

EXHIBIT 22



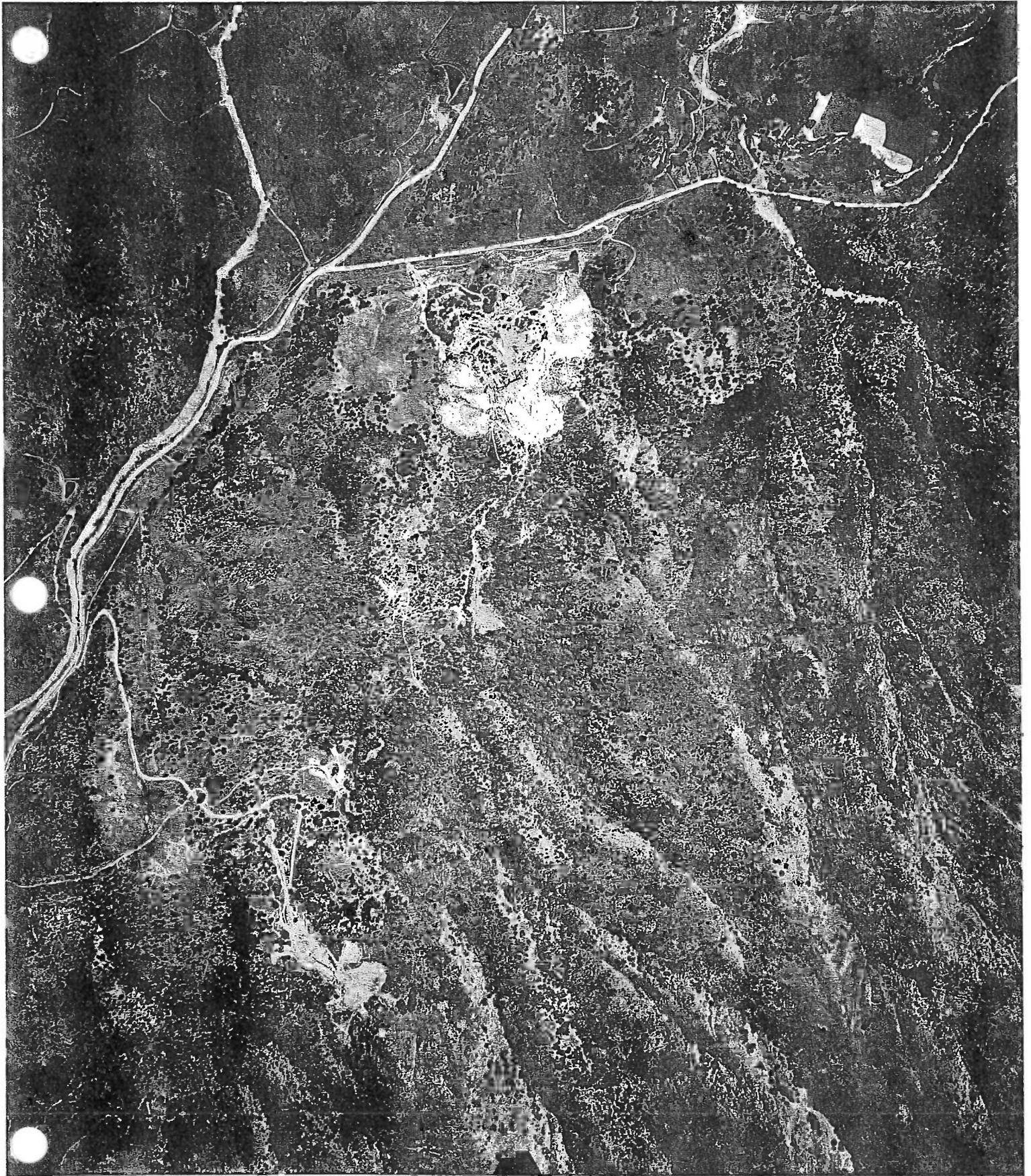


EXHIBIT 23

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PROJECT SUMMARY REPORT

By: Stephen P. Holt

November 25, 1960

1. Docket DMEA-2448 (Mercury)
Contract Idm-E544

Property - Mt. Diablo Quicksilver Mine
Contra Costa County, California

Operator - John L. Jonas and John E. Johnson
Assignees of Ronnie B. Smith, Jene Harper, and
James F. Dunnigan

Operator's Property Rights -

The Operator controlled, by assignment of a mining lease from the owners, Mt. Diablo Quicksilver Company, Ltd., Clayton, California, patented land described as: the NE $\frac{1}{2}$ of the SE $\frac{1}{4}$, and the S $\frac{1}{2}$ of the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$, sec. 29, T. 1 N., R. 1 E., M.D.B. and M., Contra Costa County, California, excepting a certain area described in Annex II and shown on map, USGS Bull. 922, Plate 6, attached to the contract. Owner's Consent to Lien and Assignment of Contract accompany the contract.

2. Contract: Dated June 5, 1953, on Long Form, MF-200 (Revised Feb. 1952).

Work Authorized:

1. Level shaft site, erect headframe and ore pocket, install hoist, build tram from headframe to dump.
2. Sink 2-compartment timbered shaft 330 feet.
3. At depth approximately 300 feet below shaft collar, crosscut approximately 200 feet southerly through vein structure on hanging-wall side of fault, and from sides of crosscut drift in opposite directions along fault a total of approximately 425 feet.
4. Sample and assay vein material encountered. Estimated 125 samples to be assayed for mercury.

Estimated Total Cost of Project	\$73,571.00
Government Participation @ 75%	\$55,178.25

Amendments -

- No. 1, dated July 14, 1953, extended the starting date from July 20 to August 15, 1953.
- No. 2, dated April 22, 1954, authorized use of funds originally intended for crosscutting and drifting, for pumping and water treatment.
- No. 3, dated November 19, 1954, corrected the effective date of Amendment No. 2 from April 22, 1954, to February 18, 1954, the day on which the mine workings were flooded.

Work under the contract started August 15, 1953, was interrupted by flooding of the mine on February 18, 1954, and again by a fatal accident March 4, 1954. All work was discontinued and the Operator surrendered its lease on March 11, 1954. Cordero Mining Company leased the property in November 1954, and conducted further exploration work without assistance from the Government. Cordero's operations were not successful, and that company discontinued work at the property early in 1956.

Work Completed -

Crosscutting and drifting, 120 feet
Shaft sinking, 324 feet

Total Accepted Cost of the Contract	\$44,340.04
Government participation @ 75%	\$33,255.03

2-A. Reports -

The final report of the Field Team, dated January 30, 1957, was received February 5, 1957. No Operator's final report was submitted and the Field Team recommended that the requirement for such a report be waived.

3. Audits -

Audit Certificate, dated May 18, 1956, showed:

Total cost billed by contractor	\$53,330.59
Exceptions during this audit	\$6,009.79
Less additional costs allowed by this audit	19.24
Total Accepted Cost	\$47,340.04
Less salvage value of project property	3,000.00
Net Total Accepted Cost	\$44,340.04
Government Contribution @ 75%	\$33,255.03

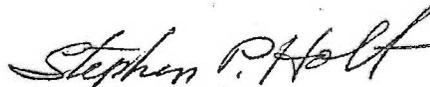
4. Certification -

No certification of discovery or development was issued. The contract was terminated by a Termination Agreement dated November 30, 1956, effective as of March 31, 1954.

5. Comments --

The purpose of the project was to explore the downward continuation of a mineralized zone exposed in the Mill Workings of the Mt. Diablo Quicksilver mine, where mercury ore occurs as fracture fillings and disseminations of cinnabar and metacinnabarite in a tabular body of silica-carbonate rock in massive poorly-bedded silicified sandstone and graywacke, with lesser amounts of sheared shale and thin-bedded chert, all of the Franciscan group of Jurassic (?) age, which are cut by a few lenticular bodies of serpentine, probably post-Pliocene in age.

The work of the project, interrupted by the flooding of the mine and other causes, did not attain its objective, and no reserves of mercury ore were discovered by project work.


Stephen P. Holt

SPHolt/gla
11-28-60

cc to: Director's Reading File
Docket
Chron

EXHIBIT 24



April 8, 2009

Ms. Janet Yocum
EPA On-Scene Coordinator
USEPA Region 9
75 Hawthorne Street, SFD-92
San Francisco, CA 94105

Subject: Summary Report for Removal Action to Stabilize the Impoundment Berm
Mount Diablo Mercury Mine
Clayton, California

Dear Ms. Yocum:

At the request of the U.S. Environmental Protection Agency ("EPA"), on behalf of Respondent Sunoco Inc. ("Sunoco"), The Source Group, Inc. ("SGI") is pleased to present this letter describing the removal action performed to stabilize the impoundment berm for the Mount Diablo Mercury Mine in Clayton, California ("Site"). SGI performed this removal action under the Unilateral Administrative Order for the Performance of a Removal Action, USEPA Docket No. 9-2009-02 ("Order" or "UAO") that EPA issued to Sunoco on December 9, 2008.

Pursuant to the UAO, SGI initiated the removal action in December 2008 and submitted a Final Summary Report for Removal Action to Stabilize the Impoundment Berm dated January 28, 2009. During January and February 2009, heavy rainfall and high flow rates in Dunn Creek caused damage to the removal action, causing additional work to be performed on the berm to address the unanticipated or changed circumstances pursuant to Article XIII, Paragraph 46, of the UAO. On March 10, 2009, SGI, USEPA, and Mr. Jack Wessman met at the Site to evaluate the condition of the removal action and EPA determined that additional work was required under the UAO.

As a result, on March 24, 2009, SGI mobilized personnel, equipment, and materials to the Site to temporarily excavate and stockpile some of the existing three to five-inch crushed rock within the portion of Dunn Creek adjacent to the northwest corner of the impoundment berm. Then the existing shotcrete embankment was scored and chipped at the bottom, back to native slope material to relieve the undermined edge. Stabilization fabric was installed along the low flowline of Dunn Creek and up the sides of the creek embankment. Subsequent to laying the stabilization fabric, the repair area was recontoured using the three to five-inch crushed rock, and two loads (approximately 40 tons) of rip-rap/rock (6 to 18-inch) were placed above the crushed rock and under vertical wall of shotcrete for structural stability. Upon reestablishing the

Ms. Janet Yocum

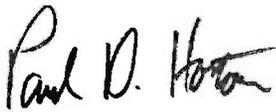
April 8, 2009

Page 2 of 2

Dunn Creek flow line within the embankments and locally downstream, the Site was returned to conditions prior to project initiation and equipment and materials were demobilized. The work was completed in one day. EPA On-Scene Coordinator, Chris Reiner, was onsite during the completion of the removal action repair work performed by SGI under the UAO. Photos showing the project area before and after repairs were completed are attached for reference.

If you have any questions or need additional information, please do not hesitate to contact me at (925) 944-2856 ext. 302.

Sincerely,
The Source Group, Inc.



Paul D. Horton, P.G., C.H.G.
Project Manager

Attachment – Photographs from before and after repair work

cc: Mr. Bret Moxley, EPA
Ms. Jerelean Johnson, EPA
Mr. Bill Morse, Sunoco, Inc.
Ms. Lisa Runyon, Sunoco, Inc.
Mr. John D. Edgcomb, Edgcomb Law Group
Mr. Jack Wessman, Mount Diablo Springs Improvement Society



Photograph 1: Before Repair Work



Photograph 2: After Repair Work

EXHIBIT 25



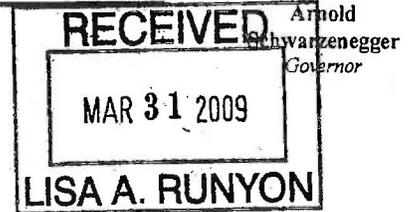
California Regional Water Quality Control Board Central Valley Region

Karl E. Longley, ScD, P.E., Chair



Linda S. Adams
Secretary for
Environmental
Protection

11020 Sun Center Drive #200, Rancho Cordova, California 95670-6114
Phone (916) 464-3291 • FAX (916) 464-4645
<http://www.waterboards.ca.gov/centralvalley>



25 March 2009

Lisa A. Runyon, Senior Counsel
Sunoco, Inc.
1735 Market Street, Ste. LL
Philadelphia PA 19103-7583

Jack and Carolyn Wessman
PO Box 949
Clayton, CA 94517

ORDER TO SUNOCO INC. TO SUBMIT TECHNICAL REPORTS IN ACCORDANCE WITH SECTION 13267 OF THE CALIFORNIA WATER CODE, MOUNT DIABLO MERCURY MINE, CONTRA COSTA COUNTY

YOU ARE LEGALLY OBLIGATED TO RESPOND TO THIS ORDER, PLEASE READ THIS ORDER CAREFULLY.

Mt. Diablo Mercury Mine is an inactive mercury mine on approximately 109 acres on the northeast slope of Mount Diablo in Contra Costa County. Acid mine drainage containing elevated levels of mercury and other metals are being discharged to a pond that periodically overflows into Horse and Dunn Creeks. Further site investigation is required to assess the extent of pollution discharged from the mine site and to evaluate the remedial options to mitigate the discharge. This site investigation and subsequent remedial option evaluation are needed to select the remedial option to restore the impacted waters of the state and to protect public health and the environment.

Presently, the mine consists of an exposed open cut and various inaccessible underground shafts, adits, and drifts. Extensive waste rock piles and mine tailings cover the hill slope below the open cut, and several springs and seeps discharge from the tailings-covered area. Three surface impoundments at the base of the tailings capture most spring flow and surface runoff. However, during winter the ponds commonly spill into Horse and Dunn Creeks, which drain to the Marsh Creek watershed.

Jack and Carolyn Wessman, who are the current owners of the Mount Diablo Mercury Mine property and are considered to be dischargers, have made some improvements to reduce surface water exposure to tailings and waste rock, including the construction of a clean fill cap was over parts of the tailings/waste rock piles. Although improvements have been made without an engineering design or approved plan, these improvements may have reduced some of the impacts from the mine site. However, discharges that contain elevated mercury levels continue to impact the site and site vicinity.

Cordero Mining Company, owned by Sunoco, Inc. in the 1950s, operated the Mt. Diablo Mine from approximately 1954 to 1956 and was responsible for the past discharge of mining waste. Cordero was dissolved in 1975. Because Cordero Mining Company operated the mine, and due to the interrelationship between Sunoco and Cordero Mining Company, the United States

California Environmental Protection Agency

Environmental Protection Agency (USEPA), Region IX, named Sunoco Inc. a responsible party for Mt. Diablo Mine site in the Unilateral Administrative Order for the Performance of a Removal Action, USEPA Docket No. 9-2009-02. Sunoco, Inc. is considered a discharger at this site.

Pursuant to California Water Code (CWC) section 13267, Sunoco, Inc. is hereby required to submit the following reports:

1. **By 1 June 2009**, a report identifying prior site owners and operators, and their current corporate status;
2. **By 1 July 2009**, a site investigation work plan to identify at the mine site the sources of mercury contamination to surface water and groundwater, and to assess the lateral and vertical extent of pollution; and
3. **By 1 November 2009**, a site investigation report evaluating the data collected and proposing interim remedial actions to inhibit on-going and future discharges to surface and groundwater.

Information in these reports may be used to set time schedules and/or identify additional responsible parties who may be added to this or future orders. Also, please submit a copy of all reports to Ms. Jerelean Johnson at USEPA, Region 9 in San Francisco.

CWC section 13267 states, in part:

(b)(1) In conducting an investigation . . . , the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or, discharging, or who proposes to discharge waste within its region . . . shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.

A discharger has a legal obligation to investigate and remediate contamination. As described above, Sunoco Inc. is subject to this Order because of its ownership interest in the Cordero Mining Company, which operated Mount Diablo Mercury Mine and discharged waste to waters of the state. Therefore, it is a "person[s] who [have] discharged ... waste" within the meaning of CWC section 13267.

The reports are necessary for the reasons described in this Order, to assure protection of waters of the state, and to protect public health and the environment. Failure to submit the required reports by their due dates may result in additional enforcement action, which may include the imposition of administrative civil liability pursuant to CWC section 13268. CWC section 13268 states, in part:

(a)(1) Any person failing or refusing to furnish technical or monitoring program reports as required by subdivision (b) of Section 13267 . . . or falsifying any information provided therein, is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b).(b)(1) Civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision

(a) in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.

Any person aggrieved by this action of the Central Valley Regional Water Board may petition the State Board to review the action in accordance with CWC section 13320 and California Code of Regulations, title 23, section 2050. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

Reimbursement of the Central Valley Water Board for reasonable costs associated with oversight of the investigation and remediation of the site will be required. Information will be provided in the next several weeks on the cost recovery program.

If you have any questions, please contact Ross Atkinson at (916) 464-4614 or via e-mail at ratkinson@waterboards.ca.gov.



JOSEPH MELLO
Acting Supervising Engineering Geologist
Title 27 Permitting and Mining Unit

cc: Patrick Palupa, Office of the Chief Counsel, SWRCB, Sacramento
California Dept of Parks and Recreation, Bay Area Dist., San Francisco
Jerelean Johnson, Site Assessment, Superfund Div. USEPA Region 9, San Francisco
Larry Bradfish, Asst. Regional Counsel, USEPA Region 9, San Francisco
Janet Yocum, On-Scene Coordinator, USEPA Region 9, San Francisco
R. Mitch Avalon, Contra Costa County Flood Control, Martinez
William R. Morse, Sunoco, Inc. Philadelphia, PA

EXHIBIT 26

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....

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.

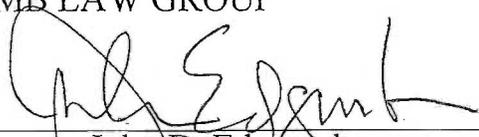
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23 Respectfully submitted,
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DATED: April 24, 2009

EDGCOMB LAW GROUP

By: _____


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

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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.

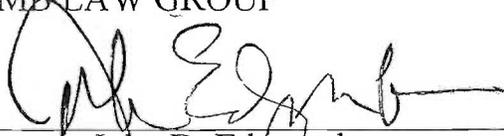
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Respectfully submitted,

DATED: April 24, 2009

EDGCOMB LAW GROUP

By: _____



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

EXHIBIT 27



California Regional Water Quality Control Board Central Valley Region

Karl E. Longley, ScD, P.E., Chair



Linda S. Adams
Secretary for
Environmental
Protection

11020 Sun Center Drive #200, Rancho Cordova, California 95670-6114
Phone (916) 464-3291 • FAX (916) 464-4645
<http://www.waterboards.ca.gov/centralvalley>

Arnold
Schwarzenegger
Governor

30 June 2009

Lisa A. Runyon, Senior Counsel
Sunoco, Inc.
1735 Market Street, Ste. LL
Philadelphia PA 19103-7583

Jack and Carolyn Wessman
PO Box 949
Clayton, CA 94517

REVISED ORDER TO SUNOCO INC. TO SUBMIT TECHNICAL REPORTS IN ACCORDANCE WITH SECTION 13267 OF THE CALIFORNIA WATER CODE, MOUNT DIABLO MERCURY MINE, CONTRA COSTA COUNTY

**~~YOU ARE LEGALLY OBLIGATED TO RESPOND TO THIS ORDER, PLEASE READ THIS
ORDER CAREFULLY~~**

This Order revises and replaces a previous Order adopted on 25 March 2009.

Mt. Diablo Mercury Mine is an inactive mercury mine on approximately 109 acres on the northeast slope of Mount Diablo in Contra Costa County. Acid mine drainage containing elevated levels of mercury and other metals are being discharged to a pond that periodically overflows into Horse and Dunn Creeks. Further site investigation is required to assess the extent of pollution discharged from the mine site and to evaluate the remedial options to mitigate the discharge. This site investigation and subsequent remedial option evaluation are needed to select the remedial option to restore the impacted waters of the state and to protect public health and the environment.

Presently, the mine consists of an exposed open cut and various inaccessible underground shafts, adits, and drifts. Extensive waste rock piles and mine tailings cover the hill slope below the open cut, and several springs and seeps discharge from the tailings-covered area. Three surface impoundments at the base of the tailings capture most spring flow and surface runoff. However, during winter the ponds commonly spill into Horse and Dunn Creeks, which drain to the Marsh Creek watershed.

Jack and Carolyn Wessman are the current owners of the Mount Diablo Mercury Mine property and are considered to be dischargers. The Wessmans have made some improvements to reduce surface water exposure to tailings and waste rock, including the construction of a clean fill cap over parts of the tailings/waste rock piles. Although improvements have been made without an engineering design or approved plan, these improvements may have reduced some of the impacts from the mine site. However, discharges that contain elevated mercury levels continue to impact the site and site vicinity.

Cordero Mining Company, owned by Sunoco, Inc. in the 1950s, operated the Mt. Diablo Mine from approximately 1954 to 1956 and was responsible for the past discharge of mining waste.

California Environmental Protection Agency

Cordero was dissolved in 1975. Because Cordero Mining Company operated the mine, and due to the interrelationship between Sunoco and Cordero Mining Company, the United States Environmental Protection Agency (USEPA), Region IX, named Sunoco Inc. a responsible party for Mt. Diablo Mine site in the Unilateral Administrative Order for the Performance of a Removal Action, USEPA Docket No. 9-2009-02. Sunoco, Inc. is considered a discharger at this site.

Pursuant to California Water Code (CWC) section 13267, Sunoco, Inc. is hereby required to submit the following reports:

1. **By 1 August 2009**, Sunoco will voluntarily submit a PRP report including a spreadsheet of known owners/operators, periods of ownership/operation, and any information regarding current financial status.
2. **By 1 August 2009**, Sunoco will submit a report that supports its "divisibility" contention including figures showing the area leased by Cordero, extent of operations, and proposed area of study under the Order. This shall include the total volume of rock removed from the underground working and an estimate of the total volume of broken rock discharged (use a realistic swell factor to calculate the volume of broken rock).
3. **By 1 October 2009**, Sunoco will submit an investigation work plan covering the area agreed upon by the Regional Water Board and Sunoco. Regional Water Board staff must review and consider the divisibility report and reach agreement with Sunoco on the limits, if any, on the Site to be investigated.
4. **By 1 February 2010**, Sunoco will submit an investigation report presenting results of the investigation work plan.

Information in these reports may be used to set time schedules and/or identify additional responsible parties who may be added to this or future orders. Also, please submit a copy of all reports to Ms. Jerelean Johnson at USEPA, Region 9 in San Francisco.

CWC section 13267 states, in part:

(b)(1) In conducting an investigation . . . , the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or, discharging, or who proposes to discharge waste within its region . . . shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.

A discharger has a legal obligation to investigate and remediate contamination. As described above, Sunoco Inc. is subject to this Order because of its ownership interest in the Cordero Mining Company, which operated Mount Diablo Mercury Mine and discharged waste to waters of the state. Therefore, it is a "person[s] who [have] discharged . . . waste" within the meaning of CWC section 13267.

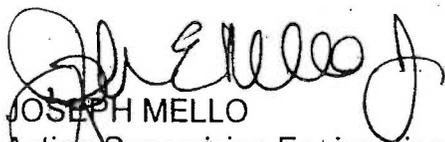
The reports are necessary for the reasons described in this Order, to assure protection of waters of the state, and to protect public health and the environment. Failure to submit the required reports by their due dates may result in additional enforcement action, which may include the imposition of administrative civil liability pursuant to CWC section 13268. CWC section 13268 states, in part:

- (a)(1) Any person failing or refusing to furnish technical or monitoring program reports as required by subdivision (b) of Section 13267 . . . or falsifying any information provided therein, is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b).(b)(1) Civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs:

Any person aggrieved by this action of the Central Valley Regional Water Board may petition the State Board to review the action in accordance with CWC section 13320 and California Code of Regulations, title 23, section 2050. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

Reimbursement of the Central Valley Water Board for reasonable costs associated with oversight of the investigation and remediation of the site will be required. Information will be provided in the next several weeks on the cost recovery program.

If you have any questions, please contact Ross Atkinson at (916) 464-4614 or via e-mail at ratkinson@waterboards.ca.gov.



JOSEPH MELLO
Acting Supervising Engineering Geologist
Title 27 Permitting and Mining Unit

cc: Patrick Palupa, Office of the Chief Counsel, SWRCB, Sacramento
California Dept of Parks and Recreation, Bay Area Dist., San Francisco
Jerelean Johnson, Site Assessment, Superfund Div. USEPA Region 9, San Francisco
Larry Bradfish, Asst. Regional Counsel, USEPA Region 9, San Francisco
Janet Yocum, On-Scene Coordinator, USEPA Region 9, San Francisco
R. Mitch Avalon, Contra Costa County Flood Control, Martinez
William R. Morse, Sunoco, Inc. Philadelphia, PA
David Chapman, Edgcomb Law Group, San Francisco.

EXHIBIT 28

115 Sansome Street, Suite 700
San Francisco, California 94104
415.399.1993 direct
415.399.1885 fax
elginfo@edgcomb-law.com

►MEMORANDUM

TO: Mr. Joseph Mello; Central Valley RWQCB

FROM: Edgcomb Law Group (for Sunoco Inc.)

DATE: July 31, 2009

CC: Ms. Jerlean Johnson, USEPA, Region IX

RE: [REDACTED]

Sunoco Inc.'s **Voluntary PRP Report** (as of 7/31/09) is attached hereto as **Exhibit A**.

EXHIBIT A

PRP Name/ Name of Representative	Relevant Time Period	CERCLA Status	Current Viability
Francis Hunsaker (a.k.a. Hastings)	? – 1907	Owner	Unknown
Edward Howard (Daisy Howard)	1907-1933 (portion to Mt. Diablo Quicksilver Co.), and owner until 1952 for another portion of property.	Owner	No further information. Obviously, very likely deceased.
George & Agnes Grutchfield	1914-1930	Owner	No further information. Obviously, very likely deceased.
Joseph Tonge	1929-1931	Owner	No further information. Obviously, very likely deceased.
Mount Diablo Quicksilver Mining Co. / Vic Blomberg, Principal, numerous individual shareholders.	1931-1960, continued to own part of property (including pond) until at least 1965.	Owner/ Operator for some of the time (1931-1933)	Currently continuing to research and locate Mr. Vic Blomberg.
C. W. Ericksen	1933-1936	Operator	No further information. Obviously, very likely deceased.
Bradley Mining Co.	1936-1947	Operator	Currently operating. Being sued by EPA on several other sites. Has some insurance.
Ronnie B. Smith / Producers Refining; Associated names: (1) Jene Harper (c/o Franklin Supply Company, 624 South Michigan Ave., Chicago, Il); (2) Albert J. Mitchell, Treasurer, Franklin Supply Company; (3) James F. Dunnigan (c/o Producers Refining, Inc., 318 West Houghton Ave.,	1951-1953	Lessees/ Operators	Jene Harper, Jr. has been identified as a former vice-president of Franklin Supply Co. and son of the former president of the company, Raymond Harper. Franklin Supply Company merged with Continental Supply in 1995 to become C.E. Franklin, Ltd., and is a publicly traded company on the NASDAQ (Symbol: CFK) and Toronto Stock Exchange (Symbol: CFT).

West Branch, MI); (4) Ronnie B. Smith.			
Margaret H. de Witt, Jane H. Reimers, Elizabeth H. Dakin and Edward A. Howard, Jr.	1952-1970	Owners	No further information.
Jonas & Johnson: John E. Johnson (deceased) and John L. Jonas (Assignees of DMEA Contract). Employees of Jonas & Johnson: Howard Castle (deceased (mining accident at Site)); (1) Melvin Brunner (or "Bruner"); (2) George Bartono; (3) Dexter Barkley; (4) Guy Castle; (5) C.N. Schuette.	1953	Lessees/ Operators	Unknown as to Mr. Jonas. Mr. Johnson deceased as of 1958. The only Melvin Brunner located that had ever lived in California, died in 1976 in Angels Camp, CA. C.N. Schuette was located at 6390 Barnett Valley Road, W. Sebastopol, CA. No further information.
U.S. Dept. of Interior; Defense Minerals Exploration Administration (DMEA)	1953-1954	Operator	U.S. Dept of Interior is successor in interest to DMEA's liabilities.
Nevada Scheelite Co., employees: A.R. McGuire & Ray Henricksen.	1956	Operator	Documents obtained from the Nevada Secretary of State confirm that Nevada Scheelite Corp. operated from 1954 to 1957 and that the officers of that corporation were also involved in what is now Kennametal. Kennametal is a currently-operating and publicly traded corporation on the N.Y. Stock Exchange (Symbol: KMT).
V. Blomberg, Dr. Fred Zumwalt, Leland B. Nickerson, Mrs. A.C. Lang, and May Perdue	1958-1962	Owners	Trying to locate V. Blomberg, no information on other names.

John E. Johnson	1958-1959	Lessee/ Operator	Deceased.
Victoria Resource Corp., 923 Fifth Avenue, New York 21, NY	1960-1969	Owner/ Operator for some of the time (1960-1965). Leased property to Welty & Randall from 1965-1969.	Located an article indicating that a "Victoria Resource Corporation" had changed its name to Victoria Gold Corp. in July 2008. Victoria Gold Corp is still operating and is a publicly-traded company, traded on the Canadian Venture Exchange (Symbol: VIT). BEMA Gold Corporation owned 33% of Victoria Gold Corp. BEMA Gold was acquired by Kinross Gold Corporation in 2007. Kinross Gold Corp. is Victoria Gold Corp's largest shareholder, owning 21% of its stock according to an article on Marketwire from May 2009.
Welty & Randall	1965-1969	Lessee/ Operator- reworked mine tailings at site.	Unable to locate any information, but apparently leased property from Victoria Resources from 1965-69.
Guadalupe Mining Co. / Jack Callaway, manager at site. Officers according to Nevada Sec. of State: John Gargan, Sr.; Lillian Gargan; Harold Everton; all of San Jose, CA.	1969/1970-1974	Owner/ Operator	The Nevada Secretary of State records indicate that this company operated as a NV Corporation from 1964-1981. CA Secretary of State Records indicate that it operated as a CA corporation from 1964-1977. Same address in San Jose, CA, listed for both corporations.
Morgan Territory Investment Co.	1970-1976	Owner	No further information.
Jack and Carolyn Wessman	1974-present	Owner	Claims limited assets
The State of California	1976-present	Owner	State Parks Department owns southernmost portion of mine site, including portion of tailings piles.
Frank & Ellen Meyer	1977-1989	Owner of portion of property containing the pond.	Frank Meyer died in 1993. Ellen Meyer listed at address in Gridley, CA. Assets unknown.

EXHIBIT 29



California Regional Water Quality Control Board Central Valley Region

Karl E. Longley, ScD, P.E., Chair

Linda S. Adams
Secretary for
Environmental
Protection

11020 Sun Center Drive #200, Rancho Cordova, California 95670-6114
Phone (916) 464-3291 • FAX (916) 464-4645
<http://www.waterboards.ca.gov/centralvalley>



Arnold
Schwarzenegger
Governor

30 October 2009

Lisa A. Runyon, Senior Counsel
Sunoco, Inc.
1735 Market Street, Ste. LL
Philadelphia PA 19103-7583

RESPONSE TO DIVISIBILITY PAPER, MOUNT DIABLO MERCURY MINE, CONTRA COSTA COUNTY

Staff of the Central Valley Regional Water Quality Control Board (Board) have reviewed the "Divisibility Position Paper, Mt. Diablo Mercury Mine, Sunoco Inc as Related to Cordero Mining Company" (Divisibility Paper) submitted on Sunoco/Cordero's behalf by The Source Group, Inc. The Divisibility Paper contends that there is a reasonable technical basis for the Board to apportion liability for the investigation and/or cleanup of the Mount Diablo Mercury Mine (Site). The Divisibility Paper concludes that, because there is a reasonable basis to apportion liability, the Board should limit Sunoco/Cordero's liability to the area near the Defense Minerals Exploration Administration (DMEA) shaft, where most of Cordero Mining Company's work was done.

Board staff disagree that there is a reasonable basis for apportioning liability. The contamination present at the Site is not susceptible to any rational means of division. The discharge of polluted water from the Site occurs after water interacts with mine waste, some of which was generated by Cordero, and some of which was generated by other responsible parties. The 790 feet of underground tunnels constructed by Cordero connect with, and thus contribute contaminated water to, the earlier underground tunnels via the Main Winze. The 165-foot level portal, a part of the earlier tunnels that connects to the Main Winze, is believed to be a major contributor of acid mine drainage. It is impossible for the Board to determine the proportion of pollutants that the water picks up through its interactions with the mine features that Cordero constructed, relative to the proportion that it picks up through its interactions with mine features constructed by other responsible parties. Indeed, even if such proportion could be calculated, it may have little to no relation to the ultimate cost of investigation and/or remediation.

The Divisibility Paper contends that the waste rock generated by Cordero was either placed back in the shaft or discharged in the My Creek drainage, but this fact is not borne out by the evidence in the Board's files. No evidence in the files indicates where the waste rock was discharged. The 790 feet of tunnels would generate too much waste to fit back into the shaft, and the descriptions of waste rock in the My Creek drainage are consistent with waste rock from a surface mine, not from underground mine tunnels.

California Environmental Protection Agency

Board staff maintain that there is no reasonable basis to apportion liability, and therefore, pursuant to State Board water quality decisions regarding apportionability, Cordero/Sunoco's liability for the site remains joint and several.

If you have any questions concerning this matter, please contact Ross Atkinson at (916) 464-4614 or via email at ratkinson@waterboards.ca.gov.



VICTOR IZZO
Senior Engineering Geologist
Title 27 Permitting and Mines Unit

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Larry Bradfish, Asst. Regional Counsel, USEPA Region 9, San Francisco
Janet Yocum, On-Scene Coordinator, USEPA Region 9, San Francisco
R. Mitch Avalon, Contra Costa County Flood Control, Martinez
William R. Morse, Sunoco, Inc. Philadelphia, PA
David Chapman, Edgcomb Law Group, San Francisco.
Paul Horton, The Source Group, Inc. Pleasant Hill

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EDGCOMB LAW GROUP

EXHIBIT 30



California Regional Water Quality Control Board Central Valley Region

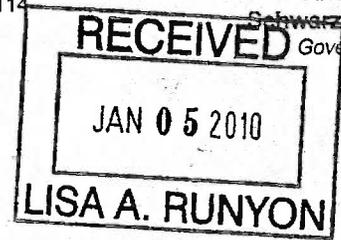
Karl E. Longley, ScD, P.E., Chair



Linda S. Adams
Secretary for
Environmental
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Arnold
Schwarzenegger
Governor



30 December 2009

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US Dept of Interior DMEA
1849 C Street, N.W.
Washington DC 20240

REVISED ORDER TO SUBMIT INVESTIGATIVE REPORTS PURSUANT TO WATER CODE SECTION 13267, MOUNT DIABLO MINE, CONTRA COSTA COUNTY

Central Valley Regional Water Quality Control Board staff has prepared the attached Revised Technical Reporting Order No. R5-2009-0869 (Order). The Order was revised at Bradley Mining Company's request to allow sufficient time for their response. The Order is issued under the provisions of California Water Code section 13267 which states in part: "... (b)(1) In conducting an investigation . . . , the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or, discharging, or who proposes to discharge waste within its region . . . shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires...". Based on the evidence in our files and as discussed in the attached Order, the parties listed in the Order have discharged, or is suspected of having discharged mining waste and therefore is responsible to respond to this Order.

If you have any questions please contact Ross Atkinson at (916) 464-4614 or via email at ratkinson@waterboards.ca.gov.

VICTOR IZZO
Senior Engineering Geologist
Title 27 Permitting and Mining Unit

cc on following page

California Environmental Protection Agency

cc: Patrick Palupa, Office of the Chief Counsel, SWRCB, Sacramento
California Dept of Parks and Recreation, Bay Area Dist., San Francisco
Jerelean Johnson, Site Assessment, Superfund Div. USEPA Region 9, San Francisco
Larry Bradfish, Asst. Regional Counsel, USEPA Region 9, San Francisco
Janet Yocum, On-Scene Coordinator, USEPA Region 9, San Francisco
Patricia S. Port, US Dept. of Interior, Oakland
R. Mitch Avalon, Contra Costa County Flood Control, Martinez
William R. Morse, Sunoco, Inc. Philadelphia, PA
David Chapman, Edgcomb Law Group, San Francisco.
Kennametal Inc., Latrobe, PA
Victoria Gold Corp., Toronto, Ontario M5H 2A4 Canada

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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

REVISED TECHNICAL REPORTING ORDER R5-2009-0869
CALIFORNIA WATER CODE SECTION 13267
FOR
MOUNT DIABLO MERCURY MINE
CONTRA COSTA COUNTY

This Order is issued to Jack and Carolyn Wessman; the Bradley Mining Co.; the U.S. Department of Interior; and Sunoco, Inc (hereafter collectively referred to as Dischargers) pursuant to California Water Code section 13267, which authorizes the Executive Officer of the California Regional Water Quality Control Board, Central Valley Region (hereafter Central Valley Water Board or Board) to issue Orders requiring the submittal of technical reports, and CWC section 7, which authorizes the delegation of the Executive Officer's authority to a deputy, in this case the Assistant Executive Officer. This Order revises and replaces the previous Order issued on 1 December 2009.

The Assistant Executive Officer finds:

BACKGROUND

1. The Mount Diablo Mercury Mine (Mine Site) is an inactive mercury mine, located on approximately 109 acres on the northeast slope of Mount Diablo in Contra Costa County. Acid mine drainage containing elevated levels of mercury and other metals is being discharged to a pond that periodically overflows into Horse and Dunn Creeks. Further investigation is required to assess the extent of pollution discharged from the Mine Site and to evaluate remedial options. The Site Investigation and Remedial Option Evaluation are needed steps that must be taken to restore the impacted waters of the state and to protect public health and the environment.
2. Presently, the Mine Site consists of an exposed open cut and various inaccessible underground shafts, adits, and drifts. Extensive waste rock piles and mine tailings cover the hill slope below the open cut, and several springs and seeps discharge from the tailings-covered area. Three surface impoundments at the base of the tailings capture most spring flow and surface runoff. However, during winter, the ponds routinely spill into Horse and Dunn Creeks, which drain to the Marsh Creek watershed.
3. Section 303(d) of the Federal Clean Water Act requires states to identify waters not attaining water quality standards (referred to as the 303(d) list). Marsh Creek has been identified by the Central Valley Water Board as an impaired water body because of high aqueous concentrations of mercury.

OWNERSHIP AND OPERATOR HISTORY

4. Jack and Carolyn Wessman have owned the Mine Site from 1974 to the present. The Wessmans have made some improvements to reduce surface water exposure to tailings and waste rock, including the construction of a cap over parts of the tailings/waste rock piles. Although these improvements have been made without an engineering design or approved plan, these improvements may have reduced some of the impacts from the Mine Site. However, discharges that contain elevated mercury levels continue to impact the Mine Site and site vicinity.
5. Bradley Mining Company operated the Mine Site from 1936 to 1947, producing around 10,000 flasks of mercury. During operations Bradley Mining Company developed underground mine workings, discharged mine waste rock, and generated and discharged mercury ore tailings.
6. The U.S. Department of the Interior created the Defense Minerals Exploration Administration (DMEA) out of the Defense Minerals Agency in 1951. The DMEA was created to provide financial assistance to explore for certain strategic and critical minerals. The DMEA contracted with private parties to operate the Mine Site under cost-sharing agreements from 1953 to 1954. The initial cost sharing was with the Ronnie B. Smith Trust, which implemented a partnership formed by Jene Harper and James Dunnigan. Although it is unclear whether the mine was operated under the DMEA contract, the Smith partnership produced approximately 102 flasks of mercury. John L. Jonas and John E. Johnson assumed the DMEA contract in 1954, Jonas and Johnson produced 21 flasks of mercury.
7. The Cordero Mining Company operated the Mine Site from approximately 1954 to 1956, and was responsible for sinking a shaft, driving underground tunnels that connected new areas to pre-existing mine workings, and discharging mine waste. The amount of mercury production from this time period is unknown. The United States Environmental Protection Agency (USEPA), Region IX, named Sunoco Inc. a responsible party for Mount Diablo Mercury Mine in the Unilateral Administrative Order for the Performance of a Removal Action, USEPA Docket No. 9-2009-02, due to its corporate relationship to the Cordero Mining Company.
8. Nevada Scheelite Company, a subsidiary of Kennametal Inc., operated at the Mount Diablo Mercury Mine in 1956. The extent of operations and the amount of production for this period is unknown. However, discharges have occurred from runoff from the mine waste piles and likely springs associated with the mine working.
9. Victoria Resources Corp., now Victoria Gold Corp., owned the Mount Diablo site from 1960 to 1969. The extent of operations and the amount of production for this period is unknown. However, discharges have occurred from runoff from the mine waste piles and likely springs associated with the mine working.

10. The Guadalupe Mining Company owned the Mine site from 1969 to 1974. The extent of operations and amount of production for this period is unknown. However, discharges have occurred from runoff from the mine waste piles and likely springs associated with the mine working.

LEGAL PROVISIONS

11. The Water Board's *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, 4th Edition* (Basin Plan) designates beneficial uses of the waters of the State, establishes water quality objectives (WQOs) to protect these uses, and establishes implementation policies to implement WQOs. The designated beneficial uses of Marsh Creek, which flows into Sacramento and San Joaquin Delta are domestic, municipal, industrial and agricultural supply.
12. CWC section 13267 states, in part:

(b)(1) In conducting an investigation, the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or, discharging, or who proposes to discharge waste within its region . . . shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.

As described in Findings Nos. 4 – 7, the Dischargers are named in this Order because all have discharged waste at the Mine Site through their actions and/or by virtue of their ownership of the Mine Site. The reports required herein are necessary to formulate a plan to remediate the wastes at the Mine Site, to assure protection of waters of the state, and to protect public health and the environment.

13. CWC section 13268 states, in part:

(a)(1) Any person failing or refusing to furnish technical or monitoring program reports as required by subdivision (b) of Section 13267 . . . or falsifying any information provided therein, is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b).

(b)(1) Civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.

(c) Any person discharging hazardous waste, as defined in Section 25117 of the Health and Safety Code, who knowingly fails or refuses to furnish technical or monitoring program reports as required by subdivision (b) of Section 13267, or who knowingly falsifies any information provided in those technical or monitoring program reports, is guilty of a misdemeanor, may be

civily liable in accordance with subdivision (d), and is subject to subdivision (e).

(d)(1) Civil liability may be administratively imposed by a regional Article 2.5 (commencing with Section 13323) of Chapter 5 for an amount which shall not exceed five thousand dollars (\$5,000) if a violation occurs.

As described above, failure to submit the required reports to the Board according to the schedule detailed herein may result in action being taken against you, which may include the imposition of penalties pursuant to CWC section 13268. Administrative civil liability of \$5,000 per day may be imposed for non-compliance with the directive.

IT IS HEREBY ORDERED that, pursuant to California Water Code sections 13268 and 13269, Dischargers shall submit the following technical reports:

1. **By 1 April 2010**, submit a *Mining Waste Characterization Work Plan* (the *Characterization Plan*) for the Mine Site. The *Characterization Plan* shall assess both the nature and extent of mining waste at the Mine Site and the potential that this mining waste poses to water quality and/or human health. The *Characterization Plan* shall describe the methods that will be used to establish baseline data for surface water, and ground water at the site, and the means and methods for determining the vertical and lateral extent of the mining waste.

The *Characterization Plan* shall also address slope stability of the Mine Site and assess the need for slope design and slope stability measures to prevent erosion of mining waste-laden soils to surface water and ephemeral streams.

2. **By 1 September 2010**, submit a *Mining Waste Characterization Report* (the *Characterization Report*), characterizing the data gathered pursuant to the *Characterization Plan*. The *Characterization Report* shall include:
 - a. A narrative summary of the field investigation;
 - b. A section describing background soil concentrations, methods of sampling, and the vertical and lateral extent of the mining waste;

3. Within **90 days** of staff concurrence with the Characterization Report, submit a *Site Remediation Work Plan* (hereafter *Remediation Plan*) for the site. The Remediation Plan shall describe remediation activities to clean up or remediate the mining waste either to background concentrations, or to the lowest level that is technically and economically achievable. The Remediation Plan shall also address long-term maintenance and monitoring necessary to confirm and preserve the long-term effectiveness of the remedies. The potential remediation activities shall comply with all applicable WQOs in the Basin Plan. The Remediation Plan shall also include:
 - a. An evaluation of water quality risk assessment:
 - b. A human health risk assessment:
 - c. A time schedule to conduct the remediation activities.

REPORTING

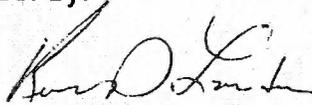
4. When reporting the data, the Dischargers shall arrange the information in tabular form so that the date, the constituents, and the concentrations are readily discernible. The data shall be summarized in such a manner as to illustrate clearly the compliance with this Order.
5. Fourteen days prior to conducting any fieldwork, submit a Health and Safety Plan that is adequate to ensure worker and public safety during the field activities in accordance with California Code of Regulations, title 8, section 5192.
6. As required by the California Business and Professions Code sections 6735, 7835, and 7835.1, all reports shall be prepared by a registered professional or their subordinate and signed by the registered professional.
7. All reports must be submitted to the Central Valley Water Board. Electronic copies of all reports and analytical results are to be submitted over the Internet to the State Water Board Geographic Environmental Information Management System database (GeoTracker) at <http://geotracker.swrcb.ca.gov>. Electronic copies are due to GeoTracker concurrent with the corresponding hard copy. Electronic submittals shall comply with GeoTracker standards and procedures as specified on the State Water Board's web site.
8. Notify Central Valley Water Board staff at least five working days prior to any onsite work, testing, or sampling that pertains to environmental remediation and investigation and is not routine monitoring, maintenance, or inspection.

Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Board to review the action in accordance with CWC section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday (including mandatory furlough days), the petition must be received by the State Water Board by 5:00 p.m. on the next business day.

Copies of the law and regulations applicable to filing petitions may be [http://www.waterboards.ca.gov/public_notices/petitions/water quality request](http://www.waterboards.ca.gov/public_notices/petitions/water_quality_request).

This Order is effective upon the date of signature.

Order by:



KENNETH LANDAU Assista

30 December 20

(Date)

EXHIBIT 31

1 Edgcomb Law Group
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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,
For Review of Revised Order To Submit
14 Investigative Reports Pursuant To Water
Code Section 13267, Mount Diablo Mine,
15 Contra Costa County, dated December 30,
2009

PETITION NO.

**SUNOCO, INC.'S PETITION FOR
REVIEW AND RESCISSION OF
REVISED TECHNICAL
REPORTING ORDER NO. R5-
2009-0869**

16
17 **I.** Pursuant to California Water Code Section 13320 and Title 23 of the
18 California Code of Regulations §§ 2050 *et seq.*, Petitioner Sunoco, Inc. ("**Sunoco**"
19 or "**Petitioner**") hereby petitions the State Water Resources Control Board ("**State**
20 **Board**") for review and rescission of the "Revised Technical Reporting Order R5-
21 2009-0869 issued pursuant to Section 13267 of the California Water Code
22 regarding the Mount Diablo Mine, Contra Costa County," originally issued on
23 December 1, 2009, and revised and reissued on December 30, 2009 ("**Rev.**
24 **Order**"), by the Regional Water Quality Control Board, Central Valley Region"
25 ("**Regional Board**"). Sunoco requests a hearing in this matter.
26
27
28

1 **II. PETITIONER**

2 The name and address of Petitioner is:

3
4 Sunoco, Inc.
5 Attn: Lisa A. Runyon, Senior Counsel
6 Sunoco, Inc.
7 1735 Market St., Ste. LL
8 Philadelphia, PA 19103-7583

9 Sunoco can be contacted through its outside legal counsel:

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

16 **III. ACTION OF THE REGIONAL BOARD TO BE REVIEWED AND**
17 **RESCINDED**

18 Sunoco requests that the State Board review and rescind the Regional
19 Board’s Rev. Order, which requires the submission of: 1) a Mining Waste
20 Characterization Work Plan; 2) a Mining Waste Characterization Report; and 3) a
21 Mine Site Remediation Work Plan (collectively, the “Work”). Sunoco is one of
22 four (4) “dischargers” named in the Rev. Order. The Rev. Order describes the site
23 as an “inactive mercury mine, located on approximately 109 acres on the northeast
24 slope of Mount Diablo in Contra Costa County” (“Mine Site”). The Order also
25 describes the Site as: “consist[ing] of an exposed open cut and various inaccessible
26 underground shafts, adits, and drifts. Extensive waste rock piles and mine tailings
27 cover the hill slope below the open cut, and several springs and seeps discharge
28 from the tailings-covered area. Three surface impoundments at the base of the
 tailings pile capture most spring flow and surface runoff...” (Declaration of

1 David T. Chapman In Support of Petition for Review and Petition for Stay of
2 Action (“Chapman Decl.”), Exh. 1, p. 1.)

3 **IV. DATE OF THE REGIONAL BOARD ACTION**

4 The Regional Board adopted the original order on December 1, 2009, and
5 issued the Rev. Order on December 30, 2009.

6 **V. STATEMENT OF REASONS WHY THE REGIONAL BOARD’S**
7 **ACTION IS IMPROPER**

8 The State Board should review and rescind the Rev. Order because: (1) it is
9 improperly vague and ambiguous in its description of the Mine Site; (2) it requires
10 Sunoco to conduct Work on large areas of the Mine Site where Sunoco was not –
11 and is not – a “discharger,” in violation of established state and federal law; and (3)
12 it violates CWC § 13267(b)(1) by failing to provide Sunoco “with a written
13 explanation with regard to the need for the reports, and [fails to] identify the
14 evidence that supports requiring [Sunoco] to provide the reports.”

15 **A. Background.**

16 **1. Prior Regional Board Order to Sunoco**

17 The Rev. Order supersedes a June 30, 2009 order (“June 30 Order”) to
18 Sunoco, which required Sunoco (but no other alleged discharger), to submit a
19 “Divisibility Report” supporting Sunoco’s contention that the operations at the
20 Mine Site of its predecessor in interest, Cordero Mining Company (“Cordero”),
21 were “divisible” from those of others. (Chapman Decl.; Exh. 2, p. 2.) The
22 Divisibility Report was to include figures showing the Cordero lease area, the
23 extent of Cordero’s operations, including the total volume of rock removed from
24 the underground workings, an estimate of the total volume of broken rock
25 discharged, and a proposed area of study. (*Id.*) The June 30 Order also required
26 Sunoco to “submit an investigation work plan covering the area agreed upon by the
27 Regional Water Board and Sunoco.” (*Id.*) The June 30 order further provided that
28

1 the "Regional Water Board staff **must review and consider the divisibility report**
2 **and reach agreement with Sunoco on the limits, if any, on the Site to be**
3 **investigated.**" (Id.; emphasis added.) The June 30 Order also required Sunoco to
4 "voluntarily" provide the Regional Board with a Potentially Responsible Party
5 ("PRP") report identifying other parties that were owners and/or operators at the
6 Site that also should be named as dischargers on any future order. (Id.)

7 **2. Sunoco's Compliance with the June 30 Order.**

8 Sunoco complied with the June 30 Order by submitting its "Divisibility
9 Position Paper" ("Divisibility Report") and "Voluntary PRP Report" ("PRP
10 Report") to the Regional Board on July 31, 2009. (Chapman Decl., Exhs. 3 & 4.)

11 **3. Findings of the PRP Report**

12 In its PRP Report, Sunoco identified more than 20 former owners and
13 operators that the Regional Board failed to name as dischargers on its June 30
14 Order to Sunoco, including Bradley Mining Company ("Bradley Mining") and the
15 United States Department of Interior ("DOI"). (Chapman Decl., Exh. 3.)

16 **4. Findings of the Divisibility Report**

17 Sunoco's Divisibility Report detailed numerous key findings based upon its
18 technical consultant's review of historical records, maps and aerial photos that
19 establish a reasonable basis for divisibility of the Mine Site among those identified
20 in the PRP Report. (Chapman Decl., Exh. 4.) The findings most relevant to this
21 Petition are set forth below.

22 Well before Cordero began operating at the Site in 1955, Mt. Diablo
23 Quicksilver Mining Company ("Mt. Diablo Quicksilver") operated the Site
24 between 1930 and 1936, producing approximately 739 flasks of mercury.
25 (Chapman Decl., Exh. 4, p. 2-1.) Bradley Mining conducted surface and extensive
26 underground mining operations between 1936 and 1951, producing over 10,000
27 flasks of mercury. Later in 1951, the Ronnie B. Smith partnership ("Smith")
28

1 surface mined mercury ore which they processed on Site to produce yet more
2 flasks of mercury. (Id., p. 2-1.) Together these three PRPs extracted significant
3 volumes - almost 11,000 flasks - of mercury. (Id., p. 2-1).

4 Of critical importance to this Petition is the fact that the mercury-bearing ore
5 processed onsite by these three PRPs generated extensive waste rock and tailings
6 piles in the south east and south central portions of the Site, where they remain.
7 (Id., Figs. 5-1, 5-4.) These are the “[e]xtensive waste rock piles and mine tailings
8 [that] cover the hill slope below the open cut,” from which “several springs and
9 seeps discharge” that are the primary concern of the Rev. Order. (Id., Exh. 1, p. 1.)

10 In contrast to the extensive mining, milling, and tailings generation and
11 disposal activities of these three PRPs operating between 1930 and 1951 (21
12 years), DOI, its contractors, and Sunoco’s predecessor in interest, Cordero,
13 conducted exclusively underground mining operations, in a separate location (the
14 DMEA Shaft), sporadically over a three-year period (1953-55). (Chapman Decl.,
15 Exh. 4.) Moreover, there is no evidence they **processed any mercury ore,**
16 **produced any flasks of mercury, or discharged any mill tailings.**

17 The DOI, through its Defense Minerals Exploration Agency (“DMEA”),
18 commenced the development of the “DMEA Shaft” by granting Smith a loan to
19 explore the deeper parts of a shear zone that Bradley previously explored.
20 (Chapman Decl., Exh. 4, p. 2-1, Exhs. 5-7.) Between approximately August 15,
21 1953 and January 16, 1954, Smith excavated a 300-foot-deep shaft, but never
22 encountered any mercury ore. (Id.) The DMEA Shaft is located over 200 feet
23 north of the open pit, shafts, adits, and drifts mined extensively by Mt. Diablo
24 Quicksilver, Bradley, and Smith. (See Id., Exhs. 5, 8-12.)

25 Under contract to DMEA, Smith constructed rail tracks for ore cars to dump
26 waste rock from the DMEA Shaft to the north, across the road (away from the pre-
27 existing tailings piles) to an “unlimited location,” believed to be on the north-
28

1 facing slope in the Dunn Creek watershed where geologist E. M. Pampeyan
2 (“Pampeyan”) of the California Division of Mines and Geology (“CDMG”)
3 mapped a large waste rock dump in 1963. (*Id.*) In January 1954, Smith assigned
4 his lease and DMEA contract to PRPs Jonas and Johnson, who extended the
5 DMEA Shaft cross-cut to 120 feet, but ceased mining after encountering water and
6 gas. (*Id.*) The DMEA Shaft flooded on February 18, 1954. (*Id.*)

7 Cordero leased the Site from Mt. Diablo Quicksilver on November 1, 1954.
8 (Chapman Decl., Exhs. 4, 16.) After reconditioning the flooded DMEA Shaft,
9 Cordero drove a new series of cross-cut tunnels a total of 790 feet from the DMEA
10 Shaft towards the shear zone previously mined by Bradley, albeit at a depth below
11 Bradley’s extensive workings. (Chapman Decl., Exh. 4, p. 2-2, Figs. 3-1 to 3-4.)
12 Cordero intermittently operated from the DMEA Shaft for one year, from
13 approximately December 1954-December 1955, and made only a single
14 connection between its westernmost tunnel at the 360’ level with the bottom of the
15 vertical “Main Winze” shaft previously excavated by Bradley. (Chapman Decl., p.
16 2-1, Exh. 4, p. 3-1, Fig. 3-3; Exh. 10.) Any hydraulic connection or groundwater
17 movement between those tunnels in the past or at present is speculative.

18 Aboveground, Cordero rehabilitated the furnace and constructed a trestle
19 from the DMEA Shaft to the ore bin, near the furnace. (Chapman Decl., Exh. 4, p.
20 4-2, Fig. 4-1). However, there is no evidence Cordero ever used the furnace.
21 Cordero also conducted water handling and treatment operations extending from
22 the DMEA Shaft to a pond 1,350 feet to the west. (Chapman Decl., Exh. 4, p. 4-2,
23 Figs. 4-1, 4-2). Water pumped to this location either evaporated or drained to
24 Dunn Creek, to the satisfaction of the then-named Water Pollution Control Board,
25 which inspected and approved of Cordero’s water handling facilities. (*Id.*, Exh. 4,
26 pp. 5-2 – 5-4, Fig. 5-3, Exhs. 8-12.) The area Cordero used for water disposal is
27 not hydraulically connected to the “[e]xtensive waste rock piles and mine tailings
28

1 [that] cover the hill slope below the open cut,” from which “several springs and
2 seeps discharge” that are the primary concern of the Rev. Order. (Id., Exh. 4 pp. 5-
3 4.)

4 The total volume of waste rock generated by Cordero from its underground
5 workings at the DMEA Shaft during its one year of intermittent operations was
6 approximately 1,228 cubic yards, using a 20% bulking factor. (Chapman Decl.,
7 Exh. 4, p. 5-1.) This contrasts with the tailings piles that preexisted Cordero,
8 which total approximately **105,848 cubic yards** of tailings and waste rock
9 resulting from the operations of all PRPs. (Chapman Decl., Exh. 4, p. 43, Tbl. 1.)

10 Near the end of its one year operational period, Cordero encountered small
11 zones of ore that it excavated and stockpiled for sampling and assaying, amounting
12 to approximately 100-200 tons of ore, or about 50-100 cubic yards. (Chapman
13 Decl., Exh. 4, p. 5-1.) A January 1953 topographical map prepared by Pampeyan
14 for the CDMG shows “dump” materials (i.e., tailings) and other features of the
15 Mine Site, including the location of prior surface mined areas and related mining
16 buildings. (Id., Exh. 4, p. 5-1, Fig. 5-1.) The January 1953 CDMG map also
17 shows the location of the DMEA’s “proposed shaft.” (Id.) In an exhibit to the
18 Divisibility Report, Sunoco’s consultant highlighted the locations of the pre-
19 existing waste rock/tailings piles and the proposed DMEA Shaft on the map. (Id.)
20 In 1956/57, following the mining by the DMEA contractors and Cordero,
21 Pampeyan updated this topographical map by, in part, **adding a pile of waste rock**
22 **adjacent to the DMEA shaft.** (Id., Exh. 4, p. 5-1, Fig. 5-2; Exh. 5.) Site
23 inspections in 2008 by Sunoco’s consultant Paul D. Horton (“Horton”) revealed
24 that this waste rock pile originally mapped around the DMEA shaft was no longer
25 present. Current Site owner Jack Wessman (“Wessman”) informed Horton that he
26 used the waste rock adjacent to the DMEA Shaft to backfill it. (Horton Decl. ¶ 8.)
27 Additional waste rock extracted from the DMEA Shaft, if any, was likely dumped
28

1 on the north facing slope (“Northern Dump”) in the Dunn Creek watershed, using
2 the rail line that Smith constructed from the DMEA Shaft for that purpose.
3 (Chapman Decl., Exh. 4, p. 5-2, Fig. 5-2.) During a 2009 Site visit, Sunoco’s
4 consultant Horton observed smaller waste rocks on the Northern Dump typical of
5 the mining waste that could have been transported from the DMEA Shaft via
6 Smith’s rail line. (Horton Decl., ¶ 8.)

7 Complimenting Cordero’s limited area of operations and waste rock
8 disposal, no evidence in the record indicates that Cordero milled any of the small
9 amount of ore it mined. Nor is there any evidence that Cordero generated any
10 tailings, or added even a single rock to the pre-existing “[e]xtensive waste rock
11 piles and mine tailings [that] cover the hill slope below the open cut,” that are the
12 primary concern of the Rev. Order. (Chapman Decl., Exhs. 1, 4, at p. 3-1, Fig. 5-
13 2)(pre-existing waste rock/tailings piles highlighted in blue.) DMEA records
14 reveal that Cordero’s operations were unsuccessful, resulting in *no mercury*
15 *production*. (Chapman Decl., Exh. 14.)

16 Based on the foregoing facts, and as required in the June 30 Order, Sunoco
17 presented in the Divisibility Report a figure depicting Cordero’s former area of
18 operations within the much larger Mine Site, which it designated as the proposed
19 area of study. (Chapman Decl., Exhs. 2, 3, & 4 at p. 5-1.)

20 **5. The Regional Board Rejects Sunoco’s Well-Documented** 21 **Divisibility Report and Proposed Study Area.**

22 Despite the detailed factual presentation set forth in Sunoco’s Divisibility
23 Report, the Regional Board issued its October 30, 2009 Divisibility Response,
24 which stated that “Board staff disagree that there is a reasonable basis for
25 apportioning liability.” (Chapman Decl., Exh. 13, p. 1). Instead of meeting with
26 Sunoco to devise a study area, as contemplated in the June 30 Order, the Regional
27 Board rejected Sunoco’s divisibility argument and issued the Rev. Order, which
28

1 implicitly finds Sunoco jointly and severally liable with three other alleged
2 dischargers for investigating and developing a remediation work plan for the entire
3 Mine Site.

4 The Regional Board's Divisibility Response letter relies on two primary
5 grounds in rejecting Sunoco's Divisibility Report. First, the Regional Board
6 assumes, without any evidentiary basis, that the "790 feet of underground tunnels
7 constructed by Cordero connect with, and thus contribute contaminated water to,
8 the earlier underground tunnels [excavated by Bradley] via the Main Winze."
9 (Chapman Decl., Exh. 13, p. 1.) There is no evidence that the connection to the
10 Main Winze in 1955 exists today, or that it existed for any duration post-1955,
11 since such mine shafts are prone to collapse and require constant rehabilitation.
12 (Horton Decl., ¶ 9.) Similarly, there is no evidence that water in the 360' level
13 Cordero tunnels was contaminated, or that it ever traveled 200 feet upwards
14 through the Main Winze and then several hundred feet horizontally out of the
15 drainage portal adit at 165' level adit. Records indicate that water emanated from
16 the 165' level adit long before Cordero operated on the Site. (Id.)

17 Second, the Regional Board contends that "no evidence in the files indicates
18 where the waste rock [from the DMEA shaft] was discharged." (Chapman Decl.,
19 Exh. 13, p. 1.) This contention is contradicted by Sunoco's Divisibility Report, in
20 which Sunoco provided the Regional Board with documented evidence of: (1)
21 CDMG topographical maps showing the Cordero waste rock piled adjacent to the
22 DMEA Shaft; (2) construction of a short stretch of rail leading from the DMEA
23 Shaft in the opposite direction of the preexisting open pit and tailings on the
24 southern portions of the Site toward the Northern Dump area in the Dunn Creek
25 drainage north of the DMEA Shaft; and (3) current Site owner Jack Wessman's
26 acknowledgment to Sunoco's consultant that he moved some or all of that adjacent
27 waste rock pile back into the DMEA Shaft, consistent with Mr. Horton's
28

1 observations that the DMEA Shaft is now filled (Chapman Decl., Exh. 4, p. 5-1;
2 Horton Decl., ¶ 7.) Moreover, the existence of the short waste rock disposal rail
3 line reasonably suggests that Cordero placed other waste rock, if any, from the
4 DMEA Shaft in the Northern Dump area, just as Smith did. Finally, Sunoco's
5 consultant observed waste rock at the area near the end of where the short line rail
6 formerly existed that is typical of the mining waste excavated from the DMEA
7 Shaft. (Horton Decl., ¶ 8.) In contrast, the Regional Board's Divisibility Response
8 presents *no evidence* that Cordero disposed *any* waste rock or ore anywhere other
9 than next to the DMEA Shaft or in the Northern Dump area

10 **6. The Rev. Order Assumes Joint and Several Liability Among**
11 **the Named Dischargers.**

12 The Rev. Order alleges that “[t]he Cordero Mining Company operated the
13 Mine Site from approximately 1954 to 1956, and was responsible for sinking a
14 shaft, driving underground tunnels that connected new areas to pre-existing mine
15 workings, and discharging mine waste,” and names Sunoco as a “discharger”
16 because Cordero allegedly “discharged waste at the Mine Site through [its] actions
17 and/or by virtue of [its] ownership of the Mine Site....” (Chapman Decl., Exh. 1,
18 pp. 1-2.)

19 The Rev. Order identifies three other “dischargers” required to prepare
20 reports: (1) Jack and Carolyn Wessman (“Wessmans”)(current Mine Site owners);
21 (2) Bradley Mining; and (3) the DOI. (Chapman Decl., Exh. 1, p. 2.) The Rev.
22 Order identifies several other PRPs, but does not name them as “dischargers.” (Id.)
23 The Rev. Order fails to mention the State of California, a PRP that owns property
24 containing tailings discharging mercury contaminated waste to the waters of the
25 State of California.

26 The Revised Order requires the four named dischargers to submit, pursuant
27 to California Water Code section 13267 (“WC § 13267”) the following:
28

- 1 1. Mining Waste Characterization Work Plan;
- 2 2. Mining Waste Characterization Report; and
- 3 3. Mine Site Remediation Work Plan. (Chapman Decl., Exh. 1, Rev.
- 4 Order, at pp. 4-5.)

5 The Rev. Order implicitly requires the four named dischargers to comply
6 with its terms, and apparently presumes them to be jointly and severally liable.

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

8 **1. The Rev. Order's Mine Site Description Is Vague and** 9 **Ambiguous.**

10 The Rev. Order's description of the Mine Site is vague and ambiguous,
11 making compliance impossible and possibly resulting in unnecessary compliance
12 efforts not required by the Regional Board. While the Rev. Order describes the
13 Mine Site as "an inactive mercury mine, located on approximately 109 acres on the
14 northeast slope of Mount Diablo in Contra Costa County," it does not provide a
15 map nor any Assessor Parcel Number(s) ("APNs") that identify the specific Mine
16 Site boundaries. (See Chapman Decl., Exh. 1.) After the Regional Board issued
17 the first Site Order on March 25, 2009, Sunoco requested either a map or APNs
18 from the Regional Board to determine the specific "Mine Site" boundaries to be
19 investigated. (*Id.*, at Exh. 15.) The Regional Board then referenced APN 78-060-
20 008-6, but the County Recorder no longer uses that number. Instead, it appears
21 that APN 78-060-008-6 became APN 078-060-034, but the Assessor's Map for
22 that APN consists of only 96.65 acres, not the Rev. Order's "109 acres." (*Id.*, at
23 Exh. 20.) An older Assessor's Map indicates that APN 78-060-008-6 refers to a
24 parcel that was divided into smaller parcels that are now APNs 078-060-013, 078-
25 060-033, and 078-060-032, which total over 120 acres, and do not appear to cover
26 what is arguably the Mt. Diablo Mercury Mine area. (See Chapman Decl., Exh.
27 17.)

1 In sum, the Rev. Order's insufficient Mine Site description makes Sunoco's
2 compliance difficult if not impossible and could result in a futile and unnecessarily
3 costly investigation. Sunoco requests the State Board grant relief by rescinding the
4 Rev. Order and requiring the Regional Board to specify properly the boundaries of
5 the Mine Site.

6 **2. Sunoco Should Not Have Been Named as a Discharger or**
7 **Operator Over the Entire "Mine Site" Referenced in the**
8 **Rev. Order Because Cordero's Operations Are Divisible.**

9 The Rev. Order's requirements that Sunoco and the other three PRPs submit
10 an investigation work plan, an investigative report, and a remedial workplan
11 related to the Mine Site, (whatever area that encompasses), are substantially
12 overbroad, since Cordero operated on only a small portion of the Mine Site during
13 its one year of intermittent operations and did not produce any mercury flasks or
14 tailings. While Sunoco is willing to join with other PRPs to investigate and
15 prepare a remedial action workplan, if necessary, for areas where it formerly
16 operated, it is unwilling to do so for areas on which it did not operate or cause any
17 discharge to, including the majority of the Site such as the open pit mining area to
18 the south and southwest of the DMEA Shaft, the related large waste rock and
19 tailings piles on the southeast and south central portions of the Mine Site, or the
20 settlement ponds farther to the east. (Chapman Decl., Exh. 4, Fig. 5-1 (pre-
21 Cordero tailings piles highlighted in blue).)

22 The Rev. Order states that the Mine Site is comprised of approximately 109
23 acres, but even based on conservative estimates, Cordero operated on less than
24 10% of that area. (Horton Decl., ¶ 10.) The Rev. Order also asserts that the Site
25 consists "of an exposed open cut and various inaccessible underground shafts, adits
26 and drifts. Extensive waste rock piles and mine tailings cover the hill slope below
27 the open cut, and several springs and seeps discharge from the tailings-covered
28 area." (Chapman Decl., Exh. 1, at p. 1.) Yet, historical mine plans, maps, aerial

1 photographs and other records demonstrate that Cordero's mining activities in
2 1955 came well after those of Mt. Diablo Quicksilver., Bradley Mining and Smith
3 between 1936-1951, who excavated the "open exposed cut" portion of the mine
4 referenced in the Rev. Order, until landslides partially covered the area. (Id., Exhs.
5 9-12.) Cordero did not "operate" that area of the Mine Site and has no
6 "discharger" liability for it. The Divisibility Report reflects that Cordero mined to
7 the north of, and without discharge to, the "[e]xtensive waste rock piles and mine
8 tailings cover[ing] the hill slope below the open cut." (Id., Exh. 1, at 1.) Thus, the
9 Rev. Order improperly requires Sunoco to prepare technical reports related to large
10 areas where Cordero was not a "discharger."

11 Given Cordero's small, divisible "discharge" footprint at the Mine Site,
12 Sunoco objects to the Rev. Order's overbroad finding that Cordero "operated the
13 Mt. Diablo Mine from approximately 1954 to 1956." (Chapman Decl., Exh. 1, at
14 2.) No evidence suggests that Cordero operated the open pit mine or discharged
15 anything to the waste rock piles and mine tailings covering the hill slope below it,
16 which the Rev. Order identifies as significant areas of environmental concern.
17 (See Id. at p. 1.) Instead, the evidence shows where Cordero is known to have
18 operated, namely the DMEA Shaft and related Cordero tunnels, refurbishing of the
19 furnace, the waste rock pile formerly adjacent to the DMEA Shaft, the settling
20 pond area approximately 1,350 feet north of the DMEA Shaft, and the Northern
21 Dump at the end of Smith's rail spur from the DMEA Shaft. (Chapman Decl., Exh.
22 4.) CWC § 13267 only authorizes the Regional Board to order Sunoco to
23 investigate and prepare reports for those areas.

24 Sunoco therefore objects to the Rev. Order's requirement that it submit work
25 plans and a report concerning the entire Mine Site.

26 The plain language of the California Water Code reveals that a "discharger"
27 is only liable for investigating areas to which it discharged. A "discharger" is not
28

1 liable for investigating and remediating the geographically distant and unrelated
2 discharges of other PRPs. This legal principle means that the Regional Board
3 cannot require Sunoco to investigate sources of mercury contamination unrelated
4 to Cordero's activities, such as the open pit mine, and the waste rock piles and
5 mine tailings covering the hill slope below it.¹

6 Moreover, the Revised Order acknowledges that CWC § 13267 requires the
7 Regional Board to provide Sunoco "with a written explanation with regard to the
8 need for the reports, and shall identify the evidence that supports requiring that
9 person to provide the reports." (WC §13267(b); emphasis added.)(Chapman Decl.,
10 Exh. 1, at p. 3.) The Rev. Order fails to identify *any* evidence in support of its
11 claim that Cordero "operated the Mt. Diablo Mine" generally, or that it specifically
12 discharged any of the mining waste that is the subject to the Rev. Order. Thus, the
13 Rev. Order fails to – and cannot – meet this requirement of CWC § 13267(b) in
14 light of the evidence.

15 The record reveals that Cordero operated solely from the DMEA Shaft north
16 of, and divisible from, the open pit, shafts, adits, and drifts mined extensively by
17 Bradley and others before and afterwards. (See Chapman Decl., Exhs: 4, 6, 8-12,
18 16.)

19 Moreover, there is no evidence that any of Cordero's waste rock would
20 cause the discharge of mercury, or that Cordero deposited it on the extensive
21 Bradley tailings piles that are the primary concern of the Rev. Order. The record
22 shows that Cordero placed its waste rock adjacent to the DMEA Shaft, and that
23 that current Site owner Jack Wessman used it to refill the shaft, or, it was discarded
24 on the Northern Dump over the ridge, into the Dunn Creek drainage, using the
25 Smith's rail track from the DMEA Shaft. (Chapman Decl., Exh. 4, 5, 8 at p. 5-1,
26

27 ¹ Sunoco continues to investigate the facts underlying this divisibility issue, and
28 reserves the right to supplement the record with relevant additional documents and
information.

1 Figs. 5-2 – 5-3; Horton Decl., ¶¶ 7-8.) Waste rock now in that location is typical of
2 the mining waste from the DMEA Shaft. (Horton Decl., ¶ 8.)

3 There is evidence that Cordero extracted a small amount of low-grade ore,
4 but never processed it because it was not commercially viable. (See Chapman
5 Decl., Exh. 19.) There is no evidence that Cordero ever produced any mercury or
6 any tailings. Thus, the Regional Board has no evidentiary basis for requiring
7 Cordero to investigate the extensive tailings piles (“mine waste”) known to have
8 been generated by Mt. Diablo Quicksilver, Bradley, and Smith or the groundwater
9 (“seeps”) emanating from them.

10 While Cordero connected at the 360’ level to the bottom of Bradley’s Main
11 Winze shaft, there is no evidence that water in the Cordero tunnels was or is
12 contaminated, or that it rose 200 feet from the bottom of the Main Winze at the
13 360’ level to then travel several hundred feet before exiting at the 165’ foot level
14 adit. There is only an evidentiary basis for requiring Sunoco to investigate its
15 underground tunnel system, the water, if any, within it, and its former connection
16 the Main Winze, to determine whether its former workings could be discharging
17 contaminants out the 165’ adit. Even so, the State Board should limit the scope of
18 Sunoco’s liability for this investigation, since water emanated from the 165’ level
19 adit before Cordero’s operations and considering that any acid mine drainage in
20 that area likely results from the operations of Bradley and others.

21 Sunoco requests that the State Board grant relief and order rescission of the
22 Rev. Order and require the Regional Board to provide reference to the evidence on
23 which it relies to order Sunoco to furnish technical reports under CWC §13267,
24 and that the Regional Board should limit any revised Order to Sunoco to the areas
25 where evidence shows that Cordero actually operated and discharged wastes.
26 Those areas are described in Sunoco’s Divisibility Report. (Chapman, Decl., Exh.
27 4, Fig. 4-1.)

1 **A. Legal Bases for Divisibility**

2 Any order requiring Sunoco to perform Work at the Mine Site should be
3 limited in scope because: (1) under well-established California law, lessees such as
4 Cordero are not responsible for investigating or remediating continuing nuisances
5 related to discharges by others, and (2) the United States Supreme Court has
6 recently held that divisibility, not joint and several liability, is proper where a party
7 such as Cordero can show that a reasonable basis for apportionment exists.

8 The Rev. Order states that:

9 As described in Findings Nos. 4 - 7, the Dischargers are named in this
10 Order because all have discharged waste at the Mine Site through
11 their actions and/or by virtue of their ownership of the Mine Site. The
12 reports required herein are necessary to formulate a plan to remediate
13 the wastes at the Mine Site, to assure protection of waters of the state,
14 and to protect public health and the environment. (Chapman Decl.,
15 Exh. 1, Rev. Order, p. 2.)

16 While a discharger may have a legal obligation to investigate and remediate
17 contamination they caused, no such obligation exists where another caused the
18 contamination. This is particularly true of alleged dischargers who leased, but did
19 not own, a site. Here, the Rev. Order's reference to the "Mount Diablo Mercury
20 Mine" is vague, and appears to suggest, without any evidentiary basis, that Cordero
21 mined the entire underground workings and is somehow responsible for all acid
22 mine drainage and waste mine rock and tailings at the Mine Site, as well as for all
23 past discharges of mercury contaminated water to a settlement pond at the Site.
24 The Rev. Order appears to suggest that Sunoco must investigate others' discharges
(i.e., Bradley Mining's).

25 This Petition provides the legal and factual basis for limiting the scope of the
26 Work to be performed by Sunoco at the Mine Site. The Rev. Order articulates no
27 legal or factual basis for requiring Sunoco to investigate or remediate areas
28 operated by other PRPs.

1 1. The Regional Board’s Purported Theory of Liability – Joint & Several
2 Through Passive Migration/Continuing Nuisance

3 a. In the Matter of the Petition of Zoecon Corporation

4 The Regional Board asserts in its Divisibility Response that it
5 “...maintain[s] that there is no reasonable basis to apportion liability, and
6 therefore, pursuant to State Board water quality decisions regarding
7 apportionability, Cordero/Sunoco’s liability for the site remains joint and several.”
8 (Chapman Decl., Exh. 13, at p. 2.) While the Rev. Order generally references
9 sections of the California Water Code, it does not specifically articulate any legal
10 authority supporting the liability of a lessee under a passive migration theory,
11 although it appears to be loosely and erroneously based on the State Water
12 Resources Control Board’s decision In the Matter of the Petition of Zoecon
13 Corporation, Order No. WQ 86-02 (“Zoecon”). However, Zoecon is inapplicable
14 to Sunoco, a mere former lessee.

15 According to this theory, Cordero’s lease of a portion of the Mine Site
16 provided it with legal control sufficient to allow it to remediate continuing
17 nuisances in the areas covered in the lease – including the discharges of others.
18 Under California law, subsequent *owners* may be liable for passive migration of a
19 continuing nuisance created by another, but lessees such as Cordero cannot be held
20 liable for those discharges. Zoecon applies to Mine Site owners and former
21 owners, but not to lessees such as Cordero. Under Zoecon, a current owner may
22 face liability because it has the authority to abate a continuing nuisance resulting
23 from the passive migration of contaminants, even where the original discharge was
24 caused by a predecessor owner. However, nothing in Zoecon supports a finding of
25 liability for former lessees such as Cordero, that neither caused any continuing
26 nuisance resulting from the mining operations of others, nor has any current
27 authority to abate it. In Zoecon, the State Board concluded that the petitioner, the
28

1 current site owner, was legally responsible for conducting the required
2 investigation or remedial action, basing its decision on a passive migration,
3 continuing nuisance theory:

4 Therefore we must conclude that there is an actual movement of waste
5 from soils to ground water and from contaminated to uncontaminated
6 ground water at the site which is sufficient to constitute a 'discharge'
7 by the petitioner for purposes of Water Code §13263(a). (Zoecon at p.
8 4.)

8 Water Code §13263(a) provides:

9 (a) The regional board, after any necessary hearing, shall prescribe
10 requirements as to the nature of any proposed discharge, existing
11 discharge, or material change in an existing discharge, except
12 discharges into a community sewer system, with relation to the
13 conditions existing in the disposal area or receiving waters upon, or
14 into which, the discharge is made or proposed. The requirements
15 shall implement any relevant water quality control plans that have
16 been adopted, and shall take into consideration the beneficial uses to
17 be protected, the water quality objectives reasonably required for that
18 purpose, other waste discharges, the need to prevent nuisance, and the
19 provisions of Section 13241. (CWC §13263(a).)

17 Zoecon also states, "...here the waste discharge requirements were imposed
18 on Zoecon not because it had 'deposited' chemicals on to land where they will
19 eventually 'discharge' into state waters, but because it *owns* contaminated land
20 which is directly discharging chemicals into water." (Zoecon at p. 5; emphasis
21 added.) Similarly, in Zoecon the State Board made the "determination that the
22 property *owner* is a discharger for purposes of issuing waste discharge
23 requirements when wastes continue to be discharged from a site into waters of the
24 state." (Id.; emphasis added.)

25 Later, Zoecon explains that a New Jersey court's application of the common
26 law nuisance doctrine would probably not be followed by a California court
27 "because California Civil Code §3483 provides that every successive *owner* of
28

1 property who neglects to abate a continuing nuisance upon, or in the use of, such
2 property, created by a former owner, is liable therefore in the same matter as the
3 one who first created it.” (Zoecon at p. 10; emphasis added). Zoecon
4 acknowledged that “[c]ommon law governs in California only to the extent that it
5 has not been modified by statute,” (id. at p. 10, n 6), thereby recognizing that the
6 California legislature specifically excluded lessees from liability in codifying
7 nuisance law, since Civil Code §3483 only applies to “owners,” and not lessees.
8 Thus, Zoecon does not apply to lessees such as Cordero, and to the extent the Rev.
9 Order attempts to require Sunoco to investigate and remediate waste discharged by
10 others such as Bradley Mining, it is inappropriate and unsupported by law.

11 b. Under California Civil Code §3483, Lessees Such As Cordero Are
12 Not Liable For Nuisances Created Prior To The Leasehold.

13 California Civil Code §3483 assesses continuing nuisance liability only
14 upon owners and former owners, not lessees. The plain language of §3483 reveals
15 that the legislature explicitly excluded lessees from liability for continuing
16 nuisance:

17 “Every successive *owner* of property who neglects to abate a
18 continuing nuisance upon, or in the use of, such property, created by a
19 former owner, is liable therefor in the same manner as the one who
20 first created it.” (Cal. Civ. Code § 3483; emphasis added.)

21 Even if the Regional Board were to somehow find that Cordero was a
22 constructive owner of the Mine Site (which it cannot), Cordero would still not face
23 liability under California law, because it is well-established that “. . . *there is no*
24 *dispute in the authorities that one who was not the creator of a nuisance must*
25 *have notice or knowledge of it before he can be held [liable].”* (Reinhard v.
26 Lawrence Warehouse Co., 41 Cal.App.2d 741 (1940) (emphasis added), citing
27 Grigsby v. Clear Lake Water Works Co., 40 Cal. 396, 407 (1870); Edwards v.
28 Atchison, T. & S. F. R. Co., 15 F.2d 37, 38 (1926).) Similarly, “[i]t is a

1 prerequisite to impose liability against a person who merely passively continues a
2 nuisance created by another that he should have notice of the fact that he is
3 maintaining a nuisance and be requested to remove or abate it, or at least that he
4 should have knowledge of the existence of the nuisance.” (Reinhard, *supra*, at
5 746.)

6 The Rev. Order’s allegation that “[a]cid mine drainage containing elevated
7 levels of mercury and other metals are being discharged to a pond that periodically
8 overflows into Horse and Dunn Creeks” is insufficient to trigger liability on the
9 part of Cordero since, in addition to it never having been an owner, no evidence
10 shows that Cordero had notice that it was maintaining a nuisance, that any agency
11 asked Cordero to remove or abate it, or that even knew of the nuisance. (Chapman
12 Decl., Exh. 1, at p. 3.) Instead, the record indicates that during Cordero’s
13 leasehold, *the State Water Pollution Control Board specifically noted that Cordero*
14 *was not maintaining any nuisance related to soil or water discharge of any*
15 *contaminant, and in fact commended Cordero for its beneficial water management*
16 *practices.* (Chapman Decl., Exh. 4, at p. 5-2; Exh. 18.) If the Regional Board now
17 asserts that a nuisance was occurring at the time of Cordero’s lease of part of the
18 Mine Site, it begs the question as to why the Regional Board did not require
19 investigation or remediation of this alleged nuisance at the time, some 60 years
20 ago. If the state regulators were not aware of the nuisance at the time, there is no
21 reason to believe that Cordero knew or should have known about it.

22 The Regional Board provides no legal or factual basis for the conclusion that
23 Cordero has legal liability as an “owner” and, therefore, a discharger, under a
24 passive migration/continuing nuisance theory. Thus, the Rev. Order’s attempt to
25 name Cordero as a party responsible for the discharge(s) of others at the Mine Site
26 is unsupported by California law.

27 iii. Divisibility Is Proper Because Sunoco Can Show A Reasonable Basis
28 For Apportionment