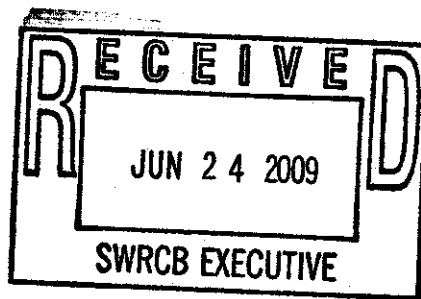




Sempra Energy utilities



Public Comment  
Dft. Construction Gen. Permit  
Deadline: 6/24/09 by 5:00 p.m.

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**Emailed on June 24, 2009 to: commentletters@waterboards.ca.gov**

June 24, 2009

Ms. Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, Ca 95814

**RE: Comment Letter – Draft Construction General Permit**

Dear Ms. Townsend:

Sempra Energy's regulated utilities (San Diego Gas & Electric Company and Southern California Gas Company or the "Utilities") appreciate this opportunity to provide the State Water Resources Control Board (SWRCB) with comments on the 2009 draft Construction Stormwater General Permit (Draft Permit).

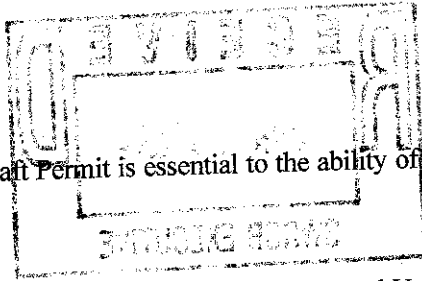
Delivery of essential public services requires routine and emergency construction, operation, inspection, maintenance, repair and replacement of utility and other linear infrastructure. A primary mandate to utilities and other entities with linear facilities by the California Public Utilities Commission and/or other state and federal regulatory agencies is to provide safe and reliable service. Since Sempra's Utilities have thousands of miles of linear facilities, to accomplish this mandate they need an efficient and timely process to obtain any required permits and authorizations for work in waters in the state, while minimizing overlap and inconsistencies between multiple state and federal agency requirements. In previous discussions with staff, Sempra's Utilities have focused on options for streamlining and minimizing the implementation permitting process (e.g., Small Linear Underground/Overhead Projects Permit) for linear facilities.

While this letter includes some comments and recommendations on the general merits and applicability of this permit to conventional footprint development projects, its primary focus is on the potential application of this permit to linear construction activities. In addition to the comments contained in this letter, Sempra Energy incorporates by reference the comments being submitted by the California Council for Environmental and Economic Balance and by Hunton & Williams on behalf of the Utility Water Act Group.

**1. Lack of Clarity Regarding Traditional/ Linear Project Requirements**

The Draft Permit has been revised to incorporate all Linear Underground/ Overhead Projects (LUPs) that require permit coverage. As such, the SWRCB has included language in the Fact Sheet, Findings, Order, Attachments and Appendices to address the uniqueness of linear projects. In some cases, this has caused some confusion where information or requirements for traditional projects is included, but omitted for linear

projects. Clarity in the Draft Permit is essential to the ability of a permittee to ensure their compliance with its requirements.



### Findings

Section I.C at page 4, identifies "Activities Not Covered Under the General Permit". However, this section does not identify those linear project activities that are not covered (or are not considered "construction activity"). These activities are later identified in Attachment A. Section I.G at page 7, describes the risk assessment process and the need for REAPs, however, the risk assessment Finding describes the LUP sediment and receiving water risk approach but omits the initial screening tool for Type 1 LUPs contained in the flowchart on Page 1 of Attachment A.1. Also, REAPS are not required on LUPs, but this is not stated in Finding 47 at page 8. Section I.L at page 11, describes post-construction requirements and infers that all construction sites must comply with these requirements; however LUPs are not subject to post-construction requirements.

**The Findings need to be revised to clarify what is applicable specifically to traditional projects, to LUPs, and to all projects. The Findings also need to incorporate equivalent information for LUPS as is presented for traditional projects.**

### Order

In Sections II.B through Section XVI (pages 13 to 39), it is unclear what sections, if any, are applicable to LUPs. Some of the information in these sections (e.g., Sections C, D, E, F, G and H) is duplicative of the information in Attachment A, which is specifically for LUPs, whereas some of the information in these sections is applicable only to traditional projects (e.g., Sections VIII through XI, and XIII (pages 32 to 35)). It is critical that the Order clarify what sections are applicable to LUPs.

**Therefore, in addition to stating that LUPs shall comply with Attachment A, A.1 and A.2, Section II.A.1 at page 13, needs to state that the balance of the Order is not applicable to LUPs except as indicated in Attachment A. This will ensure clarity on what parts of the Order apply to LUPs.**

## 2. LRPs

The standard provision for signatories contained in EPA's NPDES regulations specify who has the authority for certifying and signing NPDES permit documents. Some documents (i.e., permit applications (notices of intent) and notices of termination) can only be signed by a "responsible corporate officer", a "general partner" or "proprietor", or a "principal executive officer" or "ranking elected official", depending on whether the discharger is a corporation, partnership, sole proprietorship or public agency. The signature of other specified documents can be done by one of the above positions or can be delegated by one of the above positions to a "duly authorized representative" that meets certain criteria.

The Draft Permit inexplicably revised EPA's standard provision to redefine the discharger into the "Legally Responsible Person" (or LRP) and the "Approved Signatory"; this both confusing and unnecessary. The Draft Permit also inexplicable redefines the role of the "Duly Authorized Representative" to the equivalent position of the discharger. **These sections need to be revised to be consistent with EPA's standard provisions.**

Additionally, utilities operate across large geographic areas and have many divisions of responsibility for company operations. **As such, it is imperative that, consistent with EPA's regulations, the Draft Permit**

**does not contain language that would preclude a corporation or other discharger from having one or more authorized signatories and/or duly authorized representatives.**

Furthermore, the Draft Permit proposes that almost all submittals to the SWRCB will be conducted electronically. The Draft Permit is not clear on the procedures that will be used for the electronic submittals. **Since it is not practical for responsible corporate officials to individually prepare and upload the many submittals required by the Draft Permit, it is imperative that the SWRCB's procedures for this process are designed in a flexible manner such that internally authorized administrative staff at corporations can also prepare and upload the submittals to the SWRCB website for the ultimate review and certification by a responsible corporate official or a duly authorized representative.** EPA employs a similar procedure for their web-based construction general permit application process, wherein administrative staff can prepare and upload documents to EPA's web-site for certification by the responsible corporate official.

### **3. LUP Descriptions/Risk Determinations**

#### **LUP Description**

Attachment A (Linear Underground/Overhead Projects) requires a clearer definition of "linear project".

Attachment A (Section A.3; pages 3-4) describes LUPs as being permitted as "Projects" and "Project Sections." That is, a project does not need to obtain a single permit to cover the entire project. Rather, it can be split into "logical permit sections," with each section obtaining its own permit coverage. Sempra Energy supports this approach, since there are a number of factors on LUPs, such as developed/undeveloped areas, different contractors, different construction periods, etc., for which it makes sense to be able to obtain separate permit coverage. LUP owners need this flexibility to determine the logical permit sections for their projects.

However, Section A.3 of Attachment A, also states:

"Sections shall be determined based on portions of a project conducted by one contractor."

This is inconsistent with the previous statement that allows LUPs to be split into logical permit sections. The Draft Permit needs to allow linear project proponents to select the most appropriate project sections for their projects.

**Therefore, the sentence referring to contractors needs to be revised to state:**

"Sections may be determined based on portions of a project conducted by one contractor."

#### **Risk Determination**

The Draft Permit establishes a risk determination procedure that is unique for LUPs. While Sempra Energy supports the use of a risk based approach, there are several issues that need to be resolved in order for it to work successfully for LUPs.

Attachment A.1 contains the risk determination procedure for LUPs and consists of two flowcharts that define the Type (i.e., 1, 2 or 3) of risk. Since the flowchart criteria are based on where the LUP construction activities occur (e.g., paved/unpaved, within a Sediment Sensitive Watershed, within 150 feet of a sediment sensitive water body, etc.), it is important that the Type (or risk) be determined for specific areas within a project or project section.

### Type 1 LUPs

Projects or project sections that meet specific criteria in the flowchart on page 1 of Attachment A are considered Type 1. Projects not meeting those criteria must evaluate their combined receiving water risk and sediment risk in the flowchart on Page 2 to determine their Type. Projects using the flowchart on page 2 can also be determined to be Type 1. The Fact Sheet in Section II.J.2.a.i at page 31, needs to clarify that projects can be determined to be Type 1 based on either flowchart.

### Project Area and Project Section Area

Projects using the flowchart on page 2 of Attachment A need to be able to evaluate the Type (i.e., 1, 2 or 3) for different areas of the project or project section. It is essential for LUPs to have the ability to establish multiple Types so that areas within the project that may have a Type 2 or 3 risk level determination do not result in the entire LUP being considered a Type 2 or 3 project.

**Therefore, it is imperative that the three questions at the top of the flowchart on Page 2 refer to the "project area or project section area."** This will make it clear that the Type(s) is based upon the characteristics of specific areas of the project.

### Sediment Sensitive Watershed

The first question asked on the second flowchart (Attachment A.1 at page 2) is:

"Is 50% or more of the project section located within a Sediment Sensitive Watershed?"

Based on this question, a project section that is 50% or more located within a Sediment Sensitive Watershed will require that the whole project section become a medium or high receiving water risk, although up to 50% of the project section could be located outside of the Sediment Sensitive Watershed (which is a low receiving water risk). Project areas or project section areas need to be evaluated for whether they are in a sediment sensitive watershed, not evaluated for whether a specific percentage of the entire project or project section is in the sediment sensitive watershed. **This question needs to be revised to ask:**

"Is the project area or project section area located within a Sediment Sensitive Watershed?"

In Attachment A.1 at page 3, a Sediment Sensitive Watershed is:

"Defined as a watershed draining into a receiving water body listed on EPA's approved CWA 303(d) list for sedimentation/siltation, turbidity, or a water body designated with beneficial uses of SPAWN, MIGRATORY, and COLD."

This proposed definition is too broad as it includes all areas within the entire watershed that drain to the sediment sensitive waterbody. As written, this definition is inappropriate to apply to short-term linear construction projects that have relatively short-term potential project impacts and could be located 1, 2, 5, 10, 25 or more miles up-gradient from the sediment sensitive water body. A more relevant definition for a LUP would be to limit the definition to the "hydrographic subarea" in which the sediment sensitive water body is located.

**Therefore, the definition of Sediment Sensitive Watershed needs to be revised to state:**

“Defined as the Hydrologic sub-area within which a sediment sensitive water body is located.”

Sediment Sensitive Water Body

Attachment A.1 at page 3 also includes the proposed definition of “Tributary to Sediment Sensitive Water Body”. However, as proposed the exact meaning of the definition is unclear.

**The definition needs to be revised to make sure that it is clear that a “Tributary to Sediment Sensitive Water Body” means:**

“Tributary to Sediment Sensitive Receiving Water Body – A surface water is “tributary to a sediment sensitive water body” when it meets all three of the following criteria:

1. The surface water body is located up-gradient of and hydrologically connected to either of the following:
  - A CWA 303(d) listed water segment (i.e., for sedimentation/ siltation, turbidity); or
  - A water body designated with beneficial uses of SPAWN, MIGRATORY, and COLD;
2. The surface waterbody is located within the same hydrologic subarea as the CWA 303(d) listed water segment (i.e., for sedimentation/ siltation, turbidity) or the water body designated with beneficial uses of SPAWN, MIGRATORY, and COLD,
3. The surface water body is not one of the following:
  - An ephemeral or intermittent surface water (e.g., drainages, creeks, streams, etc.); or
  - A storm drain inlet.

Sediment Risk

Linear projects located in undeveloped areas are required to conduct sediment risk evaluations along the entire length of the linear project. This is a significant issue and was raised in our comments on the 2008 proposed permit. Linear projects can be miles or tens of miles long and may traverse many different terrains and rainfall regimes, and have changing start and completion dates, all of which are variables in determining the sediment risk. This creates a very cumbersome risk determination procedure. Requiring a sediment risk evaluation without delineating where and how many samples should be collected creates additional uncertainty in the procedure. There are three possible outcomes for receiving water risk: “high” (i.e., when the project area is within a specified distance of a Sediment Sensitive Water Body); “medium” (i.e., when the project area is within a Sediment Sensitive Watershed, but outside of a specified distance of a Sediment Sensitive Water Body) and “low” (i.e., when the project area is not located within a Sediment Sensitive Watershed). **The sediment risk evaluations should be streamlined to only be required when the project area is considered a medium or high receiving water risk.**

This approach ensures that special care is focused on those project areas that have the highest potential for affecting a sediment sensitive waterbody. **Linear project areas that are low receiving water risks due to their distance from sediment sensitive waterbodies should be assigned a low sediment risk based on their decreased potential for impacting that waterbody.**

#### 4. Oil & Gas Exemption

In describing construction activities that are subject to the Draft Permit, the Fact Sheet states:

“Discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities.<sup>3</sup> Footnote 3 – “Pursuant to the Ninth Circuit Court of Appeals’ decision in *NRDC v. EPA* (9th Cir. 2008) 526 F.3d 591, and subsequent denial of the USEPA’s petition for reconsideration in November 2008, oil and gas construction activities discharging storm water contaminated only with sediment are no longer exempt from the NPDES program.”

The Draft Permit needs to clarify that discharges from oil and gas construction activities that **do not** meet the oil & gas exemption criteria can be permitted under this Draft Permit, but those projects that **do** meet the criteria for the exemption are exempt and do not need to apply for permit coverage. The above statement can be misinterpreted to mean that a discharge of any quantity of sediment triggers the need for an oil and gas transmission project to obtain permit coverage. This is not accurate, as permit coverage is only triggered when an oil and gas transmission project causes an exceedance of a water quality standard.

**The above sentence needs to be revised to state:**

“Discharges from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities that cause the exceedance of a sediment related water quality standard.”

#### 5. Monitoring

##### **Inspections**

The Draft Permit states: “LUP Type 1 dischargers shall perform weekly inspections and observations, and at least once each 24-hour period during extended storm events, to identify BMPs that need maintenance to operate effectively, that have failed, or that could fail to operate as intended. Inspectors shall be the QSP or be trained by the QSP.”

In addition to proposed requirements for weekly and rain event inspections, daily visual inspections must also be conducted. Overall these inspection requirements are actually more intensive than those required for traditional projects (i.e., weekly and pre-, during and post-rain event inspections).

##### Type I LUPs

Under Order 2003-0007, Tier I projects are not required to conduct weekly or rain event inspections because Tier I projects are required to be “buttoned up” at the end of the work day and to conduct visual inspections “...daily during working hours and in conjunction with other daily activities in areas where active construction is occurring.” However, in addition to daily inspections, the Draft Permit would also require Type 1 LUPs to conduct weekly inspections and rain event inspections which are not appropriate for low risk projects.

**These sections need to be revised to state:**

“Type LUPs shall conduct visual inspections daily during working hours and in conjunction with other daily activities in areas where active construction is occurring. These inspections are not required to be recorded.”

Types 2 & 3 LUPs

Type 2 & 3 LUPs should also be required to conduct unrecorded daily visual inspections along with pre- and post-rain event inspections.

**These sections need to be revised to state:**

“Type LUPs shall conduct visual inspections daily during working hours and in conjunction with other daily activities in areas where active construction is occurring. These inspections are not required to be recorded. Additionally, Type 2 and 3 LUPs shall conduct inspections within 2 business days prior to each qualifying rain event and within 2 business days after each qualifying rain event to identify BMPs that need maintenance to operate effectively, that have failed, or that could fail to operate as intended. Inspectors shall be the QSP or be trained by the QSP.”

**Sampling Requirements**

Attachment A, Sections L.4.b.i and Table 4 (at pages 46-47) and L.5.b.i and Table 6 (at pages 54-55) states: “...dischargers shall collect storm water grab samples from sampling locations characterizing discharges associated with construction activity from the entire LUP disturbed area beginning the first hour of any new discharge and during the first and last hour of every day of normal operations for the duration of the discharge event.” At a minimum, 3 samples shall be collected per day of discharge. According to Footnote 13 at page 47, sampling applies to “...any type of discharge of storm water that goes beyond the property boundary...”.

It is impossible for a LUP to comply with these proposed requirements for the following reasons:

First, there could literally be hundreds of sampling locations (e.g., “...any type of discharge of storm water that goes beyond the property boundary...”). It is not clear if this footnote refers to both sheet flow and channelized flow or only channelized flow. If it includes sheet flow, there will be an unlimited number of sample locations.

Second, for all of these discharge locations, numerous qualified samplers would have to be on call for each rain event to sample each of these locations within the first hour of discharge and three times a day every single day until the discharge ends. Additionally, at least some of these sites may not be safely accessible on LUPs. This sampling and analysis effort would then have to be repeated for each rain event during the entire project. The permit also does not make it clear when sampling can be terminated; for example, once earthwork is complete and stabilization BMPs are implemented.

Third, there should be an acknowledgement that the weather does not always behave as expected or as predicted. When a storm ends suddenly and required samples are not taken, dischargers should have the option within SMARTS to provide an explanation without risk of enforcement.

We believe that sampling should only be implemented in project areas that are active and that are chosen in advance based upon risk and safety considerations. Also, consistent with the revised requirements for traditional projects, the requirement to sample within the first hour of runoff needs to be eliminated.

**The permit needs to be revised to state:**

“LUP Type 2 (and 3) dischargers shall collect storm water grab samples from one representative sampling location within each active area designated as Type 2 (or 3) that can be safely accessed during a rain event. Samples shall be taken during normal business hours. A minimum of three samples shall be taken on the sample day, unless the storm water discharge ceases before the end of the day. Sampling shall occur on the first day of discharge and two sample events per rainy season are required.”

<sup>13</sup> A new discharge is defined here as a channelized discharge of storm water that goes beyond the LUP boundary after at least a 48 hour period of no discharge.”

Sempra Energy urges the SWRCB to incorporate these concepts into the permit. Please feel free to contact Fred Jacobsen (San Diego Gas & Electric Company) at 858-637-3723 if you have any questions concerning the enclosed comments.

Yours sincerely,

