

1 JILL A. TRACY (State Bar No. 182136)
2 SAN DIEGO GAS & ELECTRIC COMPANY
3 OFFICE OF THE GENERAL COUNSEL
4 101 Ash Street, 12th Floor
5 San Diego, CA 92101
6 Telephone: (619) 699-5112
7 Facsimile: (619) 696-4488
8 jtracy@semprautilities.com

6 WARD L. BENSHOOF (State Bar No. 054987)
7 PETER A. NYQUIST (State Bar No. 180953)
8 MARISA E. BLACKSHIRE (State Bar No. 250156)
9 ALSTON & BIRD LLP
10 333 South Hope Street, Sixteenth Floor
11 Los Angeles, California 90071
12 Telephone: (213) 576-1000
13 Facsimile: (213) 576-1100
14 ward.benshoof@alston.com
15 pete.nyquist@alston.com

16 Attorneys for Designated Party
17 SAN DIEGO GAS & ELECTRIC COMPANY

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

20 IN THE MATTER OF:
21 TENTATIVE CLEANUP AND
22 ABATEMENT ORDER NO. R9-2012-0024

**SAN DIEGO GAS & ELECTRIC
COMPANY'S COMMENTS AND
OBJECTIONS TO ADOPTION OF THE
HEARING PANEL'S PROPOSED ORDER**

23 On behalf of San Diego Gas & Electric Company ("SDG&E"), we respectfully submit the
24 following comments in connection with the San Diego Regional Water Quality Control Board
25 ("Regional Board") Hearing Panel's proposed Tentative Cleanup and Abatement Order No. R9-
26 2012-0024 ("TCAO") and its accompanying Draft Technical Report ("DTR") (collectively,
27 "Proposed Order"). For the reasons set forth in the Administrative Record, including those
28 presented by SDG&E to the Hearing Panel on November 9, 14, 15 and 16, 2011, and those

1 summarized below, SDG&E once again urges the full Regional Board to overrule the Cleanup
2 Team's findings in the Proposed Order designating SDG&E as a "discharger" and, instead, grant
3 SDG&E's Request for Rescindment.

4 **I. SDG&E IS ENTITLED TO A RESPONSE TO ITS REQUEST FOR RESCINDMENT**
5 **INCLUDING THE HEARING PANEL'S FINDINGS OF FACT THEREON**

6 Over the course of these proceedings, SDG&E invested substantial efforts in preparing a
7 comprehensive presentation for the Hearing Panel detailing both the percipient and expert evidence
8 in the Administrative Record establishing that no basis whatsoever existed to support the Cleanup
9 Team's identification of SDG&E as a "discharger" to the Shipyard Site.

10 This evidentiary showing included SDG&E's 33 page Request for Rescindment, filed on
11 May 26, 2011 – citing to lengthy deposition testimony taken of Cleanup Team members, as well as
12 numerous documents and data from the Administrative Record – all of which established that *none*
13 of the DTR's allegations against SDG&E were supported by substantial evidence. (Rescindment
14 Request, at pp. 7 – 33). Further evidence filed by SDG&E accompanying and supporting its
15 Request for Rescindment included the Environ Technical Report and SDG&E's supplement to the
16 Administrative Record, as well as the expert testimony presented by Dr. Jason Conder before the
17 Hearing Panel in its November, 2011 hearings.

18 Notwithstanding the several days of hearings in November, SDG&E still not only has
19 received no response from the Hearing Panel to its Request for Rescindment, the Hearing Panel has
20 made no findings whatsoever on the evidence presented by SDG&E substantiating that the DTR's
21 allegations were not based upon reasonable, credible or substantial evidence.

22 BAE Systems, Inc. ("BAE") and the Cleanup Team, relying on BAE's filing, both sought to
23 argue against SDG&E's Request for Rescindment, and yet, in our judgment, utterly failed to rebut
24 SDG&E's evidentiary showing, falling back instead on attorney argument alone.

25 The whole purpose of the Hearing Panel process, in particular, the due process and
26 evidentiary requirements thereof, was to establish a neutral administrative forum in which to have
27 SDG&E's Request (and any concerns of others) heard, evaluated, and ruled upon. There was a
28 hearing, to be sure, but at this date – months afterwards -- SDG&E has no idea to what extent, if

1 any, the Hearing Panel evaluated the detailed evidence it spent so much effort in gathering and
2 presenting. That is why Findings of Fact are prepared – to reflect the fact finder’s evidentiary
3 evaluations and conclusions. Such Findings, in turn, are essential to later review – whether by the
4 State Board or the California courts. Without Findings reflecting the Hearing Panel’s deliberations,
5 there is no basis to conclude that any independent review at all occurred.

6 Similarly, without SDG&E’s Request for Rescindment being formally and meaningfully
7 ruled upon, there is no evidence that it was even considered.

8 This is a serious due process concern, implicating the very credibility of the Hearing Panel
9 process and whether it in fact provided the neutral independent review that it was constituted to
10 provide.

11 **II. THE HEARING PANEL’S PROPOSED ORDER PERPUTATES THE MULTIPLE**
12 **LEGAL AND FACTUAL ERRORS INTO WHICH THE SHIPYARDS LEAD THE**
13 **CLEANUP TEAM**

14 Other serious error pervades the Proposed Order. In particular, ample, substantial evidence
15 exists in the administrative record, including the expert testimony of Dr. Jason Conder presented to
16 the Hearing Panel by SDG&E, establishing that :

- 17 1. The evidence presented by the Cleanup Team purporting to support SDG&E’s
18 discharger status was fundamentally in error; and
- 19 2. The record was wholly devoid of *any* evidence that the releases wrongfully
20 attributed to SDG&E were of sufficient mass and concentration so as to be a
21 substantial factor in causing a condition of pollution or nuisance in the
22 Shipyard Site.¹

23
24 ¹ SDG&E’s evidence also identified the parties which were undoubtedly the sole cause of impacts to the
25 Shipyard Site – decades of contamination caused by the shipyards. The record also clearly demonstrates that
26 BAE Systems, supported by the City of San Diego (“City”), has for years waged a concerted campaign
27 seeking to deflect some portion of its responsibility to SDG&E. Unfortunately, the evidence also shows that
28 the Cleanup Team, subjected to this unrelenting pressure, acquiesced in BAE’s demand to name SDG&E as a
“discharger.” SDG&E seeks rescindment of the Cleanup Team’s actions not only because it has a legal right
to be protected against such arbitrary action, but also because we believe the fundamental credibility of the
Regional Board’s processes and authority demands it.

1 As the evidence presented by SDG&E to the Hearing Panel established, the Cleanup Team’s
2 flawed advocacy:

3 1. Failed to engage in any meaningful evaluation of the extensive exculpatory evidence
4 submitted by SDG&E;

5 2. Relied instead upon biased, unsubstantiated, and speculative allegations which fail to meet
6 the basic test of “substantial” evidence; and

7 3. Failed to produce *any* evidence that the alleged SDG&E discharges were significant enough
8 to constitute a substantial factor in causing a condition of pollution or nuisance at the Shipyard Site.

9 The Proposed Order unfortunately continues the Cleanup Team’s original errors. It is not
10 only ungrounded in the substantial evidence required to support continuation of SDG&E’s
11 discharger status, it is fundamentally at odds with California law on the basic standard of causation
12 required under Water Code section 13304 by wrongfully assuming no causation is required at all.
13 We therefore ask the Regional Board to sustain SDG&E’s Objections and reverse SDG&E’s
14 designation as a “Discharger” in the Proposed Order.

15 **III. THE PROPOSED ORDER FAILS TO ADDRESS THE CLEANUP TEAM’S CLEAR**
16 **FACTUAL ERRORS**

17 Since the Cleanup Team long ago conceded that any CAO has to be supported by
18 “substantial evidence,”² the Hearing Panel’s decision at page 1-6 of the DTR to strike “substantial
19 evidence” as a requirement to name responsible parties is plainly erroneous.

20 Equally serious is the Hearing Panel’s arbitrary reliance upon Cleanup Team’s
21 misrepresentation of evidence and failure to correct the numerous distortions of fact appearing in
22 Section 9 of the DTR – the section containing the allegations against SDG&E. These include:
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26

27 ² See, e.g., Cleanup Team’s “Response to Comments Report,” August 23, 2011, at p. 1-24 (Water
28 Board fails to proceed in the manner required by law when the findings of a CAO are not supported “with
substantial evidence”) (citations omitted).

- 1 1. The completely discredited claim in Section 9.9 that chemicals of concern
2 detected in sediment samples in Catch Basin 1 (upgradient from SDG&E
3 substation facilities) were attributable to storm water runoff from “the Silver
4 Gate Power Plant leasehold;”
- 5 2. The failure in Section 9.8 to acknowledge the Silver Gate Power Plant’s
6 comprehensive containment facility or to explain how, in view of that
7 comprehensive containment, any release from this area of the facility could
8 have migrated to, let alone adversely impacted, the Bay via storm water
9 runoff;
- 10 3. The meritless technical argument in Section 9.7 that elevated CTR values in
11 water allow *any* scientifically-sound conclusion to be drawn regarding
12 impacts on marine life in sediments; and
- 13 4. The inexplicable failure in Section 9.10 to mention BAE’s cover up of its own
14 extensive operations on the Tidelands Lease Area, or the Cleanup Team’s
15 failure to admonish BAE for concealing this evidence, or to adequately
16 consider those operations as the obvious source of soil impacts detected on
17 that property.

18 SDG&E’s Request for Rescindment, and supporting evidence, addressed each of these
19 serious flaws in the Cleanup Team’s allegations. We would ask the Board to once again refer to
20 that comprehensive showing by SDG&E of the Cleanup Team’s failure to address the fundamental
21 flaws in the “evidence” it relies upon. By way of example of the error which continues to undermine
22 the validity of the Proposed Order, we highlight the following:

23 **a. Tidewater Ponds and Cooling Water Tunnels**

24 The Cleanup Team alleges that oil-water separators and associated evaporation ponds located
25 on the SDG&E tidelands leasehold discharged to San Diego Bay (DTR, Section 9.3). It has been
26 established, however, that such previous allegations were in error. Although the Cleanup Team has
27 failed to address this, there is in fact no evidence in the record to demonstrate discharge from the
28 ponds.

1 Extensive sampling of the tidelands leasehold (over 312 soil, groundwater, and cooling water
2 tunnel solid samples collected at the direction of San Diego Unified Port District (SDUPD))
3 demonstrated that the concentrations of COCs found on the tidelands and cooling water tunnels are
4 lower than concentrations found in San Diego Bay sediment (ENVIRON, 2011a; Ninyo and Moore,
5 2011), precluding them as source areas or conduits for transport of COCs in significant amounts.
6 Chemical forensics analysis of tidelands pond and cooling water tunnel samples indicates that PCBs
7 associated with these features are different from San Diego Bay sediments. This was illustrated for
8 the Hearing Panel through SDG&E's Demonstrative Exhibits 13a, 13b and 14, presented during the
9 expert testimony of Dr. Conder.

10 Additionally, lease records and historical photos depict intensive industrial use of SDG&E
11 tidelands by the shipyards since 1958 to the present (ENVIRON, 2011a, SDG&E Demonstrative
12 Exhibit 12). Chemicals detected in tidelands soils may be attributable to shipyard use. The Cleanup
13 Team acknowledged in deposition testimony referenced in SDG&E's Request for Rescindment that
14 whether this is so has simply not been investigated. (*See, e.g.*, Request for Rescindment, filed on
15 May 26, 2011 at 25-26).

16 **b. Alleged Stormwater Runoff from Silvergate Power House and Substation**

17 The Cleanup Team alleges that PCBs found in stormwater Catch Basin-1 (CB-1), reports of
18 transformer leaks, and soil PCB data at the Silvergate substation are evidence of SDG&E PCB
19 releases to stormwater sufficient to result in a condition of pollution or nuisance in Site sediment
20 (DTR, Section 9.9). The evidence presented to the Hearing Panel by SDG&E showed that this
21 allegation is not supported by the data, but rather is based upon a basic misunderstanding of local
22 stormwater infrastructure perpetuated by misrepresentations of the City and BAE.

23 Simply put, as reflected on Demonstrative Exhibit 15 presented to the Hearing Panel during
24 the expert testimony of Dr. Conder, CB-1 is *not* within the stormwater runoff pathway between the
25 substation and the point at which it would enter San Diego Bay via the SW4 stormwater outfall.
26 Stormwater flowing through CB-1 either originates from the roof of the Silvergate power house (via
27 a 6-inch drainage pipe) or via an unknown source area to the west of CB-1 (12-inch drainage pipe).
28 Regardless of the source area, neither the concentrations of PCBs found in CB-1, nor the amount of

1 mass flowing through CB-1 can explain the higher PCB concentrations in sediment at the SW4
2 outfall.

3 Stormwater solids chemistry evidence collected directly downgradient of the substation
4 (within the runoff pathway between the substation and San Diego Bay) does not indicate PCB
5 contribution to condition of pollution or nuisance because concentrations in this material are orders
6 of magnitude lower than those in SW4 area sediment (ENVIRON, 2011b). Data indicate that
7 transformer and substation secondary containment was sufficient to prevent meaningful stormwater
8 runoff and discharges of PCBs to San Diego Bay. This evidence was summarized for the Hearing
9 Panel on SDG&E Demonstrative Exhibits 16a and 16b, presented during Dr. Conder's testimony.

10 The Cleanup Team continues to fail to adequately address the wide spectrum of substantial
11 evidence that indicates shipyard COC releases were of sufficient mass and concentration to represent
12 the sole cause of the condition of pollution or nuisance identified at the Site in the DTR. The close
13 proximity of shipyard sources and evidence of repeated discharges of high volumes and masses of
14 highly-contaminated wastes, soils, and stormwater runoff directly to San Diego Bay indicates that
15 the shipyards, not SDG&E, are solely responsible for the condition of pollution or nuisance at the
16 Site. Shipyard facility maps, aerial photos, inspections, and reports demonstrate dozens of COC
17 source locations directly adjacent to and directly over San Diego Bay (Moser, 1998; Booth, 2004;
18 ENVIRON, 2011b). Over 100 shipyard violations associated with these sources (e.g., SAR050536-
19 SAR050539) have been noted since the 1990s, a time period representing only a brief fraction of the
20 over 100-year shipyard presence at the Site. The mass discharge of just one of the many shipyard
21 waste types – waste sandblast and paint materials – was estimated to be 200 to 300 tons annually for
22 San Diego Bay shipyards (CRWQCB, 1972). Due to the high concentrations of COCs found within
23 this marine paints and sandblast material (Young and Heesen, 1974), this shipyard waste category
24 represents an effective process that contaminated Site sediment.

25 Chemistry data from multiple investigations over the last 15 to 20 years also indicate the
26 shipyards are the sole cause of the condition of pollution or nuisance at the Site. Data reveal the Pier
27 1 marine railways as a key COC source for the northern portion of the Site. Numerous observations
28 of oil-saturated materials, waste debris, and sandblast materials in and near the Pier 1 marine

1 railways (Moser, 1998; Ogden, 1998a; ENVIRON, 2011b) correspond to chemical evidence at this
2 location that reveals the highest concentrations of COCs found at or adjacent to the Site in intertidal
3 sediments, soils, and groundwater (Ogden, 1998a; Anchor, 2005). San Diego Bay sediment
4 investigations in the northern portion of the Site reveal a logical concentration gradient of high
5 concentrations of COCs and consistent oil saturation observations that lead directly to the marine
6 railways (Ogden, 1998b; Ogden, 1998c; Exponent, 2003; ENVIRON, 2011a; etc.). Coupled with
7 documented discharges of large amounts of wastes from sources located directly adjacent to or over
8 San Diego Bay, the environmental chemistry data provides overwhelming evidence that the
9 observed condition of pollution or nuisance can be solely attributed to the shipyards.

10 Additionally, Shipyard physical disturbances of Site sediment have transported and released
11 historical contamination to the sediment surface and have spread contamination laterally across a
12 wide area of the Site. Via numerous shoreline and pier construction projects and the near-constant
13 activity of tugboats and other large vessels, contaminated sediment at the Site has been mixed
14 vertically and laterally (Conder, 2011) and re-released into the environment. This disturbance
15 activity has prevented natural recovery processes from isolating contaminated sediment and thus,
16 naturally attenuating the observed condition of pollution or nuisance at the Site.

17 All of the compelling evidence referred to above – evidence which was never examined by
18 the Cleanup Team -- was summarized and illustrated on SDG&E's Demonstrative Exhibits 1a
19 through 11b presented during the expert testimony of Dr. Conder. It is unrefuted proof of the actual
20 causes of conditions of pollution at the Shipyard Site.

21 In summary, the Administrative Record establishes that none of the Cleanup Team's
22 allegations against SDG&E are supported by evidence sufficient to allow the naming of SDG&E as
23 a responsible party under a CAO. Those portions of the Proposed Order designating SDG&E as a
24 liable party and Discharger must be set aside.

25 **IV. THE PROPOSED ORDER DISREGARDS THE FUNDAMENTAL REQUIREMENT**
26 **OF "CAUSATION" UNDER CALIFORNIA LAW**

27 In California, no person can be held liable for harm unless its acts are a substantial factor in
28 bringing about that harm. This requirement of legal causation is fundamental to establishing liability

1 under Water Code §13304(a). A party may not be named as a “discharger” under section 13304(a)
2 unless the Regional Board demonstrates through substantial evidence that an entity was responsible
3 for a discharge that “creates, or threatens to create, a condition of pollution or nuisance,” “Threaten”
4 is defined to emphasize the need for a showing of “*substantial* probability of harm.” Water Code
5 §13304(e) (emphasis added).

6 Neither the Cleanup Team, nor other Dischargers seeking to deflect attention from their own
7 clear liability, presented any such evidence. Indeed, the *only* evidence presented to the Hearing
8 Panel that addressed causation was from SDG&E’s expert witness, Dr. Jason Conder. Dr. Conder’s
9 testimony unequivocally established that the releases attributed to SDG&E were not significant
10 enough to have either created, or “threatened” to create, a condition of pollution or nuisance in the
11 Bay sediments. This testimony, and its underlying foundational technical analysis, stands unrefuted.

12 Rather, the Cleanup Team and the others proceeded on the fundamentally flawed assumption
13 that Regional Board Orders under §13304(a) of the Water Code are somehow exempt from
14 California’s requirement that no liability can exist without establishing legal causation, and thus
15 requires no showing that the releases allegedly attributed to SDG&E caused, or threatened to cause,
16 a condition of pollution or nuisance in the Bay. Instead, the Cleanup Team in fact has simply
17 dismissed all arguments addressed to causation as merely “allocation arguments,” which it asserts
18 the Regional Board need not address.

19 Rather than following California law, the Cleanup Team has consistently argued that its *only*
20 burden was to show simply the *fact* of a discharge by SDG&E of some chemical of concern that
21 would have “contributed” or “added to” the extensive pollution previously caused by shipyard
22 operations. The Cleanup Team further asserted that all evidence necessary to show whether such
23 releases were significant enough to have been a substantial factor in causing or contributing to the
24 Bay sediment contamination – the mass and concentrations of such alleged discharges – was
25 *irrelevant* to establish Water Code liability. Hence, the record is utterly devoid of any such
26 evidence.

27 The vast scope of the Cleanup Team’s error in converting Water Code liability into
28 something which exists *regardless* of the trivial nature of a party’s discharge was illustrated to the

1 Hearing Panel by the testimony of Ms. Ruth Kolb of the City. Ms. Kolb testified to the fact that
2 copper and other metals are commonly found in storm water runoff to the Bay resulting from the
3 normal operation of automobiles driven along the shore. If Section 13304(a) liability exists, as the
4 Cleanup Team maintains, *regardless* of the mass and concentration of the release alleged, then every
5 motorist that has at any time driven near the Bay could be added to the Board's Proposed Order.
6 Obviously, such a logical extension of the Cleanup Team's argument is untenable and indefensible
7 under California law.

8 Nevertheless, the Hearing Panel's Proposed Order adopts this critical error in its entirety. In
9 doing so, the Hearing Panel unfortunately also adopted the Cleanup Team's mischaracterization of
10 SDG&E's argument. We refer to page 9-4 of the DTR, where, in footnote 65, the Hearing Panel
11 states: "SDG&E asserts that its contribution of pollutants could not, alone, have caused a condition
12 of pollution or nuisance" With all due respect, that is *not* SDG&E's argument. The law
13 recognizes, and we agree, that there are circumstances where a party's acts may combine with those
14 of others to cause harm. Yet – and this is our argument -- it is also true that under California law
15 liability *cannot* attach to such acts *unless* it is first proven that they are significant enough in
16 themselves to constitute a substantial factor in bringing about the harm. Something which is
17 "slight," "trivial" or "negligible" has never been regarded under California law as sufficient to
18 establish legal causation. The Cleanup Team's failure to recognize this fundamental principle has
19 caused the Hearing Panel to recommend adoption of a Proposed Order assigning liability to SDG&E
20 without there being a shred of evidence in the record that *any* of the releases attributed to SDG&E
21 were of such a mass and concentration as to meet the law's basic test of legal causation for liability
22 under the Water Code.

23 **V. CONCLUSION**

24 It is significant that SDG&E was the *only* party to present the Hearing Panel with any
25 causation evidence, unrefuted expert testimony which demonstrated that the releases attributed to
26 SDG&E simply could *not* have been a substantial factor in causing impacts to the Bay sediments. Its
27 Request for Rescindment constituted the only showing of substantial evidence on the issue of
28 SDG&E's alleged "discharger" status, and yet there is no way for SDG&E to determine whether the

1 Hearing Panel ever evaluated the evidence presented, or, if it did, what its conclusions were. Our
2 Request has not been responded to, and it should be.

3 Beyond that, remarkably, SDG&E was the *only* party to investigate the decades of pollution
4 to the Bay which BAE and its shipyard predecessors had caused, and to present the results of that
5 investigation to the Hearing Panel through Dr. Conder's testimony. The Cleanup Team candidly
6 acknowledged that it had never undertaken such an effort, leading one to wonder whether the reason
7 may have been because it would have necessarily had the effect – as Dr. Conder demonstrated -- of
8 confirming the absolutely trivial nature of the allegations made against SDG&E.

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1 In the face of all this, to adopt the Proposed Order without removing all findings against
2 SDG&E as a liable party and Discharger would, respectfully, countenance and affirm highly
3 erroneous findings by the Cleanup Team.

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5 DATED: February 24, 2012 Respectfully submitted,

6 OFFICE OF THE GENERAL COUNSEL

7
8 By: 

Jill A. Tracy

9 Attorneys for Designated Party

10 SAN DIEGO GAS & ELECTRIC COMPANY

