, the Petitioner adopted CEQA findings for the preferred alternative and approved construction of the sixteen mile extension of State Route 241.⁴ On March 23, 2006, the California State Parks Commission and a number of environmental groups sued the Petitioner, challenging the adequacy of the FSEIR.⁵ That litigation was eventually dismissed without prejudice.

Because the sixteen mile extension of State Route 241 required a Clean Water Act section 404 permit from the Army Corps of Engineers, the Petitioner submitted an application for a Clean Water Act section 401 water quality certification to the San Diego Water Board on June 13, 2006. The application was deemed complete by the San Diego Water Board on September 13, 2006.⁶ Despite the submission of supplemental documentation, the Petitioner's request for a water quality certification was denied without prejudice on February 6, 2008. The San Diego Water Board noted that the Petitioner's application remained insufficient to address outstanding concerns regarding the Petitioner's runoff management plan, water quality mitigation measures, proposed habitat mitigation and monitoring plan, baseline water quality monitoring, and antidegradation.⁷ The Petitioner subsequently withdrew its application

² Petitioner's Petition for Review of Waste Discharge Requirements Order No. R9-2013-0007 (SWRCB/OCC File A-2259), p. 4.

³ *Ibid.* State Clearinghouse Number 2001061046.

⁴ Foothill/Eastern Transportation Corridor Agency Resolution No. F2006-02.

⁵ *Cal. State Parks Foundation, et al. v. Foothill/Eastern Transportation Corridor Agency* (Super. Ct. San Diego County, Case Nos. GIN51194 and GIN 051371).

⁶ Letter from Senior Environmental Scientist James Smith, San Diego Water Board, to Richard Beck (Sept. 13, 2006). Note that, in this case, the application being deemed complete only means that the application has fulfilled the minimum requirements of the State Water Board certification regulations. (See Cal. Code Regs., tit. 23, § 3856.) Fulfillment of this requirement by an applicant does not mean, and should not be construed to mean, that the applicable regional water quality control board or the State Water Board has received sufficient information to make its determination that a proposed project or activity is reasonably assured to comply with water quality standards or other applicable requirements of state law.

⁷ Letter from Executive Officer John Robertus, San Diego Water Board, to Richard Beck (Feb. 6, 2008).

for water quality certification.⁸ Also on February 6, 2008, the California Coastal Commission voted not to approve the Petitioner's request for a consistency determination.⁹ The Petitioner appealed the California Coastal Commission's determination to the United States Secretary of Commerce who, in turn, rejected the Petitioner's appeal.¹⁰

After these rejections, the Petitioner authorized its staff to pursue a shorter extension of State Route 241. This shorter extension, the Tesoro Extension, would extend State Route 241 from its existing southern terminus at Oso Parkway approximately 5.5 miles south to Cow Camp Road. Cow Camp Road is immediately north of San Juan Creek in Orange County, so the Tesoro Extension would avoid the Coastal Zone and all waters subject to federal jurisdiction, thereby obviating the need for a consistency determination from the California Coastal Commission or a Clean Water Act section 404 permit from the Army Corps of Engineers. The Petitioner filed a report of waste discharge for the Tesoro Extension with the San Diego Water Board on August 10, 2012.

After analyzing the Petitioner's documentation and repeated meetings with the Petitioner, San Diego Water Board staff drafted the Revised Tentative Order for the Tesoro Extension. On January 17, 2013, San Diego Water Board staff issued a public notice announcing the availability of a tentative order and setting a March 13, 2013 public hearing for the San Diego Water Board to consider adoption of the Revised Tentative Order. The public notice established a February 18, 2013 deadline for written comments on the tentative order.

On February 15, 2013, the Petitioner's staff finalized a CEQA addendum to the 2006 FSEIR for the Tesoro Extension (Addendum) and submitted it to San Diego Water Board. The Addendum stated that the Petitioner proposed to construct the Tesoro Extension, and identified the Tesoro Extension as the project for the purposes of CEQA analysis. The Addendum concluded that, since the Tesoro Extension generally followed the same alignment as the first 5.5 miles of the sixteen mile extension preferred alternative that had been analyzed in the 2006 FSEIR, the Tesoro Extension would not result in any significant environmental

⁸ Letter from Thomas Margro, Transportation Corridor Agencies, to Chad Loflin (Feb. 9, 2009).

⁹ Petitioner's Petition for Review of Waste Discharge Requirements Order No. R9-2013-0007 (SWRCB/OCC File A-2259), p. 4; Letter from Manager Mark Delaplaine, California Coastal Commission to James Herink (Dec. 6, 2013), p. 2. The California Coastal Commission is the agency responsible for determining consistency with the federal Coastal Zone Management Act. (16 U.S.C. § 1451 et seq.)

¹⁰ See *Decisions and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of the Foothill/Eastern Transportation Corridor Agency from the Objection by the California Coastal Commission* (Dec. 18, 2008). After the rejection of the Petitioner's appeal, the plaintiffs challenging the FSEIR voluntarily dismissed their writ petition on January 12, 2011. (Petitioner's Petition for Review of Waste Discharge Requirements Order No. R9-2013-0007 (SWRCB/OCC File A-2259), Exhibit 8.)

effects that were not already discussed in the 2006 FSEIR.¹¹ The Addendum also concluded that there was no need to prepare a Subsequent or Supplemental EIR, and that the 2006 FSEIR, coupled with the Addendum, satisfied the Petitioner's CEQA obligations for the Tesoro Extension.¹²

Due to the last-minute submission of the Addendum by the Petitioner and the extensive written comments that related to the San Diego Water Board's CEQA obligations if it were to approve the tentative order, the San Diego Water Board decided that its staff needed additional time to evaluate and respond to CEQA-related issues. The San Diego Water Board stated that it would proceed with the scheduled March 13, 2013 public hearing, but that it would not take any final action on the tentative order on that date.

During the hearing on March 13, 2013, the Chair of the San Diego Water Board announced that a second hearing would be scheduled for the purpose of receiving comments related to CEQA, and that San Diego Water Board staff would circulate specific CEQA-related questions prior to the second hearing.¹³ A coalition of environmental groups called the Save San Onofre Coalition (Coalition)¹⁴ and a large number of individuals argued against adoption of the Revised Tentative Order, voicing a number of concerns related to water quality best management practices (stormwater BMPs), hydromodification, sediment generation and transport, and compensatory mitigation implementation and monitoring, as well as CEQA.

On March 15, 2013, counsel to the San Diego Water Board circulated a memorandum with CEQA-related questions to the Petitioner, the Coalition, and the public.¹⁵ The memorandum inquired as to how the Petitioner defined of the project for which WDRs were being requested, and whether it was the same as the Petitioner's CEQA definition of the project. Additionally, the memorandum asked about the CEQA consequences of the Addendum, given the lack of the Petitioner's approval of the Tesoro Extension or filing of a CEQA Notice of Determination.¹⁶

¹¹ *Addendum to the South Orange County Transportation Infrastructure Improvement Project Final Subsequent Environmental Impact Report – Tesoro Extension Project* (Feb. 2013), p. 3-22.

¹² *Ibid.*

¹³ San Diego Water Board Hearing Transcript (March 13, 2013), pp. 36-37, 70-71.

¹⁴ The "Save San Onofre Coalition" consists of a dozen non-governmental entities, including the California State Parks Foundation, the Natural Resources Defense Council, Sierra Club California, Surfrider Foundation, and Orange County Coastkeeper.

¹⁵ Letter from Senior Staff Counsel Catherine Hagan to Hagan to Foothill/Eastern Transportation Corridor Agency, Save San Onofre Coalition and Interested Persons (March 15, 2013).

¹⁶ *Ibid.*

On March 29, 2013, the Petitioner and the Coalition submitted responses to the memorandum. On April 18, 2013, the Petitioner's Board of Directors approved the conceptual design for the Tesoro Extension and approved the Addendum.¹⁷ On May 30, 2013, the San Diego Water Board staff issued a public notice announcing the availability of the Revised Tentative Order and setting a June 19, 2013 continued public hearing for the San Diego Water Board to receive comments limited to CEQA and the revisions to the tentative order, and to consider adoption of the Revised Tentative Order.

The San Diego Water Board conducted the second hearing on June 19, 2013. At the hearing, the public was asked to limit their comments to the revisions to the tentative order and CEQA-related issues.¹⁸ San Diego Water Board staff explained that the revisions to were designed to address water quality concerns related to the Tesoro Extension that had been expressed by Board Members as well as the prior hearing. The revisions addressed sediment supply and hydromodification; the timing of the habitat mitigation monitoring plan and the runoff management plan.¹⁹ The San Diego Water Board's counsel described the Petitioner's recent approval of the conceptual design for the Tesoro Extension and the Addendum, explained that, as a CEQA responsible agency, the San Diego Water Board was bound by the Petitioner's 2006 EIR and the Addendum. Counsel explained that the Revised Tentative Order did not contain any specific findings about environmental impacts related to potential future segments of the toll road.²⁰

After reviewing the written comments and listening to the public comments at both hearings, the Board Members engaged in deliberations about whether to approve the Revised Tentative Order. Eventually, one Board Member made a motion to not approve it. The motion carried, with three Board Members voting in favor of the motion and two Board Members voting against the motion. In response, the Petitioner filed a timely petition with the State Water Board alleging, among other things, that the San Diego Water Board improperly denied the Revised Tentative Order because it believed that the Petitioner's CEQA documents, particularly the description of the Tesoro Extension as the CEQA project in the Addendum, were inadequate.

¹⁷ Foothill/Eastern Transportation Corridor Agency Resolution No. 2013F-05.

¹⁸ San Diego Water Board Hearing Transcript (June 19, 2013), pp. 2-3.

¹⁹ *Id.*, p. 14.

²⁰ *Id.*, pp. 30-31, 35-36.

ISSUES AND FINDINGS

This Order addresses the general scope of San Diego Water Board’s responsibilities and authorities regarding the Tesoro Extension pursuant to both CEQA and the Porter-Cologne Water Quality Control Act,²¹ as well as the need for a regional water quality control board to provide the legal and factual basis for its adjudicative decisions. To the extent the Petitioner raised issues that are not discussed in this Order, either in whole or in part, such issues are dismissed as not raising substantial issues appropriate for our review.²²

The California Environmental Quality Act

CEQA requires that all governmental agencies that regulate activities found to affect the quality of the environment, do so giving major consideration to preventing environmental damage.²³ As such, CEQA is to be interpreted to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.²⁴ With narrow exceptions, CEQA requires an EIR whenever a public agency proposes to approve or to carry out a project that may have a significant effect on the environment. The Legislature has made clear that an EIR is “an informational document” and that “[t]he purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.²⁵

The “lead agency” is the public agency that has the principal responsibility for carrying out or approving the project. The lead agency will decide whether to prepare an EIR or a negative declaration for the project and will cause the document to be prepared.²⁶ This decision is final and conclusive on all persons, including responsible agencies, except under limited situations involving changes to a project or its circumstances.²⁷ Under CEQA, a “project”

²¹ Wat. Code, § 13000 et seq.

²² *People v. Barry* (1987) 194 Cal.App.3d 158, 175-177; *Johnson v. State Water Resources Control Bd.* (2004) 123 Cal.App.4th 1107, 1114; Cal. Code Regs., tit. 23, § 2052, subd. (a)(1).

²³ See Pub. Resources Code, § 21000, subd. (g); State Water Board Order WQ 2009-0010 (*Point Molate Naval Fuel Depot*), p.2.

²⁴ *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.

²⁵ *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390-391. Hereinafter referred to as *Laurel Heights*.

²⁶ Pub. Resources Code, § 21067; Cal. Code Regs., tit. 14, § 15367.

²⁷ Pub. Resources Code, § 21080.1; Cal. Code Regs., tit. 14, § 15050, subd. (c).

means “the *whole of an action*, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment...” It refers to the underlying “activity” for which approval is being sought.²⁸ An EIR must contain an accurate and consistent project description.²⁹

When describing the project and preparing the requisite environmental review, CEQA forbids ‘piecemeal’ review of the significant environmental impacts of a project. “Piecemealing” refers to chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.³⁰ The California Supreme Court set forth a piecemealing test in *Laurel Heights* stating that:

an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. Under this standard, the facts of each case will determine whether and to what extent an EIR must analyze future expansion or other action.³¹

Courts have held there may be improper piecemealing when the purpose of the reviewed project is to be the first step toward future development,³² or when the reviewed project legally compels or practically presumes completion of another action.³³ On the other hand, two projects may properly undergo separate environmental review (i.e., no piecemealing) when the projects have different proponents, serve different purposes, or can be implemented independently.³⁴

Public agencies, other than the lead agency, that have responsibility for carrying out or having discretionary approval power over a project are responsible agencies.³⁵ Responsible agencies have limited authority under CEQA to conduct their own environmental review outside the processes initiated and managed by the lead agency.³⁶ A responsible

²⁸ *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654 (quoting Pub. Resources Code, § 21065; Cal. Code Regs., tit. 14, § 15378, subds. (a), (c)).

²⁹ See *County of Inyo v. City of Los Angeles* (1977) 71 Cal. App.3d 185, 199.

³⁰ *Bozung v. Local Agency Formation Commission* (1975) 13 Cal. 3d 263, 283-284.

³¹ *Laurel Heights, supra*, 47 Cal.3d at p. 396.

³² *Laurel Heights, supra*, 47 Cal.3d at p. 398.

³³ *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 272.

³⁴ *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1223 (quoting *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 99).

³⁵ Pub. Resources Code, § 21069; Cal. Code Regs., tit. 14, § 15381.

³⁶ *Riverwatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1201.

agency is required to consider only the effects of those activities involved in a project which it is required by law to carry out or approve.³⁷ While a lead agency must consider all environmental impacts of the project before approving it, a responsible agency only considers those aspects of a project that are within the scope of its jurisdiction.³⁸ When mitigating or avoiding a significant effect within its jurisdiction, the responsible agency may only exercise those express or implied powers provided by laws other than CEQA.³⁹

Once a lead agency has completed an EIR, it is presumed legally adequate and the lead agency's certification of an EIR as complying with the requirements of CEQA is presumed correct.⁴⁰ If an action or proceeding is commenced alleging that the EIR does not comply with CEQA and no injunctive or similar relief is granted, responsible agencies must assume that the EIR complies with CEQA and approve or disapprove the project accordingly.⁴¹ If a responsible agency believes that the final EIR is inadequate, it may challenge that determination in court within 30 days after the lead agency files a notice of determination, prepare a subsequent EIR if permissible, assume the lead agency role under the circumstances described above, or be deemed to have waived any objections.⁴²

The Porter-Cologne Water Quality Control Act

When the Legislature enacted the Porter-Cologne Water Quality Control Act (the Porter-Cologne Act),⁴³ it declared that the 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 on those waters and that the state must be prepared to exercise its full power and jurisdiction to protect water quality.⁴⁴ The Porter-Cologne Act sets forth many authorities and responsibilities for the regional water quality control boards (regional

³⁷ *Sierra Club v. Cal. Coastal Commission* (2005) 35 Cal.4th 839, 860 (quoting Pub. Resources Code, § 21002.1, subd. (d)).

³⁸ *Riverwatch*, *supra*, 170 Cal.App.4th at p. 1202.

³⁹ *Sierra Club*, *supra*, 35 Cal.4th at p. 859; see also Pub. Resources Code, § 21004.

⁴⁰ *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 924-925.

⁴¹ Pub. Resources Code, § 21167.3, subd. (b).

⁴² See Cal. Code Regs., tit. 14, § 15096, subd (e).

⁴³ Wat. Code, § 13000, et seq.

⁴⁴ Wat. Code, § 13000.

water boards). One such authority is the issuance of WDRs to persons discharging waste that could affect the quality of waters of the state.⁴⁵

When a regional water board issues WDRs, the regional water board is obligated to ensure that the WDRs implement relevant water quality control plans, take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Water Code section 13241.⁴⁶ When issuing WDRs, a regional water board is not required to utilize the full waste assimilation capacities of the receiving water. Whether or not a discharge is authorized, the discharge of waste does not create any vested rights to continue the discharge; the discharge of waste is a privilege, not a right.⁴⁷ It follows, then, that a regional water board has the authority to decline to issue WDRs for a specific discharge. When a regional water board declines to issue WDRs, it may also choose to give the project proponent an opportunity to revise its project and submit a revised report of waste discharge. In addition to the issuance or denial of WDRs, the Porter-Cologne Act also authorizes a regional water board to specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted.⁴⁸ This may be done in a water quality control plan or in WDRs, and is a more enduring mechanism for protecting water quality.

When issuing WDRs, regional water boards must protect the beneficial uses of the waters that are receiving the discharge, as well as the beneficial uses of any downstream waters that could be affected by the discharge.⁴⁹ When a regional water board is deciding whether to issue WDRs for discharges of waste associated with a project, 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 to water quality. Normally, a regional water board may issue WDRs for the current project and defer issuance of WDRs for future discharges of waste until the point in time that those discharges are actually proposed, without compromising its responsibility to protect the beneficial uses of waters from those future discharges. However,

⁴⁵ Wat Code, §§ 13260, subd. (a)(1) & 13263.

⁴⁶ Wat. Code, § 13263, subd. (a). Water Code section 13241 contains six additional factors that must be considered when, in a project-specific context, a regional water board is establishing effluent limitations more stringent than federal law requires. (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 618.) These factors are not in contention with this petition.

⁴⁷ Wat. Code, § 13263, subds. (b), & (g).

⁴⁸ Wat. Code, § 13243.

⁴⁹ State Water Board Orders WQ 2012-0013 (*Sacramento Regional*), pp. 13, 35; WQ 2008-0008 (*City of Davis*), pp. 12-13.

there are also instances in which a regional water board may be asked to issue WDRs for a project that will likely lead to additional, future discharges of waste that a regional water board believes should not be authorized, or to other water quality impacts that the regional water board may find difficult to prevent in the future.

Linear projects (e.g., road or power line construction or maintenance) present such an example. Linear projects may affect many different waters and, in the case of new construction, may be implemented in sequential phases. When future phases of a linear project are likely to occur and may have water quality impacts, a regional water board may request available information on those future phases in connection with a pending report of waste discharge or application for the current phase. Another example is a development project that is adjacent to a sensitive area, such as an important wetlands area. While the project itself may not have any associated discharges of waste that directly affect the sensitive area, the new development may result in indirect water quality impacts resulting from increased public access to the sensitive area. A regional water board is not required to put on blinders 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.

The Need for Findings

Regional water board proceedings to consider the issuance of WDRs to an individual entity are governed by the State Water Board’s regulations for adjudicative proceedings.⁵⁰ These regulations incorporate various statutory provisions, including Government Code section 11425.50, subdivision (a), which provides that “[t]he decision shall be in writing and shall include a statement of the factual and legal basis for the decision.” This enables the parties to determine whether, and on what basis, to seek review of a regional water board’s decision.⁵¹ The requirement to explain the basis for the regional water board’s decision also helps to encourage orderly analysis and reduce the likelihood of unfounded decisions.⁵² Further, the factual basis must be supported by evidence in the administrative record.⁵³ It is critical that a regional water board’s staff and counsel ensure that these requirements are met

⁵⁰ Cal. Code Regs., tit. 23, § 648 et seq.

⁵¹ See *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514.

⁵² *Id.* at p. 516.

⁵³ *Ibid.*; State Water Board Order WQ 2007-0010 (*Escondido Creek Conservancy*), p. 6.

when they propose draft WDRs and other adjudicatory orders for the regional water board's consideration.

Of course, a regional water board is not obliged to adopt its staff's proposed orders. When a regional water board takes a final action in an adjudicative proceeding by approving an oral motion without a written order, it is incumbent upon the regional water board to ensure that the motion contains, or specifically incorporates, sufficient detail about the factual and legal basis for the motion. Depending on the circumstances, it may be advisable to take a recess to allow staff and counsel an opportunity to carefully draft a motion for the regional water board.⁵⁴

The San Diego Water Board's Decision

Following several hours of public comments at the June 19, 2013 hearing, San Diego Water Board staff stated that they maintained their recommendation to adopt the Revised Tentative Order.⁵⁵ The San Diego Water Board then closed the hearing and the Board Members engaged in public deliberations. Following the deliberations, one Board Member made a motion to not approve the Revised Tentative Order. The motion carried, with a majority of three Board Members voting in favor of the motion and two Board Members voting against the motion. Because the decision was made by oral motion only, we look to the transcript of the deliberations to determine the factual and legal basis for the San Diego Water Board's decision, paying special attention to the statements of the Board Members who comprised the majority.

The Petitioner asserts that the San Diego Water Board declined to adopt the Revised Tentative Order on the grounds that it believed that the Tesoro Extension's Addendum, particularly the Tesoro Extension project description, were inadequate.⁵⁶ The San Diego Water Board asserts in its response to the petition that it determined that potential water quality impacts from a larger, more extensive project were not sufficiently evaluated for the San Diego Water Board to approve the Revised Tentative Order.⁵⁷ The Coalition asserts in its response to the petition for review that "the transcript clearly shows that the [San Diego Water Board] based its decision on its conclusion that the Tesoro Extension was merely the initial segment of the

⁵⁴ It is not always necessary for a regional water board to adopt a formal written order; an oral motion can be memorialized in the official minutes or transcript of the regional water board meeting.

⁵⁵ San Diego Water Board Hearing Transcript (June 19, 2013), p. 197.

⁵⁶ Petitioner's Petition for Review of Waste Discharge Requirements Order No. R9-2013-0007 (SWRCB/OCC File A-2259), p. 4.

⁵⁷ San Diego Water Board Response to Petition for Review of Waste Discharge Requirements Order No. R9-2013-0007 (SWRCB/OCC File A-2259), p. 2.

proposed Foothill-South previously rejected by the [San Diego Water Board], and [the Petitioner] had thus failed to propose adequate waste discharge requirements for the entire project.”⁵⁸

As a preliminary matter, it is clear from the transcript that concerns about water quality impacts resulting directly from the Tesoro Extension did not form the basis for the San Diego Water Board’s decision. Two of the Board Members indicated that they were satisfied that the Revised Tentative Order adequately addressed any water quality impacts that were directly related to the Tesoro Extension.⁵⁹ None of the remaining three Board Members expressed any concerns about water quality impacts that were directly related to the Tesoro Extension.

The Petitioner, the San Diego Water Board, and the Coalition all appear to agree that the focus of the deliberations was on the description of the project. All five of the Board Members commented on the possibility that the Tesoro Extension may be just the first segment of a larger toll road project that connects State Route 241 to Interstate 5, as was analyzed in the 2006 FSEIR.⁶⁰ Four of the Board Members’ comments indicated that they had concluded that the Tesoro Extension is, in fact, part of a larger project that would eventually connect to Interstate 5, while the fifth Board Member’s comments did not clearly indicate whether or not he agreed.⁶¹

Three of the four Board Members who had concluded that the Tesoro Extension is part of a larger project ultimately voted to not approve the Revised Tentative Order. Two of the majority also expressed generalized concerns that future extensions to Interstate 5 may impact water quality.⁶² One of the majority referred three times during the deliberations to a CEQA complaint that had recently been filed by the Attorney General that alleged that the Petitioner had violated CEQA by failing to adequately describe the project.⁶³ Another majority-voting Board Member also referred to CEQA and stated that he thought that there was “some ambiguity in what we are required to do and not do in terms of our analysis.”⁶⁴ Additionally one

⁵⁸ Save San Onofre Coalition Response to Petition for Review of Waste Discharge Requirements Order No. R9-2013-0007 (SWRCB/OCC File A-2259), p. 24.

⁵⁹ San Diego Water Board Hearing Transcript (June 19, 2013), pp. 198, 201.

⁶⁰ San Diego Water Board Hearing Transcript (June 19, 2013), pp. 198-206.

⁶¹ *Id.* at pp. 198-203.

⁶² San Diego Water Board Hearing Transcript (June 19, 2013), pp. 192-205.

⁶³ See *Id.* at pp. 198-205.

⁶⁴ *Id.* at p. 204.

of the majority indicated that there was another important reason that he planned to vote to not approve the Revised Tentative Order, but he never explained what it was.⁶⁵ Therefore, while we can conclude that all three of the Board Members who voted in the majority believed that the Tesoro Extension was part of a larger project that would eventually connect to Interstate 5,⁶⁶ we are left with no conclusion as to why they voted to not approve the Revised Tentative Order. It is possible that one or more of the Board Members cast their vote because they believed that the Petitioner had violated CEQA. It is possible that one or more of the Board Members cast their vote because they believed that approving WDRs for the Tesoro Extension could lead to unacceptable water quality impacts from a future toll road extension. It is also possible that one or more of the Board Members cast their vote for completely different reasons. Without knowing the factual and legal basis for the decision, it is simply not possible to determine whether it was appropriate.

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⁶⁵ *Id.* at p. 207.

⁶⁶ There is substantial evidence in the record to support a factual conclusion that the Tesoro Extension is part of a larger project. That evidence includes the Petitioner’s approval of the preferred alternative described in the 2006 FSEIR, the statement on page 2-2 of the Addendum that the Tesoro Extension “does not preclude a connection to any of the 19 toll road alternatives evaluated in the [FSEIR],” Figure 4 of the Addendum, which depicts connections between the Tesoro Extension and the alternatives evaluated in the FSEIR, entitled “Future Alignment Alternatives,” and the Petitioner’s counsel’s statement during the March 13, 2013 hearing that the Tesoro Extension is part of the planned transportation corridor that extends all the way from the existing State Route 241 to Interstate 5. (San Diego Water Board Hearing Transcript (March 13, 2013), p. 74.)

ORDER

IT IS HEREBY ORDERED that, for the reasons discussed above, this matter is remanded to the San Diego Water Board to provide the factual and legal basis for its decision, consistent with this Order. This Order does not require the San Diego Water Board to conduct any further hearings regarding the issuance of WDRs for the Tesoro Extension.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 23, 2014.

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT

Jeanine Townsend
Clerk to the Board

DRAFT

August 15, 2014

JLH/amc

August 15, 2014

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