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CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD
STATE OF CALIFORNIA

In the Matter of:

RECONSIDERATION OF CLEANUP
AND ABATEMENT ORDER R5-2013-
0701, MOUNT DIABLO MINE,
CONTRA COSTA COUNTY, DATED
APRIL 16, 2013

**SUNOCO, INC.’S BRIEF IN
OPPOSITION TO THE
PROSECUTION TEAM’S
MOTION IN LIMINE TO
EXCLUDE EVIDENCE AND
LEGAL ARGUMENTS**

Hearing Date: June 4/5, 2014

Sunoco, Inc. (“Sunoco”) hereby submits this Opposition Brief, supported by the accompanying Declarations of Adam P. Baas and John D. Edgcomb, in opposition to the Prosecution Team’s Motion in Limine (“Motion”) to exclude Sunoco from introducing evidence and legal arguments at the Central Valley Regional Water Quality Control Board (“Regional Board”) hearing scheduled for June 4/5, 2014 (“Hearing”).

I. INTRODUCTION

2 The Prosecution Team seeks to exclude at the Hearing “all evidence and
3 defenses” that were not raised during a September 2012 “comment period on the
4 draft Cleanup and Abatement Order R5-2013-0701.” The Motion specifically
5 targets “all documents and testimony” related to “the issue of corporate
6 succession.” (*See*, Motion at 1:13-17). The Prosecution Team claims that due to
7 Sunoco’s alleged “failure to raise the issue of corporate succession during the
8 comment period, the Prosecution Team was not provided sufficient time to respond
9 to the ... argument and did not pursue related discovery and interrogatories.” (*Id.* at
10 3:10-12); and, that “[b]y failing to raise the issue of corporate succession during
11 the comment period, the Dischargers [Sunoco] deny the Prosecution Team the
12 ability to conduct discovery and, thereby, unfairly prejudice the Prosecution
13 Team.” (*Id.* at 4:3-5). For the reasons set forth in this Opposition Brief and the
14 accompanying Declarations, the Prosecution Team’s claims are unfounded and, as
15 such, the Motion should be denied.

16 The State Water Resources Control Board (“State Board”) Office of
17 Enforcement (“Office of Enforcement”) and the Regional Board have been on
18 notice of Sunoco’s Corporate Law Argument¹ since January 2012, months before
19 the “comment period.” In fact, during the past two years, the Office of
20 Enforcement and the Prosecution Team have consistently represented to Sunoco
21 that its Corporate Law Argument was futile and would not have an effect on
22 whether Sunoco was named as a discharger in the CAO. Therefore, it was agreed
23 upon that the September 2012 comment period would be an informal process
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25 ¹ For purposes of this Opposition Brief, “Sunoco’s Corporate Law Argument” shall refer to the
26 legal and factual argument that Sunoco cannot be found liable for the acts of its predecessor Sun Oil
27 Company’s subsidiary, the Cordero Mining Company (“Cordero”), because there is no evidence that
would permit the Regional Board to pierce Cordero’s corporate veil – *i.e.* what the Prosecution Team
calls the “issue of corporate succession” in its Motion.

2 meant to promote discussion among the PRPs, and it would not be a forum for
3 Sunoco to brief its Corporate Law Argument. The the fact that the Prosecution
4 Team now appears to argue differently comes as a surprise.

5 Notwithstanding this fact, the comment period relied upon by the
6 Prosecution Team is irrelevant to the question of whether it was properly put on
7 notice of what arguments will be presented at the Hearing. The Hearing was first
8 noticed in August 2013, almost a year after the comment period. At that time, the
9 Prosecution Team was specifically told that the Hearing would take place in
10 December 2013 and would cover Sunoco's Corporate Law Argument. In response,
11 the Prosecution Team requested more time to conduct "discovery and briefing" and
12 the Hearing date was subsequently re-scheduled to March 2014.² Since then,
13 Sunoco has timely responded to all discovery requests propounded by the Office of
14 Enforcement and has produced copies of the legal arguments and factual evidence
15 it intends to introduce at the Hearing in support of same. Thus, the Prosecution
16 Team cannot claim surprise or prejudice.

17 Finally, the case law and regulations relied upon by the Prosecution Team do
18 not support its claim of surprise or prejudice. At this time, Sunoco has complied
19 with all of the dates set forth in the Hearing Procedures document and the
20 Prosecution Team is in possession of all of the legal arguments and evidence
21 Sunoco intends to introduce at the Hearing.

22 For these reasons, and the arguments more fully set forth below, Sunoco
23 requests that the Regional Board deny the Prosecution Team's Motion in its
24 entirety.

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27 ² Notably, the Hearing date is now scheduled for June 4/5/, 2014.

II. RELEVANT FACTS

2 The relevant facts supporting Sunoco's opposition to the Prosecution Team's
3 Motion are set forth in the accompanying Declaration of Adam P. Baas ("Baas
4 Decl.") and John D. Edgcomb ("Edgcomb Decl."), including the exhibits attached
5 thereto.

III. ARGUMENT

6 A. The Prosecution Team has known about Sunoco's Corporate Law 7 Argument since January 2012, has consistently rejected the 8 argument as pointless, and has, until just recently, dismissed the 9 need for discovery. 10

11 The Office of Enforcement, the Regional Board, and the Prosecution Team
12 were made aware of Sunoco's Corporate Law Argument in January 2012 and,
13 since then; the Office of Enforcement has consistently rejected the argument as
14 pointless. (*See*, Baas Decl. ¶¶ 3-14; Edgcomb Decl. ¶¶ 3-6). Sunoco's Corporate
15 Law Argument is therefore not a "new" argument.

16 Moreover, the Prosecution Team has had years to conduct discovery related
17 to Sunoco's Corporate Law Argument and either ignored or dismissed the need for
18 such discovery. During this time, the Office of Enforcement represented to
19 Sunoco that: the State Board has a long history of rejecting such arguments, the
20 issuance of the CAO was inevitable; and, Sunoco's petition for review and
21 rescission of the CAO to the State Board would be denied. (*Id.*). It was not until
22 the Regional Board granted a reconsideration hearing to specifically address, in
23 part, Sunoco's Corporate Law Argument that the Office of Enforcement issued its
24 first Subpoena for Documents and Records to Sunoco ("Subpoena") on February
25 11, 2014. (*See*, Baas Decl. ¶¶ 15-25 and Exh. 10). The Subpoena was served
26 months after the Prosecution Team had requested more time for "discovery and
27 briefing" in this matter and months after the Hearing was first noticed. (*See*, Baas

Decl. ¶ 18). Since then, Sunoco has timely responded to the Subpoena and
2 produced a CD ROM of responsive documents to the Prosecution Team. (*See*,
3 Baas Decl. Exh. 11).

4 Thus, despite what it claims in its Motion, the Prosecution Team has not
5 only undertaken discovery in this matter, but was previously granted additional
6 time to complete its discovery. That time has passed and the parties are now
7 bound by the Hearing Procedures, which were agreed upon by the parties and
8 establish the parameters for the upcoming Hearing – including the exchange of
9 legal arguments and factual evidence. (*See*, Baas Decl. Exh. 9). What the
10 Prosecution Team seeks in its Motion is to throw out the Hearing Procedures and
11 start over. There is no justification for this result in fact or law.

12 **B. The Prosecution Team has mischaracterized the “comment**
13 **period” and, in any event, the comment period is irrelevant**
14 **because the Prosecution Team was expressly told over seven**
15 **months ago that the Hearing would cover Sunoco’s Corporate**
16 **Law Argument.**

17 The Prosecution Team has mischaracterized the comment period. Not only
18 was the comment period meant as an informal process to bring the PRPs together,
19 but the Office of Enforcement and the Regional Board were aware of, and agreed
20 to, the fact that Sunoco would not be briefing its Corporate Law Argument during
21 the comment period. (*See*, Baas Decl. ¶¶ 7-10). Thus, the use of the comment
22 period by the Prosecution Team as a means to claim surprise or prejudice is
23 unsupported by the facts.

24 Notwithstanding this, the comment period is irrelevant to the issue of
25 whether the Prosecution Team has allegedly been prejudiced by surprise or “new”
26 evidence in relation to the Hearing. In August 2013, the Prosecution Team was put
27 on notice that: 1) the Hearing would be scheduled in December 2013; and 2) the

2 Hearing would address, in part, Sunoco’s Corporate Law Argument. (*See*, Baas
3 Decl. ¶¶ 12-16). For instance, the Advisory Team expressly stated in its letter to
4 the PRPs and the Regional Board that the Hearing would cover the issues raised by
5 Sunoco in its May 15, 2013, petition to the State Board for Review and Rescission
6 of the CAO (“Sunoco’s Petition”). (*See*, Baas Decl. Exhs. 3).³ Sunoco’s Petition
7 sets forth Sunoco’s Corporate Law Argument in detail and attaches historical
8 documents evidencing the parent-subsidary relationship between Sun Oil
9 Company and the Cordero Mining Company. (*See*, Baas Decl. ¶¶ 12-13). Copies
10 of Sunoco’s Petition were provided to the Office of Enforcement on or about May
11 15, 2013. (*Id.*) Thus, the Prosecution Team cannot deny that it was completely
12 aware of Sunoco’s Corporate Law Argument and the evidence Sunoco intended to
13 rely upon in support of same by, at the latest, August 2013.

14 Further, on August 21, 2013, the Prosecution Team requested an extension
15 to the December 2013 hearing date to allow for additional time “for discovery and
16 briefing in the above-referenced matter.” (*See*, Baas Decl. ¶¶ 17-18 and Exh. 5).
17 Sunoco agreed to provide the Prosecution Team with more time to conduct
18 discovery and the Hearing was subsequently re-scheduled for March 27, 2014.
19 (*See*, Baas Decl. ¶ 19).

20 Most recently, on March 14, 2014, the Prosecution Team was provided with
21 Sunoco’s Hearing Brief and Hearing Exhibits, as well as Sunoco’s production of
22 documents in response to the Subpoena – all of which outline and support
23 Sunoco’s Corporate Law Argument. (*See*, Baas Decl. ¶ 25).

24 Thus, the facts do not support the Prosecution Team’s claim of surprise or
25 prejudice in relation to Sunoco’s Corporate Law Argument. The Prosecution
26 Team has been aware of the Hearing topics for over seven months.

27 ³ The Advisory Team’s letter was forwarded to the Prosecution Team on August 9, 2013. (*See*,
Baas Decl. Exhs. 4).

C. The Prosecution Team's use of case law and state regulations is misguided.

In support of its Motion, the Prosecution Team cites to one case from 1950 and two California regulations: 1) *English v. City of Long Beach*, 35 Cal.2d 155 (1950); 2) Gov. Code, § 11513, subd. (b); and 3) Cal. Code 12 Regs., tit. 23 § 648.4, subd. (a). (*See*, Motion at 4:3-14). All three are inapplicable to the facts at hand.

The *English* court addressed an individual's constitutional right to a hearing and found those rights violated in circumstances where a decision was rendered on evidence never disclosed to the losing party and which the losing party had no opportunity to controvert. (*English*, 35 Cal.2d at 156-159 (1950)). In *English*, members of the board took evidence outside the hearing and outside the presence of English or his attorney. (*Id.* at 156). The information was then imparted to other board members, and was considered and relied upon by them in arriving at their decision. (*Id.*). Here, as argued above, Sunoco's Corporate Law Argument and supporting evidence have been disclosed to the Prosecution Team well in advance of the upcoming Hearing. Sunoco has complied with all of the dates set forth in the Hearing Procedure document (*See*, Baas Decl. ¶¶ 25-26 and Exh. 9) and timely responded to the Prosecution Team's discovery request (*See*, Baas Decl. ¶¶ 25 and Exh. 11). The Prosecution Team will have every chance to review this evidence before the Hearing and controvert Sunoco's Corporate Law Argument. The *English* case, which addresses evidence not presented at a hearing yet considered post-hearing by the board, is therefore inapplicable to the Prosecution Team's Motion. Particularly, given that the Hearing at issue is scheduled to take place June 2014.

Gov. Code, § 11513, subd. (b) addresses an entity's right to present and rebut evidence at a hearing. Again, the Hearing has not taken place yet and, to

1 date, Sunoco has complied with the timeline set forth in the Hearing Procedure
2 document and has provided the Prosecution Team with a detailed description of its
3 Hearing arguments, as well as copies of the evidence Sunoco intends to introduce
4 at the Hearing. (*See*, Baas Decl., *generally*). Thus, the Prosecution Team will
5 have every opportunity to rebut Sunoco's Corporate Law Argument at the Hearing.

6 Finally, Cal. Code 12 Regs., tit. 23 § 648.4, subd. (a) deals with "surprise"
7 evidence at the Hearing. Surprise testimony or evidence is that which is
8 introduced not in compliance with the hearing procedures. If that occurs, the
9 presiding officer may refuse to admit the proposed testimony or proposed exhibits.
10 23 Cal. Code of Regs. §648.4(e). As argued above, the Prosecution Team has not
11 been surprised by Sunoco's Corporate Law Argument and Sunoco is currently in
12 compliance with the Hearing Procedures. (*See*, Baas Decl. ¶¶ 3-26).

13 IV. CONCLUSION

14 The Prosecution Team seeks to preclude Sunoco from presenting its
15 Corporate Law Argument at the Hearing or, in the alternative, to postpone the
16 Hearing indefinitely while the Prosecution team embarks on an undefined,
17 protracted discovery expedition. The facts and law *do not* support either of these
18 outcomes. Thus, for the reasons set forth above and in the accompanying
19 Declarations, Sunoco respectfully requests that the Regional Board deny the
20 Prosecution Team's Motion.

21
22 Respectfully submitted,

23 DATED: March 24, 2014

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