

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

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At approximately 9:06 a.m., Board members John Muller, Kristina Brouhard, Shalom Eliahu, and Gary Wolff were present. However, the meeting could not begin until another Board member arrived and quorum requirements were met. In the interim, Board members did the following.

John Muller presented the State Board's 2005 Customer Service Award to Connie Ramos, Regional Board receptionist. Bruce Wolfe said Ms. Ramos provides excellent customer service to staff and visitors, and it was a pleasure to honor her with the Award.

Shin-Roei Lee introduced Ben Livsey, new staff.

Mr. Wolfe said the Regional Board would hold Board meetings in 2006 on second Wednesdays and the State Board would hold meetings on third Wednesdays.

Mr. Wolfe said Phil Wyels, State Board Deputy Chief Counsel, and Regional Board staff recently met with deputy district attorneys from most of the Bay Area counties. He said participants discussed opportunities to work together to enforce environmental requirements.

Mr. Wolfe said earlier this morning staff received an Executive Summary of the 2004-2005 Annual Report of the Santa Clara Valley Urban Runoff Program. He said the Summary highlights significant accomplishments the Program achieved during the last year.

Mr. Muller said the written Executive Officer's Report states that Caltrans anticipates dealing with a lot of groundwater when it bores a tunnel through San Pedro Mountain as part of the Devil's Slide Project. He suggested local water districts might be interested in using the groundwater.

Dr. Wolff said the written Executive Officer's Report states that the State Board is reviewing the CWA Section 303(d) list for revisions to be made in 2006. He said the Executive Officer's Report states that the State Board recommends diazinon be delisted in all Bay segments and asked if staff concurs with the delisting recommendation.

Mr. Wolfe replied affirmatively, and said Regional Monitoring Program data show that the diazinon level in Bay waters has declined. He said the diazinon level in Bay waters

contrasts with the diazinon level found in creeks in the region. He said diazinon found in urban creeks would be considered later in the meeting.

Mr. Wolfe announced the appointment of Wil Bruhns as Chief of the North Bay Watershed Management Division. He said an announcement of Chief of the Management Services Division would be made soon.

Item 1 - Roll Call and Introductions

The meeting was called to order on November 16, 2005 at approximately 9:15 a.m. in the State Office Building Auditorium, First Floor, 1515 Clay Street, Oakland.

Board members present: John Muller, Chair; Kristina Brouhard; Margaret Bruce; Shalom Eliahu; and Gary Wolff.

Board members absent: Josephine De Luca; Clifford Waldeck (Note: Mr. Waldeck arrived at 9:30 a.m.) and Mary Warren.

Item 2 - Public Forum

Larry Johmann, Guadalupe-Coyote Resource Conservation District and Santa Clara County Creeks Coalition, said the Board's July 2005 amendment of the Santa Clara Urban Runoff Program stormwater permit did not address stormwater impacts from existing development. He invited Water Board members to attend a workshop, to be sponsored by the Santa Clara Valley Water District in 2006, which would focus on stormwater from existing development.

Item 3 – Appointment of Nominating Committee for 2006 Chair and Vice-Chair

Mr. Muller appointed Mr. Eliahu and Mrs. Bruce to co-chair a committee to nominate at the January Board meeting a Chair and Vice-Chair for 2006.

Item 4 – Consideration of 2006 Board Meeting Schedule

Mr. Wolfe said a supplemental lists the proposed 2006 Board meeting schedule. He said meetings would be held on second Wednesdays.

Item 5 – Minutes of the October 19, 2005 Board Meeting

Motion: It was moved by Mr. Eliahu, seconded by Mrs. Bruce, and it was unanimously voted to adopt the minutes of the October 19, 2005 meeting.

Mrs. Brouhard and Mr. Muller abstained because they did not attend the meeting.

[Mr. Waldeck arrived at 9:30 a.m.]

Item 6 – Chairman's, Board Members' and Executive Officer's Reports

There was no discussion.

Item 7 – Consideration of Uncontested Items Calendar

Mr. Wolfe recommended removing Item 7A from the uncontested calendar because speakers wished to be heard.

Mr. Wolfe thanked Sarah Raker for her work on the non-regulatory revisions to the Basin Plan. He recommended adoption of Item 7B as supplemented.

Motion: It was moved by Mr. Eliahu, seconded by Mrs. Bruce, and it was voted to adopt Item 7B as supplemented and recommended by the Executive Officer.

Roll Call:

Aye: Mrs. Brouhard; Mrs. Bruce; Mr. Eliahu; Mr. Waldeck; Dr. Wolff; and Mr. Muller

No: None

Motion passed 6 – 0.

Item 7A – Mountain Cascade, Inc., East Bay Municipal Utility District, Kinder Morgan Energy Partners, LLP, and Contra Costa County Department of Public Works, for the property located along South Broadway between Rudgear Road and Newell Avenue, Walnut Creek, Contra Costa County – Adoption of Site Cleanup Requirements

Stephen Hill said Mountain Cascade served as a construction contractor for EBMUD in the installation of a water pipeline. He said on November 9, 2004 a heavy equipment operator, under the direction of Mountain Cascade, struck a fuel pipeline operated by Kinder Morgan. He said the fuel pipeline released petroleum, and the tentative order addresses petroleum cleanup of soil and groundwater.

Mr. Hill said Contra Costa County granted easements for the location of both pipelines.

Barry Ogilby, attorney for Kinder Morgan, requested the tentative order not refer to possible earlier fuel discharges from the pipeline. He requested the parties be given more time to complete site characterization work as well as the sequence of tasks that follows site characterization work.

Mr. Hill said initial investigation of the site indicates petroleum contamination may have occurred from the November 9, 2004 release as well as from earlier releases.

Mr. Eliahu asked if petroleum released on November 9, 2004 could be separated from petroleum that was released earlier.

Mr. Wolfe said staff intends that requirements in the tentative order focus on cleanup of the November 9, 2004 petroleum release. He said the full extent of contamination would not be known until completion of site investigation work. He said the order regulating the site could be amended or another order could be issued if site work indicates the presence of earlier releases.

Ralph Zappala, attorney for Mountain Cascade, concurred with Mr. Ogilby's request that the parties be given additional time to complete site characterization work and the tasks that would follow.

Dr. Wolff and staff discussed amending the tentative order to give the Executive Officer authority to revise compliance dates.

Mr. Waldeck expressed concern that last minute changes were requested for an item that had been placed on the uncontested calendar.

Mr. Muller said further contamination was not being added to the site. He spoke in favor of allowing the parties additional time as requested.

Mr. Muller suggested staff work with the parties and prepare a written supplement to the tentative order that would include amendments that have been recommended verbally and to which staff and the parties agree. He said the Board would consider the supplement later in the meeting.

Item 8 – C&H Sugar Company, Crockett, Contra Costa County – Hearing to Consider Mandatory Minimum Penalty for Discharge of Partially Treated Wastewater to Waters of the State

Mr. Wolfe said C&H Sugar signed a waiver of the right to a hearing on the proposed MMP. He said no Board action was necessary. Mr. Wolfe said C&H Sugar Company agreed to pay a Mandatory Minimum Penalty in the amount of \$30,000. He said \$22,500 would be used for a supplemental environmental project.

Item 9 – Novato Sanitary District, Novato, Marin County – Hearing to Consider Mandatory Minimum Penalty for Discharge of Partially Treated Wastewater to Waters of the State

Mr. Wolfe said Novato 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 \$141,000. He said \$78,000 would be used for a supplemental environmental project.

Item 10 – Proposed Amendment to the Water Quality Control Plan (Basin Plan) for the San Francisco Bay Region to Establish a Water Quality Attainment Strategy, Total Maximum Daily Load, and Implementation Plan for Diazinon and Pesticide-Related Toxicity in Urban Creeks – Hearing to Consider Adoption of Proposed Basin Plan Amendment

Bill Johnson gave the staff report. He said the Water Quality Attainment Strategy applies to all urban creeks in the Region and is directed at all pesticide-related toxicity. He said the Strategy incorporates a TMDL to address creeks listed on the 303(d) list for diazinon toxicity.

Mr. Johnson said the Strategy identifies one source of pesticides in urban creeks: urban runoff. He said the Strategy calls on agencies that oversee pesticide use and pesticide discharges to coordinate programs and implementation.

Mr. Johnson addressed four questions that were raised during the public comment period on the Strategy. He said the first question was whether the Water Board could force oversight agencies to act. In reply, he said the Board could not force state and federal agencies to act. He said the Board could provide leadership and recommend an action strategy.

Mr. Johnson said the second question was whether urban runoff agencies could regulate pesticide use. In reply, he said California law preempts local agencies from regulating pesticide use.

Mr. Johnson said the third question was whether the Strategy offers a safe harbor to urban runoff agencies. In reply, he said the Strategy does not shield agencies from responsibilities to protect water quality. He said there are requirements in the Strategy that must be included in stormwater permits.

Mr. Johnson said the fourth question was whether there could be greater specificity in the Strategy about scope and timelines. In reply, he said staff believes the Strategy includes specificity and also retains flexibility to address future problems. He said a schedule has been added that sets out actions to be taken by the Water Board. He said every year staff would report to the Board on implementation of the Strategy.

Mr. Johnson said there is a supplement to the Board package.

Dr. Wolff requested that a sentence on page 10 of the Basin Plan Amendment (Strategy) be stricken because it provides a shield to agencies: “Urban runoff management agencies’ and similar entities’ respective responsibilities for addressing these allocations and targets will be satisfied by complying with the requirements set forth below and permit-related requirements based on them.”

Dr. Mumley summarized a November 15, 2005 letter from Mary-Ann Warmerdam, Director of the Department of Pesticide Regulation. He said Ms. Warmerdam wrote “DPR supports adoption of the proposed Basin Plan Amendment” and she appreciates the Water Board’s efforts to coordinate with her staff and develop a collaborative strategy that proactively addresses water quality and pesticide use associated with urban creeks.

Dr. Mumley said Ms. Warmerdam’s letter reflects the fact that the relationship between DPR and the Water Board is entering a new era.

Sejal Choksi, San Francisco Baykeeper, requested that the Board not adopt the resolution in support of the Basin Plan Amendment. She asked that staff delete the sentence requested by Dr. Wolff. She asked that staff revise the Amendment: (1) to specify regulatory actions that DPR must take to deal with pesticide toxicity and consequences for failure to act; and (2) to specify minimum pesticide management requirements that NPDES stormwater permits must include.

Andria Ventura applauded staff for establishing a collaborative relationship with DPR. She said, however, it is important that the Strategy include specific actions that the Water Board would take if DPR does not protect creeks.

Mr. Wolfe agreed with Dr. Wolff and Ms Choksi's request to remove the sentence on page 10 of the Basin Plan Amendment. He said staff would like to continue to develop a positive relationship with DPR. He recommended the Amendment not be too specific on actions the Water Board would take if DPR did not act.

Dr. Mumley suggested adding a sentence to the paragraph under the heading Adaptive Implementation on page 15 of the Basin Plan Amendment: "If the Water Board determines that expected actions by responsible parties are not occurring or are not sufficient to attain allocations and targets, the Water Board will consider appropriate response actions to improve implementation or otherwise consider revisions to the Strategy."

In reply to a question, Dr. Mumley said the ability of the Water Board to require another state agency to take action is limited.

Mr. Wolfe said staff would like to publicize positive steps the Water Board and DPR are taking to address urban pesticides issues.

Yuri Won said in 1997 Cal/EPA, the State Board, and DPR signed a Management Agency Agreement that sets out a conflict resolution process.

Mr. Wolfe said the regional stormwater permit that is being developed could require consistency among jurisdictions in how pesticide issues are addressed.

Dr. Wolff said three of the concerns he raised last month have not been addressed adequately. He recommended Board action on the Strategy be deferred to give staff time to address his concerns.

Dr. Wolff said he was concerned that the Board has not been briefed on the "big picture" that includes all toxicity in urban creeks. He said the Strategy only addresses one slice of toxicity, pesticide-related toxicity.

Dr. Wolff said he was concerned that the Strategy does not contain sufficient specificity on essential issues. He said he is not looking for exact actions **but wanted strategic decision points and timelines.**

Dr. Wolff said he was concerned that staff had not developed a template that could be used in future TMDLs. He suggested a TMDL template would include the "who, what, when" that is essential to successful planning.

Mr. Eliahu spoke in favor of adopting the Strategy and commended staff for work done in preparing the document. Mrs. Brouhard concurred with Mr. Eliahu.

Mr. Waldeck spoke in favor of adopting the Strategy. He said, however, he agreed with a lot of Dr. Wolff's concerns.

Mrs. Bruce said she agreed with a lot of Dr. Wolff's concerns. She said she was concerned about the fact that much of the success of the Strategy rests on the participation of DPR, which is an independent state agency.

Mr. Wolfe said staff's long-term goal is to address all of the toxicity in urban creeks. He said staff could brief the Board on the broad toxicity problem. He said staff is addressing toxicity incrementally in an effort not to miss opportunities to move forward.

In reply to a question, Mr. Wolfe said pesticide toxicity in urban creeks is a statewide issue. He said if the State Board and all the regional boards express concern, DPR may give the issue high priority.

Mr. Wolfe recommended adoption of the Resolution to Amend the Basin Plan to Establish a Water Quality Attainment Strategy and TMDL for Diazinon and Pesticide-Related Toxicity in Bay Area Urban Creeks; he recommended approval of the supplement to the Basin Plan Amendment; he recommended the sentence on page 10 of the Amendment be stricken as suggested by Dr. Wolff and Ms. Choksi; and he recommended the sentence Dr. Mumley read into the record be added to page 10 of the Amendment.

Motion: It was moved by Mr. Eliahu, seconded by Mrs. Bruce, and it was voted to follow the Executive Officer's recommendations: to adopt the Resolution; to approve the supplement to the Basin Plan Amendment; to strike the sentence of page 10 of the Amendment as suggested by Dr. Wolff and Ms. Choksi; and to add a sentence to page 10 of the Amendment as suggested by Dr. Mumley.

Roll Call:

Aye: Mrs. Brouhard; Mrs. Bruce; Mr. Eliahu; Mr. Waldeck; and Mr. Muller

No: Dr. Wolff

Motion passed 5 – 1.

[The Board took a brief recess.]

Item 11 – Amendment to the Water Quality Control Plan (Basin Plan) for the San Francisco Bay Region to Establish San Francisco Bay Mercury Total Maximum Daily Load (TMDL) and Implementation Plan – Status Report on Remand by the State Water Resources Control Board – Information Item

Tom Mumley gave the staff report. He said in September 2005 the State Board remanded the Regional Board's Mercury TMDL back to the Regional Board. He said the Remand Resolution directs the Regional Board to perform a number of tasks. He said the Regional Board is required to make a progress report by March 2006 on compliance with the Remand Resolution. He said the Regional Board is required to comply with the Remand Resolution by June 2006.

Dr. Mumley said, in compliance with the Remand Resolution, staff would conduct analyses of pollution prevention practices and treatment technologies that are applicable to wastewater treatment plants. He said staff would develop a revised wastewater allocation scheme based on the analyses. He said staff would develop requirements for wastewater dischargers to monitor effluent for methylmercury.

Dr. Mumley said, in compliance with the Remand Resolution, staff would clarify that the Mercury TMDL is consistent with the dredge disposal requirements of the Long Term Management Strategy.

Dr. Mumley said, in compliance with the Remand Resolution, staff would create an inventory of mercury mines and Bay-margin contaminated sites. He said staff has identified mercury mines in the New Almaden District as posing water quality threats and a remediation strategy for the mines is being developed. He said staff would assess water quality threats of other mines around the Bay Area.

Dr. Mumley said staff has identified sites along the Bay margin where high mercury levels have been found and said staff would evaluate cleanup requirements for the sites.

Dr. Mumley said the Remand Resolution directed the Regional Board to investigate ways to address public health impacts of mercury in Bay fish. He said, in compliance with the Resolution, staff is participating in the Clean Estuary Partnership's Risk Reduction Work Team. He said representatives from environmental groups and the regulated community are participating also. He said the work team would assist in developing and implementing effective programs to control pollutant-related health risks to people who rely on the Bay as a food source.

Dr. Mumley said, in compliance with the Remand Resolution, staff would revise the wildlife target in the Mercury TMDL. He said the current wildlife target is less than 0.5 mg/kg mercury in bird eggs. He said staff proposes that the wildlife target be revised to 0.03 mg/kg in prey fish.

Dr. Mumley said, in compliance with the Remand Resolution, staff would update the current water quality objective because it is archaic. He said staff proposes establishing the fish tissue target of the TMDL as the water quality objective.

Dr. Mumley discussed air deposition as a mercury source. He said a recently published scientific journal article concluded that air deposition is not a major source of mercury in the Bay. He said the Regional Board has required local petroleum refineries to investigate the fate of mercury in crude oil.

Dr. Mumley said some stakeholders have expressed concern with staff's prediction that it might take 120 years for the Bay to fully recover from mercury contamination. He said, in reply, that the amount of legacy mercury in Bay sediments prevents the Bay from fully recovering for decades. He said staff estimates actions to control mercury from entering the Bay could be implemented in 20 years.

In reply to questions, Dr. Mumley said allocations of mercury loads were calculated to achieve the sediment target of 0.2 ppm of mercury. He said the allocation for bed erosion would be met through naturally occurring processes and not through human intervention.

Sejal Choksi, San Francisco Baykeeper, said Baykeeper would like staff to develop strong language regarding prioritization of Bay-margin contaminated sites. She urged staff to incorporate language into the TMDL from the Remand Resolution regarding an investigation into public health impacts of mercury in Bay fish.

Ms. Choksi said the Remand Resolution requires wastewater dischargers be allocated individual wasteloads. She said the Resolution requires dischargers conduct methylmercury monitoring. She requested the investigation that local petroleum refineries are required to conduct regarding the fate of mercury in crude oil includes a full mass balance analysis.

Ms. Choksi urged staff to meet with the environmental community to discuss changes that will be made to the Mercury TMDL as a result of the Remand Resolution.

Andria Ventura, Clean Water Action and Environmental Justice Coalition, asked for clarification about development of a state pollutant trading program. She expressed concern that a complete inventory of mercury mines in the Bay Area might not occur.

Kevin Buchan, Western States Petroleum Association, said he also was speaking on behalf of Craig Johns, Partnership of Sound Science and Environmental Policy. Mr. Buchan spoke in favor of the science-based approach used in staff's report on the Remand Resolution. He said if nonpoint dischargers are required to monitor for methylmercury then all pollutant sources should be required to conduct methylmercury monitoring.

Michelle Plá, Executive Director of Bay Area Clean Water Agencies, said BACWA is in favor of establishing the fish tissue target as the water quality objective for mercury. She said the wastewater community entered into an agreement with the Water Environment Federation in which the Federation will do a three-phase study on the production, fate, and transport of methylmercury. She said the study will have a national focus and will include the San Francisco Bay.

Mr. Muller encouraged staff to discuss with all stakeholders changes being considered to the Mercury TMDL because of the Remand Resolution.

Mr. Waldeck thanked staff for taking a positive attitude towards making changes required by the Remand Resolution.

Dr. Wolff encouraged staff to include strategic decision points and timelines in work concerning TMDLs.

Item 7A – Mountain Cascade, Inc., East Bay Municipal Utility District, Kinder Morgan Energy Partners, LLP, and Contra Costa County Department of Public Works, for the property located along South Broadway between Rudgear Road and Newell Avenue, Walnut Creek, Contra Costa County – Adoption of Site Cleanup Requirements

The Board considered the item further.

Mr. Hill said staff and the parties agreed to proposed amendments of the tentative order set out in Supplement 2. He said staff distributed copies of Supplement 2 which: amends Finding 5C; corrects a typographical error in Finding 6; extends deadlines for compliance; allows the Executive Officer to revise the compliance schedule; incorporates Supplement 1; and amends the name of one party from Contra Costa County Department of Public Works to Contra Costa County.

Mr. Wolfe recommended adoption of the tentative order, along with Supplement 2.

Motion: It was moved by Mr. Eliahu, seconded by Mrs. Bruce, and it was voted to adopt the tentative order along with Supplement 2, and as recommended by the Executive Officer.

Roll Call:

Aye: Mrs. Brouhard; Mrs. Bruce; Mr. Eliahu; Mr. Waldeck; Dr. Wolff; and Mr. Muller

No: None

Motion passed 6 – 0.

Item 12 – Land Disposal Program Update – Information Item

Terry Seward gave the staff report. He said the Board regulates the following types of landfills: (1) municipal solid waste landfills; (2) industrial landfills; (3) construction landfills; (4) industrial ponds; and (5) mine sites. He said there are no active mine landfills in the Bay Area. He said staff spends most time regulating active and closed municipal landfills.

Mr. Seward said staff tries to assure that waste is contained without leakage, and the public and the environment are protected. He said staff enforces state and federal regulations that cover the following aspects of landfills: location; construction; operations; monitoring of waters; and closure.

Mr. Seward said landfills could create the following threats to water quality: (1) leachate; (2) stormwater runoff; (3) landfill gases; and (4) liner failure. He said landfill issues the Board may consider in the future include: (1) closure of Bay-front landfills; (2) development on closed landfills; and (3) expansion of existing landfills.

In reply to a question, Mr. Seward said the Integrated Waste Management Board deals with waste reduction issues.

[Mr. Waldeck left the meeting at approximately 12:55 p.m.]

[The Board took a lunch break at approximately 12:55 p.m. and went into closed session. The Board resumed the meeting at approximately 1:40 p.m.]

Item 13 – Property at 327 Moffett Boulevard, Mountain View, Santa Clara County – Hearing to Consider Procedural Options for Naming Additional Dischargers to Site Cleanup Requirements

Steve Morse gave the staff presentation. He said Rheem, Raytheon, and InnerConn operated electronic businesses at 327 Moffett. He said Union Bank became the owner of the property when InnerConn defaulted on its loan.

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

Mr. Morse said the Bank conducted active remediation at the site. He said TCE concentrations have been reduced and are expected to decline further due to natural degradation. He said groundwater monitoring is the only cleanup task that remains.

Mr. Morse 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. Morse said Union Bank has submitted evidence in support of its claim that Rheem and Raytheon are responsible for contamination at the site and should be named as parties on the site cleanup order. He said Rheem and Raytheon deny responsibility.

Mr. Morse said in March 2005 the Board considered four procedural options that could be used to determine whether additional parties should be named to the order. He said the Board selected Option 2(b) of the shorter version. He reviewed the 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 estimated 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 estimated 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. Morse said Union Bank recently asked the Board to name more parties than just Rheem and Raytheon. He said in July 2005 the Bank requested that eight parties who are current or former owners of the site be named to the order. He said in September 2005 the Bank revised its request. He said the Bank asked that only one more party (LBD Development, the current owner) be named to the order.

Mr. Morse said Raytheon has stated that Paul Zebb and Patricia Zebb (owners of InnerConn) should be required to participate in a hearing concerning naming additional parties.

Mr. Morse said staff has brought this matter back to the Board for further consideration because there is uncertainty about the length of time to conduct a hearing. He said the length of the hearing would increase as more parties are requested to be named to the order.

Mr. Morse reviewed the procedural options the Board could select to resolve the naming dispute. He said Options 2, 3, and 4 remain the same as described in March (noted above). He provided greater detail on Option 1 and Option 1a:

1. The Board would defer taking action pending (i) resolution of litigation between Rheem and Union Bank or other developments that address the disputed facts in this matter, (ii) an increased threat from site contamination to health or the environment, or (iii) the availability of more staff resources.

- 1a. The Board would continue the hearing on which procedural option to select until after April 30, 2006, which would be after mediation between Rheem and Union Bank had occurred and the Rheem-Union Bank trial date had passed.

Rupert Hansen, Counsel for Union Bank, said the Bank had spent millions of dollars to cleanup the site. He said the Bank relied on a statement in the order that if it discovered facts suggesting additional parties should be named, it would have an opportunity to present the facts. He said 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 said witnesses are getting older and the Bank could conduct depositions in connection with an evidentiary hearing.

Emily Kennedy, Counsel for Rheem Manufacturing Company, recommended the Board defer taking action on the naming issue until after the April 2006 Rheem-Union Bank trial date. She said there would be mediation before the trial date.

Kathleen Goodhart, Counsel for Raytheon Company, recommended the Board indefinitely defer action on the naming issue. She recommended, alternatively, that the Board put over taking action until after mediation between Rheem and the Bank has occurred and after the Rheem-Union Bank trial date has passed.

Ms. Goodhart said civil court is the appropriate forum for hearing the disputed issues. She said civil courts are prepared to deal with discovery issues. She said the Bank's concern about preserving testimony of aging witnesses emphasizes the appropriateness of civil court.

Mr. Hanson said under federal law, the Bank does not have a cause of action for cost recovery until there is a Final Remedial Action Plan. He said the Bank would not be able to conduct discovery and preserve evidence without a cause of action.

Mr. Hansen spoke against the Board deferring action until after April 2006. He said the Bank's lawsuit against Rheem involves the Bank's settlement with a down gradient property owner over TCE contamination.

Mr. Hansen said the Bank believes the evidentiary hearing process developed by the Water Board for this matter could be used in other cases.

In reply to a question, Ms. Dickey said she heard today for the first time that the Bank could not bring a lawsuit against Raytheon until the Executive Officer approves a Final Remedial Action Plan. She said staff has prepared the Plan for the Executive Officer's approval, and she understood it could be approved fairly quickly.

In reply to a question, staff said the State Board enforcement policy encourages the Board to name all responsible parties to a cleanup order. Staff said, however, that the policy allows for modification to allow the Board to take into account factors like availability of staff resources and the threat of contaminants to water quality.

In reply to a question, Ms. Dickey said some procedural options would involve more of the Board members time than others.

In reply to a question, Mr. Hill estimated that three staff working full time for a year would be needed to prepare for the hearing.

Mr. Eliahu suggested the Board continue the evidentiary hearing until after April 2006. He questioned the sufficiency of staff resources to conduct preparation necessary for a hearing.

Staff said the matter would be brought back to the Board before April 30, 2006 if developments occurred that would affect the Board's evaluation of procedural options.

Ms. Dickey said an evidentiary hearing must be consistent with due process. She said the number of parties involved in the hearing and the number of issues disputed would affect the length of a hearing. She said she could not estimate at this time the length of time required for an evidentiary hearing.

Motion: It was moved by Mr. Eliahu, seconded by Dr. Wolff, and it was voted to continue this matter until after April 30, 2006, unless criteria in Option 1, as Mr. Morse updated today, are met or unless substantial new evidence occurs that would affect the Board's evaluation of procedural options.

Dr. Wolff asked staff to clarify an issue when the Board considers this matter again: whether the Board must take action in order for the Bank to bring a civil lawsuit to resolve responsible party issues.

Roll Call:

Aye: Mrs. Brouhard; Mrs. Bruce; Mr. Eliahu; Dr. Wolff; and Mr. Muller

No: None

Motion passed 5 – 0.

Adjournment

The Board meeting was adjourned at 2:43 p.m.