

REGIONAL WATER QUALITY CONTROL BOARD - SAN FRANCISCO BAY  
BOARD MEETING MINUTES  
March 16, 2005

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Item 1 - Roll Call and Introductions

The meeting was called to order on March 16, 2005 at 9:02 a.m. in the State Office Building Auditorium, First Floor, 1515 Clay Street, Oakland.

Board members present: John Muller, Chair; Mary Warren, Vice-Chair; Josephine De Luca; Shalom Eliahu; and Clifford Waldeck.

Board member absent: Kristen Addicks.

John Wolfenden introduced new staff: Max Shahbazian and Roger Papler.

John Muller said the Board would like to give a Proclamation of Appreciation to John Reininga and Doreen Chiu for their service on the Board. He said they were not able to be present today and the proclamations would be mailed to them.

Bruce Wolfe presented Steve Moore, Robert Schlipf, and Mary Rose Cassa with Cal/EPA's Customer Service Award for their work on the South Bay Salt Pond Restoration Project. Board members congratulated Mr. Moore, Mr. Schlipf, and Ms. Cassa for receiving the awards and thanked them for their work.

Mr. Wolfe said Roger Brewer would be leaving the Water Board soon and presented Mr. Brewer with a Proclamation of Appreciation for his staff work.

Item 2 - Public Forum

There were no public comments.

Item 3 - Minutes of the February 16, 2005 Board Meeting

Motion: It was moved by Mrs. Warren, seconded by Mrs. De Luca, and it was unanimously voted to adopt the minutes of the February 16, 2005 Board meeting.

Item 4 - Chairman's, Board Members' and Executive Officer's Reports

Mr. Muller reported attending the State Board workshop on Region 2's Mercury TMDL. He also reported attending the Agricultural Commissioners and Sealers Association meeting held recently in San Jose.

Mr. Wolfe said the State Board hearing on the Mercury TMDL was being held today. He said State and Regional Board staff had resolved an issue raised at the State Board workshop regarding the bird egg target. He said U.S. EPA's concern about compliance with the numeric mercury objective for the bay had not been resolved. However, he said State Board staff has recommended the State Board adopt the Mercury TMDL, and Regional Board staff take steps to update the numeric mercury objective.

Item 5A – Marin Municipal Water District, Desalination Pilot Plant, San Rafael, Marin County – Issuance of New NPDES Permit

Mr. Wolfe said this item is listed as uncontested. However, he said staff would like to make a presentation.

Mr. Waldeck said he had a conversation with David Lewis, Save the Bay, and asked his opinion about the desalination pilot plant. Mr. Waldeck said Mr. Lewis sent an email reply to the question. Mr. Waldeck said he forwarded Mr. Lewis' email to Bruce Wolfe and Paul Helliker. Mr. Waldeck said Mr. Helliker sent an email reply. Mr. Waldeck said he had not made up his mind on issues regarding the pilot plant.

Gayleen Perreira gave the staff report. She said the pilot plant would be located in San Rafael and would operate for nine months. She said a reverse osmosis system would be used to remove salt from bay water. She said most of the drinking water produced at the pilot plant would be recombined with brine (salty water) and discharged back to the bay. She said a supplemental to the tentative order requires the District to conduct biological surveys if it intends to apply for an NPDES permit for a permanent desalination facility.

Paul Helliker, General Manager, Marin Municipal Water District, said the District has projected there will be a shortfall in its water supply by 2015. He said the District is considering building a permanent desalination plant and would like to test technology in a pilot plant to help decide whether to do so. He said information obtained during operation of the pilot plant would be used to understand environmental impacts of a permanent plant.

Mr. Helliker said the pilot plant would be located on the bay instead of on the ocean because power and distribution infrastructure exist along the bay. He said bay water is easier to desalinate because it is warmer and less salty than ocean water.

Mr. Helliker said a number of pretreatment filtration systems would be tested in the pilot plant. He said organic material that builds up on the filters would be sent to the sewage system.

Mrs. Warren complimented the District for developing a pilot desalination plant.

David Lewis, Save the Bay, said he believes that several studies that are termed optional requirements in the tentative order should be made mandatory requirements. He said the

District should conduct environmental studies while it operates the pilot plant in order to understand how desalination may affect the bay.

In reply to a question, Lila Tang said brine from a permanent desalination plant would be mixed with wastewater from Central Marin Sanitation Agency and discharged to the Bay.

Mr. Wolfe said staff recognizes that the District must conduct environmental studies if it intends to apply for a permit for a permanent desalination plant. He said some of the studies are required to be conducted during operation of the pilot plant. However, he said all of the studies the District would need to complete would not have to be conducted during the pilot plant operation.

Mr. Wolfe recommended adoption of the tentative order as supplemented.

Motion: It was moved by Mrs. Warren, seconded by Mrs. De Luca, and it was voted to adopt the tentative order as supplemented and recommended by the Executive Officer.

Roll Call:

Aye: Mrs. De Luca; Mr. Eliahu; Mr. Waldeck; Mrs. Warren; Mr. Muller.

No: None.

Motion passed 5 – 0.

Item 6 – North San Mateo County Sanitary District, Wastewater Treatment Plant, Daly City, San Mateo County – Hearing to Consider Mandatory Minimum Penalty for Discharge of Partially Treated Wastewater to Waters of the State

Mr. Wolfe said North San Mateo County Sanitary District signed a waiver of the right to a hearing on the proposed MMP. He said no Board action was necessary. Mr. Wolfe said the District agreed to pay a Mandatory Minimum Penalty in the amount of \$3,000. He said \$3,000 would be used for a supplemental environmental project.

Item 7 – Kinder Morgan Energy Partners, L.P., Fairfield, Solano County – Hearing to Consider Adoption of Resolution Authorizing Attorney General Referral to Seek Judicial Civil Penalties and Other Relief for Diesel Fuel Spill in April 2004

Jolanta Uchman gave the staff presentation. She said on April 27, 2004 a leak occurred in the pipeline that Kinder Morgan uses to transmit fuel from Concord to Sacramento. She said about 104,000 gallons of diesel spilled into Suisun Marsh. She said the U.S. Coast Guard, U.S. EPA, and California Department of Fish and Game oversaw the emergency response and confined the spill to a 242-acre area.

Ms. Uchman said on August 4, 2004 the Executive Officer issued a Cleanup and Abatement Order to regulate cleanup of the spill. She said Kinder Morgan has complied with requirements in the CAO and has reimbursed the Board for reasonable staff costs.

Ms. Uchman said the Board has the discretion to impose an administrative civil liability for the diesel spill. However, she recommended the case be referred to the Attorney General's office to allow state agencies to act in a coordinated manner. She said the

Department of Fish and Game already has referred the matter to the Attorney General's office.

In reply to a question, Mr. Wolfe reiterated that referring the case to the Attorney General's office would allow state agencies to pursue a consolidated penalty action.

Sejal Choksi, San Francisco BayKeeper, commended staff for recommending the penalty action be referred to the Attorney General's office. She encouraged the Board to adopt the tentative resolution.

Motion: It was moved by Mrs. De Luca, seconded by Mrs. Warren, and it was voted to adopt the tentative resolution Authorizing Attorney General Referral Regarding Kinder Morgan Energy Partners, L.P., Diesel Fuel Spill in Fairfield, Solano County.

In reply to a question, Mr. Wolfe said Kinder Morgan has been actively involved in cleaning up the spill.

In reply to a question, Yuri Won said a Cleanup and Abatement Order could include costs for staff time that were incurred in the emergency response before the CAO was issued.

Roll Call:

Aye: Mrs. De Luca; Mr. Eliahu; Mr. Waldeck; Mrs. Warren; Mr. Muller.

No: None.

Motion passed 5 – 0.

#### Item 8 – California Department of Transportation, Devil's Slide Tunnel Project, County of San Mateo – Status Report

Skip Sowko, Caltrans, Project Manager of the Devil's Slide Tunnel Project, said the project is being developed on schedule. He said federal funds have been allocated, and a groundbreaking ceremony would be held on May 6.

Mr. Sowko said the contract for construction of the tunnel is expected to be advertised in January 2006 and the tunnel is expected to be completed in 2010. He said bid openings recently occurred for the South Rock Cut, which is near the south portal.

Mr. Wolfe commended Caltrans for already completing some of the environmental mitigation for the project.

#### Item 9 – Former Zeneca Site, Richmond, Contra Costa County – Status Report

Curtis Scott gave the staff report. He said the property had been used for industrial purposes for over one hundred years. He said Zeneca was the last industrial user, and it stopped operations in 1997.

Mr. Scott said in 2001, the Board issued a site cleanup order. He said the upland area of the property has been cleaned up to meet commercial/industrial standards. He said the property is zoned for commercial/industrial use.

Mr. Scott said in 2003, Zeneca sold the property to Cherokee Simeon Ventures. He said CSV proposed building housing and submitted a health based risk assessment for residential use. He said staff had concerns about health risks for residential use and rejected the risk assessment.

Mr. Scott said a concerned citizen requested the Department of Toxic Substances Control review CSV's risk assessment. He said DTSC also rejected the risk assessment. However, he said the community developed a misunderstanding that it was DTSC who told the Water Board the risk assessment was not acceptable. He reiterated that staff already had rejected the risk assessment.

Mr. Scott said during the summer of 2004 staff received complaints from adjacent property owners about dust originating from the property. However, he said little cleanup activity was occurring on the property at the time.

Mr. Scott said in November 2004, Cal/EPA, DTSC, and the Water Board agreed that DTSC would oversee cleanup of the upland area and the Water Board would have oversight of the marsh area. He said on March 1, 2005, the Richmond City Council passed a resolution requesting that DTSC oversee cleanup on all of the property.

Mr. Waldeck said small businesses located near the property might have been affected by dust created during cleanup activities.

Mr. Morse said staff would not intend to enforce cleanup activities that create nuisances to adjacent properties.

Mr. Muller, Mrs. Warren, and Mrs. De Luca thanked Mr. Scott for his excellent staff report.

Sherry Padgett, Richmond, said she has worked across the street from the property for the last eight years. She said she has experienced serious health problems and other women who work in the area also have experienced serious health problems.

Ms. Padgett said between 1998 and 2001 buildings located on the property were demolished. She said the public was not involved in the demolition phase of the project and precautions were not taken to protect the adjacent community. She said site cleanup operations also have not taken into account wind, odor, and dust conditions that affect the adjacent community.

Ms. Padgett said the community would like DTSC to be responsible for all cleanup on the property and would like assurance that cleanup will meet Cal/EPA's safest standards.

Ms. Padgett said her primary concern is for the health of her friends, fellow employees, and neighbors. She said all parties have a responsibility to ensure that no one is harmed from cleanup of the property.

Mr. Eliahu asked if cleanup must meet commercial/industrial standards or residential standards.

Mr. Wolfe said the property is required to be cleaned up to commercial/industrial standards. He said the Board's site cleanup order required that a deed restriction be filed limiting future land use to commercial/industrial. He said a deed restriction limiting the land use had been filed. He said both the City and the Board would be required to take action in order to change the land use designation to residential. He said the Board would have to approve a change in the deed restriction.

Mrs. De Luca said it was important that all parties work cooperatively. She asked about removal of material from the area where a temporary protective cap had been placed.

Mr. Wolfe said material from the marsh would be taken to landfills. He said some of the material is hazardous. He said staff instructed Cherokee Simeon to handle all material as if hazardous in order to protect workers and the community.

Mr. Muller asked staff to keep the Board informed of activities at the property.

Mr. Wolfe said staff understands that work on the property is a major concern for the Richmond community. He said staff would coordinate with the other agencies and would work with the community. He said staff would give the Board updates in the monthly Executive Officers Report and during the Executive Officer's discussion at the Board meeting.

[The Board took a recess at 11:08 a.m. and resumed at 11:16 a.m.]

Item 10 – Property at 327 Moffett Boulevard, Mountain View, Santa Clara County - Hearing to Consider Procedural Options for Naming Additional Dischargers to Site Cleanup Requirements

Mr. Waldeck said all the attorneys involved in the case have been customers of his office supply business. He said Union Bank is a former customer. He said he had been advised by legal counsel that the attorneys have not conducted enough business to create a conflict of interest.

Vince Christian gave the staff report. He said Rheem, Raytheon, and Innerconn Technologies have operated businesses at 327 Moffett. He said Union Bank of California became an owner when Innerconn Technologies defaulted on its loan.

Mr. Christian said TCE was discovered in groundwater beneath the property about the time Union Bank became owner. He said in 1989, the Board issued a site cleanup order to Union Bank and Innerconn Technologies for subsurface cleanup.

Mr. Christian said Union Bank has submitted evidence that Rheem and Raytheon were responsible for the contamination. He said Rheem and Raytheon deny responsibility. He said the law gives the parties the right to have an evidentiary hearing. He said Union Bank would like to have former employees of Rheem and Raytheon testify. He said Rheem would like to cross-examine witnesses if the Board will rely on the testimony.

Mr. Christian said Union Bank installed a pump and treat system to reduce TCE levels and to control off-site migration. He said TCE concentrations have been reduced and are expected to decline further due to natural degradation. He said TCE concentrations

currently do not present a significant threat to human health or the environment, and staff considers the property to be a low risk case.

Mr. Christian said the Board could select a procedural option to resolve the dispute among the parties. He reviewed four options:

1. The Board would defer taking action until litigation between Rheem and Union Bank is resolved or other developments occur that address the disputed facts.
2. The Board would hold a full evidentiary hearing. Option 2(a) would involve a long hearing where parties would present direct testimony, cross-examination and rebuttal testimony. Staff estimates this option would take substantially longer than a day. Option 2(b) would involve a shorter hearing where parties would be required to submit written materials in advance of the hearing. The Board would set time limits for the parties and would allow the parties to conduct cross-examination and rebuttal. Staff estimates Option 2(b) could be conducted in a day.
3. The Board would name a panel of three Board members to conduct either a long or short hearing and make a recommendation to the full Board. The Board would consider the recommendation at a regularly scheduled Board meeting.
4. A paper hearing would be held. Evidence would be submitted in paper form to the Executive Officer who would issue an order based on the written evidentiary record.

Mr. Waldeck asked if the Board could require that parties participate in mediation. Ms. Dickey said she did not know if applicable regulations allow issues to be resolved through mediation.

Rupert Hansen, Counsel for Union Bank of California, said the Bank acquired the property through a foreclosure action in 1985 and owned the property until 1989. He said the Bank has spent millions of dollars to comply with the Board's site cleanup order. He said groundwater at the property has been remediated and natural attenuation is occurring.

Mr. Hansen said the Bank relied on a statement in the order that if it discovered facts suggesting additional parties should be named to the order, it would have an opportunity to present the facts to the Board. He said the Bank has developed information it believes establishes that Rheem and Raytheon should be named on the order. He said he thought it would be wrong for the Board to send a message that responsible parties may not be held accountable if they delay and, in the interim, groundwater has been remediated.

Mr. Hansen recommended against deferring action as described under Option 1. He said older witnesses should be given an opportunity to testify.

Mr. Hansen did not believe a paper hearing under Option 4 would meet due process standards. He said a witness' credibility could not be evaluated.

Mr. Hansen recommended the Board follow Option 2(b) and hold a shorter hearing. He said due process standards require that parties have an opportunity to cross-examine and impeach witnesses. He said the Board could limit the parties' time at the hearing and could require parties submit written direct testimony before the hearing. He said he thought the hearing could be conducted in one day.

Mr. Hansen said he thought a hearing conducted by a panel of three Board members would meet due process standards.

In reply to Mr. Waldeck's earlier question, Ms. Dickey said regulations provide that parties may agree to resolve issues through mediation or non-binding arbitration.

James Meeder, Counsel for Rheem Manufacturing of New York, said his client was not involved in activities on the property. He said Rheem Semi-Conductor operated at the subject property and then sold its assets to Raytheon.

Ms. Dickey reminded the Board that it had asked parties to limit comments to procedural options under consideration.

Mr. Meeder said the staff report states that Union Bank requests Rheem and Raytheon be named to the order as a matter of equity and to support the Bank's efforts to recover costs. Mr. Meeder suggested it was not the Board's role to assist parties in cost recovery claims. He said the Bank could bring a claim in a court of law.

Mr. Meeder said staff might not be available to assist the Board in its proposed adjudicatory role. He said there is a question whether staff that participated in a case in an investigative and prosecutorial role can also assist in an adjudicative role.

Mr. Meeder recommended the Board defer taking action. He said his client and Union Bank currently are parties to a lawsuit regarding whether adjacent property was contaminated because of Rheem Manufacturing Company's activity at 327 Moffett.

Mr. Meeder suggested it would take more than one day for the Board to hold an evidentiary hearing. He said his client would agree to mediation that was suggested by the Board and involved all three parties.

Kathleen Goodhart, Counsel for Raytheon Company, questioned whether staff resources should be used to determine whether to name additional dischargers to the order. She said the property is a low risk case.

Ms. Goodhart said cost allocation issues among the parties should be resolved in a court of law. She said the Board's decision in an adjudicatory hearing is subject to *de novo* review in Superior Court.

Ms. Goodhart said staff named Raytheon in a tentative site cleanup order. She said Raytheon complied with staff's request for additional information. She said staff reviewed the additional information and did not to name Raytheon in the order presented to the Board. She said Raytheon has complied with information requests and has not engaged in a pattern of delay.

Mr. Hansen reiterated that the Bank has become aware of additional information concerning Rheem and Raytheon and would like the parties to be named to the order. He also reiterated the Bank has completed substantial remediation at the property.

Ms. Dickey said the Board could go into executive session to receive advice from counsel because there has been a significant threat of litigation. She said the Board would return to open session after receiving counsel's advice and would decide which option to pursue.

[At 12:20 p.m., the Board took a lunch break and went into closed session to discuss exposure to litigation and personnel matters. The Board resumed the meeting at 1:30 p.m.]

Mr. Muller said the Board in closed session received advice from counsel regarding the procedural options.

Ms. Dickey recommended the Board vote in the open meeting to decide on a procedural option.

Motion: It was moved by Mrs. De Luca, seconded by Mr. Eliahu, and it was voted to hold a full Board hearing of the shorter version.

Mr. Muller encouraged the parties to resolve as many issues as possible before the hearing. He said he would not like to see the hearing extend over multiple days. He suggested a date could be set sometime later in the year.

Roll Call:

Aye: Mrs. De Luca; Mr. Eliahu; Mr. Waldeck; Mrs. Warren; Mr. Muller.

No: None.

Motion passed 5 – 0.

### Adjournment

The Board meeting was adjourned at approximately 1:35 p.m.