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BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

CENTRAL VALLEY REGION

In the Matter of:

Administrative Civil Liability Complaint No. R5-2012-0543 and Draft Cease and Desist Order

Issued to Richard Sykora
Red Ink Maid Big Seam Mine
Placer County

PROSECUTION TEAM REBUTTAL BRIEF

I. Introduction

Pursuant to the Revised Hearing Procedures issued by the Advisory Team on 1 August 2012, the Prosecution Team submits this rebuttal brief responding to Richard Sykora's (hereinafter "Discharger") evidentiary submittal for Administrative Civil Liability Complaint No. R5-2012-0543 ("Complaint") and Draft Cease and Desist Order ("CDO") for Red Ink Maid and Big Seam Mine ("Site"). For the reasons explained in detail below, the Prosecution Team continues to advocate for the imposition of administrative civil liabilities and adoption of requirements as recommended in the Complaint and Draft CDO. The Discharger is appropriately named as a party on the Complaint because the Discharger is named on Waste Discharge Requirements ("WDRs") Order No. R5-2007-0181 as the mine operator, has primary responsibility for compliance with the WDRs, and is enrolled under the General Industrial Stormwater Order No. 97-03-DWQ ("ISW Permit"). The Discharger attempts to evade the California Regional Water Quality Control Board, Central Valley Region's ("Central Valley Water Board" or "Board")

requirements by deflecting responsibility for complying with those requirements and assigning that responsibility to some other entity. Such an assignment of responsibility is inappropriate. While many different agencies, local, state and federal, are responsible for regulating surface mining activities on federally owned land, the Board maintains authority to regulate mining activities that affect water quality on federal lands by enforcing WDRs and ISW Permit requirements.

II. Richard Sykora is an appropriately named party on Administrative Civil Liability Complaint No. R5-2012-0543 and the Draft Cease and Desist Order

Mr. Sykora asserts that he should not be named as a party on the Complaint because an entity known as Wildcat Mining Enterprises, LLC ("LLC") has subsequently taken over responsibility as mine operator. In the original response to comments dated 12 July 2012, the Prosecution Team explained why the Discharger is appropriately named as a party on the Complaint and Draft CDO.[1] Though the Discharger claims that he sold the mine operation to the Nevada LLC, of which he is a named officer, in early 2008, the Board was not apprised of this change until 2012 and there is no record in the file of the Board staff receiving notice of this change prior to this time. Even if the Board received the required notification immediately following the transfer in 2008, the LLC was not authorized to conduct business in the State of California until 16 July 2012, over two months after the Prosecution Team issued the Complaint and Draft CDO. (see Exhibit AG, 8 August 2012 Letter [2].) The USFS raised a similar concern regarding the lack of foreign corporation registration in its 23 March 2012 letter to the Discharger regarding a Proposed Plan of Operation. (*Id.* at 23 March 2012 Letter.)

The Discharger, Mr. Sykora, is properly named as a party on the Complaint. The Central Valley Water Board issued WDRs to the Discharger, in his individual capacity as mine operator, and to date, the Board has not agreed to transfer the WDRs to the LLC. Notably, one of the limiting factors in transferring the WDRs to the LLC is the absence of financial assurances, a

[1] The Prosecution Team incorporates the response to comments by reference herein and will summarize the major point in this Rebuttal Brief.

[2] For ease, all correspondence pertaining to this issue is grouped as Exhibit AG to this Rebuttal Brief.

requirement explained further below. Because the Discharger continues to be named in his individual capacity as mine claimant and operator on the WDRs, he remains responsible for complying with the WDRs until a transfer is approved by the Board.

The Board may issue a CDO pursuant to Water Code section 13301 where it finds that a discharge of waste is taking place, or threatening to take place, in violation of requirements or discharge prohibitions prescribed by the Board. The purpose of a CDO is to direct those persons who are violating or threatening to violate requirements to comply according to a time schedule established by the Board. Therefore, issuance of a CDO presupposes that the Central Valley Water Board issued WDRs to those persons who are discharging waste or threatening to discharge waste in violation of requirements. The Board has neither issued WDRs to the LLC nor transferred the existing WDRs to the LLC. Until the WDRs are transferred, the Discharger continues to be the properly named party on the Draft CDO where discharges of waste are taking place or threatening to take place in violations of WDRs. If the Board transfers the WDRs to the LLC in the future, the Board may subsequently amend the CDO to make the terms applicable to the LLC.

III. Despite local, state, and federal agency involvement in the regulation of mining activities at the Site, the Board maintains jurisdiction to enforce violations of WDRs and the ISW Permit.

Neither the Surface Mining and Reclamation Act of 1975 ("SMARA"), the 1981 Management Agency Agreement ("MAA") between the State Water Board and the USFS, nor the USFS's Plan of Operation limit the Board's authority to protect water quality on federal land. As explained in each section below, nothing in SMARA, the 1981 MAA, or the USFS's Plan of Operation diminishes the Discharger's responsibility to comply with the WDRs and the ISW Permit. On the contrary, each agency's regulatory requirements for surface mining activities mirror, incorporate by reference, or supplement each other in a coordinated attempt to limit redundant requirements.

A. Surface Mining and Reclamation Act of 1975

In 1975, California's Legislature recognized the importance of balancing the role that

mineral extraction plays in the well-being of the state's economy with the need to protect and conserve environmental resources. The result was the enactment of SMARA, a comprehensive surface mining and reclamation policy regulating mining operations to assure that adverse environmental effects are prevented or minimized and that mined lands are reclaimed to a usable condition which is readily adaptable for alternative land use. (Pub. Res. Code, § 2712, subd. (a).) Both the California Department of Conservation ("DOC"), through its Office of Mine Reclamation ("OMR") and the State Mining and Geology Board ("SMGB"), and local city or county departments are responsible for administering SMARA, with local entities acting as "lead agency." (Pub. Res. Code § 2728.) The relationship between the lead agency and DOC is similar to the relationship between the Central Valley Water Board and the State Water Board. The lead agency has principal responsibility for approving and overseeing reclamation but also concurrently shares responsibility with DOC, which maintains general oversight over the administration and enforcement of SMARA.

There are three essential components for a mine operator to conduct surface mining operations in accordance with SMARA. A mine operator must first obtain a permit from the lead agency, submit a reclamation plan to the lead agency and receive plan approval, and receive financial assurance approval from the lead agency. (Pub. Res. Code § 2770, subd. (a).) Obtaining financial assurance is of particular importance because it assures sufficient funds are available for use by the lead agency or DOC to reclaim land affected by surface mining operations in the event that the mine operator fails to do so. Once mining activities commence, on-site and downstream beneficial uses must be protected in accordance with the Porter-Cologne Water Quality Control Act and the Federal Clean Water Act. (Cal. Code. Regs., tit. 14, § 3706, subd. (a).) Furthermore, erosion and sedimentation must be controlled during all phases of construction, operation, reclamation, and closure as required by the Regional Boards and State Water Board. (Cal. Code. Regs., tit. 14, § 3706 subd. (c).)

Despite the Discharger's insinuation that the Red Ink Maid and Big Seam Mines were not covered by SMARA (see Discharger Exhibits E, F, G, and H), the SMGB upheld the Director of DOC's December 2, 2003 Order to Comply with SMARA at a hearing on 19 February 2004 as

indicated by the substantive discussion documented in portions of the hearing transcript (Discharger Exhibit I, p. 47 lines 5-7, p. 48 lines 3-10.) As a result of the Order to Comply, the SMGB ordered the Discharger to obtain an approved reclamation plan and financial assurance as discussed above. Lead agency Placer County approved a Reclamation Plan and financial assurance of $20,000 in the form of an Irrevocable Standby Letter of Credit on 7 December 2006 (Exhibit AH; Exhibit AB.) The Conditions of Approval to the Reclamation Plan clearly set forth the requirement that all reclamation activities on-site shall comply with any regulations and requirements of the Board, including the requirement to file a report of waste discharge or provide the lead agency with written confirmation from the Board that WDRs are not required. (Exhibit AH, p. 2-3, para. 4 and 7[3].)

B. Porter-Cologne Water Quality Control Act

The essential components of SMARA are incorporated in the Board's regulation of mining activities through the Porter-Cologne Water Quality Control Act ("Porter-Cologne") and State Water Board promulgated regulations. Porter-Cologne applies broadly to all State waters covering waste discharges to land, surface water, and groundwater, and applies to both nonpoint and point sources of pollution. (See Wat. Code §§ 13050 subd. (e), 13260 subd. (a), 13263 subd. (a), 13376, and 13377.) Discharges of waste from mining activities are appropriately regulated by the Board as nonpoint source discharges by WDRs and as point source discharges by the National Pollutant Discharge Elimination System ("NPDES") permits.

1. Waste Discharge Requirements and Title 27 Mining Waste Management Regulations

To the extent that mining discharges to surface water occur from surface water runoff that is neither collected nor channeled, discharges are regulated as nonpoint source pollution by WDRs. (see Wat. Code § 13260.) Specific regulations in California Code of Regulations Title 27

[3] "The Reclamation Plan and all reclamation activities on-site shall comply with any regulations and requirements of the State Regional Water Quality Control Board (RWQCB)." (Exhibit AH, p. 2, para. 4.)

"The applicant shall file a waste discharge permit with the RWQCB or provide written confirmation from the RWQCB that a waste discharge permit is not required." (Exhibit AH, p. 3, para. 7.)

apply to discharges of mining waste to waste management including surface impoundments, waste piles, overburden waste rock dumps, and tailings ponds. These regulations, promulgated by the State Water Board and administered by the Central Valley Water Board, are implemented through the issuance of WDRs to owners or operators of waste management units. Dischargers must submit a report of waste discharge and shall have WDRs which implement the appropriate provisions of the mining waste management regulations unless those requirements are waived by the Board. (Cal. Code. Regs., tit. 27, § 22470, subd. (a).)

On 6 December 2007, the Central Valley Water Board adopted WDRs Order No. R5-2007-0181 which incorporate the relevant provisions of the approved 7 December 2006 SMARA Reclamation Plan and prescribe additional conditions as necessary to prevent water quality degradation. (Exhibit D, p. 5, para. 31; Cal. Code. Regs., tit. 27, § 22510, subd. (c).) Furthermore, consistent with SMARA requirements, the WDRs require that the Discharger provide adequate funding to pay for costs of closure and post-closure maintenance by providing assurance of financial responsibility to the Board. (Exhibit D, p. 13, para. E.1; Cal. Code. Regs., tit. 27, § 22510, subd. (f) and (g).) Subsequent to the Board's adoption of WDRs Order No. R5-2007-0181, the Discharger did not petition the State Water Board challenging the adopted WDRs and they are now final, beyond challenge, and legally binding.

2. NPDES Permits and Mining Regulation

While mining activities may be, at times, comprised of nonpoint sources of pollution, they may also be comprised of point sources of pollution expressly covered by the Clean Water Act's NPDES program. The term "point source" includes "any discernible, confined, and discrete conveyance." (40 C.F.R. 122.22.) Courts interpret this definition broadly. (See *Sierra Club v. Abston Construction Co. Inc.* (1980) 620 F.2d 41, 45 [stating that point source pollution may be present where miners design spoil piles from discarded overburden such that, during periods of precipitation, erosion of spoil pile walls results in discharges into a navigable body of water by means of ditches, gullies, and similar conveyances, even if the miners have done nothing beyond the mere collection of rock and other materials.]) The 1987 amendments to the Clean Water Act added subdivision (p) to section 402 and established a framework for regulating industrial

stormwater discharges under the NPDES program, specifically including active and inactive mining operations as a category of regulated industrial activity. (40 C.F.R. § 122.26 subd. (b)(14).) Where these point source discharges result from engagement in a defined industry category and threaten surface waters or surface water drainage courses, enrollment into the Industrial Stormwater Program is required by the Board. The Discharger submitted a Notice of Intent to Comply with the Terms of the ISW Permit and became enrolled in the program on 7 August 2006. The Discharger has not filed a Notice of Termination requesting to terminate its enrollment under the ISW Permit.

C. Interaction between the Water Boards and the United States Department of Agriculture – Forest Service (USFS)

The State Water Board and the Regional Boards are responsible for promulgating areawide treatment management plans or Water Quality Management Plans ("WQMP") pursuant to section 208 of the Clean Water Act. (33 U.S.C.A § 1288, subd. (a).) Congress directed the designation of one or more waste treatment management agencies to carry out appropriate portions of the WQMP. (33 U.S.C.A. § 1288 subd. (c)(1).) Through the execution of a formal Management Agency Agreement ("MAA") with the USFS in 1981, the State Water Board designated the USFS as the management agency for National Forest System ("NFS") lands in California. (Exhibit AI.) As stated in the 1981 MAA, "[s]ection 313 of the Federal Water Pollution Control Act mandates federal agency compliance with the substantive and procedural requirements of state and local water pollution control law." (*Id.* at p. 2, para. 2(b).) To satisfy its portion of the MAA, USFS developed best management practices and agreed to implement those practices to ensure that land management activities adequately protect water quality and beneficial uses on NFS lands. (*Id.* at p. 2, para. 1(b).)

1. The 1981 MAA does not limit the Central Valley Water Board's authority to regulate mining activity at the Red Ink Maid and Big Seam Mine.

In lieu of the USFS submitting a report of waste discharge and obtaining WDRs for potential nonpoint discharges taking place on NFS lands, the parties to the 1981 MAA agreed that the USFS's reasonable implementation of BMPs would constitute compliance with state water

pollution control laws. (*Id.* at pp. 2-3, para. 2(b).) The USFS *Water Quality Management for Forest System Lands in California Best Management Practices* guidance similarly states, "[i]t is through the proper installation, operation and maintenance of these State certified and EPA approved practices and procedures that the Forest Service will meets its obligations for compliance with water quality standards and fulfill its obligations as a designated WQMA [water quality management agency]." (Discharger Exhibit C, p. 1.) Waste discharge requirements generally required by Water Code sections 13260, 13263 subdivision (a), and 13264 subdivision (b) vis-à-vis the USFS are therefore waived pursuant to Water Code section 13269. However, the 1981 MAA does not waive these requirements vis-à-vis third party entities, such as Mr. Sykora, who engage in activities on NFS lands. Furthermore, the 1981 MAA unequivocally states that the State Water Board and Regional Boards do not have the authority to waive NPDES permit requirements where activities on NFS lands result in point source discharges to waters of the United States. (Exhibit AI, p. 3, para. 2(b).)

The USFS implements several practices to control nonpoint source impacts to water quality from third party mining activities on NFS lands. (Discharger Exhibit C, p. 87, para. (c).) The practices most significant to the present matter are the Plan of Operation and Reclamation Performance Bond. Mine operators must submit a Plan of Operation and receive approval from the USFS prior to instituting mining activities that are likely to cause a significant disturbance of surface resources, including surface waters. The USFS guidance clearly notifies mine operators of their obligation to submit a report of waste discharge to the appropriate Regional Board where the operator's mining activities discharge or have the potential to discharge to surface waters. (Discharger Exhibit C, p. 87, para. (c)(2).) This direction is consistent with both Porter-Cologne and the Title 27 Mining Waste Management regulations. Where WDRs are necessary, the USFS incorporates WDRs as a mandatory provision in the Plan of Operation as a condition for engaging in mining activities on NFS lands. (*Id.*) The Reclamation Performance Bond is similar to SMARA and Title 27's financial assurance requirements in that it represents a financial guarantee to perform the approved reclamation work. Absent an approved surety bond, cash, or other security to cover the estimated cost of reclamation work, mining activities may not take place on NFS

lands. (Discharger Exhibit C, p. 88, para. (c)(4).)

2. A plain reading of the 1981 MAA indicates that the Board has not waived water quality requirements for third parties engaging in activities on NFS lands.

The Discharger claims that the USFS and the Board have failed to abide by the 1981 MAA. The Discharger further asserts that the waivers of water quality requirements granted to the USFS for maintaining EPA-approved site specific BMPs logically extend to the general public who use NFS land. (Discharger's submittal, "Administrative Civil Liability Complaint #R5-2012-0543 Background", p. 1, para. 2.) This attempt to enlarge the State Water Board's waiver contradicts a plain reading of the 1981 MAA and the USFS's EPA-approved practices. As previously stated, the State Water Board and Regional Boards lack the authority to waive federal requirements to obtain a NPDES permit under the Clean Water Act and the waiver pertains to only state WDRs as they apply to the USFS and not to third parties engaging in activities on NFS lands (Exhibit AI, p. 3, para. 2(b).) The Conditions of Approval for the Plan of Operation issued by the USFS state "all mining and mining related operations shall comply with applicable Federal and State water quality standards, including regulations issued pursuant to the Federal Water Pollution Control Act" clearly evidencing that compliance with Federal and State water quality laws have not been waived as to the Discharger for operations occurring on NFS lands.

Furthermore, neither the 1981 MAA nor the USFS' Plan of Operation diminish the Discharger's responsibilities to comply with monitoring and reporting requirements in the WDRs or ISW Permit. The Discharger asserts that these documents "place responsibility of Annual Monitoring Reports on the United States Forest Service." (Discharger's Submittal *Violations*, p. 1-2.) The Discharger points to the Conditions of Approval for the Plan of Operation (Discharger Exhibit K) as the mechanism by which the USFS is charged with the responsibility for submitting Annual Monitoring Summary Reports and Facility Inspection Reports. After a thorough examination of that document, it is clear to the Prosecution Team that a delegation of responsibility to the USFS is absent and that the Discharger is relying on an unreasonable interpretation of the Plan of Operation to evade regulatory requirements ordered by the Board.

Such an interpretation is particularly unreasonable where the Plan of Operation clearly states that "the operator shall comply with all applicable Federal, State, and local laws, regulations, and standards." (Discharger Exhibit K, p. 3.)

Nothing in SMARA, the 1981 MAA, or the USFS's Conditions of Approval for the Plan of Operation limits the Board's ability to regulate either nonpoint or point source discharges of mining waste to surface waters or surface water courses nor do these documents delegate monitoring and reporting responsibilities to the USFS. Each agency's regulations and requirements mirror, incorporate by reference, or supplement the relevant provisions pertaining to water quality protection. The existence of these agreements and plans does not supplant the Board's authority to issue WDRs, coverage under the ISW Permit, or require monitoring and reporting to ensure that state water quality is being protected within NFS lands.

IV. Pursuant to WDRs issued by the Central Valley Water Board, the Discharger is responsible for reclamation of waste dumps #1 through #4 and this responsibility is consistent with SMARA and the Reclamation Plan.

As stated above, the WDRs incorporate by reference the Discharger's SMARA-required Reclamation Plan. One of the conditions of approval in the Reclamation Plan states "reclamation of the existing wasterock areas 1 through 4 shall begin within 30 days of approval of the Reclamation Plan" and as recommended by the Discharger's consultant in its 1 November 2006 report. (Exhibit AH, p. 2, para. 4.) Placer County approved the Reclamation Plan on 7 December 2006, therefore, the Discharger should have initiated reclamation of waste dumps #1 through #4 towards the end of January 2007 with full reclamation expected by the year 2015. (Exhibit AH, p. 4.)

The Discharger asserts that the consultant stated "that the dumps should be left alone in their present existing condition to avoid de-stabilization." (Discharger's Exhibit U.) The Discharger's assertion, based on a partial consultant's report included at Discharger Exhibit U, fails to capture that the consultant's recommendation was made in reference to excavation – that excavating into the exiting wasterock may cause localized oversteeping of the wasterock. (Exhibit AJ, p. 16.) The Discharger's consultant does not recommend against implementing reclamation,

and in fact notes the beneficial nature of implementing such measures, "the implementation of reclamation measures in this area, including the placement of soil on the wasterock surface and promoting vegetation, is expected to further reduce infiltration into the wasterock, potentially increasing the factor of safety during intense storm events." (*Id.* at p. 15.)

While the Discharger asserts that the "W.D.R. changes the Reclamation Plan's date for reclamation on dumps #1-4," the Board recognized the need to accelerate the completion of reclamation activities by 2009 to "reduce the threat to water quality caused by slope failure of waste dumps." (Exhibit D, p. 3, para. 17.) Pursuant to the provisions in the Discharger's WDRs, "waste dumps #1 through #4 shall be fully reclaimed by 30 October 2009." (*Id.* at p. 11 para. 6.) With a start date of January 2007, reclamation completion by 30 October 2009 was a feasible deadline given that proposed revegetation for erosion control would take approximately two years from seeding to reach 95% cover of native species. (Exhibit AH, p. 6.) Furthermore, tree planting in Fall 2007, after the first soaking rain followed by irrigation and upkeep in Summer/Fall 2008 and Summer/Fall 2009, would have resulted in nearly fully established trees by 30 October 2009. (*Id.*) However, as stated in the Complaint, successful reclamation was not occurring as discussed in face-to-face meetings with the Discharger on 9 July 2009 and did not occur by the deadline in the WDRs as noted by the 23 March 2010 Notice of Violation sent to the Discharger. (Exhibit K and Exhibit I, respectively.)

A. The USFS cannot relieve the Discharger of the duty to conduct reclamation as required by the Reclamation Plan.

As outlined above in Section III.A, the DOC and lead agency, Placer County, are responsible for administering SMARA, which includes ensuring implementation of the Discharger's approved Reclamation Plan. The Discharger argues that the USFS, through its district rangers, determined that reclamation by the Discharger on waste dumps #1 through #4 was no longer necessary and that "the only responsibility [the Discharger] now [has] to the previous waste areas – 1, 2, 3, and 4 and the access road to waste areas 2, 3, and 4, is to ensure that erosion control measures that [the Discharger] [has] been practicing, including all the successful measures previously used to divert water away from the dumps, continue." (Exhibit L.)

This argument confuses agency responsibility for administering SMARA and misconstrues statements of USFS district rangers. On 30 November 2011, Forest Supervisor Tom Quinn clarified the statements of the district rangers, whom he oversees, by explaining, "the Ranger's comments were limited to Mr. Sykora's responsibilities to the Forest Service at that time based on the terms and conditions in Mr. Sykora's then Plan of Operations. No statement in that letter alters or changes Mr. Sykora's obligations and responsibilities for his reclamation plan issued under California's Surface Mining and Reclamation Act." (Exhibit AK, p. 1-2.) Even if the USFS made those statements, those statements are not binding, particularly when the USFS acknowledges the DOC and Placer County's status as the entities with principal responsibility over SMARA-related requirements in the 1992 Memorandum of Understanding between DOC, the USFS, and Bureau of Land Management. (Exhibit AL, p. 3.) Claiming that the USFS relieved the Discharger of the duty to implement a Placer County and DOC approved reclamation plan is unfounded and reliance on misconstrued statements of USFS personnel in an attempt to justify noncompliance with required reclamation is disingenuous and ultimately unpersuasive.

B. The USFS has not taken responsibility for reclaiming waste dumps #1 through #4

An 8 November 2010 letter from Placer County to DOC, County personnel states, "Placer County, acting as Lead Agency (SMARA) recognizes that the USFS takes responsibility for any outstanding reclamation liabilities for waste rock dump sites #1, 2, 3, and 4." (Discharger Exhibit R.) This statement is untrue as confirmed by Forest Supervisor Tom Quinn. (Exhibit AK, p. 1.) In addition, in order for an entity to accept legal responsibility for reclaiming mined lands, a statement of legal responsibility must be submitted to the lead agency. (Pub. Res. Code § 2772 subd. (c)(10).) The Discharger signed a statement of responsibilities on 5 May 2006 as part of the Reclamation Plan. (Exhibit AH, p. 12.) Since that time, no modification or changes in responsibility have been submitted by the USFS to Placer County or DOC. Therefore, the Discharger remains legally responsible for reclamation of mine lands described in the Reclamation Plan.

C. Placer County's determination that the Discharger has fully reclaimed waste dumps #1 through #4 belies actual facts.

On 8 November 2010, Placer County sent the DOC a letter stating the following: "Placer County performed a special inspection of the mine site on September 14th 2010. As a result of the subject inspection, we have determined that waste rock dump sites #1, 2, 3, and 4, are considered reclaimed on behalf of the mine operator, Red Ink Maid, LLC, and that the mine operator has no outstanding reclamation liabilities on waste rock dump sites #1, 2, 3, and 4." (Discharger Exhibit R.)

The Prosecution Team questions Placer County's conclusion that "reclamation is completed for waste rock dump sites #1, 2, 3, and 4" especially considering that eight months earlier, Placer County personnel accompanied USFS personnel, DOC and Board staff on a site inspection where attendees observed a lack of reclamation on the subject waste dumps. (Exhibit E.) Pursuant to Mr. Sykora's approved Reclamation Plan, reclamation must meet defined performance standards for erosion control which require 95% coverage of native species with no bare areas larger than 5' x 5' after two years and 25 ponderosa and 25 canyon live oaks per acre. (Exhibit AH, p. 6.) During this 10 March 2010 site inspection, Board staff stated, "it was clear that waste dumps #1 through #4 had not been fully reclaimed by 30 October 2009" as required by WDRs, meaning that the defined reclamation performance standards had not been met. Further, Board staff observed that "no apparent reclamation measures such as hydroseeding or hydromulching that establish self-sustaining plant cover to control erosion, reduce infiltration, and provide for increased slope stability were evident." (*Id.*)

In addition to Placer County's participation in the inspection, the County received two separate correspondences from the Board; the 10 March 2010 inspection report (Exhibit E) and the 23 March 2010 Notice of Violation (Exhibit I) and a 15-Day Notice from DOC dated 6 August 2010 detailing the Discharger's noncompliance with the Board's WDRs and with SMARA (Exhibit AM.) DOC's 15-Day Notice letter is of particular significance because it also reminds Placer County of its responsibilities as lead agency with respect to ensuring compliance with the Reclamation Plan and demonstrates DOC and Placer County's concurrent ability to administer SMARA. (*Id.* at p. 2.) DOC followed-up with an additional letter to Placer County on 27 June

2011 stating that it would initiate its own enforcement unless the County as lead agency took the minimum steps to compel compliance with the Reclamation Plan and financial assurance requirements. (Exhibit AN, p. 3.) The County deferred enforcement of the documented noncompliance to DOC on 28 July 2011 and DOC's Office of Mine Reclamation issued a Notice and Order to Comply with SMARA which was upheld by the SMGB on 8 March 2012. (Exhibit AO and Exhibit AA.) Upon upholding the DOC's Order to Comply, the SMGB exercised its oversight authority over SMARA and ordered financial assurances and reclamation of waste dumps #1 through #4, effectively invalidating Placer County's conclusion that the site had been fully reclaimed.

V. Evidence in the record overwhelmingly supports the Prosecution Teams alleged unauthorized discharge violations on 19 April 2011 and 21 February 2012.

The Site has a long history of unauthorized discharges to Mad Canyon, a tributary to the Middle Fork of the American River and water of the United States. Instances of discharges from the waste disposal areas, waste dumps #1 through #4, have been documented by the USFS since the 1990s (see Prosecution Team Evidence by Reference List.) Time-lapsed aerial photographs from the United States Geological Survey taken on 8 May 1993, 14 August 1998, and 29 August 2011 show significant slope scarring resulting from the creation of waste debris chutes with apparent chute definition occurring between 1993 and 1998. (Exhibits AP, AQ, and AR.) Contrary to the Discharger's assertions and the photograph provided in Discharger Exhibit Z, the most recently captured aerial image of the debris chutes at waste dumps #2 and #4 indicate that the chutes merge together and subsequently stretch to Mad Canyon with chutes unobstructed by the existence of trees, bushes, and other natural vegetation. The debris chutes act as conveyances creating a clear path for waste, both colluvial material and waste rock debris, to slide down the steeply graded hillside directly into Mad Canyon.

Though the record is replete with instances of discharges to Mad Canyon since the early 1990s, the Prosecution Team limited the allegations to two particular days where Board staff actually witnessed evidence that discharge events from the waste dumps occurred. The photograph appended to the Discharger's WDRs as Attachment B depicts waste dumps #2 and

#4 in the Spring of 2006. (Exhibit D.) This photo served as a baseline for waste dump conditions during the approximate time the Board began regulating the Site through WDRs and the ISW Permit. During the 19 April 2011 site inspection, Board staff and USFS personnel observed a fresh scar created by an earth flow at the base on waste dump #4 and concluded that the discharged material traveled to Mad Canyon. (Exhibit F.) When comparing Photo 1 from the 19 April 2011 inspection to the baseline photo in the WDRs, it's apparent that significant quantities of waste were discharged between 2006 and 2011.

During a site inspection on 21 February 2012, Board staff captured photos of the waste dumps from similar angles from the eastern ridge on the hillside (Exhibit G, Photos 10-12.) When comparing Photo 1 from the 19 April 2011 inspection with the Photos 10-12 from the 21 February 2012 inspection, the scarring on waste dump #4 has widened in less than a year indicating that additional discharges of waste from waste dump failures occurred. While regulators did not physically climb down to the point where the debris chute meets Mad Canyon during either site inspection, logic dictates that discharges from the waste dump failure were channeled downhill through the debris chute conveyance to Mad Canyon given the sloped terrain, the unstable conditions of the waste dumps, and the aerial photos depicting the debris chutes merging with Mad Canyon.

VI. Despite the Discharger's assertions that the 2008-2009 Annual Stormwater Report was sent to the Central Valley Water Board, there is no record of the report in the Board's database.

The Discharger asserts that the 2008-2009 ISW Annual Report was submitted to the Central Valley Water Board. (Discharger Exhibit V.) The Board staff has no record of ever receiving the 2008-2009 ISW Annual Report. When written correspondence is sent to the Central Valley Water Board, receipt and distribution of that correspondence follows a specific process. Generally, when mail, hand delivery, or courier mail is received by the Central Valley Water Board, it is received by the front office, time stamped, and sent to the mail room for sorting. Mail is sorted into each unit supervisor's mail box, hand delivered to the supervisor, and then distributed by the supervisor to the staff. (Exhibit AS, para. 5.) Specifically, when mail contains

ISW Annual Reports, an additional logging process occurs whereby reports are entered into the State's database, reviewed, graded, and queued for filing. (*Id.*at para. 6.)

When reviewing compliance with the ISW Annual Report requirement, staff uses these databases to determine which enrollees have not submitted the required reports by the deadline. Staff uses the databases to generate enforcement letters when enrollees fail to submit reports (*Id.*) In this specific matter, the Discharger received two separate enforcement letters from the ISW staff, one on 23 July 2009 and another on 3 September 2009 (Exhibit L), indicating that there was no record of receipt of the Discharger's 2008-2009 ISW Annual Report. The Discharger failed to respond to either of these letters.

Moreover, the 2008-2009 ISW Annual Report at Discharger Exhibit V is dated 30 March 2010 and signed by the Discharger's consultants on the same date, eight months *after* the 1 July 2009 deadline for the 2008-2009 ISW Annual Report. The Discharger's signature that appears on page seven of the handwritten 2008-2009 Annual Report below the penalty of perjury statement indicates that Mr. Sykora signed the 2008-2009 Annual Report on 1 April 2010. (Discharger Exhibit V, p. 7.) While the Discharger claims that the subject report was submitted to the Board, no record of the report exists in the Board's database, which the most critical step in logging reports into the database. The Prosecution Team continues to recommend that the Board impose the recommended liability for the failure to submit the 2008-2009 ISW Annual Report.

VII. The Prosecution Team considered the Discharger's ability to pay when determining the recommended administrative civil liability amount

The Discharger asserts, "The ability to pay and continue in business were totally dismissed and not taken under consideration." (Discharger submittal, "Administrative Civil Liability Complaint #R5-2012-0543 Background", p. 2.) The Water Code and the State Water Board's Enforcement Policy require the Prosecution Team to take into account the Discharger's ability to pay when determining the recommended administrative civil liability amount in a discretionary enforcement matter. The Prosecution Team conducted a preliminary asset search prior to issuing the Complaint and submitted a summary of the results in the Enforcement Policy Methodology

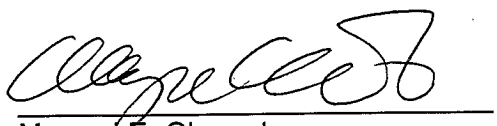
narrative attached to the Complaint as Exhibit A as directed by the Enforcement Policy. (Exhibit A, p. 19.) That preliminary asset search indicated that the Discharger has the ability to pay the propose liability of $368,624.[4]

The Prosecution Team also included a document titled "Administrative Civil Liability Fact Sheet" (Fact Sheet) when it transmitted the Complaint. The Fact Sheet specifies that "if the Discharger intends to present arguments about its ability to pay, it must provide reliable documentation to establish that ability or inability." If the Discharger has contrary evidence to present in order to argue for a reduction to the proposed administrative civil liability, it is the Discharger's burden to provide reliable documentation for the Board's consideration. The Fact Sheets lists the various types of reliable documentation that may be relied upon to demonstrate the Discharger's inability to pay. The Discharger did not submit any evidence supporting claims of an inability to pay.

VIII. Conclusion

The Discharger attempts to deflect responsibility for complying with the Board's requirements and the arguments supporting those attempts are unpersuasive. Aside from cursory arguments disputing the Board's jurisdiction to regulate the Discharger's mining activities, substantive arguments supported by evidence in the record rebutting the Prosecution Team's alleged violations and penalty methodology are notably absent. The Prosecution Team continues to recommend the imposition of administrative civil liability in the amount of $368,624 and adoption of requirements in the Draft CDO as proposed.

Respectfully submitted,



Mayumi E. Okamoto
Attorney for the Prosecution Team

Date: 5 Sept. 2012

[4] The documents supporting that asset search conducted by the Prosecution Team are included in the rebuttal submission as Exhibit AT, however, personal information such residential address have been redacted.