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Transportation Corridor Agencies™

Foothill/Eastern
Transportation
Corridor Agency

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Dana Point

February 25, 2013

Mr. Darren Bradford
Environmental Scientist
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

**Subject: Response to Shute, Mihaly & Weinberger, LLP Letter
Dated February 22, 2013**

Dear Mr. Bradford:

This provides the response of the Foothill/Eastern Transportation Corridor Agency (F/ETCA) to the letter of Shute, Mihaly & Weinberger (SMW) dated February 22, 2013.

**I. THE CEQA DOCUMENTATION FOR THE TESORO EXTENSION PROJECT
COMPLIES WITH CEQA. THE FSEIR EVALUATED CUMULATIVE
IMPACTS.**

SMW's letter restates a number of points made in its February 6, 2013 letter to the Regional Board. TCA has responded to those points in its February 20, 2013 letter to the Regional Board. As explained in TCA's February 20, 2013 letter: (a) the Tesoro Extension Project has independent utility, and, (2) the SOCTIIP EIR did evaluate the environmental impacts of the extension of SR 241 to Interstate-5 in San Diego, and also evaluated multiple alternatives to the extension of SR 241. SMW's argument that Tesoro Extension would preclude non toll road alignments has no basis in law or fact. There is nothing about the Tesoro Extension Project that would preclude a transportation agency from implementing non-toll road projects in other locations, including widening I-5, if some other agency determined such an alternative was feasible.

II. THE WDR APPLICATION AND THE ADDENDUM DESCRIBE THE TESORO EXTENSION.

SWM's claim that the F/ETCA has not described the Tesoro Project ignores the description of the Project in the WDR Application and in the Addendum.

III. THERE ARE NO NEW OR MORE SEVERE SIGNIFICANT IMPACTS OF THE TESORO PROJECT. THEREFORE, CEQA PROHIBITS THE PREPARATION OF A SUPPLEMENTAL OR SUBSEQUENT EIR.

SMW claims that there has been a "change in circumstances" that requires the preparation of a supplemental or subsequent EIR. SMW fails to cite the applicable requirement of the CEQA Guidelines. CEQA Guidelines section 15162, subd. (a)(2) provides:

(a) When an EIR has been certified or a negative declaration adopted for a project, no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one or more of the following:

...

(2) Substantial changes occur with respect to the circumstances under which the project is undertaken **which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant, environmental effects or a substantial increase in the severity of previously identified significant effects**

(CEQA Guidelines, § 15162, subd. (a)(2), emphasis added.) As the CEQA Guidelines makes clear, a change in circumstances by itself does not authorize an agency to require a supplemental or subsequent EIR. The California courts have held that a change in circumstances does not trigger the preparation of a supplemental EIR unless: (1) the change is substantial, (2) the change involves new or more severe significant environmental impacts, (3) the change will require major revisions to the previous EIR, **and** (4) the impacts were not covered in the previous EIR. (*Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538.)

As documented in the Addendum, the Tesoro Extension Project is proposed to be built within the footprint previously analyzed between Oso Parkway and Ortega Highway (as shown on Attachment A to TCA's February 20, 2013 letter). The operational characteristics and width are the same as analyzed in the FSEIR.

The Addendum documents that the Tesoro Extension Project will not have new or more significant impacts than were analyzed in the FSEIR. Indeed, the Addendum documents that the Tesoro Extension Project will reduce the impacts described in the FSEIR. The Project avoids all impacts to Clean Water Act Corps of Engineers jurisdictional waters and **reduces** permanent impacts to waters of the state to four tenths of an acre.

The courts have made it clear that the key issue in evaluating a project under the substantial change prong of CEQA § 21166 is whether any changes require major revisions of the EIR. This factor is further defined in the CEQA Guidelines § 15162, subd. (a)(1): major revisions are only required where there are “new significant environmental effects or a substantial increase in the severity of previously identified significant effects.” CEQA Guidelines § 15162, subd. (a)(1). In *Melom v. City of Madera* (2012) 183 Cal.App.4th 41, a site plan for a shopping center was changed to reduce some retail spaces so the largest retail space could be increased to allow a supercenter store. The Court of Appeal upheld the City of Madera’s use of an Addendum to evaluate this change and the finding that there were no new significant environmental effects. *Id.* at 47-51. In *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, a new use permit was requested for changes to a medical research and laboratory complex, including changes in size, building pattern, water supply requirements and adjacent uses (a wilderness park had been expanded since the original EIR, and by the time the new use permit was sought, the wilderness park surrounded the research and laboratory complex). The Court of Appeal upheld the County’s finding that none of the changes required major revisions in the original EIR.

IV. THE REPORT OF WASTE DISCHARGE APPLICATION MEETS ALL STANDARDS AND REQUIREMENTS OF THE WATER CODE

TCA provided a separate response to the ESA/PWA letter. As demonstrated in that response, the Tesoro Extension Project will comply with the recently adopted Caltrans permit, which is functionally equivalent to the South Orange County Hydromodification Plan, and has been developed specifically for state highways.

V. the regional board’s procedure is appropriate and SWM’S REQUEST FOR PROCEDURAL RELIEF SHOULD BE DENIED

The Regional Board should deny SWM’s request for procedural relief. The Project is entirely within Orange County. The March 13 hearing in Costa Mesa is the appropriate forum and location for the hearing. There has been substantial public involvement in the extension of the SR 241 going back decades. The public involvement was summarized in TCA’s February 20, 2013 letter responding to SWM’s February 6, 2013 letter. Further, the SOCTIIP Final SEIR includes documentation of public review and comment in the Executive Summary and Chapter 11 (Comments and Coordination).

Should you require any additional information on this Project, please feel free to contact me directly at (949) 754-3475.

Sincerely,



Valarie McFall, Director
Environmental Services

cc: Mr. David Gibson, SDRWQCB
Ms. Ms. Kelly Dorsey, SDRWQCB
Ms. Catherine Hagan, Staff Counsel, SDRWQCB
Mr. Robert Thornton, Nossaman