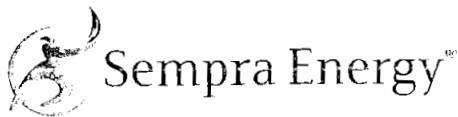


**November 14, 2007**

**Item No. 8a**

**Supporting Document No. 5**

**Comment Letter from Sempra Energy  
(13 November 2007)**



NOVEMBER 13 2007  
10:13 AM

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November 13, 2007

Mr. John Robertus  
Executive Officer  
California Regional Water Quality Control Board –  
San Diego Region  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123

Re: **NOVEMBER 14, 2007 SUPPLEMENTAL AGENDA ITEM 8a  
Tentative Resolution No. R9-2007-0211: Conditional Waiver of Statutory  
Requirements to File a Report of Waste Discharge and for Adoption of Waste  
Discharge Requirements for Discharges to Non-Federal Waters of the State Associated  
with Repair and Protection Activities in Emergency Situations in the San Diego Region**

Dear Mr. Robertus:

I am writing on behalf of San Diego Gas & Electric (SDG&E). SDG&E appreciates and supports the Regional Board's quick efforts to expedite and facilitate response to the recent firestorms and the development of Tentative Resolution R9-2007-0211<sup>1</sup> (Tentative Resolution). The Tentative Resolution is important to facilitate those activities that must be conducted in response to the firestorms (and future emergency situations) that are not already exempted from permitting requirements pursuant to Water Code 13269(c). This letter contains SDG&E's comments on the Tentative Resolution. SDG&E is working with staff to resolve the issues raised in these comments. To the extent the issues are resolved with staff, SDG&E will withdraw its comments prior to the hearing.

**SDG&E respectfully requests that the Regional Board accept and consider these comments in connection with its consideration of the Tentative Resolution.**

The November 14, 2007 Agenda indicates that written comments must be submitted no later than 5:00 p.m. on Wednesday, October 31, 2007 and that written material submitted after 5:00 p.m. on Wednesday, November 7, 2007 will not be provided to the Regional Board members and will not be considered by the Regional Board. The Tentative Resolution, however, is a supplemental agenda item that was not publicly noticed until Friday, November 2, 2007. Because the Tentative Resolution was noticed after October 31<sup>st</sup> and only 3 working days before November 7<sup>th</sup>, SDG&E did not have a sufficient opportunity to review the Tentative Resolution and develop written comments by the stated deadlines. SDG&E believes that, under these circumstances, it would be appropriate for the Regional Board to accept and consider SDG&E's comments.

<sup>1</sup> "Tentative Resolution R9-2007-0211-Conditional Waiver of Statutory Requirements to File a Report of Waste Discharge and for adoption of Waste Discharge Requirements for Discharges to Non-Federal Waters of the State Associated with Repair and Protection Activities in Emergency Situations in the San Diego Region"; San Diego Regional Water Quality Control Board, dated November 14, 2007

**SDG&E respectfully requests that the Regional Board modify the Tentative Resolution prior to adoption so that it does not apply to “discharges resulting from immediate emergency work necessary to protect life or property or immediate emergency repairs to public service facilities necessary to maintain service as a result of a disaster” that are already statutorily exempt from permitting requirements under Water Code section 13269(c).**

Executive Order S-13-07 directs state agencies “to facilitate the mitigation of the effects of the fires and the environmental restoration of the affected areas” and suspends the application of statutes, rules, regulations and requirements to the extent they apply to such emergency response activities. The Executive Order specifically applies to waste discharge requirements. The Tentative Resolution reduces regulatory requirements with respect to a broad range of emergency response activities, and as a general matter, SDG&E believes that the Tentative Resolution is consistent with the Executive Order. To the extent, however, that the Tentative Order purports to apply to, and impose conditions on, the more narrow universe of discharges that are statutorily exempt from permitting requirements under Water Code section 13269(c), the Tentative Order is *increasing regulatory requirements associated with emergency response activity*. Any such increased requirements are inconsistent with, and if adopted, would be suspended by the Executive Order.

California Water Code section 13269(c) provides a statutory exemption from the requirements to file a report of waste discharge and for adoption of waste discharge requirements for discharges that result from certain emergency activities, including

discharges resulting from immediate emergency work necessary to protect life or property or immediate emergency repairs to public service facilities necessary to maintain service as a result of a disaster in a disaster-stricken area in which a state of emergency has been proclaimed by the Governor pursuant to Chapter 7 (commencing with Section 8550) of Division 1 of Title 2 of the Government Code.

This exemption is effective as soon as the discharger notifies the Regional Board of the discharger’s intent to use the exemption. The Water Code does not require the Regional Boards to take any action whatsoever in connection with the exemption. Nor does the Water Code require the Regional Boards to “waive” requirements that, under the express terms of the statute, “do not apply” to such discharges, and, under the present circumstances, it is not appropriate for the Regional Board to do so.<sup>2</sup>

SDG&E also believes that sound public policy instructs that the Regional Board should maintain and facilitate maximum flexibility to act on a case by case basis when it comes to discharges resulting from work that is “necessary to protect life or property or immediate emergency repairs to public service facilities” and not unnecessarily limit or complicate its ability to act quickly and appropriately in the unusual and often extreme emergency situations that fall within the scope of the exemption.

**SDG&E respectfully requests that the Regional Board further modify the Tentative Resolution prior to adoption so that the terms and conditions of the Tentative Resolution mirror the terms and conditions of Department of the Army Corps of Engineers Regional General Permit 63 for Repair and Protection Activities in Emergency Situations (RGP 63).**

The U.S. Army Corps of Engineers, Los Angeles District, issued RGP 63 on October 31, 2003. RGP 63 regulates “discharges of dredged or fill material into Waters of the United States, including wetlands,

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<sup>2</sup>Water Code section 13269 does not enable Regional Boards to “waive” requirements that do not otherwise apply or to regulate discharges that they are not authorized to regulate under Water Code sections 13260, 13263 and 13264.

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and/or work or structures in Navigable Waters of the United States for necessary repair and protection measures associated with an emergency situation." The California State Water Resources Control Board certified RGP 63 on October 14, 2003 pursuant to federal Clean Water Act section 401.

In light of the Supreme Court's decision in Rapanos v. United States, 126 S.Ct. 2208 (2006) and other judicial and administrative actions, there is considerable uncertainty regarding what constitutes jurisdictional waters of the United States versus jurisdictional waters of the individual states, including California. To the extent that the Tentative Resolution imposes different requirements than RGP 63 for the same type of emergency response activity, it will create an undesirable and unworkable regulatory burden on emergency responders, who will need to seek complex jurisdictional determinations to know which set of requirements to follow. To effect the purpose of expediting and facilitating emergency response, the Tentative Order should mirror RGP 63 so that emergency response is not impeded by unresolved jurisdictional questions. SDG&E has prepared comments on the Tentative Resolution so that it is consistent with RGP 63. These comments are included in Attachment A.

**Finally, if the Regional Board declines to modify the Tentative Resolution to exclude discharges that are exempt under Water Code 13269(c), then SDG&E respectfully requests that the Regional Board modify the Tentative Resolution prior to adoption to clarify that parties that previously have submitted notice under Water Code section 13269(c) in connection with the present firestorm emergency are "grandfathered" out of the conditional waiver for the activities that are the subject of that notice.**

SDGD&E provided notice pursuant to Water Code section 13269(c) on October 26, 2007.<sup>3</sup>

We appreciate your support of SDG&E's response to these catastrophic fires and our efforts to restore our facilities that provide essential public services.

If you have any questions concerning our efforts, please call me at 619-699-5076 or Fred Jacobsen at 619-987-2473.

Sincerely,



David J. Barrett  
Assistant General Counsel

cc: Lisa P. Gomez (SDG&E)  
Fred Jacobsen (SDG&E)  
Chiara Clemente (SD-RWQCB)  
Jeremy Haas (SD-RWQCB)  
Catherine George (SD-RWQCB)

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<sup>3</sup> Letter from Ms. Lisa P. Gomez to Mr. John Robertus entitled "San Diego Gas & Electric Company – Emergency Response to Catastrophic Fires"; dated October 26, 2007

## ATTACHMENT A

Following are comments on Tentative Resolution R9-2007-0211, as they would apply to a conditional waiver for emergency activities that are not exempt pursuant to CWA 13269(c):

- The waiver should be consistent with the Regional General Permit No. 63 (RGP 63) adopted by the Los Angeles District of the Army Corps of Engineers and the associated Water Quality Certification from the State Water Resources Control Board. It is unreasonable to establish inconsistent requirements for emergency responders conducting their response activities, so it is important for the Regional Board's waiver to be consistent with RGP 63. Following are some specific areas that are not consistent:
  - **Page 7, General Condition 7** – lacks the conditional statement (“except in very unusual and limited circumstances”) at the end of this sentence from RGP 63 that states:  
“The waiver may NOT be used to upgrade an existing structure to current standards when that activity would result in additional adverse effects on aquatic resources.”
  - **Page 8, Mitigation Condition 1** – revises the area identified in RGP 63 in which stabilization must be conducted at the earliest practicable date from “the ordinary high water mark or high tide line” to the “bankfull stage”.
  - **Page 8, Mitigation Condition 2** – revises the RGP 63 condition to give the Regional Board the discretion to require revegetation, whereas RGP 63, under certain circumstances (i.e., “if an area impacted by such a temporary fill is considered likely to naturally re-establish native riparian or wetland vegetation to a level similar to pre-project or pre-event conditions within two years,”), does not require revegetation.
  - **Page 9, Mitigation Condition 3** – eliminates the following language found in RGP 63 that describes what can be considered for mitigation banking and other forms of mitigation:  
“...including contributions to wetland trust funds or in lieu fees to organizations such as State, county or other governmental or non-governmental natural resource management organizations, where such fees...”.
  - **Page 10, Notification Condition 3** – requires a Notice of Termination (NOT) to be filed within 10 working days of completing the discharge activities and restoring the site to its original condition. It also requires all restoration to be completed by the expiration date of the waiver (11/14/12). SDG&E recommends that the following changes be made:
    - Revise the language to eliminate the presumption that all sites will be restored to their previous condition as this will not always occur.
    - Revise the submittal time requirements to be the same as that for the final report required under RGP 63 (i.e., 45 days).
    - Delete the requirement that all restoration be completed by the expiration date of the Tentative Resolution, as those uses of this waiver that occur closer to the expiration date will not be able to comply with this condition.
  - **NOI Page 2, Sections VIII** - requires plans for mitigation to be provided in the NOI. In cases like the current fires, this information is not likely to be available within the stated timeframes. The initial NOI should not require this information as it could hold up the emergency response that the waiver is intended to facilitate. Instead, SDG&E recommends that the after-the-fact report include mitigation plans, as appropriate.
  - **Page 9, Notification Condition 1** – would require notification for each location of dredge and fill activity. It would also require notification to be submitted within 30 days of initiation of the discharge, which would not provide adequate time to prepare all of the information, especially when wide-scale impacts have occurred, such as in the recent fires. Although RGP 63, on its face, creates a similar problem, in practice, ACOE has allowed applicants to apply for coverage under RGP 63 in a blanket manner (one application covers several

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locations and dredge and fill activities, provided that the action is required as part of the same emergency response) and has allowed applicants to provide minimal information upfront with the balance of information submitted in a final report.

- **Page 9, Notification Condition 1(a)(i)** - should refer to Finding 11, not 10.
- **Page 10, Notification Condition 2** – would require a discharge that is operating under RGP 63 to file a NOI under this waiver with the Regional Board if the Army Corps of Engineers determines that any of the waters are not considered Waters of the US any time prior to the filing the final report required by RGP 63. We recommend that this be revised to authorize the discharger to continue operation under RGP 63 and to submit the final report required by RGP 63 to the Regional Board as provided by the SWRCB's Water Quality Certification.
- **NOI Page 1, Sections I, II & III** –should clarify that the property owner **or** the facility owner, as appropriate, can file the NOI & NOT.