



California Regional Water Quality Control Board

San Francisco Bay Region



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Arnold Schwarzenegger
Governor

MEMORANDUM

To: Board Members
Interested Persons

Date: March 2, 2005
File No.: 43s0241 (vc)

From: Bruce H. Wolfe
Executive Officer

SUBJECT: Procedural Options for Naming Responsible Parties and Response to Comments - 327 Moffett Boulevard, Mountain View, Santa Clara County

The site has been used in the past for research, development, and manufacturing of electronic components. It has since been redeveloped as a strip mall. Subsurface contamination was discovered at the site in the mid-80s, including volatile organic chemical impacts to soil and groundwater. The Water Board issued a site cleanup requirement order for the site in 1989. One of the named parties, Union Bank of California (Union Bank) has conducted site investigation and cleanup activities pursuant to the 1989 order and its amendments (cleanup order).

The issue of whether to name additional parties to the cleanup order has become complex and controversial, as described in the attached January 13, 2005, memorandum sent to interested parties. Union Bank is currently the sole solvent responsible party named on the cleanup order. Union Bank has requested that Rheem Manufacturing Company (Rheem) and Raytheon Company (Raytheon) also be named to the cleanup order as responsible parties for the site. Union Bank, Rheem and Raytheon have submitted information that present vastly conflicting versions of the facts concerning former chemical usage and handling practices at the site. This information includes a mix of written documents (aerial photographs, correspondence, inspection reports, etc.) and statements (declarations and depositions) of former Rheem/Raytheon employees. Rheem has indicated that it wishes to exercise its right to cross-examine such witnesses in a full evidentiary hearing before the Board. Such a hearing would take substantial staff time and Board time to resolve the facts in dispute. For this reason, the Board needs to consider and give guidance on the procedural options it may wish to use to resolve the issue.

Procedural Options

The January 13, 2005, memorandum describes several procedural options the Board may consider for determining whether to amend the cleanup order to name additional responsible parties. Those options (as modified in response to comments) are summarized below.

1. Defer Action – The Board would make no decision on naming Rheem and Raytheon pending:
 - i) resolution of the litigation between Rheem and Union Bank, or other developments that may address the disputed facts in this matter; ii) an increased threat from site contamination to human health or the environment; or iii) the availability of substantially more staff resources that would allow staff to fully pursue this matter without undercutting its oversight of higher priority cases.

2. Full Board Hearing – Staff would bring the matter before the Board and provide sufficient time for all three parties to present evidence and cross-examine witnesses as provided under Board regulations. The Board may wish to consider the following two alternatives under this option:
 - a. Longer hearing with direct testimony: The Board could hold a hearing at which it would hear the direct testimony of all witnesses, which would be followed by cross-examination and rebuttal testimony. Based on comments received, this process could take substantially longer than 1 to 2 days.

 - b. Shorter hearing with direct testimony submitted in advance: If the Board wishes to hold a shorter hearing (one day), the Board could require that the parties submit direct testimony in writing in advance of the hearing. The Board would encourage the parties to conduct depositions in advance of the hearing and would require that the parties submit any transcripts of the depositions in advance of the hearing. The parties would be required to identify those parts of their written submittals on which they wished the Board to particularly focus in preparing for the hearing. At the hearing, the Board would set time limits for each party and would allow parties the opportunity to conduct cross-examination and rebuttal. Under Board regulations, each witness would be required to attend the Board’s hearing and affirm that their written testimony was true and correct [Calif. Code of Regs., Title 23, sec.648.4(d)]. It is estimated that such a hearing could be conducted in a day.

3. Panel Hearing – The Board would name a panel of three Board members to hear the evidence, but would follow the same evidentiary procedures as would be followed at a full Board hearing. The panel would hold hearings, then make a recommendation to the full Board for its consideration at a subsequent Board meeting. It is estimated that it would take 1 to 2 days for the panel hearing, plus 1 to 2 hours to hear the item at a subsequent Board meeting.

4. Paper Hearing – The Executive Officer or an appointed hearing officer from Board staff would review all evidence that would be submitted in paper form. The Executive Officer or

hearing officer would then hold a brief hearing to have all witnesses affirm their testimony. After all the written evidence was received, the Executive Officer or hearing officer would direct assigned staff to analyze the evidence in detail and would prepare a written decision on whether to name additional parties and why. The Executive Officer would issue the final Order, based on the written evidentiary record. This option would require little or no Board time, but would require a significant amount of staff time.

While we have responded to the comments submitted by Union Bank, Raytheon, and Rheem on the January 13, 2005, memorandum (attached), I anticipate that each of these three parties will comment further at the March 16 hearing. I will withhold making any recommendation on which procedural option to use until after the hearing.

Attachments:

- January 13, 2005, memorandum to interested parties
- Staff response to comments received on January 13, 2005 memorandum