

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

Response to Comments Report

Tentative 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***

March 16, 2015

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

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

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San Diego Water Board Response to Comments
Tentative Order No. R9-2015-0022

Introduction

The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) has prepared this Response to Comments Report on Tentative 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* (Tentative Resolution). The Tentative Resolution was available for public review and comment for 14 days, with the comment period ending on February 18, 2015.

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Comments and Responses

The written comments and staff responses are in the table that follows. The comments are organized according to the person that made the comment and some comments have been summarized. Complete copies of comments received have been provided as part of the agenda package for the Tentative Resolution Board item.

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No.	Comment	Response	Action Taken
Foothill/Eastern Transportation Corridor Agency (F/ETCA)			
1.	As for our review of the Tentative Resolution, it does not appear to reflect the State Board's Order adopted at its September 23, 2014 hearing. The State Board's Order requires the Regional Board to adopt "detailed findings" explaining "why the regional board would be limited in its ability to exercise its full authority in the future" to restrict future discharges from future extensions of SR 241. (State Board Order No. WQ-2014-0154, at p. 11.)	State Water Board Order WQ-2014-0154 requires the San Diego Water Board to explain the factual and legal basis for its decision to deny Revised Tentative Order R9-2013-0007. The Tentative Resolution supplies the necessary findings to comply with the State Water Board's Order, Government Code section 11425.50, and bridges "the analytical gap between raw evidence and the ultimate decision or order." (<i>Topanga Assn. for a Scenic Community v. County of Los Angeles</i> (1974) 11 Cal. 3d. 506, 515.) The Tentative Resolution explains the basis for the San Diego Water Board's decision, the legal authorities it relies on, and the evidence in the administrative record to support its decision.	No changes to the Tentative Resolution have been made here.
2.	Additionally, there is no evidence in the record to support a finding that the Regional Board's authority to restrict future discharges would be limited. As the Tentative Resolution concedes, any future extension of SR 241 south of Cow Camp Road would cross waters of the State -- thus providing the Regional Board with extensive authority to restrict future discharges. Because it is uncontested that Regional Board would have authority over future extensions of SR 241, the Regional Board should not adopt the Tentative Resolution as this would go against the direction provided in the State Board Order.	Please see response to Comment No. 1 above. In the Tentative Resolution the San Diego Water Board has cited the specific evidence in the administrative record that supports its decision. Please see Paragraphs 31 and 32 for the detailed findings that support the Board's position that by approving Revised Tentative Order No. R9-2013-0007, it would be limiting its authority to restrict future discharges associated with the SR 241 Project.	No changes to the Tentative Resolution have been made here.
3.	To eliminate any doubt that the TCA agrees that the Regional Board has authority to restrict any discharges associated with future extensions of State Route 241, on January 20, 2015, TCA delivered an executed agreement to Regional Board staff that stated the following (Stipulation to Full Authority of Regional Water Quality Control Board Regarding Extension of State Route 241	The San Diego Water Board may exercise all authorities provided by the Porter Cologne Water Quality Control Act. Among the Board's authorities is the issuance of waste discharge requirements and Clean Water Act section 401 certifications to persons discharging waste that could affect the quality of waters of the state. (Water Code sections 13160, 13260, 13263.) The Board is obligated to protect beneficial uses and water quality within the San Diego Region, the exercise of	No changes to the Tentative Resolution have been made here.

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	<p>(January 15, 2015) [Attachment 1] that provides: "The Agency stipulates and agrees that the Regional Board has full authority pursuant to section 401 of the Federal Water Pollution Control Act, and California law (including but not limited to California Water Code section 13263), to prohibit or otherwise restrict future discharges or other impacts to Waters of the State from the construction or operation of State Route 241 south of Cow Camp Road."</p> <p>On February 3, 2015, TCA's counsel discussed the Stipulation with Regional Board counsel Nathan Jacobsen. Mr. Jacobsen informed TCA counsel the Stipulation was not required because the Regional Board already had the full authority to restrict discharges to waters of the state of future extensions of SR 241. The statement by Regional Board counsel constitutes an acknowledgement of the obvious - the Regional Board is unable to support the finding required by the State Board Order.</p>	<p>such authority is not predicated on entering into a stipulated agreement with TCA.</p>	
4.	<p>In addition to the submitted stipulation, and subsequent to the June 2013 denial of our WDR, the Regional Board authorized the grading of Planning Area (PA) 2 of Rancho Mission Viejo's "Ranch Plan." As permitted, the development of PA 2 included mass grading (Attachment 2) that eliminated certain waters of the state. These same waters were included in the Tesoro Extension's WDR application and calculated as an impact. As a result of the grading that was authorized by the Regional Board, the already minimal impacts of the Tesoro Extension (0.40 acre) on waters of the state have been reduced to 0.29 acre. The Regional Board's approval of the mass grading, and the resulting reduction in the water quality impacts associated with the Tesoro Extension, is significant new evidence that should be considered by the Regional Board. TCA staff discussed this reduced impact during a</p>	<p>The San Diego Water Board closed the evidentiary hearing for Revised Tentative Order R9-2013-0007 at the close of public testimony on June 19, 2013. State Water Board Order 2014-0154 does not require the San Diego Water Board to conduct further evidentiary hearings regarding the issuance or denial of waste discharge requirements for the Tesoro Extension. The Tentative Resolution is based entirely on evidence that was in the record at the close of the public hearing on June 19, 2013. The Notice of Availability for Tentative Resolution No. R9-2015-0022 issued on February 4, 2015 states, "Comments must be limited to the findings of the Tentative Resolution, additional evidence related to Order No. R9-2013-0007 will not be accepted." The San Diego Water Board, consistent with past practice, will allow comment from interested parties on the findings of the Tentative Resolution.</p>	<p>No changes to the Tentative Resolution have been made here.</p>

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	<p>meeting with Regional Board staff on November 13, 2014, and requested an opportunity to present this important new evidence to the Regional Board. The Regional Board staff, however, advised the TCA that the Regional Board would not allow the introduction of any new evidence as part of the Board's consideration of the Tentative Resolution. It is unclear to TCA why the Regional Board would not want to consider this important new evidence prior to making a decision on the Tentative Resolution. While the Regional Board has prohibited the TCA from introducing any new evidence, it has invited the public to submit comments without restriction. This highly irregular and unfair procedure raises fundamental questions of due process.</p>		
5.	<p>In addition to the impact this Tentative Resolution would have on the Tesoro Extension, it would also set a dangerous precedent for infrastructure projects throughout the state.</p> <p>The State Board's Order clearly states that in "most cases" regional boards may issue WDRs for the current project and "defer issuance of WDRs for future discharges ...until the point in time that those discharges are actually proposed." (State Board Order, p. 10.)</p> <p>The State Board provided assurances to the transportation agencies that regional boards may not deny a WDR for a proposed phase because of potential impacts of subsequent phases, unless the regional board adopted findings that it would not have the full authority to restrict water quality impacts of future phases. By failing to adopt the express finding required by the State Board Order, the Tentative Resolution ignores the assurances made to the transportation agencies by the State Board and creates the potential for enormous adverse impacts</p>	<p>State Water Board Order 2014-0154 is a precedential order. The Order provides that regional water boards may issue waste discharge requirements (WDRs) for the current phase of a phased project. The Order also states that in some instances a regional water board may be justified in declining to issue WDRs for the current phase of such a project. The San Diego Water Board's decision to deny Revised Tentative Order No. R9-2013-0007 is based on the evidence before the Board in this matter. It is not a decision that will have any bearing on infrastructure projects throughout the state or the California High Speed Rail project.</p>	<p>No changes to the Tentative Resolution have been made here.</p>

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	<p>on transportation projects throughout the state that are being permitted in phases including, but not limited to, the California High Speed Rail project and the many project identified in the letters to the State Board from the transportation agencies.</p>		
Save San Onofre Coalition			
6.	<p>The Tentative Resolution fully complies with the State Board's remand order. It confirms that the Board's decision was made pursuant to its authority under the Porter Cologne Act, and identifies substantial evidence in the record that Tesoro is simply the first step towards completion of the larger and more-damaging Foothill South project, and that TCA's failure to provide information on the impacts of that project restricted the Board's ability to exercise its full authority to condition the project to avoid or minimize impacts.</p> <p>Because it is clear that Tesoro exists only to facilitate completion of the entire Foothill South project, the Board properly denied TCA's application for WDRs. Approval of WDRs for a partial project would significantly impair the Board's options for addressing the future water quality impacts of the full project and prejudice the Board's ability to meet its obligations for protecting waters of the State. The Tesoro Extension requires a \$200 million commitment to building the 241 Completion Project, which, once made, would effectively foreclose non-toll road alternatives that could avoid or substantially lessen impacts to waters, such as I-5 widening, arterial improvements, and transit.</p> <p>Courts have long recognized that this kind of piecemealing prejudices agency decision making. Once</p>	Comments Noted.	No changes to the Tentative Resolution have been made here.

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	<p>agencies have approved the first piece of a project, it is extremely difficult to stop the financial and "'bureaucratic steam roller' once it is launched." <i>Colorado Wild, Inc. v. U.S. Forest Service</i> (D. Colo.'2007) 523 F.Supp.2d 1213, 1221. The original approval will ultimately "skew the analysis and decision-making" of the agencies responsible for overseeing the project. <i>Id.</i>; see also <i>Maryland Conservation Council, Inc. v. Gilchrist</i> (4th Cir. 1986) 808 F.2d 1039, 1042 (4thCir. 1986) (observing that permitting agency decision-makers "would inevitably be influenced" if a project were allowed to proceed in segments); <i>San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus</i> (1994) Cal.App.4th 713, 742 (full consideration of alternatives will be prejudiced as well).</p> <p>The Board's ability to retain and exercise the full range of its authority to protect waters-without limiting or prejudicing its ability to consider the full range of alternatives to the Foothill-South-requires that it be able to evaluate the entire project before the TCA irrevocably commits to the construction of a portion of that project. The Coalition therefore requests that the Board adopt the Tentative Resolution.</p>		
Buena Vista Audubon Society			
7.	<p>This letter is being written on behalf of the 2,000-plus members of the Buena Vista Audubon Society in Oceanside, CA. We have commented previously against proposals for the Foothill Tollroad based on what we believe would be its extensive environmental impact. We ask you to adopt the staff-recommended findings for denial of the Tesoro Extension. These findings properly reflect the law and the necessity to understand the totality of the Foothill Tollroad's impacts to water quality prior to allowing construction to begin.</p>	Comment Noted.	No changes to the Tentative Resolution have been made here.

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California Native Plant Society, Orange County Chapter			
8.	<p>The Orange County Chapter of the California Native Plant Society has long been concerned that the San Mateo Creek watershed continue to be Southern California's only remaining undammed, unarmored watershed south of Ventura. It still supports the full range of riparian species and habitats that have largely been extirpated in most of southern California's coastal plain. The natural riparian habitat in turn protects the watershed's water quality. We have made these points throughout all the public processes of the long campaign to defeat the Foothill Tollroad.</p> <p>The proposed Tesoro Extension could too easily lead to further extension of the Tollroad down Cristianitos and San Mateo Creeks to I-5. Thus the project threatens the integrity of the San Mateo Creek watershed. We ask you to adopt the staff-recommended findings for denial of the project. These findings properly reflect the law and the necessity to understand the totality of the Foothill Tollroad's impacts to water quality--and hence natural habitat--prior to allowing construction to begin.</p>	Comment Noted.	No changes to the Tentative Resolution have been made here.
Malibu Surfing Association			
9.	<p>We write today to ask that you to adopt the staff-recommended findings for denial of the Tesoro Extension (SR241) Project, Orange County. These findings properly reflect the law and the necessity to understand the totality of the Foothill Tollroad's impacts to water quality prior to allowing construction to begin. The Foothill Tollroad would run through some of Southern California's most intact habitat lands in Orange and San Diego Counties and literally bisect San Onofre State Beach. The California Coastal Commission and the U.S. Department Commerce turned it down the TCA's 241 project proposals. Even so, TCA has developed a strategy of first constructing the</p>	Comment Noted.	No changes to the Tentative Resolution have been made here.

No.	Comment	Response	Action Taken
	<p>northern segment called the Tesoro Extension and thus creating pressure for completion. We were part of a coalition who spoke out against their original proposal -- we object with equal voice to this new proposal. We ask the Regional Board to adopt the staff findings and finalize this decision at your hearing on March 16, 2015.</p>		
Saddleback Canyons Conservancy			
10.	<p>We have long opposed the extension of the Foothill Tollroad because of its significant environmental impacts and desecration of San Onofre State Park. We ask you to adopt the staff-recommended findings for denial of the Tesoro Extension. These findings properly reflect the law and the necessity to understand the totality of the Foothill SR 241 toll road's impacts to water quality.</p> <p>We respectfully ask the Regional Board to finalize this decision at your hearing on March 16, 2015. Thank you for your consideration in this matter.</p>	Comment Noted.	No changes to the Tentative Resolution have been made here.
South Coast Chapter of Trout Unlimited			
11.	<p>We are concerned the TCA's application does not meet the standards as required by the Southern Orange County Hydromodification Management Plan (HMP). TCA is overlooking impacts to wetlands, the San Juan Creek, and to the surrounding watershed that could subsequently impact coastal resources and ecology. The first section of the road is not only environmentally damaging, but this segment of the road would give the TCA momentum to complete the full road. Their full road would absolutely devastate fragile watersheds, greatly impact San Mateo State Park, San Onofre State Beach and the beloved recreation coastal zone for more than 2.4 million visitors/surfers each year. As if the impacts to the environment were not bad enough, this first 5-mile segment would be a literal "road to nowhere," ending at a dirt road and threatening to create unnecessary traffic</p>	Comment Noted.	No changes to the Tentative Resolution have been made here.

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	nightmares for thousands of Orange County residents. For these reasons, we urge the Regional Board to “stay the course” and again DENY waste discharge requirements for the so-called Tesoro Extension project.		
Wild Heritage Planners			
12.	We ask you to adopt the staff-recommended findings for denial of the Tesoro Extension. These findings properly reflect the law and the necessity to understand the totality of the Foothill SR 241 toll road’s impacts to water quality prior to allowing construction to begin.	Comment Noted.	No changes to the Tentative Resolution have been made here.
2,759 Private Citizen Format Letter Comments in Support of the Tentative Resolution			
13.	As a concerned citizen, I ask you to adopt the staff-recommended findings for denial of the Tesoro Extension.	Comments Noted.	No changes to the Tentative Resolution have been made here.
3 Private Citizen Format Letter Comments Against the Tentative Resolution			
14.	Join me and support TCA's WDR application.	Comments Noted.	No changes to the Tentative Resolution have been made here.

San Diego Water Board Response to Comments
Tentative Order No. R9-2015-0009, NPDES No. CA0109142
Waste Discharge Requirements for Continental Maritime of San Diego

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