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Attorney At Law

September 16, 2009

Kenneth Landau  
Assistant Executive Officer  
11020 Sun Center Drive, Suite 200  
Rancho Cordova, CA 95670

Re: Draft Cleanup and Abatement Order – Central, Cherry Hill, Empire,  
Manzanita, and West End Mines, Colusa County –  
Documentary Evidence and Legal Arguments of ALC

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Dear Mr. Landau:

In accordance with the “Proposed Draft Hearing Procedures for Cleanup and Abatement Order R5-2009-xxxx” (“**Draft Order**”) distributed for comment in this matter on July 2, 2009, American Land Conservancy, a California non-profit public benefit corporation (“**ALC**”), hereby submits its documentary evidence and legal arguments in support of removal of ALC from the list of “Dischargers” named in the Draft Order.

**I. DOCUMENTARY EVIDENCE**

In factual support of its position in this matter, ALC relies on the following documents, which are attached to this letter as ALC Exhibits 1 through 7.

1. Corporation Grant Deed dated June 25, 1999, and recorded in the Official Records of Colusa County, California on June 30, 1999, with Recorder’s Serial No. 99-003062 (conveyance from Bonneville Industries, Inc. a Nevada Corporation to ALC of the fee title to certain real property located in Colusa County, California) (the “**Sulphur Creek Parcel**”).
2. Corporation Grant Deed dated October 22, 1999, and recorded in the Official Records of Colusa County, California on October 26, 1999, with Recorder’s Serial No. 99-004647 (correction of legal description in the Deed recorded June 30, 1999, Recorder’s Serial No. 99-003062).

3. Grant Deed dated October 26, 1999, and recorded in the Official Records of Colusa County, California on December 3, 1999, with Recorder's Serial No. 99-005188 (conveyance from ALC to Richard Louis Miller, a single man, of the fee title to the real property described in Items 1 and 2, above).
4. Grant Deed dated November 10, 1999, made effective as of December 3, 1999, and recorded in the Official Records of Colusa County, California on December 3, 1999, with Recorder's Serial No. 99-005186 (conveyance from Homestake Mining Company of California, a California corporation, to Richard Louis Miller of the fee title to the real property described therein) (the "**Homestake Parcel**").
5. Grant of Easement for Conservation Purposes dated October 27, 1999, and recorded in the Official Records of Colusa County, California on December 3, 1999, with Recorder's Serial No. 99-005189 (the "**Conservation Easement**").
6. Map illustrating the boundaries of the Sulphur Creek Parcel and Homestake Parcel in relation to the mines and tailing piles indentified in the Draft Order.
7. Purchase and Sale Agreement, and amendments thereto, by and between ALC and Richard Louis Miller

Copies of the above-identified recorded documents are already included in the evidentiary record in this proceeding by the Regional Board's Prosecution Team, but are also attached hereto for convenient reference to them in connection with consideration of ALC's legal arguments presented below.

## II. LEGAL ARGUMENTS

### A. **ALC's Past Fee Ownership Interest In A Portion Of The Subject Properties Does Not Support "Discharger" Status Under The California Water Code Section 13304(a).**

ALC acquired a fee interest in the Sulphur Creek Parcel on June 30, 1999.<sup>1</sup> ALC acquired the property for the purpose of conveying it to Richard Louis Miller as part of a conservation

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<sup>1</sup> The legal description in this conveyance was corrected by the grant deed dated October 22, 1999, and recorded in the Official Records of Colusa County, California on October 26, 1999, with Recorder's Serial No. 99-004647. The Sulphur Creek Parcel includes the West End Mine and some tailings associated with the West End Mine. In ALC Exhibit 6, the boundaries of the Sulphur Creek Parcel and the Homestake Parcel are

transaction in which ALC acquired the Conservation Easement.<sup>2</sup> ALC held fee title to the Bonneville Parcel for only five months.

In its Order No. WQ 92-13, the State Water Resources Control Board (“State Board”) acknowledged that **“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.”**

(Id. at p. 5; emphasis added.) The circumstances that led the State Board to conclude that it was “inappropriate to include [Wendy’s International] as discharger” included:

- 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.
- The franchisee who bought the property from Wendy’s is named in the order.
- 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. [See Logsdon Petition, op. cit., Petition of Stinnes-Western, Order No. WQ 86-16, and Petition of The BOC Group, Order No. WQ 89-13.])
- Wendy’s never engaged in any cleanup or other activity on the site which may have exacerbated the problem.

(Order No. WQ 92-13, at p. 6.)<sup>3</sup>

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outlined in yellow and light green, respectively. The base map in ALC Exhibit 6 is Figure 2.2 of the CALFED—Cache Creek Study, Task 5C2: Final Report, prepared by Tetra Tech EM Inc. (September 2003).

<sup>2</sup> The Conservation Easement, which is further discussed in Section II.B, below, encumbers both the Sulphur Creek Parcel and the Homestake Parcel. The Purchase and Sale Agreement, and amendments thereto, for these voluntary conservation transactions are included collectively as ALC Exhibit 7.

<sup>3</sup> The State Board identified several additional considerations not directly applicable to the circumstances of ALC because the original source of the contamination addressed in Order No. WQ 91-13 was an underground petroleum storage tank rather than mine tailings. Those distinctions, however, do not undermine the core

ALC purchased the Sulphur Creek Parcel for the purpose of re-conveying it to Richard Louis Miller in a conservation transaction. ALC owned the Sulphur Creek Parcel for only five months. Dr. Miller, the current owner, is named in the Draft Order. ALC had nothing to do with the mining activity that resulted in the tailings piles. ALC has never engaged in any activity that may have exacerbated the contamination problem.<sup>4</sup>

Accordingly, it is not appropriate under State Board decision precedent, and particularly the standard set forth in Order No. WQ 92-13, to include ALC as a “discharger” in the Draft Order.

**B. ALC’s Conservation Easement Interest Does Not Support “Discharger” Status Under California Water Code Section 13304(a).**

The Conservation Easement is essentially a non-possessory interest in the subject property allowing ALC to enforce the conservation purposes of the Conservation Easement through the enforcement of restrictions on the uses of the property. The grant of the Conservation Easement did not transfer to ALC the burdens of fee ownership.

**1. The Landowner Retained The Burdens Of Fee Ownership Under The Grant Of The Conservation Easement.**

Section 3 of the Conservation Easement expresses that “Grantor understands and acknowledges that nothing contained in this Grant relieves Grantor of any obligation or restriction on the use of the Property imposed by law.”

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similarities between ALC’s circumstances and those of Wendy’s International which led the State Board to conclude that discharger status was inappropriate.

<sup>4</sup> ALC’s President, Kerry O’Toole will testify as to ALC’s stewardship of the Sulphur Creek Parcel during its brief ownership of that parcel.

Section 4 of the Conservation Easement expressly reserves to Grantor “all rights accruing from its ownership of the Property, including the right to engage in or permit or invite others to engage in all uses of the Property that are not expressly prohibited [in the Conservation Easement] and do not materially impair or interfere with the conservation purpose of [the Conservation Easement].”

Section 13 of the Conservation Easement provides that “Grantor retains all responsibilities and shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep and maintenance of the Property” and that “Grantee [ALC] shall have no obligation for the upkeep or maintenance of the Property, the monitoring of hazardous conditions thereon, or the protection of Grantor, the public or any third parties from risks relating to conditions on the Property.” Section 13 further provides that:

(b) Notwithstanding any other provision of this Grant to the contrary, the parties do not intend and this Agreement shall not be construed such that (i) it creates in Grantee the obligations or liabilities of an “owner” or “operator”, as those words are defined and used in any federal, state, local or administrative agency statute, regulation, rule, ordinance, order or requirement relating to environmental conditions or hazardous materials, including without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. Sections 9601et seq.) (collectively, “Environmental Laws”), or (ii) it creates in Grantee the obligations or liabilities of a person described in 42 U.S.C. Section 9607(a)(3), or (iii) Grantee has the obligation to investigate or remediate any Hazardous Materials (as defined below) associated with the Property, or (iv) Grantee has any control over Grantor's ability to investigate and remediate any Hazardous Materials associated with the Property. Grantor represents, warrants and covenants to Grantee that Grantor's use of the Property shall comply with all Environmental Laws. For purposes of this Grant, the term "Hazardous Materials" shall mean any flammable explosives, radioactive materials, hazardous materials, hazardous wastes,

hazardous or toxic substances or related materials defined in any Environmental Law.<sup>5</sup>

Moreover, there is no provision in the “Prohibited Uses and Practices” set forth in Exhibit B to the Conservation Easement that precludes the landowner from complying with the obligations of a “discharger” under the Draft Order. The undertaking or authorization by the landowner of actions to remediate existing conditions of contamination on the property cannot credibly be asserted to be inconsistent with the Conservation Easement purpose “to protect and preserve the conservation values of the Property, including without limitation, the integrity of the riparian corridor located on the Property, and to prevent any uses of the Property that would materially impair or interfere with those conservation values.” (Conservation Easement, Section 1.) And, in any event, as noted above, Section 3 of the Conservation Easement expressly provides that “nothing contained in this Grant relieves Grantor of any obligation or restriction on the use of the Property imposed by law.”

Finally, the development rights “transferred” to ALC by the provisions of Section 6 of the Conservation Easement were simultaneously “terminated and extinguished” by those same provisions. This is the typical convention for extinguishing development rights by a grant of

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<sup>5</sup> These provisions are comparable to provisions included in Section 14(i) of the Conservation Easement Deed template currently utilized by the California Department of Fish and Game in connection with the creation of conservation and mitigation banks in California (published at the following link: <http://www.dfg.ca.gov/habcon/conplan/mitbank/>). An interpretation that ignores such a provision would clearly be contrary state policy and potentially would expose the State of California to unintended liabilities under the conservation easements that it holds.

conservation easement.<sup>6</sup> Accordingly, ALC acquired no continuing rights or burdens in connection with the “transfer” of the simultaneously-extinguished development rights.

**2. The Limited Rights Of ALC Under The Conservation Easement Do Not Support Naming ALC As A “Discharger” Under California Water Code Section 13304(a).**

ALC’s affirmative rights to enforce the restrictions set forth in the Conservation Easement to protect the identified conservation values do not change the balance of responsibilities between the landowner and ALC; nor do ALC’s limited rights to conduct certain restoration activities, which rights must be considered in the light of the provisions of Section 13(b) of the Conservation Easement, quoted above. Those limited restoration rights allow, but do not obligate, ALC to undertake, at its own expense, certain actions to promote the purpose of the Conservation Easement. ALC has in fact previously invoked those rights in support of the purpose of the Conservation Easement.<sup>7</sup> ALC, however, is in no way obligated, or even authorized, to invoke those rights to assume liability for conditions on the encumbered property contrary to the plain terms of Section 13(b) of the Conservation Easement.

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<sup>6</sup> See, e.g., Section 2(e) of the Conservation Easement Deed template of the California Department of Fish and Game, n. 5 *supra*, which provides: “To accomplish the purposes of this Conservation Easement, Grantor hereby grants and conveys the following rights to Grantee: . . . [¶] (e) All present and future development rights appurtenant to, allocated, implied, reserved or inherent in the Bank Property; such rights are hereby terminated and extinguished, and may not be used on or transferred to any portion of the Bank Property, nor any other property adjacent or otherwise.”

<sup>7</sup> ALC’s only exercise of these rights to date has been to undertake a riparian habitat restoration project along Sulphur Creek, supported by grant funding from the Wildlife Conservation Board (Grant Agreement No. WC-2016BT), involving the removal of tamarisk and restoration of selected native grasses and forbs. A copy of Grant Agreement No. WC-2016BT has already been made part of the evidentiary record by the Regional Board Prosecution Team. ALC’s President, Kerry O’Toole, will testify as to ALC’s stewardship activities as holder of the Conservation Easement.

The existence of the mine tailings on the property does not interfere with protection of the “conservation values” identified in the Conservation Easement, which are the “significant riparian resources and . . . natural habitat for wildlife, wildflowers, oak woodlands and other plants and . . . natural, scenic, open space, historical, educational and recreational values.” (Conservation Easement, Recital B). ALC’s limited rights of entry under the Conservation Easement are properly construed to allow, but not obligate, ALC to undertake restoration activities only for the purpose of protecting the “conservation values” – not to allow ALC to undertake or require the undertaking of activities that do not serve primarily to benefit the identified “conservation values.”

A re-mixing by the Regional Board of the obligations of the landowner and holder of the Conservation Easement would amount to adoption of an enforcement policy that would subject scores of non-profit land trusts,<sup>8</sup> as well as the State of California,<sup>9</sup> to potential liability never intended under the conservation easement instruments they hold. This would, in turn, severely frustrate the land conservation policies and goals promoted by the Conservation Easements Act and similar legislation that authorizes and encourages the granting of easements in gross to protect conservation values.<sup>10</sup>

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<sup>8</sup> The California Council of Land Trusts, the pre-eminent organization for land trusts in California, claims more than 150 members. <http://www.calandtrusts.org/>.

<sup>9</sup> A perusal of the Conservation Easements Registry maintained by the Natural Resources Agency (<https://easements.resources.ca.gov/search.php>) will quickly reveal the magnitude of the State’s exposure to potential liability under such an enforcement policy.

<sup>10</sup> Cal. Civ. Code § 815 *et seq.*; Open-Space Easement Act of 1974, Cal. Gov. Code sections 51070 – 51097; California Farmland Conservancy Program Act, Cal. Pub. Res. Code §§ 10200 - 10277.

**C. Any Responsibility As A Discharger Imposed On ALC Should Be Limited To "Secondary Liability."**

The State Board has found secondary liability status appropriate where the discharger did not initiate or contribute to the discharge. *See, e.g.*, Order Nos. WQ 92-13, WQ 89-8 and WQ 86-18. The State Board has traditionally distinguished on equitable grounds between those parties who are considered responsible parties due solely to their land ownership and those parties who conducted the activity that originally caused the discharge in question. *E.g.*, Order No. 93-9 (and State Board Orders cited therein). The State Board has concluded that the initial responsibility for cleanup should be with the operator or the party who created the discharge. *See e.g.*, Order No. WQ 89-1, p. 4. Under the equitable principles recognized by the State Board, any responsibility assigned to ALC at this stage in the proceeding should be limited to secondary liability.

**D. CONCLUSION**

Under the legal policy guidance provided by precedents of the State Board with respect to implementation of California Water Code Section 13304(a), neither ALC's short-term fee ownership of a portion of the property involved in this proceeding, nor its status as grantee under the Conservation Easement, supports naming ALC as a "discharger" in the Draft Order. If ALC is named as a "discharger in a Cleanup and Abatement Order approved by the Regional Board, its responsibility should be limited to secondary liability.

**III. WITNESS LIST**

**A. Kerry O'Toole, President, ALC –**

Testimony concerning ALC's stewardship of the Sulphur Creek Parcel during its brief ownership of that property and concerning ALC's stewardship of the Conservation Easement.

**B. Jerry Meral, Ph.D., Member, ALC Board of Directors or  
Robert Stephens, Ph.D., Vice Chair, ALC Board of Directors  
(subject to the availability of each) –**

Testimony concerning ALC's land conservation mission and stewardship policies.

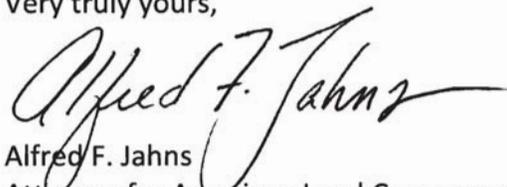
**C. Darla Guenzler, Ph.D., Executive Director, California Council of Land Trusts (subject to availability) –**

Testimony concerning the importance of conservation easements in land conservation in California, the representative quality of the Conservation Easement, and the potential chilling effect on the land conservation efforts in California of basing "discharger" status under California Water Code Section 13304(a) on the Conservation Easement.

**D. Russell J. Austin, Esq., Murphy, Austin, Adams, Schoenfeld, LLP (potential rebuttal witness) –**

Potential Rebuttal Testimony concerning the transactions by which ALC conveyed fee ownership of the Sulphur Creek Parcel to Richard Louis Miller and accepted the grant of the Conservation Easement.

Very truly yours,



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