

This document was modified by the Board's Advisory Team on Jan 13, 2017 and Jan 25, 2017

HEARING NOTICE AND HEARING PROCEDURE

FOR THE CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD'S LIMITED
RECONSIDERATION OF CLEANUP AND ABATEMENT ORDER R5-2014-0124

FOR
THE MOUNT DIABLO MERCURY MINE
CONTRA COSTA COUNTY

PLEASE READ THIS HEARING PROCEDURE CAREFULLY. FAILURE TO COMPLY WITH THE
DEADLINES AND OTHER REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE
EXCLUSION OF YOUR DOCUMENTS AND/OR TESTIMONY

The Central Valley Water Board has the authority to issue orders to persons who have caused or permitted, cause or permit, or threaten to cause or permit waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance. (Wat. Code § 13304, subd. (a).) The Central Valley Water Board may require such persons to clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action. (*Id.*)

On 10 October 2014, the Central Valley Water Board issued Cleanup and Abatement Order (CAO) R5-2014-0124 to Jack and Carolyn Wessman, the Bradley Mining Co., the U.S. Department of Interior, Sunoco, Inc. (Sunoco), Mt. Diablo Quicksilver Co., Ltd., and the California Department of Parks and Recreation. CAO R5-2014-0124 named Sunoco, Inc. liable for the cleanup of the Mt. Diablo Mercury Mine by virtue of its relationship with Cordero Mining Company of Nevada (Cordero), which once engaged in work at the former mine site. Sunoco contested the Board's finding of liability, and on 22 September 2016, the Sacramento County Superior Court issued a ruling remanding CAO R5-2014-0124 to the Central Valley Water Board for further hearing regarding Sunoco's liability. The court stated that the following issues warranted reconsideration by the Board:

- Whether language contained in a consent agreement that was endorsed by Cordero's former directors when they agreed to Sunoco's assumption of liability for Cordero's Retirement and Stock Purchase Plans, and/or additional evidence related to the meaning of that language, provides sufficient evidence that Sunoco also voluntarily assumed **all known debts and liabilities of Cordero, including to facilitate Cordero's dissolution in 1975, and that such known debts and liabilities included** Cordero's cleanup liability at the Mt. Diablo Mercury Mine **at issue in the CAO.**
- Whether the environmental harm caused by the discharges of mining waste at the Mt. Diablo Mercury Mine is subject to apportionment, and, if so, on what grounds apportionment should be based.
- If the Central Valley Water Board finds that there is a reasonable basis upon which to apportion liability for the cleanup of the Mt. Diablo Mercury Mine, what is Sunoco's relative share of the cleanup liability.

The Board has scheduled a hearing to consider this matter on the following date:

23/24 February 2017
Central Valley Water Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, California

At the 23/24 February 2017 hearing, Central Valley Water Board will receive testimony regarding the above matters. After hearing testimony and considering the evidence in the administrative record, the Board may modify CAO R5-2014-0124 in a manner consistent with testimony and evidence received

and consistent with one of the proposed options presented in the proposed Order Amending Cleanup and Abatement Order R5-2014-0124, or the Board may continue the matter to another date.

The Board's Meeting Agenda will set the specific date of the hearing. The Meeting Agenda will be posted at least ten days before the meeting on the Board's website, at the following address:

http://www.waterboards.ca.gov/centralvalley/board_info/meetings

To ensure a fair hearing, the Board staff and attorneys that advocated for the issuance of CAO R5-2014-0124 (the "Prosecution Team") have been separated from the Board staff and attorneys that will provide legal and technical advice to the Board (the "Advisory Team"). Members of the Board's Prosecution Team are subject to the prohibition on ex parte contacts in Section V, below.

Objections to this Hearing Procedure must be sent to the Board's Advisory Team no later than the deadline listed on the "Important Deadlines" page of this Hearing Procedure. The Board's Advisory Team will promptly respond to all timely objections.

I. Hearing Participants

Participants in the hearing are considered either "Designated Parties" or "Interested Persons." At the hearing, both Designated Parties and Interested Persons may be asked to respond to questions from the Board, staff, or others, at the discretion of the Board Chair.

Designated Parties are the primary participants in the hearing. Designated Parties may submit evidence, may offer witnesses to testify at the hearing, are allowed to cross-examine adverse witnesses, and are subject to cross-examination.

Interested Persons are those persons that have an interest in the outcome of the hearing, but who are not the primary participants in the hearing. Interested persons typically include members of the public as well as advocacy groups. Interested persons may present policy statements to the Board, but may not generally present evidence (photographs, eyewitness testimony, etc.). Interested persons are not subject to cross-examination.

The following participants have been designated as Designated Parties in this proceeding:

1. Central Valley Water Board Prosecution Team
2. Sunoco, Inc.
3. Any other party named in CAO R5-2014-0124 that submits comments or evidence to the Central Valley Water Board by the deadline specified on the "Important Deadlines" page of this Hearing Notice and Hearing Procedure.

II. Hearing Time Limits

The following combined time limits will apply at the hearing absent a contrary ruling by the Board Chair:

1. Board Prosecution Team: **30 45 minutes**
2. Sunoco, Inc.: **30 45 minutes**
3. All other Designated Parties: **10 minutes**

The Designated Parties may allocate their allotted time as they see fit. The time allotted is the total time allowed for presenting evidence and testimony, cross-examining adverse witnesses, and making a closing statement. **The hearing itself will be conducted in two phases, with the first phase discussing the threshold issue of Sunoco's liability, and the second phase discussing the matter of liability apportionment.** Interested Persons will have **3 minutes** to present their statements.

Participants who would like additional time must submit a request to the Advisory Team so that it is received no later than the deadline listed on the "Important Deadlines" page of this Hearing Procedure. Additional time may be provided at the discretion of the Advisory Team (prior to the hearing) or the Board Chair (at the hearing) upon a showing that additional time is necessary. A timer will be used, but will not run during Board questions and the responses to such questions, or during discussions of procedural issues.

III. Documents in Evidence and Availability of Board Files

The Board's Prosecution Team maintains a file containing CAO R5-2014-0124 and all related documents at the Central Valley Water Board's office at 11020 Sun Center Drive in Rancho Cordova. Other submittals received in accordance with this Hearing Procedure will be added to the file unless the Board rules to exclude them. The file is available to the public and may be inspected or copied during regular business hours. Scheduling an appointment to review the file by contacting the Prosecution Team in advance is not required, but calling ahead will help ensure timely access to these documents. Documents will also be posted online at:

http://www.waterboards.ca.gov/centralvalley/board_decisions/tentative_orders/index.shtml

Although the website is updated regularly, to ensure access to the latest materials, you may contact the Prosecution Team for assistance in obtaining copies.

IV. Submittal of Evidence, Legal and Technical Arguments or Analysis, and Policy Statements

The 23/24 February 2017 Hearing will be limited in scope to the *three issues described on the first page of this Hearing Notice and Procedure*. Submittals that exceed this scope may be excluded.

The Prosecution Team and all other Designated Parties (including the Discharger) must submit the following in advance of the hearing by the deadline specified on the Important Deadlines page of this Hearing Notice and Procedure:

1. All evidence that the Designated Party would like the Board to consider. Evidence already in the Board's files (including all evidence submitted and received into evidence for the Board's consideration of CAO R5-2014-0124) may be submitted by reference as long as the location of the evidence is clearly identified.
2. All legal and technical arguments or analysis.
3. The name of each witness (including Board staff) whom the Designated Party intends to call at the hearing, the subject(s) that will be covered by each witness, and the estimated time required by each witness to present their testimony. Witness testimony at the hearing may not exceed the scope of previously-submitted written material.
4. The qualifications of each expert witness, if any.

Prohibition on Surprise Evidence: In accordance with California Code of Regulations, title 23, section 648.4, the Central Valley Water Board endeavors to avoid surprise testimony or evidence. Absent a showing of good cause and lack of prejudice to the parties, the Board Chair may exclude material that is not submitted in accordance with this Hearing Procedure. Excluded material will not be considered by the Board.

Rebuttal Evidence: "Rebuttal evidence" is evidence offered to disprove or contradict evidence presented by an opposing party. This Hearing Procedure requires rebuttal evidence to be submitted prior to the start of the hearing in order to ensure the fairness and orderly conduct of the proceeding.

Printing: For each Designated Party, including the Board's Prosecution Team, the Board has set a **120 page limit** (60 pages printed on both sides) for printed materials. Although the Board Members will receive electronic copies of all submittals, no matter how voluminous, only 120 pages will be printed out per Designated Party and provided to the Board Members. Designated Parties that submit more than 120 pages should specify which 120 pages should be printed out by the deadline listed on the "Important Deadlines" page of this Hearing Procedure. Printed materials may include excerpts of larger documents as long as the larger document is submitted in its entirety in electronic format. If a Designated Party does not specify which 120 pages should be printed out, the Advisory Team will simply select the first 120 pages of the Designated Party's submittal. The proposed Order Amending CAO R5-2014-0124, CAO R5-2014-0124, and this Hearing Notice and Procedure will be printed out and will not count against the Prosecution Team's 120 page limit.

Hard copies will be printed in black and white on 8.5"x11" paper. Designated Parties who are concerned about the print quality of all or part of their 120 pages of printed materials should provide an extra nine paper copies for the Board Members, which must be received by the Advisory Team at Board's Rancho Cordova Office (address listed below) no later than the deadline listed on the "Important Deadlines" page.

Written Statements by Interested Persons: Interested Persons who would like to submit their policy statements in writing are encouraged to submit them as early as possible, but they must be received by the deadline listed on the "Important Deadlines" page in order to be included in the Board's agenda package. Interested Persons do not need to submit written statements in order to speak at the hearing.

V. Miscellaneous Matters

Presentations: Power Point and other visual presentations may be used at the hearing, but their content shall not exceed the scope of previously-submitted written material. These presentations must be provided to the Advisory Team at or before the hearing both in hard copy and in electronic format so that they may be included in the administrative record.

Witnesses: All witnesses who have submitted written testimony should be available at the hearing to affirm that the testimony is true and correct, and should be available for cross-examination. A witnesses' failure to appear may result in the submitted testimony being treated as hearsay.

Prohibition on Ex Parte Contacts: Any communication regarding the matters to be considered by the Board in the 23/24 February hearing that is directed at the Board members or the Advisory Team by a participant in the hearing and that is not made in a manner open to all other persons is considered an "ex parte" contact. In order to maintain the impartiality of the Board, all "ex parte" contacts are prohibited. Communications regarding non-controversial procedural matters are not considered ex parte contacts and are not restricted.

Applicable Regulations: The regulations governing adjudicatory hearings before the Board may be found at California Code of Regulations, title 23, section 648 et seq., and are available online at: <http://www.waterboards.ca.gov>. Copies of these regulations will be provided upon request. Any procedures not provided by this Hearing Procedure are not applicable to this hearing. Except as provided in Section 648(b) and herein, Chapter 5 of the California Administrative Procedures Act (Gov. Code, § 11500 et seq.) does not apply to this hearing.

VI. Questions

Questions concerning this proceeding may be addressed to the Advisory Team attorney (contact information on the following page).

CONTACT INFORMATION: PRIMARY CONTACTS

Board Advisory Team*	
Adam Laputz, Assistant Executive Officer Central Valley Water Board Adam.Laputz@waterboards.ca.gov	Patrick Pulupa, Attorney III State Water Board Office of Chief Counsel Patrick.Pulupa@waterboards.ca.gov
Board Prosecution Team**	
Marty Hartzell, Senior Engineering Geologist Central Valley Water Board Marty.Hartzell@waterboards.ca.gov	Julie Macedo, Attorney IV State Water Board Office of Enforcement Julie.Macedo@waterboards.ca.gov
Sunoco, Inc.	California Dept. of Parks and Recreation
Kevin Dunleavy, Esq. krdunleavy@sunoco.com Adam Baas, Esq. and John Edgcomb, Esq. Edgcomb Law Group, LLP abaas@edgcomb-law.com jedgcomb@edgcomb-law.com	Kathryn Tobias, Senior Staff Counsel Kathryn.Tobias@parks.ca.gov
Jack and Carolyn Wessman	US Dept. of Interior, DMEA
Jack and Carolyn Wessman PO Box 949 Clayton, CA 94517	Clementine Josephson, Esq. and James Monroe, Esq., Office of Solicitor clementine.josephson@sol.doi.gov james.monroe@sol.doi.gov
Bradley Mining Company	Mt. Diablo Quicksilver Company
Peter Ton, Esq. Wactor & Wick LLP 180 Grand Avenue, Suite 950 Oakland, CA 94612 pton@ww-envlaw.com	Presumed dissolved (California Secretary of State No. C0030150)

* The Board's Advisory Team also includes: Alex MacDonald, Senior Water Resource Control Engineer

** The Board's Prosecution Team also includes: Pamela Creedon, Executive Officer, Robert Busby, Supervising Engineering Geologist; and David Boyers, Assistant Chief Counsel (OE)

CONTACT INFORMATION: INTERESTED PERSONS

Linda Wilcox, Deputy County Counsel
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Juan Galvan, Land Use Planner
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Bryan Montgomery, City Manager
City of Oakley
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IMPORTANT DEADLINES

All submissions must be received by 5:00 p.m. on the respective due date. Unless otherwise noted, documents only need to be submitted in electronic format by submitting electronic versions of the documents to the email addresses for the Board's Prosecution Team and Advisory Team listed in the "Primary Contacts" table on the previous page. All of the submitted documents will be promptly placed online. Please provide both unredacted and redacted versions of any documents that contain personal information that you do not want posted online.

Where *only* hard copies are being submitted, hard copies must be received by the date listed below. When hard copies are being submitted *in addition to* electronic copies, hard copies must be mailed by the date listed below.

6 Jan 2017	<ul style="list-style-type: none">▪ Advisory Team issues Draft Order to Revise CAO R5-2014-0124
12 Jan 2017	<ul style="list-style-type: none">▪ Objections due regarding this Hearing Notice and Procedure
6 Feb 2017	<ul style="list-style-type: none">▪ The Board's Prosecution Team, Sunoco, and any other Party named in CAO R5-2014-0124 whose rights may be affected by any of the proposed revisions to CAO R5-2014-0124 must submit all materials required under <i>IV. Submittal of Evidence, Legal and Technical Arguments or Analysis, and Policy Statements</i> by this deadline.▪ Interested Persons wishing to submit written comments on the proposed Order revising CAO R5-2014-0124 must submit them by this date.▪ If a Designated Party's submittals, including rebuttal, exceed 120 pages, the Designated Party shall identify which 120 pages should be printed out for the Board Members by this date. Designated Parties concerned about the print quality of their 120 pages of printed materials must provide an extra nine paper copies for the Board Members so that they are <u>received by</u> the Advisory Team by this date.▪ Requests for additional time should be made to the Board's Advisory Team on this date.
14 Feb 2017	<ul style="list-style-type: none">▪ All Designated Parties shall submit any rebuttal evidence and the names of each rebuttal witness (including witness qualifications, if an expert witness) by this date.
23/24 Feb 2017	<ul style="list-style-type: none">▪ Board Hearing