

HEARING OF THE CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL
BOARD

PROPOSED TECHNICAL AND MONITORING REPORT ORDER R5-2010-xxxx
FOR THE WIDE AWAKE MERCURY MINE
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 Wide Awake Mercury Mine, Colusa County, California, 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. 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.

Homestake continues to object to its inclusion as a Designated Party with respect to the Wide Awake Mine, 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.

To begin with, in that response, the Draft Order simply cites prior decisions of the State Water Resources Board. Draft Order, par. 44. However, with regard to the application of the Water Code to Homestake, the response completely ignores the conclusion of the State Board that an interim lessee that did not cause releases, although in exclusive possession and control of the property during the time that releases occurred, was not liable for those releases. *In the Matter of U.S. Cellulose, WQ 92-04*. As discussed in Homestake's September 16, 2009 filing, that is Homestake's posture with respect to its activities at the Wide Awake Mine, except that Homestake, unlike the lessee in *U.S. Cellulose*, did not even have exclusive possession and

control of the property. There is no basis in the record to justify a finding that Homestake is liable under the Water Code at the Wide Awake Mine.

The Draft Order does recognize that the factual record establishes that none of the Designated Parties is directly responsible for the mining waste at the Site that is the alleged source of mercury discharges to Sulphur Creek, and acknowledges that all Designated Parties are only "passive dischargers." Put more directly, just as the Draft Order states clearly 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. 20), the Draft Order also states clearly that the Designated Parties did NOT even produce the mining waste conditions that have allegedly resulted in the releases of mercury to Sulphur Creek. The tenuous connection to mercury concentrations in Sulphur Creek established by the record here should not be the basis for an order directing the Designated Parties to carry out complex and expensive site investigations.

The Draft Order does not directly address Homestake's argument that if it were to be liable at all for the Wide Awake, it should not be jointly and severally liable, because the alleged harm is reasonably divisible. However, the modified factual statements in the Draft Order add support to Homestake's position.

The Draft Order states at Par. 50 that all of the Designated Parties at the Wide Awake Mine are "essentially on the same footing."¹ Starting from that premise, 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. The CVRWQCB has already used estimates of the annual contribution of mercury from the Site in connection with its load and waste allocations for the Sulphur Creek TMDL. 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 that the use of those estimates is so "unreasonable" 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.

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.

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