

California Regional Water Quality Control Board
San Francisco Bay Region

April 11, 2018

9:03 a.m.

Elihu M. Harris Building
First Floor Auditorium
1515 Clay Street
Oakland, CA 94612

Reported by:
Susan Palmer

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P R O C E E D I N G S

APRIL 11, 2018

9:03 A.M.

Item 1. Roll Call and Introductions

CHAIR YOUNG: All right folks, let's get started, please. And if we could have the roll call, please.

MS. STONE: Board Member Ogbu?

BOARD MEMBER OGBU: Here.

MS. STONE: Board Member Lefkovits?

Board Member Ajami?

Board Member Kissinger?

Board Member Battey?

BOARD MEMBER BATTEY: Here.

MS. STONE: Vice Chair McGrath?

VICE CHAIR MCGRATH: Here.

MS. STONE: Chair Young?

CHAIR YOUNG: Here. Thank you.

We have no introductions today?

MR. WOLFE: We do not.

Item 2. Public Forum

CHAIR YOUNG: And we have no cards for the public forum.

1 **Item 3. Minutes of the Board Meeting for March 14,**
2 **2018**

3 CHAIR YOUNG: So we are going to race to
4 Item 3 and discuss the minutes.

5 MR. WOLFE: Okay. I'm not aware of any
6 changes to the minutes, although I think you said
7 you had one.

8 CHAIR YOUNG: I do. I would like to
9 suggest one change to the minutes and it is on page
10 8, in the third full paragraph, which was the long
11 paragraph. And it's the middle of that paragraph.
12 I think it's line 8. The clause I'm looking at
13 says: Removing offsets based on the previous
14 acknowledgement that they were part of a compromise
15 package, et cetera.

16 I want to clarify that what I was talking
17 about was removing offsets in the next permit
18 draft, rather than removing the existing offsets in
19 the existing permit.

20 So I would like to carrot in, after the
21 word offset, in the next permit draft.

22 Do we have any other edits?

23 BOARD MEMBER BATTEY: I have a comment.

24 CHAIR YOUNG: We'll just have a motion and
25 then we'll do comments.

1 VICE CHAIR MCGRATH: Well, I would move
2 the minutes with the change suggested by the Chair.

3 BOARD MEMBER OGBU: Second.

4 CHAIR YOUNG: Thank you.

5 And you had a comment?

6 BOARD MEMBER BATTEY: Oh, okay. So I want
7 to just thank the staff, first of all, for such
8 thorough minutes. And it was a lot to capture and
9 I wanted to just -- I just wanted to highlight on
10 the conversation around trash that we had last
11 meeting, which was excellent, that there was a lot
12 in the minutes around next steps on this. And I
13 wanted to make sure highlight the really good
14 conversation we had about trying to better
15 understanding the root cause of the trash issues
16 that we're seeing, and also the potential.

17 This is all in there, but I just wanted to
18 highlight this root cause that I think is
19 important. The public education possibilities
20 around trash, reducing the trash.

21 And also, I was hoping that we could
22 capture the follow-up date for our next
23 conversation around this and maybe we can just
24 capture that in this time around or can I get
25 clarification on the next steps, on next time we'll

1 be talking about this.

2 MR. WOLFE: There's two approaches I would
3 say. One for discussion now, where we can clarify
4 the next steps or if there is something you suggest
5 as a wording change, we can put it in the minutes.
6 Otherwise, we could capture it as part of this
7 month's --

8 BOARD MEMBER BATTEY: I think that's good,
9 right.

10 MR. WOLFE: -- to make sure that it's
11 included in the discussion of the March minutes.

12 CHAIR YOUNG: Yes, as you point out there
13 was a lot of detail lift and we had a very long
14 discussion as well. And kind of that was a long
15 item.

16 I think the next steps actually do appear
17 in the minutes because our next steps are going to
18 be our consideration of the enforcement letters,
19 which are coming, but we haven't noticed when each
20 of them is going to come yet. So as far as putting
21 a date on the next steps, I'm not sure we can do
22 that at this point in time.

23 MR. WOLFE: But I think the message was
24 clear last month that the Board, and I think Chair
25 Young, as we note here, sort of collected some of

1 the Board sense and made it clear that the Board
2 was directing the staff to come back as soon as
3 possible with enforcement actions.

4 CHAIR YOUNG: It's fine with me if you
5 want to suggest an edit or maybe put some things in
6 bold and some things not in bold.

7 BOARD MEMBER BATTEY: I think what I'm
8 suggesting is maybe for the minutes for this
9 meeting, commenting on these minutes that we --
10 aside from the enforcement actions, which I think
11 is pretty clear in here and the next steps around
12 each of the regulated entities and how that would
13 go, I'm thinking more about our own staff work and
14 Board work around looking at some of these other
15 issues around the broader topic of how do we
16 measure -- I'm sorry, I missed that one before.
17 How do we measure the trash reduction, there were a
18 lot of questions raised about that and what other
19 vehicles might we have around understanding root
20 cause, and that power, potential power or lack
21 thereof, of public information campaigns. So I
22 think it's those three items that it's just an item
23 for discussion for the Board, for the staff to --
24 that is sort of outside of the regulatory action.

25 MR. WOLFE: Although I would anticipate,

1 as we move forward with some enforcement actions
2 that certainly many of those issues will be
3 broached during those items and I fully expect the
4 cities on that basis to maybe explain themselves a
5 little bit by touching on some of those issues. So
6 to what extent they are doing education programs or
7 having other sources, such as homelessness, or in
8 building dumping, that sort of thing that are
9 impacting. And so it provides, I think, an
10 opportunity for us to look what is it that we
11 actually have specifically in the permit and how we
12 measure compliance. But what is it that you could
13 say the broader root cause, how are we working with
14 the permittees on addressing that.

15 VICE CHAIR MCGRATH: Local governments
16 asked in the first round of this for a lot of
17 discretion in developing their own programs and
18 they talked a lot about education. And as someone
19 who's volunteered in the schools for 13 years now,
20 I remember that there used to be education programs
21 in the Berkeley schools about trash. And so they
22 were getting the kids young. And those have
23 disappeared, largely, over the last ten years.

24 I know they still didn't do just the
25 schools, I think the University of California,

1 although they've finally taking some steps, there's
2 a mass dumping in the streets after the school gets
3 out in May. That only in the last year what I see
4 is in the educational effort.

5 I think East Bay General Park District has
6 large areas of unsecured land.

7 So I think the need for educational
8 programs developed and tailored to the purpose, at
9 least something appropriate for either a response
10 to lagging performance or the next permit. I
11 wanted to double down on it.

12 CHAIR YOUNG: Yeah, let's, since we're
13 discussing the nature of the minutes I'm a little
14 loathe to get into a substantive discussion about
15 an item that we didn't notice.

16 So let me suggest this, what I heard you
17 saying is that you're comfortable with the level of
18 the detail in the minutes. You would like to have
19 the high points of the meetings more clearly
20 demarcated within the longer discussion. And
21 specifically with respect to trash and the non-
22 enforcement part of the discussion, you would like
23 to make sure that that is on the calendar and
24 upcoming somewhere.

25 And I would suggest that you, and I, and

1 Bruce work together to formulate the nature of that
2 discussion, if you'd like it to be a workshop, or
3 an item in the Executive Officer's Report, and then
4 we will get it on calendar.

5 BOARD MEMBER BATTEY: Yes, that works.

6 CHAIR YOUNG: All right. Thank you.

7 I think we can vote on the minutes, now.
8 I don't think we need a roll call vote.

9 All in favor?

10 (Ayes)

11 CHAIR YOUNG: Anyone opposed? Thank you.

12
13 **Item 4. Chair's, Board Members', and Executive**
14 **Officer's Reports**

15 CHAIR YOUNG: All right, moving on to
16 Board Members' Reports.

17 BOARD MEMBER OGBU: I, hopefully if
18 everyone remembered, back in October I think it was
19 we had the different divisions present their
20 priorities, and challenges as we always do. And
21 coming out of that further discussion, where we
22 decided to have a subcommittee with Jayne and I,
23 and sat discussing those issues further, and we
24 have been meeting. And so, we wanted to give a
25 little bit of an update, Lisa would you, on what

1 we've been working on.

2 MS. MCCANN: Yes, I'm Lisa McCann and I'm
3 Assistant Executive Officer at the San Francisco
4 Bay Board, and I am working with Board Member
5 Battey and Board Member Ogbu on this subcommittee
6 to work on a prioritization project and process for
7 the Water Board.

8 And what we -- I provided a status to
9 staff and then this morning, as well, to the
10 subcommittee members, affirming a proposal to
11 initiate a pilot project as a subset of the overall
12 project. And let me back up and say the overall
13 project is to define a prioritization process and
14 then implement that process, and to come out with
15 clear priorities for 2019-2020.

16 So the subset of that is to run a pilot
17 project where we make -- we agree that an
18 assumption that we're going to run with it is we
19 have determined that the Water Board's efforts in
20 response to climate change and the risks with
21 climate change are a priority.

22 So we're going to implement some steps to
23 how will we -- once we know that that's a priority
24 and a new priority, not actually a new priority,
25 nevertheless we're going to start as it's a new

1 priority. And from there we're going to inventory
2 activities that the Water Board is doing now and
3 then take a look at whether there are additional
4 activities that we should be implementing to
5 further fill gaps or better address climate change
6 risk.

7 So the status of that, specifically, is
8 that on April 30th the staff will have an internal
9 inventory of all the activities that they're
10 engaged in, in all programs. And by May 30th we'll
11 have a write up about it, to share with Board
12 Members, and can be a template to either post on
13 our website for public consumption and/or use
14 however we determine from there.

15 And then we'll continue on from there and
16 try to identify how to further implement climate
17 adaptation activities.

18 And then we'll look back around and kind
19 of in parallel continue to define what our
20 prioritization process will be, run that process,
21 and then redo what we're doing now with climate
22 change once we identify any new priorities.

23 CHAIR YOUNG: This is good news Wednesday.
24 Thank you for that update. And I don't know
25 whether anyone else wants to comment, but I'm

1 really appreciative of you folks doing this work
2 and I think that is a great place to start.

3 MS. MCCANN: I have one other thing,
4 sorry. I wanted to suggest or offer that we could
5 put a status in the Executive Officer's Report next
6 meeting, or the meeting after that, as appropriate,
7 to make sure that it's documented and in case any
8 of you want to have a discussion about it that it's
9 actually on the agenda.

10 CHAIR YOUNG: Let's do that.

11 BOARD MEMBER OGBU: Thank you.

12 VICE CHAIR MCGRATH: So I have two things,
13 really quick. One is that I was recently named to
14 the Mayor's Task Force in Berkeley, a group of 40
15 people looking at how to reinvent infrastructure
16 for what it should be, not what it used to be.

17 And I think that's all consistent with our
18 work because it's talking about making sure that
19 for roads -- from roads is all managed through
20 green infrastructure and trying to change some
21 general policies into actually actionable items.

22 The other one is there was a meeting last
23 month of the Technical Advisory Committee for the
24 Middle Harbor enhancement area at the Port of
25 Oakland. And I think obvious to most people, and

1 it is to me, that my involvement as one of the
2 originators of this idea has me hopelessly
3 conflicted in terms of any type of unbiased
4 approach, should there be any action before this
5 Board.

6 So I tend to recuse myself.

7 MR. WOLFE: Should you need to.

8 VICE CHAIR MCGRATH: Should I need to.

9 But I just wanted to make it clear on the record
10 that I take these things seriously.

11 CHAIR YOUNG: All right, thank you. I can
12 fill you in very quickly on the most recent Chair's
13 Call. We had a briefing on the direct potable
14 reuse of water. The most direct of which I think
15 now has been renamed Flange to Flange. Just so you
16 know.

17 (Laughter)

18 CHAIR YOUNG: The procedure that's coming
19 out -- Tamarin, stop.

20 MS. AUSTIN: (Indiscernible comment)

21 CHAIR YOUNG: The short version of our
22 briefing was that there's going to be a framework
23 for regulatory, future regulatory actions provided
24 to the Regional Board staff by the end of April.
25 And I imagine you folks know that's coming.

1 And then, there's going to be an
2 information item in from of the State Board on June
3 5th. That's all on what's being characterized as a
4 framework.

5 And then, there are going to be either one
6 set or a series, I think, of regulations covering
7 the various ways that we do indirect and direct
8 potable reuse. Some of which is already in the
9 regulatory scheme, but some of which I think needs
10 to be -- or that the State Board Members think
11 needs to be better defined.

12 I think that's all the detail that is
13 relevant for now.

14 The other item that we had a briefing on
15 was that the cannabis regulations are up and
16 running. And as you know, the State Board has
17 published its policy and general order. And we
18 were told that the initial focus of the
19 implementation under the General Order will be
20 getting the illegal grows that are on private lands
21 into the light, into the regulatory system. So
22 that's step one, getting people enrolled, which I
23 think is familiar to us in terms of all of our
24 agricultural programs.

25 It was unclear to me how much that

1 activity is going to be happening in our Region,
2 but we will have the staff briefings on that as the
3 issue emerges.

4 I also should report that on March 21st I
5 received a courtesy call from Gordon Burns,
6 suggesting that he and the State Board staff meet
7 with and assist our staff in their ongoing
8 communications with Caltrans, with respect to the
9 enforcement order that the Board Members requested
10 at the last meeting.

11 And my understanding is that those
12 meetings have begun. And, of course, we are all in
13 the cone of silence, so that's all we know is the
14 procedural stuff.

15 With that, Bruce, can you fill us in?

16 MR. WOLFE: A number of things. One,
17 concurrent with today's meeting is a meeting of the
18 Governing Board of the San Francisco Bay
19 Restoration Authority. And what's notable is that
20 today the Governing Board plans or is proposing to
21 approve the first round of projects that would be
22 funded by Measure AA funds.

23 There is -- as they say, there is money in
24 the bank. The property taxes have been coming in
25 and they do project that they will be receiving

1 very close to the \$25 million that had been
2 anticipated.

3 The first round of projects will be eight
4 projects of approximately \$18 million worth.
5 There's one project that they're tweaking and
6 holding out until the Governing Board's June
7 meeting.

8 But of those eight projects, they range
9 from some projects that we have already permitted
10 and are somewhat underway, such as the Montezuma
11 Wetlands Restoration Project in Suisun March. The
12 South Bay Shoreline Project, which we permitted in
13 December. The phase two of the South Bay Salt Pond
14 Project, which will be before you next month. So
15 those are significant ones that are moving forward
16 with big dollars to it.

17 There are other projects, Lower Sonoma
18 Creek, North Bay Wetland, Upland Transition Zone
19 Restoration, and Deer Island Restoration. Deer
20 Island is adjacent to Novato Creek, in the Novato
21 area. A planning project for converting a 4.3-acre
22 unused wastewater storage basin in the City of San
23 Leandro, to convert that into a multi-benefit
24 treatment wetland. And a project at the Encinal
25 Dunes in Alameda.

1 So there's a mix of projects and I think
2 it's both exciting that the funding is now moving
3 forward, but also there has been a broad concern
4 that it will be a challenge for the agencies to
5 permit these projects. As I say, of these eight
6 three of them are already permitted or will be
7 permitted by next month. Two are only in planning.
8 And I would say that one is a multi-year project.
9 And two could be very straight forward projects
10 that we should have a very straight forward, easy
11 time to permit.

12 So we don't expect this year to have a big
13 challenge to get these moving, at least from the
14 regulatory side. But I think with the award of
15 these projects, the visibility of the program is
16 ramping up. And this year there were 22 proposals.
17 It may be next year there's double that number of
18 proposals. In theory, the more proposals you have
19 the better projects you have.

20 But I think the ongoing challenge will be
21 to look at how does the Restoration Authority get a
22 proper mix of projects that may be in planning,
23 maybe multi-year, and make sure that these projects
24 are sort of evenly spaced around the Region.

25 CHAIR YOUNG: Bruce, is there some kind of

1 time cutoff where the funding disappears if the
2 regulatory, all of the regulatory -- all of the
3 permits are not, you know, given in a certain
4 amount of time?

5 MR. WOLFE: Generally, no. I think we
6 have an opportunity to work closely with the
7 Restoration Authority, which is staffed by the
8 Coastal Conservancy, to address that. But some of
9 the challenges moving forward will be when you have
10 a multi-year project, for instance, how do we
11 anticipate the permitting over multiple phases.
12 And how do we keep things moving when, especially
13 on some of these that are in their early stages, we
14 may not really have a project design.

15 So I think there's going to be some
16 challenges, obviously, but I think the agencies
17 will be working closely with all of these parties.
18 Already, there are efforts to help the project
19 proponents do things like develop labor agreements.
20 The Coastal Conservancy will be entering into grant
21 agreements and contracts with these projects. And
22 so, there's opportunities to address the permitting
23 moving forward.

24 CEQA is certainly going to be a challenge
25 because not all of these projects will have gone

1 through the CEQA process and we can't permit them
2 until that's complete.

3 So there are a lot of moving parts. I
4 think there's the understanding that this is going
5 to have to be a level of give and take moving
6 forward. But as I say, the good things is some of
7 these are projects that are already permitted and
8 that this can augment ongoing projects, rather than
9 start from scratch.

10 CHAIR YOUNG: Go ahead.

11 VICE CHAIR MCGRATH: Bruce, I do have a
12 question about Lower Sonoma Creek, I think you said
13 it was. Is this just a planning grant?

14 MR. WOLFE: Right.

15 VICE CHAIR MCGRATH: Okay.

16 MR. WOLFE: That is at this point \$150,000
17 to the Sonoma Land Trust to develop a strategy for
18 landscape-scale restoration, flood protection, and
19 public access in the Lower Sonoma Creek.

20 VICE CHAIR MCGRATH: As Naomi knows,
21 that's dear to my heart.

22 MR. WOLFE: No, that's dear to mine.

23 So I'll keep the Board posting on how this
24 is playing out. I'll also note that in the report
25 this month we had an item on what's being called

1 Resilient San Francisco Project. That it's really
2 a name that locally we've given to the proposal
3 submitted to the U.S. Army Corps of Engineers to be
4 one of ten pilot projects around the country that
5 would demonstrate the beneficial reuse of dredge
6 material in wetland and upland areas. Not that it
7 hasn't already been done here, but this would plug
8 into what the 2016 Water Resources Development Act
9 specified would be a funded effort by the Army
10 Corps.

11 I understand that there's been -- there's
12 competition for the ten. There apparently were 96
13 proposals from around the country to the Corps.
14 But this has gotten support from the Bay Area's
15 Congressional Delegation and other letters we have
16 put in, a support letter. And so, we'll keep you
17 posted on how that plays out.

18 We also had an item on the latest on
19 efforts on North Bay Fire Response. There's a lot
20 of things that have been going on, on the ground.
21 I think it's significant that at this point our
22 work with the Sonoma Ecology Center has allowed the
23 Ecology Center and volunteers to leverage some of
24 the cleanup money that we were able to get there,
25 and some other local monies to be able to put in

1 best management practices protection around at
2 least, a minimum of 82 percent of the properties
3 that are within 100 feet of streams. And that
4 number continues to grow.

5 So far, there has been, as the item notes,
6 not an overly significant signal of materials in
7 the monitoring in receiving waters. This is
8 certainly something we're continuing to monitor,
9 especially with recent rains.

10 But I guess the challenge -- I heard an
11 interesting discussion at the North Bay Watershed
12 Association seminar last week, talking about the
13 new normal. We'll be certainly recognizing the
14 ongoing proliferation of wildfire. And that
15 they're noting that in 1964 there was a fire that
16 started in Calistoga and burned to Santa Rosa, and
17 it took four days to do that.

18 This year, the Tubbs fire started in
19 Calistoga and burned to Santa Rosa in four hours.
20 And so, it's based on the fuel load. And everybody
21 says, gee, it was great this year that we got some
22 rains and we get some growth. The flip side of it
23 is that with the rains comes more fuel.

24 And so, that's a recognition moving
25 forward that there's going to need to be broader

1 maintenance activities. And we're looking at ways
2 how we can plug that into our ongoing maintenance
3 permits that we have with many of the local
4 agencies, predominantly on flood control agencies.
5 But where there are opportunities for us to
6 streamline that type of maintenance that might
7 minimize the potential for fires moving forward.

8 So this is one thing we didn't note in
9 there, there's been a statewide effort for all the
10 Regions and State Board to get together to do
11 planning for emergency response. Lisa's been our
12 representative to work on that. And the initial
13 steps are to come up with consolidated approaches
14 towards wildfire. We continue to make the point
15 that it's not only wildfire, it's all emergencies.
16 Oil spills, earthquakes, floods, et cetera that
17 need to be looked at on a statewide basis. So I
18 think we've got a vehicle for that moving forward.
19 So we'll keep you posted on how that plays out.

20 One thing Jim had forwarded to me relative
21 to the North Bay fires, in the City of Santa Rosa,
22 in the Fountain Grove area they are noting that in
23 the water lines they are picking up elevated levels
24 of benzene in those water lines. And it turns out
25 that they've been able to determine this is not

1 from underground fuel tanks. It's likely due to
2 the water lines that come from the main water line
3 in the street. The water line lateral that during
4 the fires pressure went down and those lines were
5 compromised and there wasn't enough pressure in
6 those lateral lines to keep some of the chemicals
7 out of the water.

8 So the bad news is that potentially
9 they're going to have to rebuild that whole system
10 to the tune of \$47 million.

11 The good news is that this is
12 predominantly in areas that have used PVC pipe. We
13 have limited areas. We're still trying to find out
14 if some of the areas that have been impacted in
15 Sonoma and Napa Counties, in our Region, are
16 potentially facing the same situation. And so far
17 we haven't been able to determine that there's any
18 similar impact, but we're going to continue to
19 track that.

20 But we think this is somewhat specific to
21 the Fountain Grove area when it was built, using
22 the PVC water lines back in the '60s, '70s and
23 '50s.

24 VICE CHAIR MCGRATH: I'd like to follow up
25 with that. That came up at a winery that I was at

1 on Saturday and I did promise the winery owner that
2 I would get back to him. And I had to refresh my
3 mind about how benzene is linked to wildfires.
4 And, indeed, there's trace amounts. It didn't seem
5 like those trace amounts would end up compromising
6 the water supply system.

7 But now that we do have water supply
8 responsibilities I thought this was kind of a new
9 area for us to investigate.

10 So what do we think the pathway is? Do we
11 think the pathway is that benzene fallout from the
12 fires was present in the surface and what, negative
13 pressure sucked that into the lines, or do you
14 think it was actual combustion of --

15 MR. WOLFE: Right, it will be coming from
16 the pipes themselves.

17 VICE CHAIR MCGRATH: Just the heating of
18 the pipes could have created --

19 MR. WOLFE: The heating of the pipes in
20 some instances, you know, full damage to those
21 pipes, especially the lateral lines. So it's
22 something specific to where you have a community
23 water system. Most of the wineries, especially if
24 they're on a well system, this would be at issue.

25 Conceivably it could be, I guess, if they

1 had internally used PVC piping and had significant
2 damage to their system. The lines fairly shallow
3 and that might have been, you know, heating.

4 But what goes along with it is the
5 pressure at the system. And apparently, Fountain
6 Grove had significant issues that at least one of
7 the reservoirs that served that area was out of
8 service during the fire. Both, all of the local
9 people were trying to hose down their properties,
10 the fire department was trying to hose down, and so
11 the system was (indiscernible) -- extreme, you
12 know, effort and it really compromised the pressure
13 in that system.

14 So as I say, usually water systems are run
15 with significant pressure so that material like
16 this would not get in. That's not necessarily why
17 they run it at that pressure, but that's a
18 sidelight is that this material would not get in.
19 In fact, that's why they're not seeing this,
20 necessarily, in the main lines. They're seeing it
21 more in the smaller, lateral lines.

22 VICE CHAIR MCGRATH: So thanks for that.
23 What's the next step to assure that drinking water
24 is safe and how we, as Board Members, can help
25 communicate?

1 MR. WOLFE: Well, the water companies are
2 doing testing. In this case, Santa Rosa Water
3 Company is doing testing throughout. I'm trying to
4 get information from the Sonoma County Water Agency
5 what other testing they're doing, in other areas.
6 And how can we have a sense that is this only a
7 Santa Rosa issue or is it a broader issue? So,
8 we'll keep you posted as we get more information on
9 that.

10 VICE CHAIR MCGRATH: All right, thanks.

11 MR. WOLFE: I'll note I did mention the
12 North Bay Watershed Association having a seminar on
13 water sustainability. And this came on the heels
14 of a similar seminar that San Mateo County held.
15 The communities are definitely recognizing that as
16 part of water sustainability things like floods,
17 and fires, and a rising Bay are a challenge to
18 address. And so, it's heartening that the
19 conferences are coming together with lots of
20 discussion, including many elected, especially
21 Legislative representatives there, talking about
22 next steps.

23 The one in San Mateo was notable in that
24 at the end of that one there was a video from
25 Jackie Speier, pointing out that when San Francisco

1 proposes a project, such as addressing the
2 Embarcadero to address its potential compromise
3 under sea level rise, the Port of San Francisco
4 mobilizes one agency to move that project forward.

5 Right now, as we saw through the South Bay
6 Shoreline Project, when there's something in Santa
7 Clara County it's the Santa Clara Valley Water
8 District that's the one agency moving forward on
9 that.

10 In San Mateo, they pointed out that
11 there's 22 local agencies that are involved in
12 local projects of this nature. And so her
13 challenge was, to San Mateo County, to come
14 together to develop a single agency. And
15 Supervisor Dave Pine is taking this on as a project
16 that is going to be moving forward.

17 So I think the message is clear that there
18 needs to be more than, you know, just one city
19 working on the project, on its own.

20 BOARD MEMBER BATTEY: Bruce, before you go
21 on, I'll just -- I attended this conference, as
22 well, and it was I was struck by the same things.
23 I mean, it was very -- it was a sold out
24 conference, so over 200 people there. The level of
25 expertise, they had something like 300 white papers

1 on issues surrounding climate, and adaptation, and
2 post reports all around, which was amazing.

3 And Jackie Speier's message at the end was
4 just so crystal clear and it didn't leave me
5 wondering about the -- as we see water agencies
6 come before us and even on the little Coastside,
7 you know, 12,000 people there, three water
8 agencies.

9 Our potential to at least guide or suggest
10 that the fragmentation is not the way to go. To be
11 able to leverage Federal dollars or, you know, to
12 really tackle the big problems.

13 So it was really a great -- great
14 leadership on Supervisor Pine's part and the whole
15 conference. And Jackie Speier's message was quite
16 clear.

17 MR. WOLFE: One unfortunate side light to
18 the North Bay Watershed Association, in the storm
19 we had last week one of the folks attending that
20 was Carl Morrison, the Executive Director of the
21 Bay Area Flood Protection Agency's Association, who
22 has also been a consultant for a number of years,
23 and is also currently working on the project to
24 improve detection of atmospheric rivers by putting
25 in radar at the 5,000-foot elevation. As Doppler

1 radar now is predominantly reading at 10,000-foot
2 and it doesn't give a good reading at the lower
3 levels that the atmospheric rivers are coming in.

4 Unfortunately, at the end of the
5 conference Carl said, well, I'm off to the airport.
6 He lives in Fallbrook, down near San Diego, and
7 flies a single-engine plane. And I didn't put two
8 and two together until the next day, when I heard
9 about a single-engine plane crash at Petaluma.
10 Carl was the only casualty, but he's one who will
11 be definitely missed. He's been quite a help to
12 the Bay Area and others for many years. So we're
13 saddened at his passing.

14 So on that somber note, I'll wrap up.

15 CHAIR YOUNG: I do have a question about
16 one of the items and that's the Prosperity Cleaners
17 update. The update says that our upcoming
18 amendment would formalize the ten-year time frame
19 for meeting the cleanup levels in the offsite area.
20 Did that -- can someone remind me when that time
21 clock started? Was it -- it was based on something
22 that we already approved and I don't recall what
23 the time clock was.

24 MR. HILL: Stephen Hill with the Water
25 Board staff. Madam Chairman, I don't have a

1 particular date in mind. I think it was in 2017 at
2 some point, but when we approved the cleanup plan
3 for the offsite groundwater area, we set that ten-
4 year time frame. I believe it's in the -- well, I
5 don't want to speculate. But it's going to be in
6 2027.

7 CHAIR YOUNG: Uh-hum. All right, thank
8 you. Given the fact that it's still some time
9 away, I want to make sure that we are on top of the
10 idea of making sure that there's an alternate water
11 supply for both livestock watering and domestic
12 use, should that become necessary during the ten-
13 year time frame. So, just putting that out there
14 as a suggestion or something for the staff to keep
15 in mind. I think you already had it in mind.

16 MR. HILL: We actually have treatment on
17 one supply well that did have detections. We're
18 not aware of other wells that have been impacted.
19 But if there are, we would probably use the same
20 approach.

21 CHAIR YOUNG: Thank you.

22 MR. WOLFE: And it's worth noting that
23 staff anticipates having that tentative order out
24 later this month, so we will have that back before
25 you possibly as soon as July.

1 CHAIR YOUNG: All right. Are there any
2 other questions on Bruce's report?

3 VICE CHAIR MCGRATH: I just appreciate the
4 detail on that report.

5 CHAIR YOUNG: Ms. Battey? I think I
6 skipped over you. Did you want to tell us more
7 about the conference?

8 BOARD MEMBER BATTEY: No, I'm all set.

9 CHAIR YOUNG: Okay. All right, thank you.
10 Sorry.

11 Okay, then if there's no more on reports,
12 we will do the swearing in, for which I cannot find
13 the script. You'd think I'd have it memorized by
14 now. I do have the one typo memorized that's in
15 the middle of it.

16 I'll tell you what, this is not a bad time
17 to take a break, if we're just going to -- I don't
18 know what happened to my laminated version, though.
19 Is it on anybody else's desk?

20 MR. WOLFE: We'll try to see if we can
21 locate that.

22 VICE CHAIR MCGRATH: I don't see it.

23 CHAIR YOUNG: We'll take a ten-minute
24 break. Thank you.

25 (Off the record at 9:44 a.m.)

1 (On the record at 9:55 a.m.)

2 CHAIR YOUNG: All right. Let's reconvene,
3 folks. Thank you.

4 So we are going to go ahead with the oath.
5 And for any of you who are unfamiliar with this
6 procedure, if you have any kind of a possibility of
7 testifying later on during this proceeding, this
8 would be a good time to take the oath.

9 All right. All relevant evidence that any
10 person desires to be considered by this Board must
11 be introduced at this hearing first by Board staff,
12 second by the discharger, third by public agencies,
13 and fourth by any other interested persons.

14 The Board and Board counsel may ask
15 questions to clarify the testimony of a witness at
16 any time. Cross-examination of any witness by
17 others will be allowed following completion of the
18 direct testimony by all persons.

19 Each person testifying will commence by
20 stating his or her name, whom he or she represents,
21 and whether he or she took the oath to tell the
22 truth.

23 The hearings will not be conducted
24 according to technical rules of evidence. The
25 Board will accept any evidence or testimony that is

1 reasonably relevant to the issues.

2 All Board files, exhibits, and agenda
3 materials pertaining to this matter will be made
4 part of the record of this proceeding. Additional
5 written material will be made part of the record at
6 the discretion of the Board.

7 Those wishing to testify in the hearing
8 will now rise or raise their hand. Do you promise
9 to tell the truth?

10 (Collective affirmations)

11 CHAIR YOUNG: Thank you.

12
13 **Item 5. Uncontested Items**

14 MR. WOLFE: Item 5, the uncontested items,
15 we have three items there. We do have a supplement
16 for Item 5.b, a date change and a wording change.
17 I'm not aware you have any cards for any of the
18 items.

19 CHAIR YOUNG: Correct, we do not.

20 MR. WOLFE: Okay. And we don't plan any
21 presentations. So I recommend adoption of the
22 uncontested calendar with incorporating the
23 supplement for Item 5.b.

24 CHAIR YOUNG: So moved.

25 VICE CHAIR MCGRATH: I'll second.

1 CHAIR YOUNG: All right, is there any
2 discussion? Not at this time.

3 May we have a roll call vote, please?

4 MS. STONE: Board Member Ogbu?

5 BOARD MEMBER OGBU: Aye.

6 MS. STONE: Board Member Lefkovits?

7 Board Member Ajami?

8 Board Member Kissinger?

9 Board Member Battey?

10 BOARD MEMBER BATTEY: Aye.

11 MS. STONE: Vice Chair McGrath?

12 VICE CHAIR MCGRATH: Aye.

13 MS. STONE: Chair Young?

14 CHAIR YOUNG: Aye.

15 MR. WOLFE: So moved.

16 CHAIR YOUNG: So moved.

17
18 **Item 6. Proposed Amendment to the Water Quality**
19 **Control Plan (Basin Plan) to Establish Water**
20 **Quality Objectives and Total Maximum Daily Load**
21 **(TMDL) for Dissolved Oxygen in Suisun Marsh and to**
22 **Amend the San Francisco Bay Mercury TMDL to Include**
23 **Suisun Marsh**

24 MR. WOLFE: Okay, Item 6 is consideration
25 of a Basin Plan Amendment to Establish Water

1 Quality Objectives and Total Maximum Daily Load
2 Dissolved Oxygen in Suisun Marsh and to Amend the
3 San Francisco Bay Mercury TMDL to Include Suisun
4 Marsh.

5 Barbara Baginska is going to give the
6 presentation.

7 MS. BAGINSKA: Good morning Chair Young
8 and Members of the Board. My name is Barbara
9 Baginska and I'm --

10 MR. WOLFE: Move the microphone a little
11 closer.

12 MS. BAGINSKA: I'm an Engineering
13 Geologist in the TMDL and Planning Division. I
14 will be presenting, today, on total maximum daily
15 loads to address water quality impairments in
16 Suisun Marsh.

17 We're asking here to consider adopting a
18 resolution to amend the Basin Plan. And the Basin
19 Plan amendment that we are proposing today includes
20 establishing a TMDL and site-specific objectives
21 for dissolved oxygen in Suisun Marsh.

22 We're also proposing to amend the mercury
23 TMDL to include Suisun Marsh.

24 And finally, we want to make minor,
25 nonregulatory editorial changes to the Basin Plan.

1 These kinds of changes were identified as necessary
2 in the 2015 Triennial Review. Although those
3 changes are not affecting the Suisun Marsh in
4 particular, we adding them to this project because
5 they require the same public notification period.
6 We did not receive any comments on these minor
7 changes.

8 And the map you see here shows San
9 Francisco Bay and the Delta, and highlighted in
10 between, in red, is Suisun Marsh.

11 Let's start with some information about
12 the marsh. Suisun Marsh is the largest contiguous
13 marsh on the West Coast of the United States, and
14 one of the most remarkable natural areas in our
15 Region. It is also a highly dynamic aquatic system
16 that has been altered by urban development and the
17 creation of a network of management plans.

18 And the map shows about 152 private dock
19 laps and some extensive areas managed by the
20 California Department of Fish and Wildlife, shown
21 in light grey, in light brown.

22 Just north of the marsh are the cities of
23 Fairfield and Suisun City which generate some
24 stormwater flows. And the Fairfield/Suisun Sewer
25 District outfall, red diamond, is located next to

1 tidal slough. Altogether, almost half of the marsh
2 is managed. And managed wetlands are diked and
3 separated from the tidal sloughs by levees.

4 The primary goal of seasonal wetland
5 management is to provide wintering habitat for
6 water fowl and year round habitat for resident and
7 migratory wildlife.

8 There might be some unintended
9 consequences of wetland management on water
10 quality. Each fall, prior to the hunting season, a
11 controlled flooding and circulation of water is
12 conducted within the management wetlands to flush
13 salt and decaying material, and to provide
14 additional feeding, rearing, and resting habitat
15 for ducks. Over the years there have been
16 incidences of so-called black water releases from
17 managed wetlands into adjacent sloughs.

18 These black water discharges often have
19 high organic load and fairly low DO concentrations.
20 The most severe reduction in DO concentration have
21 been observed in small, back-end sloughs in the
22 western portion of the marsh, within the tidal
23 exchange and long water residents times.

24 These DO drops have been also linked to
25 fish kills. The fish kills were mostly observed

1 between 1999 and 2009, and some may not have been
2 documented.

3 Also, like in the rest of San Francisco
4 Bay, mercury concentrations in fish in Suisun Marsh
5 are above levels of concern for people and
6 wildlife.

7 So, these are the problems that the
8 proposed amendment is designed to address.

9 And this graph illustrates how the water
10 quality changes in Butcher Slough in the western
11 portion of the marsh, after receiving discharges
12 from managed wetlands.

13 The red dots on this plot represent the DO
14 concentrations measured at every 15 minutes. And
15 in the background you can see the water level
16 fluctuations, the gray line, due to tidal surge.
17 And just to remind you, Suisun Marsh is a natural
18 tidal system connected to Suisun Bay.

19 We learned over the years that there were
20 daily DO fluctuations from approximately 3 to 8
21 milligrams per liter, even without any discharges
22 to the sloughs. And shown here, on right, at
23 ambient DO. The lowest DO concentrations occur
24 immediately after the low tide and we associate
25 these fluctuations and quite low DO with the

1 natural conditions in these back-end sloughs.

2 Now, I would like you to pay attention to
3 the green line. So this green line shows the
4 average daily dissolved oxygen concentration. And
5 as you can see, there is a clear and significant,
6 and almost immediate drop in the daily average from
7 approximately 6 milligrams per liter to as low as
8 2.5 milligrams per liter after the discharges from
9 the managed wetland stops.

10 The managed ponds accumulate a lot of
11 organic material and the subsequent decay of this
12 material causes depletion of oxygen. When multiple
13 discharges from these ponds enter a small back-end
14 slough, it causes the reduction of DO in that
15 slough.

16 CHAIR YOUNG: Sorry, clarifying question.
17 Each of the red dots, is that a once-every --

18 MS. BAGINSKA: Fifteen minutes.

19 CHAIR YOUNG: Fifteen minutes, okay.

20 MS. BAGINSKA: Yes.

21 CHAIR YOUNG: Okay.

22 MS. BAGINSKA: So it's a -- we call it a
23 continuous water quality monitoring.

24 CHAIR YOUNG: Right. So if we're looking
25 at 12 red dots, then that's 12 times 15 minutes

1 that are all in a clump.

2 MS. BAGINSKA: That's correct.

3 CHAIR YOUNG: Thank you.

4 MS. BAGINSKA: There are 96 of these dots
5 in a day.

6 Before we could fully realize the extent
7 of water quality impairment and develop a total
8 maximum daily load to address the problem, we
9 needed to determine the approximately levels of DO
10 on the marsh that would protect its beneficial
11 uses.

12 DO objectives that currently apply in
13 Suisun Marsh were first established by the Board in
14 1975 and have remained unchanged since that time.
15 They were developed to protect fish in San
16 Francisco Bay open waters. And the objectives were
17 not really designed to apply to vegetative, shallow
18 areas, such as marsh sloughs. And did not
19 recognize the fact that the back-end sloughs may
20 get low or lower DO concentrations at times due to
21 natural processes and naturally appearing organic
22 enrichment, which is part of the marsh environment.

23 Well, unlike traditional objectives for
24 toxic pollutants, DO objectives are often region or
25 water quality specific because the DO regime is

1 dependent on physical and biological processes that
2 all vary geographically.

3 And to help with the development of the
4 objectives, we convened an expert panel composed of
5 local and national experts, such as the fish
6 expert, Professor Peter Moyle from UC Davis, and DO
7 expert Paul Stacey, from the Great Lakes National
8 Estuary and Research Reserve, who developed
9 criteria for the East Coast.

10 And the panel recommended that we use the
11 US EPA 2000 methodology first established to
12 develop DO criteria for East Coast estuarine and
13 marine waters. This methodology supports
14 derivation of region-specific DO criteria tailored
15 to the species in a particular water flow.

16 In particular, we paid a lot of attention
17 to selection of the fish and (indiscernible)
18 species used in the calculation of the objectives.
19 By using more than 25 years' of data, fish data
20 collected by UC Davis.

21 Our objectives include acute and chronic
22 thresholds to make sure that we protect all
23 sensitive and endangered species and their life
24 stages.

25 Finally, the proposed objectives were

1 validated with reference data from the minimally
2 impacted sloughs in the marsh.

3 As a result of this process, we propose
4 new, site-specific objectives which focus on
5 protection of fish, including sensitive salmonids.
6 We established one acute and two chronic
7 objectives. The acute objective of 3.8 milligrams
8 per liter protects against short-term effects that
9 is mortality of sensitive juveniles and adults.

10 Chronic objective of 5 milligrams per
11 liter protects against long-term effects, such
12 development of juveniles.

13 And these two objectives apply rear round
14 in all sloughs in Suisun Marsh.

15 For protection of salmonids, we are
16 proposing an additional chronic objective of 6.4
17 milligrams per liter, which will be required during
18 the times when juvenile salmonids out-migrate from
19 freshwater streams to the estuary, which happens
20 pretty much between January and April. This
21 objective will only apply to the large sloughs that
22 serve at migratory corridors. And where, according
23 to 25 class years of data, salmonids were protected
24 in the past.

25 With the expert panel, we critically

1 evaluated all the thresholds and the averaging
2 periods you see here.

3 You are probably more familiar with the
4 load-based TMDLs, when we establish a maximum daily
5 load of a pollutant that the water body can receive
6 and still meet the targets. But dissolved oxygen
7 is not a typical pollutant. We all need oxygen to
8 breath. So we are proposing a concentration-based
9 TMDL for Suisun Marsh with the targets, the TMDL
10 and the allocations being equivalent to the site-
11 specified objectives I just discussed.

12 In other words, the sources of low DO must
13 meet the water quality objectives in order to meet
14 the allocations. And this is similar, for example,
15 to the TMDLs you have adopted for criteria.
16 Expressing the allocations for managed wetlands,
17 municipal wastewater and stormwater equal to the
18 objectives provides a direct, measurable target for
19 the sources to monitor and to comply with.

20 And these allocations will also ensure
21 that the conditions in the sloughs support the most
22 sensitive aquatic life beneficial uses present.

23 Now, let's talk about implementation. So,
24 for managed wetlands our primary regulatory tool
25 for implementing the TMDL is the 401 Water Quality

1 Certification for the Army Corps Original General
2 Permit for management activities in the marsh, or
3 401 Cert for short.

4 We conducted early implementation in the
5 marsh, in part relying on the earlier 2013 401
6 certification. And we just issued a new
7 certification for the marsh this past February.
8 The certification requires the best management
9 practices to improve vegetation and water
10 management as the managed wetlands. And includes
11 monitoring and reporting requirements, discussed in
12 the TMDL.

13 We focused on the northwestern portion of
14 the marsh, shown in green, to implement BMPs
15 because, as I described earlier, this area
16 experienced the most severe drops in DO in the
17 past.

18 For municipal wastewater and stormwater
19 sources, we rely on existing requirements in the
20 Fairfield-Suisun Sewer District NPDES Permit, and
21 the Municipal Original Stormwater NPDES Permit to
22 implement the TMDL.

23 And now, the interesting part. To give
24 you a preview of how DO implementation works on the
25 ground, let's have a look at the BMPs supplied

1 during just one season at the Walnut Creek Club,
2 which is located between Peytonia and Boynton
3 Sough, in the center of the map, and surrounded by
4 four other clubs.

5 So first, at the end of summer they
6 cleared interior ditches to improve water
7 circulation at the property and mechanically
8 removed broadleaf vegetation to reduce the amount
9 of organic material available for decomposition.

10 Second, this club started discharging at
11 the end of September, according to a schedule set
12 by the Suisun RCD to avoid or prevent multiple
13 clubs draining water simultaneously to the same
14 slough.

15 Third, based on the previous observations
16 they changed discharge points from upstream Boynton
17 Slough to the points closer to much large Suisun
18 Slough to take advantage of better mixing and
19 dilution. Despite this, shortly after the
20 discharge began the monitoring data started showing
21 DO drops in Boynton Slough. So they reduced the
22 discharge to 15 percent capacity and opened the
23 drains to Peytonia Slough, instead.

24 So as you can see from this example, there
25 is no one-size-fits-all approach to improve DO in

1 the marsh. The BMP deployment and its
2 effectiveness depends on each individual club's
3 hydrological concentration, existing control
4 structures, and access to different sloughs.

5 And we developed a toolbox of BMP, and the
6 landowners, with help from Suisun RCD, have to
7 choose the most feasible actions.

8 It would also require tracking of water
9 quality and continuous monitoring of dissolved
10 oxygen at various locations across the marsh.
11 Similarly, to the implementation of BMPs our
12 monitoring focuses on the western marsh to help
13 make adjustments to BMP implementation and to
14 respond of discharges contribute to lowering DO.

15 However, a new monitoring station to make
16 sure that salmonids are protected has been
17 established in December by the Department of Water
18 Resources, in Montezuma Slough, shown as a large
19 green circle in the center of the map.

20 And this station and the other two green
21 circles, one in Boynton Slough and one in Goodyear
22 Slough, represent our compliance stations. One
23 more annual station in downstream Goodyear Slough,
24 the blue circle, was also added to our monitoring
25 network by Department of Water Resources. And,

1 interestingly, the data collected by stations
2 managed by Department of Water Resources are
3 available in real time. So we can access the data
4 and have a look at what is happening right now.

5 In assessing DO conditions, we also relied
6 on mixture of discrete monthly measures throughout
7 the marsh, conducted by UC Davis, with small gray
8 circles, and two long-term ambient monitoring
9 stations, purple diamonds, maintained by the
10 National Estuarine Research Reserve. And we do
11 this for comparison and assessment of long-term
12 trends.

13 The red dots represent the locations where
14 DO was measured each fall for the past five years.
15 I am quite confident that the data collected
16 through all these efforts and applications to
17 evaluate our objectives are met.

18 As these best measurement practices have
19 been implemented over the past five years, we have
20 noted a substantial improvement in DO
21 concentrations. Once again, you see here DO
22 concentrations in Goodyear Slough, in the fall of
23 2012, at the top. And also, data from 2015 at the
24 bottom. And here is the green line again,
25 representing the daily average DO and the purple

1 dotted line is our proposed objective. In contrast
2 to 2012, when DO concentrations were very low and
3 below the objective for days in a row, in 2015 the
4 daily average DO dropped below the objective just
5 on two occasions.

6 And this and the fact that we have not
7 seen a fish kill for almost a decade is also a sign
8 that our BMPs and our approach is working.

9 Okay. And now let's switch our attention
10 from dissolved oxygen to mercury. In 2006, the
11 Board adopted a TMDL to address mercury impairment
12 in San Francisco Bay. The Bay Mercury TMDL have
13 this all way segment. It addresses all sources of
14 mercury, including wetland metal mercury and
15 employs targets protective of human health and
16 wildlife.

17 Thus, importantly, these targets are
18 equivalent to the statewide mercury objectives
19 which were just established last year, in 2017.

20 Since the same concerns about
21 bioaccumulation of mercury in fish, wildlife, and
22 people also exists in Suisun Marsh and the sources
23 of mercury are the same, we proposed adding Suisun
24 Marsh to the list of waterbodies addressed by the
25 Bay Mercury TMDL. And this way, all the

1 implementation actions already required under the
2 Mercury TMDL will also apply to Suisun Marsh,
3 including monitoring for wetland restoration
4 projects.

5 The public comment period for this Basin
6 Plan amendment ended on February 28, and we
7 received four comment letters. Department of Water
8 Resources, Fairfield-Suisun Sewer District, and
9 Suisun RCD are generally supportive of the TMDL and
10 only asked for minor qualifications, some of which
11 we made to the staff report.

12 San Francisco Baykeeper is concerned about
13 the effectiveness of the objectives for DO and
14 asked for more specific implementation
15 requirements.

16 EPA did not submit comments, but we have
17 been communicating with them and they support the
18 objectives and the TMDLs.

19 We generally disagree with the conclusions
20 in the Baykeeper's comment letter. In particular,
21 Baykeeper commented that the DO objectives are
22 under-protective and monitoring insufficient to
23 assess compliance.

24 As I mentioned already, our site-specific
25 objectives follow the EPA methodology, which

1 supports the (indiscernible) of the region-specific
2 DO criteria.

3 Our objectives differ from Chesapeake Bay
4 criteria because our system is much smaller and the
5 Suisun Marsh does not experience hypoxia or DO
6 stratification due to extensive replication.

7 The proposed acute and chronic threshold
8 and average periods reflect the current
9 understanding of the needs of the species that use
10 the marsh.

11 We can select an instantaneous minimum
12 threshold in the range of 1 to 2 milligrams per
13 liter, but this approach lacks scientific basis and
14 was not supported as a valid option.

15 And the objectives that we propose today
16 are fully supported by the expert panel.

17 As you heard earlier, year round, as well
18 as seasonal monitoring is required by this TMDL to
19 ensure that we can evaluate whether the objectives
20 are met in the sloughs into Suisun Marsh.

21 The Department of Water Resources, which
22 is also named in the 401 certification, added two
23 year round, continuous DO monitoring stations to
24 demonstrate that DO conditions support juvenile
25 salmonids and meet the objectives.

1 Regarding a need for stronger actions to
2 regulate managed wetland discharges, contrary to
3 Baykeeper assertions our implementation plan
4 outlines actions required by the managed wetlands.
5 And the 401 certification is an appropriate tool
6 representing the Water Board's authority under the
7 Clean Water Act to require these actions.

8 The specific BMPs implemented at each
9 managed wetland will depend on the severity of the
10 problem, conditions within the wetland and the
11 understanding of the performance and effectiveness
12 of class BMPs.

13 We also have an ability to modify and
14 prioritize monitoring activities proposed by the
15 applicants as they need to submit a monitoring plan
16 for our approval on an annual basis.

17 And as you recall from previous slides,
18 the approach we use to improve DO at the marsh have
19 been successful and we continue working together
20 with the landowners and the agencies to ensure they
21 met all the objectives.

22 Regarding the controls of mercury, we
23 expect that our approach to increase the DO to meet
24 the requirements of the DO TMDL will actually
25 reduce metal mercury production at managed wetlands

1 and subsequent transfer of mercury into the food
2 web. Mercury data is being collected under the
3 EPA's Water Quality Improvement Fund Grant, and
4 also there is an opportunity in future for
5 certification to require additional monitoring.

6 We're also working with San Francisco Bay
7 Estuary Institute and the proposed Wetland
8 Restoration Project to develop original approach to
9 mercury monitoring in Suisun Marsh and elsewhere in
10 the Bay.

11 And this concludes my presentation about
12 the Basin Plan amendment that would establish a
13 TMDL and site-specific objective for dissolved
14 oxygen, amend Mercury TMDL to include Suisun Marsh,
15 and incorporate these minor clarifications to the
16 Basin Plan. And I am happy, now, to answer your
17 questions. Thank you.

18 CHAIR YOUNG: I have a drill-down style
19 question. The monitors that were getting the
20 continuous data from those every-15-minute
21 readings, how do people get that data? Does it
22 come in remotely to somebody's computer, or cell
23 phone, or does someone have to go out and pick up a
24 physical thing and read it?

25 MS. BAGINSKA: So as I mentioned, we now

1 have two continuous monitoring stations for which
2 we have access to the data online. But these
3 stations have been operated since this last
4 December. All other data that have been collected
5 throughout the marsh is collected with the
6 (indiscernible) regarding this continuous
7 measurement, but to access data we need to go and
8 retrieve the (indiscernible).

9 But during the discharge period, the ICD,
10 the Department of Fish and Wildlife, and Water
11 Board staff will work together at going there on a
12 weekly basis, or even more often to retrieve the
13 data so we can actually detect the adverse changes
14 in DO.

15 CHAIR YOUNG: All right, thank you. It
16 will become clear later on why that's an issue.
17 Bear with me.

18 BOARD MEMBER BATTEY: I actually have a
19 question and a comment. So I'll do the comment
20 first, which is -- for your report, thank you. And
21 I know this area a bit from an old job, once upon a
22 time, and thank you for all the great work here.

23 I hesitate to ask this question but can
24 you -- what is the source of black water? Can you
25 talk more about that?

1 MS. BAGINSKA: Oh, so basically what
2 happens that when they manage the vegetation, they
3 cut down the vegetation that vegetation is stored
4 on the -- in the past was stored on the ground.
5 And when they flood the property that vegetation
6 that's decomposing gets into the ponds. And when
7 the water is released from these ponds there's a
8 lot of organic material that is partially
9 decomposed, which takes out oxygen.

10 BOARD MEMBER BATTEY: It's not as bad as I
11 thought, okay.

12 MS. BAGINSKA: No. It actually happens
13 naturally, as well.

14 BOARD MEMBER BATTEY: Yeah, okay.

15 CHAIR YOUNG: All right, other questions?
16 Well, I did have only one card and that's from
17 Steve Chappell, who's the Executive Director of the
18 Suisun Resource Conservation District.

19 MR. CHAPPELL: Good morning. I'm the
20 Executive Director of the Suisun Resource
21 Conservation District, Steve Chappell.

22 I've worked in the Suisun Marsh with the
23 Suisun Marsh landowners for 22 years as a
24 biologist. And the Resource Conservation District
25 has held the Army Corps of Engineers permit on

1 behalf of the private landowners, in partnership
2 with Department of Fish and Wildlife, and in 2013
3 we added the Department of Water Resources as a
4 partner in that.

5 Those permits have always had a 401
6 certification. So, we have a long relationship of
7 working with the Regional Board and your staff
8 through the 401 cert process to integrate best
9 management practices with the private landowners.

10 I'm proud to say that over the years,
11 working with your staff extensively to identify
12 problems, identify solutions, which are these BMPs,
13 we've made a lot of strides. And I think the 2018
14 401 certification for the next five years of the
15 general permit outlines those opportunities where
16 we can continue to show not only major
17 improvements, but show those improvements and then
18 we'll be reporting that back to your executive and
19 staff through our annual report process.

20 I do want to emphasize that we're talking
21 about landscape. There's 50,000 acres of wetlands.
22 The managed wetlands are seasonal wetlands. So
23 we're balancing needs for resident, migratory
24 species, for fisheries, protected beneficial uses
25 in the sloughs. They're also providing habitat at

1 critical times. The Suisun Marsh is highly
2 altered. We're very much influenced by delta
3 outflow, droughts, wet periods, but we also have
4 constraints such as mosquito abatement.

5 So when we manage these wetlands, we have
6 the public health and safety issues that influence
7 our management capabilities and how we can
8 discharge, and operate the duck clubs, as well as
9 infrastructures and where each unit is located in
10 the marsh.

11 So having a toolbox that we've built over
12 the years, through studies, of BMTs that apply
13 individually to each managed wetland, and improving
14 regional coordination is critical.

15 I have a landowner workshop next
16 Wednesday. With the issuance of the new Regional
17 General Permit, I will be walking through not only
18 does everybody receive the new permit, the 401
19 certification, but I'll also be walking through
20 these new requirements for water quality monitoring
21 at our landowner workshop. These reports are also
22 on our website.

23 So it requires a lot of outreach,
24 education, of working with Department of Fish and
25 Wildlife, who's the largest landowner in the marsh

1 and managing their properties and implementing it.
2 But it's not one -- you know, one action doesn't
3 fit all sites and I think that's where we need to
4 be adaptive and responsive to your regulatory
5 needs, but also the resources needs and management.

6 So I'm here to answer any technical
7 questions that may come through this discussion.
8 Thank you.

9 CHAIR YOUNG: All right. Don't leave.
10 Questions?

11 I have one question that I was going to
12 ask the staff, but I think you would also have more
13 on-the-ground experience and be able to give a good
14 answer. And it refers to something that our staff
15 put in the response to comments to Baykeeper. The
16 Baykeeper comment that I'm thinking, that I'm
17 referring to is the one that basically asked for
18 immediate response to the violation of the acute
19 standard. And I'm not making you responsible for
20 these statements but I'm just letting you know what
21 I'm trying to ask.

22 One of the reasons that the staff said
23 that, well, we're not requiring people to go out
24 immediately and do something when there is a
25 violation of the acute, which is a 24-hour

1 standard, is, in quote: "Immediate action is not
2 feasible."

3 I need a little more explanation as to why
4 immediate action would not be feasible. Let's say
5 that there was a -- and I know some of the stations
6 are going to be not -- as Barbara explained,
7 they're not going to be picked up until a week
8 later. So that makes sense to me that immediate
9 action wouldn't be feasible.

10 But on the ones that have the continuous
11 monitors now that can be read remotely, it looks to
12 me on the map like they are averaging out the flow
13 from a whole lot of different sloughs for one
14 thing, so I understand that that could be
15 complicated. But can you give me some other --
16 some more insight into why, you know, if not
17 tomorrow, maybe next week something could be
18 changed?

19 MR. CHAPPELL: I would prefer to have your
20 staff make the initial response --

21 CHAIR YOUNG: Okay.

22 MR. CHAPPELL: -- but then I'll follow up.

23 CHAIR YOUNG: All right. Fair enough,
24 thank you.

25 MS. BAGINSKA: I would like to start with

1 the fact that not the entire marsh experiences the
2 same low DO conditions. It is low DO is basically
3 observed in these back-end sloughs. So if we're
4 having a station in Montezuma Slough this is mostly
5 to make sure that the conditions there remain very
6 good, so we protect. And these kinds of
7 observations come from, you know, historically data
8 when we observed, you know, good DO throughout the
9 year.

10 As for the back-end sloughs in the western
11 portion of the marsh, these sloughs experience a
12 lot of actions that are required by different
13 agencies. And these actions relate not only to
14 water quality, but also to other actions like what
15 Steve mentioned must be the abatement.

16 So there might be a situation when the
17 property is flooded and from the water quality
18 perspective we would like that water to stay on the
19 property and not be drained to a slough. But the
20 mosquito abatement may require immediate drainage
21 because of the development of mosquitos and human
22 health issues.

23 So in this case this is like a real
24 example what may happen that would require the
25 property to drain to the slough, despite our

1 readings of DO and our needs, maybe, to wait a
2 little bit longer so we can stagger these
3 discharges to the same slough.

4 The other thing I would like to mention is
5 that part of the marsh really looks like a natural
6 environment. There's no electricity. There is no
7 power, there is no access. The flooding and
8 draining relies mostly on high and low tide, so
9 there's no pumping specific. So if they start
10 discharging, they just take out the boards from the
11 water structure and start releasing that water.
12 Sometimes it may not be possible to stop that
13 discharge straight away.

14 But as you may recall from my presentation
15 and the fact that this particular club, after we
16 discovered the DO was actually going down in
17 Boynton Slough, they actually were able to close
18 these discharge points and open the points to
19 another slough. That's an example of how we are
20 trying to address, you know, problems at each
21 hydrological -- well, at each club, individually.

22 CHAIR YOUNG: It's funny because when you
23 were -- it's not funny. But when you gave that
24 example of the Walnut Creek Shooting Club, or Duck
25 Club, whatever it was, it struck me that that was a

1 good example of something that could be done before
2 the next plan came out the next season, or the next
3 year, and that would be the kind of response that
4 perhaps Baykeeper is looking for and certainly that
5 I would be looking for. But it's not written
6 anywhere.

7 Let me give Mr. Chappell the opportunity
8 to add whatever he would like to.

9 MR. CHAPPELL: So I think where we are
10 today is an evolution, as I said, education with
11 the landowners and coordination. I currently have
12 three staff that are full time, dedicated as water
13 managers. So they have divided the marsh up into
14 three regions.

15 That still means that one individual has
16 50 properties and each property may have multiple
17 diversion points. So this idea that it's not just
18 opening or closing one gate, it is you have a
19 region, a slough that's having multiple inputs, and
20 discharges, and activities. We're monitoring that
21 and then we're making regional decisions on
22 individual sites. So I feel that we can be very
23 responsive.

24 The wetlands only discharge at low tide.
25 So you have two low tides. One of those tides

1 occur at night and one is during the daytime
2 period. So they're short duration, maybe two to
3 three hours that they're discharging, and we're
4 managing the load. And we're regionally staggering
5 activities so everyone in that region is not doing
6 the same thing at the same time to minimize load,
7 and also meet our other management objectives.

8 So it is the remoteness, the access, and
9 although I have staff that are water managers,
10 they're still private properties. So I have to
11 work in collaboration with them. I'm not a
12 regulatory agency that can come in and open their
13 gate, and go on their property without their
14 consent and participation. And we work five days a
15 week, not seven days a week.

16 So, you know, there's some realities
17 associated with that. But I think that we've shown
18 measurable results as a result of our efforts and
19 our collaboration.

20 CHAIR YOUNG: All right, thank you. I'll
21 circle back to this discussion, but I did want Mr.
22 Chappell to have the opportunity to explain what's
23 going on, on the ground. I appreciate it.

24 BOARD MEMBER BATTEY: I just want to make
25 an observation, too, or just really a question. I

1 suspect, too, that over time and with staff time on
2 the ground and expertise that there is a bit of an
3 art to this, as well, that you're learning all the
4 time about what needs to be lowered. And, you
5 know, based on the moon and whatever is going on
6 with the weather.

7 MR. CHAPPELL: And experience.

8 BOARD MEMBER BATTEY: Yeah.

9 MR. CHAPPELL: What was successful this
10 year. You know, so you want to emulate your
11 successes and avoid your failures from year to
12 year.

13 But there are environmental conditions
14 that we can't control. If you have an Indian
15 Summer and waterfowl season tends to open up
16 towards the end of October, and on Halloween it's
17 85 or 90, the environmental conditions that are
18 causing the organic decomposition are at a higher
19 rate than if we had a cool, early October and it's
20 50 degrees and stormy. You know, there are some
21 environmental factors that are driving this.

22 So we have to be responsive to that, but
23 we also have to be responsive to the tidal cycles.
24 If you have a big spring and neap tides, you can
25 move more water off. If you have really flat

1 tides, there's very little exchange. So then we
2 have to modulate our activities even to a 50-day
3 tidal cycle. And we're taking all those into
4 consideration on an annual basis as part of our
5 planning and then our regional coordination with
6 the individual wetland units and the owners.

7 BOARD MEMBER BATTEY: I have just one more
8 because I'm very curious. So you have multiple
9 permits and multiple objectives that you're
10 managing to. Is the priority of those clear or do
11 you make your best judgment? Like mosquitos and
12 dissolved oxygen?

13 MR. CHAPPELL: I comply with everything.

14 BOARD MEMBER BATTEY: You comply with
15 everything. For the record, they comply with
16 everything.

17 MR. CHAPPELL: Mosquito abatement is a
18 challenge because there's a desire to reduce the
19 use pesticides as treatment. So as a last case
20 operative, if we can't use best management
21 practices for mosquito control, which includes
22 water circulation and drainage, then they can come
23 in and treat. But there's a cost, there's a
24 treatment cost that passes on to landowners. But
25 there's also an ecological impact to aquatic

1 organisms that we would prefer not to do if we can
2 do it organically through water management, and
3 still meet our water quality objectives in the
4 sloughs. We're trying to reduce costs, we're
5 trying to reduce the applications of herbicides or
6 pesticides. And also, limiting the disturbance of
7 airplanes actually out there treating these
8 wetlands with aerial applications of larvicides.
9 So it is, it's complex.

10 BOARD MEMBER BATTEY: Thank you.

11 CHAIR YOUNG: Thank you. That is the only
12 card, yes.

13 Yeah, I have a couple more issues that I'm
14 going to delve into, but go ahead with yours.

15 VICE CHAIR MCGRATH: I read this thing
16 pretty carefully and people, I guess, are surprised
17 at what I find in the appendices, including typos
18 that confuse me. But at the 30,000-foot this is a
19 work of just stunning quality. This is just
20 amazing. And I think you found the right balance
21 of adaptive management process in a procedure going
22 forward.

23 So let me back up a little bit. I've been
24 involved in mercury issues in wetlands since 1990.
25 The Port of Oakland, on Sonoma Bay Lands, and the

1 use of Montezuma for mercury sediments that had
2 been covered under the goals, through the
3 stakeholder forum for the South Bay Ponds. And
4 here, in reviewing the development of the TMDL for
5 mercury along the Guadalupe River. I see Carrie up
6 there.

7 We've learned a tremendous amount about
8 mercury and its cycling through wetlands. And if
9 you want to generalize, which is always a little
10 bit dangerous, there's enough mercury to initiate
11 bioaccumulation in most of these systems. And what
12 we've found is that the reducing environments
13 maximize uptake.

14 So trying to figure out ways to manage our
15 systems that reduce the reducing environments is
16 the way forward and that's clearly laid out
17 analytically in the staff report. And it's clearly
18 the result of what we've learned since 1990.

19 Second, preservation of habitat in Suisun
20 Marsh is a very good thing. 50,000 acres of
21 wetlands, it's an act of stewardship. It's very
22 important. There's about a quarter million ducks
23 that come into the Bay Area every year. They don't
24 spend their time just in these systems. And some
25 of them that spend their time in these systems are

1 killed. But it's a minor take from that overall
2 population and it helps provide the funds for
3 management that benefits not just the ducks, but in
4 fact a wide array of habitat systems. It also
5 provides resiliency and flood reduction -- not
6 prevention, but reduction.

7 What we come to in here is it can be
8 improved. And it can't be improved without public
9 ownership and transitioning the land to full tidal
10 systems, but systems that still sustain duck clubs.

11 The most interesting thing that I've found
12 in this report was the discussion of the comments.
13 I read pretty carefully the Technical Review
14 Panel's comments and conclusions.

15 And the response of the staff to the
16 comments of Professor Essington were particularly
17 illuminating. Professor Essington was worried
18 about sub-lethal effects and had a number of things
19 to ask the staff of what kinds of effects do you
20 have not at the chronic level, but at sub-lethal
21 and reproduction?

22 And the response of the staff in that was
23 just really, really excellent. It's the kind of
24 discussion that we rely on, scientific, to make
25 sure that we haven't missed something and we go.

1 The conclusion I reach is this is probably
2 not perfect and there may need to be adjustments.
3 But as I look at the overall level of depression of
4 oxygen and now much of it might be natural, how
5 much of it is amenable to better results of
6 management and what we've already done in
7 negotiations.

8 I'm convinced that this is a very good
9 starting place. It's kind of put the chair back to
10 earth. It's some of those no-regrets-actions that
11 you start with, with sufficiently robust monitoring
12 to see if there will have to be more. As I said,
13 I'm very impressed.

14 CHAIR YOUNG: I'm waiting for Jim to say I
15 really didn't read this very carefully.

16 (Laughter)

17 CHAIR YOUNG: We'll see when that happens.

18 Okay, are there other comments?

19 I have just a couple of other things. Let
20 me continue on the theme of why not do something
21 right away when we see that the daily threshold has
22 been exceeded or it's actually a standard, it's an
23 objective.

24 I found your comments, both Mr. Chappell's
25 and the staff, to be illuminating and convincing.

1 I would like to leave you, however, with the idea
2 that this is one of those things where adaptive
3 management should be able to help us shorten up the
4 response time in those situations where one can do
5 something. And it sounds to me like you're doing
6 that already, but I just wanted to highlight that
7 that's an important issue to me, at least as we go
8 through the implementation of this package.

9 The second thing I wanted to ask, and this
10 is as much for the record as for my education, and
11 it relates to the response on the Appendix D7. And
12 that's the D7 that was the response to comments.

13 And again, it's with respect to one of the
14 Baykeeper's suggestions that we should have
15 included an instantaneous minimum. And I know that
16 you did present that to the expert panel.

17 I would like to get on the record a little
18 bit more description of why the expert panel said
19 that this was not a good idea. In particular this
20 phrase: "This approach lacked a scientific basis."
21 And that's the quote.

22 I don't want that to be misinterpreted
23 because instantaneous minimums do have a scientific
24 basis, but they might not in this particular site-
25 specific application because of, I'm assuming, lack

1 of data on sensitive species.

2 MS. BAGINSKA: That's correct.

3 CHAIR YOUNG: Okay.

4 MS. BAGINSKA: Also, well, the
5 instantaneous minimum implies that our organisms
6 are exposed to that low DO or concentration of
7 other pollutants for a prolonged period of time for
8 the instantaneous minimum to have an effect.

9 Many studies demonstrate that fish would
10 not -- would be able to detect low DO conditions
11 and avoid these low DO conditions.

12 So from the perspective of identifying one
13 particular minimum which would affect fish in
14 Suisun Marsh that we would know exactly that this
15 is the detrimental value of DO that would cause
16 some kind of hard to fish was -- we were not able
17 to identify the values or the fish that would
18 protect these instantaneous minimums.

19 Also, I would like to provide an example
20 why the instantaneous minimum might be misleading.
21 So last year there was a caged experiment when
22 juvenile salmonids were placed in cages, in
23 different environments throughout the marsh, in the
24 northwestern portion of the marsh, including a
25 location at the pond, at the managed wetland, in

1 the slough and elsewhere. And then they basically
2 observed the growth and survival of these juvenile
3 salmonids. Despite the fact that DO concentrations
4 measured at the pond were within the range 2 to 4
5 milligrams per liter, and the fish could not
6 escape.

7 Actually, the only place that there was no
8 mortality observed of these juvenile salmonids
9 throughout the experiment was at the managed pond.
10 And elsewhere, both the growth and mortality, the
11 growth was affected and the mortality was detected.
12 These juvenile salmonids grew best in the pond, in
13 the caged environment.

14 And the scientists hypothesized that it
15 was due to the fact that there was food and
16 temperature conditions were appropriate in that
17 particular slough.

18 So what I'm trying to say is that we're
19 trying to balance what we know about the fish that
20 we want to protect and how they react to low DO,
21 and also we also need to be -- to understand that
22 our measurements are not 100 percent precise.

23 So when we do the continuous monitoring,
24 we do observe occasional drops in DO that we cannot
25 explain. We do also see the low DO conditions in

1 the sloughs, which are not impacted by these
2 discharges, that is also very low on occasions.
3 Usually, for short periods of time. So I presented
4 a graph showing the DO concentrations measured in
5 these minimal-impacted sloughs that demonstrated
6 that we would have triggered the minimum threshold
7 if it was established in that range between 1 and 2
8 milligrams per liter.

9 But this appears to be a natural
10 phenomenon in this particular case. So there
11 wouldn't be any actions that we would be able to
12 take to prevent this.

13 And so, we're trying to sort of manage and
14 balance the efforts to recognize these potential
15 exceedances. And what we would be able to do to
16 prevent this -- or in this case it seems to be
17 unlikely that the fish is affected.

18 Okay, so yes, so the graph is on page D8,
19 in Responses to Comments, document and demonstrate
20 the DO concentrations measured in minimally-
21 impacted sloughs.

22 CHAIR YOUNG: Very good. All right, thank
23 you for that additional explanation.

24 And I would also like to echo my
25 colleague's comments about the quality of the work

1 which we have come to expect from our staff. And
2 this is yet another example. It's very thorough.

3 Do we have a staff recommendation?

4 MR. WOLFE: Yes. Before the
5 recommendation just let me reiterate that our
6 primary vehicle for addressing the discharge from
7 the duck clubs is the 401 certification that was
8 issued in February. And that very clearly is an
9 adaptive management vehicle. We are requiring
10 annual monitoring reports, annual wetland
11 maintenance summary report, and a number of items
12 there that provide staff an opportunity to weigh in
13 on actions taken over the past year and proposed
14 for the coming year.

15 So I think we do have the mechanism in
16 place to continue the adaptive management and to
17 continue, ideally, the improved response that we
18 have seen over the past few years.

19 So that said, let me remind you what we
20 are doing. There's a tentative resolution before
21 you that is the vehicle to adopt the Basin Plan
22 amendment. Assuming you approve that resolution,
23 what then happens is that we would transmit the
24 Basin Plan amendment to the State Board. The State
25 Board needs to do its own approval action. And

1 then it goes to the State Office of Administrative
2 Law for its approval action. And finally, to US
3 EPA for approval action.

4 So this is the first, but most significant
5 I would say, step in this process. So with that, I
6 recommend adoption of the tentative resolution that
7 would adopt the Basin Plan amendment for the site-
8 specific water quality objectives and the TMDL for
9 dissolved oxygen in Suisun Marsh. And that would
10 amend the Bay Mercury TMDL to include Suisun Marsh.
11 And it would also make some minor editorial changes
12 to the Basin Plan.

13 VICE CHAIR MCGRATH: I'll so move.

14 BOARD MEMBER BATTEY: Second.

15 CHAIR YOUNG: Thank you. Any additional
16 discussion?

17 May we then have a roll call vote, please?

18 MS. STONE: Board Member Ogbu?

19 BOARD MEMBER OGBU: Aye.

20 MS. STONE: Board Member Ajami?

21 BOARD MEMBER AJAMI: Aye.

22 MS. STONE: Board Member Battey?

23 BOARD MEMBER BATTEY: Aye.

24 MS. STONE: Vice Chair McGrath?

25 VICE CHAIR MCGRATH: Aye.

1 MS. STONE: Chair Young?

2 CHAIR YOUNG: Aye.

3 So adopted.

4
5 **Item 7. Sang Lee, Individually and Doing Business**
6 **as Hillview Cleaners; Suk Lee, Individually and**
7 **Doing Business as Hillview Cleaners; Eugene**
8 **Zambetti, Individually and Doing Business as**
9 **Hillview Cleaners; Estate of Julia Zambetti,**
10 **Deceased, Individually and Doing Business as**
11 **Hillview Cleaners; Estate of Peter Zambetti,**
12 **Deceased, Individually and Doing Business as**
13 **Hillview Cleaners; and Frank L. Burrell, Trustee of**
14 **the Frank L. Burrell 1937 Trust, for the property**
15 **located at 14440 Big Basin Way, Saratoga, Santa**
16 **Clara County - Adoption of Site Cleanup**
17 **Requirements**

18 CHAIR YOUNG: We will be moving on, now,
19 to Item 7.

20 MR. WOLFE: And as we're moving on to Item
21 7, I think the record should note that Board Member
22 Ajami has arrived.

23 And I'll note that I have an e-mail from
24 Board Member Kissinger that he has a client
25 emergency. He thought he might be able to get here

1 later in the morning. He's still in the office and
2 said that if there continues to be any emergency at
3 this side, he would try to get over here. But I
4 said we do have a quorum. So that he's sort of
5 monitoring any cell phone call that I might get.

6 VICE CHAIR MCGRATH: He's going to lose
7 his ability to persuade on what's the best
8 zinfandel in the State.

9 CHAIR YOUNG: That's ongoing.

10 MR. WOLFE: So, we'll move to Item 7.

11 CHAIR YOUNG: Where we have separation of
12 functions.

13 MR. WOLFE: Right.

14 CHAIR YOUNG: Do you want to take a --

15 MR. WOLFE: And we have multiple parties.
16 We have an Advisory Team that I head. We have a
17 Cleanup Team that Lisa heads. And then we have
18 multiple parties that are the named item.

19 Essentially, everybody gets a seat at the
20 table, but we recognize the table is limited. But
21 we will provide space as well we can.

22 CHAIR YOUNG: Do we need to take a break
23 to rejigger the seating plan here?

24 MR. WOLFE: I think that just a short
25 break that would be best to invite people to come

1 up.

2 CHAIR YOUNG: All right, five to ten
3 minutes while we get everyone organized here.

4 (Off the record at 10:57 a.m.)

5 (On the record at 11:06 a.m.)

6 CHAIR YOUNG: I think I am supposed to
7 start with the discussion of the hearing procedure.
8 And I just wanted to alert those of you who are
9 going to testify that embedded in this thing I'm
10 going to read is another oath.

11 MR. WOLFE: Actually, right before I do
12 that I know Cecilia has a disclosure.

13 CHAIR YOUNG: Thank you.

14 BOARD MEMBER OGBU: Thanks. So I'll just
15 go. The Zambettis' estates are representing by an
16 attorney from the San Francisco office of Crowell &
17 Moring. That is the firm and office where I worked
18 from December of 2009, when my prior firm and
19 office became a part of Crowell, until December
20 2011. I did not work on the matter and I do not
21 know the attorney who prepared the comment letter
22 on behalf of the states. Nor have I discussed this
23 matter with anyone at Crowell & Moring. My former
24 role at the firm does not in any way impact my
25 ability to be fair and impartial in considering the

1 Tentative Cleanup and Abatement Order based solely
2 on the record as presented to this Board.

3 CHAIR YOUNG: Thank you. All right, we
4 are now going to hear Agenda Item Number 7, which
5 is the Revised Tentative Cleanup and Abatement
6 Order for the Hillview Cleaners property, located
7 at 14440 Big Basin Way, in Saratoga, Santa Clara
8 County.

9 This is the time and place for a public
10 hearing to consider a Tentative Cleanup and
11 Abatement Order naming San Lee, individually and
12 doing business as Hillview Cleaners; Suk Lee,
13 individually and doing business as Hillview
14 Cleaners; Eugene Zambetti, individually and doing
15 business as Hillview Cleaners; the estate of Julia
16 Zambetti, deceased; estate of Peter Zambetti,
17 deceased; Frank L. Burrell, Trustee of the Frank L.
18 Burrell 1937 Trust. All these parties are
19 collectively referred to as the dischargers.

20 The designated parties for this proceeding
21 are as follows: The Regional Board's Cleanup Team
22 and the dischargers, as named above. All other
23 parties are considered interested persons.

24 The functions of staff who will act in a
25 prosecutorial role by presenting evidence for

1 consideration by the Regional Water Board, who will
2 be called the Cleanup Team, have been separated
3 from those who will provide advice to the Regional
4 Board, which is the Advisory Team.

5 Members of the Cleanup Team are Lisa
6 Horowitz McCann, Stephen Hill, John Wolfenden,
7 David Barr, and Tamarin Austin.

8 Members of the Advisory Team are Bruce
9 Wolfe, Adriana Constantinescu, and Marnie Ajello.

10 The Cleanup Team has a combined total of
11 15 minutes for direct testimony, cross-examination,
12 and a closing statement.

13 Representatives of each discharger will
14 also have 15 minutes each.

15 Interested persons shall limit their
16 comments to 3 minutes.

17 Pursuant to Government Code Section
18 11126(c)(3), please note that the Board may meet in
19 closed session to deliberate on a decision to be
20 reached based on the evidence introduced in this
21 hearing.

22 All persons expecting to testimony please
23 stand at this time, raise your right hand, and take
24 the following oath: Do you swear the testimony
25 you're about to give is the truth? If so, answer I

1 do.

2 (Collective affirmations)

3 CHAIR YOUNG: Thank you. The order of
4 this hearing is as follows: Testimony and cross-
5 examination of the Prosecution Team. Testimony and
6 cross-examination of the dischargers in the
7 following order: Representatives of Frank Burrell,
8 representatives of the Lees, representatives of
9 Eugene Zambetti, representatives of the estates of
10 Julia and Peter Zambetti.

11 Comments by interested persons, including
12 the Santa Clara Valley Water District, then a
13 closing statement from each discharger, followed by
14 a closing statement from the Cleanup Team.

15 Please state your name, affiliation, and
16 whether you have taken the oath before testifying.
17 If you haven't submitted a speaker card, yet, now
18 is the time to submit one to the Board staff at the
19 table.

20 And we will shortly proceed with the
21 Cleanup Team's testimony.

22 I want to make sure everyone understands
23 at the outset what I think these instructions meant
24 in terms of the timing. That the testimony and
25 cross-examination, and closing statements of each

1 of the dischargers is to take a total of 15
2 minutes. So you may allocate your time among those
3 different functions.

4 Is that correct?

5 MS. AUSTIN: (Nods head affirmatively)

6 CHAIR YOUNG: Thank you. All right, we
7 will now proceed with the Cleanup Team's testimony.
8 Thank you.

9 MR. BARR: Good morning Madam Chair and
10 Board Members. My name is David Barr. I'm an
11 Engineer here in the Toxics Cleanup Division and a
12 member of the Cleanup Team, and I took the oath.

13 This morning I am presenting the Revised
14 Tentative Order for the adoption of site cleanup
15 requirements for Hillview Cleaners in Saratoga.
16 This site presents a threat to human health and the
17 environment due to a significant PCE release from
18 past dry cleaning operations.

19 In my presentation I'll go over the site
20 history, investigation and pilot test results, the
21 cleanup plan and the revised tentative order. I
22 will summarize the dischargers objections to being
23 named and our rationale for naming them. I will
24 then finish the presentation with the Cleanup Team
25 recommendations.

1 This figure shows the location of the
2 site. The site is located within the Saratoga
3 Village Center, a shopping center in the City of
4 Saratoga. And the shopping center is outlined in
5 purple-red there. And it is in the commercial
6 strip along Big Basin Way, a short distance from
7 the intersection with Saratoga-Los Gatos Road.
8 Saratoga Creek, right here, is about 650 feet to
9 the north. The site is near the hills and the
10 Santa Cruz Mountains begin rising steeply to the
11 west.

12 Saratoga Village Center contains a
13 building that runs along the west and south sides
14 of the property there. And a parking lot in the
15 remainder of the site.

16 Hillview Cleaners is shown in green,
17 occupies a tenant space at the east end of the
18 shopping center.

19 This slide shows the site history as it
20 relates to the named dischargers. The Frank L.
21 Burrell 1937 Trust is the current owner of the
22 property. Mr. Frank Burrell is the trustee.

23 Hillview Cleaners began operation at the
24 site in 1955 and was operated by Peter and Julia
25 Zambetti from 1955 through 1983. Their son, Eugene

1 Zambetti, co-operated the dry cleaners from 1976 to
2 1983.

3 The Hillview Cleaners business was
4 purchased by Sang and Suk Lee in 1983 and they
5 continue to operate Hillview Cleaners.

6 The PCE concentrations at this site are
7 significant and expect several different meeting,
8 as shown in this slide. PCE has been detected in
9 soil gas, in indoor air, in groundwater, and in
10 Saratoga Creek. To put these detections in
11 perspective, this table shows maximum PCE
12 concentrations compared to our environmental
13 screening levels for a residential site.

14 PCE exceeding the ESLs is found in soil
15 gas on the Hillview property and downgradient of
16 Hillview Cleaners. The source of PCI in soil gas
17 is the groundwater plume.

18 PCE is found in indoor air at levels above
19 the ESLs in two buildings that overlie the
20 groundwater pollutant plume downgradient of the
21 source area.

22 A plume of PCE contaminated groundwater
23 extends from Hillview Cleaners about 650 feet north
24 to Saratoga Creek.

25 Groundwater PCE concentrations from

1 samples in front of Hillview Cleaners have been as
2 high as 41,000 micrograms per liter. The PCE
3 concentrations are currently much lower. PCE is
4 currently detected at over 1,000 micrograms per
5 liter in groundwater. This is more than 200 times
6 the drinking water maximum contaminant level for
7 PCE.

8 The Santa Clara Valley Water District has
9 met with Water Board staff to state their concern
10 about this site. They want to see a robust
11 groundwater cleanup.

12 Saratoga Creek recharges the Santa Clara
13 Valley groundwater basin and PCE has been detected
14 over the drinking water maximum contaminant level
15 in the creek.

16 Groundwater at the site is considered a
17 potential source of drinking water.

18 Significant work has been done at the
19 site, including multiple investigations to
20 delineate the extent of groundwater pollution, soil
21 vapor and PCE levels, indoor air vapor intrusion
22 impacts, and PCE impact in Saratoga Creek.

23 In addition, a successful pilot study of
24 enhanced bioremediation was implemented. Enhanced
25 bioremediation is a treatment method where a

1 solution containing a food source is injected into
2 contaminated groundwater. The food source
3 encourages the growth of naturally occurring
4 bacteria capable of breaking down PCE to ethene, a
5 nontoxic compound.

6 The cleanup plan consists of the following
7 elements: Enhanced bioremediation injections into
8 groundwater adjacent to and downgradient of
9 Hillview Cleaners. Reinjection, if needed. Vapor
10 intrusion mitigation. A risk management plan for
11 residual contamination that may remain at the site
12 post-remediation, and monitored natural attenuation
13 following after cleanup.

14 Now, I will briefly discuss the tentative
15 order. We need a cleanup order in order to require
16 implementation of the cleanup plan. The tentative
17 order names the past and current dry cleaner
18 operators and the current landowner as dischargers.
19 It sets cleanup levels for groundwater, soil, soil
20 gas, and indoor air. And the tentative order sets
21 various tasks to make sure those cleanup levels are
22 met in a reasonable time.

23 We received comments from five parties.
24 The key issues in this case raised by the parties
25 are whether to name the property owner, whether to

1 name the operators, and whether to issue the
2 Revised Tentative Order.

3 Mr. Burrell has commented that the
4 tentative order is vague on the basis for naming
5 the property owner as a discharger. Mr. Burrell is
6 named as discharger because he is the trustee of
7 the trust that owns the site. He has knowledge of
8 the activities that caused the discharge. As
9 property owner, he has the legal ability to control
10 the discharge and to control ongoing migration of
11 the contaminated groundwater. Naming of Mr.
12 Burrell is a discharger is consistent with standard
13 Regional and State Board practice.

14 Since 1986 it has been the Board's
15 practice to name current property owners as
16 dischargers. A 1986 State Water Board order
17 concluded that property owners of source properties
18 are dischargers because there's an actual movement
19 of waste from soils to groundwater, and from
20 contaminated to uncontaminated groundwater at the
21 site which is sufficient to constitute a discharge.

22 Contamination continues to migrate in
23 groundwater from Hillview Cleaners downgradient.

24 The legal counsel for Farmers Insurance
25 Company has comment for the estates of Peter and

1 Julia Zambetti that Peter and Julia are deceased
2 and cannot be ordered to clean up the site.

3 Cleanup staff disagrees that the estates
4 of Peter and Julia Zambetti cannot be named.
5 Probate Code allows the naming of deceased persons
6 and estates for cleanup liability. Prior actions
7 of this Regional Water Board and the State Water
8 Board have identified estates of deceased persons
9 as dischargers.

10 The naming of dischargers in the tentative
11 order intentionally replicates the naming of
12 parties in the discharger's ongoing litigation
13 regarding the site for the purposes of triggering
14 whatever trust, estates, assets and insurance are
15 available to address the site and to avoid disputes
16 over naming issues.

17 The cleanup staff finds substantial
18 evidence that Peter and Julia Zambetti discharged
19 PCE at the site. The evidence includes the history
20 of solvent usage beginning in 1955. the physical
21 evidence of PCE at the site and downgradient from
22 it, common industry-wide operational practices and
23 the inefficiencies of older dry cleaning equipment
24 from the 1950s to the 1990s.

25 This same evidence also applies to the

1 other operators, Eugene Zambetti, and Sang and Suk
2 Lee.

3 Further, there is testimony in deposition
4 that there were two known sudden and accidental
5 releases of PCE at the site during the time Peter
6 and Julia Zambetti operated Hillview Cleaners.

7 Eugene Zambetti comments that he should
8 not be named as a discharger because he was an
9 employee of the dry cleaner, had managerial
10 responsibilities to assist his mother. His role is
11 limited to a business function and he did not
12 handle chemicals or assist in the dry cleaning
13 process.

14 Cleanup staff believe there is substantial
15 evidence to name Eugene Zambetti as a discharger,
16 including deposition testimony, declarations, and
17 other documentation that identify Eugene Zambetti
18 as an owner of the dry cleaner business and lessee
19 of the site. Mr. Zambetti identified himself both
20 in public and on legal documents as an owner and
21 lessee of Hillview Cleaners. He profited from the
22 sale of Hillview Cleaners.

23 Statements from Mr. Zambetti's 2011
24 deposition and in the attachment to Mr. Burrell's
25 comments include that Peter Zambetti retired in

1 1976. Eugene Zambetti was involved in running the
2 business from 1976 to 1983, when it was sold. This
3 evidence indicates Mr. Zambetti was in a position
4 of authority over the operations of the business,
5 even if he never personally ran the machines or
6 handled chemicals.

7 The same evidence that applied, previously
8 discussed, regarding use of PCE equipment and
9 practices applies to Eugene Zambetti.

10 There is substantial evidence that Sang
11 Lee and Suk Lee discharged PCE at the site. They
12 used the same dry cleaning equipment as the
13 Zambettis, from 1983 to 1986. The same evidence
14 previously discussed regarding use of PCE equipment
15 and practices applies to Sang and Suk Lee.

16 Mr. Burrell argues that the Board should
17 not issue a cleanup order or that issuance of the
18 cleanup order should be delayed 180 days to allow
19 additional time for the parties to settle their
20 litigation which will, in turn, fund the cleanup.

21 The Cleanup Team argues against any
22 further delay. We acknowledge that the dischargers
23 have completed considerable work, including an
24 extensive investigation, two pilot studies of
25 cleanup technologies and development of a

1 conceptual cleanup plan.

2 However, we believe a cleanup order is
3 needed to the site's significant and unabated
4 contamination. We believe that the cleanup order
5 can help settlement discussions because the order
6 provides a cleanup roadmap with future expectations
7 that may be used to guide settlement discussions of
8 finances.

9 The cleanup order is now needed to require
10 the implementation of the cleanup plan and provide
11 for an enforcement mechanism if the cleanup is not
12 completed.

13 We have been regulating the site under
14 Section 13277 letters. Section 13267 does not
15 allow for requiring implementation of cleanup. The
16 litigation between the dischargers has been ongoing
17 for 13 years. We have been hearing for some time
18 that a settlement is very close.

19 Cleanup staff disagree that a cleanup
20 order will hinder settlement.

21 In conclusion, this site presents a threat
22 to human health and the environment due to the
23 significant PCE release from past dry cleaning
24 operations. Therefore, it's important that this
25 PCE contamination is cleaned up and the Board's

1 adoption of a site cleanup order will help make
2 that happen.

3 We conclude there is sufficient evidence
4 to name the estates of Peter and Julia Zambetti,
5 Eugene Zambetti, Sang and Suk Lee, and Frank
6 Burrell, as trustee of the Frank L. Burrell Trust
7 as dischargers.

8 You have a Revised Tentative Order in your
9 packages. It reflects changes made in response to
10 comments. In addition, you have a supplemental
11 with some factual corrections. We recommend
12 adoption of the Revised Tentative Order with the
13 supplemental changes.

14 This concludes the Cleanup Team
15 presentation and I'd be happy to answer any
16 questions.

17 VICE CHAIR MCGRATH: I do have a single
18 question. That in your presentation you indicated
19 that injection based on a pilot project would be
20 the way to go. So I didn't see any consideration
21 in your discussion of an actual pump-and-treat
22 along the leading edge.

23 But this is tributary to the creek, which
24 does supply downstream water supply. And you did
25 indicate that there's evidence that PCE is present

1 in that water supply at above the safe drinking
2 water standards.

3 So can you walk me through the reasoning
4 why a more active intersection of the leading edge
5 is not appropriate in terms of the downstream
6 health potential affects?

7 MR. BARR: Yes. So the creek flows for a
8 while before it actually gets to the place where
9 the Santa Clara Valley Basin recharge area begins.
10 The levels of contamination in the creek are
11 relatively low. The highest concentration was
12 about 30 micrograms per liter and that occurred
13 during the last drought we had, during the final
14 year of that drought.

15 So in general, during the wet season PCE
16 hasn't been detected in the creek. So the levels
17 are low, they're generally below the ESLs,
18 sometimes above. And as you go downstream, the
19 detections become lower and lower.

20 So given kind of that buffer zone between
21 where the creek -- you know, where the discharge
22 is, where the PCE detections are and the time it
23 gets to the Santa Clara Valley recharge area, we
24 think that that's -- you know, the need for
25 intersecting it at the leading edge is not an

1 immediate concern.

2 MR. HILL: This is Stephen Hill. Let me
3 just add to what David said. We think that the
4 cleanup that's proposed in this cleanup plan will
5 deplete the offsite groundwater plume, and so
6 before too much longer there should be no further
7 impact to the creek.

8 So we do want to see the impact ended, but
9 we feel there's enough time to allow that to happen
10 with the current proposed cleanup plan.

11 VICE CHAIR MCGRATH: Does that mean --
12 Steve, does that mean that injections would occur
13 offsite, downstream, within the plume?

14 MR. BARR: Yes, injections would occur
15 both -- well, adjacent -- they've already been done
16 on the source area property and they would then be
17 done immediately adjacent to the source area
18 property and another very high concentration area.
19 And then further downgradient.

20 And the conceptual RAP analysis is that
21 that should result in a pretty quick and
22 significant decline in PCE concentrations migrating
23 downgradient.

24 VICE CHAIR MCGRATH: Okay.

25 BOARD MEMBER BATTEY: Can I ask you, on

1 slide 7 you talk about the investigation and the
2 pilot test. Just remind me, I'm not sure I saw it,
3 what year the pilot was carried out?

4 MR. BURR: The most recent pilot test, the
5 successful pilot test of in situ enviro remediation
6 was carried out in 2011.

7 BOARD MEMBER BATTEY: Thank you.

8 MR. BARR: 2012. And then, there was a
9 previous pilot test of in situ chemical oxidation
10 that was a little earlier than that, but did not
11 work too well.

12 BOARD MEMBER BATTEY: Thank you.

13 MR. HILL: Did the cleanup that you did in
14 -- the effort in 2007 and '12, were they treated by
15 the Regional Board wanting them to do the cleanup
16 or how was that triggered, that effort?

17 MR. BARR: The litigation between the
18 parties triggered insurance coverage to defend the
19 lawsuits, and so part of that process was -- you
20 know, the Water Board wants cleanup of the site.
21 And so, in order to figure out how to do it, the
22 pilot tests were done to address Water Board
23 concern.

24 BOARD MEMBER AJAMI: I guess, so how long
25 we have been trying to engage with different

1 parties to clean up this site, I guess that's the
2 different, that's another question I have.

3 MR. BARR: It's been both the Water Board
4 and the Santa Clara Valley Water District.
5 Initially, the Santa Clara Valley Water District
6 was the lead agency for the site, back when they
7 were doing, you know, groundwater cleanup oversight
8 as a local agency. And they -- you know, a
9 significant of investigation was done then. A
10 pilot test was done.

11 The Water Board then took over the site
12 when the Santa Clara Valley Water District stopped
13 doing, you know, local oversight.

14 BOARD MEMBER AJAMI: Right.

15 MR. BARR: The Water Board got the site in
16 2008 and since then, you know, we've been engaging
17 with the dischargers.

18 But the mechanism by which this has been
19 happening had already been set in place.

20 BOARD MEMBER AJAMI: Thank you.

21 MR. BARR: You're welcome.

22 VICE CHAIR MCGRATH: I'm going to go back
23 on this. You know, I'm going to quote my friends
24 from the San Francisco Estuary Institute that talk
25 about when the kitchen's leaking, you know, the

1 kitchen floor is flooded, turn off the taps before
2 you start mopping.

3 It appears to me that this site is still
4 in operation and there's been nothing here that
5 indicates that the equipment has been modified or
6 the building has been modified to prevent any
7 further leakage. So, I want you to address that.

8 And the second kind of structural question
9 is as you can tell, I'm a little uncomfortable with
10 not having a more aggressive approach on the
11 leading edge of this. And so, I wonder if the
12 Santa Clara Water District, which is responsible
13 for the downstream water quality has given us any
14 indication in writing that they are satisfied with
15 this approach?

16 MR. BARR: So to address the first
17 question, PCE ceased at the site in 2011. So
18 currently, PCE is no longer --

19 VICE CHAIR MCGRATH: So they're not using
20 it as a solvent now?

21 MR. BARR: They're not using it as a
22 solvent, now.

23 Regarding the downgradient or the Santa
24 Clara Valley Water District, the Santa Clara Valley
25 Water District has indicated they want to see a

1 robust cleanup. They have commented on the cleanup
2 plan. I think they're generally supportive of the
3 cleanup plan.

4 One issue with -- initially, there was,
5 you know, the possibility of injections closer to
6 the creek, but one issue with that, brought up by
7 the Water District, was groundwater is moving
8 relatively quickly and the material injected could
9 end up in the creek, which would cause its own
10 problems with turbidity, and biological oxygen and
11 that.

12 VICE CHAIR MCGRATH: Okay, that helps,
13 thank you.

14 MR. HILL: Stephen Hill, just adding on.
15 We have a member of the District staff with us
16 today and he will be available to answer any
17 questions on that later on.

18 CHAIR YOUNG: And he has submitted a card,
19 so he will be up. I believe it's the same person.

20 MR. HILL: George Cook.

21 CHAIR YOUNG: Mr. Cook has submitted a
22 card so he will have the opportunity to make
23 comments. And then we will be able to ask
24 questions of him, when he's done. Thank you.

25 MR. BARR: Thank you.

1 CHAIR YOUNG: Next we have the
2 representatives of Frank Burrell. And I have a
3 card from Mike Harrison, I believe, and John Till.

4 MR. HARRISON: Thank you for the
5 opportunity to address the Board. I'm Michael
6 Harrison and this is John Till. We're representing
7 Frank L. Burrell, trustee of the Frank L. Burrell
8 1937 Trust, the property owner who is working
9 diligently to settle three currently pending
10 litigations and fund cleanup of the site. And both
11 of us have taken the oath.

12 The key issue for the Water Board today is
13 not just naming dischargers, it is whether to issue
14 an order at this time. And if so, what should be
15 in the order.

16 As our public comments stated, issuing the
17 order does not serve the Water Board's mission at
18 this time. The mission is complex. Having to
19 balance economic and social considerations, along
20 with whether attainment of back ground levels is
21 reasonable. That complexity reflects the
22 difficulty of cleaning up legacy contamination,
23 such as we have at this site.

24 Funding complexities are a part of every
25 cleanup. And here, we have a settlement we believe

1 will fund cleanup in whole. And to the extent that
2 it does not, the current property owner will take
3 on responsibility of attaining a no-further-action
4 under the final settlement terms.

5 The Board is considering issuing this
6 order in the home stretch of settlement
7 negotiations to bring \$2.8 million to this cleanup
8 effort.

9 In response to the request to defer the
10 order, the Water Board responded that the order
11 would help focus settlement discussions by
12 providing a cleanup roadmap. This order does not
13 do that. It, in fact, clouds many of the issues.

14 The approved RAP was expressly and jointly
15 submitted by the parties to create the roadmap and
16 provide a target for settlement discussions and
17 funding. This is what the parties have been
18 working towards.

19 And as we are involved in the extensive
20 settlement negotiations, I reiterate that the order
21 is not facilitating the settlement. In fact, the
22 order is complicating and jeopardizing the
23 settlement negotiations.

24 The Water Board staff assert that a
25 cleanup order is needed now due to the site-

1 significant and unabated contamination. However,
2 we believe the facts do not support this argument.
3 Significant work has been completed.
4 Concentrations have been reduced. The work is
5 ongoing. And the Regional Board acknowledges the
6 following, the investigation has been completed.

7 Multiple pilot tests have been conducted,
8 with significant reductions in PCE levels in
9 groundwater. Those pilot tests were done
10 voluntarily, not under Board order.

11 In fact, the order recognizes that
12 groundwater wells in the source area have been as
13 high as 41,000 micrograms per liter, with the
14 current maximum PCE around 1,000, perimeter to that
15 treatment area.

16 Additionally, downgradient concentrations
17 have already been significantly reduced.

18 The Water Board's 2016 fact sheet states
19 drinking water has not been affected. The San Jose
20 Water Company supplies drinking water in Saratoga.

21 There are currently two properties
22 identified with vapor intrusion concerns. The
23 first one is the Mint Leaf property which has the
24 only residential unit. And it is our understanding
25 that that residential property, which is currently

1 not occupied, that it will not be occupied under
2 the sub-slab depressurization system is installed
3 and confirmation sampling has been completed.

4 Additionally, the access agreement that
5 has been in negotiation since May of 2017 is
6 necessary in order to implement the injections on
7 that property, as well as the sub-slab
8 depressurization system. And until that access is
9 provided, the RAP cannot move forward.

10 At the second property of concern, the
11 Wells Fargo building, which is strictly commercial,
12 mitigation measures have been taken which include
13 adjustments to the access and to increase pressure
14 intake, and add carbon filters to be changed every
15 four months. A sub-slab depressurization kit has
16 been installed, with the remaining work currently
17 being scheduled.

18 Exceedances of drinking water standards in
19 the Saratoga Creek have only occurred at extremely
20 low flow and in close proximity to the Saratoga-
21 Sunnyvale Bridge. Not in the creek -- excuse me.
22 When that occurs at very low flow, when groundwater
23 is flowing into the creek, not when the creek is
24 infiltrating to groundwater. And concentrations
25 are well below drinking water before it leaves the

1 immediate vicinity of the site, just downgradient
2 of the bridge.

3 So that departure from the site near the
4 bridge is over a mile from the nearest Santa Clara
5 Valley Water District groundwater well, and the
6 groundwater cascade form the Saratoga upland.

7 Furthermore, the Water Board recognized in
8 its fact sheet that discharges to the creek occur
9 at very low levels of PCE.

10 In summary, contaminant concentrations are
11 lower now than ever before. Vapor mitigation
12 measures are underway, as contemplated in the
13 improved RAP. The parties intend to implement the
14 RAP as soon as the settlement is completed.

15 The two factors that have recently
16 complicated the settlement negotiations are the
17 order and the fact that the Mint Leaf owners filed
18 their own litigation. But the parties have
19 continued to work through these complications and
20 settlement documents are nearly complete.

21 So why must the Water Board issue an
22 order, now? The Water Board can accommodate the
23 parties for a reasonable postponement of 180 days.
24 This will facilitate settlement and fund the
25 cleanup. And should the parties fail to reach

1 settlement, the Water Board has lost nothing.

2 Burrell is the innocent party here.
3 Environmental laws are designed to require the
4 polluter to pay. That is the operators of the dry
5 cleaner. In this case the order harms an already
6 damaged, innocent and non-discharging party, the
7 property owner.

8 The order is internally inconsistent and
9 confusing, creating perceived conflicts with the
10 approved RAP by simplifying hydrogeology and site
11 conditions, de-emphasizing the importance of the
12 low threat closure policy, and conflating
13 commercial data with residential guidance levels.

14 This confusion will adversely impact the
15 sale or redevelopment of the property. And it's
16 obvious that a developer or purchaser looks at a
17 site under a voluntary cleanup agreement
18 differently than one under a cleanup and abatement
19 order.

20 So that completes my discussion of why
21 we're urging the Board not to issue the order at
22 this time.

23 The next portion relates to shortcomings
24 of the current draft order. It's something of a
25 laundry list, so I ask you to please bear with me.

1 In its current form, the order has a
2 variety problems all of which I don't have time to
3 cover today. However, some examples of these flaws
4 include unequal and inconsistent enforcement in
5 application standards. Residential levels have not
6 been applied at other sites in the immediate
7 vicinity and within the same zoning area, where
8 sites have been closed with commercial levels or
9 not even investigated thoroughly.

10 These include the former Chevron site, now
11 Kerful Cleaners, the Saratoga Cleaners site, the BP
12 site and the Screw Shop (phonetic).

13 The response to comments, Comment E,
14 Response 1, describes the groundwater and soil gas
15 pollutant plume extending from the source property
16 to Saratoga Creek, which is inconsistent with the
17 order and data that shows that the vapor plume ends
18 south of Big Basin Way.

19 The order requires residential soil vapor
20 cleanup standards regardless of property use, which
21 is inconsistent with Water Board guidance, prior
22 approaches, and the current property use.

23 Issuance of the significantly revised
24 order, without reopening the public comment period
25 also is imposing severe restrictions on

1 presentation time at this hearing and violates due
2 process.

3 The significant changes include changes
4 from commercial cleanup to residential cleanup
5 levels, including the application of residential
6 soil gas standards on commercial properties.

7 The mixing of indoor air data collected on
8 commercial properties with residential ESLs.

9 The misapplication of soil leaching
10 standards for soil at depth and below groundwater
11 that's in Finding 6. The description of soil as
12 near this misapplied ESL leaching ESL. And
13 incorporating incorporation of the leaching concern
14 in the Table 7B.

15 The revised order does not site the
16 particular data that the Board is relying on, in
17 most cases, in order to determine or order that
18 site is significantly polluted and has not been
19 abated. For example, it does not provide the
20 sample information with concentrations, which are
21 critical to its conclusions and vital to our
22 ability to understand and respond.

23 The ownership date for the Burrell Trust
24 isn't correct.

25 The order fails to specifically identify

1 the evidence to support the findings of fact.

2 Instead, it points to the entire record on
3 GeoTracker as evidence, which is not appropriate.

4 The Response Number 5 points to the
5 authority in Water Code 106.3 with regards to
6 recognizing human right to water, yet the 2016
7 Water Board fact sheet states that drinking water
8 has not been effected as drinking water is supplied
9 by the San Jose Water Company.

10 The case cited by the Water Board to
11 support naming the Burrell Trust as a discharger,
12 that's ZeoCon Corporation (phonetic), Order Number
13 W2862, is not applicable and ZeoCon Corporation was
14 both the owner and the operator of the business at
15 that site.

16 The order improperly names Burrell as a
17 discharger and that the order fails to identify
18 that Burrell had knowledge and failed to act to
19 address the contamination. There are no facts that
20 the Burrell Trust created or maintained any uses
21 conditions at the site.

22 Once it learned of the potential
23 contamination, the Burrell Trust conducted further
24 investigation and shortly thereafter commenced the
25 litigation for the abatement of the nuisance. That

1 litigation that has driven the investigation and
2 pilot tests, and work at the site.

3 Under the definition provided by the
4 Regional Board, the Regional Board itself could be
5 a responsible party. It knew of the contamination
6 prior to the Burrell Trust, had knowledge of the
7 potential source and alleged discharges, and had
8 the legal ability to control such discharges.

9 Obviously, this is not the appropriate
10 standard to apply to the Burrell Trust.

11 In fact, shortly after discovering the
12 contamination, Burrell instituted the litigation
13 which has driven the work at the site for the last
14 14 years. The Burrell Trust did what is
15 contemplated by every environmental in our nation,
16 brought an action to require polluters to pay.

17 Now, at the end of this 14-year process,
18 the Water Board has decided to insert itself in the
19 process at this key moment when resolution is
20 pending.

21 The Burrell Trust would like to move
22 forward with remediation of the site and wants to
23 conserve resources for the Regional Board and
24 itself, rather than continuing administrative and
25 legal proceedings. It wants to put the dollars

1 into the ground, where they belong.

2 Therefore, we ask the Water Board to
3 reconsider moving forward with the cleanup and
4 abatement order at this time until settlement can
5 be finalized, and a voluntary program can be
6 implemented, which we expect to be no more than 180
7 days from today. Thank you.

8 If you don't have any questions at this
9 time, we'll reserve the rest of the time.

10 VICE CHAIR MCGRATH: Early in your
11 presentation, when you talked about the potential
12 availability of \$2.8 million and it wasn't clear
13 what conditions were attached to that, you've
14 stated that work is ongoing. Can you be specific
15 about what work is ongoing in terms of the
16 bioremediation?

17 MR. HARRISON: Well, you say in terms of
18 the bioremediation. The pilot test results, as of
19 2017, show that there's still degradation ongoing
20 in the pilot test area. It's now, you know,
21 generally --

22 VICE CHAIR MCGRATH: No, I asked what work
23 was ongoing. You said work was ongoing.

24 MR. HARRISON: Correct. Well, in addition
25 to the mediation and trying to bring the settlement

1 funds into the picture, we also have just installed
2 a sub-slab depressurization in the Wells Fargo --

3 VICE CHAIR MCGRATH: Maybe you don't
4 understand work. Work means work at the site to
5 reduce the level of pollution. That's what I'm
6 asking?

7 MR. HARRISON: Okay. I thought you also
8 meant work to install mitigation systems, as
9 described in the RAP. So that's what I was
10 describing at the sub-slab at Wells Fargo.

11 Currently, there are no remediation
12 efforts underway at the site.

13 VICE CHAIR MCGRATH: Okay, thank you.

14 CHAIR YOUNG: All right.

15 BOARD MEMBER AJAMI: I actually have a
16 question. So you used a lot of general terms, like
17 clouding negotiation issues, complicating the
18 cleanup process. And I'm just wondering can you be
19 more specific why this order would cloud any of the
20 efforts that you already have? I mean, 13 years,
21 right? So the water moves, the contamination has
22 moved from the original place that -- it's not just
23 sitting and waiting. So can you be more specific
24 about those?

25 MR. TILL: Yeah, I think what's important

1 about as far as the Burrell Trust is concerned,
2 they've been dragging both the investigation and
3 the cleanup for 13 years or 14 years, technically.

4 And some of that they've done themselves
5 and some of it has been driven by the litigation.
6 We are at the cusp of settling three different
7 litigations. One by Fireman's Fund that claims
8 that they don't have any obligation to pay for any
9 of the cleanup because that would fall within the
10 indemnity coverage within the insurance policy. So
11 they are taking the position that, one, they don't
12 have coverage for any of the Regional Board orders
13 because it's a claim versus a suit. And that's
14 Foster-Gardner, the case of Foster-Gardner, a
15 California Supreme Court case.

16 And then the second thing that they are
17 taking a position is that that there were no sudden
18 accidental events. And if there are no set of
19 accidental events, there is a potential that all of
20 the settlement funds would go away.

21 And so, that \$2.8 million would
22 potentially not be available to any of the parties
23 or to the cleanup itself. And funding, as has been
24 a process for all dry cleaning sites within the
25 State of California, is a major hurdle on these

1 cleanup programs.

2 The State has tried to address various
3 other components, including trying to use some of
4 the US Key Funds for people that don't have
5 insurance, and so on and so forth. Recently,
6 there's been attempts to bring dry cleaning funding
7 through a tax program, but that hasn't worked,
8 either.

9 So the insurance policies that are at
10 issue in the Fireman's Fund policy we are settling
11 that litigation as part of the settlement, as well.
12 And that litigation has been going on for a year
13 and a half, two years, something in that time
14 frame.

15 So Fireman's Fund filed, about a year and
16 a half or two years ago they filed what's a
17 declaration with that action, in order to try to
18 get out of coverage. Okay.

19 The early litigation is ongoing and has
20 been ongoing, and has been driving the
21 contaminants.

22 A new litigation was filed by the Mint
23 Leaf, the property owners, in November of last
24 year, but we didn't learn about it -- I didn't
25 learn about it until January of this year. So that

1 has also complicated some of the issues with moving
2 forward because we're trying to resolve all of
3 these issues together.

4 And so, in addition, the Mint Leaf
5 property, we provided them with an access agreement
6 in May, as we had a team, in order to put in the
7 sub-slab depressurization so we can continue doing
8 work that's identified as mitigation measures
9 within the RAP, even though we didn't have a
10 settlement in place and we didn't have the funding
11 in place, yet.

12 And so that process of collecting all of
13 those settlements and documents, and the parties,
14 and the insurance coverage together in one place,
15 even working with a mediator, an outside mediator,
16 at least technically, is complicated. We have, I
17 think, eight settlement documents between, plus I'm
18 sure they have -- the other responsible parties,
19 potentially responsible parties have other
20 settlements that they're working with Fireman's
21 Fund as well.

22 So there's a whole bunch of moving parts
23 with regards to the settlement process. And the
24 scope of what the cleanup was. And that's why we
25 submitted the RAP. And when we submitted the RAP

1 we told the Water Board, in the cover letter, that
2 this was creating a roadmap. So the approval
3 process took about a year for the approval of the
4 RAP. And now, and once that happened then we
5 started negotiations in earnest. And it's been an
6 extensive process.

7 But we are really close and I just don't
8 want to lose the \$2.8 million.

9 BOARD MEMBER AJAMI: But what if in two
10 months you've realized there's an issue going on,
11 or another settlement, or another litigation then
12 that's going to push the process back.

13 So there's no way for us to see how the
14 process can be -- the cleanup can start and we can,
15 you know, figure out this issue as fast as
16 possible. I mean, 13 years is a long time.

17 MR. TILL: Yes, but during that 13-year
18 period you have to understand that there's been a
19 ton of work that has been done.

20 BOARD MEMBER AJAMI: I mean, all pilots,
21 right? They're not have working done --

22 MR. TILL: Well, and a complete
23 investigation which has taken, you know, an
24 extended period of time. The first pilot test
25 study was done in 2000 -- I mean, not the first

1 one, the first pilot test was done when?

2 MR. HILL: Well, the first pilot test was
3 done in 2007.

4 MR. TILL: In 2007. So even before the
5 (indiscernible) were involved, right, we had an
6 investigation enough to start the process at the
7 beginning. And that ended up not working because
8 of the geology that was there and getting product
9 into the ground.

10 We worked through -- during that time
11 there was additional investigation and monitoring
12 that took place. Then a new pilot test study was
13 done in 2012. That continued to show in 2017 that
14 reductions were continuing to work. Based on those
15 results, we feel confident that the RAP is going
16 to, and I think the order does as well, from the
17 Water Board as well, that the proposed RAP that has
18 been submitted, with the understanding that that
19 was our roadmap and that was our target that we
20 were shooting at. As far as funding from the
21 insurance carrier is in fact where we are going.

22 MR. HARRISON: And also, I do think it's
23 important to highlight the magnitude of the
24 investigation. As David Barr pointed out, the
25 pulling stretches almost 600 feet. So during that

1 time period it wasn't, you know, when the
2 litigation started that drove the investigation.
3 It's an iterative investigation that included
4 downgradient investigation going on the far side of
5 Saratoga Creek, going downgradient of Saratoga
6 Creek. Then as we became more aware of soil vapor
7 as an issue, which has obviously been a growing
8 body of knowledge, a soil vapor investigation was
9 initiated.

10 So it's been a very long, iterative
11 investigative process that --

12 BOARD MEMBER AJAMI: But you understand
13 the plume is moving, right, so it's not standing
14 waiting for the litigation to end, and things to
15 settle?

16 MR. HARRISON: Actually, that's not the
17 case. The plume is already attenuating. We have
18 data, it's included in the RAP and I have the
19 figures here, if you'd like to see it, from
20 downgradient that shows significant attenuation and
21 reduction in concentrations in the downgradient
22 plume. And we think that that's probably driven by
23 the pilot test.

24 But one of the reasons why the order is
25 very difficult for the participants in this

1 mediation is the over-simplification that happens
2 in writing an order. It's not just comparing
3 commercial indoor air standards to a residential
4 standard that makes the problem look significantly
5 problem than it actually is, it's also downgradient
6 -- the downgradient hydrogeology is much more sandy
7 and gravelly.

8 So the concentrations that were
9 downgradient are being fed by the source area
10 because there's not a lot of organic material
11 that's retaining contamination. And there's no
12 method in these downgradient portion of the plume
13 where any source material was ever done.

14 So there was no spill, so there's free
15 product or something that has a very long residence
16 and a back diffusion is a term we use a lot in the
17 downgradient plume. It's most sand, clays and
18 gravels. I'm sorry, not so much clay, some, but
19 mostly sand and gravel.

20 So that's not the case in the source area.
21 The source area is much more low permeability
22 materials that have retained a significant amount
23 of mass. And that's why when we cut off, you know,
24 the head of the plume we deprived the downgradient
25 of this continuing source that we think is going to

1 have a relatively rapid and continuing impact on
2 what's already significantly decreased.

3 So the plume data does not suggest that it
4 is migrating in the sense of increasing and moving.
5 It's actually the opposite. The concentrations, we
6 say that the original concentrations the Water
7 Board mentions were 41,000 down to 1,000. 41,000
8 was in the source area that was treated. 1,000 was
9 at the perimeter of that. So that will also be
10 significantly reduced.

11 In the area where the treatment was, we're
12 actually around 100 is the highest and many wells
13 are at non-detect.

14 So the point is that the concentrations in
15 the creek are either non-detect or below drinking
16 water standard immediately downgradient of the
17 Saratoga Bridge. That's a mile away from where
18 this recharges groundwater. Those concentrations
19 are almost always below drinking water standards,
20 except for 2014 in a three-month period, during the
21 height of the drought. At that point that creek
22 was flowing about a tenth of a CFM -- excuse me, a
23 CFS. That's basically two residential hoses. So
24 it was barely moving at all. It was in puddles.
25 And groundwater was coming into the creek, not the

1 other way around.

2 So those simplifications which the Board
3 -- the staff recognizing when you write an order
4 you do simplify these issues. But those issues
5 make it much more of a concern for the parties that
6 are actually involved in owning the site, trying to
7 redevelop the site, trying to clean up the site and
8 dealing with liability.

9 So I don't want to minimize. There are a
10 bunch of issues that are raised and we can answer
11 questions about all of those. There are other
12 issues in the order that raise concern for the
13 parties.

14 BOARD MEMBER AJAMI: Thank you.

15 BOARD MEMBER BATTEY: I have two questions
16 that I want to ask. The first is when this pilot
17 work and such has been going on have all the
18 parties been working together on this or has the
19 Burrell Trust been doing this work?

20 MR. TILL: As part of the -- as the
21 plaintiff, the defendants have been doing most of
22 the work because their tenants and they have the
23 insurance carrier that has been paying for the
24 restoration at issue.

25 BOARD MEMBER BATTEY: Can you just explain

1 that to me? Is that being all of them, all parties
2 that are involved with it.

3 MR. TILL: The defendant parties, they all
4 had one environmental control that was --

5 BOARD MEMBER BATTEY: All of them had
6 something in --

7 MR. TILL: That's the Less and the
8 Zambettis all had one -- we had four or five. I'm
9 actually a number of the consultants out of that
10 were involved in this process on the defendants'
11 side. But there were multiple environmental
12 consultants that came and went during the process.

13 BOARD MEMBER BATTEY: Okay, my second
14 question, I actually have three. My second
15 question is do you know the total amount that's
16 been spent to date between legal fees and the
17 environmental fees of the pilot work and such to
18 date?

19 MR. TILL: I don't know as far as legal
20 fees is concerned. But I know that, and I don't
21 have an exact estimate on what the defendants have
22 spent, really. I know that it's in excess of \$1.5
23 million.

24 BOARD MEMBER BATTEY: Okay.

25 MR. TILL: I believe it's actually,

1 probably over \$2 million that has been spent on
2 pilot test studies, investigations and --

3 BOARD MEMBER BATTEY: That's on the
4 environmental work but not the --

5 MR. TILL: It is environmental work. As
6 far as litigation fees and costs, I really don't
7 know.

8 BOARD MEMBER BATTEY: Okay.

9 MR. TILL: I don't have a good estimate.

10 BOARD MEMBER BATTEY: Okay. And then my
11 last question, I want to figure out how to ask this
12 question the right way, but it's a very straight
13 forward question, actually. So I hear staff saying
14 this a threat to human health and the environment.

15 And my question is given the 13 years that
16 have gone by do you believe that all parties, the
17 legal team, the environmental team have been
18 working to the most intense capability, diligently,
19 quickly to resolve this issue as is possible?

20 MR. TILL: I do. I believe that this
21 process has kind of run the route of what an
22 investigation will do and ultimately end up -- were
23 there glitches along the way? Absolutely. Were
24 there environmental consultants that got replaced a
25 few who had to be brought up to speed, and so on

1 and so forth. Yes. But that happens on every
2 single site that is involved. I mean, many times
3 people are on sites where actually the project at
4 either DTSC or Regional Board gets replaced and we
5 have to start the process over.

6 BOARD MEMBER BATTEY: So you feel like
7 you've been working as fast as you can?

8 MR. TILL: I think that we've been making
9 very good progress. And although the settlement is
10 taking longer than I would like, I think that we
11 needed to have the RAP approved. We needed to
12 finish the investigation first before we proposed
13 the RAP. And once we got the investigation done,
14 we were able to come together as a group, with a
15 mediator, and the insurance carriers, and come up
16 with a proposed RAP to submit jointly, with a cover
17 letter that said that once we have this approved
18 we'll be able to do that, and go back and have the
19 --

20 BOARD MEMBER BATTEY: Okay, and just one
21 last question.

22 MR. TILL: I don't mind.

23 BOARD MEMBER BATTEY: Just can you explain
24 your particular roles? You're both attorneys?

25 MR. HARRISON: No, I'm an environmental

1 engineer.

2 BOARD MEMBER BATTEY: An environmental
3 engineer and --

4 MR. HARRISON: Which is why I do think
5 it's important that I answer part of your question
6 because you've pointed out that there are risks to
7 human health and the environment. So I want to be
8 very clear about that.

9 Number one, no one is drinking groundwater
10 in Saratoga. As the Water Board states in its own
11 fact sheet, it's being supplied by the water
12 company. So nobody's drinking this water.

13 There is a significant amount of
14 contamination in the environment. We are not
15 trying to minimize that at all. When we identified
16 a vapor intrusion concern, we immediately worked
17 with -- number one, there is a residential
18 property. Initially, that was slated to be torn
19 down on an already-approved development plan with
20 the prior owners, and there was no occupant of it.
21 So, really, it was just being used for storage for
22 the restaurant, which is commercial property.

23 For the Wells Fargo, the changes we have
24 made -- the number that they referred of the 18
25 microgram per cubic meter, was a single recording

1 in a break room where people spend no more than 30
2 minutes a day. In the lobby, where people spend
3 their full time, the number is about 3 microgram
4 per liter which is 1 microgram per liter greater
5 the DSL. And we've moved to modify the HVAC and
6 install a sub-slab depressurization system.

7 As far as the creek goes, our RAP has a
8 review from a toxicologist about the concerns of
9 these low concentrations in the creek. And the
10 conclusion is that it's not significant.

11 So we are not ignoring risks to human
12 health and the environment in this at all. What
13 we are doing is working diligently through a legal
14 process to get enough funds to fund a very
15 significant cleanup, which is what we believe we're
16 extremely close to doing.

17 BOARD MEMBER BATTEY: Great, thank you.

18 CHAIR YOUNG: I have one question that I
19 think actually will be quick. You mentioned three
20 lawsuits and considering those three lawsuits as a
21 group are the Lees, and Eugene Zambetti and the
22 estates of Julia and Peter Zambetti also in the
23 group that is in the mediation. So the cast of
24 characters is not -- of the people who might
25 potentially be responsible is the same?

1 MR. TILL: Yeah, the same parties are all
2 actually in all three litigations. And I should
3 come back and just talk about that for a second, if
4 I may. Is that the two properties that have been
5 identified with regards to the gas, one is the
6 Wells Fargo building which we've already talked
7 about. That's actually (indiscernible) -- so
8 that's not going to become another litigation that
9 could slow down the settlement process.

10 And the Mint Leaf property, which is the
11 other litigation that's already been filed is, in
12 fact, the only other property that's been
13 identified as having soil gas, an indoor air
14 problem. And that's the only residential area
15 within the soil gas investigation.

16 CHAIR YOUNG: Okay. And they are also a
17 part of this three-litigation group, several
18 people?

19 MR. TILL: They are a part of -- they are
20 a part of the litigation, one litigation.

21 CHAIR YOUNG: Okay.

22 MR. TILL: That they --

23 CHAIR YOUNG: Got it. Okay, thank you.

24 I don't see any other questions from the
25 Board. I need to ask a procedural question. Do we

1 do all of the direct testimony first and then ask
2 for cross-examination, ask if anyone's interested
3 in doing cross-examination of each other?

4 MS. AJELLO: I think cross-examination
5 should be done within the allotted time of each
6 presentation. Because what's left now would seem
7 to be leftover for closing statements.

8 CHAIR YOUNG: All right, I guess what I'm
9 asking, and I'm sorry to have to do this in public,
10 but like if somebody else, one of the other parties
11 wants to cross-examine these folks is that part of
12 our procedure. And if so, should we do it now or
13 should it be done after all of the direct
14 testimony?

15 MS. AJELLO: They can do it within their
16 direct allotment, if that's something they would
17 like to do, they can call people.

18 CHAIR YOUNG: Okay.

19 MS. AJELLO: Oh, I see what you mean.

20 CHAIR YOUNG: We will make sure by the end
21 of this procedure that everyone has had a chance to
22 cross-examine everybody that they want to cross-
23 examine. How's that?

24 MS. AJELLO: Yes, good enough.

25 CHAIR YOUNG: All right.

1 MR. HARRISON: Thank you for your
2 consideration.

3 MR. TILL: Thank you.

4 CHAIR YOUNG: And thank you for now.

5 All right, we will now have the
6 representatives of the Lees and I have a card that
7 lists Jeff Hawkins and a card that lists Stephen
8 Ardis.

9 MR. ARDIS: Good afternoon. My name is
10 Stephen Ardis. I'm with Isola Law Group. We
11 represent Mr. and Mrs. Lee.

12 With me today is Jeff Hawkins of our
13 office, who has some points that he wishes to raise
14 with respect to the Lees.

15 And I would like to then follow up with an
16 additional answer for Dr. Ajami's question
17 regarding complexities introduced in the settlement
18 process. So Mr. Hawkins, first.

19 MR. HAWKINS: Good afternoon. I'm Jeff
20 Hawkins. As Steve mentioned, we represent the Lees
21 and I have taken the oath.

22 I want to first ensure that the Board
23 Members understand that I am not here testifying as
24 to the Lees operations in any way. I'm not going
25 to offer evidence regarding the operations --

1 AUDIENCE MEMBER: I can't hear him.

2 MR. HAWKINS: Oh, I'm sorry. I've got a
3 throat problem. I'll speak up, try to speak up.

4 The Lees have provided operational
5 information in the past, to the Board Members, per
6 request.

7 My comments this morning are focused on
8 the issue of the evidence that the Board has cited
9 in the Tentative CAO, naming the Lees as one of the
10 dischargers and the insufficiency of that evidence.

11 The Board, in identifying the Lees as
12 dischargers under the Tentative CAO, have cited to
13 substantial evidence. Now, when I look at the
14 site, I wouldn't dispute that there's a problem out
15 there and there's substantial evidence of that
16 problem. But there is no specific evidence that
17 that problem was caused in any manner by the Lees'
18 operations.

19 The substantial evidence cited in the CAO
20 doesn't cite any specific evidence of an actual
21 discharge of PCE during the Lees' operations.
22 That's despite over 20 years of information
23 gathering and site investigations under Water Code
24 13267, which provides the Board, as you know, the
25 authority to direct suspected dischargers to gather

1 and provide information and data.

2 As we know, Water Code Section 13304, the
3 section which provides for the Board to issue
4 cleanup and abatement orders, speaks to the term of
5 identifying dischargers. Not suspected
6 dischargers. A distinction that we pointed out and
7 which is my main point today, which we pointed out
8 also in our comments that we submitted in response
9 to this tentative order.

10 As I touched on briefly before, the Lees
11 are responding to the numerous 13267 investigation
12 and information requests. They submitted a
13 package, a sizeable package of operational
14 information describing how they run the dry
15 cleaner. And it includes things such as PCE
16 purchase and waste records, chemical stored and
17 handled at the Hillview Cleaners, information
18 regarding the new dry cleaner or the wet/dry
19 machine that they purchased, and installed in
20 approximately 1987, photographs of their hazardous
21 waste storage area and other information that's
22 listed in the information package.

23 I am aware of no follow up that the Board
24 has every provided or any comment to that
25 information package.

1 So in summary, after the 20 years of
2 investigation and information gathering directed at
3 the suspected dischargers under the 13267 orders,
4 the Board has not or possibly is not able to cite
5 any specific evidence of a discharge during the
6 Lees operation of Hillview Cleaners.

7 Thank you.

8 MR. ARDIS: If I may, to address Dr.
9 Ajami's question, which I understood to be
10 essentially in what way -- can we be more specific
11 of the way in which the prospect of this cleanup
12 and abatement order might affect the ongoing
13 settlement discussions?

14 From the Lees' perspective, I think an
15 understanding of those complications starts with
16 the situation of the Lees. When you have a small
17 business owner, who is in a situation like this, in
18 which they may be held responsible for and are
19 being held responsible for investigation
20 activities, and ultimately whatever response may be
21 required to an environmental problem like this, as
22 I'm sure the Board recognizes this is an --
23 relative to the assets of a small business person,
24 the expenses of these responses is astronomical.
25 It would ruin most small businesspersons to comply

1 with a cleanup and abatement of the type that's
2 being contemplated here.

3 It's no secret that what makes these
4 things float, what makes it possible to do these
5 cleanups is the insurance policies which small
6 business owners, such as the Lees, have obtained.
7 And trying to get those insurance companies to
8 provide coverage for pollution, which is a type of
9 risk which is not generally provided -- coverage is
10 not generally provided now, in your federal
11 liability insurance policies.

12 It's a very difficult thing, where we do
13 have old policies, where there is potential
14 coverage, to convince the insurers to actually
15 provide a defense, and then provide monies for a
16 cleanup.

17 And so what we've been doing throughout
18 this process is basically trying to create
19 circumstances where we can go to this insurance
20 company and say, look, it's going to cost X number
21 of dollars to take care of this problem that the
22 Lees are facing. You don't want to have any more
23 claims on this policy. The Lees want to make this
24 problem go away and take care of their
25 responsibilities with respect to cleanup.

1 And so what we do is we do a policy
2 buyback. And in exchange for giving up all rights
3 to future insurance coverage, the Lees will get
4 some funding for a cleanup. And what we're facing
5 is trying to quantify what is the risk to the Lee
6 family of losing their insurance coverage and
7 having a certain set amount of money that is all
8 the resources that is going to be available to them
9 to comply with their response objectives?

10 And that's a very difficult risk to
11 quantify. And when we're put in a situation in
12 which we've got an order that is directing the Lees
13 to do certain things, in the middle of discussions
14 with the property owner, who's going to be
15 receiving funding from the cash out of an insurance
16 policy, and all of the questions about who's
17 responsible if there's cost overruns, who is
18 responsible for anything different in this cleanup
19 order from what the parties expected in settlement
20 discussions, all these issues come to the fore
21 again. And we have to talk about what are the
22 risks to the Lees of giving up their insurance
23 coverage.

24 And that's a very difficult decision for
25 the Lees to make and it's a very difficult decision

1 for us to advice the Lees on. It would be fair
2 easier if we're in a situation in which we know
3 what the cleanup plan is, and we do have that plan.
4 And we have undertakings, certain undertakings by
5 the property owner to undertake that work and do
6 the response. And we had everyone agree that money
7 is going to be given to the property owner, they're
8 going to do the job, and they're going to get this
9 taken care of.

10 And then at that point, frankly, I think
11 the calculus of risk is a little bit different in
12 terms of whatever orders and directives the Board
13 might issue.

14 But the timing right now, when we're at
15 the point of trying to quantify this risk and
16 advise our client as to whether or not they should
17 give up their insurance coverage, it's a difficult
18 thing for us.

19 CHAIR YOUNG: I was just making sure that
20 the clock stopped when you stopped.

21 So we will go with Board questions now.

22 VICE CHAIR MCGRATH: I have a question for
23 Mr. Hawkins. Mr. Hawkins, you've argued that the
24 burden of proof should be on the staff, rather on
25 the discharger. It's something we can perhaps

1 agree to disagree upon.

2 But I want to be -- I want to drill down.
3 You gave us one example of something that the Lees
4 did. They began operating in '83 and installed new
5 equipment in 1987. So the staff's comment about
6 the aged equipment may not be completely
7 appropriate. But there's still first the period
8 from '83 to '87.

9 Second, in the comment responses, and
10 these are found on page 6 of our staff report,
11 there are three things that are identified as
12 pathways, in addition to inadvertent leaks and
13 spills within the operation that go through cracks
14 in the concrete.

15 They were the below-grade trench at the
16 rear, the storm drain catch basin, and the sewer
17 lateral which had breaks.

18 Did you provide any evidence of repairs to
19 the property that had been done either by the Lees
20 or by the property owner under that period of time
21 to address any of those three problems?

22 MR. HAWKINS: What we have provided,
23 standing here today what I recall that the Lees did
24 provide, and this was before our involvement in the
25 case. In '87, as we referred to, they installed

1 the new machine. And from what I understand, they
2 put in some type of metal flooring beneath the area
3 of the new machine. They epoxied the floor under
4 the new machine and they put the secondary
5 containment around the new machine.

6 VICE CHAIR MCGRATH: So they epoxied the
7 floor.

8 MR. HAWKINS: Some type of a metal plate.
9 I don't know what that means. It's in his
10 testimony. But they took actions.

11 VICE CHAIR MCGRATH: But on these other
12 three pathways, you have no evidence to submit at
13 this time?

14 MR. HAWKINS: They did no repairs.

15 VICE CHAIR MCGRATH: Okay, thank you.

16 BOARD MEMBER BATTEY: I have just a quick
17 one. Is this the only dry cleaning business the
18 Lees operate?

19 MR. HAWKINS: I'm sorry?

20 BOARD MEMBER BATTEY: Is this the only dry
21 cleaning operation the Lees operate?

22 MR. ARDIS: Actually, the proper answer to
23 the question is it's not a dry cleaning facility.

24 BOARD MEMBER BATTEY: I'm sorry.

25 MR. ARDIS: Yeah, they no longer do dry

1 cleaning.

2 BOARD MEMBER BATTEY: Okay.

3 MR. ARDIS: So this is why there's no use
4 of any sort of dry cleaning solvents at all on the
5 site, let alone PCE which was the --

6 BOARD MEMBER BATTEY: Do they own other
7 businesses or is this their sole business?

8 MR. HAWKINS: I'm not sure. I don't
9 believe they do, but cannot say that for certain.

10 BOARD MEMBER BATTEY: Okay.

11 CHAIR YOUNG: Questions? All right, thank
12 you.

13 I have one card now from Mr. Michael
14 Huggins who is -- identifies himself as a
15 representative of Peter and Julia Zambetti. I
16 don't have a card identifying anyone as a
17 representative -- but I'm about to get one.

18 (Laughter)

19 MR. WOOD: I have a card.

20 CHAIR YOUNG: Okay.

21 MR. WOOD: Mr. David Wood for Mr. Eugene
22 Zambetti.

23 CHAIR YOUNG: Thank you. That clears it
24 up. So it's Mr. David Wood for Gene Zambetti. And
25 then following that we will take representatives of

1 the Estates of Julia and Peter Zambetti.

2 MR. WOOD: Good afternoon. I'm David
3 Wood, here representing Gene Zambetti, who is the
4 daughter of Peter and Julia Zambetti, who owned
5 this and operated Hillview Cleaners for 28 years,
6 going back into the fifties.

7 I'm not here to make an argument about
8 whether you should issue a cleanup and abatement
9 order. I have a feeling from watching the body
10 language that's not going to happen. But I'm not
11 here to make an argument one way or the other about
12 that.

13 But I am here to make an argument that
14 Gene Zambetti had control, and operation, and
15 ownership interest in this business for only seven
16 months and that he should not be named as a
17 discharger.

18 Let me give you a couple of facts. First,
19 his parents operated the Hillview Cleaners for 28
20 years, from 1954 to September of '82. Gene, during
21 that period of time was an occasional employee.
22 That is it. Never dealt in any way with -- he was
23 not a manager. He never dealt in any way with the
24 solvents that were involved and never dealt with
25 PCE.

1 He was not a co-operator since 1976, as
2 Mr. Barr suggested. That comes from a fact that he
3 signed a lease in 1976, as a favor to his father
4 when he was at the bank. So he signed the lease,
5 his mother had signed it as well. But signing a
6 lease doesn't make you an owner of a business. I
7 admit it, they raised the issue of whether it
8 happened and whether he became an owner at that
9 point, but he didn't. He's testified under penalty
10 of perjury that he didn't. There's no evidence of
11 it.

12 His father continued to run the business
13 until he got sick in September of 1982. We were
14 not anticipating that Mr. Zambetti would testify,
15 but if the Board has any questions he is here and
16 he could tell you this under oath.

17 So he didn't take over operation of the
18 business until his father got sick in September of
19 '82, as I said, He had to step in at that point
20 and help. His mother couldn't continue to operate
21 it because she was helping her dying husband.

22 So he did at that point. There was some
23 time when at that point he was stepping in. His
24 brother was not there to help. The business was
25 going on. He was the only person who could have

1 done it. And during that period of time there was
2 some decision made by the family that, okay, Gene,
3 you're willing to step up. You're going to manage
4 the business when your dad passes the way. You
5 know, we'll make you a co-owner at this point.
6 You're now a co-owner.

7 So for a period of seven months he was --
8 no more than that, he was a co-owner as decided in
9 discussions with his family, and he was the manager
10 of the business.

11 His father died on March 1, of 1983 and
12 the business was sold shortly thereafter, later in
13 March of 1983.

14 So again, I want to reiterate that he was
15 not a manager or co-owner until March -- until his
16 father got sick in December of 1982.

17 This is supported by his deposition
18 testimony under oath, his 2011 deposition, and his
19 interrogatory response in 2004, which correctly
20 states that he was not a co-owner until his father
21 retired. But his father did not retire until 1982.

22 There is one -- there is an area that
23 we're particularly concerned about and it was
24 addressed in our letter of January 3, 2018 to the
25 Board, in response to the original temporary order.

1 And that is that he was named as a discharger
2 because of "substantial evidence that he discharged
3 pollutants into soil and groundwater at the site."
4 That's just blatantly false. There is no evidence
5 of that. There's not even an indication that there
6 was any discharge of solvents during that short, 7-
7 month period of time.

8 And we cited legal authority in our
9 January 2018 report because he was named as a
10 discharger under the Water Code 13304. And 13304
11 of the Water Code, A says: "The notion of a
12 discharge is given a literal interpretation." That
13 used in Section 13304, discharge means "Relieve of
14 a charge, load, or burden."

15 And liability under this part of the Water
16 Code has been generally interpreted, consistent
17 with the Law of Nuisance. And we cited City of
18 Modesto Redevelopment Agency versus Superior Court,
19 119 Cal.App.4, 28. In which that court found that
20 the critical question is whether the defendant
21 created or assisted in the creation of the
22 nuisance.

23 So in this case, there is simply no
24 evidence that he ever created this nuisance. That
25 he was ever involved in any discharge. And I think

1 that we're not looking at a situation as we might
2 in a CERCLA case where, yes, you could be an owner
3 for a day and you're technically responsible.

4 This Board does not have to view this case
5 the same way you would in a CERCLA case. This
6 Board can look at the equities of the situation.
7 Gene gets no benefit from the cleanup of this
8 property. The Burrell Trust, on the other hand,
9 this delay in the sale has been, in a way, a big
10 benefit. It's gone up in value two, three, four
11 times from when all of this started.

12 We estimate that the value of the property
13 cleaned up is \$10 to \$15 million. Gene Zambetti
14 gets nothing of that.

15 It was stated that he gets some benefit
16 out of the sale of the business. I don't know what
17 the amount was, but it was a very, very small
18 amount and it occurred in 1983. That's long gone.

19 Gene's insurance carrier has contributed
20 over a million dollars on his policy and another
21 million dollars on other policies, so almost two
22 million dollars to investigate this.

23 So from his stand point, he's stepped up.
24 He got insurance and he stepped up and paid for the
25 investigative costs.

1 But if we have this settlement, as was
2 stated by the Lee's counsel, his insurance will end
3 and he will have nothing left. So making Gene
4 responsible for a multi-million dollar cleanup,
5 this will hang over his head for years. And if
6 there is any chance that he has to fund any of
7 this, it's going to be financially devastating for
8 him. All because he essentially inherited this,
9 helped his parents for six or seven months and then
10 is out.

11 So I guess in summary, I think that you do
12 have to look at the equities of the situation and
13 it's simply unfair to find Gene Zambetti, for this
14 short period of time that he helped out in the
15 business, to a potentially multi-million dollar
16 liability. We respectfully request that the
17 tentative order be amended and that Gene Zambetti
18 not be named as a discharger.

19 I would suggest, also, that the Board
20 could still, in the unlikely event that the Burrell
21 Trust is not able to complete the work, could still
22 at the end of that time name him in the future, but
23 they don't have to do it now, and he shouldn't have
24 this hanging over his head.

25 Any questions? Yes, sir?

1 VICE CHAIR MCGRATH: I do have a question.
2 One of the issues that's been raised is the cleanup
3 standard. And you testified that the value of the
4 property cleaned up is \$10 to \$15 million.

5 MR. WOOD: That's our estimate.

6 VICE CHAIR MCGRATH: That's your estimate.
7 Has that been documented in any way and does that
8 vary according to whether or the property is used
9 as residential or as commercial property? What's
10 your underlying assumption there?

11 MR. WOOD: We're assuming that it is going
12 to be used for condominiums. That's what we've
13 heard. Although, again, we don't know the Burrell
14 Trust's specific plans. That is what was assumed.

15 VICE CHAIR MCGRATH: So you've assumed
16 condominiums?

17 MR. WOOD: Yes.

18 VICE CHAIR MCGRATH: According to the
19 zoning at the site?

20 MR. WOOD: Correct.

21 VICE CHAIR MCGRATH: So there's -- and
22 this is important to get on the record, so bear
23 with me for a second. Assuming that the costs
24 exceed that or it's technologically impossible,
25 then the value would be substantially less than

1 that. But you haven't made an estimate of that?

2 MR. WOOD: I think all parties are
3 expecting that the \$2.8 million settlement is going
4 to be sufficient to complete the RAP as presently
5 set forth. And there wouldn't be a settlement
6 unless they thought that was sufficient. If the
7 amount is higher than that, the Burrell Trust
8 certainly can fund whatever is necessary. A very,
9 very substantial trust, obviously with a very
10 valuable piece of property. Versus Gene Zambetti,
11 who's in his retirement years and, as I say, would
12 be finally devastated.

13 VICE CHAIR MCGRATH: Okay, thank you.
14 That was helpful.

15 MR. WOOD: Yes?

16 BOARD MEMBER OGBU: I have just a quick
17 question on sort of one of the last points that you
18 made about if the cleanup has been successful
19 through the settlement, and then the Regional Board
20 could come back with a cleanup order at that time,
21 and maybe Mr. Zambetti as a discharger. But if
22 he's giving up his insurance wouldn't that -- there
23 would be no money. I guess that's sort of one of
24 the things that I've been thinking about this whole
25 time is everyone is very against this order because

1 it may make things more uncertain as to the
2 settlement. But it also seems as if would they be
3 preferable to sort of have the potential universe
4 of obligations known before the settlement rather
5 than later, when it sounds like no one's going to
6 have any money to pay for anything if a cleanup and
7 abatement order comes a few years down the line and
8 everyone has already -- you know, they've given up
9 their insurance. And I'm very sympathetic that
10 there is a tension there between it's a fight to
11 get the insurance to pay for it, but if the result
12 is that people have to give up any future claims
13 there's not going to be any money to pay for any
14 future order.

15 So I'm just confused about why that makes
16 it --

17 MR. WOOD: I'm actually not arguing that
18 you shouldn't issue the order.

19 BOARD MEMBER OGBU: Okay.

20 MR. WOOD: I think it's somewhat
21 understandable considering the length of time it's
22 gone on. But I do have a strong objection to
23 naming Gene Zambetti in that order. And what I'm
24 saying is that there is more than enough out of the
25 Burrell Trust, the property owner, to pay for

1 remediation and they're going to be committed to
2 doing that. And I'm just saying if in the future,
3 for some odd reason he absconds or something, and
4 isn't there, you can name Gene Zambetti then.

5 There isn't going to be insurance either
6 way to do remediation, so that's it for him.

7 BOARD MEMBER OGBU: Thanks.

8 CHAIR YOUNG: I think the answer to my
9 question was just embedded in your answer, but I
10 want to clarify. The insurance policy that Mr.
11 Eugene Zambetti currently has, are the terms of
12 that such that it could be used to settle a
13 lawsuit, but not to implement the cleanup order
14 from this Board?

15 MR. WOOD: As part of the agreement to put
16 up that substantial amount of money, my
17 understanding is, although I'm not involved in the
18 coverage side, my understanding is they want a site
19 release at the very minimum, and maybe a policy buy
20 back. Either way, Gene Zambetti and I guess the
21 Lees, as well, would lose any change of any
22 insurance. So that's where that comes from.

23 CHAIR YOUNG: All right, thank you. All
24 right, thank you very much.

25 Now, Michael Huggins for the estates of

1 Julia and Peter Zambetti.

2 MR. HUGGINS: Yes, good afternoon. I
3 realize I'm in the precarious position of going
4 while no one's had lunch and it's after noon.

5 So my name is Michael Huggins. I
6 represent Fireman's Fund Insurance Company and I'm
7 here to speak about two points, really. Oh, and I
8 did take the oath.

9 The first which I came to address is
10 regarding Peter and Julia Zambetti. And regardless
11 of whether the Board issues an order today or
12 later, Peter and Julia Zambetti should not be named
13 in that order.

14 The second point, which I wasn't going to
15 address, but I think I could add some helpful
16 context to is this point about delaying the order
17 for the settlement.

18 So with respect to Peter and Julia
19 Zambetti, there seems to be some confusion in the
20 tentative order as to how the Probate Code applies.
21 And it does not apply here. That is because there
22 are no estates.

23 So to begin with, Peter and Julia Zambetti
24 are deceased. And as far as I understand or know
25 of, there is no Water Board precedent or any other

1 precedent to order a dead person to cleanup. So
2 that is why the estates are named.

3 But it's a misnomer because -- and it's
4 based on the misunderstanding of a very specific
5 carve out in the Probate Code naming an estate,
6 where there actually isn't one.

7 So let me explain that. The Probate Code,
8 when there's a testamentary estate is governed by
9 the court's jurisdiction. The Superior Courts of
10 California need to administer that estate. That's
11 their jurisdiction.

12 There is no testamentary estate here for
13 Peter or Julia Zambetti. There's no personal
14 representative. There's no administrator. There's
15 nothing like that.

16 But Sections 550 through 555 of the
17 Probate Code make an exception to the general rule
18 that you can't go after -- there are no third-party
19 claims against an insurer. Section 550 says, well,
20 actually, for victims of a tort, where the alleged
21 tortfeasor is dead, we the legislature are going
22 to let you go after the insurer, specifically for
23 the insurance proceeds under any coverage that that
24 dead, alleged tortfeasor may have had.

25 Now, there are very specific conditions

1 under which you can do that. First of which -- so,
2 Section 550 says because the legislators did not
3 want there to be prejudice in a trial under this
4 action under 550, when you're going after the
5 insurer, essentially they don't want a jury to sit
6 there and say, oh, you're actually attacking the
7 insurer? Oh, yeah, just give them the money.

8 They allow the plaintiff to -- actually,
9 they require the plaintiff to name it as under the
10 estate of the dead, alleged tortfeasor. But
11 service of the summons and complaint is on the
12 insurer and it says that all actions, all
13 proceedings under that action are going to be taken
14 as if it's against the personal representative of
15 the estate.

16 But there is no actual estate. This is
17 not a testamentary estate. It's a specific naming
18 of an estate so that you can go after the insurer
19 under Section 550.

20 There are several other problems with
21 using that as a basis here to name Peter and Julia
22 Zambetti in a cleanup order. Which is, one, the
23 entire time because we're not actually talking
24 about estates, we're actually talking about naming
25 dead people and they can't clean up, okay.

1 So, a Section 550 action has to be brought
2 in court. We're not in court. The Board can issue
3 orders, but the AG's office, the California AG's
4 office would have to issue -- initiate any
5 litigation.

6 The Board issuing an order, the Board is
7 not a victim of a tort here and so it doesn't have
8 the standing under 550 to actually bring that
9 action.

10 It has to be an action for damages and
11 damages under California law are any award of money
12 issued in an order by a court.

13 And so here, a cleanup order would not
14 satisfy that damages provision under 550. It also
15 wouldn't satisfy damages under what insurers are
16 expected to pay under California precedent. So,
17 the California Supreme Court has said that the
18 damages that insurers are expected to pay has to be
19 money ordered by a court.

20 It does not -- they specifically address
21 this in Empower (phonetic), and I believe it was
22 said earlier, the Foster-Gardner cases. I can give
23 you those cites if you like, in the Q and A.

24 But those precedents say specifically that
25 cleanup orders are not within the indemnity that an

1 insurer has to provide.

2 So, all of that and a Section 550 action
3 is to go after insurance persons. Here there is no
4 insurance coverage. And I can explain why.

5 Fireman's Fund is actually sort of the man behind
6 the curtain here. You might have picked up that
7 the Lees, the Zambettis, Burrell, are of these are
8 insured's of Fireman's Fund. So Fireman's Fund is
9 actually funding the defense costs against itself
10 in a bunch of different ways, which makes this all
11 very expensive for Fireman's Fund. All that on top
12 of a decade and a half of litigation.

13 So the issue is that in insurance there's
14 indemnity and there's defense costs. Under the
15 policies that are at issue here, we're not even
16 getting to indemnity yet. That would have to be
17 litigated. But if there's any potential for a
18 liability, the insurer has to fund the defense
19 costs. So all the while Fireman's Fund has been
20 funding the defense costs, they're still doing
21 that.

22 So Fireman's Fund position here, if we
23 were actually to getting to litigating indemnity is
24 that there is none because some of the policies
25 that are at issue here have an absolute pollution

1 exclusion. It says if you -- any pollution is
2 excluded from coverage. The other ones say that
3 it's a qualified pollution exclusion that say,
4 well, this does not cover pollution unless you can
5 show particular sudden and accidental events. And
6 that's where that language comes up where they say,
7 well, there may have been these two sudden and
8 accidental events, because that would be the
9 exception to the exclusion. So, I'm very easy to
10 follow.

11 So we could get all the way down the road
12 here and find out that there is -- even if 550 were
13 a basis for issuing the order here, which it's not,
14 there's no coverage. So that section just does not
15 apply. It's not a basis for issuing a cleanup
16 order against Peter or Julia Zambetti.

17 So the context that I provided with that
18 respect, and again because 550 doesn't apply, the
19 rest of the Probate Code talks about a testamentary
20 estate, which there's not one. That's why I'm
21 here, on behalf of Fireman's Fund, talking about
22 Peter and Julia Zambetti. They don't have their
23 own lawyer here. That's because there's no estate.

24 Okay. So no matter what order is issued
25 there is no legal basis. Putting them in the order

1 is just going to cause us to have to appeal to the
2 Supreme Court and there's going to be more
3 litigation on top of litigation. And while that's
4 in my best interest personally, it's not in my
5 clients' best interest and they don't want more
6 litigation.

7 That context is helpful for talking about
8 settlement. Right now the only money that you've
9 heard today discussed is \$2.8 million. And that
10 money is being offered by my client, who claims
11 that they have no coverage liability.

12 So why? Because Fireman's Fund is funding
13 all of these defense costs. It's very expensive.
14 So right now the value of a settlement would be
15 \$2.8 million. That's what my client has
16 determined.

17 If the order is issued now, and we have
18 all these issues. We have issues over whether or
19 not people should have been named in this order.
20 We have issues over what it entails. This is going
21 to cause more litigation and the value, just from a
22 purely business perspective, the value of the
23 settlement goes down. \$2.8 million on top of the
24 one or one and a half million dollars that's
25 already been put into the investigation or any

1 tests that have happened, \$2.8 million more could
2 go into that right now. We're very close. As
3 you've heard the other parties, who are on the
4 other side of that settlement say. I'm confirming
5 it from Fireman's Fund's perspective. It's very
6 close. There's \$2.8 million on the table.

7 I'm not saying that that money would go
8 away entirely, but the cost of more litigation is
9 certainly going to cause Fireman's Fund to rethink
10 whether or not they can put that much money on the
11 table.

12 So it is a roll of the dice either way.
13 You roll the dice by issuing the order and
14 potentially risk a settlement that's very close to
15 more immediately putting up substantial money,
16 money that's been determined by all the parties
17 involved in the settlement to actually cover the
18 cause of the cleanup. You know, it risks that
19 going away or diminishing.

20 And I understand that, you know, there is
21 this pressure. But right now, it seems that the
22 more immediate way to address this issue is to
23 allow this last piece of the settlement to be
24 addressed when everybody in the room, that's a
25 party to that settlement, is in agreement that it

1 is very close and that it is substantial money.

2 That if it goes away could put people out of
3 business.

4 And, you know, when it comes down to it,
5 it really is -- from my client's perspective, it's
6 not a matter of being put out of business, but it
7 is a numbers issue. And at the end of the day the
8 position remains that there is no coverage. So,
9 really, we're just talking about defense costs from
10 Fireman's Fund's perspective of evaluating the
11 settlement. It is a matter of defense costs.

12 So driving up defense costs is naturally
13 going to risk that settlement.

14 So those are the two issues that I had to
15 address. Just again, Peter and Julia Zambetti,
16 there's just no reason they should be in the order.
17 There's no legal basis for it.

18 And then the second piece being that --
19 confirming from the other side of the table, so to
20 speak, that settlement is close. It is
21 substantial. And it is at risk if we're not able
22 to complete the settlement now versus, you know,
23 having to litigate more.

24 CHAIR YOUNG: Thank you. Yes?

25 VICE CHAIR MCGRATH: So if I can cut

1 through that, I think you've made a fairly simple
2 argument that you believe that Fireman's is not
3 liable for the liability, but they're liable for
4 defense costs. And because the defense are
5 substantial, at some point Fireman's would be
6 willing to settle the lawsuit and put, at the
7 moment, \$2.8 million on the table. Is that your
8 client?

9 MR. HUGGINS: Yes, that's correct.

10 VICE CHAIR MCGRATH: And to make it go
11 away?

12 MR. HUGGINS: Yes.

13 VICE CHAIR MCGRATH: And to exact
14 certainty out of the uncertainty of defense costs?

15 MR. HUGGINS: That's right.

16 VICE CHAIR MCGRATH: And anything that
17 increases litigation costs diminishes the value of
18 a nuisance settlement. Is that --

19 MR. HUGGINS: That's correct.

20 VICE CHAIR MCGRATH: I got it. Thank you.

21 MR. HUGGINS: That's my summation, thank
22 you.

23 (Laughter)

24 BOARD MEMBER OGBU: I do have a quick
25 question. Has there been any analysis of how much

1 more money it would take to comply with the actual
2 terms of the order versus just the RAP? Setting
3 aside the issue that Fireman's Fund likely sue if
4 the order went through as stated to get the estate,
5 you know, out of being the discharger. But the
6 actual work that's included in the cleanup and
7 abatement order, is there any sense of how much
8 more money it would --

9 MR. HUGGINS: No, it's a great question.
10 And I think, you know, right now the \$2.8 million
11 is supposed to cover the RAP. I don't think anyone
12 disputes that.

13 Part of that is -- part of what you're
14 describing is the issue. You know, we don't know
15 how much more it's going to cost for the order.
16 That's one of the issues.

17 One of the issues is to even figure out
18 how much that's going to cost is going to cost
19 money. So, you know, all the while the numbers
20 keep going up and it just -- at some point it's
21 just not a good business deal.

22 BOARD MEMBER BATTEY: So forgive me as I
23 try to keep all these parties straight But
24 Fireman's Fund is the insurance for all these
25 entities?

1 MR. HUGGINS: Yes.

2 BOARD MEMBER BATTEY: Everybody.

3 Congratulations.

4 MR. HUGGINS: Thanks.

5 (Laughter)

6 BOARD MEMBER BATTEY: I think I'm going to
7 stop there.

8 MR. HUGGINS: Okay.

9 VICE CHAIR MCGRATH: So I have one further
10 question. Assuming that we were not persuaded by
11 our own counsel that Fireman's exposure is much
12 greater and, of course, I'm assuming your argument
13 for the purposes of this discussion, would 30 days
14 be sufficient for the likelihood to focus
15 everyone's mind sufficiently to come in here and
16 sing Kumbaya? Or, do you think six months is
17 required?

18 MR. HUGGINS: Well, to be frank, I've not
19 been in the settlement discussions myself.
20 However, I understand Mr. Till asked for 180 days.
21 Thirty days seems tight given how many parties are
22 involved. But, you know, I would ask to join the
23 180-day request. However, I understand if there
24 needs to be a splitting of a baby.

25 VICE CHAIR MCGRATH: Well, you're the

1 folks with the money, so I'm interested in your
2 opinion, not the other ones.

3 I asked it of him, not of the Burrells.
4 That's all.

5 CHAIR YOUNG: All right, Mr. Huggins, I am
6 not a lawyer. So here's my question.

7 MR. HUGGINS: Congratulations.

8 CHAIR YOUNG: If this Board were to delay
9 taking up the order and you reached -- and the
10 parties reached a settlement, and the settlement
11 said Fireman's Fund is going to spend \$2.8 million
12 on XYZ, then I have two questions.

13 Then if the order -- if the Board
14 subsequently adopts an order does that \$2.8 million
15 go away at that time because it's now the subject
16 of an order as opposed to a lawsuit? I mean, does
17 money then disappear later on or once it's
18 enshrined in the settlement does it stay on the
19 table and get used?

20 MR. HUGGINS: So once the -- let me make
21 sure I understand the situation. So the settlement
22 has been entered into, it's finalized, payment,
23 even a part of the 2.8 or the entire 2.8 has been
24 made, or at least part of it has been made. And
25 then there is an issue -- an order issued by the

1 Board.

2 CHAIR YOUNG: When you say payment has
3 been made, does that mean that at that point
4 Fireman's Fund would execute a check to the --
5 whoever it would be, the Burrell's, and then that
6 transaction is complete from your perspective?

7 MR. HUGGINS: I'm actually not sure of the
8 particulars of whether the check would be cut or
9 whether there would be sort of reimbursement for
10 expenses. I'm not sure.

11 But to answer your question, the money --
12 so any settlement monies that are paid out by
13 Fireman's Fund will be on the condition that there
14 is no coverage, there's no liability under the
15 policies. And so there wouldn't be any additional
16 money.

17 But, you know, if there is a settlement
18 for \$2.8 million, and it's agreed upon, then that's
19 going to be paid regardless of whether there's an
20 order.

21 CHAIR YOUNG: So it doesn't get clawed
22 back?

23 MR. HUGGINS: No, no, that I know.

24 CHAIR YOUNG: Got it. Okay. That was my
25 question. Are there others?

1 MS. AJELLO: I have a question. Could I
2 have the citations to those cases you mentioned?

3 MR. HUGGINS: Yes. Okay, so a California
4 Supreme Court decision, Empowering is 24 Cal.4th
5 945. And the PEN cite is 960, page 960.

6 The subsequent case -- or I'm sorry, prior
7 case, Foster-Gardner is 18 Cal.4th 857. And the
8 PEN cites I have are pages 878 through 882.

9 MS. AJELLO: Thank you.

10 MR. HUGGINS: You're welcome.

11 BOARD MEMBER AJAMI: Actually, I'm a
12 little confused, maybe because I'm not a lawyer,
13 either. But I just can't understand why this order
14 would impact the \$2.8 million dollars. I just
15 really cannot understand this part. And maybe I'm
16 not following the case closely. I just don't
17 understand what's going on here.

18 Because this should be complementary to
19 what you're already doing. It in a way actually
20 provides a way to implement the order -- to
21 implement the cleanup. With or without this, that
22 \$2.8 million needs to be spent to clean up the
23 pollution that has been caused.

24 So why, and I know multiple people have
25 tried to sort of explain this, but I still feel

1 very unclear that why this order or 180 days from
2 now having this order would change anything about
3 the settlement, or that \$2.8 million, or why do we
4 need to have more litigation because of the order?

5 MR. HUGGINS: Okay, so let me try. The
6 180 days that's been asked for is to try and wrap
7 up the settlement agreement for the \$2.8 million.

8 BOARD MEMBER AJAMI: Right. I understand
9 that part of it.

10 MR. HUGGINS: Okay. And so, the
11 settlement for \$2.8 million, that number has been
12 reached by Fireman's Fund based on how they value
13 the settlement right now.

14 BOARD MEMBER AJAMI: Okay.

15 MR. HUGGINS: The question of whether or
16 not the policies actually cover the pollution has
17 not been litigated. Because of the operation of
18 insurance law, Fireman's Fund is paying for
19 everyone to sue each other and that's very
20 expensive. So Fireman's Fund wants out.

21 And they said, we'll pay you \$2.8 million.
22 This can go to the cleanup and we're done.

23 BOARD MEMBER AJAMI: Right.

24 MR. HUGGINS: But the longer everyone
25 keeps suing each other, the less of a good deal

1 that is for Fireman's Fund.

2 BOARD MEMBER AJAMI: So why would people
3 continue -- and so, maybe that's what I'm not
4 understanding here. But why would people sue each
5 other more after we have this cleanup order in
6 place?

7 MR. HUGGINS: Uh-hum.

8 BOARD MEMBER AJAMI: Because, you know,
9 they're settling, today or 180 days from now. You
10 know, the settlement -- I mean, you're not trying
11 to change the settlement right now. We're just
12 trying to say -- this order said we need to clean
13 up and this is how you need to clean it up, right.

14 So, the \$2.8 million will be on the table
15 today or 180 days from now.

16 MR. HUGGINS: Maybe not.

17 BOARD MEMBER AJAMI: So if this order is
18 adopted, Fireman's Fund is going to take the \$2.8
19 million and say, you know, go sue each other some
20 more and --

21 MR. HUGGINS: I'm not saying that.

22 BOARD MEMBER AJAMI: Okay.

23 MR. HUGGINS: I don't know what my client
24 would do in that scenario.

25 BOARD MEMBER AJAMI: Okay.

1 MR. HUGGINS: But the reason why some more
2 litigation would spawn is because some people don't
3 -- so some of us think that certain people should
4 not be named in the order.

5 BOARD MEMBER AJAMI: But that's a
6 different argument.

7 MR. HUGGINS: If they're named in the
8 order, then we're going to --

9 BOARD MEMBER AJAMI: Right. I heard that.

10 MR. HUGGINS: Yeah.

11 BOARD MEMBER AJAMI: So that's a different
12 thing. So that maybe the order needs to be -- and
13 I'm not saying we should. I'm just saying maybe
14 the argument should not be we don't need the order,
15 it should be maybe the naming would be different.
16 But just saying flat out that the order is going to
17 cause the \$2.8 million to go away, there will be
18 more litigation, there will be more of this and
19 that, it's just -- it's a little, you know,
20 unclear.

21 MR. HUGGINS: Well, there are also some
22 due process issues raised. There were other things
23 that, you know, just concerning the way that this
24 order would be adopted based on today's discussion.
25 So that there are issues that could arise. And to

1 the extent they did I'm saying -- my only point is
2 that to the extent more litigation did arise, it
3 might become a bad business deal at some point for
4 Fireman's Fund.

5 BOARD MEMBER AJAMI: So imagine -- I guess
6 this sort of goes back to your question. Imagine
7 six months from now we come back to the table, the
8 same order right in front of us, right.

9 MR. HUGGINS: Uh-hum, and we might have
10 settled by then.

11 BOARD MEMBER AJAMI: Okay, but people may
12 start doing the same things you're just telling me
13 they will do if we pass this order right now.
14 Right? They still may go and litigate more and sue
15 each other for other things, right.

16 So the money will be there, but there's
17 still more money that will be spent on fighting
18 amongst themselves, rather than trying to solve the
19 problem.

20 MR. HUGGINS: I don't think anyone is more
21 motivated to get this result than Fireman's Fund,
22 who is paying for everyone's defense costs. So, I
23 think that's why we're very close. I think, you
24 know, there is a very particular issue that I
25 think, you know, daily discussions.

1 So I mean, you know, the only -- I wanted
2 to add context to that discussion from Fireman's
3 Fund's perspective because, you know, the money
4 that's on the table, and it's the only money that's
5 on the table right now is being offered by someone
6 who doesn't think they have any liability. You
7 know, Fireman's Fund --

8 BOARD MEMBER AJAMI: They just want out.

9 MR. HUGGINS: Just wants out. Yeah,
10 right.

11 CHAIR YOUNG: Go ahead.

12 BOARD MEMBER BATTEY: I'm afraid I'm going
13 to ask the same question, but I don't know that
14 I've gotten clarity on the relationship between
15 this order, potentially this order --

16 MR. HUGGINS: Yes.

17 BOARD MEMBER BATTEY: -- and the
18 settlement. What's the relationship?

19 MR. HUGGINS: Well, the settlement would
20 cover what needs to be cleaned up. It would be the
21 money would be there for that cleanup.

22 Whereas if there were an order here, it's
23 not -- the money -- you know, there would be more
24 litigation over who's responsible. And, you know,
25 again, we haven't even reached the issue of whether

1 there's coverage under the insurance policies,
2 again. Right now, the only thing the Fireman's
3 Fund is paying for is defense cost. And if there
4 is an order saying you do have to clean this up,
5 then we have to talk about whether or not the
6 insurance policies even cover it. And again,
7 Fireman's Fund's position is that they don't.

8 BOARD MEMBER BATTEY: So what's
9 interesting is that somebody used a number of
10 cleanup estimate of \$10 to \$15 million. Let's just
11 -- we don't know what the number is, but let's just
12 say it's bigger than \$2.8 million. Either way
13 isn't there going to be ongoing conversation about
14 that? Assume for a minute that \$2.8 million isn't
15 going to do it, to actually get it cleaned up. Is
16 that why there's ongoing -- won't there be ongoing
17 conflict around that?

18 MR. HUGGINS: Regarding whether there's
19 compliance or --

20 BOARD MEMBER BATTEY: About who pays?

21 MR. HUGGINS: Well, from Fireman's Fund's
22 perspective everyone -- I know it's disputed
23 whether or not the RAP actually does the job. I
24 think everyone's on board with it from the parties
25 who are at the table for the settlement. They're

1 on board with that the amount of money being
2 offered covers those actions.

3 And from Fireman's Fund's perspective, the
4 deal is here's \$2.8 million and we're out of the
5 discussion now.

6 BOARD MEMBER BATTEY: Okay, thank you.

7 CHAIR YOUNG: It's not clear. I'm sorry,
8 I'm jumping back in. Thank you for your patience.

9 It's not clear to me -- one thing is clear
10 to me is that one narrative here is that if this
11 settlement -- if we were to delay the settlement,
12 then the parties would go through, everybody would
13 sign stuff, you'd send some money to these guys and
14 then you'd be out of here. I can see why that
15 would be attractive to Fireman's Fund.

16 On the other hand, my mind is spinning
17 another narrative where so there's a settlement or
18 there isn't, and we adopt the order and everybody's
19 still litigating against each other and arguing
20 that, well, yeah, you have coverage. No, you have
21 coverage. And you're saying nobody has coverage.
22 But everybody's still litigating.

23 And it strikes me that it's still in
24 Fireman's Fund's interest to put some money on the
25 table to make it all go away. The fact that

1 there's a settlement doesn't make it clear to me
2 that you guys are not involved anymore. Meaning
3 Fireman's Fund is not involved anymore.

4 So is there something radically wrong with
5 where my brain's narrative is going on that?

6 MR. HUGGINS: I don't think so. But maybe
7 just a -- so it's a function of how the insurance
8 law works that the only reason why Fireman's Fund
9 is even funding the defense costs is if there's any
10 potential liability at all under -- you know, even
11 if it's miniscule, they're going to have to front
12 those defense costs.

13 CHAIR YOUNG: Right.

14 MR. HUGGINS: But if there's an agreement
15 on the table that the insurance policies are bought
16 back, and for these \$2.8 million that policies no
17 longer cover any of that, then there's no more
18 defense costs, either. And Fireman's Fund is out
19 of the conversation.

20 CHAIR YOUNG: Thank you.

21 All right, I want to do a process check
22 here. We said that we would allow the opportunity
23 for anyone to cross-examine anyone else. Is that
24 right? So is there anybody interested in cross-
25 examining the dischargers or the Prosecution Team?

1 MR. BARR: We still have the Water
2 District's comments.

3 CHAIR YOUNG: Yeah, but they're not going
4 to be the people who are being cross-examined. I'm
5 trying to get a sense of the timing here. I don't
6 see any hands. Okay, so there's going to be no
7 cross-examination.

8 So we have a commenter from Santa Clara
9 Valley Water District who's been afforded three
10 minutes. And then we will have closing statements
11 which, by my calculation, come out to about 25
12 minutes.

13 (Conferring)

14 CHAIR YOUNG: I'm going to go ahead and
15 take Santa Clara's testimony. But while we're
16 doing that, then let's think about then whether we
17 want to take a break, a short break, reconvene,
18 have closing statements and then perhaps have the
19 break for lunch before you all hear the answer to
20 your question.

21 All right. It's always very difficult to
22 get lunch agreement with this Board.

23 MR. COOK: That should be the easiest
24 part.

25 CHAIR YOUNG: So Mr. Cook.

1 MR. COOK: Yes, my name's George Cook.
2 I'm a Senior Water Resources Specialist for the
3 Groundwater Management Unit, Santa Clara Valley
4 Water District. I'm speaking today in support of
5 adopting the site cleanup requirements for the
6 Hillview Cleaners site.

7 The District is the groundwater
8 sustainability agency for the Santa Clara sub-
9 basin. Groundwater is a critical resource to our
10 town and it provides about 40 percent of the water
11 that our residents and businesses use each year.

12 We're also committed to protecting the
13 environment and our streams as part of our mission.

14 The Hillview Cleaner site has impacted
15 groundwater within the recharge area of the Santa
16 Clara sub-basin and the contaminants have impacted
17 and been released at the Saratoga Creek. We use
18 this creek for many of these recharge programs and
19 we want to make sure both our local surface water
20 and groundwater are protected.

21 The contamination was first discovered at
22 that site a little over 20 years ago. It's been
23 pretty -- you know, the dischargers have been doing
24 a lot of work over the last 10 to 15 for
25 investigation and that, but it is time to implement

1 a remediation system at that site and offsite.

2 The District does acknowledge all of the
3 work that the dischargers have completed and we are
4 in general agreement with the remedial action plan
5 that they've come up with.

6 Because of the complexity of the site, the
7 District supports the recognition in the site
8 cleanup requirements that multiple objections may
9 be needed. And we will continue to engage on this
10 process to make sure that the remediation is
11 progressing and that any related activities to the
12 program are protective of our groundwater and
13 surface water.

14 We appreciate the Board and the staff for
15 the work you guys do in protecting the water
16 resources in Santa Clara County. We believe that
17 the remediation at this site should be implemented
18 as soon as possible and we support the site cleanup
19 requirement order as a critical step in this
20 process.

21 CHAIR YOUNG: All right, thank you. Are
22 there questions? Thank you very much. We
23 appreciate you coming here today.

24 MR. COOK: Thank you.

25 CHAIR YOUNG: All right, I think we should

1 at least, at the very least take a 10-minute break
2 before we have closing statements.

3 We're going to break for lunch. And let's
4 see, it's --

5 MS. MCCANN: Madam Chair, may I ask a
6 question before we break for lunch?

7 CHAIR YOUNG: Sure.

8 MS. MCCANN: We were just wondering if the
9 Board Members wanted to state any specific issues
10 they heard that they wanted the Cleanup Team to be
11 sure to respond to in our closing statements?

12 CHAIR YOUNG: We will do that. We'll take
13 five minutes to do that and then we will break,
14 which it looks like that will be about 1:10. We'll
15 take a 45-minute lunch break from whenever the
16 start of the break is to the finish.

17 Okay, so we will have Board Members -- you
18 have an opportunity to highlight the particular
19 issues in which you're most interested for
20 everyone's closing statement.

21 BOARD MEMBER AJAMI: I think I still want
22 to hear -- maybe the Cleanup Team can explain a
23 little bit more about the whole legal issues with
24 our order and the settlement.

25 I also want a little bit more

1 clarification on the named parties that are
2 involved and some talk about it.

3 BOARD MEMBER BATTEY: I agree with
4 everything that Newsha just said. And I would add
5 that I want to understand this is actually going to
6 get done. And the gap between whatever money is
7 going to show up through Fireman's and what is
8 actually going to be required, and how these
9 parties who have taken over a decade, two decades,
10 I don't know, to move forward, how is the rest of
11 the money going to show up.

12 And I'm sort of interested in knowing more
13 about the landowner and the future land use of this
14 property. And, you know, fairly specifically
15 future land use of this property and the economics
16 associated with that.

17 VICE CHAIR MCGRATH: I certainly reserve
18 the right to speak with my lawyers about the level
19 of risk and their take on the court cases. But it
20 seems that if you boil this down that this is very
21 simple. Most parties think that \$2.8 million is
22 sufficient to cover the first round of injections
23 and I've been convinced that that's an appropriate,
24 responsible remediation activity. And there is
25 still some remaining risk that there may be further

1 injections required.

2 So I guess I would have two questions.
3 What's the magnitude of the exposure that that
4 would be? And, you know, what's the viewpoint
5 about who most appropriately would be liable for
6 those costs?

7 BOARD MEMBER OGBU: Other than those fine
8 points, which are also things I'm interested in, I
9 was hoping you all could tough a little bit about
10 the appropriateness of the residential cleanup
11 levels being applied at the particular places where
12 that's the level that the Board asks for.

13 CHAIR YOUNG: And I think I am going to
14 say something that most of -- that all of my
15 colleagues would agree with, which is what we want
16 to see at the end of the day is that the
17 appropriate people be required to do the
18 appropriate proportion of the cleanup on this site,
19 whatever that is. And that's the end point that we
20 are going to try to get to.

21 So anything, any additional information
22 that can illuminate that set of responsibilities,
23 that allocation of responsibilities is going to be
24 very welcome.

25 I would also, and I think this is what Jim

1 was getting at, I'd also like to have, without any
2 prejudice towards the future, have our staff's best
3 professional judgment at what the total cost might
4 be of cleaning this up.

5 And again, nobody -- I do not want anyone
6 to hold you to what you say, but based on similar
7 experiences in the past, ballpark of how the total
8 costs might compare to \$2.8 million that we've been
9 talking about.

10 BOARD MEMBER AJAMI: Can I ask just one
11 question?

12 CHAIR YOUNG: Yes.

13 BOARD MEMBER AJAMI: I think that was a --
14 that last point you mentioned was also in my mind a
15 little bit. And also I was -- another thing that I
16 have a question about was, you know, we have been
17 dealing with these cases for a while now. And I'm
18 interested to know if there's any -- have been any
19 experience with the situation we are dealing with
20 right now, in the past cases we've seen.

21 And also, I asked a question about the
22 plume and I can't recall your name --

23 MR. HARRISON: Micke.

24 MS. MCCANN: Yes, Micke mentioned that
25 it's contained. It's not going anywhere. It's in

1 a good shape for now. I actually want to hear your
2 perspective on that, as well.

3 BOARD MEMBER BATTEY: Of course, we always
4 come back to this at the end of the day. But I'm
5 interested in if we did do 30 days, or 90 days, or
6 180 days what are the risks to the Water Board, if
7 any, around doing that. And is there any way to
8 make some automatic, if you don't do it by this
9 date it will be worse sort of thing. I don't know.
10 I don't know, it worked with my kids.

11 (Laughter)

12 MS. AUSTIN: I'd like a little
13 clarification, if I might, by Dr. Ajami and Ms.
14 Battey. You requested clarification on naming.
15 Could you be more specific about which parties?

16 BOARD MEMBER BATTEY: I think the whole
17 kit and caboodle because I think it's not just who,
18 but this issue of percentage of like I don't know
19 how that -- whether we have anything to say about
20 that.

21 MS. AUSTIN: Okay. So, right, to clarify,
22 so the Water Board does not allocate percentages of
23 responsibility, traditionally, in every order I've
24 ever seen.

25 BOARD MEMBER BATTEY: I think it's just if

1 you heard anything today that changed your sense of
2 things let us.

3 MS. AUSTIN: Okay.

4 BOARD MEMBER AJAMI: I'm on the same.

5 CHAIR YOUNG: Very good. We will
6 reconvene at two o'clock for closing statements.
7 Thank you.

8 (Off the record at 1:12 p.m.)

9 (On the record at 2:06 p.m.)

10 CHAIR YOUNG: All right. Thank you,
11 folks, we will go ahead and reconvene and have
12 closing statements.

13 We will first, as we heard before, have
14 the closing statements from each discharger,
15 followed by the closing statement of cleanup teams.
16 And I'm going to suggest that the closing
17 statements of the dischargers begin in the same
18 order as which we did the direct testimony.

19 So, we will first have the representatives
20 of Frank Burrell who have, I believe, five minutes
21 and four seconds, or something very close
22 remaining.

23 MR. TILL: Are we ready?

24 CHAIR YOUNG: Yes, thank you.

25 MR. TILL: Hi, John Till, representing

1 Burrell Trust, again. I wanted to do some quick
2 cleanup because there seems to be a lot of
3 questions about the settlement process, and maybe
4 back to the 180-day request.

5 It is we anticipate that the settlement
6 will be completed in the next 30 to 60 days. And
7 they're needing to submit that to the court for a
8 court approval, which will take 30 to 45 days,
9 somewhere in that time frame. And that court
10 approval of the settlement will then create a
11 remediation trust. And the settlement funds will
12 then go into the remediation trust, with a
13 declaration of trust that will dedicate those funds
14 to the cleanup and to the implementation of the
15 approved RAP.

16 And so, that is the process. And then, in
17 order to get the funds after the court approves,
18 we're going to need another 30 to 60 days,
19 depending on how long the court takes to actually
20 approve, and issue the order. And Santa Clara
21 Court is way under-staffed, as many government
22 entities are. And so, sometimes it's taking a
23 really long time for orders to come out.

24 So, our hope is that that 180 days is
25 enough time to get the settlement done, get it

1 submitted to the court, get the court to approve
2 it, and get the order from the court establishing
3 the trust, which then will trigger Fireman's Fund's
4 \$2.8 million to be deposited directly into the
5 remediation trust. Which will then be able to be
6 used to implement the approved and hopefully
7 noticed RAP.

8 And so that now we turn to the extent of
9 the RAP because I think there was some questions as
10 to risk and concern about whether or not the RAP is
11 sufficient. So, and then I've got, you know,
12 ending comments.

13 MR. HARRISON: So I think that the Board
14 was very concerned about the sufficiency and the
15 scope of the RAP, so I'd like to talk about that
16 briefly.

17 But the RAP was -- it went through a
18 public process. It was approved by the Board.
19 Which means that the technical staff in front of
20 you thought that the RAP was sufficient, with a
21 caveat, which they thought it was possible that
22 some additional injections might be required.

23 So, the initial scope for one thing, they
24 -- you thought that a single round of injections,
25 just to be clear the initial RAP scope has two

1 rounds of injections, with the second round being
2 50 percent of the original area, which is
3 aggressive in most injection programs.

4 There's also a 25 percent contingency
5 included in that \$1.9 million budget.

6 So, the amount of settlement is \$2.8
7 million. That means we've got an additional 40
8 percent for contingency injections.

9 So the concept agreed, I think by staff,
10 and by all members of these parties is this is a
11 very aggressive and comprehensive remediation.
12 Because the parties recognized ultimately liability
13 is extinguished when the site's closed.

14 So once again, two injections on the
15 original RAP that was approved on a \$1.9 million
16 budget, with a 25 percent contingency built in. An
17 additional 40 percent dollars in the remediation
18 trust, in response to the potential need for
19 additional injections beyond that.

20 MR. TILL: So in connection with the -- I
21 wanted to try to address some of the questions that
22 the Board Members had, if I can, very quickly. Is
23 that first of all is I think very rarely do you
24 have all of the parties that are actually opposing
25 parties within the litigation, and two regional,

1 both the Water District and the Regional Board
2 agreeing that we have a cleanup program that is
3 going to work to address this site, which is the
4 approved RAP.

5 In addition, you have all of the people
6 that are actually involved in this out there saying
7 that the order is creating complexities within the
8 settlement process that we were not anticipating.
9 And those are complicating and jeopardizing the
10 settlement process.

11 And it's important to note that when we
12 did the RAP, the whole concept of doing the RAP,
13 and submitted it to the Board to get approval was
14 so that once it was approved we could then come
15 back collectively, as a group, with the insurance
16 carriers to get that approved.

17 And now, we're on the verge of having that
18 done and, yes, it's taken about a year and a half
19 since the RAP was approved, but we have a lot of
20 processes that have happened during that time
21 frame.

22 So I think it's really important to
23 understand also, and I hear the Board talking
24 apportionment, equity, and so on and so forth, and
25 the parties here are trying to get the equity done

1 so that the implementation of the RAP can be paid
2 for by the insurance carriers, where they paid for
3 those premiums over an extended period of time.

4 And there are a lot of issues that we will
5 have to deal with in the litigation, if we don't
6 have it.

7 CHAIR YOUNG: Thank you very much.

8 MR. TILL: Questions?

9 CHAIR YOUNG: I don't think we're going
10 back to questions because procedurally -- well, we
11 get to do whatever we want.

12 (Laughter)

13 CHAIR YOUNG: Unless you want to ask any
14 questions?

15 Thank you.

16 MR. TILL: Thank you.

17 CHAIR YOUNG: And now we'll have the
18 representatives of the Lees, please. Thank you.

19 MR. ARDIS: Good afternoon. Stephen Ardis
20 again for Mr. and Mrs. Lee.

21 I don't have a whole lot to add to what
22 Mr. Hawkins stated with respect to our position.
23 Essentially, what we have in this case is that the
24 Lees have been -- responsibility for dischargers
25 has been allocated or has been attributed to the

1 Lees on the basis of the fact that they are dry
2 cleaners with common industry -- industry-wide
3 operational practices.

4 Well, industry-wide operational practices
5 is not something the Lees did. That's something
6 that somebody did generically, generally speaking.
7 So when we say that there's no evidence attributing
8 any sort of a release to the Lees, what we mean is
9 there's no indication beyond the fact that they
10 simply are dry cleaners.

11 And it can't be that the Board expects
12 that if a dry cleaner takes over somebody else's
13 business that they suddenly are taking on all of
14 the liabilities, responsibilities for something
15 that happened prior to their ownership.

16 And so that's really all we're saying on
17 this is that, you know, we've got a case here in
18 which it's not clear that these releases would have
19 had to have taken place during the time that the
20 Lees operated the dry cleaner, even if we take it
21 for granted that the PCE is emanating from this dry
22 cleaning facility. Which, you know, I can see is
23 probably not an irrational inference.

24 The other thing that I wanted to do is to
25 get even more specific about the complications that

1 this order will impose on the Lees with the respect
2 to the pending settlement.

3 The first thing that I, as an attorney,
4 will do for the Lees if this order is issued, is to
5 take the steps that are necessary to protect their
6 interests legally, to safeguard their rights to
7 appeal, to any sort of re-hearing before the State
8 Board, any proceedings that might take place and so
9 forth. Regardless of the merits, I owe that duty
10 to my client. And I don't do that work for free.
11 I would be continuing to bill as defense costs, the
12 same costs that I've -- you know, the same type of
13 work that I've been billing up to this point for
14 the work that I do for the Lees.

15 And I don't know what the reaction of
16 Fireman's Fund is going to be to continue billing.
17 In fact, accelerated billing in this case because
18 we've had a major event that requires a bunch of
19 legal work in order to preserve rights.

20 So, that's one big complication that is
21 kind of thrown into things. And, you know, the
22 uncertainties about how this affects what Fireman's
23 Fund is going to do is very real. And we're
24 somewhat fearful of having this Board call
25 Fireman's Fund's bluff, rather than have us make a

1 conscious decision with respect to the risk.

2 So I guess that's why we're asking that
3 the Board consider allowing us the time to properly
4 take care of the Lees and mitigate, to the extent
5 we can, their potential liabilities once they've
6 given up their insurance coverage.

7 Any questions? Thank you.

8 CHAIR YOUNG: Yeah, thank you very much.

9 All right, the representatives of Eugene
10 Zambetti.

11 MR. WOOD: Yes, David Wood for Gene
12 Zambetti. Just needed to highlight a couple of
13 points that I made in my argument. Number one, the
14 mistake and the factual error that's very
15 significant that Gene did not get any ownership
16 interest in this business, or have any control over
17 the business until his dad was forced to retire in
18 September of '82. So we're talking about an
19 ownership, operation control for seven months or
20 less.

21 Two, the argument that there is evidence
22 of a discharge, which is required under the Code,
23 and not only that has to be substantial evidence.
24 Well, we don't think that there's any evidence of a
25 discharge during his period of ownership.

1 And furthermore, the evidence standard
2 they've applied doesn't comply with the standard of
3 proof that the Water Code 13304(a), or the cases
4 that have interpreted that section require. And we
5 point that out in our letter of January 3, 2018.

6 Finally, you want to get this cleaned up.
7 I get it. I've been in this case, I think, longer
8 than anybody else in the room, over ten years.

9 You do have -- not Mr. Burrell, though.
10 But you do have the Burrell Trust, you've named
11 them in the order. There's an entity that is
12 certainly able to fund whatever work is needed
13 beyond the \$2.8 million they're getting in their
14 settlement.

15 So you don't need Gene Zambetti. And it's
16 inequitable to bring him into the case.

17 That's all I have, thank you.

18 CHAIR YOUNG: Thank you.

19 All right, finally, the representative of
20 Fireman's Fund, in regard to the estates of the
21 Julia and Peter Zambetti.

22 MR. HUGGINS: Okay, Michael Huggins again,
23 for Fireman's Fund, with respect to Julia and Peter
24 Zambetti.

25 The first point that I addressed today was

1 that there just is no legal basis for naming Peter
2 or Julia Zambetti, or the purported estates of
3 Peter or Julia Zambetti in this order. In any
4 order, whether it's issued now or whether it's
5 issued later, because there is no testamentary or
6 probate estate here. The Cleanup Team hasn't
7 identified any personal representative or
8 administrator of an estate with respect to either
9 of those two deceased individuals. I'm not aware
10 of any.

11 In order to go after the insurance assets
12 under Section 550, there needs to be an action in
13 court. There needs to actually be coverage. There
14 is not. And there needs to be damages ordered by a
15 court. And here, an order from this Board would
16 not satisfy that obligation under Section 550. So
17 the statute just doesn't apply.

18 So with respect to the estates of Peter
19 and Julia Zambetti that is an estate in name alone,
20 and it comes from Section 550. Any other -- so
21 naming them in the order, by this Board, would be a
22 misapplication of the law. There is no basis,
23 legal basis for doing that.

24 And the second point that I addressed
25 today was just to add to the discussion regarding

1 the ongoing settlement. Again, just to reiterate,
2 from Fireman's Fund's perspective, as the funder of
3 all things litigation in this 13-, 14-year ongoing
4 matter, there is pressure to settle. I'd like to
5 also point out that there's pressure to get it
6 right.

7 I think there was some interest, a lot of
8 discussion around, well, how do we know that this
9 RAP is good enough. And besides the points that
10 Mr. Till made about it already being approved,
11 there's the additional factor that everyone at the
12 table has -- who would be on the hook and, you
13 know, Dr. Young, you made this point where who's
14 liable once Fireman's Fund is out of the
15 conversation? Who picks up the tab?

16 And I think that that highlights, that
17 underscores the interests of the parties on the
18 other side here to get it right because they don't
19 want to be liable for anything after Fireman's Fund
20 is out of the picture.

21 And so, there's been lots of testimony
22 about how the number on the table right now, \$2.8
23 million is -- everybody's agreement, who's at the
24 table for settlement that that's a good number.
25 That the RAP has been approved.

1 And this settlement would undergo a court
2 approval once it's reached. It's very close to
3 being reached. And so, there's been a request for
4 some additional time to accomplish that.

5 Those are my two points.

6 CHAIR YOUNG: All right, thank you.

7 MR. HUGGINS: Thank you.

8 CHAIR YOUNG: We'll now have the closing
9 from the Prosecution Team.

10 MS. MCCANN: Yes, thank you. Lisa McCann,
11 again, Assistant Executive Officer on the Cleanup
12 Team.

13 First, I wanted to address your various
14 questions that you asked and then I want to make a
15 general statement.

16 So first of all, Dr. Ajami wanted to hear
17 more about the relationship between our order and
18 the settlement. And we have heard the dischargers
19 talking about their settlement for two years. We
20 don't see there is a strong relationship and still
21 think the incentive to settle remains the same for
22 all the parties, whether or not the order is
23 approved. And we also believe the order provides
24 clarity about our Water Board's expectations.

25 Ms. Battey asked about risks to the Water

1 Board if we delay. First, we know there is a
2 potential for vapor intrusion and we're depending
3 on mitigation systems that need to get installed to
4 protect human health. And we don't want to rely on
5 the attenuation and mitigation to happen naturally.

6 Second, there are discharges to the creek.
7 That's contrary to our Board policy and that should
8 be addressed as soon as possible.

9 And as mentioned earlier, we're not
10 persuaded that an additional 180 days will make a
11 difference between we've heard the request for
12 delay and we're almost settled previously.

13 Dr. Ajami and Ms. Battey asked whether
14 anything we heard changed our position on naming
15 the parties. No, nothing today swayed us or
16 changed our minds about that. And our response has
17 the information and substantial evidence that
18 supports our reason for wanting to name each party.

19 Ms. Battey asked about the gap between
20 Fireman's Fund and the amount, and the rest of the
21 funding, and how that cleanup will get funded.

22 Chair Young added to that by asking what
23 we think the cleanup will cost.

24 Dr. Ajami asked about our prior experience
25 in other cases related to costs.

1 Our response to that is that the
2 dischargers' consultants have provided a cost
3 estimate and they estimate that the cost of \$2.8
4 million. We don't have any reason to dispute that
5 amount and we believe it's certainly in the
6 ballpark of what we've seen for other, similar
7 sites.

8 Mr. McGrath further asked about who should
9 pay. And Dr. Young also mentioned wanting to see
10 that the appropriate people required to give
11 appropriate portion of cleanup.

12 And as Ms. Austin said before the break,
13 the Regional Water Board's job is just to identify
14 dischargers. We don't apportion responsibility or
15 allocation of costs.

16 Ms. Battey had some questions about future
17 land use and economics associated with that. It's
18 not in our shop and we defer to the dischargers to
19 respond to any questions you still might have about
20 that.

21 Ms. Ogbu had questions about the
22 appropriateness of residential cleanup levels that
23 we're applying. We changed to that because we
24 received comments on the tentative order from two
25 parties. One was the attorney for the adjacent

1 property, Mint Leaf, and the other was Mr.
2 Burrell's attorney. And both suggested anticipated
3 residential use on the site. There's already a
4 residential use next door, at the Mint Leaf
5 property, and further zoning allows for this
6 property to be used for residential use.

7 CHAIR YOUNG: All right, I'm giving you a
8 little extra time because you were not able to
9 answer the Board's questions when we -- after you
10 initially gave your testimony.

11 But if you could move to wrap as soon as
12 possible that would be great.

13 MS. MCCANN: Yeah, I'll just answer the
14 last question and leave it at that. And the last
15 question was that Dr. Ajami asked for a response to
16 the representation that the plume is fairly
17 contained. And staff does not agree. The source
18 on the property is continuing to migrate and is
19 getting to the creek. And while we are seeing some
20 lower concentrations in monitoring, we're still
21 seeing mass moving slowly towards the creek. And
22 it will eventually migrate all to the creek and
23 dissipate, or attenuate, or cleanup will occur and
24 then it will be removed.

25 We think the benefits of issuing the

1 cleanup order significantly outweigh the costs and
2 we do recommend that the Board adopt the order as
3 revised and supplemented.

4 CHAIR YOUNG: Thank you.

5 Additional questions for the prosecution?

6 VICE CHAIR MCGRATH: I guess most
7 everything is pretty clear except the question of I
8 think we've heard substantial evidence that there
9 is a 25 percent contingency in the proposal.
10 There's two rounds of injection and so there's
11 sufficient to provide two, maybe three rounds of
12 injection, which probably would be sufficient for
13 cleanup to standards for commercial areas.

14 The one question here is I think the
15 residential. That would there be a likelihood of
16 being -- certainly, residential cleanup standards
17 are more stringent than those for commercial.

18 And does that increase the risk that the
19 \$2.8 million would not be sufficient?

20 MS. MCCANN: Generally, we don't think
21 that -- well, let me say it differently.
22 Generally, we think that costs overall is likely to
23 accommodate the overall cleanup costs, even to
24 residential standards.

25 VICE CHAIR MCGRATH: Even to residential.

1 Okay.

2 MS. MCCANN: Stephen, would you like to
3 add anything or clarify further?

4 MR. HILL: I think I agree with that. A
5 well-designed injection program should knock soil
6 gas levels down to very low levels. And we think
7 this looks like it's a pretty well designed system.

8 VICE CHAIR MCGRATH: Okay.

9 MR. HILL: So, sometimes it doesn't really
10 make a difference to the cost. You overshoot the
11 commercial standards and go all the way past
12 residential standards.

13 VICE CHAIR MCGRATH: That's quite helpful.

14 MS. AUSTIN: And if I can just add one
15 point, from a legal perspective, which is that the
16 Board does not typically adopt cleanup orders based
17 upon how much they will cost. They adopt cleanup
18 orders based upon the cleanup necessary to protect
19 beneficial uses. In this case, the human health,
20 and environment, groundwater, and the adjacent
21 creek.

22 BOARD MEMBER AJAMI: I actually was
23 wondering, you mentioned for the past two years we
24 have been hearing that the settlement is coming,
25 the settlement is coming. I did not hear that

1 before. But obviously, it was part of the
2 questions, actually one of the questions I had,
3 which I never asked.

4 So this is not a new conversation for us.
5 So we have been waiting for the settlement. So you
6 believe that, again, the six months or 180 days may
7 come and go and we still might be in the same
8 situation we're in right now?

9 MS. MCCANN: Yes.

10 CHAIR YOUNG: I'd like to ask a follow-up
11 question on the costs. We've talked about your
12 best professional judgment estimate of the cleanup
13 costs, but we all know that on these sites there's
14 a lot of monitoring and follow up, and sometimes
15 that goes on for years. Does that -- do you want
16 to comment as to the potential costs of those
17 follow-up actions, up until the point where the
18 Board closes the site, and in the context of the
19 types of them, not so many we're talking about.

20 MR. HILL: This is Stephen Hill. You may
21 even talk to one of the dischargers, Mr. Burrell's
22 representatives for instance, in terms of what
23 exactly does the \$2.8 million cover? We think it
24 covers the monitoring. It should. That's part of
25 the package.

1 But as Lisa just said, our job is to set
2 cleanup standards, approve a cleanup plan that
3 looks like it's going to work, not figure out how
4 much it's going to cost.

5 CHAIR YOUNG: All right. I would like to
6 ask one of the two representatives of Mr. Burrell
7 to come to the podium and just answer the question
8 of whether that proposed price tag for cleanup does
9 include the follow-up monitoring? Yes or no?

10 MR. TILL: So on the approved RAP, under
11 Table 6, it has the 1.9 number, which does include
12 ten years of monitoring.

13 CHAIR YOUNG: Very good. Thank you.

14 All right, folks, thank you all very much.
15 This has been very informative. And I think I
16 speak for all of my colleagues in expressing my
17 appreciation for the professional, both quality and
18 demeanor of this proceeding. Often are not -- we
19 often are not as privileged as this to have people
20 who are so organized and polite. And we really
21 appreciate it when we do.

22 The Board Members would like to meet in
23 Closed Session, which we are allowed to do. And
24 Marnie will give you the citation, if that's
25 necessary.

1 So we would ask you to -- we'll have to
2 clear the room, close the door. We'll send
3 somebody out when we're ready to come back in and
4 have a set of motions, discussion, and a vote.
5 Thank you.

6 MS. AJELLO: The Board will meet in Closed
7 Session pursuant to Government Code Section
8 11126(c)(3).

9 (Closed session commenced at 2:32 p.m.)

10 (Open session resumed at 3:03 p.m.)

11 CHAIR YOUNG: Thank you, folks. Welcome
12 back. The Board has not yet reached agreement on
13 this item. We are going to continue the item until
14 July. We assume that you will use the 90 days
15 wisely. Thank you very much.

16
17 **Item 8. Correspondence**

18 MR. WOLFE: So there is one correspondence
19 item today. We have staff available to discuss it.
20 We could discuss it, but I would say that the
21 (indiscernible) -- enforcement on those grievance
22 proceedings before you. So I would think that we
23 should not get into too much detail about it.

24 CHAIR YOUNG: Okay.

25 MR. WOLFE: But I'd be happy to ask staff

1 to provide some input on this (indiscernible) --

2 VICE CHAIR MCGRATH: Well, if there's an
3 enforcement potential, I don't want to discuss it
4 without all parties available. That's just a case
5 of fairness.

6 MR. WOLFE: Yeah. (Indiscernible) --

7 CHAIR YOUNG: It's to the State and
8 Regional Water Boards.

9 MR. WOLFE: And, unfortunately, that's
10 sort of why we got this back in February and we're
11 now -- she is confused as to who she's contacting
12 to a certain degree.

13 BOARD MEMBER AJAMI: Not to -- but can we
14 read the letter?

15 MR. WOLFE: Oh, yeah. Yeah.

16 BOARD MEMBER AJAMI: That's okay.

17 MR. WOLFE: Right. So it's -- you know --

18 VICE CHAIR MCGRATH: Let's just not talk
19 about it.

20 MR. WOLFE: There will be a quiz.

21 (Laughter)

22 MR. WOLFE: It is interesting.

23 BOARD MEMBER AJAMI: You received it at
24 the Board a while ago (indiscernible) --

25 VICE CHAIR MCGRATH: They changed the

1 password on me again.

2 MR. WOLFE: I think staff is involved on
3 this, but I would have to say at this point that
4 the less said, the better.

5 BOARD MEMBER AJAMI: That's everything?

6 MR. WOLFE: Yes.

7 BOARD MEMBER AJAMI: Okay.

8 MR. WOLFE: And that's it.

9 CHAIR YOUNG: That's it. And I think we
10 stand adjourned. Thank you.

11 **Item 11. Adjournment to the Next Board Meeting -**
12 **Wednesday, May 9, 2018**

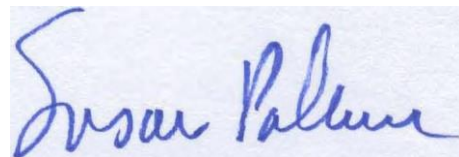
13 (Adjourned at 3:06 p.m.)
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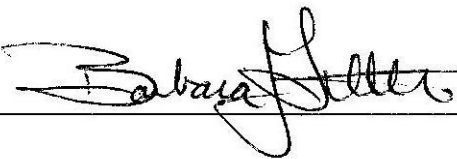
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