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**California Regional Water Quality Control Board, San Diego Region**

DATE: December 9, 2013

TO: James Herink  
Senior Staff Counsel  
State Water Resources Control Board/ Office of Chief CounselFROM:   
David Gibson<sup>for</sup>  
Executive Officer  
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD**Subject: San Diego Regional Water Quality Control Board Response to Petition of Foothill Eastern Transportation Corridor Agency, Denial of Waste Discharge Requirements, Revised Tentative Order WQ 2013-0007, SWRCB/OCC File A-2259****I. INTRODUCTION:**

On June 19, 2013, the San Diego Regional Water Quality Control Board (San Diego Water Board or board) denied the Foothill/Eastern Transportation Corridor's (TCA) application for Waste Discharge Requirements (WDRs) for its project known as the "Tesoro Extension" (Tesoro Extension or Project). TCA submitted a timely appeal to the State Water Resources Control Board (State Water Board).

TCA requests that the State Water Board either adopt the Revised Tentative Order, Order WQ 2013-0007 (Tentative Order), or reverse and remand the Tentative Order to the San Diego Water Board with direction to adopt the Order. The State Water Board issued a request for the administrative record and response from the San Diego Water Board and other interested parties on November 8, 2013. The San Diego Water Board submitted this response and the administrative record on which it based its decision on December 9, 2013.

## II. SUMMARY OF RESPONSE:

The San Diego Water Board requests that the State Water Board deny TCA's request for the State Water Board to adopt Order WQ 2013-0007, and its alternative request that the State Water Board require the San Diego Water Board to adopt the Tentative Order. Until the San Diego Water Board has an accurate and complete project description it cannot issue WDRs for the Project.

The San Diego Water Board did not adopt Order WQ 2013-0007 because it could not assess water quality impacts based on an indeterminate and shifting project description. Evidence in the record, including evidence and testimony presented at the March 13, 2013 and June 19, 2013 administrative hearings, suggests that TCA intends to build a different project than the Tesoro Extension Project described in Order WQ 2013-0007.

The San Diego Water Board determined that potential water quality impacts from a larger, more extensive project were not sufficiently evaluated for the board to approve the Tentative Order. Based on the evidence in the record, the board, among other things, could not determine whether the larger project would include necessary mitigation measures, satisfy anti-degradation prohibitions, or result in a loss of beneficial uses in affected waters. Obtaining a permit that authorizes the discharge of waste into waters of the state is a privilege, not a right, and the San Diego Water Board properly exercised its discretion when it determined it could not approve the Tentative Order until it had an adequate project description.

## III. BACKGROUND OF DENIAL OF TENTATIVE ORDER 2013-0007

TCA is a joint powers transportation authority comprised of local agencies in Orange County. TCA's primary purpose is to build toll roads. It has completed several projects in the region, and has planned for future toll road projects. One major project it has sought to build is a toll road extension that would add approximately 16 miles of toll road to the current terminus of State Route 241 (SR 241) in southern Orange County and extend the road south and parallel to Interstate-5 before merging with Interstate-5 near the Orange County-San Diego County line. (Vol.:4 Index:4,5.)

TCA requested a Clean Water Act section 401 Water Quality Certification (401 Certification) for the toll road project from the San Diego Water Board in 2006. (Vol.:5 Index:8.) In its denial of the application in 2008, the Regional Board Executive Officer denied the Certification without prejudice citing concerns

about mitigation measures, runoff management and impacts to water quality, and impacts to the San Mateo Creek system. (Vol.:5 Index:71.) The approximately 16-mile toll road project was ultimately rejected by the California Coastal Commission (Coastal Commission). (Vol.:1 Index:9 p.278.) The Coastal Commission rejected the project due to its recreational impacts to San Onofre State Park/San Mateo Creek, water quality effects, wetland impacts, and impacts to other environmental resources. The determination was upheld by the United States Department of Commerce.<sup>1</sup> (Vol.:5 Index:146.)

Pursuant to the California Environmental Quality Act (CEQA), TCA developed a Final Supplemental Environmental Impact Report (FSEIR) for the 16-mile project. (Vol.:4 Index:5.) The FSEIR was challenged in court by the California State Parks Foundation and a coalition of environmental groups. The plaintiffs voluntarily dismissed the lawsuit (with the right to refile the litigation), after the United States Department of Commerce upheld the Coastal Commission's denial of the project. (TCA Petition Ex.8.)

In 2011, TCA's Board of Directors decided to pursue a shorter segment of the proposed road, the "Tesoro Extension". (Vol.:1 Index:6.) The Tesoro Extension is an approximately 5.5 mile extension of SR 241 that avoids the Coastal Zone and all federal waters, and would terminate immediately north of San Juan Creek in Orange County.<sup>2</sup> TCA submitted an application for WDRs to the San Diego Water Board and prepared an addendum to the 2006 FSEIR to cover the Tesoro Extension. (Vol.:3 Index:14-16; Vol.:1 Index:1.) As lead agency for CEQA purposes, TCA filed a Notice of Determination stating there were no significant environmental effects that would result from changing the project from a 16-mile toll road to the Tesoro Extension. (Vol.:1 Index:7.)

After a series of discussions, and proposed changes to the WDRs, San Diego Water Board staff determined TCA's application for the 5.5 mile segment of road was complete and drafted Revised Tentative Order WQ 2013-0007, proposing WDRs for the Project.<sup>3</sup> (Vol.:1 Index:20, 23.) The San Diego Water Board held two public hearings on the Tentative Order—one on March 13, 2013 in Costa Mesa, and a continuance of the hearing in San Diego on June 19, 2013. (Vol.:2 Index:20; Vol.:1 Index:27.)

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<sup>1</sup> After the decision by the Department of Commerce TCA formally withdrew its Certification application, confirmed by the Executive Officer on February 19, 2009. (Vol.:5 Index:151.)

<sup>2</sup> San Juan Creek is defined as a Water of the United States for purposes of the Federal Clean Water Act.

<sup>3</sup> A Clean Water Act section 401 certification was not necessary because the project stopped short of San Juan Creek and no other waters of the United States were affected.

A coalition of environmental groups, including the California State Parks Foundation, Natural Resources Defense Council, Sierra Club California, Surfrider Foundation, Orange County Coastkeeper and others, collectively known as the "Save San Onofre Coalition" (Coalition),<sup>4</sup> along with a large number of individuals, argued against the issuance of the Tentative Order. The Board also heard from TCA, and a large number of individuals and groups that supported adoption of the Order. The Coalition and TCA were the only designated parties. (Vol.:1 Index:9-18; Vol.2. ; Index:6-12.)

After reviewing the evidence in the record and hearing testimony at both hearings, the San Diego Water Board denied issuance of Order WQ 2013-0007, finding the Project was not sufficiently defined for the board to determine its impacts to water quality. TCA submitted a petition to the State Water Board alleging the San Diego Water Board: 1) violated CEQA; 2) failed to make findings as required by law; and 3) exceeded its statutory authority in denying the Tentative Order.

#### **IV. RESPONSE TO CONTENTIONS RAISED BY PETITION**

##### **A. TCA CONTENDS THE SAN DIEGO WATER BOARD VIOLATED PUBLIC RESOURCES CODE SECTION 21167.3 AND CEQA GUIDELINES SECTION 15050**

TCA asserts that under Public Resources Code section 21167.3 a responsible agency must presume the lead agency's CEQA documentation is valid while litigation is pending. The board disagrees with TCA's contention that it violated CEQA. TCA's argument mischaracterizes the board's action.

TCA's alleged non-compliance with CEQA was the subject of the 2006 litigation challenging TCA's FSEIR for the 16-mile toll road. In the San Diego Water Board's consideration of Order WQ 2013-0007, CEQA issues were briefed by the parties and addressed at the San Diego Water Board hearings when the board considered the Tentative Order. In addition, the parties addressed specific CEQA issues in supplemental briefing responses submitted to the board on March 29, 2013. (Vol.:1 Index:3-5.) At both the March 13, and June 19, 2013 hearings, the Coalition asserted that TCA's addendum did

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<sup>4</sup> A similar coalition had opposed the version of the toll road that was rejected by the Coastal Commission.

not comply with CEQA and TCA had violated CEQA when it approved the 5.5 mile highway segment.<sup>5</sup> TCA asserted that its actions complied with CEQA, and the San Diego Water Board must presume its environmental documentation was adequate for CEQA purposes.

At the hearings and in the questions presented for supplemental briefing, Board members and San Diego Water Board staff questioned TCA's process and its role as lead agency under CEQA, however, the board, a responsible agency under CEQA because of its authority to issue waste discharge requirements for the Project, ultimately did not decline to adopt the Tentative Order based on alleged non-compliance with CEQA. The board's decision was based on whether the activity could be permitted in compliance with the Porter-Cologne Water Quality Control Act (Porter Cologne), Water Code section 13000 et seq.

Under the authority provided by Porter-Cologne, the board has discretion to issue WDRs. Porter-Cologne provides the authority for the board to issue waste discharge requirements and take 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.) TCA does not dispute this authority; it concedes, "the role of the San Diego Water Board is to ensure that applicable water quality standards are met." (TCA Petition p. 23.) Porter-Cologne is clear that issuance of waste discharge requirements is a discretionary action, and all discharges into waters are privileges, not rights. (Wat. Code § 13263 subdivision (g).)

TCA simply did not make its case before the board that WDRs should be issued for its Project. It is a general principle of administrative hearings that the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal. App.3d 1044, 1052.) The conflicting evidence about the scope of the Project made it impossible for the board to determine whether the Project would unreasonably affect water quality. TCA therefore did not meet its burden.

At the beginning of the March 13, 2013 hearing, San Diego Water Board staff framed the scope of the potential water quality concerns for the board's consideration. In staff's opening presentation, Project

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<sup>5</sup> TCA's board of directors approved the addendum on April 18, 2013 and filed a Notice of Determination on April 19, 2013. The Coalition and California Attorney General's office commenced litigation against TCA challenging the adequacy of the addendum and TCA's alleged improper "piecemealing" of the project. (Vol.:1 Index:9 p.34, p.82.)

lead staff Darren Bradford stated, "The majority of the key issues regarding the tentative order are related to whether the board should consider the potential impacts of the entire 16-mile reach of the proposed toll road during its consideration of the tentative order." (Vol.:2 Index:20 p.20.)

The water quality impacts of the approximately 16-mile proposed toll road had been analyzed by San Diego Water Board staff in 2008 when TCA sought a 401 Certification for the SR 241 extension that would terminate near San Onofre State Beach and Interstate-5. In 2008, the board's Executive Officer denied TCA's application for a 401 Certification because "supplemental information was requested that was still not forthcoming." The Executive Officer determined that, "As currently proposed, the project does not meet Water Quality Standards and therefore, would not warrant certification." Attached to the denial was a summary of the information lacking in the application that was needed to certify that the project would meet Water Quality Standards. (Vol.:5 Index:71.) Listed was a failure to account for impacts in the San Mateo Creek watershed, a large unmitigated loss of linear feet of waters, and impacts to "rare" beneficial uses. (Ibid.) The Executive Officer also noted the proposed fill and fragmenting of wetland and riparian habitat at San Onofre State Beach and Donna O'Neil Land Conservancy, finding that, "[t]hese resources have been protected from development and provide exceptional recreational and ecological significance." Additionally, the Executive Officer determined that "to comply with Federal and State Anti-Degradation policies, TCA ha[s] not demonstrated that existing high quality waters would be maintained or losses appropriately mitigated." These concerns were mirrored by the Coastal Commission in its determination that the project proposed by TCA was inconsistent with the Coastal Act and California Coastal Management Program. (Vol.:1 Index:9 p.278.)<sup>6</sup>

This evidence was part of the record when the board considered the Tentative Order, and established that the water quality impacts of the entire proposed toll road extension remained unaddressed. The board determined the evidence showed TCA's project was not the Tesoro Extension Project described in its application for waste discharge requirements but the entire 16-mile toll road. Thus, the unresolved impacts to water quality for the previously proposed 16-mile toll road extension were directly relevant to whether the board should issue the Tentative Order.

At the March 13, 2013 hearing, Board member Abarbanel questioned TCA regarding the Project description. Mr. Abarbanel asked, "From what you've said, I would infer that TCA agrees that the

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<sup>6</sup> Documents including technical reports, tables, and staff analysis of the unresolved water quality impacts can be found in Volume 5 of the index. For examples, see Volume 5, Index numbers: 9, 12, 20, 29, 31, 45, 61, 81, 87, 90, 110, 120, 137.

Tesoro Extension is part of a larger project.” (Vol.:2 Index:20 p.74.) Mr. Thornton, representative for TCA replied, “it’s part of the SR 241...it begins, actually, in Riverside County...[a]nd extends...all the way to Interstate 5. So yes, it’s part of the larger system and part of that larger project; correct.” (Ibid.)

Additional testimony at the March 13, 2013 hearing suggested that the Project was not the 5.5 mile Tesoro Extension described in TCA’s application for waste discharge requirements. Darren Chidsey from the Southern California Association of Governments (SCAG) testifying in support of the Order, described the project as being consistent with the SCAG’s Regional Transportation Plan. When questioned by Dr. Abarbanel on whether his description of “the project” referred to the whole project or the 5.5 mile Tesoro Extension, Mr. Chidsey responded, that “Ye[s], the—the entire project [which] ...had been included, as I said, in our regional transportation plan since 1991...when the entire network was built.” (Vol.:2 Index:20 p.193) When further questioned on what the “entire project” was, Mr. Chidsey responded that he did not have an answer. (Vol.:2 Index:20 p.195.)

This uncertain description of the Project persisted at the June 19, 2013 board hearing. Board member Sharon Kalemkarian asked Mr. Thornton, “If you’re recognizing it’s a segment, which I appreciate, of a larger plan, and on your website the whole 241 is still projected as needed and desired and everything by the TCA; is that correct”? (Vol.:1 Index:27 p.84.) Mr. Thornton replied, “That’s correct”. (Ibid.)

Additional evidence submitted by the Coalition suggests that when TCA decided to pursue waste discharge requirements for the Tesoro Extension, the TCA Board of Directors considered the project to be a larger highway section that would connect to Interstate-5. In TCA’s October 13, 2011 board meeting, TCA staff recommended that its Board of Directors develop a financial strategy to build the Tesoro Extension, “while continuing to pursue the balance of the alignment that connects to Interstate 5”. (Vol.:2 Index:2 p. 88-89.) In the TCA Board meeting agenda that listed the Tesoro Extension as a matter under consideration, the agenda item is listed as “Initial Segment of the 241 Completion Project”. In associated documents that describe the project to bond investors, the financing is described as for “the 241 Completion Initial Segment.”(Vol.:2 Index:2 p.95.)<sup>7</sup>

Based on the evidence in the record and testimony at the hearings, the board determined that the Tesoro Extension is a piece of a larger ongoing project with unaddressed water quality impacts.

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<sup>7</sup> When questioned directly about the project description that TCA would provide to the bond market and whether it would be described as a part of a larger project, Mr. Thornton did not answer the question directly stating, “we haven’t gone to the bond market for this project yet.” (Vol.:1 Index:27 p.85-86.)

Relying on the express authority provided to it by Porter-Cologne, the board exercised its discretion to deny the Tentative Order until TCA identified and addressed the water quality impacts of the project it intends to build. This permitting authority is squarely within the board's purview. Given the conflicting evidence about the scope of the Project in this case, considering the entire project rather than a piece of the project furthers an important policy objective of addressing water quality in a comprehensive manner to ensure water quality objectives can be met and that requirements are adequate to protect beneficial uses. It also provides certainty to the TCA as water quality concerns can be addressed at an early stage of project development when additional flexibility exists.

## **B. TCA CONTENDS THE SAN DIEGO WATER BOARD FAILED TO MAKE FINDINGS TO SUPPORT ITS DECISION**

TCA asserts that the San Diego Water Board did not "include statements regarding the factual and legal basis for the decision." (TCA Petition p.19.) The San Diego Water Board agrees with TCA's assertion that the board is required to make findings that "bridge the analytic gap between the raw evidence and the ultimate decision or order." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 (*Topanga*)). Contrary to TCA's contention, however, the board fulfilled the requirement. Board members' statements at the hearing and the supporting evidence in the record make clear the basis for the board's decision and the factual evidence in the record that supported the decision.

TCA's assertion that the San Diego Water Board abused its discretion by not making more detailed findings is not supported. As the court stated in *Topanga*, "in examining an agency's decision, reasonable doubts should be resolved in favor of the administrative findings and decision." (*Topanga* (1974) 11 Cal 3d. 506, 514.) Further, "[w]ritten findings are not the sole means by which *Topanga's* requirements may be satisfied." (*Linborg-Dahl Investors, Inc. v. City of Garden Grove* (1986) 179 Cal.App.3d 956, 963.) Prior to denying the Tentative Order, board members made express findings supported by evidence in the record that supported the board's denial of the Tentative Order.

At the June 19, 2013 hearing, Board member Abarbanel stated his position on the record that the project before the board was a project that extends from the current terminus of SR 241 to "somewhere intersecting Interstate 5." (Vol.:1 Index:27 p.201.) Dr. Abarbanel cited TCA's own website as evidence



that the project was intended to extend to Interstate-5.<sup>8</sup> Dr. Abarbanel further stated that the whole project had already been rejected in prior proceedings with the Coastal Commission and he did not see a reason to accept part of it when the whole project is “clearly identified as impacting water quality and many other things.” He further stated that, “The entire project impacts water quality in a way that this board should not support.” (Vol.:1 Index:27 p.202.)

At the conclusion of the June 19, 2013 hearing, Board member Kalemkiarian also stated her position that she believed the evidence showed TCA was pursuing a different project than the one presented to the board, and the water quality impacts for this larger project were unaddressed. (Vol.:1 Index:27 p.198.) Consistent with TCA’s suggestion that the board’s role was only to consider water quality related effects, Board member Kalemkiarian stated, “[if TCA would] show me the entire highway and then we make a decision if water quality standards are going to be compromised.”<sup>9</sup> (Vol.:1 Index:27 p. 205.) San Diego Water Board chair Tomas Morales stated he believed TCA had presented to it a “five and a half mile...portion of the overall project.” (Vol.:1 Index:27 p.203.)

During the board’s deliberations Mr. Morales explicitly stated that the decision would be based on the information before the board. (Ibid.) Board members Kalemkiarian and Abarbanel both acknowledged the need to make findings and that they believed they had provided the basis for their decision. Ms. Kalemkiarian stated, “the board members, have fairly clearly stated their views in their deliberations.” Dr. Abarbanel stated, “I think the reasons...I have tried to articulate. I hope they’re on the record.” (Vol.:1 Index:27 p.206.)

Finally, TCA’s assertion that Board member Kalemkiarian improperly relied on a complaint the California Attorney General’s Office filed against TCA alleging CEQA violations is misplaced. TCA alleges the complaint is not evidence and presumably cannot be used as a basis to support the board’s findings. As TCA points out, while the complaint may not be cited as evidence in a court proceeding, the complaint itself is admissible in the administrative hearing and evidence that it cites was properly submitted into the record. The complaint cites the October 13, 2011 TCA staff report that was submitted into the record by the Coalition. (Vol.:2 Index:2 p.89.) The TCA staff report recommends

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<sup>8</sup> Board member Dr. Abarbanel cited information on the TCA website which shows the project connecting to Interstate- 5. In its petition, TCA objected to this as extra-record evidence. The website, however was earlier referenced in the hearing, without objection, and the website was introduced into evidence, by the Coalition (Vol.:1 Index:9 p.692.)

<sup>9</sup> Whether Water Quality Standards would be met for the 5.5 mile Tesoro Extension was not at issue in the Board’s decision. As originally framed by staff, the issue was whether the Board should consider water quality related impacts associated with the larger project.

that staff continue to work on the “full project alignment.” The complaint was introduced into evidence, the document it cites was properly introduced, and there was nothing improper in Board member Kalemkiarian referencing the complaint in her finding that the lack of clarity about what the Project entailed made it impossible to consider the water quality impacts based on the record before the board.

In short, substantial evidence in the record showed uncertain impacts to water quality outside the 5.5 mile Tesoro Extension segment, and that TCA’s project was not the Tesoro Extension as described in the Tentative Order. The San Diego Water Board adequately articulated the basis for its denial and the board’s findings are supported by evidence in the record as required by *Topanga*.

### **C. PETITIONER CONTENDS THE SAN DIEGO WATER BOARD EXCEEDED ITS JURISDICTION**

TCA alleges that the board exceeded its jurisdiction as a water quality control agency by basing its denial on impacts to resources outside the board’s purview. TCA also states the board acted outside its jurisdiction by defining the project as something other than the Tesoro Extension as described in the Tentative Order. TCA’s contentions are inaccurate; the board based its decision on potential impacts to water quality and an uncertain project description.

Petitioner outlines areas where it asserts the board acted outside its jurisdiction by discussing impacts related to greenhouse gas emissions, cultural resource impacts, impacts to farmland, and “matters of transportation policy.” (TCA Petition p.24.) But the board did not base its decision on any of these impacts, and specifically was advised that staff had not made findings regarding impacts to any other resources. (Vol.:1 Index:27 p.35.) The conjecture that the board made its decision based on impacts to other resources is unsupported and contrary to Board member statements that they considered the unknown water quality impacts of the larger toll road project to be potentially significant. Board member Kalemkiarian specifically stated, “I’m not going to do transportation policy....but I just don’t believe that we have been given the project...it’s not been explained, the environmental impacts...for the entire project and the water quality standards as well.” (Vol.:1 Index:27 p.199.)

As previously discussed, the board did make specific findings on impacts to water quality based on evidence in the record. The board determined that based on an inadequate project description it lacked enough information to determine whether the project would meet water quality standards. The board is not required to issue waste discharge requirements if it cannot determine that the discharge will meet

water quality standards. The board has the discretion to prohibit the discharge of waste: "A regional 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.) The State Water Board has determined that a regional board may completely prohibit a discharge. "[T]he simple fact is that this section [Water Code section 13243] has been uniformly interpreted since its enactment to permit a prohibition against "discharge" under certain conditions or in certain areas. This prior and consistent interpretation is entitled to great weight, and is supported by the legislative history of the Porter-Cologne Water Quality Control Act." (State Water Board Order WQ 76-11 p.11.) Accordingly, TCA's contention that Water Code sections 13260 and 13263 require the San Diego Water Board to issue waste discharge requirements based on the report it receives from a discharger is without merit. If a regional water board has authority to prohibit discharges, then by implication it has the authority not to permit them. (See also, Wat. Code § 13265, allowing imposition of administrative civil liability for unpermitted discharges.)

TCA's argument that the San Diego Water Board exceeded its authority in questioning the project description because TCA was the lead agency under CEQA is also inaccurate. As previously discussed, the board did not deny the project on CEQA grounds. The board exercised its discretion in determining that it could not issue waste discharge requirements for an uncertain project that could have significant effects on water quality. Nothing in CEQA prohibits an agency from disapproving a project based on its independent authority. (See e.g. *San Diego Trust & Savings Bank v. Friends of Gil* (1981) 121 Cal.App.3d 203, 214 [CEQA challenge was not at issue as the EIR was not challenged as being inadequate; the City still had the power to grant or not grant a discretionary permit].) The San Diego Water Board, when granting 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. (See generally, *Reddell v. California Coastal Commission*, 180 Cal.App.4th 956, 970-971, [the Coastal Commission denied a development permit despite the applicant revising his project description and assertion that the Commission was reviewing the "wrong project"].)

Finally, TCA's reliance on San Diego Water Board staff's recommendation that the board adopt the Tentative Order misses the point. The San Diego Water Board members are the decision-making body. The board is not required to adopt staff's recommendation; by statute it has the sole authority to adopt waste discharge requirements. (Wat. Code § 13223.)

The board, after holding a public hearing, receiving evidence, and considering the record may reach a different conclusion than staff. Board member Kalemkiarian stated that she did not have a project description that was accurate enough to make a water quality decision and the board as the adjudicatory body in this hearing had the authority and the obligation to assess the application and evidence and independently reach a conclusion. (Vol.:1 Index:27 p.199.) Board member Abarbanel stated, "I think our obligation here is not to be blinded by a representation of part of the project, but to recognize that the entire project impacts water quality in a way that this board should not support." (Vol.:1 Index:27 p.202.) If, as TCA seems to assert, the board was required to mirror staff recommendations and adopt all orders as presented, there would be no need for an adjudicative hearing before board members.

## V. CONCLUSION

The issuance of waste discharge requirements is not mandatory. The board may exercise the discretion provided by statute and deny waste discharge requirements. TCA had the burdens of proof and persuasion. TCA has not met its burden, and has cited no authority for its proposition that the board had a ministerial duty to adopt the Tentative Order.

For the foregoing reasons, the San Diego Water Board requests that the State Water Board deny TCA's request that either the State Water Board or the San Diego Water Board adopt Tentative Order WQ 2013-0007. Without a complete project description, the San Diego Water Board cannot make an informed decision about the Project's water quality impacts. Until TCA provides a complete project description that provides adequate information for the board to determine that waste discharge requirements for the Project will meet water quality standards, the board cannot support issuance of Order WQ 2013-0007.

Enclosure:

cc: Catherine George Hagan, [Via email]  
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Nathan Jacobsen, [Via email]

Interested persons