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San Diego, CA 92101-3017

October 31, 2001

Chair  
Council on Environmental Quality  
Executive Office of the President  
17th and G Streets, NW  
Washington, DC 20503  
Attention: Task Force

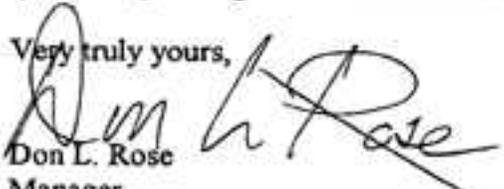
RE: Sempra Energy Comments on Federal Register Listing on Executive Order 13212

Dear Mr. Chairman:

Sempra Energy is pleased to provide the following comments on the Federal Register listing soliciting comments on the President's Executive Order 13212. Obviously, there is a great deal more supporting information on this topic that space limitations precluded. While we do have critical projects in the queue that warrant your attention, we want to emphasize that assuring capacity and reliability may be more crucial than new projects. Without that assurance, no amount of new generation can be effective. We are hopeful that the Task Force will address this as part of its agenda.

Thank you for your efforts in this important initiative. I would be pleased to meet with your office again to follow up on our discussion with Ms. V.A. Stephens. Please call me with any questions you might have at 619-696-2409.

Very truly yours,

  
Don L. Rose  
Manager  
Land Planning and Natural Resources

Attachment

cc:  
James Cason, DOI  
Sloan Rappoport, DOC  
Jimmy Glotfelty, DOE  
V.A. Stephens, CEQ

**SEMPRA ENERGY COMMENTS ON EXECUTIVE ORDER 13212**

White House Council on Environmental Quality

OCTOBER 31, 2001

1. Name of the project:  
Reliability protection – performing the essential maintenance of existing natural gas and electric transmission facilities
2. Entity proposing the project:  
Sempra Energy on behalf of  
San Diego Gas & Electric Company/Southern California Gas Company
3. Category of the project:  
Natural gas and electric transmission infrastructure, maintenance and operations
4. Brief description of the project:  
To develop a efficient, reliable and predictable process capable of addressing all current and future federal Endangered Species Act (ESA) issues related to essential maintenance of existing gas and electric transmission facilities on federal and non-federal lands and wetlands. Such activities include:
  - Insulator washing, replacement and repair
  - Repair and replacing conductors
  - Pole brushing (removal of flammable vegetation from base of wood poles)
  - Tree trimming
  - Access road re-grading and maintenance
  - Pole line inspection
  - Repair or replacement of structures supporting utility equipment
  - Exposed pipeline and erosion repair
  - Pipeline leak patrolling
  - Pipeline repair and replacement

5. Agency or agencies that must be consulted and agencies from which approval is needed:Federal:

Department of the Interior  
 -U.S. Fish & Wildlife Service  
 -Bureau of Indian Affairs (including Indian tribes)  
 -Bureau of Land Management

Department of Commerce:

-National Oceanic and Atmospheric Administration

Department of Agriculture:

-U S Forest Service

Department of Energy:

-Federal Energy Regulatory Commission

Department of Defense:

-U.S. Navy  
 -U.S. Marine Corps  
 -U.S. Army Corps of Engineers  
 -U.S. Army  
 -U.S. Air Force

State of California:

-The Resources Agency of California  
 -Department of Fish & Game  
 -California Coastal Commission  
 -Public Utilities Commission  
 -State Lands Commission  
 -Regional Water Quality Control Board  
 -Regional Air Quality Control Board

6. Reason for bringing the project to the task force's attention:

Since the energy crisis, a great deal of attention has been focused on new construction, particularly for generation. However, little attention has been given to assuring the capacity and reliability of existing facilities. Without that assurance, no amount of new generation can be effective. Implementation of existing regulations by federal agencies imposes significant constraints on performing essential routine maintenance on existing facilities. In fact, mandated maintenance by state and federal agencies that control operations of energy utilities is being impeded or halted by other federal agencies, threatening the reliability of energy delivery systems.

In addition, there are practical implementation problems with federal environmental regulation. For instance, SDG&E's system-wide HCP does not apply to federal lands within its service territory. Additional listings under the ESA can stop work in progress and can even prevent crews from driving on existing access roads. A Critical Habitat designation pursuant to the ESA may render void an existing operating HCP. Also, there are areas, especially on some military installations, where the President's executive order is not being carried out.

7. Suggestions you have for improving federal agency(s)' process:

Sempra proposes four types of solutions.

1. Effective Enforcement of the Executive Order Goals
2. Working with existing Regulations and Authorities
3. Changes to Existing Policy/Regulations
4. Amending Existing Legislation and Enacting New Legislation

**Effective Enforcement of the Executive Order Goals**

We note that much decision-making in the executive branch is decentralized, and that extending the effective reach of an Executive Order down through the ranks of decision-makers will be difficult. To comply with the spirit of the Executive Order, administrators, especially supervisors, should use judgment and discretion reasonably and not be unnecessarily restrictive in their interpretations. To the contrary, federal managers should be pushing the envelope of flexibility, not pulling back from innovative use of their authority. Judgment calls should be based on prudent science - not a desire to overcompensate just to be "safe". This is a significant change in management philosophy, which will not be easily pushed down the ranks of decision-makers. This problem is not unique to this Order, but has been a recognized problem in prior Administrations. An effective approach requires finding some way to help influence the performance evaluation of decentralized management based on their compliance with the goals of the Order.

**Working With Existing Regulations and Authorities**

The overarching goal is to devise a single conservation plan that addresses both Sections 7 and 10 of the ESA and would cover all activities on federal and non-federal uplands as well as wetlands. Currently, separate plans are needed for each. In addition, separate plans are needed for various federal agencies, eg. Forest Service land, BLM, military land, etc. None covers wetlands.

- HCP Exclusions from Critical Habitat Designations. The Company seeks a commitment from USDO/FWS that the HCP exclusion policy will automatically be applied to future HCP's.
- Use of Safe Harbor Agreements to Bank Mitigation Credits. Sempra would like to incorporate a safe harbor program that allows the Company to bank credits for habitat areas with utility uses that experience an increase in numbers of species in those areas.

### **Changes to Existing Policy/Regulations**

- **Deference to HCP's under Section 7 Consultation Process.** The FWS should adopt a policy that requires the FWS to defer to the conservation measures established in an HCP for covered activities that may be subject to section 7 consultation. That is the FWS should automatically issue a "no effect" determination for any activity addressed by an existing HCP. This policy is partially in place today in the guise of a provision confining the FWS and CDFG approval policy to those policies and regulations in the existing NCCP/HCP
- **Critical Habitat Standards.** Sempra has been told that FWS is currently in the process of developing a new regulatory interpretation of the language of section 7(a)(2) concerning "destruction or adverse modification" of critical habitat. The outcome of this process may have significant ramifications for approval standards for HCP's.
- **Habitat-Based Assurances.** Sempra would like the FWS to return to the concept of habitat-based assurances as provided in the San Diego County MSCP and Orange County Central-Coastal NCCP.
- **FWS Hiring and Career Practices.** Currently, the FWS fills nearly all their professional positions with field biologist thus eliminating diversity in opinions, insight, and solutions. The complex nature of HCP's, MOU's, etc. require a more multi-disciplinary team to design and administer them, such as: Land Planners, Hydrologists, Project Managers, Agriculturist, Geographers, and others.
- **Coastal Act Conflicts with ESA.** The conflict between the ESA and the Coastal Act threatens the NCCP/HCP program in California. In particular, current federal consistency provisions must be either removed or changed to prevent the Coastal Commission from overruling the FWS. This is a current threat and needs to be addressed as soon as possible.

### **Amending Existing Legislation and Enacting New Legislation**

To the extent the Administration seeks to gain congressional support to amend existing legislation or enact new legislation, we would add the following items for your consideration

- **Codify "No Surprises" Rule and Habitat-Based Assurances.** Given the pending lawsuit concerning the legality of the "no surprises" rule and the reluctance of the FWS to embrace a habitat-based assurances policy, an effort to codify these concepts might be worthwhile. Unlike the majority of proposed amendments to the ESA, an "assurances" amendment may garner the support of a wide coalition of interests, including some moderate environmental groups (e.g., Endangered Habitats League and The Nature Conservancy).
- **Repeal the Critical Habitat Provisions of the ESA.** In light of the apparently irreconcilable inconsistencies between the standards set forth in section 10 and the critical habitat provisions of section 7, there may be substantial support for an amendment to the ESA to eliminate or modify the critical habitat concept.
- **Codify a Utility Provision.** Sempra would like to discuss the pros and cons of devising a potential amendment to the ESA that would provide utilities with a more efficient process of compliance with the ESA while performing essential and mandated maintenance.

**SEMPRA ENERGY/ UTILITY ESA STRATEGIES**  
**October 2001**

**Statement of the Problem**

Sempra Energy cannot reliably maintain and operate its electric and gas facilities in areas containing native habitat, even though the Company has a groundbreaking, multi-species HCP with 110 covered species. The problem is more acute with the electric power system, where, long after a facility is built, mitigation for ongoing maintenance is routinely and repeatedly required, or maintenance activities are prohibited. Due to new species listings, and typically, dispersion of species into areas not previously occupied, the stability and predictability promised by the multi-species HCP is eliminated. Lack of applicability of the HCP on federal lands further stymies efficient maintenance and operations.

**Objective**

To develop a streamlined, reliable and predictable process capable of addressing all current and future federal Endangered Species Act issues concerning Sempra Energy subsidiaries San Diego Gas & Electric's (SDG&E) and Southern California Gas Company (SCG) activities, including new construction, operations and maintenance, on federal and non-federal lands.

**Overall Structure**

To the extent possible, Sempra proposes using mechanisms already in place under the existing ESA and associated regulations. These mechanisms are likely to provide a basic framework sufficient to achieve SDG&E's and SCG's goals and objectives, as well as those of other public utilities struggling to maintain stable and reliable service in the face of a too-quickly changing ESA regulatory climate. Sempra Energy puts this proposal forward, but many utilities in high growth areas with environmental resource sensitivities have experienced similar problems working with the ESA. To eliminate this potential system reliability risk, a number of significant changes to current policy, regulations, and perhaps law will ultimately need to occur in order for this effort to fully succeed. As such, Sempra would like to work with key officials from the Department of the Interior, Fish and Wildlife Service, and the Council on Environmental Quality; and, if necessary, with those members of Congress sitting on relevant committees to gain support for this effort and effectuate these changes.

The following approach utilizes existing ESA mechanisms to provide a framework adequate to meet Sempra's goals and objectives:

Conservation Plan Addressing Section 7 and Section 10. Under this approach, a single "master" HCP/NCCP would be developed to cover activities occurring on both non-federal and federal lands. The plan would meet the standards of section 10 of the ESA, but would provide the basis for take authorizations for activities with a federal nexus. Likely, this approach would pose

certain challenges because it would require the FWS to adopt new policies concerning the relationship between section 7 and section 10.

### **Measures to Attain the Objective**

In order to facilitate this approach, Sempra intends to pursue several of the policy changes which follow. The greater the success in integrating the following concepts and approaches into a plan, the more the plan will deliver the level of certainty and efficiency that SDG&E needs to properly carry out its various utility activities.

#### **1. Within Existing Authorities**

- **HCP Exclusions from Critical Habitat Designations.** In addition to Sempra's intervention in the NRDC gnatcatcher critical habitat lawsuit, the Company seeks a commitment from USDOJ/FWS that the HCP exclusion policy will automatically be applied to future HCPs.
- **Use of Safe Harbor Agreements to Bank Mitigation Credits.** As part of a new HCP, Sempra would like to incorporate a safe harbor program that allows the Company to bank credits for habitat areas with utility uses that experience an increase in numbers of species in those areas.

#### **2. Require Change in Policy/Regulations**

- **Deference to HCPs under Section 7 Consultation Process.** We should strongly encourage the FWS to adopt a policy that requires the FWS to defer to the conservation measures established in an HCP for covered activities that may be subject to section 7 consultation. That is, as a matter of practice, the FWS should automatically issue a "no effect" determination for any activity addressed by an existing HCP. This policy is partially in place today in the guise of a provision confining the FWS and CDFG approval policy to those policies and regulations in the existing NCCP/HCP
- **Critical Habitat Standards.** Sempra has been told that FWS is currently in the process of developing a new regulatory interpretation of the language of section 7(a)(2) concerning "destruction or adverse modification" of critical habitat. The outcome of this process may have significant ramifications for approval standards for HCPs.
- **Habitat-Based Assurances.** Sempra would like the FWS to return to the concept of habitat-based assurances as provided in the San Diego County MSCP and Orange County Central-Coastal NCCP.

- Coastal Act Conflicts with ESA. The conflict between the ESA and the Coastal Act threatens the NCCP program in California. In particular, current federal consistency provisions must be either removed or changed to require early collaboration between the CDFG, FWS, and the Coastal Commission. The Coastal Commission needs to operate under standards similar to those of the NCCP program as embodied in such State legislation as SB 107. This is a current threat and needs to be addressed as soon as possible.

### 3. Require Legislative Change

- Codify "No Surprises" Rule and Habitat-Based Assurances. Given the pending lawsuit concerning the legality of the "no surprises" rule and the reluctance of the FWS to embrace a habitat-based assurances policy, an effort to codify these concepts might be worthwhile. Unlike the majority of proposed amendments to the ESA, an "assurances" amendment may garner the support of a wide coalition of interests, including some moderate environmental groups (e.g. Endangered Habitats League and The Nature Conservancy).
- Repeal the Critical Habitat Provisions of the ESA. In light of the apparently irreconcilable inconsistencies between the standards set forth in section 10 and the critical habitat provisions of section 7, there may be substantial support for an amendment to the ESA to eliminate or modify the critical habitat concept.
- Codify a Utility Provision. Sempra would like to discuss the pros and cons of devising a potential amendment to the ESA that would provide utilities with a more efficient process of compliance with the ESA.