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April 29, 2010

Via Electronic Mail

Pamela Creedon, Executive Officer
Kenneth Landau, Assistant Executive Officer
State Water Resources Control Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670

Lori Okun, Senior Staff Counsel
State Water Resources Control Board, Office of Chief Counsel
1001 I Street
Sacramento, CA 95814

Re: Comments on Proposed Technical and Monitoring Report Order
Order R5-2010-XXX
Wide Awake Mine / Emma G. Trebilcot Trust
Our File No.: 1225-011

Dear Ms. Creedon, Mr. Landau and Ms. Okun:

This law firm represents Wells Fargo Bank, N.A., trustee for the Emma G. Trebilcot Trust ("Trust"). We appreciate the opportunity to comment on the Proposed Technical and Monitoring Report Order ("Proposed Order"), and we thank the Central Valley Regional Board for its consideration of the Trust's position through these proceedings.

We cannot, however, agree with any recommendation that the Proposed Order should be finalized against the Trust, and derivatively, the four charities that rely on the Trust's funding: Shriners Hospital for Crippled Children, the Salvation Army, the San Francisco Lighthouse for the Blind and Visually Impaired, and Lion's Eye Foundation.

Requiring that the Trust pay the costs to investigate and study mercury at the former mine is only marginally better than the original cleanup order. The fact remains

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that these four charities, that had no ownership or control over the property, will find their income reduced as a direct result of this Proposed Order. The Trust would be required to pay costs that include the expense of hiring environmental consultants, and paying for Regional Board staff time. These costs also include the risk that the Trust may find it necessary to shoulder the responsibilities of dischargers that are insolvent, or that refuse to contribute. And the Trust would still, under the Proposed Order, face the open-ended risk of a future cleanup and abatement order after this investigative phase is complete. As such, the costs and potential liabilities associated with the Proposed Order remain significant.

The fact also remains that these four charities had no ownership or control over the property, and that even the Trust had only the most fleeting and tenuous connection to the alleged water-quality issues. The findings in the Proposed Order are clear on this point. Paragraph 55 of the Proposed Order establishes that the Trust (not the charitable beneficiaries) received ownership of the property through a court order in March 1988, listed the property for sale within two months, and soon thereafter sold the property after a brief 20-month period. The Proposed Order further confirms that the Trust never developed or improved the land in any way during its short ownership, nor is there any evidence that the Trust knew of mercury pollution leaving the former mine.

The Trust understands the need to spread environmental costs, and that purchasers of land bear the risk of conditions that they did not create. But against the Trust, the Proposed Order takes this too far. The Trust did not purposefully acquire the property, but received it involuntarily and worked to shed it immediately. In the 20 years since, the charities have developed a reasonable expectation that Trust funds would continue to provide income, and they have budgeted on that expectation. The Proposed Order, if adopted, would hasten the loss of income that began approximately one year ago when the Trust was required to respond to the original order. More importantly, for the future, the adoption of the Proposed Order would place the reliability of the Trust's income stream in question, and force the charities to restructure budgets during what continue to be challenging economic times.

The Regional Board has ample authority to release the Trust based on these findings. As stated by the Trust in its papers and during oral argument at the hearing in October 2009, the State Water Board's precedent in *Wenwest et al.*, Order No. WQ 92-13, should control here. That decision allows the Regional Board to release an innocent landowner on equitable grounds, if the landowner did not cause or exacerbate the threat to water quality. The *Wenwest* decision was tailor-made for situations precisely such as this. The equities clearly favor releasing the Trust to protect the assets of charities that had no relationship to the property or source of pollution.

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Accordingly, we ask on the Trust's behalf that the Regional Board release the Trust from the Proposed Order. In support of this request, the Trust also incorporates by reference all legal and equitable arguments contained in its prior written submissions and all oral argument presented to the Regional Board members in the October 2009 hearing.

The Trust looks forward to presenting its views during the upcoming May hearing. We thank the Regional Board and its staff for the opportunity to provide our comments.

Very truly yours,

DIEPENBROCK HARRISON
A Professional Corporation

By 

Sean K. Hungerford

CKF:gjc