Slide 1

In Re Tentative Cleanup and Abatement Order No. R9-2011-001

SAN DIEGO GAS & ELECTRIC COMPANY'S

PRESENTATION FOR

EVIDENTIARY HEARING BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

NOVEMBER 9, 2011

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Jason Conder, Ph.D.

- General experience
  - Ph.D. environmental toxicologist and chemist
  - Over 20 peer-reviewed scientific publications in ecotoxicology, environmental chemistry, and contaminated sediment assessment and management
  - Experience with numerous contaminated sediment and terrestrial site assessments in the US (CA, TX, WA, MN, MI, NY, NJ, VA, HI, etc.) and worldwide (Italy, Indonesia, Israel, etc.)

- Experience with the San Diego Shipyard Sediment Site since 2007: Over 4,700 hours of effort
  - Reviewed several hundred thousand pages of Site documents
  - Analyzed Site data and other information
  - Several dozen mediation support meetings with other parties and CRWQCB Cleanup Team
  - Authored three expert reports on sediment chemistry and Beneficial Use Impairments
  - Authored additional reports filed to the public record on tidelands soil chemistry, technical comments regarding the DTR, and technical comments regarding other parties' technical opinions

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Jason Conder, Ph.D.
Admission of Testimony

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SDG&E is Not Properly Named as a Discharger in this Action

- SDG&E's Request for Rescindment has not been challenged by credible evidence and must be granted
- Regional Board's decision to name a discharger must be based upon substantial evidence caused a condition of "pollution"
- Cleanup Team acted unreasonably in naming SDG&E
  - Failed to offer any evidence establishing SDG&E caused a condition of nuisance or pollution
  - Ignored substantial and credible evidence SDG&E is not responsible for impacts to Site
  - WB Orders cited by Cleanup Team compel the Regional Board to grant SDG&E's Request for Rescindment
  - Failed to evaluate probability of shipyards as sole cause

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Cleanup Team's Legal Burden

- Must Produce Evidence Which Establishes That a Discharger Was Responsible for Releasing Contaminates Of Such a Mass and Concentration That The Beneficial Use of the Receiving Water Was Unreasonably Affected; and
- The Evidence Produced Must Meet the Legal Test of "Substantial"
  - Excludes Speculation
  - Must be
    - "Reasonable in Nature";
    - "Credible"; and
    - "Of Solid Value"

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Discharger Liability Attaches *Only* to Discharges That Are Significant Enough to Create "Pollution"

Cleanup Team's Prehearing Brief, page 1

Water Code section 13050 defines "pollution" as an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either "the waters for beneficial uses[,]"or [f]acilities which serve these beneficial uses."[2] Water Code § 13050(l). As the Tentative Cleanup and Abatement Order (TCAO) finds, each of the Dischargers caused and/or contributed to an alteration of the quality of the waters at the Shipyard Sediment Site (Site) to a degree that has unreasonably affected beneficial uses there.

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Slide 7

Clean-Up Team Acted Unreasonably

By:

1. Failing to Evaluate Probability of Shipyards as Sole Cause
2. Failing to engage in any meaningful evaluation of extensive exculpatory evidence submitted by SDG&E and Port
3. Relying upon biased, unsubstantiated information provided by the Shipyards and others seeking to implicate SDG&E as an additional discharger
4. Failing to produce any evidence that alleged SD&E discharges were of a sufficient mass and concentration to cause a condition of pollution

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No Substantial Evidence of SDG&E's Liability as a Discharger

- The Clean-Up Team has refused to update invalid assumptions and incorrect statements despite overwhelming and substantial evidence gained during the last 7 years of investigation

Slide 9

No Substantial Evidence of SDG&E's Liability as a Discharger

- Examples:
  - It has been established that previous allegations that the SDG&E tidelands ponds/oil-water separators discharged to San Diego Bay were in error
  - Extensive sampling of the tidelands leasehold and cooling water system (312 soil, groundwater, and cooling water tunnel solid samples collected by Port) demonstrated that neither SDG&E feature is a source of the observed condition of pollution or nuisance at the Shipyard Sediment Site
    - PCB signature in Site sediments different from tidelands/cooling water tunnel PCBs, demonstrating dissimilar sources
    - Concentrations of COCs in leasehold soils and cooling water tunnels were insufficient to explain elevated levels found in San Diego Bay sediment
    - The absence of a pattern of COCs leading from pond areas to the Bay demonstrates that the low levels of COCs associated with the ponds did not discharge or migrate to the Bay
- Neither the Clean-Up Team nor the other dischargers have provided any credible evidence to rebut these facts

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CUT's Legal Authority Does Not Justify Adding SDG&E

- CUT cites to *In re County of San Diego,* WQO 96-6.
  - Order addressed whether parties were properly designated as dischargers to County landfill
- Not applicable to our circumstances:
  - City claimed it should not be named because it was only an easement holder for roadway adjacent to landfill and had not contributed to contamination at site.
  - RWQCB found that, despite City's "relatively minor" contribution, it would still be required to participate in remediation **because the RWQCB was unable to locate any other PRPs to participate in remediation.**

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Evidence of the Shipyards' Sole Responsibility is Overwhelming

- Administrative record replete with uncontradicted evidence of decades of mass quantities of direct discharges of COCs to sediment by shipyards
- Historical and current shipyard physical disturbance of sediment:
  - Incorporates deeper contamination into surface layers to prevent natural recovery following control of shipyard COC sources
  - Spreads contamination from shipways and adjacent to shipyard activities over Site, necessitating a large-scale SWAC approach
  - Prevents consideration of Monitored Natural Recovery as a remedy, forcing selection of remedies that result in orders-of-magnitude higher costs
- Past and Present shipyards, and not SDG&E are liable as dischargers for Beneficial Use Impairment at Shipyard Sediment Site

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Slide 12

Demonstrative Exhibits Illustrating Testimony of Jason Conder, Ph.D.

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Slide 13

Conclusion: Shipyards Systematically Discharged PCBs to Bay

- Repeated detection of lighter PCB Aroclors 1242/1248 through 2006 in Pier 1 area consistent with hydraulic fluid/marine paint sources attributed to shipyard activities in marine railways
  - In contrast, lighter Aroclors were only found in two of 185 samples (max 170 µg/kg) on the SDG&E tidelands leasehold, confirming SDG&E not attributable for this Aroclor signature (ENVIRON, 2011a)
- PCBs detected in BAE marine railways (as high as 160,000 µg/kg) indicates PCB sources attributable to BAE were present until removal in 1998 (Ogden , 1998)
  - Note that these concentrations represent conditions after the top layer of soils were removed

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Other Shipyard COCs

- Shipyards clearly-documented sources of the other primary COCs: HPAH, TBT, Copper, and Mercury (ENVIRON, 2011b)
  - HPAHs from creosote piers (Chadwick et al., 1999)
  - Use and discharge of TBT, Copper, and Mercury in marine paints and sandblasting material and leaching from ships (CRWQCB, 1972; Young and Heesen, 1974)
  - Stormwater runoff (sources cited in ENVIRON, 2011b)
  - DTR clearly acknowledges "particularly strong positive correlation of TBT with copper, HPAH and total PCBs indicated by their correlation coefficients (DTR 2011, Section 18-2, p. 18-5)

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Slide 15

The Oppositions to SDG&E's Request for Rescindment are Baseless

- Arguments repeat the same flawed and self-serving evidence
- BAE Systems continues to fail to disclose or even acknowledge their decades of activities on the tidelands leasehold
  - Rather, they continue to encourage the CUT's flawed arguments regarding chemicals found on the tidelands
- CUT joins BAE in refusing to acknowledge the probability that BAE's activity explains presence of chemicals on the tidelands

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Slide 16

Conclusions

- SDG&E not properly named as Discharger.
- Evidence relied upon by the Cleanup Team is replete with bias, errors and speculation.
- Clean-Up Team completely fails to carry its legal burden:
  - No substantial evidence that SDG&E contributed to condition of nuisance or pollution.

Slide 17

References Cited

- Chadwick et al. 1999. Sediment quality characterization, Naval Station San Diego, final summary report. US Navy Technical Report 1777. SAR372960.
- CRWQCB. 1972. Wastes Associated with Shipbuilding and Repair Facilities in San Diego Bay. SAR374265.
- ENVIRON. 2011a. Summary of Sampling and Analysis of Soil and Cooling Water Tunnels, BAE Subleasehold Area, San Diego Bay, San Diego, CA. February 23.
- ENVIRON. 2011b. Technical Comments on May, 26, 2011 Documents Submitted on Behalf of Parties to the San Diego Shipyard Sediment Site. June 23.
- Ogden. 1998. Final Report Site Remediation, Marine Railway Removal Project, Southwest Marine Shipyard. December. SAR198846.
- Young, D.R., Heesen, T.C. 1974. Inputs and Distributions of Chlorinated Hydrocarbons in Three Southern California Harbors. SAR393796.

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