

TABLE 3-9

MERCURY, SEDIMENT, AND SULFATE LOADS FROM THE SULPHUR CREEK MINING DISTRICT
(Page 1 of 2)

Location	Total Mercury Load (kg/yr)	Methyl Mercury Load (kg/yr)	Sediment Load (kg/yr)	Sulfate Load (kg/yr)
UPPER CACHE CREEK BASIN				
Upper Bear Creek	0.0015	4.8×10^{-4}	--	--
Bear Creek above the confluence with Cache Creek	0.071 to 603	4.8×10^{-4} to 0.16	Up to 2.7×10^8	--
Sulphur Creek at Wilbur Springs	0.30 to 39	3.3×10^{-1} to 0.062	--	--
Sulphur Creek Watershed	0.51 to 160	--	--	--
Harley Gulch	0.018 to 2.3	7.3×10^{-5} to 0.004	--	--
Sum of Bear Creek, Sulphur Creek, and Harley Gulch	0.60 to 765	8.8×10^{-4} to 0.23	--	--
SPRINGS				
Turkey Run Spring	1.3×10^{-6} to 0.058	--	--	4.5×10^{10} to 1.5×10^{11}
Blank Spring	6.9×10^{-4} to 0.051	--	--	9.1×10^7 to 3.3×10^9
Jones Fountain of Life	0.002 to 0.032	--	--	9.1×10^7 to 1.8×10^8
Elbow	4.0×10^{-4} to 0.004	--	--	up to 9.1×10^7
Unnamed	9.8×10^{-4}	--	--	9.1×10^7 to 1.8×10^8
Wilbur	0.014 to 0.062	--	--	1.1×10^9 to 2.8×10^9
Elgin - Main	0.055 to 0.095	--	--	--
Elgin - Orange Tub	4.0×10^{-4}	--	--	4.5×10^8
Sum of Load from Springs***	0.18 to 0.30	--	--	4.7×10^{10} to 1.6×10^{11}
MINE SITES				
Abbott Mine	0.8 to 3.5	--	14,000 to 16,300	--
Turkey Run Mine	0.42 to 6.7	--	28,600 to 30,400	--
Sum of Abbott and Turkey Run Mines	1.22 to 10.2	--	42,500 to 46,700	--
Central Mine	0.0028 to 0.034	--	480 to 970	--
Empire Mine	0.04 to 0.06	--	270 to 360	--
Manzanita Mine	0.3 to 6.5	--	4,500 to 49,900	--
Cherry Hill Mine	None*	--	None*	--
West End Mine	0.002 to 1.1	--	Up to 1,630	--
Wide Awake Mine	0.02 to 0.44	--	360 to 7,300	--
Sum of Wilbur Springs Area Mines	0.4 to 8.2**	--	5,700 to 60,100	--

TABLE 3-9
(Page 2 of 2)

MERCURY, SEDIMENT, AND SULFATE LOADS FROM THE SULPHUR CREEK MINING DISTRICT

Location	Total Mercury Load (kg/yr)	Methyl Mercury Load (kg/yr)	Sediment Load (kg/yr)	Sulfate Load (kg/yr)
MINE SITES (continued)				
Elgin Mine	3.9 to 9.3	--	16,400 to 28,300	--
Clyde Mine	0.036 to 0.076	--	6,100 to 12,400	--
Sum of Upper Sulphur Creek Mines	3.94 to 9.4	--	79,100 to 263,700	--
Rathburn - Petray Mines	1.1 to 24.3*	--	8,400 to 116,100*	--
Sum of Bear Creek Mines	1.1 to 24.3*	--	8,400 to 116,100*	--
BACKGROUND				
Abbott and Turkey Run Site	0.078 to 0.24	--	--	--
Immediate Area of Sulphur Creek Mines	0.34 to 57	--	--	--

Notes:

- * = Material released from the site is not known to reach Sulphur or Bear creeks at this point.
- ** = Mercury release from Sulphur Creek bank erosion is uncertain
- *** = Aqueous mercury only, does not include precipitate bound mercury
- = Not calculated or not reported
- kg/yr = Kilogram per year

Sources:

Upper Cache Creek Basin: Domagalaki and Alpers 2001
 Springs: Goff and others 2001
 Mine Sites and Background: Churchill and Clinkenbeard 2002

Mercury in San Francisco Bay

Total Maximum Daily Load (TMDL) Proposed Basin Plan Amendment and Staff Report



Richard Looker / Bill Johnson

California Regional Water Quality Control Board
San Francisco Bay Region

September 2, 2004

**TABLE 4.7: Examples of Bay Margin Sites
with Elevated Mercury Concentrations**

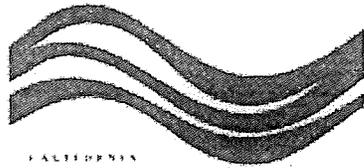
Site	Average Mercury Concentration (ppm)	Estimated Mercury Mass (kg)
Treasure Island Air Station – Area B	0.62	4.8
Treasure Island Air Station – Area E	0.51	1.0
Hamilton Army Air Field	0.6	3.0
U.C. Berkeley Richmond Field Station	16	130
Zeneca – Stege Marsh	5.2	22
Alameda Seaplane Lagoon	1.0	36
Castro Cove	2.3	4.4
Point Potrero	4.7	3.1
Pacific Dry Dock	1.3	NA
San Leandro Bay	0.77	3.0
San Francisco International Airport	1.9	NA

Source: URS 2002
NA = not available

threshold represent some of the most contaminated bay margin sites. Table 4.7 estimates the mass of mercury at each site (URS 2002). The extent to which this mercury enters San Francisco Bay and affects beneficial uses or influences mercury concentrations in the bay is unknown. However, the margin of safety discussed in Section 7, Allocations, is intended to account for this uncertainty. Moreover, Section 8, Implementation Plan, includes measures to investigate and address potential mercury effects from bay margin contaminated sites.

Key Points

- About 1,220 kg of mercury enters San Francisco Bay each year.
- The sources of mercury in San Francisco Bay include bed erosion (about 460 kg/yr), the Central Valley watershed (about 440 kg/yr), urban storm water runoff (about 160 kg/yr), the Guadalupe River watershed (about 92 kg/yr), direct atmospheric deposition (about 27 kg/yr), non-urban storm water runoff (about 25 kg/yr), and wastewater discharges (about 20 kg/yr).
- San Francisco Bay loses mercury as sediment is transported to the ocean through the Golden Gate (about 1,400 kg/yr), mercury evaporates from the bay surface (about 190 kg/yr), and dredged material is removed and disposed of (about 150 kg/yr, net).



CALIFORNIA
Water Boards
STATE WATER RESOURCES CONTROL BOARD
REGIONAL WATER QUALITY CONTROL BOARDS

REGIONAL WATER QUALITY CONTROL BOARD,
CENTRAL VALLEY REGION

**Sulphur Creek
TMDL for Mercury**

Final Staff Report

January 2007



CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

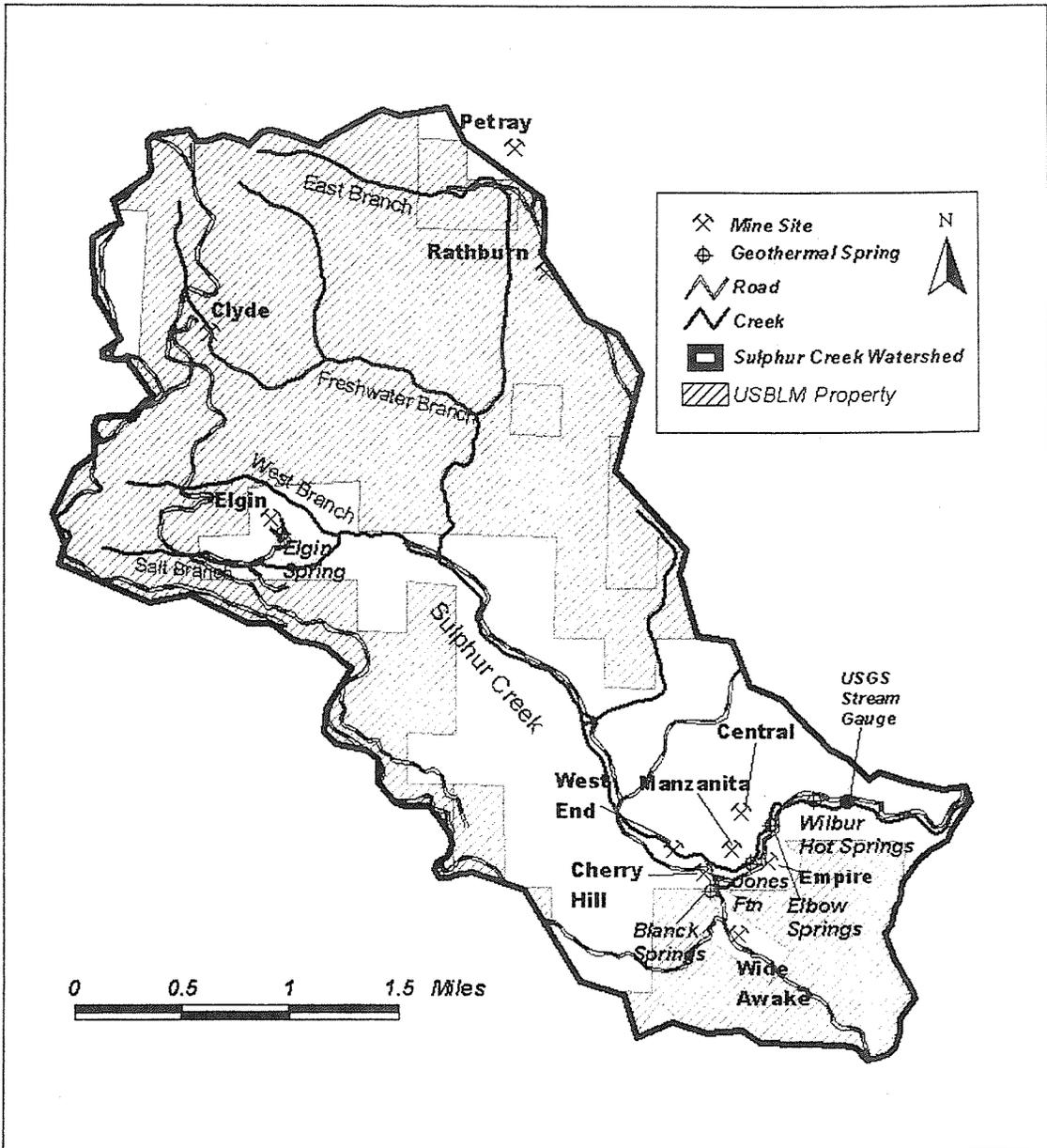


Figure 1.2 Sulphur Creek Watershed

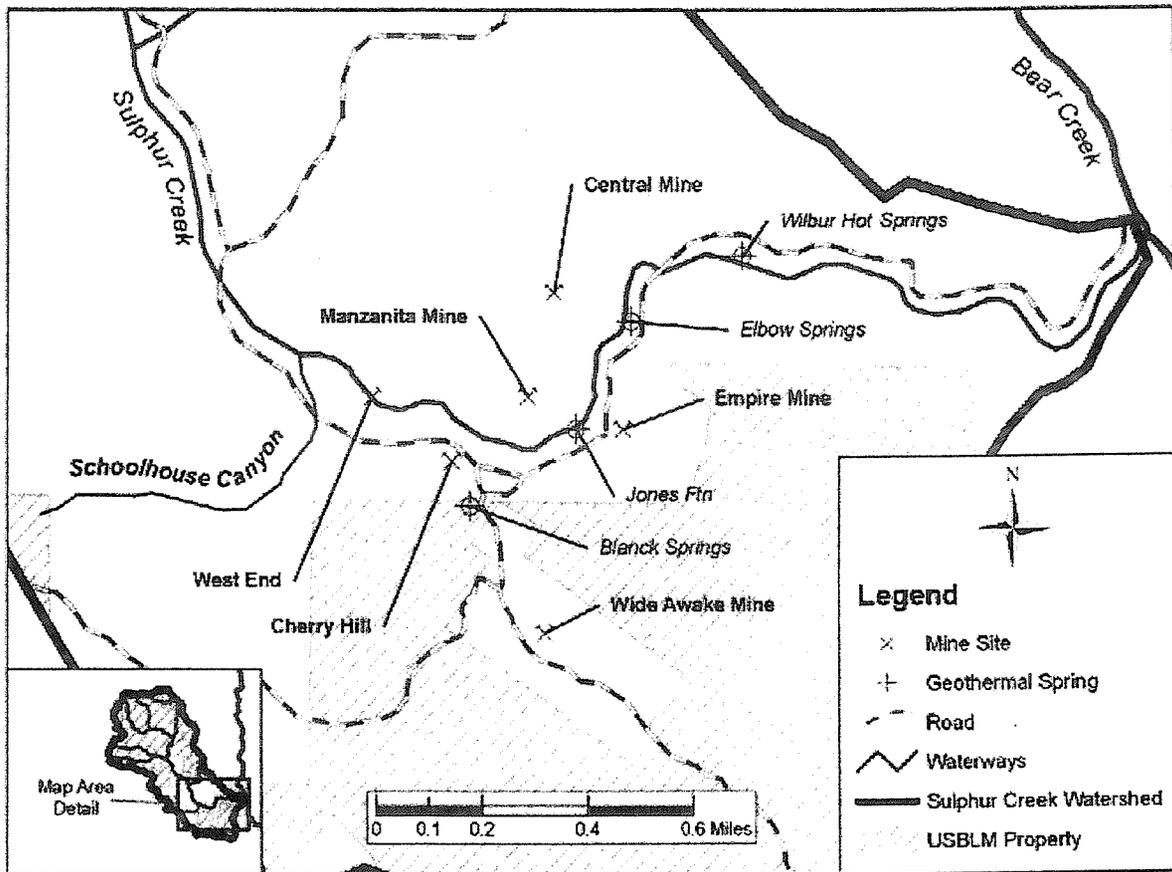


Figure 1.3. Lower Sulphur Creek, from Schoolhouse Canyon to the Mouth.

1.6 Toxicity of Mercury

1.6.1 Mercury Accumulation in Biota

Both inorganic mercury and organic mercury can be taken up from water, sediments, and food by aquatic organisms (Figure 1.3). Because organic mercury uptake rates are generally much greater than rates of elimination, methylmercury concentrates within organisms. Low trophic level species such as phytoplankton obtain most mercury directly from the water. Piscivorous (fish-eating) fish and birds obtain most mercury from contaminated prey rather than directly from the water (USEPA, 1997).

Repeated consumption and accumulation of mercury from contaminated food sources results in tissue concentrations of mercury that are higher in each successive level of the food chain. The proportion of total mercury that exists as the methylated form generally increases with level of the food chain (Nichols *et al.*, 1999). This occurs because inorganic mercury is less well absorbed and more readily eliminated than methylmercury.

Exhibit 14

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT
 UKIAH DISTRICT OFFICE
 555 Leslie Street
 Ukiah, California 95482-5599

IN REPLY REFER TO:
 CA-27838

NOV 0 4 1992

Memorandum

To: Manager, Clear Lake Resource Area

From: District Geologist

Subject: Property Examination of Robert Leal and Marilyn Kerwin Properties.

On Thursday November 5, 1992 Alice Vigil, Clear Lake Resource Area Realty Specialist, and I examined the Robert Leal and Marilyn Kerwin properties at Walker Ridge in an area on either side of Highway 20. The Leal property, north of the highway is predominately oak grass lands. The Wide Awake (Buckeye) Mine is located on this property at T.14 N., R.5 W., Section 29 SE4. The Buckeye workings were 600 feet northwest of the Wide Awake shaft on a deposit in serpentine adjoining a shale contact. These workings were largely superficial and produced a reported total of 6000 flasks of mercury, to a depth of 80 feet beginning in 1875. The Wide Awake Mine apparently operated from 1896 to 1900. According to an article by C.A. Logan of 1929 in the California Division of Mines, 25th No. 3, Report to the State Mineralogist, this mine was developed by a 470 foot shaft with development headings on the 190, 290, and 390 foot levels. Apparently little ore was mined and treated from this mine.

On the 290 foot level, a seepage of heavy paraffin-base oil was cut in 1900. This yielded oil at the rate of one-half barrel every 24 hours. During the period of 1896 to 1900 a Scott furnace of 24 tons capacity was built and a small amount of production made a few flasks of mercury. During the earthquake of 1906 this furnace was cracked according to Logan (1929).

Today the large brick furnace still remains on the mine site along with an extensive system of stone walls. The furnace is cracked but has withstood the rigors of time. Also at the mine site there are the ruins of possibly three other brick furnaces. There is a fenced in area that appears to have been the location of a house or housing for the miners. The shaft of the Wide Awake Mine has been filled in and its exact location is not evident. Several hundred feet north of the large brick furnace is a mine waste dump with a tippel, furnace, and metal retort. This appears to be newer than

the large brick Scott furnace.

The danger of there being large amounts of hazardous mercury at this site is probably minor. The waste rock from the mine and furnace on the mine dump would contain little or no mercury. There might be some mercury found in and around where mercury was removed from the retorts. It would be necessary to determine where these areas are and take soil samples to determine if there is any mercury contamination of the ground.

The rest of the Leal property was examined by driving the existing roads and no other area of possible hazardous material was seen.

The Kerwin property north of Highway 20 was examined by driving the road that goes southwest off of the Walker Ridge road to Highway 20. The property appears to be almost completely underlain by serpentinized rock. No surface disturbances other than the road was observed and no hazardous material or sites were observed.

Charles W. Whitcomb

EXHIBIT C

LAWRENCE S. BAZEL (State Bar No. 114641)
RICHARD J. WALLACE (State Bar No. 124286)
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
(415) 402-2700
Fax (415) 398-5630

Attorneys for
MR. AND MRS. ROBERT and JILL LEAL

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

In the matter of:

DRAFT CLEANUP AND ABATEMENT ORDER
THE WIDE AWAKE MERCURY MINE
COLUSA COUNTY

**OPPOSITION TO ALLEGATIONS OF LIABILITY
SUBMITTED BY MR. AND MRS. ROBERT AND JILL LEAL**

September 15, 2009

TABLE OF CONTENTS

1. INTRODUCTION1

2. MRS. LEAL THANKS THE REGIONAL BOARD STAFF2

3. STAFF CONCEDE THAT MR. LEAL IS NOT LIABLE
BECAUSE HE DID NOT RECEIVE NOTICE OF THE NUISANCE2

4. MR. LEAL IS ALSO NOT LIABLE
BECAUSE OF THE WENWEST FACTORS4

5. MR. LEAL IS NOT LIABLE UNDER SECTION 133044

 A. MR. LEAL DID NOT DISCHARGE OR DEPOSIT
 THE WASTE ROCK AT ISSUE5

 B. STAFF HAVE NO EVIDENCE OF A CONDITION
 OF POLLUTION OR NUISANCE6

6. IF MR. LEAL IS HELD LIABLE, HE SHOULD BE HELD
SECONDARILY LIABLE6

7. WITNESS IDENTIFICATION AND REQUEST FOR ADDITIONAL TIME6

8. CONCLUSION.....7

1. INTRODUCTION

Robert Leal is a farmer. His wife Jill is a housewife. He stands accused of owning the Wide Awake Mine Site (the "Site") for six months—between February 28, 1990 and August 15, 1990. He did not own the mining rights, which were owned by the Trebilcott Trust and leased to Homestake Mining. He did not and does not know anything about mercury mining, and never conducted any activities on the property. He visited the area only once, and appears not to have been to the Site itself, because he did not see the facilities and waste piles shown in the photographs provided by Regional Board staff. (Amended Declaration of Robert Leal (attached as Exhibit 1), ¶¶ 9-10.)

Earlier this year, Regional Board staff asked for comments on the proposed cleanup and abatement order (the "Draft Order"), and Mr. and Mrs. Leal submitted extensive comments (the "Comments") in July 2009. The Comments, with all their exhibits, have already been submitted as part of this proceeding, and are incorporated here in full by reference. For the convenience of the reader of this opposition brief, the Comments (without all their exhibits) are attached as Exhibit 2.

In the Comments, Mrs. Leal explained that she had never owned any interest in the Site. Regional Board staff have now concurred, and have removed her name from the order. In section 2, below, Mrs. Leal thanks staff for that correction.

The Comments also provided many reasons why Mr. Leal should not be held liable. Regional Board staff did not respond to the great majority of reasons and arguments provided by the Comments, and have thereby conceded them.

The hearing procedures established for the Draft Order required Regional Board staff (referred to as the "Prosecution Team") to submit, by August 26, 2009, "All evidence" other than witness testimony, and "All legal and technical arguments or analysis". (Revised Hearing Procedures, attached to e-mail from L.Okun dated August 3, 2009, at 6-8.) The hearing procedures emphasized that, in accordance with regulations, "the Central Valley Water Board endeavors to avoid surprise testimony." (*Id.* at 7.) Regional Board staff have therefore had their opportunity to present all their evidence and make all their arguments.

Particularly notable is the absence of any argument, by the Prosecution Team, that Mr. Leal had notice of the alleged nuisance. Both case law and State Board orders hold that a former owner of property cannot be held liable when that person was not on notice of the nuisance. As explained in section 3, below, Mr. Leal's name should be removed from the Draft Order because he was not on notice, and for the many other arguments asserted in the Comments.

Regional Board staff argue that Mr. Leal should be held liable in accordance with the *Wenwest* decision of the State Board. But that case that a former owner could be held liable only if he had notice, as explained in section 3 below. And then it went on to hold that a former

owner should not be held liable, even if it had notice, if it had no part in the activity that caused the waste, and if other factors argued in favor of no liability. These factors also exonerate Mr. Leal, as explained in section 4 below.

Regional Board staff rely on the language of Water Code § 13304. But a close look at § 13304, and at the evidence staff have submitted, show that the language of the section is not sufficient to hold Mr. Leal liable, as explained in section 5 below. The Draft Order is not directed at cleaning up any past discharges that may have occurred during Mr. Leal's ownership, but rather is directed only at preventing future discharges. Mr. Leal has no responsibility for any discharges that occurred after he sold the property.

To obtain an order under § 13304, staff must show that the discharges at issue have caused a condition of pollution or nuisance. But, remarkably, they have not been able to show any condition of pollution or nuisance. They have asserted that the discharges caused water quality objectives to be exceeded, but the argument is not supported by any identification of any objective that has been exceeded.

If Mr. Leal is held liable at all, he should be held secondarily liable, as explained in section 6 below.

Finally, in section 7 below, Mr. Leal identifies the witnesses he will call and requests a total of 3.5 hours for direct examination, cross-examination, and argument.

For all these reasons, Mr. Leal is not liable for the discharges covered by the Draft Order. His name should be removed from the order.

2. MRS. LEAL THANKS THE REGIONAL BOARD STAFF

In the Comments, Mrs. Leal explained that she has never owned the Site. (Comments at 3.) Regional Board staff responded by removing her name from the list of persons that would be subject to the cleanup and abatement order. Mrs. Leal thanks the Regional Board staff for removing her name.

3. STAFF CONCEDE THAT MR. LEAL IS NOT LIABLE BECAUSE HE DID NOT RECEIVE NOTICE OF THE NUISANCE

Regional Board staff do not dispute most of the legal arguments in the Comments. By declining to present any evidence or argument in response, staff have implicitly conceded many of the arguments made in the Comments. In particular, they have conceded that Mr. Leal is not liable because he was not aware that Site conditions were allegedly creating a nuisance.

The Comments explained that Water Code § 13304 "must be construed in light of common law principles . . . of public nuisance". (Comments at 4, quoting *City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, 38, quotation marks removed; excerpts from the case, with key language highlighted, are attached as Exhibit 3.) The section must also be construed consistent with State Board decisions about § 13304.

The Comments explained that, under both case law and State Board decisions, a former owner cannot be held liable if that owner did not have notice of the nuisance. The Comments first quotes the California Supreme Court, which in 1870 held that “a party who is not the original creator of a nuisance is entitled to notice that it is a nuisance, and a request must be made, that it may be abated, before an action will lie for that purpose”. (Comments at 6, quoting (*Grigsby v. Clear Lake Water Works Co.* (1870) 40 Cal. 396, 407; case excerpts attached as Exhibit 4.)

The same requirement—a former owner must have “knowledge” to be held liable—was adopted by the State Board in the *Wenwest* decision:

... we apply a three-part test to former owners: ... (2) did they have knowledge of the activities which resulted in the discharge?

(Comments at 13, quoting *Petitions of Wenwest, Inc.*, Order No. WQ 92-13 (1992) 1992 Cal. ENV LEXIS 19, at *5; case excerpts attached as Exhibit 5.)

Here Mr. Leal did not have notice, or knowledge, of the activities that resulted in the discharge. Regional Board staff are asserting that the discharge was from piles of waste rock. Staff have not submitted any evidence that Mr. Leal was aware of these conditions, and have not argued that he was aware.

In fact, Mr. Leal was not aware that mercury was being discharged from the Site. (Amended Leal Decl., ¶ 11.)

In short, both case law and State Board decisions make clear that Mr. Leal cannot be held liable for discharges from the Site because he was not aware of them at the time he owned an interest in it.¹

¹ Regional Board staff also do not dispute that former landowners are generally not liable for dangerous conditions on the land (Comments at 5-6), there is no evidence that the site was causing a nuisance in the early 1990s, or is causing a nuisance now (Comments at 7-10, see section 5.B below), Mr. Leal did not neglect to abate a continuing nuisance (Comments at 10-11), any mercury discharged in the early 1990s is long gone (Comments at 11-12), Mr. Leal should not be singled out for harsh treatment (Comments at 16), Mr. Leal, if he is named at all, should be named as secondarily liable (Comments at 16, see section 6 below), Mr. Leal is not liable under Water Code § 13267 (Comments at 18-19), and that the draft order is a “taking” in violation of the Constitution (Comments at 20). By not submitting any argument or evidence in response to these assertions, Regional Board staff have implicitly conceded them. Mr. Leal should be found not liable, and his name removed from the order, for all these reasons in addition to those set out in the text.

4. MR. LEAL IS ALSO NOT LIABLE BECAUSE OF THE WENWEST FACTORS

Regional Board staff cite the *Wenwest* decision of the State Board as one of the cases they are relying on. In *Wenwest*, the State Board decided that some former owners should *not* be held liable:

No order issued by this Board has held responsible for a cleanup a former landowner who had no part in the activity which resulted in the discharge of the waste and whose ownership interest did not cover the time during which that activity was taking place. . . .

In this case, the gasoline was already in the ground water and the tanks had been closed prior to the brief time Wendy's owned the site. They were told about the pollution problem . . . They took no steps to remedy the situation. On the other hand, they did nothing to make the situation any worse. Had a cleanup been ordered while Wendy's owned the site, it would have been proper to name them as a discharger. Under the facts as presented in this case, it is not.

(Comments at 14, quoting *Wenwest* at *6-7.) One of the key factors was Wendy's innocence:

* Wendy's had nothing to do with the activity that caused the leaks. (In previous orders in which we have upheld naming prior owners, they have been involved in the activity which created the pollution problem.)

(Comments at 14, citing *Wenwest* at *7-8.) Here, Mr. Leal is in the position that Wendy's was in (only he is even more innocent, because he did not know about the contamination, whereas Wendy's did). Mr. Leal did not put the waste rock where it is, or do anything else that might have made conditions worse. For the same reasons that Wendy was found not to be liable, Mr. Leal is not liable.

5. MR. LEAL IS NOT LIABLE UNDER SECTION 13304

Regional Board staff asserts that Mr. Leal is subject to a cleanup and abatement order under Water Code § 13304 because he "held title to the property during the time when the waste piles were discharging mercury and other pollutants to surface waters, which caused exceedances of water quality objectives." (Staff's submission for Robert Leal ("Staff Submission"), as attached to an e-mail from P. Pulupa dated August 26, 2009, at section entitled Legal Theory [etc].) Note that the alleged discharge is *from the waste piles* into surface waters. For several reasons, however, Mr. Leal is not liable under § 13304.

The authority to issue a cleanup and abatement order comes from Water Code § 13304, which provides as follows:

Any person . . . who has caused or permitted, causes or permits, or threatens to cause or permit any 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, shall upon order of the regional board, clean up the waste or abate the effects of the waste

(Water Code § 13304(a).) This language establishes that § 13304 (1) applies only to people who have caused or permitted waste to be discharged to waters of the state, or deposited where it will be discharged, (2) applies only when the waste creates or threatens a condition of pollution or nuisance, and (3) authorizes the Regional Board only to order cleanup of *that waste*. Here the draft order does not apply to Mr. Leal because he did not cause or permit the waste rock at issue to be discharged or deposited, and because Regional Board staff have not shown that the waste caused any exceedance of water quality objectives, or any other condition of pollution or nuisance.

A. Mr. Leal Did Not Discharge Or Deposit The Waste Rock At Issue

Regional Board staff have confused two different wastes. Mr. Leal stands accused of discharging mercury *from the waste piles to surface waters*. The wastes he is accused of discharging, therefore, are wastes that *left the site* nearly twenty years ago and are long gone. But the Draft Order does not require the named parties to investigate or abate any *offsite* wastes. Instead, the Draft Order is directed only at the *onsite* waste piles.

Staff do not accuse Mr. Leal of discharging or depositing the waste piles themselves, which are described as “waste rock” and “processed mill tailings”. (Staff Submission at sections entitled Legal Theory, Waste Located on the Site.) Mr. Leal did not discharge or deposit these waste piles at the site. (Amended Leal Decl., ¶ 7.)

In short, Mr. Leal has not “caused or permitted” these waste piles to be deposited onsite. He is therefore not subject to § 13304, which allows a Regional Board to order someone to “clean up the waste” *only* when that person has “caused or permitted” *that waste* to be “discharged to waters of the state, or deposited where it will be discharged”. Mr. Leal has not caused or permitted *the waste piles* to be discharged or deposited, and therefore is not responsible *for those piles*.²

Staff rely on the *Zoecon* decision, but *Zoecon* is readily distinguishable. First, *Zoecon* imposed liability on the *current owner*, not on a past owner. *Zoecon* explained that current owners may be issued waste discharge requirements—the case did not involve cleanup and abatement orders—because there is a continuing discharge of groundwater. The law

²Put another way, the Draft Order is directed only at abating *future discharges* from the waste piles. It is not directed at cleaning up *past discharges* from the waste piles. Mr. Leal is not responsible for any future discharges from the waste piles, and therefore should not be named in the Draft Order.

distinguishes between a current owner and a past owner. A current owner who “neglects to abate a continuing nuisance” is liable for that nuisance. (Civil Code § 3483.) However, with limited exceptions not relevant here, “liability is terminated upon termination of ownership and control”. (Comments at 5, quoting *Preston v. Goldman* (1986) 42 Cal. 3d 108, 110.)

Second, *Zoecon* concluded that the current landowner could be held liable because the groundwater at issue in that case continued to discharge, and the landowner could be held liable for the current discharge. Here staff assert that the waste piles continue to discharge. *Zoecon* supports the proposition that the current owner is liable for discharges from those waste piles into waters of the state. But it does not support the proposition that former owners can be held liable, because the former owners are no longer discharging anything from the Site.

B. Staff Have No Evidence Of A Condition Of Pollution Or Nuisance

Water Code § 13304 applies only when the waste “creates, or threatens to create, a condition of pollution or nuisance”. Staff assert that “the waste piles were discharging mercury and other pollutants to surface waters, which caused exceedances of water quality objectives.” (Staff Submission at section entitled Legal Theory.) But in their papers, staff do not identify which water quality objective is being exceeded. They do not provide any evidence of any exceedances, and do not make any argument in support of any exceedances.

Mr. Leal, in his Comments, explained that Regional Board staff had not provided any evidence of any exceedance of any water quality objectives, and the assertions made in the Draft Order are wrong, because the numerical “limits” identified are not Regional Board limits and plainly do not apply to Sulphur Creek. (Comments at 7-10.)

Regional Board staff did not respond, and have therefore waived any argument to the contrary.

In short, Mr. Leal is not liable under § 13304 because the Draft Order is directed only at discharges for which Mr. Leal is not responsible, and because Regional Board staff have not presented any evidence that any discharges cause a condition of pollution or nuisance.

6. IF MR. LEAL IS HELD LIABLE, HE SHOULD BE HELD SECONDARILY LIABLE

In the Comments, Mr. Leal argued that if he is held liable, he should be held secondarily liable. (Comments at 16.) Regional Board staff have not responded, and have therefore conceded this issue.

7. WITNESS IDENTIFICATION AND REQUEST FOR ADDITIONAL TIME

Counsel for Mr. Leal expects to call and cross-examine the following witnesses:

Witness	Subject	Time
Robert Leal	Knowledge of property and alleged nuisance	20 minutes
Jill Leal	If needed	10 minutes
Victor Izzo	Cross-examination about lack of Regional Board evidence on key issues, and in response to issues raised on direct	45 minutes
Other Regional Board witnesses	Cross-examination in response to issues raised on direct	15 minutes

In addition, counsel for Robert Leal requests 2 hours for argument, for a total of 3.5 hours of argument, direct examination, and cross-examination. This time is needed because Mr. Leal has submitted more than 25 single-spaced pages of argument, much of it undoubtedly new to members of the Regional Board. Mr. Leal will need time to explain the legal concepts to Regional Board members, who are mostly not lawyers. He will then need to apply the legal concepts to the evidence, or lack of evidence, in a way that is both accurate and understandable to non-lawyers. Regional Board staff will have the advantage of familiarity, and Mr. Leal will need extra time to compensate for their home-court advantage. He will also need extra time to respond to questions and concerns of members of the Regional Board, who will undoubtedly be hearing some of the issues raised for the first time.

8. CONCLUSION

Mr. Leal's name should be removed from the Draft Order.

Dated: September 15, 2009

BRISCOE IVESTER & BAZEL LLP



By: _____
 Lawrence S. Bazel
 Attorneys for MR. AND MRS. ROBERT
 AND JILL LEAL

Exhibit 1

LAWRENCE S. BAZEL (State Bar No. 114641)
RICHARD J. WALLACE (State Bar No. 124286)
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
(415) 402-2700
Fax (415) 398-5630

Attorneys for
MR. AND MRS. ROBERT and JILL LEAL

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

CENTRAL VALLEY REGION

In the matter of:

DRAFT CLEANUP AND ABATEMENT ORDER
THE WIDE AWAKE MERCURY MINE
COLUSA COUNTY

Amended Declaration of Robert Leal

I, Robert Leal, declare:

1. I am a person named in the Draft Cleanup and Abatement Order revised as of June 10, 2009 (the "Draft Order"). My business address is 950 Tharp Road, Suite 201, Yuba City, California 95993.

2. During the early 1990s, I owned a half interest in property identified by Attachment B to the Draft Order as the former Wide Awake Mine (the "Site"). I never at any time conveyed any interest in the Site to my wife, Jill Leal.

3. As part of the sale of my interest in the parcels that make up the Site, the title company insisted that my wife sign deeds conveying any interest she might have in the Site to me, even though she did not have any interest. I understood these deeds to be a formality that title companies insist on.

4. I am a farmer. I have never studied mining, and I have no knowledge about mining issues. I do not have any specific knowledge about mercury, its occurrence or movement in soil or water, its chemistry or biochemistry, or its toxicology or risk to human health or the environment. I never studied, and am not an expert in, chemistry, biochemistry, or toxicology.

5. I purchased a larger area of property (the "Property"), of which the Site was a relatively small portion, for investment purposes. I learned about the Property from Tom Nevis, who controlled Goshute Corporation. Mr. Nevis had arranged to purchase the property from Wells Fargo Bank, but needed money to complete the transaction. I provided that money, and in return received a half interest in the Property. The other half interest went to NBC Leasing, another corporation controlled by Mr. Nevis.

6. I never conducted any operations on the Property. I leased it out to the Harter Land Company, which used it for grazing.

7. I understand that waste materials from mining operations may be located on the Site. I did not place any of these materials, or direct anyone else to place them. I was not even aware that they existed on the Site until this year.

8. I am not certain when I was told that there was a former mine on the Site. The U.S. Bureau of Land Management provided me with an evaluation by their geologist dated November 6, 1992, which I understand will be submitted to the Regional Board as part of my comments. I do not remember when I received the document.

9. After I sold part of the Property to the Bureau of Land Management, I went to look for the former mine. I had assumed that it was a gold mine, and did not understand that it was a mercury mine. I was taken there by Roy Whiteaker, who was the real estate broker trying to sell the Site, and who owns Cal Sierra Properties, which eventually bought the Site to use for hunting. We never saw anything that looked like a mine. All we saw was a remnant of a brick structure. I did not see any piles of rock or other materials. I did not, and still do not, know what "tailings" are. Grass had grown over the area, and there was not much to see. I did not see anything that seemed like it might contain mercury. I did not, and still would not, know what mercury looked like even if I saw it. Other than that one visit, I have never been to the area.

10. I have reviewed photographs, provided by Regional Board staff, showing what they say are remnants of mining facilities and mining wastes at the Site. I did not see these facilities and wastes when I visited the area.

11. During the time I partly owned the Site I did not know that mercury might be leaving the Site. I did not know that anything on the Site might be causing a nuisance. No one ever informed me, during the time of my part ownership, that mercury might be leaving the Site or that anything on the Site might be causing a nuisance. I had absolutely no idea that I should be doing anything on the Site to protect public health or the environment.

I hereby declare under penalty of perjury under the laws of the State of California that the statements made in this declaration are true and correct.

Dated: September 15, 2009



Robert Leal

Exhibit 2

LAWRENCE S. BAZEL (State Bar No. 114641)
RICHARD J. WALLACE (State Bar No. 124286)
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
(415) 402-2700
Fax (415) 398-5630

Attorneys for
MR. AND MRS. ROBERT and JILL LEAL

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

In the matter of:

DRAFT CLEANUP AND ABATEMENT ORDER
THE WIDE AWAKE MERCURY MINE
COLUSA COUNTY

**COMMENTS ON DRAFT ORDER
AND REQUEST FOR EVIDENTIARY HEARING
SUBMITTED BY MR. AND MRS. ROBERT AND JILL LEAL**

TABLE OF CONTENTS

1. INTRODUCTION1

2. THE REGIONAL BOARD MUST PROVIDE DUE PROCESS AND AN EVIDENTIARY HEARING2

3. THE REGIONAL BOARD HAS THE BURDEN OF PROOF2

4. MR. AND MRS. LEAL ARE PEOPLE, NOT CORPORATIONS3

5. MRS. LEAL NEVER OWNED ANY INTEREST IN THE PROPERTY.....3

6. MR. LEAL IS NOT APPROPRIATELY NAMED IN THE ORDER BECAUSE HE IS NOT LIABLE UNDER THE COMMON LAW OF NUISANCE.....4

 A. Former Landowners Are Generally Not Liable For Dangerous Conditions On The Land5

 B. Mr. Leal Is Not Liable Because He Did Not Receive Notice Of The Nuisance6

 C. There Is No Evidence That The Site Was Causing A Nuisance In The Early 1990s—Or That It Is Causing A Nuisance Now7

 D. Mr. Leal Did Not “Neglect” To Abate A Continuing Nuisance.....10

 E. Any Mercury Discharged In The Early 1990s Is Long Gone11

7. MR. LEAL IS NOT SUBJECT TO WATER CODE § 13304.....12

8. MR. LEAL IS NOT LIABLE UNDER STATE BOARD DECISIONS13

9. MR. LEAL SHOULD NOT BE SINGLED OUT FOR HARSH TREATMENT.....16

10. IF MR. LEAL IS NAMED, HE SHOULD BE NAMED AS SECONDARILY LIABLE16

11. IF MR. LEAL IS LIABLE, HE IS SEVERALLY LIABLE16

12. THE DRAFT ORDER EXCEEDS THE AUTHORITY OF § 1330417

13. MR. LEAL IS NOT LIABLE UNDER § 1326718

14. THE DRAFT ORDER IS A “TAKING” IN VIOLATION OF THE CONSTITUTION20

15. CONCLUSION.....20

1. INTRODUCTION

On June 11, 2009, staff of the California Regional Water Quality Control Board, Central Valley Region (the "Regional Board") e-mailed counsel for Mr. and Mrs. Robert and Jill Leal a revised draft, identified in a footer as "Rev 06-10-09", of a cleanup and abatement order for the Wide Awake Mine in Colusa County (the "Draft Order"). Mr. and Mrs. Robert and Jill Leal are named in that order, and are referred to as "Dischargers". (Draft Order at 1, unnumbered heading, and 2, ¶ 5.) Mr. and Mrs. Leal request that their names be removed from the order before it is issued in final.

Mr. and Mrs. Leal request an evidentiary hearing and the Constitutional protections of due process they are entitled to, as explained in sections 2 and 3 below.

Although Mr. and Mrs. Leal are identified in the Draft Order as a corporation, they are actually real living people, as explained in section 4.

Mrs. Leal should be removed from the order because she never owned the Site, as explained in section 5. She should also be removed for the same reasons that Mr. Leal should be removed.

Mr. Leal should be removed from the order for many reasons. In particular, he should be removed because Water Code § 13304 implements common-law principles of nuisance, and Mr. Leal is not liable under these principles, as explained in section 6. He is therefore not liable under § 13304, as explained in section 7. He should be removed from the order consistent with decisions of the State Water Resources Control Board ("State Board"), as explained in section 8, and should not be singled out for harsh treatment when other individuals are let go, as explained in section 9. If his is named he should be named as secondarily liable, as explained in section 10.

The Draft Letter appears to assume that the named parties are all "jointly" liable for any abatement work. But because they did not act together, there are only "severally" liable, meaning liable only for their share, as explained in section 11. Mr. Leal's share should be set at zero.

Water Code § 13304 allows the Regional Board, in some circumstances, to require dischargers to clean up *their* wastes. But Mr. Leal is not being ordered to clean up *his* waste; he is being ordered to clean up someone else's waste. The Draft Order therefore exceeds the Regional Board's authority under § 13304, as explained in section 12.

The Draft Order also cites Water Code § 13267 for authority, but Mr. Leal is not liable under § 13267, as explained in section 13.

The Draft Order is directed either at mercury *now* leaving the area where the Wide Awake Mine was, or at mercury waste brought out of the mine and placed on the surface in the nineteenth century. Either way, Mr. Leal is being unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. The Regional Board is therefore "taking" Mr. Leal's property (i.e. his money) in violation of the Constitution, as explained in section 14. The Regional Board should reimburse him for any costs incurred.

2. THE REGIONAL BOARD MUST PROVIDE DUE PROCESS AND AN EVIDENTIARY HEARING

The issuance of a cleanup and abatement order is a quasi-judicial action, and due process applies:

In considering the applicability of due process principles, we must distinguish between actions that are legislative in character and actions that are adjudicatory. In the case of an administrative agency, the terms "quasi-legislative" and "quasi-judicial" are used to denote these differing types of action. . . .quasi-judicial acts involve the determination and application of facts peculiar to an individual case. Quasi-legislative acts are not subject to procedural due process requirements while those requirements apply to quasi-judicial acts regardless of the guise they may take. . . .

(*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal. App. 4th 1160, 1188, citations omitted.) In *Beck Development*, the Department of Toxic Substances Control attempted "to restrict the use of Beck's property based upon facts peculiar to that property", which, the court concluded, was "unquestionably quasi-judicial in nature and must comport with requirements of due process." Here the determination of facts related to whether Mr. and Mrs. Leal are responsible for an alleged nuisance is unquestionably quasi-judicial.¹

Because the issuance of the Draft Order is quasi-judicial, the provisions of 23 CCR § 648 et seq. apply. Consistent with these provisions, Mr. and Mrs. Leal request a formal evidentiary hearing and an opportunity to cross-examine witnesses.

They also request an opportunity to consider and respond to any evidence or argument submitted by Regional Board staff in response to these comments.

3. THE REGIONAL BOARD HAS THE BURDEN OF PROOF

Regional Board staff sometimes respond to evidence offered by private parties by saying that they are not convinced. In the *Beck Development* case, DTSC "insisted that Beck had failed to convince it that the property is nonhazardous." (*Beck Development*, 44 Cal.App.4th at 1206.) Here, it will not be enough for Regional Board staff to say that they are not convinced, because they have the burden of proof. They must submit sufficient evidence to prove that the Regional Board has authority to order Mr. and Mrs. Leal to conduct the cleanup and abatement activities required by the order.

¹ Chief Counsel for the State Board has confirmed that cleanup and abatement orders are adjudicative. (Memo from M. Lauffer, Chief Counsel, State Water Resources Control Board (August 2, 2006), attached as Exhibit 1 at 2.)

4. MR. AND MRS. LEAL ARE PEOPLE, NOT CORPORATIONS

The Draft Order asserts that “The parties listed in Attachment B . . . are known landowners . . . of the Mine site”. (Draft Order at 2, ¶ 5.) Attachment B incorrectly lists “Robert and Jill Leal” as “Owner”, for specified intervals, of Parcels 3, 9, 11, and 12. In the last column of Attachment B, which asks whether the owner is a “State Registered Corporation”, the answers given are “Yes—current agent” for Parcel 3, “Yes” for Parcel 9, and “Yes—active” for Parcels 11 and 12. These answers are all wrong, because Mr. and Mrs. Leal are not a corporation. They are individual people.

5. MRS. LEAL NEVER OWNED ANY INTEREST IN THE PROPERTY

A person “cannot be held liable for the defective or dangerous condition of property which it did not own, possess, or control.” (*Preston v. Goldman* (1986) 42 Cal. 3d 108, 119, quoting *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 134.) Mrs. Leal does not own, possess, or control any of the property at issue, and never has. She therefore cannot be held liable for any condition on that property, and her name should be removed from the Draft Order.

Numbering of the parcels involving the “Wide Awake Mercury Mine Property” has changed over the years. According to Attachment B to the Draft Order, the mine property was originally part of assessor parcel number 018-200-003-000 (“Parcel 3”).² In May 1993 Parcel 3 was split into smaller parcels, and parcel 018-200-009-000 (“Parcel 9”) became what Attachment B refers to as the “Mine Property” (the “Site”). In 1995 Parcel 9 was split into three smaller parcels, 018-200-010-000 (“Parcel 10”), 018-200-011-000 (“Parcel 11”), and 018-200-012-000 (“Parcel 12”). A figure showing Parcels 10, 11, and 12 (i.e. the Site) is attached as Exhibit 2.

Attachment B incorrectly lists “Robert and Jill Leal” as “Owner”, for specified intervals, of Parcels 3, 9, 11, and 12. Mrs. Leal never owned any interest in any of the parcels. Attached as Exhibit 3 is the deed by which Mr. Leal received his interest in part of Parcel 3. As you can see, the interest was granted to “ROBERT LEAL, a married man, as his sole and separate property”. As a matter of law, when a man obtains property as his “separate” property, he alone owns the property, and his wife does not own any part of it. (Cal. Family Code § 752 (“[e]xcept as otherwise provided by statute, neither husband nor wife has any interest in the separate property of the other”); *Huber v. Huber* (1946) 27 Cal.2d 784, 791 (“[r]eal property purchased with the separate funds of the husband is his separate property”).)

The Regional Board’s files contain no deed showing any conveyance of any interest in the Site to Mrs. Leal. Mr. Leal never conveyed any part of the Site to Mrs. Leal. (Declaration of Jill Leal, attached as Exhibit 4, ¶ 2; Declaration of Robert Leal, attached as Exhibit 5, ¶ 2.) At no time did anyone convey any interest in the Site to Mrs. Leal. (Ex. 4, ¶ 2.) Mrs. Leal never owned any interest of any nature in the Site. Mrs. Leal, therefore, never had any ownership interest in the Site. Nor did she operate the Site or conduct operations of any nature on the Site. (*Id.*)

² But see footnote 4 below.

The Draft Order is therefore wrong when it asserts that “[a]ll of the parties named in this order either owned the site at the time when a discharge of mining waste into the waters of the state took place, or operated the mine, thus facilitating the discharge of mining waste into waters of the state.” (Draft Order at 2, ¶ 5.) Mrs. Leal neither owned the Site nor operated it.

Regional Board staff may have been misled by the deeds *from* Mrs. Leal to Mr. Leal. The Regional Board files include three deeds of this type, and they are attached as Exhibits 6, 7, and 8. These deeds were issued not because Mrs. Leal actually had any interest to transfer to Mr. Leal, but because title companies demand these deeds when a married man sells his property. (Declaration of Richard J. Wallace, attached as Exhibit 9, ¶¶ 4-6.) Title companies believe that deeds of this type protect them against the hypothetical possibility that the wife might have an interest that might not be transferred when the husband sells. They reason that *if* the wife has an interest, the deed will transfer it to the husband, who will then transfer it as part of the sale; and if the wife does not have an interest, she cannot object to signing a deed that gives away nothing. That is what happened here. (Ex. 4, ¶ 3; Ex. 5, ¶ 3.) .) In each case, the deed transferred nothing, because Mrs. Leal had never obtained any interest in any of the parcels from Mr. Leal or anyone else. (Ex 4, ¶ 2.)

In short, Mrs. Leal should be taken off the order because she never owned or operated the Site.

Mrs. Leal should also be taken off the order for the reasons her husband’s name should be taken off, as described in sections 6-14 below.³

6. MR. LEAL IS NOT APPROPRIATELY NAMED IN THE ORDER BECAUSE HE IS NOT LIABLE UNDER THE COMMON LAW OF NUISANCE

In 2004, the California Court of Appeal concluded that Water Code § 13304 “must be construed ‘in light of common law principles bearing upon the same subject’—here the subject of public nuisance”. (*City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, 38, quoting *Leslie Salt Co. v. San Francisco Bay Conservation And Development Commission* (1984) 153 Cal. App. 3d 605, 619.) In *Leslie Salt*, the court “emphasized” that the act it was construing “represents the exercise by government of the traditional power to regulate public nuisances”:

It needs to be emphasized at this point that the [act] is the sort of environmental legislation that represents the exercise by government of the traditional power to regulate public nuisances. Such legislation constitutes but a sensitizing of and refinement of nuisance law. Where, as here, such legislation does not expressly purport to depart from or alter the common law, it will be

³ As explained in her declaration, Mrs. Leal lacks any knowledge about mining, mercury, and their consequences. Nothing put her on notice that the Site might be causing a nuisance. (Ex. 4, ¶¶ 4-9.)

construed in light of common law principles bearing upon the same subject.

(*Leslie Salt* at 618-619, citations and quotation marks omitted.) Now that *City of Modesto* has established that § 13304 “must be construed in light of common law principles bearing upon . . . public nuisance”, the Regional Board must consider these common-law principles. (See *City of Modesto* at 38, quotation marks omitted.) To the extent that decisions of the State Board are contrary to these common-law principles (see section 8 below), the State Board decisions are no longer good law.

Common-law principles establish that Mr. Leal is not liable for the nuisance identified in the Draft Order. The following sections explain that former landowners are generally not liable for dangerous conditions on the property, and that the exception for continuing public nuisances does not apply to Mr. Leal.

A. Former Landowners Are Generally Not Liable For Dangerous Conditions On The Land

In the *Goldman* case, the California Supreme Court concluded that former owners are generally not liable for dangerous conditions on property they no longer own, even if the danger was created by their own negligence:

Should former owners, allegedly negligent in constructing an improvement on their property, be subject to liability for injuries sustained on that property long after they have relinquished all ownership and control? The Restatement Second of Torts proposes that *liability is terminated upon termination of ownership and control* except under specified exceptions, and we agree.

(*Preston v. Goldman* (1986) 42 Cal. 3d 108, 110, emphasis added.) After a full review of the Restatement and case law, the Supreme Court concluded that it “should not depart from the existing rules restricting liability of predecessor landowners.” (*Id.* at 125.)

Here, Mr. Leal is a former part-owner of the Site.⁴ Under the *Preston* rule, he is no longer liable for conditions on the property unless an exception applies.

The only exception that may be relevant here is found in Civil Code § 3483, which provides that “Every successive owner of property who *neglects* to abate a continuing nuisance upon, or in the use of, such property, created by the former owner, is liable therefor in the same manner as the one who first created it.” (Civil Code § 3483, emphasis added.) The following

⁴ The Site, as referred to in the Draft Order, consists of Parcels 10, 11, and 12. (See section 5 above.) The deed with which Mr. Leal obtained his interest did not include what are now Parcels 11 and 12. (Ex. 9, ¶ 3.) There is no other evidence that Mr. Leal ever owned what is now Parcels 11 and 12. He therefore is not responsible for any discharges or activities related to that portion of the Site.

sections explain why Mr. Leal is not liable under this section. First, he did not receive notice of the nuisance, which is required for liability. Second, the alleged nuisance did not come into being until after Mr. Leal sold the property. Third, even assuming that there was a continuing nuisance, he did not “neglect” to abate it. Fourth, any mercury discharged during the early 1990s cannot be causing the alleged nuisance.

B. Mr. Leal Is Not Liable Because He Did Not Receive Notice Of The Nuisance

The California Supreme Court decided long ago that a person may not be held liable for a continuing nuisance without notice of the nuisance:

The rule seems to be well established that a party who is not the original creator of a nuisance is entitled to notice that it is a nuisance, and a request must be made, that it may be abated before an action will lie for that purpose, unless it appear that he had knowledge of the hurtful character of the erection. This rule . . . is adopted for the reason that it would be a great hardship to hold a party responsible for consequences of which he may be ignorant.

(*Grigsby v. Clear Lake Water Works Co.* (1870) 40 Cal. 396, 407.) As discussed in section 8 below, State Board decisions have recognized that a person cannot be held liable without notice. Here, Mr. Leal did not receive notice “that it is a nuisance”.

Mr. Leal is a farmer. (Ex. 5, ¶ 4.) He has never studied mining, and has no knowledge about mining issues. He does not have any specific knowledge about mercury, its occurrence or movement in soil or water, its chemistry or biochemistry, or its toxicology or risk to human health or the environment. (*Id.*)

Mr. Leal did not know that there was a former mine on the Site when he purchased his interest in the property. (*Id.*, ¶ 5.) He purchased a larger area of property (the “Property”), of which the Site was a relatively small portion, for investment purposes. He learned about the Property from Tom Nevis, who controlled Goshute Corporation. Mr. Nevis had arranged to purchase the property from Wells Fargo Bank, but needed money to complete the transaction. Mr. Leal provided that money, and in return received a half interest in the Property. The other half interest went to NBC Leasing, another corporation controlled by Mr. Nevis.

Mr. Leal never operated any of the Property, but rather leased it out to the Harter Land Company, which used it for grazing. (*Id.*, ¶ 6.)

Mr. Leal did not learn that there was a former mine on the Site until he was trying to sell his part interest to the U.S. Bureau of Land Management. (*Id.*, ¶ 7.) After Mr. Leal found out about the former mine, he went to look for it. He had assumed that it was a gold mine, and did not understand that it was a mercury mine. He was taken to the Site by Roy Whiteaker, who was the real estate broker trying to sell the Site, and who owns Cal Sierra Properties, which eventually bought the Site to use for hunting. During that visit, Mr. Leal never saw anything that looked like a mine. All he saw was a remnant of a brick structure. He did not see any piles of rock or other materials. He did not, and still does not, know what “tailings” are. Grass had grown over the area, and there was not much to see. He did not see anything that seemed like it

might contain mercury. He did not, and still would not, know what mercury looked like even if he saw it. Other than that one visit, he has never been to the Site. (*Id.*, ¶ 8.)

During the time Mr. Leal partly owned the Site he did not know that mercury might be leaving the Site. He did not know that anything on the Site might be causing a nuisance. No one ever informed him, during the time of his part ownership, that mercury might be leaving the Site or that anything on the Site might be causing a nuisance. He had absolutely no idea that he should be doing anything on the Site to protect public health or the environment. (*Id.*, ¶ 9.)

The condition of the Site, therefore, did not put Mr. Leal on notice of any nuisance, and no one informed him that there might be a nuisance.⁵

C. There Is No Evidence That The Site Was Causing A Nuisance In The Early 1990s—Or That It Is Causing A Nuisance Now

The nuisance alleged in the Draft Order is not the kind that could have been observed by Mr. Leal, or by anyone else, during the time he partly owned the Site. The Draft Order provides no evidence that the Site was causing a nuisance in the early 1990s—there is no evidence, in fact, that it is causing a nuisance *now*.

The Regional Board did not establish numerical criteria for mercury in Sulphur Creek until 2007. (Resolution No. R5-2007-0021.)⁶ That resolution established two standards, one for low-flow conditions (1,800 ng/L of total mercury), and one for high-flow conditions (ratio of mercury to total suspended solids not to exceed 35 mg/kg). (*Id.*, Attachment 1 at 2.)

The Draft Order does not mention either of these criteria. The only reasonable conclusion is that there is no evidence that either of these criteria is being exceeded.

Instead, the Draft Order identifies four “limits” that are imported from agencies other than the Regional Board. (Draft Order at 5, ¶ 26.) The Draft Order asserts that these “numerical limits for [methylmercury, total mercury, and inorganic mercury] implement the Basin Plan objectives for mercury and methylmercury in Sulphur Creek.” This statement is plainly incorrect, because the real Basin Plan objectives have no relationship to these four “limits”. Worse still, the four “limits” plainly *do not apply* to Sulphur Creek.

⁵ Regional Board staff may be tempted to argue that Mr. Leal is liable, even though he did not receive notice during the time of his ownership, because he has received notice *now*. But Mr. Leal does not *now* own any interest in the Site. If he is to be held liable for a nuisance resulting from his part ownership of the Site, he must have received notice while he was part owner. Anything else would violate *Grigsby*, which explained that notice is required because “it would be a great hardship to hold a party responsible for consequences of which he may be ignorant”. (*Grigsby*, 40 Cal. at 407.)

⁶ Resolution available at http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/resolutions/r5-2007-0021.pdf

These limits are intended to protect supplies of *drinking water* and the human consumption of fish.⁷ But the Regional Board has made clear that natural conditions in Sulphur Creek preclude the use of the creek for drinking-water supply or fish consumption:

Studies have been completed evaluating the attainability of the municipal and domestic supply (MUN) beneficial use and the human consumption of aquatic organisms, which concluded that these beneficial uses are not existing and cannot be attained in Sulphur Creek from Schoolhouse Canyon to the mouth due to natural sources of dissolved solids and mercury.

(Resolution R5-2007-0021 at 1, ¶ 8.)

The table in ¶ 26 should therefore be removed from the Draft Order. It imposes only requirements designed to protect drinking water and fish consumption, but Sulphur Creek is not used for drinking water or fish consumption. Nor is it protected for these uses, because natural conditions prevent their attainment.

So what *is* the nuisance being alleged in the Draft Order? Note that the former mine itself is not alleged to be causing a nuisance. It has apparently been sealed. The only concern identified in the Draft Order is the erosion of material from piles of mining wastes into Sulphur Creek. (*Id.* at 3-4, ¶¶ 14-20.) The Draft Order identifies, in particular, about 20,000 cubic yards of “tailings” and up to 8,000 cubic yards of “waste rock” at the Site.

According to the Draft Order, mercury eroded from the Site causes Sulfur Creek to exceed its water-quality objectives. The named parties have “caused or permitted waste to be discharged”, and this waste has affected Sulphur Creek by “exceeding applicable” water-quality objectives, thereby creating “a condition of pollution or nuisance”. (Draft Order at 6, ¶ 32.) The exceeded water-quality objectives, however, are those four numbers, discussed above, that cannot apply to Sulphur Creek. So this argument is plainly wrong.

Although the Draft Order argues that the four numbers in the table “implement the narrative objectives”, the Draft Order never asserts that discharges from the Site cause violations of the narrative objectives themselves. (*See* Draft Order at 5, ¶ 26.) The relevant narrative objective, as it exists now, specifies that “All waters shall be maintained free of toxic substances in concentrations that produce detrimental physiological responses in human, plant, animal, or aquatic life.” (Basin Plan⁸ at III-8.01.) This narrative criterion does not require that Sulphur

⁷ The first “limit” in the table is identified as “a drinking water standard”. The second is for “fish tissue”. The third is for “human health protection”, which considers exposure through both drinking water and fish consumption. The fourth is a “public health goal”, which applies to drinking water. Public health goals are goals, not enforceable limits.

⁸ The Water Quality Control Plan (Basin Plan) For The California Regional Water Quality Control Board Central Valley Region, Fourth Edition, Revised October 2007 (with Approved Amendments), The Sacramento River Basin And The San Joaquin River Basin (http://www.swrcb.ca.gov/rwqcb5/water_issues/basin_plans/sacsjr.pdf)

Creek be maintained free of all toxic substances, which of course would be impossible, but only free of toxic substances that are present “in concentrations that produce detrimental physiological responses”. The Draft Order does not identify any “detrimental physiological responses”, and does not assert that the Site causes any detrimental physiological responses in Sulphur Creek.

The reason, no doubt, is that Regional Board staff do not have evidence to prove a causal connection between *particulate* mercury from the mines, which is a relatively minor concern, and *methylmercury* in fish, which might produce the “detrimental physiological response” required for a violation of the narrative criterion. Any connection between the two would depend on complicated reactions that vary from site to site:

Historic mining activities in the Cache Creek watershed have discharged and continue to discharge large volumes of inorganic mercury (termed total mercury) to creeks in the watershed. . . .

Total mercury in the creeks is converted to methylmercury by bacteria in the sediment. The concentration of methylmercury in fish tissue is directly related to the concentration of methylmercury in the water. The concentration of methylmercury in the water column is controlled in part by the concentration of total mercury in the sediment and the rate at which the total mercury is converted to methylmercury. The rate at which total mercury is converted to methylmercury is variable from site to site, with some sites (i.e., wetlands and marshes) having greatly enhanced rates of methylation.

(*Id.* at IV-33.04.) In Sulphur Creek fish do not appear to be present, and people do not drink the water. As a result, there does not appear to be anything that would demonstrate a “detrimental physiological response”.

It is also difficult to blame the mines for the mercury in Sulphur Creek, because most of the mercury in the water comes from natural hot springs:

Active hydrothermal springs constantly discharge into Sulphur Creek, with mercury concentrations ranging from 700 to 61,000 nanograms per liter

. . . dissolved mercury comprises as much as 90 percent of the total mercury in Sulphur Creek. Dissolved mercury appears to be released by the active hydrothermal system, whereas particulate-bound mercury . . . comes from sediments and mercury-bearing mine waste mobilized into the creek during storms.

(Draft Order at 3-4, ¶¶ 19-20.) With so much mercury coming from natural sources, and because there appears to be nothing in the creek that might suffer a “detrimental physiological response”, Regional Board staff cannot demonstrate that discharges from the Site cause the narrative

criterion to be violated. They cannot demonstrate a causal connection now, and they certainly cannot demonstrate a causal connection from the early 1990s, when there were no data.⁹

The Draft Order also asserts that “[m]ine waste at this Mine may also pose a threat to human health due to exposure (dermal, ingestion, and inhalation) through recreational activities (hiking, camping, fish, and hunting) or work at the site.” (Draft Order at 4, ¶ 21.) But there is no evidence that the public uses the Site for hiking, camping, and hunting, which of course would be a trespass on private property. The Regional Board can safely assume that no one uses the Site for fishing, because there is no water on the Site. It is also a distance from Sulphur Creek, which in any case does not appear to maintain sport fish. Without considerable public use, there cannot be a *public* nuisance, as that term is used in the Civil Code, because a public nuisance “affects at the same time an entire community or neighborhood, or any considerable number of persons”. (Civil Code § 3480.) The Water Code uses this same language to define “nuisance”. (Water Code § 13050(m), (m)(2).) There must, in short, be evidence of considerable public use of the Site to establish an onsite nuisance that would be subject to a cleanup and abatement order. There is certainly no evidence of any public use of the Site in the early 1990s, and it therefore cannot have created an onsite nuisance then.

D. Mr. Leal Did Not “Neglect” To Abate A Continuing Nuisance

As noted in section 6.A above, Civil Code § 3483 holds a successor landowner who *neglects* to abate a continuing nuisance liable for that nuisance. The word “neglect” carries a connotation that the person was negligent or otherwise at fault. (*See Delaney v. Baker* (1999) 20 Cal. 4th 23, 34 (statute defines nursing-home neglect as a “negligent failure”).) Here there is no evidence of any negligence or fault by Mr. Leal.

Mr. Leal never conducted any mining operations, or any other operations, on the Site. He leased the property out to someone who used it for grazing. Mr. Leal did not know the former mine existed until he tried to sell the Site. When he visited the Site he saw nothing to suggest that the Site was causing any sort of problem. No one ever notified him that the Site could be causing a nuisance. (Ex. 5, ¶ 9.)

In 2003, CalFed published a study on mercury loading from former mines in the area, and on measures needed to abate the loading. (CalFed Cache Creek Study, Task 5C2 (September 2003)¹⁰.) The report concluded that an interim action was *not* needed: “Mitigation of mercury loading using an interim action is not warranted due to the anticipated small load reduction.” (*Id.* at 9-32.) If interim action was not appropriate even in 2003, when sufficient data had been

⁹ If the Site were so clearly causing a nuisance in 1995, then why didn’t Regional Board staff put Mr. Leal on notice of the nuisance? By 1995, the Regional Board was working with a Cache Creek group, in a collaborative process, to determine “water quality goals” for mercury, understand “transport and fate of mercury”, and “identify and evaluate source releases”. (Webpage describing Delta Tributaries Mercury Council, attached as Exhibit 10, at 1-2.)

¹⁰ Report available at <http://mercury.mlml.calstate.edu/wp-content/uploads/2008/12/finalrpt-task-5c2-final-scnd-eeca-sept-2003.pdf>

collected to evaluate the issue, Mr. Leal can hardly have been at fault for not instituting interim action before any of the data were collected.

Because Mr. Leal did not “neglect” to abate a continuing nuisance during his ownership, he cannot be held liable now.

E. Any Mercury Discharged In The Early 1990s Is Long Gone

Mr. Leal can only be held liable for mercury discharged during the time of his partial ownership:

Whether liability is based upon nuisance or negligence, the scope of that liability has been similarly measured: It extends to damage which is proximately or legally caused by the defendant's conduct, not to damage suffered as a proximate result of the independent intervening acts of others.

(*Martinez v. Pac. Bell* (1990) 225 Cal. App. 3d 1557, 1565.) Here there is no evidence that any mercury that left the Site in the early 1990s still remains in Sulphur Creek. The mercury present comes from the intervening acts of others, and Mr. Leal cannot be held liable for it.

The Draft Order explains that the named parties were chosen because they “either owned the site at the time when a discharge of mining waste into the waters of the state took place, or operate the mine, thus facilitating the discharge of mining waste into waters of the state.” (Draft Order at 2, ¶ 5.) The discharge at issue takes place when stormwater carries mining waste into the creek:

The Mine waste rock and tailings are susceptible to erosion from uncontrolled stormwater runoff. Surface water runoff transports mercury-laden sediment to a tributary to Sulphur Creek The estimate mercury [load] from this Mine is 0.02 to 0.44 kg/yr or 2.4% of the total mine related mercury [load] of 4.4 to 18.6 kg/yr to Sulphur Creek.

(*Id.*, ¶ 17.) Note that this percentage is only for “mine related mercury”. Background loadings may be as high as 57 kilograms per year, which more than three times as much as all the mines in the area put together—according to the CalFed study from which the Draft Order takes its figures. (CalFed, Task 5C2, Table 3-9, page 2, attached as Ex. 11.) If background loadings were added in, the Site loading would be only about 0.6% of the entire mercury load to Sulphur Creek.

And all these numbers are small compared to the San Francisco Bay, which receives about 1,220 kilograms per year of mercury, of which 440 kilograms per year come from the

Central Valley. (Total Maximum Daily Load (TMDL) Proposed Basin Plan Amendment and Staff Report (2004) at 34, excerpt attached as Exhibit 12.¹¹)

Any waste discharge attributable to Mr. Leal would have taken place not less than 14 years ago, when he sold the Site. And where is that waste now? There is no reason to believe that the waste is still in Sulphur Creek, and nothing in the Draft Order suggests otherwise.

Only erodible waste—i.e. material small enough to be picked up by rainwater running off the property—could have been discharged to Sulphur Creek during the time Mr. Leal partly owned the Site. If it was not erodible, it would not have been discharged. Erodible material, by its nature, is carried downstream by storms. Mining wastes generated within the last 160 years (i.e. since 1849) are now moving through San Francisco Bay and out the Golden Gate. (*Id.*) Because 160 miles may be used as a rough upper estimate of the distance these wastes have traveled, it would be fair to conclude that these wastes have been moving at a rate of at least one mile per year. Up in the mountains, when the slopes are steeper, a better estimate would be several miles per year.

Wastes from Wide Awake Mine enter Sulphur Creek roughly one mile above the point where it flows into Bear Creek. (Sulphur Creek TMDL For Mercury, Final Staff Report (2007), Figs. 1.2 and 1.3, attached as Ex. 13.) If mines wastes in the area are moving several miles a year, then any wastes discharged 14 years ago would have long ago been flushed out of Sulphur Creek. As a result, there is no reason to believe that any mercury discharged from the Site during the time that Mr. Leal partly owned it still remains in the creek.

In short, there is no evidence that any mercury discharged from the Site before 1995, when Mr. Leal party owned it, remains in Sulphur Creek. If mercury discharged before 1995 is no longer in the creek, it cannot be causing a problem in the creek. The alleged nuisance is limited to conditions in the creek. Therefore, there is no evidence that any mercury that might be attributable to Mr. Leal is causing the alleged nuisance.

In summary, Mr. Leal should be removed from the Draft Order because § 13304 was intended to implement the common law of nuisance, and Mr. Leal is not liable under the common law of nuisance. Former landowners are generally not liable, and the exception for owners who neglect to abate a continuing nuisance does not apply because Mr. Leal did not receive notice, because there was no neglect, and because there is no evidence that any discharges from the Site from the early 1990s are causing the alleged nuisance.

7. MR. LEAL IS NOT SUBJECT TO WATER CODE § 13304

The Draft Order cites Water Code § 13304 for the authority to issue a cleanup and abatement order. (Draft Order at 1, introductory paragraph, and at 6, ¶ 33.) But Mr. Leal is not subject to § 13304, which applies to people who have “caused or permitted” waste to be discharged or deposited:

¹¹ Full report available at http://www.swrcb.ca.gov/rwqcb2/board_info/agendas/2004/september/09-15-04-10_appendix_c.pdf.

Any person . . . who has caused or permitted, causes or permits, or threatens to cause or permit any 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, shall upon order of the regional board, clean up the waste or abate the effects of the waste

(Water Code § 13304(a).) Mr. Leal is not subject to § 13304 because he did not cause or permit waste to be discharged.

As noted in section 6.A above, § 13304 “must be construed” consistent with “common law principles bearing upon . . . public nuisance”. (*City of Modesto Redevelopment Agency*, 119 Cal.App.4th at 38.) The phrase “caused or permitted” can easily be construed consistent with common law. Those who “caused” the nuisance are those who were its actual cause-in-fact. Those who “permitted” the nuisance are those who neglect to abate it as required by Civil Code § 3483. (See section 6.D above.) To be liable as someone who “permitted” the discharge under § 13304, therefore, the person must have (1) received notice of the nuisance, and (2) neglected to act through negligence or other fault. (*Id.*)

The phrase “caused or permitted” cannot be given a broader meaning without violating the U.S. Constitution. In the *Heitzman* case, the California Supreme Court considered whether the phrase “causes or permits”, as used in a statute prohibiting elder abuse, met “constitutional standards of certainty”. (*People v. Heitzman* (1994) 9 Cal. 4th 189, 193.) The Supreme Court concluded that “the broad statutory language at issue here fails to provide fair notice” and that that prohibition on *permitting* elder abuse “would be unconstitutionally vague absent some judicial construction clarifying its uncertainties.” (*Id.*)

Here § 13304 would not provide fair notice, and therefore would be unconstitutionally vague, if it were applied to past owners of property who had no notice during their ownership that their properties were causing a nuisance. If, however, § 13304 is interpreted consistent with common-law principles of public nuisance, then there is no constitutional infirmity.

Because Mr. Leal is not liable for the alleged nuisance under common-law principles, he is not a person whom § 13304 identifies as having “caused or permitted”.

8. MR. LEAL IS NOT LIABLE UNDER STATE BOARD DECISIONS

Wenwest is the leading State Board decision on when former landowners may be held liable under § 13304. (*Petitions of Wenwest, Inc.*, Order No. WQ 92-13 (1992) 1992 Cal. ENV LEXIS 19.) *Wenwest* identified a three-part rule applicable to former owners:

. . . we apply a three-part test to former owners: (1) did they have a significant ownership interest in the property at the time of the discharge?; (2) did they have knowledge of the activities which resulted in the discharge?; and (3) did they have the legal ability to prevent the discharge?

(*Id.* at *5.) When a former owner “passes” all three parts of the test, it is held liable.

Here Mr. Leal cannot pass the test because he cannot satisfy the second part. He did not have knowledge of the activities that resulted in the discharge. Because he did not receive notice, he is not liable under the common law. (See section 6 above.) He is also not liable under State Board precedent.

The *Wenwest* decision did not stop there, however. It considered the situation of Wendy's, who had owned the property for a short time but had not contributed to the contamination, and concluded that it was not appropriate to hold Wendy's liable:

No order issued by this Board has held responsible for a cleanup a former landowner who had no part in the activity which resulted in the discharge of the waste and whose ownership interest did not cover the time during which that activity was taking place. . . .

In this case, the gasoline was already in the ground water and the tanks had been closed prior to the brief time Wendy's owned the site. They were told about the pollution problem . . . They took no steps to remedy the situation. On the other hand, they did nothing to make the situation any worse. Had a cleanup been ordered while Wendy's owned the site, it would have been proper to name them as a discharger. Under the facts as presented in this case, it is not.

(*Id.* at *6-7.) The State Board did not set out a clear test for exonerating Wendy's. Its conclusion depended "on a number of considerations", and list of nine items was presented, not all of which weighed in Wendy's favor. Two key factors emphasized Wendy's innocence:

- * Wendy's had nothing to do with the activity that caused the leaks. (In previous orders in which we have upheld naming prior owners, they have been involved in the activity which created the pollution problem.)

- * Wendy's never engaged in any cleanup or other activity on the site which may have exacerbated the problem.

(*Id.* at *7-8.) Wendy's had some knowledge of the contamination, but the State Board did not find the knowledge sufficient blameworthy to require liability:

- * While Wendy's had some knowledge of a pollution problem at the site, the focus at the time was on a single spill, not an on-going leak.

- * Wendy's purchased the site in 1984 at a time when leaking underground tanks were just being recognized as a general problem and before most of the underground tank legislation was enacted.

(*Id.* at *8.) Two other factors suggest equitable reasons for leniency:

* Wendy's purchased the site specifically for the purpose of conveying it to a franchisee.

* Wendy's owned the site for a very brief time.

(*Id.* at *7.) The final three factors seem to relate to the convenience of the State Board:

* The franchisee who bought the property from Wendy's is on the order.

* There are several other responsible parties who are properly named in the order.

* The cleanup is proceeding.

(*Id.* at *7-8.)¹² Note that one factor *not* included in the list is whether Wendy's continued discharging during its ownership. The State Board long ago decided that the natural movement of groundwater through the soil is a discharge. Wendy's therefore continued to "discharge", as the State Board has construed that term.

When these factors are applied to Mr. Leal, he should be found not liable. Once again, the key factor is his factual innocence. He had nothing to do with the activity that is causing the nuisance. Unlike Wendy's however, he had no knowledge that there might be a problem. He knows nothing about mining, did not purchase the property with the intent to obtain any benefit from the mine, and never owned any mineral rights at the Site. The seller and purchasers are on the order, and there are sufficient other parties to expect that the abatement will proceed without him.

In addition, Mr. Leal had received a memo prepared by Charles W. Whitcomb, the District Geologist of the U.S. Bureau of Land Management. (Attached as Exhibit 14.) Mr. Whitcomb, who clearly was an impartial expert in these matters, examined the Site and concluded that Site risks were not significant:

The danger of there being large amounts of hazardous mercury at this site is probably minor. The waste rock from the mine and furnace on the mine dump would contain *little or no mercury*.

¹² These last three factors appear to depend not on the duty or fault of the party, but on the convenience of the regulatory agency, and therefore appear inappropriate for the determination of liability. (See *People v. Heitzman*, 9 Cal. 4th at 206 ("whether or not the lack of statutory clarity has opened the door to arbitrary or discriminatory enforcement of the law" is part of inquiry into constitutionality of statute), 207 ("under the statute as broadly construed, officers and prosecutors might well be free to take their guidance not from any legislative mandate embodied in the statute, but rather, from their own notions".))

(Ex. 14, at 2, emphasis added.) Mr. Leal, who knows nothing about mining or the environmental consequences of mercury, can hardly be faulted for not taking action when an expert from the federal government inspected the Site and found nothing that would require action.

Mr. Leal should therefore be removed from the Draft Order.

9. MR. LEAL SHOULD NOT BE SINGLED OUT FOR HARSH TREATMENT

It is not fair to name Mr. Leal while letting others go. Tom Nevis, who sold him the Site and held the other half-interest in it, is not named in the Draft Order. Nor are his corporations, Goshute and NBC Leasing. Roy Whiteaker, who bought Mr. Leal's interest in the Site through Cal Sierra Properties, is also not named. If these individuals, who are no less responsible than Mr. Leal for any problem caused by the Site, are not sufficiently liable to be named, then neither is Mr. Leal.

The Draft Order does not even name the Ralph M. Parsons Company, which now does business as Parsons and is "an engineering and construction firm with revenues exceeding \$3.4 billion in 2008". (<http://www.parsons.com/about/default.asp>.) Regional Board files include an assignment to Parsons of a lease dated January 28, 1965 and signed by Ms. Gibson and Ms. Trebilcott. This lease appears to refer to the Site, or to the mineral rights for the Site. Parsons would have understood, far better than Mr. Leal, about mercury at the Site.

For reasons of equity, therefore, Mr. Leal should not be named in the Draft Order.

10. IF MR. LEAL IS NAMED, HE SHOULD BE NAMED AS SECONDARILY LIABLE

In *Wenwest* the State Board concluded that Wenwest and the current owner of the property, Susan Rose, should be secondarily liable. It explained that secondary liability puts "the landowner in a position where it would have no obligations under the order unless and until the other parties defaulted on [theirs]." (*Id.* at *9.) In *Wenwest* the State Board concluded that Susan Rose and Wenwest should be secondarily liable because "While she is the current landowner, it is clear that she neither caused nor permitted the activity which led to the discharge", and because "Wenwest had nothing to do with the activity which caused the discharge". (*Id.* at *9-10.)

Here Mr. Leal had nothing to do with the mining activities that caused the discharge. If he is named, he should be secondarily liable.¹³

11. IF MR. LEAL IS LIABLE, HE IS SEVERALLY LIABLE

When several persons, acting independently, cause harm, each is "individually and separately liable for his proportionate share of the damage". (*Slater v. Pacific American Oil Co.* (1931) 212 Cal. 648, 655.) The concept that individuals are liable only for their share of the

¹³ This argument is made in the alternative, without waiving any other argument.

harm is known as “several” liability, as opposed to “joint” liability, in which any individual may be required to pay for all the damage caused.

Here Mr. Leal’s proportionate share is zero, because there is no evidence that any mercury that entered the creek in the early 1990s still is there.

Here any obligation to abate a nuisance would arise from a party’s understanding of the potential for nuisance. The only parties who would have understood the potential for nuisance are those who understood mercury mining, which would have been the mineral-rights owners and lessees, and the government: Homestake Mining, the Trebilcot Trust, Parsons, and the U.S. Bureau of Land Management.

12. THE DRAFT ORDER EXCEEDS THE AUTHORITY OF § 13304

Even assuming that Mr. Leal is liable, § 13304 limits what he can be ordered to do. Under § 13304, a person who has caused or permitted “waste to be discharged” can be ordered to “clean up *the waste* or abate *the effects of the waste . . .*” (Water Code § 13304(a), emphasis added.) Here Mr. Leal allegedly discharged mercury from the Site during the early 1990s. But the Draft Order does not order him to clean up *that* waste, nor does it order him to abate the effects of *that* waste. That waste, as explained above, is long gone. Instead, it requires him to *prevent additional waste* from being discharged from the property. (Draft Order at 9-10, ¶¶ 9-14 (requiring remediation of onsite wastes).) Mr. Leal is plainly not liable for waste that has not yet been discharged, and the Draft Order therefore exceeds the authority provided by § 13304.

To be sure, § 13304 also holds liable persons who caused or permitted “any waste to be . . . *deposited* where it is, or probably will be, discharged into the waters of the state”. (Water Code § 13304(a), emphasis added.) But Mr. Leal did not deposit the tailings piles or waste rock at the Site. They were there when he bought it. Regional Board staff may argue that Mr. Leal “permitted” waste to be “deposited” when rain carried erodible material from the piles into drainage ditches at the Site. But this reading would threaten the constitutionality of § 13304, as described in section 7 above. In any case, there is no evidence of any deposits made into any ditches on the Site during the early 1990s. Any erodible materials that were carried into the drainage ditches in before 1995 would have been carried into the creek soon afterwards, and are long gone. (See section 6.E above.) As a result, there is no evidence that during the time that Mr. Leal partly owned the site there were any deposits of waste that is now, “or probably will be, discharged into the waters of the state”. (Water Code § 13304(a).)¹⁴

Nor is there any evidence that discharges from the Site in the early 1990s caused groundwater contamination. Because groundwater in this area is so naturally high in mercury,

¹⁴ The Regional Board recognizes that it does not have sufficient evidence to require abatement of instream sediments. The Basin Plan concludes that “further assessments are needed”, and notes that “Responsible Parties that could be required to conduct feasibility studies include the U.S. Bureau of Land Management (USBLM), State Lands Commission (SLC)[;] California Department of Fish and Game (CDFG); Yolo, Lake, and Colusa Counties, mine owners, and private landowners.” (Basin Plan at IV-33.08.)

there is no reason to believe that any surface activity could have any significant effect. The Draft Order does not specifically refer to groundwater contamination. It argues, however, that “water-rock interaction likely mobilizes mercury based on detection of mercury in a WET leachate sample from waste rock . . . (CalFed Report).” (Draft Order at 3, ¶ 16.) But the CalFed report does not support this argument. On the contrary, it reaches the opposite conclusion and exonerates the Site from any concerns related to leachate:

Mine waste at Wide Awake Mine was not found to leach mercury at a concentration [above regulatory requirements]; therefore, the waste is considered a Group C mine waste. A Group C mine waste does not require control of the generation and migration of leachate to surface water and groundwater. Therefore, implementation of the final mitigation action at Wide Awake Mine does not require control [of] generation and migration of leachate to the tributary to Sulphur Creek.

(CalFed Cache Creek Study, Task 5C2, at 9-32.) Note that this conclusion—that leachate levels are too low to be of concern—eliminates not only the question of groundwater contamination, but also the question of whether leachate from the mine wastes are contaminating Sulphur Creek.

The Draft Order exceeds the authority of § 13304 by ordering Mr. Leal to abate onsite waste when there is no evidence that he is responsible for any onsite waste that is being discharged or may be discharged to Sulphur Creek.

13. MR. LEAL IS NOT LIABLE UNDER § 13267

The Draft Order also cites as authority Water Code § 13267. (Draft Order at 1, unnumbered introductory paragraph, and at 7, ¶¶ 37-38.) This section authorizes the Regional Board to demand “technical or monitoring program reports”:

. . . the regional board may require that any person who has discharged . . . shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires.

(Water Code § 13267(b)(1).) This section, however, goes on to limit the Regional Board’s authority to those reports whose burden bears a reasonable relationship to the benefits:

The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports.

(*Id.*) The section also limits the Regional Board’s authority by imposing conditions. The Regional Board must provide a written explanation and identify the evidence “requiring that person to provide the reports”:

In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the

reports, and shall identify the evidence that supports requiring that person to provide the reports.

(*Id.*) Here the Draft Order makes only the most minimal attempt to satisfy these requirements. Here is the Draft Order's showing, in full:

The technical reports required by this Order are necessary to ensure compliance with this Cleanup and Abatement Order, and to ensure the protection of the waters of the state. The Dischargers either own, have owned, operated, or have operated the mining site subject to this Order.

(Draft Order at 7, ¶ 38.) This showing is insufficient to impose the Draft Order's requirements on Mr. Leal.

To begin with, the Draft Order requires much more than technical reports. It requires actual cleanup and abatement. (Draft Order at 9-10, ¶¶ 9-14.) Nothing in § 13267 requires a former discharger to clean up and abate mining waste.

In any case, the Draft Order exceeds the authority of § 13267 because it imposes requirements on Mr. Leal unrelated to any discharge he may be responsible for. It should be obvious that § 13267 authorizes the Regional Board to require persons who have discharged to submit reports *related to their discharges*. The Regional Board can hardly contend that because Mr. Leal may have discharged in Colusa County he is therefore required to provide technical reports related to someone else's discharge in, for example, San Diego County. The Draft Order requests only reports related to existing conditions at the Site and at any water-supply wells within a half mile of the Site (of which there may be none). (Draft Order at 8-9, ¶¶ 2-8.) Because the reports are related only to existing conditions at the Site, not to any discharges that may have occurred during the early 1990s, § 13267 does not provide authority to require Mr. Leal to provide them.

The principal need for the requested reports, according to the Draft Order, is that they "are necessary to ensure compliance with this Cleanup and Abatement Order". (Draft Order at 7, ¶ 38.) In other words, the reports are necessary to support the abatement actions ordered under the authority of § 13304. But Mr. Leal is not subject to § 13304, and he should therefore not be subject to any reports required in support of that section. (See section 7 above.) The burden on Mr. Leal greatly outweighs the benefit.

The remainder of the Draft Order's explanation does not satisfy the requirements of § 13267. In particular, it does not identify "the evidence that supports requiring that person to provide the reports". The Draft Order identifies only the status of the named persons as owners, operators, or former owners or operators. That is not enough. At the very least, the Draft Order should explain why someone who may have been associated with the property long ago should be required to provide information, unrelated to that ownership, now.

14. THE DRAFT ORDER IS A "TAKING" IN VIOLATION OF THE CONSTITUTION

The United States Constitution requires a public agency pay compensation when it "takes" private property for public use:

"compensation is required only if considerations . . . suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." (*Yee v. Escondido* (1992) 502 U.S. 519, 522-523.)

(*Arcadia Development Company v. City of Morgan Hill* (2008) 169 Cal.App.4th 253, 265, parallel citation omitted.)

Here the Draft Order is directed either at mercury *now* leaving the area where the Wide Awake Mine was, or at mercury waste brought out of the mine and placed on the surface in the nineteenth century. More generally, it is part of a response to a problem caused by a combination of natural conditions and acts that took place, throughout large parts of the Central Valley, in the nineteenth century. As a result, the Draft Order unfairly singles out Mr. Leal, a former part owner of property who did nothing on the property and certainly never caused any problem, and requires him to pay costs that should properly be borne by the public as a whole. The Regional Board should therefore reimburse Mr. Leal for any costs he incurs as a result of the Draft Order and any final order.

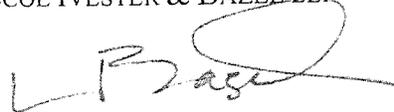
15. CONCLUSION

Mrs. Jill Leal should be removed from the order because she never owned the property, and also for the reasons that Mr. Robert Leal should be removed.

Mr. Leal should be removed because he is not liable under common-law principles of nuisance (section 6); he is therefore not liable under § 13304 (section 7); removal is consistent with State Board decisions (section 8); he should not be singled out for harsh treatment (section 9); if named he should be only secondarily liable (section 10); he is only severally liable, and only for a share of zero (section 11); the Draft Order exceeds the authority of the Regional Board (section 12); he is not liable under § 13267 (section 13), and issuing the order would be a "taking" in violation of the Constitution (section 14).

Dated: July 1, 2009

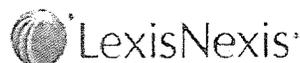
BRISCOE IVESTER & BAZEL LLP



By: _____

Lawrence S. Bazel
Attorneys for MR. AND MRS. ROBERT
AND JILL LEAL

Exhibit 3



LEXSEE 119 CAL.APP.4TH 28

CITY OF MODESTO REDEVELOPMENT AGENCY et al., Petitioners, v. THE SUPERIOR COURT OF SAN FRANCISCO COUNTY, Respondent, THE DOW CHEMICAL COMPANY et al., Real Parties in Interest.

A104367

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

119 Cal. App. 4th 28; 13 Cal. Rptr. 3d 865; 2004 Cal. App. LEXIS 831; 2004 Cal. Daily Op. Service 4692; 2004 Daily Journal DAR 6452

May 28, 2004, Filed

NOTICE:

[**1] As modified June 28, 2004.

SUBSEQUENT HISTORY: Rehearing denied by *City of Modesto Redevelopment Agency v. Superior Court*, 2004 Cal. App. LEXIS 1019 (Cal. App. 1st Dist., June 28, 2004)

Time for Granting or Denying Review Extended *City of Modesto Redevelopment v. S.C. (Dow Chemical Co.)*, 2004 Cal. LEXIS 8440 (Cal., Aug. 27, 2004)

Review denied by, Request denied by *City of Modesto Redevelopment Agency v. S.C. (Dow Chemical Co.)*, 2004 Cal. LEXIS 8692 (Cal., Sept. 15, 2004)

Related proceeding at *United States v. Lyon*, 2008 U.S. Dist. LEXIS 67191 (E.D. Cal., June 25, 2008)

PRIOR HISTORY: Superior Court of the City and County of San Francisco, Nos. 999345 and 999643, Richard A. Kramer, Judge.

DISPOSITION: Writ of mandate issued with directions.

COUNSEL: Miller, Axline & Sawyer, Duane C. Miller, Michael D. Axline, A. Curtis Sawyer, Jr., Tracey L. O'Reilly, Tamarin E. Austin, Evan Eickmeyer and Daniel Boone for Petitioners.

No appearance for Respondent.

Beveridge & Diamond, Gary J. Smith, Alexia L. Beer, Mark A. Turco and Robert Brager for Real Party in Interest PPG Industries, Inc.

Filice Brown Eassa & McLeod, Gennaro A. Filice and Stephen J. Valen for Real Party in Interest The Dow Chemical Company.

Glynn & Finley, Patrick L. Finley and Adam Friedenberg for Real Party in Interest E.I. du Pont De Nemours and Company.

Barg Coffin Lewis & Trapp, Stephen C. Lewis and R. Morgan Gilhuly for Real Party in Interest [**2] Occidental Chemical Corporation.

[*32] Wendel, Rose, Black & Dean, Christine K. Noma, Berger Kahn, Gene A. Weisberg and Melanie D. Long for Real Party in Interest Echco Sales and Equipment Co., Inc.

Brydon Hugo & Parker, Edward R. Hugo and Roland E. Thé; Law Offices of William W. Burns and William W. Burns for Real Party in Interest Goss-Jewett Company of Northern California.

Gordon & Rees, Roger M. Mansukhani and Kristin N. Reyna for Real Party in Interest American Laundry Machinery Inc., Cooper Industries.

Hamrick & Evans, A. Raymond Hamrick III, David L. Evans and Kenneth A. Hearn for Real Party in Interest M.B.L., Inc.

119 Cal. App. 4th 28, *; 13 Cal. Rptr. 3d 865, **;
2004 Cal. App. LEXIS 831, ***; 2004 Cal. Daily Op. Service 4692

tion that represents the exercise by government of the traditional power to regulate public nuisances. (*CEEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal. App. 3d 306, 318 [118 Cal. Rptr. 315]) Such legislation 'constitutes but "a sensitizing of and refinement of nuisance law." ' (*Id.*, at p. 319.) Where, as here, such legislation does not expressly purport to depart from or alter the common law, it will be construed in light of common law principles bearing upon the same subject. [Citations.]" (*Leslie Salt*, at pp. 618-619 [***16] .) ⁶ Noting that under the common law, a landowner's liability for a public nuisance could result from the failure to act as well as from affirmative conduct, the court concluded that a landowner could be liable under the McAteer-Petris Act even if it was not actively involved in the condition that caused harm, and even if it did not know of or intend to cause such harm. (*Leslie Salt*, at pp. 619, 622.) This liability could include both responsibility to obey a cease and desist order, and civil fines on a per-day basis for violating the order. (*Id.* at p. 618.)

6 The court in *CEEED* stated: "Contemporary environmental legislation represents an exercise by government of this traditional power to regulate activities in the nature of nuisances" (*CEEED v. California Coastal Zone Conservation Com.*, *supra*, 43 Cal. App. 3d at p. 318.)

The Porter-Cologne Act similarly appears to be harmonious with the common law of nuisance. *Water Code section 13304, subdivision (a)* [***17] authorizes cleanup or abatement orders against a person who "has caused or permitted, causes or permits, or threatens to cause or permit any 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 ...* ." (Italics added.) The Porter-Cologne Act defines " '[n]uisance' " to mean "anything which meets all of the following requirements: [¶] (1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable [*38] enjoyment of life or property. [¶] (2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. [¶] (3) Occurs during, or as a result of, the treatment or disposal of wastes." (*Wat. Code*, § 13050, *subd. (m)*.) The first two paragraphs of this definition track relevant portions of the language of *Civil Code sections 3479 and 3480* [***18] , which define nuisance and public nuisance. The third paragraph establishes that the Porter-Cologne Act regulates only nuisances that are [***872] connected with the treatment or disposal of wastes. Thus, it appears that the Legislature not only did not intend to

depart from the law of nuisance, but also explicitly relied on it in the Porter-Cologne Act.

(5) Having concluded that the statute must be construed "in light of common law principles bearing upon the same subject" (*Leslie Salt*, *supra*, 153 Cal. App. 3d at p. 619)--here the subject of public nuisance--we turn next to identify those principles. It has long been the law in California that " '[n]ot only is the party who maintains the nuisance liable but also the party or parties who create or assist in its creation are responsible for the ensuing damages.' " (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal. App. 3d 1125, 1137 [281 Cal. Rptr. 827].) Thus, courts have upheld as against a demurrer a nuisance claim founded upon allegations that defendants disposed of hazardous substances on property during their lease, but at the time of the action did not have a possessory interest in the property [***19] (*id.* at pp. 1132-1133, 1137); and on allegations that defendant soils engineer prepared a plan for slope repair on a neighboring property which, when constructed, caused water, mud, and debris to flow onto the plaintiff's property (*Shurpin v. Elmhurst* (1983) 148 Cal. App. 3d 94, 100-101 [195 Cal. Rptr. 737]). Similarly, a nonsuit on plaintiff's cause of action for nuisance was reversed where the evidence showed defendant contractor dumped fill on a street, interfering with drainage and causing the plaintiff's property to be flooded. (*Portman v. Clementina Co.* (1957) 147 Cal. App. 2d 651, 654, 659-660 [305 P.2d 963].) And the Supreme Court has held that a defendant who obstructs a private road can be liable for nuisance, irrespective of whether he claims any interest in the land over which the plaintiff claimed a right of way. (*Hardin v. Sin Claire* (1896) 115 Cal. 460, 462-463 [47 P. 363].) In sum, liability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant [***20] created or assisted in the creation of the nuisance. (*Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal. App. 4th 334, 343 [23 Cal. Rptr. 2d 377].)

[*39] While liability for nuisance is broad, ⁷ however, it is not unlimited. *City of San Diego* established one important limitation. There, the city brought an action on various theories, including nuisance, against defendants who manufactured, distributed or supplied asbestos-containing building materials, alleging asbestos had contaminated city buildings and seeking recovery for, among other things, money the city spent to identify and abate the asbestos danger. (*City of San Diego*, *supra*, 30 Cal. App. 4th at pp. 578-579.) The Court of Appeal concluded the city could not maintain an action based on nuisance, stating, "City cites no California decision ... that allows recovery for a defective product under a nuisance cause of action. Indeed, under City's theory, nui-

Exhibit 4

 Points decided.

No. 1,859.

J. M. GRIGSBY, RESPONDENT, v. THE CLEAR LAKE WATER WORKS COMPANY, APPELLANT.

NUISANCE.—JURISDICTION OF COUNTY COURT.—In an action to abate a nuisance and to recover damages, the County Court has no jurisdiction of the action for damages, except as an incident to its power to abate the nuisance.

IDEM.—If the nuisance had been abated prior to the commencement of the action, the County Court has no jurisdiction for any purpose.

EVIDENCE.—DECLARATION OF AGENT.—The declarations of any agent are not admissible in evidence against his principal, until the fact of his agency is first proven.

PRACTICE ON APPEAL.—STATEMENT MUST SHOW PROOF OF AGENCY.—It will not be presumed that evidence to establish such agency was given, but the statement must show that fact.

NUISANCE.—EVIDENCE OF EXPERTS.—In an action to abate a nuisance caused by the erection of a dam, and the consequent overflow of land by back-water, the evidence of an expert as to the effect of an obstruction in causing the back-water, is admissible.

EVIDENCE OF EXPERTS.—When an expert is called by one of the parties to an action, his evidence should be received with great caution by the jury, and should never be allowed except upon subjects which require unusual scientific attainments or peculiar skill.

NUISANCE, PUBLIC OR PRIVATE.—DAMAGES.—The plaintiff, in an action for nuisance, cannot recover damages for injuries which affect the public generally; but if he has suffered damages peculiar to himself, it becomes, to that extent, a private nuisance for which he may recover.

PRESCRIPTION, RIGHT TO OVERFLOW LAND.—To acquire a prescriptive right to overflow the lands of another, there must have been an uninterrupted enjoyment, under claim of right, for a period of five years; there must have been an actual occupation by the flow of water, to the knowledge of the owner, and such as to occasion damage and give him a right of action; and there must have been such a use of the premises and such damage, as will raise a presumption that the owner would not have submitted to it unless the other party had acquired a right so to use it.

NUISANCE.—CONTINUANCE OR NOTICE.—A party who continues a nuisance but is not the original creator of it, is entitled to notice that it is a nuisance, and a request must be made, that it may be abated, before an action will lie for that purpose, unless it appear that he had knowledge of its hurtful character; where the extent of the nuisance is increased by such party, the rule is otherwise.

IDEM.—EVIDENCE.—Evidence tending to show that the nuisance was produced by natural cause, is admissible.

APPEAL from the County Court of Lake County.

On the trial the plaintiff proved that there were two dams erected in Cache Creek under the personal direction of one

1. Cited, 35 Wis. 677.

Opinion of the Court—Temple, J.

The rule seems to be well established that a party who is not the original creator of a nuisance is entitled to notice that it is a nuisance, and a request must be made, that it may be abated before an action will lie for that purpose, unless it appear that he had knowledge of the hurtful character of the erection. This rule is not inconsistent with the authorities cited by plaintiff's counsel, that every continuance of a nuisance is a new nuisance, but it is adopted for the reason that it would be a great hardship to hold a party responsible for consequences of which he may be ignorant. If, therefore, the defendant became the purchaser of the premises after the dam had been erected, or if he replaced the old dam by a new structure—there being no greater interval between the removal of the old and the erection of the new than was necessary to do the work—and the new structure does not cause the land of the plaintiff to be overflowed to a greater extent than the old one did, then the defendant was entitled to notice before he could be made liable to an action for damages. If, however, the new structure caused the lands of plaintiff to be flowed to a greater extent than the old one, the rule is otherwise.

As to the "*flash-boards*," we see no reason why they may not be considered a portion of the dam, if they were actually used, and if the overflow of plaintiff's land was occasioned by their use the defendant would be liable, although they were not in use all the time. The question as to whether they were used or not was properly left with the jury, although the evidence only seems to be material as bearing upon the question as to whether the defendant was entitled to notice before the action could be maintained. The damages would depend upon the amount of land flowed whether the backwater was caused by the "*flash-boards*" or by the more permanent part of the dam.

We understand that the counsel for plaintiff finally conceded the right of defendant to show that during the time for which damages are claimed for the overflow of plaintiff's

Exhibit 5



1 of 1 DOCUMENT

In the Matter of the Petitions of WENWEST, INC., SUSAN ROSE, WENDY'S INTERNATIONAL, INC. AND PHILLIPS PETROLEUM COMPANY For Review of Cleanup and Abatement Order No. 92-041 by the California Regional Water Quality Control Board, San Francisco Bay Region. Our Files Nos. A-799, A-799(a), and A-799(b)

Order No. WQ 92-13

State of California
State Water Resources Control Board

1992 Cal. ENV LEXIS 19

October 22, 1992

BEFORE: [*1] W. Don Maughan, John Caffrey, Marc Del Piero, James M. Stubchaer**OPINIONBY:** BY THE BOARD**OPINION:**

On April 15, 1992, the California Regional Water Quality Control Board, San Francisco Bay Region (RWQCB), adopted Cleanup and Abatement Order No. 92-041 directing the cleanup of soil and ground water at a site in Concord. The contamination consists of gasoline and dissolved hydrocarbons at and near a former service station. The site is now occupied by a Wendy's hamburger restaurant. The RWQCB named five parties in its order: the former operators of the service station, the oil company whose predecessor owned the property, Wendy's International, Wenwest -- the franchise owner, and Susan Rose, a retired school teacher in Hawaii who has inherited the real property from her mother. All but the former operators have filed timely petitions with the State Water Resources Control Board (State Water Board). All argue that it is improper to name them in the order and, in the alternative, that the RWQCB abused its discretion when it refused to place them in a position of secondary responsibility.

I. BACKGROUND

There has been a service station on the site since near the end of World War II. From 1960 until [*2] 1980, the property was owned by a subsidiary of Aminoil USA, Inc. and leased to Redding Petroleum, Inc. (Redding). Aminoil USA, Inc. merged with Phillips Oil Company which became Phillips Petroleum Company in 1985. Redding operated a service station at this location from 1960 until 1984. Redding bought the property from Aminoil in 1980 and transferred title to Mr. and Mrs. Redding. They transferred it back to their corporation for sale to Wendy's International in 1984. Later that same year, after Wendy's found that Wenwest was qualified to build and run a restaurant, it sold the site to the franchise. The following year, Wenwest sold the property to the mother of Susan Rose and immediately leased it back. Before escrow closed, the woman died leaving her daughter to take title. Ms. Rose still owns the property subject to a lease with Wenwest.

Contamination problems first came to light in the early 1980's. A neighbor began to detect floating gasoline in his well located some 150 feet downgradient of the service station. In 1983, responding to a complaint from that neighbor, Redding determined that an inventory loss of 600-800 gallons had taken place. Redding did some cleanup [*3] work with an extraction well and closed the underground tanks. When the property was sold in 1984, Redding claims it told Wendy's of the problem. Wendy's consultant noted in a report that "a gasoline layer was noticed floating on the groundwater in the borehole." However, no remediation was recommended or undertaken. In 1985, after Wenwest bought the property and built the restaurant, strong hydrocarbon odors were found in the women's restroom. An investigation by a different consultant was inconclusive and no action was taken. A subsequent and more extensive investigation by the second consultant began about three years later. By 1990 they had found strong evidence of gasoline con-

tamination. Levels as high as 210,000 ppb total petroleum hydrocarbons were found in ground water. Those findings are the basis of the order RWQCB's order we now review.

II. CONTENTIONS AND FINDINGS

Contention: Each petitioner makes the same basic claim that the RWQCB should have left them off the order or that they should have been treated as secondarily responsible for the cleanup. n1

n1 All contentions not discussed in this order are denied for failure to raise substantial issues appropriate for review. Title 23, California Code of Regulations, Section 2052(a)(1). People v. Barry (1987) 194 Cal.App.3d 158, 139 Cal.Rptr. 349.

[*4]

Findings: The RWQCB properly included Phillips Petroleum as a fully responsible party. Wendy's International should not have been included as a discharger in the cleanup and abatement order. Wenwest and Susan Rose are properly included in the order but should be treated as secondarily responsible for the tasks in the order. n2

2n At the time the RWQCB issued its order, work was not progressing on the cleanup. This led the RWQCB to decide that the primary/secondary distinction was inapplicable. This was not an unreasonable conclusion for the RWQCB to reach. We now take notice that work is progressing satisfactorily and will address the case as it stands before us.

1. Phillips Petroleum

Although the Phillips name was not associated with the service station during its years of operation, the entity which owned the property from 1960 until 1980 was a subsidiary of what has since become Phillips Petroleum. The question before us is whether Phillips' predecessor acted in such a way as to obligate Phillips [*5] to participate in the cleanup. Under precedent established by this Board (see Petition of John Stuart, Order No. WQ 86-15), we apply a three-part test to former owners: (1) did they have a significant ownership interest in the property at the time of the discharge?; (2) did they have knowledge of the activities which resulted in the discharge?; and (3) did they have the legal ability to prevent the discharge? The answer to all three questions is affirmative as regards Phillips' predecessor.

While the only documented discharge of gasoline occurred in 1983, the record shows clearly that discharges took place much earlier. Phillips has offered no evidence to rebut the reports made by Wendy's and Wenwest's consultant that, considering the soil in the area and the distance the gasoline has travelled to reach the neighbor's well, discharges took place at least 12 years before it was detected by the neighbor. That places the time of discharge well within the ownership of the property by Phillips' predecessor. Phillips' argument that the 1983 leak somehow caused the pollution of the well that same year flies in the face of common sense and the laws of nature.

That Phillips' liability [*6] arises because of discharges which took place before 1980 is of no legal significance. The discharge of hydrocarbons into the State's ground water was a violation of the law long before 1980.

2. Wendy's International

We have issued many orders addressing the question of who is responsible for ground water cleanups. No order issued by this Board has held responsible for a cleanup a former landowner who had no part in the activity which resulted in the discharge of the waste and whose ownership interest did not cover the time during which that activity was taking place. Considering those facts and the existence of other fully responsible parties, we see no reason to establish that precedent in this case. We have applied to current landowners the obligation to prevent an ongoing discharge caused by the movement of the pollutants on their property, even if they had nothing whatever to do with putting it there. (See Petition of Spitzer, Order No. WQ 89-8; Petition of Logsdon, Order No. WQ 84-6; and others.) The same policy and legal arguments do not necessarily apply to former landowners.

In this case, the gasoline was already in the ground water, and the tanks had been closed [*7] prior to the brief time Wendy's owned the site. They were told about the pollution problem by their consultant and perhaps by Redding. They took no steps to remedy the situation. On the other hand, they did nothing to make the situation any worse. Had a

cleanup been ordered while Wendy's owned the site, it would have been proper to name them as a discharger. Under the facts as presented in this case, it is not.

In short, we conclude that it is inappropriate to include Wendy's as a discharger based on a number of considerations. Among the factors unique to this case are:

- * Wendy's purchased the site specifically for the purpose of conveying it to a franchisee.
- * Wendy's owned the site for a very brief time.
- * The franchisee who bought the property from Wendy's is named in the order.
- * Wendy's had nothing to do with the activity that caused the leaks. (In previous orders in which we have upheld naming prior owners, they have been involved in the activity which created the pollution problem. [See Logsdon Petition, op. cit., Petition of Stinnes-Western, Order No. WQ 86-16, and Petition of The BOC Group, Order No. WQ 89-13.])
- * Wendy's never engaged in any cleanup or other [*8] activity on the site which may have exacerbated the problem.
- * While Wendy's had some knowledge of a pollution problem at the site, the focus at the time was on a single spill, not an on-going leak.
- * Wendy's purchased the site in 1984 at a time when leaking underground tanks were just being recognized as a general problem and before most of the underground tank legislation was enacted.
- * There are several responsible parties who are properly named in the order.
- * The cleanup is proceeding.

3. Susan Rose

As we indicated above, the current landowner, however blameless for the existence of the problem, should be included as a responsible party in a cleanup order. We have taken that position many times in the past and have never ruled to the contrary. Thus, we find that the RWQCB was correct in naming Susan Rose in its order.

The issue of secondary liability remains. This concept is one which we have discussed in a relative few of our orders. We first used it, without that label, in our order concerning the development of solar power plants in the Southern California desert. (See Petition of Southern California Edison, Order No. WQ 86-11.) Later we applied the principle [*9] to a mining operation on federal land. (See Petition of U.S. Department of Agriculture, Order No. WQ 87-5.) In both cases, the Regional Water Board had decided to place the petitioner in a position of secondary responsibility and we concurred.

We first applied this principle over the wishes of the Regional Water Board in another 1987 order. (See Petition of Prudential Insurance Company of America, Order No. WQ 87-6.) There we found that the unique facts of that case (a long-term lease with little actual access along with a cleanup that was well under way) justified putting the landowner in a position where it would have no obligations under the order unless and until the other parties defaulted on their's. In 1989, we again affirmed a Regional Water Board order which utilized the secondary liability approach. (See Petition of William R. Schmidl, Order No. WQ 89-1.) We have also required a Regional Water Board to include a previously unnamed party and to give that person secondary liability status in circumstances similar to the Prudential petition. (See Petition of Arthur Spitzer, Order No. WQ 89-8.)

Based on our earlier decisions and the information in the record, we find [*10] it appropriate that Susan Rose be listed in the cleanup and abatement order as secondarily responsible party. While she is the current landowner, it is clear that she neither caused nor permitted the activity which led to the discharge. The order will be redrafted to reflect that change.

4. Wenwest, Inc.

The situation with regard to Wenwest is a little bit more complicated. Because Wenwest had nothing to do with the activity which caused the discharge and is, like Wendy's International, a former owner of the land, it could be argued that it does not belong in the order at all. However, we find that the controlling interest which Wenwest has in the property, springing as it does from a sale/lease back arrangement with an absentee landowner, places it in a position of some

responsibility. Wenwest exercises all the normal attributes of day-to-day ownership of the property. We see no reason to treat Wenwest any differently from Susan Rose. Wenwest should be named as a secondarily responsible party.

III. CONCLUSION

The cleanup and abatement order issued by the RWQCB must be modified to remove one party and change the status of two others. The RWQCB properly included [*11] Phillips Petroleum whose predecessor owned the property and leased it to a service station operator during a time when leaks from the underground storage tanks were clearly taking place. Wendy's International has no present interest in the property and never owned it during the time the tanks were actually leaking. There is no basis to include Wendy's International in the order. Wenwest, the operator of the restaurant on the site, and Susan Rose, the owner of the property at present, both belong on the order as responsible parties. However, because they had nothing to do with the actual discharge and because the two primarily responsible parties are capable of and willing to undertake the cleanup, Wenwest and Ms. Rose should be required to perform the cleanup only in the event of default by Redding and Phillips.

IV. ORDER

It is hereby ordered that Cleanup and Abatement Order No. 92-041 be amended to remove Wendy's International, Inc. from the list of dischargers and to state that Wenwest, Inc. and Susan Rose are only to be held responsible for the performance of the listed tasks in the event that Redding and Phillips fail to fulfill their obligations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOil & GasReal Property LawWater RightsGroundwater

EXHIBIT D

LAWRENCE S. BAZEL (State Bar No. 114641)
RICHARD J. WALLACE (State Bar No. 124286)
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
(415) 402-2700
Fax (415) 398-5630

Attorneys for
MR. AND MRS. ROBERT and JILL LEAL

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

In the matter of:
DRAFT CLEANUP AND ABATEMENT ORDER
THE WIDE AWAKE MERCURY MINE
COLUSA COUNTY

**SUPPLEMENTAL BRIEF
SUBMITTED BY ROBERT LEAL
RESPONDING TO COMMENTS FROM OTHER NAMED PARTIES**

September 23, 2009

TABLE OF CONTENTS

1. INTRODUCTION1

2. ROBERT LEAL HAD ONLY A PAPER INTEREST IN THE SITE2

3. MR. LEAL IS NOT LIABLE
BECAUSE HE DID NOT HAVE CONTROL.....3

4. MR. LEAL AGREES THAT NONE OF THE NAMED PARTIES
IS RESPONSIBLE FOR NATURAL CONDITIONS4

5. MR. LEAL AGREES WITH THE CORRECTION
MADE BY CAL-SIERRA PROPERTIES5

6. CONCLUSION.....5

1. INTRODUCTION

Robert and Jill Leal submit this supplemental brief in response to assertions made by Homestake Mining and Cal-Sierra Properties. In its submission, Homestake acknowledged that it leased the Site, but argued that the owner—Emma G. Trebilcot and the Trebilcot Trust (jointly the “Trebilcot Trust”)—should be held liable. Mr. Leal takes no position on any dispute between Homestake and the Trebilcot Trust. Nevertheless, Mr. Leal is responding because Homestake’s arguments might be applied against him.

Homestake’s submission has clarified the limited nature of Mr. Leal’s ownership. He received a paper interest only, and did not have control over the Site. He never owned any of the mineral rights, including any of the mercury in the waste piles. That mercury, and all the mineral rights, were owned by the Trebilcot Trust. Mr. Leal purchased an interest only in the surface rights, and those rights were subject to two leases. First, Homestake had “exclusive possession” of the land, including the surface, subject to the use of the surface for grazing. Second, the surface was leased out for grazing. The two leases gave possession and control to the tenants, and there was nothing for Mr. Leal to possess or control. As a result, he should not be held liable for events that occurred when others had possession and control.

The lease also makes clear that Homestake and the Trebilcot Trust considered who should be responsible for reclaiming the property. Homestake agreed, at the termination of the lease, to comply with the reclamation plan approved by appropriate governmental agencies and then in force. The tasks imposed in the cleanup and abatement order are effectively reclamation, because they would return the Site to a more natural condition. The obligation to reclaim the Site, if it should be imposed on anyone, should be imposed on a holder of mineral rights rather than an individual who merely acquired a paper interest.

Homestake cites *U.S. Cellulose*, a State Board order in which a tenant who refrained from exercising any control was held not to be liable for discharges at the property. The principles of *U.S. Cellulose* apply to Mr. Leal, who exercised no control over the waste piles. Mr. Leal should therefore not be named as a liable party.

Homestake notes that none of the named parties can be held liable for natural conditions, and Mr. Leal agrees. The mercury in Sulphur Creek comes mostly from natural sources. If the mercury is causing a problem, the problem should be solved by public agencies without singling out Mr. Leal and others for harsh treatment.

Finally, Mr. Leal agrees with the correction, filed by Cal-Sierra, explaining that Mr. Leal never owned the mineral rights to the Site.

Mr. Leal’s name should be removed from the draft order.

2. ROBERT LEAL HAD ONLY A PAPER INTEREST IN THE SITE

A lease gives a tenant “exclusive possession of the premises against all the world, including the owner”. (*Kaiser Co. v. Reid* (1947) 30 Cal.2d 610, 619.) Here Homestake and the grazing tenant had exclusive possession of the property, “against all the world”, including Mr. Leal.

Homestake has attached the relevant lease as Exhibit C to its submission. Section 3 of that lease, which is entitled “*Exclusive Possession*” gives Homestake exclusive possession of the property, subject to grazing and agricultural uses. Here is the lease provision in full:

Exclusive Possession. During the lease term Homestake shall have quiet enjoyment and exclusive possession for mining purposes of all of the Mining Property, reserving to Owner the use of the surface for livestock grazing and other agricultural uses and water development incidental to such uses so long as such uses do not unreasonably interfere with the mining uses of Homestake.

(Submission of Evidence and Policy Statements by Designated Party Homestake Mining Company of California, dated September 16, 2009 (“Homestake’s Submission”), Exhibit C (“Homestake Lease”), ¶ 3.)

The lease also makes clear that Homestake agreed to reclaim the Site at the end of its lease. Here is the reclamation provision in full:

Following termination of the lease[,] Lessee shall comply with the reclamation plan approved by appropriate government agencies and then in force, including cosmetic treatment of waste material or excavations on the Mining Property.

(Homestake Lease, ¶ 13(d).) This provision makes clear that the owner and tenant of the mineral rights—the Trebilcot Trust and Homestake—recognized that reclamation of the Property could be required. They also recognized that reclamation was an obligation associated with the mineral rights. Homestake asserts that it did, in fact, reclaim parts of the property, not including the areas at issue. (Homestake’s Submission at 3.) Reclamation is what would be required by the cleanup and abatement order, which aims to restore the Site to a more natural condition, or at least to reduce erosion. Whether or not this lease imposes any current obligation on Homestake, it makes clear that reclamation is an obligation associated with mineral rights, not with the interest once held by Mr. Leal.

Because the Trebilcot Trust retained ownership of the mineral rights, it continued to receive lease payments from Homestake. Mr. Leal never received any lease payments from Homestake. (Supplemental Declaration of Robert Leal (“Leal Decl.”), ¶ 2.)

At the time Mr. Leal obtained his interest, the Site was subject to two leases: (1) a lease between the Trebilcot Trust and Homestake Mining, and a lease between the Trebilcot Trust and

Harter Land Company. (*Id.*, ¶ 3.) This second lease, which was entered into in 1988, gave the Harter Land Company the rights to grazing and pasturing on the Site. (*Id.*)

These two leases gave the tenants full possession and control of the Site. Mr. Leal never owned any interest in any of the minerals on the Site, including any of the mercury in the waste piles. He should not be held liable for any activity that took place at the Site during the time he held a paper interest.

In its submission, Homestake argues that “as a matter of either law or fact,” it did not have “management responsibility for conditions on the Wide Awake Mine Property” because it “was not a tenant in exclusive possession” of the Site. (Homestake’s Submission at 2.) In fact, Homestake had exclusive possession of the Site, as specified in the lease, subject to some exceptions. (See discussion above.) As a tenant in exclusive possession, Homestake had “unrestricted access” and “exclusive rights” to conduct operations on the Site, including the right to “dispose of any and all ores and minerals” and “deposit such materials on or in the Mining Property”. (Homestake’s Lease, ¶ 7.)

3. MR. LEAL IS NOT LIABLE BECAUSE HE DID NOT HAVE CONTROL

Homestake cites *U.S. Cellulose* for the proposition that liability is not imposed “on a lessee whose actions while a lessee did not contribute to the alleged contamination.” (Homestake’s Submission at 4, citing *In the Matter of U.S. Cellulose*, WQ 92-04.) But that case did not turn on the distinction between landlord and tenant. Rather, it turned in the degree of control. The tenant in *U.S. Cellulose* did not have sufficient control to be held liable:

Although a lessee has exclusive control of the leased premises, in this case Pacific carefully refrained from exercising any control over the tanks and deferred control of the tanks to the Smiths as the property owners.

(*Id.* 1992 Cal. ENV LEXIS 2 at *5.) Here Mr. Leal is the one who should not be held liable because of lack of control. He “carefully refrained” from exercising any control over the Site, and left control to the tenants, in the sense that he had no personal involvement in any activities at the Site. Moreover, he refrained from exercising any control because he had no control—full control over all activities at the Site had been conveyed to the tenants by a previous owner. Consistent with *U.S. Cellulose*, therefore, Mr. Leal should not be held liable.¹

¹ “It is well established in this state, as in other jurisdictions, that a landlord is not liable for acts of negligence of tenants.” (*O’Leary v. Herbert* (1936) 5 Cal.2d 416, 419, citing inter alia *Kalis v. Shattuck*, 69 Cal. 593, where “it was held (p. 597) that a landlord is not liable for the consequences to others of a nuisance in connection with property in the possession and control of a tenant unless the landlord authorized or permitted the act which caused it to become a nuisance occasioning the injury.”) Mr. Leal did not authorize or permit the alleged discharge from the waste piles. He did not even know of their existence.

4. MR. LEAL AGREES THAT NONE OF THE NAMED PARTIES IS RESPONSIBLE FOR NATURAL CONDITIONS

Homestake argues that it cannot be held liable for natural sources of mercury: “It should go without saying . . . that neither Homestake nor any other party given notice of a Cleanup and Abatement Order for Sulphur Creek should be responsible for addressing the many acknowledged and significant natural sources of mercury to Sulphur Creek.” (Homestake’s Submission at 5.) Mr. Leal agrees.

Regional Board staff rely on State Board orders relating to properties with contaminated groundwater, but the Site here is quite unlike those sites. In those sites the contamination comes from discharges of industrial chemicals that had been brought onto the property. Here mercury is naturally present at the Site, and most of the mercury in Sulphur Creek is natural. (Comments On Draft Order [Etc.], July 1, 2009, at 9.) The transformation of inorganic mercury to methyl mercury is also natural.

To be sure, there is evidence that *some* of the inorganic mercury reaching Sulphur Creek is from *some* waste piles in the area—piles that were created more than 100 years ago. Those persons who created the piles are long gone. Those persons who now own the land, and those persons who owned it during the last few decades, are neither mining the Site nor receiving the benefits of the mining activities that created the waste piles. As time passes, the distinction between natural and artificial diminishes. The California Supreme Court, when called on to determine whether soil accretion resulting from 19th century mining operations could be considered natural, held that mining operations could indeed produce natural accretion when those operations were not in the immediate vicinity of the accretion. (*State Lands Commission v. Superior Court (Lovelace)* (1995) 11 Cal.4th 50, 79-80.)²

Here the conditions in Sulphur Creek should be considered natural. Most of the mercury in the creek comes from natural hot springs. Natural erosion of soil in the area, which naturally contains mercury, contributes much of the particulate mercury carried into the creek by stormwater. Although some mercury comes from some waste piles in the area, the piles were

² Here is the key language:

We thus hold, consistent with our prior cases, that accretion is artificial if directly caused by human activities Accretion is not artificial merely because human activities far away contributed to it. The dividing line between what is and is not in the immediate vicinity will have to be decided on a case-by-case basis, keeping in mind that the artificial activity must have been the direct cause of the accretion before it can be deemed artificial. The larger the structure or the scope of human activity such as dredging or dumping, the farther away it can be and still be a direct cause of the accretion, although it must always be in the general location of the accreted property to come within the artificial accretion rule.

created so long ago, by people so distant from Mr. Leal, that it would be inequitable to hold him and others liable. If mercury in Sulphur Creek is a problem, it is a widespread problem that should be solved by public agencies without singling out Mr. Leal and others for harsh treatment. The California Hazardous Substance Account Act, for example, establishes a fund that can be used to clean up contaminated properties and pay for "orphan shares" when responsible parties no longer exist. (Health & Safety Code §§ 25300 et seq.)

5. MR. LEAL AGREES WITH THE CORRECTION MADE BY CAL-SIERRA PROPERTIES

Cal-Sierra Properties has filed a correction making clear that Mr. Leal did not own the mineral rights for the Site, and that Cal-Sierra was not arguing to the contrary:

On page 24 of Respondents CAL-SIERRA PROPERTIES and MERCED GENERAL CONTRUCTION, INC. brief, I did not mean to imply that ROBERT LEAL or anyone else was the literal owner of mercury on the property in question. I simply picked the most recent grantor who reserved the mineral rights to the property. In actuality, it is probable that the earliest reservations were by EMMA TREBILCOT or the TREBILCOT TRUST. MR. LEAL's deed to CAL-SIERRA reserved the mineral rights, but he did not, and does not own the mineral rights.

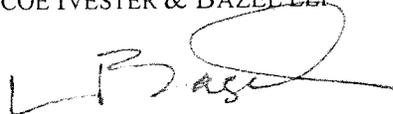
Mr. Leal agrees that he did not and does not own the mineral rights, and thanks Cal-Sierra for the correction.

6. CONCLUSION

Mr. Leal's name should be removed from the Draft Order.

Dated: September 23, 2009

BRISCOE IVESTER & BAZEL LLP



By: _____

Lawrence S. Bazel
Attorneys for MR. AND MRS. ROBERT
AND JILL LEAL

LAWRENCE S. BAZEL (State Bar No. 114641)
RICHARD J. WALLACE (State Bar No. 124286)
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
(415) 402-2700
Fax (415) 398-5630

Attorneys for
MR. AND MRS. ROBERT and JILL LEAL

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

In the matter of:
DRAFT CLEANUP AND ABATEMENT ORDER
THE WIDE AWAKE MERCURY MINE
COLUSA COUNTY

Supplemental Declaration of Robert Leal

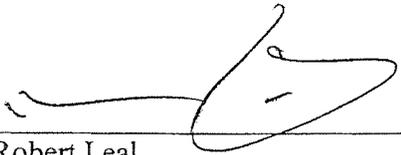
I, Robert Leal, declare:

1. I am a person named in the Draft Cleanup and Abatement Order revised as of June 10, 2009 (the "Draft Order"). My business address is 950 Tharp Road, Suite 201, Yuba City, California 95993.
2. I never received any lease payments from Homestake Mining.
3. At the time I obtained my interest, the Site was subject to two leases: (1) a lease between Mrs. Trebilcot or the Trebilcot Trust and Homestake Mining, and a lease between the

Trebilcot Trust and Harter Land Company. This second lease, which was entered into in 1988, gave the Harter Land Company the rights to grazing and pasturing on the Site.

I hereby declare under penalty of perjury under the laws of the State of California that the statements made in this declaration are true and correct.

Dated: September 23, 2009



Robert Leal

EXHIBIT E

Presentation of Robert Leal Wide Awake Mine Site

Lawrence S. Bazel
Briscoe Ivester & Bazel LLP
October 2009

Mr. Leal Is Not Liable

- ◆ No notice
- ◆ No fault
- ◆ Not fair (Wenwest factors)
- ◆ No nuisance

Background:

No Knowledge About
Possible Discharge

Mr. Leal

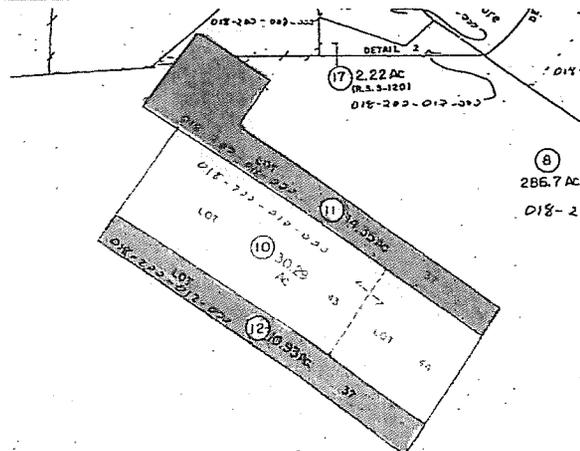
- ◆ Is a farmer
- ◆ No knowledge about mining
- ◆ No knowledge about mercury
- ◆ No knowledge about chemistry
- ◆ No knowledge about toxicology
- ◆ No knowledge about economic risk of buying mine site

Purchase of Property

- ◆ Tom Nevis had purchased property through Goshute Corporation
 - But needed money
- ◆ Mr. Leal provided money
 - Received a half interest
- ◆ Other half interest to NBC Leasing
 - Controlled by Mr. Nevis

5

Included Part of Mine Site



6

Obtained Only Limited Rights

- ◆ Did not purchase mineral rights
 - Owned by Trebilcot Trust
- ◆ Mineral and surface lease
 - Homestake Mining
- ◆ Grazing lease
 - Harter Land Company

7

Did Not Operate Site

- ◆ Tries to sell property to U.S. Bureau of Land Management
- ◆ BLM sends District Geologist to investigate mine site

8

BLM District Geologist

- ◆ "predominantly oak grass lands"
- ◆ "danger of...mercury at this site is probably minor"
- ◆ "waste rock...would contain little or no mercury"
- ◆ "would be necessary to...take soil samples to determine if there is any mercury contamination"

9

BLM Buys Property

- ◆ Except part on site

10

Mr. Leal Tries To Find Mine

- ◆ With real-estate agent Roy Whiteaker
- ◆ He does not find mine site
 - Sees some bricks
- ◆ Does not see items in photographs
 - Does not see large structures
 - Does not see waste piles
 - Does not know what tailings are

11

Mr. Leal Did Not Know

- ◆ That mercury might be leaving the site
- ◆ That anything on the site might be causing a nuisance
- ◆ That he should be doing anything to protect health or environment
- ◆ No one ever told him

12

Mr. Leal Is Not Liable Because

1. He Did Not Have Notice Of A Nuisance

No Automatic Liability

- ◆ Passive discharger not liable under CERCLA
- ◆ Not a groundwater site
- ◆ Not being ordered to clean up his waste
 - Any waste he discharged long gone

No Liability Without Notice

- ◆ "a party who is not the original creator of nuisance is entitled to notice...before an action will lie"
 - *Grigsby*, California Supreme Court 1870
- ◆ Part 2 of 3-part test for former owners: "did they have knowledge?"
 - *Wenwest*, Order WQ 92-13, 1992

15

Mr. Leal Did Not Have Notice

- ◆ No notice of mercury leaving site
 - (alleged discharge)
- ◆ No notice that discharges might be exceeding water quality objectives for Sulphur Creek
 - (alleged condition of pollution or nuisance)
- ◆ No notice that he should be taking any action

16

First Conclusion

- ◆ The law requires notice for liability
- ◆ Mr. Leal did not receive notice
- ◆ Therefore, he is not liable

17

Mr. Leal Is Not Liable Because

2. He Was Not At
Fault

The Law Requires Fault

- ◆ Civil Code §3483
 - "Each successive owner of property"
 - "who neglects to abate a continuing nuisance"
 - Is liable
- ◆ Neglect = negligence

19

Mr. Leal Was Not At Fault

- ◆ No notice
- ◆ No site operations

20

Second Conclusion

- ◆ Law requires fault
- ◆ Mr. Leal was not at fault
- ◆ Therefore, he is not liable

21

Mr. Leal Is Not Liable Because

3. It Would Be Unfair
To Hold Him Liable

Wenwest Leniency

- ◆ Even when person is liable
 - Regional Board can exercise leniency
- ◆ *Wenwest* decision identified factors
 - Applicable to that decision
 - Not only factors allowed
 - Not all required

23

Wenwest Factors

- | | |
|--|------------------------------------|
| ◆ Nothing to do with activity that caused leaks | ◆ Purchased property for conveying |
| ◆ No exacerbation | ◆ Owned for brief time |
| ◆ Only some knowledge of contamination | ◆ Purchaser on order |
| ◆ Issue just being recognized as general problem | ◆ Other responsible parties |
| | ◆ Cleanup proceeding |

24

Factors Apply to Mr. Leal

- ◆ Had nothing to do with cause
- ◆ Did not exacerbate it
- ◆ Did not have ANY knowledge
- ◆ Issue not recognized by federal expert
- ◆ Only partial ownership
- ◆ No possession, purchased for resale
- ◆ Other parties on draft order

25

Third Conclusion

- ◆ *Wenwest* factors allow leniency
- ◆ Factors apply to Mr. Leal
- ◆ Therefore, leniency should be applied to Mr. Leal

26

Mr. Leal Is Not Liable Because

4. The Mine Site Was
Not Creating A Nuisance

Discharge Must Cause Nuisance

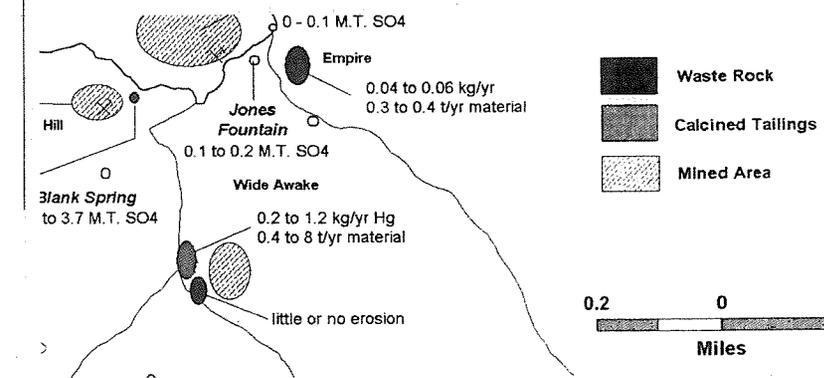
- ◆ Water Code §13304 authorizes CAO
- ◆ When person "causes or permits"
- ◆ "waste to be discharged"
- ◆ Where it creates "condition of pollution or nuisance"

No Nuisance In Early 1990s

- ◆ Draft CAO: MUN and consumption of organisms "did not exist and could not be attained...due to natural sources"
- ◆ No exceedance of WQOs identified

29

Mercury From Tailings



30

Mercury In Tailings ~20 ppm

- ◆ Two samples from tailings pile
 - "Calcined Tailings—red calcined tailings from large mixed waste pile"
 - 5C1 report
- ◆ 10 ppm (WA-7)
- ◆ 30 ppm (WA-4)
- ◆ Old RB sample = 13 ppm

31

Less Than Screening Values

- ◆ BLM
 - Camper 40
 - Worker 60
 - Surveyor 480
 - Driver 550
- ◆ EPA PRG
 - Industrial worker 115

32

Less Than New WQO

- ◆ Numeric standard
 - "During high flow conditions...ratio of mercury to total suspended solids shall not exceed 35 [ppm]"
- ◆ Tailings pile is only 20 ppm

33

CAO Implements TMDL

- ◆ Reduction in anthropogenic sources
 - Applies to current and FUTURE discharges
- ◆ Not applicable to PAST discharges

34

Fourth Conclusion

- ◆ CAO authorized only when discharge creates condition of pollution or nuisance
- ◆ No nuisance in the early 1990s
- ◆ Therefore, Mr. Leal is not liable

35

Conclusion

- ◆ No notice
- ◆ No fault
- ◆ Leniency applicable
- ◆ No nuisance

36

EXHIBIT F

EXHIBIT G

LAWRENCE S. BAZEL (State Bar No. 114641)
RICHARD J. WALLACE (State Bar No. 124286)
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
(415) 402-2700
Fax (415) 398-5630

Attorneys for
MR. AND MRS. ROBERT and JILL LEAL

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

CENTRAL VALLEY REGION

In the matter of:

PROPOSED TECHNICAL AND MONITORING
REPORT ORDER

THE WIDE AWAKE MERCURY MINE

COLUSA COUNTY

**COMMENTS ON DRAFT ORDER
SUBMITTED BY MR. ROBERT LEAL**

29 April 2010

In response to the proposed order received from Lori Okun on 14 April 2010, Robert Leal submits the following comments:

1. The Site Is Not A Mine.

There is no evidence of any mine shaft or open mine on any part of the property. The concern expressed by Regional Board staff is about piles of rock and other materials.

2. The Regional Board Has Confused Two Mine Sites.

The evidence submitted shows that there were once two mines, the "Wide Awake Mine" and the "Buckeye Quicksilver Mine". Most if not all of the mine-associated structures reported by Regional Board staff appear to be on the Buckeye site. There is no evidence that Mr. Leal had an ownership interest in this site.

The Wide Awake Mine site was on Government Survey Lots 43 and 44. The Buckeye Quicksilver Mine site was on Government Survey Lot 37. The Wide Awake Mine site is now identified as Assessor's Parcel Number 10. The Buckeye Quicksilver Mine is now Assessor's Parcel Numbers 11 and 12. Robert Leal's vesting deed was recorded on February 28, 1990 at Book 649, Page 118 of the Official Records of Colusa County, California. The legal description for the property that was conveyed to Mr. Leal in the Grant Deed included Lots 43 and 44, but did not include Lot 37. The Regional Board, therefore, has not established that Mr. Leal owned two of the three lots it has identified as the site.

3. There Is Not Sufficient Evidence To Hold Mr. Leal Liable For Nuisance.

By proposing to modify the order so that it is no longer an cleanup and abatement order, and by removing the imposition of any requirement under authority of Water Code § 13304, Regional Board staff are conceding that there is not sufficient evidence to hold the named parties liable for nuisance.

4. Site Information Showed That Mercury Levels In The Piles Were Not At Harmful Levels.

The evidence offered by the Regional Board established that the levels of mercury identified at the property were below screening values used to determine whether they pose a risk. They were also below natural background levels. The Regional Board therefore has not established that the property has mercury present at levels above natural background, or that it was discharging at above natural background levels at the time of Mr. Leal's ownership. Because there is no evidence of levels above background, there is no evidence of any anthropogenic contribution or nuisance.

5. Regional Board Personnel Did Not Find Any Evidence Of A Nuisance When They Visited The Site In The 1990s.

During his deposition, Regional Board staff member Victor Izzo testified that he visited the property in about 1992, along with another Regional Board member, and that a report was produced as a result of the visit. Excerpts of Mr. Izzo's testimony are provided as Exhibit 1, and

the report is provided as Exhibit 2. This evidence, which also came out at the evidentiary hearing last fall, shows that Regional Board members did not identify any nuisance when they visited the property during the time of Mr. Leal ownership. Mr. Izzo also testified that he did not notify Mr. Leal of any nuisance.

6. Every Owner Of Every Property In The Central Valley, Including Residential Properties, Would Also Be Liable Under The Theory Of The Proposed Order.

The proposed order asserts that “Any discharges of mercury or mercury-laden sediments . . . therefore threaten to cause or contribute to a condition of pollution or nuisance.” (§ 27.) Because every property contains dirt, and all the dirt in the region contains mercury, this sentence establishes that every property is creating a nuisance. This statement confirms what Mr. Leal previously said, which is that the mercury problem is caused by natural and background sources, and that there is no evidence that any runoff from the property at issue here, during the time that Mr. Leal owned it, is causing or contributing to any problem. In other words, the Regional Board has not established that the property, during Mr. Leal’s ownership, is a substantial factor in causing any nuisance.

7. Regional Board Staff Have Not Fairly Considered The Applicable Law On Nuisance.

Regional Board have ignored the *Preston* case holding that former owners generally are not liable for dangerous conditions on property they have sold. (*Preston v. Goldman* (1986) 42 Cal. 3d 108.) Staff rely on the Civil Code section that says successive owners of property are liable for nuisances, but ignore related case law, as cited by Mr. Leal in previous submissions. They ignore the case law holding that nuisance requires fault, and that a landowner is not liable for a nuisance until put on notice. (See Mr. Leal’s comments dated 1 July 2009.)

People are responsible for the land they own. When landowners are informed that their land is causing a nuisance, they become liable for harm caused by the nuisance. But people are not responsible for land they do not own. Former landowners are therefore not responsible for what may have been dangerous conditions on the land when they owned the land, but were never brought to their attention while they owned it.

Here Regional Board staff cite only the statutes, case law, and State Board orders tending to expand the authority of the Regional Board. They have not responded to Mr. Leal’s citations to other authority that limits that authority, and to higher authority to the contrary.

8. Liability Is Not Joint And Several.

The proposed order asserts that the liability among former landowners is joint and several. Mr. Leal cited case law for the proposition that liability is not joint, but only several. (Comments of 1 July 2009, § 10, citing *Slater v. Pacific American Oil Co.* (1931) 212 Cal. 648, 655.)

9. Title Documents Do Not Provide Notice Of A Nuisance.

Regional Board staff argue that title documents provide notice. But at most they provide notice of a mining claim. They do not provide notice of a discharge, or of a nuisance.

10. Section 13267 Reports Must Be Related To The Discharge.

Implicit in Water Code § 13267, which allows a Regional Board to require technical reports of people who have discharged waste, is that the technical reports must be related to *that person's* discharge. Regional Board staff cannot seriously believe, for example, that a person can be made to provide technical reports about someone else's discharge. But the proposed order is not related to any discharge that may have occurred during the time of Mr. Leal's ownership. Any discharge that might have occurred in the 1990s is long gone, and there is no evidence that it remains anywhere within the State of California. The proposed order is not directed at any past discharge, but rather to the piles of rock and earthen materials on the property that have *not been discharged*. But section 13267 does not provide any authority to require technical reports of materials that have not been discharged. The proposed order therefore goes beyond the authority provided by section 13267.

11. The Regional Board Has Not Established That The Burden Bears A Reasonable Relationship To The Costs.

Water Code § 13267 requires the burden, including costs, to bear a reasonable relationship to the need for the reports and the benefit to be obtained. The Regional Board has not provided any analysis of the burden, including costs, or any analysis of the benefit that will be obtained.

12. The Regional Board Has Not Provided A Sufficient Explanation About The Need For The Reports.

Section 13267 requires a written explanation about the need for the reports, and an identification of the evidence that supports requiring the individual person to provide the reports. The explanation and evidence are inadequate. The Board concedes, for example, that the evidence of discharge during Mr. Leal's ownership is speculative. In paragraph 45, the order says that waste piles were discharging "or suspected of discharging". In paragraph 57, directly related to Mr. Leal, the Board says that these wastes were eroding or suspected of eroding. The technical reports being required, however, will not determine whether there was any erosion during the time of Mr. Leal ownership.

13. Regional Board Staff Read Wen-West Too Narrowly.

In *Wen-West*, the State Board did not decide that Wen-West actually was liable. It sidestepped the issue by applying equitable factors, finding that there was no culpability, and deciding that even if Wen-West was technically liable it should not be held liable.

Here those same equitable factors show that Mr. Leal should not be held liable. Staff try to distinguish Wen-West because there is no cleanup currently proceeding, but Mr. Leal is not

responsible in any way for that lack of cleanup. The equitable factors weigh strongly in his favor, and he should not be held liable.

14. The Proposed Order Incorrectly Asserts That The Regional Board Did Not Acquiesce In The Discharge.

The proposed order says that there is no evidence that the Board acquiesced in the discharge. On the contrary, Regional Board staff visited the property in the 1990s, took samples, and prepared a report. (See discussion above.) Regional Board staff did not identify any nuisance or any need for waste discharge requirements. If there was any discharge at that time, they acquiesced in it.

15. Regional Board Staff Have Not Properly Considered Whether There Is A Taking In Violation Of The Fifth Amendment.

The proposed order asserts that there is not taking because of the decision in the *Lucas* case. But *Lucas* considered only one form of taking. The *Lingle* case, cited by Mr. Leal, makes clear that there can be a taking not only under the *Lucas* analysis, but also under the *Penn Central* analysis. Here the burden on private property is too great, because it requires a former landowner to pay money to solve a problem that he did not create, and was never notified of by the Board at the time he owned the property even though the Board.

The Regional Board cannot make an individual pay for costs that should be paid by the community. (*Pennell v. City of San Jose* (1988) 485 U.S. 1.) Here the mercury of concern is coming from throughout the Central Valley. Mr. Leal is no more responsible for it than any other *former* owner of any property in the region. He should not be held responsible for a cost that should be paid by the community.

16. The Proposed Order Does Not Comply With The California Environmental Quality Act (“CEQA”).

CEQA requires an EIR to be prepared for any project “that may have a significant effect on the environment.” (Pub. Resources Code § 21100(a).) Here there is no doubt that the project will have a significant effect on the environment, because the project (as envisioned by the Regional Board) requires earth moving and construction, in a remote area, related to large piles of mercury-containing material. An EIR is required before “the agency has committed itself to the project as a whole or to any particular features . . . including the alternative of not going forward with the project.” (*Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116, 139.) Here the Regional Board is clearly committed to going forward with the project. The original order specifically required site remediation, including construction and the use of heavy equipment. The revised order deletes the requirement for site remediation not because the Regional Board is any less committed to site remediation, but because the Regional Board concedes that it does not have enough information to order the named parties to undertake the remediation.

The draft order argues that the project is exempt from CEQA, and cites three sections within the CEQA Guidelines. But none of them applies. The first, § 15321(a)(2) applies to actions “to enforce or revoke a lease, permit, license, certificate, or other entitlement”. Here

there is no lease, permit, license, certificate, or other entitlement, and so the section does not apply. Moreover, the implicit reason for the section—that any required CEQA review would have been done before the entitlement was issued—does not apply here.

The other sections identified in the proposed order, § 15307 and 15308, do not apply to actions involving construction activities. Here the project requires construction activities. As a result, neither section applies.

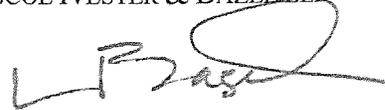
The Regional Board should comply with CEQA before issuing the proposed order.

17. Mr. Leal Should Be Given More Than Two Weeks' Notice.

The e-mail from Ms. Okun asserts that nothing will be considered if it is received by the Regional Board after the deadline, which is well before the Regional Board hearing. This deadline artificially cuts off Mr. Leal's right to comment. He should have an opportunity to present his arguments up to an including the hearing. Anything else cuts off his right to comment, as protected by due process, California statutes, and State Board regulations.

Dated: 29 April 2009

BRISCOE IVESTER & BAZEL LLP



By: _____

Lawrence S. Bazel

Attorneys for MR. ROBERT LEAL

CALIFORNIA REGIONAL WATER QUALITY BOARD

IN THE MATTER OF:

DRAFT CLEANUP AND ABATEMENT
ORDER, THE WIDE AWAKE MERCURY
MINE, COLUSA COUNTY

DEPOSITION OF VICTOR IZZO, R.G.

Rancho Cordova, California

Monday, September 28, 2009

Reported by:

ELIZABETH A. WILLIS-LEWIS, CSR, RPR
CSR No. 12155

Job No. 121648A

1 CALIFORNIA REGIONAL WATER QUALITY BOARD

2

3

4 IN THE MATTER OF:

5 DRAFT CLEANUP AND ABATEMENT
6 ORDER, THE WIDE AWAKE MERCURY
7 MINE, COLUSA COUNTY

8

9

10

11

12

13

14

15 Deposition of VICTOR IZZO, R.G., taken on behalf
16 of Robert and Jill Leal, at 11020 Sun Center Drive,
17 Suite 200, Rancho Cordova, California, beginning at
18 8:47 a.m. and ending at 2:18 p.m. on Monday, September
19 28, 2009, before Elizabeth A. Willis-Lewis, Certified
20 Shorthand Reporter No. 12155.

21

22

23

24

25

1 believe that map is in the 5C-1 report.

2 Q. Did anyone in the regional board make any visit
3 to the Wide Awake Mine site to confirm the items
4 identified in the aerial photograph on page 1 of Exhibit
5 2?

6 A. Jeff or I did not. We weren't allowed on the
7 property.

8 Q. Have you ever been to the Wide Awake Mine site?

9 A. Yes, I have.

10 Q. When were you there?

11 A. 19 -- you know, I'm going to give you a range.

12 Q. That's fine.

13 A. I would say between around 1992, plus or minus
14 a couple years.

15 Q. And let me say in general when I ask you for a
16 date if you don't remember the exact date --

17 A. Right.

18 Q. -- if you remember approximately, that's great.

19 A. Yeah.

20 Q. Why were you at the Wide Awake Mine site in
21 1992, plus or minus a couple of years?

22 A. We would -- we were doing a study of mine sites
23 in the central valley and they were identifying --
24 actually they were mapping the mine sites and
25 determining if there was any significant threat to water