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MR. AND MRS. ROBERT and JILL LEAL

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

CENTRAL VALLEY REGION

In the matter of:

PROPOSED TECHNICAL AND MONITORING
REPORT ORDER

THE WIDE AWAKE MERCURY MINE

COLUSA COUNTY

**COMMENTS ON DRAFT ORDER
SUBMITTED BY MR. ROBERT LEAL**

29 April 2010

In response to the proposed order received from Lori Okun on 14 April 2010, Robert Leal submits the following comments:

1. The Site Is Not A Mine.

There is no evidence of any mine shaft or open mine on any part of the property. The concern expressed by Regional Board staff is about piles of rock and other materials.

2. The Regional Board Has Confused Two Mine Sites.

The evidence submitted shows that there were once two mines, the “Wide Awake Mine” and the “Buckeye Quicksilver Mine”. Most if not all of the mine-associated structures reported by Regional Board staff appear to be on the Buckeye site. There is no evidence that Mr. Leal had an ownership interest in this site.

The Wide Awake Mine site was on Government Survey Lots 43 and 44. The Buckeye Quicksilver Mine site was on Government Survey Lot 37. The Wide Awake Mine site is now identified as Assessor’s Parcel Number 10. The Buckeye Quicksilver Mine is now Assessor’s Parcel Numbers 11 and 12. Robert Leal’s vesting deed was recorded on February 28, 1990 at Book 649, Page 118 of the Official Records of Colusa County, California. The legal description for the property that was conveyed to Mr. Leal in the Grant Deed included Lots 43 and 44, but did not include Lot 37. The Regional Board, therefore, has not established that Mr. Leal owned two of the three lots it has identified as the site.

3. There Is Not Sufficient Evidence To Hold Mr. Leal Liable For Nuisance.

By proposing to modify the order so that it is no longer an cleanup and abatement order, and by removing the imposition of any requirement under authority of Water Code § 13304, Regional Board staff are conceding that there is not sufficient evidence to hold the named parties liable for nuisance.

4. Site Information Showed That Mercury Levels In The Piles Were Not At Harmful Levels.

The evidence offered by the Regional Board established that the levels of mercury identified at the property were below screening values used to determine whether they pose a risk. They were also below natural background levels. The Regional Board therefore has not established that the property has mercury present at levels above natural background, or that it was discharging at above natural background levels at the time of Mr. Leal’s ownership. Because there is no evidence of levels above background, there is no evidence of any anthropogenic contribution or nuisance.

5. Regional Board Personnel Did Not Find Any Evidence Of A Nuisance When They Visited The Site In The 1990s.

During his deposition, Regional Board staff member Victor Izzo testified that he visited the property in about 1992, along with another Regional Board member, and that a report was produced as a result of the visit. Excerpts of Mr. Izzo’s testimony are provided as Exhibit 1, and

the report is provided as Exhibit 2. This evidence, which also came out at the evidentiary hearing last fall, shows that Regional Board members did not identify any nuisance when they visited the property during the time of Mr. Leal ownership. Mr. Izzo also testified that he did not notify Mr. Leal of any nuisance.

6. Every Owner Of Every Property In The Central Valley, Including Residential Properties, Would Also Be Liable Under The Theory Of The Proposed Order.

The proposed order asserts that “Any discharges of mercury or mercury-laden sediments . . . therefore threaten to cause or contribute to a condition of pollution or nuisance.” (§ 27.) Because every property contains dirt, and all the dirt in the region contains mercury, this sentence establishes that every property is creating a nuisance. This statement confirms what Mr. Leal previously said, which is that the mercury problem is caused by natural and background sources, and that there is no evidence that any runoff from the property at issue here, during the time that Mr. Leal owned it, is causing or contributing to any problem. In other words, the Regional Board has not established that the property, during Mr. Leal’s ownership, is a substantial factor in causing any nuisance.

7. Regional Board Staff Have Not Fairly Considered The Applicable Law On Nuisance.

Regional Board have ignored the *Preston* case holding that former owners generally are not liable for dangerous conditions on property they have sold. (*Preston v. Goldman* (1986) 42 Cal. 3d 108.) Staff rely on the Civil Code section that says successive owners of property are liable for nuisances, but ignore related case law, as cited by Mr. Leal in previous submissions. They ignore the case law holding that nuisance requires fault, and that a landowner is not liable for a nuisance until put on notice. (*See* Mr. Leal’s comments dated 1 July 2009.)

People are responsible for the land they own. When landowners are informed that their land is causing a nuisance, they become liable for harm caused by the nuisance. But people are not responsible for land they do not own. Former landowners are therefore not responsible for what may have been dangerous conditions on the land when they owned the land, but were never brought to their attention while they owned it.

Here Regional Board staff cite only the statutes, case law, and State Board orders tending to expand the authority of the Regional Board. They have not responded to Mr. Leal’s citations to other authority that limits that authority, and to higher authority to the contrary.

8. Liability Is Not Joint And Several.

The proposed order asserts that the liability among former landowners is joint and several. Mr. Leal cited case law for the proposition that liability is not joint, but only several. (Comments of 1 July 2009, § 10, citing *Slater v. Pacific American Oil Co.* (1931) 212 Cal. 648, 655.)

9. Title Documents Do Not Provide Notice Of A Nuisance.

Regional Board staff argue that title documents provide notice. But at most they provide notice of a mining claim. They do not provide notice of a discharge, or of a nuisance.

10. Section 13267 Reports Must Be Related To The Discharge.

Implicit in Water Code § 13267, which allows a Regional Board to require technical reports of people who have discharged waste, is that the technical reports must be related to *that person's* discharge. Regional Board staff cannot seriously believe, for example, that a person can be made to provide technical reports about someone else's discharge. But the proposed order is not related to any discharge that may have occurred during the time of Mr. Leal's ownership. Any discharge that might have occurred in the 1990s is long gone, and there is no evidence that it remains anywhere within the State of California. The proposed order is not directed at any past discharge, but rather to the piles of rock and earthen materials on the property that have *not been discharged*. But section 13267 does not provide any authority to require technical reports of materials that have not been discharged. The proposed order therefore goes beyond the authority provided by section 13267.

11. The Regional Board Has Not Established That The Burden Bears A Reasonable Relationship To The Costs.

Water Code § 13267 requires the burden, including costs, to bear a reasonable relationship to the need for the reports and the benefit to be obtained. The Regional Board has not provided any analysis of the burden, including costs, or any analysis of the benefit that will be obtained.

12. The Regional Board Has Not Provided A Sufficient Explanation About The Need For The Reports.

Section 13267 requires a written explanation about the need for the reports, and an identification of the evidence that supports requiring the individual person to provide the reports. The explanation and evidence are inadequate. The Board concedes, for example, that the evidence of discharge during Mr. Leal's ownership is speculative. In paragraph 45, the order says that waste piles were discharging "or suspected of discharging". In paragraph 57, directly related to Mr. Leal, the Board says that these wastes were eroding or suspected of eroding. The technical reports being required, however, will not determine whether there was any erosion during the time of Mr. Leal ownership.

13. Regional Board Staff Read Wen-West Too Narrowly.

In *Wen-West*, the State Board did not decide that Wen-West actually was liable. It sidestepped the issue by applying equitable factors, finding that there was no culpability, and deciding that even if Wen-West was technically liable it should not be held liable.

Here those same equitable factors show that Mr. Leal should not be held liable. Staff try to distinguish Wen-West because there is no cleanup currently proceeding, but Mr. Leal is not

responsible in any way for that lack of cleanup. The equitable factors weigh strongly in his favor, and he should not be held liable.

14. The Proposed Order Incorrectly Asserts That The Regional Board Did Not Acquiesce In The Discharge.

The proposed order says that there is no evidence that the Board acquiesced in the discharge. On the contrary, Regional Board staff visited the property in the 1990s, took samples, and prepared a report. (See discussion above.) Regional Board staff did not identify any nuisance or any need for waste discharge requirements. If there was any discharge at that time, they acquiesced in it.

15. Regional Board Staff Have Not Properly Considered Whether There Is A Taking In Violation Of The Fifth Amendment.

The proposed order asserts that there is not taking because of the decision in the *Lucas* case. But *Lucas* considered only one form of taking. The *Lingle* case, cited by Mr. Leal, makes clear that there can be a taking not only under the *Lucas* analysis, but also under the *Penn Central* analysis. Here the burden on private property is too great, because it requires a former landowner to pay money to solve a problem that he did not create, and was never notified of by the Board at the time he owned the property even though the Board.

The Regional Board cannot make an individual pay for costs that should be paid by the community. (*Pennell v. City of San Jose* (1988) 485 U.S. 1.) Here the mercury of concern is coming from throughout the Central Valley. Mr. Leal is no more responsible for it than any other *former* owner of any property in the region. He should not be held responsible for a cost that should be paid by the community.

16. The Proposed Order Does Not Comply With The California Environmental Quality Act (“CEQA”).

CEQA requires an EIR to be prepared for any project “that may have a significant effect on the environment.” (Pub. Resources Code § 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 Regional Board) requires earth moving and construction, in a remote area, related to large piles of mercury-containing material. 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 required 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.

The draft order argues that the project is exempt from CEQA, and cites three sections within the CEQA Guidelines. But none of them applies. The first, § 15321(a)(2) applies to actions “to enforce or revoke a lease, permit, license, certificate, or other entitlement”. Here

there is no lease, permit, license, certificate, or other entitlement, and so the section does not apply. Moreover, the implicit reason for the section—that any required CEQA review would have been done before the entitlement was issued—does not apply here.

The other sections identified in the proposed order, § 15307 and 15308, do not apply to actions involving construction activities. Here the project requires construction activities. As a result, neither section applies.

The Regional Board should comply with CEQA before issuing the proposed order.

17. Mr. Leal Should Be Given More Than Two Weeks' Notice.

The e-mail from Ms. Okun asserts that nothing will be considered if it is received by the Regional Board after the deadline, which is well before the Regional Board hearing. This deadline artificially cuts off Mr. Leal's right to comment. He should have an opportunity to present his arguments up to and including the hearing. Anything else cuts off his right to comment, as protected by due process, California statutes, and State Board regulations.

Dated: 29 April 2009

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By: _____

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