

1 **IN THE MATTER OF:** )  
2 )  
3 **MOUNT DIABLO MERCURY** ) **MOTION IN LIMINE TO EXCLUDE EVIDENCE**  
4 **MINE** ) **AND LEGAL ARGUMENTS NOT PRESENTED**  
5 ) **IN THE RESPONSIBLE PARTIES’ COMMENTS**  
6 ) **TO THE ORDER**  
7 )  
8 )

9 The Prosecution Team respectfully submits this Motion *In Limine* to exclude at the hearing all  
10 evidence and defenses that were not raised during the comment period on the draft Cleanup and  
11 Abatement Order R5-2013-0701.

12 **I. Introduction**

13 The Prosecution Team hereby moves *in limine* for a decision precluding Sunoco, Inc. and  
14 Kennametal Inc. (collectively “Dischargers”) from introducing and raising evidence or testimony that was  
15 not first raised during the comment period on draft Cleanup and Abatement Order R5-2013-0701. This  
16 exclusion should extend and cover all documents and testimony, including, but not limited to the issue of  
17 corporate succession, that the Dischargers failed to raise during the comment period.

18 **II. Factual Summary**

19 In 2009, the Central Valley Regional Water Quality Control Board (“Regional Board”) issued  
20 Technical Reporting Orders to Kennametal Inc. (R5-2009-0871) and Sunoco, Inc. (R5-2009-0869)  
21 requiring the Dischargers to submit a work plans and reports regarding the Mount Diablo Mercury Mine  
22 site (“Site”). As a result of those and other investigations, which concluded mercury contamination in the  
23 Marsh Creek Watershed originates from Mount Diablo Mine, a draft Cleanup and Abatement Order was  
24 issued to the Dischargers in September 2012. The Prosecution Team commenced the comment period for  
25 that draft on September 12, 2012 and requested that the Dischargers submit comments by October 12,  
26 2012.

1           During the comment period, Sunoco Inc. submitted comments regarding the following technical  
2 challenges: (1) that no mercury was produced during Cordero’s 14 months of operations at the Site; (2)  
3 alleged inaccuracies in the description of background levels of mercury, chromium, and nickel, and in the  
4 descriptions of water quality standards; and (3) the use of the term “earlier reports” without a definition.  
5 All of these comments were addressed by the Prosecution Team in the Final Order. Kennametal Inc. also  
6 submitted comments during the comment period. Kennametal Inc.’s comments were limited to the  
7 assertion that neither Kennametal Inc., nor any of its predecessors owned or operated the Site.  
8 Kennametal’s entire defense was based on the testimony of Kennametal’s former employee, George  
9 Heidemann. Sunoco and Kennametal both failed to submit comments raising the issue of corporate  
10 succession. Neither party advanced the theory that it cannot be held liable for the actions of its wholly  
11 owned subsidiary or a statute of limitations defense.<sup>1</sup>

12           The Prosecution Team responded to the comments asserted by the Dischargers on December 31,  
13 2012. The Prosecution Team’s response was appropriately limited in scope to the issues that were raised  
14 during the comment period. The scope of discovery conducted, in which the Prosecution Team took  
15 part, was limited to those issues raised during the comment period. Specifically, the deposition of Mr.  
16 Heideman, which took place on November 2, 2011, consisted of investigating whether Kennametal or its  
17 predecessors conducted operations at the Site.

18           On April 16, 2013, the Executive Office of the Regional Board issued Cleanup and Abatement  
19 Order R5-2013-0701 regarding the Site. On July 25, 2013, counsel for Kennametal Inc., requested the  
20 Board to hold a hearing on the issuance of the Cleanup and Abatement Order. On August 8, 2013, the  
21 Board granted that request.

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<sup>1</sup> Sunoco may argue that it provided its arguments after the Order was issued in the form of a petition to the State Board. However, filing a petition is not a substitute for submitting its arguments in the comment period. The petition, and ultimate hearing before the State Board, is a separate proceeding, will address different arguments, and does not generally include representation and/or participation by the Prosecution Team. In addition, the hearing on the petition had not been scheduled at the time the Regional Board hearing was set.

1           **III.    Argument**

2           Sunoco and Kennametal should be precluded from offering evidence or raising new arguments at  
3 the hearing that they failed to raise during the comment period on the draft order. The comment period is  
4 designed to accomplish several goals. The comment period on the draft provides the Dischargers with  
5 notice of the Cleanup and Abatement Order, and an opportunity to comment and suggest revisions or  
6 raise objections to its issuance. The comment period, however, is also designed to provide the  
7 Prosecution Team with notice of the types of objections underlying opposition to the order, and to provide  
8 the Prosecution Team with an opportunity to respond to those comments and/or address them in the  
9 Order.

10           Due to the Dischargers failure to raise the issue of corporate succession during the comment  
11 period, the Prosecution Team was not provided sufficient time to respond to the discharger's arguments  
12 and did not pursue related discovery and interrogatories. The Prosecution Team can only be reasonably  
13 expected to respond to those comments that are raised during the comment period. Sunoco's Appeal to  
14 do otherwise would both waste resources and undermine the purpose of the comment period. Based on  
15 the evidence in the Regional Board files, the Prosecution Team has sufficient evidence in the record to  
16 name the Dischargers.

17           Had the Prosecution Team been given notice that the Dischargers planned to raise these issues,  
18 the Prosecution Team would have addressed them in its response to comments as opposed to in a  
19 shortened rebuttal period and, if necessary, would have revised the order to reflect the comments. The  
20 hearing procedures and corresponding deadlines were set and agreed upon by the Prosecution Team based  
21 in part on the comments and evidence received by the Dischargers. Had the Prosecution Team known of  
22 the newly discovered evidence<sup>2</sup> and new defenses it would have allowed for proper time in the hearing  
23 scheduled for its rebuttal, requested the hearing be held at a later date, or both. The Prosecution Team

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<sup>2</sup> Staff requested all documents related to this site from Kennametal in 2009. Staff was told no documents existed beyond what had been provided. However, in its submission of evidence Kennametal relies on additional documents not previously produced.

1 also would have undertaken additional discovery and interrogatories regarding corporate succession, or, at  
2 the very least provided for time to pursue that discovery prior to the hearing.

3 By failing to raise the issue of corporate succession during the comment period, the Dischargers  
4 deny the Prosecution Team the ability to conduct discovery and, thereby, unfairly prejudice the  
5 Prosecution Team. (*English v. City of Long Beach* (1950) 35 Cal.2d 155, 159 [“A hearing requires that  
6 the party be apprised of the evidence against him so that he may have an opportunity to refute, test, and  
7 explain it, and the requirement of a hearing necessarily contemplates a decision in light of the evidence  
8 there introduced”].) In denying the Prosecution Team the ability to conduct discovery, the Dischargers, in  
9 essence, preclude the Prosecution Team from potentially introducing relevant evidence, thereby violating  
10 the Prosecution Team’s evidentiary rights. (See Gov. Code, § 11513, subd. (b) [establishing each party’s  
11 rights to call and examine witnesses, introduce exhibits, rebut evidence].) By doing so, the Dischargers  
12 also violate the Board’s prohibition on the introduction of surprise testimony and evidence. (Cal. Code  
13 Regs., tit. 23 § 648.4, subd. (a).)

14 **IV. Conclusion**

15 The admission of evidence and defenses not raised during the comment period unfairly prejudices  
16 the Prosecution Team by denying them the chance to undertake appropriate discovery. The Prosecution  
17 Team, therefore, respectfully requests that evidence and testimony not raised during the comment period  
18 including, but not limited to, the issue of corporate succession be excluded.

19 In the alternative, if the Regional Board believes the Prosecution Team has not provided enough  
20 evidence related to the issue of corporate successor liability to name the Dischargers, the Prosecution  
21 Team respectfully requests that the Board continue the hearing for a later date so that discovery related to  
22 new evidence and defenses raised by the Dischargers can be conducted. This discovery would include,  
23 but not be limited to, interrogatories to the Secretary of State, out of state depositions related to corporate  
24 succession, and discovery to the parties.

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