

Measure M 2 Environmental Cleanup Allocation Committee

**March 14, 2013
Meeting Minutes**

Committee Members Present:

Chair Mary Anne Skorpanich, O. C. Watersheds
Vice Chair Garry Brown, Orange County Coastkeeper
John Bahorski, City of Cypress
Scott Carroll, Costa Mesa Sanitary District
Hector B. Salas, Caltrans
Dick Wilson, City of Anaheim
Marwan Youssef, City of Westminster

Committee Members Absent:

Mark Adelson, Santa Ana Regional Water Quality Control Board
Gene Estrada, City of Orange
Chad Loflen, San Diego Water Quality Control Board
Tom Rosales, General Manager, South Orange County Wastewater Authority
Jean-Daniel Saphores, UCI
Sat Tamaribuchi, Environmental Consultant
Dennis Wilberg, City of Mission Viejo

Orange County Transportation Authority Staff Present:

Alison Army, Senior Transportation Analyst
Marissa Espino, Senior Strategic Communications Officer
Janice Kadlec, Public Reporter
Charlie Larwood, Manager of Planning and Analysis
Roger Lopez, Senior Analyst, Programming
Dan Phu, Project Development Strategic Planning Section Manager

Guest(s)

Ryan Baron, Orange County Legal Counsel,
Colin Kelly, Legal Counsel, Orange County Coastkeeper
Ken Susilo, Geosyntec

1. Welcome

Chair Mary Anne Skorpanich began the Environmental Cleanup Allocation Committee (ECAC) meeting at 10:10 a.m. and welcomed everyone.

2. Approval of the February 14, 2013 Meeting Minutes

Chair Mary Anne Skorpanich asked if there were any additions or corrections to the February 14, 2013 ECAC meeting minutes. A motion was made by Garry Brown,

seconded by Marwan Youssef, and carried unanimously to approve the February 14, 2013 ECAC meeting minutes as presented.

3. Tier 2 Update

Dan Phu reported the OCTA Board (the Board) approved the Tier 2 projects in February 2013. He gave a presentation based on comments from the Board Subcommittee and the fiscal year (FY) 2012 – 2013 Tier 2 Call for Projects Lessons Learned.

Lessons Learned

Chair Mary Anne Skorpanich asked if the applicants were filling out paper applications or doing it online. Dan Phu said they are filling out a paper form but a Word document can be provided upon request. Chair Skorpanich suggested the Right-Of-Way (ROW), question can be done in a “check box” format – Have ROW, Don't have ROW, or Have ROW but not yet. Charlie Larwood clarified that if the city had previously purchased ROW specifically for the Water Quality Project then the reduction in matching funds would apply.

Chair Mary Anne Skorpanich said she would hope if the applicant previously bought ROW so that they could do a Tier 2 type project in the future they would get credit for it. Dan Phu said they will work on clarifying this because it was vague before. It is really subject to interpretation by OCTA or the applicant. Charlie Larwood asked how the Comprehensive Transportation Funding Programs (CTFP) dealt with this issue – is the idea that they owned ROW a readiness issue? Roger Lopez said for the CTFP ROW is not a match reduction; it is a readiness point. The CTFP gives points if they have ROW in possession.

Garry Brown said in comment#5 when replacing the wording “*matching funds are 50% of the total project cost*” with “*For the Tier 2 Grant Program, a minimum local match of fifty (50) percent of the total eligible project phase cost is required,*” he questioned using the word phase. Charlie Larwood suggested the elimination of the word “phase” because the words “eligible project” would be added to meet the definition. Dan Phu said they would look into this change and see if it is consistent with the Streets and Roads side of the CTFP.

Dick Wilson said the document in general needed to have more definitions. An argument could be made for the word *phase*; only a portion of some projects have to do with Water Quality. Dan Phu said there is a need to not only make the document crystal clear to us but it needs to be crystal clear to the applicants.

Dan Phu said there needed to be a better definition on what constituted “Partnership” and suggested revising the application so the applicants can state “in what capacity the joint applicant/third party will be contributing to the project.” Garry Brown said he agreed with this. He saw three different ways applicants considered “Partners”:

1) “partners” were actually contributing monetarily to the project, 2) “partners” were anyone downstream, or 3) “partners” were anyone who wrote a support letter. Therefore, what constitutes a partner?

The ECAC discussed the definition of eligible and ineligible expenditures. Chair Mary Anne Skorpanich said eligible expenditures must contribute to Water Quality improvements. Dan Phu suggested they include a definition of what constitutes eligible expenditures.

John Bahorski suggested, to be consistent, the last bullet point under comment #8 should be changed to:

- Planning activities beyond 10 percent of the grant ~~amount~~ request

Charlie Larwood suggested including a Glossary. Garry Brown said it looks like this is where the conversation is going. The subcommittee agreed a glossary is needed.

The ECAC discussed different ways of changing the 70 point minimum to receive grant funds and how to rank projects.

Charlie Larwood said it was discussed at a previous ECAC meeting that once they have seen a few rounds of projects there may be some water quality threshold that can be measured and a way of rating the projects.

Garry Brown said he believed they could develop a narrative standard. The problem with the 70 percent minimum was it was just an arbitrary number selected. When the ECAC recommended projects below the 70 percent level, the Board Subcommittee questioned the quality of the projects and assumed they were substandard projects because they didn't reach the 70 percent threshold.

John Bahorski said this is an educational issue and he would not change the program, just let the process work. It is a long term thing and they will get there eventually.

Dan Phu reported in # 12 of the Lessons Learned comments, staff recommends coming up with more explicit language of what constitutes “supplement” or “supplant.” Garry Brown suggested talking with OCTA Legal Counsel before they do this because the language in the Measure M Ordinance is very specific.

Dan Phu discussed # 13 dealing with shovel-ready projects and agreements with third parties on the Lessons Learned comments . The suggestion is to possibly change the language under **Eligible Applicants** as follows: *“Recommend providing incentives for applicants who have agreements secured.”* Dan Phu said he recommended tabling this discussion for another meeting. Garry Brown asked if it was necessary to incentivize. By the time they submit their Grant Application, there

should be some indication or letter of intent from the partner agency. It should be a requirement.

Chair Mary Anne Skorpanich said they still need to clarify when this documentation is needed – when you apply for the grant, before you start construction, etc. Garry Brown suggested they would need some kind of firm agreement before award – MOU, Letter of Agreement, etc.

Chair Mary Anne Skorpanich asked if OCTA had received any feedback from the applicants. This may be something the ECAC should think about doing. Dan Phu said they did get some feedback and some of the changes talked about in his presentation were the result of applicant feedback. Chair Skorpanich asked if they could do a mailer to the applicants asking for their opinions. Marissa Espino said yes, OCTA can do an informal survey.

Dick Wilson said the ECAC members who were not on the evaluation committee never got to see how the applicants scored in every category. He would like to see these scores. Chair Mary Anne Skorpanich asked if they could see it online. Dan Phu said yes, but he could also get a copy of the scoring breakdown to all the ECAC members. John Bahorski said he would like to see the Special District applications also.

Chair Mary Anne Skorpanich asked if the ECAC should look at the 50-acre minimum for projects; did the applications come in right at 50 acres. Dan Phu said the applications were all over the map. Garry Brown suggested keeping the 50-acre minimum as is for right now.

Chair Mary Anne Skorpanich suggested calling all the cities that drain to one area co-applicants. Dan Phu said as long as the cities are willing.

Garry Brown asked where they were with the Geosyntec contract. Dan Phu said the Geosyntec contract has run out for the Planning Study and the support for the first round of funding on Tier 2. They are in the middle of recruitment for another consultant. Within the next 60-days they should have someone on board to support the entire program (Tier 1 and Tier 2).

Chair Mary Anne Skorpanich said as part of the consultant contract there was supposed to be a useable tool to help applicants with their applications – where are we with this. Dan Phu said as part of their last order of business with OCTA Geosyntec will put their SBPAT, the manual, the tools on the SBPAT website. Once the new consultant is on board to support the program they will share this information with the cities.

4. Tier 1 Call for Projects (CFP)

Dan Phu announced that OCTA gave approval for the Tier 1 Call for Projects on March 11, 2013. Marissa Espino said with the Board approval OCTA will kick off the Call for Projects on Monday, March 18, 2013.

Chair Mary Anne Skorpanich asked if the cities who have not applied have been targeted. Dan Phu said there are five cities who have not received funding, three of the five have never applied, and of the two remaining, Rancho Santa Margarita dropped out and La Habra, did not get funded. The outreach staff has met with the cities of Los Alamitos, La Habra, Rancho Santa Margarita and Placentia. The meeting with the City of Stanton is being set up.

5. Public Comments

There were no public comments.

6. Committee Member Reports

Chair Mary Anne Skorpanich introduced two speakers Ryan Baron, Orange County Legal Counsel and Colin Kelly, Orange County CoastKeeper Legal Counsel who gave presentations on the recent court rulings for NRBC (now Santa Monica Bay Keeper) versus on the Los Angeles County Flood Control District (LACFCD). This case asked whether the County of Los Angeles could be liable for accidents of water quality standards.

Chair Mary Anne Skorpanich summarized the court case – if the receiving water (the protected water body – river, bay, ocean, etc.) is being monitored and it exceeds water quality standards, then do you go after the municipal permittees to let them know they violated their permit? Or do you need further evidence? Or do you have to measure what is in the end of your pipe to establish you violated your permit. Ryan Baron said there are some groups that are trying to get better enforcement by being able to identify hot spots of activity. They then work their way up to find out if there is a city that is not pulling its weight and says they are doing some responsible things but in fact are not doing the same as the surrounding cities and investing the same amount of money. The surrounding cities should not be punished.

John Bahorski said this doesn't just pit the cities against the counties. Colin Kelly said he was right the County sued all the cities. This was more of a strategic move than to blame. It was a move to get more cities into the action. John Bahorski said doesn't this spoil the concept of a regional Board whose purpose is to have the regional permits rather than deal with all the individuals? Chair Mary Anne Skorpanich said this does not change the responsibility it just makes for less permit writing.

John Bahorski asked if the cities would be better off to monitor this in order to protect themselves from dead money. If it ever came up, they could say they monitored in and out take, and this would be cheaper than litigation. Everyone agreed.

Scott Carroll asked if the new permit and litigation have anything to do with the assessment LACFCD tried to pass on to the public and then they killed it. Ryan Baron said yes. Chair Mary Anne Skorpanich said this had been in the works for 10 years or more and then never got off the ground until they struck a deal with the other permittees who split the money up.

John Bahorski said when he read a newspaper article on this litigation, the thing that troubled him was the “unimproved portion” and the “improved portion”. Was this not a big issue? Colin Kelly said he would answer this in his slide presentation. Essentially they had an engineered channel turned into a non-engineered channel. The monitoring stations were mid-stream and were monitoring within the MS4.

John Bahorski asked who would make the determination on how to measure liability. Ryan Baron said some parties may be proactive and determine this before hand or it will be done within the court system. John Bahorski asked how the source of pollutants as exceedances would be determined. Ryan Baron said once they get to this point it will be a battle of experts.

Dan Phu said from a flood control standpoint, there was a trend of lining the channels with concrete over the years. Is there a rethinking of this philosophy? This would make a huge difference in the amount of pollutants at the outfall. Ryan Baron said it is in the San Diego permit to restore channels back to their natural state; there is a large movement to do this.

Chair Mary Anne Skorpanich said what it comes down to is not so much whether or not it's natural but if it is in the basin plan listed as a receiving water, then those are the protected water bodies and discharging of pollutants in question. The Los Angeles River is a classic example – it's a river and a protected water body whether it is protected or not.

Charlie Larwood said this seems like a discussion of where the liability lies rather than a distribution or enforcement of Best Management Practices. Colin Kelly said this might be the result of some of the questions he has received but underlying liability has not been determined yet at any court level. If the argument is that the environmental community is making is a Regional Board is going to adopt a permit to comply with the Clean Water Act, then there has to be a mechanism in place for determining that the permit is in compliance. In this instance the County recommended in 2001 the monitoring stations are that mechanism. If the County acknowledges these monitoring stations determine compliance with the permit and they show that there are exceedances then there is implied liability. This is a liability

found in private contract law. If this permit is found not to be enforceable against the County, then it does not comply with the Clean Water Act and is an illegal contract.

Chair Mary Anne Skorpanich said how to divvy up the liability is part "B" and part "A" is yet to be determined and deals with what are permittees generally liable for.

Colin Kelly and Ryan Baron thanked the committee for inviting them and advised the committee to keep an eye open for the next few months. Hopefully, by the end of 2013, there will a decision made on the case.

7. Next Meeting – April 11, 2013

The next regular scheduled meeting of the ECAC will be April 11, 2013 in the OCTA offices.

8. Adjournment

The meeting adjourned at 12:00 p.m.