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California Regional Water Quality Control Board, San Diego Region

Via Electronic Mail

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(9/23/14) Board Meeting

A-2259

Deadline: 9/15/14 by 12:00 noon

DATE: September 15, 2014
TO: Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board



FROM: David Gibson
Executive Officer

SUBJECT: COMMENTS TO- A-2259--SEPTEMBER 23, 2014 BOARD MEETING

The San Diego Regional Water Quality Control Board (San Diego Water Board) greatly appreciates the time and effort of the State Water Resources Control Board (State Water Board) and its staff in reviewing the record and preparing a draft Order remanding the San Diego Water Board's decision on the denial of Waste Discharge Requirements Revised Tentative Order No. R9-2013-0007 (Revised Tentative Order) to the San Diego Water Board. The San Diego Water Board would like to express its strong support for the draft Order. We appreciate your concern over the San Diego Water Board's need to provide a clear factual and legal basis for our decision, and upon remand will take actions consistent with the direction provided in the draft Order. We offer the following comments to highlight our support for several significant aspects of the draft Order, and to respectfully suggest minor clarifying language. San Diego Water Board counsel Nathan Jacobsen, board staff, and I will be in attendance at the September 23 board meeting to answer any questions the State Water Board may have.

The San Diego Water Board appreciates the State Water Board's recognition that a regional water board may be asked to issue Waste Discharge Requirements (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 other water quality impacts that the regional water board may find difficult to prevent in the future." The State Water Board notes that this scenario may be present in linear projects such as road construction, which is the type of project the San Diego Water Board considered in its Revised Tentative Order. We strongly support the State Water Board's statement that 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."

In the case of a major highway project, such as the Tesoro Extension, potential future highway segments could have a significant adverse effect on water quality and beneficial uses. In this particular case, where the evidence in the administrative record suggests the project the San Diego Water Board was asked to permit is a part of a larger project that would likely to lead to future highway segments and water quality impacts, the Board must have adequate project information to fully evaluate those future impacts and make an informed decision on whether and how to permit a discharge of waste.

As the State Water Board's draft Order notes, in some circumstances, it may be appropriate for a regional water board to issue WDRs for a current project and defer issuance of WDRs for future discharges until the time that the discharges are actually proposed without compromising its responsibility to protect the beneficial uses of waters. The San Diego Water Board does not believe the two concepts conflict, but to make what we believe is the State Water Board's intent absolutely clear, we suggest the following sentence be added following the second paragraph on page 10:

So long as a regional water board complies with CEQA, a regional water board may find it appropriate to issue waste discharge requirements for a portion or segment of a larger phased project. A regional water board, however, may disapprove any project, or portion or segment thereof, so long as the disapproval is consistent with the authority granted by the Porter-Cologne Act.

This change would reflect our reading of the draft Order that nothing in the Porter-Cologne Water Quality Control Act prohibits a regional water board from authorizing a discharge of waste for a segment of a phased project. Rather, the Order makes clear that under Porter Cologne, a regional water board may, but is not required to, authorize a discharge of waste for either a segment of a larger project, or the "project" as defined under CEQA, as long as the approvals also comply with CEQA.

With respect to CEQA, the Petitioner, Foothill Eastern Transportation Authority (F/ETCA), contends the San Diego Water Board acted improperly in its role as a responsible agency under CEQA. The draft Order provides background on a responsible agency's roles and duties under CEQA, but does not specifically address whether the San Diego Water Board acted consistent with CEQA and the CEQA Guidelines (Cal. Code Regs., tit. 14, section 15000 et seq.).

In its response to the petition, the San Diego Water Board asserted that TCA mischaracterized the basis of the board's decision to deny WDRs. The board asserted that its decision was based on Porter-Cologne rather than CEQA. The board continues to assert that position here, and as directed by the State Water Board, on remand, the San Diego Water Board will adopt findings to make clear the legal basis of its decision.

For clarification purposes, we suggest the State Water Board consider the following modifying language to the draft Order to make clear the legal obligations of the San Diego Water Board when acting as a responsible agency under CEQA. The draft Order notes that under Public Resources Code section 21167.3, "a responsible agency under CEQA must presume an EIR complies with CEQA where an action is commenced against the lead agency and no injunctive or similar relief is granted." The draft order also notes that an EIR must include a project description. (Draft Order, p. 7; see also, Cal. Code Regs., tit. 14, §§ 15120, subd. (a); 15124.) Because the situation addressed by section 21167.3 is precisely the circumstance here, the San Diego Water Board suggests the following addition to Footnote 41.

In this case, an action was commenced against F/ETCA on May 22, 2013 when the Save San Onofre Coalition filed a complaint challenging F/ETCA's CEQA document in San Diego County Superior Court. The San Diego Water Board therefore must presume the EIR, which includes the project description in the Addendum filed by F/ETCA, complied with CEQA.

We also suggest one further clarifying addition with respect to CEQA and the San Diego Water Board's role as a responsible agency. We believe the sentence that follows Footnote 41 pertains to circumstances where an action or proceeding has not been commenced against a lead agency. These provisions of the CEQA Guidelines, which describe the actions a responsible agency may take when it believes a lead agency's EIR is inadequate, apply only when a challenge to the lead agency's document has not been filed. To make this clear, the San Diego Water Board requests the following revision (in italics and strikethrough) to the sentence:

If no action or proceeding is commenced as described in Public Resources Code section 21167.3, and a responsible agency believes that the final EIR is inadequate, based on impacts to resources within the scope of its purview, it may challenge that determination in court take

that issue to court within 30 days after the lead agency files a notice of determination, prepare a subsequent EIR if permissible *under CEQA Guidelines section 15162*, assume the lead agency role under the circumstances described above, or be deemed to have waived any objections.

Finally, the San Diego Water Board supports the State Water Board's direction that no further evidentiary hearing is necessary following the State Water Board's remand of the matter to the San Diego Water Board. The San Diego Water Board held two public hearings with associated public comment periods, and accepted supplemental responses from F/ETCA and interested parties before acting on the proposed WDRs. The San Diego Water Board has sufficient evidence in the administrative record to enable it to comply with the State Water Board's direction to more fully explain the legal and factual basis for its denial.

We thank the State Water Board for its thoughtful Order that provides further direction to the San Diego Water Board while recognizing our board's commitment to take actions that will protect water quality and beneficial uses within our Region. The San Diego Water Board supports adoption of the draft Order with the suggested revisions.