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6 behalf of CORDERO MINING COMPANY
and SUNOCO ENERGY DEVELOPMENT
7 COMPANY

8 CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD

9 STATE OF CALIFORNIA

10 In the Matter of

11 HEARING BEFORE THE CENTRAL
12 VALLEY REGIONAL WATER
13 QUALITY CONTROL BOARD RE:
14 CLEANUP AND ABATEMENT ORDER
15 No. R5-2009-XXXX

16 Issued to:

17 BAILEY MINERALS CORPORATION,
18 TERHEL FARMS, INC., MAGMA
POWER COMPANY, CORDERO
19 MINING COMPANY, RICHARD L.
MILLER, HOLIDAY FOUNDATION
20 INC., SUNOCO ENERGY
DEVELOPMENT COMPANY,
21 HOMESTAKE MINING COMPANY,
BONNEVILLE INDUSTRIES, INC.,
22 FILIATRA, INC., ASERA WESTERN
CORPORATION, AMERICAN LAND
23 CONSERVANCY

CAO R5-2009-XXXX

SUNOCO, INC.'S SUBMISSION OF
EVIDENCE AND POLICY
STATEMENT PER PROPOSED
DRAFT HEARING PROCEDURES
FOR CLEANUP AND ABATEMENT
ORDER R5-2009-XXXX

Hearing Date: October 7, 8, & 9, 2009
Time: 8:30 a.m.
Location: 11020 Sun Center Drive
Suite 200
Rancho Cordova, CA

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I. INTRODUCTION

In accordance with the Proposed Draft Hearing Procedures For Cleanup And Abatement Order R5-2009-xxxx (“Hearing Procedures”), Sunoco, Inc. (“Sunoco”), without admitting any legal liability for Cordero Mining Company (“Cordero”) and Sunoco Energy Development Company (“SEDC”), hereby submits its Evidence and Policy Statement (“Statement”) on behalf of these corporate entities with respect to any liability they may have related to the geothermal exploration leases referenced in the June 10, 2009 Revised Draft Cleanup And Abatement Order No. R5-2009-XXXX, Central, Cherry Hill, Empire, Manzanita, And West End Mines, Colusa County, (“Draft Order” or “DO”), issued by the California Regional Water Quality Control Board, Central Valley Region (“Regional Board”). The Draft Order improperly names Cordero and SEDC as “dischargers” based on inapplicable State Water Resources Control Board (“State Board”) precedent and provisions of California Water Code (“CWC”) sections 13267 and 13304, and Sunoco herein requests that Cordero and SEDC be removed from the Draft Order.

In accordance with the Hearing Procedures, this Statement includes the following: (1) all evidence (other than witness testimony to be presented orally at the hearing) that Sunoco would like the Regional Board to consider; (2) all legal and technical arguments or analysis; (3) the name of each witness, if any, whom Sunoco intends to call at the hearing, the subject of each witness’ proposed testimony, and the estimated time required by each witness to present direct testimony, and; (4) the qualifications of each expert witness.

Sunoco’s request that Cordero and SEDC be removed from any future orders arises from: (1) Cordero and SEDC held geothermal leases – the terms of which did not allow for any activity unrelated to geothermal exploration or production – but never owned or operated any mine site at issue; (2) the Prosecution Teams’ reliance on In the Matter of the Petition of Zoecon Corporation, Order No. WQ 86-02, and In the Matter of the Petitions of Wenwest, Inc. et al, Order No. WQ 92-13 is misplaced, as neither order applies to lessees and instead support the *removal* of Cordero and SEDC from the Draft Order; (3) lessees are not liable for continuing nuisances under California Civil Code §3483; (4) under analogous federal law, neither Cordero nor SEDC can be considered an owner or operator of the mine sites at issue; (5) CWC §§ 13267 and 13304 are inapplicable to non-discharger lessees such as Cordero and SEDC; (6) the Regional Board’s admission that beneficial uses of municipal and domestic supply (“MUN”) and the human consumption of aquatic organisms do not exist and are not attainable in Sulphur Creek due to natural sources of mercury and salts; and, (7) removal of Cordero and SEDC from

1 the Draft Order is appropriate given the recent removal of similarly situated potentially
2 responsible parties (“PRPs”) based on the Regional Board’s inability to attribute legal
3 responsibility to them regarding the Elgin Mine Site draft Cleanup and Abatement Order.

4 **II. Legal Argument & Technical Analysis**

5 **A. The Order Wrongly Identifies Cordero and SEDC As Former Owners** 6 **and/or Operators Of The Mine Sites.**

7 The Draft Order’s identification, in Finding No. 5, that “[a]ll the parties named in this
8 order *either owned the site* at the time when a discharge of mining waste into waters of the state
9 took place, *or operated the mine*, thus facilitating the discharge of mining waste into waters of
10 the state” is incorrect and fundamentally unfair as to Cordero and SEDC, which never owned or
11 operated any mine site at issue. (DO at p. 2; emphasis added.) The Prosecution Team’s “Board
12 Evidence Document” (“Evidence Document”) echoes this error; stating, “. . . Cordero [] and
13 [SEDC][] should not be allowed to disclaim their responsibility for managing the wastes during
14 the time of their *ownership* once their exploration proved fruitless.” (Emphasis added.) Neither
15 entity conducted any mercury mining at any site identified in the Draft Order. (See generally,
16 Cordero and SEDC geothermal leases referenced in Attachment B of the Evidence Document.)
17 The leases were limited in scope, only allowing Cordero and SEDC to drill exploratory
18 geothermal wells. (Id.)

19 For example, the terms of the June 3, 1965 lease agreement (“June 3 Lease”) that Magma
20 Power Company assigned to Cordero only allowed:

21 “. . . the sole and exclusive right to Lessee to explore for, (by such methods as it
22 may desire), drill for, produce, extract, remove and sell steam and steam power
23 and extractable minerals¹ from, and utilize, process, convert and otherwise treat
24 such steam and steam power upon, said land, and to extract any extractable
25 materials, during the term hereof, with the right of entry thereon and use and
26 occupancy thereof at all time for said purposes of and the furtherance thereof,
27 including the right to construct, use and maintain thereon and to remove
28 therefrom structures, facilities and installations, pipe lines, utility lines, power and
transmission lines.” (See June 3 Lease, attached hereto as Exhibit A, at p. 1.)

Moreover, under the June 3 Lease, the Lessor reserved the right:

“to use and occupy said land, or to lease or otherwise deal with the same, without

¹ Section 17 (d) of the June 3 Lease defines “extractable minerals” as “any minerals in solution in the well effluence, and minerals or gasses produced from or by means of any well or wells on the leased land or by means of condensing steam or processing water produced from or the effluence from any such well or wells.”

1 interference with Lessee's rights, for residential, agricultural, commercial,
2 horticultural, or grazing uses, or for mining of minerals lying on the surface of or
3 in vein deposits on or in said land, or for any and all uses other than the uses and
4 rights permitted to Lessee hereunder." (*Id.* at pp. 1-2.)

5 Section 4 of the June 3 Lease further restricted Cordero's use of the land, providing only
6 the right to drill wells and requiring that:

7 ". . . Lessee shall utilize for such purpose or purposes only so much of the leased
8 land as shall be reasonably necessary for Lessee's operations and activities
9 thereon and shall interfere as little as reasonably possible with the use and
10 occupancy of the leased land by Lessor." (*Id.* at p. 4, Sec. 4.)

11 Not only did the June 3 Lease specifically limit Cordero's area of operation on the site, it
12 *prohibited* Cordero from engaging in any activity (including the investigation/remediation of
13 alleged mercury contamination) not related to geothermal exploration. The Regional Board
14 offers *no evidence* that Cordero and SEDC engaged in any activity unrelated to geothermal
15 exploration. Thus, the Prosecution Team's Evidence Document submitted in support of the
16 Draft Order, makes the factually and legally unsupported allegation that "Cordero [] and
17 [SEDC], by leasing portions of the property where mining waste piles were present, took
18 responsibility for appropriately managing the discharges from these waste piles to the extent that
19 their lease gave them the ability to do so." The June 3 Lease speaks for itself and reveals that
20 Cordero *could not have* taken such responsibility. (See Exhibit A.) Similarly, the Evidence
21 Document makes the erroneous allegation that Cordero and SEDC "controlled" the parcels
22 where the waste piles were present. This contradicts the plain language of the geothermal leases.
(*Id.*; see also leases referenced in Attachment B of the Evidence Document.) As a result, Sunoco
23 requests that the Regional Board amend the Draft Order, removing Cordero and SEDC as
24 respondents, since they were not "dischargers." Otherwise, Sunoco will pursue all legal
25 remedies, including but not limited to the filing of a Petition for Review and a Petition for Stay
26 of Action with the State Water Resources Control Board.

27 **B. In the Matter of the Petition of Zoecon Corporation, Order No. WQ 86-**
28 **02, and In the Matter of the Petitions of Wenwest, Inc. et al, Order No.**
WQ 92-13, May Apply To Owners In Some Instances But Never To
Lessees.

29 The Prosecution Team's Evidence Document cites the State Water Resource Control
30 Board decisions In the Matter of the Petition of Zoecon Corporation, Order No. WQ 86-02
31 ("Zoecon"), and In the Matter of the Petitions of Wenwest, Inc. et al, Order No. WQ 92-13
32 ("Wenwest"), which purportedly support the allegation that "[t]he [State Board] has

1 determined that, in addition to the initial release of pollutants into the environment, the passive
2 release of pollutants is considered a 'discharge' of waste for the purposes of determining liability
3 under CWC section 13304." These orders, however, only apply and attribute liability to site
4 owners, but not mere lessees such as Cordero and SEDC. As a result, the Prosecution Team has
5 not met its burden of showing that Cordero or SEDC have any legal liability under a passive
6 migration/continuing nuisance theory. It is well-established that "[t]he Porter-Cologne Act []
7 appears to be harmonious with the common law of nuisance." (City of Modesto Redevelopment
8 Agency v. Superior Court, 119 Cal.App.4th 28, 370 (2004).)

9 Under Zoecon and Wenwest, a *current owner* may face liability because it has the
10 authority to abate a continuing nuisance resulting from the passive migration of contaminants,
11 even where caused by a predecessor owner. However, nothing in either decision supports a
12 finding of liability for *former lessees* such as Cordero and SEDC, which neither caused the
13 continuing nuisance nor have any current authority to abate it.

14 In Zoecon, the Regional Board concluded that the petitioner, the current site owner, was
15 legally responsible for conducting the required investigation or remedial action. (Zoecon at p. 2.)
16 The State Board based its decision on a passive migration, continuing nuisance theory, stating:

17 "Therefore we must conclude that there is an actual movement of waste from soils
18 to ground water and from contaminated to uncontaminated ground water at the
19 site which is sufficient to constitute a "discharge" by the petitioner for purposes of
20 Water Code §13263(a)." (Zoecon at p. 4.)

21 Water Code §13263(a) provides:

22 "(a) The regional board, after any necessary hearing, shall prescribe requirements
23 as to the nature of any proposed discharge, existing discharge, or material change
24 in an existing discharge, except discharges into a community sewer system, with
25 relation to the conditions existing in the disposal area or receiving waters upon,
26 or into which, the discharge is made or proposed. The requirements shall
27 implement any relevant water quality control plans that have been adopted, and
28 shall take into consideration the beneficial uses to be protected, the water quality
objectives reasonably required for that purpose, other waste discharges, the need
to prevent nuisance, and the provisions of Section 13241." (CWC §13263(a).)

Zoecon also states, "...here the waste discharge requirements were imposed on Zoecon
not because it had 'deposited' chemicals on to land where they will eventually 'discharge' into
state waters, but *because it owns contaminated land which is directly discharging chemicals into*
water." (Zoecon at p. 5; emphasis added.) Similarly, in Zoecon the Regional Board made the
"determination that *property owner is a discharger for purposes of issuing waste discharge*

1 requirements when wastes continue to be discharged from a site into waters of the state.” (Id.;
2 emphasis added.)

3 Later, Zoecon states, in explaining why a New Jersey court’s conclusion regarding
4 application of the common law nuisance doctrine would probably not be applied by a California
5 court, that, “[t]his is because California Civil Code §3483 provides that every successive *owner*
6 of property who neglects to abate a continuing nuisance upon, or in the use of, such property,
7 created by a former owner, is liable therefore in the same matter as the one who first created it.”
8 (Zoecon at p. 10; emphasis added). Zoecon acknowledged that “[c]ommon law governs in
9 California only to the extent that it has not been modified by statute.” (Id. at p. 10, fn 6.) In this
10 regard, Zoecon recognized that the California legislature specifically excluded lessees from
11 liability in codifying nuisance law, since Civil Code §3483 only applies to “owners,” and not
12 lessees. Thus, Zoecon does not apply to lessees Cordero and SEDC, and the Regional Board
13 must remove them from the draft Order and any future orders related to the sites at issue.

14 The Prosecution Team’s reliance on Wenwest is also misplaced, as that matter attributed
15 liability to former and current owners. There, while some of the former site owners were at one
16 time lessees, the State Board did not base cleanup liability on their former lessee status. Instead,
17 the State Board relied on the precedent of a prior order (Petition of John Stuart, Order No. WQ
18 86-15) to apply a three-part test to “*former owners*” to determine whether a predecessor acted in
19 such a way as to obligate participation in the cleanup: “(1) did they have a significant ownership
20 interest in the property at the time of the discharge?; (2) did they have knowledge of the
21 activities which resulted in the discharge; and (3) did they have the legal ability to prevent the
22 discharge.” (Wenwest at p. 4.) The Wenwest decision attributed liability to former owners only
23 upon finding affirmative answers to all three questions. More significantly, in Wenwest, the
24 State Board removed PRP Wendy’s International (“Wendy’s”), a *former site owner*, from the
25 cleanup order upon recognizing that “[n]o order issued by this Board has held responsible for a
26 cleanup a former landowner who had no part in the activity which resulted in the discharge of the
27 waste and whose ownership interest did not cover the time during which that activity was taking
28 place.” (Wenwest at p. 5.)

29 The State Board also based its decision to remove Wendy’s in part on the fact that “the
30 gasoline was already in the ground water and the tanks had been closed prior to the brief time
31 Wendy’s owned the site.” Here, the alleged mercury contamination of concern either was
32 already in Sulphur Creek due to naturally occurring discharges (see discussion below) or

1 mercury mining activity that took place long before Cordero and SEDC entered into their
2 geothermal leases. Moreover, Wendy's was "told about the pollution...but took no steps to
3 remedy the situation. On the other hand, they did nothing to make the situation any worse." (Id.)
4 Here, the Prosecution Team offers no evidence that Cordero or SEDC knew about the pollution
5 or "did [anything] to make the situation any worse." The Prosecution Team suggests in the
6 Evidence Document only that Cordero/SEDC had the "ability to control" the alleged discharge
7 during the leasehold. It offers no evidence that these entities developed any road (which may
8 have predated the leasehold), or that construction of a geothermal drilling pad could have made
9 the situation any worse.

10 In summary, applying the considerations the State Board addressed in removing Wendy's
11 in Wenwest supports removal of Cordero and SEDC from the Draft Order here:

- 12 • Cordero/SEDC leased the site specifically for geothermal exploration;
- 13 • The Cordero/SEDC leaseholds were limited in scope and short in duration;
- 14 • The current site owner is named in the Draft Order;
- 15 • No evidence has been offered demonstrating that Cordero/SEDC had anything to do with
16 the activity (mercury mining/naturally occurring background levels) that caused the
17 alleged discharge;
- 18 • No evidence has been offered demonstrating Cordero/SEDC engaged in any activity on
19 the site which may have exacerbated the problem;
- 20 • No evidence has been offered demonstrating Cordero/SEDC had knowledge of a
21 pollution problem at the site during their leases;
- 22 • Cordero/SEDC leased the site(s) in the 1960's and 1970's, prior to the development of
23 TMDL's and/or any other water quality objectives;
- 24 • There are several responsible parties who are properly named in the order.

(Cf. Wenwest considerations at pp. 6-7.)

25 **C. Under California Civil Code §3483 Lessees Such As Cordero And SEDC**
26 **Are Not Liable For Nuisances Created Prior To The Leasehold.**

27 California Civil Code §3483 assesses continuing nuisance liability only upon *owners* and
28 *former owners*, not lessees. The plain language of §3483 reveals that the legislature explicitly
excluded lessees from liability for continuing nuisance:

"Every successive *owner* of property who neglects to abate a continuing nuisance
upon, or in the use of, such property, created by a former *owner*, is liable therefor

1 in the same manner as the one who first created it.” (Cal. Civ. Code § 3483;
2 emphasis added.)

3 Even if the Regional Board were to somehow find that Cordero and SEDC were
4 constructive owners of the site(s) (which they were not), these entities would still not face
5 liability under California law, because it is well-established that “. . . there is no dispute
6 in the authorities that one who was not the creator of a nuisance *must have notice or*
7 *knowledge of it before he can be held [liable].*” (Reinhard v. Lawrence Warehouse Co.,
8 41 Cal.App.2d 741 (1940) (emphasis added), citing Grigsby v. Clear Lake Water Works
9 Co., 40 Cal. 396, 407 (1870); Edwards v. Atchison, T. & S. F. R. Co., 15 F.2d 37, 38
10 (1926).) Moreover, “[i]t is a prerequisite to impose liability against a person who merely
11 passively continues a nuisance created by another that he should have notice of the fact
12 that he is maintaining a nuisance and be requested to remove or abate it, or at least that he
13 should have knowledge of the existence of the nuisance.” (Reinhard, supra, at 746.)
14 While Wendy’s was a former owner (a fact distinguishing its potential liability from that
15 of lessees Cordero and SEDC), the Wenwest decision *is* analogous here in that the State
16 Board recognized that “[h]ad a cleanup been ordered while Wendy’s owned the site, it
17 would have been proper to name them as a discharger. Under the facts as presented in
18 this case, it is not.” (Wenwest at p. 6.) Here, the State Board did not order Cordero or
19 SEDC to cleanup while they held leaseholds, thus, it would be improper to name them as
20 a discharger under either the cases listed above *or* the Wenwest decision.

21 The Prosecution Team’s allegation that “an ongoing discharge is and was
22 occurring” (July 16 letter at p. 1) is insufficient to trigger liability on the part of Cordero
23 and SEDC since, in addition to neither having been an owner, no evidence is presented
24 proving that either Cordero or SEDC was on notice of the fact that it was maintaining a
25 nuisance and had been requested to remove or abate it, or that it had knowledge of the
26 existence of the nuisance. Moreover, if the Prosecution Team is now asserting that a
27 nuisance was occurring at the time Cordero and SEDC held the leaseholds, it begs the
28 question as to why the Regional Board did not require investigation or remediation of this
alleged nuisance at the time, some 30-40 years ago. If the Regional Board was not aware
of the nuisance at the time, there is no reason to believe that a geothermal lessee not
engaged in mercury mining had knowledge that a continuing nuisance existed on the
leased property.

1 The Prosecution Team fails to provide any legal or factual basis for the
2 conclusion that either Cordero or SEDC has legal liability as an “owner” and, therefore, a
3 discharger, under a continuing nuisance theory. Thus, the Regional Board’s attempt to
4 name Cordero and SEDC as dischargers is unsupported by California law and must be
5 denied.

6 Even if the Prosecution Team offered any factual or legal bases for liability
7 (which it has not), the Prosecution Team’s assertion that liability under CWC section
8 13304 is “joint and several” is erroneous under the recent United States Supreme Court
9 decision holding that divisibility is appropriate where a party can show a reasonable basis
10 for apportionment. (Burlington Northern & Santa Fe Railway Co. et al. v. United States,
11 (2009) 129 S. Ct. 1870.) In Burlington, neither the parties nor the lower courts disputed
12 the principles that govern apportionment in CERCLA cases, and both the District Court
13 and Court of Appeals agreed that the harm created by the contamination of the Arvin site,
14 although singular, was theoretically capable of apportionment. (Id. at 1881.) Thus, the
15 issue before the Court was whether the record provided a “reasonable basis” for the
16 District Court’s divisibility conclusion. (Id.) Despite the parties’ failure to assist the
17 District Court in linking the evidence supporting apportionment to the proper allocation
18 of liability, the District Court ultimately concluded that this was “a classic ‘divisible in
19 terms of degree’ case, both as to the time period in which defendants’ conduct occurred,
20 and ownership existed, and as to the *estimated maximum contribution* of each party's
21 activities that released hazardous substances that caused Site contamination.” (Id. at
22 1882; emphasis added.)

23 Consequently, the District Court apportioned liability, assigning one set of
24 defendants 9% of the total remediation costs. (Id.) The Supreme Court concluded that the
25 facts contained in the record reasonably supported the apportionment of liability, because
26 the District Court's detailed findings made it abundantly clear that the primary pollution
27 at the facility at issue was contained in an unlined sump and an unlined pond in the
28 southeastern portion of the facility most distant from the defendants’ parcel and that the
spills of hazardous chemicals that occurred on that parcel contributed to no more than
10% of the total site contamination, some of which did not require remediation. (Id. at
1882-3.) Thus, the Supreme Court recognized that “. . . if adequate information is
available, divisibility may be established by ‘volumetric, chronological, or other types of

1 evidence,' including appropriate geographic considerations." (*Id.* at 1883; emphasis
2 added.) Although the evidence adduced by the parties did not allow the court to calculate
3 precisely the amount of hazardous chemicals contributed by the parcel to the total site
4 contamination or the exact percentage of harm caused by each chemical, the evidence did
5 show that fewer spills occurred on the parcel and that of those spills that occurred, not all
6 were carried across the parcel to the sump and pond from which most of the
7 contamination originated. (*Id.*) Because the District Court's ultimate allocation of
8 liability was supported by the evidence and comported with general apportionment
9 principles, the Supreme Court *reversed the Court of Appeals' conclusion that the*
10 *defendants are subject to joint and several liability for all response costs arising out of*
11 *the contamination of the facility.* (*Id.*)

12 It is well-established that "litigants may not invoke state statutes in order to
13 escape the application of CERCLA's provisions in the midst of hazardous waste
14 litigation." (*Fireman's Fund Insurance Company v. City of Lodi*, 303 F.3d 928, 947 n.
15 15 (9th Cir. 2002).) Similarly, because "[f]ederal conflict preemption [exists] where
16 'compliance with both the federal and state regulations is a physical impossibility,' or
17 when the state law stands as an 'obstacle to the accomplishment and execution of the full
18 purposes and objectives of Congress'" (*Id.* at 943), the Regional Board may not – in an
19 attempt to assess joint and several liability – assert any state law provisions that would be
20 inconsistent with *Burlington*, and applying its holding to the facts outlined herein related
21 to Cordero's or SEDC's *de micromis* geothermal leasehold operations at the sites,
22 apportionment is appropriate and there is no basis for the Regional Board to find Cordero
23 jointly and severally liable for mercury contamination caused by any other discharger
24 based solely on geothermal leases.

25 **D. Analogous Federal Case Law Reflects California Law And Suggests That**
26 **Cordero and SEDC, Merely By Entering Into Geothermal Leases, Did**
27 **Not Constructively "Own" Or Otherwise "Operate" Any Mine Site.**

28 In a related and therefore relevant context, federal law reflects the same legal principles
as those adopted in the California legislature's codification of nuisance law in Civil Code §3483,
and does not support the imposition of liability upon former lessees Cordero and SEDC as
"operators" or "owners" under CERCLA.

A. Neither Cordero Nor SEDC Would Be Considered an "Operator" Under CERCLA.

While the draft Order suggests that Cordero and SEDC can be considered "dischargers"

1 under CWC §§ 13267 and 13304 because of their alleged status as “owners or operators” of the
2 site(s), analogous federal case law applied to the facts of this matter demonstrate that, as to the
3 mine waste at issue here, neither Cordero nor SEDC qualify as either an “owner” or an
4 “operator” with liability for the mine waste. Under federal law, a finding that geothermal lessees
5 Cordero and SEDC were “operators” of the mercury mine would require a showing that they
6 managed, directed, or conducted operations specifically related to the pollution at issue, that is,
7 operations having to do with the leakage or disposal of hazardous waste, or decisions about
8 compliance with environmental regulations. (See United States v. Bestfoods, 524 U.S. 51, 66-67
9 (1998).) Yet, the Prosecution Team offers no evidence that Cordero or SEDC conducted any
10 operations related to the mercury mines or any related materials. Moreover, the terms of the
11 geothermal exploration leases entered into by Cordero and SEDC do not support a finding that
12 Cordero or SEDC were “operators”, and several cases support this conclusion. (See, e.g., Nurad
13 Inc. v. Wm. E. Hooper & Sons, Co., et al., 966 F.2d 837, 842 (4th Cir. 1992) (court refused to
14 impose “operator” liability on a lessee of a building for contamination that occurred as a result of
15 leaks from underground storage tanks built by the prior property owner that occurred adjacent to
16 the leased building during the tenant’s leasehold); Kaiser Aluminum & Chemical Corp. v.
17 Catellus Dev. Corp., 976 F.2d 1338, 1341-1342 (9th Cir. Cal. 1992) ([R]eiterating the well-
18 settled rule that "operator" liability under section 9607(a) (2) only attaches if the defendant had
19 authority to control the cause of the contamination at the time the hazardous substances were
20 released into the environment; CPC Int'l, Inc. v. Aerojet-General Corp., 731 F. Supp. 783, 788
21 (W.D. Mich. 1989) ("The most commonly adopted yardstick for determining whether a party is
22 an owner-operator under CERCLA is the degree of control that party is able to exert over the
23 activity causing the pollution."))

24 The United States Supreme Court’s decision in United States v. Bestfoods, 524 U.S. 51
25 (1998) clarified the test for “operator” liability as follows:

26 [U]nder CERCLA, an operator is simply someone who directs the workings of,
27 manages, or conducts the affairs of a facility. To sharpen the definition for
28 purposes of CERCLA's concern with environmental contamination, an operator
must manage, direct, or conduct operations specifically related to pollution, that
is, operations having to do with the leakage or disposal of hazardous waste, or
decisions about compliance with environmental regulations.” (United States v.
Bestfoods, 524 U.S. 51 at 66-67.)

Here, no evidence is adduced that Cordero and SEDC acted to “manage, direct or
conduct” the mercury mining operations that gave rise to the alleged mercury pollution at the

1 Site such that they could be considered “operators” of the Site. Furthermore, Cordero and SEDC
2 did not have the authority to control any mercury mining waste at the Site, let alone exercise any
3 “actual control” over the Site, such that they should be considered operators. (See generally,
4 leases referenced in Attachment B of the Prosecution Team’s Evidence Document.) Indeed, as
5 discussed above, there is no evidence Cordero or SEDC were even aware of any nuisance caused
6 by mercury mining waste at the site(s). Thus, in accordance with the Zoecon and Wenwest
7 decisions and Civil Code §3483 discussed above, and under analogous federal law, Cordero and
8 SEDC cannot and should not should be considered liable as “dischargers” under the California
9 Water Code because, as mere geothermal lessees (pursuing the environmentally beneficial goals
10 of developing renewable energy sources), they could not have arguably become “operators” of
11 the historical mercury mines or mining waste on the Sites.

12 **E. Neither Cordero Nor SEDC Are “Dischargers” Under CWC Sections**
13 **13304 and 13267 As A Result of Their Geothermal Leases and**
14 **Exploration Activities.**

15 Even if there was any mercury mining waste on any of the parcels leased by Cordero or
16 SEDC for geothermal investigation purposes, the Regional Board bases the Order on California
17 Water Code sections 13267 and 13304, which do not create liability for mere geothermal lessees
18 such as Cordero and SEDC. First, the Regional Board has not met the requirement under section
19 13267² of “identifying the evidence that supports requiring [Sunoco] to provide the reports.”
20 Merely referencing the facts that Cordero and SEDC held geothermal leases is insufficient to
21 establish that they caused any discharge of any mercury mine wastes.³ Nor has the Regional
22 Board produced any evidence showing any nexus between Cordero or SEDC and mercury
23 mining activity at any of the sites referenced in the Draft Order. Again, the Regional Board’s
24 mere identification of Cordero and SEDC as having held geothermal leases allegedly covering
25 parcels on which former mercury mine wastes allegedly exist does not establish a reasonable or

26 ² Section 13267(b)(1) provides in relevant part: “In conducting an investigation specified in subdivision
27 (a), the regional board may require that any person who has discharged, discharges, or is suspected of
28 having discharged or discharging...waste within its region...shall furnish, under penalty of perjury,
technical or monitoring program reports which the regional board requires. 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.”

³ We also note that the Draft Order is inconsistent and unfair in its treatment of Cordero and SEDC
compared with the State of California by the Regional Board, in that it names the former companies as
“dischargers” under the Draft Order, but not the State, even though Attachment B to the Draft Order
identifies the “State of California (all quicksilver rights)” as a lessee of some of the sites at issue in the
Draft Order.

1 rational basis for concluding, as the Regional Board apparently does, that these entities have
2 “discharged” any mine waste.

3 Similarly, the Regional Board has not met the requirements of section 13304⁴ in naming
4 Cordero and SEDC as “dischargers.” As discussed above, the Regional Board has provided no
5 evidence that either Cordero or SEDC conducted any mercury mining activities or otherwise
6 “discharged” any mercury mine waste in connection with the limited geothermal investigation
7 activities they conducted on the properties they leased.

8 For example, paragraph 3 of the Draft Order focuses on “[*m*]ining waste [that] has been
9 discharged onto ground surface where it has eroded into Sulphur Creek, resulting in elevated
10 concentrations of metals within the creek...”, yet alleges only that “[*t*]he Dischargers either
11 own, have owned, or have operated the mining sites where Mines are located and where mining
12 waste has been discharged.” (DO pp. 2-3; ¶ 3.) Neither Cordero nor SEDC ever owned or
13 “operated” the mining sites at issue. Instead, at most, they only held geothermal leases for short
14 time periods and conducted limited geothermal investigation activities. The Regional Board’s
15 Draft Order is therefore without factual basis as it pertains to Cordero and SEDC since it fails to
16 cite to any evidence that Cordero or SEDC “discharged” any of the referenced mercury mining
17 waste. Thus, Sunoco respectfully requests that the Regional Board amend the Draft Order and
18 any subsequent final order to not include Cordero or SEDC.

19 **F. The Draft Order Is Unjustified Because The Regional Board Admits That**
20 **Added Beneficial Uses Of Sulphur Creek Are Unattainable Due To**
21 **Natural Sources Of Mercury and Salts.**

22 The Regional Board’s March 2007 final staff report proposed an amendment to the Water
23 Quality Control Plan for the Sacramento and San Joaquin River Basins (Basin Plan)(“Final Staff
24 Report”), which recommended finding that certain beneficial uses are not applicable and
25 establishing site-specific water quality objectives for mercury in Sulphur Creek. The Final Staff
26 Report illustrates that the Draft Order is legally and technically unjustified since it will neither
27
28

24 ⁴ CWC section 13304(a) provides in relevant part: “Any person who has discharged or discharges waste
25 into the waters of this state in violation of any waste discharge requirement or other order or prohibition
26 issued by a regional board or the state board, or who has caused or permitted, causes or permits, or
27 threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be,
28 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, or, in
the case of threatened pollution or nuisance, take other necessary remedial action, including, but not
limited to, overseeing cleanup and abatement efforts....”

1 enhance the beneficial uses of Sulphur Creek nor result in any measurable benefits that justify
2 the likely cost. (See excerpt from p. i of Final Staff Report, attached hereto as Exhibit B;
3 (complete document located at [http://www. waterboards. ca.gov/ centralvalley/water_ issues](http://www.waterboards.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/sulphur_creek_hg/sulphur_creek_staff_final.pdf)
4 [/tmdl/central_valley_projects/ sulphur_creek_hg/sulphur_creek_staff_final.pdf](http://www.waterboards.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/sulphur_creek_hg/sulphur_creek_staff_final.pdf).)⁵

5 Specifically, the Draft Order is suspect in light of the Regional Board’s admission that
6 Sulphur Creek does not support the MUN beneficial use or the human consumption of aquatic
7 organisms in light of the fact that *naturally occurring concentrations of total suspended solids,*
8 *mercury, and electrical conductivity exceed drinking water criteria and make Sulphur Creek*
9 *unsuitable habitat for fish and consumable aquatic invertebrates.* (Id.) Total suspended solids
10 and electrical conductivity also exceed the criteria in Resolution 88-63 for excepting the MUN
11 beneficial use designation for surface and ground waters. (Id.) The Regional Board
12 acknowledges that “[t]hese uses are not existing and cannot feasibly be attained in the future.”
13 (Id.)

14 Because these uses do not exist and are not attainable, none of the promulgated water
15 quality criteria for mercury apply, so the staff’s proposal of a “site-specific” water quality
16 objective for mercury in Sulphur Creek based on natural background conditions is inappropriate.
17 Moreover, the setting of site specific water quality criteria that will not establish such beneficial
18 uses violates the requirement of the Porter-Cologne Act that Regional Boards engage in a cost-
19 benefit analysis prior to issuing any cleanup and abatement orders. (See CWC §§ 13263, 13241.)
20 While the California Porter-Cologne Act regulates the discharge of waste into ambient waters
21 and authorizes Regional Boards to impose requirements on waste dischargers, CWC §13263
22 requires Regional Boards to “take into consideration” the following factors prior to imposing
23 these requirements: “the beneficial uses to be protected, the water quality objectives reasonably
24 required for that purpose, other waste discharges, the need to prevent nuisance, and the
25 provisions of section 13241.” (CWC § 13263.) Under section 13241, the six “factors to be
26 considered,” include “*economic considerations*” and “*water quality conditions that could*
27 *reasonably be achieved through the coordinated control of all factors which affect water quality*
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⁵ Per the Hearing Procedures, Sunoco submits by reference all evidence and exhibits already in the public files of the Regional Board in accordance with California Code of Regulations, title 23, section 648.3, including all documents, studies and reports, related to the CVRWQCB Sulphur Creek (Colusa County) Mining District Remediation located at:
[http://www.waterboards.ca.gov/centralvalley/water_ issues/mining/sulphur_creek/index.shtml](http://www.waterboards.ca.gov/centralvalley/water_issues/mining/sulphur_creek/index.shtml)

1 *in the area.*” (CWC § 13241; emphasis added.)

2 The Draft Order’s requirements that Cordero and SEDC submit a work plan and
3 investigative report related to the “Site” and “mine site” are overly broad, especially given the
4 expense involved in the essentially existential endeavor of remediating a site that cannot be
5 remediated due to naturally occurring conditions.

6 Moreover, the Draft Order is premature in that it requires investigation and remediation
7 before the Board has proven that there has been a discharge of mercury waste from the Central
8 and Empire mine sites. Paragraph 20 of the Draft Order *estimates* that the mercury load from
9 Central Mine is 0.003 to 0.03 kg/yr or 0.16% of the total mine related mercury load of 4.4 to 18.6
10 kg/yr to Sulphur Creek. Similarly, paragraph 20 *estimates* that the mercury load from the
11 Empire Mine is 0.04 to 0.06 kg/yr or 0.32% of the total mine related mercury load of 4.4 to 18.6
12 kg/yr to Sulphur Creek (CalFed Report). This low amount of estimated mercury loading from
13 these sites is likely the result of the good ground cover that has developed over the years. The
14 significant amount of naturally occurring mercury in Sulphur Creek combined with an apparent
15 over-estimation of erosion of mine-tailings contributing mercury to Sulphur Creek indicates that
16 the nature of site conditions remains largely uncertain, and that the Regional Board needs to
17 conduct considerable investigative work – including the assessment of natural or background
18 conditions – prior to determining that there has been any discharge of mercury mine waste at
19 these Sites meriting the assessment of liability for investigation and remediation of the Sites and
20 Sulphur Creek.

21 The water quality of Sulphur Creek is naturally degraded. The highest concentrations of
22 mercury and dissolved solids in Sulphur Creek are found in water from the natural springs that
23 enter the creek. Mining is not believed to have affected or altered the water quality from the
24 springs (Regional Board, 2007). Further, it has been reported that a major portion of the mercury
25 content in Sulphur Creek is from the naturally occurring springs and that the presence of the
26 mine workings contributes a significantly lesser amount of mercury to the creek. (Final Staff
27 Report.) Therefore, even if the parties made the considerable investment to remediate all of the
28 mine tailings, and it were assumed that all of the mercury contributed by the mines was to be
remediated, the overall water quality of Sulphur Creek would remain poor with elevated mercury
concentrations based on the naturally occurring background levels. (Id.)

Statements regarding the erosion of the mine tailings as a key source of mercury to
Sulphur Creek appear to be overstated as a result of the generalized nature of runoff modeling

1 previously conducted. Thus, Sunoco requests that the Regional Board conduct investigations of
2 mercury background levels and mine site contribution prior to issuing any final cleanup and
3 abatement order.

4 **G. Sunoco's Witness List, Subject Of Proposed Testimony, Estimated Time
5 Of Testimony, And Qualifications.**

6 In accordance with the Hearing Procedures, Sunoco herein provides the name of each
7 witness, if any, whom Sunoco intends to call at the hearing, the subject of each witness'
8 proposed testimony, the estimated time required by each witness to present direct testimony, and
9 the qualifications of each expert witness.

10 At the October 7-9, 2009 Hearing, Sunoco may offer the testimony of its retained
11 environmental consultant Andy Zdon, Principal Hydrogeologist with The Source Group, Inc.,
12 3451-C Vincent Road, Pleasant Hill, CA 94523. Mr. Zdon's proposed testimony may reflect the
13 technical discussion outlined above, as well as any other relevant matters pertaining to the Draft
14 Order or the studies and reports concerning the CVRWQCB's Sulphur Creek (Colusa County)
15 Mining District Remediation located at [http://www.waterboards.ca.gov/centralvalley/water
16 issues/mining/sulphur_creek/index.shtml](http://www.waterboards.ca.gov/centralvalley/water_issues/mining/sulphur_creek/index.shtml) (as referenced in f.n. 4, above). Sunoco reserves the
17 right to offer Mr. Zdon's testimony in rebuttal of any argument or technical analysis offered by
18 the Prosecution Team, any other Designated Party, or any Interested Persons (as that term is
19 defined in the Hearing Procedures). Sunoco estimates that any testimony offered by Mr. Zdon
20 will be 5-10 minutes in duration, but reserves the right to exceed this estimated time limit if
21 circumstances so warrant. (Attached hereto as Exhibit C is a true and correct copy of Mr. Zdon's
22 current curriculum vitae.)

23 **Conclusion/Policy Statement.**

24 For the above-stated reasons, the Regional Board's Draft Order and the Prosecution
25 Team's Evidence Document improperly identify Cordero and SEDC as "dischargers" without
26 sufficient legal or factual basis. Moreover, as a matter of policy, it is unfair and inappropriate to
27 penalize entities engaged in the environmentally beneficial activity of pursuing the development
28 of renewable energy resources by attempting to hold them responsible for mining activities as to
which there is no evidence they had any connection. Sunoco therefore requests that the Regional
Board remove Cordero and SEDC as dischargers from the Draft Order and any subsequent final
order.

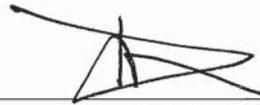
Reservation of Rights.

Sunoco reserves the right to supplement its Statement with additional legal argument and factual information should the Prosecution Team or any other alleged Discharger or Interested Party introduce new legal or factual argument in a rebuttal response to this Statement.

Respectfully Submitted,

DATED: September 15, 2009

EDGCOMB LAW GROUP

By:  - fore -

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Attorneys for Sunoco, Inc.

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