

1 Edgcomb Law Group
JOHN D. EDGCOMB (SBN 112275)
2 DAVID T. CHAPMAN (SBN 207900)
115 Sansome Street, Suite 700
3 San Francisco, California 94104
Telephone: (415) 399-1555
4 Facsimile: (415) 399-1885
jedgcomb@edgcomb-law.com

5 Attorneys for Petitioner
6 SUNOCO, INC.

7
8 STATE WATER RESOURCES CONTROL BOARD

9 STATE OF CALIFORNIA

10 In the Matter of
11 SUNOCO, INC.,

12
13 Petitioner,

14 For Review of Order to Sunoco, Inc. to
Submit Technical Reports in Accordance
15 with Section 13267 of the California
Water Code, Mount Diablo Mercury
16 Mine, Contra Costa County, dated
March 25, 2009

PETITION NO.

**PETITION FOR STAY OF
ACTION**

1 Pursuant to Section 13321 of the California Water Code and Section 2053 of Title
2 23 of the California Code of Regulations (“CCR”), Sunoco, Inc. (“Sunoco” or
3 “Petitioner”) hereby petitions the State Water Resources Control Board (“State
4 Board”) to stay the California Regional Water Quality Control Board for the
5 Central Valley Region’s (“Regional Board”) implementation of the “Order To
6 Sunoco, Inc. To Submit Technical Reports In Accordance With Section 13267 of
7 the California Water Code, Mount Diablo Mercury Mine, Contra Costa County”
8 (“Order”), dated March 25, 2009.

9 Petitioner has concurrently filed a Petition for Review of the Order with this
10 Petition for Stay of Action.

11 I. STANDARD OF REVIEW

12 Water Code section 13321 authorizes the State Board to stay the effect of
13 Regional Board decisions. Title 23, CCR § 2053 requires that a stay shall be
14 granted if a petitioner alleges facts and produces proof of:

15 (1) Substantial harm to petitioner or to the public interest if a stay is
16 not granted,

17 (2) A lack of substantial harm to other interested persons and to the
18 public if a stay is granted, and

19 3) Substantial questions of fact or law regarding the disputed action.

20 (Title 23, CCR § 2053(a).)

21 The State Board’s granting of a stay is equivalent to a preliminary
22 injunction. The California Supreme Court has stated that the standard for a
23 preliminary injunction is as follows:

24 In deciding whether to issue a preliminary injunction, a court must weigh
25 two “interrelated” factors: (1) the likelihood that the moving party will ultimately
26 prevail on the merits and (2) the relative interim harm to the parties from issuance
27 or non-issuance of the injunction....
28

1 The trial court's determination must be guided by a "mix" of the potential-
2 merit and interim-harm factors; the greater the plaintiff's showing on one, the less
3 must be shown on the other to support an injunction. (Butt v. California (1992) 4
4 Cal.4th 668, 678 (citations omitted)). Sunoco, as detailed below, has satisfied the
5 requirements of both tests. Therefore, the State Board should grant a stay of the
6 Order.

7 **II. ARGUMENT**

8 The Regional Board adopted the Order without holding a public hearing or
9 otherwise providing Petitioner an opportunity to negotiate its terms or present
10 evidence that shows why the Order lacks factual and legal basis and is otherwise
11 flawed.

12 The Regional Board's adoption of the Order was an erroneous action that
13 poses substantial harm to Petitioner and the public interest. First, the Order
14 requires Petitioner to prepare work plans related to the Mount Diablo Mercury
15 Mine ("Site"), but has provided only a vague and ambiguous description of that
16 Site, making compliance with certainty impossible and unnecessary compliance
17 efforts likely. Secondly, the Order requires Petitioner to submit a PRP report, but
18 does not provide any relevant legal authority in support of such a requirement.
19 Third, the Order incorrectly assumes Petitioner operated the entire Site identified,
20 which is false, requires the Petitioner to furnish technical reports covering the
21 entire site, which is unjustified, fails to identify the evidence on which it relies to
22 make the unjustified demands as required, and improperly fails to name known
23 PRPs for the relevant portion of the Site and require them to participate in the work
24 required to furnish the required reports. Thus, Sunoco has a high likelihood of
25 success on the merits of its appeal.

26 **A. Substantial and Irreparable Harm to Petitioner and the** 27 **Public Interest Will Result if the Order is Implemented**

28

1 The public interest and Petitioner will be substantially harmed by
2 implementation of the Order. Because Sunoco cannot be forced to investigate or
3 remediate discharges to which it has no nexus at the Site, the Order's failure to
4 name the appropriate PRPs for those discharges may result in needless litigation
5 and delay, and allow the responsible parties to avoid their fair share of response
6 costs at the Site. Moreover, a failure to stay pending State Board review would
7 burden Petitioner by forcing it to begin implementing an inadequate and illegal
8 Order that may be vacated upon judicial review.

9 Furthermore, a stay is proper because there is a lack of substantial harm to
10 other interested persons and the public interest if it is granted. First, while a stay
11 would prevent enforcement of the Order against Sunoco, the Regional Board could
12 focus on identifying and issuing one or more orders to the parties having legal
13 responsibility for creating the conditions over much of the Site that are of concern
14 to the Regional Board as well as the current owner(s). The Regional Board could
15 thereby achieve the response action it seeks over the entire Site (wherever that is)
16 much sooner than it can by incorrectly and illegally forcing only Sunoco to
17 perform all such work, when Sunoco is not legally responsible for the entire Site.

18 The other responsible parties that the Regional Board should name in such
19 new orders cannot claim unjustified substantial harm because they are the correct
20 parties to be performing this work, not Sunoco.

21 **B. A Stay of the Order Will Not Result in Substantial Harm to Other**
22 **Interested Persons or the Public.**

23 While there may be some delay to the performance of the investigations
24 sought by the Regional Board as a result of the requested stay, that delay and any
25 resulting harm are not substantial given that: 1) the Regional Board can issue
26 orders to other, actually responsible parties to perform the studies sought to be
27 furnished in a relatively short time frame; 2) the Regional Board has been
28

1 generally aware of the site conditions it now seeks to address for 50 years or more
2 already, without issuing any such orders to Sunoco's knowledge; 3) any such harm
3 is substantially outweighed by the harm to be suffered by Sunoco in the absence of
4 a stay as a result of the Order improperly requiring only Sunoco to furnish studies
5 on extensive Site areas for which Sunoco is not responsible.

6 The record on file with the State Board in relation to the concurrently filed
7 Petition for Review contains the relevant supporting documents to this Petition for
8 Stay of Action, which Sunoco reserves the right to – and will – supplement, if and
9 when it activates the Petition for Review and this Petition for Stay from their
10 current “in abeyance” status.

11 As set forth more fully in Sunoco's Petition for Review and the Declaration
12 of John D. Edgcomb in Support of Petition for Review and Petition for Stay
13 (“Edgcomb Declaration”) being filed herewith, a stay is appropriate because the
14 action of the Regional Board with respect to Sunoco is illegal and should be
15 revoked or amended in that the Order: 1) is improperly vague and ambiguous in its
16 description of the Site, making Sunoco's compliance impossible and unnecessary
17 compliance efforts likely; 2) requires preparation of a non-technical PRP report,
18 which requirement is beyond the scope of the Regional Board's cited statutory
19 authority; 3) apparently requires Sunoco to prepare a PRP report and technical
20 reports for large areas of a Site where it was not a “discharger,” and without
21 providing the required reference to the evidence supporting those requirements,
22 meaning the Regional Board is again acting inconsistent with and beyond the
23 scope of its cited statutory authority; and 4) fails to identify known PRPs as
24 respondents on the Order and make them responsible for preparing the required
25 reports. Sunoco hereby incorporates all of the facts and arguments set forth in that
26 Petition for Review and the accompanying Edgcomb Declaration, including any
27 and all supplemental submissions made by Sunoco in support of that Petition.
28

1 **C. The Regional Board's Action Raises Substantial Questions of Law on**
2 **Which Petitioners are Likely to Prevail.**

3 The Petition for Review of the Order has been filed contemporaneously with
4 this Petition and delineates Sunoco's arguments regarding the legal questions on
5 which Sunoco is likely to prevail. The Order clearly violates requirements set
6 forth in the Porter-Cologne Water Quality Act and is wholly unsupported by
7 existing law and the factual record. The State Board should therefore stay the
8 Order and prevent the implementation of a decision that is illegal and sets a
9 dangerous precedent. (The Petition for Review is hereby incorporated by
10 reference.)

11 **III. CONCLUSION**

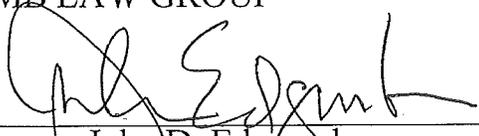
12 Sunoco and the public interest will be substantially and irreparably harmed
13 by the implementation of the Order, while other Site PRPs and the public interest
14 will not suffer from a stay and, in fact, may benefit by a clarification of the vague
15 regulatory requirements in the Order, which may otherwise result in their
16 involvement in litigation and delay issuance of orders to other, more appropriate
17 PRPs. Thus, the balance of harms at issue in the Petition heavily favors the
18 granting of a stay. In addition, the Order has raised substantial questions of fact
19 and law, which, upon review in accordance with the historical record and
20 provisions of the California Water Code are highly likely to be resolved in favor of
21 Sunoco. Therefore, the State Board should issue a stay of the Order.

22
23 Respectfully submitted,
24
25
26
27
28

1 DATED: April 24, 2009

EDGCOMB LAW GROUP

2
3 By: _____


John D. Edgcomb
jedgcomb@edgcomb-law.com
Attorneys for Petitioner
SUNOCO, INC.

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Edgcomb Law Group
JOHN D. EDGCOMB (SBN 112275)
2 DAVID T. CHAPMAN (SBN 207900)
115 Sansome Street, Suite 700
3 San Francisco, California 94104
Telephone: (415) 399-1555
4 Facsimile: (415) 399-1885
jedgcomb@edgcomb-law.com

5 Attorneys for Petitioner
6 SUNOCO, INC.

7
8 STATE WATER RESOURCES CONTROL BOARD

9 STATE OF CALIFORNIA

10 In the Matter of
11 SUNOCO, INC.,

12
13 Petitioner,

14 For Review of Order to Sunoco, Inc. to
Submit Technical Reports in Accordance
15 with Section 13267 of the California
Water Code, Mount Diablo Mercury
16 Mine, Contra Costa County, dated
March 25, 2009

PETITION NO.

**PETITION FOR STAY OF
ACTION**

17
18 Pursuant to California Water Code Section 13320 and Title 23 of the California
19 Code of Regulations §§ 2050 *et seq.*, Petitioner Sunoco, Inc. (“Sunoco” or
20 “Petitioner”) hereby petitions the State Water Resources Control Board (“State
21 Board”) for review of the “Order To Sunoco, Inc. To Submit Technical Reports In
22 Accordance With Section 13267 of the California Water Code, Mount Diablo
23 Mercury Mine, Contra Costa County” (“Order”), adopted by the California
24 Regional Water Quality Control Board, Central Valley Region” (“Regional
25 Board”) dated March 25, 2009. The Order establishes timelines for Sunoco to
26 submit: (1) a potentially responsible party (“PRP”) report; (2) a site investigation
27 work plan; and, (3) a site investigation report. Sunoco requests a hearing in this
28

1 matter.

2 **I. PETITIONER**

3
4 The name and address of Petitioner is:

5 Sunoco, Inc.
6 Attn: Lisa A. Runyon, Senior Counsel
7 Sunoco, Inc.
8 1735 Market St., Ste. LL
9 Philadelphia, PA 19103-7583

10 Sunoco can be contacted through its outside legal counsel:

11 John D. Edgcomb
12 Edgcomb Law Group
13 115 Sansome Street, Ste. 700
14 San Francisco, CA 94104
15 jedgcomb@edgcomb-law.com
16 (415) 399-1555

17 **II. ACTION OF THE REGIONAL BOARD TO BE REVIEWED**

18 Sunoco requests that the State Board review the Regional Board's "Order To
19 Sunoco, Inc. To Submit Technical Reports In Accordance With Section 13267 of
20 the California Water Code, Mount Diablo Mercury Mine, Contra Costa County,"
21 which establishes reporting requirements and names Sunoco as a "discharger" with
22 respect to the Mount Diablo Mercury Mine, which is described in the Order only as
23 an "inactive mercury mine on approximately 109 acres on the northeast slope of
24 Mount Diablo in Contra Costa County" (the "Site"). A copy of the Order is
25 attached as Exhibit 1.

26 This Petition for Review is a protective filing, and pursuant to 23 Cal. Code
27 Regs. § 2050.5(d). **Petitioner requests that this Petition and the Petition for**
28 **Stay of Action filed concurrently herewith be held in abeyance by the State**
Board until further notice from Sunoco.

1 **III. DATE OF THE REGIONAL BOARD ACTION**

2 The Regional Board adopted the Order on March 25, 2009.

3 **IV. STATEMENT OF REASONS WHY THE REGIONAL BOARD'S**
4 **ACTION IS INAPPROPRIATE OR IMPROPER**

5 As set forth more fully below, Sunoco seeks State Board review of the Order
6 because the action of the Regional Board with respect to Sunoco is illegal and
7 should be revoked or amended in that the Order: 1) is improperly vague and
8 ambiguous in its description of the Site, making compliance with certainty
9 impossible and unnecessary compliance efforts likely; 2) requires preparation of a
10 non-technical PRP report, which is beyond the scope of the Regional Board's cited
11 statutory authority; 3) apparently requires Sunoco to prepare a PRP report and
12 technical reports for large areas of a Site where it was not a "discharger," and
13 without providing the required reference to the evidence supporting those
14 requirements, meaning the Regional Board is again acting inconsistent with and
15 beyond the scope of its cited statutory authority; and 4) fails to identify known
16 PRPs as respondents on the Order and make them also responsible for furnishing
17 the required reports.

18 **A. Background.**

19 The Order asserts that the "Mt. Diablo Mercury Mine is an inactive mercury
20 mine on approximately 109 acres on the northeast slope of Mount Diablo in Contra
21 Costa County." (See Declaration of John D. Edgcomb In Support of Petition for
22 review and Petition for Stay of Action ("Edgcomb Decl."), Exhibit 1, Order, at p.
23 1.) The Order further asserts that "[p]resently, the mine consists of an open
24 exposed cut and various inaccessible underground shafts, adits and drifts.
25 Extensive waste rock piles and mine tailings cover the hill slope below the open
26 cut, and several springs and seeps discharge from the tailings-covered area." (Id.)
27 The Order also alleges that "[a]cid mine drainage containing elevated levels of
28

1 mercury and other metals are being discharged to a pond that periodically
2 overflows into Horse and Dunn Creeks” and that “[f]urther site investigation is
3 required to assess the extent of pollution discharged from the mine site and to
4 evaluate the remedial options to mitigate the discharge.” (Id.)

5 With respect to Sunoco, the Order alleges that “Cordero Mining Company,
6 owned by Sunoco, Inc. in the 1950s, operated the Mt. Diablo Mine from
7 approximately 1954 to 1956 and was responsible for the past discharge of mining
8 waste.” (Edgcomb Decl., Ex. 1, Order, at p. 1.) The Order also alleges that “. . .
9 Sunoco Inc. is subject to this Order because of its ownership interest in the Cordero
10 Mining Company, which operated Mount Diablo Mercury Mine and discharged
11 waste to waters of the state. Therefore it is a ‘person[s] who [have] discharged . . .
12 waste’ within the meaning of CWC section 13267.” (Id. at p. 2; brackets in
13 original.)

14 The Order also identifies Jack and Carolyn Wessman (“Wessmans”) as the
15 current owners of the Site, but does not order them to participate in the preparation
16 of the required reports. (Edgcomb Decl., Ex. 1, Order, at p. 1.) The Order does
17 not identify any of the other known former owners or operators of the Site as
18 respondents, but does state that if additional PRPs are identified in the required
19 reports, they may be added to this Order or future orders. (Id. at p. 2).

20 The Order establishes the following Reporting Requirements related to the
21 Site, which are purportedly supported by California Water Code section 13267
22 (“WC § 13267”):

- 23 1. A report identifying prior site owners and operators, and their current
24 corporate status (“PRP report”);
- 25 2. A site investigation work plan to identify at the mine site the sources of
26 mercury contamination to surface water and groundwater, and to assess
27 the lateral and vertical extent of pollution; and
28

1 3. A site investigation report evaluating the data collected and proposing
2 interim remedial actions to inhibit on-going and future discharges to
3 surface and groundwater. (Id. at p. 2.)

4 **B. Legal Bases for Sunoco's Challenge to the Order.**

5 **1. The Order's Site Description Is Vague and Ambiguous.**

6 The Order's description of the Site is vague and ambiguous, making
7 Sunoco's ability to comply with it impossible, and also potentially causing Sunoco
8 to over-perform work not intended to be performed by the Regional Board, without
9 further clarification. As noted above, the Order describes the Site only as an
10 inactive mercury mine on approximately 109 acres on the northeast slope of Mount
11 Diablo. However, the Order provides neither a map nor any Assessor Parcel
12 Number(s) ("APN") that identify the specific Site boundaries. After the Regional
13 Board issued the Order, on behalf of Sunoco, the Edgcomb Law Group ("ELG")
14 requested either a map or APNs from the Regional Board to determine the specific
15 "Site" boundaries. (See Edgcomb Decl., Ex. 2). In response, the Regional Board
16 provided a reference to APN 78-060-008-6. (Id.) Research of that APN by
17 Sunoco's title research vendor, however, revealed that it is no longer used by the
18 County Recorder. Moreover, in further investigating this APN, Sunoco's title
19 research vendor informed ELG there is some indication that APN 78-060-008-6
20 became APN 078-060-034. However, according to the relevant Assessor's Map,
21 that parcel consists of only 96.65 acres, not the "109 acres" referenced in the
22 Order. (See Edgcomb Decl., Ex 3). Moreover, Sunoco's title research vendor
23 located an older Assessor's Map which indicated that APN 78-060-008-6
24 referenced by the Regional Board refers to a parcel that was divided into smaller
25 parcels that are now APNs 078-060-013, 078-060-033, and 078-060-032. (See
26 Edgcomb Decl. Ex. 4). But these parcels total over 120 acres, and do not appear to
27 cover what one might consider to be the Mt. Diablo Mercury Mine area. (Id.)
28

1 In summary, insufficient information has been given in the Regional Board's
2 Order to enable Sunoco to comply with the Order with an adequate level of
3 confidence, since the Order requires investigation of a Site without clearly defined
4 boundaries. Moreover, the uncertainty regarding the Site boundaries raises the
5 possibility that Sunoco may needlessly over-investigate property that the Regional
6 Board did not intend be included within its "Site." Accordingly, Sunoco requests
7 the State Board grant relief in part by declaring that the Order does not provide the
8 required, clearly defined Site boundaries, and suspending its enforcement until the
9 Regional Board withdraws or amends the Order to include information establishing
10 clearly defined site boundaries. The newly defined Site boundaries should also
11 reflect the limited area of Cordero's operations, as reflected in Section IV.B.3 of
12 this Petition.

13 **2. The Regional Board Does Not Have Legal Authority to**
14 **Require Sunoco to Submit a "PRP Report."**

15 The State Board must order the Regional Board to amend the Order by
16 removing the requirement that Sunoco to prepare a PRP report, as no legal
17 authority exists for this requirement. The Order states that: "[p]ursuant to
18 California Water Code (CWC) section 13267, Sunoco, Inc. is hereby required to
19 submit. . .a report identifying prior site owners and operators, and their current
20 corporate status...."

21 However, WC § 13267, the only legal authority cited by the Regional Board
22 for its Order, does not provide it with legal authority to require Sunoco to submit a
23 PRP report. As the Order notes, WC § 13267 provides in pertinent part:

24 "(b)(1) In conducting an investigation specified in subdivision (a), the
25 regional board may require that any person who has
26 discharged...waste within its region...shall furnish, under penalty of
27 perjury, technical or monitoring program reports which the
28

1 regional board requires. (WC § 13267(b); emphasis added.)
2 Sunoco contends that the required “PRP report” is not a “technical or monitoring
3 program report” that WC § 13267 authorizes the Regional Board to require be
4 produced by alleged dischargers to investigate Site conditions, but is instead a legal
5 report containing information regarding the legal status of past owners and
6 operators. As such, it falls outside the scope of reports the Regional Board is
7 authorized to require be furnished under WC § 13267.

8 In addition to being unauthorized, the PRP report requirement is also
9 impermissibly vague and ambiguous and, again, presents improper risk of non-
10 compliance by Sunoco. Specifically, Sunoco is unaware of any Regional Board or
11 other State regulations or other guidelines that identify the objective standards to
12 be followed in preparing a PRP report. Thus, like the vague Site description
13 discussed above, the absence of information makes compliance with the PRP
14 report requirement of the Order difficult to impossible. For example, on what
15 objective basis would the Regional Board determine the adequacy of the PRP
16 report required to be submitted by Sunoco? Without clear requirements,
17 enforcement of this Order provision could be arbitrary and capricious.

18 Absent a legal basis, or any objective set of performance criteria, the PRP
19 report requirement in the Order is improper. Sunoco requests the State Board grant
20 relief and order the Regional Board to amend the Order to remove this
21 requirement.

22 **3. Sunoco Should Not Have Been Named as a Discharger or**
23 **Operator Over the Entire Site Referenced in the Order**
24 **Because Cordero’s Operations Are Divisible.**

25 The Order’s requirements that Sunoco submit a work plan and investigative
26 report related to the Site are substantially overbroad, given that Sunoco’s factual
27 research to date demonstrates that Cordero Mining Company (“Cordero”) operated
28 on only a small area on Mount Diablo during its approximately one year of

1 intermittent operations (approx. December 1954-December 1955). Sunoco is
2 unwilling, and has no legal obligation, to accept liability for the discharges of
3 others on the Site where it never operated.

4 The Order states that the Site is comprised of approximately 109 acres, but
5 even based on conservative estimates, Cordero's operations and discharges
6 occurred on less than 1% of that number of acres. In particular, the Order makes
7 specific reference to the mine consisting "of an open exposed cut and various
8 inaccessible underground shafts, adits and drifts. Extensive waste rock piles and
9 mine tailings cover the hill slope below the open cut, and several springs and seeps
10 discharge from the tailings-covered area." (Edgcomb Decl., Ex. 1, Order, at p.1.)
11 Yet, historical mine plans, maps, aerial photographs and other records demonstrate
12 that Cordero's mining activities, which the Order contends occurred from
13 "approximately 1954 to 1956," came long after those of Bradley Mining Company
14 and other PRPs between 1867 and 1952, who excavated the "open exposed cut"
15 portion of the mine referenced in the Order until it was partially covered by
16 landslides. (See, e.g. Id., Ex. 5-10). Therefore, Cordero did not "operate" that
17 portion of the Site and has no "discharger" liability for it. The same information
18 reflects that Cordero's mining activities occurred to the north of, and without
19 discharge to, the "[e]xtensive waste rock piles and mine tailings cover[ing] the hill
20 slope below the open cut." (Id., Ex. 1, Order, at 1). Thus, the Order improperly
21 requires Sunoco to prepare technical reports under WC section 13267 concerning
22 large areas of concern to the Regional Board where Cordero was not a
23 "discharger."

24 Given Cordero's small, divisible "discharge" footprint at the mine site,
25 Sunoco objects to the Order's finding that Cordero "operated the Mt. Diablo Mine
26 from approximately 1954 to 1956" (Edgcomb Decl., Ex. 1, Order, at 1). Cordero's
27 area of operation did not include the open pit mine, and the waste rock piles and
28

1 mine tailings covering the hill slope below it, that are identified as significant areas
2 of environmental concern in the Order. Moreover, the Regional Board has not
3 presented any evidence that any materials discharged by Cordero resulted in the
4 discharge of any waste sufficient to trigger the authority to require the furnishing
5 of technical reports under WC section 13267.

6 On that basis, Sunoco also objects to the Order's requirement that it submit:

- 7 • a site investigation work plan to identify, across the entire "mine site,"
8 the sources of mercury contamination to surface water and groundwater, and to
9 assess the lateral and vertical extent of pollution; and
- 10 • a "site" investigation report evaluating the data collected, and
11 proposing interim remedial actions to inhibit on-going and future discharges to
12 surface and groundwater.

13 A reading of the plain language of the California Water Code reveals that a
14 "discharger" is only liable for investigating areas to which it discharged. A
15 "discharger" is not liable for investigating and remediating the geographically
16 distant and unrelated discharges of other PRPs. Applied here, that legal principle
17 means Sunoco cannot be required to investigate sources of mercury contamination
18 unrelated to Cordero's activities at the Site, including the open pit mine, and the
19 waste rock piles and mine tailings covering the hill slope below it.¹

20 Moreover, as the Regional Board acknowledges in the Order, WC § 13267
21 requires the Regional Board to provide Sunoco "with a written explanation with
22 regard to the need for the reports, and shall identify the evidence that supports
23 requiring that person to provide the reports." (WC § 13267(b); emphasis added.)
24 But the Regional Board Order fails to identify any evidence in the Order in support
25 of its claim that Cordero "operated the Mt. Diablo Mine." Thus, the Order fails to

26
27 ¹ Sunoco continues to investigate the facts underlying this divisibility issue, having
28 had less than 30 days to do so since the issuance of the Order, and will supplement
the record with relevant additional documents and information at an appropriate
time.

1 meet this requirement of WC § 13267(b). Sunoco submits that the Regional Board
2 cannot meet this requirement since the relevant evidence contradicts this claim.
3 The Regional Board did not meet or confer with Sunoco prior to issuing its Order.
4 Accordingly, Sunoco was unable to present its evidence contradicting the
5 unsupported factual findings made by the Regional Board in the Order prior to its
6 issuance.

7 Documentary evidence obtained by Sunoco to date indicates that Cordero
8 operated solely from a mine shaft sunk by contractors operating under contract to
9 the United States Department of Interior's Defense Minerals Exploration
10 Administration ("DMEA") (see Edgcomb Decl., Ex. 11-13, DMEA contract and
11 related documents). The DMEA shaft was located north of, and is divisible from,
12 the open pit, shafts, adits, and drifts mined extensively by Bradley Mining
13 Company between 1936-1947 and others before and afterwards. (See Id., Ex. 5-
14 10).

15 On the basis of this evidence, Sunoco requests that the State Board grant
16 relief and order that the Regional Board amend its Order to: 1) provide reference to
17 the evidence on which it relies to order Sunoco to furnish technical reports under
18 WC section 13267 and to either rescind the Order in its entirety or limit the Order's
19 application to the areas where the evidence demonstrates that Cordero operated and
20 discharged waste of a manner sufficient to trigger the application of WC section
21 13267; and 2) find that Sunoco cannot be ordered to furnish technical reports for
22 areas where there is no evidence that Cordero conducted any operations.

23 **4. The Regional Board Should Add Other PRPs to the**
24 **Order and Require Their Participation.**

25 After requiring the Regional Board to limit Sunoco's responsibility for
26 furnishing technical reports to the areas on which it can present evidence that
27 Cordero operated and discharged waste of a nature sufficient to trigger the
28

1 application of WC section 13267, Sunoco further requests that the State Board
2 require the Regional Board to add other known PRPs for any such area identified
3 in the revised Order and require them to cooperate with Sunoco in the preparation
4 and funding of the required technical reports. At this time, those other PRPs would
5 include, at a minimum, the DMEA and its contractors, which the relevant evidence
6 indicates funded and/or conducted mining operations in the same area as Cordero.
7 (See Edgcomb Decl., Ex. 10-12). DMEA has already been found liable under
8 CERCLA in federal court as a responsible party under similar circumstances at
9 another mine site. (See Ex. 13, copy of relevant, excerpted 2003 District Court of
10 Idaho decision). Other PRPs would include the Wessmans, whom the existing
11 Order identifies as the current owners of the Site.

12 As for other areas of the Mt. Diablo Mine Site where Cordero did not
13 operate, as noted in its Order, the Regional Board can issue new investigation
14 orders under WC section 13267 to other PRPs, such as Bradley Mining Company,
15 to furnish technical reports. Such areas include, but are not limited to, the open pit
16 mine and the waste rock piles and mine tailings covering the hill slope below it that
17 are incorrectly referenced as being within the scope of the current Order to Sunoco.

18 **V. THE MANNER IN WHICH PETITIONER HAS BEEN AGGRIEVED**

19 Sunoco has been aggrieved by the Regional Board's actions because Sunoco
20 will be subjected to provisions of an arbitrary and capricious Order unsupported by
21 the evidence in the record or applicable legal authority. Absent a better definition
22 of the Site, Sunoco is subject to an inability to comply and a potentially arbitrary
23 and capricious enforcement of the Order. Sunoco is also being required to submit
24 a PRP report not authorized to be required by the relevant statute.

25 The Regional Board's Order as it pertains to Site description and the
26 required PRP report is also vague and ambiguous because it provides no objective
27 standards to determine Sunoco's compliance, leaving Petitioner to guess as to the
28

1 scope of the Regional Board's requirements, in violation of Sunoco's due process
2 rights. (Connally v. General Construction Co., 269 U.S. 385, 391 (1926) ("[A]
3 statute which either forbids or requires the doing of an act in terms so vague that
4 men of common intelligence must necessarily guess at its meaning and differ as to
5 its application, violates the first essential of due process of law"); Gatto v. County
6 of Sonoma, 98 Cal. App. 4th 744, 773-774 (2002); Papachristou v. City of
7 Jacksonville, 405 U.S. 156, 162 (1972) (law was unconstitutionally vague for
8 failure to give fair notice of what constituted a violation; "all persons are entitled to
9 be informed as to what the State commands or forbids").)

10 Moreover, as a result of being named the sole discharger at the Site, and
11 made solely responsible for furnishing all of the requested technical reports
12 required in the Order covering the entire Site, despite contrary evidence regarding
13 the divisible nature of Cordero's Site activities, Sunoco will be forced to shoulder
14 significant and inappropriate costs of compliance, a heavy burden of regulatory
15 oversight, and other potentially serious economic consequences. Further, by
16 naming Sunoco as the sole discharger for the entire site, at least three other PRPs
17 known to the Regional Board, namely Bradley Mining Company, Jack and Carolyn
18 Wessman, and the U.S. Government (DMEA), (which either caused the majority of
19 mercury contamination or own portions of the Site), are unfairly avoiding their
20 fair share of costs in conducting the required investigations.

21 VI. STATE BOARD ACTION REQUESTED BY PETITIONER

22 As discussed above, Sunoco requests that this Petition and its concurrently
23 filed Petition for Stay be held in abeyance. If it becomes necessary for Sunoco to
24 pursue this Petition and its Petition for Stay of Action, Sunoco will request that the
25 State Board stay enforcement of the Order and determine that the Regional Board's
26 adoption of the Order was arbitrary and capricious or otherwise inappropriate and
27 improper, and will request that the State Board amend the Order as follows: (1)
28

1 provide an accurate description of the "Site" boundaries so that Sunoco can
2 comply with the Order; (2) delete the requirement that Sunoco furnish a PRP
3 report; (3) require references to the evidence on which the Regional Board relies to
4 name Sunoco as a discharger over whatever area it identifies as the "Site" covered
5 by the Order; (4) limit the scope of its Order by changing the area identified as the
6 "Site" to be limited to areas where it can establish through identified evidence that
7 Cordero discharged waste of a nature sufficient to trigger the application of WC
8 section 13267; and (5) name other known PRPs for any area so identified,
9 including but not limited to the United States (DMEA), and Jack and Carolyn
10 Wessman, and require them to participate in any required investigations.

11 **VII. STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF**
12 **LEGAL ISSUES RAISED IN THE PETITION**

13 For purposes of this protective filing, the Statement of Points and
14 Authorities is subsumed in Sections IV and V of this Petition. If Sunoco elects to
15 pursue this Petition, Sunoco reserves the right to file a Supplemental Statement of
16 Points and Authorities, including references to the complete administrative record
17 and other legal authorities and factual documents and testimony, which Sunoco is
18 still assembling. Sunoco also reserves its right to supplement its evidentiary
19 submission and reiterates its request for a hearing to allow the State Board to
20 consider testimony, other evidence, and argument.

21 **VIII. STATEMENT REGARDING SERVICE OF THE PETITION ON**
22 **THE REGIONAL BOARD**

23 A copy of this Petition is being sent to the Regional Board, to the
24 attention of Pamela C. Creedon, Executive Director by email and U.S. Mail. By
25 copy of this Petition, Sunoco is also notifying the Regional Board of Sunoco's
26 request that the State Board hold the Petition and the concurrently filed Petition for
27 Stay of Action in abeyance.
28

1 **IX. STATEMENT REGARDING ISSUES PRESENTED TO THE**
2 **REGIONAL BOARD/REQUEST FOR HEARING**

3 The substantive issues and objections raised in this Petition were not raised
4 before the Regional Board before it acted in issuing the Order because Sunoco had
5 no notice from the Regional Board that it was issuing the Order, Sunoco was not
6 provided with a draft version of the Order, Sunoco was not provided with any
7 opportunity to comment upon a draft version of the Order or to appear before the
8 Board to present comments.

9 Sunoco requests a hearing in connection with this Petition, should Sunoco
10 activate it from its current “in abeyance” status.

11 For all the foregoing reasons, if Sunoco pursues its appeal, Sunoco
12 respectfully requests that the State Board review the Order and grant the relief as
13 set forth above.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Respectfully submitted,

DATED: April 24, 2009

EDGCOMB LAW GROUP

By: 

John D. Edgcomb
jedgcomb@edgcomb-law.com
Attorneys for Petitioner
SUNOCO, INC.