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Attorneys for Petitioner
OCEAN INDUSTRIES, INC.

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

IN RE:	NO.
ORDER NO. R2-2013-0025 TIME SCHEDULE ORDER PRESCRIBING ADMINISTRATIVE CIVIL LIABILITY	**PETITION FOR REVIEW**

Pursuant to Section 13320 of the California Water Code and Section 2050 of Title 23 of the California Code of Regulations, Petitioner Ocean Industries, Inc. submits this Petition for Review of Order No. R2-2013-0025 Time Schedule Order Prescribing Administrative Civil Liability for Alcoa Construction Systems, Inc., Alcoa Properties, Inc., AP Construction Systems, Inc., Challenge Developments, Inc., Dr. Collin Mbanugo, F.M. Smith and Evelyn Ellis Smith, Leona Chemical Company, Ocean Industries, Inc., Realty Syndicate, Ridgemont Development, Inc., Watt Housing Corporation, Watt Industries Oakland, Watt Residential, Inc. ("Order") adopted by the California Regional Water Quality Control Board, San Francisco Bay Region ("Regional Board") on July 10, 2013 in connection with the "Leona Heights Sulfur Mine" site.

Petitioner Ocean Industries, Inc. seeks review on behalf of itself and on behalf of current or former affiliated companies, including Ridgemont Development Inc., Watt Residential Inc., Watt Industries Oakland and Watt Housing Corporation, which are also named as dischargers in the Order. Petitioner Ocean Industries, Inc. collectively references itself and these other entities

hereafter as "Petitioner".

Petitioner provides the following information in support of its Petition as required by Section 2050 of Title 23 of the California Code of Regulations:

1. Petitioner is Ocean Industries, Inc., and its address is 2716 Ocean Park Boulevard, Suite 2025, Santa Monica, CA 90405. Petitioner requests that all communications be directed through its counsel as identified in the caption of this Petition.

2. Petitioner requests that the State Water Resources Control Board ("State Board") review the above-mentioned Order. A copy of the Order is attached as **Exhibit A** to this Petition.

3. The Regional Board approved the Order at its July 10, 2013 meeting and the Order was certified and issued by the Regional Board's Executive Officer on July 10, 2013. This Petition is timely filed.

4. Petitioner submits this Petition as a protective filing to ensure that Petitioner's rights are protected while it seeks to work with the Regional Board to resolve its disputes and reach agreement on various issues related to the Order. In the event that this Petition is made active, Petitioner will submit as an amendment to this Petition a full and complete statement of the reasons that the Order is improper.

5. Petitioner notes that this Order imposes civil liability based on Petitioner's alleged non-compliance with the tasks and schedule contained in Cleanup and Abatement Order (CAO) No. 98-004, as amended by Order Nos. R2-2003-0028 and R2-2013-0021. Consequently, this current Petition is related to Petitioner's previously submitted Petition for Review of Order No. R2-2013-0021 Amendment of Cleanup and Abatement Order Nos. 98-004 and R2-2003-0028 and Recission of Waste Discharge Requirements (Order No. 92-105).

6. The submittal of the current Petition is based on various grounds, including but not limited to, Petitioner not being a "discharger" as described in Water Code Section 13304. Petitioner has not owned the property since 2001 when it was sold to the current Property Owner. Petitioner never operated the mine which is the source of the discharge, did not discharge or deposit the mine waste where it could be discharged into the waters of the State and did not cause or threaten to cause a condition of pollution or nuisance. Petitioner purchased the property many

years after the mine operations ceased. The Regional Board has presented no facts supporting Petitioner being named as a discharger other than the fact that it was one of many former owners of the property.

7. As additional grounds supporting this Petition, the Regional Board has presented no facts substantiating that Petitioner has violated Cleanup and Abatement Order (CAO) No. 98-004, as amended by Order Nos. R2-2003-0028 and R2-2013-0021 so as to justify imposition of the maximum daily penalty of $10,000 per day against Petitioner. Specifically, the Order does not comply with the provisions set forth in California Water Code Section 13308, which require that the amount of any penalty to be imposed must be based on an amount reasonably necessary to achieve compliance and shall not include any amount intended to punish or redress previous violations. The justifications contained in the Order for imposing the maximum daily penalty against Petitioner are inaccurate and fail to take into account the actions of the Regional and State Boards over the years against the current property owner. Notably, in recognition of his position as property owner and for his failure to comply with deadlines set, the current property owner was the sole party assessed civil penalties by the State Board in connection with the "Leona Heights Sulfur Mine" site.

8. As further grounds for the Petition, the justifications contained in the Order for imposing the maximum daily penalty against Petitioner are inaccurate as they fail to take into account the steps that Petitioner took to comply with prior orders by entering into an agreement with the property owner and Alcoa Properties, Inc. in which it funded corrective actions at the site. In addition, Petitioner asserts that if a substantial penalty is to be imposed, it should only be imposed for the critical deadline for completion of the construction work in late 2014 and not for interim deadlines well in advance of the construction work being commenced.

9. Petitioner is aggrieved by the Order because compliance with the requirements therein will result in unnecessary burden and expense to Petitioner, which will continue its efforts to work with the Regional Board to reach a mutually-agreeable resolution. If those efforts are unsuccessful, Petitioner will submit an amendment to this Petition which will include, inter alia, a statement of the manner in which Petitioner is further aggrieved by the Order, as necessary.

10. Pursuant to Section 2050.5 of the California Code of Regulations, Petitioner asks that the State Board hold this Petition for Review in abeyance, while the Petitioner attempts to work cooperatively with the Regional Board to resolve these issues in a mutually-satisfactory manner. In the event such efforts are unsuccessful, Petitioner will amend this Petition for Review, as necessary, and inform the State Board of the need for active review of the Petition for Review.

11. Petitioner reserves its rights to submit to the State Board as an amendment to this Petition a complete statement of points and authorities in support of this Petition, as necessary.

12. A copy of this Petition for Review and the attached **Exhibit A** have been sent to the Regional Board, as well as to all parties named as dischargers in the Order for which contact information is available.

13. Petitioner's concerns regarding the Order were presented in written comments on the Tentative Order submitted to the Regional Board on June 14, 2013, which are attached as **Exhibit B** to this Petition.

For all of the reasons stated herein, Petitioner requests that the State Board accept this Petition for Review and hold it in abeyance while Petitioner works with the Regional Board to resolve its disputes. In the event that such efforts are unsuccessful, Petitioner will amend this Petition for Review.

Respectfully Submitted,

DATED: August 9, 2013

LEWIS BRISBOIS BISGAARD & SMITH LLP

By _____

CHRISTOPHER P. BISGAARD
GLENN A. FRIEDMAN
ALEXANDRA M. OZOLS
Attorneys for Petitioner
OCEAN INDUSTRIES, INC.

EXHIBIT A

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

ORDER NO. R2-2013-0025

TIME SCHEDULE ORDER PRESCRIBING ADMINISTRATIVE CIVIL LIABILITY for:

ALCOA CONSTRUCTION SYSTEMS, INC., ALCOA PROPERTIES, INC., AP CONSTRUCTION SYSTEMS, INC., CHALLENGE DEVELOPMENTS, INC., DR. COLLIN MBANUGO, F.M. SMITH AND EVELYN ELLIS SMITH, LEONA CHEMICAL COMPANY, OCEAN INDUSTRIES, INC., REALTY SYNDICATE, RIDGEMONT DEVELOPMENT, INC., WATT HOUSING CORPORATION, WATT INDUSTRIES OAKLAND, WATT RESIDENTIAL, INC.

for the property located at

END OF MCDONELL AVENUE
OAKLAND, ALAMEDA COUNTY

The California Regional Water Quality Control Board, San Francisco Bay Region (hereinafter Water Board), finds that:

1. **Purpose of the Order:** This Order prescribes civil liability for non-compliance with the tasks and schedule contained in Cleanup and Abatement Order (CAO) No. 98-004, as amended by Order Nos. R2-2003-0028 and R2-2013-0021. The Water Board adopted these orders pursuant to section 13304 of the Water Code. Order No. R2-2013-0021 established a schedule for the submittal and implementation of plans to address existing and potential water quality impacts at the Leona Heights Sulfur Mine for protection of water quality and human and environmental health. Although the above named dischargers (collectively, the "Dischargers") have worked cooperatively with Water Board staff to complete a portion of tasks required by CAO No. 98-004 (as amended in 2003), they have not initiated cleanup. The Dischargers will be subject to civil liability prescribed in this Order should they fail to complete any task of Order No. R2-2013-0021, as listed below.

2. **Site Location and Description:** As described in CAO No. 98-004, the Leona Heights Sulfur Mine is an inactive pyrite mine located in the Oakland Hills at the end of McDonell Avenue south of the Montclair District (Figure 1). The mine is located in the upper reach of the Leona Creek watershed, and sulfur-bearing mining waste (also referred to as tailings) fills the stream channel. Water flowing over and through these tailings dissolves sulfur, producing acid mine drainage in Leona Creek. In the dry season, the main source of water to the creek is groundwater that daylights on the property. During rain events, runoff from the watershed above the site forms an ephemeral stream that combines with the daylighted groundwater significantly increasing flows, and therefore increasing acid mine drainage in the creek (Figure 2). The creek has the characteristic orange color associated with acid mine drainage, which also dissolves metals (including cadmium, copper, mercury, nickel, lead, and zinc) and metalloids (arsenic) from surrounding soil and bedrock. Runoff from the site impairs water quality in Leona Creek until it flows into Aliso Lake (also known as Mills College Lake), located approximately 1400 feet downstream of the mine property boundary. No remedial work has been performed at this site, and thus water quality has not changed significantly since CAO No. 98-004 was issued.

3. **Parties Responsible for Discharge:** The site is currently owned by Dr. Collin Mbanugo, who is named as a Discharger in this and the R2-2013-0021 Order. As described in Order No. 98-004, the remaining Dischargers "caused or permitted the discharge of waste that has entered Waters of the State and created a condition of pollution or nuisance. The Dischargers have permitted the discharge of acidic water that contains concentrations of dissolved metals above Water Quality Objectives. All of the Dischargers knew of the discharge and have [or had] the ability to control it."

4. **Regulatory History:** Prior Water Board Orders include:
   a. In 1992, the Water Board adopted Order No. 92-105, prescribing Waste Discharge Requirements for the site. Corrective measures to address the mining waste and resultant pollution were required, however none were submitted, and no corrective measures were taken.
   b. In 1998, the Water Board adopted CAO No. 98-004 for the investigation and cleanup of the site. No tasks were completed.
   c. In 2003, the Water Board amended CAO No. 98-004 (CAO Amendment No. R2-2003-0028) to add the current property owner as a Discharger and amend task due dates. The Dischargers submitted a Corrective Action Plan and Implementation Schedule in partial completion of Task 2, however permits for construction of the remedy were not obtained, and cleanup has not been initiated.
   d. In May of 2013, the Water Board amended CAO No. 98-004 (CAO Amendment No. R2-2013-0021) to add Ocean Industries, Inc., as a Discharger, clarify tasks required to comply, and amend due dates.

5. **History of Non-Compliance:** The Dischargers missed deadlines for the following tasks required of CAO Amendment No. R2-2003-0028:

98-004 Task No.	R2-2003-0028 Action	Description	Due Date (per R2-2003-0028)	Status
B.1	Deleted by 2.a			
B.2	Replaced by 2.b	i. Technical Report Submittal, Corrective Action Plan and Implementation Schedule	May 30, 2003	Submitted April 11, 2006
		ii. Implentation of Corrective Action Plan and Implementation Schedule	Immediately Upon Approval (July 5, 2006)	Not Completed
B.3	Replaced by 2.c	i. Post Construction Monitoring	Upon Completion of Construction	Not Completed
		ii. Post Construction Reporting of Monitoring	Semi-Annually on October 31st and April 30th	Not Completed
B.4	Deleted by 2.d			
B.5		Proper Disposal and Prevention of Erosion of Wastes Onsite	N/A	Not Completed
B.6		Submit Monthly Progress Reports During Implementaion of Corrective Action Activities	N/A	Partially Completed

6. **Justification for this Order:**

a. The Water Board finds there is an ongoing violation of CAO No. 98-004, as amended by Order No. R2-2003-0028, and a threatened violation of Order No. R2-2013-0021, based upon the Dischargers' history of delayed compliance with Order Nos. 98-004 and R2-2003-0028.

b. Pursuant to section 13308(a) of the Water Code: "If the Board determines there is a threatened or continuing violation of any Cleanup and Abatement Order, Cease and Desist Order, or any Order issued under section 13267 or 13383, the Board may issue an Order establishing a time schedule and prescribing a civil penalty which shall become due if compliance is not achieved with that schedule."

c. In view of the ongoing violation of Order Nos. 98-004 and R2-2003-0028 and threatened violation of Order No. R2-2013-0021, issuance of a Time Schedule Order under section 13308(a) of the California Water Code, which establishes tasks, a compliance time schedule, and maximum civil liabilities to be assessed in the event of violation, including delayed compliance, is an appropriate action to ensure timely compliance with CAO No. 98-004 (as amended).

d. According to section 13308(b) of the Water Code: "The amount of the civil penalty [in a section 13308 Order] shall be based upon the amount reasonably necessary to achieve compliance, and may not include any amount intended to punish or redress previous violations. The amount of penalty may not exceed ten thousand dollars ($10,000) for each day in which the violation occurs."

e. If the Water Board prosecution staff determines the Dischargers have failed to comply with the time schedule of this Order, it may issue a complaint pursuant to Water Code section 13323(a) alleging the violation(s) of the time schedule and setting forth the amount of civil liability due under this Order. The Dischargers may either pay the civil liability or request a hearing before the Water Board. If the Water Board decides to impose the liability, it may impose a liability that is less than the amount prescribed in this Order if it makes express findings setting forth the reasons for its action based on the specific factors to be considered for administrative civil liabilities in Water Code section 13327 which states:

> *In determining the amount of civil liability, the regional board, and the state board upon review of any order pursuant to Section 13320, shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.*

f. Given the lengthy history of non-compliance and the nature and duration of the ongoing discharge, the maximum penalty is warranted and reasonably necessary to achieve compliance and is not intended to punish or redress previous violations.

7. **CEQA:** Adoption of this Order will not have any direct or reasonably foreseeable indirect physical change on the environment since it merely prescribes liabilities that will become due if there is non-compliance with Order No. 98-004, as amended by Order Nos. R2-2003-0028 and R2-2013-0021. As such, this Order is not subject to the California Environmental Quality Act ("CEQA"). (See Cal. Code Regs., tit. 14, § 15060(c)(2). Adoption of the Order falls within the general rule that CEQA only applies to activities that have the potential for causing a significant effect on the environment. Where it can be seen with certainty, as in the case of this Order, that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. (Cal. Code Regs., tit. 14, § 15061(b)(3).)

8. **Notification:** The Water Board has notified the Dischargers and interested agencies and persons of its intent under Water Code section 13308 to adopt a Time Schedule Order for the discharge and has provided them with the opportunity for a public hearing and an opportunity to submit their written comments.

9. **Public Hearing:** The Water Board, at a public meeting, heard and considered all comments pertaining to this discharge.

IT IS HEREBY ORDERED, pursuant to section 13308 of the California Water Code (CWC) that the Dischargers, their assigned agents, successors and assigns, must complete the tasks described in accordance with the task schedule specified in Table 1 of this Order. In the event of non-compliance with a task or task schedule, the respective penalty (or penalties) prescribed by the Order shall become due. Each discharger who fails to achieve compliance in accordance with the schedule established in this Order shall be liable civilly in an amount not to exceed the amount prescribed by the Order. The penalty shall accrue on each day after the due date until the task is completed.

A. TASKS

Each of the following numbered tasks refers to the tasks outlined in Order No. R2-2013-0021.

2.I.a Remedial Design Plan:

COMPLIANCE DATE: October 15, 2013
PENALTY: $10,000 each day the report is late

2.I.b Creek Restoration Design Plan:

COMPLIANCE DATE: October 15, 2013
PENALTY: $10,000 each day the report is late

2.II Application for Permits:

COMPLIANCE DATE: November 15, 2013
PENALTY: $10,000 each day the report is late

2.III Implement Mine Remediation and Creek Restoration Designs:

COMPLIANCE DATE: September 15, 2014
PENALTY: $10,000 each day the remediation and creek restoration is incomplete after compliance date

2.IV Recordation of Deed Restriction:

COMPLIANCE DATE: 180 days after completion of construction
PENALTY: $10,000 each day the report is late

3. Monitoring and Maintenance Plans:

COMPLIANCE DATE: October 30, 2014
PENALTY: $10,000 each day the report is late

I, Bruce H. Wolfe, do hereby certify that the foregoing is a full, true, and correct copy of an order adopted by the California Regional Water Quality Control Board, San Francisco Bay Region, on July 10, 2013.

Digitally signed by Bruce H. Wolfe
Date: 2013.07.10 15:10:52 -07'00'

Bruce H. Wolfe
Executive Officer

Attachments:

- Figure 1. Site Location
- Figure 2. Leona Creek
- Figure 3. Leona Creek, discoloration from acidophilic bacteria and iron oxide

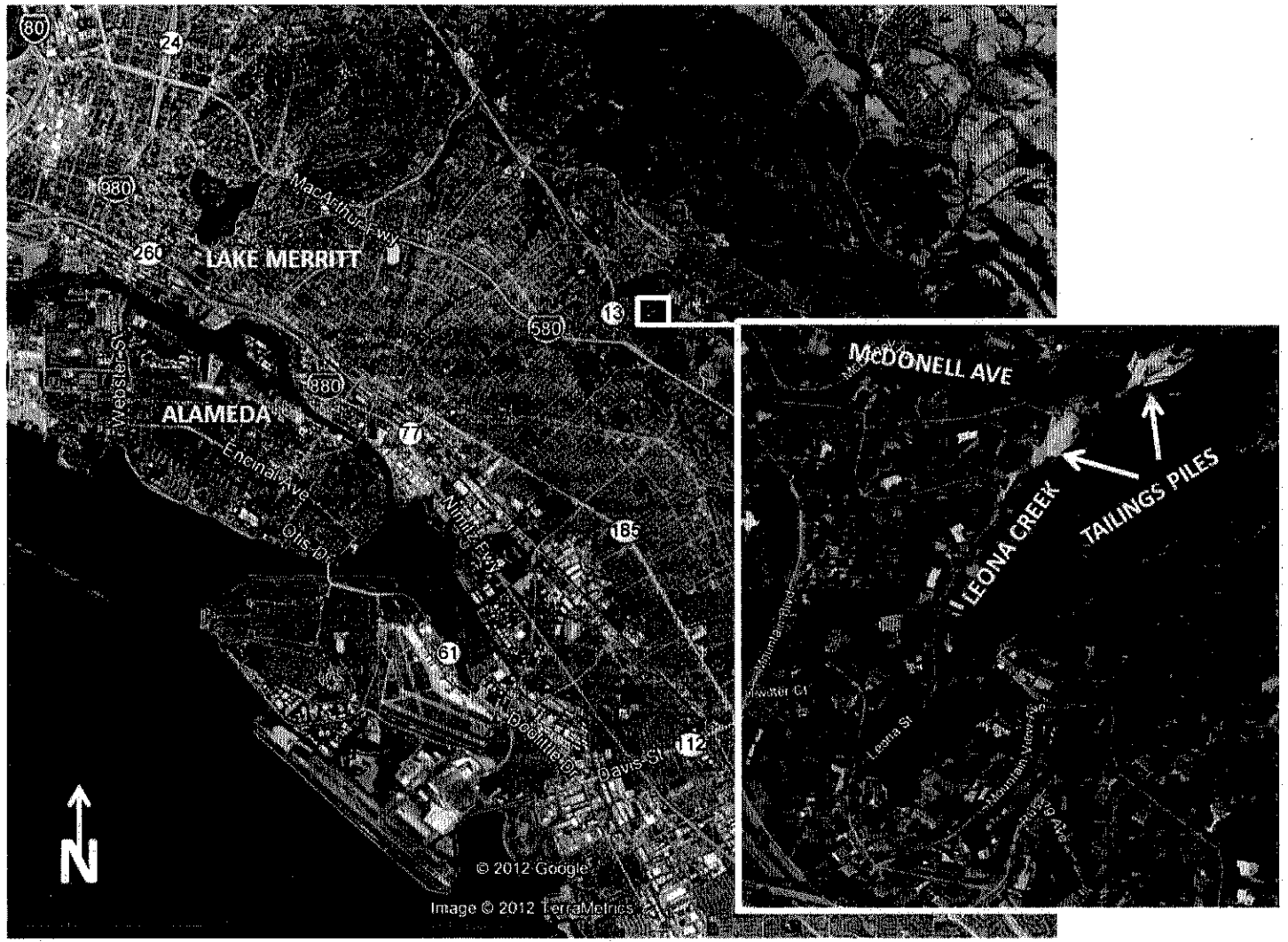

Figure 1. Site location

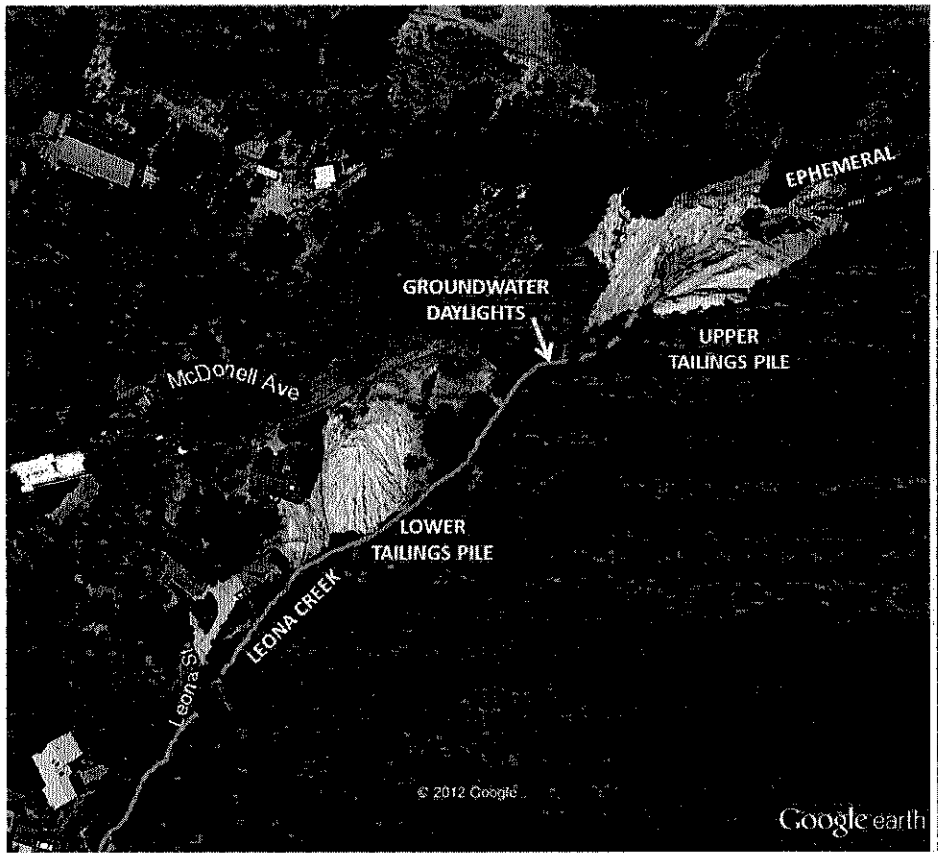

Figure 2. Leona Creek

Figure 3. Leona Creek, discoloration from acidophilic bacteria and iron oxide

EXHIBIT B

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June 14, 2013

File No.
8650.16

VIA E-MAIL AND US MAIL

Lindsay Whalin
California Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Re: Revised Tentative Time Schedule Order Prescribing Administrative Civil Liability for Leona Heights Sulfur Mine, Oakland, Alameda County

Dear Ms. Whalin:

Lewis Brisbois Bisgaard & Smith LLP, as counsel for Ocean Industries, Inc., Ridgemont Development, Inc., Watt Housing Corporation, Watt Industries Oakland and Watt Residential, Inc. (hereinafter collectively referred to as "Ocean" for purposes of convenience), submit the following comments/objections to the California Regional Water Quality Control Board's ("the Board") Revised Tentative Time Schedule Order Prescribing Administrative Civil Liability ("Revised Tentative TSO") for the property located at the end of McDonell Avenue, Oakland, Alameda County and more commonly known as the former Leona Heights Sulfur Mine:

I. REVISED TENTATIVE TIME SCHEDULE ORDER PRESCRIBING ADMINISTRATIVE CIVIL LIABILITY

Before proceeding to its specific comments/objections, Ocean reiterates its position that it should not be considered a "discharger" subject to the Revised Tentative TSO as follows:

A. Ocean is Not a Discharger

Pursuant to the definition of "Dischargers" set forth in California Water Code Section 13304, Ocean should not be named as a Discharger in the Revised Tentative TSO. Specifically, California Water Code Section 13304(a) states:

> Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or 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 water 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 affects of the waste, or in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.

Ocean never operated the Leona Heights Sulfur Mine. Ocean did not purchase the property where the mine is located until more than 50 years after mine operations had ended. There is no information that Ocean caused or contributed to waste being discharged into the waters of the state as it at no time had any involvement in the mining operations that were conducted at the site and never placed or moved the mine tailings at the property.

During its period of its ownership, Ocean contemplated residential development on other portions of the parcel on which the mine is located. Throughout its ownership of the property, Ocean's activities at most could be characterized as passive.

Ocean sold the property to current owner Dr. Collin Mbanugo in 2001 in "as is" condition with full disclosure of all site conditions. Pursuant to the terms of sale, Dr. Mbanugo agreed to be responsible for property maintenance on a going forward basis.

Separate and apart from contractual obligations imposed on Dr. Mbanugo to address site conditions, the current owner is responsible for and in the best position to take appropriate action for the property he owns. Dr. Mbanugo has owned and controlled the site for the last 12 years. In fact, the Board's enforcement actions were directed to Dr. Mbanugo.

There is no information to suggest that Ocean discharged wastes into the waters of the state when it owned the property. After selling the property to Dr. Mbanugo, Ocean has not "permitted" waste to be discharged into the waters of the state as only the current

property owner can take corrective action under the circumstances. Moreover, since the sale of the subject property to Dr. Mbanugo, Ocean has not had the ability to control any discharge of wastes emanating from the property.

While Ocean is in the chain of title for the subject property, there is no information to suggest that Ocean was aware that mining waste could or would be discharged from the subject property into waters of the state which it owned for a limited number of years, decades after the mine operations ceased in the late 1920s. It is requested that Ocean be removed from the Revised Tentative TSO for the reasons set forth above.

B. The $10,000 a Day Civil Liability is Unfair and Disproportionate to Ocean's Relationship to the Site

The Revised Tentative TSO suggests that it is legally permissible to impose the maximum daily penalty of $10,000 a day against Ocean based on its "lengthy history of non-compliance and the nature and duration of the ongoing discharge" in violation of Cleanup and Abatement Order ("CAO") No. 98-004, as amended by CAO No. R2-2003-0028. This characterization of Ocean's actions/inactions is inaccurate and fails to take into account the actions of the Board over the years taken against the current property owner, Dr. Mbanugo.

Indeed, the cooperation of Ocean working towards remedial action at the site is well documented by its agreement to fund work (along with Alcoa) which work was to be completed by Dr. Mbanugo. As the current property owner, Dr. Mbanugo is the only person with the authority to actually perform work on his property. Ocean is in no way culpable for Dr. Mbanugo's continual failures to proceed with the work that has been paid for by others - with no financial contribution on his part. The best evidence of this is the actions taken by the Board against Dr. Mbanugo and no other party. The Board has recognized in the past which party has failed to take appropriate actions at the site and has sought and obtained an award of $200,000 in administrative civil liabilities against Dr. Mbanugo.

It is inappropriate for the Board to now seek to impose the maximum daily penalty on Ocean for its alleged inactions when in the past the Board correctly attributed inaction at the site solely to the current property owner - Dr. Mbanugo. Note the Board has never sought to assess a civil penalty against Ocean. The record is clear. The Board's prior written Notices of Violations of CAO No. R2-2003-0028 were directed solely to Dr. Mbanugo as they should have been. (Inexplicably and for reasons known only to the Board and its staff is the failure to take action to actually cause Dr. Mbanugo to pay even one dollar of the fine imposed on him years ago.)

It is instructive to review the Board's prior steps to enforce remediation at the site. The Board's prior actions acknowledged the reality that a current landowner controls access to the site and is the sole entity with standing to enter into contracts and request permits for work at the site.

In the Board's First Notice of Violation, dated October 6, 2005[1] and addressed solely to Dr. Mbanugo, the Board advised him that it would consider imposing civil liabilities for each day he continued his noncompliance with CAO No. R2-2003-0028. (See First Notice of Violation attached to Ocean's letter as **Exhibit A.**) No such notice was directed to Ocean or Alcoa.

Five months later, on March 10, 2006, the Board issued its Second Notice of Violation again addressed solely to Dr. Mbanugo. The Board warned Dr. Mbanugo that the requirements of CAO No. R2-2003-0028 could subject him to penalties from up to $500 to $5,000 a day. (See Second Notice of Violation attached to Ocean's letter as **Exhibit B.**) No such notice was directed to Ocean or Alcoa.

Four months later the Board issued its Third Notice of Violation dated July 17, 2006 which was again addressed solely to Dr. Mbanugo. The Board advised him that his continued noncompliance with both CAO No. R2-2003-0028 and the instructions in the Board's December 16, 2005 letter to him could subject him to penalties up to $5,000 a day. (See Third Notice of Violation attached to Ocean's letter as **Exhibit C.**) No such notice was directed to Ocean or Alcoa.

A month later, in correspondence dated August 10, 2006, the Board advised Dr. Mbanugo that he continued to be in noncompliance with CAO No. R2-2003-0028. The stated violations included his failure to provide the City of Oakland information needed for its permitting process.[2] Executive Director Bruce Wolfe stated as follows:

> *The fact remains that you have still not completed the actions to obtain the agency permits that are required to implement the Leona Mine cleanup. Specifically, you have not provided the City of Oakland the information it requested to process your permit applications.* ***The failure to obtain these permits has caused critical delays in***

[1] Four years after the current property owner purchased the site on an "as is" basis.

[2] As an example of the arbitrary nature of the Revised Tentative TSO, during the staff's May 8, 2013 presentation to the Board and the public, the staff attributed the failure to submit required information to the City of Oakland for the permitting process to Ocean and Alcoa as well as to Dr. Mbanugo, despite previous correspondence from the Board acknowledging that this task was strictly within Dr. Mbanugo's purview.

> *meeting the project deadlines. We consider you to be seriously out of compliance with our order and we are preparing to take enforcement action in the form of administrative civil liabilities pursuant to California Water Code Section 13350. [Emphasis added.] You may be subject to penalties up to $5,000 per day for each day you are out of compliance with the CAO and our December 16, 2005 letter.... We urge you to come into full compliance forthwith.* (See the Board's letter attached to Ocean's letter as **Exhibit D.**)

Some two years later, on September 15, 2008, the Board assessed an Administrative Civil Liability solely against Dr. Mbanugo for $200,000 for his "violations of law", namely his failure to comply with CAO No. R2-2003-0028 and the further instructions given to him in the December 16, 2005 letter.

Ocean directs the Board to the specific findings of Order No. R2-2008-0084, which included an analysis under California Water Code Section 13327. These findings are especially illuminating and support Ocean's argument that the Revised Tentative TSO should be directed solely to Dr. Mbanugo.

Specifically, the Board in Order No. R2-2008-0084 noted that the "nature, circumstances, extent and gravity of the reporting violations in this instance are very serious, and the Water Board's analysis of this factor weighs in favor of assessing a substantial penalty" on Dr. Mbanugo. Under "Prior History of Violations", the Board noted Dr. Mbanugo's three prior Notices of Violation which "support[] imposition of a substantial penalty because of the need for progressive enforcement". Ocean has never been the subject of a Notice of Violation concerning this site.

Under "Degree of Culpability" the Board noted that Dr. Mbanugo as the "Discharger is solely responsible for submission of monthly progress reports to demonstrate compliance". Moreover, under "other Matters as Justice May Require", the Board noted that:

> *The Discharger's property is a significant source of pollutants to the environment. . Although he initially demonstrated cooperation after purchasing the property, the Discharger has terminated efforts to obtain necessary permits and has cut off communication with the Water Board staff by failing to submit the required reports. The Discharger has not implemented any corrective actions to comply with the CAO for more than four years or to comply with the December 16, 2005 letter requiring progress reports for more than a year. The Discharger's willful refusal to comply with the Water Board's duly-issued CAO and reporting requirements continues to allow the prolonged discharge of harmful and toxic material into the environment. The Water Board's analysis of the factor supports the imposition of a substantial penalty.*

Order No. R2-2008-0084 specifically found that based on Dr. Mbanugo's 3,817 days of late reporting violations, the Board could have assessed a total liability of $3,817,000, but instead chose to impose a liability of only $200,000 (approximately $52.40 a day). The Board never collected the penalty of $200,000 from Dr. Mbanugo, despite noting in the order that Dr. Mbanugo owned properties in Oakland and Emeryville which were assessed with a value at that time in excess of $1.5 million.

(See ACL Complaint No. R2-2008-0002 and Order No. R2-2008-0084 attached to Ocean's letter as **Exhibits E** and F.)

Based on the foregoing, the Revised Tentative TSO should be directed solely at the current property owner and not Ocean. Ocean's actions in providing funding (along with Alcoa) towards completing the work at the site has not changed since the Board sent its first letter to Dr. Mbanugo in October 2005. There is no evidence that Ocean has not met all of its obligations in terms of funding what should have been the ongoing work of the current property owner. The natural question that follows logically from all of the above is: what has changed that would cause the Board to now seek to impose civil penalties against Ocean when it has done everything it has been asked to do by funding the activities seeking to remediate conditions at the site? The Board correctly focused on the only person who could actually undertake the work at the site - Dr. Mbanugo - in everything it did from 2005 through 2008 (when it imposed the administrative civil penalties against Dr. Mbanugo). To now seek to impose the maximum civil daily penalty against Ocean fails to recognize who has done what at the site - and who has not. The fact that the site remains unremediated over five years after the civil penalties were imposed on Dr. Mbanugo (with the findings noted above) is not the fault of Ocean. As it was in 2005, the "fault" for inaction lies solely at the feet of the current property owner and imposing civil penalties against Ocean would be unfair and unjustified.

Moreover, the $10,000 per day penalty is wholly excessive when the amount of the civil liability previously imposed on Dr. Mbanugo is considered. While Ocean strongly believes that it should not be subject to the Revised Tentative TSO, it absolutely rejects the notion that the amount of fines called for in the revised TSO is many multiples of the amount imposed on the current property owner for his well-documented failures to meet his obligations at the site.

C. Comments and Objections Regarding Specific Text of the Revised Tentative TSO

Page 1, Paragraph 1. "Purpose of the Order":

"They have not initiated cleanup."

As Ocean is not the current property owner, it does not have appropriate standing to obtain permits that would affect conditions on property that it does not possess, control or own. Moreover, it has no legal right to bind the property in any respect. Finally, Ocean has no legal right to access the property or commit to improvements that affect the property.

Ocean and Alcoa entered into an agreement with the current property owner to provide $795,000 towards the obtaining of necessary permits and applications and the construction of an approved remedy for conditions at the site. The subject agreement provides that Ocean and Alcoa shall pay $150,000 into an escrow account from which Dr. Mbanugo's consultants can draw to pay for the permitting work. When it became clear that additional money would be necessary to obtain the necessary permits, Ocean and Alcoa agreed to make additional funds available so that the work could proceed - even though they had no legal obligation to do so. To date, Ocean and Alcoa have contributed $515,000 into the escrow account. (Of the $515,000, over $120,000 remains in the escrow account.)

It is correct to state that cleanup of the site has not been initiated - if that means construction of the remedy has not begun. It is incorrect to conclude that substantial efforts have not been undertaken to reach a point where construction can begin. Moreover, all of that work has been paid for by Ocean and Alcoa. Ocean is informed that the current property owner has not expended any of his own money towards the work undertaken by his consultants. Rather, those consultants have been paid through the escrow funded by Ocean and Alcoa.

> "The Dischargers will be subject to civil liability prescribed in this Order should they fail to complete any task of Order No. R2-2013-0021, as listed below."

As set forth earlier, it is fundamentally unfair to subject Ocean to civil liability should the current property owner fail to complete the tasks set forth in the Revised Tentative TSO. Not only does Ocean have no ability to obtain permits for work to be done on the current property owner's property, the undisputed facts are that Ocean (and Alcoa) have funded all of the work that has been undertaken to date. To subject Ocean to civil liability up to $10,000 a day for failure to meet milestone deadlines related to pre-construction work over which it has no control (but has paid for - with Alcoa) is just wrong. Should the Revised Tentative TSO be issued, it would punish Ocean (and Alcoa) for doing "the right

thing" - even though both strenuously object to their being included in any of the orders related to the site as dischargers.

Page 2, Paragraph 3. "Parties Responsible for Discharge":

As indicated above, Ocean should not be named in the Revised Tentative TSO as it is not a "Discharger" as that term is defined in California Water Code Section 13304. Ocean incorporates herein by reference all of the comments/objections set forth above as to why it is not a "Discharger."

"All of the Dischargers knew of the discharge and have or [had] the ability to control it."

When it comes to Ocean, it is clear that it does not currently have "the ability to control it." That control rests with the current property owner (who has owned the site for well over a decade).

Pages 2-3, Paragraph 5. "History of Non-Compliance":

This paragraph inaccurately depicts the circumstances under which deadlines were missed by the current property owner pursuant to CAO No. R2-2003-0028. As was well-known to the staff and legal counsel for the Board, Ocean, Alcoa and the current property owner entered into an agreement whereby Ocean and Alcoa deposited funds into an escrow account for the current property owner's implementation of the corrective action. The agreement provided that the current property owner would perform the corrective action and would be responsible for costs above the financial commitments which Alcoa and Ocean had agreed to fund. Ocean and Alcoa have significantly exceeded financial responsibilities imposed on them pursuant to that agreement by depositing funds for the current property owner's design work and permitting applications. Any "non-compliance" is solely the responsibility of the current property owner, not Ocean.

Notably, as discussed above, the two cited tasks of Section 2.b of CAO No. R2-2003-0028 were solely within the purview of the current property owner as evidenced by the past Notices of Violation attached as exhibits to this correspondence.

Page 3, Paragraph 6. "Justification for this Order":

Based on the circumstances, a Time Schedule Order equally subjecting Ocean, Alcoa and the current property owner to civil penalties for failing to achieve prescribed compliance dates is not an effective means for achieving the desired improvement in water quality from the mine tailings discharges at the site. As noted above, Ocean (and Alcoa) have already significantly exceeded their contractual obligations with the current property owner, who himself has been solely responsible for non-compliance with previous orders

and deadlines. Notwithstanding the substantial financial commitments previously expended by Ocean (and Alcoa), the current property owner has for an extended period of time not moved this matter forward through no fault of Ocean (or Alcoa.)

Subjecting Ocean to fines of $10,000 per day for tasks over which it has no control in no way fosters compliance. (California Water Code Section 13308(b)). Indeed, the mere possibility of such fines leaves Ocean with little choice but to assert its legal position that it is not a "Discharger" under California Water Code Section 13304 and at the same time seek a stay of any enforcement action against it pending a decision on Ocean's legal position. The possibility of draconian penalties and fines forces Ocean to change its focus from working towards solving the environmental problems at the site to challenging its inclusion in the Revised Tentative TSO as a "Discharger."

It is requested that the Revised Tentative TSO be modified to impose the compliance dates (and the possibility of civil liability) solely on the current property owner - the only person who has failed to meet his obligations to the Board (and to Ocean and Alcoa). By adopting this modification, Ocean (and Alcoa) can continue to work cooperatively with the Board and its staff in seeking a cost effective solution to the current conditions at the site.

Rather than issuing a Time Schedule Order against Ocean, Ocean submits that the Board should enforce the previously-imposed, but not effectuated penalties of $200,000 against the current property owner. Subjecting Ocean to penalties for the current property owner's unwillingness to comply with previous orders and deadlines reinforces and encourages the current property owner's intransigence and failure to move this matter forward.

> **Page 4, "In the event of non-compliance . . . civil liability up to the prescribed maximum shall accrue on each day until the task is completed."**

The Revised Tentative TSO does not address the stated concerns of the Board at the May 8, 2013 public hearing. At the hearing, the Board advised staff that the proposed TSO contained procedural defects in violation of California Water Code Section 13308 in that it was impermissibly vague in how it set forth the method for assessing penalties. The Board requested staff to revise and recirculate a TSO which took into account the Board's comments. The Revised Tentative TSO still suffers from the improper ambiguities noted by the Board by continuing to use the language "up to" in regard to the assessment of penalties. It is also impermissibly vague in that it does not indicate how penalties will be apportioned. Moreover, as discussed above, it also contains an excessive penalty based on prior civil liability solely imposed on the current property owner at this site, which should again be solely directed at the current property owner.

II. CONCLUSION

Ocean respectfully requests that the foregoing comments be considered and implemented on the Revised Tentative TSO prior to final adoption by the Board.

Very truly yours,

Christopher P. Bisgaard of
Glenn A. Friedman of
LEWIS BRISBOIS BISGAARD & SMITH LLP

Encls.

EXHIBIT A

California Regional Water Quality Control Board
San Francisco Bay Region

C. Lloyd, Ph.D.
ncy Secretary

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(510) 622-2300 • Fax (510) 622-2460
http://www.waterboards.ca.gov/sanfranciscobay

Arnold Schwarzenegger
Governor

CPB WORK COPY

Date: OCT 0 6 2005
File No. 2199.9279 (KER)

Leona Heights Sulfur Mine
Attn: Dr. Collin Mbanugo
3300 Webster Street, Suite 900
Oakland, CA 94609

Subject: Notice of Violation, Leona Heights Sulfur Mine, Oakland, Alameda County

Dear Dr. Mbanugo:

You are in violation of Cleanup and Abatement Order (CAO) No. 2003-0028 to complete corrective action at the Leona Heights Sulfur Mine site in Oakland. Specifically, implementation of remedial work at the Leona Heights Sulfur Mine property has not been implemented per Task B.2 of the CAO and your own commitments to perform work during the summer of 2005. Task B.2 requires implementation of the Corrective Action Plan and Implementation Schedule *immediately upon approval* by the Board. Your Corrective Action Plan was submitted on August 25, 2003, and approved by Board staff on Sept 11, 2003. On March 17, 2004, Board staff approved a follow-up document you submitted on March 1, 2004, under the title *Summary Design Report and Construction Documents*. A schedule presented within this report indicated the remediation would be performed during the summer of 2004. However, you made no attempt to implement the work until after Board staff contacted you in May 2005. Your subsequent applications for permits submitted in late June 2005 to the City of Oakland to implement corrective actions were deemed incomplete.

More than two years have passed since we approved your Corrective Action Plan and still no work has been performed at the site. The failure to implement corrective actions has allowed a discharge of contaminants into Waters of the State to continue unabated. We are considering enforcement action for your failure to comply with the CAO in the form of administrative civil liabilities pursuant to California Water Code Section 13350. Please provide a written explanation, **by November 1, 2005**, describing the circumstances for your failure to apply for permits to perform construction activities in a timely manner.

If you have any questions, please contact Keith Roberson at (510) 622-2404 or by email at KRoberson@waterboards.ca.gov.

Christopher Bisgaard, Esq.
Lewis, Brisbois, Bisgaard & Smith
221 N. Figueroa Street, Suite 1200
Los Angeles, CA 90012

Ocean Industries, Inc.
Attn: Chris Chase, Esq.
2716 Ocean Park Boulevard, Suite 2025
Santa Monica, CA 90405

Alcoa Inc.
Attn: Ralph Waechter, Esq.
Alcoa Corporate Center
201 Isabella Street
Pittsburgh, PA 15212-5858

Mr. Alan Berman
5171 McDonell Avenue
Oakland, CA 94619

EXHIBIT B

California Regional Water Quality Control Board
San Francisco Bay Region

Alan C. Lloyd, Ph.D.
Agency Secretary

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Arnold Schwarzenegger
Governor

Date: MAR 1 0 2006
File No. 2199.9279 (KER)

Leona Heights Sulfur Mine
Attn: Dr. Collin Mbanugo
3300 Webster Street, Suite 900
Oakland, CA 94609

Subject: Notice of Violation, Leona Heights Sulfur Mine, Oakland, Alameda County

Dear Dr. Mbanugo:

You are in violation of Cleanup and Abatement Order (CAO) No. R2-2003-0028 to implement corrective actions at the Leona Heights Sulfur Mine site in Oakland. This is your second Notice of Violation for non-compliance with the CAO. Specifically, remedial work at the Leona Heights Sulfur Mine property specified in Remedial Measure No. B.2 of the CAO has not been implemented in compliance with the revised scope of work and schedule that was approved by the Executive Officer in our December 16, 2005 letter. Copies of the CAO and our letter approving the revised work scope and schedule are attached.

Please submit forthwith all documents required for compliance with Order No. R2-2003-0028. These documents include 1) a Revised Construction Design Report and Drawings; 2) an application package to the Regional Water Board for a Section 401 Water Quality Certification permit; and 3) an application package to the U.S. Army Corps of Engineers for a Section 404 Streambed Alteration Permit. According to the revised schedule approved on December 16, 2005, each of these documents was due on December 31, 2005.

The failure to implement corrective actions has allowed a discharge of contaminants into Waters of the State to continue unabated. We are considering enforcement action for your failure to comply with the CAO in the form of administrative civil liabilities pursuant to California Water Code Section 13350. You may be subject to penalties between $500 and $5,000 per day for each day you are out of compliance with the CAO. The required documents are now more than 66 days late.

If you have any questions, please contact Keith Roberson at (510) 622-2404 or by email at KRoberson@waterboards.ca.gov.

Sincerely,

Bruce H. Wolfe
Executive Officer

Attachments: 1) Cleanup and Abatement Order No. R2-2003-0028
2) December 16, 2005 Letter to Dr. Collin Mbanugo

cc w/o attachments: Mailing List

Mailing List

Moju Environmental Technologies
Attn: Mr. Akali Igbene
780 Chadbourne Road, Suite A1
Fairfield, CA 94585

Mr. Brian Matsumura
City of Oakland
Building & Engineering Services
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Oakland, CA 94612

Ms. Alison Schwartz
City of Oakland
Environmental Services
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Mr. Alan Berman
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EXHIBIT C

California Regional Water Quality Control Board
San Francisco Bay Region

Linda S. Adams
Secretary for
...vironmental Protection

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http://www.waterboards.ca.gov/sanfranciscobay

Arnold Schwarzenegger
Governor

Date: JUL 17 2006
File No. 2199.9279 (KER)

Certified Mail No. 70042890000400474863
Leona Heights Sulfur Mine
Attn: Dr. Collin Mbanugo
3300 Webster Street, Suite 900
Oakland, CA 94609

Subject: Notice of Violation, Leona Heights Sulfur Mine, Oakland

Dear Dr. Mbanugo:

You are in violation of Cleanup and Abatement Order (CAO) No. R2-2003-0028 to implement corrective actions at the Leona Heights Sulfur Mine site in Oakland. This is your third Notice of Violation for non-compliance with the CAO. Specifically, remedial work at the Leona Heights Sulfur Mine property specified in Remedial Measure No. B.2 of the CAO has not been implemented in compliance with the revised scope of work and schedule that was proposed by you and approved by the Executive Officer in our December 16, 2005 letter. A copy of the December 16th letter approving the revised work scope and schedule is attached.

The following are violations of the CAO:

1. Our December 16, 2005 letter required you to submit monthly progress reports documenting work completed on the project. Our requirement for submittal of monthly progress reports was made pursuant to California Water Code Section 13267. You have not submitted a monthly progress report since the March 2006 progress report was submitted on April 7, 2006. To date the required progress reports have not been received for the months of April, May, and June 2006.

2. Permits that are required for the site remediation work to proceed have not been obtained. These permits include grading and creek protection permits from the City of Oakland, a Section 401 Water Quality Certification from the Water Board, and a Section 404 Streambed Alteration Permit from the US Army Corps of Engineers. The work schedule you proposed in the October 28, 2005, letter from Moju Environmental Technologies, which we approved in our December 16, 2005 letter, stated that application packages for these permits would be submitted no later than December 31, 2005. These permit applications were not submitted until April 10 – 11, 2006, over 90 days late. Your late submittal of these applications has resulted in project delays in obtaining the necessary permits, and completing the remediation at the Leona Mine.

3. Your April 11 permit application package to the City of Oakland was determined to be incomplete. On April 18, City of Oakland staff requested submittal of additional information in order to process your permit application. This information included:
   - A survey showing surrounding property lines adjacent to your project site;
   - Construction staging plan and drawing showing equipment hauling routes, City right of way, and surrounding property lines;
   - Engineers cost estimate for Grading and Watercourse improvements, wet signed and sealed;
   - Revised application for Category 4 Creek Protection Permit (CP05106) reflecting your current project, including required technical reports.

4. Also, on May 11, City of Oakland staff requested you also demonstrate your project's California Environmental Quality Act (CEQA) Compliance, through use of appropriate categorical exemptions. Specifically, you were requested to:
   - Submit a Request for Environmental Review Form and appropriate fee; and
   - Submit an analysis demonstrating whether the project could be considered categorically exempt under CEQA Guidelines sections 15333 (Small Habitat Restoration Projects) and/or 15304 (Minor Alterations to Land), taking into account the "exceptions" to the exemptions.

As of July 14, the City of Oakland has received no response from you to its requests for additional information, and therefore cannot process the permit applications. Furthermore, Water Board staff cannot process the Section 401 Permit application until the CEQA compliance issues with the City are addressed. Your failure to submit, in a timely manner, the information requested by the City of Oakland has resulted in unnecessary delays in obtaining the permits required for implementation of remediation of the Leona Mine site. Additionally, numerous calls to your office have not been returned. Your actions have not demonstrated a commitment to complete this project per the approved schedule, and as required by the CAO.

The failure to implement corrective actions at the Leona Mine site has allowed the discharge of contaminants into Waters of the State to continue unabated. We are considering enforcement action for your failure to comply with the CAO in the form of administrative civil liabilities pursuant to California Water Code Section 13350. You may be subject to penalties up to $5,000 per day for each day you are out of compliance with the CAO and our December 16, 2005 letter. We urge you to come into full compliance forthwith.

If you have any questions, please contact Keith Roberson at (510) 622-2404 or by email at KRoberson@waterboards.ca.gov.

Sincerely,

Bruce H. Wolfe
Executive Officer

Attachment: December 16, 2005 Letter to Dr. Collin Mbanugo

cc w/o attachment: Mailing List

MAILING LIST

Mr. Alan Friedman
Enforcement Coordinator
Regional Water Quality Control Board
San Francisco Bay Region

Moju Environmental Technologies
Attn: Mr. Akali Igbene
780 Chadbourne Road, Suite A1
Fairfield, CA 94585

Mr. Brian Matsumura
City of Oakland
Building & Engineering Services
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Mr. Alan Berman
5171 McDonell Avenue
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EXHIBIT D

California Regional Water Quality Control Board
San Francisco Bay Region

Linda S. Adams
Secretary for
Environmental Protection

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http://www.waterboards.ca.gov/sanfranciscobay

Arnold Schwarzenegger
Governor

Date: AUG 1 0 2006
File No. 2199.9279 (KER)

Certified Mail No. 70032260000212585715
Leona Heights Sulfur Mine
Attn: Dr. Collin Mbanugo
3300 Webster Street, Suite 900
Oakland, CA 94609

Subject: Response to Letter from Attorney Regarding the Leona Heights Sulfur Mine, Oakland

Dear Dr. Mbanugo:

This letter responds to the letter we received on July 27, 2006, from your attorney, Samuel U. Ogbu, regarding the Leona Heights Sulfur Mine site in Oakland.

Mr. Ogbu's letter implied that the Leona Mine cleanup is being delayed by the Water Board's failure to issue the Water Quality Certification permit you need to proceed, rather than by any inaction on your part. Mr. Ogbu's letter also suggested that the Regional Water Quality Control Board, San Francisco Bay Region, is handling this abandoned mine cleanup case differently than other similar cases by requiring you to comply with the California Environmental Quality Act (CEQA), whereas most Superfund site cleanups are exempt from CEQA. We disagree with these assertions, for the reasons outlined below:

1. The Leona Heights Mine site is not listed on USEPA's National Priorities List, and is not a "Superfund" site. CEQA exemptions that apply to federal Superfund sites do not apply to this site.

2. The Water Board is not the agency that has requested additional actions relating to CEQA compliance. The Cleanup and Abatement Order issued by the Water Board in 2003 for this site (Order No. R2-2003-0028) states that our Order is categorically exempt from CEQA, pursuant to section 15321, Chapter 3, Title 14 of the California Code of Regulations (CCR). Consistent with this CEQA exemption, the Water Board considers any work you perform under our direct oversight to comply with our Order to be exempt from CEQA process.

3. However, some aspects of the work necessary to comply with our Order require the involvement and approval of other agencies, and these tasks may require CEQA compliance. For example, the City of Oakland must demonstrate compliance with CEQA

guidelines before it can issue permits for projects that have the potential to cause environmental damage within the City's jurisdiction. The City Attorney, in consultation with the Water Board's Legal Counsel, has determined that the Section 15321 CEQA exemption that applies to the Water Board Order for this project *does not* apply to the City's permitting process. The Water Board cannot require the City to bypass any applicable CEQA requirements. The City must independently determine the level of CEQA compliance that is necessary before issuing the permits you need to implement the proposed remedial actions at the Leona Mine.

4. In order to expedite site cleanup, City staff expressed its desire to identify other CEQA exemptions allowed under the CCR that might apply to their permitting process for this project. On May 11, 2006, City of Oakland staff requested that you submit an analysis demonstrating whether the project could be considered categorically exempt under CEQA Guidelines section 15333 (Small Habitat Restoration Projects) and/or 15304 (Minor Alterations to Land). As of August 3, 2006, the City has not received this analysis from you.

The fact remains that you still have not completed the actions to obtain the agency permits that are required to implement the Leona Mine cleanup. Specifically, you have not provided the City of Oakland the information it requested to process your permit applications. The failure to obtain these permits has caused critical delays in meeting the project deadlines. We consider you to be seriously out of compliance with our order and we are preparing to take enforcement action in the form of administrative civil liabilities pursuant to California Water Code Section 13350. You may be subject to penalties up to $5,000 per day for each day you are out of compliance with the CAO and our December 16, 2005 letter (attached). We urge you to come into full compliance forthwith.

If you have any questions, please contact Keith Roberson at (510) 622-2404 or by email at KRoberson@waterboards.ca.gov.

Sincerely,

Bruce H. Wolfe
Executive Officer

Attachment: December 16, 2005 letter
Cc w/o attachment: Mr. Alan Friedman, RWQCB
Mr. Erik Speiss, OCC/SWRCB
Mailing List

MAILING LIST

Moju Environmental Technologies
Attn: Mr. Akali Igbene
780 Chadbourne Road, Suite A1
Fairfield, CA 94585

Mr. Brian Matsumura
City of Oakland
Building & Engineering Services
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EXHIBIT E

California Regional Water Quality Control Board

San Francisco Bay Region

Linda S. Adams
Secretary for
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Arnold Schwarzenegger
Governor

Date: July 9, 2008
File No. 2199.9279 (ADF)

SENT VIA CERTIFIED MAIL
#7007 2560 0001 7505 2531

Dr. Collin Mbanugo
Leona Heights Sulfur Mine
3300 Webster Street, Suite 900
Oakland, CA 94609

NOTICE: Administrative Civil Liability (ACL) assessed under California Water Code Section 133268 for the Leona Heights Sulfur Mine, Oakland, Alameda County

Dear Dr. Mbanugo:

Enclosed is ACL Complaint No. R2-2008-0002. The Complaint alleges that you have violated Section 13267 of the California Water Code by failing to submit technical reports for the Mine, as required in a letter from the Water board Executive Officer dated December 16, 2005. The Complaint describes the alleged violations in detail, and proposes a liability of $200,000. The deadline for submittal of written comments, evidence, and waivers is **August 11, 2008, at 5 p.m.**

I plan to bring this matter to the Water Board at its September 10, 2008, meeting. You have the following options:

1. You can appear before the Water Board at the meeting to contest the matter. Written comments and evidence shall be submitted by the deadline indicated above, and in accordance with the process set forth in the attached Public Notice. At the meeting, the Water Board may impose an administrative civil liability in the amount proposed or for a different amount, decline to seek civil liability, or refer the case to the Attorney General for judicial enforcement.

2. You can waive the right to a hearing to contest the allegations contained in the Complaint by paying the civil liability in full or by undertaking an acceptable SEP of up to $100,000 and paying the remainder of the civil liability, all in accordance with the procedures and limitations set forth in the waiver attached to the Complaint.

If you waive your right to a hearing, please mail and fax a copy of the signed waiver to the attention of Alan Friedman of my staff. If you have any questions regarding this matter, please contact Mr. Friedman at (510) 622-2347, or by email at afriedman@waterboards.ca.gov .

Sincerely,

Dyan C. Whyte

Dyan C. Whyte
Assistant Executive Officer

Enclosure: Complaint No. R2-2008-0002

Copy to: Standard R-1E List
Mailing List
Bruce H. Wolfe, Executive Officer

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

COMPLAINT NO. R2-2008-0002

ADMINISTRATIVE CIVIL LIABILITY
IN THE MATTER OF
DR. COLLIN MBANUGO
FOR VIOLATIONS OF CALIFORNIA WATER CODE
SECTION 13267
AT THE LEONA HEIGHTS SULFUR MINE
OAKLAND, ALAMEDA COUNTY

The Assistant Executive Officer of the California Regional Water Quality Control Board, San Francisco Bay Region (hereinafter the Water Board), hereby gives notice that:

1. Dr. Collin Mbanugo (the Discharger) has violated provisions of law for which the Water Board may impose civil liability pursuant to California Water Code Sections 13268(a)(1) and (b)(1) and 13323.

2. The Discharger has violated Section 13267 by failing to submit technical reports required in a letter from the Executive Officer dated December 16, 2005.

3. Unless waived, a hearing on this complaint will be held before the Water Board as set forth below on September 10, 2008, at the Elihu M. Harris State Building, First Floor Auditorium, 1515 Clay Street, Oakland, California. You or your representative will have an opportunity to be heard and to contest the allegations in this complaint and the imposition of the civil liability. An agenda for the meeting will be mailed to you not less than 10 days before the hearing date. The deadline to submit all evidence or comments concerning this complaint is August 11, 2008. The Water Board will not consider any evidence or comments not submitted by this deadline.

4. At the hearing, the Water Board will consider whether to affirm, reject, or modify the proposed civil liability, to refer the matter to the Attorney General for recovery of judicial liability, or take other enforcement actions.

ALLEGATIONS

5. This complaint is based on the following facts:

   a. Dr. Mbanugo is the current owner of the Leona Heights Sulfur Mine, a two-acre abandoned mining site located in the Oakland Hills near the junction of Interstate 580 and State Highway 13. Water quality at the site is impacted by acid mine runoff, which discharges into a creek that flows through waste rock piles left behind when the mine was abandoned in the late 1920s. Flows passing through the site follow a natural drainage channel of several hundred feet and then enter a storm drain. The

storm drain discharges to Lake Aliso on the Mills College Campus, and ultimately discharges to San Leandro Bay via another Storm Drain System. Site remediation was required under Cleanup and Abatement Order No. 98-004, which this Board adopted on January 30, 1998.

b. The Discharger purchased the property on November 29, 2001. Water Board staff met with the Discharger shortly thereafter. The Discharger indicated that he was aware of the discharges and planned to remediate the site. The Board amended the 1998 Order on April 14, 2003 by adopting Order No. R2-2003-0028 (hereafter referred to as "the CAO"), which identified Dr. Mbanugo as the current owner and added him to the list of Dischargers of the Leona Heights Sulfur Mine.

c. On December 16, 2005, the Executive Officer sent a letter to the Discharger pursuant to Water Code Section 13267. This Section 13267 letter had two purposes:

   1) The letter approved a revised scope of work and schedule that had been proposed by the Discharger in a work plan submitted on October 28, 2005. This scope of work was required for compliance with the CAO.

   2) The letter required the Discharger to submit monthly progress reports documenting work completed on the project. The progress reports were to be submitted by the last day of each month, beginning in December 2005. Submittal of progress reports was to continue until the Discharger had fully complied with the requirements of the CAO.

d. The Discharger was out of compliance with the CAO at the time the Section 13267 letter was issued. Enforcement action was not taken at that time because technical comments received from an outside permitting agency (the City of Oakland) necessitated substantive changes to the Discharger's corrective action plan. The Discharger demonstrated a willingness to make beneficial revisions to the corrective action plan, provided additional time was allowed.

e. The Section 13267 letter approved a revised implementation schedule, but required the submittal of monthly progress reports because the Discharger previously had not been diligent in completing tasks required for compliance with the CAO. Prior work had been intermittent with a history of missed deadlines, resulting in the issuance of a Notice of Violation from Water Board staff on October 6, 2005. The progress reports were required as a means to substantiate the Discharger's compliance with the CAO.

f. The Discharger has not complied with the December 16, 2005 letter. Specifically, the Discharger has stopped submitting the monthly progress reports required by the letter. Furthermore, the Discharger has not completed project tasks according to the schedule that was approved in the letter.

g. Monthly progress reports were received from the Discharger in January, February, April, May, September, October, and November of 2006, and in February and May of

2007. No further reports have been received since May 2007. The Discharger has provided no indication that any further work has been performed to comply with the CAO.

h. Two additional Notices of Violation were issued to the Discharger on March 10, 2006 and July 17, 2006, in an attempt to gain compliance with the December 16, 2005 letter.

6. This Administrative Civil Liability is being issued for the Discharger's failure to submit monthly progress reports required in the Section 13267 letter issued December 16, 2005. For violating CWC Section 13267, the Water Board may administratively impose civil liability pursuant to CWC Section 13268(a)(1) and (b)(1) in an amount which shall not exceed one thousand dollars ($1,000) for each day in which the violation occurs.

7. In determining the amount of civil liability to be assessed to the Discharger, the Water Board must take into consideration the factors described in CWC Section 13327. These factors and considerations are as follows:

a. Nature, Circumstances, Extent and Gravity of the Violations:

Compliance with the December 16, 2005 request for technical reports under CWC Section 13267 is necessary so that Water Board staff can monitor the Discharger's progress and efforts toward compliance with the CAO. Failure to provide those reports deprives the Water Board of information related to the Discharger's progress in complying with the CAO. The progress reports are an integral part of the CAO compliance. Failure to submit the reports is reflective of the Discharger's failure to comply with the scope of work and schedule approved in the December 16, 2005 letter. The failure to comply with the approved scope of work has allowed an ongoing discharge of low pH water contaminated with metals into waters of the State to continue unabated.

b. Susceptibility of the Discharge to Cleanup:

The discharges from the mine can be cleaned up by means of implementation of a corrective action plan submitted by the Discharger, which was approved by Water Board staff on July 5, 2006. If implemented, the corrective actions will significantly reduce the seriously detrimental effects of the discharge in an economically achievable manner. However, the corrective actions have not been implemented.

c. Degree of Toxicity of the Discharge:

The waste rock at the site contains elevated concentrations of sulfur and metals such as iron, lead, copper, and arsenic. The waste rock piles are more porous than the native bedrock. This allows water to migrate easily through the material. Contact between water and the sulfur-rich waste rock, primarily during the rainy season, causes sulfur to be dissolved, promoting the formation of sulfuric acid within the

waste rock piles. Discharge of acidic water from the waste rock pile, known as acid mine runoff, is indicated at the site by the characteristic yellow coloration in the streambed. Creek sampling has shown very acidic conditions in the creek, with the ph at time dropping below 3. The low pH, in turn, increases the solubility of metals present in the waste rock, resulting in high metals concentrations in the creek. Water quality in the creek is impacted visually and chemically for a considerable distance downstream from the site. This water is toxic to aquatic species living in the creek at the site and downstream of the discharge. Beneficial uses of the creek and other water bodies downstream from the site are seriously compromised as a direct result of the discharge.

d. Ability to Pay and Ability to Continue in Business:

The Discharger owns a number of properties located in Oakland and Emeryville. Although some of the properties are undeveloped, they are zoned for residential development. The assessed value of those properties (which may not reflect their market value, which is likely higher) is in excess of $1.5 million. The property owner has not provided any evidence of inability to pay.

e. Voluntary Cleanup Efforts Undertaken:

The discharger has not voluntarily undertaken cleanup activities. The Discharger is required under the CAO to implement corrective actions.

f. Prior History of Violations:

Water Board staff has issued three Notices of Violation (NOV) to the Discharger in an attempt to gain compliance with the December 16, 2005 letter and the CAO. These NOV letters were issued on October 6, 2005; March 10, 2006; and July 17, 2006.

g. Degree of Culpability:

The Discharger is solely responsible for submission of monthly progress reports to demonstrate compliance with the 13267 letter and the CAO. The Discharger has not submitted a progress report since May 2007 despite numerous requests by Water Board staff that he comply.

h. Economic Savings:

The Discharger has achieved modest economic savings by not preparing and submitting the technical reports required under CWC Section 13267. The Discharger has achieved significantly greater economic savings by not performing the corrective actions required to comply with the Section 13267 letter and the CAO.

i. Other Matters As Justice May Require:

The Discharger's property is a significant source of pollutants to the environment. The toxicity of the pollutants emanating from the property has impacted beneficial uses downstream, including the inability to sustain aquatic life. Although he initially demonstrated cooperation after purchasing the property, the Discharger has terminated all efforts to obtain necessary permits and has cut off communication with the Water Board staff by failing to submit the required reports. The Discharger has not implemented any corrective actions to comply with the CAO for more than four years or to comply with the December 16, 2005 letter requiring progress reports for more than a year. The Discharger's willful refusal to comply with the Water Board's duly-issued CAO and reporting requirements continues to allow the prolonged discharge of harmful material into the environment. This enforcement action is necessary to compel the Discharger to comply with the CAO and reporting requirements.

8. The maximum civil liability that could be imposed for this matter is calculated based on the number of days the required technical reports are overdue. For all of the reports missing to date (June 10, 2008):

   The report due on May 31, 2007 is 376 days late.
   The report due on June 30, 2007 is 346 days late.
   The report due on July 31, 2007 is 315 days late.
   The report due on August 31, 2007 is 284 days late.
   The report due on September 30, 2007 is 254 days late.
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   The report due on February 29, 2008 is 102 days late.
   The report due on March 31, 2008 is 71 days late.
   The report due on April 30, 2008 is 41 days late
   The report due on May 31, 2008 is 10 days late.

   There are a total of 2,508 days of late reports, for which the Water Board could assess a total liability of $2,508,000. The Executive Officer proposes that civil liability should be imposed on the Discharger in the amount of $200,000 for the violations cited above, which is due as provided below.

9. This action is an enforcement action and is, therefore, exempt from the California Environmental Quality Act, pursuant to Title 14, California Code of Regulations, Section 15321.

10. The Discharger can waive its right to a hearing to contest the allegations contained in this Complaint by (a) paying the civil liability in full or (b) undertaking an approved supplemental environmental project in an amount not to exceed $100,000 and paying the remainder of the civil liability, all in accordance with the procedures and limitations set forth in the attached waiver.

July 9, 2008
Date

Dyan C. Whyte
Assistant Executive Officer

Attachment: Waiver of Hearing Form

COMPLAINT NO. R2-2008-0002

WAIVER

If you waive your right to a hearing, the matter will be included on the agenda of a Water Board meeting but there will be no hearing on the matter, unless a) the Water Board staff receives significant public comment during the comment period, or b) the Water Board determines it will hold a hearing because it finds that new and significant information has been presented at the meeting that could not have been submitted during the public comment period. If you waive your right to a hearing but the Water Board holds a hearing under either of the above circumstances, you will have a right to testify at the hearing notwithstanding your waiver. **Your waiver is due no later than August 11, 2008, 5 p.m.**

☐ Waiver of the right to a hearing and agreement to make payment in full.
By checking the box, I agree to waive my right to a hearing before the Water Board with regard to the violations alleged in this Complaint and to remit the full penalty payment to the State Water Pollution Cleanup and Abatement Account, c/o Regional Water Quality Control Board at 1515 Clay Street, Oakland, CA 94612, within 30 days after the Water Board meeting for which this matter is placed on the agenda. I understand that I am giving up my right to be heard, and to argue against the allegations made by the Assistant Executive Officer in this Complaint, and against the imposition of, or the amount of, the civil liability proposed unless the Water Board holds a hearing under either of the circumstances described above. If the Water Board holds such a hearing and imposes a civil liability, such amount shall be due 30 days from the date the Water Board adopts the order imposing the liability.

☐ Waiver of right to a hearing and agree to make payment and undertake an SEP.
By checking the box, I agree to waive my right to a hearing before the Water Board with regard to the violations alleged in this Complaint, and to complete a supplemental environmental project (SEP) in lieu of the suspended liability up to the amount identified in Finding 10 of this Complaint and paying the balance of the fine to the State Water Pollution Cleanup and Abatement Account (CAA) within 30 days after the Water Board meeting for which this matter is placed on the agenda. The SEP proposal shall be submitted no later than the due date for this waiver, above. I understand that the SEP proposal shall conform to the requirements specified in Section IX of the Water Quality Enforcement Policy, which was adopted by the State Water Resources Control Board on February 19, 2002, and be subject to approval by the Assistant Executive Officer. If the SEP proposal, or its revised version, is not acceptable to the Assistant Executive Officer, I agree to pay the suspended penalty amount within 30 days of the date of the letter from the Assistant Executive Officer rejecting the proposed/revised SEP. I also understand that I am giving up my right to argue against the allegations made by the Assistant Executive Officer in the Complaint, and against the imposition of, or the amount of, the civil liability proposed unless the Water Board holds a hearing under either of the circumstances described above. If the Water Board holds such a hearing and imposes a civil liability, such amount shall be due 30 days from the date the Water Board adopts the order imposing the liability. I further agree to satisfactorily complete the approved SEP within a time schedule set by the Assistant Executive Officer. I understand failure to adequately

complete the approved SEP will require immediate payment of the suspended liability to the CAA.

Name (print) Signature

Title/Organization Date

California Regional Water Quality Control Board
San Francisco Bay Region

Linda S. Adams
Secretary for
Environmental Protection

1515 Clay Street, Suite 1400, Oakland, California 94612
(510) 622-2300 • Fax (510) 622-2460
http://www.waterboards.ca.gov/sanfranciscobay

Arnold Schwarzenegger
Governor

Notice of Public Hearing
To Consider Administrative Civil Liability for
Dr. Collin Mbanugo
Alameda County

Complaint Amount and Allegations
The San Francisco Bay Regional Water Board (Regional Water Board) Assistant Executive Officer has issued an administrative civil liability complaint (Complaint) proposing a civil liability of $200,000 against Dr. Collin Mbanugo (Discharger) for failing to submit technical reports required in a letter from the Executive Officer dated December 16, 2005.

Hearing to be Held
The Regional Water Board will hold a hearing on the Complaint as follows:
Date and Time: September 10, 2008, 9:00 a.m.
Place: Auditorium, 1515 Clay Street, Oakland

Discharger May Waive Hearing
No hearing will be held if the Discharger waives its right to a hearing and agrees to pay the proposed civil liability as set forth in the Complaint, provided no significant public comments are received during the public comment period. At the hearing, the Regional Water Board may affirm, reject, or modify the proposed civil liability, or refer the matter to the Attorney General for judicial enforcement.

Hearing Procedures are Legally Determined
This will be an adjudicatory hearing before the Regional Water Board. The procedures governing such hearings are located in Title 23 of the California Code of Regulations, § 648 et seq.

Any persons objecting to the hearing procedures set forth herein must do so in writing by August 11, 2008, to Alan D. Friedman at 1515 Clay Street, Suite 1400, Oakland, CA 94612.

Participation in the Hearing
The Board staff members who will be involved in this matter have been separated into two groups. One group consists of members of the Groundwater Protection Division to the Board (the "prosecution team") together with Dorothy Dickey, an attorney with the State Water Board's Office of Chief Counsel and who advises the Board on unrelated matters. The prosecution team will appear as a party before the Board. They have had (and will have had) no communication with Board members on this matter outside of the public hearing.

2007. No further reports have been received since May 2007. The Discharger has provided no indication that any further work has been performed to comply with the CAO.

h. Two additional Notices of Violation were issued to the Discharger on March 10, 2006 and July 17, 2006, in an attempt to gain compliance with the December 16, 2005 letter.

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7. In determining the amount of civil liability to be assessed to the Discharger, the Water Board must take into consideration the factors described in CWC Section 13327. These factors and considerations are as follows:

a. Nature, Circumstances, Extent and Gravity of the Violations:

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b. Susceptibility of the Discharge to Cleanup:

The discharges from the mine can be cleaned up by means of implementation of a corrective action plan submitted by the Discharger, which was approved by Water Board staff on July 5, 2006. If implemented, the corrective actions will significantly reduce the seriously detrimental effects of the discharge in an economically achievable manner. However, the corrective actions have not been implemented.

c. Degree of Toxicity of the Discharge:

The waste rock at the site contains elevated concentrations of sulfur and metals such as iron, lead, copper, and arsenic. The waste rock piles are more porous than the native bedrock. This allows water to migrate easily through the material. Contact between water and the sulfur-rich waste rock, primarily during the rainy season, causes sulfur to be dissolved, promoting the formation of sulfuric acid within the

waste rock piles. Discharge of acidic water from the waste rock pile, known as acid mine runoff, is indicated at the site by the characteristic yellow coloration in the streambed. Creek sampling has shown very acidic conditions in the creek, with the ph at time dropping below 3. The low pH, in turn, increases the solubility of metals present in the waste rock, resulting in high metals concentrations in the creek. Water quality in the creek is impacted visually and chemically for a considerable distance downstream from the site. This water is toxic to aquatic species living in the creek at the site and downstream of the discharge. Beneficial uses of the creek and other water bodies downstream from the site are seriously compromised as a direct result of the discharge.

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10. The Discharger can waive its right to a hearing to contest the allegations contained in this Complaint by (a) paying the civil liability in full or (b) undertaking an approved supplemental environmental project in an amount not to exceed $100,000 and paying the remainder of the civil liability, all in accordance with the procedures and limitations set forth in the attached waiver.

July 9, 2008
Date

Dyan C. Whyte
Assistant Executive Officer

Attachment: Waiver of Hearing Form

COMPLAINT NO. R2-2008-0002

WAIVER

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Name (print)	Signature
Title/Organization	Date

California Regional Water Quality Control Board

San Francisco Bay Region

Linda S. Adams
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Environmental Protection

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Notice of Public Hearing
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Hearing to be Held
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Date and Time: September 10, 2008, 9:00 a.m.
Place: Auditorium, 1515 Clay Street, Oakland

Discharger May Waive Hearing
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Hearing Procedures are Legally Determined
This will be an adjudicatory hearing before the Regional Water Board. The procedures governing such hearings are located in Title 23 of the California Code of Regulations, § 648 et seq.

Any persons objecting to the hearing procedures set forth herein must do so in writing by August 11, 2008, to Alan D. Friedman at 1515 Clay Street, Suite 1400, Oakland, CA 94612.

Participation in the Hearing
The Board staff members who will be involved in this matter have been separated into two groups. One group consists of members of the Groundwater Protection Division to the Board (the "prosecution team") together with Dorothy Dickey, an attorney with the State Water Board's Office of Chief Counsel and who advises the Board on unrelated matters. The prosecution team will appear as a party before the Board. They have had (and will have had) no communication with Board members on this matter outside of the public hearing.

A separate group of staff will advise the Board on this matter. That group (the "advisory team") consists of a technical staff member to be determined, as well as an attorney from the State Water Board's Office of Chief Counsel. Both the staff member and the attorney have had no contact with the prosecution team on this matter.

Other than prosecutorial staff, participants at the hearing are either designated as "parties" or "interested persons". Designated parties to the hearing may present evidence and cross-examine witnesses. Designated parties are subject to cross-examination. Interested persons may make any comments to the Board, but may not offer factual evidence. Interested persons will not be subject to cross-examination, nor may they cross examine parties.

The following participants are hereby designated as parties at the hearing:

- **Dr. Collin Mbanugo**
- **Advisory team**

To ensure that all participants have an opportunity to participate in the hearing, the prosecution team will recommend that the chair establish the following deadlines:

- 20 minutes for each of the prosecutorial staff and Discharger to testify, present evidence, and cross examine witnesses,
- 3 minutes for interested persons to make statements to the Board.

Written Comment and Evidence Deadline
The deadline to submit any and all written comments and evidence to be offered at the hearing is **5 p.m.** on August 11, 2008. Persons shall submit **14 copies** to Alan D. Friedman at 1515 Clay Street, Suite 1400, Oakland, CA 94612.

Questions
Questions concerning this matter may be addressed to prosecutorial staff Alan Friedman at 510-622-2347 or by email at afriedman@waterboards.ca.gov.

Evidentiary Documents are on File at Regional Water Board Office
The Complaint and related documents are on file, and may be inspected or copied at the Regional Water Board's offices during weekdays between 8 a.m. and 5:00 p.m. The Complaint is also available on the Regional Water Board's website at www.waterboards.ca.gov/sanfranciscobay.

July 9, 2008
Dated

Dyan C. Whyte
Assistant Executive Officer

California Regional Water Quality Control Board
San Francisco Bay Region

Linda S. Adams
Secretary for
Environmental Protection

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http://www.waterboards.ca.gov/sanfranciscobay

Arnold Schwarzenegger
Governor

Date: July 9, 2008
File No. 2199.9279 (ADF)

SENT VIA CERTIFIED MAIL
#7007 2560 0001 7505 2531

Dr. Collin Mbanugo
Leona Heights Sulfur Mine
3300 Webster Street, Suite 900
Oakland, CA 94609

NOTICE: Administrative Civil Liability (ACL) assessed under California Water Code Section 133268 for the Leona Heights Sulfur Mine, Oakland, Alameda County

Dear Dr. Mbanugo:

Enclosed is ACL Complaint No. R2-2008-0002. The Complaint alleges that you have violated Section 13267 of the California Water Code by failing to submit technical reports for the Mine, as required in a letter from the Water board Executive Officer dated December 16, 2005. The Complaint describes the alleged violations in detail, and proposes a liability of $200,000. The deadline for submittal of written comments, evidence, and waivers is **August 11, 2008, at 5 p.m.**

I plan to bring this matter to the Water Board at its September 10, 2008, meeting. You have the following options:

1. You can appear before the Water Board at the meeting to contest the matter. Written comments and evidence shall be submitted by the deadline indicated above, and in accordance with the process set forth in the attached Public Notice. At the meeting, the Water Board may impose an administrative civil liability in the amount proposed or for a different amount, decline to seek civil liability, or refer the case to the Attorney General for judicial enforcement.

2. You can waive the right to a hearing to contest the allegations contained in the Complaint by paying the civil liability in full or by undertaking an acceptable SEP of up to $100,000 and paying the remainder of the civil liability, all in accordance with the procedures and limitations set forth in the waiver attached to the Complaint.

If you waive your right to a hearing, please mail and fax a copy of the signed waiver to the attention of Alan Friedman of my staff. If you have any questions regarding this matter, please contact Mr. Friedman at (510) 622-2347, or by email at afriedman@waterboards.ca.gov .

Sincerely,

Dyan C. Whyte

Dyan C. Whyte
Assistant Executive Officer

Enclosure: Complaint No. R2-2008-0002

Copy to: Standard R-1E List
Mailing List
Bruce H. Wolfe, Executive Officer

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

COMPLAINT NO. R2-2008-0002

ADMINISTRATIVE CIVIL LIABILITY
IN THE MATTER OF
DR. COLLIN MBANUGO
FOR VIOLATIONS OF CALIFORNIA WATER CODE
SECTION 13267
AT THE LEONA HEIGHTS SULFUR MINE
OAKLAND, ALAMEDA COUNTY

The Assistant Executive Officer of the California Regional Water Quality Control Board, San Francisco Bay Region (hereinafter the Water Board), hereby gives notice that:

1. Dr. Collin Mbanugo (the Discharger) has violated provisions of law for which the Water Board may impose civil liability pursuant to California Water Code Sections 13268(a)(1) and (b)(1) and 13323.

2. The Discharger has violated Section 13267 by failing to submit technical reports required in a letter from the Executive Officer dated December 16, 2005.

3. Unless waived, a hearing on this complaint will be held before the Water Board as set forth below on September 10, 2008, at the Elihu M. Harris State Building, First Floor Auditorium, 1515 Clay Street, Oakland, California. You or your representative will have an opportunity to be heard and to contest the allegations in this complaint and the imposition of the civil liability. An agenda for the meeting will be mailed to you not less than 10 days before the hearing date. The deadline to submit all evidence or comments concerning this complaint is August 11, 2008. The Water Board will not consider any evidence or comments not submitted by this deadline.

4. At the hearing, the Water Board will consider whether to affirm, reject, or modify the proposed civil liability, to refer the matter to the Attorney General for recovery of judicial liability, or take other enforcement actions.

ALLEGATIONS

5. This complaint is based on the following facts:

   a. Dr. Mbanugo is the current owner of the Leona Heights Sulfur Mine, a two-acre abandoned mining site located in the Oakland Hills near the junction of Interstate 580 and State Highway 13. Water quality at the site is impacted by acid mine runoff, which discharges into a creek that flows through waste rock piles left behind when the mine was abandoned in the late 1920s. Flows passing through the site follow a natural drainage channel of several hundred feet and then enter a storm drain. The

storm drain discharges to Lake Aliso on the Mills College Campus, and ultimately discharges to San Leandro Bay via another Storm Drain System. Site remediation was required under Cleanup and Abatement Order No. 98-004, which this Board adopted on January 30, 1998.

b. The Discharger purchased the property on November 29, 2001. Water Board staff met with the Discharger shortly thereafter. The Discharger indicated that he was aware of the discharges and planned to remediate the site. The Board amended the 1998 Order on April 14, 2003 by adopting Order No. R2-2003-0028 (hereafter referred to as "the CAO"), which identified Dr. Mbanugo as the current owner and added him to the list of Dischargers of the Leona Heights Sulfur Mine.

c. On December 16, 2005, the Executive Officer sent a letter to the Discharger pursuant to Water Code Section 13267. This Section 13267 letter had two purposes:

   1) The letter approved a revised scope of work and schedule that had been proposed by the Discharger in a work plan submitted on October 28, 2005. This scope of work was required for compliance with the CAO.

   2) The letter required the Discharger to submit monthly progress reports documenting work completed on the project. The progress reports were to be submitted by the last day of each month, beginning in December 2005. Submittal of progress reports was to continue until the Discharger had fully complied with the requirements of the CAO.

d. The Discharger was out of compliance with the CAO at the time the Section 13267 letter was issued. Enforcement action was not taken at that time because technical comments received from an outside permitting agency (the City of Oakland) necessitated substantive changes to the Discharger's corrective action plan. The Discharger demonstrated a willingness to make beneficial revisions to the corrective action plan, provided additional time was allowed.

e. The Section 13267 letter approved a revised implementation schedule, but required the submittal of monthly progress reports because the Discharger previously had not been diligent in completing tasks required for compliance with the CAO. Prior work had been intermittent with a history of missed deadlines, resulting in the issuance of a Notice of Violation from Water Board staff on October 6, 2005. The progress reports were required as a means to substantiate the Discharger's compliance with the CAO.

f. The Discharger has not complied with the December 16, 2005 letter. Specifically, the Discharger has stopped submitting the monthly progress reports required by the letter. Furthermore, the Discharger has not completed project tasks according to the schedule that was approved in the letter.

g. Monthly progress reports were received from the Discharger in January, February, April, May, September, October, and November of 2006, and in February and May of

EXHIBIT F

California Regional Water Quality Control Board
San Francisco Bay Region

Linda S. Adams
Secretary for
Environmental Protection

1515 Clay Street, Suite 1400, Oakland, California 94612
(510) 622-2300 • Fax (510) 622-2460
http://www.waterboards.ca.gov/sanfranciscobay

Arnold Schwarzenegger
Governor

Date: September 15, 2008
File No. 2199.9279 (KER)

Dr. Collin Mbanugo
Leona Heights Sulfur Mine
3300 Webster Street, Suite 900
Oakland, CA 94609

Subject: **Order No. R2-2008-0084, Administrative Civil Liability for Dr. Collin Mbanugo, Owner, Leona Heights Sulfur Mine, Oakland, Alameda County**

Dear Dr. Mbanugo:

This letter transmits Order No. R2-2008-0084, which imposes an Administrative Civil Liability of $200,000 for violations of California Water Code Section 13267. Order No. R2-2008-0074 was adopted by the Water Board during its public hearing on September 10, 2008, and is effective immediately. The liability must be paid to the State Water Pollution Cleanup and Abatement Account by October 10, 2008.

If you have any questions, please contact me at 510-622-2404 or by email at KRoberson@waterboards.ca.gov.

Sincerely,

Keith E. Roberson

Keith Roberson
Engineering Geologist

Attachments: Order R2-2008-0084
Cc w/ attachment: Mailing List

Mailing List

Moju Environmental Technologies
Attn: Mr. Akali Igbene
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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

ORDER NO. R2-2008-0084

ADMINISTRATIVE CIVIL LIABILITY FOR:

DR. COLLIN MBANUGO, Owner
THE LEONA HEIGHTS SULFUR MINE
OAKLAND, ALAMEDA COUNTY

The California Regional Water Quality Control Board, San Francisco Bay Region (hereinafter the "Water Board"), finds with respect to Dr. Collin Mbanugo (hereinafter the "Discharger") that:

1. Dr. Mbanugo is the current owner of the Leona Heights Sulfur Mine, a two-acre abandoned mining site located in the Oakland Hills near the junction of Interstate 580 and State Highway 13 (hereinafter the "Site").

2. Water quality at the site is impacted by acid mine runoff, which discharges into a creek that flows through waste rock piles left behind when the mine was abandoned in the late 1920s. Flows passing through the site follow a natural drainage channel of several hundred feet and then enter a storm drain. The storm drain discharges to Lake Aliso on the Mills College Campus, and ultimately discharges to San Leandro Bay via another storm drain system.

3. Site remediation was required initially under Cleanup and Abatement Order No. 98-004, which this Board adopted on January 30, 1998. The Discharger purchased the property on November 29, 2001. The Board amended the 1998 Order on April 14, 2003 by adopting Order No. R2-2003-0028 (hereafter the "CAO"), which identified Dr. Mbanugo as the current owner and added him to the list of dischargers of the Site.

4. On December 16, 2005, the Executive Officer sent a letter to the Discharger pursuant to Water Code Section 13267. The letter approved a revised scope of work and schedule that had been proposed by the Discharger in a work plan submitted pursuant to the CAO on October 28, 2005. The letter required the Discharger to submit monthly progress reports documenting work completed on the project. The progress reports were to be submitted by the last day of each month, beginning in December 2005. Submittal of progress reports was to continue until the Discharger had fully complied with the requirements of the CAO.

5. The Section 13267 letter approved a revised implementation schedule, but required the submittal of monthly progress reports because the Discharger previously had not been diligent in completing tasks required for compliance with

the CAO. Prior work had been intermittent with a history of missed deadlines, resulting in the issuance of a Notice of Violation from Water Board staff on October 6, 2005. The progress reports were required as a means to substantiate the Discharger's compliance with the CAO.

6. The Discharger has not complied with the December 16, 2005 letter because he stopped submitting the required monthly progress reports. Furthermore, the Discharger has not completed project tasks according to the schedule that was approved in the letter. Monthly progress reports were received from the Discharger in January, February, April, May, September, October, and November of 2006, and in February and May of 2007. No further reports have been received since May 2007.

7. Two additional Notices of Violation were issued to the Discharger on March 10, 2006 and July 17, 2006, in an attempt to gain compliance with the December 16, 2005 letter.

8. On July 9, 2008, the Assistant Executive Officer issued an Administrative Civil Liability Complaint in the amount of $200,000 for the Discharger's failure to submit monthly progress reports required in the Section 13267 letter issued December 16, 2005. For violating CWC Section 13267, the Water Board may administratively impose civil liability pursuant to CWC Section 13268(a)(1) and (b)(1) in an amount which shall not exceed one thousand dollars ($1,000) for each day in which the violation occurs.

9. The maximum civil liability that could be imposed for this matter is calculated based on the number of days the required technical reports are overdue. For all of the reports missing as of the date the Administrative Civil Liability Complaint was issued (June 10, 2008) there are 2,508 days of violation. (The report due on May 31, 2007 is 376 days late; the report due on June 30, 2007 is 346 days late; the report due on July 31, 2007 is 315 days late; the report due on August 31, 2007 is 284 days late; the report due on September 30, 2007 is 254 days late; the report due on October 31, 2007 is 223 days late; the report due on November 30, 2007 is 193 days late; the report due on December 31, 2007 is 162 days late; the report due on January 31, 2008 is 131 days late; the report due on February 29, 2008 is 102 days late; the report due on March 31, 2008 is 71 days late; the report due on April 30, 2008 is 41 days late; and the report due on May 31, 2008 is 10 days late.) Since the ACL Complaint was issued, there have been an additional 92 days of violation for each of these 13 late reports (1,196 days of violation). The Discharger has also failed to submit the report due on June 30, 2008, which is now 72 days late and for July 31, which is now 41 days late. Accordingly, there are a total of 3,817 days of late report violations, for which the Water Board could assess a total liability of $3,817,000.

10. On July 9, 2008, the Assistant Executive Officer proposed that civil liability should be imposed on the Discharger in the amount of $200,000 for the violations

11. The Water Board, after hearing all testimony and reviewing the exhibits and information in the record, determined the Discharger is subject to civil penalties. In determining the amount of civil liability to be assessed to the Discharger under CWC Section 13268, the Water Board has taken into consideration the factors described in CWC Section 13327.

12. With respect to the factors the Water Board has taken into consideration under CWC Section 13327, it finds as follows:

    a. Nature, Circumstances, Extent and Gravity of the Violations:
    Compliance with the December 16, 2005 request for technical reports under CWC Section 13267 is necessary so that Water Board staff can monitor the Discharger's progress and efforts toward compliance with the CAO. Failure to provide those reports deprives the Water Board of information related to the Discharger's progress in complying with the CAO. The progress reports are an integral part of the CAO compliance. Failure to submit the reports is reflective of the Discharger's failure to comply with the scope of work and schedule approved in the December 16, 2005 letter. The failure to comply with the approved scope of work has allowed an ongoing discharge of low pH water contaminated with metals into waters of the State to continue unabated. Because the reporting violations deprived the Water Board of the opportunity to monitor the Discharger's progress towards protecting water quality, the nature, circumstances, extent and gravity of the reporting violations in this instance are very serious, and the Water Board's analysis of this factor weighs in favor of assessing a substantial penalty.

    b. Susceptibility of the Discharge to Cleanup:
    The discharges from the mine can be cleaned up by means of implementation of a corrective action plan submitted by the Discharger, which was approved by Water Board staff on July 5, 2006. However, because this ACL Complaint seeks penalties for failure to submit reports under CWC 13267, this factor is not applicable to the Water Board's analysis of an appropriate penalty amount for this violation, except to the extent the failure to submit reports has deprived the Water Board of its opportunities to protect water quality, as discussed under Subdivision a, above.

    c. Degree of Toxicity of the Discharge:
    The waste rock at the site contains elevated concentrations of sulfur and metals such as iron, lead, copper, and arsenic. The waste rock piles are more

porous than the native bedrock. This allows water to migrate easily through the material. Contact between water and the sulfur-rich waste rock, primarily during the rainy season, causes sulfur to be dissolved, promoting the formation of sulfuric acid within the waste rock piles. Discharge of acidic water from the waste rock pile, known as acid mine runoff, is indicated at the site by the characteristic yellow coloration in the streambed. Creek sampling has shown very acidic conditions in the creek, with the ph at time dropping below 3. The low pH, in turn, increases the solubility of metals present in the waste rock, resulting in high metals concentrations in the creek. Water quality in the creek is impacted visually and chemically for a considerable distance downstream from the site. This water is toxic to aquatic species living in the creek at the site and downstream of the discharge. Beneficial uses of the creek and other water bodies downstream from the site are seriously compromised as a direct result of the discharge. However, because this ACL Complaint seeks penalties for failure to submit reports under CWC 13267, this factor is not applicable to the Water Board's analysis of an appropriate penalty amount for this violation, except to the extent the failure to submit reports has deprived the Water Board of opportunities to protect water quality from toxic discharges, as discussed under subdivision a, above.

d. Ability to Pay and Ability to Continue in Business:
The Discharger owns a number of properties located in Oakland and Emeryville. Although some of the properties are undeveloped, they are zoned for residential development. The assessed value of those properties (which may not reflect their market value, which is likely higher) is in excess of $1.5 million. The property owner has not provided any evidence of inability to pay. The Water Board's analysis of this factor does not indicate that there should be a reduction in the proposed penalty.

e. Voluntary Cleanup Efforts Undertaken:
The discharger has not voluntarily undertaken cleanup activities. The Discharger is required under the CAO to implement corrective actions. The Water Board's analysis of the factor does not indicate that there should be a reduction in the proposed penalty.

f. Prior History of Violations:
Water Board staff has issued three Notices of Violation ("NOV") to the Discharger in an attempt to gain compliance with the December 16, 2005 letter and the CAO. These NOV letters were issued on October 6, 2005; March 10, 2006; and July 17, 2006. The Water Board's analysis of this factor supports imposition of a substantial penalty because of the need for progressive enforcement, as outlined in the State Water Resources Control Board's February 2002, Water Quality Enforcement Policy.

g. Degree of Culpability:
The Discharger is solely responsible for submission of monthly progress reports to demonstrate compliance with the 13267 letter and the CAO. The Discharger has not submitted a progress report since May 2007 despite numerous requests by Water Board staff that he comply, and despite his written representation that he would do so. The Water Board's analysis of this factor supports imposition of a substantial penalty.

h. Economic Savings:
The Discharger has achieved modest economic savings by not preparing and submitting the technical reports required under CWC Section 13267. The Discharger has achieved significantly greater economic savings by not performing the corrective actions required to comply with the Section 13267 letter and the CAO. The Water Board's analysis of this factor supports the imposition of a substantial penalty.

i. Other Matters As Justice May Require:
The Discharger's property is a significant source of pollutants to the environment. The toxicity of the pollutants emanating from the property has impacted beneficial uses downstream, including the inability to sustain aquatic life. Although he initially demonstrated cooperation after purchasing the property, the Discharger has terminated efforts to obtain necessary permits and has cut off communication with the Water Board staff by failing to submit the required reports. The Discharger has not implemented any corrective actions to comply with the CAO for more than four years or to comply with the December 16, 2005 letter requiring progress reports for more than a year. The Discharger's willful refusal to comply with the Water Board's duly-issued CAO and reporting requirements continues to allow the prolonged discharge of harmful and toxic material into the environment. The Water Board's analysis of the factor supports the imposition of a substantial penalty.

13. A $200,000 civil penalty is appropriate based on the specific findings made in Finding No. 12.

14. This action is an Order to enforce the laws and regulations administered by the Water Board. Issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with Section 15321(a)(2), Title 14, of the California Code of Regulations.

15. The Discharger may petition the State Board to review this Action. The State Board must receive the petition within 30 days of the date this order was adopted by the Water Board. The petition will be limited to raising only the substantive issues or objections that were raised before the Water Board at the public hearing or in a timely submitted written correspondence delivered to the Water Board.

IT IS HEREBY ORDERED that Dr. Colin Mbanugo is civilly liable for the violations of the 13267 Order set forth in detail above, and shall pay the administrative civil liability in the amount of $200,000. The liability shall be paid to the State Water Pollution Cleanup and Abatement Account within 30 days of the date of this Order.

I, Bruce H. Wolfe, Executive Officer, do herby certify that the foregoing is a full, complete, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Francisco Bay Region, on September 10, 2008.

Digitally signed by Bruce Wolfe
Date: 2008.09.15 11:12:50 -07'00'

Bruce H. Wolfe
Executive Officer