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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 and Rescission of Cleanup  
and Abatement Order No. R5-2013-0701,  
15 Mount Diablo Mine, Contra Costa County,  
dated April 16, 2013

PETITION NO.

**SUNOCO, INC.'S PETITION FOR  
REVIEW AND RESCISSION OF  
CLEANUP AND ABATEMENT  
ORDER NO. R5-2013-0701**

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1           **I.     PETITION**

2           Pursuant to California Water Code Section 13320 and Title 23 of the  
3 California Code of Regulations §§ 2050 *et seq.*, Petitioner Sunoco, Inc. (“**Sunoco**”  
4 or “**Petitioner**”) hereby petitions the State Water Resources Control Board (“**State**  
5 **Board**”) for review and rescission of the Cleanup and Abatement Order R5-2013-  
6 0701 issued pursuant to Sections 13267 and 13303 of the California Water Code  
7 regarding the Mount Diablo Mercury Mine, Contra Costa County, issued on April  
8 16, 2013 (“**CAO**”), by the Regional Water Quality Control Board, Central Valley  
9 Region (“**Regional Board**”).

10           **II.    PETITIONER**

11           The name and address of Petitioner is:

12           Sunoco, Inc.  
13           Attn: Kevin Dunleavy, Counsel  
14           Sunoco, Inc.  
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16           Philadelphia, PA 19103-7583

17           Sunoco can be contacted through its outside legal counsel:

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24           **III.   ACTION OF THE REGIONAL BOARD TO BE REVIEWED AND**  
25           **RESCINDED**

26           Sunoco requests that the State Board review and rescind the Regional  
27 Board’s CAO issued on April 16, 2013, and attached hereto as Exhibit 1 to the  
28 Declaration of Adam P. Baas In Support of Sunoco’s Petition for Review and  
Petition for Stay of Action (“**Baas Decl.**”). The CAO names seven “**Dischargers**”:

1 Jack and Carolyn Wessman; the Bradley Mining Co.; the United States  
2 Department of Interior; Mt. Diablo Quicksilver, Co., Ltd; Kennametal Inc.; the  
3 California Department of Parks and Recreation; and Sunoco. (Baas Decl. Exh. 1).

4 The CAO states that Sunoco has been named as a Discharger because the  
5 “U.S. EPA, Region IX, named Sunoco Inc. a responsible party for the Mount  
6 Diablo Mercury Mine in the Unilateral Administrative Order for Performance of a  
7 Removal Action, U.S. EPA Docket No. 9-2009-02, *due to its corporate*  
8 *relationship to the Cordero Mining Company,*” and that “[t]he Cordero Mining  
9 Company operated the Mine Site from approximately 1954 to 1956, and was  
10 responsible for sinking a shaft, driving underground tunnels that connected new  
11 areas to pre-existing mine workings, and discharging mine waste.” (Baas Decl.  
12 Exh. 1, p. 3)(italics added).

13 The CAO describes the Mount Diablo Mercury Mine site as an “inactive  
14 mercury mine ... located on the northeast slope of Mount Diablo in Contra Costa  
15 County. The Mine and historic working areas are on 80 acres southwest of the  
16 intersection of Marsh Creek Road and Morgan Territory Road. The Mine site is  
17 adjoined on the south and west by the Mount Diablo State Park and on the north  
18 and east by Marsh Creek Road and Morgan Territory Road” (hereinafter, the  
19 “**Site**”). (Baas Decl. Exh. 1, p. 1). The CAO further describes the Site as:  
20 “consist[ing] of an exposed open cut and various inaccessible underground shafts,  
21 adits, and drifts . . . [with] extensive waste rock piles and mine tailings cover[ing]  
22 the hill slope below the open cut, and several springs and seeps discharg[ing] from  
23 the tailings-covered area.” (Id.)

24 The CAO requires the Dischargers to “investigate the discharges of waste,  
25 clean up the waste, and abate the effects of the waste, within 30 days,” including:

26 (1) Submit the following reports:

27 a. by June 30, 2013, form a respondents group to manage and fund  
28

1 the remedial actions at the Site and submit a letter or report on any  
2 group agreement to the Regional Board;

3 b. by October 1, 2013, “submit a Work Plan and Time Schedule to  
4 close the mine tailings and waste rock piles ... and to remediate the  
5 [S]ite ... to prevent future releases to surface and groundwater of  
6 mercury and other pollutants”; and

7 c. submit quarterly reports documenting the remedial actions.

8 (2) By December 31, 2015, complete all remedial actions and submit a  
9 final construction report.

10 (3) Provide a certification with all reports submitted.

11 (4) Reimburse the Regional Board for reasonable oversight costs.

12 (Collectively, the “Work”).

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

14 The Regional Board adopted the CAO on April 16, 2013.

15 **V. STATEMENT OF REASONS WHY THE REGIONAL BOARD’S**  
16 **ACTION IS IMPROPER**

17 The State Board should review and rescind the CAO, as it pertains to  
18 Sunoco and Cordero, because:

19 1. The California Corporations Code and a recent California Supreme  
20 Court decision dictate that the State Board must look to Nevada law to determine  
21 whether and to what extent the Cordero Mining Company (“Cordero”), a dissolved  
22 Nevada (foreign) corporation, can be sued as a discharger in California. Nevada  
23 law requires that any claim against Cordero must have been commenced within 2  
24 years after the date of Cordero’s November 18, 1975, dissolution, *i.e.* before Nov.  
25 18, 1977. The Regional Board, however, waited until 2009, or over 30 years after  
26 Cordero was legally dead and gone, to make any claim against Cordero. As such,  
27 the Regional Board is barred from issuing a CAO or making any claim against  
28

1 Cordero, a non-existent company.

2 2. The CAO lists Sunoco as a Discharger based solely on its relationship  
3 to Sun Oil Company, the former shareholder of Cordero. There is no legal support,  
4 however, for finding Sunoco liable for Cordero's historical activities. First, Sun  
5 Oil Company is a former shareholder of, not a successor-in-interest to, Cordero;  
6 second, there is no statutory liability for pre- or post-dissolution claims against a  
7 shareholder such as Sunoco unless that shareholder acted as the *alter ego* of the  
8 corporation; and, third, there is no evidence that Sun Oil Company acted as the  
9 *alter ego* of Cordero. As such, Sunoco cannot be held liable for the actions of  
10 Cordero as a matter of law, regardless of whether Cordero is deemed to be capable  
11 of being held responsible today.

12 3. In addition to arguments 1 and 2, which require rescission of the  
13 CAO, the factual record does not support allocating any responsibility to Cordero  
14 and/or Sunoco for the purported elevated contaminant levels on and/or emanating  
15 from the Site, and there is a reasonable basis for apportioning Cordero a *de minimis*  
16 share of the cleanup, and apportioning the remainder to other, far more culpable,  
17 Dischargers in light of the following: (i) Cordero was involved with the Site for a  
18 very short period of time on a small area of the Site, did not mill any ore or  
19 generate any tailings, and contributed only 1.2 percent (%) of the waste rock (as  
20 opposed to tailings) at the Site; (ii) 88% of the mercury sourced from the Site is  
21 linked to the mine tailings disposed of on the hillside of the Site by other  
22 Dischargers; (iii) the remaining mercury is sourced from groundwater seeping as a  
23 spring from a 165'-level adit constructed by a former Discharger and unrelated to  
24 Cordero's historical activities; and (iv) as a lessee, Cordero cannot be held liable  
25 for prior property owner/lessees' discharges.  
26  
27  
28

1                   **A. FACTUAL BACKGROUND**

2                   **1. Sunoco is a Successor to Sun Oil Company of Delaware, a**  
3                   **Former Shareholder of Cordero Mining Company, a**  
4                   **Dissolved Nevada Corporation with No Remaining Assets.**

5                   In 1941, Cordero was incorporated in Nevada, to “engage in the business of  
6 mining generally,” with its principle office and place of business in McDermitt,  
7 Nevada. (Baas Decl. Exh. 2). At the time of incorporation, and at all relevant  
8 times thereafter, Sun Oil Company of Delaware (“**Sun Oil**”) owned 100% of  
9 Cordero’s common stock. (Id.) Cordero’s Articles of Incorporation established a  
10 Board of Directors and By-laws, which were separate and apart from Sun Oil. (Id.)  
11 Cordero’s initial capitalization came by way of a stock purchase agreement to Sun  
12 Oil for 750 shares @ \$100/share, or \$750,000, authorized by the Board of  
13 Directors on March 11, 1941. Also in March 1941, Cordero’s Board of Directors  
14 instructed the treasurer to open a bank account “in the name of the Company with  
15 the First National Bank of Reno, Nevada ... to carry on the operations of the  
16 Company [Cordero] in the State of Nevada.” (Baas Decl. Exh. 3). The record  
17 shows that Cordero held regular board meetings, separate and apart from Sun Oil,  
18 as well as stockholder meetings during its entire time of existence. (Baas Decl.  
19 Exh. 4, sample set of Meeting Minutes). As such, all available evidence indicates  
20 that Cordero was a fully capitalized, independently operated company, with its  
21 own Board of Directors and assets separate and apart from Sun Oil.

22                   In 1972, pursuant to the Agreement and Plan of Liquidation dated December  
23 31, 1972, the officers of Cordero were directed to liquidate the company by selling  
24 or otherwise liquidating all remaining tangible assets of Cordero, providing for all  
25 proper debts of the corporation, and distributing all remaining assets (if any  
26 remained) to its sole shareholder, Sun Oil. (Baas Decl. Exh. 5). Included in the  
27 liquidation, and as required at the time to legally effectuate the dissolution, Sun Oil  
28

1 assumed the responsibility of the Cordero Retirement and Stock Purchase Plans.  
2 (Id.) On November 18, 1975, Cordero was legally dissolved as a corporate entity,  
3 as acknowledged by the Nevada Secretary of State. (Baas Decl. Exh. 6). In or  
4 around 1998, Sun Company, Inc. (f/k/a Sun Oil Company) changed its name to  
5 Sunoco, Inc. (Baas Decl. Exh. 7).

6 Sunoco has searched its historical files and public records for any evidence  
7 of Cordero's assets that may exist today, as well as any evidence of what assets (if  
8 any) may have been distributed by Cordero to Sun Oil at the time of Cordero's  
9 dissolution. After a reasonable and diligent search, Sunoco has been unable to  
10 identify any remaining assets. (Baas Decl. Exh. 8). Nor has Sunoco been able to  
11 locate any insurance policies held by Cordero during that time period, or other  
12 policies that would cover the CAO and/or time period at issue here. (Baas Decl.  
13 Exh. 9, letter from D. Chapman to R. Atkinson directing the Regional Board to  
14 insurance coverage of other PRPs). In addition, Cordero's federal dissolution tax  
15 form for the period ending December 31, 1972, appears to demonstrate that any  
16 assets (if any) distributed to Sun Oil by way of the dissolution in 1975 were offset  
17 by the limited liabilities assumed at that time – making Cordero's balance sheet as  
18 of December 31, 1972, zero (0) and the value of any distributed assets zero (0).  
19 (Baas Decl. Exh. 10).

## 20 **2. Pre-1955 Operations at the Site, Before Cordero Leased the** 21 **Site from the Mt. Diablo Quicksilver Mining Company.**

22 The record demonstrates that a majority, if not all, of the mine waste rock  
23 and mill tailings currently present at the Site were generated prior to 1955. Mt.  
24 Diablo Quicksilver Mining Company ("**Mt. Diablo Quicksilver**") operated the  
25 Site for six years, between 1930 and 1936, producing approximately 739 flasks of  
26 mercury. (Declaration of Robert M. Gailey In Support of Sunoco's Petition for  
27 Review and Petition for Stay of Action ("Gailey Decl.") Exh. C, 2-1). Bradley  
28

1 Mining Company (“**Bradley Mining**”) then leased the Site from Mt. Diablo  
2 Quicksilver in 1936 and conducted extensive and invasive surface and  
3 underground mining operations at the Site over the next fifteen (15) years,  
4 producing over 10,000 flasks or 785,000 lbs of mercury and generated 91,561 tons  
5 of calcine. (Id.; Baas Decl. Exh. 15, p. 13). At the end of Bradley’s operations,  
6 extensive underground mine workings existed at the Site, consisting of four levels  
7 in a steeply dipping shear zone, and large aboveground deposits of mine tailings on  
8 the southeastern hillside of the site (the “**Bradley Mine Tailings**”). (Id.) The  
9 Bradley workings were accessed by a main shaft (the “**Main Winze**”) and had a  
10 drain or adit tunnel that exited to the north-facing hillside on the 165-foot level  
11 (“**Bradley’s 165’-level Adit**”) where Bradley’s extensive mine tailings piles are  
12 located today. (Id.; See also, Gailey Decl. Exh. B).

13 In 1951, the Ronnie B. Smith partnership (“**Smith**”) surface mined mercury  
14 ore until 1954, which they processed on Site to produce more flasks of mercury.  
15 (Gailey Decl. Exh. C, 2-1). Together these three owners and/or operators (Mt.  
16 Diablo Quicksilver, Bradley Mining, and Smith) extracted significant volumes -  
17 almost 11,000 flasks - of mercury. Smith, however, has not been named as a  
18 Discharger. (Id.)

19 During the Korean War, the United States Department of Interior (“**DOI**”),  
20 through its Defense Minerals Exploration Administration (“**DMEA**”), commenced  
21 the development of the “**DMEA Shaft**” in a further effort to extract mercury at the  
22 Site by granting Smith a loan to explore the deeper parts of a shear zone that  
23 Bradley previously explored. (Gailey Decl., Exh. C, p. 2-1; Baas Decl. Exhs. 11-  
24 13). Between August 1953 and January 1954, Smith excavated a 300-foot-deep  
25 shaft, but is not documented to have encountered any mercury ore. (Id.) The  
26 DMEA Shaft is located over 200 feet north of the open pit, shafts, adits, and drifts  
27 mined extensively by Mt. Diablo Quicksilver, Bradley Mining, and Smith.  
28

1 In addition, under contract to DMEA, Smith constructed rail tracks for ore  
2 cars to dump waste rock from the DMEA Shaft to the north, across the road (away  
3 from the pre-existing Bradley Mine Tailings) to an "unlimited location," believed  
4 to be on the north-facing slope in the Dunn Creek watershed where geologist E. M.  
5 Pampeyan ("**Pampeyan**") of the California Division of Mines and Geology  
6 ("**CDMG**") mapped a large waste rock dump in 1963. (Gailey Decl. Exh. C, 2-1;  
7 Exh. D, the Declaration of Paul D. Horton in Support of Sunoco's Petition for  
8 Review and Rescission of Order, dated January 28, 2010 "**Horton Decl**"; Baas  
9 Decl. Exh. 14). In January 1954, Smith assigned his lease and DMEA contract to  
10 Jonas and Johnson, who extended the DMEA Shaft cross-cut to 120 feet, but  
11 ceased mining after encountering water and gas. (Id.) The DMEA Shaft and cross-  
12 cut flooded on February 18, 1954. (Id.)

13 During the 1952/53 time period, after the operations of Mt. Diablo  
14 Quicksilver and Bradley Mining had generated over a thousand tons of waste rock  
15 and mill tailings at the Site, but before Cordero appeared at the Site, Water  
16 Pollution Control Board #5 (predecessor to the Regional Board) received multiple  
17 complaints from neighboring property owners concerning downstream water  
18 quality. (Baas Decl. Exh. 15, pgs. 15, 19). On June 9, 1952, Water Pollution  
19 Control Board #5 issued the first waste discharge requirements for the mine  
20 discharge, Order No. 135. The Order was addressed to Smith. The Pollution  
21 Control Board later issued Resolution Number 53-71 on February 27, 1953. (Id.)  
22 The record is unclear as to what if any remedial action resulted from this  
23 Resolution. The next administrative order that appears in the record is Order No.  
24 78-114 on September 8, 1978, issued to current Site owner Jack Wessman. (Id.)

25 Notably, in *circa* 1993, a three-year study of the Marsh Creek watershed was  
26 commissioned by Contra Costa County to determine the sources of mercury in the  
27 Marsh Creek watershed to which the Site is argued to be a contributor. The results  
28

1 of this independent study concluded that the pre-1955 (and pre-Cordero)  
2 operations at the Mt. Diablo Mine are the source of a majority, if not all, of the  
3 contamination that currently exists at the Site. (Baas Decl., Exh. 16, March 1996  
4 report titled “Marsh Creek Watershed 1995 Mercury Assessment Project – Final  
5 Report” prepared by Darell G. Slotton, Shaun M. Ayers, and John E. Reuter  
6 (“**Slotton Report**”). The Slotton Report concluded that the exposed mine tailings  
7 and waste rock (Bradley Mine tailings) above the existing onsite pond combined  
8 with acid discharge from the spring (Bradley’s 165’-level Adit) emanating from  
9 the waste rock was the dominant source of mercury in the watershed. (Slotton  
10 Report at 61 (“[w]ith an estimated 88% of the currently exported mercury linked  
11 directly to the tailings piles themselves, mercury source mitigation work within the  
12 watershed would clearly be best directed toward this localized source [i.e. the  
13 Bradley Mine Tailings]”); Gailey Decl. Exh. C, pgs.6-2, 6-3).

14 **3. Cordero’s 14 Months of Prospecting Activities at the Site**  
15 **from November 1954 to December 1955.**

16 In contrast to the extensive mining, milling, and tailings generation and  
17 disposal activities of three owner/operators between 1930 and 1951 (21 years),  
18 Cordero conducted sporadic underground mining activities, in a separate location  
19 (the DMEA Shaft), over approximately a one-year period (1954-55). (Gailey Decl.,  
20 Exh. C, pgs. 2-1, 2-2). Moreover, there is no evidence that Cordero’s activities  
21 included or otherwise resulted in the processing (milling) of any mercury ore, the  
22 production of any flasks of mercury, or the discharge of any mill tailings. (Id.;  
23 Horton Decl. ¶ 4)

24 Cordero leased the Site from Mt. Diablo Quicksilver on November 1, 1954.  
25 (Baas Decl., Exhs. 17). After reconditioning the flooded DMEA Shaft, Cordero  
26 drove a new series of cross-cut tunnels a total of 790 feet from the DMEA Shaft  
27 towards the shear zone previously mined by Bradley, but at a depth 200 feet below  
28

1 Bradley's extensive workings. (Gailey Decl., Exh. C, p. 2-2, Figs. 3-1 to 3-4).  
2 Thereafter, Cordero intermittently used the DMEA Shaft for one year, from  
3 approximately December 1954-December 1955, and made only a single  
4 connection between its westernmost tunnel at the 360 foot level with the bottom of  
5 the vertical Main Winze shaft previously excavated by Bradley Mining. (Gailey  
6 Decl. Exh. C, pgs. 2-1, 3-1, Fig. 3-3; Exh. 10).

7 Aboveground, Cordero rehabilitated the furnace and constructed a trestle  
8 from the DMEA Shaft to the ore bin, near the furnace. (Gailey Decl., Exh. C, p. 4-  
9 2, Fig. 4-1). However, no records have been located indicating that Cordero ever  
10 used the furnace. Cordero also conducted water handling and treatment activities  
11 extending from the DMEA Shaft to a pond 1,350 feet to the west. Id. Water  
12 pumped to this location either evaporated or drained to Dunn Creek, to the  
13 satisfaction of the Water Pollution Control Board, which inspected and approved  
14 of Cordero's water handling facilities. (Id., pp. 5-2 – 5-4, Fig. 5-3; Baas Decl.  
15 Exhs. 18-22)(Gailey Decl. ¶ 8).

16 The total volume of waste rock generated by Cordero from its underground  
17 workings at the DMEA Shaft during its one year of intermittent use was  
18 approximately 1,228 cubic yards, using a 20% bulking factor. (Gailey Decl. Exh.  
19 C, p. 5-1). This is *de minimis* compared to the tailings piles and waste rock left by  
20 the three other owner-operators that pre-existed Cordero, which total  
21 approximately 105,848 cubic yards. (Id.; Horton Decl. ¶ 5).

22 Near the end of its one-year period, Cordero encountered small zones of ore  
23 from which it excavated approximately 100-200 tons of ore (about 50-100 cubic  
24 yards). Cordero stockpiled this ore for sampling and assaying. (Gailey Decl. Exh.  
25 C, p. 5-1). However, no evidence in the record indicates that Cordero milled any  
26 of the small amounts of ore it mined. Nor is there any evidence that Cordero  
27 generated any tailings, or added even a single rock to the pre-existing "[e]xtensive  
28

1 waste rock piles and mine tailings [that] cover the hill slope below the open cut,"  
2 that are the focus of the Slotton Report and the CAO. (Baas Decl., Exh. 1; Gailey  
3 Decl. Exh. C, p. 3-1; Horton Decl. ¶¶ 4-5). In fact, the DMEA records reveal that  
4 Cordero's activities were unsuccessful, resulting in no mercury production. (Baas  
5 Decl. Exh. 23).

6 In 1956/57, following the mining by the DMEA contractors and Cordero,  
7 Pampeyan updated his topographical map by, in part, adding a pile of waste rock  
8 adjacent to the DMEA shaft. (Gailey Decl. Exh. C, p. 5-1, Fig. 5-2; Baas Decl.  
9 Exh. 11). The record shows that Cordero placed waste rock adjacent to the DMEA  
10 Shaft, and that current Site owner Jack Wessman used it to refill the shaft, or, it  
11 was placed in the Northern Dump, over the ridge, into the Dunn Creek drainage,  
12 using the rail track from the DMEA Shaft. (Gailey Decl. Exh. C, p. 5-1, Figs. 5-2 –  
13 5-3; Baas Decl. Exhs. 11, 18; Horton Decl., ¶¶ 7-8). Waste rock now in that  
14 location is typical of the waste rock extracted from the DMEA Shaft. (Horton Decl.  
15 ¶ 8).

16 In December 1955, Cordero indefinitely suspended all mining activities due  
17 to heavy rainfall that flooded the mine to the 130-foot level. During the entire time  
18 it had any relationship to the Site, all available evidence demonstrates that Cordero  
19 was strictly prospecting. Indeed, the Regional Board admits that “[t]here is no  
20 record of mercury production for this time period and the amount of mercury  
21 production, if any, from this time period is unknown.” (Baas Decl. Exh. 1, p.3)

22 Significantly, the Water Pollution Control Board (predecessor to the  
23 Regional Board) was monitoring the groundwater and surface water conditions, as  
24 well as Cordero’s activities, at the Site during the relevant time. (see *e.g.* Baas  
25 Decl. Exh. 15). There is no evidence that Cordero was ever found to be non-  
26 compliant or issued an administrative order or other directive related to the Site  
27 from a state or federal agency. (*Id.*) As such, there were no known existing  
28

1 liabilities for which Cordero could be held responsible related to the Site prior to  
2 its dissolution in 1975.

3 The Site remained idle until March 1956, when the Cordero lease with Mt.  
4 Diablo Quicksilver was transferred to Nevada Scheelite, Inc. (“Scheelite”), which  
5 began dewatering the mine and conducted some basic prospecting activities.  
6 Scheelite was a subsidiary of named Discharger Kennametal Inc. The CAO  
7 contends that “Scheelite apparently operated an unidentified part of the mine from  
8 1956 to 1958.” (Baas Decl. Exh. 1, p. 3).

9 Notably, during the short period of time that Cordero was active at the Site,  
10 there is no evidence in the record that Sun Oil, Sun Company, or Sunoco ever  
11 directly owned, leased, operated, or otherwise had any direct contact with the Site.  
12 (Baas Decl. ¶ 42)

#### 13 **4. Sunoco’s Investigation of the Site and Submissions to the** 14 **Regional Board, State Board, and the EPA**

15 Despite its non-liability as a successor to Cordero’s shareholder, Sun Oil,  
16 Sunoco has been the only party to cooperate in good faith with both federal and  
17 state administrative orders which have been issued historically to investigate the  
18 Site.

19 In December 2008, in response to a Unilateral Administrative Order from  
20 the EPA, Sunoco commissioned work at the Site, without prejudice, to shore up the  
21 “toe” of the water impoundment (“**Lower Pond**”) at the base of the Site. This  
22 work helped assure that Dunn Creek would not undercut the impoundment,  
23 potentially causing the release of mercury contaminated sediments. (Baas Decl.  
24 Exh. 24).

25 On March 25, 2009, the Regional Board issued an order to Sunoco directing  
26 it to submit a site investigation work plan and report to identify “at that Site the  
27 sources of mercury contamination to surface water and groundwater.” (Baas Decl.  
28

1 Exh. 25, “**March Order**”) On April 24, 2009, Sunoco filed a Petition for Stay of  
2 the March Order. (Baas Decl. Exh. 26, “**2009 Petition**”). The 2009 Petition was  
3 held in voluntary abeyance while discussions were held between Sunoco and the  
4 Regional Board and was later voluntarily withdrawn without prejudice.

5 On June 30, 2009, the Regional Board issued a revised order to Sunoco.  
6 (Baas Decl. Exh. 27 “**June Order**”). In response, Sunoco submitted a Divisibility  
7 Position Paper (“**Divisibility Report**”) to the Regional Board outlining the  
8 historical activities at the Site – highlighting: (i) the short period Cordero leased  
9 the Site (1954-1956); (ii) Cordero’s use of less than 10% of the Site; and (iii) that  
10 Cordero’s activities took place well after the open cut, shafts and adits were  
11 excavated, and well after extensive waste rock piles and mine tailings were  
12 discarded along the hillside by prior owners and operators. (Gailey Decl. Exh. C).  
13 Sunoco’s Divisibility Report detailed numerous key findings based upon its  
14 technical consultant’s review of historical records, maps and aerial photos that  
15 establish a reasonable basis for divisibility of Cordero’s share of the cleanup.

16 In compliance with the June Order, in July 2009, Sunoco also submitted a  
17 voluntary Potentially Responsible Party Report (“**PRP Report**”) to the Regional  
18 Board, wherein it identified more than 20 former owners and operators that the  
19 Regional Board had failed to name as dischargers on its June Order, including  
20 Bradley Mining – which as stated above, operated the Site from 1936-1951,  
21 producing over 10,000 flasks of mercury and a great majority of the waste rock and  
22 mine tailings at the Site. (Baas Decl. Exh. 28).

23 In October 2009, despite the detailed factual presentation set forth in the  
24 Divisibility and PRP Reports, the Regional Board issued its Divisibility Response,  
25 which stated that “Board staff disagree that there is a reasonable basis for  
26 apportioning liability.” (Baas Decl. Exh. 29). The Regional Board then issued a  
27 Revised Order on December 30, 2009 (“**Revised Order**”), seeking to hold Sunoco  
28

1 jointly and severally liable to investigate and develop a remediation work plan for  
2 the entire Site – including the Bradley Mine Tailings. The Revised Order required  
3 the drafting of three reports: (i) Mining Waste Characterization Work Plan; (ii)  
4 Mining Waste Characterization Report; and (iii) Mine Site Remediation Work  
5 Plan. (Baas Decl. Exh. 30).

6 The Revised Order further identified three other “dischargers” required to  
7 prepare the same reports, none of whom took any such action: (i) Jack and Carolyn  
8 Wessman; (ii) Bradley Mining; and (iii) the United States Department of Interior  
9 (“**DOI**”). To Sunoco’s knowledge, the Regional Board has not taken any  
10 enforcement action against these three PRPs for non-compliance with the Revised  
11 Order. (Id.) Indeed, the Regional Board issued a separate Order to a fourth PRP,  
12 Kennametal, Inc., on December 1, 2010, against which it also has not sought to  
13 enforce its order. Notably, the EPA has taken action against Bradley Mining in its  
14 bankruptcy proceeding to assure that at least some funds are earmarked for the Mt.  
15 Diablo Site remediation – recognizing Bradley Mining’s culpability for the Site  
16 conditions. (Baas Decl. Exh. 1).

17 In January 2010, Sunoco submitted a Petition for Review and Stay of Action  
18 of the Revised Order to the State Board, with a copy to the Regional Board. (Baas  
19 Decl. Exh. 31, “**2010 Petition**”). The 2010 Petition sought rescission of the  
20 Revised Order because: (1) it was improperly vague and ambiguous in its  
21 description of the Mine Site; (2) it required Sunoco to conduct Work on large areas  
22 of the Mine Site where neither Cordero nor Sunoco were “dischargers,” under  
23 established state and federal law; and (3) it violated CWC § 13267(b)(1) by failing  
24 to provide Sunoco “with a written explanation with regard to the need for the  
25 reports, and [fails to] identify the evidence that supports requiring [Sunoco] to  
26 provide the reports.” (Id.) The 2010 Petition was held in voluntary abeyance for a  
27 period and was later voluntarily withdrawn without prejudice in anticipation of the  
28

1 current Petition before the State Board.

2 In compliance with the Revised Order, in August 2010, Sunoco submitted a  
3 Site Characterization Report to the Regional Board presenting evidence that: (i) the  
4 "My Creek" watershed was not contributing any mercury to Dunn Creek, which  
5 significantly reduces the scope of the area of concern at the Site, including areas  
6 that may have been utilized for waste rock disposal by Cordero; (ii) that a sample  
7 of water emanating from Bradley's 165'-level Adit collected after it passed  
8 through some of the tailings, was low in total mercury and contained no dissolved  
9 mercury; and (iii) instead, Bradley Mining's large tailings piles are the source of  
10 nearly all of the mercury-laden Site runoff. (Baas Decl. Exh. 32). On August 30,  
11 2010, the Regional Board responded by requesting additional studies be  
12 performed. (Baas Decl. Exh. 33).

13 In December 2011, after having additional on-site investigative work  
14 performed, Sunoco submitted an Additional Characterization Report to the  
15 Regional Board, which concluded that: (1) the 360'-level Cordero workings have  
16 little to no impact on the flow of water from Bradley's 165'-level Adit workings;  
17 (2) water emanating from Bradley's 165'-level Adit contains mercury  
18 concentrations above freshwater Regional Board and USEPA criteria, but does not  
19 contribute a significant enough flow into Dunn Creek to result in downgradient  
20 concentrations above the criteria; and, (3) other compounds present in Dunn Creek  
21 above these criteria are also present in background water samples above water  
22 quality criteria. (Gailey Decl. Exh. B). This additional data supports the  
23 conclusions reached by previous investigations (*i.e.* the Slotton Report) that the  
24 key remedial focus at the Site is mitigating rain water and spring water from  
25 contact with the Bradley Mining tailings piles through removal and/or capping,  
26 conditions that Cordero's mining activities did not cause or exacerbate, to any  
27 meaningful degree.  
28

1 On January 20, 2012, in advance of an in-person meeting with the Regional  
2 Board on January 24, 2012, counsel for Sunoco, John Edgcomb, sent State Board  
3 Senior Staff Counsel, Julie Macedo, Esq. a letter, copying Regional Board  
4 representative, Victor Izzo, which outlined Sunoco's position of non-liability as a  
5 former shareholder of Cordero. The letter detailed Cordero's corporate history, its  
6 dissolution, and the argument that Cordero currently lacks the capacity to be sued  
7 under Nevada law. (Baas Decl. Exh. 34).

8 Nonetheless, in compliance with the Revised Order, and based upon the Site  
9 Characterization Reports, Sunoco submitted a Work Plan to the Regional Board on  
10 May 9, 2012, which presented a plan to mitigate the migration of particulate  
11 material and water potentially containing mercury from mine-related materials  
12 (e.g., waste rock, tailings, and spring/adit discharges) associated with the Site (but  
13 not Cordero's activities) that are potential sources of mercury to Dunn and Marsh  
14 Creeks. Examples of the proposed work included: the removal, consolidation, and  
15 capping of mine wastes of concern, the capture and re-routing of spring/adit  
16 discharges, and the restoration of the Dunn Creek Floodplain immediately below  
17 the Site. (Baas Decl. Exh. 35, "**Work Plan**").

18 On June 8, 2012, the Regional Board responded to Sunoco's submission of  
19 the Plan stating "[s]taff concurs with the remedial action approach proposed in the  
20 Work Plan and recognized that more detailed planning will occur at a later date.  
21 Water Board staff anticipates further enforcement to finalize the remedial action  
22 plan and require cleanup." (Baas Decl. Exh. 36).

23 Despite the factual and legal support presented to the Regional Board  
24 demonstrating Sunoco's non-liability as a former shareholder of a dissolved  
25 Nevada corporation, and the overwhelming technical evidence establishing a  
26 reasonable basis for Sunoco's divisibility, the Regional Board issued the CAO on  
27 April 16, 2013, seeking to impose joint and several liability on Sunoco for  
28

1 remediation of the entire Site.

2 **B. LEGAL BASES FOR SUNOCO'S CHALLENGE TO THE CAO**

3 **1. Nevada law requires that any claim against Cordero must have**  
4 **been commenced within 2 years after the date of Cordero's**  
5 **Nov. 18, 1975 dissolution, i.e. before Nov. 18, 1977.**

6 Federal Rules of Civil Procedure 17(b) provides that "the capacity of a  
7 corporation to sue or be sued shall be determined by the law under which it was  
8 organized." (Levin Metals v. Parr Richmond, 817 F.2d 1448, 1451 (9th Cir. 1987);  
9 Louisiana Pacific Corp. v. Asarco, Inc., 5 F.3d 431 (9th Cir. 1993)(CERCLA's  
10 three-year statute of limitations does not pre-empt State law regarding the capacity  
11 of a dissolved corporation to be sued and related time periods).

12 Recently, the California Supreme Court confirmed this conclusion, holding  
13 that the capacity of a foreign corporation (such as Cordero) to be sued in the State  
14 of California shall be determined by the laws of the state in which the corporation  
15 was formed (here, Nevada). (Greb, et al. v. Diamond Intl. Corp., 56 Cal.4<sup>th</sup> 243  
16 (Feb. 21, 2013).)

17 Nevada's corporate capacity statute provides that claims against a dissolved  
18 corporation relating to pre-dissolution acts survive only for a period of two years  
19 following the date of dissolution. NRS 78.595 ("The dissolution of a corporation  
20 does not impair any remedy or cause of action available to or against it or its  
21 directors, officers or shareholders arising before its dissolution and commenced  
22 within two years after the date of the dissolution.") Further, effective June 16,  
23 2011, Section 15 of Nevada Senate Bill 405 enacted a provision reaffirming the  
24 limited liability of stockholders of a dissolved corporation:

25 "2. A stockholder of a corporation dissolved  
26 pursuant to an NRS 78.580 or whose period of corporate  
27 existence has expired, the assets of which were  
28 distributed pursuant to an NRS 78.590, is not liable for

1 any claim against the corporation on which an action, suit  
2 or proceeding is not begun before the expiration of the  
3 period described in NRS 78.585.”

4 As noted above, Cordero was dissolved as of November 18, 1975, and  
5 lacked the capacity to be sued two years later (November 18, 1977). Accordingly,  
6 Cordero cannot now be liable, as a matter of law, for the Site cleanup. Further,  
7 because any derivative liability of Sunoco for the activities of Cordero at the Site  
8 is, by its very terms, dependent upon the liability of Cordero, and because Sunoco  
9 could not have direct liability pursuant to Section 15 of Nevada Senate Bill 405,  
10 Sunoco cannot be held liable for Cordero’s Site actions either.

11 **2. The law does not impose liability on Sunoco solely in the**  
12 **capacity of being a successor in interest to Sun Oil, the former**  
13 **sole stockholder of Cordero.**

14 **a. Sunoco cannot be held liable as a matter of law as the**  
15 **“successor-in-interest” to Cordero.**

16 In 1972, Cordero agreed to liquidate its remaining tangible assets, pay any  
17 existing debts, and distribute the remainder of its assets (if any) to Sun Oil. Under  
18 Nevada law, when a corporation sells or otherwise transfers its assets, the general  
19 rule is that the successor corporation is not liable for the acts of the predecessor  
20 corporation. (Village Builders 96, LP v. U.S. Labs, Inc. 112 P.3d 1082, 1087  
21 (Nev. 2005) (citation omitted); see also, Lessard v. Applied Risk Mgmt., 307 F.3d  
22 1020, 1027 (9th Cir. 2002) (“Ordinarily a corporation which purchases the assets  
23 of another corporation does not thereby become liable for the selling corporation’s  
24 obligations....”).) The exceptions to this general rule are: (1) where the purchaser  
25 expressly or impliedly agrees to assume such debts; (2) where the transaction is  
26 really a consolidation or a merger; (3) when the purchasing corporation is merely a  
27 continuation of the selling corporation; or (4) where the transaction was  
28 fraudulently made in order to escape liability for such debts. (Id.)

1           Identically, in California, “[w]hen a corporation has been duly and lawfully  
2 dissolved, its shareholders are not liable for debts of the corporation . . . , nor is the  
3 rule changed on account of the fact that the shareholder happens to be another  
4 corporation, that is, that the dissolved corporation was a wholly owned subsidiary  
5 of another corporation.” (Potlatch Corp. v. Superior Court, 154 Cal. App. 3d 1144,  
6 1151 (1984)(citations omitted).) The exceptions to this rule in California are  
7 similar to those in Nevada: (1) there is an express or implied agreement of  
8 assumption, (2) the transaction amounts to a consolidation or merger of the two  
9 corporations, (3) the purchasing corporation is a mere continuation of the seller, or  
10 (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping  
11 liability for the seller's debts. (Cleveland v. Johnson, 209 Cal. App. 1315, 1327  
12 (1212).)

13           Here, none of the exceptions apply. First, it is clear from the record that, if  
14 any liabilities were assumed, Sun Oil only assumed the administration of  
15 Cordero’s qualified Retirement and Stock Purchase Plans, together with all assets  
16 and liabilities related to such Plans. (Baas Decl. Exh. 5, 6, 8, 10) Under Nevada  
17 law, when a corporation is dissolved, the directors of the corporation become  
18 trustees of the corporate assets and the trustees have the obligation to pay or  
19 provide for payment of all existing liabilities of the corporation. (See NRS  
20 78.590(1)([u]pon the dissolution of any corporation under the provisions of NRS  
21 78.580, ... the directors become trustees thereof, with full power to settle the  
22 affairs, collect the outstanding debts, sell and convey property, real and personal,  
23 and divide the money and other property among the stockholders, after paying or  
24 adequately providing for the payment of its liabilities and obligations).) Thus,  
25 Cordero was required to either pay or provide for payment of the only known  
26 existing liability, its Retirement and Stock Purchase Plans, before dissolving its  
27 corporate existence.  
28

1 Second, the record demonstrates that the liquidation was a dissolution, not a  
2 consolidation or merger of Cordero with Sun Oil. Evidence of this consists of  
3 Cordero filing a Certificate of Dissolution with the Department of State of Nevada,  
4 surrendering its charter, settling its affairs, liquidating its assets, and “ceas[ing] to  
5 be and exist as a corporation.” (Baas Decl. Exhs. 2-8). Cordero transferred its  
6 one-known remaining liability at the time – the Retirement and Stock Purchase  
7 Plan – to Sun Oil along with any remaining assets, which may or may not have  
8 offset this liability, and ceased to exist. There is no evidence indicating otherwise.

9 Third, there is no evidence in the record that the activities of Cordero were  
10 continued after its dissolution in 1975.

11 Finally, there is no evidence (or allegation) that Cordero’s dissolution was  
12 made for the purpose of escaping liability or effectuating a fraud. For example,  
13 there is no evidence that the Regional Board had asserted any site cleanup liability  
14 attributable to Cordero or Sunoco at or just before the time of Cordero’s  
15 dissolution.

16 Therefore, Sunoco, as the successor to Sun Oil, cannot be held to be the  
17 successor in interest to Cordero and, more importantly, cannot be found liable for  
18 claims now made against Cordero, which were not in existence (and therefore  
19 could not have been expressly assumed) at the time of dissolution.

20 **b. There is No Statutory Remedy to Hold Sunoco Liable as a**  
21 **Former Shareholder of a Dissolved Corporation, Since the**  
22 **Regional Board Cannot Demonstrate Sun Oil Acted as**  
23 **Cordero’s *Alter Ego*.**

24 Under Nevada Revised Statute (“NRS”) 78.225, “[u]nless otherwise  
25 provided in the articles of incorporation, no stockholder of any corporation formed  
26 under the laws of this state is individually liable for the debts or liabilities of the  
27 corporation.” Similarly, NRS 78.747 provides that “[e]xcept as otherwise provided  
28 by specific statute, no stockholder, director or officer of a corporation is

1 individually liable for a debt or liability of the corporation, unless the stockholder,  
2 director or officer acts as the *alter ego* of the corporation.”

3 By its own terms, the CAO alleges that the sole nexus between Sunoco and  
4 the Site is that the “U.S. EPA, Region IX, named Sunoco, Inc. a responsible party  
5 for the Mount Diablo Mercury Mine in the Unilateral Administrative Order for  
6 Performance of a Removal Action, U.S. EPA Docket No. 9-2009-02, due to its  
7 *corporate relationship to the Cordero Mining Company.*” (Baas Decl., Exh. 1 p.  
8 1)(italics added). Yet, Sunoco never had any direct “corporate relationship” to  
9 Cordero. Its only indirect “corporate relationship” to Cordero (if any), is through a  
10 name change from Sun Company, Inc. f/k/a Sun Oil, which formerly owned 100%  
11 of Cordero’s common stock. Thus, Sunoco’s predecessor was no more than a  
12 shareholder of Cordero; and all available evidence demonstrates that Sunoco’s  
13 predecessor never owned, leased, or operated the Site. Consequently, Sunoco is  
14 immune from liability for the alleged actions of Cordero, a dissolved Nevada  
15 corporation, unless the Regional Board can demonstrate *alter ego* liability. (Id.)  
16 (see also, Robbins v. Blecher, 52 Cal. App. 4th 886, 892 (1997) (applying the same  
17 principles in California).

18 A 2011 decision by the United States District Court for the District of  
19 Nevada, Assurance Co. of Am. v. Campbell Concrete of Nev., Inc., 2011 U.S.  
20 Dist. LEXIS 145845 (D. Nev. Dec. 19, 2011)(“Assurance”), confirms the  
21 conclusion that Sunoco has no liability for Cordero as the successor in interest to  
22 its former shareholder. (Baas Decl. Exh. 37). In Assurance, the court granted a  
23 motion to dismiss filed by a defendant shareholder of a dissolved corporation  
24 against whom post-dissolution claims had been asserted. In granting the motion,  
25 after surveying the Nevada statutes referenced above, the Assurance court found  
26 that “no [Nevada] statutory section provides for suit against a shareholder for post-  
27 dissolution claims for corporate funds distributed to the shareholder” and  
28

1 concluded that: “[a]lthough Nevada has not given clear guidance on the point, the  
2 Court concludes [defendant] is not liable as a shareholder for any post-dissolution  
3 claims that were unknown at the time the Nevada corporations were dissolved, as  
4 there is no statutory basis for such a claim and Assurance has not identified any  
5 case law showing Nevada has adopted the trust fund theory in the face of statutory  
6 provisions limiting shareholder liability.” (Id. at \*16, 18).

7 Notably, the Assurance court affirmed that the California Supreme Court  
8 reached a similar conclusion applying California statutory law to claims against the  
9 shareholders of dissolved corporations, concluding that California has interpreted  
10 its own law in exactly the same fashion. (Assurance, supra, at \*16-17)(citing  
11 Penasquitos, Inc. v. Superior Ct., 53 Cal. 3d 1180, 1190-91, 283 Cal. Rptr. 135,  
12 812 P.2d 154 (Cal. 1991).

13 **c. There is no factual basis establishing that Sun Oil acted as**  
14 **Cordero’s *alter ego*.**

15 The Ninth Circuit’s *alter ego* test considers: (1) the amount of respect given  
16 to the separate identity of the corporation by its shareholders; (2) the fraudulent  
17 intent of the incorporators; and (3) the degree of injustice visited on the litigants by  
18 recognition of the corporate entity. (See Basic Mgmt. v. United States, 569 F.  
19 Supp. 2d 1106, 1118 (D. Nev. 2008) (citing Ministry of Defense of the Islamic  
20 Republic of Iran v. Gould, Inc., 969 F.2d 764, 769 (9th Cir. 1992); see also Bd. of  
21 Trustees. v. Valley Cabinet & Mfg. Co., 877 F.2d 769, 772 (9th Cir. 1989).)

22 Nevada law regarding the establishment of *alter ego* liability is similar to the  
23 Ninth Circuit’s analysis, and requires that: (1) the corporation is influenced and  
24 governed by the stockholder asserted to be its *alter ego*; (2) there must be such  
25 unity of interest and ownership that corporation and the stockholder are inseparable  
26 from each other; and (3) adherence to the corporate fiction of a separate entity  
27 would sanction fraud or promote a manifest injustice. (Basic Mgmt., supra, 569 F.  
28

1 Supp. 2d 1106, 1117-1118, citing NRS § 78.747.); see also Sonora Diamond Corp.  
2 v. Sup. Ct., 83 Cal. App. 4th 523, 539 (Cal. Ct. App. 2000) (applying similar *alter*  
3 *ego* requirements in California).

4 Here, requirements 1 and 2 are clearly not met. The evidence demonstrates  
5 that Sun Oil and Cordero had separate Boards of Directors and Officers, separate  
6 headquarters, separate bank accounts, separate tax statements, and observed the  
7 required corporate formalities – such as regular shareholder and director meetings.  
8 (Baas Decl., Exhs. 2-8). In addition, the dissolution documents indicate that Sun  
9 Oil was a shareholder only, that Cordero’s Board acted independently when  
10 determining its dissolution, and that no assets existed at the time of Cordero’s  
11 dissolution in 1975. (Id.).

12 Likewise, requirement 3 has not been established. Unlike the case often  
13 relied upon by the Regional Board to impute liability on shareholder(s) of  
14 dissolved corporations, J.F. Katenkamp v. Superior Court, 16 Cal.2d 696 (1940),  
15 there is no evidence that Cordero was undercapitalized throughout the relevant  
16 time period; nor is there any evidence of fraudulent intent on the part of Sun Oil in  
17 maintaining Cordero as a separate corporate subsidiary between 1941 and 1975.  
18 Because there was no known claim, or even evidence of a violation of regulation or  
19 law, asserted by the Regional Board against Cordero related to cleanup prior to  
20 dissolution, a fundamental element of fraud (scienter or knowledge) is missing and,  
21 therefore, this matter is distinguishable from Katenkamp. (Id.)(holding a  
22 shareholder of a dissolved corporation responsible for the actions of the  
23 corporation where the original claim against the corporation was made *before*  
24 dissolution and the dissolution was performed *to effectuate a fraud and avoid*  
25 *liability*). Accordingly, Katenkamp is inapplicable and, based on the evidence, the  
26 Regional Board cannot establish *alter ego* liability of Sunoco for Cordero’s actions  
27 at the Site.  
28

1           The State Board has recognized this legal truism in prior rulings. In WQ 93-  
2 9, In Re Aluminum Co., the State Board (addressing a similar fact pattern to that  
3 presented here) considered petitioner Alcoa's contention that it could not be  
4 considered a discharger under a Waste Discharge Cleanup and Closure Order  
5 because: (1) Alcoa was never an owner or operator of the Leona Heights Sulfur  
6 Mine, and (2) it could not be considered liable as either the successor or *alter ego*  
7 of CDI or ACS (both subsidiaries of a subsidiary of Alcoa), each of which  
8 previously held ownership interests in the mine. (WQ 93-9, In the Matter of the  
9 Petitions of Aluminum Company of America, (et al.) 1993 Cal. ENV LEXIS 17,  
10 Baas Decl. Exh. 38)). After a review of the record searching for evidence  
11 indicating that Alcoa was in fact the successor or *alter ego* of CDI or ACS, the  
12 State Board concluded that there was insufficient evidence to hold Alcoa (a  
13 shareholder) liable for the actions of CDI or ACS on an *alter ego* basis. In  
14 reaching its conclusion, the State Board acknowledged the very limited  
15 circumstances where a parent corporation can be held liable for the actions of its  
16 subsidiary, holding:

17           More is required ... than solely a parent-subsidary  
18 corporate relationship to create liability of a parent for  
19 the actions of its subsidiary. Walker v. Signal  
20 Companies, Inc., 84 Cal.App.3d 982, 1001 (1978).  
21 Rather, *where, in addition to stock ownership, there is*  
22 *relatively complete management and control by the*  
23 *parent so 'as to make [the subsidiary] merely an*  
24 *instrumentality, agency, conduit, or adjunct of' the*  
25 *parent, the alter ego doctrine will be applied.*  
26 McLoughlin v. L. Bloom Sons Co., Inc., 206 Cal. App.2d  
27 848, 851-852, (1962).  
28

1 (WQ 93-9 at \*7. (emphasis added).)

2 Similarly, there is no evidence that Cordero was merely an instrumentality,  
3 agency, conduit, or adjunct of Sun Oil. To the contrary, the record demonstrates  
4 that Cordero had its own independent Board of Directors; a separate management  
5 structure and staff; separate offices; etc. (see above). Therefore, there are no  
6 material facts that support piercing Cordero's corporate veil and find its  
7 shareholder, Sun Oil, liable for the alleged activities at the Site on an *alter ego*  
8 basis.

9 **3. Cordero's share of liability for the mercury contamination is**  
10 ***de minimis* (at most) and, in any event, is divisible from the**  
11 **other culpable Dischargers.**

12 **a. Joint & Several Liability and Apportionment After the**  
13 **Burlington Northern Case.**

14 The United States Supreme Court has held that the division of liability for  
15 site cleanup is appropriate where a party can show a reasonable basis for  
16 apportionment. (Burlington No. & Santa Fe Ry. Co. et al. v. United States, 556  
17 U.S. 599, 129 S. Ct. 1870 (2009).) In Burlington Northern, neither the parties nor  
18 the lower courts disputed the principles that govern apportionment in CERCLA  
19 cases, and both the District Court and Court of Appeals agreed that the harm  
20 created by the contamination of the facility at issue there, although singular, was  
21 capable of apportionment. (*Id.* at 1881.) Thus, the issue before the Court was  
22 whether the record provided a "reasonable basis" for the District Court's  
23 conclusion that the railroad defendants were liable for only 9% of the harm caused  
24 by contamination at the facility. *Id.* Despite the parties' failure to assist the  
25 District Court in linking the evidence supporting apportionment to the proper  
26 allocation of liability, the District Court concluded that this was "a classic  
27 'divisible in terms of degree' case, both as to the *time period in which defendants'*  
28 *conduct occurred*, and ownership existed, *and as to the estimated maximum*

1 *contribution of each party's activities that released hazardous substances that*  
2 *caused site contamination.” Id. at 1882 (italics added).*

3       Ultimately, the Burlington Northern District Court apportioned liability,  
4 assigning the railroad defendants 9% of the total remediation costs. (Id.) The  
5 District Court created an apportionment formula taking into account geographic,  
6 chronological, and volumetric percentages, based on its findings that the primary  
7 pollution at the facility was contained in an unlined sump and an unlined pond in  
8 the southeastern portion of the facility distant from the railroads’ parcel, and that  
9 the spills of hazardous chemicals that occurred on the railroad parcel contributed to  
10 no more than 10% of the total facility contamination, some of which did not  
11 require remediation. (Id. at 1882-3) The Supreme Court concluded that the facts in  
12 the record reasonably supported the District Court’s apportionment of liability, and  
13 stated that “. . . *if adequate information is available, divisibility may be established*  
14 *by ‘volumetric, chronological, or other types of evidence,’ including appropriate*  
15 *geographic considerations” Id. at 1883 (italics added).* Notably, although the  
16 evidence adduced by the parties did not allow the Court to calculate precisely the  
17 amount of hazardous chemicals contributed by the railroad parcel to the total Site  
18 contamination, or the exact percentage of harm caused by each chemical, the  
19 evidence did show that fewer spills occurred on the railroad parcel and that of  
20 those spills that occurred, not all were carried across the railroad parcel to the sump  
21 and pond from which most of the contamination originated. (Id.)

22       Since Burlington Northern, courts have articulated a two-step process for  
23 assessing whether a reasonable basis for apportionment exists based on the  
24 Restatement (Second) of Torts § 433A, which states that “when two or more  
25 persons acting independently cause a distinct or single harm for which there is a  
26 reasonable basis for division according to the contribution of each, each is subject  
27 to liability only for the portion of the total harm that he himself caused.” First, a  
28

1 court must determine whether the harm is capable of apportionment; and second, if  
2 the harm can be apportioned, the court must determine how to apportion damages.  
3 It is the defendants' burden to demonstrate a reasonable basis for apportionment  
4 exists. Burlington Northern, at 129 S. Ct. at 1881.

5 The Restatement (Second) § 433A also provides that, "where two or more  
6 persons cause a single and indivisible harm, each is subject to liability for the  
7 entire harm." However, even where contamination is commingled in a single area,  
8 the comments to the Restatement suggest the harm can be divisible in terms of  
9 degree:

10 Where two or more factories independently pollute a  
11 stream, the interference with the plaintiff's use of the  
12 water may be treated as divisible in terms of degree, and  
13 may be apportioned among the owners of the factories,  
14 on the basis of evidence of the respective quantities of  
15 pollution discharged into the stream.

16 (Restatement (Second) of Torts, § 433A, Comments c, d; see also Pentair Thermal  
17 Mgmt., LLC v. Rowe Indus., Case No. 06-cv-07164, 2013 U.S. Dist. LEXIS  
18 47390 (N.D. Cal. Mar. 31, 2013)("A single harm also may be "divisible because it  
19 is possible to discern the degree to which different parties contributed to the  
20 damage," by looking to, for example, relative quantities of hazardous materials  
21 discharged"); 3000 E. Imperial, LLC v. Robertshaw Controls Co., Case No. CV  
22 08-3985, 2010 U.S. Dist. LEXIS 138661, \*25-26 (C.D. Cal. Dec. 29, 2010); In re  
23 Bell Petroleum Servs., Inc., 3 F.3d 889, 903 (5th Cir. 1993) (holding volume  
24 apportionment reasonable where only one single harm was detected even though it  
25 was not possible to determine with absolute certainty the amount of chromium  
26 each defendant released).

27 Here, as demonstrated below, Cordero's liability, if any, at the site is readily  
28

1 divisible and the facts support apportioning Cordero, at most, less than 5% share of  
2 the cleanup responsibility, if any cleanup is attributable to Cordero at all. First,  
3 there is an undisputable chronological record and overpowering geographic and  
4 volumetric bases for divisibility of the cleanup. Second, these bases provide clear  
5 evidence that Cordero did not cause any material part of the contamination in this  
6 matter, if any at all.

7 **b. There Are multiple Grounds on Which the State Board Can**  
8 **reasonably Allocate Little or No Liability to Cordero.**

9 **i. The short time period (chronology) during which**  
10 **Cordero leased the Site and was active is readily known**  
11 **and distinguishable from the other, more culpable,**  
12 **Dischargers.**

13 The chronology of operations at the Site alleged in the CAO generally fall  
14 into two categories, (1) consistent prospecting and mining operations from 1930 to  
15 1958; and (2) sporadic and/or non-existent prospecting and mining operations  
16 from 1958 to the present. (Baas Decl. Exh. 1, 15; Gailey Decl. Exh. C). Within  
17 these time spans, Cordero was at the Site intermittently for one year. When  
18 comparing Cordero's short period spent prospecting at the Site to the period of  
19 years the Site was consistently in operation (28 years), Cordero's percentage of  
20 time at the Site is minimal – or 3.5%; and, when comparing Cordero's short period  
21 spent prospecting at the Site to the 83 years covered by the CAO, Cordero's  
22 percentage drops to <1%. Thus, from a purely temporal standpoint, Cordero's  
23 work at the Site accounts for between 1 and 3.5% of the historical mining activities  
24 alleged by the Regional Board to be the cause of the environmental conditions at  
25 the Site. (Baas Decl., Exh. 1, p. 2).

26 In Burlington Northern, the Supreme Court affirmed the use of time of  
27 ownership as a reasonable basis for divisibility where the District Court calculated  
28 that the railroad had leased its parcel to an operator for 13 years, which was 45% of

1 the time the operator operated the facility. (Burlington Northern, 129 S. Ct. at  
2 1882) Here, the time of ownership is even more definitive, since it is undisputed  
3 that Cordero never owned the Site and operated for no more than 1 year (in a  
4 distinct location, no less), while other more culpable Dischargers consistently  
5 operated the mining site for 27 years (over the entire portion of the Site that is of  
6 concern). Thus, the evidence for apportionment on a chronological basis for  
7 Cordero is even clearer and more favorable for Cordero than it was for the railroad  
8 in Burlington Northern.

9                   ii.   **The geographic area in which Cordero was active is**  
10                   **readily known and distinguishable from the other, more**  
11                   **culpable, Dischargers.**

12           The CAO states that the Site is comprised of approximately 80 acres and  
13 asserts that the Site consists "of an exposed open cut and various inaccessible  
14 underground shafts, adits and drifts. Extensive waste rock piles and mine tailings  
15 cover the hill slope below the open cut, and several springs and seeps discharge  
16 from the tailings-covered area." (Baas Decl., Exh. 1, at p. 1).

17           The historical mine plans, maps, aerial photographs and other records,  
18 however, demonstrate that Cordero was active on and under only a small portion of  
19 the Site and that Mt. Diablo Quicksilver, Bradley Mining, and Smith, excavated  
20 the "open exposed cut" portion of the mine referenced in the CAO, until landslides  
21 partially covered the area. (Gailey Decl. Exh. C; Baas Decl. Exhs. 15, 18-22). No  
22 evidence suggests that Cordero operated the open pit mine or discharged anything  
23 to the waste rock piles and mine tailings covering the hill slope below it, which the  
24 CAO identifies as significant areas of environmental concern. (Baas Decl. Exh. p.  
25 1). Instead, the evidence shows that Cordero is known only to have been  
26 associated with the DMEA Shaft and related Cordero tunnels, refurbishing of the  
27 furnace, the waste rock pile formerly adjacent to the DMEA Shaft, the settling  
28 pond area approximately 1,350 feet north of the DMEA Shaft, and the Northern

1 Dump at the end of Smith's rail spur leading northerly away from the DMEA Shaft.  
2 (Gailey Decl. Exh. C; Gailey Decl. ¶ 8). Thus, Cordero had no involvement (0%)  
3 with any of the surface areas responsible for the ongoing releases of mercury at the  
4 Site, as described in more detail below.

5 In Burlington Northern, the Supreme Court affirmed the geographic basis for  
6 apportionment where the railroad's portion of the site was 19% compared with the  
7 total size of the liable operator's facility. Burlington Northern, 129 S. Ct. at 1882.  
8 Again, Cordero's argument is even stronger than the defendant railroad's position  
9 because there is no evidence demonstrating that Cordero operated on or  
10 contributed to the tailings and waste rock piles that are the source of releases of  
11 mercury discussed below – i.e. the Bradley Mine Tailings. (Horton Decl. ¶¶ 5-7).

12 **iii. The estimated contribution (waste volume) of Cordero's**  
13 **activities at the Site (if any) is readily divisible.**

14 The March 1996 Slotton Report titled "Marsh Creek Watershed 1995  
15 Mercury Assessment Project – Final Report" supports the conclusion that the  
16 exposed mine tailings and waste rock (Bradley Mining Tailings) above the existing  
17 onsite pond is the dominant source of mercury in the watershed. (Baas Decl. Exh.  
18 16; Gailey Decl Exh. C, pgs. 6-2:6-3). The Regional Board specifically recognizes  
19 the Slotton Report and its conclusions in the CAO. (Baas Decl. Exh. 1 p.4).  
20 Indeed, the Slotton Report estimated that 88% of the mercury emanating from the  
21 Site is linked directly to the Bradley Mining Tailings. (Baas Decl. Exh.16).

22 By comparison, the total volume of waste rock generated by Cordero from  
23 its underground workings at the DMEA Shaft during its one year of intermittent  
24 use was approximately 1,228 cubic yards, using a 20% bulking factor, which  
25 accounts for approximately 1.2% of the total volume of waste rock historically  
26 mined from the entire Site. (Horton Decl. ¶ 5; Gailey Decl. Exh. C, p. 5-1). This  
27 is *de minimis* compared to the tailings piles and waste rock left by the three other  
28

1 owner-operators that pre-existed Cordero, which total approximately 105,848  
2 cubic yards. (Id.; Horton Decl. ¶ 5).

3 In addition, the evidence reasonably shows that Cordero did not generate  
4 any mill tailings and that Cordero did not deposit its waste rock on the extensive  
5 Bradley Mine Tailings that are the primary concern of the CAO. (Gailey Decl.  
6 Exh. C; Horton Decl. ¶¶ 4-6). Particularly, the relevant reports and related  
7 documents submitted to the Regional Board indicate that: (1) Cordero's waste  
8 rock was either piled adjacent to the DMEA Shaft or was taken by rail in the  
9 opposite direction of the preexisting open pit and tailings on the southern portions  
10 of the Site toward the Northern Dump area in the Dunn Creek drainage north of the  
11 DMEA Shaft (Baas Decl. Exh. 4, 5, 8 p. 5-1, 1; Horton Decl. 7, 8; Baas Decl. Exh.  
12 14); (2) the current Site owner Jack Wessman acknowledges that he moved some  
13 or all of that adjacent waste rock pile back into the DMEA Shaft, which is  
14 consistent with the observation that the DMEA Shaft is now filled (Horton Decl. ¶  
15 7)(Sunoco's consultant observed waste rock at the area near the end of where the  
16 short line rail formerly existed that is typical of the mining waste excavated from  
17 the DMEA Shaft); and (3) the data indicate that, after contact with waste rock on  
18 the northern portion of the Site, the overland flow from rainwater: (a) contains no  
19 mercury or arsenic, (b) is not acidic and (c) has a different geochemical signature  
20 than the water collected in the central and southern portions of the Site and,  
21 therefore, there are no apparent environmental impacts associated with the northern  
22 portion of the Site. (Gailey Decl.).

23 Therefore, the record, witness testimony, and independent studies show that  
24 work conducted and materials generated during Cordero's one year of mining  
25 activity at the Site were not and are not related to the mercury-contaminated waters  
26 emanating from the Bradley Mine Tailings – which account for 88% of the  
27 mercury emanating from the Site. At most, even using a technically unsound  
28

1 approach equating unproven mercury releases from waste rock mined by Cordero  
2 with proven releases from ore tailings and waste rock mined by and milled by  
3 Bradley and others, Cordero's contribution to the entire mercury loading to the  
4 existing impoundments (including the Lower Pond) at the base of the Mine, or into  
5 Marsh Creek is "divisible" on an 88/12% basis..

6 **iv. The connection (if any) between the Cordero workings**  
7 **and the Bradley 165'-level Adit is insignificant and there**  
8 **is no evidence that the Cordero workings contribute to**  
9 **the contaminants emanating from the Adit spring.**

10 The Regional Board relied on two primary grounds when it rejected  
11 Sunoco's Divisibility Report in 2010. First, the Regional Board assumed, without  
12 any evidentiary basis, that the "790 feet of underground tunnels constructed by  
13 Cordero connect with, and thus contribute contaminated water to, the earlier  
14 underground tunnels [excavated by Bradley] via the Main Winze." (Baas Decl.,  
15 Exh. 13, p. 1.) This contention has since been studied by Sunoco's consultant,  
16 resulting in the following findings:

17 The groundwater sampling results indicate geochemical  
18 dissimilarities between groundwater at the 165'-level (the  
19 Bradley workings) and 360'-level (the Cordero  
20 workings) within the underground workings (results for  
21 monitoring wells ADIT-1 and DMEA-1, Exhibit B –  
22 Section 4.4.1 plus subsections, Figure 4-3 and Table 3-4).  
23 One difference is that water deeper in the underground  
24 workings (the 360'-level) contains no mercury (Id.)  
25 Another difference is the inorganic geochemical  
26 signature of the 165'-level and 360'-level waters  
27 observed during the July, 2011 sampling (Exhibit B –  
28 Table 3-4 and Appendix G). *These observations*

1            *indicate that groundwater from the 360'-level*  
2            *underground workings does not contribute mercury to*  
3            *flows at ground surface. The observations also indicate*  
4            *that the 360'-level underground workings contribute*  
5            *little, if any, flow to the overland flow that is sourced*  
6            *from underground mine workings at the Site. If the*  
7            deeper workings did contribute significant flow, the  
8            geochemical signature of the deeper groundwater  
9            observed in July, 2011 would be evident, which it is not.

10 (Gailey Decl., ¶ 11)(italics added).

11            In summary, there is substantial evidence in the record on which to  
12 reasonably to apportion liability pursuant to Burlington Northern and the  
13 Restatement “by volumetric, chronological, or other types of evidence, including  
14 appropriate geographic considerations,” in the following manner: (1) Cordero  
15 worked for less than 1-3.5% of the Site history; (2) Cordero conducted its activities  
16 on a small portion of the Site’s geographic area and not at all where the established  
17 primary source of contamination is located; (3) Cordero is only responsible for  
18 1.2% of the total volume of mine related waste at the Site; (4) Independent studies  
19 conclude that 88% of the mercury emanating from the Site is linked to the Bradley  
20 Mining Tailings, with which Cordero’s activities have no causal relationship since  
21 Cordero’s activities did not result in the processing of any mercury ore, meaning it  
22 generated no tailings, and there is no evidence that Cordero ever disposed of waste  
23 rock on or in the vicinity of the Bradley Mining Tailings; and, (5) the 360'-level  
24 Cordero workings have little to no impact on the flow of water from the Bradley  
25 165'-level Adit, do not contain mercury and, in any event, the seep emanating from  
26 the Bradley 165'-level Adit does not contribute a significant enough flow into  
27 Dunn Creek to result in downstream concentrations above the criteria.  
28

1 As a result, Cordero is, at most, responsible for less than 5% of any Site  
2 cleanup, while current and former owners and operators, especially Bradley, which  
3 benefited from extensive mercury mining and production, are responsible for at  
4 least the other 95%.

5 **c. Cordero, as a lessee, is not liable for the discharges of prior**  
6 **property owners and/or lessees.**

7 The CAO's requirement that Sunoco remediate the entire Site is  
8 substantially overbroad and inequitable, since Cordero's activities touched upon  
9 only a small portion of the Site during its one year of intermittent work and did not  
10 produce any mercury flasks or tailings. Sunoco should not be required to  
11 remediate areas on which it did not operate or cause any discharge to, which  
12 constitute the majority of the Site, including the open pit mining area to the south  
13 and southwest of the DMEA Shaft, and the related large tailings and waste rock  
14 piles on the southeast and south central portions of the Mine Site (Bradley Mining  
15 Tailings). (Baas Decl., Exh. 4, Fig. 5-1 (pre-Cordero tailings piles highlighted in  
16 blue).)

17 While the CAO generally references sections of the California Water Code,  
18 it does not specifically articulate any legal authority supporting the liability of  
19 Cordero as a lessee for the entire period of time that the Site operated historically.  
20 Under California law, subsequent *owners* may be liable for passive migration of a  
21 continuing nuisance created by another, but *lessees*, such as Cordero, cannot be  
22 held liable for those discharges. California Civil Code §3483 assesses continuing  
23 nuisance liability only upon owners and former owners, not lessees. The plain  
24 language of §3483 reveals that the legislature explicitly excluded lessees from  
25 liability for continuing nuisance:

26 "Every successive *owner* of property who neglects to  
27 abate a continuing nuisance upon, or in the use of, such  
28 property, created by a former owner, is liable therefore in

1 the same manner as the one who first created it.” (Cal.  
2 Civ. Code § 3483)(emphasis added.)  
3

4 Therefore, to the extent that the Regional Board seeks to hold Cordero liable  
5 for operations and activities that preceded its activities at the Site based on a  
6 continuing nuisance theory, there is no legal support.

7 **VI. THE MANNER IN WHICH PETITIONER HAS BEEN**  
8 **AGGRIEVED**

9 The Regional Board’s actions have aggrieved Sunoco because the CAO is  
10 arbitrary and capricious, vague and ambiguous, overreaching, and unsupported by  
11 the facts or law. (See Section V above)

12 **VII. STATE BOARD ACTION REQUESTED BY PETITIONER**

13 Sunoco requests that the State Board immediately stay enforcement of the  
14 CAO and determine that the CAO is arbitrary and capricious or otherwise without  
15 factual or legal bases, and rescind it on the following grounds: (1) it is untimely  
16 under Nevada law regarding claims against dissolved corporations; (2) improperly  
17 names Sunoco as a Discharger when Sunoco, as a successor to a shareholder of  
18 Cordero, never owned or operated the Site and never acted as Cordero’s *alter ego*;  
19 and (3) it improperly seeks to impose joint and several liability on Sunoco and fails  
20 to limit the scope of the CAO to at most areas where Cordero had activities at the  
21 Site and/or where the evidence demonstrates a nexus to Cordero’s historical  
22 activities and any contamination at issue.

23 **VIII. STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF**  
24 **LEGAL ISSUES RAISED IN THE PETITION**

25 For purposes of this protective filing, the Statement of Points and  
26 Authorities is subsumed in Sections V and VI of this Petition. Sunoco reserves the  
27 right to file a Supplemental Statement of Points and Authorities, including  
28

1 references to the complete administrative record and other legal authorities and  
2 factual documents and testimony, as well as to supplement its evidentiary  
3 submission.

4 **IX. STATEMENT REGARDING SERVICE OF THE PETITION ON**  
5 **THE REGIONAL BOARD AND NAMED DISCHARGERS**

6 A copy of this Petition is being sent to the Regional Board, to the  
7 Attention of Pamela C. Creedon, Executive Officer, by email and U.S. Mail. By  
8 copy of this Petition, Sunoco is also notifying the Regional Board of Sunoco's  
9 Petition and the concurrently filed Petition for Stay of Action. A copy of this  
10 Petition is also being sent by U.S. Mail to the six other dischargers named in the  
11 CAO.

12 **X. STATEMENT REGARDING ISSUES PRESENTED TO THE**  
13 **REGIONAL BOARD/REQUEST FOR HEARING**

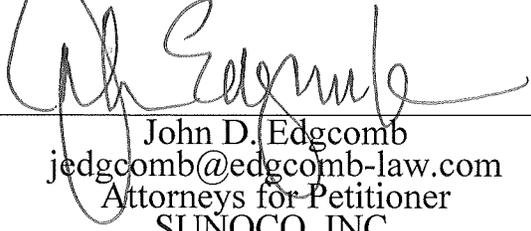
14 Sunoco has raised all of the substantive issues and objections set forth in  
15 Section V and VI above with the Regional and/or State Board prior to submitting  
16 these Petition for Rescission and Stay. Sunoco requests a hearing in connection  
17 with this Petition.

18 For all the foregoing reasons, Sunoco respectfully requests that the State  
19 Board review the CAO and grant the relief as set forth above.

20  
21 Respectfully submitted,

22 DATED: May 15, 2013

23 EDGCOMB LAW GROUP

24  
25 By: 

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