



California Regional Water Quality Control Board

Santa Ana Region



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Arnold Schwarzenegger
Governor

PROPOSED NOTICE OF PUBLIC HEARING

RESOLUTION NO. R8-2009-0009

APPROVAL OF ADMINISTRATIVE SETTLEMENT
WITH THE COUNTY OF SAN BERNARDINO ET AL.

SCHEDULED FOR REGIONAL BOARD CONSIDERATION ON APRIL 24, 2009

PLEASE READ THIS HEARING NOTICE CAREFULLY. FAILURE TO COMPLY WITH THE DEADLINES AND OTHER REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF YOUR DOCUMENTS AND/OR TESTIMONY.

Background

The County of San Bernardino ("County") has operated the Mid Valley Sanitary Landfill ("MVSL") since 1958. According to Cleanup and Abatement Order No. R8-2003-0013, in 1997, perchlorate and perchlorate salts were detected in the groundwater sampled by two of the MVSL monitoring wells. In 2001, the concentration of perchlorate in one of these wells increased significantly. Further investigation indicated that the source of the perchlorate then in groundwater immediately adjacent to, and downgradient of, the County's property may be from the northeast area of its property that the County purchased in 1994.

The Santa Ana Regional Water Quality Control Board ("Regional Water Board") issued Cleanup and Abatement Order No. R8-2003-0013 to direct the County to remediate the perchlorate contamination in groundwater that discharged or was threatening to discharge from the County's property. The County filed a petition for review of that order, which was placed in abeyance by the State Water Resources Control Board ("State Water Board") at the County's request. The Regional Water Board subsequently amended that Order by adopting Order No. R8-2004-0072 to require the County to supply replacement water to the City of Rialto for contamination of Rialto Well No. 3 by perchlorate from the County's property. The County also filed a petition for review of this Order, which was also placed in abeyance by the State Water Board at the County's request.

The County and other persons and entities associated with the County's property (the "Settling Parties") and selected Regional Water Board staff (the "Settlement Team") have reached a Proposed Settlement of matters pertaining to the County's remediation of contamination from its property. The Proposed Settlement is scheduled for hearing and potential adoption by the Regional Water Board on April 24, 2009.

California Environmental Protection Agency



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Purpose of Hearing

The purpose of the hearing is to consider relevant evidence and testimony regarding the Proposed Settlement. At the hearing, the Regional Water Board will consider whether to adopt the Proposed Settlement, propose modifications to it, or reject it. The public hearing on April 24, 2009, will commence at 10:00 a.m. or as soon thereafter as practical, or as announced in the Regional Water Board meeting agenda. An agenda for the meeting, including the location of the meeting, will be issued at least ten days before the meeting and posted on the Regional Water Board's website at <http://www.waterboards.ca.gov/santaana/>.

THIS NOTICE AND THE PROCEDURES AND DEADLINES HEREIN MAY BE AMENDED BY THE ADVISORY TEAM IN ITS DISCRETION. ANY OBJECTIONS TO THIS HEARING NOTICE MUST BE SUBMITTED¹ TO THE REGIONAL WATER BOARD'S ADVISORY TEAM NO LATER THAN FEBRUARY 20, 2009, OR THEY WILL BE WAIVED.

Hearing Procedures

The hearing will be conducted in accordance with this hearing notice. This proposed version of the hearing notice has been prepared by the Regional Water Board's Settlement Team, and is subject to revision by the Regional Water Board's Advisory Team. The settlement that is being proposed for adoption by the Regional Water Board does not provide protection for the Settling Parties from contribution actions by other potential responsible parties. Therefore, this proceeding does not directly affect the rights of any other entities. Nonetheless, as this settlement is related to the Rialto-area perchlorate contamination, which has generated high levels of public interest, and in order to promote an orderly process for the Regional Water Board's consideration of the proposed settlement, the Regional Water Board Settlement Team has proposed that this proceeding be conducted with some of the formalities of a public adjudicative proceeding, as set forth in this hearing notice.² A copy of the general procedures governing adjudicatory hearings before the Regional Water Board may be found at Title 23 of the California Code of Regulations, section 648 et seq., and is available at <http://www.waterboards.ca.gov> or upon request. In accordance with section 648, subdivision (d), any procedure not provided by this Hearing Notice is deemed waived. Except as provided in Section 648, subdivision (b), Chapter 5 of the Administrative Procedures Act (commencing with Section 11500 of the Government Code) does not apply to this hearing.

1 The word "submitted," as used in this notice does not mean the date served or postmarked, but instead means the date that the Regional Water Board must actually receive the material being submitted. Unless otherwise noted, the material must be received by 5:00 p.m. on the applicable date for it to have been "submitted" on time.

2 The proposed hearing notice that was distributed in November 2008 contained a higher level of hearing formality because it was expected that the settlement would provide contribution protection to the Settling Parties.

Separation of Functions

To help ensure the fairness and impartiality of this proceeding, the functions of those who will act in an advocacy role by presenting evidence for consideration by the Regional Water Board (Settlement Team) have been separated from those who will provide advice to the Regional Water Board (Advisory Team). Members of the Advisory Team are Joanne Schneider, David Rice, and Frances McChesney. Members of the Settlement Team are: Gerard Thibeault, Kurt Berchtold, Robert Holub, Ann Sturdivant, Kamron Saremi, Debi Ney, and Jorge Leon. The Settlement Team includes members of the "Advocacy Team" that is advocating for the adoption of a Cleanup and Abatement Order by the State Water Resources Control Board for contamination allegedly coming from the so-called "160-Acre Site." Any members of the Advisory Team who normally supervise any members of the Settlement Team are not acting as their supervisors in this proceeding, and vice versa. Members of the Settlement Team may have acted as advisors to the Regional Water Board in other, unrelated matters, but they are not advising the Regional Water Board in this proceeding.

Ex Parte Communications

All persons are forbidden from engaging in ex parte communications regarding this matter with members of the Advisory Team or members of the Regional Water Board. An ex parte contact is any written or verbal communication pertaining to the Proposed Settlement that is substantive in nature or concerns a procedural matter potentially in controversy in this proceeding between any person on the one hand, and a Regional Water Board member or an Advisory Team member on the other hand, unless the communication is copied to all interested persons (if written) or made in a manner open to all other interested persons (if verbal). Communications regarding non-controversial procedural matters are not ex parte communications and are not restricted. Communications among one or more interested persons are not ex parte contacts.

Hearing Time Limits

The Regional Water Board will not be designating parties for this proceeding. Any entity or member of the public that intends to present evidence, testimony, argument, or comments to the Regional Water Board is considered to be an "interested person." To ensure that all interested persons have an opportunity to participate in the hearing, the following time limits shall apply: the Settling Parties (as a group) and the Regional Water Board Settlement Team, as the entities that are directly affected by the Proposed Settlement, shall each have a combined total of 30 minutes, and each other interested person shall have a combined total of 15 minutes, to present evidence, cross-examine witnesses (if warranted), and provide a closing statement. Interested persons who present only non-evidentiary policy statements shall have 3 minutes. Interested persons with similar interests or comments are requested to make joint presentations, but will not otherwise be allowed to cede their time to other interested persons. Interested persons who would like additional time must submit their request to the Advisory Team no later than April 6, 2009. Additional time may be provided at the discretion of the Advisory Team (prior to the hearing) or the Regional Water Board

Presiding Officer (at the hearing) upon a showing that additional time is necessary. All interested persons are requested to avoid redundant comments. Depending on the number of interested persons, the Regional Water Board may further limit the amount of time as warranted.

Order of Proceeding

Open Hearing (Presiding Officer reads procedure)
 Settlement Team's Presentation
 Settling Parties' Presentation
 Other Interested Persons' Cross-Examination of Settlement Team and Settling Parties*
 Other Interested Persons' Presentation
 Settlement Team and Settling Parties' Cross-Examination of Other Interested Persons*
 Closing Statements
 Board Member/Advisory Team Questions, Close of Public Hearing
 Deliberations and Decision-making

* Cross-examination will be permitted only to the extent warranted.

Evidence, Argument and Policy Statements

Interested persons who would like to present evidence for this hearing must submit the following information in advance of the hearing in accordance with the deadlines contained at the end of this hearing notice:

1. All written evidence, including exhibits, that any interested person would like the Regional Water Board to consider (hereafter, "evidence.") Evidence already in the public files of the Regional Water Board may be submitted by reference as long as the evidence and its location are clearly identified in accordance with Title 23, CCR, Section 648.3.
2. All legal and technical arguments and analysis (hereafter, "argument.")
3. The name of each witness, if any, whom the interested person intends to call to testify at the hearing, the subject of each witness' proposed testimony, the estimated time required by each witness to present direct testimony, and the qualifications of each expert witness, if any (hereafter, "witness information.")

All evidence that is cited in the argument must be accompanied by an index and submitted to the Regional Water Board. All evidence and argument must be submitted to the Regional Water Board in both hard-copy and DVD format. In addition, each interested person who submits evidence must also submit a separate index and DVD containing no more than 20 of its key evidentiary documents in pdf format for posting on the Regional Water Board's website. Argument (often submitted in the form of a brief) shall be limited to 25 pages, with font size 12 or greater, double-spaced, and one-inch margins. Each interested person submitting argument shall also submit a separate single pdf file containing both the argument and no more than 75 additional pages of key excerpts from the evidence that is cited in the argument (a total of 100 pages) for posting on the Regional Water Board's website.

Interested persons who would like to present only non-evidentiary policy statements are encouraged to submit written statements to the Advisory Team as early as possible, but must submit them no later than April 6, 2009. Interested persons do not need to submit written statements in advance in order to provide oral non-evidentiary policy statements at the hearing.

In accordance with Title 23, California Code of Regulations, Section 648.4, the Regional Water Board endeavors to avoid surprise testimony or evidence. Absent a showing of good cause and lack of prejudice to the participants, the Regional Water Board may exclude evidence, argument, and witness testimony that is not submitted in accordance with this hearing notice. Excluded evidence, argument, and witness testimony will not be considered by the Regional Water Board and will not be included in the administrative record for this proceeding. Power Point and other visual presentations may be used at the hearing, but their content may not exceed the scope of other submitted written material. A copy of such material intended to be presented at the hearing must be submitted to the Advisory Team at or before the hearing for inclusion in the administrative record. Additionally, any witness who has submitted written testimony for the hearing shall appear at the hearing and affirm that the written testimony is true and correct, and shall be available for cross-examination.

Rebuttal Evidence or Argument

The Settling Parties may submit rebuttal evidence, argument, and witness testimony if necessary. It shall be limited to rebuttal of evidence, argument, and witness testimony submitted by other interested persons. Rebuttal is not an opportunity to raise new issues. The Presiding Officer will have the discretion to strike any rebuttal evidence, argument, or witness testimony that does not comply with this requirement. The Settling Parties' rebuttal evidence, argument, and witness testimony shall be submitted by March 27, 2009, using the same procedures as described above for the submittal of evidence, argument, and witness testimony. The Settlement Team may distribute a staff report along with the Regional Water Board's official meeting agenda no later than April 14, 2009, but the staff report may not contain or refer to any new evidence absent a showing that they could not have been produced earlier.

Evidentiary Objections

Any interested person objecting to written evidence submitted by another interested person must, within two weeks of the date the evidence was submitted, submit a written objection to the Advisory Team with a copy to all other interested persons. The Advisory Team will notify the persons about further action to be taken on such objections and when that action will be taken.

Evidentiary Documents and File

The proposed settlement and related evidentiary documents are on file and may be inspected or copied during business hours at the Regional Water Board office at 3737 Main Street, Suite 500, Riverside, CA 92501-3348. Appointments for file review are preferred and can be made by calling (951) 782-4499. This file shall be considered part of the official administrative record for this hearing. Other submittals received for this proceeding will be added to this file and will become a part of the administrative record absent a contrary ruling by the Regional Water Board Presiding Officer. Many of these documents will also be posted on-line at the Regional Water Board's website at <http://www.waterboards.ca.gov/santaana/>. All interested persons are strongly encouraged to subscribe to the "perchlorate" email distribution list on the website, in order to receive updates about this hearing and other perchlorate-related matters. Although the website is updated regularly, to assure access to the latest information, you may contact Kurt Berchtold, at (951) 782-3286, or at kberchtold@waterboards.ca.gov.

IMPORTANT DEADLINES

- February 13, 2009 Proposed Hearing Notice distributed; Proposed Settlement Documents and Settlement Team's evidence, argument, and witness information posted on Regional Water Board's website.
- February 20, 2009 Objections due on Proposed Hearing Notice.
- February 24, 2009 Settling Parties' deadline for submitting evidence, argument, and witness information.
- March 16, 2009 Remaining Interested Persons' deadline for submitting evidence, argument and witness information.
- March 27, 2009 Settling Parties' deadline to submit rebuttal evidence, argument, and witness information.
- April 6, 2009 Interested Persons' deadline to submit non-evidentiary policy statements and deadline to request additional time at hearing.
- April 14, 2009 Regional Water Board's official meeting agenda distributed.
- April 24, 2009 Regional Water Board Hearing

Primary Contacts

Advisory Team:

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Settlement Team:

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Questions

Questions concerning this proceeding may be addressed to David Rice, Regional Water Board Staff Counsel, at (davidrice@waterboards.ca.gov) or (916) 341-5182.