STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petitions of **ALUMINUM COMPANY OF AMERICA; ALCOA CONSTRUCTION SYSTEMS, INC.; and CHALLENGE DEVELOPMENTS, INC.** For Review of Waste Discharge Requirements Order No. 92-105 of the California Regional Water Quality Control Board, San Francisco Bay Region. Our File Nos. A-792, A-815 and A-815(a).	**ORDER NO. WQ 93-9**

BY THE BOARD:

On March 18, 1992, the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board), adopted waste discharge requirements in Order No. 92-028. The Order established cleanup and closure requirements for an inactive sulfur mining site located in the Oakland Hills. The Order was issued to Ridgemont Development Company and Ridgemont Development Company dba Watt Homes of Northern California, as the current owners of the site, and to Alcoa Aluminum Company of America (Alcoa), as a former owner. Alcoa subsequently filed a petition for review of Order No. 92-028 with the State Water Resources Control Board (State Water Board or Board), alleging that Alcoa was improperly named as a discharger.

On August 19, 1992, the Regional Water Board adopted a new order, No. 92-105, superseding Order No. 92-028. Order No. 92-105 differed from Order No. 92-028 by the addition of

several new responsible parties.[1] These included two corporations, Alcoa Construction Systems, Inc. (ACS) and Challenge Developments, Inc. (CDI), which were subsidiaries of a subsidiary of Alcoa. After adoption of Order No. 92-105, the two subsidiaries filed petitions for review with the Board, contending that they were not liable for cleanup of the site. Alcoa also renewed its petition for review.

The three petitions are factually and legally related. They have, therefore, been consolidated for purposes of review by the Board. See 23 C.C.R. Sec. 2054.

I. BACKGROUND

The Leona Heights Sulfur Mine was apparently operated from the early 1900s to about 1930 by the Leona Chemical Company.[2] The site, which comprises about two acres, is located in a steep ravine in the hills of Oakland. Sulfur-bearing ore was mined at the site for the manufacture of sulfuric acid. The site is currently inactive.

Remnants of previous mining activity consist of mine adits, or horizontal mine tunnels, extending into the hillside;

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1 Order No. 92-105 lists Ridgemont Development, Inc. and Watt Residential, Inc. and Watt Industries/Oakland, Inc. dba Ridgemont Development, Inc. as the current property owners. The following parties were also named as dischargers: Watt Industries/Oakland, Inc.; Watt Residential, Inc.; Watt Housing Corporation; CDI; ACS; AP Construction Systems, Inc.; F. M. Smith and Evelyn Ellis Smith; Realty Syndicate; and Alcoa.

2 According to technical reports submitted to the Regional Water Board by consultants for Ridgemont Development Company, historical documents identify Leona Chemical Company as the operator. However, other evidence in the record indicates that the operator may have been either Oakland Chemical Company and Leona Chemical Company or Stauffer Mining Company.

iron rails; residual crushed ore, or mine tailings; and waste rock. The site contains three tailings piles, which produce drainage when they come in contact with water. The drainage is highly acidic and contains elevated concentrations of dissolved metals.[3] A spring-fed perennial stream emerges from a mine adit buried in one of the tailings piles. Ephemeral streams also pass through the site. Runoff flows from the site enter a storm drain, which discharges to Lake Aliso on the Mills College Campus and ultimately discharges to San Leandro Bay via another storm drain system.

On July 22, 1991, Ridgemont Development Company submitted a report of waste discharge, consisting of a mine closure and post-closure maintenance plan, for the site. On March 18, 1992, the Regional Water Board adopted waste discharge requirements in Order No. 92-028 for cleanup and closure of the site. These requirements were superseded by requirements adopted on August 19, 1992 in Order No. 92-105.

II. CONTENTIONS AND FINDINGS

1. Contention: Alcoa contends that it cannot be considered a discharger under Order No. 92-105 because it was never an owner or operator of the Leona Heights Sulfur Mine. Alcoa further contends that it cannot be considered liable as either the successor or alter ego of CDI or ACS.

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3 The results of surface water samples of drainage from the mine showed pH values ranging from 2.9 to 4.4 units. The applicable water quality objective for pH in that watershed is 6.5 to 8.5. Copper concentrations measured during wet weather were as high as 32,000 micrograms per liter (ug/l). The water quality objective for copper is 40 ug/l. Similarly, zinc levels were high, ranging up to 13,000 ug/l, as compared to the objective of 327 ug/l.

Findings: Alcoa was neither an owner nor an operator of the Leona Heights site. CDI and ACS both held an ownership interest in the mining site at one time. CDI has been dissolved, and ACS was sold to another company. Ridgemont Development Company urges the Board, therefore, to hold Alcoa liable as the alter ego of CDI and ACS.

In 1964 CDI, a California corporation, became a wholly owned subsidiary of Alcoa Properties, Inc., a Delaware corporation, which is a subsidiary of Alcoa. From 1972 to 1980, CDI held a 50 percent interest in a partnership which owned the mining site. In April of 1990 CDI was dissolved.

ACS was also a wholly owned subsidiary of Alcoa Properties, Inc. From 1980 through 1986 ACS held a 50 percent interest in a partnership, known as Caballo Hills Development Company, which became Ridgemont Development Company. In October of 1986 Alcoa Properties, Inc. sold all of the stock of ACS to AP Ventures, Inc. AP Ventures, Inc. changed the name of ACS to AP Construction Systems, Inc. and, two months later, conveyed all of AP Construction Systems, Inc.'s partnership interest in Ridgemont Development Company to Watt Housing Corporation. AP Ventures, Inc. is still apparently in existence as a real estate investment trust.

There is no evidence in the record indicating that Alcoa was in fact the successor of CDI or ACS. Further, we conclude that there is insufficient evidence in the record to hold Alcoa liable as the alter ego of CDI or ACS.

In certain circumstances, a parent corporation will be held liable for the actions of its subsidiary. In those cases, the parent corporation is said to have acted as the alter ego of the subsidiary.[4]

More is required, however, than solely a parent-subsidiary corporate relationship to create liability of a parent for the actions of its subsidiary. Walker v. Signal Companies, Inc., 84 Cal.App.3d 982, 1001, 149 Cal.Rptr. 119 (1978). Rather, where, in addition to stock ownership, there is relatively complete management and control by the parent so "as to make [the subsidiary] merely an instrumentality, agency, conduit, or adjunct of" the parent, the alter ego doctrine will be applied. McLoughlin v. L. Bloom Sons Co., Inc., 206 Cal.App.2d 848, 851-852, 24 Cal.Rptr. 311 (1962).

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4 Generally, the shareholders of a corporation are not liable for the actions of the corporation. The shareholders are said to be protected by the corporate veil. However, in certain circumstances the courts have disregarded the corporate entity and held the individual shareholders liable as the alter ego of the corporation. See 9 Witkin, Summary of California Law (9th ed. 1989), Corporations, Sec. 12, pp. 524-526. The alter ego doctrine is based on equitable considerations. Thus, the corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require. Mesler v. Bragg Management Co., 39 Cal.3d 290, 301, 216 Cal.Rptr. 443, 702 P.2d 601 (1985).

Whether it is appropriate to pierce the corporate veil in a given case will depend on the particular circumstances of that case. Id. at 300. In general, two factors must be present. These are: "(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow." Id., citing Automotriz del Golfo de Cal. v. Resnick, 47 Cal.2d 792, 796, 306 P.2d 1 (1957). The same principles apply where the shareholder sought to be held liable is another corporation instead of an individual. Las Palmas Associates v. Las Palmas Center Associates, 235 Cal.App.3d 1220, 1249, 1 Cal.Rptr.2d 301 (1991).

In this case, circumstantial evidence suggests some degree of involvement by Alcoa in the affairs of CDI and ACS. The evidence indicates, for example, that: (1) Alcoa, CDI, and ACS have been jointly represented by the same counsel throughout the proceedings before the Regional Water Board and this Board; (2) correspondence from Alcoa to the Regional Water Board indicated that Alcoa at one time held an interest in the mining site[5]; (3) the principal executive office and the business address of all of the officers and directors of CDI was the Alcoa headquarters in Pittsburgh; (4) Robert D. Buchanan, a senior financial officer for Alcoa, also served as a director and vice president of CDI and a director of ACS; and (5) three of the four directors and four of the officers of ACS had their business address at the Alcoa's Pittsburgh office.

On the other hand, Alcoa has introduced evidence into the record indicating that Alcoa was not the alter ego of CDI and ACS. According to the affidavit of Buchanan, both CDI and ACS were fully capitalized, independently operating companies, with their own boards of directors, assets, and bank accounts. See Exhibit D to petition of Alcoa. Further, the Board notes that Alcoa was one step removed from the two subsidiaries through an intermediary corporation, Alcoa Properties, Inc. On balance, the

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5 See, e.g., letter dated January 23, 1992, from Alcoa to the Regional Water Board ("As you know, Alcoa has not had an interest in this site for several years. Moreover, for the period of time that Alcoa did have an interest in the property, it had no involvement in the day-to-day operations."), and letter dated March 9, 1992, from Alcoa to the Regional Water Board ("Alcoa, which owned the property at issue [the Leona Heights site] from 1975-1986, was named as a 'discharger' ...."). Alcoa contends that this correspondence was written before all of the relevant records on the site were retrieved from archives.

Board concludes that the evidence in the record is insufficient to support the conclusion that Alcoa exercised the type of pervasive management and control over CDI and ACS which would render Alcoa liable as the alter ego of the two subsidiaries.[6]

In reaching this conclusion, the Board is aware of the difficulties the Regional Water Boards face when asked to determine whether a particular entity should be considered a discharger. This is particularly true when the determination involves resolution of fairly complex legal issues. And, as the Board noted in Order No. WQ 84-6, "[f]ewer parties named in the order may well mean no one is able to clean up a demonstrated water quality problem". P. 11. Nevertheless, "[t]here must be substantial evidence to support a finding of responsibility for each party named". Id. at pp. 10-11.

2. Contention: CDI contends that it cannot be considered a discharger under Order No. 92-105 because CDI's ownership interest in the mining site predated this Board's regulations on mining wastes.

Finding: CDI held an ownership interest in the Laurel Heights Sulfur Mine from 1972 to 1980. The Board adopted regulations governing the land disposal of mining wastes in 1984. See 23 C.C.R. Sec. 2570-2574.

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6 The Board notes that CDI, a California corporation, was dissolved in 1990. Under California law, if any assets of a dissolved corporation have been distributed to the shareholders, in this case, Alcoa Properties, Inc., an action may be brought against the shareholders. See Corps Code Sec. 2011(a)(1)(B). The Regional Water Baord may, therefore, wish to consider whether it would be appropriate to add Alcoa Properties, Inc. to Order No. 92-105.

The mining regulations address both active and inactive mining waste management units. See id. Sec. 2570. They specify siting, construction, monitoring, closure and post-closure maintenance criteria for these land disposal units. See id. Secs. 2572-2574. Order No. 92-105 implements relevant portions of the mining regulations. See, e.g., Order No. 92-105, Discharge Spec. B.1 (monitoring), Prov. C.2 (financial responsibility).

CDI cites California case law holding that regulations affecting substantive rights may only be applied prospectively to support its position that CDI cannot be held liable. CDI assumes that its liability for cleanup is predicated on the mining regulations. This assumption is erroneous.

Generally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of administrative regulations. Union of American Physicians and Dentists v. Kizer, 223 Cal.App.3d 490, 505, 272 Cal.Rptr. 886 (1990). As a general rule, statutes are not to be given a retroactive interpretation unless that is clearly the legislative intent. Evangelatos v. Superior Court, 44 Cal.3d 1188, 1207, 246 Cal.Rptr. 629, 753 P. 2d 585 (1988). However, as the court stated in Union of American Physicians and Dentists v. Kizer, supra:

> "...a statute is not retroactive unless 'it substantially changes the legal effect of past events.' [Citations omitted.] 'A statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment.' [Citations omitted.]" 223 Cal.App.3d at 505.

The adoption of this Board's mining regulations did not change the legal effect of past events. CDI was unquestionably a waste discharger under the law in effect when CDI held an ownership interest in the mining site. Since 1949 when the Dickey Water Pollution Act, the predecessor of the Porter-Cologne Water Quality Control Act, Water Code Section 13000 et seq., was enacted, drainage from inactive or abandoned mines has been considered a discharge of waste which is subject to regulation by the Regional Water Boards. See 26 Ops.Cal.Atty.Gen. 88, 90 (1955); 27 Ops.Cal.Atty.Gen. 182, 183-185 (1956). See also People v. New Penn Mines, Inc., 212 Cal.App.2d 667, 673-674, 28 Cal.Rptr. 337 (1963) (drainage from mines subject to Regional Water Board regulation).[7] The dischargers are those with legal control over the property. Id.

Further, even though CDI ceased being an owner in October 1980, CDI could legally be required to clean up the site. Water Code Section 13304 authorizes the Regional Water Board to mandate cleanup by both past and present dischargers. Dischargers who stopped discharging prior to January 1, 1981, are liable under Section 13304 if their acts were in violation of existing laws or regulations at the time they were discharging. Water Code Section 13304(f).

CDI's acts or failure to act were in violation of at least two laws in effect during CDI's land ownership. Since

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7 The legislative history of the Porter-Cologne Water Quality Control Act indicates that the prior Attorney General opinions on mine tailing runoff and liability of the landowner were intended to be incorporated into the definition of "waste" under the act. 63 Ops.Cal.Atty.Gen. 51, 56 (1980).

1872, California law has prohibited the creation or continuation of a public nuisance. See Civ. Code Sec. 3490. Water pollution can constitute a public nuisance. See People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374 (1897). A successor property owner, such as CDI, who fails to abate a continuing nuisance created by a prior owner is liable in the same manner as the prior owner. See City of Turlock v. Bristow, 103 Cal.App. 750, 284 P. 962 (1930). Additionally, since 1949 California law has prohibited the discharge of waste in any manner which will result in a pollution, contamination, or nuisance. Health & Safety Code Sec. 5411. For these reasons, the Board finds that the Regional Water Board acted properly in including CDI in Order No. 92-105 as a discharger.

3. Contention: ACS contends that it cannot be held liable because all liability for the site has vested in the current property owner. Alternatively, ACS requests that, if ACS is not removed from Order No. 92-105, the current landowner be held primarily liable and other parties secondarily liable.

Finding: In 1986 AP Ventures, Inc. purchased all of the stock of ACS and changed the name of ACS to AP Construction Systems, Inc. Shortly thereafter, AP Ventures, Inc. contracted with Watt Housing Corporation to convey all of AP Construction Systems, Inc.'s interest in the partnership, Ridgemont Development Company, to Watt Housing Corporation. ACS contends that, by virtue of this agreement, Watt Housing Corporation has acquired all liability for the site.

ACS' contention is without merit. The private contractual arrangements between successive owners of a site are not binding on the Regional Water Boards or this Board and are not determinative of an entity's status as a discharger. Cf. State Water Board Order No. WQ 86-2, pp. 9-10.

ACS also apparently argues that because a partnership can own property in its own name, liability incurred by the partnership flowing from its land ownership is retained by the partnership, rather than the individual partners. Whether the property in question, in this case, was held in the name of the partnership or the individual partners is not clear from the record. In any event, ACS' contention is inconsistent with California law. Contrary to ACS' assertion, a partnership is not an entity like a corporation, but rather is an association of individuals. See Corps. Code Sec. 15006(1); 9 Witkin, Summary of California Law (9th ed. 1989), Partnerships, Sec. 15, pp. 412-413. In general, the individual partners are jointly and severally liable for the obligations of the partnership. See Corps. Code Sec. 15015. This liability is not discharged simply because one leaves the partnership. Alioto v. United States, 593 F.Supp. 1402, 1413 (1984), citing California Corporations Code Secs. 15013, 15015, 15036.

Having concluded that ACS was properly named in Order No. 92-105, the Board now turns to ACS' request that it be considered secondarily liable for compliance. The Board concludes that application of this concept is not appropriate here. The current landowners, like ACS and CDI, are considered

waste dischargers primarily due to their land ownership. None of these parties actually engaged in the mining activities which resulted in the ongoing discharge. The mine operators, the entity which created the problem, are no longer in existence. Therefore, all of the parties to Order No. 92-105 stand on essentially the same footing and should be treated alike.[8]

4. Contention: CDI and ACS contend that additional parties who held an ownership interest in the site since the creation of the mine should be included in Order No. 92-105.

Finding: For the reasons explained previously, those parties who held an ownership interest in the mining site since the creation of the mine drainage can be considered waste dischargers. To the extent that any of these parties, in

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8 All of this Board's orders addressing primary versus secondary liability have made a distinction between those parties who were considered responsible parties due solely to their land ownership (or, in one case, their possession of a long-term lease) and those parties who actually operated the facility or otherwise caused the discharge in question. See Order Nos. WQ 86-11 (landowner and operator named in waste discharge requirements; operator primarily responsible for compliance); 86-18 (landowner and manufacturer of semiconductors named in site cleanup requirements; manufacturer primarily responsible; 87-5 (mine operator and landowner named in waste discharge requirements; operator primarily responsible); 87-6 (landowner and lessees/manufacturers of seminconductors named in site cleanup requirements; lessees primarily responsible); 89-1 (landowners and operator of crop dusting business named in cleanup and abatement order; operator primarily responsible); 89-8 (possessor of long-term lease included in cleanup and abatement order together with the parites who caused the release of pollutants; lessee considered secondarily liable along with the landowners); 92-13 (landowners held secondarily liable in cleanup and abatement order; operators considered primarily liable). This distinction has been made primarily for equitable reasons. The Board has concluded that the initial responsibility for cleanup should be with the operator or the party who created the discharge. See e.g, Order No. WQ 89-1, p. 4. The Board has cited several factors which are appropriate for the Regional Water Boards to consider in determining whether a party should be held secondarily liable. These include: (1) whether or not the party initiated or contributed to the discharge; and (2) whether those parties who created or contributed to the discharge are proceeding with cleanup. See Order Nos. WQ 87-6 and 89-8.

addition to those already named in Order No. 92-105, can be identified and located by petitioners, the Regional Water Board may consider including them in Order No. 92-105. We note that the Regional Water Board has demonstrated a willingness to consider inclusion of additional responsible parties in the waste discharge requirements in question here.[9]

III. CONCLUSIONS

1. There is insufficient evidence in the record to hold Alcoa liable as a discharger under Order No. 92-105.

2. Both CDI and ACS were properly named in Order No. 92-105 as dischargers.

3. All parties to Order No. 92-105 should be considered primarily liable for compliance with the order.

IV. ORDER

IT IS HEREBY ORDERED that Regional Water Board Order No. 92-105 is hereby amended to remove references to Alcoa as a discharger on pages 1 and 5 of the Order.

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9 All other contentions raised by petitioners, which are not discussed in this order, are denied for failure to raise substantial issues appropriate for review. 23 C.C.R. Sec. 2052(a)(1). See People v. Barry, 194 Cal.App.3d 158, 139 Cal.Rptr. 349 (1987).

IT IS FURTHER ORDERED that the petitions of Alcoa, ACS, and CDI are otherwise dismissed.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on July 22, 1993.

AYE: John Caffrey
Marc Del Piero
James M. Stubchaer
Mary Jane Forster
John W. Brown

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marché
Administrative Assistant to the Board