

STAFF RESPONSE TO COMMENTS

Comments on the January 13, 2005, memorandum were due January 27, and were to focus on the procedural options, not the substance of the dispute. Comments from Union Bank, Rheem and Raytheon, were all received on January 27. The following summarizes the letters and provides Board staff responses *in italics* following each comment.

Kathleen Goodhart, attorney at Cooley Godward, on behalf of Raytheon – 2 pages

1. The Board should defer consideration of the proposed options until the March Board meeting at the earliest because Raytheon is trying to resolve the matter informally with Union Bank. No impact from the contamination would occur as a result of the postponement because this is a low risk site. (pgs. 1-2, paragraphs 1-4)

Staff has agreed to a limited delay and the item has been scheduled for the Water Board's March meeting. However, we don't believe it's appropriate to delay the Board's consideration of the procedural options any longer. Staff commends Raytheon for its efforts to resolve the dispute informally and we encourage all the parties to continue such efforts.

2. It is inappropriate for the Board to get involved a case regarding cost allocation. (pg.2, paragraph 5)

This case is not about cost allocation, but about providing the Board with an opportunity to consider whether there is evidence to support adding additional parties to the cleanup order based on Water Code section 13304(a). (Parties named to an order are typically called "responsible parties" or "dischargers".) This is a very important distinction. It is the policy of the Board to name all parties responsible for the contamination of a property to a cleanup order. Once named, the allocation of costs among those parties is the responsibility of such parties. The Board does not get involved in allocating cleanup cost or responsibility among responsible parties.

James L. Meeder, attorney at Allen Matkins, Leck Gamble & Mallory, on behalf of Rheem Manufacturing Company – 7 pages

3. An evidentiary hearing will take much longer than one or two days. It will take significantly more than 20 days. This is based on the estimate Union Bank provided to the court for the trial time in its lawsuit against Rheem. Additional Board time will be required to resolve disputes related to pre-hearing discovery as required by law. Pre-hearing discovery includes the issuing of subpoenas and taking of depositions. (pgs. 1-2, section A.1)

If the Board elects to require that parties submit direct testimony in writing in advance of the hearing as well as any transcripts of depositions, then the evidentiary hearing is not expected to take longer than a day. The Board will set the rules and time limits for the evidentiary hearing. If the Board prefers to hear the witnesses' direct testimony at the hearing then it appears that the hearing could take more time than one to two days.

4. The Board staff may not be available to assist the Board in carrying out its proposed adjudicatory function. The Board is subject to the Administrative Procedure Act which provides that the adjudicative function shall be separated from “investigation, prosecutorial, and advocacy functions within the agency”. Other regions have sometimes been required to retain another attorney counsel when their executive officer and/or staff have been engaged in investigation or prosecution. (pg. 2, section A.2)

Rheem’s counsel refers to a provision of law that sets forth the procedures applicable to adjudicative hearings conducted by state agencies. The comment implies that the Board may not receive legal advice from its attorney based on the theory that Board staff has been involved in investigating or prosecuting this matter. We disagree. First, it is unclear that the Board’s staff has been involved in activities that can be characterized as investigation or prosecution under the law cited. The staff has not conducted any independent fact finding or investigation. Instead they responded to Union Bank’s request to add additional parties to the order by requesting that Union Bank and the parties describe their positions in writing. Staff has reviewed the responses and has concluded that there are significant differences between the parties on whether Rheem and Raytheon should be named on the cleanup order. In light of those factual questions staff is not currently proposing that the Board add any new parties on the cleanup order, thus it should not be interpreted to be “prosecuting” any party. Instead staff believes that the Board is in the best position to review Union Bank’s request and determine whether the facts support adding additional parties. At this point, staff is bringing the matter to the Board for its decision on whether to proceed with hearings on Union Bank’s request.

Next, even if the staff’s actions to date could somehow be characterized as investigatory or prosecutorial, the statute cited by Rheem’s attorney contains an applicable exception that would allow the Board to continue to have its attorney advise it on this matter. The law provides that someone who has participated only in “determination of probable cause or other equivalent preliminary determination” can participate in adjudicating the matter itself [Govt. Code sec. 11425.30(b)(2)]. As noted above, staff’s only determination to date is to bring this matter to the Board for the Board’s decision on whether to proceed with hearings on Union Bank’s request. Staff’s action can be seen as “a preliminary determination”, thus there is no need for the Board to seek legal advice from another attorney.

5. Any decision by the Board following an adjudicatory hearing is subject to de novo review in the Superior Court. If the Board holds a hearing in this case, the Board will “find [itself] in court relitigating the issues all over again.” (pg. 3, section A.3)

Comment noted.

6. This Board is not a court of equity nor is it authorized to assist parties with their cost recovery claims. (pgs. 3-4, section A.4)

This comment misses the point. The Board has an obligation to name appropriate dischargers to the cleanup order; naming dischargers is different than cost allocation or cost recovery. See response to comment 2 above.

7. The equities favor Rheem over Union Bank. Rheem never owned or operated on the property. They only leased it through a subsidiary company for less than 3 years, more than 45 years ago. Union Bank filed a lawsuit against Rheem. The Board should therefore wait for the court to decide the matter. (pg. 4, section A.5)

The staff requested that commenters limit their comments to the procedures the Board should use in deciding whether to name additional dischargers to the order. This comment relates to the substantive issue of which parties should be named to the order rather than to the issue of the procedures the Board should follow in making that decision. It is thus not appropriate to respond to this comment at this time. If the Board decides to hold hearings on this matter Rheem and all parties will have adequate opportunity to make their views known on the issue of whether additional parties should be named.

8. Defer Action: Rheem supports this option. The lawsuit between Union Bank and Rheem will be over in less than two years. Any ruling made by the Board would not become final for that time period anyway because of appeals. Deferring action will allow the Board to gain from the ruling of the court while eliminating the need for an evidentiary hearing. (pg.5, section B.1)

Even if the court decides the issue of the liability between Union Bank and Rheem in the lawsuit referenced by the commenter, it is possible that the court's ruling may not address the issue of whether Raytheon discharged pollutants at the site.

9. Full Board Hearing and Panel Hearing: For the reasons provided in Section A, these options should not be exercised at this time. (pgs. 5-6, sections B.2 and B.3)

See responses to comments 3-7.

10. Paper Hearing : A paper hearing would violate laws governing procedural requirements of the Board. State Board regulations and the Administrative Procedure Act do not authorize the staff or its executive officer to hold adjudicatory hearings. (pgs. 6-7, section B.4)

The Executive Officer is authorized to hold adjudicatory hearings concerning Union's request to name additional parties to the cleanup order because such an action would fit under the Board's broad delegation of authority to the Executive Officer in 1970. The Board took that action pursuant to Water Code section 13223 which provides that a Water Board may delegate any of its powers and duties to its Executive Officer (subject to certain exceptions, none of which is relevant here). The Administrative Procedure Act does not prohibit the Board's Executive Officer from holding an adjudicatory hearing as a "paper hearing".

Rupert P. Hansen, attorney at Cox, Wootton, Griffin et. al on behalf of Union Bank – 15 pages

11. Union Bank would have preferred reaching the present procedural juncture some 3½ years ago when on September 24 and 25, 2001, the Executive Officer wrote to Rheem and Raytheon, respectively, advising them that staff intended to name them on a new tentative Order. (pgs. 1-2, Introduction)

Staff is typically able to bring issues concerning the possible naming of parties to the Board in a shorter time frame than has been possible in this case. In most cleanup cases, the issues in dispute become narrower and more focused as staff works with the parties such that the issues are often largely (or completely) resolved by the time that the staff brings a tentative order to the Board. In this matter, staff has found that the disputes between the parties have become more entrenched and that significant factual disputes continue to exist.

12. Union Bank has fully cooperated with the Board, paying for an investigation and cleanup of site they didn't pollute. The Board should not send the message to innocent property owners that they will not take action against the actual dischargers. (pg. 2, Important policy issues and due process)

Staff agrees that Union Bank has fully cooperated with the Board in this matter. The Board named Union Bank to the order because it is the property owner. The State Water Board has consistently held that water boards should name a current owner to a cleanup order (e.g., Zoecon, WQ 86-2; Spitzer, 89-8.) The staff recommends that the Board consider whether or not to hold a hearing to consider Union Bank's request that other parties be named to the order. The Board may base a decision on whether or not to hold such a hearing on a variety of factors including the availability of staff resources and the threat to water quality.

13. It's a bad precedent to allow parties to avoid responsibility simply by submitting extensive written materials and requesting a full evidentiary hearing. (pg. 3, Important policy issues and due process)

While Rheem has invoked their right to a full evidentiary hearing, this will not allow them to avoid their alleged responsibilities. However, a full evidentiary hearing is not a course of action the Board has previously explored. In most cases, staff can provide a technical basis for naming dischargers without relying on sworn witness testimony. This case is unusual because the discharge occurred so long ago and Rheem has requested sworn testimony to establish if discharges occurred during Rheem's occupancy. It is for this reason, not merely because Rheem has requested an extensive process, that we are carefully weighing the Board's procedural options. If the Board decides to defer taking action at this time, it will not be just because the parties have submitted a lot of materials or that one of the parties has requested a formal evidentiary hearing.

14. State Board enforcement policy (Feb. 19, 2002) and State Board Resolution No. 92-49 dictates that the Board should pursue all potentially responsible parties. (pg. 3, Important policy issues and due process)

*Staff agrees that our policy is to name all responsible parties. However, the Board has wide discretion in this matter and the two policies make this clear. Section I.B of State Water Board resolution No. 92-49 states "The Regional Board shall ... make a reasonable effort to identify the dischargers associated with the discharge. **It is not necessary to identify all dischargers for the Regional Board to proceed with requirements for a discharger to investigate and cleanup.**" (emphasis added) It appears that Union Bank may be interpreting State Water Board resolution No. 92-49 to commit the Board to staff-intensive efforts without regard to available resources, the relative threat to water quality or the priority/importance of naming all eligible dischargers. Such an interpretation would not be consistent with the State Water Board's Enforcement Policy. It provides that a Water Board should consider a number of criteria in setting priorities as to which enforcement actions it will pursue which include "evidence of, or threat of, pollution or nuisance and the magnitude or impacts of the violation", "the availability of resources for enforcement", and "the strength of evidence in the record to support the enforcement action". (Enforcement Policy, page 4.)*

15. Raytheon was named in the original tentative order that went out for public comment in 1989, but was removed from the tentative order prior to being adopted by the Board. (pg. 4, comment #1 to "Background")

Comment noted.

16. While this is now a low-risk case, concentrations were higher 3 ½ years ago. (pg. 4, comments #2 to "Background")

The highest TCE concentration in June 2001 was 200 ug/l and the highest current (April 2004) TCE concentration is 72 ug/l. While groundwater concentrations at the site were somewhat higher 3.5 years ago, the site's threat to water quality and human health were not substantially greater. The Water Board in fact approved curtailment of the groundwater remediation system at this site more than 3.5 years ago due to its much-reduced threat.

17. Union Bank has not sued Rheem to recover cleanup costs at the site. Union Bank's suit against Rheem is to recover costs associated the settlement of a suit against Union Bank by a down gradient property owner. (pg. 4, comments #3 to "Background")

Comments noted. We thank Union Bank for clarifying the scope of the matters it is litigating with Rheem.

18. Union Bank strongly opposes deferring action because waiting for a decision by the court would not resolve the matter. As noted above, the suit is not related to the on-site contamination. Furthermore, Raytheon is not part of the suit. (pg. 5, Defer Action)

Comment noted. Option 1 focuses on deferring action until the disputed facts are addressed in another forum, either by settlement of litigation or other means. Staff recommends that if the Board decides to defer consideration of the matter, that there would be two other situations that would make it appropriate for the Board to end the deferral: (i) an increased threat from site contamination to human health or the environment or (ii) the availability of substantially more staff resources that would allow staff to fully pursue this matter without undercutting its oversight of higher priority cases.

19. The matter should be resolved promptly because many of the witnesses are advanced in age so valuable testimony could be lost. (pgs. 5-6, Defer Action)

The staff's efforts to resolve this matter to date have been slowed by the entrenched disputes between the parties over significant issues related to the activities of Rheem and Raytheon several decades ago. Union Bank's comment regarding the advancing age of witnesses seems to assume that if the Board revises the cleanup order to add Rheem and Raytheon, then Union Bank would not need to take any other action that would involve those witnesses in order to get contributions from Rheem and Raytheon. However, as noted above, an action by the Board to name additional parties would not resolve contribution issues in a cleanup matter. It is always necessary for the parties to resolve their disputes regarding responsibility for contributions outside the Board process. Union Bank can commence litigation at any time to address those contribution issues, thus it is not necessary for the Board to amend the order to allow Union Bank to bring such an action. If litigation is required then the parties must produce whatever witnesses would be necessary for them to substantiate their case.

20. Union Bank has paid all staff costs related to this case so this should not conflict with other cleanup cases. (pg. 6, Defer Action)

This comment misses the point. The Board's staff resources for cleanup oversight are limited by the state budget process, and we cannot expand staffing for this program merely based on a discharger's willingness to reimburse staff oversight costs. Therefore, if staff devotes substantial time to this matter, it will inevitably result in staff spending less time on higher priority cases, to the detriment of water quality.

21. Deferring action is not consistent with the Board's enforcement policy. It is also inconsistent with various State Water Board orders that provide that a Water Board should name all parties of which there is reasonable evidence of responsibility, even in other cases of disputed liability. [e.g., SWRCB decision in *Sanmina* (Order No. WQ 93-14)], SWRCB decision in *Exxon Company* (Order No. WQ 85-7), *International Longshore and Warehouse Union for Review of the Failure to Act by the California Regional Water Quality Control Board, L.A. Region* (Order No. WQ 99-03) (pg. 6, Defer Action)

As discussed above, the Board has discretion as to how to allocate its and its staff resources to address the various cleanup cases within its jurisdiction. In light of the significant staff time already expended on this case due to the entrenched disputes between the parties on relevant facts, staff has determined that before investing further time and resources it would be advisable to get the Board's input on how to proceed with this case. The State Water Board orders cited by Union Bank are not relevant to the issue of whether a water board must prosecute all cleanup cases without regard to the limitations of Board or staff resource or the site's relative threat to water quality. As discussed above, the State Water Board has provided guidance on this issue in its Enforcement Policy and has indicated that a water board must consider those factors in deciding which enforcement cases to pursue.

22. Union Bank has no objection to a full Board hearing. Staff should not delegate its responsibility to prosecute the case to Union Bank as proposed in the January 13, 2005 Memorandum, but Union Bank is prepared to take on this role if necessary. (pgs. 6-7, Full Board Hearing)

Comment noted. Board staff believes that Union Bank is in the best position to make the case to support its request that the Board name additional dischargers to the Board's cleanup order.

23. Union Bank has no objection to a panel hearing, but would prefer a full Board hearing. (pg. 7, Panel Hearing)

Comment noted.

24. A paper hearing will be less effective than a Board hearing and it would be less likely to satisfy due process requirements. (pg. 7, Paper Hearing)

Comment noted. We believe that a paper hearing could be conducted in a manner that would be just as effective at deciding the matter as an oral hearing before the Board and that it would fully satisfy due process.

25. Hearing Protocol and Evidence: This section provides an outline of the laws and policies applicable to this matter. State Board Resolution No. 92-49 provides guidance as to the naming of responsible parties. Pages 8-14 describe the rules of evidence including hearing notices, the Board's power to subpoena witnesses, admissible evidence, and evidentiary limitations. Pages 14-15 describe the procedural order for the hearing. (pgs. 7-15, Comments on Hearing Protocol and Evidence)

Comments noted. Staff recognizes the laws and policies applicable to the proposed hearing.