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Via E-Mail and Hand Delivery

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Re: Questions for Written Response Regarding Tentative Order No. R9-2013-0007

Dear Mr. Bradford:

This letter constitutes the response of the Save San Onofre Coalition to the Questions for Written Response issued by the San Diego Regional Water Quality Control Board (“Water Board” or “Board”) on March 15, 2013.

The Board’s questions go to the heart of what is wrong with TCA’s attempt to obtain Waste Discharge Requirements at this point in the process. To put the Board’s questions another way: Why is TCA asking the Board to rely on an EIR for a 16-mile toll road project, but then claiming that the Board should completely ignore the last 11 miles of that road? And why is TCA asking the Board for approval now, before the TCA Board of Directors has taken up the project for review and approval, and decided how to proceed under CEQA?

These questions lead to one answer: that TCA, in its eagerness to obtain as many approvals for the Tesoro Extension as quickly as possible, has taken an entirely backwards approach to the project. The entire toll road project—modified to account for the substantial new circumstances of the Coastal Commission’s rejection of the proposed final segment—must be described and analyzed under CEQA *before* the TCA starts building the first segment. And the TCA Board must confront the fundamental question—whether to approve the first segment and what CEQA review is required for

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that approval—*before* it is brought to the Water Board or any other responsible agency for approval.

TCA’s backward approach has placed the Water Board in the difficult position of being asked to resolve a major CEQA compliance problem that the TCA Board can and should address first. The TCA Board has not considered these issues because, to date, the TCA has afforded no public process on the Tesoro Extension or the CEQA Addendum prepared by TCA staff. That process, if it occurs, will allow the TCA Board to comply with CEQA by requiring preparation of a subsequent EIR that describes and analyzes the entire toll road project, and to use that EIR to decide whether to approve the Tesoro Extension. Until the TCA Board acts, the Water Board should deny TCA’s application and refrain from further action on the project.

Question 1: How does TCA define the project for which the San Diego Water Board is being asked to issue waste discharge requirements? Is that definition of the project the same for purposes of CEQA evaluation?

The TCA purports to define the “project” for purposes of WDR approval as only the 5.5-mile long Tesoro Extension, rather than the full 16-mile toll road that TCA intends to build. But for *CEQA* purposes, TCA’s artificial definition is not determinative. CEQA does not permit TCA to avoid full environmental review simply by chopping a larger project into smaller pieces. As discussed at length in our prior letters, under CEQA there is no way to separate the Tesoro Extension from the rest of the toll road.

CEQA’s rule against piecemealing has been in place for over a quarter century. In the landmark *Laurel Heights* decision, the California Supreme Court held that an agency must analyze the effects of potential future development in its EIR if such development: (1) is “a reasonably foreseeable consequence of the initial project,” and (2) “will likely change the scope or nature of the initial project or its environmental effects.” (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396 (“*Laurel Heights*”).)

In that case, a university had analyzed as the “project” a pharmacy school that would occupy a portion of a building, but had ignored future expansion into the remainder of the building, claiming that the expansion was speculative and would be subject to future approvals. The Court rejected that approach. It found that the university’s statements regarding the likely future use of the additional area rendered the future expansion “reasonably foreseeable.” (*Id.* at 398.) The Court held that deferring environmental review to a later point, when “bureaucratic and financial momentum” would make it difficult to deny the expansion, violated CEQA. (*Id.* at 395–96.)

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Here, the entire Foothill South toll road is far more defined than the more nebulous future expansion plans in *Laurel Heights*. As discussed in our prior letters, TCA has engaged in decades of planning for the entire 16-mile extension of State Route 241. It has repeatedly asserted the necessity to connect the toll road extension to the I-5 and its intention to do so. In fact, TCA previously rejected an alternative nearly identical to the Tesoro Extension as “infeasible.” Indeed, TCA asks the Water Board to rely on the 2006 EIR for the full toll road project. There is no question that the entire project is “reasonably foreseeable” and will “change the scope or nature of the initial project or its environmental effects” under *Laurel Heights*.

Courts refuse to allow project proponents to improperly narrow the definition of a project because to do otherwise would defeat a fundamental purpose of CEQA. CEQA’s prohibition on segmenting projects ensures “that environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimum potential impact on the environment—which cumulatively may have disastrous consequences.” (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283–84.)

Accordingly, it is not how TCA defines the “project” that matters. A “project” is “the whole of an action, which has a potential for resulting in either a direct physical change” or “a reasonably foreseeable indirect physical change in the environment.” (Guidelines § 15378(a).) A project is the whole of the “activity which is being approved” and not “each separate government approval.” (Guidelines § 15378(c).) CEQA instructs that “[w]here an individual project is a necessary precedent for action on a larger project . . . an EIR must address itself to the scope of the larger project.” (Guidelines § 15165.)

Properly identifying and describing the whole of the project is the crucial first step of the CEQA process. “An accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR.” (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713,730 (quoting *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193).) Courts have found that a “truncated project concept” itself violates CEQA. (*San Joaquin Raptor*, 27 Cal.App.4th at 729–30.) “An accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity.” (*Id.* at 730.) If an EIR “does not ‘adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project,’ informed decisionmaking cannot occur under CEQA and the final EIR is inadequate as a matter of law.” (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82–83.)

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As we have previously explained to the Water Board, the TCA cannot start building the beginning of the toll road without knowing where it will end.

Building first and asking questions later is exactly the approach to development that CEQA is intended to prevent. The TCA is seeking an end run around CEQA by chopping the Foothill South project into smaller segments, rather than identifying the full extent of what TCA intends to build in response to the rejection of the original route. The Board should deny TCA's application until the full, revised project has been analyzed.

Question 2: What further approval(s) does TCA intend to make prior to commencing construction of the Tesoro Extension 5.5 mile toll road? At what point in the process does TCA intend to make such approval(s)? Will project approval be made by the TCA board of directors or can it legally be made by the Project Manager or other executive staff?

At the March 13, 2013 hearing, counsel for TCA was asked if the TCA Board of Directors would have to approve the Tesoro Extension. He indicated that the TCA Board would need to formally approve the project, and that TCA may supplement the CEQA Addendum before TCA Board approval. This fact is not surprising, but begs the question as to why the project is being brought to the Water Board *first*, before the TCA has approved the project, or even commenced the public review process. At this time, it is wholly speculative whether the TCA Board will approve the project at all, and, if it does so, what the project description will be. Once the public process commences, the TCA will have the opportunity to consider and rectify the CEQA problems raised by the Coalition and others. We cannot say what the outcome of that process will be, or what additional environmental issues, including those affecting water quality, may come to light. But the Water Board should deny the WDR application until that process has run its course.

Question 3: What are the consequences for CEQA purposes of the Addendum prepared by TCA in February 2012 since it was prepared without an associated lead agency project approval or Notice of Determination being filed?

The Addendum prepared by TCA staff has no legal consequence for the Water Board's consideration of the TCA's application.

The TCA asserts that the Water Board, as a responsible agency, should be bound by the TCA's 2006 EIR for the Foothill South, and that therefore the decision of TCA

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staff to proceed on the basis of the 2006 EIR and the Addendum cannot be challenged. But as we have discussed in our February 25 letter, responsible agencies are not bound by an earlier EIR where, as here, there are new circumstances, new information, or changes to the project that trigger the requirements for a subsequent or supplemental EIR under Section 21166 and related guidelines. (Cal. Code Regs., tit. 14, § 15050(c).) As we have discussed in detail in prior letters, the rejection by the Coastal Commission and Secretary of Commerce of the final segment of the project that was described in the 2006 EIR is a substantial change in circumstances that profoundly affects the project and thus its potential impacts.

Additionally, as the Water Board's question notes, the Addendum was never approved by the TCA Board. The process of public review and consideration of the Addendum by the TCA Board has not begun. That process could result in a decision to do what CEQA requires: prepare new or subsequent environmental review of the entire project. The outcome of that process cannot be known at this time. But we do know that neither the TCA Board nor the Water Board is bound by the decision of TCA staff to prepare an Addendum. Indeed, a decision to move forward with approvals for the Tesoro Extension without the full environmental review required by CEQA would be contrary to law.

Question 4: Explain how the Tesoro Extension 5.5 mile toll road construction relates to the program laid out by AB32.

The Tesoro Extension alone has never been described or analyzed as part of the program laid out by the Global Warming Solutions Act of 2006, also known as AB 32. The near-term goal of AB 32 is to bring the State's Greenhouse Gas ("GHG") emissions back to 1990 levels by the year 2020. (*See* Cal. Health & Safety Code §§ 38500–38599.) Control of GHG emissions from land use and transportation, however—constituting nearly 40% of the State's GHG emissions total—relies in part on a complementary law, known as SB 375. That law mandates that regions attempt to develop "sustainable communities strategies" that reduce transportation-related GHG emissions as part of the regional transportation planning process undertaken by Metropolitan Planning Organizations ("MPOs"). (*See* Cal. Gov't Code § 65080.) The relevant MPO for most of Southern California, including Orange County, is the Southern California Association of Governments ("SCAG"). SCAG adopted its Sustainable Communities Strategy and associated Regional Transportation Plan in early 2012 ("2012 RTP/SCS"). The California Air Resources Board ("CARB") approved the Transportation Plan later that year.

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The 2012 RTP/SCS does not include the Tesoro Extension as a stand-alone project. Instead—consistent with all previous environmental review and consideration of the toll road completed by TCA itself, regional planning agencies such as SCAG, and GHG emissions-control agencies such as CARB—the Transportation Plan describes and analyzes the entire toll road project as part of the regional transportation network. As we have explained in prior letters to the Federal Highway Administration and the Water Board, both the 2012 RTP/SCS and the adopted 2013 Regional Transportation Improvement Plan (“2013 RTIP”) only evaluate the entire toll road.¹

Thus, the GHG emission impacts of the Tesoro Extension as a stand-alone project have never been properly evaluated as part of any GHG emissions-related plan or program. Furthermore, the GHG emission impacts of a 5.5-mile segment that connects to a two-lane arterial in Orange County will differ fundamentally from the GHG emissions impacts of a 16-mile toll road that connects to the I-5 in San Diego County.

TCA must conduct environmental review of the *entire* toll road, as regional planning and air quality agencies have done for decades. The Water Board should decline to approve the Tesoro Extension until TCA’s environmental review of the project conforms to the analyses in the 2012 RTP/SCS and the 2013 RTIP.

Thank you for your consideration of these comments.

Very truly yours,

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for William J. White

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¹ See 2012 RTP Project List at 235 (“(FTC-S) (I-5 TO OSO PKWY) (15MI) 2 MF EA. DIR BY 2013; AND I ADDITIONAL M/F EA. DIR. PLS CLMBNG & AUX LANES AS REQ BY 2030 PER SCAG/TCA MOU 4105/01.”), available at http://rtpscs.scag.ca.gov/Documents/2012/final/SR/2012fRTP_ProjectList.pdf).