

HEARING OF THE CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL
BOARD

PROPOSED TECHNICAL AND MONITORING REPORT ORDER R5-2010-xxxx
FOR THE CENTRAL MINE, ET AL.
COLUSA COUNTY, CALIFORNIA

**SUBMISSION OF COMMENTS
BY
DESIGNATED PARTY HOMESTAKE MINING COMPANY OF CALIFORNIA**

Pursuant to the Hearing Procedures established for the above matter by the Central Valley Regional Water Quality Control Board ("CVRWQCB"), Designated Party Homestake Mining Company of California ("Homestake") herewith submits its comments on the Proposed Technical and Monitoring Report Order ("Draft Order") for the Central, Cherry Hill, Empire, Manzanita, and West End Mines, Colusa County, California, R5-XXXX, scheduled for hearing by the CVRWQCB on May 26/27/28, 2010.

Homestake appreciates the decision to substitute this draft Technical and Monitoring Report order under Water Code 13267 ("Draft Order") for the draft Cleanup and Abatement Order ("Proposed CAO") originally proposed for consideration by the CVRWQCB for the Central Mine, et al., sites ("Central Mine Group"). The written submissions and testimony at the hearing held on October 7, 2009, firmly established that the technical data offered in support of that Proposed CAO were inadequate to establish the need for, and the scope of, active remediation at the Site.

That hearing also demonstrated that additional investigation was required to assure that all potentially liable parties, under the broad liability theories offered by the Prosecution Team, were included in proceedings before the CVRWQCB and subject to the order. That obligation is expressly incorporated in this Draft Order. However, Homestake believes it would be more appropriate and more consistent with the views of the CVRWQCB members expressed at the October 7, 2009 hearing, to continue to include Magma Power Company, Cordero Mining Company and Sunoco Energy Development Company as Designated Parties subject to later decision by the Executive Officer at the completion of the investigation directed by the Draft Order.

Par. 4 of the Draft Order states that "Mercury levels are already above applicable objectives in Sulphur Creek..., which constitutes a condition of pollution or nuisance." It is not clear in the record what "applicable objectives" are referred to in that statement. Likewise, it is not clear what evidence in the record establishes that any "applicable objective" for Sulphur Creek has been exceeded, or that such exceedance is due to discharges of mercury from mining waste. The statement should be clarified, and the specific source and data supporting the statement should be identified.

Homestake continues to object to its inclusion as a Designated Party with respect to the Central Mine Group, for the reasons set out in its objection to the Proposed CAO, and incorporates those objections fully in this response. However, pursuant to the instructions of the CVRWQCB, Homestake will limit its comments for the May 2010 hearing to the redlined changes to the Proposed CAO.

In many of those changes, the Draft Order addresses the objections expressed by several parties to the assertion that current and interim owners, operators and lessees are jointly and severally liable at this Site despite the fact that the Designated Parties did not actively cause the alleged discharges to surface water. The responses of the Prosecution Team are insufficient to overcome those objections.

The Draft Order recognizes that the factual record establishes that none of the Designated Parties, with the exception of Bailey Minerals, is directly responsible for the mining waste at the Site that is the alleged source of mercury discharges to Sulphur Creek, and specifically states that there is no evidence that Homestake actively mined the Site.

Likewise, the Draft Order does not dispute Homestake's assertion that naturally occurring conditions contribute significantly to any mercury present in Sulphur Creek, and in fact states expressly that "as much as 90%" of the total mercury in Sulphur Creek is dissolved mercury released by the active hydrothermal system, as opposed to particulate-bound mercury from sediments and mercury-bearing mine waste (Draft Order, par. 29). However, the Draft Order declines to deal substantively with Homestake's argument that if it were to be liable at all for the mercury releases from mining waste located at the Central Mine Group, it should not be jointly and severally liable, because the alleged harm is reasonably divisible.

Indeed, the modified factual statements in the Draft Order add support to Homestake's position. The Draft Order at Par. 62, in the course of addressing the liability of the Helen Holliday Foundation, states expressly that all of the Designated Parties at the Central Mine Group "stand on essentially the same footing."¹ Starting from that premise (and the Draft Order's assumption that it has rained every year), there is an obvious reasonable basis for divisibility in terms of any Designated Party's contribution to the alleged harm: the period of time during which it, either alone or with other Designated Parties, allegedly had the "control" of the property that the Prosecution Team alleges as the basis for liability.

It is not premature or unreasonable to consider that basis for divisibility in this matter. It is disingenuous to say, as is done in Par. 56 of the Draft Order, that the Board has not determined the relative contributions from sources or various dischargers at the site, given the Board's use of the estimates in the TMDL report to establish loading allocations. While it is certainly true that the estimates used by the Board are imprecise, and, in the view of Homestake, among others, greatly overestimate the contribution from mining material sources, that simply means that the use of those estimates here would present a "worst case" for Homestake's potential liability, not

¹ Homestake would agree that is a largely accurate characterization except that it ignores the obvious equitable consideration that interim Designated Parties, unlike the current owners, will not benefit in any way from site investigation and cleanup.

that the use of those estimates is "unreasonable" so as to preclude their use to establish divisible liability shares.

If those estimates can be used by the CVRWQCB for the TMDL, they can properly be applied to the period beginning in the 1870's during which the mining materials have been present at the Site, to identify the proportionate share of the harm assigned to the owners, operators and lessees during each time period. That evaluation precludes placing liability for site investigation and cleanup on interim owners, operators or lessees as "passive dischargers" for releases that occurred over the course of a hundred-year-period prior to their connection to the site, or that occurred after they ceased any connection to the property.

Respectfully submitted this 29th day of April, 2010.



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Of California

cc: Kenneth Landau, Assistant Executive Officer
Lori Okun, Senior Staff Counsel
Prosecution Team
All Designated Parties