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Attorneys for Petitioner
ROBERT LEAL

STATE WATER RESOURCE CONTROL BOARD

STATE OF CALIFORNIA

In Matter of ROBERT LEAL, Petitioner, For Review of Technical and Monitoring Report Order No. R5-2010-0049 of the California Regional Water Quality Control Board, Central Valley Region, for the Wide Awake Mercury Mine	PETITION NO.: **PETITION FOR REVIEW; REQUEST FOR STAY**

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Pursuant to California Water Code section 13320 and Title 23 of California Code of Regulations §§ 2050 et seq., Petitioner ROBERT LEAL ("Petitioner") hereby petitions the State Water Resource Control Board ("State Board") for review of the Technical and Monitoring Report Order No. R5-2010-0049 ("Order") adopted by California Regional Water Quality Control Board, Central Valley Region ("Regional Board") on May 27, 2010. The Order requires the submittal of technical and monitoring reports for the Wide Awake Mine site located in Colusa County, California. The Order improperly names Petitioner as a purported discharger due to his alleged ownership of parcels on which the mine was located between February 28, 1990 to November 1, 1995. Petitioner requests a hearing on this matter and a Stay of the Order pending this appeal.

I. PETITIONER

Petitioner is Robert Leal and should be contacted through his legal counsel at the following addresses:

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II. ACTION OF THE REGIONAL BOARD TO BE REVIEWED

Petitioner requests that the State Board review the Order, which requires the preparation and submittal of technical reports, including a *Mining Waste Characterization Work Plan*, a *Mining Waste Characterization Report,* and a *Surface and Groundwater Monitoring Plan* for the Site and improperly identifies Petitioner as "person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state." (See Order at ¶ 57, p. 12 a copy of which is attached hereto and incorporated herein by this reference as Exhibit "A").

III. DATE OF THE REGIONAL BOARD ACTION

The Regional Board issued the Order on May 27, 2010.

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IV. STATEMENT OF REASONS WHY THE REGIONAL BOARD'S ACTION WAS INAPPROPRIATE OR IMPROPER

As set forth more fully below, the Regional Board:

(1) Exceeded its authority by finding Petitioner to be a discharger for land he never owned;

(2) Exceeded its authority by requiring Petitioner to participate in the preparation of reports not related to Petitioner's purported discharge in violation of CWC 13267;

(3) Issued an Order that does not comply with the requirements of CWC 13267 because it does not establish a basis for which Petitioner, who has not owned the site for 15 years should be required to submit reports relating only and/or pertaining to "present" and/or "future" discharges;

(4) Found that Petitioner's liability is joint and several;

(5) Failed to properly apply statutory and case law regarding the law of nuisance;

(6) Did not properly apply and/or consider the *Wen-West* factors;

(7) Issued an Order that does not comply with the California Environmental Quality Act ("CEQA"); and

(8) Issued an Order that violates Petitioner's right to due process in violation of the Fifth Amendment.

As such, the Regional Board's Order as to this Petitioner is not supported by the record and is arbitrary, capricious, and in violation of law, due process, and notions of fair justice and policy.

A. Background

The Order states: "The Wide Awake Mine is an inactive mercury mine with mining waste that includes in part, mine cuts, waste rock, and tailings that erode, or threaten to erode, into a Sulphur Creek tributary during storm runoff conditions." (¶ 1 of Order). Petitioner owned the parcel on which the mine was located from 28 February 1990 to 1 November 1995 (¶ 57). Petitioner does not currently own the site property. (¶ 57).

Petitioner respectfully requests that the State Board review and incorporate herein by this reference Petitioner's numerous submittals, evidence, and exhibits submitted to the Regional Board

as part of the October 7, 2009 hearing and the May 27, 2010 Regional Board Meeting, including, but not limited to, Petitioner's Initial Comments on Draft Order and Request for Evidentiary Hearing, including exhibits attached thereto submitted on July 1, 2009 (attached to this Petition as Exhibit B), Petitioner's Opposition to Allegations of Liability, including exhibits and evidence attached thereto, submitted on September 15, 2009 (attached as Exhibit C), Petitioner's Supplemental Brief responding to comments from other named parties, and Supplemental Declaration of Robert Leal submitted on September 23, 2009 (attached as Exhibit D), Petitioner's presentation and evidence submitted at the initial Regional Board Meeting which took place on October 7, 2009 (Power Point presentation attached as Exhibit E; transcript, which will be provided to all parties once is received, as Exhibit F), Petitioner's Comments on Draft Order including exhibits and evidence attached, submitted on April 29, 2010 (attached as Exhibit G), and the transcript of the May 27, 2010 Regional Board Hearing relating to the Wide Awake Mercury Mine and presentation of Petitioner's counsel, Larry Bazel (which will be provided to all parties once it is received, as Exhibit H).

Based on the entirety of the record, including the evidence presented by Petitioner, and the arguments raised by Petitioner's submittal, Petitioner respectfully requests that it be removed and/or dismissed from this Order, since there is no legal and/or factual basis to hold him as a discharger so as to require him to contribute to the cost of preparing reports the purpose of which is to characterize present and/or future alleged discharges of mercury.

B. The Regional Board's Action Was Inappropriate and Improper

Based on the Order's "findings the Order concludes: Petitioner "is a person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state." (¶ 57). Based on the entirety of the record, including but not limited to, the evidence and arguments submitted by Petitioner, and considering the purposes to be achieved by the present Order, this conclusion is either unsupported by the record or the law, or does not take into consideration the proper application of CWC 13267 to Petitioner.

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V. THE MANNER IN WHICH PETITIONER HAS BEEN AGGRIEVED

Petitioner has been aggrieved by the Regional Board's actions and the Order because if the Order is enforced he will be subjected to a requirement to meet the provisions contained in Division 7 of the California Water Code and Regulations, Plans and Policies adopted thereunder, including to conduct work in conformance with the Regional Board's Water Quality Control Plan, the preparation of a *Mining Waste Characterization Work Plan,* the preparation of a *Mining Waste Characterization Report,* and the preparation of a *Surface and Groundwater Monitoring Plan.*

As such, Petitioner will be forced to incur significant costs of compliance, to bear a burden of regulatory oversight and to suffer other serious economic consequences, thereby depriving him of property without due process of law n violation of the United States constitution.

VI. STATE BOARD ACTION REQUESTED BY PETITIONER

Petitioner requests that:

(1) The State Board determine that the Regional Board's adoption of the Order was arbitrary and capricious, contrary to law, or otherwise inappropriate and improper as applied to Petitioner; and

(2) The State Board amend the Order to remove and/or dismiss Petitioner as a named discharger.

Alternatively, if the State Board declines to remove and/or dismiss Petitioner as a named discharger, then Petitioner requests that the State Board designate him as a secondarily liable party.

VII. STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION

Petitioner incorporates herein by this reference, the evidence and legal points and authorities previously submitted by him in advance and at the October 7, 2009 Evidentiary Regional Board Hearing and in advance and at the May 27, 2010 Regional Board Meeting held prior to the adoption of the Order, including, but not limited to, attached Exhibits B through H.

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A. The Regional Board Has Exceeded its Authority by Issuing an Order Requiring Petitioner to Characterize Waste on Land He Never Owned

The Order requires the assessment and characterization of what it refers to as the Wide Awake Mine site, a 100-acre property described in ¶ 2 of the Order. There are three parcels listed: parcel 018-200-010-000 ("Parcel 10"), parcel 018-200-11-000 ("Parcel 11"), and parcel 018-200-12-000 ("Parcel 12"). The Regional Board did not present any expert testimony about title or ownership. All research was done by Regional Board staff, who conceded that they were not experts in this area. Title to the area was complicated. Several names were added to the draft order and removed form it as Regional Board staff conceded some erroes and discovered others. According to the one deed conveying an interest to Petitioner, he received an interest in land that included what was then referred to as parcel 018-200-003-000. Although Regional Board staff asserted that Petitioner had owned Parcel 10, Parcel 11, or Parcel 12, they did not present any evidence showing any relationship between Parcel 3 identified in the deed and Parcels 10 through 12. Counsel for Petitioner presented evidence showing that the land formerly identified as parcel 018-200-003-000 is now Parcel 10. (See Figure 6 of Petitioner's Power Point Presentation at October 7, 2009 Evidentiary Hearing, attached as Exhibit E). Petitioner never owned or received any interest in Parcels 11 and 12 (see Figure 6).

Although Parcel 10 is associated with the Wide Awake Mine, Parcels 11 and 12 are associated with a different mine. Regional Board staff were confused about the two mines. Confusion may have been the reason that the prosecution team misrepresented Petitioner's ownership to the Regional Board. At the hearing which the Regional Board approved the draft order presented by staff, counsel for Petitioner argued that Petitioner never owned Parcels 11 and 12. Counsel for the prosecution team responded that Petitioner owned former parcel 018-200-003-000, which, he said, corresponded to Parcels 11 and 12. This statement was false. Former parcel 018-200-003-000 corresponds to Parcel 10, not Parcels 11 and 12. Counsel for Petitioner was not given an opportunity to correct this misrepresentation. The Regional Board, therefore, heard false testimony asserting that Petitioner was the owner of Parcels 11 and 12, and did not give Petitioner

an opportunity to correct the misrepresentation. For this reason alone, the Order invalidly names Petitioner.

The prosecution team never argued that Water Code § 13267 authorizes the Regional Board to hold Petitioner liable. Nor could they. A person "cannot be held liable for the defective or dangerous condition of property which he did not own, possess, or control." *Preston v. Goldman* (1986) 42 Cal.3d 108, 119, quoting *Isaacs v. Huntington Memorial Hosp.* (1985) 38 Cal.3d 112, 134. The Regional Board presented no evidence showing that Peitioner owned, possessed or controlled Parcels 11 and 12, and he therefore cannot be held liable.

The Regional Board responded to Petitioner's arrgument by including in the Order a provision that would hold Petitioner liable unless and until he convinced staff that he did not own all of the property at issue. (See ¶ 63.) But this provision improperly puts the burden of proof on Petitioner. The Regional Board does not have authority to hold anyone liable until that person proves his innocence. Rather, it is the Regional Board that has the burden of proof. *Beck Development Co. v. So. Pacific Transportation Co.*, (1996) 44 Cal. App. 4th 1160, 1206. For this reason alone, the Order goes beyon the Regional Board's authority.

Nor is this error harmless. According to evidence submitted by Regional Board staff, the land at issue is undeveloped and there is no way to distiguish one parcel from another. Regional Board staff expressed concern about mining wastes that had been observed, but admitted during cross examination that they did not know on which parcel the mining wastes were located. As as result, there is no evidene that any mining waste was ever discharged from the land in which Petitioner received an interest.

By requiring Petitioner to submit reports on land he never owned, possessed, or controlled, the regional Board exceded its authority.

B. The Regional Board Exceeded its Authority under CWC 13287 by Requiring in its Order That Petitioner Submit Technical and Monitoring Reports Unrelated to His Purported Discharges

Regional Board staff argued that Water Code § 13267 authorizes the regional Board to

require reports from any person who has discharged waste. Ut implicit in § 13267 is the concept that the reports *must be related to that waste*. Surely a person who has discharged waste in Sacramento cannot be required to submit reports related to another person's discharge of waste in Redding. Here the discharges at issue are unrelated to the alleged discharges from Petitioner.

The Order finds that there are three piles of waste rock and tailings at the site. (¶ 15). It also states that the mercury remaining at the site is "almost entirely" within those three piles (Ibid). The remaining mercury is undoubtedly natural background mercury, because mercury is found naturally in the soils in that area. The Order acknowledges that background concentrations of mercury are about 2-90 mg/kg (¶ 18), and that natural sources of mercury prevent Sulphur Creek from being used for drinking water or fish consumption (¶ 24).

Clearly, the purpose of the Order and the original proposed Cleanup and Abatement Order is to stabilize the piles so that the material from these piles does not erode into Sulphur Creek and downstream waters. (See Draft CAO). Furthermore, Regional Board staff acknowledged that the purpose of the Order is to implement the basin plan requirements that Anthropogenic sources of mercury be reduced by approximately 95 percent (see Advisory Team Staff Report in response to comments on hearing panel recommendation).

Petitioner had nothing to do with the mining waste piles, which apparently are more than 100 years old. Petitioner is alleged to have discharged only by allowing rain that fell on the property to flow off the property. But the Order does not require any action related to any rainwater that flowed off the property during the time that Petitioner may have owned an interest in the property. It is directed only at identifying and ultimately stabilizing mine wastes still remaining on the property. The piles of mine wastes, however, are those wastes that have not yet been discharged. They are wastes that may be discharged in the future. As such, the purpose of the Order is to stabilize the piles in order to prevent **future** discharges from the property. Nothing in the Order requires any investigation of the **past** discharges that allegedly took place due to rain falling on the property and runoff.

Regional Board staff have treated this case as though it were a routine groundwater

contamination case. But it is not. In aroutine groundwater contamination case, wastes discharged decades ago may still be present. An order directed at a former property owner may therefore ask for reports about the wastes discharged *by that* person.

Here Petitioner is not alleged to have contaminated groundwater. The evidence has established that groundwater in the area naturally contains high levels of mercury, and that natural springs discharge high levels of mercuryt into Sulphur Creek. These natural springs prevent Sulphur Creek from attaining several beneficial uses, and the creek has been declassified for them.

Consider a property on which there was once a factory discharging to ambient surface waters. Assume that the former owner of the factory sold the property to the current owner in 1980. The current owner installed an underground take that leaked and contaminated groundwater. In this situation, it would be proper to require reports from the current owner under § 13267, because it is the current owner's discharges that are at issue. But it would not be proper to hold the former owner liable, because that owner did not discharge any of the wastes at issue. Here Petitioner's wastes, like the former owner's, are long gone. He should not be held liable.

Furthermore, CWC section 13267 requires that the Regional Board identify the evidence that supports requiring a person to provide reports. (CWC 13267(b)(1)). Here, the Regional Board staff have not specified any evidence that would support requiring Petitioner to implement the Order, other than he had a paper interest in part of the property at some prior point in time. CWC section 13267 also requires a showing that the burden, including the cost, of the report, bear a reasonable relationship to the need for the report. However, the Order provides no assessment of costs and no showing of why the burden on Petitioner is outweighed by the need for the report. In fact, the futuristic nature of the discharges at issue demonstrates that the Regional Board has not complied with the requirement that the burden shall bear a reasonable relationship to the need for the report and the benefits to be obtained. The burden *on Petitioner* of producing reports about wastes that *he did not discharge* greatly outweighs the benefits from requiring him to produce those reports. The very same reports can be obtained from those people who would be responsible for any future

discharges from the waste piles.

C. Petitioner is Not Appropriately Named in the Order since He Is Not Liable under the Law of Nuisance

Petitioner respectfully requests that the State Board refer to his Points and Authorities submitted on July 1, 2009, section 6 starting at p. 4 through p. 12 (attached as Exhibit B).

Regional Board staff failed to respond to, consider, and/or evaluate the issue of nuisance as it applies to Petitioner. Staff completely ignored the requirement that Petitioner must own an interest in the property, the principle that former landowners are generally not liable for dangerous conditions on the land, the requirement that Petitioner receive notice of the nuisance, the lack of any evidence to suggest that the site was causing a nuisance in the early 1990's, or that it is presently causing a nuisance directly related to Petitioner's ownership, the lack of any evidence that Petitioner "neglected" to abate the continuing nuisance, and more importantly, that any mercury that may have discharged from a site owned by Petitioner in the early 1990's is long gone. A fair and just consideration of these factors would lead to the only reasonable conclusion - that Petitioner should not be a party to this Order.

D. A Proper Application of the Wen-West Factors Leads to the Conclusion That Petitioner Should Be Dismissed And/or Removed from the Order

In *Wen-West,* the leading State Board decision on when former landowners may be held liable under Water Code section 13304, the State Board recognized that equitable considerations should be applied to avoid holding a person liable even when that person might technically bear responsibility. As indicated in Petitioner's initial submittal to the Regional Board dated July 1, 2009, at section 8, pp. 13 -16, Petitioner pointed out the lack of culpability of Petitioner with respect to the alleged discharge. Rather than conduct an overall consideration of Petitioner's knowledge and activities of the site, the Regional Board treated *Wen-West* not as a general authorization to consider equity, but rather as a strict six part test that was not met in this case because two of the six elements were missing. (See Order ¶ 57).

The Regional Board's treatment of the *Wen-West* factors as they pertain to Petitioner was

erroneous and in direct contravention of State Board precedent and policy.

E. The Order Does Not Comply with the California Environmental Quality Act

The California Environmental Quality Act ("CEQA") requires an Environmental Impact Report to be prepared for any project "that may have a significant effect on the environment." (Public Resources Code section 21100(a)). Here, there is no doubt that the project will have a significant effect on the environment, because the project (as envisioned by the Order) requires earth moving and construction, in a remote area, related to large piles of mercury-containing material. Therefore, an EIR is required before "the agency has committed itself to the project as a whole or to any particular features . . . including the alternative of not going forward with the project." *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 139.

Here, the Regional Board is clearly committed to going forward with the project. The original Order specifically requires site remediation, including construction and the use of heavy equipment. The revised Order deletes the requirement for site remediation, not because the Regional Board is any less committed to site remediation, but because the Regional Board concedes that it does not have enough information to order the named parties to undertake the remediation.

VIII. STATEMENT REGARDING SERVICE OF THE PETITION ON THE REGIONAL BOARD

A copy of the Petition is being sent to the Regional Board, to the attention of Pamela C. Creedon, Executive Officer.

IX. STATEMENT REGARDING ISSUES PRESENTED TO THE REGIONAL BOARD

The substantive issues and/or objections raised in this Petition were raised before the Regional Board, but the Regional Board either chose to ignore these issues and/or objections and/or improperly and erroneously considered them in its refusal to remove and/or dismiss Petitioner from the final Order.

X. REQUEST FOR STAY

A stay "shall be granted" if Petitioner alleges facts and produces proof consistent with three

requirements. Here Petitioner meets all three requirements, and a stay should be issued. (See 23 CCR section 2053.)

First, there will be substantial harm to Petitioner if a stay is not granted. The Order requires the preparation of reports by July 26, 2010. Petitioner is not qualified to prepare the reports specified in the Order. (See Declaration of Robert Leal, attached hereto as Exhibit I.) Consultants would have to be hired to prepare the reports. (*Id.*) The consultants would require payment regardless of the outcome of this petition. (*Id.*) Petitioner believes that the cost of hiring consultants to prepare the reports identified in the Order is significant. (*Id.*) No other party identified in the Order has expressed to Petitioner any willingness to pay for the reports required by the Order. (*Id.*) The Regional Board has not offered to reimburse Petitioner for his expenses if he prevails, and Petitiioner does not believe the Regional Board will reimburse him. (*Id.*) Because the Order requires the hiring of consultants at significant cost, and because the Regional Board cannot be expected to reimburse Petitioner for the costs he incurs, Petitioner will be significantly harmed if he is required to comply with the Order before his petition is considered.

Second, there will be no substantial harm to other interested persons or to the public interest if a stay is granted. Petitioner has consistently objected to the order. (*Id.*) None of the other persons named in the order should expect Petitioner to proceed without the filing of a petition. (*Id.*) None of the other persons named in the order has informed Petitioner of any willingness to proceed with the order. (*Id.*) Petitioner expects the other parties who have appeared to file petitions. (*Id.*) As a result, a stay would not interfere with the expectations of any other interested party or otherwise harm any other interested party.

The public interest will not be harmed because a stay would merely maintain the status quo. Regional Board staff have concluded that the mining waste piles have been on the property for more than 100 years. (¶¶ 3 and 7 of Order.) The Regional Board has been working on the issues identified in the Order for more than fifteen years. Evidence submitted during the proceedings before the Regional Board established that Regional Board staff first visited the property in the early 1990s,

and did not identify any imminent threat at that time. (See Exhibits B, C, D, and E.)

Evidence presented by Petitioner established that the concentrations of mercury in the waste piles onsite are within natural background levels, and are too low to cause violations of ambient water quality standards. (See Exhibit E.) Because the site cannot cause a violation of water quality standards, there is no pressing need for any action on the property. The public interest will not be harmed.

Finally, there are substantial questions of fact and law regarding the disputed action. Petitioner has asserted that the Regional Board has acted beyond its statutory authority, contrary to black-letter law, and even in violation of the United States Constitution. This Order goes beyond any previous order, or any State Board order, identified by Regional Board staff. The issues raised in this proceeding are novel and should be resolved before Petitioner is required to comply with the Order.

XI. CONCLUSION

For all the forgoing reasons, Petitioner respectfully requests that the State Board review the Order and grant the relief as set forth above.

Petitioner further requests stay of the Order as to Petitioner and a hearing. Petitioner reserves the right to file a Supplemental Statement of Points and Authorities, including references to the complete administrative record, which is not yet available. Petitioner also reserves the right to supplement its request for a hearing to consider testimony, other evidence and argument.

Respectfully submitted,

DATED: June 28, 2010

THE COSTA LAW FIRM

By: _____

DANIEL P. COSTA
Attorneys for Petitioner
ROBERT LEAL

for LAWRENCE S. BAZEL
BRISCOE IVESTER & BAZEL LLP
Attorneys for Petitioner
ROBERT LEAL

PROOF OF SERVICE

COURT: State Water Resource Control Board
IN RE: Robert Leal
PETITION NO.:

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; I am employed by The Costa Law Firm, 2489 Sunrise Blvd., Ste. A, Gold River, California 95670.

I am familiar with the regular mail collection and processing practice of said business, and in the ordinary course of business the mail is deposited with the United States Postal Service that same day.

On this date, I served the foregoing document described as:

PETITION FOR REVIEW; REQUEST FOR STAY

on all parties in said action as addressed below by causing a true copy thereof to be:

[ ] Telecopied Via Facsimile.
[XX] Placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail.
[ ] Delivered By Hand.
[ ] Sent Via Overnight Delivery. (UPS)

TO ALL PARTIES LISTED ON THE ATTACHED ADDRESS LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 28, 2010, at Sacramento, California.

Jackie Long-Worley

Jackie Long-Worley

Address List
Wide Awake Mine

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Merced General Construction, Inc. Kevin Garcia, President 2370 West Cleveland Ave., PMB #123 Madera, CA 93637	NBC Leasing, Inc. Attention: Tom Nevis 319 Teegarden Avenue Yuba City, CA 95991

EXHIBIT A

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

TECHNICAL AND MONITORING REPORT ORDER R5-2010-0049
FOR
HOMESTAKE MINING COMPANY, EMMA G. TREBILCOTT TRUST,
ROBERT LEAL, NBC LEASING, INC.,
CAL SIERRA PROPERTIES, ROY WHITEAKER AND GLADYS WHITEAKER, DAVID G. BROWN, ROY TATE, AND MERCED GENERAL CONSTRUCTION

THE WIDE AWAKE MERCURY MINE
COLUSA COUNTY

This Order is issued to Homestake Mining Company, Emma G. Trebilcott Trust, Robert Leal, NBC Leasing, Inc., Cal Sierra Properties, Roy Whiteaker and Gladys Whiteaker, David G. Brown, Roy Tate, and Merced General Construction (hereafter collectively referred to as Dischargers) based on provisions of California Water Code (CWC) section 13267, which authorizes the Central Valley Water Quality Control Board (Central Valley Water Board or Board) to require the submittal of technical and monitoring reports.

The Central Valley Water Board finds, with respect to the Dischargers' acts or failure to act, the following:

1. The Wide Awake Mine (hereafter "Mine") is an inactive mercury mine with mining waste that includes in part, mine cuts, waste rock, and tailings that erode, or threaten to erode, into a Sulphur Creek tributary during storm runoff conditions. These wastes have eroded into drainage swales, ditches, and a tributary to Sulphur Creek, which is tributary to Cache Creek. The Mine has discharged and continues to discharge or threatens to discharge mining waste into waters of the state. These discharges have affected water quality, and continuing erosion of mining waste into Sulphur Creek will further affect water quality. .

2. The Mine is located in the Sulphur Creek Mining District (District) of Colusa County, about one mile southwest of the Wilber Springs resort and about 26 miles southwest of Williams. The 100-acre property is described by Assessor's Parcel Numbers 018-200-010-000, 018-200-11-000, and 018-200-12-000 in Sections 28 and 29, Township 14 North, Range 5 West, Mount Diablo Base and Meridian (MDBM), as shown in Attachment A, a part of this Order.

3. Mining waste has been discharged at the Mine since mining activities began in the 1870s. Mining waste has been discharged onto ground surface where it has eroded into Sulphur Creek, resulting in elevated concentrations of metals within the creek. Mining waste discharged onto ground surface has not been evaluated for its potential impact to ground water. The Dischargers either own, lease or operate, or have owned, leased, or operated the mining site where the Mine is located and where mining waste has been discharged. In its current condition, mining waste is causing or threatens to cause a discharge of pollutants to waters of the state.

4. The Central Valley Water Board's *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, Fourth Edition* (hereafter Basin Plan) states: "By 6 February 2009, the Regional Water Board shall adopt cleanup and abatement orders or take other

Ex "A"

appropriate actions to control discharges from the inactive mines (Table IV-6.4) in the Cache Creek watershed." Basin Plan p. IV-33.05. Mercury levels are already above applicable objectives in Sulphur Creek and Cache Creek, which constitutes a condition of pollution or nuisance.

5. The Prosecution Team conducted a title review of property records from the Colusa County Recorders Office. The parties named in this Order as Dischargers are known to presently exist or have a viable successor. The basis of liability for each Discharger is addressed below under Dischargers' Liability.

6. This Order may be revised to include additional Dischargers as they become known, and may include additional current or former owners, leaseholders, and operators.

Mining History

7. Mercury was discovered in the District in the 1870s, and the mine was developed at that time. The Mine was opened in the 1870s and may have been originally known as the Buckeye Mine, a name retained until the 1890s, at which time is was renamed the Wide Awake Mine. This information is described in the *CalFed-Cache Creek Study, Task 5C2: Final Report. Final Engineering Evaluation and Cost Analysis for the Sulphur Creek Mining District*, prepared by Tetra Tech EM Inc., September 2003 (hereafter CalFed Report).

8. Early production was from shallow workings and later, in the 1870s, a 500-foot vertical shaft was sunk with levels at 190, 290, and 390 feet below the ground surface. During shaft dewatering, water flowing to Blank Spring, a small local thermal spring 400 meters to the northwest of the Mine, was intersected. Efforts were made to drain the shaft by driving a drainage tunnel, but operations ceased shortly thereafter. Some ore from the nearby Empire mine was probably processed at the Mine during this period (CalFed Report).

9. The mine was worked extensively for several years in the 1870s with a reported output of approximately 1,800 flasks of mercury (one flask equals 76 pounds). Ore processing facilities in the 1870s included a Knox-Osborne 10-ton furnace and two small retorts. A small amount of production is reported during the 1890s and early 1900s (CalFed Report).

10. In the late 1890s and early 1900s, an effort was made to rehabilitate the vertical shaft and extensive surface facilities were constructed, including a 24-ton Scott furnace, enclosed hoist house, and bunkhouses (CalFed Report).

11. Some work was done in 1932 and 1943, and a moderate production was reported. The production in 1943 may have been in conjunction with mining and processing of ore from the nearby Manzanita mine to the north at a facility that was constructed on the Wide Awake property by the operators of the Manzanita mine (CalFed Report).

12. Total mercury production at the mine was probably not much greater than 1,800 flasks, most of which was produced in the 1870s (CalFed Report).

13. The Wide Awake Mine is intermediate in size and production relative to other mines in the Sulphur Creek Mining District. Remains of the Scott furnace and the rotary furnace with condenser coils remain largely intact on-site (CalFed Report).

Mining Waste Description and Characterization

14. Mining waste at the Mine includes mercury-bearing material from mine cuts, waste rock, tailings, waste around the perimeter of and within the processing facilities, and contaminated sediment within drainage swales, and ditches. Mining waste at the Mine erodes or threatens to erode into a Sulphur Creek tributary with stormwater runoff (CalFed Report).

15. The Mine contains about 20,000 cubic yards (CY) of processed tailings spread over an area of approximately 1.25 acres. An estimated 8,000 CY of waste rock is immediately adjacent to and within the tributary to Sulphur Creek. Another waste rock dump exposed in the eastern stream bank below the rotary furnace may contain up to 11,000 CY. An estimated 400 kilograms (kg) of mercury remains at the Mine, almost entirely within the mixed calcine (tailings) and waste piles (CalFed Report).

16. In 2002, waste extraction tests were conducted on mining waste. The results exceeded water quality objectives for the metals antimony, arsenic, chromium, mercury, and nickel. Maximum concentrations detected were: antimony - 107 micrograms per liter (ug/L), arsenic - 24.6 ug/L, chromium - 33.3 ug/L, mercury - 21 ug/L, and nickel - 102 ug/L. The potential for water-rock interaction to mobilize mercury from tailings is thought to be minimal based on analysis of waste extraction test (WET) leachates. However, water-rock interaction likely mobilizes mercury based on detection of mercury in a WET leachate sample from waste rock approximately 250 feet downstream from the 1940s furnace (CalFed Report). Complete characterization of the soil and mining waste at the site has not been performed.

17. The Mine waste rock and tailings are susceptible to erosion from uncontrolled stormwater runoff. Surface water runoff transports mercury-laden sediment into a tributary to Sulphur Creek, which is tributary to Cache Creek. Approximately 8 tons/year of sediment from the Mine is estimated to erode from mining waste located immediately adjacent to and within the tributary to Sulphur Creek. The estimated mercury lode from this Mine is 0.02 to 0.44 kg/yr or 2.4% of the total mine related mercury lode of 4.4 to 18.6 kg/yr to Sulphur Creek. It is estimated that the Mine contributes 1.53% of the mine related mercury lode from the District (CalFed Report).

18. Mercury concentrations detected in mining waste at the Mine range from 5.0 to 1,040milligrams per kilogram (mg/kg). Site background concentrations range from 2.37 to 90 mg/kg (CalFed Report).

19. Aqueous mercury concentrations in Sulphur Creek are among the highest in the Cache Creek watershed, and remain elevated during non-peak flow periods. Active hydrothermal springs constantly discharge into Sulphur Creek, with mercury concentrations ranging from 700 to 61,000 nanograms per liter (ng/L) (CalFed Report).

20. Particulate bound mercury in Sulphur Creek comes mostly from sediments and mercury-bearing mine waste mobilized into the creek during storms. All the mines together are estimated to contribute about 78% of the total mercury load. The Wide Awake Mine sub watershed is estimated to contribute about 7 % of the total mercury load. Similar to total and dissolved concentrations, methyl mercury concentrations in Sulphur Creek are among the highest reported for the Cache Creek watershed. Methyl mercury concentrations were as high as 20.64 ng/L in Sulphur Creek above the confluence with Bear Creek. (*Sulphur Creek TMDL for Mercury, Final Staff Report,* January 2007.[1]).

21. Mercury is a toxic substance, which can cause damage to the brain, kidneys, and to a developing fetus. Young children are particularly sensitive to mercury exposure. Methyl mercury, the organic form of mercury that has entered the biological food chain, is of particular concern, as it accumulates in fish tissue and in wildlife and people that eat the fish. Mine waste present at this Mine may also pose a threat to human health due to exposure (dermal, ingestion, and inhalation) through recreational activities (hiking, camping, fishing, and hunting) or work at the site.

Regulatory Considerations

22. Section 303(d) of the Federal Clean Water Act requires states to identify waters not attaining water quality standards (referred to as the 303(d) list). Since 1990, Sulphur Creek has been identified by the Central Valley Water Board as an impaired water body because of high aqueous concentrations of mercury.

23. The Basin Plan designates beneficial uses of the waters of the state, establishes Water Quality Objectives (WQOs) to protect these uses, and establishes implementation policies to achieve WQOs.

24. Studies were conducted that demonstrated that the municipal and domestic supply (MUN) beneficial use and the human consumption of aquatic organisms beneficial use did not exist and could not be attained in Sulphur Creek from Schoolhouse Canyon to the mouth, due to natural sources of dissolved solids and mercury. The Central Valley Water Board, in Resolution R5-2007-0021, adopted a basin plan amendment that de-designated these uses in Sulphur Creek from Schoolhouse Canyon to the mouth. The remaining beneficial uses for Sulphur Creek, a tributary of Cache Creek, are: agricultural supply; industrial service supply; industrial process supply; water contact recreation and non-contact water recreation; warm freshwater habitat; cold fresh water habitat; spawning, reproduction, and/or early development; and wildlife habitat.

25. The beneficial uses of underlying groundwater, as stated in the Basin Plan, are municipal and domestic supply, agricultural supply, industrial service supply, and industrial process supply.

[1] The report is available at http://www.swrcb.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/sulphur_creek_hg/sulphur_creek_tmdl.pdf

26. The Central Valley Water Board adopted site-specific water quality objectives for Sulphur Creek in Resolution R5-2007-0021. The WQOs now listed in the Basin Plan for Sulphur Creek state that waters shall be maintained free of mercury from anthropogenic sources such that beneficial uses are not adversely affected. During low flow conditions, defined as flows less than 3 cfs, the instantaneous maximum total mercury concentration shall not exceed 1,800 ng/L. During high flow conditions, defined as flows greater than 3 cfs, the instantaneous maximum ratio of mercury to total suspended solids shall not exceed 35 mg/kg. Both objectives apply at the mouth of Sulphur Creek. Exceedances of the water quality objective in Sulphur Creek during high flow events are documented in Appendix C (page 24) of the *Staff Report for the Amendment to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins to Determine Certain Beneficial Uses are Not Applicable in and Establish Water Quality Objectives for Sulphur Creek*[2] dated March 2007 which is part of the administrative record of this Order.

27. Sulphur Creek is tributary to Bear Creek, which is tributary to Cache Creek. Beneficial uses of Bear and Cache Creeks are municipal and domestic supply (MUN), agriculture – irrigation and stock watering, contact and non-contact recreation, industrial process and service supply, warm freshwater habitat, spawning – warm and cold, wildlife habitat, cold freshwater habitat, and commercial and sport fishing. Cache Creek is impaired for mercury and therefore has no assimilative capacity. Any discharges of mercury or mercury-laden sediments that reach Cache Creek therefore threaten to cause or contribute to a condition of pollution or nuisance. Cache Creek drains to the Cache Creek Settling Basin, which discharges to the Yolo Bypass and flows into the Sacramento-San Joaquin Delta Estuary. Data documenting exceedances of water quality objectives in Cache and Bear Creeks are found in Table 3.2 (page 9) of the October 2005 staff report entitled *Amendments to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control of Mercury in Cache Creek, Bear Creek, Sulfur Creek, and Harley Gulch*, which is part of the administrative record of this Order.[3]

28. The Cache Creek Watershed Mercury Program, included in the Basin Plan, requires responsible parties to develop plans to reduce existing loads of mercury from mining or other anthropogenic activities by 95% in the Cache Creek watershed (i.e., Cache Creek and its tributaries). The Basin Plan, Chapter IV, page 33.05 states that,

> Responsible parties shall develop and submit for Executive Officer approval plans, including a time schedule, to reduce loads of mercury from mining or other anthropogenic activities by 95% of existing loads consistent with State Water Resources Control Board Resolution 92-49. The goal of the cleanup is to restore the mines to premining conditions with respect to the discharge of mercury. Mercury and methylmercury loads produced by interaction of thermal springs with mine wastes from the Turkey Run and Elgin mines are considered to be anthropogenic loading. The responsible parties shall be deemed in compliance with this requirement if cleanup actions

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[2] This report is available at http://www.swrcb.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/sulphur_creek_hg/sulphur_creek_staff_final.pdf

[3] This report is available at http://www.swrcb.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/cache_sulphur_creek/cache_crk_hg_final_rpt_oct2005.pdf

and maintenance activities are conducted in accordance with the approved plans. Cleanup actions at the mines shall be completed by 2011.

29. The Basin Plan, Chapter IV, page 33.05 states that,

> The Sulphur Creek streambed and flood plain directly below the Central, Cherry Hill, Empire, Manzanita, West End and Wide Awake Mines contain mine waste. After mine cleanup has been initiated, the Dischargers shall develop and submit for Executive Officer approval a cleanup and abatement plan to reduce anthropogenic mercury loading in the creek.

30. Under CWC section 13050, subdivision (q)(1), "mining waste" means all solid, semisolid, and liquid waste materials from the extraction, beneficiation, and processing of ores and minerals. Mining waste includes, but is not limited to, soil, waste rock, and overburden, as defined in Public Resources Code section 2732, and tailings, slag, and other processed waste materials...." The constituents listed in Findings No.**Error! Reference source not found.** and **Error! Reference source not found.** are mining wastes as defined in CWC section 13050, subdivision (q) (1).

31. Because the site contains mining waste as described in CWC sections 13050, closure of Mining Unit(s) must comply with the requirements of California Code of Regulations, title 27, sections 22470 through 22510 and with such provisions of the other portions of California Code of Regulations, title 27 that are specifically referenced in that article.

32. Affecting the beneficial uses of waters of the state by exceeding applicable WQOs constitutes a condition of pollution as defined in CWC section 13050, subdivision (*l*).

33. Under CWC section 13050, subdivision (m) a condition that occurs as a result of disposal of wastes, is injurious to health, or is indecent or offensive to the senses, or is an obstruction to the free use of property, and affects at the same time any considerable number of persons, is a nuisance.

34. Mine waste has been discharged or deposited where it has discharged to waters of the state and has created, and continues to threaten to create, a condition of pollution or nuisance.

35. CWC section 13304(a) states that:

> Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a Regional Water Board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the Regional Water Board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts. A cleanup and abatement order issued by the state board or a Regional Water Board may require the provision of, or payment for, uninterrupted replacement water service, which may include wellhead treatment, to each affected public water supplier or private well owner. Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to

comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant.

36. The State Water Resources Control Board (State Board) has adopted Resolution No. 92-49, the *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under CWC Section 13304*. This Resolution sets forth the policies and procedures to be used during an investigation or cleanup of a polluted site and requires that cleanup levels be consistent with State Board Resolution No. 68-16, the *Statement of Policy With Respect to Maintaining High Quality of Waters in California*. Resolution No. 92-49 and the Basin Plan establish cleanup levels to be achieved. Resolution No. 92-49 requires waste to be cleaned up to background, or if that is not reasonable, to an alternative level that is the most stringent level that is economically and technologically feasible in accordance with California Code of Regulations, title 23, section 2550.4. Any alternative cleanup level to background must: (1) be consistent with the maximum benefit to the people of the state; (2) not unreasonably affect present and anticipated beneficial use of such water; and (3) not result in water quality less than that prescribed in the Basin Plan and applicable Water Quality Control Plans and Policies of the State Board.

37. Chapter IV of the Basin Plan contains the *Policy for Investigation and Cleanup of Contaminated Sites*, which describes the Central Valley Water Board's policy for managing contaminated sites. This policy is based on CWC sections 13000 and 13304, California Code of Regulations, title 23, division 3, chapter 15; California Code of Regulations, title 23, division 2, subdivision 1; and State Water Board Resolution Nos. 68-16 and 92-49. The policy addresses site investigation, source removal or containment, information required to be submitted for consideration in establishing cleanup levels, and the basis for establishment of soil and groundwater cleanup levels.

38. The State Board's *Water Quality Enforcement Policy* states in part:

> At a minimum, cleanup levels must be sufficiently stringent to fully support beneficial uses, unless the Central Valley Water Board allows a containment zone. In the interim, and if restoration of background water quality cannot be achieved, the Order should require the discharger(s) to abate the effects of the discharge (Water Quality Enforcement Policy, p. 19).

39. CWC section 13267states that:

> (a) A regional board, in establishing or reviewing any water quality control plan or waste discharge requirements, or in connection with any action relating to any plan or requirement authorized by this division, may investigate the quality of any waters of the state within its region.
> (b) (1) In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from

the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.

40. Each Discharger named in this Order "has discharged, discharges, or is suspected of having discharged or discharging . . . waste" within the region of the Central Valley Water Board. The Dischargers own, lease, or operate, or have owned leased, or operated the mining sites subject to this Order. Additional findings establishing the liability of each Discharger pursuant to CWC section 13267 are set forth below in Findings 53-62.

41. The technical reports required by this Order are necessary to ensure the protection of the waters of the state, comply with the Basin Plan's requirement for responsible parties to develop plans to reduce existing loads of mercury from mining or other anthropogenic activities by 95% in the Cache Creek watershed (Basin Plan, Chapter IV, page 33.05, see Finding 28), to further characterize the location of mining wastes, to complete a conceptual site model for the eventual cleanup of the mining sites and determine what cleanup measures are necessary, and to provide additional information about suspected past or future discharges. While no specific cost for the required reports has been estimated, the need for cleanup is well established. (See, e.g., the Basin Plan's Cache Creek Watershed Mercury Program.) The technical or monitoring report is necessary to accomplish the cleanup. (See, State Water Board Resolution 92-49.) The investigation is as limited as possible, and is consistent with orders requiring investigation or cleanup at other sites.

42. The issuance of this Order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality Act (CEQA) (Pub. Resources Code, section 21000 et seq.), pursuant to California Code of Regulations, title 14, section 15321(a) (2). The implementation of this Order is also an action to assure the restoration of natural resources and/or the environment and is exempt from the provisions of the CEQA, in accordance with California Code of Regulations, title 14 sections 15307 and 15308. The implementation of this Order also constitutes basic data collection, research and/or resource evaluation activities which do not result in a serious or major disturbance to an environmental resource, and is exempt from the provisions of the CEQA, in accordance with California Code of Regulations, title 14 sections 15306.

Dischargers' Liability

43. The meaning of "discharge" under Porter-Cologne includes not only the initial introduction of waste into the environment, but also the continued migration and spread of the contamination, including the migration of waste from soil to water. (State Board Order WQ 86-2 [*Zoecon Corp.*]; State Board Order WQ 92-13 [*Wenwest, Inc., et al.*]; *see also* 26 Ops.Atty.Gen. 88, Opinion No. 55-116, [1955]). Waste piles at the mining sites have and continue to discharge, and threaten to discharge, mercury and other pollutants to surface waters as stated in Findings 14-21 above.

44. Owners, lessees, and operators of a property that is a source of passive discharge of pollutants are liable for the discharge even if they did not own, lease, or operate the property at the time of initial discharge of pollutants. (State Board Order WQ 86-2 [*Zoecon Corp.*]; State Board Order WQ 92-13 [*Wenwest, Inc., et al.*]; State Board Order WQ 89-8 [*Spitzer et al.*]). An owner, lessee, or operator has the ability to control the passive release of pollutants from the property. The Dischargers may have prevented mine materials and enriched mercury soil from entering surface waters through a number of measures including, but not limited to: relocating material piles away from waterways, placing barriers, such as grass covered berms, between mine materials and waterways, recontouring and revegetating material piles and areas of surface disturbance by mining activity to reduce erosion, redirecting storm runoff around material piles and areas of surface disturbance to reduce erosion, stabilizing of stream banks containing enriched mercury alluvium to minimize erosion during storm events. An owner, lessee, or operator may have knowledge of a passive discharge by notification in a deed or lease, even if the owner, lessee, or operator never observes the discharge. The mining claim was listed on county Assessor's Parcels for the mine property.

45. The Central Valley Water Board has the authority under Water Code section 13267 to require a technical report from any individual or entity "suspected" of having discharged or discharging waste. Each of the owner, leaseholder, or operator Dischargers is subject to the Central Valley Water Board's section 13267 authority because, based on evidence in the record, they have or had an ownership, tenancy, or operation interest in the mining sites during a time period when waste piles were discharging or are suspected of discharging mercury and other pollutants to surface waters.

46. "Evidence" for purposes of CWC section 13267 "means any relevant evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in a civil action" (CWC § 13267, subd. (e).) There is adequate evidence in this case that each Discharger had an ownership, leasehold, or operator interest in the property and to suspect that each Discharger discharged waste.

47. As established in Findings 14-21 mercury is mobilized by storm water runoff, slope failure, or water-rock interaction from mine waste. In addition, disturbed sediments can migrate across the property and be deposited where they are later discharged to waters of the state. Each of the Dischargers owned the property in question for at least twelve months. Although the Board did not consider rain data for each year at the Hearing, the Board takes official notice that there are no years on record during the relevant period of time when it did not rain at all.

48. The State Water Board has held that all dischargers are jointly and severally liable for the discharge of waste. (State Board Order WQ 90-2 [*Union Oil Company*]). At this stage, the Board has not determined the relative mercury contributions of various dischargers. Even if the Board was inclined to apportion responsibility, which it is not, apportionment would be premature at this time.

49. The State Water Board has determined that it is inappropriate to require certain dischargers to participate in a cleanup, even though the dischargers have some legal responsibility for cleanup. (*See*, State Water Board Order WQ 92-13 (*Wenwest*). In *Wenwest*, the State Board held that an interim owner of a property with passive discharge would be released from being named as a responsible party under the specific facts of that case including (1) that the discharger had only owned the property for a short period of time, (2) the ownership was for the limited purpose of conveyance to a transferee, (3) the ownership occurred at a time when there was limited understanding of the problems associated with the passive discharge, (4) the discharger did not conduct any activities which might have exacerbated the problem, (5) clean-up was already proceeding, and (6) there were several additional responsible parties. Several Dischargers named in this Order argue that they should not be liable for clean-up under the *Wenwest* factors. However, this Order is limited to site investigation. Even assuming the *Wenwest* factors apply to site investigations, the Board finds none of the named Dischargers satisfy the *Wenwest* factors because no clean-up is currently proceeding at the mine site and the Dischargers that caused the initial discharges during mining operations are no longer in existence and cannot be held liable for the investigation or clean-up.

50. In the context of clean-up orders (CWC section 13304), the Central Valley Water Board may find certain dischargers to be only secondarily liable for clean-up. (*See* State Board Order WQ 87-6 [*Prudential Ins. Co.*] and State Board Order WQ 86-18 [*Vallco Park, Ltd.*]). Even if the secondary liability concept can be applied in the section 13267 context, it is not appropriate here. The Central Valley Water Board considered whether any named Dischargers should be secondarily liable and has concluded that all Dischargers should be primarily liable. Here, the investigation and cleanup is not proceeding and the parties that actively engaged in the mining operations at the root of the ongoing discharge are no longer in existence. Accordingly, all named Dischargers to the Order stand on essentially the same footing and should be treated alike. (State Board Order WQ 93-9 [*Aluminum Company of America et al.*]

51. The Board considered whether interim landowners and lessees should be held liable for passive discharges to surface waters even though the specific discharges during the time of interim ownership may have in the intervening years left the Sulphur Creek/Cash Creek watersheds. The Board finds that such interim landowners are liable under this Order. As a preliminary matter, the migration of pollutants from soil in one area of the property to soil in another area, from where it may later be discharged into the surface waters, is a discharge for which an interim owner may be liable. Additionally, in accordance with *City of Modesto Redevelopment Agency v. Superior Court* ((2004) 119 Cal.App.4th 28), the Board may look to the law of nuisance to interpret liability in the context of a section 13304 clean-up order. California Civil Code section 3483, which codified the common law duty of successive owners to abate a continuing nuisance, states that every successive owner of property who neglects to abate a continuing nuisance created by a former owner is liable in the same manner as the one who first created it. In accordance with this principle, interim owners could have been named in a section 13304 order and it is even more appropriate to name them in this section 13267 Order where the Board need only establish that the interim owners are "suspected" of discharging waste.

52. Cal Sierra and Merced Construction asserted that the Order may be barred by the doctrine of laches. In order to prevail on a defense of laches in an administrative proceeding, the defendant must establish an unreasonable delay in bringing the action, "plus either acquiescence in the act about which the complainant complains or prejudice to the party asserting the equitable defense resulting from the delay." (*Chemical Specialties Manufacturers Assn., Inc. v. Deukmejian* (1991) 227 Cal.App.3d 663, 672). Here, the discharges being investigated are continuous and therefore there is no unreasonable delay in bringing an Order for investigation of the conditions of the ongoing discharge. Furthermore, the Board has been diligently working toward addressing the discharge of mercury in the Cache Creek watershed through several complex and time-intensive regulatory steps, including preparation of the Cal-Fed Report (see Findings 7-21) and two Basin Plan amendments (Findings 24-28). There is no evidence in the record that the Board acquiesced in the discharges, or that Cal Sierra or Merced Construction relied specifically on any inaction on the part of the Board in deciding to purchase, sell, or operate the mine property.

53. The property on which Wide Awake Mercury Mine was located has been identified as Assessor's Parcel Number 018-200-003-000 until 16 October 1995 and Assessor's Parcel Numbers 0180-200-010-000, 018-200-011-000, and 018-200-012-000 from 16 October 1995 to the present. The Dischargers named in this Order have owned or leased the relevant parcels as follows in Findings 55-62.

54. At least one Discharger named in this Order has argued that mining waste was not present on the specific parcel it owned. Evidence in the record indicates that all three parcels created after the 16 October 1995 split of Assessor's Parcel Number 0180-200-003-000 were part of the mine property, but the CalFed Report does not reference individual parcels. There is sufficient evidence before the Board to suspect that each Discharger owned property that discharged mine waste because each Discharger owned, leased, or operated a parcel that constituted part of the mine property. If the Board concludes, based on the technical reports required by this Order that a particular parcel was not a source of waste discharges, the affected Dischargers will have no further responsibility for clean-up. Similarly, affected Dischargers will not have further clean-up responsibility if the timing of waste discharges relative to property ownership or control was such the Discharger(s) did not cause or permit the discharge of waste.

55. EMMA G. TREBILCOTT TRUST: The Emma G. Trebilcott Trust (Trust) owned Assessor's Parcel Number 018-200-003-000 from 28 March 1988 to 5 December 1989. The property was placed in the Trust by court order following the death of Emma G. Trebilcott, the previous owner of the parcel. At its creation, the Trust did not assume any liabilities that arose during the lifetime of Ms. Trebilcott. Within two months, the Trust entered into a listing agreement with a realty company for sale of the property and held the property pending its eventual sale in December 1989, without developing or improving the property during its ownership. The Trust assets are now held by Wells Fargo Bank, NA, for the benefit of four charities. The Trust retained the mineral rights to the parcel following its sale, leasing the rights during its ownership of the parcel and through 20 May 1993 to Homestake Mining Company. It appears that the mineral rights have been retained by the Trust to date; however, liability under this Order is being imposed due to the Trust's ownership of the

parcel until its 5 December 1989 sale and not under its retention of the mineral rights because this Order only addresses surface discharges. The Trust, by taking title to the property where mining waste was present, assumed responsibility for appropriately managing the discharges from the waste. As these wastes were eroding or suspected of eroding into surface waters during the time that the Trust held title to the property, the Trust is a person who has discharged, discharges, or is suspected of having discharged or discharging wastes into waters of the state.

56. HOMESTAKE MINING COMPANY: Homestake Mining Company (Homestake) was a lessee of the mineral rights to Assessor's Parcel Number 018-200-003-000 from 20 July 1978 to 20 May 1993. Homestake was not an owner of the parcel during this time period and there is no evidence that Homestake operated any mine on the site. Homestake has provided evidence that its activity on the site was limited to mining exploration activity consisting primarily of seven drill pads of dimensions 30 by 50 feet or less, all of which were subsequently reclaimed, and that no road work took place under its lease. However, the lease provided that Homestake had exclusive possession of the property for mining purposes and the lease's scope included control of tailings and waste piles on the mining property. The owner reserved surface rights for livestock grazing and other agricultural uses only and water development incidental to such use. Under the terms of its lease, Homestake exercised control over the property and had the ability to prevent mine materials and enriched mercury soil from entering waterways. Homestake, by holding a leasehold interest giving it control over the property during a time when mining waste was present, assumed responsibility for managing the discharges from the waste. As these wastes were eroding or are suspected of eroding into surface waters during the time that Homestake held a leasehold interest in the property, Homestake is a person who has discharged, discharges, or is suspected of having discharged or discharging wastes into waters of the state.

57. ROBERT LEAL: Robert Leal owned the parcel on which the mine was located (variously numbered Assessor's Parcel Number 018-200-03-000 until 16 October 1995, and Assessor's Parcel Numbers 018-200-011-000 and 018-200-012-000 thereafter) from 28 February 1990 to 1 November 1995. Leal owned the mine property during this time period and leased it to another party not named in this order for grazing. Leal did not own the mineral rights to the property. Leal entered an easement agreement with Homestake for Homestake's access to the property. Leal, by taking title to the property where mining waste was present, assumed responsibility for managing the discharges from the waste. As these wastes were eroding or are suspected of eroding into surface waters during the time that Leal held title to the property, Leal is a person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state.

The Board finds that Leal should not be released from this Order under the *Wenwest* factors. In addition to the reasons laid out it Finding 49 (no clean-up is currently proceeding at the mine site and the Dischargers that caused the initial discharges during mining operations are no longer in existence), Leal's ownership extended over several years and was not for a short period of time and his ownership of the property was not for the limited purpose of conveyance to a transferee.

Leal has argued that this Order may constitute a "taking" of property without just compensation. A regulatory action may constitute a taking when it deprives a property owner of all economically beneficial use of that property. (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)). Leal does not currently own the mine property. This Order may impose certain costs on Leal, but does not deprive him of economically beneficial use of any property.

58. CAL SIERRA PROPERTIES, ROY WHITEAKER AND GLADYS WHITEAKER: Cal Sierra Properties (Cal Sierra) held an ownership interest in Assessor's Parcel Number 018-200-010-000 from 16 October 1995 to 10 September 1999 and Assessor's Parcel Numbers 018-200-011-000 and 018-200-012-000 from 1 November 1995 to approximately 1 January 2004. Cal Sierra did not own the mineral rights to those parcels. Cal Sierra, by taking title to the property where mining waste was present, assumed responsibility for managing the discharges from the waste. As these wastes were eroding or are suspected of eroding into surface waters during the time that Cal Sierra held title to the property, Cal Sierra is a person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state. Cal Sierra was a general partnership that has been dissolved. Roy and Gladys Whiteaker were general partners, and are therefore personally liable for Cal Sierra's obligations.

59. NBC LEASING, INC.: NBC Leasing, Inc. (NBC Leasing) held an ownership interest in Assessor's Parcel Number 018-200-003-000, upon which the mine was located, from 15 August 1990 to 16 October 1995. After that parcel was split into three, NBC Leasing continued to own Assessor's Parcel Number 018-200-010-000 until 7 March 1996 and has continued in its ownership of parcel numbers 018-200-011-000 and 018-200-012-000 to date. NBC Leasing did not and does not own the mineral rights to the parcels. NBC Leasing, by taking title to the property where mining waste was present, assumed responsibility for appropriately managing the discharges from the waste. As these wastes were eroding or are suspected of eroding and continue to erode into surface waters during the time that NBC Leasing held title and continues to hold title to the property, NBC Leasing is a person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state.

60. DAVID G. BROWN. David G. Brown is a current owner of Assessor's Parcel numbers 018-200-010-000, 018-200-011-000 and 018-200-012-000. Brown has had an ownership interest in parcel 018-200-010-000 since 10 September 1999 and in parcels 018-200-011-000 and 018-200-012-000 since approximately 1 January 2004. Brown does not own the mineral rights to the parcels. Brown, by taking title to the property where mining waste was present, assumed responsibility for appropriately managing the discharges from the waste. As these wastes were eroding or are suspected of eroding and continue to erode into surface waters during the time that Brown has held title to the property, Brown qualifies a person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state.

61. ROY TATE. Roy Tate is a current owner of Assessor's Parcel numbers 018-200-010-000, 018-200-011-000 and 018-200-012-000. Tate has owned parcel 018-200-010-000 since 10 September 2009 and parcels 018-200-011-000 and 018-200-012-000 since approximately 1 January 2004. Tate does not own the mineral rights to the parcel. Tate, by taking title to the property where mining waste was present, assumed responsibility for appropriately managing the discharges from the waste. As these wastes were eroding or are suspected of eroding and continue to erode into surface waters during the time that Tate has held title to the property, Tate is a person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state.

62. MERCED GENERAL CONSTRUCTION, INC: Merced General Construction, Inc. (Merced General) is a current owner of Assessor's Parcel number 018-200-010-000 and has owned the parcel since approximately 1 January 2005. Merced General does not own the mineral rights to the parcel. Merced General, by taking title to the property where mining waste was present, assumed responsibility for appropriately managing the discharges from the waste. As these wastes were eroding or were suspected of eroding and continue to erode into surface waters during the time that Merced General has held title to the property, Merced General is a person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state.

63. The Executive Officer may add additional responsible parties to this Order without bringing the matter to the Central Valley Water Board for a hearing, if the Executive Officer determines that additional parties are liable for investigation of the mine waste. The Executive Officer may remove Dischargers from this Order if the Executive Officer receives new evidence demonstrating that such Dischargers did not cause or permit the discharge of waste that could affect water quality. All Dischargers named in this Order and any responsible parties proposed to be added shall receive notice of, and shall have the opportunity to comment on, the addition or removal of responsible parties.

IT IS HEREBY ORDERED that, the Dischargers, and their agents, assigns and successors, in order to meet the provisions contained in Division 7 of the California Water Code and regulations, plans and policies adopted thereunder,:

1. Conduct all work in conformance with the Regional Board's Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (in particular the Policies and Plans listed within the Control Action Considerations portion of Chapter IV).

Waste Characterization

2. By **26 July 2010**, submit a *Mining Waste Characterization Work Plan* (hereafter *Characterization Plan)* for the Mine site. The Characterization Plan shall assess the nature and extent and location of mining waste discharged at the site and the potential threat to water quality and/or human health. The Characterization Plan shall describe the methods that will be used to establish background levels for soil, surface water, and ground water at the site, and the means and methods for determining the vertical and lateral extent of the mining waste.

The Characterization Plan shall also address slope stability of the site and assess the need for slope design and slope stability measures to minimize the transport of mining waste-laden soils to surface water and ephemeral streams. The Characterization Plan shall adopt the time schedule as described below in items 3 through 13 below for implementation of the proposed work.

3. Within **30 days** of staff concurrence with the Characterization Plan, but no later than **27 September 2010**, begin implementing the Characterization Plan in accordance with the approved time schedule, which shall become part of this Order.

4. By **27 January 2011**, submit a *Mining Waste Characterization Report* (hereafter *Characterization Report)* for the Mine. The Characterization Report shall include:

    a. A narrative summary of the field investigation;
    b. A section describing background soil concentrations, mining waste concentrations, and the vertical and lateral extent of the mining waste;
    c. Surface water and ground water sampling results;
    d. A section describing slope stability and erosion potential and recommendations for slope stabilization;
    e. An evaluation of risks to human health from site conditions, and;
    f. A map and description of the current or historic location of mining waste, including waste that has eroded or migrated over land to a location where it was, or could be, discharged to waters of the State;
    g. A work plan for additional investigation, if needed, as determined by staff. If no additional investigation is needed, this report shall be the Final Characterization Report.

5. By **27 January 2011**, submit a *Surface and Ground Water Monitoring Plan* (hereafter *Monitoring Plan)* for the Mine. The Monitoring Plan shall describe the methods and rationale that will be used to establish background levels for surface water and ground water at the site. The Monitoring Plan shall also address long-term monitoring necessary to confirm the effectiveness of the remedies.

Water Supply Well Survey

6. By **27 September 2010**, submit the results of a water supply well survey within one-half mile of the site and a sampling plan to sample any water supply well(s) threatened to be polluted by mining waste originating from the site. The sampling plan shall include specific actions and a commitment by the Dischargers to implement the sampling plans, including obtaining any necessary access agreements. If the Dischargers demonstrate that exceedances of water quality objectives in the water supply well survey discussed above are the result of naturally occurring hydrothermal sources, then the Dischargers may request a waiver of requirements No. 7 and 8 listed below.

7. Within **30 days** of staff concurrence with the water supply well sampling plan, the Dischargers shall implement the sampling plan and submit the sampling results in accordance with the approved time schedule, which shall become part of this Order.

8. Within **30 days** of staff notifying the Dischargers that an alternate water supply is necessary, submit a work plan and schedule to provide an in-kind replacement for any impacted water supply well. The Dischargers shall implement the work plan in accordance with an approved time schedule, which shall become part of this Order.

General Requirements

The Dischargers shall:

9. Pursuant to CWC section 13365, reimburse the Central Valley Water Board for reasonable costs associated with oversight of the investigation of the site. Within **30 days** of the effective date of this Order, the Dischargers shall provide the name and address where the invoices shall be sent. Failure to provide a name and address for invoices and/or failure to reimburse the Central Valley Water Board's oversight costs in a timely manner shall be considered a violation of this Order. If the Central Valley Water Board adopts Waste Discharge Requirements (WDRs), review of reports related to writing of the WDRs and all compliance measures thereafter would be subject to the fees required by issuance of the Order and the reimbursement under this requirement would no longer apply.

10. Submit all reports with a cover letter signed by the Dischargers. In the cover letter, the Dischargers shall express their concurrence or non-concurrence with the contents of all reports and work plans.

11. Notify staff at least three working days prior to any onsite work, testing, or sampling that pertains to environmental remediation and investigation and is not routine monitoring, maintenance, or inspection.

12. Obtain all local and state permits and access agreements necessary to fulfill the requirements of this Order prior to beginning work.

13. Continue any investigation, reporting or monitoring activities until such time as the Executive Officer determines that sufficient work has been accomplished to comply with this Order. The Executive Officer, with concurrence from the Prosecution Team, and after soliciting comments from the remaining named parties, may determine that a party named to this Order has satisfied or will satisfy their obligations under this Order by performing or agreeing to perform substantial work that results in a more complete understanding of the scope of the problems at the Site, consistent with the obligations imposed by this 13267 Order. After such a determination has been made, the Prosecution Team will be directed to compel the remaining named parties to fulfill the remaining obligations under this Order.

Investigation of Additional Responsible Parties

14. The Prosecution Team shall complete its investigation of other entities that are or may be responsible for investigation or cleanup of the Mine. This investigation shall include, without limitation, the Bureau of Land Management. The Prosecution Team may issue subpoenas, or may request the Executive Officer to issue orders under section 13267, as appropriate. This directive is without prejudice to any rights of any person to contest such subpoena(s)

or order(s). Any person may provide evidence relevant to liability (or lack thereof); whether or not that person is the subject of a subpoena or section 13267 order. The Prosecution Team shall report the results of its investigation to the Executive Officer, with a copy to all parties and interested persons, by 30 November 2010. The Executive Officer may extend this deadline.

Any person signing a document submitted under this Order must make the following certification:

> *"I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my knowledge and on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."*

In accordance with California Business and Professions Code sections 6735, 7835, and 7835.1, engineering and geologic evaluations and judgments must be performed by or under the direction of registered professionals competent and proficient in the fields pertinent to the required activities. All technical reports specified herein that contain work plans for, that describe the conduct of investigations and studies, or that contain technical conclusions and recommendations concerning engineering and geology must be prepared by or under the direction of appropriately qualified professional(s), even if not explicitly stated. Each technical report submitted by the Dischargers must contain the professional's signature and, where necessary, his stamp or seal.

The Executive Officer may extend the deadlines contained in this Order if the Dischargers demonstrate that unforeseeable contingencies have created delays, provided that the Dischargers continue to undertake all appropriate measures to meet the deadlines and make the extension request in advance of the expiration of the deadline. The Dischargers shall make any deadline extension request in writing prior to the compliance date. An extension may be denied in writing or granted by revision of this Order or by a letter from the Executive Officer. Any request for an extension not responded to in writing by the Board shall be deemed denied.

If, in the opinion of the Executive Officer, the Dischargers fail to comply with the provisions of this Order, the Executive Officer may issue a complaint for administrative civil liability. Failure to comply with this Order may result in the assessment of an Administrative Civil Liability of up to $1,000 per violation per day pursuant to the California Water Code section 13268. The Central Valley Water Board reserves its right to take any enforcement actions authorized by law.

Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Board to review the action in accordance with CWC section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day.

Copies of the law and regulations applicable to filing petitions may be found on the Internet at:
http://www.waterboards.ca.gov/public_notices/petitions/water_quality
or will be provided upon request.

I, Pamela Creedon, do hereby certify that the foregoing is a full, true, and correct copy of an Order issued by the Central Valley Water Board on 27 May 2010

PAMELA C. CREEDON, Executive Officer

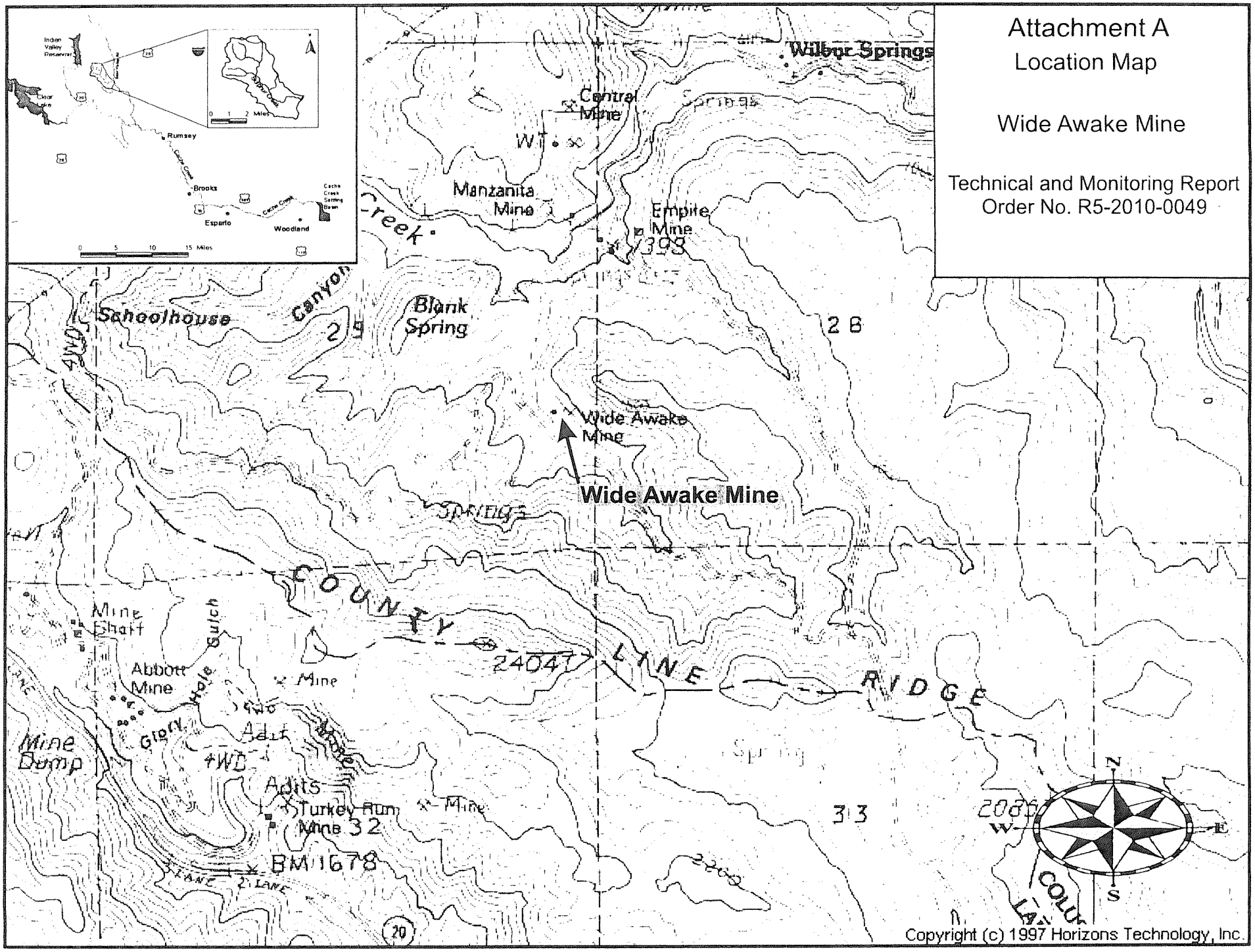
Attachment A
Location Map
Wide Awake Mine
Technical and Monitoring Report
Order No. R5-2010-0049
Wilbur Springs
Central Mine
Manzanita Mine
Empire Mine
Schoolhouse Canyon
Blank Spring
Wide Awake Mine
Wide Awake Mine
COUNTY
LINE
RIDGE
Abbott Mine
Mine Dump
Adits
Turkey Run Mine
BM 1678
Rumsey
Brooks
Esparto
Woodland
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EXHIBIT B

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1 July 2009

By E-Mail and Federal Express

California Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive #200
Rancho Cordova, California 95670-6114

Attn: Victor J. Izzo
Senior Engineering Geologist
Title 27 Permitting and Mining
vizzo@waterboards.ca.gov

Subject: Wide Awake Mine

Dear Mr. Izzo:

I am submitting these comments and request for an evidentiary hearing, on behalf of Mr. and Mrs. Robert and Jill Leal, in response to your letter of 10 June 2009 and the draft cleanup and abatement order transmitted by that letter.

I assume that Mr. Pulupa is the prosecuting lawyer for the Regional Board on this matter. Please let me know which lawyer is advising the Board. If there are communications between the prosecuting and advising lawyers, I would like to be informed about them and participate.

Thank you for this opportunity to comment, and please call or e-mail me with any questions.

Sincerely,

Lawrence S. Bazel

cc: P. Pulupa (by e-mail and Federal Express)

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Attorneys for
MR. AND MRS. ROBERT and JILL LEAL

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

CENTRAL VALLEY REGION

In the matter of:

DRAFT CLEANUP AND ABATEMENT ORDER

THE WIDE AWAKE MERCURY MINE

COLUSA COUNTY

COMMENTS ON DRAFT ORDER
AND REQUEST FOR EVIDENTIARY HEARING
SUBMITTED BY MR. AND MRS. ROBERT AND JILL LEAL

TABLE OF CONTENTS

1. INTRODUCTION

On June 11, 2009, staff of the California Regional Water Quality Control Board, Central Valley Region (the "Regional Board") e-mailed counsel for Mr. and Mrs. Robert and Jill Leal a revised draft, identified in a footer as "Rev 06-10-09", of a cleanup and abatement order for the Wide Awake Mine in Colusa County (the "Draft Order"). Mr. and Mrs. Robert and Jill Leal are named in that order, and are referred to as "Dischargers". (Draft Order at 1, unnumbered heading, and 2, ¶ 5.) Mr. and Mrs. Leal request that their names be removed from the order before it is issued in final.

Mr. and Mrs. Leal request an evidentiary hearing and the Constitutional protections of due process they are entitled to, as explained in sections 2 and 3 below.

Although Mr. and Mrs. Leal are identified in the Draft Order as a corporation, they are actually real living people, as explained in section 4.

Mrs. Leal should be removed from the order because she never owned the Site, as explained in section 5. She should also be removed for the same reasons that Mr. Leal should be removed.

Mr. Leal should be removed from the order for many reasons. In particular, he should be removed because Water Code § 13304 implements common-law principles of nuisance, and Mr. Leal is not liable under these principles, as explained in section 6. He is therefore not liable under § 13304, as explained in section 7. He should be removed from the order consistent with decisions of the State Water Resources Control Board ("State Board"), as explained in section 8, and should not be singled out for harsh treatment when other individuals are let go, as explained in section 9. If his is named he should be named as secondarily liable, as explained in section 10.

The Draft Letter appears to assume that the named parties are all "jointly" liable for any abatement work. But because they did not act together, there are only "severally" liable, meaning liable only for their share, as explained in section 11. Mr. Leal's share should be set at zero.

Water Code § 13304 allows the Regional Board, in some circumstances, to require dischargers to clean up *their* wastes. But Mr. Leal is not being order to clean up *his* waste; he is being ordered to clean up someone else's waste. The Draft Order therefore exceeds the Regional Board's authority under § 13304, as explained in section 12.

The Draft Order also cites Water Code § 13267 for authority, but Mr. Leal is not liable under § 13267, as explained in section 13.

The Draft Order is directed either at mercury *now* leaving the area where the Wide Awake Mine was, or at mercury waste brought out of the mine and placed on the surface in the nineteenth century. Either way, Mr. Leal is being unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. The Regional Board is therefore "taking" Mr. Leal's property (i.e. his money) in violation of the Constitution, as explained in section 14. The Regional Board should reimburse him for any costs incurred.

2. THE REGIONAL BOARD MUST PROVIDE DUE PROCESS AND AN EVIDENTIARY HEARING

The issuance of a cleanup and abatement order is a quasi-judicial action, and due process applies:

> In considering the applicability of due process principles, we must distinguish between actions that are legislative in character and actions that are adjudicatory. In the case of an administrative agency, the terms "quasi-legislative" and "quasi-judicial" are used to denote these differing types of action. . . .quasi-judicial acts involve the determination and application of facts peculiar to an individual case. Quasi-legislative acts are not subject to procedural due process requirements while those requirements apply to quasi-judicial acts regardless of the guise they may take. . . . .

(*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal. App. 4th 1160, 1188, citations omitted.) In *Beck Development*, the Department of Toxic Substances Control attempted "to restrict the use of Beck's property based upon facts peculiar to that property", which, the court concluded, was "unquestionably quasi-judicial in nature and must comport with requirements of due process." Here the determination of facts related to whether Mr. and Mrs. Leal are responsible for an alleged nuisance is unquestionably quasi-judicial.[1]

Because the issuance of the Draft Order is quasi-judicial, the provisions of 23 CCR § 648 et seq. apply. Consistent with these provisions, Mr. and Mrs. Leal request a formal evidentiary hearing and an opportunity to cross-examine witnesses.

They also request an opportunity to consider and respond to any evidence or argument submitted by Regional Board staff in response to these comments.

3. THE REGIONAL BOARD HAS THE BURDEN OF PROOF

Regional Board staff sometimes respond to evidence offered by private parties by saying that they are not convinced. In the *Beck Development* case, DTSC "insisted that Beck had failed to convince it that the property is nonhazardous." (*Beck Development*, 44 Cal.App.4th at 1206.) Here, it will not be enough for Regional Board staff to say that they are not convinced, because they have the burden of proof. They must submit sufficient evidence to prove that the Regional Board has authority to order Mr. and Mrs. Leal to conduct the cleanup and abatement activities required by the order.

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[1] Chief Counsel for the State Board has confirmed that cleanup and abatement orders are adjudicative. (Memo from M. Lauffer, Chief Counsel, State Water Resources Control Board (August 2, 2006), attached as Exhibit 1 at 2.)

4. MR. AND MRS. LEAL ARE PEOPLE, NOT CORPORATIONS

The Draft Order asserts that "The parties listed in Attachment B . . . are known landowners . . . of the Mine site". (Draft Order at 2, ¶ 5.) Attachment B incorrectly lists "Robert and Jill Leal" as "Owner", for specified intervals, of Parcels 3, 9, 11, and 12. In the last column of Attachment B, which asks whether the owner is a "State Registered Corporation", the answers given are "Yes—current agent" for Parcel 3, "Yes" for Parcel 9, and "Yes—active" for Parcels 11 and 12. These answers are all wrong, because Mr. and Mrs. Leal are not a corporation. They are individual people.

5. MRS. LEAL NEVER OWNED ANY INTEREST IN THE PROPERTY

A person "cannot be held liable for the defective or dangerous condition of property which it did not own, possess, or control." (*Preston v. Goldman* (1986) 42 Cal. 3d 108, 119, quoting *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 134.) Mrs. Leal does not own, possess, or control any of the property at issue, and never has. She therefore cannot be held liable for any condition on that property, and her name should be removed from the Draft Order.

Numbering of the parcels involving the "Wide Awake Mercury Mine Property" has changed over the years. According to Attachment B to the Draft Order, the mine property was originally part of assessor parcel number 018-200-003-000 ("Parcel 3").[2] In May 1993 Parcel 3 was split into smaller parcels, and parcel 018-200-009-000 ("Parcel 9") became what Attachment B refers to as the "Mine Property" (the "Site"). In 1995 Parcel 9 was split into three smaller parcels, 018-200-010-000 ("Parcel 10"), 018-200-011-000 ("Parcel 11"), and 018-200-012-000 ("Parcel 12"). A figure showing Parcels 10, 11, and 12 (i.e. the Site) is attached as Exhibit 2.

Attachment B incorrectly lists "Robert and Jill Leal" as "Owner", for specified intervals, of Parcels 3, 9, 11, and 12. Mrs. Leal never owned any interest in any of the parcels. Attached as Exhibit 3 is the deed by which Mr. Leal received his interest in part of Parcel 3. As you can see, the interest was granted to "ROBERT LEAL, a married man, as his sole and separate property". As a matter of law, when a man obtains property as his "separate" property, he alone owns the property, and his wife does not own any part of it. (Cal. Family Code § 752 ("[e]xcept as otherwise provided by statute, neither husband nor wife has any interest in the separate property of the other"); *Huber v. Huber* (1946) 27 Cal.2d 784, 791 ("[r]eal property purchased with the separate funds of the husband is his separate property").)

The Regional Board's files contain no deed showing any conveyance of any interest in the Site to Mrs. Leal. Mr. Leal never conveyed any part of the Site to Mrs. Leal. (Declaration of Jill Leal, attached as Exhibit 4, ¶ 2; Declaration of Robert Leal, attached as Exhibit 5, ¶ 2.) At no time did anyone convey any interest in the Site to Mrs. Leal. (Ex. 4, ¶ 2.) Mrs. Leal never owned any interest of any nature in the Site. Mrs. Leal, therefore, never had any ownership interest in the Site. Nor did she operate the Site or conduct operations of any nature on the Site. (*Id.*)

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[2] But see footnote 4 below.

The Draft Order is therefore wrong when it asserts that "[a]ll of the parties named in this order either owned the site at the time when a discharge of mining waste into the waters of the state took place, or operated the mine, thus facilitating the discharge of mining waste into waters of the state." (Draft Order at 2, ¶ 5.) Mrs. Leal neither owned the Site nor operated it.

Regional Board staff may have been misled by the deeds *from* Mrs. Leal to Mr. Leal. The Regional Board files include three deeds of this type, and they are attached as Exhibits 6, 7, and 8. These deeds were issued not because Mrs. Leal actually had any interest to transfer to Mr. Leal, but because title companies demand these deeds when a married man sells his property. (Declaration of Richard J. Wallace, attached as Exhibit 9, ¶¶ 4-6.) Title companies believe that deeds of this type protect them against the hypothetical possibility that the wife might have an interest that might not be transferred when the husband sells. They reason that *if* the wife has an interest, the deed will transfer it to the husband, who will then transfer it as part of the sale; and if the wife does not have an interest, she cannot object to signing a deed that gives away nothing. That is what happened here. (Ex. 4, ¶ 3; Ex. 5, ¶ 3.) .) In each case, the deed transferred nothing, because Mrs. Leal had never obtained any interest in any of the parcels from Mr. Leal or anyone else. (Ex 4, ¶ 2.)

In short, Mrs. Leal should be taken off the order because she never owned or operated the Site.

Mrs. Leal should also be taken off the order for the reasons her husband's name should be taken off, as described in sections 6-14 below.[3]

6. MR. LEAL IS NOT APPROPRIATELY NAMED IN THE ORDER BECAUSE HE IS NOT LIABLE UNDER THE COMMON LAW OF NUISANCE

In 2004, the California Court of Appeal concluded that Water Code § 13304 "must be construed 'in light of common law principles bearing upon the same subject'—here the subject of public nuisance". (*City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, 38, quoting *Leslie Salt Co. v. San Francisco Bay Conservation And Development Commission* (1984) 153 Cal. App. 3d 605, 619.) In *Leslie Salt*, the court "emphasized" that the act it was construing "represents the exercise by government of the traditional power to regulate public nuisances":

> It needs to be emphasized at this point that the [act] is the sort of environmental legislation that represents the exercise by government of the traditional power to regulate public nuisances. Such legislation constitutes but a sensitizing of and refinement of nuisance law. Where, as here, such legislation does not expressly purport to depart from or alter the common law, it will be

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[3] As explained in her declaration, Mrs. Leal lacks any knowledge about mining, mercury, and their consequences. Nothing put her on notice that the Site might be causing a nuisance. (Ex. 4, ¶¶ 4-9.)

> construed in light of common law principles bearing upon the same subject.

(*Leslie Salt* at 618-619, citations and quotation marks omitted.) Now that *City of Modesto* has established that § 13304 "must be construed in light of common law principles bearing upon . . . public nuisance", the Regional Board must consider these common-law principles. (*See City of Modesto* at 38, quotation marks omitted.) To the extent that decisions of the State Board are contrary to these common-law principles (see section 8 below), the State Board decisions are no longer good law.

Common-law principles establish that Mr. Leal is not liable for the nuisance identified in the Draft Order. The following sections explain that former landowners are generally not liable for dangerous conditions on the property, and that the exception for continuing public nuisances does not apply to Mr. Leal.

A. Former Landowners Are Generally Not Liable For Dangerous Conditions On The Land

In the *Goldman* case, the California Supreme Court concluded that former owners are generally not liable for dangerous conditions on property they no longer own, even if the danger was created by their own negligence:

> Should former owners, allegedly negligent in constructing an improvement on their property, be subject to liability for injuries sustained on that property long after they have relinquished all ownership and control? The Restatement Second of Torts proposes that *liability is terminated upon termination of ownership and control* except under specified exceptions, and we agree.

(*Preston v. Goldman* (1986) 42 Cal. 3d 108, 110, emphasis added.) After a full review of the Restatement and case law, the Supreme Court concluded that it "should not depart from the existing rules restricting liability of predecessor landowners." (*Id.* at 125.)

Here, Mr. Leal is a former part-owner of the Site.[4] Under the *Preston* rule, he is no longer liable for conditions on the property unless an exception applies.

The only exception that may be relevant here is found in Civil Code § 3483, which provides that "Every successive owner of property who *neglects* to abate a continuing nuisance upon, or in the use of, such property, created by the former owner, is liable therefor in the same manner as the one who first created it." (Civil Code § 3483, emphasis added.) The following

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[4] The Site, as referred to in the Draft Order, consists of Parcels 10, 11, and 12. (See section 5 above.) The deed with which Mr. Leal obtained his interest did not include what are now Parcels 11 and 12. (Ex. 9, ¶ 3.) There is no other evidence that Mr. Leal ever owned what is now Parcels 11 and 12. He therefore is not responsible for any discharges or activities related to that portion of the Site.

sections explain why Mr. Leal is not liable under this section. First, he did not receive notice of the nuisance, which is required for liability. Second, the alleged nuisance did not come into being until after Mr. Leal sold the property. Third, even assuming that there was a continuing nuisance, he did not "neglect" to abate it. Fourth, any mercury discharged during the early 1990s cannot be causing the alleged nuisance.

B. Mr. Leal Is Not Liable Because He Did Not Receive Notice Of The Nuisance

The California Supreme Court decided long ago that a person may not be held liable for a continuing nuisance without notice of the nuisance:

> The rule seems to be well established that a party who is not the original creator of a nuisance is entitled to notice that it is a nuisance, and a request must be made, that it may be abated before an action will lie for that purpose, unless it appear that he had knowledge of the hurtful character of the erection. This rule . . . is adopted for the reason that it would be a great hardship to hold a party responsible for consequences of which he may be ignorant.

(*Grigsby v. Clear Lake Water Works Co.* (1870) 40 Cal. 396, 407.) As discussed in section 8 below, State Board decisions have recognized that a person cannot be held liable without notice. Here, Mr. Leal did not receive notice "that it is a nuisance".

Mr. Leal is a farmer. (Ex. 5, ¶ 4.) He has never studied mining, and has no knowledge about mining issues. He does not have any specific knowledge about mercury, its occurrence or movement in soil or water, its chemistry or biochemistry, or its toxicology or risk to human health or the environment. (*Id.*)

Mr. Leal did not know that there was a former mine on the Site when he purchased his interest in the property. (*Id.*, ¶ 5.) He purchased a larger area of property (the "Property"), of which the Site was a relatively small portion, for investment purposes. He learned about the Property from Tom Nevis, who controlled Goshute Corporation. Mr. Nevis had arranged to purchase the property from Wells Fargo Bank, but needed money to complete to transaction. Mr. Leal provided that money, and in return received a half interest in the Property. The other half interest went to NBC Leasing, another corporation controlled by Mr. Nevis.

Mr. Leal never operated any of the Property, but rather leased it out to the Harter Land Company, which used it for grazing. (*Id.*, ¶ 6.)

Mr. Leal did not learn that there was a former mine on the Site until he was trying to sell his part interest to the U.S. Bureau of Land Management. (*Id.*, ¶ 7.) After Mr. Leal found out about the former mine, he went to look for it. He had assumed that it was a gold mine, and did not understand that it was a mercury mine. He was taken to the Site by Roy Whiteaker, who was the real estate broker trying to sell the Site, and who owns Cal Sierra Properties, which eventually bought the Site to use for hunting. During that visit, Mr. Leal never saw anything that looked like a mine. All he saw was a remnant of a brick structure. He did not see any piles of rock or other materials. He did not, and still does not, know what "tailings" are. Grass had grown over the area, and there was not much to see. He did not see anything that seemed like it

might contain mercury. He did not, and still would not, know what mercury looked like even if he saw it. Other that that one visit, he has never been to the Site. (*Id.*, ¶ 8.)

During the time Mr. Leal partly owned the Site he did not know that mercury might be leaving the Site. He did not know that anything on the Site might be causing a nuisance. No one ever informed him, during the time of his part ownership, that mercury might be leaving the Site or that anything on the Site might be causing a nuisance. He had absolutely no idea that he should be doing anything on the Site to protect public health or the environment. (*Id.*, ¶ 9.)

The condition of the Site, therefore, did not put Mr. Leal on notice of any nuisance, and no one informed him that there might be a nuisance.[5]

C. There Is No Evidence That The Site Was Causing A Nuisance In The Early 1990s—Or That It Is Causing A Nuisance Now

The nuisance alleged in the Draft Order is not the kind that could have been observed by Mr. Leal, or by anyone else, during the time he partly owned the Site. The Draft Order provides no evidence that the Site was causing a nuisance in the early 1990s—there is no evidence, in fact, that it is causing a nuisance *now*.

The Regional Board did not establish numerical criteria for mercury in Sulphur Creek until 2007. (Resolution No. R5-2007-0021.)[6] That resolution established two standards, one for low-flow conditions (1,800 ng/L of total mercury), and one for high-flow conditions (ratio of mercury to total suspended solids not to exceed 35 mg/kg). (*Id.*, Attachment 1 at 2.)

The Draft Order does not mention either of these criteria. The only reasonable conclusion is that there is no evidence that either of these criteria is being exceeded.

Instead, the Draft Order identifies four "limits" that are imported from agencies other than the Regional Board. (Draft Order at 5, ¶ 26.) The Draft Order asserts that these "numerical limits for [methylmercury, total mercury, and inorganic mercury] implement the Basin Plan objectives for mercury and methylmercury in Sulphur Creek." This statement is plainly incorrect, because the real Basin Plan objectives have no relationship to these four "limits". Worse still, the four "limits" plainly *do not apply* to Sulphur Creek.

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[5] Regional Board staff may be tempted argue that Mr. Leal is liable, even though he did not receive notice during the time of his ownership, because he has received notice *now*. But Mr. Leal does not *now* own any interest in the Site. If he is to be held liable for a nuisance resulting from his part ownership of the Site, he must have received notice while he was part owner. Anything else would violate *Grigsby*, which explained that notice is required because "it would be a great hardship to hold a party responsible for consequences of which he may be ignorant". (*Grigsby*, 40 Cal. at 407.)

[6] Resolution available at http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/resolutions/r5-2007-0021.pdf

These limits are intended to protect supplies of *drinking water* and the human consumption of fish.[7] But the Regional Board has made clear that natural conditions in Sulphur Creek preclude the use of the creek for drinking-water supply or fish consumption:

> Studies have been completed evaluating the attainability of the municipal and domestic supply (MUN) beneficial use and the human consumption of aquatic organisms, which concluded that these beneficial uses are not existing and cannot be attained in Sulphur Creek from Schoolhouse Canyon to the mouth due to natural sources of dissolved solids and mercury.

(Resolution R5-2007-0021 at 1, ¶ 8.)

The table in ¶ 26 should therefore be removed from the Draft Order. It imposes only requirements designed to protect drinking water and fish consumption, but Sulphur Creek is not used for drinking water or fish consumption. Nor is it protected for these uses, because natural conditions prevent their attainment.

So what *is* the nuisance being alleged in the Draft Order? Note that the former mine itself is not alleged to be causing a nuisance. It has apparently been sealed. The only concern identified in the Draft Order is the erosion of material from piles of mining wastes into Sulphur Creek. (*Id.* at 3-4, ¶¶ 14-20.) The Draft Order identifies, in particular, about 20,000 cubic yards of "tailings" and up to 8,000 cubic yards of "waste rock" at the Site.

According to the Draft Order, mercury eroded from the Site causes Sulfur Creek to exceed its water-quality objectives. The named parties have "caused or permitted waste to be discharged", and this waste has affected Sulphur Creek by "exceeding applicable" water-quality objectives, thereby creating "a condition of pollution or nuisance". (Draft Order at 6, ¶ 32.) The exceeded water-quality objectives, however, are those four numbers, discussed above, that cannot apply to Sulphur Creek. So this argument is plainly wrong.

Although the Draft Order argues that the four numbers in the table "implement the narrative objectives", the Draft Order never asserts that discharges from the Site cause violations of the narrative objectives themselves. (*See* Draft Order at 5, ¶ 26.) The relevant narrative objective, as it exists now, species that "All waters shall be maintained free of toxic substances in concentrations that produce detrimental physiological responses in human, plant, animal, or aquatic life." (Basin Plan[8] at III-8.01.) This narrative criterion does not require that Sulphur

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[7] The first "limit" in the table is identified as "a drinking water standard". The second is for "fish tissue". The third is for "human health protection", which considers exposure through both drinking water and fish consumption. The fourth is a "public health goal", which applies to drinking water. Public health goals are goals, not enforceable limits.

[8] The Water Quality Control Plan (Basin Plan) For The California Regional Water Quality Control Board Central Valley Region, Fourth Edition, Revised October 2007 (with Approved Amendments), The Sacramento River Basin And The San Joaquin River Basin (http://www.swrcb.ca.gov/rwqcb5/water_issues/basin_plans/sacsjr.pdf)

Creek be maintained free of all toxic substances, which of course would be impossible, but only free of toxic substances that are present "in concentrations that produce detrimental physiological responses". The Draft Order does not identify any "detrimental physiological responses", and does not assert that the Site causes any detrimental physiological responses in Sulphur Creek.

The reason, no doubt, is that Regional Board staff do not have evidence to prove a causal connection between *particulate* mercury from the mines, which is a relatively minor concern, and *methylmercury* in fish, which might produce the "detrimental physiological response" required for a violation of the narrative criterion. Any connection between the two would depend on complicated reactions that vary from site to site:

> Historic mining activities in the Cache Creek watershed have discharged and continue to discharge large volumes of inorganic mercury (termed total mercury) to creeks in the watershed. . . . .
>
> Total mercury in the creeks is converted to methylmercury by bacteria in the sediment. The concentration of methylmercury in fish tissue is directly related to the concentration of methylmercury in the water. The concentration of methylmercury in the water column is controlled in part by the concentration of total mercury in the sediment and the rate at which the total mercury is converted to methylmercury. The rate at which total mercury is converted to methylmercury is variable from site to site, with some sites (i.e., wetlands and marshes) having greatly enhanced rates of methylation.

(*Id.* at IV-33.04.) In Sulphur Creek fish do not appear to be present, and people do not drink the water. As a result, there does not appear to be anything that would demonstrate a "detrimental physiological response".

It is also difficult to blame the mines for the mercury in Sulphur Creek, because most of the mercury in the water comes from natural hot springs:

> Active hydrothermal springs constantly discharge into Sulphur Creek, with mercury concentrations ranging from 700 to 61,000 nanograms per liter . . . .
>
> . . . dissolved mercury comprises as much as 90 percent of the total mercury in Sulphur Creek. Dissolved mercury appears to be released by the active hydrothermal system, whereas particulate-bound mercury . . . comes from sediments and mercury-bearing mine waste mobilized into the creek during storms.

(Draft Order at 3-4, ¶¶ 19-20.) With so much mercury coming from natural sources, and because there appears to be nothing in the creek that might suffer a "detrimental physiological response", Regional Board staff cannot demonstrate that discharges from the Site cause the narrative

criterion to be violated. They cannot demonstrate a causal connection now, and they certainly cannot demonstrate a causal connection from the early 1990s, when there were no data.[9]

The Draft Order also asserts that "[m]ine waste at this Mine may also pose a threat to human health due to exposure (dermal, ingestion, and inhalation) through recreational activities (hiking, camping, fish, and hunting) or work at the site." (Draft Order at 4, ¶ 21.) But there is no evidence that the public uses the Site for hiking, camping, and hunting, which of course would be a trespass on private property. The Regional Board can safely assume that no one uses the Site for fishing, because there is no water on the Site. It is also a distance from Sulphur Creek, which in any case does not appear to maintain sport fish. Without considerable public use, there cannot be a *public* nuisance, as that term is used in the Civil Code, because a public nuisance "affects at the same time an entire community or neighborhood, or any considerable number of persons". (Civil Code § 3480.) The Water Code uses this same language to define "nuisance". (Water Code § 13050(m), (m)(2).) There must, in short, be evidence of considerable public use of the Site to establish an onsite nuisance that would be subject to a cleanup and abatement order. There is certainly no evidence of any public use of the Site in the early 1990s, and it therefore cannot have created an onsite nuisance then.

D. Mr. Leal Did Not "Neglect" To Abate A Continuing Nuisance

As noted in section 6.A above, Civil Code § 3483 holds a successor landowner who *neglects* to abate a continuing nuisance liable for that nuisance. The word "neglect" carries a connotation that the person was negligent or otherwise at fault. (*See Delaney v. Baker* (1999) 20 Cal. 4th 23, 34 (statute defines nursing-home neglect as a "negligent failure").) Here there is no evidence of any negligence or fault by Mr. Leal.

Mr. Leal never conducted any mining operations, or any other operations, on the Site. He leased the property out to someone who used it for grazing. Mr. Leal did not know the former mine existed until he tried to sell the Site. When he visited the Site he saw nothing to suggest that the Site was causing any sort of problem. No one ever notified him that the Site could be causing a nuisance. (Ex. 5, ¶ 9.)

In 2003, CalFed published a study on mercury loading from former mines in the area, and on measures needed to abate the loading. (CalFed Cache Creek Study, Task 5C2 (September 2003)[10].) The report concluded that an interim action was *not* needed: "Mitigation of mercury loading using an interim action is not warranted due to the anticipated small load reduction." (*Id.* at 9-32.) If interim action was not appropriate even in 2003, when sufficient data had been

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9 If the Site were so clearly causing a nuisance in 1995, then why didn't Regional Board staff put Mr. Leal on notice of the nuisance? By 1995, the Regional Board was working with a Cache Creek group, in a collaborative process, to determine "water quality goals" for mercury, understand "transport and fate of mercury", and "identify and evaluate source releases". (Webpage describing Delta Tributaries Mercury Council, attached as Exhibit 10, at 1-2.)

10 Report available at http://mercury.mlml.calstate.edu/wp-content/uploads/2008/12/finalrpt-task-5c2-final-scmd-eeca-sept-2003.pdf

collected to evaluate the issue, Mr. Leal can hardly have been at fault for not instituting interim action before any of the data were collected.

Because Mr. Leal did not "neglect" to abate a continuing nuisance during his ownership, he cannot be held liable now.

E. Any Mercury Discharged In The Early 1990s Is Long Gone

Mr. Leal can only be held liable for mercury discharged during the time of his partial ownership:

> Whether liability is based upon nuisance or negligence, the scope of that liability has been similarly measured: It extends to damage which is proximately or legally caused by the defendant's conduct, not to damage suffered as a proximate result of the independent intervening acts of others.

(*Martinez v. Pac. Bell* (1990) 225 Cal. App. 3d 1557, 1565.) Here there is no evidence that any mercury that left the Site in the early 1990s still remains in Sulphur Creek. The mercury present comes from the intervening acts of others, and Mr. Leal cannot be held liable for it.

The Draft Order explains that the named parties were chosen because they "either owned the site at the time when a discharge of mining waste into the waters of the state took place, or operate the mine, thus facilitating the discharge of mining waste into waters of the state." (Draft Order at 2, ¶ 5.) The discharge at issue takes place when stormwater carries mining waste into the creek:

> The Mine waste rock and tailings are susceptible to erosion from uncontrolled stormwater runoff. Surface water runoff transports mercury-laden sediment to a tributary to Sulphur Creek . . . . The estimate mercury [load] from this Mine is 0.02 to 0.44 kg/yr or 2.4% of the total mine related mercury [load] of 4.4 to 18.6 kg/yr to Sulphur Creek.

(*Id.*, ¶ 17.) Note that this percentage is only for "mine related mercury". Background loadings may be as high as 57 kilograms per year, which more than three times as much as all the mines in the area put together—according to the CalFed study from which the Draft Order takes it figures. (CalFed, Task 5C2, Table 3-9, page 2, attached as Ex. 11.) If background loadings were added in, the Site loading would be only about 0.6% of the entire mercury load to Sulphur Creek.

And all these numbers are small compared to the San Francisco Bay, which receives about 1,220 kilograms per year of mercury, of which 440 kilograms per year come from the

Central Valley. (Total Maximum Daily Load (TMDL) Proposed Basin Plan Amendment and Staff Report (2004) at 34, excerpt attached as Exhibit 12.[11])

Any waste discharge attributable to Mr. Leal would have taken place not less than 14 years ago, when he sold the Site. And where is that waste now? There is no reason to believe that the waste is still in Sulphur Creek, and nothing in the Draft Order suggests otherwise.

Only erodible waste—i.e. material small enough to be picked up by rainwater running off the property—could have been discharged to Sulphur Creek during the time Mr. Leal partly owned the Site. If it was not erodible, it would not have been discharged. Erodible material, by its nature, is carried downstream by storms. Mining wastes generated within the last 160 years (i.e. since 1849) are now moving through San Francisco Bay and out the Golden Gate. (*Id.*) Because 160 miles may be used as a rough upper estimate of the distance these wastes have traveled, it would be fair to conclude that these wastes have been moving at a rate of at least one mile per year. Up in the mountains, when the slopes are steeper, a better estimate would be several miles per year.

Wastes from Wide Awake Mine enter Sulphur Creek roughly one mile above the point where it flows into Bear Creek. (Sulphur Creek TMDL For Mercury, Final Staff Report (2007), Figs. 1.2 and 1.3, attached as Ex. 13.) If mines wastes in the area are moving several miles a year, then any wastes discharged 14 years ago would have long ago been flushed out of Sulphur Creek. As a result, there is no reason to believe that any mercury discharged from the Site during the time that Mr. Leal partly owned it still remains in the creek.

In short, there is no evidence that any mercury discharged from the Site before 1995, when Mr. Leal party owned it, remains in Sulphur Creek. If mercury discharged before 1995 is no longer in the creek, it cannot be causing a problem in the creek. The alleged nuisance is limited to conditions in the creek. Therefore, there is no evidence that any mercury that might be attributable to Mr. Leal is causing the alleged nuisance.

In summary, Mr. Leal should be removed from the Draft Order because § 13304 was intended to implement the common law of nuisance, and Mr. Leal is not liable under the common law of nuisance. Former landowners are generally not liable, and the exception for owners who neglect to abate a continuing nuisance does not apply because Mr. Leal did not receive notice, because there was no neglect, and because there is no evidence that any discharges from the Site from the early 1990s are causing the alleged nuisance.

7. MR. LEAL IS NOT SUBJECT TO WATER CODE § 13304

The Draft Order cites Water Code § 13304 for the authority to issue a cleanup and abatement order. (Draft Order at 1, introductory paragraph, and at 6, ¶ 33.) But Mr. Leal is not subject to § 13304, which applies to people who have "caused or permitted" waste to be discharged or deposited: .

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[11] Full report available at http://www.swrcb.ca.gov/rwqcb2/board_info/agendas/2004/september/09-15-04-10_appendix_c.pdf.

> Any person . . . who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste . . . .

(Water Code § 13304(a).) Mr. Leal is not subject to § 13304 because he did not cause or permit waste to be discharged.

As noted in section 6.A above, § 13304 "must be construed" consistent with "common law principles bearing upon . . . public nuisance". (*City of Modesto Redevelopment Agency*, 119 Cal.App.4th at 38.) The phrase "caused or permitted" can easily be construed consistent with common law. Those who "caused" the nuisance are those who were its actual cause-in-fact. Those who "permitted" the nuisance are those who neglect to abate it as required by Civil Code § 3483. (See section 6.D above.) To be liable as someone who "permitted" the discharge under § 13304, therefore, the person must have (1) received notice of the nuisance, and (2) neglected to act through negligence or other fault. (*Id.*)

The phrase "caused or permitted" cannot be given a broader meaning without violating the U.S. Constitution. In the *Heitzman* case, the California Supreme Court considered whether the phrase "causes or permits", as used in a statute prohibiting elder abuse, met "constitutional standards of certainty". (*People v. Heitzman* (1994) 9 Cal. 4th 189, 193.) The Supreme Court concluded that "the broad statutory language at issue here fails to provide fair notice" and that that prohibition on *permitting* elder abuse "would be unconstitutionally vague absent some judicial construction clarifying its uncertainties." (*Id.*)

Here § 13304 would not provide fair notice, and therefore would be unconstitutionally vague, if it were applied to past owners of property who had no notice during their ownership that their properties were causing a nuisance. If, however, § 13304 is interpreted consistent with common-law principles of public nuisance, then there is no constitutional infirmity.

Because Mr. Leal is not liable for the alleged nuisance under common-law principles, he is not a person whom § 13304 identifies as having "caused or permitted".

8. MR. LEAL IS NOT LIABLE UNDER STATE BOARD DECISIONS

Wenwest is the leading State Board decision on when former landowners may be held liable under § 13304. (*Petitions of Wenwest, Inc.*, Order No. WQ 92-13 (1992) 1992 Cal. ENV LEXIS 19.) *Wenwest* identified a three-part rule applicable to former owners:

> . . . we apply a three-part test to former owners: (1) did they have a significant ownership interest in the property at the time of the discharge?; (2) did they have knowledge of the activities which resulted in the discharge?; and (3) did they have the legal ability to prevent the discharge?

(*Id.* at *5.) When a former owner "passes" all three parts of the test, it is held liable.

Here Mr. Leal cannot pass the test because he cannot satisfy the second part. He did not have knowledge of the activities that resulted in the discharge. Because he did not receive notice, he is not liable under the common law. (See section 6 above.) He is also not liable under State Board precedent.

The *Wenwest* decision did not stop there, however. It considered the situation of Wendy's, who had owned the property for a short time but had not contributed to the contamination, and concluded that it was not appropriate to hold Wendy's liable:

> No order issued by this Board has held responsible for a cleanup a former landowner who had no part in the activity which resulted in the discharge of the waste and whose ownership interest did not cover the time during which that activity was taking place. . . . .
>
> In this case, the gasoline was already in the ground water and the tanks had been closed prior to the brief time Wendy's owned the site. They were told about the pollution problem . . . They took no steps to remedy the situation. On the other hand, they did nothing to make the situation any worse. Had a cleanup been ordered while Wendy's owned the site, it would have been proper to name them as a discharger. Under the facts as presented in this case, it is not.

(*Id.* at *6-7.) The State Board did not set out a clear test for exonerating Wendy's. Its conclusion depended "on a number of considerations", and list of nine items was presented, not all of which weighed in Wendy's favor. Two key factors emphasized Wendy's innocence:

> * Wendy's had nothing to do with the activity that caused the leaks. (In previous orders in which we have upheld naming prior owners, they have been involved in the activity which created the pollution problem.)
>
> * Wendy's never engaged in any cleanup or other activity on the site which may have exacerbated the problem.

(*Id.* at *7-8.) Wendy's had some knowledge of the contamination, but the State Board did not find the knowledge sufficient blameworthy to require liability:

> * While Wendy's had some knowledge of a pollution problem at the site, the focus at the time was on a single spill, not an on-going leak.
>
> * Wendy's purchased the site in 1984 at a time when leaking underground tanks were just being recognized as a general problem and before most of the underground tank legislation was enacted.

(*Id.* at *8.) Two other factors suggest equitable reasons for leniency:

* Wendy's purchased the site specifically for the purpose of conveying it to a franchisee.

* Wendy's owned the site for a very brief time.

(*Id.* at *7.) The final three factors seem to relate to the convenience of the State Board:

* The franchisee who bought the property from Wendy's is on the order.

* There are several other responsible parties who are properly named in the order.

* The cleanup is proceeding.

(*Id.* at *7-8.)[12] Note that one factor *not* included in the list is whether Wendy's continued discharging during its ownership. The State Board long ago decided that the natural movement of groundwater through the soil is a discharge. Wendy's therefore continued to "discharge", as the State Board has construed that term.

When these factors are applied to Mr. Leal, he should be found not liable. Once again, the key factor is his factual innocence. He had nothing to do with the activity that is causing the nuisance. Unlike Wendy's however, he had no knowledge that there might be a problem. He knows nothing about mining, did not purchase the property with the intent to obtain any benefit from the mine, and never owned any mineral rights at the Site. The seller and purchasers are on the order, and there are sufficient other parties to expect that the abatement will proceed without him.

In addition, Mr. Leal had received a memo prepared by Charles W. Whitcomb, the District Geologist of the U.S. Bureau of Land Management. (Attached as Exhibit 14.) Mr. Whitcomb, who clearly was an impartial expert in these matters, examined the Site and concluded that Site risks were not significant:

> The danger of there being large amounts of hazardous mercury at this site is probably minor. The waste rock from the mine and furnace on the mine dump would contain *little or no mercury.*

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[12] These last three factors appear to depend not on the duty or fault of the party, but on the convenience of the regulatory agency, and therefore appear inappropriate for the determination of liability. (*See People v. Heitzman*, 9 Cal. 4th at 206 ("whether or not the lack of statutory clarity has opened the door to arbitrary or discriminatory enforcement of the law" is part of inquiry into constitutionality of statute), 207 ("under the statute as broadly construed, officers and prosecutors might well be free to take their guidance not from any legislative mandate embodied in the statute, but rather, from their own notions").)

(Ex. 14, at 2, emphasis added.) Mr. Leal, who knows nothing about mining or the environmental consequences of mercury, can hardly be faulted for not taking action when an expert from the federal government inspected the Site and found nothing that would require action.

Mr. Leal should therefore be removed from the Draft Order.

9. MR. LEAL SHOULD NOT BE SINGLED OUT FOR HARSH TREATMENT

It is not fair to name Mr. Leal while letting others go. Tom Nevis, who sold him the Site and held the other half-interest in it, is not named in the Draft Order. Nor are his corporations, Goshute and NBC Leasing. Roy Whiteaker, who bought Mr. Leal's interest in the Site through Cal Sierra Properties, is also not named. If these individuals, who are no less responsible than Mr. Leal for any problem caused by the Site, are not sufficiently liable to be named, then neither is Mr. Leal.

The Draft Order does not even name the Ralph M. Parsons Company, which now does business as Parsons and is "an engineering and construction firm with revenues exceeding $3.4 billion in 2008". (http://www.parsons.com/about/default.asp.) Regional Board files include an assignment to Parsons of a lease dated January 28, 1965 and signed by Ms. Gibson and Ms. Trebilcott. This lease appears to refer to the Site, or to the mineral rights for the Site. Parsons would have understood, far better than Mr. Leal, about mercury at the Site.

For reasons of equity, therefore, Mr. Leal should not be named in the Draft Order.

10. IF MR. LEAL IS NAMED, HE SHOULD BE NAMED AS SECONDARILY LIABLE

In *Wenwest* the State Board concluded that Wenwest and the current owner of the property, Susan Rose, should be secondarily liable. It explained that secondary liability puts "the landowner is a position where it would have no obligations under the order unless and until the other parties defaulted on [theirs]." (*Id.* at *9.) In *Wenwest* the State Board concluded that Susan Rose and Wenwest should be secondarily liable because "While she is the current landowner, it is clear that she neither caused nor permitted the activity which led to the discharge", and because "Wenwest had nothing to do with the activity which caused the discharge". (*Id.* at *9-10.)

Here Mr. Leal had nothing to do with the mining activities that caused the discharge. If he is named, he should be secondarily liable.[13]

11. IF MR. LEAL IS LIABLE, HE IS SEVERALLY LIABLE

When several persons, acting independently, cause harm, each is "individually and separately liable for his proportionate share of the damage". (*Slater v. Pacific American Oil Co.* (1931) 212 Cal. 648, 655.) The concept that individuals are liable only for their share of the

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[13] This argument is made in the alternative, without waiving any other argument.

harm is known as "several" liability, as opposed to "joint" liability, in which any individual may be required to pay for all the damage caused.

Here Mr. Leal's proportionate share is zero, because there is no evidence that any mercury that entered the creek in the early 1990s still is there.

Here any obligation to abate a nuisance would arise from a party's understanding of the potential for nuisance. The only parties who would have understood the potential for nuisance are those who understood mercury mining, which would have been the mineral-rights owners and lessees, and the government: Homestake Mining, the Trebilcot Trust, Parsons, and the U.S. Bureau of Land Management.

12. THE DRAFT ORDER EXCEEDS THE AUTHORITY OF § 13304

Even assuming that Mr. Leal is liable, § 13304 limits what he can be ordered to do. Under § 13304, a person who has caused or permitted "waste to be discharged" can be ordered to "clean up *the waste* or abate *the effects of the waste* . . ." (Water Code § 13304(a), emphasis added.) Here Mr. Leal allegedly discharged mercury from the Site during the early 1990s. But the Draft Order does not order him to clean up *that* waste, nor does it order him to abate the effects of *that* waste. That waste, as explained above, is long gone. Instead, it requires him to *prevent additional waste* from being discharged from the property. (Draft Order at 9-10, ¶¶ 9-14 (requiring remediation of onsite wastes).) Mr. Leal is plainly not liable for waste that has not yet been discharged, and the Draft Order therefore exceeds the authority provided by § 13304.

To be sure, § 13304 also holds liable persons who caused or permitted "any waste to be . . . *deposited* where it is, or probably will be, discharged into the waters of the state". (Water Code § 13304(a), emphasis added.) But Mr. Leal did not deposit the tailings piles or waste rock at the Site. They were there when he bought it. Regional Board staff may argue that Mr. Leal "permitted" waste to be "deposited" when rain carried erodible material from the piles into drainage ditches at the Site. But this reading would threaten the constitutionality of § 13304, as described in section 7 above. In any case, there is no evidence of any deposits made into any ditches on the Site during the early 1990s. Any erodible materials that were carried into the drainage ditches in before 1995 would have been carried into the creek soon afterwards, and are long gone. (See section 6.E above.) As a result, there is no evidence that during the time that Mr. Leal partly owned the site there were any deposits of waste that is now, "or probably will be, discharged into the waters of the state". (Water Code § 13304(a).)[14]

Nor is there any evidence that discharges from the Site in the early 1990s caused groundwater contamination. Because groundwater in this area is so naturally high in mercury,

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[14] The Regional Board recognizes that it does not have sufficient evidence to require abatement of instream sediments. The Basin Plan concludes that "further assessments are needed", and notes that "Responsible Parties that could be required to conduct feasibility studies include the U.S. Bureau of Land Management (USBLM), State Lands Commission (SLC)[;] California Department of Fish and Game (CDFG); Yolo, Lake, and Colusa Counties, mine owners, and private landowners." (Basin Plan at IV-33.08.)

there is no reason to believe that any surface activity could have any significant effect. The Draft Order does not specifically refer to groundwater contamination. It argues, however, that "water-rock interaction likely mobilizes mercury based on detection of mercury in a WET leachate sample from waste rock . . . (CalFed Report)." (Draft Order at 3, ¶ 16.) But the CalFed report does not support this argument. On the contrary, it reaches the opposite conclusion and exonerates the Site from any concerns related to leachate:

> Mine waste at Wide Awake Mine was not found to leach mercury at a concentration [above regulatory requirements]; therefore, the waste is considered a Group C mine waste. A Group C mine waste does not require control of the generation and migration of leachate to surface water and groundwater. Therefore, implementation of the final mitigation action at Wide Awake Mine does not require control [of] generation and migration of leachate to the tributary to Sulphur Creek.

(CalFed Cache Creek Study, Task 5C2, at 9-32.) Note that this conclusion—that leachate levels are too low to be of concern—eliminates not only the question of groundwater contamination, but also the question of whether leachate from the mine wastes are contaminating Sulphur Creek.

The Draft Order exceeds the authority of § 13304 by ordering Mr. Leal to abate onsite waste when there is no evidence that he is responsible for any onsite waste that is being discharged or may be discharged to Sulphur Creek.

13. MR. LEAL IS NOT LIABLE UNDER § 13267

The Draft Order also cites as authority Water Code § 13267. (Draft Order at 1, unnumbered introductory paragraph, and at 7, ¶¶ 37-38.) This section authorizes the Regional Board to demand "technical or monitoring program reports":

> . . . the regional board may require that any person who has discharged . . . shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires.

(Water Code § 13267(b)(1).) This section, however, goes on to limit the Regional Board's authority to those reports whose burden bears a reasonable relationship to the benefits:

> The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports.

(*Id.*) The section also limits the Regional Board's authority by imposing conditions. The Regional Board must provide a written explanation and identify the evidence "requiring that person to provide the reports":

> In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the

> reports, and shall identify the evidence that supports requiring that person to provide the reports.

(*Id.*) Here the Draft Order makes only the most minimal attempt to satisfy these requirements. Here is the Draft Order's showing, in full:

> The technical reports required by this Order are necessary to ensure compliance with this Cleanup and Abatement Order, and to ensure the protection of the waters of the state. The Dischargers either own, have owned, operated, or have operated the mining site subject to this Order.

(Draft Order at 7, ¶ 38.) This showing is insufficient to impose the Draft Order's requirements on Mr. Leal.

To begin with, the Draft Order requires much more than technical reports. It requires actual cleanup and abatement. (Draft Order at 9-10, ¶¶ 9-14.) Nothing in § 13267 requires a former discharger to clean up and abate mining waste.

In any case, the Draft Order exceeds the authority of § 13267 because it imposes requirements on Mr. Leal unrelated to any discharge he may be responsible for. It should be obvious that § 13267 authorizes the Regional Board to require persons who have discharged to submit reports *related to their discharges*. The Regional Board can hardly contend that because Mr. Leal may have discharged in Colusa County he is therefore required to provide technical reports related to someone else's discharge in, for example, San Diego County. The Draft Order requests only reports related to existing conditions at the Site and at any water-supply wells within a half mile of the Site (of which there may be none). (Draft Order at 8-9, ¶¶ 2-8.) Because the reports are related only to existing conditions at the Site, not to any discharges that may have occurred during the early 1990s, § 13267 does not provide authority to require Mr. Leal to provide them.

The principal need for the requested reports, according to the Draft Order, is that they "are necessary to ensure compliance with this Cleanup and Abatement Order". (Draft Order at 7, ¶ 38.) In other words, the reports are necessary to support the abatement actions ordered under the authority of § 13304. But Mr. Leal is not subject to § 13304, and he should therefore not be subject to any reports requires in support of that section. (See section 7 above.) The burden on Mr. Leal greatly outweighs the benefit.

The remainder of the Draft Order's explanation does not satisfy the requirements of § 13267. In particular, it does not identify "the evidence that supports requiring that person to provide the reports". The Draft Order identifies only the status of the named persons as owners, operators, or former owners or operators. That is not enough. At the very least, the Draft Order should explain why someone who may have been associated with the property long ago should be required to provide information, unrelated to that ownership, now.

14. THE DRAFT ORDER IS A "TAKING" IN VIOLATION OF THE CONSTITUTION

The United States Constitution requires a public agency pay compensation when it "takes" private property for public use:

> "compensation is required only if considerations . . . suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." (*Yee v. Escondido* (1992) 502 U.S. 519, 522-523.)

(*Arcadia Development Company v. City of Morgan Hill* (2008) 169 Cal.App.4th 253, 265, parallel citation omitted.)

Here the Draft Order is directed either at mercury *now* leaving the area where the Wide Awake Mine was, or at mercury waste brought out of the mine and placed on the surface in the nineteenth century. More generally, it is part of a response to a problem caused by a combination of natural conditions and acts that took place, throughout large parts of the Central Valley, in the nineteenth century. As a result, the Draft Order unfairly singles out Mr. Leal, a former part owner of property who did nothing on the property and certainly never caused any problem, and requires him to pay costs that should properly be borne by the public as a whole. The Regional Board should therefore reimburse Mr. Leal for any costs he incurs as a result of the Draft Order and any final order.

15. CONCLUSION

Mrs. Jill Leal should be removed from the order because she never owned the property, and also for the reasons that Mr. Robert Leal should be removed.

Mr. Leal should be removed because he is not liable under common-law principles of nuisance (section 6); he is therefore not liable under § 13304 (section 7); removal is consistent with State Board decisions (section 8); he should not be singled out for harsh treatment (section 9); if named he should be only secondarily liable (section 10); he is only severally liable, and only for a share of zero (section 11); the Draft Order exceeds the authority of the Regional Board (section 12); he is not liable under § 13267 (section 13), and issuing the order would be a "taking" in violation of the Constitution (section 14).

Dated: July 1, 2009

BRISCOE IVESTER & BAZEL LLP

By: _____

Lawrence S. Bazel
Attorneys for MR. AND MRS. ROBERT AND JILL LEAL

Exhibit 1

Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

Office of Chief Counsel
1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 • FAX (916) 341-5199 • http://www.waterboards.ca.gov

Arnold Schwarzenegger
Governor

TO: [via e-mail and U.S. Mail]
Board Members
STATE WATER RESOURCES CONTROL BOARD AND
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARDS

FROM: Michael A.M. Lauffer
Chief Counsel
OFFICE OF CHIEF COUNSEL

DATE: August 2, 2006

SUBJECT: SUMMARY OF REGULATIONS GOVERNING ADJUDICATIVE PROCEEDINGS BEFORE THE CALIFORNIA WATER BOARDS

This memorandum outlines and reinforces some of the primary requirements that apply when the State Water Resources Control Board (State Water Board) and the nine California Regional Water Quality Control Boards conduct adjudicative proceedings. Adjudicative proceedings are the evidentiary hearings used to determine the facts by which a water board reaches a decision that determines the rights and duties of a particular person or persons. Adjudicative proceedings include, but are not limited to, enforcement actions and permit issuance.

Background

The California Water Boards perform a variety of functions. The boards set broad policy consistent with the laws passed by Congress and the Legislature. The boards also routinely determine the rights and duties of individual dischargers or even a class of dischargers. In this regard, the boards perform a judicial function. The judicial function manifests itself when the boards adopt permits and conditional waivers or take enforcement actions.

Different rules apply depending on the type of action pending before a water board. One of the distinctions between the two types of proceedings is the prohibition against ex parte communications. A prohibition on ex parte communications only applies to adjudicative proceedings.[1] Besides the ex parte communications prohibition, additional rules, procedures, and participant rights adhere in adjudicative proceedings. This memorandum outlines some of the more important procedural mechanisms associated with adjudicative proceedings.

[1] The Office of Chief Counsel addressed ex parte communications in a July 25, 2006 memorandum and questions and answers document.

Adjudicative Proceedings

What is an adjudicative proceeding?
Adjudicative proceedings are the evidentiary hearings used to determine the facts by which a water board reaches a decision that determines the rights and duties of a particular person or persons. Generally, this includes permitting and enforcement actions, but does not include planning and general regulatory functions such as Basin Plan amendments and Total Maximum Daily Loads.

Below is a partial list of common water board actions that are of an adjudicative nature:

- National Pollutant Discharge Elimination System (NPDES) permits;
- Waste discharge requirements (WDRs);
- Water right permits and requests for reconsideration;
- Orders conditionally waiving waste discharge requirements;
- Administrative civil liability (ACL) orders;
- Cease and desist orders;
- Cleanup and abatement orders;
- Water quality certification orders (401 certification);
- Permit revocations.

What laws govern adjudicative proceedings?
Adjudicative proceedings are governed by Chapter 4.5 of the Administrative Procedure Act[2] and by regulations adopted by the State Water Board[3]. By regulation, the State Water Board has chosen not to apply several sections of the Administrative Procedure Act to the California Water Boards' proceedings. These sections are Language Assistance, Emergency Decisions, Declaratory Decision, and Code of Ethics. All other sections and provisions of Administrative Procedure Act Chapter 4.5 apply.

Who are the parties to an adjudicative proceeding?
Parties to an adjudicative proceeding are any person or persons to whom a water board's action is directed as well as any other person or persons that the board chooses to designate as a party. In some cases, certain members of a water board's staff will be a party to an adjudicative proceeding. If some water board staff are designated as a party, other staff will be assigned to advise the board members. Anyone who is not a party, but who participates in the proceedings (other than staff advisers to the water board), is considered an interested person. The process for deciding who is a party is left to the discretion of a water board. A hearing may be held on the issue or the chair may be delegated to make such determinations. When a party is designated, the chair should provide notice in advance of the hearing to the water board staff and the discharger.

What is a formal hearing?
Most of the time an adjudicative proceeding will be a formal hearing in which a water board requires parties to follow a pre-determined process that may include such procedural issues as

[2] Gov. Code, § 11400 et seq.

[3] Cal. Code Regs., tit. 23, §§ 648-648.8.

submittal of the names of witnesses, qualifications of experts, exhibits, proposed testimony, and legal argument. A hearing notice will be drafted spelling out the requirements and the timeframes. The terms and conditions of the notice are left to the discretion of the water board conducting the proceeding, though it is suggested that some level of formality is useful in preserving decorum and fostering efficiency. A hearing under Chapter 4.5 of the Administrative Procedure Act and the State Water Board's regulations is considered a "formal hearing," even if it does not have some attributes of hearing formality, unless it is officially designated as an "informal hearing" under Government Code section 11445.20 and California Code of Regulations, title 23, section 648.7.

The order of proceedings is within the discretion of a water board as well. However, the regulations suggest a specific order and should generally be followed unless the facts and circumstances of a particular case indicate otherwise. Normally, the proceedings begin with an opening statement by the chair followed by the administration of the oath to those indicating that they intend to participate. Then the parties make their presentations through testimony and the introduction of exhibits. Typically, witnesses may be cross-examined by other parties but the timing of such cross-examination is within the discretion of the regional board. If the re-direct examination has been specified in the notice, re-direct examination follows cross-examination. A water board should decide in advance how it would like to handle questions from board members. Interruptions and questions by board members should not count against time allotted to a party. At some point during the proceeding, comments from interested persons must be admitted. Thereafter, the regulations anticipate a closing statement from each party.

What are the rules of evidence in an adjudicative proceeding?
The rules of evidence are not those that apply in the courtroom. Any relevant evidence will be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, no matter what the statutory or customary rule may be. Hearsay evidence is admissible, but only for the purpose of supplementing or explaining other evidence. If an objection is raised that certain testimony constitutes hearsay evidence, the chair should note for the record that the evidence will be admitted but that it cannot, by itself, support a finding. If no other evidence is introduced in support of that finding, a water board must ignore the hearsay evidence and decline to make such a finding.

A water board may accept evidence by taking official notice of certain things such as laws, court decisions, regulations, and facts and propositions that are common knowledge or not in reasonable dispute.

What are informal hearings?
Informal hearings may be used in place of formal hearings in some instances, if a water board thinks it advisable. Generally, this process can be used where significant facts are not in issue and the proceeding held is to determine only what consequences flow from those facts. In deciding whether to use the informal process, a water board should consider how many parties are involved, whether any of the parties have requested a more formal process, how many interested persons there are, how complex the issues facing the water board may be, and how important a formal record may be if petitions and appeals result. If any party objects to the informality of the process, a water board or its chair must address and resolve the objections before proceeding.

Because of the flexibility the regulations provide for formal hearings, a water board may find it advisable to conduct its hearings as formal hearings with streamlined procedures, as opposed to conducting an informal hearing. The regulations provide that a water board may waive any of the regulatory requirements that are not required by a statute. While this is certainly within the prerogative of a water board, caution should be exercised before any such waiver. These regulations generally seek to preserve the fairness of the process and omission of any of these provisions may result in unnecessary disputes over procedural issues.

How can the chair control the conduct of the adjudicative proceeding?
A water board need not tolerate disruption of an adjudicative proceeding. The Administrative Procedure Act and State Water Board regulations provide that a water board may cite for contempt any person who defies a lawful order, refuses to take an oath, obstructs or interrupts a meeting by disorderly conduct or breach of the peace, violates the ex parte communication rules, or refuses to comply with a subpoena or similar order of a water board. No immediate action can be taken, but the matter may be referred to the local Superior Court for action, including sanctions and attorneys fees.

cc: [All via e-mail only]

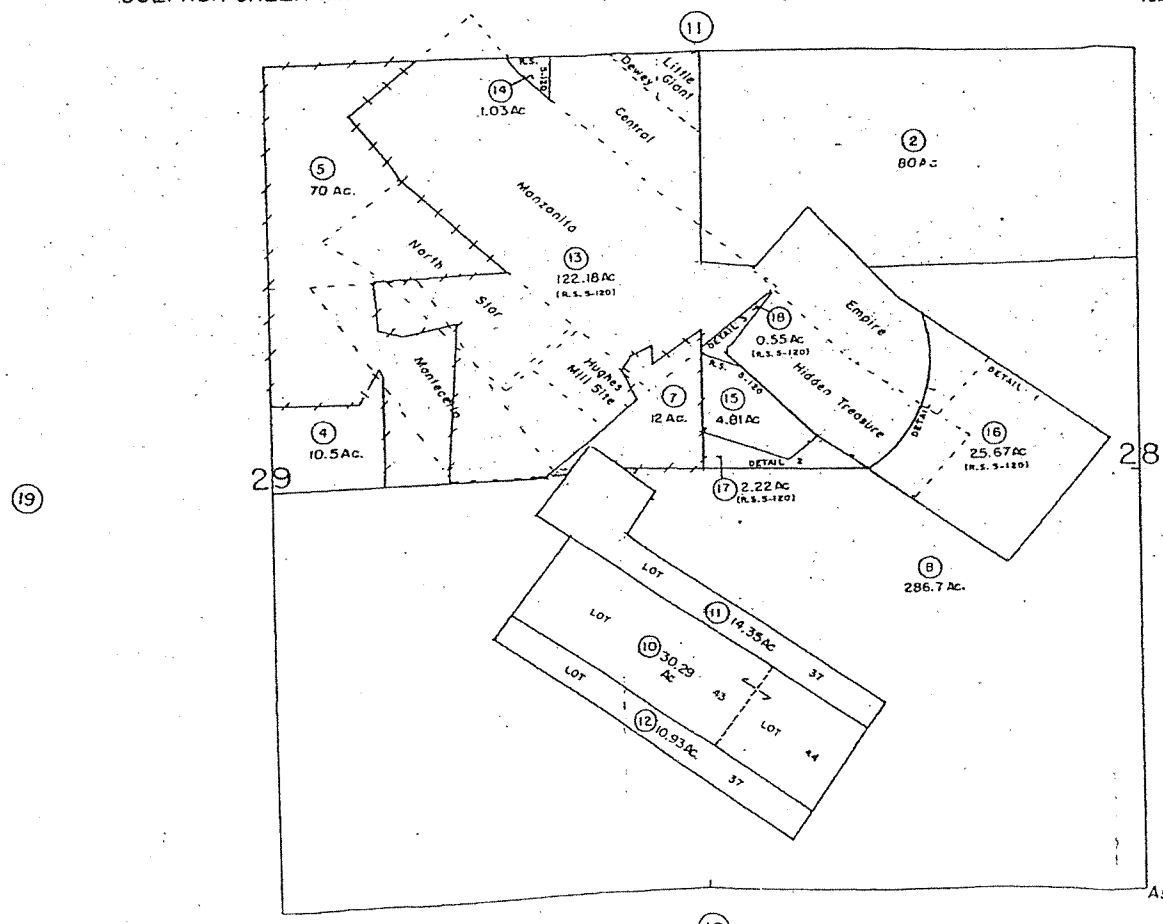
Celeste Cantú, EXEC
Tom Howard, EXEC
Beth Jines, EXEC
All Division Deputy Directors
All Executive Officers
Regional Water Boards
All Assistant Executive Officers
Regional Water Boards, Branch Offices
All Office of Chief Counsel attorneys

Exhibit 2

SULPHUR CREEK MINING DIST. T. 14 N, R. 5 W, M.D.B.& M.

Tax Area Code 71-1

18-20



Patents Bk. K Pg. 303, 408

R.S. BK. 5, PG. 120

NOTE - Assessor's Block Numbers Shown in Ellipses
Assessor's Parcel Numbers Shown in Circles

Assessor's Map Bk. 18 Pg. 20
County of Colusa, Calif.
1999

Exhibit 3

COLUSA COUNTY

831

Recording Requested By

When Recorded Mail To

Robert Leal
Post Office Box 580
Roseville, CA 95661-0580

Order No.

This Form Furnished courtesy of
Colonial Title Guaranty Company

RECORDED AT REQUEST OF
Colonial Title Guaranty Co.
— MIN. PAST 9 A.M.
OFFICIAL RECORDS COLUSA COUNTY, CALIF.

FEB 28 1990

Kathleen Moran
Recorder, Colusa County

$ 7.00

BOOK 649 PAGE 118

Space above this line for Recorder's use

CORPORATION GRANT DEED

Documentary Transfer Tax Due $110.65
☐ Based on Full Consideration.
☒ Based on Transferred Equity.
By: COLONIAL TITLE GUARANTY

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,
GOSHUTE CORPORATION

a corporation organized under the laws of the State of California, does hereby GRANT to

ROBERT LEAL, a married man, as his sole and separate property

the real property in the unincorporated area of the County of Colusa State of California, described as:

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF

IN WITNESS WHEREOF, said corporation has caused its corporate name and seal to be affixed hereto and this instrument to be executed by its _____ President and _____ Secretary thereunto duly authorized.

Dated: February 21, 1990

(seal)

GOSHUTE CORPORATION

By _____ President

By _____ Secretary

STATE OF CALIFORNIA
COUNTY OF Sutter } ss.

On February 22, 1990 before me, the undersigned, a Notary Public in and for said State, personally appeared

Melvin G. Epley

known to me to be the _____ President, and

known to me to be the _____ Secretary of the corporation that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the within instrument pursuant to its by-laws or a resolution of its board of directors.

WITNESS my hand and official seal.

Signature Yolanda G Reyes

OFFICIAL SEAL
YOLANDA G. REYES
NOTARY PUBLIC - CALIFORNIA
SUTTER COUNTY
My Commission Expires Apr. 1, 1991

Mail tax statements to return address above

All that certain real property situate in the County of Colusa, State of California, described as follows:

Lot 3, the Southeast quarter of the Northwest quarter, and the Northeast quarter of the Southwest quarter of Fractional Section 3, the Whole of Fractional Section 4, Lots 1, 2, 3, 4 and the south half of the Northeast quarter of Fractional Section 5, Lots 2, 3 and4 of Fractional Section 18 and Lot 1 in Fractional Section 19, Twonship 13 North, Range 5 West, M.D.B. & M.

Lots 3, 4, 5, 6, 8, 9, 10 and the Southwest quarter of the Northeast quarter, the West half of the Southeast quarter and the southeast quarter of the Southwest quarter of Section 28, Lots 2, 3, 4, 5, 12, 13 and 14, and the Southwest quarter of the Southeast quarter of Section 29, the "Wide Awake Quick Silver Lode Mining Claim" represented by Lots 43 and 44 in Sections 28 and 29, Lots 2 and 3, the Southeast quarter of the Northwest quarter and the Northeast quarter of the Southwest quarter of Fractional Section 31, Lots 2, 5, 6, 7, 8, 9, 11 and 12, the Northeast quarter of the Northeast quarter, and the Northeast quarter of the Southeast quarter of Section 32, the Whole of Section 33, and the Southwest qurater of Section 34, Township 14 North, Range 5 West, M.D.B. & M.

ESCEPTING THEREFROM that portin described in Deed from Emma G. Trebilcot to the State of California recorded February 1, 1980, Book 484 Official Records, page 346.

ALSO EXCEPTING THEREFROM any portion thereof lying within the County of Lake.

ALSO EXCEPTING THEREFROM all oil, gas, minerals and other hydrcarbons and geothermal rights, together with the right of ingress and egress to obtain and remove same as reserved in that certain Deed from Wells Fargo Bank, N.A., as Trustee for the Emma G. Trebilcot Trust to Goshute Corporation, a California corporation, dated December 5, 1989 and recorded February 28, 1990 as Recorder's Serial No. 828.

Exhibit 4

LAWRENCE S. BAZEL (State Bar No. 114641)
RICHARD J. WALLACE (State Bar No. 124286)
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
(415) 402-2700
Fax (415) 398-5630

Attorneys for
MR. AND MRS. ROBERT and JILL LEAL

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

CENTRAL VALLEY REGION

In the matter of:

DRAFT CLEANUP AND ABATEMENT ORDER

THE WIDE AWAKE MERCURY MINE

COLUSA COUNTY

Declaration of Jill Leal

I, Jill Leal, declare:

1. I am a person named in the Draft Cleanup and Abatement Order revised as of June 10, 2009 (the "Draft Order"). My business address is 950 Tharp Road, Suite 201, Yuba City, California 95993.

2. During the early 1990s, my husband Robert Leal owned a half interest in property identified by Attachment B to the Draft Order as the former Wide Awake Mine (the "Site"). He never at any time conveyed any interest in the Site to me. At no time did anyone convey to me

any interest in the Site. I never owned any interest of any nature in the Site. I never operated the Site or conducted any operations of any nature on the Site.

3. As part of the sale of his interest in the parcels that make up the Site, the title company insisted that I sign deeds conveying any interest I might have in the Site to my husband, even though I did not have any interest. I understood these deeds to be a formality that title companies insist on.

4. I am a housewife. I have never studied mining, and I have no knowledge about mining issues. I do not have any specific knowledge about mercury, its occurrence or movement in soil or water, its chemistry or biochemistry, or its toxicology or risk to human health or the environment. I never studied, and am not an expert in, chemistry, biochemistry, or toxicology.

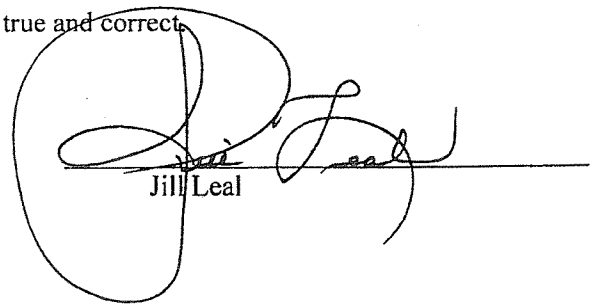
5. I did not know that there was a former mine on the Site when my husband purchased his interest in it. I did not learn that there was a former mine on the Site until after my husband tried to sell part of the Property to the U.S. Bureau of Land Management.

8. I accompanied my husband when he was taken to the Site by Roy Whiteaker. I went for the ride and to be with my husband. The scenery was beautiful. Other that that one visit, I have never been to the Site.

9. During the time my husband partly owned the Site I did not know that mercury might be leaving the Site. I did not know that anything on the Site might be causing a nuisance. No one ever informed me, during that time, that mercury might be leaving the Site or that anything on the Site might be causing a nuisance. I had absolutely no idea that we should be doing anything on the Site to protect public health or the environment.

I hereby declare under penalty of perjury under the laws of the State of California that the statements made in this declaration are true and correct.

Dated: June 30, 2009



Jill Leal

Exhibit 5

LAWRENCE S. BAZEL (State Bar No. 114641)
RICHARD J. WALLACE (State Bar No. 124286)
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
(415) 402-2700
Fax (415) 398-5630

Attorneys for
MR. AND MRS. ROBERT and JILL LEAL

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

CENTRAL VALLEY REGION

In the matter of:

DRAFT CLEANUP AND ABATEMENT ORDER

THE WIDE AWAKE MERCURY MINE

COLUSA COUNTY

Declaration of Robert Leal

I, Robert Leal, declare:

1. I am a person named in the Draft Cleanup and Abatement Order revised as of June 10, 2009 (the "Draft Order"). My business address is 950 Tharp Road, Suite 201, Yuba City, California 95993.

2. During the early 1990s, I owned a half interest in property identified by Attachment B to the Draft Order as the former Wide Awake Mine (the "Site"). I never at any time conveyed any interest in the Site to my wife, Jill Leal.

3. As part of the sale of my interest in the parcels that make up the Site, the title company insisted that my wife sign deeds conveying any interest she might have in the Site to me, even though she did not have any interest. I understood these deeds to be a formality that title companies insist on.

4. I am a farmer. I have never studied mining, and I have no knowledge about mining issues. I do not have any specific knowledge about mercury, its occurrence or movement in soil or water, its chemistry or biochemistry, or its toxicology or risk to human health or the environment. I never studied, and am not an expert in, chemistry, biochemistry, or toxicology.

5. I did not know that there was a former mine on the Site when I purchased my interest in it. I purchased a larger area of property (the "Property"), of which the Site was a relatively small portion, for investment purposes. I learned about the Property from Tom Nevis, who controlled Goshute Corporation. Mr. Nevis had arranged to purchase the property from Wells Fargo Bank, but needed money to complete to transaction. I provided that money, and in return received a half interest in the Property. The other half interest went to NBC Leasing, another corporation controlled by Mr. Nevis.

6. I never conducted any operations on the Property. I leased it out to the Harter Land Company, which used it for grazing.

7. I did not learn that there was a former mine on the Site until I tried to sell part of the Property to the U.S. Bureau of Land Management. The Bureau provided me with an evaluation by their geologist dated November 6, 1992, which I understand will be submitted to the Regional Board as part of my comments.

8. After I found out about the former mine, I went to look for it. I had assumed that it was a gold mine, and did not understand that it was a mercury mine. I was taken there by

Roy Whiteaker, who was the real estate broker trying to sell the Site, and who owns Cal Sierra Properties, which eventually bought the Site to use for hunting. We never saw anything that looked like a mine. All we saw was a remnant of a brick structure. I did not see any piles of rock or other materials. I did not, and still do not, know what "tailings" are. Grass had grown over the area, and there was not much to see. I did not see anything that seemed like it might contain mercury. I did not, and still would not, know what mercury looked like even if I saw it. Other that that one visit, I have never been to the Site.

9. During the time I partly owned the Site I did not know that mercury might be leaving the Site. I did not know that anything on the Site might be causing a nuisance. No one ever informed me, during the time of my part ownership, that mercury might be leaving the Site or that anything on the Site might be causing a nuisance. I had absolutely no idea that I should be doing anything on the Site to protect public health or the environment.

I hereby declare under penalty of perjury under the laws of the State of California that the statements made in this declaration are true and correct.

Dated: June 30, 2009

Robert Leal

Exhibit 6

COLUSA COUNTY

1278

RECORDING REQUESTED BY
COLONIAL TITLE GUARANTY COMPANY

AND WHEN RECORDED MAIL TO

Name: North State Title Company
Street Address: 809 Plumas Street
City & State: Yuba City, CA 95991

MAIL TAX STATEMENTS TO

Name: Robert Leal
Street Address: P. O. Box 580
City & State: Roseville, CA 95661-0580

RECORDED AT REQUEST OF
Colonial Title Guaranty Co.
39 MIN. PAST 8 a.m.
OFFICIAL RECORDS COLUSA COUNTY, CALIF.
OCT 10 1991
Kathleen Moore
Recorder, Colusa County
$ 8.00
BOOK 697 PAGE 138

SPACE ABOVE THIS LINE FOR RECORDER'S USE

CAT. NO. MN00030
TO 1922 CA (2-83)

Individual Quitclaim Deed

THIS FORM FURNISHED BY TICOR TITLE INSURERS

ALL | P.N.

The undersigned grantor(s) declare(s):
Documentary transfer tax is $ Zero
( ) computed on full value of property conveyed, or
( ) computed on full value less value of liens and encumbrances remaining at time of sale.
(x) Unincorporated area: ( ) City of _____, and

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,
JILL LEAL, wife of the Grantee named herein

hereby REMISES, RELEASES AND QUITCLAIMS to
ROBERT LEAL, a married man, as his sole and separate property

the following described real property in the unincorporated area
County of Colusa, State of California:

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF

APN 18-200-03
18-210-06
18-190-03 & 04
21-010-01, 04

Dated: April 15, 1991

Jill Leal

STATE OF CALIFORNIA
COUNTY OF Sutter } ss.

On April 15, 1991 before me, the undersigned, a Notary Public in and for said State, personally appeared Jill Leal

personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged that she executed the same.
WITNESS my hand and official seal.

Signature Yolanda G Reyes

OFFICIAL SEAL
YOLANDA G. REYES
NOTARY PUBLIC-CALIFORNIA
SUTTER COUNTY
My Commission Expires Mar. 13, 1995

BK 0697 PG 138

(This area for official notarial seal)

COLUSA COUNTY

EXHIBIT "A"

Order No. 76797 -A

SCHEDULE C

The land referred to in this policy is situated in the State of California, County of Colusa and is described as follows:

AS TO AN UNDIVIDED 1/2 INTEREST IN AND TO THE FOLLOWING DESCRIBED REAL PROPERTY:
Lot 3, the Southeast quarter of the Northwest quarter, and the Northeast quarter of the Southwest quarter of Fractional Section 3, the Whole of Fractional Section 4, Lots 1, 2, 3, 4 and the South half of the Northeast quarter of Fractional Section 5, Lots2, 3 and 4 of Fractional Section 18 and Lot 1 in Fractional Section 19, Township 13 North, Range 5 West M.D.B. & M.

Lots 3, 4, 5, 6, 8, 9, 10 and the Southwest quarter of the Northeast quarter, the West half of the Southeast quarter and the Southeast quarter of the Southwest quarter of Section 28, Lots 2, 3, 4, 5, 12, 13 and 14, and the Southwest quarter of the Southeast quarter of Section 29, the "Wide Awake Quick Silver Lode Mining Claim" represented by Lots 43 and 44 in Sections 28 and 29, Lots 2 and 3, the Southeast quarter of the Northwest quarter and the Northeast quarter of the Southwest quarter of Fractional Section 31, Lots 2, 5, 6, 7, 8, 9, 11 and 12, the Northeast quarter of the Northeast quarter, and the Northeast quarter of the Southeast quarter of Section 32, the Whole of Section 33, and the Southwest quarter of Section 34, Township 14 North, Range 5 West, M.D.B. & M..

EXCEPTING THEREFROM that portion described in Deed from Emma G. Trebilcot to the State of California recorded February 1, 1980, Book 484 Official Records, page 346.

RECORDER'S MEMO:
THIS PAGE DOES NOT
MAKE CLEAR REPRODUCTION.

Order No.
Escrow No. 509813-DK
Title No. 47777

WHEN RECORDED MAIL TO

Robert Leal
P. O. Box 580
Roseville, Ca. 95678

2279

RECORDED AT REQUEST OF
Western Title Colusa County
30 MIN. PAST 2 p.m.
OFFICIAL RECORDS COLUSA COUNTY, CALIF.

MAY 20 1993

Kathleen Moore

$ 8.00 Recorder, Colusa County

BOOK 738 PAGE 825

SPACE ABOVE THIS LINE FOR RECORDER'S USE

MAIL TAX STATEMENTS TO

DOCUMENTARY TRANSFER TAX $ -0-

Computed on the consideration or value of property conveyed, OR
Computed on the consideration or value less liens or encumbrances remaining at time of sale

X is exempt from imposition of the Documentary Transfer Tax pursuant to Revenue and Taxation Code § 11927(a) on transfer(s) community, quasi-community or quasi-marital property assets between spouses, pursuant to a judgment, an order, or a written agreement between spouses in contemplation of any such judgment or order

The Undersigned Grantor Declares

Signature of declaring grantor or grantee

INTERSPOUSAL TRANSFER GRANT DEED

(Excluded from reappraisal under California Constitution Article 13 A § 1 et seq.)

This is an interspousal transfer and not a change in ownership under §63 of the Revenue and Taxation Code and Grantor(s) has (have) checked the applicable exclusion from reappraisal:

- A transfer to a trustee for the beneficial use of a spouse, or the surviving spouse of a deceased transferor, or by a trustee of such a trust to the spouse of the trustor
- A transfer to a spouse or former spouse in connection with a property settlement agreement or decree of dissolution of a marriage or legal separation, or
- A creation, transfer or termination, solely between spouses, of any co-owner's interest
- The distribution of a legal entity's property to a spouse or former spouse in exchange for the interest of such spouse in the legal entity in connection with a property settlement agreement or a decree of dissolution of a marriage or legal separation
- Other

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,

JILL LEAL, wife of the herein grantee

hereby GRANT(S) to

ROBERT LEAL, a married man, as his sole and separate property

the real property in the ~~CITY~~ (Unincorporated Area) County of Colusa
State of California, described as

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF COMPRISING ONE PAGE.

"THE GRANTOR IS EXECUTING THIS INSTRUMENT FOR THE PURPOSE OF RELINQUISHING ALL OF GRANTORS RIGHTS, TITLE AND INTEREST INCLUDING, BUT NOT LIMITED TO, ANY COMMUNITY PROPERTY INTEREST IN AND TO THE LAND DESCRIBED HEREIN AND PLACE TITLE IN THE NAME OF THE GRANTEE AS HIS/HER SOLE AND SEPARATE PROPERTY. GRANTOR'S INITIALS _____."

Dated April 5, 1993

Jill Leal

STATE OF CALIFORNIA)
COUNTY OF) ss

On

before me, the undersigned, a Notary Public, in and for said State, personally appeared

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same

WITNESS my hand and official seal.

Signature

(This area for official notarial seal)

738 825

MAIL TAX STATEMENTS AS DIRECTED ABOVE

FD-13C

EXHIBIT "A"

T 14N., R5W., MDM:
SECTION 28: Lots 3-6 inclusive, SW1/4NE1/4, SE1/4SW1/4, W1/2SE1/4.
SECTION 29: Lots 2-5 inclusive, SW1/4SE1/4.
SECTION 32: Lots 2,5,6,7,8,11,12,NE1/4NE1/4,NE1/4SE1/4.
SECTION 33: All
SECTION 34: SW1/4

EXCEPTING THEREFROM that portion decribed in Deed from Emma C. Trebilcot to the State of California, recorded February 1, 1980, Book 484 Official Records, page 346.

EXCEPTING THEREFROM any portion thereof lying within Lake County.

ALSO EXCEPTING THEREFROM all oil, gas, minerals and other hydrocarbons, etc.as reserved in Deed from Wells Fargo Bank N.A., as Trustee of the Emma C. Trebilcot Trust to Coshute Corporation , recorded February 28, 1990, Book 649, Official Records, page 109.

State of California } SS.

County of SUTTER

On 4/15/93 before me, LESLYE ROSSITER
Notary Public, personally appeared JILL LEAL
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature Leslye Rossiter (Seal)

OFFICIAL SEAL
LESLYE ROSSITER
NOTARY PUBLIC-CALIFORNIA
SUTTER COUNTY
My Commission Expires Sept 21, 1994

FD-1 (Revised 11/92)

2279 BK 738 PAGE 826

Exhibit 8

95 003865

RECORDING REQUESTED BY

NORTH STATE TITLE COMPANY

AND WHEN RECORDED MAIL THIS DEED AND UNLESS OTHERWISE SHOWN BELOW, MAIL TAX STATEMENTS TO:

Robert Leal

P. O. Box H
Yuba City, CA 95992

Title No. 50114te
Escrow No. 164132

RECORDED AT REQUEST OF
WESTERN TITLE COLUSA COUNTY

47 min. past 10 a.m.
Official Records Colusa County, CA
OCT 16 1995
KATHLEEN MORAN - COUNTY RECORDER

No. of Pages 2 Fee $ 10.00 p

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Grant Deed

A.P.N. ptn: 18-20-003

The Undersigned grantor(s) declare(s):
Documentary transfer tax is $0.00
(x) computed on full value of property conveyed, or
( ) computed on full value less value of liens and encumbrances remaining at time of sale.
(x) Unincorporated area: ( ) City of , and

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,
Jill Leal, wife of the grantee named herein

hereby GRANT(S) to
Robert Leal, a married man, as his sole and separate property

the following described real property in the Unincorporated Area , County of Colusa , State of California:

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF FOR LEGAL DESCRIPTION
It is the intent of the grantor herein to relinquish any interest, community or otherwise, in and to the herein described property, and to vest title in the name of the grantee as his/her sole and separate property.

Dated: September 29, 1995

Jill Leal

STATE OF CALIFORNIA
COUNTY OF Sutter } SS.

On September 29, 1995 before me, the undersigned, a Notary Public in and for said State, personally appeared Jill Leal

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature Pamela Brockman
Pamela Brockman

PAMELA BROCKMAN
COMM. #1050017
NOTARY PUBLIC - CALIFORNIA
SUTTER COUNTY
Comm. Expires JULY 10, 1999

MAIL TAX STATEMENTS TO PARTY SHOWN ON FOLLOWING LINE; IF NO PARTY IS SHOWN, MAIL AS DIRECTED ABOVE

Robert Leal	P. O. Box 3509	Yuba City, CA 95992
Name	Street Address	City & State

95 003865

Exhibit "A"

That certain real property situate in the county of Colusa, state of California described as follows:

Lots 43 and 44 in Sections 28 and 29, in Township 14 North Range 5 West, M.D.B. & M.

Excepting therefrom all oil, gas, minerals and other hydrocarbons, etc., as reserved in deed from Wells Fargo Bank N.A., as Trustees of the Emma G. Trebilcot Trust to Goshute Corporation, recorded February 28, 1990, Book 649 Official Records, page 109.

Exhibit 9

LAWRENCE S. BAZEL (State Bar No. 114641)
RICHARD J. WALLACE (State Bar No. 124286)
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
(415) 402-2700
Fax (415) 398-5630

Attorneys for
MR. AND MRS. ROBERT and JILL LEAL

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

CENTRAL VALLEY REGION

In the matter of:

DRAFT CLEANUP AND ABATEMENT ORDER

THE WIDE AWAKE MERCURY MINE

COLUSA COUNTY

Declaration of Richard J. Wallace

I, Richard J. Wallace, declare:

1. I am an attorney licensed to practice law in the State of California. I have personal knowledge of the following facts, and if called as a witness I could and would competently testify to them under oath.

2. I currently practice law with Briscoe Ivester & Bazel LLP. Before joining the firm in 2007, I was in-house counsel with the Legal Department of Old Republic Title Company, formerly Founders Title Company. I was employed with Old Republic's Legal Department for

over fifteen years, from 1991 to 2007. During the last four years of my employment, from 2003 to 2007, I was Regional Counsel and Senior Vice President of Old Republic. In those capacities, I knew the title industry's underwriting criteria and practices from before 1991 until I left the employ of Old Republic in 2007.

3. I have reviewed recorded documents in the chain of title for the land in Colusa County, California that Robert Leal acquired on February 28, 1990, which included land within the parcel that was identified as Assessor Parcel Number 018-200-003 ("Parcel 3"). Robert Leal acquired the property by the Corporation Grant Deed that was recorded on that date at Book 649, Page 118 of the Colusa County Records. The deed vested the property in Robert Leal as "a married man, as his sole and separate property". The property included the land that is now identified as Parcel 10, but not what is now Parcels 11 and 12.

4. The documents that I reviewed include the following three recorded deeds from Jill Leal to Robert Leal: (1) Individual Quitclaim Deed recorded on October 10, 1991 at Book 697, Page 138 of the Colusa County Records ("the 1991 Deed"); (2) Interspousal Transfer Grant Deed recorded on May 20, 1993 at Book 738, Page 825 of the Colusa County Records ("the 1993 Deed"); and (3) Grant Deed recorded on October 16, 1995 as Instrument Number 95-003865 in the Colusa County Records ("the 1995 Deed"). The description in the 1991 Deed included land within Parcel 3, including the Wide Awake Mine site that is now identified as Parcel 10. The description in the1993 Deed did not include Parcel 10. The description in the 1995 Deed described Parcel 10 only. The recording information on all three deeds indicates that each of them was recorded at the request of a title company. The deeds were recorded in connection with Robert Leal's separate transactions concerning the respective properties.

5. At the time of each deed, it was title industry practice to require a spousal deed from the non-titled spouse in any transaction concerning the property of a married individual who owned the subject property as his or her sole and separate property. A deed from the non-titled spouse was not an indication that the spouse owned any interest in the property. Instead, the deed was the title companies' way to ensure that the "community" had not acquired any interest in the property under California community property laws.

6. The three deeds from Jill Leal to Robert Leal were consistent with title industry practice to require the deeds in connection with Robert Leal's transactions solely to confirm that the community had no interest in the respective properties. The 1991 Deed was in the form of a quitclaim deed, which by its very nature does not connote that Jill Leal had any interest in the property that was described in the deed. The 1993 Deed and the 1995 Deed each contained the standard recital, unique to spousal deeds, confirming that the deeds were recorded for the purpose of establishing that Jill Leal had no interest, "community" or otherwise, in the described properties.

I declare under penalty of perjury that the statements made in this declaration are true and correct as to my own knowledge, and that this declaration was executed on July 1, 2009 at San Francisco, California.

Richard Wallace

Exhibit 10

Delta Tributaries Mercury Council (DTMC)

History

The Delta Tributaries Mercury Council (DTMC) has its origins in the Cache Creek Stakeholders Group which was initiated in 1995 in response to Cache Creek's status as an impaired stream due in large part to high mercury concentration. Prior monitoring had indicated very high mercury levels in lower reaches of Cache Creek and the Yolo Bypass which were carried downstream into the Delta and on to San Francisco Bay. In late 1995 the State Water Resources Control Board and the Central Valley Regional Water Quality Control Board were approached by the Colorado Center for Environmental Management with a proposal to initiate and facilitate a collaborative process to consider and help resolve some of the local problems of flood control and mine-impacted pollution in Cache Creek. A two year funding commitment for the program was provided by the Hewlett Foundation and USEPA. The first Stakeholder meeting was held in October 1996 and approximately 50 persons representing federal, state, county agencies and citizen organizations attended. Meetings were held approximately every 6 weeks thereafter. Speakers were invited to address the meetings on substantive issues and subcommittees were formed to investigate and report on relevant topics.

After 2 years the Cache Creek Stakeholders group reorganized, limiting concerns to flood control and related local topics in the Capay Valley. Meanwhile the Mercury Subcommittee had expanded its interests and activities to cover the whole Sacramento watershed area including Clear Lake and the Delta. Monitoring had indicated widespread mercury pollution and it seemed expedient for the Mercury Subcommittee to join forces with other groups and agencies interested in determining its origin and remediation. In June 1999 the Delta Tributaries Mercury Council was formed to expedite monitoring, determination of sites of mercury transformation and bioaccumulation and to assist in the establishment of mercury TMDLs in these regions.

In order to coordinate the activities dealing with mercury pollution in Northern California the Mercury Council in October 1999 voted to approve development of a website with funding for the first year to be provided by the Sacramento River Watershed Program and the U.S.EPA.

Draft Planning and Operating Document of the DTMC

Vision

To reduce mercury in fish and wildlife in the Delta and its tributaries to levels that no longer pose a human health or environmental hazard while promoting the long-term social and economic vitality of the region.

Mission

To bring together scientists, regulators, landowners, resources managers and users, to collaboratively develop and implement a strategic plan for the management of mercury in the Delta and its tributaries and monitor its effectiveness.

Objectives

The diverse stakeholders interested in and impacted by mercury contamination in the Delta and its tributaries have organized to create a forum 1) for outreach, education, and exchange of scientific data; 2) to identify opportunities to improve public policy on mercury management; and 3) to act as a sounding board for ideas. The group will promote, evaluate, critique integrate and actively participate in carrying out the following objectives:

- **Develop Goals and Targets.** Identify, evaluate and recommend water quality goals and targets for mercury that are protective of human health and the environment (e.g. TMDL's, fish advisories, etc.)
- **Develop Models.** Develop methods to evaluate remedial options and help to understand transport and fate of mercury and its compounds within the Sacramento/San Joaquin River Watershed system (Conceptual and analytical models).
- **Identify Sources Fate and Impact.** Identify and evaluate source releases, distribution, transformation (e.g. methylation and demethylation) and uptake of mercury throughout the system and its impact on human health and the environment.
- **Identify Control Measures.** Identify, develop and evaluate the effectiveness of remedial methods for modifying the release, distribution, transformation and uptake of mercury.
- **Develop Strategic Plan.** Develop a plan to reduce relevant environmental mercury levels to meet identified goals and targets and reduce the bioaccumulation and biomagnification of mercury. (You can view the plan here)
- **Implement Strategic Plan.** Implement the strategic plan, including monitoring to track its effective-ness and a feedback loop to revise the plan as new information becomes available.

The objectives established by the Delta Tributaries Mercury Council are not chronological. They will be developed through a parallel and collaborative process. DTMC member organizations are responsible for implementing the objectives, not the group as a whole.

Geographic Area of Focus

The scope of the group focuses on the Delta and its tributaries. Cache Creek was originally selected as a "pilot project" (see Bay Protection Cleanup Plan for justification) Study and implementation started there and has expanded to include other mercury enriched waterbodies in the Sacramento and San Joaquin watersheds.

Membership

The Delta Tributaries Mercury Council strives to be a diverse and inclusive group open to all interested parties. As such it does not limit membership. Stakeholder delegates have not been designated. A balance of representation in decision making depends on active participation from a variety of perspectives at regular meetings. A core group of participants have been active and consistent contributors to the group process. Participants in each meeting are listed in the minutes. A listing of various organizations and agencies participating in the DTMC follows at the end of this section.

Decision Making

DTMC members will work towards reaching "consensus" on the issues addressed. Unless notified via email, all decisions will be made at the full DTMC meetings by those members present. The group will work through decisions, adopting one of the following levels of consensus as often as possible:

- Level I. Everyone strongly supports the agreement.
- Level II. Everyone can "live with" the outcome, though aspects of it may not be their first choice.
- Level III. Everyone agrees to move forward despite remaining concerns.

Members agree to actively participate in decision making and take responsibility for voicing opposition. Lack of opposition may be interpreted as support for the decision. The "fall back" if consensus cannot be reached will be to require a 75% majority vote for a decision to be adopted by the group. In such cases, individual opinions may be documented if requested.

Meetings

Regular meetings of the DTMC are held approximately every eight weeks. Meeting notices are emailed to all interested individuals. Check here for information on upcoming meetings, or agendas and minutes from past meetings.

Facilitation

The facilitator(s) serve at the will of the DTMC members. Facilitator(s) will seek to guide the discussions in a balanced and fair manner. Facilitators will guide members in discussions in a manner that keeps

them focused, respectful, and within time limits agreed to in agendas.

Ground Rules

Members agree to follow and enforce with each other these ground rules. Alterations to the ground rules can be made at the full DTMC meetings.

- Respect start and end times
- Keep discussion focused
- Give everyone a chance to speak
- Be brief and to-the-point
- Don't dominate the conversation
- Don't interrupt
- No side conversations
- Share all relevant information
- Everyone participate actively
- Disagree openly

Document Review Process

The DTMC will review documents relevant to their mission as requested. Documents should be submitted in electronic form at least two weeks prior to a full DTMC meeting for discussion at the meeting. The Documents will not be a product of the DTMC. Individual review of relevant information may also be sought from the DTMC members via email.

Organizations and Agencies Represented in the DTMC

- Cache Creek Conservancy
- Cal EPA
- CALFED Bay-Delta Program
- Calif. Department of Conservation, Mines and Geology
- Calif. Department of Fish and Game
- Calif. Department of Water Resources Conservation
- Calif. State University, Chico
- Calif. State Water Resources Control Board (SWRCB)
- Central Valley Regional Water Quality Control Board (CVRWQCB)
- City of Sacramento
- County of Sacramento
- Electric Power Research Institute
- G Fred Lee & Associates
- Homestake Mining Company
- Larry Walker Associates
- MFG, Inc
- Sacramento Regional County Sanitation District
- San Francisco Bay Regional Water Quality Control Board (SFBRWQCB)
- SFEI
- Tetra Tech EM
- U.C. Davis, Department of Environmental Science & Policy
- U.C. Davis, Dept. of Wildlife. Fish and Game
- U.S. Army Corp. of Engineers
- U.S. Bureau of Land Management
- U.S. Department of Agriculture, NRCS
- U.S. EPA
- U.S. Fish and Wildlife Service
- U.S. Forest Service
- U.S. Geological Survey (USGS)
- Yolo County Health Department
- Yolo County Planning/Public Works

Contact

Stephen A. McCord, Ph.D., P.E.
Senior Engineer
Larry Walker Associates
707 Fourth Street, Suite 200
Davis, CA 95616

sam@lwa.com