

## ***QUESTIONS AND ANSWERS***

# **STATE WATER RESOURCES CONTROL BOARD**

## **RESOLUTION NO. 92-49**

### **I. PURPOSE**

The purpose of this Memorandum is to provide information to Regional Water Quality Control Board (RWQCB) and State Water Resources Control Board (SWRCB) staff concerning the implementation of SWRCB Resolution No. 92-49 (Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304). In 1994, the SWRCB adopted Resolution No. 92-49 under California Water Code (CWC) Section 13307. Resolution No. 92-49 establishes procedural and substantive requirements that apply to cleanups of waste. This Memorandum provides answers to frequently asked questions concerning the implementation of Resolution No. 92-49. This Memorandum also provides answers to questions concerning the application of Resolution No. 92-49 at cleanup sites subject to federal law, particularly the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

### **II. DESCRIPTION OF SWRCB RESOLUTION NO. 92-49**

SWRCB Resolution No. 92-49 is a state policy that establishes policies and procedures for investigation and cleanup and abatement of discharges under CWC Section 13304. See Resolution No. 92-49 (Attachment 1). The Resolution establishes the basis for determining cleanup levels of waters of the State and soils that impact waters of the State. Dischargers are required to clean up and abate the effects of discharges "in a manner that promotes attainment of either background water quality, or the best water quality which is reasonable if background levels of water quality cannot be restored, . . ." Alternative cleanup levels less stringent than background must, among other things, not unreasonably affect present and anticipated beneficial uses of waters of the State. The Resolution also includes procedures to investigate the nature and horizontal and vertical extent of a discharge and procedures to determine appropriate cleanup and abatement measures. Resolution No. 92-49 is consistent with CWC Sections 13000 and 13304.

SWRCB Resolution No. 92-49 is applied by the RWQCBs and the SWRCB primarily by issuing cleanup and abatement orders under CWC Section 13304 and

monitoring and investigation orders under CWC Section 13267. The Resolution was adopted following all procedures required by state law and is legally binding on dischargers and other state agencies. (CWC Section 13146 and Government Code Section 11353.)

### III. SWRCB RESOLUTION NO. 92-49 QUESTIONS AND ANSWERS

1. **Q. How does Resolution No. 92-49 apply to the determination of in situ cleanup levels of contaminated ground water?**

A. Resolution No. 92-49 establishes the policy that dischargers are required to cleanup and abate the effects of discharges in a manner that promotes attainment of either background water quality or the best water quality which is reasonable if background levels of water quality cannot be restored. In determining any cleanup level that is less stringent than background all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible are considered. In addition, Title 23 California Code of Regulations (CCR) Section 2550.4 applies in determining cleanup levels less stringent than background. Cleanup levels less stringent than background must attain the following requirements in Paragraph III.G. of the Resolution:

- "1. Be consistent with maximum benefit to the people of the state;
2. Not unreasonably affect present and anticipated beneficial uses of such water; and
3. Not result in water quality less than that prescribed in the Water Quality Control Plans and Policies adopted by the State and Regional Water Boards."

To comply with this Resolution, the cleanup level of polluted ground water would range between background and the applicable water quality objective specified in water quality control plans.

2. **Q. Does Resolution No. 92-49 apply to cleanup of soils?**

A. Yes. Resolution No. 92-49 requires discharges to clean up and abate the effects of discharges of waste to waters of the state and discharges of waste that threaten waters of the state, which may include discharges to soil. As

described in Question and Answer No. 1, dischargers are required to clean up and abate the effects of the discharge in a manner that promotes attainment of either background water quality or the best water quality which is reasonable if background levels of water quality cannot be restored. For soils, the effects of waste in the soil on water quality must be addressed. The soil cleanup level would range between the level that would achieve background in the affected water and the alternative level that would comply with Title 23 CCR Section 2550.4 and the three factors listed in Paragraph III.G. of the Resolution, i.e., the level that would achieve the applicable water quality objectives specified in water quality control plans.

3. **Q. How does Resolution No. 68-16 apply to cleanup of ground water and soils under Resolution No. 92-49?**

A. Resolution No. 92-49 requires actions for cleanup and abatement to conform to Resolution No. 68-16. Resolution No. 68-16 would apply if discharges to high quality waters of the State were occurring or would result from the cleanup. See Questions and Answers, State Water Resources Control Board Resolution No. 68-16.

4. **Q. Under what circumstances does Resolution No. 92-49 apply to cleanup actions?**

A. Resolution No. 92-49 applies to cleanup and abatement actions under CWC Section 13304. Section 13304 authorizes the RWQCB to order cleanup or abatement where a person has discharged or discharges waste into waters of the state in violation of waste discharge requirements or other orders or prohibitions issued by an RWQCB or the SWRCB. CWC Section 13304 also authorizes the RWQCBs to require "any person who has discharged or discharges waste" or who has

"caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance . . ."

to cleanup or abate such discharge.

Persons subject to Resolution No. 92-49 include present or past owners or operators and any other person who "caused or permitted . . ." discharges of waste. See SWRCB Order Nos. WQ 85-7, WQ 86-2, WQ 86-16, WQ 87-1, WQ 89-13, WQ 90-2, WQ 90-3.

5. **Q. Does Resolution No. 92-49 require cleanup to zero or background?**

A. No. Resolution No. 92-49 requires cleanup to occur in a manner that promotes attainment of either background water quality or that level that is reasonable if background levels of water quality cannot be restored.

6. **Q. What does the term "be consistent with maximum benefit to the people of the state" mean as used in Section III.G. of Resolution No. 92-49?**

A. Resolution No. 92-49 requires alternative cleanup levels less stringent than background to, among other factors, "be consistent with maximum benefit to the people of the state" and requires consideration of "all demands being made and to be made on the waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." As with Resolution No. 68-16, this determination is made on a case-by-case basis and is based on considerations of reasonableness under the circumstances at the site. Factors to be considered include (1) past, present, and probable beneficial uses of the water (specified in Water Quality Control Plans); (2) economic and social costs, tangible and intangible, of the proposed discharge compared to the benefits, (3) environmental aspects of the proposed discharge; and (4) the implementation of feasible alternative treatment or control methods. See SWRCB Order No. WQ 92-09.

7. **Q. What do the phrases "not unreasonably affect present and anticipated beneficial uses of such water" and "not result in water quality less than that prescribed in the Water Quality Control Plans and Policies adopted by the State and Regional Water Boards" mean as used in Section III.G. of Resolution No. 92-49?**

A. The CWC requires the SWRCB and RWQCBs to specify the beneficial uses of each water body in Water Quality Control Plans. Such beneficial uses include past, present, and probable future uses and include domestic, municipal, agricultural and industrial supply, power generation, recreation, aesthetic enjoyment, navigation, and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves. (CWC Section 13050(f).) Waters are designated for particular beneficial uses if they are suitable for that use even if they are not currently being used. Such probable uses must also be protected to ensure future usability of the water. See e.g., CWC Sections 13000 and 13241.

The CWC generally requires the SWRCB and RWQCBs to establish water

quality objectives in water quality control plans to ensure the reasonable protection of beneficial uses. Compliance with Resolution No. 92-49 would ordinarily require compliance with the water quality objectives in order to ensure the reasonable protection of beneficial uses.

The SWRCB and the RWQCBs have the authority under the CWC to adopt policies, including water quality control plans, for the protection of waters of the State. Such policies establish beneficial uses (e.g., SWRCB Resolution No. 88-63, "Sources of Drinking Water Policy"), water quality objectives (e.g., California Ocean Plan, RWQCB Water Quality Control Plans), antidegradation policy (e.g., Resolution No. 68-16), and other requirements for protection of waters of the State. To comply with Resolution No. 92-49, a cleanup and abatement action must comply with these other plans and policies of the SWRCB or the RWQCBs where applicable to the situation.

Cleanup levels should result in the protection of the designated beneficial uses and compliance with the relevant water quality objectives, implementation plans, and discharge prohibitions.

8. **Q. How is background determined as required by Resolution No. 92-49?**

A. Resolution No. 92-49 requires compliance with Title 23 CCR Section 2550.4 in determining cleanup levels less stringent than background. Section 2550.4 refers to Section 2550.7(e) which provides the methodology for determining background levels for ground water, surface water, and the unsaturated zone.

9. **Q. How does Title 23 California Code of Regulations, Division 3, Chapter 15 ("Chapter 15") apply to cleanup and abatement actions under Resolution No. 92-49?**

A. Chapter 15 applies primarily in three types of circumstances:

1. If cleanup and abatement involves corrective action at a waste management unit regulated by waste discharge requirements, all applicable requirements of Chapter 15 apply. For example, if the waste management unit is an "existing" waste management unit to be closed, Article 5 (Water Quality Monitoring and Response Programs for Waste Management Units) and Article 8 (Closure and Post-Closure Maintenance) would apply to the unit. See Title 23 CCR Section 2510(d) and Resolution No. 92-49 Section III.F. If the waste management unit is a "closed, abandoned, or inactive" waste

management unit, Article 5 would be applicable and Article 8 would be considered in determining appropriate closure methods. See Title 23 CCR Section 2510(g) and Resolution No. 92-49 Section III.F.

2. If cleanup and abatement of discharges of waste resulting from unintentional or unauthorized releases of waste involves the removal of the waste from the immediate place of release for treatment, storage, or disposal of waste to land, the new discharge must comply with Chapter 15. Article 2 specifies the method for classifying the waste to determine appropriate management. See Title 23 CCR Section 2511(d) and Resolution No. 92-49 Section III.F.
3. If cleanup and abatement of discharges resulting from unintentional or unauthorized releases involves actions other than removal, such as containment or in-situ treatment, the applicable provisions of Chapter 15 apply to the extent feasible. See Title 23 CCR Section 2511(d) and Resolution No. 92-49 Section III.F.

#### **Application of Resolution No. 92-49 at sites subject to CERCLA.**

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is the federal law that establishes requirements for the cleanup of sites containing hazardous substances. It establishes cleanup standards that are in part based on state cleanup requirements. Specifically, CERCLA Section 121(d)(2) requires remedial actions at CERCLA sites listed on the National Priorities List (NPL) to at least attain federal and more stringent state "applicable or relevant and appropriate" requirements (ARARs) upon completion of the remedial action. The 1990 National Contingency Plan (NCP), which are the federal regulations that implement CERCLA, requires compliance with ARARs during remedial actions as well as at completion, and mandates attainment of ARARs during removal actions to the extent practicable. See NCP, 40 CFR Section 300.435(b)(2) and 300.415(i). CERCLA establishes criteria necessary for a state requirement to be considered an ARAR and therefore be applicable to a cleanup at a site listed on the NPL. The following questions and answers discuss Resolution No. 92-49 as an ARAR.

#### **10. Q. Is Resolution No. 92-49 a potential ARAR at CERCLA sites?**

- A. Yes. CERCLA Section 121 requires remedial actions to attain state requirements that qualify as ARARs. State ARARs must be promulgated (legally enforceable and of general applicability) and more stringent than federal ARARs. Resolution No. 92-49 meets CERCLA's requirements since it is legally enforceable and of general applicability. It is legally enforceable

because it was adopted in conformance with the procedural requirements of state law. The SWRCB adopted Resolution No. 92-49 under CWC Section 13140 and 13307. Resolution No. 92-49 was adopted properly following notice and several public hearings and was approved by the Office of Administrative Law in accordance with applicable state law. Upon adoption by the SWRCB and approval by the Office of Administrative Law, the Resolution became legally enforceable under the CWC. Resolution No. 92-49 is of general applicability. It applies to all discharges of waste to waters of the state or that threaten waters of the state.

ARARs include only those requirements that are substantive, not procedural. The substantive, but not the procedural requirements of Resolution No. 92-49 are potential ARARs at CERCLA sites. Sections III.F. And III.G. Of Resolution No. 92-49 contain substantive requirements.

11. **Q. How is Resolution No. 92-49 incorporated into cleanups at CERCLA sites?**

A. Resolution No. 92-49 is usually implemented when the RWQCB issues a cleanup and abatement order or monitoring order. At sites subject to CERCLA, the substantive requirements of Resolution No. 92-49 should be incorporated into the decision document (either a Record of Decision or Removal Action Memorandum) for the site. CERCLA and the federal National Contingency Plan (40 CFR Part 300) establishes an iterative process for identifying substantive requirements as early as possible in the remedial investigation/feasibility study and remedy selection process.