CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

RESOLUTION NO. R9-2015-0022

RESOLUTION SUPPORTING DENIAL OF REVISED TENTATIVE ORDER NO. R9-2013-0007, WASTE DISCHARGE REQUIREMENTS FOR FOOTHILL/EASTERN TRANSPORTATION CORRIDOR AGENCY, TESORO EXTENSION (SR 241) PROJECT, ORANGE COUNTY

WHEREAS, the California Regional Water Quality Control Board, San Diego Region (hereinafter, San Diego Water Board), finds that:

1. On June 13, 2006 the Foothill/Eastern Transportation Corridor Agency (TCA) submitted an application for Clean Water Act section 401 Water Quality Certification (Water Quality Certification) for the Southern Orange County Transportation Infrastructure Improvement Project (SOCTIIP) (Water Quality Certification Application No. 06C-064). The SOCTIIP toll road extension would have added approximately 16 miles of toll road to the current terminus of State Route 241 (SR 241) at Oso Parkway in Southern Orange County and extended the SR 241 south and parallel to Interstate-5 (I-5) before merging with I-5 near the Orange County-San Diego County Line.

2. On February 23, 2006, TCA certified a Final Subsequent Environmental Impact Report (FSEIR) for the SOCTIIP project and filed a Notice of Determination.

3. In support of the FSEIR, TCA adopted findings and a statement of overriding considerations for the SOCTIIP project. TCA found that impacts to wildlife, fisheries and vegetation could not be mitigated to a less than significant level.

4. On February 6, 2008[1], the San Diego Water Board Executive Officer denied Water Quality Certification Application No. 06C-064 without prejudice and expressed concerns that the project, as proposed, would not meet water quality standards[2]. Water quality standards include the water quality objectives and beneficial uses contained in the *Water Quality Control Plan for the San Diego Basin (9)* (Basin Plan)

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[1] (Administrative Record (A.R.) Vol. 5 Index 71.) Citations are to the administrative record the San Diego Water Board submitted to the State Water Resources Control Board in response to TCA's *Petition for Review of Waste Discharge Requirements Order No. R9-2013-0007*. The complete administrative record is available for review on the internet at the following location: ftp://swrcb2a.waterboards.ca.gov/pub/rwqcb9/Tesoro%20Resolution/Tesoro%20Official%20Administrative%20Record_Final/.

[2] Under State law, the water boards establish beneficial uses and water quality objectives in their basin plans. Together with an anti-degradation policy, these beneficial uses and water quality objectives serve as water quality standards under the Clean Water Act. In Clean Water Act parlance, state beneficial uses are called "designated uses" and state water quality objectives are called "criteria." Throughout this Resolution, the relevant term is used depending on the statutory scheme.

and the State Water Resources Control Board (State Water Board) Resolution 68-16, *Statement of Policy with Respect to Maintaining High Quality of Waters in California* (Antidegradation Policy). The project application did not address outstanding concerns expressed by the San Diego Water Board regarding the proposed habitat mitigation plan, anti-degradation, the runoff management plan, and water quality monitoring.[3]

5. On February 6, 2008, the SOCTIIP toll road extension was rejected by the California Coastal Commission (Coastal Commission) due to its recreational impacts to San Onofre State Park and San Mateo Creek, water quality effects, wetland impacts, and impacts to other environmental resources. The Coastal Commission staff report states, "The project is fundamentally inconsistent with the spirit and letter of numerous resource protection policies of the Coastal Act." [The project would not] be compatible with the continuance of the ESHA [environmentally sensitive habitat area]. The ESHA includes habitat for the Pacific pocket mouse, tidewater goby, arroyo toad, coastal California gnatcatcher, least Bell's vireo, and southern California coast steelhead." " [T]he toll road's impacts would be permanent, irreversible, and, for the most part, unmitigable. No other alternative alignment poses the threat of unmitigable and irrevocable impacts of such magnitude." [4]

6. TCA appealed the Coastal Commission's objection to the United States Secretary of Commerce. After holding its own public hearing, the Secretary of Commerce rejected the appeal, finding, among other things, that less environmentally damaging alternatives were available to meet the project need.[5]

7. By letter dated February 9, 2009, TCA formally withdrew Water Quality Certification Application No. 06C-064. The San Diego Water Board Executive Officer confirmed the application withdrawal on February 19, 2009.

8. On August 10, 2012, TCA filed a report of waste discharge for the Tesoro Extension Project (Tesoro Extension) with the San Diego Water Board. This initial segment of the SOCTIIP toll road extension would extend SR 241 from its existing southern terminus at Oso Parkway approximately 5.5 miles south to Cow Camp Road in the vicinity of Ortega Highway (SR 74) in Orange County. In TCA's report of waste

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[3] Documents supporting the determination that the San Diego Water Board could not ensure protection of beneficial uses due to unresolved water quality impacts can be found in A.R. Vol.5 Index numbers: 9, 10, 17 20, 29, 31,61,81, 90 (emails from Jeremy Hass, San Diego Water Board to TCA consultant discussing unresolved impacts and needed studies and plans); 5, 6, 87 (memos from PWA associates discussing sediment impacts to San Mateo Creek); 120,137 (emails from San Diego Water Board staff to TCA discussing missing information needed to assess impacts); 12,13 (San Diego Water Board staff meeting memos documenting unresolved impacts); 8 (2006 memo from James Smith, San Diego Water Board showing need for additional supplemental information for SOCTIIP 401 Certification application); 33 (correspondence from San Diego Water Board Executive Officer to TCA indicating incomplete assessment of water quality impacts.)

[4] A.R. Vol. 1 Index 9, p.280-282.

[5] A.R. Vol.5 Index 146 p.13-14.

discharge, SR 241 would now terminate at Cow Camp Road immediately north of San Juan Creek in Orange County. 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 Coastal Commission, a Clean Water Act section 404 permit from the Army Corps of Engineers, and Water Quality Certification from the San Diego Water Board.

9. On January 17, 2013, the San Diego Water Board released Tentative Order No. R9-2013-0007, *Waste Discharge Requirements for Foothill/Eastern Transportation Corridor Agency Tesoro Extension (SR 241) Project Orange County* (Tentative Order) for public review and comment. The comment period was open from January 17, 2013 to February 25, 2013.

10. On March 13, 2013, the San Diego Water Board opened a public hearing to consider adoption of the Tentative Order No. R9-2013-0007, *Waste Discharge Requirements for Foothill/Eastern Transportation Corridor Agency Tesoro Extension (SR 241) Project Orange County* (Tentative Order). The San Diego Water Board received testimony and accepted written comments but did not take final action on the Tentative Order.

11. At the March 13, 2013, public hearing, the San Diego Water Board directed TCA, the Save San Onofre Coalition (Coalition), and any interested persons to submit written responses to five supplemental California Environmental Quality Act (CEQA) questions. The comment period was open from March 15, 2013 to March 29, 2013.

12. TCA and the Coalition responded to the supplemental questions. TCA stated that the Tesoro Extension is a modification of SOCTIIP, and it prepared an Addendum to the SOCTIIP FSEIR to document changes to the toll road extension.

13. On April 18, 2013, the Board of Directors of TCA approved an Addendum to the SOCTIIP FSEIR for the Tesoro Extension. TCA determined that an Addendum and FSEIR would serve as its environmental documentation for the Tesoro Extension Project.[6]

14. The San Diego Water Board received an Addendum to the FSEIR (Addendum) filed by TCA on April 23, 2013 and considered the contents of the Addendum along with the FSEIR prior to reaching its decision.

15. The Addendum notes that the Tesoro Extension as analyzed in the FSEIR and Addendum does not preclude a connection to any of the 19 toll road alternatives evaluated in the SOCTIIP technical reports.[7]

16. On May 30, 2013 Revised Tentative Order No. R9-2013-0007, *Waste Discharge Requirements for Foothill/Eastern Transportation Corridor Agency, Tesoro Extension*

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[6] A.R. Vol.1 Index 6.
[7] A.R. Vol.1 Index 1 p.7.

(SR 241) Project, Orange County was released for public review and comment. Written comments were limited to: 1) revisions to the Tentative Order since the March 13, 2013 public hearing; and 2) comments pertaining to CEQA. The comment period was open from May 30, 2013 to June 7, 2013. The San Diego Water Board received written comments from TCA, the Coalition and other interested parties.

17. On June 19, 2013, the San Diego Water Board continued the public hearing to consider adoption of Revised Tentative Order No. R9-2013-0007, comments on the Project's compliance with CEQA, and the revisions to the Tentative Order proposed since the March 13, 2013 hearing.

18. At the June 19, 2013 hearing a majority of San Diego Water Board members voted to deny adoption of Revised Tentative Order R9-2013-0007. Board members in the majority cited concerns about water quality impacts and an inaccurate and incomplete project description. Board members determined that based on testimony received, and evidence in the record, the Tesoro Extension Project was part of the larger SOCTIIP toll road extension that would extend the toll road south of San Juan Creek connecting to Interstate 5.[8]

19. So long as the San Diego Water Board can determine that a project complies with CEQA, the Board may find it appropriate to issue waste discharge requirements for a portion or segment of a larger phased project. The San Diego Water Board, however, may disapprove any project, or portion or segment thereof, as long as the disapproval is consistent with the authority granted by the Porter-Cologne Water Quality Control Act (Porter-Cologne)(Wat. Code, section 13000 et seq.).

20. The San Diego Water Board may issue waste discharge requirements for large projects in phases; however, phased projects should not segment a larger project into pieces to avoid or limit the Board's review of the project's impacts on water quality and beneficial uses. In considering an earlier phase of a larger project, the San Diego Water Board may consider indirect water quality impacts and whether the current phase of the project is likely to lead to future activities with unacceptable water quality impacts.[9]

21. The San Diego Water Board, when considering the adoption of a discretionary permit, can make its own findings regarding the accuracy and sufficiency of the project description to carry out its statutory obligation to protect water quality. The Board is not required to issue waste discharge requirements if it cannot determine

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[8] See A.R. Vol. 1 Index 27 p. 198-207.

[9] See A.R. Vol. 1 Index 27 p.201-202 (Board hearing transcript 6-19-2013, Board member Abarbanel discussing the water quality impacts of the project proposed in the SOCTIIP FSEIR and rejected by the Coastal Commission); A.R. Vol. 1 Index 27 p.198, 205 (Board member Kalemkarian discussing inadequate project description leading to an inability to completely assess water quality impacts); p. 203 (Board Chair Morales stating the project is more than a 5.5 mile Tesoro Extension and it is unclear where the larger project may terminate.)

that the project will meet water quality objectives and requirements in its regional water quality control plan.

22. Porter-Cologne provides the authority for the Board to require a report of waste discharge (Wat. Code, §13260) and issue waste discharge requirements taking into consideration "the beneficial uses to be protected, the water quality objectives reasonably required for that purpose...and the need to prevent nuisance..." (Wat. Code, § 13263.)

23. A regional water board...in waste discharge requirements may specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted. (Wat. Code, § 13243.) In addition, a regional water board may prescribe requirements even if a discharger has not filed a report of waste discharge. (Wat. Code, § 13263, subd. (d).)

24. Issuance of waste discharge requirements is a discretionary action, and all discharges into waters are privileges, not rights. (Wat. Code, § 13263, subd. (g).) Even if a discharge is authorized, the discharge of waste does not create any vested rights to continue the discharge.

25. On July 19, 2013, TCA submitted a timely petition to the State Water Board for: *Reconsideration of Denial of Waste Discharge Requirements Revised Tentative Order No. R9-2013-0007 for Foothill/Eastern Transportation Corridor Agency, Tesoro Extension (SR 241) Project.* (SWRCB/OCC File A-2259.)

26. On September 23, 2014, after accepting comments from interested parties, the State Water Board adopted Order WQ 2014-0154, *supra.* State Water Board Order WQ 2014-0154 remands the matter to the San Diego Water Board and provides direction to the Board to further explain the factual and legal basis for its denial.

27. State Water Board Order WQ 2014-0154 states that when a regional water board is deciding whether to issue waste discharge requirements for a project it is appropriate for the board to consider whether the project will likely lead to additional future discharges of waste or other related impacts to water quality. The regional water board has the authority to decline to issue waste discharge requirements for a specific discharge and the discretion to prohibit the discharge of waste in certain conditions or areas. (State Water Board Order WQ- 2014-0154 (*Foothill/Eastern Transportation Corridor Agency*).)

28. The Order states that when a regional water board declines to issue waste discharge requirements due to future impacts there is a heightened need for detailed findings. The findings need to explain the potential for future discharges of waste or water quality impacts, explain why they are likely to result from the current project before the regional water board, and explain why the regional water board would be limited in its ability to exercise its full authority in the future to prohibit, or otherwise restrict those future discharges or other water quality impacts.

29. When issuing waste discharge requirements, regional water boards must protect the beneficial uses of the waters that are receiving both direct, and indirect discharges from the project, as well as the beneficial uses of any downstream waters that could be affected by the discharge. (State Water Board Order WQ 2012-0013 (*Sacramento Regional*).)

30. Substantial evidence in the record supports a factual conclusion that the Tesoro Extension is part of a larger SOCTIIP toll road extension. The proposed toll road, and preferred alternative, as analyzed in the FSEIR, extends south of San Juan Creek and will impact waters of the United States and waters of the State.[10]

31. Due to readily available information that the Tesoro Extension is part of the larger SOCTIIP toll road project, and TCA's failure to address water quality impacts identified in the SOCTIIP toll road project, the San Diego Water Board determines that water quality impacts of TCA's proposed toll road extension have not been adequately addressed. Because evidence in the record shows the Tesoro Extension is likely to lead to the SOCTIIP toll road project and that unmitigated water quality impacts are likely to result from the SOCTIIP toll road project, the San Diego Water Board cannot determine that water quality and beneficial uses in the region will be protected if it approves the Tesoro Extension.

32. In accordance with the direction provided in Order WQ 2014-0154, limiting the San Diego Water Board's review to the Tesoro Extension restricts the Board's ability to exercise its full authority to condition the project to avoid or minimize impacts. Proposed future alignments of the toll road extension will have impacts to water quality and water resources, including the San Juan Creek, San Mateo Creek, San Onofre Creek and Christianitos Creek watersheds. Evidence in the record shows that the toll road extension TCA presented to the San Diego Water Board in 2006 would not meet water quality standards. By submitting a report of waste discharge for the first phase of a larger project without addressing known, unmitigable water quality impacts from subsequent phases, TCA precluded the San Diego Water Board from evaluating the entire project and potential alternatives that could mitigate known significant and unavoidable impacts associated with subsequent phases.

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[10] Vol. 2 Index 2 p.89 (Memo from Sam Elters, Chief Engineer to TCA Board of Directors discussing construction of Tesoro Extension as phase of larger project, and attached Exhibit titled, "241 Completion-Initial Segment"); Vol. 2 Index 2 p.104 (TCA Board of Directors Agenda, October 13, 2011, Agenda Item 6: "Initial Segment of the 241 Completion Project"); Vol. 2 Index 20 (Board transcript from 3-13-2013 hearing p.74, Counsel for TCA discussing Tesoro Extension as part of a larger project connecting to Interstate 5); Vol.2 Index 2 p.183 (Army Corps of Engineers Memo to Record of meeting with TCA discussing Corps concerns of TCA attempting to segment a larger project to avoid a more rigorous and public environmental review process and the need for TCA to submit supporting documentation showing that the Tesoro Extension is a single and complete project); Vol.1 Index 1 p. 52 (figure in TCA's 2013 Addendum depicting Tesoro Extension and future alignments to Interstate 5); Vol. 5 Index 1 p.442 (figure in TCA's 2006 FSEIR depicting toll road preferred alternative route connecting to Interstate 5.)

33. The denial of *Revised Tentative Order No. R9-2013-0007 Waste Discharge Requirements for the Tesoro Extension (SR 241) Project* is solely based on the authorities granted to the San Diego Water Board under Porter-Cologne including, but not limited to Water Code sections 13225, 13243, 13260 and 13263 subds. (a), (b), (d), (g).

THEREFORE, BE IT RESOLVED THAT:

The San Diego Water Board:

1. Adopts the detailed findings as set forth above describing the factual and legal basis of its decision to deny Revised Tentative Order No. R9-2013-0007.

2. Finds it is unnecessary to reopen the evidentiary hearing for Revised Tentative Order No. R9-2013-0007.

3. Makes no other changes to its June 19, 2013 decision to deny adoption of *Revised Tentative Order No. R9-2013-0007, Waste Discharge Requirements for Foothill/Eastern Transportation Corridor Agency, Tesoro Extension (SR 241) Project, Orange County*.

I, David W. Gibson, Executive Officer, do hereby certify that this Resolution with all attachments is a full, true, and correct copy of a Resolution adopted by the California Regional Water Quality Control Board, San Diego Region, on March 16, 2015.

David W. Gibson
Executive Officer