

Memorandum, may present an imminent and substantial endangerment to public health, or welfare, or the environment.

VII. OUTSTANDING POLICY ISSUES

There are no outstanding policy issues with the Site identified at this time.

VIII. ENFORCEMENT

Please see the attached Confidential Enforcement Addendum for a discussion regarding potentially responsible parties. In addition to the extramural costs estimated for the proposed action, a cost recovery enforcement action also may recover the following intramural costs:

Intramural Costs ¹	
U.S. EPA Direct Costs	\$ 20,000
U.S. EPA Indirect Costs (35.28%)	\$ <u>53,625</u>
TOTAL Intramural Costs	\$ 73,625

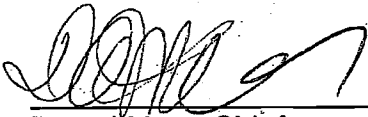
The total U.S. EPA extramural and intramural costs for this removal action, based on full-cost accounting practices, that will be eligible for cost recovery are estimated to be \$205,625.

IX. U.S. EPA RECOMMENDATION

This decision document represents the selected removal action for the Mt. Diablo Mercury Mine Site, Clayton, Contra Costa County, California developed in accordance with CERCLA as amended, and not inconsistent with the NCP. This decision is based on the Administrative Record for the Site.

1. Direct costs include direct extramural costs and direct intramural costs. Indirect costs are calculated based on an estimated indirect cost rate expressed as a percentage of site-specific direct costs, consistent with the full cost accounting methodology effective October 2, 2000. These estimates do not include pre-judgment interest, do not take into account other enforcement costs, including Department of Justice costs, and may be adjusted during the course of a removal action. The estimates are for illustrative purposes only and their use is not intended to create any rights for responsible parties. Neither the lack of a total cost estimate nor deviation of actual costs from this estimate will affect the United States' right to cost recovery.

Because conditions at the site meet the NCP criteria for a Time-Critical Removal Action, U.S. EPA enforcement staff recommend the approval of the removal action proposed in this Action Memorandum. The total project ceiling if approved will be \$205,625, of which an estimated \$132,000 comes from the Regional Removal Allowance. Approval may be indicated by signing below.

Approve:  2 December 2008
Daniel Meer, Chief Date
Response, Planning and Assessment Branch

Disapprove: _____ Date
Daniel Meer, Chief
Response, Planning and Assessment Branch

Enforcement Addendum
Appendix A, Figures
Appendix B, Photographic Log

Attachments:

1. Index to the Administrative Record

cc: Sherry Fielding, OEM, HQ
Pat Port, U.S. Department of Interior
Pamela C. Creedon, Central Valley Regional Water Quality Control Board

**Mount Diablo Mercury Mine Site
November 2008**

**APPENDIX A
FIGURES**

**Mount Diablo Mercury Mine Site
November 2008**

**Figure 1
Site Location Map**



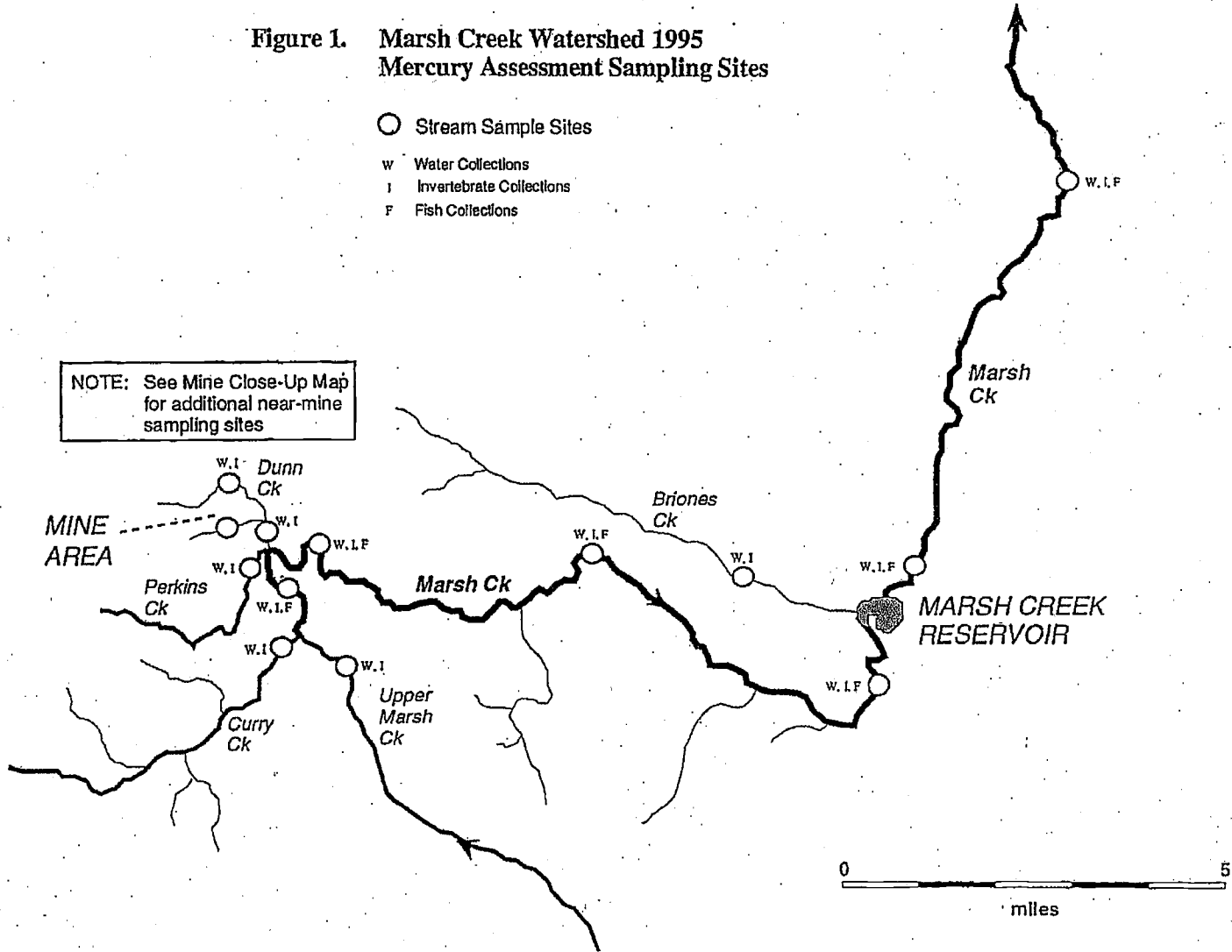
**Mount Diablo Mercury Mine Site
November 2008**

**Figure 2
Slotten 1995 Sample Locations**

Figure 1. Marsh Creek Watershed 1995 Mercury Assessment Sampling Sites

- Stream Sample Sites
- w Water Collections
- I Invertebrate Collections
- F Fish Collections

NOTE: See Mine Close-Up Map for additional near-mine sampling sites



**Mount Diablo Mercury Mine Site
November 2008**

**Figure 3
US EPA Sampling Locations**



Retort Area
(MD-SS-11)

Seep #1
(MD-SW-2, MD-SS-2)

Seep #1 midpoint
(MD-SW-9, MD-SS-9)

Seep #1/Impoundment Convergence
(MD-SW-10, MD-SS-10)

Seep #2
(MD-SS-3)

Seep #3
(MD-SW-4, MD-SS-4)

SE corner of impoundment
(MD-SW-1, MD-SS-1)

Seep #4 (uppermost seep)
(MD-SS-5)

Upgradient (Horse Creek)
(MD-SW-6, MD-SS-6)

Outflow to State Park
(MD-SW-8, MD-SS-8)

© 2000 Teo Atlas

Streaming 100%

Pointer 37°54'03.70"N 121°52'32.16"W elev. 755ft

EyeAlt 1842ft

**Mount Diablo Mercury Mine Site
November 2008**

**APPENDIX B
PHOTOGRAPHIC LOG**



10.14.2008

Mount Diablo Mercury Mine Site
November 2008

Index to the Administrative Record

1. Agency for Toxic Substances and Disease Registry (ATSDR). 1999. Toxicological profile for mercury. Atlanta, GA.
2. Central Valley Regional Water Quality Control Board (RWQCB). 2008. Request for Federal Action.
3. State of California, Division of Mines. 1958. California Journal of Mines and Geology, Vol. 54, No. 4.
4. Darryl G. Sloten, et.al. Marsh Creek Watershed 1995 Mercury Assessment Project. (1996)
5. Central Valley Regional Water Quality Control Board. 2006. Proposed 2006 CWA Section 303(d) List of Water Quality Limited Segments.

bcc: J. Yocum, SFD-9-2
L. Bradfish, ORC-3
J. Witul, SFD-9-4
C. Temple, SFD-9-4
B. Lee, SFD 9-4
Site File

Law Department



Sunoco, Inc.
1735 Market Street Ste LL
Philadelphia PA 19103-7583

Via Electronic Mail

December 15, 2008

Larry Bradfish, Esq.
Office of Regional Counsel
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105
Bradfish.Larry@epa.gov

Re: Notice of Intent to Comply with Unilateral Administrative Order
Mt. Diablo Mercury Mine Site

Dear Mr. Bradfish:

On behalf of Sunoco, Inc. ("Sunoco"), this letter serves as the Notice of Intent to Comply ("Notice") with the Unilateral Administrative Order for the Performance of Removal Action, USEPA Docket No. 9-2009-02 ("Order"), which was issued by the United States Environmental Protection Agency ("EPA") for the Mt. Diablo Mercury Mine Site in Clayton, California ("Site") on December 9, 2008 and received by Sunoco on December 10, 2008. A copy of the Order is included as Appendix A. In accordance with the requirements of paragraph 38 of the Order, Sunoco confirms that it intends to comply with the Order, including the scope of the field work requested in paragraph 22 of the Order and any additional work that may be requested pursuant to paragraph 46 of the Order, so long as it is reasonably required to address the unanticipated or changed circumstances referred therein.

This Notice reflects Sunoco's continued cooperation with EPA in addressing environmental conditions at the Site. We think it is fair to point out that Sunoco did not receive notice of potential responsibility for the Site until October 22, 2008. Moreover, Sunoco was not notified that "emergency conditions" required immediate action until a telephone conversation with representatives of EPA on November 7, just slightly over a month before the Order was issued. At that time, no scope of work had been developed for the field activities requested, and Sunoco did not have a proposed scope of work for those activities until December 4, 2008, when we received EPA's Request for Action Memo, dated December 2, 2008. During this four-week period, Sunoco actively participated in meetings with legal and technical representatives of EPA and arranged for

its consultant to review site conditions and potential interim remedial measures. Through this course of cooperation, Sunoco has been able to take all reasonable measures, many in advance of the issuance of the Order, to be prepared to respond in a timely manner. In fact, even before this timely Notice was issued, EPA has already received and approved Sunoco's work plan for the Site.

Sunoco's agreement to comply with this Order should not be construed to constitute a waiver of Sunoco's right to object to such unauthorized demands in any future orders or in connection with any expanded demands for work under this Order. Additionally, to the extent that Sunoco has not commented on any of the factual (or legal) assertions made by EPA in the Order, its silence should not be taken as assent to or an admission of their accuracy or justification.

Please feel free to contact me at 856-853-3903 if you have any questions related to this Notice.

Sincerely,



Lisa A. Runyon
Senior Counsel

cc: Janet Yocum, USEPA (Yocum.Janet@epamail.epa.gov)
Michael Bourque
Steve Coladonato
William R. Morse



April 8, 2009

Ms. Janet Yocum
EPA On-Scene Coordinator
USEPA Region 9
75 Hawthorne Street, SFD-92
San Francisco, CA 94105

Subject: Summary Report for Removal Action to Stabilize the Impoundment Berm
Mount Diablo Mercury Mine
Clayton, California

Dear Ms. Yocum:

At the request of the U.S. Environmental Protection Agency ("EPA"), on behalf of Respondent Sunoco Inc. ("Sunoco"), The Source Group, Inc. ("SGI") is pleased to present this letter describing the removal action performed to stabilize the impoundment berm for the Mount Diablo Mercury Mine in Clayton, California ("Site"). SGI performed this removal action under the Unilateral Administrative Order for the Performance of a Removal Action, USEPA Docket No. 9-2009-02 ("Order" or "UAO") that EPA issued to Sunoco on December 9, 2008.

Pursuant to the UAO, SGI initiated the removal action in December 2008 and submitted a Final Summary Report for Removal Action to Stabilize the Impoundment Berm dated January 28, 2009. During January and February 2009, heavy rainfall and high flow rates in Dunn Creek caused damage to the removal action, causing additional work to be performed on the berm to address the unanticipated or changed circumstances pursuant to Article XIII, Paragraph 46, of the UAO. On March 10, 2009, SGI, USEPA, and Mr. Jack Wessman met at the Site to evaluate the condition of the removal action and EPA determined that additional work was required under the UAO.

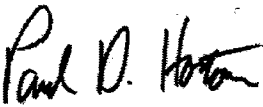
As a result, on March 24, 2009, SGI mobilized personnel, equipment, and materials to the Site to temporarily excavate and stockpile some of the existing three to five-inch crushed rock within the portion of Dunn Creek adjacent to the northwest corner of the impoundment berm. Then the existing shotcrete embankment was scored and chipped at the bottom, back to native slope material to relieve the undermined edge. Stabilization fabric was installed along the low flowline of Dunn Creek and up the sides of the creek embankment. Subsequent to laying the stabilization fabric, the repair area was recontoured using the three to five-inch crushed rock, and two loads (approximately 40 tons) of rip-rap/rock (6 to 18-inch) were placed above the crushed rock and under vertical wall of shotcrete for structural stability. Upon reestablishing the

Ms. Janet Yocum
April 8, 2009
Page 2 of 2

Dunn Creek flow line within the embankments and locally downstream, the Site was returned to conditions prior to project initiation and equipment and materials were demobilized. The work was completed in one day. EPA On-Scene Coordinator, Chris Reiner, was onsite during the completion of the removal action repair work performed by SGI under the UAO. Photos showing the project area before and after repairs were completed are attached for reference.

If you have any questions or need additional information, please do not hesitate to contact me at (925) 944-2856 ext. 302.

Sincerely,
The Source Group, Inc.



Paul D. Horton, P.G., C.HG.
Project Manager

Attachment – Photographs from before and after repair work

cc: Mr. Bret Moxley, EPA
Ms. Jerelean Johnson, EPA
Mr. Bill Morse, Sunoco, Inc.
Ms. Lisa Runyon, Sunoco, Inc.
Mr. John D. Edgcomb, Edgcomb Law Group
Mr. Jack Wessman, Mount Diablo Springs Improvement Society

Client Name: Sunoco, Inc.

Photo Date: March 24, 2009

Project: Sunoco Mt. Diablo



Photograph 1: Before Repair Work



Photograph 2: After Repair Work

115 Sansome Street, Suite 700
San Francisco, California 94104
415.399.1993 direct
415.399.1885 fax
elginfo@edgcomb-law.com

▶MEMORANDUM

TO: Mr. Joseph Mello; Central Valley RWQCB

FROM: Edgcomb Law Group (for Sunoco Inc.)

DATE: July 31, 2009

CC: Ms. Jerlean Johnson, USEPA, Region IX

RE: [REDACTED]

[REDACTED]

Sunoco Inc.'s **Voluntary PRP Report** (as of 7/31/09) is attached hereto as **Exhibit A**.

EXHIBIT A

PRP Name/ Name of Representative	Relevant Time Period	CERCLA Status	Current Viability
Francis Hunsaker (a.k.a. Hastings)	? – 1907	Owner	Unknown
Edward Howard (Daisy Howard)	1907-1933 (portion to Mt. Diablo Quicksilver Co.), and owner until 1952 for another portion of property.	Owner	No further information. Obviously, very likely deceased.
George & Agnes Grutchfield	1914-1930	Owner	No further information. Obviously, very likely deceased.
Joseph Tonge	1929-1931	Owner	No further information. Obviously, very likely deceased.
Mount Diablo Quicksilver Mining Co. / Vic Blomberg, Principal, numerous individual shareholders.	1931-1960, continued to own part of property (including pond) until at least 1965.	Owner/ Operator for some of the time (1931-1933)	Currently continuing to research and locate Mr. Vic Blomberg.
C. W. Ericksen	1933-1936	Operator	No further information. Obviously, very likely deceased.
Bradley Mining Co.	1936-1947	Operator	Currently operating. Being sued by EPA on several other sites. Has some insurance.
Ronnie B. Smith / Producers Refining; Associated names: (1) Jene Harper (c/o Franklin Supply Company, 624 South Michigan Ave., Chicago, Il); (2) Albert J. Mitchell, Treasurer, Franklin Supply Company; (3) James F. Dunnigan (c/o Producers Refining, Inc., 318 West Houghton Ave.,	1951-1953	Lessees/ Operators	Jene Harper, Jr. has been identified as a former vice-president of Franklin Supply Co. and son of the former president of the company, Raymond Harper. Franklin Supply Company merged with Continental Supply in 1995 to become C.E. Franklin, Ltd., and is a publicly traded company on the NASDAQ (Symbol: CFK) and Toronto Stock Exchange (Symbol: CFT).

West Branch, MI); (4) Ronnie B. Smith.			
Margaret H. de Witt, Jane H. Reimers, Elizabeth H. Dakin and Edward A. Howard, Jr.	1952-1970	Owners	No further information.
Jonas & Johnson: John E. Johnson (deceased) and John L. Jonas (Assignees of DMEA Contract). Employees of Jonas & Johnson: Howard Castle (deceased (mining accident at Site)); (1) Melvin Brunner (or "Bruner"); (2) George Bartono; (3) Dexter Barkley; (4) Guy Castle; (5) C.N. Schuette.	1953	Lessees/ Operators	Unknown as to Mr. Jonas. Mr. Johnson deceased as of 1958. The only Melvin Brunner located that had ever lived in California, died in 1976 in Angels Camp, CA. C.N. Schuette was located at 6390 Barnett Valley Road, W. Sebastopol, CA. No further information.
U.S. Dept. of Interior; Defense Minerals Exploration Administration (DMEA)	1953-1954	Operator	U.S. Dept of Interior is successor in interest to DMEA's liabilities.
Nevada Scheelite Co., employees: A.R. McGuire & Ray Henricksen.	1956	Operator	Documents obtained from the Nevada Secretary of State confirm that Nevada Scheelite Corp. operated from 1954 to 1957 and that the officers of that corporation were also involved in what is now Kennametal. Kennametal is a currently-operating and publicly traded corporation on the N.Y. Stock Exchange (Symbol: KMT).
V. Blomberg, Dr. Fred Zumwalt, Leland B. Nickerson, Mrs. A.C. Lang, and May Perdue	1958-1962	Owners	Trying to locate V. Blomberg, no information on other names.

John E. Johnson	1958-1959	Lessee/ Operator	Deceased.
Victoria Resource Corp., 923 Fifth Avenue, New York 21, NY	1960-1969	Owner/ Operator for some of the time (1960-1965). Leased property to Welty & Randall from 1965-1969.	Located an article indicating that a "Victoria Resource Corporation" had changed its name to Victoria Gold Corp. in July 2008. Victoria Gold Corp is still operating and is a publicly-traded company, traded on the Canadian Venture Exchange (Symbol: VIT). BEMA Gold Corporation owned 33% of Victoria Gold Corp. BEMA Gold was acquired by Kinross Gold Corporation in 2007. Kinross Gold Corp. is Victoria Gold Corp's largest shareholder, owning 21% of its stock according to an article on Marketwire from May 2009.
Welty & Randall	1965-1969	Lessee/ Operator- reworked mine tailings at site.	Unable to locate any information, but apparently leased property from Victoria Resources from 1965-69.
Guadalupe Mining Co. / Jack Callaway, manager at site. Officers according to Nevada Sec. of State: John Gargan, Sr.; Lillian Gargan; Harold Everton; all of San Jose, CA.	1969/1970-1974	Owner/ Operator	The Nevada Secretary of State records indicate that this company operated as a NV Corporation from 1964-1981. CA Secretary of State Records indicate that it operated as a CA corporation from 1964-1977. Same address in San Jose, CA, listed for both corporations.
Morgan Territory Investment Co.	1970-1976	Owner	No further information.
Jack and Carolyn Wessman	1974-present	Owner	Claims limited assets
The State of California	1976-present	Owner	State Parks Department owns southernmost portion of mine site, including portion of tailings piles.
Frank & Ellen Meyer	1977-1989	Owner of portion of property containing the pond.	Frank Meyer died in 1993. Ellen Meyer listed at address in Gridley, CA. Assets unknown.



California Regional Water Quality Control Board Central Valley Region

Karl E. Longley, ScD, P.E., Chair



Linda S. Adams
Secretary for
Environmental
Protection

11020 Sun Center Drive #200, Rancho Cordova, California 95670-6114
Phone (916) 464-3291 • FAX (916) 464-4645
<http://www.waterboards.ca.gov/centralvalley>

Arnold
Schwarzenegger
Governor

30 October 2009

Lisa A. Runyon, Senior Counsel
Sunoco, Inc.
1735 Market Street, Ste. LL
Philadelphia PA 19103-7583

RESPONSE TO DIVISIBILITY PAPER, MOUNT DIABLO MERCURY MINE, CONTRA COSTA COUNTY

Staff of the Central Valley Regional Water Quality Control Board (Board) have reviewed the "~~Divisibility Position Paper, Mt. Diablo Mercury Mine, Sunoco Inc as Related to Cordero Mining Company~~" (Divisibility Paper) submitted on Sunoco/Cordero's behalf by The Source Group, Inc. The Divisibility Paper contends that there is a reasonable technical basis for the Board to apportion liability for the investigation and/or cleanup of the Mount Diablo Mercury Mine (Site). The Divisibility Paper concludes that, because there is a reasonable basis to apportion liability, the Board should limit Sunoco/Cordero's liability to the area near the Defense Minerals Exploration Administration (DMEA) shaft, where most of Cordero Mining Company's work was done.

Board staff disagree that there is a reasonable basis for apportioning liability. The contamination present at the Site is not susceptible to any rational means of division. The discharge of polluted water from the Site occurs after water interacts with mine waste, some of which was generated by Cordero, and some of which was generated by other responsible parties. The 790 feet of underground tunnels constructed by Cordero connect with, and thus contribute contaminated water to, the earlier underground tunnels via the Main Winze. The 165-foot level portal, a part of the earlier tunnels that connects to the Main Winze, is believed to be a major contributor of acid mine drainage. It is impossible for the Board to determine the proportion of pollutants that the water picks up through its interactions with the mine features that Cordero constructed, relative to the proportion that it picks up through its interactions with mine features constructed by other responsible parties. Indeed, even if such proportion could be calculated, it may have little to no relation to the ultimate cost of investigation and/or remediation.

The Divisibility Paper contends that the waste rock generated by Cordero was either placed back in the shaft or discharged in the My Creek drainage, but this fact is not borne out by the evidence in the Board's files. No evidence in the files indicates where the waste rock was discharged. The 790 feet of tunnels would generate too much waste to fit back into the shaft, and the descriptions of waste rock in the My Creek drainage are consistent with waste rock from a surface mine, not from underground mine tunnels.

California Environmental Protection Agency

Board staff maintain that there is no reasonable basis to apportion liability, and therefore, pursuant to State Board water quality decisions regarding apportionability, Cordero/Sunoco's liability for the site remains joint and several.

If you have any questions concerning this matter, please contact Ross Atkinson at (916) 464-4614 or via email at ratkinson@waterboards.ca.gov.



VICTOR IZZO

Senior Engineering Geologist
Title 27 Permitting and Mines Unit

cc: Patrick Palupa, Office of the Chief Counsel, SWRCB, Sacramento
California Dept of Parks and Recreation, Bay Area Dist., San Francisco
Jerelean Johnson, Site Assessment, Superfund Div. USEPA Region 9, San Francisco
Larry Bradfish, Asst. Regional Counsel, USEPA Region 9, San Francisco
Janet Yocum, On-Scene Coordinator, USEPA Region 9, San Francisco
R. Mitch Avalon, Contra Costa County Flood Control, Martinez
William R. Morse, Sunoco, Inc. Philadelphia, PA
David Chapman, Edgcomb Law Group, San Francisco.
Paul Horton, The Source Group, Inc. Pleasant Hill

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EDGCOMB LAW GROUP



**California Regional Water Quality Control Board
Central Valley Region**

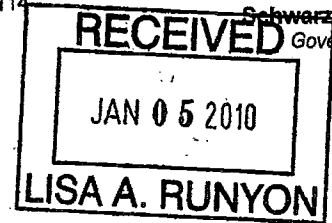
Karl E. Longley, ScD, P.E., Chair



Linda S. Adams
Secretary for
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Arnold
Schwarzenegger
Governor



30 December 2009

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Oakland CA 94612

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US Dept of Interior DMEA
1849 C Street, N.W.
Washington DC 20240

REVISED ORDER TO SUBMIT INVESTIGATIVE REPORTS PURSUANT TO WATER CODE SECTION 13267, MOUNT DIABLO MINE, CONTRA COSTA COUNTY

Central Valley Regional Water Quality Control Board staff has prepared the attached Revised Technical Reporting Order No. R5-2009-0869 (Order). The Order was revised at Bradley Mining Company's request to allow sufficient time for their response. The Order is issued under the provisions of California Water Code section 13267 which states in part: "... (b)(1) In conducting an investigation . . . , the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or, discharging, or who proposes to discharge waste within its region . . . shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires...". Based on the evidence in our files and as discussed in the attached Order, the parties listed in the Order have discharged, or is suspected of having discharged mining waste and therefore is responsible to respond to this Order.

If you have any questions please contact Ross Atkinson at (916) 464-4614 or via email at ratkinson@waterboards.ca.gov.

VICTOR IZZO
Senior Engineering Geologist
Title 27 Permitting and Mining Unit

cc on following page

California Environmental Protection Agency



cc: Patrick Palupa, Office of the Chief Counsel, SWRCB, Sacramento
California Dept of Parks and Recreation, Bay Area Dist., San Francisco
Jerelean Johnson, Site Assessment, Superfund Div. USEPA Region 9, San Francisco
Larry Bradfish, Asst. Regional Counsel, USEPA Region 9, San Francisco
Janet Yocum, On-Scene Coordinator, USEPA Region 9, San Francisco
Patricia S. Port, US Dept. of Interior, Oakland
R. Mitch Avalon, Contra Costa County Flood Control, Martinez
William R. Morse, Sunoco, Inc. Philadelphia, PA
David Chapman, Edgcomb Law Group, San Francisco.
Kennametal Inc., Latrobe, PA
Victoria Gold Corp., Toronto, Ontario M5H 2A4 Canada

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**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION**

**REVISED TECHNICAL REPORTING ORDER R5-2009-0869
CALIFORNIA WATER CODE SECTION 13267
FOR
MOUNT DIABLO MERCURY MINE
CONTRA COSTA COUNTY**

This Order is issued to Jack and Carolyn Wessman; the Bradley Mining Co.; the U.S. Department of Interior; and Sunoco, Inc (hereafter collectively referred to as Dischargers) pursuant to California Water Code section 13267, which authorizes the Executive Officer of the California Regional Water Quality Control Board, Central Valley Region (hereafter Central Valley Water Board or Board) to issue Orders requiring the submittal of technical reports, and CWC section 7, which authorizes the delegation of the Executive Officer's authority to a deputy, in this case the Assistant Executive Officer. This Order revises and replaces the previous Order issued on 1 December 2009.

The Assistant Executive Officer finds:

BACKGROUND

1. The Mount Diablo Mercury Mine (Mine Site) is an inactive mercury mine, located on approximately 109 acres on the northeast slope of Mount Diablo in Contra Costa County. Acid mine drainage containing elevated levels of mercury and other metals is being discharged to a pond that periodically overflows into Horse and Dunn Creeks. Further investigation is required to assess the extent of pollution discharged from the Mine Site and to evaluate remedial options. The Site Investigation and Remedial Option Evaluation are needed steps that must be taken to restore the impacted waters of the state and to protect public health and the environment.
2. Presently, the Mine Site consists of an exposed open cut and various inaccessible underground shafts, adits, and drifts. Extensive waste rock piles and mine tailings cover the hill slope below the open cut, and several springs and seeps discharge from the tailings-covered area. Three surface impoundments at the base of the tailings capture most spring flow and surface runoff. However, during winter, the ponds routinely spill into Horse and Dunn Creeks, which drain to the Marsh Creek watershed.
3. Section 303(d) of the Federal Clean Water Act requires states to identify waters not attaining water quality standards (referred to as the 303(d) list). Marsh Creek has been identified by the Central Valley Water Board as an impaired water body because of high aqueous concentrations of mercury.

OWNERSHIP AND OPERATOR HISTORY

4. Jack and Carolyn Wessman have owned the Mine Site from 1974 to the present. The Wessmans have made some improvements to reduce surface water exposure to tailings and waste rock, including the construction of a cap over parts of the tailings/waste rock piles. Although these improvements have been made without an engineering design or approved plan, these improvements may have reduced some of the impacts from the Mine Site. However, discharges that contain elevated mercury levels continue to impact the Mine Site and site vicinity.
5. Bradley Mining Company operated the Mine Site from 1936 to 1947, producing around 10,000 flasks of mercury. During operations Bradley Mining Company developed underground mine workings, discharged mine waste rock, and generated and discharged mercury ore tailings.
6. The U.S. Department of the Interior created the Defense Minerals Exploration Administration (DMEA) out of the Defense Minerals Agency in 1951. The DMEA was created to provide financial assistance to explore for certain strategic and critical minerals. The DMEA contracted with private parties to operate the Mine Site under cost-sharing agreements from 1953 to 1954. The initial cost sharing was with the Ronnie B. Smith Trust, which implemented a partnership formed by Jene Harper and James Dunnigan. Although it is unclear whether the mine was operated under the DMEA contract, the Smith partnership produced approximately 102 flasks of mercury. John L. Jonas and John E. Johnson assumed the DMEA contract in 1954, Jonas and Johnson produced 21 flasks of mercury.
7. The Cordero Mining Company operated the Mine Site from approximately 1954 to 1956, and was responsible for sinking a shaft, driving underground tunnels that connected new areas to pre-existing mine workings, and discharging mine waste. The amount of mercury production from this time period is unknown. The United States Environmental Protection Agency (USEPA), Region IX, named Sunoco Inc. a responsible party for Mount Diablo Mercury Mine in the Unilateral Administrative Order for the Performance of a Removal Action, USEPA Docket No. 9-2009-02, due to its corporate relationship to the Cordero Mining Company.
8. Nevada Scheelite Company, a subsidiary of Kennametal Inc., operated at the Mount Diablo Mercury Mine in 1956. The extent of operations and the amount of production for this period is unknown. However, discharges have occurred from runoff from the mine waste piles and likely springs associated with the mine working.
9. Victoria Resources Corp., now Victoria Gold Corp., owned the Mount Diablo site from 1960 to 1969. The extent of operations and the amount of production for this period is unknown. However, discharges have occurred from runoff from the mine waste piles and likely springs associated with the mine working.

10. The Guadalupe Mining Company owned the Mine site from 1969 to 1974. The extent of operations and amount of production for this period is unknown. However, discharges have occurred from runoff from the mine waste piles and likely springs associated with the mine working.

LEGAL PROVISIONS

11. The Water Board's *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, 4th Edition* (Basin Plan) designates beneficial uses of the waters of the State, establishes water quality objectives (WQOs) to protect these uses, and establishes implementation policies to implement WQOs. The designated beneficial uses of Marsh Creek, which flows into Sacramento and San Joaquin Delta are domestic, municipal, industrial and agricultural supply.

12. CWC section 13267 states, in part:

(b)(1) In conducting an investigation, the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or, discharging, or who proposes to discharge waste within its region . . . shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.

As described in Findings Nos. 4 – 7, the Dischargers are named in this Order because all have discharged waste at the Mine Site through their actions and/or by virtue of their ownership of the Mine Site. The reports required herein are necessary to formulate a plan to remediate the wastes at the Mine Site, to assure protection of waters of the state, and to protect public health and the environment.

13. CWC section 13268 states, in part:

(a)(1) Any person failing or refusing to furnish technical or monitoring program reports as required by subdivision (b) of Section 13267 . . . or falsifying any information provided therein, is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b).

(b)(1) Civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.

(c) Any person discharging hazardous waste, as defined in Section 25117 of the Health and Safety Code, who knowingly fails or refuses to furnish technical or monitoring program reports as required by subdivision (b) of Section 13267, or who knowingly falsifies any information provided in those technical or monitoring program reports, is guilty of a misdemeanor, may be

civily liable in accordance with subdivision (d), and is subject to subdivision (e).

(d)(1) Civil liability may be administratively imposed by a regional Article 2.5 (commencing with Section 13323) of Chapter 5 for an amount which shall not exceed five thousand dollars (\$5,000) if a violation occurs.

As described above, failure to submit the required reports to the Board according to the schedule detailed herein may result in action being taken against you, which may include the imposition of a fine pursuant to CWC section 13268. Administrative civil liability of \$5,000 per day may be imposed for non-compliance with the directive.

IT IS HEREBY ORDERED that, pursuant to California Water Code sections 13268 and 13269, Dischargers shall submit the following technical reports:

1. **By 1 April 2010**, submit a *Mining Waste Characterization Work Plan* (the *Characterization Plan*) for the Mine Site. The *Characterization Plan* shall assess both the nature and extent of mining waste at the Mine Site and the potential that this mining waste poses to water quality and/or human health. The *Characterization Plan* shall describe the methods that will be used to establish baseline data for surface water, and ground water at the site, and the means and methods for determining the vertical and lateral extent of the mining waste.

The *Characterization Plan* shall also address slope stability of the Mine Site and shall assess the need for slope design and slope stability measures to prevent erosion of mining waste-laden soils to surface water and ephemeral streams.

2. **By 1 September 2010**, submit a *Mining Waste Characterization Report* (the *Characterization Report*), characterizing the data gathered pursuant to the *Characterization Plan*. The *Characterization Report* shall include:
 - a. A narrative summary of the field investigation;
 - b. A section describing background soil concentrations, methods of sampling, and the vertical and lateral extent of the mining waste;

3. Within **90 days** of staff concurrence with the Characterization Report, submit a *Site Remediation Work Plan* (hereafter *Remediation Plan*) for the site. The Remediation Plan shall describe remediation activities to clean up or remediate the mining waste either to background concentrations, or to the lowest level that is technically and economically achievable. The Remediation Plan shall also address long-term maintenance and monitoring necessary to confirm and preserve the long-term effectiveness of the remedies. The potential remediation activities shall comply with all applicable WQOs in the Basin Plan. The Remediation Plan shall also include:
 - a. An evaluation of water quality risk assessment:
 - b. A human health risk assessment:
 - c. A time schedule to conduct the remediation activities.

REPORTING

4. When reporting the data, the Dischargers shall arrange the information in tabular form so that the date, the constituents, and the concentrations are readily discernible. The data shall be summarized in such a manner as to illustrate clearly the compliance with this Order.
5. Fourteen days prior to conducting any fieldwork, submit a Health and Safety Plan that is adequate to ensure worker and public safety during the field activities in accordance with California Code of Regulations, title 8, section 5192.
6. As required by the California Business and Professions Code sections 6735, 7835, and 7835.1, all reports shall be prepared by a registered professional or their subordinate and signed by the registered professional.
7. All reports must be submitted to the Central Valley Water Board. Electronic copies of all reports and analytical results are to be submitted over the Internet to the State Water Board Geographic Environmental Information Management System database (GeoTracker) at <http://geotracker.swrcb.ca.gov>. Electronic copies are due to GeoTracker concurrent with the corresponding hard copy. Electronic submittals shall comply with GeoTracker standards and procedures as specified on the State Water Board's web site.
8. Notify Central Valley Water Board staff at least five working days prior to any onsite work, testing, or sampling that pertains to environmental remediation and investigation and is not routine monitoring, maintenance, or inspection.

Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Board to review the action in accordance with CWC section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday (including mandatory furlough days), the petition must be received by the State Water Board by 5:00 p.m. on the next business day.

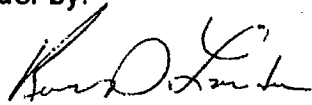
Revised Report Order #R5-2009-0869
Mount Diablo Mercury Mine
Contra Costa County

- 6 -

Copies of the law and regulations applicable to filing petitions may be
http://www.waterboards.ca.gov/public_notices/petitions/water_quality
request.

This Order is effective upon the date of signature.

Order by:



KENNETH LANDAU Assista

30 December 20

(Date)

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

CLEANUP AND ABATEMENT ORDER NO. R5-2013-0701

FOR

**MOUNT DIABLO MERCURY MINE
CONTRA COSTA COUNTY**

This Order is issued to Jack and Carolyn Wessman; the Bradley Mining Co.; the U.S. Department of Interior; Sunoco, Inc.; Mt. Diablo Quicksilver, Co.; Ltd., Kennametal Inc. and the California Department of Parks and Recreation (hereafter collectively referred to as Dischargers) pursuant to California Water Code section 13303 which authorizes the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) to issue a Cleanup and Abatement Order (Order) and CWC section 13267, which authorizes the Executive Officer to issue Orders requiring the submittal of technical reports, and CWC section 7, which authorizes the delegation of the Executive Officer's authority to a deputy, in this case the Assistant Executive Officer.

The Executive Officer finds:

BACKGROUND

1. The Mount Diablo Mercury Mine (Mine Site) is an inactive mercury mine. The Mine is located on the northeast slope of Mount Diablo in Contra Costa County. The Mine and historic working areas are on 80 acres southwest of the intersection of Marsh Creek Road and Morgan Territory Road. The Mine site is adjoined on the south and west by the Mount Diablo State Park and on the north and east by Marsh Creek Road and Morgan Territory Road.
2. The Mine Site consists of an exposed open cut and various inaccessible underground shafts, adits, and drifts. Extensive waste rock piles and mine tailings cover the hill slope below the open cut, and several springs and seeps discharge from the tailings-covered area. Three surface impoundments at the base of the tailings capture most spring flow and surface runoff.
3. Acid mine drainage containing elevated levels of mercury and other metals is being discharged to Pond 1, an unlined surface impoundment that periodically overflows discharging contaminants into Horse and Dunn Creeks. Horse and Dunn Creeks are tributaries to Marsh Creek which drains to the San Francisco Bay.
4. Section 303(d) of the Federal Clean Water Act requires states to identify waters not attaining water quality standards (referred to as the 303(d) list). Dunn Creek, located below Mount Diablo Mine, and Marsh Creek, located below Dunn Creek, have been

identified by the Central Valley Water Board as an impaired water bodies because of high aqueous concentrations of mercury and metals.

5. It is the policy of the State Water Board, and by extension the Central Valley Water Board, that every human being has the right to safe, clean, affordable and accessible water adequate for human consumption, cooking, and sanitary purposes. Dunn Creek and Marsh Creek may impact municipal drinking supply in the area. The current site conditions may constitute a threat to municipal drinking supply beneficial use. Therefore, the Water Board is authorized to protect such uses pursuant to section 106.3 of the Water Code.

OWNERSHIP AND OPERATOR HISTORY

6. Jack and Carolyn Wessman have owned the Mine Site from 1974 to the present. The Wessmans have made some improvements to reduce surface water exposure to tailings and waste rock, including the construction of a cap over parts of the tailings/waste rock piles. Although these improvements have been made without an engineering design or approved plan, these improvements may have reduced some of the impacts from the Mine Site. However, discharges that contain elevated mercury levels continue to impact the Mine Site and site vicinity.
7. A portion of the mine tailings are located on land owned by Mount Diablo State Park. The California Department of Parks and Recreation is named as a Discharger in this Order. The California Department of Parks and Recreation has conducted activities on the property related to surveying and possible fence line adjustments.
8. The mine was discovered by a Mr. Welch in 1863 and operated intermittently until 1877. The Mine reopened in 1930 and was operated until 1936 by the Mt. Diablo Quicksilver Co., Ltd. producing an estimated 739 flasks of mercury. Mt. Diablo Quicksilver no longer exists.
9. Although Mt. Diablo Quicksilver no longer exists, it is named as a Discharger in this order because it likely has undistributed assets, including, without limitation, insurance assets held by the corporation that may be available in response to this order.
10. Bradley Mining Company leased the Mine from Mt. Diablo Quicksilver and operated from 1936 to 1947, producing around 10,000 flasks of mercury. During operations Bradley Mining Company developed underground mine workings, discharged mine waste rock, and generated and discharged ore tailings containing mercury.
11. In 2008 the United States of America, on behalf of the Administer of the United States Environmental Protection Agency (EPA), filed a complaint pursuant to section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, against Bradley Mining Company and Frederick Bradley in his representative capacity as Trustee of the Worthen Bradley Family Trust (Bradley). Prior to the suit the EPA had identified Bradley Mining as a potentially responsible party for the remediation of the Mount Diablo Mercury Mine Site. The complaint filed by the EPA and DOJ sought reimbursement and

damages associated with various sites, including the Mount Diablo Mercury Mine Site in Contra Costa County, California.

12. In 2012 the EPA and Bradley Mining Company and Frederick Bradley in his representative capacity as Trustee of the Worthen Bradley Family Trust entered into a settlement for all sites set forth in the complaint. Under the terms of the Consent Decree \$50,500 of the funds Bradley received from insurance was allocated to the Mt Diablo Mercury Mine Site, along with 10 percent of future payments made that were linked to Bradley's future income.
13. The Bradley Mining Company still exists, although it claims that it has limited resources and the resources it has are mostly tied up in environmental actions at other former mines. Bradley Mining Company is a named Discharger in this Order.
14. Ronnie B. Smith and partners leased the mine from Mt. Diablo Quicksilver from 1951 to 1954 and produced approximately 125 flasks of mercury by surface mining (open pit mining methods). Successors to the Smith et al. partnership have not been identified and are not named as Dischargers in this Order.
15. In 1953, the Defense Minerals Exploration Administration (DMEA) granted the Smith, et al. partners a loan to explore for deep mercury ore. The DMEA was created to provide financial assistance to explore for certain strategic and critical minerals. The DMEA contracted with private parties to operate the Mine Site under cost-sharing agreements from 1953 to 1954. The DMEA was a Federal Government Agency in the US Department of the Interior and is named as a Discharger in this Order.
16. John L. Jonas and John E. Johnson assumed the DMEA contract in 1954, producing 21 flasks of mercury in less than one year. Their successors have not been found and they are not named Dischargers in this Order.
17. The Cordero Mining Company operated the Mine Site from approximately 1954 to 1956, and was responsible for sinking a shaft, driving underground tunnels that connected new areas to pre-existing mine workings, and discharging mine waste. There is no record of mercury production for this time period and the amount of mercury production, if any, from this time period is unknown. The United States Environmental Protection Agency (USEPA), Region IX, named Sunoco Inc. a responsible party for Mount Diablo Mercury Mine in the Unilateral Administrative Order for the Performance of a Removal Action, USEPA Docket No. 9-2009-02, due to its corporate relationship to the Cordero Mining Company. Sunoco Inc. is a named Discharger in this Order.
18. Nevada Scheelite Corporation, a subsidiary of Kennametal Inc., leased from Mount Diablo Quicksilver and operated the mine in 1956. Minutes of a 25 March 1956 Mount Diablo Quicksilver Co Directors' Meeting with managers representing Nevada Scheelite Corporation discuss Nevada Scheelite's lease and operations at the mine. Nevada Scheelite apparently operated an unidentified part to the mine from 1956 to 1958. At one point, downstream landowners objected to Nevada Scheelite's discharge of acid mine drainage and that part of the operation was suspended. The amount of production for this

period is uncertain. At the time of Nevada Scheelite's lease, it was a wholly owned subsidiary of Kennametal Inc. with its headquarters in Latrobe Pennsylvania. Because of its ownership and control of Nevada Scheelite, Kennametal Inc. is named a Discharger in this Order.

19. Victoria Resources Corp. owned the Mount Diablo Mine from 1960 to 1969. The extent of operations and the amount of production for this period is unknown. However, discharges have occurred from runoff from the mine waste piles and likely springs associated with the mine working. Victoria Resources Corp. no longer exists under that name, Technical Reporting Order No. R5-2009-0870 was issued to Victoria Gold Corp. on December 1, 2009, requiring submittal of a report describing the extent of Victoria Resources activities at the mine. Victoria Gold Corp. notified the Board that they have no relationship to Victoria Resources Inc. Research into the corporate evolution of Victoria Resources Inc. is ongoing.
20. The Guadalupe Mining Company owned the Mine site from 1969 to 1974. The extent of operations and amount of production for this period is unknown. However, discharges have occurred from runoff from the mine waste piles and likely springs associated with the mine working. Guadalupe Mining Company no longer exists and efforts to trace a corporate successor have been unsuccessful.

INVESTIGATIONS

21. In 1989, a technical investigation by JL Lovenitti used historical data and focused on Pond 1. The report characterized Pond 1 chemistry, its geohydrochemical setting, the source of contaminants, remedial alternatives and preliminary remediation cost estimates. The report documents acidic conditions and elevated concentrations of mercury, lead, arsenic, zinc, and copper that are greater than primary drinking water standards.
22. Between 1995 and 1997, a baseline study of the Marsh Creek Watershed was conducted by Prof. Darrell Slotton for Contra Costa County. The study concluded that the Mount Diablo Mercury Mine and specifically the exposed tailings and waste rock above the existing surface impoundment are the dominant source of mercury in the watershed.
23. Technical Reporting Order No. R5-2009-0869 was issued on 1 December 2009 to the Dischargers that had been identified at that time, Jack and Carolyn Wessman, Bradley Mining Co, US Department of the Interior, and Sunoco Inc. The Order required the Dischargers to submit a Mining Waste Characterization Work Plan by 1 March 2010 and a Mining Waste Characterization Report by 1 September 2010.
24. On 3 August 2010 Sunoco submitted a Characterization Report in partial compliance of Order No. R5-2009-0869. The report presented results of Sunoco's investigation to date, summarized data gaps and proposed future work to complete site characterization. Sunoco Inc. is the only party making an effort to comply with the Order.

25. The Characterization Report concludes that most mercury contamination in the Marsh Creek Watershed originates from the Mount Diablo Mine, is leached from mining waste and discharged via overland flow to the Lower Pond (Pond 1) and Dunn Creek.
26. Various investigations have sampled surface water discharging from the mine site. Sunoco submitted a Characterization Report that includes data from two sampling events conducted in the Spring of 2010. In addition, at the end of 2011 Sunoco submitted an Additional Characterization Report that includes data from up to five sampling events. The following summarizes results from the Characterization Report:

Constituent	Water Quality Goal (MCL)	Background ⁽²⁾	Mine Waste ⁽³⁾	Pond 1 ⁽⁴⁾	Dunn Creek Downstream ⁽⁵⁾
TDS (mg/L)	500 - 1500	225.5	8056	6960	337.5
Sulfate (mg/L)	500	24.5	5660	5465	70.5
Mercury (ug/L)	2	<0.20 ⁽¹⁾	97.6	91	0.69
Chromium (ug/L)	50	<5 ⁽¹⁾	781.6	22.5	14
Copper (ug/L)	1300	5	202.2	46.5	14
Nickel (ug/L)	100	<5 ⁽¹⁾	25224	13900	213.5
Zinc (ug/L)		10.5	693.4	351.5	22

(1) Non-detect result, stated value reflects the method detection limit.

(2) Average of two samples collected from My Creek and Dunn Creek above the mine site.

(3) Average of five surface water samples collected immediately below the tailings/waste rock piles.

(4) Average of two samples collected from Pond 1, the settling pond located at the base of the tailings/waste rock piles.

(5) Average to two samples collected from Dunn Creek downstream of the mine site.

27. The limited population of recent samples summarized in Finding 26 above demonstrates that water draining from the mine waste, collected in Pond 1 and in Dunn Creek downstream of the mine all have been impacted by increased concentrations of salts and metals including mercury. Dunn Creek drains into Marsh Creek. The 1997 Slotton study concluded that Mount Diablo Mercury Mine was the major source of mercury in the Marsh Creek, the Sunoco study confirms the Slotton results.

LEGAL PROVISIONS

28. Section 303(d) of the Federal Clean Water Act requires states to identify waters not attaining water quality standards (referred to as the 303(d) list). Dunn Creek from Mount Diablo Mine to Marsh Creek and Marsh Creek below Dunn Creek have been identified by the Central Valley Water Board as an impaired water bodies because of high aqueous concentrations of mercury and metals.

29. The Central Valley Regional Board is in the process of writing Total Daily Maximum Loads (TMDLs) for Dunn Creek and Marsh Creek.
30. The Water Board's *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, 4th Edition* (Basin Plan) designates beneficial uses of the waters of the State, establishes water quality objectives (WQOs) to protect these uses, and establishes implementation policies to implement WQOs. The designated beneficial uses of Marsh Creek, which flows into Sacramento and San Joaquin Delta are domestic, municipal, industrial and agricultural supply.
31. The beneficial uses of underlying groundwater, as stated in the Basin Plan, are municipal and domestic supply, agricultural supply, industrial service supply, and industrial process supply.
32. Under CWC section 13050, subdivision (q)(1), "mining waste" means all solid, semisolid, and liquid waste materials from the extraction, beneficiation, and processing of ores and minerals. Mining waste includes, but is not limited to, soil, waste rock, and overburden, as defined in Public Resources Code section 2732, and tailings, slag, and other processed waste materials...." The constituents listed in Finding No.21 are mining wastes as defined in CWC section 13050, subdivision (q)(1).
33. Because the site contains mining waste as described in CWC sections 13050, closure of Mining Unit(s) must comply with the requirements of California Code of Regulations, title 27, sections 22470 through 22510 and with such provisions of the other portions of California Code of Regulations, title 27 that are specifically referenced in that article.
34. Affecting the beneficial uses of waters of the state by exceeding applicable WQOs constitutes a condition of pollution as defined in CWC section 13050, subdivision (1). The Discharger has caused or permitted waste to be discharged or deposited where it has discharged to waters of the state and has created, and continues to threaten to create, a condition of pollution or nuisance.
35. CWC section 13304(a) states that: *"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 Water 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 waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the Regional Water Board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts. A cleanup and abatement order issued by the state board or a Regional Water Board may require the provision of, or payment for, uninterrupted replacement water service, which may include wellhead treatment, to each affected public water supplier or private well owner. Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the*

request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant."

36. The State Water Resources Control Board (State Board) has adopted Resolution No. 92-49, the *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under CWC Section 13304*. This Resolution sets forth the policies and procedures to be used during an investigation or cleanup of a polluted site and requires that cleanup levels be consistent with State Board Resolution No. 68-16, the *Statement of Policy With Respect to Maintaining High Quality of Waters in California*. Resolution No. 92-49 and the Basin Plan establish cleanup levels to be achieved. Resolution No. 92-49 requires waste to be cleaned up to background, or if that is not reasonable, to an alternative level that is the most stringent level that is economically and technologically feasible in accordance with California Code of Regulations, title 23, section 2550.4. Any alternative cleanup level to background must: (1) be consistent with the maximum benefit to the people of the state; (2) not unreasonably affect present and anticipated beneficial use of such water; and (3) not result in water quality less than that prescribed in the Basin Plan and applicable Water Quality Control Plans and Policies of the State Board.
37. Chapter IV of the Basin Plan contains the *Policy for Investigation and Cleanup of Contaminated Sites*, which describes the Central Valley Water Board's policy for managing contaminated sites. This policy is based on CWC sections 13000 and 13304, California Code of Regulations, title 23, division 3, chapter 15; California Code of Regulations, title 23, division 2, subdivision 1; and State Water Board Resolution Nos. 68-16 and 92-49. The policy addresses site investigation, source removal or containment, information required to be submitted for consideration in establishing cleanup levels, and the basis for establishment of soil and groundwater cleanup levels.
38. The State Board's Water Quality Enforcement Policy states in part: "At a minimum, cleanup levels must be sufficiently stringent to fully support beneficial uses, unless the Central Valley Water Board allows a containment zone. In the interim, and if restoration of background water quality cannot be achieved, the Order should require the discharger(s) to abate the effects of the discharge (Water Quality Enforcement Policy, p. 19)."
39. CWC section 13267 states, in part:

"(b)(1) In conducting an investigation, the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or, discharging, or who proposes to discharge waste within its region . . . shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports."

As described in Findings Nos. 5 – 14, the Dischargers are named in this Order because all have discharged waste at the Mine Site through their actions and/or by virtue of their ownership of the Mine Site. The reports required herein are necessary to formulate a plan to remediate the wastes at the Mine Site, to assure protection of waters of the state, and to protect public health and the environment.

40. CWC section 13268 states, in part:

(a)(1) Any person failing or refusing to furnish technical or monitoring program reports as required by subdivision (b) of Section 13267 . . . or falsifying any information provided therein, is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b).

(b)(1) Civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.

(c) Any person discharging hazardous waste, as defined in Section 25117 of the Health and Safety Code, who knowingly fails or refuses to furnish technical or monitoring program reports as required by subdivision (b) of Section 13267, or who knowingly falsifies any information provided in those technical or monitoring program reports, is guilty of a misdemeanor, may be civilly liable in accordance with subdivision (d), and is subject to criminal penalties pursuant to subdivision (e).

(d)(1) Civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (c) in an amount which shall not exceed five thousand dollars (\$5,000) for each day in which the violation occurs.

As described above, failure to submit the required reports to the Central Valley Water Board according to the schedule detailed herein may result in enforcement action(s) being taken against you, which may include the imposition of administrative civil liability pursuant to CWC section 13268. Administrative civil liability of up to \$5,000 per violation per day may be imposed for non-compliance with the directives contained herein.

IT IS HEREBY ORDERED that, pursuant to California Water Code section 13304 and 13267, the Dischargers, their agents, successors, and assigns, shall investigate the discharges of waste, clean up the waste, and abate the effects of the waste, within 30 days of entry of this order, from Mount Diablo Mercury Mine (Mine Site). The work shall be completed in conformance with California Code of Regulations, title 27, sections 22470 through 22510, State Board Resolution No. 92-49 and with the Regional Water Board's Basin Plan (in particular the Policies and Plans listed within the Control Action Considerations portion of Chapter IV), other applicable state and local laws, and consistent with HSC Division 20, chapter 6.8. Compliance with this requirement shall include, but not be limited to, completing the tasks listed below.

1. **The Discharger shall submit the following technical reports:**
 - a. **By 30 June 2013**, form a respondents group to manage and fund remedial actions at the Mount Diablo Mine Site or independently take liability to implement the remedial actions in this Order. On or before the **30 June 2013** submit a letter or report on any agreement made between the responsible parties. If no agreement is made between the parties, then submit a document stating no agreement has been made. Any agreement shall include all the signatures of the responsible parties agreeing to the respondents group.
 - b. **By 1 October 2013**, submit a Work Plan and Time Schedule to close the mine tailings and waste rock piles in compliance with California Code of Regulations, title 27, sections 22470 through 22510 and to remediate the site in such a way to prevent future releases to surface and ground waters of Mercury and other Pollutants.
 - c. **Beginning 90 Days after Regional Board approval of the Work Plan and Time Schedule**, submit regular quarterly reports documenting progress in completing remedial actions.
2. **By 31 December 2015**, complete all remedial actions and submit a final construction report.
3. Any person signing a document submitted under this Order shall make the following certification:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my knowledge and on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."
4. Pursuant to Section 13304(c)(1), the Discharger shall reimburse the Regional Water Board for reasonable costs associated with oversight of the cleanup of the sites subject to this Order. Failure to do so upon receipt of a billing statement from the State Water Board shall be considered a violation of this Order.

REPORTING

5. When reporting data, the Dischargers shall arrange the information in tabular form so that the date, the constituents, and the concentrations are readily discernible. The data shall be summarized in such a manner as to illustrate clearly the compliance with this Order.

6. Fourteen days prior to conducting any fieldwork, submit a Health and Safety Plan that is adequate to ensure worker and public safety during the field activities in accordance with California Code of Regulations, title 8, section 5192.
7. As required by the California Business and Professions Code sections 6735, 7835, and 7835.1, all reports shall be prepared by a registered professional or their subordinate and signed by the registered professional.
8. All reports must be submitted to the Central Valley Water Board. Electronic copies of all reports and analytical results are to be submitted over the Internet to the State Water Board Geographic Environmental Information Management System database (GeoTracker) at <http://geotracker.swrcb.ca.gov>. Electronic copies are due to GeoTracker concurrent with the corresponding hard copy. Electronic submittals shall comply with GeoTracker standards and procedures as specified on the State Water Board's web site.
9. Notify Central Valley Water Board staff at least five working days prior to any onsite work, testing, or sampling that pertains to environmental remediation and investigation and is not routine monitoring, maintenance, or inspection.

NOTIFICATIONS

10. No Limitation on Central Valley Water Board Authority-This Order does not limit the authority of the Central Valley Water Board to institute additional enforcement actions and/or to require additional investigation and cleanup of the site consistent with the Water Code. This Order may be revised by the Executive Office or her delegate as additional information becomes available.
11. Enforcement Notification-Failure to comply with requirements of this Cleanup and Abatement Order may subject the Discharger to additional enforcement action, including, but not limited to, the imposition of administrative civil liability pursuant to Water Code sections 13268 and 13350, or referral to the Attorney General of the State of California for injunctive relief or civil or criminal liability. Pursuant to Water Code section 13350, \$5,000 in administrative civil liability may be imposed for each day in which the violation(s) occurs under Water Code section 13304; and pursuant to Water Code section 13268, \$1,000 in administrative civil liability may be imposed for each day in which the violation(s) occurs under Water Code section 13267.

Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Board to review the action in accordance with CWC section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday (including mandatory furlough days), the petition must be received by the State Water Board by 5:00 p.m. on the next business day.

16 April 2013

Copies of the law and regulations applicable to filing petitions may be found on the Internet at: http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

This Order is effective upon the date of signature.

Order by:

Original signed by

PAMELA C. CREEDON, Executive Officer

16 April 2013

(Date)



EDMUND G. BROWN JR.
GOVERNOR

MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

Central Valley Regional Water Quality Control Board

August 8, 2013

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Dear Mr. Sanders, Mr. Edgcomb, and Mr. Baas:

REQUEST FOR RECONSIDERATION OF CLEANUP AND ABATEMENT ORDER NO. R5-2013-0701 FOR MOUNT DIABLO MERCURY MINE, CONTRA COSTA COUNTY

As you know, Kennemetal, Inc. and Sunoco, Inc. have filed petitions with the State Water Resources Control Board to review Cleanup and Abatement Order (CAO) No. R5-2013-0701 issued by the Central Valley Regional Water Quality Control Board's (Central Valley Water Board) Executive Officer, Pamela Creedon. These two petitions have been assigned numbers A-2249(a) and A-2249(b) as noted in the State Water Board's Acknowledgement of Petition Received letter dated May 23, 2013.

At the July 25/26 Central Valley Water Board's Board meeting, during the Public Forum session, Mr. Sanders spoke to the Central Valley Water Board as legal counsel for Kennemetal, Inc. and requested that the Central Valley Water Board reconsider CAO No. R5-2013-0701. Dr. Karl Longley, Chair of the Central Valley Water Board, noted that he would consult with me as Board Counsel on the request.

This letter serves to inform all interested persons concerning this request and the Board's Chair's ruling.

The Board Chair notes that reconsideration of a Cleanup and Abatement Order by the Central Valley Water Board is strictly discretionary and the State Water Board's Enforcement Policy notes in pertinent part, that "significant enforcement actions by a Regional Water Board Executive Officer may, in some circumstances, be reviewed by the Regional Water Board at the request of the discharger, though such review does not extend the time to petition the State Water Board."

In this particular case, the Board Chair has ruled to **GRANT** Kennemetal's request to reconsider CAO No. R5-2013-0701. As a result, the Central Valley Water Board will hold a hearing at a subsequent date to reconsider CAO No. R5-2013-0701 within the scope of issues presented in Petition Nos. A-2249(a) and A-2249(b). Although no hearing date has been firmly established at this time, it is anticipated that this matter will be heard during the December 2013 Board Meeting. At the present time, the designated parties have been identified as the Central Valley Water Board's Prosecution Team, Kennemetal, Inc. and Sunoco, Inc.

Given the pending nature of this adjudicatory proceeding, the Central Valley Water Board has split functions between the Prosecution Team who is responsible for prosecuting this matter in front of the Central Valley Water Board and an Advisory Team that provides neutral legal and technical advice to the Board members. Mr. Ken Landau and I serve as members of the Advisory Team for this matter. Additional information concerning the hearing will be provided when a Hearing Procedure is issued, most likely in September or October.

Additional questions of strictly a procedural nature may be addressed to me or Mr. Landau via email at dcoupe@waterboards.ca.gov or klandau@waterboards.ca.gov.



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Adam Baas

From: Coupe, David@Waterboards [David.Coupe@waterboards.ca.gov]
Sent: Wednesday, May 14, 2014 11:18 AM
To: Altevogt, Andrew@Waterboards; Benedict, AnnaKathryn@Waterboards; Hartzell, Marty@Waterboards; Adam Baas; Christopher Sanders (cms@eslawfirm.com); Atkinson, Ross@Waterboards; Busby, Robert@Waterboards
Cc: Landau, Ken@Waterboards; Mayer, Alex@Waterboards
Subject: Pre-Hearing Rulings: Mt Diablo Mercury Mine

All:

Thanks again to those of you that were able to attend the pre-hearing conference on Thursday, May 8th. In response to a number of pre-hearing motions and objections made by the parties concerning this matter, this email memorializes rulings made by the Board Chair. In particular, this email addresses (1) the Prosecution Team's Motion in Limine to Exclude Legal Evidence and Argument; (2) Sunoco's Objection to the Prosecution Team's Buff Sheet; and (3) Kennametal's Motion in Limine Regarding the Exclusion of Arguments by the Prosecution Team.

I. Prosecution Team's Motion in Limine to Exclude Legal Evidence and Arguments

The Prosecution Team submitted its rebuttal on March 20th, which included a motion in limine to exclude evidence and legal arguments not presented in the Sunoco, Inc.'s and Kennametal Inc.'s (collectively, the Dischargers) comments to the proposed order.

The Prosecution Team has claimed, in pertinent part, that "Sunoco and Kennametal should be precluded from offering evidence or raising new arguments at the hearing that they failed to raise during the comment period on the draft order." The Prosecution Team further claims that "Due to the Dischargers [sic] failure to raise the issue of corporate succession during the comment period, the Prosecution Team was not provided sufficient time to respond to the discharger's [sic] arguments and did not pursue related discovery and interrogatories. The Prosecution Team can only be reasonably expected to respond to those comments raised during the comment period."

In response, Kennametal filed an opposition, noting that "The Prosecution Team seeks to preclude evidence that was discovered and provided in response to a subpoena issued by the Prosecution Team on February 11, 2014." (Kennametal Opposition at p. 4.) Kennametal also notes that "The Prosecution Team requests that the Regional Board continue the hearing should the Prosecution Team be found to have failed to meet its burden of proof. Not only is this an improper request within a motion in limine, but it is a de facto admission that the Regional Board does not have sufficient evidence to name Kennametal." (*Id.* at p. 6.) On the same day, March 24, Sunoco also filed an opposition to the Prosecution Team's motion in limine to exclude evidence and legal arguments. In part, Sunoco claims that "What the Prosecution Team seeks in its Motion is to throw out the Hearing Procedures and start over." (Sunoco Opposition at p. 5.)

The Advisory Team has consulted with the Board Chair concerning this matter and the Board Chair has ruled to **DENY** the Prosecution Team's motion. The Board Chair grants this motion, at least in part, due to the fact that (1) this evidence, at least in part, apparently was discovered in response to a subpoena issued by the Prosecution Team; and (2) the hearing was originally scheduled for December and then rescheduled for March and then finally to the June 2014 Board Meeting. Furthermore, in Mr. Altevogt's email of March 17, he noted that the Prosecution Team was "fully prepared" to proceed with the March 27 hearing despite receipt of evidence and argument that the Prosecution Team now seeks to exclude. Finally, and perhaps most importantly, the Dischargers complied with the Hearing Procedure's provisions for the introduction of evidence. The Board Chair finds that submittal of this evidence at this time does not constitute prejudice sufficient to exclude this evidence and legal argument from the Administrative Record. (See 23 CCR section 648.4(f).)

II. Sunoco Objection to Prosecution Team Summary Sheet

In an email dated April 3, 2014, Sunoco objects to the Summary Sheet created by the Prosecution Team for this particular matter. The objection is based in part on Sunoco's assertion that its arguments challenging Order R5-2013-0701 (the CAO) were not accurately characterized by the Prosecution Team.

In response to Sunoco's objection, the Board Chair directs Sunoco and the Prosecution Team by May 16 at 5 p.m. to jointly develop within the Summary Sheet a complete summary of Sunoco's arguments challenging the CAO. In the event that a mutually-agreeable Summary Sheet cannot be developed by the deadline, the existing Summary Sheet shall be amended to note that it was specifically prepared by the Prosecution Team. The Advisory Team believes that the Prosecution Team should be able to work with Sunoco to develop a mutually agreed-upon Summary Sheet that includes a very brief summary of the issues and arguments raised by the designated parties.

III. Kennametal Motion in Limine Regarding Exclusion of Evidence and Arguments of the Prosecution Team

On April 11, 2014, Kennametal filed a motion in limine regarding the exclusion of evidence introduced by and arguments raised by the Prosecution Team. In part, the motion states that "Kennametal believes that the P-Team has raised a new legal argument in its rebuttal brief, claiming a de facto merger between Kennametal and Nevada Scheelite that was not responsive to materials previously submitted." (Kennametal Motion at p. 1.) Kennametal also states that "The Order adopted by the Regional Board in April 2013 lacked any explanation or justification for holding Kennametal liable for the actions of its wholly owned subsidiary, Nevada Scheelite, even though holding Kennametal liable was clearly contrary to general principles of corporate law." (*Id.* at p. 2.)

The Board Chair has ruled to **DENY** Kennametal's motion to exclude evidence and argument as to de facto merger or corporate successor liability. The Board Chair has also ruled to allow for additional briefing or evidence that Kennametal or Sunoco may wish to submit to rebut the arguments raised in the Prosecution Team's Corporate Successor Liability Rebuttal Brief. As defined in the Hearing Procedure, rebuttal shall be limited to the scope of those arguments. In particular, any briefing should address the question of whether and to what extent de facto merger is or is not an appropriate basis to name Kennametal and/or Sunoco subject to a cleanup and abatement order issued pursuant to Water Code section 13304. Any such briefing shall not exceed 10 pages and must be submitted via email so that it is received by all parties and the Advisory Team no later than Friday, May 23 at 5:00 p.m. The allowance of additional briefing is being made, in part, because it is the Board Chair and Advisory Team's understanding that evidence and argument concerning the specific theories of liability expressed in the Corporate Successor Liability Rebuttal Brief are new and outside the scope of previous submittals and were only first raised in the Prosecution Team's rebuttal.

It should be further noted that the use of the phrase "rebuttal" appears only twice in the regulations governing quasi-adjudicatory proceedings and specifically refers to "rebuttal testimony" or "rebuttal testimony and exhibits." (See 23 CCR section 648.4(f).) There is no reference in the regulations concerning the word "rebuttal" that would include the use of entirely new legal theories that may be used to support a claim of liability. The purpose of rebuttal testimony is to respond to another party's previously submitted testimony or evidence.

IV. Standard of Proof and Burden of Proof for 13304 Orders

At the pre-hearing conference, the Advisory Team mentioned that the Chair may issue a ruling setting forth the applicable standard of proof and burden of proof for 13304 Orders. The Prosecution Team, in Section I of its Corporate Successor Liability Rebuttal Brief, has asserted that State Water Board precedents establish that "in order to issue orders under Water Code section 13304, the Central Valley Water Board's findings must be supported by 'substantial evidence in the record' and not a 'preponderance of evidence.'" While the cited State Water Board orders explain the standard of proof the State Water Board employs in reviewing 13304 Orders issued by Regional Water Boards, they do not explain the standard of proof the Regional Water Boards use or the standard that is employed by trial courts reviewing regional board actions.

The Central Valley Water Board employs a preponderance of the evidence standard of review in deciding whether to issue 13304 Orders. See, e.g. Chair's ruling on pre-hearing motion 6 in the matter of Cleanup and Abatement Order No. R5-2014-0039. While Water Code section 13304 is silent regarding the applicable burden of proof, the Central Valley

Water Board is mindful that a trial court, should it be asked to review a Regional Board issued 13304 Order, would apply its independent judgment to determine whether the findings are supported by the weight of the evidence. See Water Code section 13330(e); Code of Civil Procedure section 1094.5(c). It is incumbent that 13304 Orders are capable of withstanding that level of review. Further, while not strictly bound by the rules of evidence (see 23 CCR section 648(b); Gov. Code section 11513(c)), the Central Valley Water Board often looks to the Evidence Code for guidance. Evidence Code section 115 reads in part: "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." The "weight of the evidence" and "preponderance of the evidence" standards are the same; the Board will refer to the applicable standard of review in shorthand as "preponderance of the evidence."

At the pre-hearing conference held on May 8, 2014, the designated parties also asked for a ruling as to which party bears the burden of proof in naming parties to a 13304 Order. The Evidence Code provides further guidance on this issue. Under Evidence Code section 500, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting. Accordingly, the Prosecution Team, and ultimately the Central Valley Water Board has the burden of proof in establishing that each of the designated parties should have been named in the 13304 Order.

As always, additional questions of strictly a procedural nature may be addressed to me, Mr. Landau, and Mr. Mayer and with a copy to all parties.

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MOUNT DIABLO MERCURY MINE

PROSECUTION TEAM'S REBUTTAL BRIEF –

CORPORATE SUCCESSOR LIABILITY

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1 Sunoco and Kennametal merged with their wholly owned subsidiaries upon dissolution of
2 those subsidiaries and thereby assumed all of their liabilities.

3 Sunoco and Kennametal both argue that they cannot be held liable for the acts of their wholly
4 owned subsidiaries because those companies were dissolved with no assets. Both claim that they
5 are protected from liability as successors in interest and shareholders. As a result, they contend
6 that they should not be named on a Cleanup and Abatement Order issued pursuant to California
7 Water Code section 13304, which would find them liable for cleanup costs given their ownership
8 or activities, or the activities of their legal predecessors. The Prosecution Team disagrees with
9 this contention and argues that both can be named in this order as successors in interest. This
10 position comports with the long-standing position of the Water Boards to liberally apply the rules
11 of corporate successor liability and the State and Regional Board's unwillingness to allow
12 corporate entities to shift liability onto the general public by business transactions that elevate
13 form over function. Finally, it is the Prosecution Team's position that these arguments are simply
14 another way to argue that liability should be apportioned, and that Sunoco and Kennametal's
15 portion should be zero. The facts and law will demonstrate otherwise.

16 **I. Cleanup and Abatement Orders Issued Pursuant to California Water Code**
17 **Section 13304 Must be Supported by Substantial Evidence in the Record.**

18 The applicable State Water Resources Control Board (State Water Board) precedents
19 hold that, in order to issue orders under Water Code section 13304, the Central Valley Water
20 Board's findings must be supported by "substantial evidence in the record" and not a
21 "preponderance of evidence." The State Water Board has addressed the applicable legal standard
22 on several occasions, each time holding that the "substantial evidence" standard governs regional
23 board proceedings. For example, in *Exxon Company, USA* (Order No. WQ 85-7), the State Water
24 Board upheld an order by the Central Valley Water Board, noting:

25 [A]ny findings made by an administrative agency in support of an action must be based
26 on substantial evidence in the record. (*See, e.g., Topanga Association for a Scenic*

1 *Community v. County of Los Angeles* (1974) 11 Cal.3d 506.) Thus, while we can
2 independently review the Regional Board record, in order to uphold a Regional Board
3 action, we must be able to find that finding of ownership was founded upon substantial
4 evidence.

5 (*Id.* at p. 6 [emphasis added].) Later, in a matter involving a cleanup order issued by the San
6 Francisco Bay Regional Water Board, the State Water Board affirmed its application of the
7 “substantial evidence” test, rejecting arguments that the “preponderance of evidence” test should
8 apply. (*Stinnes-Western Chemical Corporation*, Order No. 86-16.) In subsequent cases, the State
9 Water Board has held to the principle that the “substantial evidence” standard applies to Regional
10 Board and State Water Board proceedings. (*Aluminum Company of America*, Order No. WQ 93-
11 9; *In re: Sanmina Corporation*, Order No. WQ 93-14.)

12 The State Water Board has defined substantial evidence to mean “credible and reasonable
13 evidence.” (*In re: Sanmina Corp.*, Order No. WQ 93-14.) “Substantial evidence does not mean
14 proof beyond a doubt or even a preponderance of evidence. Substantial evidence is evidence upon
15 which a reasoned decision may be based.” (*In re: Robert S. Taylor, et al. and John F. Bosta, et*
16 *al.*, Order No. WQ 92-14, at p. 5.)

17 Despite this well settled principle, Sunoco argues that it is settled law in both California and
18 Nevada that the party seeking to have the corporate entity disregarded has the burden of proving
19 by a preponderance of the evidence that the alter ego theory should be applied. (Sunoco, Inc.’s
20 Hearing Brief, at p. 12.) In the first case cited by Sunoco, the United States Court of Appeals for
21 the Ninth Circuit held that the party seeking to have the corporate entity disregarded bears the
22 burden of proof regarding alter ego theory. (*In the Matter of Christian & Porter Aluminum Co.*
23 (1978) 584 F.2d 326, 338.) That court, however, did not establish what that standard of proof is
24 in its holdings or dicta. (*Id.*) In the other case Sunoco cites, the Supreme Court of Nevada held
25 that the party relying on the alter ego doctrine must establish the elements by a preponderance of
26 the evidence. (*Ecklund v. Nevada Lumber Co.* (1977) 93 Nev. 196.) Even if this latter case is

1 controlling in California, its holding does not reach all legal proceedings, such as criminal
2 proceedings or administrative adjudications. Both of the cases cited by Sunoco are civil court
3 cases in which the standard of proof, except in very limited circumstances, is a preponderance of
4 the evidence standard. (*U.S. v. F/V Repulse* (1982) 688 F.2d 1283, 1284; *Addington v. Texas*
5 (1979) 441 U.S. 418, 423.) Sunoco ignores this context and erroneously extrapolates from the
6 two cases that the standard of proof in regard to the alter ego doctrine is a preponderance of the
7 evidence in administrative proceedings before the Water Boards.

8 Therefore, the findings and naming of parties pursuant to California Water Code section
9 13304 must be supported by substantial evidence, which the Prosecution Team has done in this
10 matter.

11 **II. Sunoco's and Kennametal's Acquisition of the Corporate Assets of Their**
12 **Respective Wholly Owned Subsidiaries Resulted in a De Facto Merger and**
13 **Thereby They Assumed All of the Liabilities Of their Wholly Owned**
14 **Subsidiaries.**

15 The ordinary rule of law states that the purchaser does not assume the seller's liabilities
16 unless (1) there is an express or implied agreement of assumption, (2) the transaction amounts to
17 a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere
18 continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent
19 purpose of escaping liability of the sellers debts. (*Ortiz v. South Bend Lathe* (1975) 46
20 Cal.App.3d 842, 846.) With respect to Cleanup and Abatement Orders, the State Board has
21 liberally applied the rules of corporate successor liability.

22 In this matter, Sunoco and Kennametal took all of the assets of their wholly owned
23 subsidiaries, upon which time their subsidiaries were dissolved, and left no consideration which
24 could be made available to meet the claims of the subsidiaries' creditors.

25 Kennametal took Nevada Scheelite's only asset, its remaining mine in Rawhide Nevada.

1 Sunoco also received all of Cordero's assets and accepted liabilities in the form of Cordero's
2 Retirement and Stock Purchase Plans.

3 This absorption of assets and acceptance of liability in Sunoco's case, without consideration
4 is effectively a de facto merger. As a result, Sunoco and Kennametal must legally assume the
5 liabilities of their wholly owned subsidiaries, in this case, liability for contamination at the Mount
6 Diablo Mercury Mine site.

7 The Supreme Court stated in *Ray v. Alad Corp.*, the *de facto* consolidation or merger
8 exception¹ is invoked:

9 Where one corporation takes all of another's assets without providing any
10 consideration that could be made available to meet claims of the other's creditors
11 [citation omitted] or where the consideration consists wholly of shares of the
12 purchaser's stock which are promptly distributed to the seller's shareholders in
13 conjunction with the seller's liquidation [citation omitted.]

14 (*Id.* at 28.) The *de facto* merger exception articulated by the Court in *Ray v. Alad*, which
15 has been applied and relied on in Water Board matters, focused on the nature of the
16 transaction. The *de facto* merger exception addresses the circumstances where, for all
17 intents and purposes, two companies have in fact, if not in law, merged. Like a *de jure*
18 merger², only the acquirer and the shareholders of the acquired company benefit. While
19 this may be acceptable, the courts have crafted the de facto merger doctrine so that the
20 acquiring company in a *de facto* merger succeeds to all of the liabilities of the acquired
21 company just as if the transaction was a more formal merger.

¹ The Supreme Court in *Ray v. Alad Corp.*, (1977) 19 Cal.3d 22 recognized four traditional exceptions to the general rules that an acquirer of corporate assets takes free of corporate liabilities, to wit (1) assumption of liabilities, (2) de facto consolidation or merger, (3) mere continuation and (4) fraudulent purpose (*Id.* at 28,) and to these added a "special" fifth exception in circumstance involving strict tort liability for defective products. (*Id.* at 30-34.)

² Versus a merger in fact.

1 The Prosecution Team’s and Responsible Parties’ submissions establish that Sunoco and
2 Kennametal merged with their respective wholly owned subsidiaries and therefore succeeded to
3 all of their liabilities, including Cordero and Nevada Scheelite’s contingent liabilities for the
4 discharge of contaminants at Mount Diablo Mercury Mine. This has been established through
5 evidence showing the dissolution of the wholly owned subsidiaries and the absorption of those
6 assets, and in Sunoco’s case some liabilities, by the parent company.³ Given the injustice that
7 would result if a company were allowed to only take the assets of another company, leaving
8 nothing behind for creditors, acceptance of the assets obligates both companies to acceptance of
9 the liabilities.

10 “It is a general rule that a corporation formed by consolidation or merger is answerable
11 for the debts and liabilities of the constituent corporations, whether they arise ex contractu or ex
12 delicto.” (*Moe v. Transamerica Title Ins. Co.* (1971) 21 Cal.app.3d 289, 304.) It has been
13 repeatedly stated in case law that “[t]he crucial factor in determining whether a corporate
14 acquisition constitutes either a de facto merger or a mere continuation is the same: whether
15 adequate cash consideration was paid for the predecessor corporation’s assets.” (*Franklin v. USX*
16 *Corp.* (1st Dist. 2001) 87 Cal.app.4th 615, 625.)

17 In this case there was no consideration paid for the assets received by the parent
18 companies. The dissolved company’s assets were absorbed by the parent company in conjunction
19 with the dissolution. For the reasons states above, the Prosecution Team’s initial submissions,
20 and the Responsible Parties’ submissions it is clear, Sunoco and Kennametal effected a *de facto*
21 merger and as a consequence, both succeeded to all the liabilities of their wholly owned
22 subsidiaries, including liabilities for discharges at the Mount Diablo Mercury Mine.

23 A. Sunoco and Kennametal Should Not Be Afforded Protection of the Corporate Veil
24 As It Would Be Inequitable

³ See Sunoco Exhibits 8 & 12 and Prosecution Team’s Rebuttal, Exhibit A.

1 It is true that generally a parent corporation is not liable for the actions of its subsidiary.
2 Like any stockholder it is protected from liability by the corporate veil (*McLaughlin v. L. Bloom*
3 *Sons Co.* (1962) 206 Cal.App.848, 24 Cal.Rptr.311.) However, that corporate veil may be
4 pierced if it is determined that the parent is really the alter ego of the subsidiary. (6 Witkin
5 *Summary of California Law* (8th Edition 1974) Corporations Section 11, p. 4323). The conditions
6 under which a corporate entity may be disregarded are founded in equity and vary depending on
7 the special circumstances of the case. (*Goldsmith v. Tub-O-Wash* (1959) 199 Cal.App.2d 132, 18
8 Cal.Rptr. 446, 451.) As set forth in *Ray v. Alad* and adopted by the State Board in *Spitzer, et al.*,
9 WQ Order 89-8, the California Supreme Court has stated that the principle that if one corporation
10 acquires all the assets of another corporation without paying substantial consideration for the
11 assets, the purchasing corporation is liable for the pre-purchase activities of the selling
12 corporations. (*Ray v. Alad*, (1997) 19 Cal.3d 22, 136 Cal.Rptr. 574; *Malone v. Red Top Cab*,
13 (1936) 16 Cal.App.2d 268, 60 P.2d 543; see *Schoenberg v. Benner* (1967) 251. App. 2d 154, 59
14 Cal.Rptr. 359.) The principle applies here. Sunoco and Kennametal acquired control of the
15 assets of their wholly owned subsidiaries.⁴ The subsidiaries then dissolved, leaving no corporate
16 assets or ongoing business to pursue for the obligations of those subsidiaries. As a result, it
17 would be inequitable to afford Sunoco and Kennametal the protection of the corporate veil of
18 their subsidiaries. At its most basic level, where injustice would result but for the finding of alter
19 ego liability, courts tend to find for piercing the veil, especially in the context of a tort. (*Mesler v.*
20 *Bragg Management Co.* (1985) 39 Cal.3d 290, 300.) “The essence of the alter ego doctrine is
21 that justice be done.” (*Mesler, supra*, 39 Cal.3d at 301.)

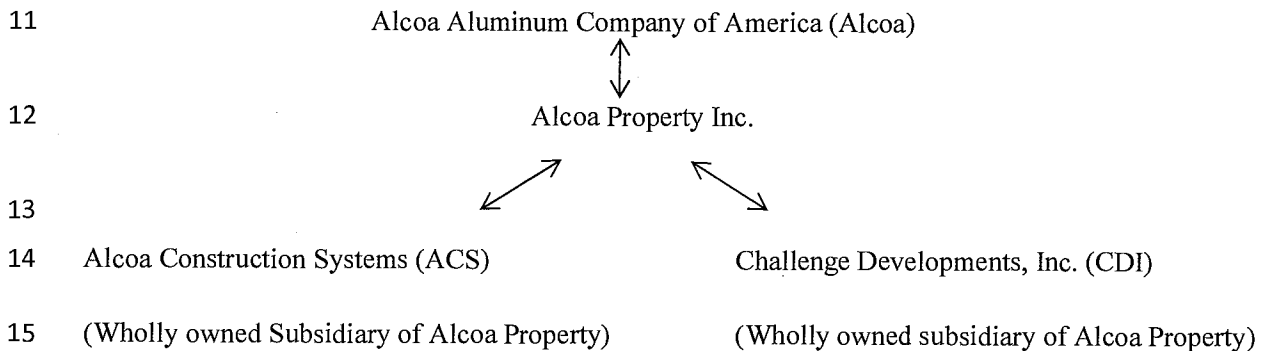
22 Kennametal and Sunoco have pointed to *In the Matter of the Petitions of Aluminum*
23 *Company of America, et al.*, WQ Order 93-9 (*Alcoa*) in support of their position. This Order does

⁴ See Prosecution Team Rebuttal, Exhibit A and Sunoco’s Exhibits 8 & 11, showing that all assets of Cordero and Nevada Scheelite, and in Sunoco’s case the remaining liabilities, were distributed to Sunoco and Kennametal respectively.

1 not support their position and is distinguishable on its facts due to the corporate structure
2 employed by Alcoa.

3 *In the Matter of the Petitions of Aluminum Company of America, et al.*, WQ Order 93-9, deals
4 with the establishment of cleanup and closure requirements for an inactive sulfur mining site
5 located in the Oakland Hills. Alcoa Aluminum Company of America (Alcoa) was named as a
6 former owner. Alcoa filed a petition for review of the order alleging it was improperly named as
7 a discharger because it was never an owner or operator of the mine and could not be considered
8 liable as either the success or later ego of CDI or ACS. However, unlike the situation in this
9 matter, Alcoa's connection to these two entities was through an intermediary, Alcoa Property Inc.

10 The following diagram shows the corporate structure in *Alcoa*:



16 Therefore, CDI and ACS were wholly owned subsidiaries of Alcoa Property Inc., not Alcoa.

17 In this matter, Nevada Scheelite Corporation (Nevada Scheelite) and Cordero Mining
18 Company (Cordero) are the wholly owned subsidiaries of Kennametal and Sunoco respectively .
19 *In Alcoa*, ACS and CDI were subsidiaries of Alcoa Properties Inc., which is the exact relationship
20 between Sunoco and Kennametal and their respective subsidiaries. And with respect to Alcoa
21 Properties, Inc., the State Board points out that "if any assets of a dissolved corporation have been
22 distributed to the shareholders, in this case, Alcoa Properties, Inc., an action may be brought
23 against the shareholders. *See* Corps Code Sec. 2011(a)(1)(B)." (*In the Matter of the Petitions of*
24 *Aluminum Company of America, et al.*, WQ Order 93-9, footnote 6.)

1 In this case, the assets of Nevada Scheelite when dissolved were distributed to Kennametal.⁵
2 Upon dissolution, the remaining assets, and liability in the form of responsibility of the Cordero
3 Retirement and Stock Purchase Plans, of Cordero were distributed to its sole shareholder, Sun
4 Oil.⁶ Therefore, *In the Matter of the Petitions of Aluminum Company of America, et al.*, WQ
5 Order 93-9 does not support Kennametal's and Sunoco's argument, but instead upholds the long-
6 standing policy of naming them pursuant to Corps Code Sec. 2011(a)(1)(B) and Water Code
7 section 13304.

8 **III. Sunoco's and Kennametal's Corporate Successor Argument Is Merely A**
9 **Request for Apportionment.**

10 Sunoco's and Kennametal's claim they cannot be named in the Order is essentially a request
11 for apportionment of liability, which is contrary to Regional and State Board interpretation of
12 Water Code section 13304 and should be disallowed.

13 The State Board has consistently found that liability is joint and several under the Water
14 Code. For example:

15 In a series of prior Orders, we have established certain principles regarding liability for
16 groundwater cleanups. Cleanup liability is broad and may extend, depending on the facts
17 of the case, to old landowners, present landowners, old tenants, and present tenants. In
18 cases involving several potentially responsible parties, it is appropriate to name in a
19 cleanup order all parties for which there is reasonable evidence of responsibility for each
20 party named. In reviewing an action of a Regional Board, we look at the record to
21 determine whether, in light of the record as a whole, there is a reasonable and credible
22 basis to name a party.

23 (*U.S. Cellulose and Louis J. and Shirley D. Smith*, WQ Order No. 92-04 (pg. 2) [emphasis
24 added].)

⁵ See Prosecution Team Rebuttal, Exhibit A, deposition of George Heideman, pgs 4, 14 & 15, wherein he stated that Nevada Scheelite's assets were taken over by Kennametal.

⁶ See Sunoco Exhibit 12.

1 The State Water Board has consistently applied joint and several liability in cleanup
2 matters. In part, this conserves time and seeks to maximize limited resources of the state agency
3 that must prioritize its actions and act on behalf of all members of the public to address serious
4 water quality issues, while still allowing the private parties the opportunity to seek redress
5 through a contribution action if one is needed. In *Union Oil Company of California*, WQ Order
6 No. 90-2, the State Water Board stated that the Regional Board is authorized:

7 To issue either one order, or several orders with coordinated tasks and time schedules, to
8 all persons it finds are legally responsible, requiring any further investigating and cleanup
9 which is necessary.

10 (State Water Board Order WQ No. 90-2, at p. 3.) The Board went on to say that, “while we
11 consider all dischargers jointly and severally liable for discharges of waste, it is obviously not
12 necessary for there to be duplication of effort in investigation and remediation.” *Id.* at p. 4
13 [emphasis added].

14 An agency interpretation of the meaning and legal effect of a statute is entitled to
15 consideration and respect by the courts ... the binding power of an agency’s
16 *interpretation* of a statute or regulation is contextual: Its power to persuade is both
17 circumstantial and dependent on the presence or absence of factors that support the merit
18 of the interpretation ... An “administrative interpretation ... will be accorded great
19 respect by the courts and will be followed if not clearly erroneous....”

20 (*Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 7 [emphasis in
21 original].) Accordingly, although courts independently review the text of a statute, they must
22 “tak[e] into account and respect[t] the agency’s interpretation of its meaning, of course, whether
23 embodied in a formal rule or less formal representation.” (*Id.*) Relevant factors for deference
24 include “the particular agency offering the interpretation ... [factors] ‘indicating that the agency
25 has a comparative interpretive advantage over the courts’ [e.g., factors that “assume the agency
26 has expertise and technical knowledge, especially where the legal text to be interpreted is

1 technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion”]
2 and [factors] ‘indicating that the interpretation in question is probably correct’ [e.g., “careful
3 consideration by senior agency officials ... evidence that the agency ‘has consistently maintained
4 the interpretation in question, especially if [it] is long-standing”...]. (*Id.* at pp. 7-13.) Similarly,
5 under the primary jurisdiction doctrine, where issues are placed within the “special competence of
6 an administrative body, limited review is more rationally exercised by “preliminary resort for
7 ascertaining and interpreting the circumstances underlying legal issues to agencies that are better
8 equipped than courts by specialization, by insight gained through experience, and by more
9 flexible procedure.” *Palmer v. University of California*, 107 Cal.App.4th 899, 906-07 (2003).

10 Cleanup and abatement orders issued pursuant to California Water Code section 13304
11 impose joint and several liability on all those named in the order. Despite this policy and well
12 established interpretation of section 13304, the dischargers are attempting to apportion their
13 liability to 0%, even though the other parties are not present and/or able to respond. The result of
14 Sunoco’s and Kennametal’s argument would be that they have no liability as successors, thus
15 increasing the liability the Regional Board is assigning to those named in the Order. This is
16 essentially an end-run around joint and several liability.

17 Consistent with the Regional and State Board’s long held and applied principles regarding
18 Cleanup and Abatement Orders issued pursuant to California Water Code section 13304, Sunoco
19 and Kennametal are jointly and severally liable and thus should not be allowed to have their
20 liability apportioned to the detriment of the other named responsible parties.

21 **IV. Public Policy Dictates Naming Sunoco and Kennametal in the Cleanup and**
22 **Abatement Order for Contamination Caused by Their Respective Wholly-**
23 **Owned Subsidiaries**

24 California Water Code section 13000 provides, “that the state must be prepared to exercise its
25 full power and jurisdiction to protect the quality of waters in the state from degradation
26 originating inside or outside the boundaries of the state.” To that end, the Water Board liberally

1 applies the rules of corporate successor liability. For example, in *Spitzer* it held that a company
2 that had purchased the assets of a direct discharger would be named in a cleanup order. The State
3 Board has also held that Corporations Code 2010(a) provided authority to name a dissolved
4 corporation in a cleanup order.⁷ This is in keeping with the strong public policy of holding those
5 that contributed to the contamination responsible for the cleanup, regardless of corporate
6 machinations to limit and/or absolve an entity from liability. Essentially these Responsible
7 Parties are asking the Regional Board to shift the cost of the cleanup of their contamination at the
8 site from Nevada businesses to the citizens of California. That cannot stand and would result in
9 Nevada businesses performing actions harmful to California water quality with no responsibility
10 for the contamination. This is contrary to the Water Code and its mandate to protect the quality
11 of waters in the state from degradation originating inside the bounds of its state.

12 CONCLUSION

13 Based on the above, Kennametal and Sunoco are properly named in the Order as
14 successors in interest to their wholly owned subsidiaries.

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⁷ *Arthur Spitzer et al.*, Order WQ 89-8 (SWRCB 1989). *Trams-Tech Resources, Inc.*, Order WQ 89-14 (SWRCB 1989).

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BEFORE THE CENTRAL VALLEY
REGIONAL WATER QUALITY CONTROL BOARD

In the Matter of:

MOUNT DIABLO MERCURY MINE,
CONTRA COSTA COUNTY,
CLEANUP AND ABATEMENT ORDER R5-
2013-0701

} PROSECUTION TEAM BRIEFING
} REGARDING EXPRESS AND
} IMPLIED ASSUMPTION OF
} LIABILITY; PROPOSED CLEANUP
} AND ABATEMENT ORDER
} SUBMITTED HEREWITH

Consistent with the Revised/Supplemental Hearing Procedures in this matter, the Prosecution Team for the Regional Water Quality Control Board, Central Valley Region (Prosecution Team) submits this briefing regarding Sunoco, Inc.'s (Sunoco) express or implied assumption of Cordero Mining Company's (Cordero) liabilities associated with operations at the Mt. Diablo mine site. It is the Prosecution Team's position that Sunoco is properly named in the Proposed Cleanup and Abatement Order (CAO).

ARGUMENT

I. Scope of This Brief.

The Prosecution Team has previously briefed alternate theories of liabilities with regard to Sunoco, including piercing the corporate veil and liability pursuant to a de facto merger. This briefing is limited to analysis of another exception for the assumption of liabilities by a parent for the actions of its subsidiaries: when there is an express or implied agreement. *See generally, Ray v. Alad* (1977) 19 Cal.3d 22. This brief discusses only Sunoco's express or implied assumption of Cordero's liabilities for activities at the Mt. Diablo mine site. This brief relies on verified federal

1 interrogatories submitted in United States District Court in *County of Santa Clara v. Myers*
2 *Industries, Inc. et al.*, Case No. C-92 20246 JW (PVT). (Interrogatories)¹

3 The relevant Responses in the Interrogatories are 1 and 2, which provide:

4 RESPONSE TO INTERROGATORY NO. 1:

5 Sun Company, Inc. admits that it is the successor in interest to Cordero Mining Company.

6 RESPONSE TO INTERROGATORY NO. 2:

7 Cordero Mining Company, a Nevada corporation, was dissolved on November 18, 1975.

8 At the time of dissolution, a subsidiary of Sun Company, Inc. was the sole shareholder of
9 Cordero Mining Company. This subsidiary was subsequently spun-off to the shareholders
10 of Sun Company, Inc. on November 1, 1988 as part of a corporate restructuring, although
11 Sun Company, Inc. retained responsibility for the liabilities of Cordero Mining Company.

12 Sun Company, Inc. admits that it is the successor in interest to Cordero Mining Company.

13 In prior briefing, Sunoco has indicated that Sun Company, Inc. changed its name to Sunoco, Inc. in
14 1998 (*Sunoco, Inc.'s Petition for Review and Rescission of Cleanup and Abatement Order No. R5-*
15 *2013-0701* at 6:4-5).

16 The party responding to the Interrogatories is Sun Company, Inc. The Interrogatories
17 provide information about Cordero's mining activities at the New Almaden Mine from 1951-1953,
18 only shortly before Cordero's mining activities at the Mt. Diablo site from 1954-1956. The
19 Interrogatories identify people with knowledge of Cordero's mining activity, equipment, and the
20 production of mercury, including the former General Manager and President of Cordero and two
21 former Cordero geologists.

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23
24 ¹ On or about August 15, 2014, the Prosecution Team served a subpoena for records on counsel for Sunoco, which is
25 attached hereto as Exhibit A. The subpoena requested documents mentioned during the August 7, 2014 hearing by
26 Sunoco's counsel, as well as all documents that would otherwise tend to show Sunoco has expressly or impliedly
27 assumed liability for Cordero's activities. Such requests were not limited to exculpatory documents that may be
28 presented with Sunoco's rebuttal briefing. As explained in the cover letter to the subpoena, the briefing schedule
established in the Supplemental Hearing Procedures and agreed to by all parties permits the Prosecution Team to
submit the Interrogatories in support of this brief, and additional evidence, if any, that is produced pursuant to the
subpoena with its rebuttal brief. Notwithstanding Mr. Baas' comments on August 7, 2014, no documents regarding the
Interrogatories have been provided to date.

1 **II. Weight that Should be Given to the Interrogatories**

2 Sunoco must be bound by its admissions made in the Interrogatories. “[W]hen discovery
3 has produced an admission or concession on the part of the party opposing summary judgment
4 which demonstrates there is no factual issue to be tried...,” self-serving affidavits that Sunoco may
5 now seek to submit may be disregarded. *D’Amico v. Board of Medical Examiners* (1974) 11
6 Cal.3d 1, 21. This rule, set forth by the California Supreme Court, prevents a party opposing
7 summary judgment from filing a declaration that purports to impeach his or her own prior sworn
8 testimony. As stated by the California Supreme Court:

9 The reasons for this attitude [reliance on discovery admissions] toward the legitimate
10 products of discovery are clear. As the law recognizes in other contexts (see Evidence Code
11 sections 1220-1230) admissions against interest have a very high credibility value. This is
12 especially true when, as in this case, the admission is obtained not in the normal course of
13 human activities and affairs but in the context of an established pretrial procedure whose
14 purpose is to elicit facts.

15 *Id.*, at 22. See also *Union Bank v. Superior Court (Demetry) et al.* (1995) 31 Cal.App.4th 573.

16 The Interrogatories are signed by Sun Company, Inc.’s counsel, and are additionally verified
17 by an “officer/agent of a party” to the lawsuit, signed under penalty of perjury. There are no legal
18 objections or qualifications to Response Nos. 1 and 2; they have been reprinted here in their
19 entirety. The Interrogatories are entitled to great weight, as “[t]here is a vast difference between
20 written discovery admissions, which are a studied response, made under sanctions against easy
21 denials, that occur under the division and supervision of counsel, who has full professional
22 realization of their significance and glib, easily misunderstood answers given by a lay opponent in a
23 deposition.” *Scalf v. D.B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1522 (internal quotations
24 and citations omitted). The *D’Amico* rule, when properly applied, would prevent a party (Sunoco)
25 from filing a declaration that attempts to impeach its prior testimony or admissions without
26 additional evidence. *Scalf* at 1521-22.

27 **III. The Interrogatories are Evidence that Sunoco Expressly Assumed Liability for**
28 **Cordero’s Mining Activities**

 In this matter, the record does not contain a written agreement between Cordero and its

1 successor, Sun Oil Company regarding the transfer of Cordero's liabilities. Instead, Sunoco's
2 argument is that Cordero dissolved and the general rule, that companies are free to take assets
3 without taking liabilities, should apply. However, there is sufficient evidence that Sunoco
4 expressly or impliedly assumed Cordero's liabilities, and admitted that it is the successor in interest
5 in federal litigation. The language in the Interrogatories is "Sun Company, Inc. retained
6 responsibility for the liabilities of Cordero Mining Company." (Interrogatories, 2:20-21) This
7 language is broad enough to transfer all liability, including all known and unknown environmental
8 liabilities at the time of Cordero's dissolution. This position is supported by the date of Sunoco's
9 admission (1994, 18 years after Cordero's dissolution) and the context in which it was made (a
10 federal lawsuit for cleanup costs at another mine site).

11 Cases which have analyzed the language of assumption of liability agreements support this
12 conclusion. In *U.S. v. Iron Mountain Mines, Inc.* (1997) 987 F. Supp.1233, 1236, the Assignment
13 Agreement stated that Mountain Copper (the predecessor company) transferred all of its assets to
14 Stauffer (the successor company). In return, Stauffer agreed to "assume all of the liabilities and
15 contractual obligations of [Mountain Copper]." A successor to Stauffer argued that the
16 assignments only passed existing liabilities, but not unknown liabilities, such as liabilities under
17 CERCLA, which was not even enacted until 12 years after the assignments were signed. *Id.* at
18 1240. The Court disagreed, and found that courts "universally have held that language transferring
19 'all liabilities' is sufficiently broad to include known and unknown environmental liabilities. *Id.* at
20 1241. This includes the Ninth Circuit, in *Jones-Hamilton Co. v. Beazer Materials & Services, Inc.*
21 (1992) 973 F.2d 688, 693.

22 The only exception to the transfer of all liabilities when an agreement states that all
23 liabilities were transferred is where other clauses or attachments to the assumption agreement make
24 it clear that the parties did not intend to include environmental liabilities. Such examples would
25 include when transferring liabilities are explicitly enumerated in an attachment to the assumption
26 agreement (for example, when "all liabilities" is modified by a clause stating all liabilities were
27 identified on an attachment to the assignment agreement, or a balance sheet). However, courts are
28 reluctant to consider self-serving statements that the liabilities are limited when the language does
not appear in the assumption agreement itself. A clause that provided indemnification "for all

1 applicable Federal, State and local laws, ordinances, codes, rules and regulations” was not
2 ambiguous, and the party could not admit extrinsic evidence to allege that the indemnification
3 covered only with industrial health and safety laws, but not environmental laws. A declaration by
4 the company chairman seeking to limit the liability was thus properly excluded because the contract
5 was unambiguous, and not reasonably susceptible to the chairman’s interpretation. *Jones-*
6 *Hamilton*, 973 F.2d at 692-93; *see also Lee-Thomas, Inc. v. Hallmark Cards, Inc.* (2002) 275 F.3d
7 702, 705 (finding that an agreement for buyer to assume “all the liabilities of the seller existing on
8 the date of closing” and “liabilities arising solely out of the business conducted by seller prior to the
9 closing” was unambiguous and not reasonably susceptible to an argument that products liabilities
10 were not transferred).

11 Nothing in the record indicates that Sunoco limited its assumption of liabilities to any
12 particular kind of liability, such as environmental, at the time of Cordero’s dissolution or at the
13 time Sun Company Inc. admitted it was Cordero’s successor in interest. At the time of Cordero’s
14 dissolution and of Sunoco’s admission, there were liabilities to assume because of Cordero’s
15 mining activities in 1954 through 1956, even if the Water Board had not yet issued a cleanup and
16 abatement order.²

17 **IV. In the Event that the Interrogatories are Ambiguous, Sunoco’s Actions Have Been**
18 **Consistent with an Implied Agreement to Assume Liability for Cordero’s**
19 **Discharges**

20 Notwithstanding the plain language of the Interrogatories and existing doctrine that any
21 parol evidence should be excluded if the Advisory Team finds that the Interrogatories are
22 unambiguous, Sunoco’s conduct since the time of its admissions in the Interrogatories indicates an

23 _____
24 ² Sunoco’s argument that “there were no known existing liabilities for which Cordero could be held responsible related
25 to the Site prior to its dissolution in 1975” (*Sunoco, Inc.’s Petition for Review and Rescission of Cleanup and*
26 *Abatement Order No. R5-2013-0701* at 11:28-12:2) is simply false. Section 13304 was enacted in 1969, and effective
27 January 1, 1970, prior to the dissolution of Sunoco. Notwithstanding Porter-Cologne and the liability under the Water
28 Code, the 1949 Dickey Act (California Water Code Section 13000), the 1907 Public Health Act (Public Health Code,
1906 Cal.Stat. 893-94) and common law nuisance claims (*see Lind v. City of San Luis Obispo* (1895) 109 Cal. 340,
341-42; *People v. Truckee Lumber Co.* (1897) 116 Cal. 397, 400-02; and *City of Turlock v. Bristow* (1930) 103
Cal.App.750, 753-55) exposed Cordero to liability for its discharges of wastes that could potentially contaminate
waters of the State of California.

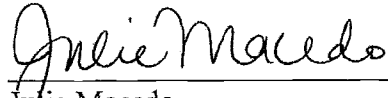
1 implied agreement to assume responsibility for Cordero's liabilities. Sunoco argues that "[d]espite
2 its non-liability as a successor to Cordero's shareholder, Sun Oil, Sunoco has been the only party to
3 cooperate in good faith with both federal and state administrative orders which have been issued
4 historically to investigate the Site." (*Sunoco, Inc.'s Petition for Review and Rescission of Cleanup
5 and Abatement Order No. R5-2013-0701* at 12:15-18). Sunoco made no objection to the EPA's
6 Unilateral Administrative Order issued in December 2008. Sunoco also complied, despite filing a
7 petition which **was later voluntarily withdrawn**, with the Regional Board's 13267 Order issued in
8 March 2009. When the Regional Board issued a revised Order to Sunoco in June 2009, it
9 responded with a petition to divide the liability among responsible parties, including Bradley
10 Mining, but it did not allege that Sunoco was not the corporate successor to Cordero. This conduct
11 is additional evidence that Sunoco at all times, until 2013 when Kennametal began to assert
12 arguments related to corporate succession, believed it was responsible for Cordero's discharges.
13 This conduct is also consistent with the only interpretation of the Interrogatories that is logical: that
14 all Cordero's liabilities were transferred to Sun Oil Company, including environmental liabilities
15 for mining activities.

16 **V. Conclusion**

17 The Prosecution Team's previous briefing has alleged that Sun Oil Company, and
18 eventually Sunoco, are the proper successors to Cordero, including its environmental liabilities,
19 through either a de facto merger or because it is necessary to pierce the corporate veil. Once the
20 Interrogatories were submitted into evidence, it appeared that another exception to the general rule
21 applies in this instance. To comport with the Board's Order to continue this hearing and brief the
22 matter of express or implied assumption, the Prosecution Team has articulated why the
23 Interrogatories are unambiguous and statements made by Sunoco in 1994, almost 40 years after
24 Cordero's mining activities giving rise to liability and approximately 20 years after Cordero's
25 dissolution, Sunoco should be bound by these admissions and named in the Proposed Cleanup and
26 Abatement Order.
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August 22, 2014



Julie Macedo,
Senior Staff Counsel, Office of Enforcement
State Water Resources Control Board

EXHIBIT A



EDMUND G. BROWN JR.
GOVERNOR



MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

August 13, 2014

VIA PERSONAL SERVICE

Adam Baas
Edgcomb Law Group
One Post Street, Suite 2100
San Francisco, CA 94104

RE: SUBPOENA FOR DOCUMENTS IN THE MATTER OF CLEANUP AND ABATEMENT
ORDER R5-2013-0701

Dear Mr. Baas:

Please find enclosed a subpoena for documents and records directed to Sunoco, Inc. in the matter of Cleanup and Abatement Order (CAO) R5-2013-0701. This subpoena follows your comments at the August 7, 2014 hearing on this matter that you or Sunoco, Inc. has documents related to the "express or implied assumption" exception argument raised by the Prosecution Team of the Central Valley Regional Water Quality Control Board, but has not yet produced them, either in Sunoco's opposition to the Prosecution Team's motion to admit "Responses to First Set of Interrogatories to All Parties" submitted in *County of Santa Clara v. Myers Industries, Inc. et al.*, Case No. C92-20246 (Interrogatories) submitted on July 30, 2014, or in response to David Coupe's email ruling on July 31, 2014.

The subpoena seeks all documents regarding Sunoco's assumption of Cordero's liabilities, not just exculpatory documents that you may choose to produce. Such documents are exclusively in Sunoco, Inc.'s possession and control and as they go to a fundamental matter at issue in the hearing, we seek all relevant documents for the Board's consideration. In the draft hearing procedures, consistent with statements by the Board members, we have narrowed the items upon which additional evidence and argument may be submitted to two:

- (1) The express/implied assumption of liabilities argument; and
- (2) Evidence related to Kennametal's liability for Nevada Scheelite's discharges at the Mt. Diablo site.

The Prosecution Team will use the Interrogatories already in evidence to support its argument on the briefing schedule established for your review. The date selected for subpoena production will allow the Prosecution Team to have any relevant documents available for rebuttal.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, Ca 95812-0100 | www.waterboards.ca.gov

Mr. Adam Baas

- 3 -

August 13, 2014

Please let me know if you have any questions.

Sincerely,



Julie E. Macedo
Senior Staff Counsel
Office of Enforcement.

cc: *(via email only)*

Christopher Sanders, Counsel for Kennametal
cms@eslawfirm.com

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8 Telephone: (916) 323-6847
9 Facsimile: (916) 341-5896

10 BEFORE THE STATE WATER RESOURCES CONTROL BOARD
11 STATE OF CALIFORNIA

12 In the Matter of:

13 MOUNT DIABLO MERCURY MINE,
14 CONTRA COSTA COUNTY,
15
16 CLEANUP AND ABATEMENT ORDER R5-
17 2013-0701

18 } SUBPOENA FOR RECORDS AND
19 } DOCUMENTS
20 } (California Water Code § 183,
21 } California Government Code § 11181)

22 TO: SUNOCO, INC.

23 NOTICE:

- 24 () You are served as an individual.
25 () You are served as (or on behalf of) the person
26 doing business under the fictitious name
27 of
28 (X) You are served on behalf of: SUNOCO, INC.

Pursuant to the powers conferred by California Water Code Section 183 and Government Code Sections 11180 et seq.:

SUNOCO, INC. IS COMMANDED to produce the papers, books, records and documents in your possession or under your control described below in connection with the above-titled

1 proceeding by September 5, 2014. Documents must be sent to: Julie Macedo, Office of
2 Enforcement, State Water Resources Control Board, P.O. Box 100, Sacramento, CA 95812-0100.

3 You may seek the advice of an attorney in any matter connected with this subpoena. You
4 should consult your attorney promptly so that any problems concerning your production of
5 documents may be resolved within the time required by this subpoena.

6 **FAILURE TO COMPLY WITH THE COMMANDS OF THIS SUBPOENA WILL**
7 **SUBJECT YOU TO THE PROCEEDINGS AND PENALTIES PROVIDED BY LAW.**

8 **DEFINITIONS**

9 Definitions for industry or trade terms contained herein are to be construed broadly. Where
10 the industry or trade definition set forth herein does not coincide precisely with your definition, the
11 question, inquiry or production request should be responded to or answered by using the definition
12 which you apply and/or recognize in your usage of the term, further documenting your definition in
13 the response. Non-industry or non-trade definitions should be applied as defined herein.

14 (1) The term "COMMUNICATION" or "COMMUNICATIONS" means every disclosure,
15 transfer, exchange or transmission of information, whether oral or written and whether face to face
16 or by telecommunications, computer, mail, telecopier or otherwise.

17 (2) The terms "RELATING TO" or "RELATE TO" includes referring to, alluding to,
18 responding to, concerning, connected with, commenting on, in respect of, about, regarding,
19 discussing, showing, describing, mentioning, reflecting, analyzing, constituting, evidencing, or
20 pertaining to.

21 (3) (a) The term "DOCUMENT" means a document whose existence is known to
22 you, your employees, superiors, representatives or assigns, regardless of its location or origin,
23 including the original and all non-identical copies, whether written, printed or recorded, including,
24 with limitations, contracts, agreements, leases, receipts, invoices, payment vouchers, purchase
25 orders, books, booklets, brochures, reports, notices, announcements, minutes and other
26 communications, including inter and intra-office communications, studies, analyses, maps, charts,
27 tables, questionnaires, indices, telegrams, messages (including reports of telephone conversations
28 and conferences), tapes, letters, electronic mail, notes, records, drafts, proposals, authorizations,

1 negotiations, canceled checks, financial statements, deposit slips, bank drafts, books of account,
2 summaries, reports, tests, projections, studies, charts, notebooks, worksheets, recordings, calendars,
3 or other materials which are written, recorded, printed, typed, or transcribed. "DOCUMENT" also
4 means data sheets or data processing cards, tapes, films or graphic matter or materials on computer
5 magnetic diskettes or tapes, electronically or magnetically-stored data (including data stored on
6 "hard," "floppy" or "micro-floppy" disks or data stored in data base systems), photographs,
7 videotapes or any other matter of any kind or nature however produced or reproduced and each
8 copy of any of the foregoing which is not identical because of margin notations or otherwise. If any
9 such documents were, but no longer are, in your possession or control, state what disposition was
10 made of them and when.

11 (b) The term "DOCUMENT" shall also include all documents necessary to
12 interpret, translate, decode or understand any other document requested or produced. If a form of
13 document (i.e., magnetic tape) cannot be read, such form must be converted to a paper document
14 that can be read.

15 (4) The term "SUNOCO" means Sunoco, Inc., Sun Company, Inc., Sun Oil Company,
16 its officers, employees, agents, and representatives of the foregoing.

17 (5) The term "CORDERO" means Cordero Mining Company, a Nevada corporation,
18 which was dissolved on November 18, 1975.

19 (6) The terms "AND" and "OR" have both conjunctive and disjunctive meanings.

20 (7) All references to a "YEAR" refer to a calendar year.

21 (8) The terms "YOU" or "YOUR" refer to SUNOCO, as defined herein.

22 (9) The term "CAO HEARING" means the administrative hearing for Cleanup and
23 Abatement Order R5-2013-0701, currently scheduled for October 10, 2014, and any related or
24 preceding petitions, correspondence, or evidence submitted to the Regional Water Quality Control
25 Board, Central Valley Region or State Water Resources Control Board. It includes the evidentiary
26 hearing that commenced on August 7, 2014.

27 (10) The term "EPA" shall mean the United States Environmental Protection Agency.

28 (11) The term "PROSECUTION TEAM" shall mean Regional Water Quality Control
Board, Central Valley Region staff and counsel representing them in the CAO HEARING.

INSTRUCTIONS

1
2 i. **Unless otherwise indicated, the time period covered by this subpoena is from**
3 **November 1, 1975 to up to five days before YOUR full compliance with this subpoena. Any**
4 **documents relating to this time period are to be produced, regardless of whether the**
5 **documents came into existence before or during this period.**

6 ii. YOUR response to the subpoena should include a declaration or affidavit. It should
7 state that a diligent search for all requested DOCUMENTS has been conducted and that the affiant
8 or declarant was in charge of the search or otherwise monitored and reviewed the search
9 sufficiently to be able to represent under oath that such a search was conducted. It should be signed
10 under oath by the person most knowledgeable about the DOCUMENTS and YOUR efforts to
11 comply with the subpoena. If different people are the most knowledgeable about portions of the
12 search (e.g., one person is most knowledgeable about DOCUMENTS contained in computer media
13 and a different person is most knowledgeable about DOCUMENTS contained on paper) each should
14 sign an affidavit or declaration identifying the category in the request for DOCUMENTS for which
15 that person is the most knowledgeable.

16 iii. Unless otherwise indicated, for any DOCUMENT stored in a computer, including
17 all electronic mail messages, YOU should produce the DOCUMENT in the original electronic file
18 format in which it was created (e.g., Microsoft email should be provided in its original format,
19 which would have the .pst suffix, not in a tif file; spreadsheets should be in their original file form,
20 such as an Excel file and word-processed DOCUMENTS should be in their original file format,
21 such as a Word or WordPerfect file), together with instructions and all other materials necessary to
22 use or interpret the data. Electronic mail messages should be provided, even if only available on
23 backup or archive tapes or disks. Computer media should be accompanied by (a) an identification
24 of the generally available software needed to open and view the DOCUMENTS or (b) a copy of the
25 software needed to open and view the DOCUMENT. Note, however, that if a print-out from a
26 computer DOCUMENT is a non-identical copy of the electronic form in which it was created
27 (non-identical as described in the definition of "DOCUMENT," by way of example, but not
28 limitation, because it has a signature, handwritten notation, or other mark or attachment not

1 included in the computer DOCUMENT), both the electronic form in which the DOCUMENT was
2 created and the original print-out should be produced.

3 iv. For each DOCUMENT contained in an audio or video medium, YOU should
4 provide both the tape, disk or other device from which the audio or video can be played and the
5 transcript of the DOCUMENT.

6 v. For all DOCUMENTS YOU do not produce in the original, as defined in Evidence
7 Code section 255, YOU may submit copies (black and white copies if the original was in black and
8 white, color copies if the original was in color, and, if the original was in electronic format, in the
9 same electronic medium as the original) in lieu of original DOCUMENTS provided that such
10 copies are accompanied by an affidavit of an officer of SUNOCO stating that the copies of all three
11 types of DOCUMENTS are true, correct, and complete copies of the original DOCUMENTS. If
12 there is in YOUR possession, custody or control no original, but only a copy or photographic record
13 thereof, then YOU should produce a true and legible copy of each such DOCUMENT. The
14 accompanying affidavit should state that the DOCUMENT is only a copy or photographic record
15 and not the original.

16 vi. If a DOCUMENT is responsive to this subpoena and is in YOUR control, but is not
17 in YOUR possession or custody, in addition to obtaining and producing the DOCUMENT, identify
18 the person who had possession or custody of the DOCUMENT, their telephone number and current
19 business and residence addresses.

20 vii. If any DOCUMENT subpoenaed is no longer in YOUR possession, custody, control
21 or care, YOU should provide a written statement identifying the DOCUMENT with specificity,
22 stating whether it is lost or missing, has been destroyed, has been transferred to others, or has
23 otherwise been disposed of. The written statement should also identify the person who disposed of
24 the DOCUMENT, explain the circumstances and authorization for the disposition and the
25 approximate date of the disposition of the DOCUMENT. If there are no DOCUMENTS responsive
26 to a document request, as to each such document request, YOU should include a statement to that
27 effect in the accompanying declaration or affidavit.

28 viii. DOCUMENTS provided in response to this subpoena should be complete and,
unless privileged, unredacted, submitted as found in YOUR files (e.g., DOCUMENTS that in their

1 original condition were stapled, clipped, attached as a "post-it," or otherwise fastened together shall
2 be produced in the same form).

3 ix. Each DOCUMENT produced pursuant to this subpoena should be identified
4 according to the category in the subpoena to which it is responsive. In lieu of indicating on each
5 DOCUMENT the category to which it is responsive, on the date set for production, YOU may
6 instead provide an index if YOU provide it in both paper and in electronic form (such as a
7 computerized spread sheet in Excel or a Word or WordPerfect DOCUMENT set up in a table
8 format) of all DOCUMENTS YOU produce, as long as this index shows by document control
9 number the request(s) to which each DOCUMENT or group of DOCUMENTS is responsive.
10 Responsive DOCUMENTS from each person's files should be produced together, in one box or in
11 consecutive boxes, or on one disk or consecutive disks. Mark each page of a paper DOCUMENT
12 and each tangible thing containing audio, video, computer or other electronic DOCUMENTS (e.g.
13 cassette, disk, tape or CD) with corporate identification and consecutive document control numbers
14 (e.g., S.I. 00001, S.I. CD 001, S.I. audio tape 001). Number each box of DOCUMENTS produced
15 and mark each with the name(s) of the person(s) whose files are contained therein, the requests(s)
16 to which they are responsive, and the document control numbers contained therein.

17 x. For data produced in spreadsheets or tables, include in the declaration or affidavit
18 the identification of the fields and codes and a description of the information contained in each
19 coded field.

20 xi. The document requests contained in this subpoena should be deemed to include a
21 request for all relevant DOCUMENTS in the personal files, including but not limited to files
22 contained on laptops, palm devices, home computers and home files of all YOUR officers,
23 employees, accountants, agents and representatives, including sales agents who are independent
24 contractors, and unless privileged, attorneys.

25 xii. If any DOCUMENTS are withheld from production based on a claim of privilege,
26 provide a log under oath by the affiant or declarant, which includes each DOCUMENT'S authors,
27 addressees, date, a description of each DOCUMENT, all recipients of the original, and any copies,
28 and the request(s) of this subpoena to which the DOCUMENT is responsive. Attachments to a
DOCUMENT should be identified as such and entered separately on the log. For each author,

1 addressee, and recipient, state the person's full name, title, and employer or firm, and denote all
2 attorneys with an asterisk. To the extent the claim of privilege relates to any employee, agent,
3 representative, or outside attorney, identify the person's name, division, and organization. Include
4 the number of pages of each DOCUMENT and in the description of the DOCUMENT, provide
5 sufficient information to identify its general subject matter without revealing information over
6 which a privilege is claimed. For each DOCUMENT withheld under a claim that it constitutes or
7 contains attorney work product, also state whether YOU assert that the DOCUMENT was prepared
8 in anticipation of litigation or for trial and, if so, identify the anticipated litigation or trial on which
9 the assertion is based. Submit all non-privileged portions of any responsive DOCUMENT
10 (including non-privileged or redactable attachments) for which a claim of privilege is asserted
11 (except where the only non-privileged information has already been produced in response to this
12 instruction), noting where redactions in the DOCUMENT have been made. DOCUMENTS
13 authored by outside lawyers representing YOU that were not directly or indirectly furnished to
14 YOU or any third-party, such as internal law firm memoranda, may be omitted from the log.

15 xiii. Whenever necessary to bring within the scope of this subpoena DOCUMENTS that
16 might otherwise be construed as outside its scope:

17 (a) the use of the verb in any tense shall be construed as the use of that verb in all
18 other tenses;

19 (b) the use of a word in its singular form shall be deemed to include within its use
20 the plural form as well; and

21 (c) the use of the word in its plural form shall be deemed to include within its use
22 the singular form as well.

23 xiv. Whenever responsive DOCUMENTS apply to more than one site, such
24 DOCUMENTS shall be organized by address of the site.

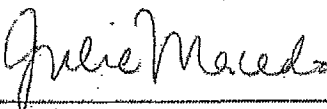
25 DOCUMENTS TO BE PRODUCED

26 This subpoena commands production of the original of each and every DOCUMENT now
27 or at any time in the possession, custody or control of YOU or SUNOCO without regard to the
28 person(s) by whom or for whom said DOCUMENTS were prepared, including, but not limited to,
all DOCUMENTS in the personal, business, or other files of all present or former officers,

1 directors, trustees, agents, employees, attorneys, and accountants of SUNOCO, which refers or
2 relates to any of the following subjects:

- 3
- 4 1. Provide all DOCUMENTS which refer or RELATE TO the "Responses to First Set of
5 Interrogatories to All Parties from *County of Santa Clara v. Myers Industries, Inc. et al.*,
6 Case No. C92-20246" submitted by the PROSECUTION TEAM in the CAO HEARING,
7 including documents identified in the Interrogatories (see for example, Response to
8 Interrogatory No. 7).
- 9 2. Provide all DOCUMENTS which refer or RELATE TO the "Responses to First Set of
10 Interrogatories to All Parties" submitted in *County of Santa Clara v. Myers Industries, Inc.*
11 *et al.*, Case No. C92-20246" submitted by the PROSECUTION TEAM in the CAO
12 HEARING that YOU mentioned were in YOUR possession during the consultation with
13 David Coupe on August 7, 2014.
- 14 3. Provide all DOCUMENTS which refer or RELATE TO "Requests for Admissions" and
15 "Responses to Requests for Admissions," propounded or served in *County of Santa Clara v.*
16 *Myers Industries, Inc. et al.*, Case No. C92-20246.
- 17 4. Provide all DOCUMENTS which refer or RELATE TO SUNOCO'S acceptance of
18 liabilities from CORDERO since 1975. This interrogatory is not limited to actions ordered
19 by the CAO Hearing, by EPA, or by the geographic boundaries of California.
- 20 5. Provide all DOCUMENTS which refer or RELATE TO SUNOCO'S payment of
21 CORDERO's liabilities since 1975. This interrogatory is not limited to actions ordered by
22 the CAO Hearing, by EPA, or by the geographic boundaries of California.

23
24 Given under my hand this 13th day of August 2014.

25
26 

27 _____
28 Julie Macedo,
Senior Staff Counsel, Office of Enforcement
State Water Resources Control Board



54 of 60 DOCUMENTS

In the Matter of the Petition of PUREX INDUSTRIES, INC. For Review of Administrative Civil Liability Order 96-042 of the California Regional Water Quality Control Board, San Francisco Bay Region. Our File A-1023

Order WQ 97-04

State of California
State Water Resources Control Board

1997 Cal. ENV LEXIS 3

May 14, 1997

BEFORE: [*1] John Caffrey, James M. Stubchaer, Marc Del Piero, Mary Jane Forster, John W. Brown

OPINIONBY: BY THE BOARD:

OPINION:

On March 20, 1996, the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board), adopted Order 96-042, imposing administrative civil liability on Purex Industries, Inc. The order was issued because the company failed to submit, at the Regional Water Board Executive Officer's request, an addendum to a workplan to investigate groundwater pollution at a site in Belmont, California. Purex Industries, Inc. (Purex Industries, Inc. or petitioner) filed a timely petition for review of Order 96-042 and for a hearing with the State Water Resources Control Board (State Water Board or Board). n1

n1 See Water Code sec. 13320; Cal. Code Reg., title 23, sec. 2050 et seq. Purex Industries, Inc. later granted the State Water Board a 60-day extension to resolve the petition. See Cal. Code Regs., tit. 23, sec. 2052(d). The time for final State Water Board action on the petition expires on or about May 14, 1997.

----- End Footnotes -----

[*2]

Purex Industries, Inc. challenges the Regional Water Board's action on the ground that the company was improperly named as a responsible party in the enforcement order. Purex Industries, Inc. requests that the Board find that it is not responsible for investigation or remediation of the Belmont site and that, conversely, responsibility resides with either Baron-Blakeslee, Inc. or AlliedSignal, Inc., or both.

The Regional Water Board named Purex Industries, Inc. in Order 96-042 as the corporate successor of several entities, including Purex Corporation, a former operator of the site. Ordinarily, this would be a proper basis for holding Purex Industries, Inc. liable. Petitioner contends, however, that a leveraged buy-out in 1982 shifted all liability for the Belmont site from Purex Corporation to Baron-Blakeslee, Inc.

This order concludes that the Regional Water Board properly named Purex Industries, Inc. in Order 96-042. While the leveraged buyout included an assumption of liability for the Belmont site by Baron-Blakeslee, Inc., the assumption agreement did not relieve Purex Corporation (and, hence, its successor, Purex Industries, Inc.) of liability. Rather, the Board concludes [*3] that, based on Baron-Blakeslee, Inc.'s assumption of liability, the Regional Water Board should

add that company to the list of responsible parties for the site. At the present time, it is unclear whether AlliedSignal, Inc., the parent of Baron-Blakeslee, Inc., can also be considered a responsible party.

I. BACKGROUND

A. Site History

In the late '80s volatile organic compounds (VOCs) were detected in groundwater beneath a site located at 500 Harbor Boulevard in Belmont. Groundwater samples collected in 1990 at the property line boundary between 500 Harbor Boulevard and adjoining property contained 28,823,000 parts per billion (ppb) of TCE and 586,000 ppb of DCE. There were no known sources of VOCs at the 500 Harbor Boulevard site; consequently, an off-site source was suspected. Later investigations revealed that the adjacent site, located at 511 O'Neill Avenue, had previously been used for solvent recycling and was, therefore, a potential source of the VOCs.

The Currier Company opened the 511 O'Neill Avenue site in 1960. The Currier Company and, later, Baron-Blakeslee, Inc., a California corporation (Baron-Blakeslee/Cal), operated a solvent sales and recycling operation [*4] there. On June 30, 1970, Baron-Blakeslee/Cal merged with Purex Corporation, a California corporation, and became a division of Purex Corporation. Purex Corporation, through its Baron-Blakeslee Division, continued to operate the solvent recycling facility until 1972, when the facility was closed. The site is currently owned by W. Howard and Catherine Jones, who operate a small battery retail facility at that location.

B. Corporate Activity

In 1978 Purex Industries, Inc. was incorporated in Delaware (Purex Industries A) and acquired all of the stock of Purex Corporation. In March 1982, in anticipation of a leveraged buyout n2 of Purex Corporation and its parent, two shell companies were incorporated in Delaware--PII Holdings, Inc. and a wholly-owned subsidiary, PII Acquisitions, Inc. Later, in June 1982, nine additional shell corporations were created in Delaware, all wholly-owned subsidiaries of PII Acquisitions, Inc., to receive the assets and liabilities of nine divisions of Purex Corporation.

n2 A leveraged buyout consists of financing the purchase of a company mainly with debt that can be repaid from the company's assets or operations. 19 Am.Jur.2d, Corporations, sec. 2531, pp. 334-335.

----- End Footnotes -----

[*5]

On August 11, 1982, Purex Corporation and Purex Industries A underwent a leveraged buyout. All of the 11,000,000 shares of Purex Industries A stock were purchased by private investors for \$ 360 million. On the same day, Purex Industries A was merged with PII Acquisitions, Inc., which then became the parent of Purex Corporation.

On August 13, 1982, Purex Corporation transferred all of the assets and liabilities relating to nine of its divisions to PII Acquisitions, Inc., which executed an agreement assuming all of the liabilities relating to these divisions. PII Acquisitions, Inc., in turn, transferred all of the assets and liabilities for the nine divisions to the nine similarly named shell corporations. The assets and liabilities for the Baron-Blakeslee Division, for example, were transferred to Baron-Blakeslee, Inc. (Baron-Blakeslee/Del). Baron-Blakeslee/Del also executed an agreement assuming all liabilities relating to the former division.

PII Acquisitions, Inc. was subsequently dissolved. On August 30, 1982, PII Holdings, Inc., the parent, underwent a name change to Purex Industries, Inc. Purex Industries, Inc. thus became the parent of both Baron-Blakeslee/Del and Purex Corporation. [*6]

Three years later Purex Industries, Inc. sold all of the stock of Baron-Blakeslee/Del to Allied Corporation, now known as AlliedSignal, Inc. The exact relationship between Baron-Blakeslee/Del and AlliedSignal, Inc. is unclear.

After August 13, 1982, Purex Corporation continued in existence although it underwent a name change 10 days later to T P Industrial, Inc. The company retained the Turco Products Division, the Purex Industrial Division, and other assets and liabilities. The company continued to do millions of dollars of business in the sale of cleaners, coatings, Brillo metal scouring pads, Franklin hand cleaner, and Old Dutch cleanser. In 1986 T P Industrial, Inc. merged with its parent, Purex Industries, Inc.

C. Regional Water Board Action

In March 1995, after several years of investigation at the 500 Harbor Boulevard site, the Regional Water Board requested that Purex Industries, Inc. submit a work plan for a soil and groundwater investigation at 511 O'Neill Avenue to determine whether the site was a source of the high VOC levels found in the groundwater. n3 The 511 O'Neill Avenue site was a suspected source because of its past use for solvent recycling, the direction [*7] of groundwater flow, the elevated concentrations of solvents in groundwater at the boundary between the two properties, and other factors.

n3 See Water Code sec. 13267.

----- End Footnotes -----

Purex Industries, Inc. submitted the workplan, but staff determined that the plan did not contain a sufficient number of soil borings to adequately characterize the site. Several months later, the Regional Water Board requested that the company submit an addendum to the workplan addressing this deficiency. Purex Industries, Inc. refused apparently on the ground that the company was improperly named.

In March 1996, the Regional Water Board imposed administrative civil liability in Order 96-042 on Purex Industries, Inc. for failure to submit the addendum. n4 The Regional Water Board found that Purex Industries, Inc. was a responsible party because the company was the successor in interest to Baron-Blakeslee/Cal, Purex Corporation, and T P Industrial, Inc. n5 This petition followed.

n4 See *id.*, secs. 13268, 13323 et seq.

[*8]

n5 See Order 96-042, fdng. 2.f., 1., and m.

----- End Footnotes -----

II. DISCUSSION

Purex Corporation of California, through its Baron-Blakeslee Division, operated the former solvent recycling facility at 511 O'Neill Avenue. Operation of the facility apparently caused groundwater pollution. Purex Industries, Inc. is the successor to Purex Corporation, due to the 1986 merger with T P Industrial, Inc. n6 Purex Industries, Inc. is, therefore, liable for any pollution caused by its predecessor. Purex Industries, Inc. contends, however, that the 1982 leveraged buyout shifted liability to Baron-Blakeslee/Del or AlliedSignal, Inc., or both.

n6 See, e.g., *Moe v. Transamerica Title Ins. Co.* (1971) 21 Cal.App.3d 289, 304 [98 Cal.Rptr. 547] (as a general rule, a corporation formed by merger is liable for the debts and liabilities of the constituent corporations, whether based on contract or tort). See also California Corporations Code sec. 1107 (the surviving corporation of a merger is subject to all of the debts and liabilities of the disappearing corporation).

----- End Footnotes -----

[*9]

As a preliminary matter, the Board notes that both the Regional Water Board record and our record contain numerous submittals from Purex Industries, Inc. and AlliedSignal, Inc. on the issue of liability. The Board, therefore, concludes that an additional hearing, as requested by the petitioner, is unnecessary.

A. Liability of Baron-Blakeslee/Del

California follows the general rule that a corporation that purchases the assets of another corporation does not assume the liabilities of the seller. n7 The courts recognize four exceptions to this general rule where:

- (1) there is an express or implied agreement of assumption of liability;
- (2) the transaction amounts to a consolidation or merger of the two corporations;
- (3) the purchasing corporation is a mere continuation of the seller; or
- (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability. n8

n7 See e.g., *Beatrice Co. v. State Board of Equalization* (1993) 6 Cal.4th 767, 778 [25 Cal.Rptr.2d 438, 863 P.2d 683]; *Ray v. Alad* (1977) 19 Cal.3d 22, 28 [136 Cal.Rptr. 574, 560 P.2d 3].

[*10]

n8 See *id.* The California Supreme Court has created a fifth exception to the general rule which imposes successor liability under certain circumstances in product liability cases. See *Ray v. Alad, supra fn. 7*. This exception is inapplicable here.

----- End Footnotes -----

Purex Industries, Inc. argues that the first three exceptions apply in this case. The State Water Board conclude that only the first applies. Because the Board find that Baron-Blakeslee/Del expressly agreed to assume liability for the 511 O'Neill Avenue site, the Board further conclude that the Regional Water Board should consider Baron-Blakeslee/Del, and possibly AlliedSignal, Inc., as additional responsible parties for investigation and remediation of the site.

1. Agreement of Assumption

Whether Baron-Blakeslee/Del expressly or impliedly assumed liability for the Belmont site is a question of fact. n9 To resolve the issue, the Board must review the contractual agreements between Purex Corporation and PII Acquisitions, Inc. and between PII Acquisitions, Inc. and Baron-Blakeslee/Del.

n9 See, e.g., *Schwartz v. Pillsbury Inc.* (9th Cir. 1992) 969 F.2d 840, 845-846; *Gee v. Tenneco, Inc.* (9th Cir. 1980) 615 F.2d 857, 862-863.

----- End Footnotes -----

[*11]

The transfer of assets and liabilities between Purex Corporation and PII Acquisitions, Inc. included an assumption agreement. n10 Under the agreement, PII Acquisitions, Inc. assumed all of the liabilities relating to "the assets and liabilities specifically identified" in paragraph 1 of the agreement. n11 Paragraph 1 identified these as the Distributed Assets and Liabilities, as defined in Purex Corporation's Plan of Partial Liquidation (Plan). The Distributed Assets and Liabilities were "all of [Purex Corporation's] assets and liabilities, real and personal, known and unknown," other than those retained by Purex Corporation, "including, but not limited to, all of the assets and liabilities related to . . . the Baron-Blakeslee Division . . ., including, but not limited to, all the land . . . and other assets at the facilities and addresses listed on Exhibit B" (emphasis added) of the Plan. n12 The Belmont site was not listed on Exhibit B.

n10 Instrument of Assignment and Assumption, dated August 13, 1982, between Purex Corporation and PII Acquisitions, Inc.

n11 *Id.*, paragraph 2.

[*12]

n12 Plan of Partial Liquidation between Purex Corporation and PII Acquisitions, Inc., dated August 13, 1982, paragraph 3, p. 2.

----- End Footnotes -----

PII Acquisitions, Inc. and Baron-Blakeslee/Del, in turn, executed an assumption agreement in which Baron-Blakeslee/Del assumed all of the liabilities of PII Acquisitions, Inc. "with respect to the assets and liabilities specifically identified in paragraph 1" of the agreement. n13 These were "all the assets and liabilities, known or unknown, relating to its Baron-Blakeslee Division, including, but not limited to, all the land . . . and other assets located at the facilities and addresses listed on Exhibit A (emphasis added)" of the assumption agreement. n14 The Belmont site was not included on Exhibit A.

n13 Instrument of Assignment and Assumption, dated August 13, 1982, between PII Acquisitions, Inc. and Baron-Blakeslee/Del, paragraph 2.

n14 *Id.*, par. 1.

----- End Footnotes -----

When the two assumption agreements [*13] were signed, the Belmont site was an unknown liability related to the former Baron-Blakeslee Division of Purex Corporation. In the Board's view, under the first assumption agreement, PII Acquisitions, Inc. assumed this unknown liability, which was, in turn, assumed by Baron-Blakeslee/Del. The Board based its conclusion on the expansive language used in the agreements, covering all unknown as well as known liabilities. In addition, although the agreements enumerated certain liabilities, the listings were prefaced with the phrase "including, but not limited to." This indicated an intent to not restrict the assumed liabilities to those enumerated.

AlliedSignal, Inc. contends that liability for the Belmont site, nevertheless, remained with Purex Corporation because the site was not "specifically identified" in either assumption agreement. Assuming that use of this language created an ambiguity, the agreements are subject to the general rules of contract interpretation. n15 The agreements must be interpreted as a whole, in order to give effect to every part. n16 An interpretation which makes part of the agreement inoperative is to be avoided. n17

n15 See California Civil Code sec. 1637. See generally 17A Am.Jur.2d (rev.) Contracts, sec. 336 et seq.; 1 Witkin, Summary of California Law (9th ed. 1987), Contracts, sec. 681 et seq.

[*14]

n16 See California Civil Code sec. 1641; *Titan Corp. v. Aetna Casualty & Surety Co.* (1994) 22 Cal.App.4th 457, 473-474 [27 Cal.Rptr. 2d 476].

n17 See California Civil Code sec. 1643; *Titan Corp. v. Aetna Casualty & Surety Co.*, *supra* fn. 16.

----- End Footnotes -----

AlliedSignal, Inc.'s interpretation of the agreements would make the language including "unknown liabilities" meaningless. Unknown liabilities existing when the agreements were executed obviously could not have been "specifically identified." In addition, AlliedSignal, Inc.'s interpretation would nullify the language "including, but not limited to," which indicated an intent to cover liabilities not specifically enumerated. The Board concludes, therefore, that AlliedSignal, Inc.'s interpretation is unreasonable and that Baron-Blakeslee/Del expressly agreed to assume the unknown liability for the Belmont site.

Whether this agreement is binding on AlliedSignal, Inc. cannot be determined from the record before this Board. Although AlliedSignal, Inc. purchased the stock of Baron-Blakeslee/Del, this fact alone is insufficient to impose [*15] liability on the parent. As a general rule, a parent corporation, like any other stockholder, is protected from liability by the

corporate veil. n18 There is some evidence in the record, however, to indicate that the two companies may have merged. n19 If this is true, AlliedSignal, Inc. would have acquired the liabilities of Baron-Blakeslee/Del.

n18 E.g., *McLaughlin v. L. Bloom Sons Co.* (1962) 206 Cal.App.2d 848 [24 Cal.Rptr. 311].

n19 See Regional Water Board Administrative Record, Item 19, letter dated March 17, 1995, from Kenneth J. Burke, Senior Counsel, Allied Signal, Inc., to Mr. Stephen Morse, Chief, Toxics Cleanup Division, Regional Water Board, et al., Att. 2.

----- End Footnotes -----

2. De Facto Merger

Purex Industries, Inc. apparently contends that there was a de facto merger between the Baron-Blakeslee Division of Purex Corporation and Baron-Blakeslee/Del. Petitioner maintains that there was a de facto merger between Purex Corporation and PII Acquisitions, Inc., which, in turn, merged with Baron-Blakeslee/Del. [*16]

In general, a merger is the absorption of one corporation by another, which survives, retains its name and corporate identity together with the added capital, franchises, and powers of the merged corporation, and continues the combined business. n20 The merged corporation ceases to exist. n21

n20 *Phillips v. Cooper Laboratories, Inc.* (1989) 215 Cal.App.3d 1648, 1660 [264 Cal.Rptr. 311], citing *Heating Equipment Mfg. Co. v. Franchise Tax Board* (1964) 228 Cal.App.2d 290, 302 [39 Cal.Rptr. 453].

n21 *Id.*

----- End Footnotes -----

Here, obviously there was no actual merger between Purex Corporation and PII Acquisitions, Inc. because Purex Corporation continued in business. Nor was there a de facto merger.

The doctrine of de facto merger was created to address cases in which a transaction cast as an asset sale achieves the same result as a merger. The California Supreme Court has recognized the de facto merger exception in two situations: (1) where one corporation takes all of another's assets without providing any consideration [*17] that could be available to meet claims of the other's creditors; and (2) where the consideration consists wholly of shares of the purchaser's stock which are promptly distributed to the seller's shareholders in conjunction with the seller's liquidation. n22 Neither circumstance is applicable in this case. Purex Corporation apparently received a fair consideration for its stock and assets from PII Acquisitions, Inc. And, Purex Corporation did not liquidate, but rather continued in business for a number of years. There can be no de facto merger where the seller corporation continues to exist. n23

n22 See *Ray v. Alad*, *supra* fn. 7, 19 Cal.3d at 28-29.

n23 See, e.g., *Beatrice Co. v. Board of Equalization*, *supra* fn. 7, 6 Cal.4th at 778.

----- End Footnotes -----

Purex Industries, Inc. contends that PII Acquisitions, Inc. merged with Baron-Blakeslee/Del. Assuming that this is true, it does not change our conclusion. Purex Corporation did not merge with PII Acquisitions, Inc. Hence, there was no ultimate merger between Purex [*18] Corporation and Baron-Blakeslee/Del.

3. Mere Continuation

Purex Industries, Inc. also contends that Baron-Blakeslee/Del was a mere continuation of the Baron-Blakeslee Division of Purex Corporation. California cases holding that a corporation acquiring the assets of another corporation is the

latter's mere continuation and therefore liable for its debts have required a showing of one or both of the following: (1) no adequate consideration was given for the predecessor's assets; and (2) one or more persons were officers, directors, or stockholders of both corporations. n24

n24 See *Ray v. Alad*, *supra* fn. 7, 19 Cal.3d at 29.

----- End Footnotes -----

As stated previously, there is no evidence of inadequate consideration in this case. Further, while it appears that at least one person was an officer of both Purex Corporation and Baron-Blakeslee/Del, the Board cannot conclude that the latter was a mere continuation of the former. Liability is not imposed on an acquiring corporation when recourse to the seller corporation is available [*19] and the two corporations have separate identities. n25 In fact, the Board is aware of no California cases finding either a de facto merger or mere continuation between a purchasing corporation and a division of the seller corporation.

n25 See *Beatrice Co. v. Board of Equalization*, *supra* fn. 7, 6 Cal.4th at 778.

----- End Footnotes -----

B. Liability of Purex Industries, Inc.

Purex Industries, Inc. is the successor to Purex Corporation, a former operator of the solvent recycling facility at the Belmont site. The State Water Board has concluded that Baron-Blakeslee/Del expressly agreed to assume the unknown liability for the site related to the former Baron-Blakeslee Division of Purex Corporation. Did this agreement relieve Purex Corporation and, thus, its successor, Purex Industries, Inc. from liability? The Board conclude that it did not.

Baron-Blakeslee/Del's agreement to assume the unknown liabilities related to the former division was contractual in nature. n26 Absent the agreement, the corporation was not legally obligated [*20] to assume the liabilities related to the former division because of the general rule that an asset purchaser does not assume the liabilities of the selling corporation. The legal effect of the agreement was to give PII Acquisitions, Inc., and its successors the right to compel Baron-Blakeslee/Del to perform its obligations under the assumption agreement.

n26 See *Beatrice Co. v. Board of Equalization*, *supra* fn. 7, 6 Cal.4th at 782-783 ("An agreement to assume liabilities is a contractual promise to perform the obligations of another.")

----- End Footnotes -----

The State Water Board conclude that the agreement is not binding on the State or Regional Water Boards for several reasons. First, this conclusion is consistent with past precedent. The Board has previously taken the position that contractual agreements between individuals regarding liability are not binding on the State or Regional Water Boards. n27 The Board has recognized the public policy considerations present in cases such as this. "Multiple parties should properly be named [*21] in cases of disputed responsibility." n28

n27 State Water Board Order WQ 93-9, pp. 10-11. The Board has designated its decisions and orders as precedent decisions. State Water Board Order WR 96-1 at 18, n.11.

n28 State Water Board Order WQ 86-16, p. 13. In this regard, the Board note that Regional Water Board staff have indicated that they intend to recommend the addition of the landowners as secondarily responsible parties if site cleanup requirements are issued. Transcript of Regional Water Board hearing on February 21, 1996, p. 6.

----- End Footnotes -----

Second, this conclusion is consistent with the federal hazardous waste cleanup statute, the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. Section 9601 et seq. Under CERCLA, con-

tractual provisions regarding liability between an owner or operator of a site who is liable for a hazardous waste release and another party are unenforceable against the government. n29 This rule has been applied in circumstances similar to those presented here. In [*22] *United States v. Lang*, for example, the court held that a parent corporation, which was liable as an owner under CERCLA, could not shift liability to a subsidiary. n30 The parent had transferred assets to a subsidiary, which had apparently agreed, as a condition of the transfer, to accept all liabilities associated with the transferred assets. The court held that the parent remained liable and that, if the agreement were proven, the subsidiary could also be added to the chain of cleanup accountability.

n29 *See 42 U.S.C. Sec. 9607(e)(1)*.

n30 *864 F.Supp. 610 (E.D.Tex. 1994)*.

----- End Footnotes -----

III. CONCLUSIONS

For the reasons explained above, the Board concludes that the Regional Water Board acted properly in naming Purex Industries, Inc. in Order 96-042. The State Water Board further conclude that Baron-Blakeslee/Del expressly assumed the unknown liability for the Belmont site related to the former Baron-Blakeslee Division of Purex Corporation. The Board therefore concludes that the Regional Water Board should treat [*23] Baron-Blakeslee/Del as an additional responsible party for any future investigative or remedial work at the site. Although the evidence in the record indicates that AlliedSignal, Inc. purchased all of the stock of Baron-Blakeslee/Del, it is unclear whether AlliedSignal, Inc. should also be considered a responsible party.

IV. ORDER

IT IS HEREBY ORDERED that the Regional Water Board should consider Baron-Blakeslee/Del as a responsible party for any future investigative or remedial work at the 511 O'Neill Avenue site.

IT IS FURTHER ORDERED that the petition of Purex Industries, Inc. is otherwise denied.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 14, 1997.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Real Property Law Water Rights Groundwater Torts Vicarious Liability Corporations Predecessor & Successor
 Corporations Torts Vicarious Liability Corporations Subsidiary Corporations

1058PN

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5 Attorneys for Designated Party
6 SUNOCO, INC.

7
8 CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD
9 STATE OF CALIFORNIA

10
11 In the Matter of:

12
13 RECONSIDERATION OF CLEANUP
AND ABATEMENT ORDER R5-2013-
14 0701, MOUNT DIABLO MINE,
15 CONTRA COSTA COUNTY, DATED
16 APRIL 16, 2013

**DECLARATION OF ADAM P.
BAAS IN SUPPORT OF SUNOCO,
INC.'S OPPOSITION TO THE
PROSECUTION TEAM'S
MOTION IN LIMINE**

Hearing Date: June 4/5, 2014

17
18
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20
21 I, the undersigned Adam P. Baas, declare as follows:

22 1. I am an attorney admitted to practice law in the State of
23 California and am Senior Counsel with the Edgcomb Law Group LLP ("ELG").
24 ELG is counsel for Designated Party Sunoco, Inc. ("Sunoco") in connection with
25 the Central Valley Regional Water Quality Control Board's ("Regional Board")
26 reconsideration of Cleanup and Abatement Order No. R5-2013-0701, Mount Diablo
27 Mine, Contra Costa County, issued on April 16, 2013 ("CAO").
28

1 2. I have personal knowledge of the facts set forth herein or am
2 familiar with such facts from: 1) my personal involvement in this matter; or 2) my
3 review of the files and records obtained from public agencies and other public
4 sources of information.

5 3. On or about January 20, 2012, representatives from the Regional
6 Board and the State Water Resources Control Board (“State Board”), Office of
7 Enforcement (“Office of Enforcement”), were put on notice of Sunoco’s corporate
8 law argument that there is no legal basis for the Regional Board to attribute the
9 Cordero Mining Company’s (“Cordero”) liability at the Mount Diablo Mercury
10 Mine site (“Site”), if any, to Sunoco because a former shareholder or parent
11 company cannot be held liable for the acts of its subsidiary (“Sunoco’s Corporate
12 Law Argument”). *See* Exhibit 1 to the Declaration of John D. Edgcomb being
13 submitted simultaneously herewith.

14 4. Upon information and belief, it is my understanding that on or
15 about January 24, 2012, State Board enforcement attorney, Julie Macedo, Esq.
16 rejected Sunoco’s Corporate Law Argument. *See* ¶¶ 5 and 6 of the Declaration of
17 John D. Edgcomb being submitted simultaneously herewith.

18 5. On or about June 15, 2012, I participated in a telephone
19 conversation with Ms. Macedo during which we discussed, among other things,
20 Sunoco’s Corporate Law Argument. Ms. Macedo informed me that Sunoco’s
21 Corporate Law Argument had been discussed with the Office of Enforcement and
22 Regional Board back in January 2012 and that the Office of Enforcement’s position
23 had not changed – the argument was rejected and there was nothing Sunoco could
24 do to prevent Sunoco from being named in the yet to be issued CAO.

25 6. On or about July 26, 2012, I participated in a telephone
26 conversation with State Board enforcement attorney, Anna Kathryn Benedict, Esq.
27 during which we discussed, among other things, Sunoco’s Corporate Law
28 Argument. My understanding after this telephone conversation was that the Office

1 of Enforcement's position regarding Sunoco's Corporate Law Argument had not
2 changed, but that Ms. Benedict would like to give Sunoco a "draft" of the CAO in
3 order to foster "creative" solutions between the potentially responsible parties
4 ("PRPs"), as well as to see if additional PRPs could be added to the CAO.

5 7. In August 2012, I participated in multiple telephone
6 conversations with Ms. Benedict. My understanding throughout this time was that:
7 the Regional Board and Office of Enforcement was fully aware of Sunoco's
8 Corporate Law Argument; the Office of Enforcement's position was that the
9 Sunoco's Corporate Law Argument was futile; and, despite the Office of
10 Enforcement's position, Sunoco would be provided a "draft" of the CAO as a
11 "courtesy" in order to reveal the new list of PRPs and foster a PRP agreement
12 without protracted litigation. Further, because the Office of Enforcement and
13 Regional Board members were already aware of Sunoco's various non-liability
14 arguments (including Sunoco's Corporate Law Argument) the expectation was that
15 Sunoco's comments to the draft CAO would be limited to technical inaccuracies.

16 8. On or about September 12, 2012, Ms. Benedict sent a copy of
17 the draft CAO *via* letter to the named PRPs. Attached hereto as **Exhibit 1** is a true
18 and correct copy of Ms. Benedict's September 12, 2012, letter. To my knowledge,
19 a copy of the draft CAO was not posted to the Regional Board or State Board
20 websites, nor was the draft CAO otherwise presented to the general public for
21 comment.

22 9. On or about October 8, 2012, I participated in a telephone
23 conversation with Ms. Benedict and Ms. Macedo during which we discussed
24 Sunoco's comments to the draft CAO. I reiterated that: Sunoco has multiple
25 arguments in support of removing it completely from the CAO, including Sunoco's
26 Corporate Law Argument; the Regional Board was aware of these arguments and
27 had rejected them; Sunoco intended to petition the State Board for review and
28 rescission of the CAO; and, notwithstanding these facts, Sunoco would be willing

1 to participate in a PRP meeting if scheduled. It was further discussed and agreed
2 that Sunoco would not be briefing its non-liability arguments in response to the
3 draft CAO, but that Sunoco would focus its comments on technical inaccuracies
4 within the draft CAO.

5 10. On or about October 12, 2012, I sent a letter to Ms. Macedo on
6 behalf of Sunoco, setting forth three technical comments to the draft CAO.
7 Attached hereto as **Exhibit 2** is a true and correct copy of my October 12, 2012,
8 letter. Within this letter, I memorialized the October 8th telephone conversation
9 between myself, Ms. Benedict, and Ms. Macedo:

10 This letter follows my telephone conversation with you
11 and Anna Kathryn Benedict, Esq., on October 8, 2012
12 regarding Sunoco's comments to the Draft Cleanup and
13 Abatement Order ("Draft Order") for the Mount Diablo
14 Mercury Mine ("Site"). . . . This submission is made
15 solely to correct what we believe to be inaccuracies in
16 certain statements in the Draft Order and is not intended
17 to cover the substance or merits of the Order. As you are
18 aware, Sunoco intends to contest its liability as an alleged
19 PRP at the Site. Therefore, we make this submission
20 without admission or prejudice to, or waiver of, Sunoco's
21 rights and defenses.

22 11. The Regional Board and Office of Enforcement issued the final
23 CAO on April 16, 2013.

24 12. On or about May 15, 2013, Sunoco filed a Petition for Review
25 and Rescission of the CAO with the State Board ("Sunoco's Petition"). A true and
26 correct copy of Sunoco's Petition is attached to Sunoco's Comments Regarding the
27 CAO submitted with Sunoco's Submission of Evidence and Policy Statement in
28 relation to the above captioned matter. Page 4 of Sunoco's Petition summarizes
Sunoco's Corporate Law Argument as follows:

The CAO lists Sunoco as a Discharger based solely on its
relationship to Sun Oil Company, the former shareholder

1 of Cordero. There is no legal support, however, for
2 finding Sunoco liable for Cordero's historical activities.
3 First, Sun Oil Company is a former shareholder of, not a
4 successor-in-interest to, Cordero; second, there is no
5 statutory liability for pre- or post-dissolution claims
6 against a shareholder such as Sunoco unless that
7 shareholder acted as the *alter ego* of the corporation; and,
8 third, there is no evidence that Sun Oil Company acted as
9 the *alter ego* of Cordero. As such, Sunoco cannot be
10 held liable for the actions of Cordero as a matter of law,
11 regardless of whether Cordero is deemed to be capable of
12 being held responsible today.

13 13. Sunoco's Petition attaches multiple documents in support of
14 Sunoco's Corporate Law Argument, copies of which were provided to the Regional
15 Board and Office of Enforcement on or about May 15, 2013.

16 14. On or about May 23, 2013, I participated in a telephone
17 conversation with Ms. Benedict regarding scheduling an in-person PRP meeting
18 with the Regional Board. During this conversation, Ms. Benedict was again put on
19 notice that Sunoco's position was one of non-liability for the reasons set forth in
20 Sunoco's Petition, but that nevertheless, Sunoco was willing to participate in a PRP
21 meeting.

22 15. On or about August 8, 2013, I received a letter from Advisory
23 Team member David P. Coupe stating that the Regional Board had agreed to
24 reconsider the CAO and that a hearing would be held on the arguments raised in
25 Sunoco's Petition. The letter expressly stated that, "the Central Valley Water Board
26 will hold a hearing at a subsequent date to reconsider CAO No. R5-2013-
27 0701 within the scope of issues presented in [Sunoco's Petition]." Attached hereto
28 as **Exhibit 3** is a true and correct copy of Mr. Coupe's August 8, 2013, letter.

16 16. On August 9, 2013, I forward a copy of Mr. Coupe's letter to
17 Ms. Benedict *via* email. Attached hereto as **Exhibit 4** is a true and correct copy of
18 My August 9, 2013, email.

1 17. On or about August 15, 2013, I participated in an in-person PRP
2 meeting with representatives from the Office of Enforcement, the Regional Board,
3 Sunoco and the other PRPs, at the Regional Board's offices in Rancho Cordero,
4 California (the "PRP Meeting"). Present at the PRP Meeting were, among others,
5 Ms. Benedict and Regional Board representatives, Victor Izzo and Ross Atkinson.
6 During the PRP Meeting, Ms. Benedict represented that the Prosecution Team
7 would need more time to prepare for the upcoming hearing. At that time, the
8 understanding was that the Regional Board hearing was to take place in December
9 2013.

10 18. On or about August 21, 2013, Ms. Benedict emailed the PRPs,
11 stating that the Prosecution Team would "be requesting a later hearing date to allow
12 for discovery and briefing in the above-referenced matter. If you are willing to
13 stipulate to a briefing schedule and later hearing date, we are willing to move the
14 deadlines in the CAO." Attached hereto as **Exhibit 5** is a true and correct copy of
15 Ms. Benedict's August 21, 2013, email.

16 19. Thereafter, the PRPs and the Prosecution Team reached an
17 agreement and the hearing date was re-scheduled to March 27, 2014, in order to
18 provide the Prosecution Team with its requested time for discovery and briefing.

19 20. On or about December 16, 2013, Ms. Benedict provided a draft
20 Hearing Procedure document to Sunoco, *et al.* via email, which set forth the
21 Prosecution Team's desired timeline for the March hearing. Attached hereto as
22 **Exhibit 6** is a true and correct copy of Ms. Benedict's December 16, 2013, email.

23 21. I responded *via* email on December 18, 2013, stating that the
24 lack of any correspondence from the Prosecution Team regarding the Hearing
25 Procedure document had left the parties in a tough position before the holidays.
26 Attached hereto as **Exhibit 7** is a true and correct copy of my December 18, 2013,
27 email.

1 22. On or about January 6, 2014, the parties reached an agreement
2 on the Hearing Procedure document and a final draft was submitted to the Advisory
3 Team by Ms. Benedict *via* email. Attached hereto as **Exhibit 8** is a true and correct
4 copy of Ms. Benedict's January 6, 2014, email.

5 23. The final Hearing Procedure document was later approved by
6 the Advisory Team and required, among other things, that the Prosecution Team
7 submit its Submission of Evidence and Policy Statement by February 21, 2014, and
8 that Sunoco must submit its Rebuttal Submission by March 14, 2014. Attached
9 hereto as **Exhibit 9** is a true and correct copy of the final Hearing Procedure
10 document.

11 24. On or about February 11, 2014, the Office of Enforcement
12 issued its first Subpoena for Document and Records to Sunoco ("Subpoena") with
13 one (1) request: Sunoco was to "[p]rovide all documents that refer or relate to
14 Cordero Mining Company, including any contact with or connection to Sunoco,
15 Inc." to the attention of Ms. Benedict by March 14, 2014. Attached hereto as
16 **Exhibit 10** is a true and correct copy of the Subpoena.

17 25. On March 14, 2014, Sunoco timely provided Ms. Benedict with
18 its Objections and Response to the Subpoena, and timely submitted its Submission
19 of Evidence and Policy Statement to the Prosecution Team pursuant to the Hearing
20 Procedure. Attached hereto as **Exhibit 11** is a true and correct copy of the
21 Sunoco's Objections and Response to the Subpoena. Attached hereto as **Exhibit 12**
22 is a true and correct copy of Sunoco's transmittal letter attaching its Hearing
23 Submissions.

24 26. To date, Sunoco has complied with the deadlines set forth in the
25 Hearing Procedure document and the hearing date has been re-scheduled to June
26 4/5, 2014.

27 27. To date, despite being on written and verbal notice of Sunoco's
28 Corporate Law Argument since at least January of 2012, the only discovery request

1 propounded on Sunoco by either the Regional Board or the Office of Enforcement
2 is the February 11th Subpoena.

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I declare under penalty of perjury under the laws of the State of California
and the United States of America that the foregoing is true and correct.

Executed this 24th day of March, 2014 in San Francisco, California.


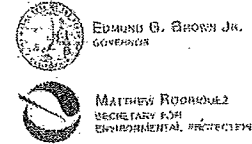
By: 
Adam P. Baas

Exhibit 1



State Water Resources Control Board

September 12, 2012

(Via Email & Certified Mail)

Mr. Adam Baas
Mr. John D. Edgcomb
Edgcomb Law Group
115 Sansome Street, Suite 700
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abaas@edgcomb-law.com
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Mr. Peter Ton, Esq.
Mr. Jon K. Wactor, Esq.
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Ms. Kathryn Tobias
Senior Staff Counsel
California Department of Parks and Recreation
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Sacramento, California 95814
ktobias@parks.ca.gov
CM NO. 7004 2510 0003 3898

(Via Certified Mail Only)

Ms. Patricia S. Port
Environmental Office
U.S. Department of Interior – Regional
Jackson Center One
1111 Jackson Street, Suite 520
Oakland, California 94607
CM NO. 7004 2510 0003 9153 3904

Mr. Jack Wessman
Ms. Carolyn Wessman
P.O. Box 949
Clayton, California 94517
CM NO. 7004 2510 0003 9153 3911

Ms. Emily T. Lewis
Counsel for Kennametal, Inc.
BCCZ Corporation
Two Gateway Center
Pittsburgh, Pennsylvania 15222
CM NO. 7004 2510 0003 9153 3928

**RE: DRAFT CLEANUP AND ABATEMENT ORDER FOR THE MOUNT DIABLO
MERCURY MINE LOCATED IN CONTRA COSTA COUNTY**

To All Responsible Parties:

Attached please find the DRAFT Cleanup and Abatement Order for the Mount Diablo Mercury Mine located in Contra Costa County. Please let me know by October 12, 2012, if you have any comments or concerns with respect to the parties named in the order.¹

¹ Mt. Diablo Quicksilver, Co., Ltd. is a dissolved entity and, after an exhaustive search, no office, directors, or person having charge of its assets or any agent of process, was identified. Our office will also be providing Mt. Diablo Quicksilver, Co., Ltd. with a copy of the order pursuant to California Corporations Code section 2011, and in accordance with the California Water Code and all other applicable laws and regulations.

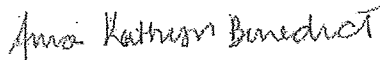
CHARLES R. HOPPIN, CHAIRMAN | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | www.waterboards.ca.gov

September 12, 2012

If you have any questions, please do not hesitate to contact me by telephone at (916) 323-6848, or by email at abenedict@waterboards.ca.gov, or Senior Staff Counsel Julie Macedo by telephone at (916) 323-6847 or by email at jmacedo@waterboards.ca.gov.

Sincerely,



Anna Kathryn Benedict
Senior Staff Counsel
Office of Enforcement

Attachments

cc: *(with attachment)*

Ms. Jan K. Wactor, Esq.
Wactor & Wick LLP
180 Grand Avenue, Suite 950
Oakland, California 94612

(Via U.S. Mail)

Ms. Lisa A. Runyon, Esq.
Senior Counsel
Sunoco, Inc.
1735 Market Street, Suite LL
Philadelphia, Pennsylvania 19103-7583

(Via U.S. Mail)

Kehnametal Inc.
1600 Technology Way
Latrobe, Pennsylvania 15650-4647

(Via U.S. Mail)

California Department of Parks and Recreation
Bay Area District
96 Mitchell Canyon Road
Clayton, California 94517

(Via U.S. Mail)

U.S. Department of Interior DMEA
1849 "C" Street, N.W.
Washington D.C. 20240

(Via U.S. Mail)

Central Valley Region Water Quality Control Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670-6114

(Via email only)

Pamela Creedon
Executive Officer

Rick Moss
Assistant Executive Officer

Clean up and Compliance Branch
Ross Atkinson
Victor Izzo
Robert Busby

All Responsible Parties
Mount Diablo Mercury Mine

- 3 -

September 12, 2012

cc: *(continued, without attachment)*

State Water Resources Control Board
Office of the Chief Counsel
Michael Lauffer
Chief Counsel

(Via email only)

Patrick Pulupa
Staff Counsel

Office of Enforcement
Julie Macedo
Senior Staff Counsel

Exhibit 2

EDGCOMB LAW GROUP

One Post Street, Suite 2100
San Francisco, California 94104
415.692.8144 direct
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abaas@edgcomb-law.com

October 12, 2012

BY EMAIL & U.S. MAIL

Julie Macedo, Esq.
State Water Resources Control Board
Senior Staff Counsel, Office of Enforcement
1001 "I" Street, 16th Floor
P.O. Box 100
Sacramento, CA 95814

Re: Comments by Sunoco, Inc. to the Draft Cleanup and Abatement Order for the Mount Diablo Mercury Mine Located in Contra Costa County

Dear Ms. Macedo:

We represent Sunoco, Inc. ("Sunoco"). This letter follows my telephone conversation with you and Anna Kathryn Benedict, Esq., on October 8, 2012 regarding Sunoco's comments to the Draft Cleanup and Abatement Order ("Draft Order") for the Mount Diablo Mercury Mine ("Site"). The Draft Order was sent to us along with other entities on September 12th by Ms. Benedict, requesting comments to the State Water Resource Control Board ("State Board") by October 12, 2012. On behalf of Sunoco, we appreciate the opportunity to review the Draft Order and respectfully request that the State Board, in conjunction with the Regional Water Quality Control Board Central Valley Region ("Regional Board"), consider the following three (3) comments when drafting the final Cleanup and Abatement Order.

First, the statement in Paragraph No. 16 of the Draft Order, which states "[t]he amount of mercury production from this time period is unknown," is inaccurate. It is our understanding that there was no mercury production during Cordero's 14 months of operations at the Site; and that Cordero was prospecting only and never actually mined mercury from the ground. We also believe that the Regional Board agrees with our understanding. In view of this, we request that the statement be changed to accurately reflect that Cordero did not produce mercury at the Site.

Second, as we discussed over the telephone this week, there are two issues with the table in Paragraph No. 25 of the Draft Order that we request be corrected.

1. the "Background" levels of mercury, chromium, and nickel depicted in the table as 0.20, 5, and 5, respectively, are the detection limits set for the lab equipment and, for each of these chemical elements, the actual sampling results came back as non-detect.

Julie Macedo, Esq.
Re: Comments to Draft CAO
October 12, 2012

Thus, the levels for these elements are actually below what is reported in the table, if they exist at all. Please change these results to non-detect, or "ND."

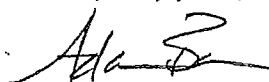
2. The "Water Quality Goal" numbers within the table are municipal supply standards generally used for assessing the potable quality of groundwater. By comparison, the numbers depicted throughout the rest of the table all came from surface water samples, not ground water samples. As a result, the table depicts data results for surface water sampling and compares these results to municipal, or potable, standards. Please change the numbers within the Water Quality Goal column to reflect the State Water Board's surface water standards.

Third, the last sentence of Paragraph No. 26 is confusing because the term "earlier reports" is not defined. It appears that the intent of the paragraph is to focus on the 1997 Slotton study, but the reference to "earlier reports" could be interpreted to mean all earlier reports referenced in the Draft Order, which would be an inaccurate statement. To eliminate this confusion, we suggest changing the term "earlier reports" to "the Slotton study."

Thank you again for the opportunity to comment on the Draft Order. This submission is made solely to correct what we believe to be inaccuracies in certain statements in the Draft Order and is not intended to cover the substance or merits of the Order. As you are aware, Sunoco intends to contest its liability as an alleged PRP at the Site. Therefore, we make this submission without admission or prejudice to, or waiver of, Sunoco's rights and defenses.

Please let us know if you have any question or would like to set up a time to discuss.

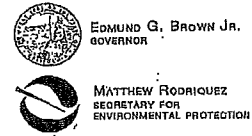
Very truly yours,



Adam P. Baas

cc (via email only):
Anna Kathryn Benedict, Esq.
Rick Moss
Ross Atkinson

Exhibit 3



Central Valley Regional Water Quality Control Board

August 8, 2013

Christopher M. Sanders, Esq.
Ellison, Schneider & Harris, LLP
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816
cms@eslawfirm.com

John D. Edgcomb, Esq.
Adam P. Baas, Esq.
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One Post Street, Suite 2100
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jedgcomb@edgcomb-law.com
abaas@edgcomb-law.com

Dear Mr. Sanders, Mr. Edgcomb, and Mr. Baas:

REQUEST FOR RECONSIDERATION OF CLEANUP AND ABATEMENT ORDER NO.
R5-2013-0701 FOR MOUNT DIABLO MERCURY MINE, CONTRA COSTA COUNTY

As you know, Kennemetal, Inc. and Sunoco, Inc. have filed petitions with the State Water Resources Control Board to review Cleanup and Abatement Order (CAO) No. R5-2013-0701 issued by the Central Valley Regional Water Quality Control Board's (Central Valley Water Board) Executive Officer, Pamela Creedon. These two petitions have been assigned numbers A-2249(a) and A-2249(b) as noted in the State Water Board's Acknowledgement of Petition Received letter dated May 23, 2013.

At the July 25/26 Central Valley Water Board's Board meeting, during the Public Forum session, Mr. Sanders spoke to the Central Valley Water Board as legal counsel for Kennemetal, Inc. and requested that the Central Valley Water Board reconsider CAO No. R5-2013-0701. Dr. Karl Longley, Chair of the Central Valley Water Board, noted that he would consult with me as Board Counsel on the request.

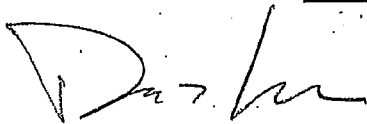
This letter serves to inform all interested persons concerning this request and the Board's Chair's ruling.

The Board Chair notes that reconsideration of a Cleanup and Abatement Order by the Central Valley Water Board is strictly discretionary and the State Water Board's Enforcement Policy notes in pertinent part, that "significant enforcement actions by a Regional Water Board Executive Officer may, in some circumstances, be reviewed by the Regional Water Board at the request of the discharger, though such review does not extend the time to petition the State Water Board."

In this particular case, the Board Chair has ruled to **GRANT** Kennemetal's request to reconsider CAO No. R5-2013-0701. As a result, the Central Valley Water Board will hold a hearing at a subsequent date to reconsider CAO No. R5-2013-0701 within the scope of issues presented in Petition Nos. A-2249(a) and A-2249(b). Although no hearing date has been firmly established at this time, it is anticipated that this matter will be heard during the December 2013 Board Meeting. At the present time, the designated parties have been identified as the Central Valley Water Board's Prosecution Team, Kennemetal, Inc. and Sunoco, Inc.

Given the pending nature of this adjudicatory proceeding, the Central Valley Water Board has split functions between the Prosecution Team who is responsible for prosecuting this matter in front of the Central Valley Water Board and an Advisory Team that provides neutral legal and technical advice to the Board members. Mr. Ken Landau and I serve as members of the Advisory Team for this matter. Additional information concerning the hearing will be provided when a Hearing Procedure is issued, most likely in September or October.

Additional questions of strictly a procedural nature may be addressed to me or Mr. Landau via email at dcoupe@waterboards.ca.gov or klandau@waterboards.ca.gov.



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Attorney III and Member of the Advisory Team

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[via US mail only]
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Environmental Office **[via US mail only]**
US Department of Interior
Regional Office
Jackson Center One
1111 Jackson Street, Suite 520
Oakland, CA 94607

cc: (Continued)

[via US mail only]

US Dept. of Interior DMEA
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Washington, DC 20240

[via US mail only]

California Department of
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Mr. Ross Atkinson **[via email only]**

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Exhibit 4

Adam Baas

From: Adam Baas
Sent: Friday, August 09, 2013 9:47 AM
To: 'Benedict, AnnaKathryn@Waterboards'
Subject: FW: Reconsideration of Cleanup and Abatement Order R5-2013-0701
Attachments: CAO R5-2013-0701.pdf

Hi, Anna Kathryn. I hope you are doing well. Do you have time today or early next week to discuss the attached correspondence. It appears that Sunoco will be going before the Regional Board in December. Thanks.

Adam P. Baas, Esq.
Edgcomb Law Group, LLP
One Post Street, Suite 2100
San Francisco, California 94104
T 415.692.8144 | F 415.399.1885
www.edgcomb-law.com

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From: Coupe, David@Waterboards [<mailto:David.Coupe@waterboards.ca.gov>]
Sent: Thursday, August 08, 2013 11:26 AM
To: Christopher Sanders (cms@eslawfirm.com); Adam Baas; John Edgcomb
Cc: rthomson@babstcalland.com; jonwactor@ww-envlaw.com; Okun, Lori@Waterboards; Creedon, Pamela@Waterboards; Landau, Ken@Waterboards; Atkinson, Ross@Waterboards; Tobias, Kathryn@Parks; Rodgers, Clay@Waterboards; Pulupa, Patrick@Waterboards; Wyels, Philip@Waterboards; Mayer, Alex@Waterboards
Subject: Reconsideration of Cleanup and Abatement Order R5-2013-0701

All:

Please see the attached letter concerning Kennemetal's Request for Reconsideration of Cleanup and Abatement Order No. R5-2013-0701.

David P. Coupe
Attorney III and Member of the Advisory Team
c/o San Francisco Bay Regional Water Quality Control Board
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Oakland, CA 94612
Phone: (510) 622-2306
Fax: (510) 622-2460
E-mail: dcoupe@waterboards.ca.gov

Exhibit 5

Adam Baas

From: Benedict, AnnaKathryn@Waterboards [AnnaKathryn.Benedict@waterboards.ca.gov]
Sent: Wednesday, August 21, 2013 11:19 PM
To: Tobias, Kathryn@Parks; Christopher Sanders (cms@eslawfirm.com); Adam Baas; Jon Wactor; Izzo, Victor@Waterboards; Atkinson, Ross@Waterboards; Altevogt, Andrew@Waterboards; Busby, Robert@Waterboards
Cc: Rob Campbell
Subject: Mt. Diablo Mercury Mine

Kathryn, Chris, Adam and Jon: I spoke with the Prosecution Team and we will be requesting a later hearing date to allow for discovery and briefing in the above-referenced matter. If you are willing to stipulate to a briefing schedule and later hearing date, we are willing to move the deadlines in the CAO.

I'm out of the office for the next few days, but upon my return I can send out a draft schedule and corresponding hearing dates. Once we have agreement, I will let the Regional Board's Advisory Team know of our proposal.

Thanks.

Anna Kathryn Benedict

Exhibit 6

Adam Baas

From: Benedict, AnnaKathryn@Waterboards [AnnaKathryn.Benedict@waterboards.ca.gov]
Sent: Monday, December 16, 2013 10:28 AM
To: Adam Baas; Christopher Sanders (cms@eslawfirm.com)
Subject: Mt. Diablo Hearing Procedures
Attachments: MtDiablo_HearingProcedures_March2014.docx

Adam and Chris: Attached please find the draft hearing procedures in the above-referenced matter. As I wasn't on the conference call and wasn't included in the follow-up emails from David Coupe I'm not sure if these were to be sent to all the Dischargers or just Sunoco and Kennametal. Please let me know. Also, in the future, if you wouldn't mind including me in any conference call/correspondence that involves due dates I would appreciate it.

Thanks.

Anna Kathryn Benedict
Senior Counsel-Office of Enforcement

Exhibit 7

Adam Baas

From: Adam Baas
Sent: Wednesday, December 18, 2013 4:20 PM
To: 'Benedict, AnnaKathryn@Waterboards'
Cc: Christopher Sanders (cms@eslawfirm.com)
Subject: Mt. Diablo CAO Hearing: March 27/28, 2014
Attachments: MtDiablo_HearingProcedures_March2014.docx

Anna Kathryn,

David Coupe's email below references an October 10th teleconference involving myself, Chris Sanders, and Cris Carrigan. During this teleconference, it was agreed that: the Prosecution Team would put together the first draft of the hearing procedures document for the March 2014 Regional Board hearing; the Prosecution Team would circulate that draft to the alleged Dischargers (Sunoco and Kennametal); and the parties would collectively provide a final draft to the Advisory Board in a timely manner (or "foreseeable future"). During that same call, Mr. Carrigan represented that the Prosecution Team would do its best to get Sunoco and Kennametal the first draft as soon as possible. On October 28th, you sent Mr. Sanders an email stating that Mr. Carrigan had relayed the details of our meeting to you and that you would be working on the draft hearing procedures during the first week of November. When we did not hear from you, I sent you an email on November 25th asking for a status report. You responded to my email on December 3rd, stating that you had been tied up on other matters and did not have an update at that time. We did not hear from you again until you provided us with the attached draft hearing procedures on December 16th.

With Christmas next week, the parties are now in a difficult position. The members of the Advisory Board are likely going to be unavailable during the upcoming holidays (and potentially not available until Monday, January 6th). Nevertheless, I am willing to do my best to red-line your draft before I leave the office this Friday – with the goal being to come to an agreement on a final draft before the first of the new year. Please be prepared to be flexible with the dates that you've proposed, however, so that the parties can accomplish this goal and maintain the March hearing date. For instance, your first proposed deadline for the parties to object to the hearing procedures and/or request Designated Party status is January 7th. This date will not work. Once the Advisory Board receives the document, it will have to review, approve, and circulate the final draft to the other RPs. The other RPs will then need time to object and/or request status. This notice and response period needs to be more than just a few days. In addition, your Evidence and Policy Statements schedule has each party producing only one week apart, which I do not believe either party had in mind when we agreed to extend the hearing date into March 2014. And, you have the Prosecution Team's first submittal on February 27th, when the parties discussed this submittal being at least 6-weeks in advance of the hearing. These are just a few comments after my cursory review. I'll provide our final comments in red-line form as soon as possible.

This being said, hopefully we can work cooperatively to come to an agreement in the next couple of weeks. Please let us know your availability to review our comments/edits. If you are able to review/approve our comments next week, we can schedule a call for the week of New Year's Eve and try to agree on a final document to give to the Advisory Board by January 2nd. This is an aggressive timeline, but given the circumstances we are willing to make the effort so long as it does not prejudice our client.

Regards,

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From: Coupe, David@Waterboards [mailto:David.Coupe@waterboards.ca.gov]
Sent: Monday, December 16, 2013 11:24 AM
To: Benedict, AnnaKathryn@Waterboards
Cc: Christopher Sanders (cms@eslawfirm.com); Adam Baas; Carrigan, Cris@Waterboards; Landau, Ken@Waterboards
Subject: FW: Today's Conference Call

Anna Kathryn:

In response to your inquiry earlier today, I am forwarding my latest email to the Parties concerning the Mt. Diablo matter back in October. As always, additional questions of strictly a procedural nature may be addressed to me and Mr. Landau and with a copy to all parties. With that said, please note that I will be out of the office from December 23 until January 6th.

David P. Coupe
Attorney III and Member of the Advisory Team
c/o San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
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E-mail: dcoupe@waterboards.ca.gov

From: Coupe, David@Waterboards
Sent: Thursday, October 10, 2013 11:32 AM
To: Christopher Sanders (cms@eslawfirm.com); abaas@edgcomb-law.com; Carrigan, Cris@Waterboards
Cc: Landau, Ken@Waterboards
Subject: Today's Conference Call

Mr. Sanders, Mr. Baas, and Mr. Carrigan:

This email memorializes an agreement among the parties reached on today's conference call that the hearing to reconsider CAO No. R5-2013-0701 will be scheduled for the March 27/28, 2014 Board Meeting. This email also memorializes an agreement among the parties reached on today's conference call that a hearing procedure will be drafted by the parties and submitted to the Advisory Team for its review and approval in consultation with the Board Chair. Although no firm date has been established to provide a draft hearing procedure, it is my understanding that a draft hearing procedure will be provided by the parties to the Advisory Team in the foreseeable future.

As always, questions of strictly a procedural nature may be sent to me and Mr. Landau via email with a copy to all parties.

David P. Coupe
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Exhibit 8

Adam Baas

From: Benedict, AnnaKathryn@Waterboards [AnnaKathryn.Benedict@waterboards.ca.gov]
Sent: Monday, January 06, 2014 5:05 PM
To: Coupe, David@Waterboards; Landau, Ken@Waterboards
Cc: Adam Baas; Christopher Sanders (cms@eslawfirm.com); Busby, Robert@Waterboards; Atkinson, Ross@Waterboards; Huggins, Jeff@Waterboards; Altevogt, Andrew@Waterboards
Subject: Mt Diablo Mine Draft Hearing Procedures
Attachments: MtDiablo_HearingProcedures_V2_010614_March 2014.docx

David and Ken: Attached please find the draft hearing procedures for the above-referenced matter. The Parties have reached an agreement on all but one aspect, Sunoco, Inc.'s and Kennametal, Inc.'s time limit for presenting evidence to the Board (page 4 of the Order). The Regional Board recommends each party be provided 20 minutes to present, which we believe will keep the parties focused on the issue at hand. Sunoco, Inc. and Kennametal, Inc. have requested 30 minutes.

In addition, per my email, once we know the procedure for dealing with the 2013 Order, the section title "Overview" can be revised to reflect your decision.

Thanks.

Anna Kathryn Benedict

Exhibit 9

Central Valley Regional Water Quality Control Board

HEARING PROCEDURE
FOR RECONSIDERATION OF CLEANUP AND ABATEMENT ORDER
R5-2013-0701

ISSUED TO
SUNOCO, INC., KENNAMETAL INC., et al.
Mt. Diablo Mercury Mine

Contra Costa County

SCHEDULED FOR March 27/28, 2014

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

Overview

On March 27/28, 2014, the Central Valley Regional Water Quality Control Board ("Board") will conduct a hearing to reconsider Cleanup and Abatement Order R5-2013-0701 ("CAO"). The Prosecution Team proposes that the Board affirm the CAO in its entirety, which requires the dischargers named in the CAO to investigate and clean up the Mount Diablo Mercury Mine site ("Site") in accordance with the guidelines and tasks set forth in the order. Sunoco, Inc. and Kennametal, Inc. have separately requested that they be removed from the CAO, arguing they have been erroneously named as dischargers. The hearing is currently scheduled to be conducted before the Board during its March 27/28, 2014 meeting.

The purpose of the hearing is to consider relevant evidence and testimony regarding the CAO. This CAO was previously issued by the Executive Officer on April 16, 2013. At a Board meeting on July 25, 2013, counsel for Kennametal requested the Board to hold a hearing on the issuance of this CAO. The Board by letter dated August 8, 2013 granted the request for the Board to reconsider the CAO. At this hearing, the Board will consider whether to affirm adoption of the CAO, whether to modify the CAO or remand the CAO to the Executive Officer, or whether to rescind the CAO. The public hearing will commence at 8:30 a.m. or as soon thereafter as practical, or as announced in the Board's meeting agenda. The meeting will be held at:

11020 Sun Center Drive, Suite 200, Rancho Cordova, California.

An agenda for the meeting will be issued at least ten days before the meeting and posted on the Board's web page at:

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

Hearing Procedure

The hearing will be conducted in accordance with this Hearing Procedure, which has been approved by the Board Chair for the adjudication of such matters, and the California Code of Regulations, title 23. The procedures governing adjudicatory hearings before the Central Valley Water Board may be found at California Code of Regulations, title 23, section 648 et seq., and are available at

<http://www.waterboards.ca.gov>

Copies will be provided upon request. Except as provided in Section 648(b) and herein, Chapter 5 of the Administrative Procedures Act (Gov. Code, § 11500 et seq.) does not apply to this hearing.

The parties shall attempt to resolve objections to this Hearing Procedure BEFORE submitting objections to the Advisory Team.

Separation of Prosecutorial and Advisory Functions

To help ensure the fairness and impartiality of this proceeding, the functions of those who will act in a prosecutorial role by presenting evidence for consideration by the Board (the "Prosecution Team") have been separated from those who will provide legal and technical advice to the Board (the "Advisory Team"). Members of the Advisory Team are: Ken Landau, Assistant Executive Officer, Alex MacDonald, Senior Water Resource Control Engineer, and David Coupe, Senior Staff Counsel, Office of Chief Counsel. Members of the Prosecution Team are: Pamela Creedon, Executive Officer, Robert Busby, Supervising Engineering Geologist, Andrew Altevogt, Assistant Executive Officer, Ross Atkinson, Associate Engineering Geologist, and Anna Kathryn Benedict, Senior Legal Counsel, Office of Enforcement.

Any members of the Advisory Team who normally supervise any members of the Prosecution Team are not acting as their supervisors in this proceeding, and vice versa. Pamela Creedon regularly advises the Central Valley Water Board in other, unrelated matters, but is not advising the Central Valley Water Board in this proceeding. Other members of the Prosecution Team act or have acted as advisors to the Central Valley Water Board in other, unrelated matters, but they are not advising the Central Valley Water Board in this proceeding. Members of the Prosecution Team have not had any ex parte communications with the members of the Central Valley Water Board or the Advisory Team regarding this proceeding.

Hearing Participants

Participants in this proceeding are designated as either "Designated Parties" or "Interested Persons." Designated Parties may present evidence and cross-examine witnesses and are subject to cross-examination. Interested Persons may present non-evidentiary policy statements, but may not cross-examine witnesses and are not subject to cross-examination. Interested Persons generally may not present evidence (e.g., photographs, eye-witness testimony, monitoring data). At the hearing, both Designated Parties and Interested Persons may be asked to respond to clarifying questions from the Central Valley Water Board, staff, or others, at the discretion of the Board Chair.

The following participants are hereby designated as **Designated Parties** in this proceeding:

1. **Central Valley Water Board Prosecution Team**
2. **Sunoco, Inc. and**
3. **Kennametal, Inc.**

Requesting Designated Party Status

Persons who wish to participate in the hearing as a Designated Party, and have not already been named as a Designated Party by this Hearing Procedure, must request designated party status by submitting a request in writing so that it is received no later than the deadline listed under "Important Deadlines" below. The request shall include an explanation of the basis for status as a Designated Party (i.e., how the issues to be addressed at the hearing affect the person, the need to present evidence or cross-examine witnesses), along with a statement explaining why the parties listed above do not adequately represent the person's interest. Any objections to these requests for designated party status must be submitted so that they are received no later than the deadline listed under "Important Deadlines" below.

Primary Contacts

Advisory Team:

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Prosecution Team:

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Anna Kathryn Benedict, Senior Staff Counsel
State Water Resources Control Board, Office of Enforcement
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Mailing Address: P.O. Box 100, Sacramento, CA 95812
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abenedict@waterboards.ca.gov

Designated Parties:

Sunoco, Inc.
Represented by Edgcomb Law Group LLP
John D. Edgcomb
Adam P. Baas
One Post Street, Suite 2100
San Francisco, California 94104
abaas@edgcomb-law.com

Kennemetal Inc.
Represented by Ellison Schnieder & Harris, L.L.P.
Christopher M. Sanders
2600 Capital Avenue, Suite 400
Sacramento, California 95816

cms@eslawfirm.com

Ex Parte Communications

Designated Parties and Interested Persons are forbidden from engaging in ex parte communications with a Board Member or a member of the Board's Advisory Team regarding this matter. An ex parte communication is a written or verbal communication related to the investigation, preparation, or adoption of the Cleanup and Abatement Order between a Designated Party or an Interested Person and a Board Member or a member of the Board's Advisory Team (see Gov. Code, § 11430.10 et seq.). However, if the communication is copied to all other persons (if written) or is made in a manner open to all other persons (if verbal), then the communication is not considered an ex parte communication. Communications regarding non-controversial procedural matters are also not considered ex parte communications and are not restricted.

Hearing Time Limits

To ensure that all participants have an opportunity to participate in the hearing, the following time limits shall apply: Sunoco, Inc. and Kennametal, Inc. will each have **30 minutes** to present evidence (including evidence presented by witnesses called by the Designated Party), to cross-examine witnesses (if warranted), and to provide a closing statement. The Prosecution shall have **1 hour** to present evidence (including evidence presented by witnesses called by the Designated Parties), to cross-examine witnesses (if warranted), and to provide a closing statement. Each Interested Person shall have 3 minutes to present a non-evidentiary policy statement. Participants with similar interests or comments are requested to make joint presentations, and participants are requested to avoid redundant comments. Participants who would like additional time must submit their request to the Advisory Team so that it is received no later than the deadline listed under "Important Deadlines" below. Additional time may be provided at the discretion of the Advisory Team (prior to the hearing) or the Board Chair (at the hearing) upon a showing that additional time is necessary. Such showing shall explain what testimony, comments, or legal argument requires extra time, and why it could not have been provided in writing by the applicable deadline.

A timer will be used, but will not run during Board questions or the responses to such questions, or during discussions of procedural issues.

Submission of Evidence and Policy Statements

The Prosecution Team and all other Designated Parties must submit the following information in advance of the hearing:

1. All evidence (other than witness testimony to be presented orally at the hearing) that the parties would like the Board to consider. Evidence and exhibits already in the public files of the Board may be submitted by reference, as long as the exhibits and their location are clearly identified in accordance with California Code of Regulations, title 23, section 648.3. Board members will not generally receive copies of materials incorporated by reference unless copies are provided, and the referenced materials are generally not posted on the Board's website.
2. All legal and technical arguments or analysis.
3. The name of each witness, if any, whom the parties intend to call at the hearing, the subject of each witness' proposed testimony, and the estimated time required by each witness to present direct testimony.
4. The qualifications of each expert witness, if any.

Prosecution Team: The Prosecution Team's information must include the legal and factual basis for its claims against Sunoco, Inc. and Kennametal, Inc. (and any additional Designated Party); a list of all evidence on which the Prosecution Team relies, which must include, at a minimum, all documents cited in the CAO, Staff Report, or other material submitted by the Prosecution Team; and the witness information required under items 3-4 for all witnesses, including Board staff, no later than the deadline listed under "Important Deadlines" below.

Designated Parties: All Designated Parties shall submit comments regarding the CAO, along with any additional supporting evidence not cited by the Prosecution Team, no later than the deadline listed under "Important Deadlines" below.

Rebuttal: Any Designated Party that would like to submit evidence, legal analysis, or policy statements to rebut information previously submitted by other Designated Parties shall submit this rebuttal information so that it is received no later than the deadline listed under "Important Deadlines" below. "Rebuttal" means evidence, analysis or comments offered to disprove or contradict other submissions. Rebuttal shall be limited to the scope of the materials previously submitted. Rebuttal information that is not responsive to information previously submitted may be excluded. Rebuttal information that is untimely may be excluded.

Copies: Board members will receive copies of all submitted materials. The Board Members' hard copies will be printed in black and white on 8.5"x11" paper from the Designated Parties' electronic copies. Designated Parties who are concerned about print quality or the size of all or part of their written materials should provide an extra nine paper copies for the Board Members. For voluminous submissions, Board Members may receive copies in electronic format only. Electronic copies will also be posted on the Board's website. Parties without access to computer equipment are strongly encouraged to have their materials scanned at a copy or mailing center. The Board will not reject materials solely for failure to provide electronic copies.

Other Matters: The Prosecution Team will prepare a summary agenda sheet (Summary Sheet) and will respond to all significant comments. The Summary Sheet and the responses shall clearly state that they were prepared by the Prosecution Team. The Summary Sheet and the responses will be posted online, as will revisions to the proposed Order.

Interested Persons: Interested Persons who would like to submit written non-evidentiary policy statements are encouraged to submit them to the Advisory Team as early as possible, but they must be received by the deadline listed under "Important Deadlines" to be included in the Board's agenda package. Interested Persons do not need to submit written comments in order to speak at the hearing.

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

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

Witnesses: All witnesses who have submitted written testimony shall appear at the hearing to affirm that the testimony is true and correct, and shall be available for cross-examination.

Request for Pre-hearing Conference

A Designated Party may request that a pre-hearing conference be held before the hearing in accordance with Water Code Section 13228.15. A pre-hearing conference may address any of the matters described in subdivision (b) of Government Code Section 11511.5. Request must contain a description of the issues Proposed to be discussed during that conference, and must be submitted to the Advisory Team, with a copy to all other designated parties, as early as practicable.

Evidentiary Objections

Any Designated Party objecting to written evidence or exhibits submitted by another Designated Party must submit a written objection to the Advisory Team and all other designated parties so that it is received by 5 p.m. on March 14. Any party responding to the objection must submit a written response to the Advisory Team and all other designated parties so that it is received by 5 p.m. on March 24, 2014. The Advisory Team will notify the parties about further action to be taken on such objections and when that action will be taken.

Evidentiary Documents and File

The CAO and related evidentiary documents are on file and may be inspected or copied at the Central Valley Water Board office at 11020 Sun Center Drive, Rancho Cordova, CA 95670. The CAO is hereby incorporated by reference into the administrative record for this Matter. "Related evidentiary documents" and comments received shall be considered part of the official administrative record for this hearing to the extent a designated party or interested person (as applicable) submit the document(s) or comments or incorporates them by reference, in accordance with "Submission of Evidence and Policy Statements," above. This file shall be considered part of the official administrative record for this hearing. All timely submittals received for this proceeding will be added to this file and will become a part of the administrative record, absent a contrary ruling by the Board's Chair. Many of these documents are also posted on-line at:

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

Although the web page is updated regularly, to assure access to the latest information, you may contact Ross Atkinson (contact information above) for assistance obtaining copies.

Questions

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

IMPORTANT DEADLINES

All required submissions must be received by 5:00 p.m. on the respective due date.

January 24, 2014	<ul style="list-style-type: none"> ▪ Objections due on Hearing Procedure. ▪ Deadline to request "Designated Party" status. <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
January 28, 2014	<ul style="list-style-type: none"> ▪ Deadline to submit opposition to requests for Designated Party status. <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
February 4, 2014	<ul style="list-style-type: none"> ▪ Advisory Team issues decision on requests for designated party status. ▪ Advisory Team issues decision on Hearing Procedure objections.
February 21, 2014	<ul style="list-style-type: none"> ▪ Prosecution Team's deadline for submission of information required under "Submission of Evidence and Policy Statements," above. <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons</p> <p><u>Electronic and Hard Copies to:</u> Advisory Team Primary Contact, Advisory Team Attorney</p>
March 14, 2014	<ul style="list-style-type: none"> ▪ Designated Parties' (other than Prosecution Team) deadline to submit all information required under "Submission of Evidence and Policy Statements" above. This includes all written comments regarding the CAO. ▪ Interested Persons' comments are due. <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
March 20, 2014	<ul style="list-style-type: none"> ▪ Prosecution Team shall submit its rebuttal evidence, any rebuttal to legal arguments and/or policy statements, and all evidentiary objections. ▪ Deadline to submit requests for additional time. ▪ If rebuttal evidence is submitted, all requests for additional time (to respond to the rebuttal at the hearing) must be made within 3 working days of <i>this</i> deadline. <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
March 24, 2014	<ul style="list-style-type: none"> ▪ All Designated Parties' deadline for responding to evidentiary objections.
March 25, 2014 [†]	<ul style="list-style-type: none"> ▪ Prosecution Team submits Summary Sheet and responses to comments. <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons</p> <p><u>Electronic and Hard Copies to:</u> Advisory Team Primary Contact, Advisory Team Attorney</p>
March 27/28	<ul style="list-style-type: none"> ▪ Hearing

[†] This deadline is set based on the date that the Board compiles the Board Members' agenda packages. Any material received after this deadline will not be included in the Board Members' agenda packages.

Exhibit 10

1 CRIS CARRIGAN (SBN 197045)
2 ANNA KATHRYN BENEDICT (SBN 221238)
3 OFFICE OF ENFORCEMENT
4 STATE WATER RESOURCES CONTROL BOARD
5 P.O. Box 100
6 Sacramento, California 95812-0100
7 Telephone: (916) 341-5272

8 BEFORE THE STATE WATER RESOURCES CONTROL BOARD
9 STATE OF CALIFORNIA

10 In the Matter of the Investigation of:
11 Mt. Diablo Mercury Mines

12) SUBPOENA FOR RECORDS AND
13) DOCUMENTS
14) (California Water Code § 183,
15) California Government Code §
16) 11181)

17 TO: **VIA OVERNIGHT MAIL**
18 Adam Bass, Esq.
19 John D. Edgcomb, Esq.
20 Edgcomb Law Group
21 One Post Street
22 Suite 2100
23 San Francisco, CA 94104

VIA CERTIFIED MAIL NO.
7013 0600 0001 4936 7436
Lisa A. Runyon, Esq., Sr. Counsel
Sunoco, Inc.
1735 Market Street, Suite LL
Philadelphia, PA 19103-7583

24 **NOTICE:**

- 25 () You are served as an individual.
26 () You are served as (or on behalf of) the person
27 doing business under the fictitious name
28 of
(x) You are served on behalf of: **Sunoco, Inc.**

Pursuant to the powers conferred by California Water Code Section 183 and
Government Code Sections 11180 et seq.:

SUNOCO, INC. IS COMMANDED to produce the papers, books, records and
documents in your possession or under your control described below in connection with

1 the above-titled proceeding by no later than **March 14, 2014**. Documents must be sent
2 to: Anna Kathryn Benedict, Office of Enforcement, State Water Resources Control Board,
3 P.O. Box 100, Sacramento, CA 95812-0100.

4 You may seek the advice of an attorney in any matter connected with this
5 subpoena. You should consult your attorney promptly so that any problems concerning
6 your production of documents may be resolved within the time required by this subpoena.

7 **FAILURE TO COMPLY WITH THE COMMANDS OF THIS SUBPOENA WILL**
8 **SUBJECT YOU TO THE PROCEEDINGS AND PENALTIES PROVIDED BY LAW.**

9 **DEFINITIONS**

10 Definitions for industry or trade terms contained herein are to be construed
11 broadly. Where the industry or trade definition set forth herein does not coincide
12 precisely with your definition, the question, inquiry or production request should be
13 responded to or answered by using the definition which you apply and/or recognize in
14 your usage of the term, further documenting your definition in the response. Non-industry
15 or non-trade definitions should be applied as defined herein.

16 1. The term "COMMUNICATION" or "COMMUNICATIONS" means every
17 disclosure, transfer, exchange or transmission of information, whether oral or written and
18 whether face to face or by telecommunications, computer, mail, telecopier or otherwise.

19 2. The terms "RELATING TO" or "RELATE TO" includes referring to, alluding
20 to, responding to, concerning, connected with, commenting on, in respect of, about,
21 regarding, discussing, showing, describing, mentioning, reflecting, analyzing, constituting,
22 evidencing, or pertaining to.

23 3. a. The term "DOCUMENT" means a document whose existence is
24 known to you, your employees, superiors, representatives or assigns, regardless of its
25 location or origin, including the original and all non-identical copies, whether written,
26 printed or recorded, including, with limitations, contracts, agreements, leases, receipts,
27 invoices, payment vouchers, purchase orders, books, booklets, brochures, reports,
28 notices, announcements, minutes and other communications, including inter and intra-

1 office communications, studies, analyses, maps, charts, tables, questionnaires, indices,
2 telegrams, messages (including reports of telephone conversations and conferences),
3 tapes, letters, electronic mail, notes, records, drafts, proposals, authorizations,
4 negotiations, canceled checks, financial statements, deposit slips, bank drafts, books of
5 account, summaries, reports, tests, projections, studies, charts, notebooks, worksheets,
6 recordings, calendars, or other materials which are written, recorded, printed, typed, or
7 transcribed. "DOCUMENT" also means data sheets or data processing cards, tapes,
8 films or graphic matter or materials on computer magnetic diskettes or tapes,
9 electronically or magnetically-stored data (including data stored on "hard," "floppy" or
10 "micro-floppy" disks or data stored in data base systems), photographs, videotapes or any
11 other matter of any kind or nature however produced or reproduced and each copy of any
12 of the foregoing which is not identical because of margin notations or otherwise. If any
13 such documents were, but no longer are, in your possession or control, state what
14 disposition was made of them and when.

15 b. The term "DOCUMENT" shall also include all documents necessary
16 to interpret, translate, decode or understand any other document requested or produced.
17 If a form of document (i.e., magnetic tape) cannot be read, such form must be converted
18 to a paper document that can be read.

19 c. You are required to produce not only the original or an exact copy of
20 the original of all writings responsive to any of the following numbered requests, but also
21 all copies of such writings which bear any notes or markings not found on the originals
22 and all preliminary, intermediate, final and revised drafts of such writings.

23 4. The term "SUNOCO, INC." means SUNOCO, INC., its officers, employees,
24 agents, and representatives of the foregoing.

25 5. The term the "STATE OF CALIFORNIA" means all land within the
26 geopolitical boundaries of the State of California.

27 6. The terms "AND" and "OR" have both conjunctive and disjunctive meanings.

28 7. The terms "YOU" or "YOUR" refer to SUNOCO, INC. and any of its
predecessors, successors, assigns, agents, employees, officers, former employees,

1 former officers, directors, affiliates, partners, subsidiaries, parent corporations, attorneys,
2 or any other persons or entities acting on its behalf.

3 8. The term "Cordero Mining Company" refers to Cordero Mining Company
4 and any of its predecessors, successors, assigns, agents, employees, officers, former
5 employees, former officers, directors, affiliates, partners, subsidiaries, parent
6 corporations, attorneys, or any other person or entities acting on its behalf.

7 **INSTRUCTIONS**

8 1. YOUR response to the subpoena should include a declaration or affidavit. It
9 should state that a diligent search for all requested DOCUMENTS has been conducted
10 and that the affiant or declarant was in charge of the search or otherwise monitored and
11 reviewed the search sufficiently to be able to represent under oath that such a search was
12 conducted. It should be signed under oath by the person most knowledgeable about the
13 DOCUMENTS and YOUR efforts to comply with the subpoena. If different people are the
14 most knowledgeable about portions of the search (e.g., one person is most
15 knowledgeable about DOCUMENTS contained in computer media and a different person
16 is most knowledgeable about DOCUMENTS contained on paper) each should sign an
17 affidavit or declaration identifying the category in the request for DOCUMENTS for which
18 that person is the most knowledgeable.

19 2. YOUR response to the subpoena should meet the requirements of
20 California Code of Civil Procedure section 2031.210.

21 3. Unless otherwise indicated, for any DOCUMENT stored in a computer,
22 including all electronic mail messages, YOU should produce the DOCUMENT in the
23 original electronic file format in which it was created (e.g., Microsoft email should be
24 provided in its original format, which would have the .pst suffix, not in a tif file;
25 spreadsheets should be in their original file form, such as an Excel file and
26 word-processed DOCUMENTS should be in their original file format, such as a Word or
27 WordPerfect file), together with instructions and all other materials necessary to use or
28 interpret the data. Electronic mail messages should be provided, even if only available on
backup or archive tapes or disks. Computer media should be accompanied by (a) an

1 identification of the generally available software needed to open and view the
2 DOCUMENTS or (b) a copy of the software needed to open and view the DOCUMENT.
3 Note, however, that if a print-out from a computer DOCUMENT is a non-identical copy of
4 the electronic form in which it was created (non-identical as described in the definition of
5 "DOCUMENT," by way of example, but not limitation, because it has a signature,
6 handwritten notation, or other mark or attachment not included in the computer
7 DOCUMENT), both the electronic form in which the DOCUMENT was created and the
8 original print-out should be produced.

9 4. For each DOCUMENT contained in an audio or video medium, YOU should
10 provide both the tape, disk or other device from which the audio or video can be played
11 and the transcript of the DOCUMENT.

12 5. For all DOCUMENTS YOU do not produce in the original, as defined in
13 Evidence Code section 255, YOU may submit copies (black and white copies if the
14 original was in black and white, color copies if the original was in color, and, if the original
15 was in electronic format, in the same electronic medium as the original) in lieu of original
16 DOCUMENTS provided that such copies are accompanied by an affidavit of an officer of
17 THE COMPANY stating that the copies of all three types of DOCUMENTS are true,
18 correct, and complete copies of the original DOCUMENTS. If there is in YOUR
19 possession, custody or control no original, but only a copy or photographic record thereof,
20 then YOU should produce a true and legible copy of each such DOCUMENT. The
21 accompanying affidavit should state that the DOCUMENT is only a copy or photographic
22 record and not the original.

23 6. If a DOCUMENT is responsive to this subpoena and is in YOUR control, but
24 is not in YOUR possession or custody, in addition to obtaining and producing the
25 DOCUMENT, identify the person who had possession or custody of the DOCUMENT,
26 their telephone number and current business and residence addresses.

27 7. If any DOCUMENT subpoenaed is no longer in YOUR possession,
28 custody, control or care, YOU should provide a written statement identifying the
DOCUMENT with specificity, stating whether it is lost or missing, has been destroyed, has

1 been transferred to others, or has otherwise been disposed of. The written statement
2 should also identify the person who disposed of the DOCUMENT, explain the
3 circumstances and authorization for the disposition and the approximate date of the
4 disposition of the DOCUMENT. If there are no DOCUMENTS responsive to a document
5 request, as to each such document request, YOU should include a statement to that
6 effect in the accompanying declaration or affidavit.

7 8. DOCUMENTS provided in response to this subpoena should be complete
8 and, unless privileged, un-redacted, submitted as found in YOUR files (e.g.,
9 DOCUMENTS that in their original condition were stapled, clipped, attached as a "post-it,"
10 or otherwise fastened together shall be produced in the same form).

11 9. Each DOCUMENT produced pursuant to this subpoena should be identified
12 according to the category in the subpoena to which it is responsive. In lieu of indicating
13 on each DOCUMENT the category to which it is responsive, on the date set for
14 production, YOU may instead provide an index if YOU provide it in both paper and in
15 electronic form (such as a computerized spread sheet in Excel or a Word or WordPerfect
16 DOCUMENT set up in a table format) of all DOCUMENTS YOU produce, as long as this
17 index shows by document control number the request(s) to which each DOCUMENT or
18 group of DOCUMENTS is responsive. Responsive DOCUMENTS from each person's
19 files should be produced together, in one box or in consecutive boxes, or on one disk or
20 consecutive disks. Mark each page of a paper DOCUMENT and each tangible thing
21 containing audio, video, computer or other electronic DOCUMENTS (e.g. cassette, disk,
22 tape or CD) with corporate identification and consecutive document control numbers (e.g.,
23 S.I., 00001, S.I. CD 001, S.I. audio tape 001). Number each box of DOCUMENTS
24 produced and mark each with the name(s) of the person(s) whose files are contained
25 therein, the requests(s) to which they are responsive, and the document control numbers
26 contained therein.

27 10. For data produced in spreadsheets or tables, include in the declaration or
28 affidavit the identification of the fields and codes and a description of the information
contained in each coded field.

1 11. The document requests contained in this subpoena should be deemed to
2 include a request for all relevant DOCUMENTS in the personal files, including but not
3 limited to files contained on laptops, palm devices, home computers and home files of all
4 YOUR officers, employees, accountants, agents and representatives, including sales
5 agents who are independent contractors, and unless privileged, attorneys.

6 12. If any DOCUMENTS are withheld from production based on a claim of
7 privilege, provide a log under oath by the affiant or declarant, which includes each
8 DOCUMENT'S authors, addressees, date, a description of each DOCUMENT, all
9 recipients of the original, and any copies, and the request(s) of this subpoena to which
10 the DOCUMENT is responsive. Attachments to a DOCUMENT should be identified as
11 such and entered separately on the log. For each author, addressee, and recipient, state
12 the person's full name, title, and employer or firm, and denote all attorneys with an
13 asterisk. To the extent the claim of privilege relates to any employee, agent,
14 representative, or outside attorney, identify the person's name, division, and organization.
15 Include the number of pages of each DOCUMENT and in the description of the
16 DOCUMENT, provide sufficient information to identify its general subject matter without
17 revealing information over which a privilege is claimed. For each DOCUMENT withheld
18 under a claim that it constitutes or contains attorney work product, also state whether
19 YOU assert that the DOCUMENT was prepared in anticipation of litigation or for trial and,
20 if so, identify the anticipated litigation or trial on which the assertion is based. Submit all
21 non-privileged portions of any responsive DOCUMENT (including non-privileged or
22 redactable attachments) for which a claim of privilege is asserted (except where the only
23 non-privileged information has already been produced in response to this instruction),
24 noting where redactions in the DOCUMENT have been made. DOCUMENTS authored
25 by outside lawyers representing YOU that were not directly or indirectly furnished to YOU
26 or any third-party, such as internal law firm memoranda, may be omitted from the log.

26 13. Whenever necessary to bring within the scope of this subpoena
27 DOCUMENTS that might otherwise be construed as outside its scope:
28

1 a. the use of the verb in any tense shall be construed as the use of that
2 verb in all other tenses;

3 b. the use of a word in its singular form shall be deemed to include
4 within its use the plural form as well; and

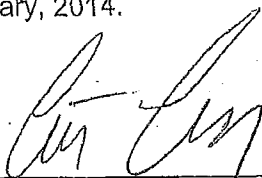
5 c. the use of the word in its plural form shall be deemed to include
6 within its use the singular form as well.

7 **DOCUMENTS TO BE PRODUCED**

8 This subpoena commands production of the original of each and every
9 DOCUMENT now or at any time in the possession, custody or control of you or SUNOCO,
10 INC. without regard to the person(s) by whom or for whom said DOCUMENTS were
11 prepared, including, but not limited to, all DOCUMENTS in the personal, business, or
12 other files of all present or former officers, directors, trustees, agents, employees,
13 attorneys, and accountants of SUNOCO, INC., which refers or relates to the following
14 subject:

15 1. Provide all DOCUMENTS that refer or RELATE TO Cordero Mining
16 Company, including any contact with or connection to SUNOCO, INC.

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18 Given under my hand this 11^m day of February, 2014.

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22 _____
23 Cris Carrigan
24 Director, Office of Enforcement
25 State Water Resources Control Board
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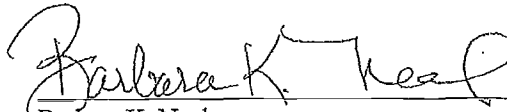
PROOF OF SERVICE

I, Barbara K. Neal, declare that I am over 18 years of age. I am employed in Sacramento County at 1001 I Street, Sacramento, CA 95814. My mailing address is P.O. Box 100, Sacramento, California 95812-0100. On this date, I served the within documents:

SUBPOENA FOR RECORDS AND DOCUMENTS

X	BY FEDERAL EXPRESS: I caused the original of the above-referenced document to be sent via Federal Express Overnight Delivery (Tracking No. 8037 8693 3790) on February 11, 2014 to Adam Bass, Esq., Edgcomb Law Group, One Post Street, Suite 2100, San Francisco, California 94104.
X	BY CERTIFIED MAIL: I am readily familiar with my employer's practice for the collection and processing of mail. Under that practice, I caused an envelope addressed to Lisa A. Runyon, Esq., Senior Counsel, Sunoco, Inc. 1735 Market Street, Suite LL, Philadelphia, PA 19103-7583, which contained a copy of the above-referenced document to be deposited with the U.S. Postal Service, with first class postage thereon fully prepaid, and Domestic Return Receipt No. 7013 0600 0001 4936 7436 attached, in the ordinary course of business.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on February 11, 2014 at Sacramento, California.



Barbara K. Neal

Exhibit 11

March 14, 2014

VIA FEDEX AND ELECTRONIC MAIL

Anna Kathryn Benedict, Esq.
Senior Staff Counsel
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814-2828

**RE: February 11, 2014, State Board Subpoena for Documents and Records
Mount Diablo Mercury Mine, Contra Costa County, CA**

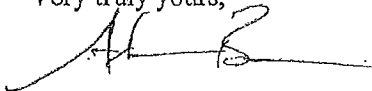
Dear Ms. Benedict:

On behalf of Sunoco, Inc. ("Sunoco"), please find enclosed:

1. Sunoco's Objections and Response to the State Water Resources Control Board's Subpoena for Documents and Records dated February 11, 2014;
2. A Privilege Log; and
3. A CD ROM containing Sunoco's production of documents (bates range SUN_MD0000001 to 0001584). The CD ROM is being sent *via* Federal Express only.

If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,



Adam Baas
Encls.

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Edgcomb Law Group
JOHN D. EDGCOMB (SBN 112275)
ADAM P. BAAS (SBN 220464)
One Post Street, Suite 2100
San Francisco, California 94104
Telephone: (415) 399-1555
Facsimile: (415) 399-1885
jedgcomb@edgcomb-law.com

Attorneys for Designated Party
SUNOCO, INC.

BEFORE THE STATE WATER RESOURCES CONTROL BOARD
STATE OF CALIFORNIA

In the Matter of:

MOUNT DIABLO MERCURY MINE

**SUNOCO, INC.'S OBJECTIONS
AND RESPONSES TO THE STATE
BOARD'S SUBPOENA FOR
RECORDS AND DOCUMENTS**

SUNOCO, INC. (hereinafter "Sunoco") herein provides its Objections and Response to the STATE WATER RESOURCES CONTROL BOARD'S (hereinafter "State Board") February 11, 2014, Subpoena for Records and Documents directed at Sunoco in relation to the Mount Diablo Mercury Mine, Contra Costa County, California.

1
2
3 **OBJECTIONS**

4 1. Sunoco objects to the Subpoena to the extent that it calls for
5 documents protected by the attorney-client privilege, the joint defense privilege,
6 the investigative privilege, the work product doctrine or any other discovery
7 exemption. In particular, Sunoco objects to the Subpoena seeking "all documents"
8 as potentially subject to the attorney-client privilege and/or work product doctrine.
9 Sunoco will not produce documents that fall within any of these categories.
10 Inadvertent disclosure of such a document shall not waive the applicable protection
11 or privilege.

12 2. Sunoco objects to the Subpoena on the grounds that it is overly broad,
13 unduly burdensome, and does not reasonably particularize each category of item
14 sought pursuant to California Code of Civil Procedure. In particular, the Subpoena
15 does not: limit the scope of the documents sought to transactions related to the
16 State of California; limit the subject matter of the documents sought to those which
17 reasonably relate to the above captioned action (namely the Mt. Diablo Mercury
18 Mine site, Contra Costa County, California); and limit the date range of the
19 documents sought.

20 3. Sunoco objects to the Subpoena to the extent that it seeks
21 Electronically Stored Information (ESI). The Subpoena is overly broad, making
22 any search for, review, and production of accessible ESI (if it exists, which it likely
23 does not) unduly burdensome.

24 4. Sunoco objects to the Subpoena on the grounds that it calls for
25 documents that are not presently in Sunoco's possession, custody, or control.

26 5. Sunoco objects to the Subpoena to the extent that it seeks documents
27 that would disclose trade secrets or other proprietary or other competitively
28 sensitive business information, or that may be protected by a right of privacy under

1 the United States Constitution, Article I of the Constitution of the State of
2 California, or any other applicable law. Sunoco reserves the right to condition
3 production of trade secret or proprietary documents on the issuance of a Protective
4 Order.

5 6. Sunoco objects to the Subpoena to the extent that it could be
6 interpreted as calling for documents that were not generated, maintained or
7 received in the ordinary course of Sunoco's business. Sunoco will construe the
8 Subpoena as not seeking any such documents.

9 7. Sunoco objects to the Subpoena as unduly burdensome to the extent it
10 seeks production of documents that are already in the State Board's possession.

11 8. Sunoco objects to the Subpoena as unduly burdensome to the extent it
12 seeks production of documents equally available to Sunoco and the State Board.

13 9. Sunoco objects to the Subpoena to the extent that it seeks information
14 or documents beyond the scope of or in violation of the California Code of Civil
15 Procedure, California Water Code, or the California Government Code, or
16 otherwise purports to require Sunoco to do any act not required of it under these
17 Codes.

18 10. Sunoco objects to the Subpoena to the extent that it seeks documents
19 that are not relevant to the subject matter of the above captioned matter, and are
20 not reasonably calculated to lead to the discovery of admissible evidence.

21 11. The production of any documents does not constitute an admission
22 that any of those documents were in Sunoco's possession, custody, or control at
23 any particular point in time other than on the date of production.
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RESPONSE

Subject to the Objections set forth above and incorporated herein as if set forth in full in this response, and without waiving any rights related to same, Sunoco directs Plaintiff to the CD ROM enclosed herein, containing documents with a bates range of SUN_MD0000001 to 0001584.

Within this production set are historical tax records from the Nevada Corporation, Cordero Mining Company, as well as internal correspondence from the Delaware Corporation, Sun Oil Company. Sunoco believes that this set of material may be proprietary and asks that the State Board refrain from making this set of documents available for public review without first contacting Sunoco's Outside Counsel Adam P. Baas (contact information above).

This Response is given without prejudice to Sunoco's right to produce any subsequently discovered documents. Sunoco reserves its right to supplement and/or amend its response as additional documents are discovered, analyses are made, and investigation and research are completed. Pursuant to the Subpoena Instructions, a privilege log is attached hereto.

DATED: March 14, 2014

EDGCOMB LAW GROUP LLP

By: 

Adam Baas, Esq.
Attorneys for SUNOCO

Exhibit 12

March 14, 2014

VIA HAND-DELIVERY

Anna Kathryn Benedict, Esq.
Senior Staff Counsel
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814-2828

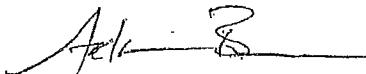
Ken Landau
Assistant Executive Officer
Central Valley Regional Water Quality Control Bd.
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670-6114

**RE: Mount Diablo Mercury Mine, Contra Costa County, CA
Reconsideration of Cleanup and Abatement Order No. R5-2013-0701**

Dear Ms. Benedict and Mr. Landau:

Pursuant to the Hearing Procedure for Reconsideration of Cleanup and Abatement Order R5-2013-0701 ("CAO"), Designated Party Sunoco, Inc. ("Sunoco") hereby submits Sunoco's Submission of Evidence and Policy Statement to the Central Valley Regional Water Quality Control Board ("Regional Board") in support of removing Sunoco from the list of Dischargers named in the CAO. Enclosed herein are: 1) Sunoco's Hearing Brief; 2) Sunoco's Evidence List and Exhibits; and 3) Sunoco's Written Comments Regarding the CAO. The hearing in this matter is scheduled for March 27/28, 2014.

Very truly yours,



Adam Baas
Encls.

cc: All Designated Parties and Interested Parties
(via electronic mail only)

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5 Attorneys for Designated Party
6 SUNOCO, INC.

7
8 CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD
9 STATE OF CALIFORNIA

10
11 In the Matter of:

12
13 RECONSIDERATION OF CLEANUP
AND ABATEMENT ORDER R5-2013-
14 0701, MOUNT DIABLO MINE,
15 CONTRA COSTA COUNTY, DATED
16 APRIL 16, 2013

**DECLARATION OF JOHN D.
EDGCOMB IN SUPPORT OF
SUNOCO, INC.'S OPPOSITION
TO THE PROSECUTION TEAM'S
MOTION IN LIMINE**

Hearing Date: June 4/5, 2014

17
18
19
20
21 I, the undersigned John D. Edgcomb, declare as follows:

22 1. I am an attorney admitted to practice law in the State of
23 California and am a Partner at the Edgcomb Law Group ("ELG"). ELG is counsel
24 for Designated Party Sunoco, Inc. ("Sunoco") in connection with the Central Valley
25 Regional Water Quality Control Board's ("Regional Board") Reconsideration of
26 Cleanup and Abatement Order No. R5-2013-0701, issued on April 16, 2013
27 ("CAO"). I am aware that the reconsideration hearing is currently scheduled for
28 June 4/5, 2014.

1 2. I have personal knowledge of the facts set forth herein or am
2 familiar with such facts from: 1) my personal involvement in this matter; or 2) my
3 review of the files and records obtained from public agencies and other public
4 sources of information.

5 3. On January 20, 2012, in advance of an in-person meeting to
6 discuss, in part, Sunoco's alleged liability for the mercury contamination associated
7 with the Mount Diablo Mercury Mine site, Contra Costa County, California
8 ("Site"), I sent a letter to State Water Resources Control Board ("State Board"),
9 Senior Staff Counsel, Julie Macedo, Esq., with a courtesy copy to Regional Board
10 representative Victor Izzo, *et al.* Attached hereto as **Exhibit 1** is a true and correct
11 copy of the January 20, 2012, letter ("Letter").

12 4. The Letter set forth, among others things, Sunoco's corporate
13 law argument that there "is no legal basis for the Regional Board to ... attribute
14 Cordero liability at the Site, if any, to Sunoco" because "a former shareholder
15 cannot be held liable for Cordero's Site actions..." ("Sunoco's Corporate Law
16 Argument"). Sunoco's Corporate Law Argument was support by the following
17 facts:

18 Cordero was organized under Nevada law on March 4,
19 1941. Cordero briefly leased the Site and conducted
20 limited operations there between late 1954 and early
21 1956. Effective as of November 18, 1975, long after
22 Cordero operations at the Site were completed, Cordero
23 was dissolved as a corporate entity, as acknowledged by
24 the Nevada Secretary of State. It is our understanding
25 that Cordero was a wholly-owned subsidiary of Sun Oil
26 Company (Delaware) when Cordero dissolved in 1975.

27 5. On January 24, 2012, I participated in an in-person meeting with
28 representatives from the State Board Office of Enforcement, the Regional Board,
and Sunoco at the Regional Board's offices in Rancho Cordero, California (the

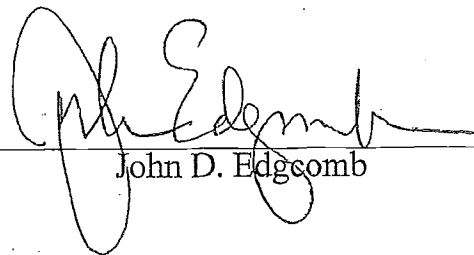
1 "Meeting"). Present at that Meeting were, among others, Ms. Macedo and Mr.
2 Izzo.

3 6. During the Meeting, Ms. Macedo responded to the Letter. My
4 understanding from Ms. Macedo's response was that: the State and Regional
5 Boards rejected Sunoco's Corporate Law Argument; the State Board has a long
6 history of rejecting such arguments; and Ms. Macedo was confident that Sunoco's
7 anticipated petition for review and rescission of the CAO to the State Board would
8 be denied.

9
10 I declare under penalty of perjury under the laws of the State of California
11 and the United States of America that the foregoing is true and correct.

12
13 Executed this 24th day of March, 2014 in San Francisco, California,

14
15
16 By: _____



John D. Edgcomb

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Exhibit 1

EDGCOMB LAW GROUP

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San Francisco, California 94104
415.399.1555 direct
415.399.1885 fax
jedgcomb@edgcomb-law.com

January 20, 2012

BY EMAIL & U.S. MAIL

Julie Macedo, Esq.
State Water Resources Control Board
Senior Staff Counsel, Office of Enforcement
1001 "I" Street, 16th Floor
P.O. Box 100
Sacramento, CA 95814

Dear Ms. Macedo:

In advance of the January 24, 2012 meeting between Sunoco, Inc. (R&M) ("Sunoco") and the Central Valley Regional Water Quality Control Board ("Regional Board") concerning the December 7, 2011 *Additional Characterization Report, Mount Diablo Mercury Mine* ("Site") prepared by Sunoco's consultant SGI, we are bringing to your attention another issue we would like to discuss at that meeting.

Specifically, our ongoing investigation into the corporate relationship between Cordero Mining Company ("Cordero") and Sunoco has determined there is no legal basis for the Regional Board to pursue Site related claims against Cordero, or to attribute Cordero liability at the Site, if any, to Sunoco.

The relevant background facts may be summarized as follows. Cordero was organized under Nevada law on March 4, 1941. Cordero briefly leased the Site and conducted limited operations there between late 1954 and early 1956. Effective as of November 18, 1975, long after Cordero operations at the Site were completed, Cordero was dissolved as a corporate entity, as acknowledged by the Nevada Secretary of State. It is our understanding that Cordero was a wholly-owned subsidiary of Sun Oil Company (Delaware) when Cordero dissolved in 1975.

Nevada law governs the capacity of Cordero, and its former shareholder, to be pursued for Cordero's Site actions. The California Corporations Code does not apply to foreign entities such as Cordero (a dissolved Nevada corporation). *See Cal. Corp. Code § 162* ("Corporation," unless otherwise expressly provided, refers only to a corporation organized under this division or a corporation subject to this division under the provisions of subdivision (a) of Section 102.")

Julie Macedo, Esq.
State Water Resources Control Board
Re: Sunoco Non-Liability
January 20, 2012

Nevada's corporate capacity statute provides that claims against a dissolved corporation relating to pre-dissolution acts survive only for a period of two years following the date of dissolution. NRS 78.595 ("The dissolution of a corporation does not impair any remedy or cause of action available to or against it or its directors, officers or shareholders arising before its dissolution and commenced within two years after the date of the dissolution.") Further, effective June 16, 2011, Section 15 of Nevada Senate Bill 405 enacted a provision reaffirming the limited liability of stockholders of a dissolved corporation:

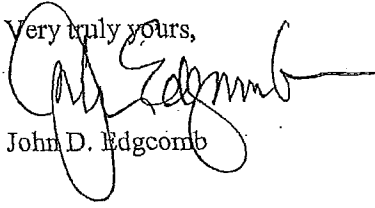
"2. A stockholder of a corporation dissolved pursuant to an NRS 78.580 or whose period of corporate existence has expired, the assets of which were distributed pursuant to an NRS 78.590, is not liable for any claim against the corporation on which an action, suit or proceeding is not begun before the expiration of the period described in NRS 78.585."

As noted above, Cordero was dissolved as of November 18, 1975 and lacked the capacity to be sued two years later (November 18, 1977). Therefore, Cordero cannot be a liable party in regards to the Site. For the same reason, and also pursuant to Section 15 of Nevada Senate Bill 405, a former shareholder of Cordero cannot be held liable for Cordero's Site actions either.

A recent decision by the United States District Court for the District of Nevada, *Assurance Co. of Am. v. Campbell Concrete of Nev., Inc.*, 2011 U.S. Dist. LEXIS 145845 (D. Nev. Dec. 19, 2011), supports the non-liability under Nevada law of Cordero's former shareholder with respect to claims arising post-dissolution as well. *See Assurance, supra* (applying Nevada law, grants motion to dismiss filed by defendant shareholder of a dissolved Nevada corporation against which post-dissolution claims had been filed).

We look forward to discussing with you the technical and legal issues related to the Site on January 24, 2012. Please let us know if you have any questions regarding the above in advance of the meeting.

Very truly yours,


John D. Edgcomb

cc (via email only):

V. Izzo
J. Freudenberg
S. Cullinan
B. Morse

CHARACTERIZATION REPORT

**Mount Diablo Mercury Mine
2430 Morgan Territory Road
Contra Costa County, California**

01-SUN-050

Prepared For:



10 Industrial Highway, MS4
Lester, PA 19029

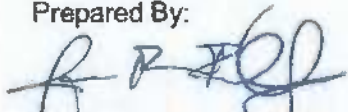
Prepared By:



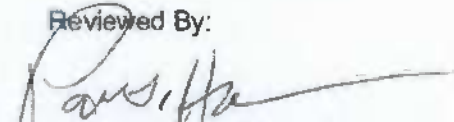
3451C Vincent Road
Pleasant Hill, CA 94619

August 2, 2010

Prepared By:


Jon R. Philipp, P.G., C.Hg.
Senior Hydrogeologist

Reviewed By:


Paul D. Horton, P.G., C.Hg.
Principal Hydrogeologist

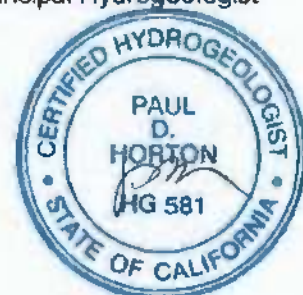


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1.0 INTRODUCTION

The Source Group, Inc. (SGI) has conducted a characterization of conditions at the former Mount Diablo Mercury Mine in Contra Costa County, California (the Site, Figure 1-1) on behalf of Sunoco Inc. (Sunoco). This characterization was conducted in order to satisfy, in part, the requirements of the California Regional Water Quality Control Board (CRWQCB) in their Revised Technical Reporting Order R5-2009-0869 (Rev. Order) of December 30, 2009.

This Characterization Report (Report) provides details (including the results) of the work conducted by SGI on behalf of Sunoco that included a comprehensive review of existing site data and conditions, field surveys, and two surface water sampling events across the Mine Site and the Dunn Creek drainage.

The Report presents a complete discussion of current site conditions, field sampling and analyses, a discussion of data gaps and future work, and is organized into the following sections:

- Section 2.0 Site Background;
- Section 3.0 Field Investigation and Sampling;
- Section 4.0 Investigation Results;
- Section 5.0 Investigation Summary and Conclusions; and
- Section 6.0 Data Gaps and Future Work.

A list of references is provided in Section 7.0.

2.0 SITE BACKGROUND

2.1 Location and Current Use

The former Mount Diablo Mercury Mine (Mine or Site) is located in an unincorporated area of Contra Costa County, California at the northeastern base of Mount Diablo. The Mine and the historic working areas of the Mine are generally described as the 80 acres of land on the southwest quadrant of the intersection of Marsh Creek Road and Morgan Territory Road as shown on Figure 1-1. The Mine is adjoined to the south and west by lands of Mount Diablo State Park and to the north and east by Marsh Creek Road and Morgan Territory Road.

We understand the Mine has been closed since around 1969. Most assay and process equipment have been removed from the Site. The Site still retains some abandoned wood structures that were part of the facility operations (Figure 2-1, aerial photograph of Mine). The Site is situated at an elevation of approximately 700 to 1100 feet above mean sea level (msl). Currently the property is used by Site owners Jack & Carolyn Wessman and their lessees for residential purposes and cattle ranching.

2.2 Ownership and Operational History

The first shaft on what became the Mount Diablo Mine Site was sunk by a Mr. Welch in about 1863. Mr. Welch encountered ore at 37 feet below ground where "both cinnabar and native mercury could be obtained by panning the soil removed". After a short period of commercial production between 1875 and 1877, the Mine was relatively idle until 1930 when Mr. Vic Blomberg organized the Mt. Diablo Quicksilver Co., Ltd. (Mt. Diablo Quicksilver), which operated the Mine between 1930 until 1936 producing an estimated 739 flasks of mercury. Mt. Diablo Quicksilver then leased the property to the Bradley Mining Company (Bradley) from 1936 to 1951, during which time Bradley conducted surface and underground mining and produced over 10,000 flasks of mercury. At the end of Bradley's operations, the underground mine workings consisted of four levels in a steeply dipping shear zone. The Bradley workings were accessed by a main shaft and had a drain or "adit" tunnel that exited to the surface on the 165 foot level (the 165 foot Adit; Pampeyan, 1963).

The Bradley Mining Company operated the Mine for a period of fifteen years generating a total of 78,188 cubic yards of milled tailings and 24,815 cubic yards of waste rock from the mine tunnels (Ross 1958). The material generated by Bradley Mining Company represents 97.3 percent of all material generated as documented in the attached Table 2-1. In addition to the materials generated from the Mercury Mine, Bradley Mining Company also operated a rock quarry to the west of the Mine. Waste rock generated from the Quarry operation is reported to have been placed in the Area called the "Waste Dump" on maps produced by the California Division of Mines

and Geology (Pampeyan, 1963). As a result of the mining and milling conducted by the Bradley Mining Company, records indicate that all or nearly all of the currently existing waste and tailings piles at the Mine can be attributed to generation by the Bradley Mining company as their configuration matches the mapped site conditions as documented by Site mapping conducted in 1953 by the California Division of Mines and Geology (Pampeyan, 1963). Figure 2-2 provides a map depicting the locations of the tailings and waste rock piles on the site as generated by the Bradley Mining Company. Field confirmed locations of Mercury mine tailings and waste rock are depicted in blue hatched outline and can be readily discerned as bare looking areas on the aerial photographs. The waste dump that received Quarry waste rock is north (northern waste dump) and is circled in a dashed green outline. The northern waste dump area is physically different from the other Bradley waste areas as it has an extensive tree cover as can be seen on Figure 2-2.

Following the period of extensive Bradley Mining Company operations, Mt. Diablo Quicksilver next leased the Mine to Ronnie B. Smith and partners (Smith, et al.) in 1951. Using surface (open pit) mining methods, Smith, et. al. produced an estimated 125 flasks of mercury in a rotary furnace. In 1953, the United States Defense Minerals Exploration Agency (DMEA) granted Smith, et al. a loan to explore the deeper parts of the shear zone. With DMEA's grant money, and under the DMEA's supervision, Smith, et. al. constructed a 300-foot-deep shaft (historically referred to as the DMEA Shaft) during the period from August 15, 1953 to January 16, 1954. After completing the DMEA Shaft, Smith, et. al. turned southeast with a 77-foot-long crosscut in dry shale, in the direction of the shear zone mined by Bradley. At the surface, Smith, et. al. constructed dump tracks to the north and across the road (away from the pre-existing Bradley waste piles at the southeast portion of the Site) to an "unlimited location" (Schuette, 1954), presumably on the north facing slope in the Dunn Creek Watershed, where a large waste rock dump is located, as mapped by Pampeyan (1963). Smith, et. al. assigned their lease and DMEA contract to J. L. Jonas and J. E. Johnson in January 1954. Jonas and Johnson extended the lateral drift to 120 feet, but stopped after encountering water and gas. The DMEA Shaft and workings flooded on February 18, 1954 and, subsequently, Jonas and Johnson abandoned the project.

Cordero Mining Company (Cordero) acquired a lease for the Mine Site from Mt. Diablo Quicksilver dated November 1, 1954 and In January 1955 began reconditioning the DMEA Shaft. Cordero replaced failed lagging, mucked out and dewatered the DMEA Shaft bypassing the Jonas and Johnson lateral tunnel, and drove a series of crosscut and drift tunnels a total of 790 feet from the DMEA Shaft to the shear zone. Intense rain storms during December 1955 increased the normal flow of mine water beyond pumping capacity and resulted in re-flooding of the DMEA/Cordero mine workings (Pampeyan and Sheahan, 1957), at which point Cordero suspended operations. The total period of active mining operations by Cordero at the Mine are documented to be just 12 months.

Following the work by Cordero, the Mine remained idle until March 1956, when the Cordero lease was transferred to Nevada Scheelite, Inc., which began dewatering with a 500 gallon per minute (gpm) pump. Nevada Scheelite apparently operated an unidentified portion of the Mine Site from

1956 to 1958. Downstream ranchers objected to Nevada Scheelite's discharge of acid mine waters to the creek and the operation was suspended. Nevada Scheelite relinquished its lease after developing an unknown tonnage of ore from the open pit. The disposition of materials generated by Nevada Scheelite is not documented, but can be inferred based on site surveys to either supplement or slightly expand tailings and waste rock piles created by Bradley Mining Company.

In June 1958, a State Water Pollution Control Board (WPCB) inspection report states the Mine was leased to John E. Johnson and that he was operating it, but he apparently died later that year and the Mine again ceased operation. Subsequent operations on an unidentified portion of the Mine Site were conducted by Welty and Randall Mining Co. from approximately 1965 to 1969. They apparently re-worked mine tailings at the Mine Site, under a lease from Victoria Resources Company (Victoria Resources), which purchased the Mine from Mt. Diablo Quicksilver in May 1962. On or about December 9, 1969, Guadalupe Mining Co. (Guadalupe) purchased the Mine from Victoria Resources. It is unclear whether any operations were conducted by Guadalupe. In June 1974, the current owners, Jack and Carolyn Wessman and the Wessman Family Trust purchased the Mine Site from Guadalupe. In 1977, the Wessmans sold the portion of the Mine Site containing the settlement pond to Ellen and Frank Meyer, but subsequently repurchased it in 1989.

2.3 Cordero Work Areas

The Cordero lease area within the Mine Site is graphically presented on Figure 2-2 (Aerial Photograph) and on Figure 2-3 which is overlain on the map of mining produced by the California Division of Mines and Geology (CDMG) in 1963. The lease area excludes a significant portion of the easterly areas of Bradley Mining Company's exposed waste rock, the spring outflow area, emanating from the 165' Level Adit from which Bradley operated and the current waste and settlement pond below the Mine adjacent to Morgan Territory Road.

Cordero conducted its underground mining efforts from the pre-existing DMEA Shaft (Pampeyan and Sheahan, 1957). The area of this shaft and the interpreted potential surface work area (no surface mining was conducted, however) is highlighted on Figure 2-3. Additional documentation indicates that Cordero conducted water handling and treatment operations extending from the DMEA Shaft to a location 1,350 feet to the west within the lease area (Sheahan, 1956 and WPCB, 1955a).

The areas depicted on Figure 2-3 showing the DMEA Shaft and the waste rock dump area, and the water disposal area west of the DMEA Shaft, are the only documented potential Cordero work areas and represent the extent of known operations by Cordero.

2.4 Cordero Mining Activity

Cordero mining activity consisted of repairing lagging, and mucking out and de-watering of the existing DMEA Shaft, beginning in January 1955, followed by driving a new crosscut and drifts from the DMEA Shaft on the 360 foot level (360 Level). Cordero's workings totaled 790 feet and extended south from the existing DMEA Shaft (Pampeyan and Sheahan, 1957).

The DMEA/Cordero tunnel system was mapped by investigators for the DMEA as documented in the Report of Examination by Field Team Region II, Final Report, and dated January 30, 1957 (Pampeyan and Sheahan, 1957). Figure 2-4 depicts the Cordero mine tunnels in plan view and their relationship to the DMEA Shaft and the originally flooded DMEA crosscut that was abandoned by Jonas and Johnson. Figure 2-5 shows the same plan view of the Cordero tunnel system and includes the Plan view of the entire pre-Cordero tunnel system located to the south. A cross section produced by the DMEA demonstrates the pre-Cordero tunnel system as presented on Figure 2-6. The Cordero tunnels were advanced at the 360 Level, below the extensive Bradley underground mine workings depicted on Figure 2-6, but were ultimately connected to the bottom of Bradley's Main Winze shaft via a 15 foot raise (Sheahan, 1956). The Figure 2-7 plan view outlines of the pre-Cordero and the Cordero workings are transposed on a current aerial photograph for perspective with the current condition of the Mine.

2.4.1 Cordero Materials Disposition

The tunnels advanced by Cordero on the 360 Level totaled 790 feet as documented by Pampeyan and Sheahan (1957). The total volume of waste rock generated by Cordero during its 12 months of operation is calculated using a 20-percent (%) bulking factor to be approximately 1,228 cubic yards (Table 2-1). Near the end of Cordero's operational period, Cordero encountered small zones of low-grade ore. Cordero stockpiled that ore for sampling and assay. The DMEA field team inspected the Mine and sampled the Cordero ore stockpile. The total ore generated by Cordero was estimated to be between 100 to 200 tons of ore with a grade of 3 to 10 pounds of mercury per ton (Pampeyan and Sheahan, 1957). This tonnage of ore translates to approximately 50 to 100 cubic yards of ore material.

The calculated total ore and waste rock generated by all documented mining activities prior to and including Cordero is calculated to be approximately 105,848 cubic yards as noted and referenced on Table 2-1. Based on these material calculations, waste rock and ore generated by the Cordero activities represents less than 1.2% of the estimated total volume of mined material at the entire Mine Site.

The final disposition of the Cordero mined ore and waste rock was ascertained through a review of "before and after" maps of the Mine created by Pampeyan for the CDMG in 1954 and 1963, and a review of aerial photographs before and after the Cordero operational period. Pampeyan (1963) prepared maps of the underground mine workings, waste rock dumps and general mine

information. Figure 2-8 illustrates the proposed location of the DMEA Shaft. In 1956/57, following mining by the DMEA and Cordero, Pampeyan updated this map as published in the document "CDMG, Special Report 80, Plate 3" dated 1963. The updated map is shown as Figure 2-3. A comparison of the maps shows the location of the DMEA Shaft and the addition of waste rock adjacent to the DMEA Shaft that did not exist on the 1954 map as demonstrated on Figure 2-9. The map clearly shows that material generated by DMEA and Smith, et al. during the sinking of the DMEA Shaft was located immediately adjacent to the DMEA Shaft. Site inspections in 2008 confirmed that the pile of waste rock adjacent to the DMEA Shaft on the 1956 map no longer exists (Figures 2-3 and 2-9). Based on interviews with the current property owner Jack Wessman, he stated that he used the waste rock adjacent to the DMEA Shaft to re-fill the DMEA Shaft.

Additionally, the Pampeyan 1963 map depicts a large "waste dump" located to the north of the DMEA Shaft (Figure 2-3). This waste rock dump is clearly seen in an aerial photograph from 1952, indicating that it appeared active at that time as shown on Figure 2-10. Dump tracks were extended north and across the road to an "unspecified location" (Schuette, 1954) by Smith, et al., presumably on the north-facing slope in the Dunn Creek Watershed where the large waste rock dump is mapped by Pampeyan (1963). Review of an aerial photograph from 1957 (Figure 2-11) also confirms the location of the large waste dump to the north of the DMEA Shaft, although the clarity of this photograph does not allow determination of changes as compared to the 1952 photo. The large waste dump north of the DMEA Shaft was inspected in 2008. The waste dump is on a steep slope and contains approximately 1.3 acres of large blocks of rock 2 to 10 feet in diameter that are now densely covered with vegetation. The condition of the waste dump in 2008 can be seen on the aerial photo presented as Figure 2-2.

In summary, maps and aerial photos combined with anecdotal information from the current property owner indicate that material generated by Cordero in 1955 was hoisted out of the DMEA Shaft and placed adjacent to the Shaft in a waste pile that has subsequently been placed back into the Shaft. Additionally, most or all of any remaining waste rock, if any, generated by Cordero was likely disposed of in the large waste rock dump located immediately north of the DMEA Shaft via the rail tracks installed by Smith, et al. in 1954 expressly for this purpose (Schuette, 1954).

2.5 Previous Investigations

The potential for contamination of Marsh Creek has long been of concern, resulting in considerable sampling of Marsh Creek, Dunn Creek, Horse Creek, pond effluent, etc., over the past 50+ years (WPCB Document Log). Sampling events have been conducted by the following entities or persons:

- CRWQCB and its predecessor, the WPCB; as part of inspection visits to the Mine that have occurred since the late 1930's;
- J.L. Iovenitti, Weiss Associates, and J. Wessman, as part of *Mount Diablo Mine Surface Impoundment Technical Report* dated June 30, 1989; and

- Prof. Darell G. Slotton, U.C. Davis, as part of the Marsh Creek Watershed Mercury Assessment Project conducted in March 1996, July 1997, and June 1998.

These previous investigations are summarized in the following sections.

2.5.1 State Water Pollution Control Board / California Regional Water Quality Control Board Investigations

Since the late 1930's, the CRWQCB and its predecessor, the WPCB, conducted inspection visits to the Mine. During these inspections, surface water grab samples were collected under varying conditions (ranging from high runoff periods, to periods of little or no runoff). The surface water samples were collected from the following sampling locations:

- Dunn Creek (at various locations);
- Horse Creek (upstream of pond outlet);
- Perkins Creek (above the confluence with Marsh Creek);
- Curry Creek (above the confluence with Marsh Creek);
- Marsh Creek (at various locations);
- Drainage from Mine/Tailings on Wessman Property;
- Drainage from ponded area, north of tailings;
- Springs on State Park Land;
- Alkali Spring below and east of pond/dam;
- Mine pond;
- Zuur well;
- Prison Farm well; and
- Marsh Creek Springs Resort well.

These samples were analyzed for general water quality parameters and metals. A summary of these water sample results has been compiled into an Excel table format and is included as Appendix A.

2.5.2 J.L. Iovenitti, Weiss Associates, and J. Wessman *Mount Diablo Mine Surface Impoundment Technical Report*

In 1989, a technical report was prepared as part of the application to qualify for an exemption authorized by the Amendment to the Toxic Pits Cleanup Act of 1984 (Iovenitti, 1989). This investigation focused on characterizing the surface impoundment located at the Mine. This report evaluated the geohydrochemical setting of the surface impoundment, the source of contaminants in the surface impoundment, and waste control alternatives and preliminary cost estimates for

these alternatives. This report characterized the contaminants in the surface impoundment based on historical data. From 1953 through 1988, eleven water samples were collected from the surface impoundment. The surface water samples were analyzed for general water quality parameters and metals. The results indicated that the metals concentrations detected in the water within the surface impoundment exceeded the primary drinking water standards. As summarized in the table in Appendix A of this report, in April and May of 1989, nine surface water samples were collected by J.L. Iovenitti, a consulting geoscientist in Pleasant Hill, California. These surface water samples were collected from Dunn Creek (various locations), Ore House Spring, the creek above the Northern Pond, the Northern Pond, and the surface impoundment (two locations).

2.5.3. Prof. Darell G. Slotton, Marsh Creek Watershed Mercury Assessment Project

A three year study (1995, 1996, and 1997) of the Marsh Creek Watershed was conducted by Contra Costa County to comprehensively determine the sources of mercury in the Marsh Creek Watershed, both natural and anthropogenic. These studies were also used to document mercury concentrations in indicator species, surface water, and sediment to evaluate mercury bioavailability within the Marsh Creek Watershed. These studies were designed to characterize baseline conditions of the Marsh Creek Watershed and to evaluate the relative effectiveness of potential future remedial actions at the Mount Diablo Mine.

The results of the 1995 study are summarized in a March 1996 report titled "Marsh Creek Watershed 1995 Mercury Assessment Project – Final Report" prepared by Darell G. Slotton, Shaun M. Ayers, and John E. Reuter (Slotton, et. al, 1996). The 1995 study evaluated all aspects of mercury loading within the Marsh Creek Watershed. As part of this Mercury Assessment Project, sampling was conducted at the Mine area, including the Lower Pond, the spring on State Park property, the spring emanating from the tailings pile, and other locations upstream in Dunn Creek and downstream along Marsh Creek. The chemical results of the Slotton et. al. 1996 study in the Mine area are summarized in Table 2-2.

The results of the 1996 study are summarized in a July 1997, report titled "Marsh Creek Watershed Mercury Assessment Project – Second Year (1996) Baseline Data Report" prepared by Darell G. Slotton, Shaun M. Ayers, and John E. Reuter (Slotton, et. al, 1997). In this second year of a three-year baseline study, the 1996 study focused on evaluating mercury availability in indicator species and sediment within stream sites and the Marsh Creek Reservoir. 175 individual and composite samples of invertebrates, sediment, and young fish from 13 stream sites and the Marsh Creek Reservoir were collected for this study (Slotton, et. al., 1997).

The results of the 1997 study are summarized in a June 1998 report titled "Marsh Creek Watershed Mercury Assessment Project – Third Year (1997) Baseline Data Report with 3-Year Review of Selected Data" prepared by Darell G. Slotton, Shaun M. Ayers, and John E. Reuter (Slotton, et. al, 1998). In this final year of a three year baseline study, similar to the 1996 study, the study focused on evaluating mercury availability in indicator species and sediments within stream

sites and the Marsh Creek Reservoir. 137 individual and composite samples of invertebrates, sediment, and young fish from 12 stream sites and the Marsh Creek Reservoir were collected for this study (Slotton et. al., 1998).

Based on the results of the 3-year study and extensive sampling of the entire Marsh Creek Watershed, the Slotton report concluded that the Mount Diablo Mercury Mine, and specifically the exposed tailings and waste rock (Bradley Mining Company's waste) above the existing pond was the dominant source of mercury in the watershed. Sampling of Dunn Creek above the Lower Ponds indicated minimal sourcing of mercury was occurring from the watershed immediately above the Lower Pond.

2.6 Previous Remedial Actions

Since the operations of Cordero in 1955, multiple operators and property owners have been involved in actions that have modified some of the physical features of the general Mine area. Most notably, the current property owner, Jack Wessman, over the period of his ownership since 1974, has conducted work in an effort to minimize the impact of exposed mine waste material to surface water runoff. This work has included earth moving at the Mine involving the importation of a large quantity of fill material (reported by Jack Wessman to be on the order of 50,000 cubic yards) and the movement and grading of this fill material around the Mine Site to cap Mine waste.

Based on discussions with Jack Wessman conducted during Site Inspections in 2008, this work has specifically included: 1) infilling and capping of the original collapsed mine workings located to the north of the DMEA Shaft and Cordero work area, 2) filling of the DMEA Shaft and filling and capping of waste rock below the shaft toward the furnace, 3) filling and capping of a small pond located west of the DMEA Shaft, 4) grading of waste rock and tailings piles located to the east of and overlying the mine workings as part of surface drainage control actions, 5) re-configuring, enhancing and maintaining impoundments around the lower waste ponds, and 6) installing drains and drainage pipe for the purpose of redirecting surface rainfall runoff in the upper Mine area around the exposed tailings and waste rock into Dunn Creek directly bypassing flow through the Lower Pond.

Current surface drainage for the upper Mine areas, including the Cordero operations around the DMEA Shaft area, is captured and routed around the exposed tailings and waste rock and around the Lower Pond emptying directly into Dunn Creek at a location up-gradient of the Lower Pond.

In response to an Order from the United State environmental Protection Agency, work at the Site was conducted by Sunoco in 2008/2009 involving the emergency stabilization of the southeastern wall of the Lower Pond's Impoundment dam to prevent continued storm flow erosion of the impoundment. This work was documented in the SGI report titled "Final Summary Report For Removal Action to Stabilize The Impoundment Berm, January 28, 2009".

3.0 FIELD INVESTIGATION AND SAMPLING

3.1 Objective

Work conducted by SGI on behalf of Sunoco has included research, acquisition, review and analysis of existing published information and data related to the former Mine and attendant water quality impacts, field surveys of the Mine conducted over a period of two years, property owner interviews, and two surface water sampling events at the Mine Site. This work, and the additional work proposed to be conducted in this Report, provides a basis for Sunoco to comply with the CRWQCB requirement to investigate both the nature and extent of mining waste at the Mine Site and the nature of attendant impacts as requested by the CRWQCB in its Revised Technical Reporting Order R5-2009-0869 (Rev. Order) of December 30, 2009.

The research conducted has uncovered more than 50 years of chemical monitoring data and two previous investigations as discussed in Section 2.6. Based on the results of this long history of data collection and analysis, and upon our initial research, analysis and field surveys, we have reached the following conclusions relevant to implementation of potential remedial actions to control the primary sources of mercury loading from the Mine Site to Marsh Creek and environs:

- The majority (93% of loading from the Mine area calculated by Slotton, 1995) of mercury loading to Marsh Creek is derived from surface water runoff moving over the exposed Bradley Mining Company-generated tailings along the eastern edge of the Mine;
- Generation of methyl mercury within existing pond sediments appears insignificant; and
- Remedial actions focused on the Bradley Mining Company tailings would result in a 93% (Slotton 1995) reduction in mine waste related impacts to Marsh Creek.

The surface water sampling events conducted in April and May of 2010 were focused on the objective of more fully establishing the credibility of these initial conclusions. The following sections detail the work conducted and the results of this work.

3.2 Field Surveys

Over the last two years, SGI on behalf of Sunoco has conducted numerous field surveys of the Mine Site, including two rounds of surface water sampling in 2010. Initial field surveys of the Mine Site focused on visual analysis of current conditions and how they relate to the extensive body of historical documentation that exists for the Site such as United States Geological Survey (USGS) mine and topographic mapping surveys, geologic maps, corporate documentation of mining activities, and regulatory agency assessment documentation. Using the historical topographic and mining survey maps, the geographic coordinates of current Site features that exist on the historical maps were identified using a hand-held GPS-device. These coordinates allowed for the geo-referencing of Site features found on historical maps that are no longer in existence, such as mine

shafts, adits and buildings. Several Site visits included interviews with the land owner, who has owned the property since 1974 and has made extensive modifications to the former mine features in an effort to improve safety and to channel surface water drainage. This knowledge of the Site has aided in the location of historical Site features within the current landscape.

An additional goal of these initial field surveys was to ascertain the current condition of the Bradley Mining Company tailings piles, the condition of the retention ponds, and the current state of surface water runoff from the Mine Site. The tailings piles were visually mapped as to type and compared with historical documentation including the extent, stability and the current state of vegetative cover. Based on visual surveys during both winter storm conditions and late summer conditions, and on input from the land owner of his modifications to the Site, the state of surface water drainage from the various mine features was mapped.

3.3 Surface Water Sampling

On April 12 and again on May 27, 2010, SGI collected surface water samples from a variety of locations around the former Mine. The aim of the collection and analysis of the surface water samples was to identify and quantify sources of mercury and other chemicals in runoff water in order to satisfy the requirements of the Mining Waste Characterization Work Plan requested by the CRWQCB in their Revised Technical Reporting Order R5-2009-0869 (Rev. Order) of December 30, 2009.

A total of twenty-three surface water samples were collected at the following sixteen locations during the two sampling events:

- Bradley Tailing Piles (four locations, SW-01, SW-02, SW-03, and SW-15);
- Springs (three locations, including the Adit Spring (SW-01, SW-15), Mount Diablo State Park Spring [Park Spring, SW-04] and the Ore House Spring [SW-14]);
- Runoff water between the Bradley Tailings Piles and the Lower Pond (SW-05);
- Storm Water Retention Ponds (three locations, including the Upper Pond [SW-06], the Middle Pond [SW-10], and the Lower Pond [SW-09]);
- Dunn Creek (three locations, including downstream of the Lower Pond [SW-07], between the Middle Pond and My Creek [SW-08], and upstream of My Creek [SW-16]); and
- My Creek (three locations, including upstream, within and downstream of the Northern Waste Dump [SW-12, SW-11, and SW-13, respectively]).

Upstream surface water sampling locations SW-12 and SW-16 were considered background locations. The surface water sampling locations are presented on Figure 3-1.

3.3.1 Sample Collection Procedures

Samples were collected in clean laboratory supplied containers by allowing flowing surface water to enter into the container. In some cases (generally resulting from a lack of access), a clean glass jar was used to initially capture the water sample, which was then subsequently decanted into the appropriate container. If water was observed emerging from the wet area, the sample was collected as close to the origin as possible. Field parameters including temperature, dissolved oxygen, and conductivity were measured with equipment pre-calibrated, according to the manufacturer's instructions. Each sample collected was placed on ice and transported to California-certified Accutest Laboratory located in San Jose, California. Chain-of-custody procedures were followed at all times. Chain-of-custody documentation is included with the laboratory reports in Appendix C.

3.3.2 Equipment Decontamination

No reusable sampling equipment was employed during the collection of the samples. Following the collection of each sample, all sampling equipment, such as gloves, was properly disposed of and not reused for any subsequent sample collection.

3.3.3 Laboratory Analysis

In addition to field parameters, the surface water samples were analyzed for the following parameters:

- Total Mercury;
- Dissolved Mercury;
- Methyl Mercury;
- pH;
- Alkalinity (Bicarbonate, Carbonate and total);
- Dissolved Organic Carbon;
- Specific Conductivity;
- Total Dissolved Solids;
- Hardness (as CaCO₃);
- Turbidity;
- Dissolved Silica;
- Cations -B, K, Fe, Mn, Mg, Ca, Na, Si-;
- Anions - Cl, F, SO₄, Br, NO₃, Zn, As.; and
- Remaining Priority Pollutant Metals- Sb, Be, Cd, Cr, Cu, Pb, Ni, Se, Ag, Tl.

4.0 INVESTIGATION RESULTS

4.1 Field Survey Results

Field surveys were conducted over a period of two years. These surveys included inspection of waste materials and tailings piles, assessment of general material types, inspections of springs, inspections of ponds, inspections of historic mine features that remain, and inspections of remedial actions conducted by Site owner Jack Wessman. These inspections also included observing and mapping of surface water flow patterns during and after storm events over the course of two winters.

4.1.1 Materials Mapping

Figure 4-1 presents a Site aerial photo depicting mine waste and features mapped at the Site. Features noted include areas capped by Jack Wessman, areas of exposed mine waste rock, areas of well-sorted processed mine tailings (Calcine), areas of general waste dumping including waste rock generated by a rock quarry that was located west of the Mine Site and operated by Bradley Mining Company, and the locations of the three surface water collection ponds.

Figure 4-2 includes these same material features with an overlay of historic mine features depicting mine tunnels and waste piles mapped by the USGS (Pampeyan, 1963). Photographs of these different materials and features at the Site are included in Appendix B.

An example of a capped area is depicted on photograph B-1 in Appendix B showing the capped area located at the top area of the Bradley tailings piles and waste rock. Photograph B-2 depicts the capped area overlying the historic collapsed main mine workings area. These caps are composed of clean-imported fill and reported by Jack Wessman to range in thickness from 10 to 20 feet.

Materials mapped in the northern waste dump include two main types. Near the DMEA shaft location at the central southern boundary of the northern waste dump, a relatively small area of materials was identified as indicated on Figure 4-1 to consist of material similar to non-ore related waste rock seen in other parts of the Mine. The majority of material in the remainder of the northern waste dump appears to be composed of large boulder-sized waste rock derived from a former Bradley Mining Corporation quarry operation. The location of the quarry is to the west of the Mine area.

Bradley waste rock and tailings present in the eastern portion of the Mine Site remain exposed above the location of the Lower Pond, and due to their chemistry, are devoid of vegetation. These materials are noted based on historic and current sampling data to be acid-generating materials

(Figure 4-2). Field observations of the exposed waste rock in these areas confirm the presence of sulfate-type waste rock material consistent with the ability to generate acidic surface water runoff.

Fully processed ore rock (tailings) is a well sorted granular material called Calcine and is also mapped on Figures 4-1 and 4-2. At this Mine, the Calcine is reddish in color and the exposed piles of Calcine are devoid of vegetation. The amount of Calcine present in this area appears to be significantly less than that which was produced by the Bradley Mining Company based on the volume of mercury produced. As a result, it can be assumed that additional Calcine like material may be incorporated within other waste rock/tailings at the Mine Site.

4.1.2 Surface Flow Mapping

Surface flow assessment was focused on identifying areas of surface water runoff into the three ponds located to the east of all the Mine working areas. Based on the field surveys, an interpreted surface drainage map was developed as presented on Figure 4-3. Three main areas of surface flow drainage are highlighted on Figure 4-3. These include uncontrolled surface runoff over exposed Bradley tailings that moves directly into the Lower Pond (depicted in red on Figure 4-3), surface flow moving from potential Cordero work areas at the Mine (depicted in yellow on Figure 4-3), and surface flow from the remaining mine workings area (depicted in green on Figure 4-3). Remedial efforts conducted by Jack Wessman included the capping of areas in the old mine workings and on top of the Bradley tailings piles. As part of this capping work by Wessman, surface drainage controls were installed that capture water from the upper workings area to redirect it around the exposed acid generating Bradley tailings. This captured flow is directed into the Upper Pond which then flows into the Middle Pond, and hence flows directly into Dunn Creek (photograph B-3 in Appendix B).

Surface flow over the northern waste dump and the northern part of the former potential Cordero work areas drains to the north into My Creek which then empties into Dunn creek above the location of the three ponds as shown on Figure 4-3. This flow moves through the Wessman-created pond that straddles My Creek in the area below the northern waste dump.

Surface flow moving over the exposed Bradley tailings piles moves directly into the Lower Pond. When this pond fills, water moves out of the overflow ditch located on the southwest corner. This flow then combines with flow emanating from the Park Spring and moves into Dunn Creek below the pond impoundment. Inspections and observations of the Lower Pond indicate that seepage of pond water through the toe of the impoundment represents a likely steady flow of water derived from Bradley mine waste material into Dunn Creek.

4.1.3 Spring Flows

Three springs have been identified historically and inspected as part of the field survey. These include the Park Spring, the Adit spring, and the Ore House spring. The Park Spring (photograph

B-4 in Appendix B) is located on the southern perimeter of the Mine working area as depicted on Figure 4-3. The Park Spring is perennially flowing as observed during our surveys and corroborated by property owner Jack Wessman. The Park Spring flows into what has been called Horse Creek, then moves directly adjacent and below the impoundment of the Lower Pond, entering Dunn Creek below the Lower Pond. Some surface flow runoff from the extreme southern area of the Bradley tailings piles coningles with the Park Spring water in the area just above the Lower Pond during rain events. The only known measurement of flow rate for the Park Spring was conducted by Slotton (1995) and was measured at 0.32 cubic feet per second (cfs) in late March of 1995 following an extensive period of storms (Slotton, 1995). As a result of the timing of measurement by Slotton, this flow rate likely can be considered on the high side of the range for spring base flow from this location.

The Adit spring location coincides generally with the location of the former 165 foot level Adit which was the only lateral entrance to the historic underground mine workings of Bradley Mining Company (Figure 2-3). This coincident location was confirmed based on geo-referencing of Site features based on the USGS mine and topographic mapping survey (Pampeyan, 1963). The Adit spring is perennially flowing as observed during our surveys and corroborated by property owner Jack Wessman over his period of ownership since 1974. Between our April and May 2010 sampling events, the first emanation point of what is interpreted as the Adit spring moved down-slope. Thus, sampling locations for the Adit spring plot at different locations for the April data (SW-01) and the May data (SW-15). The SW-01 location plots very near the geo-referenced location of the former 165 foot level Adit that is currently buried beneath waste rock and tailings. The SW-15 location plots immediately downgradient of this location where the emanation point has been previously noted in summer conditions during these field surveys. The higher emanation point for the SW-1 sample location is interpreted to be a result of higher saturation conditions within the waste rock and tailings as a result of extensive storms and total precipitation prior to the April sampling event.

Flow from the Adit spring flows directly down-gradient over Bradley Mining Company tailings piles and enters the Lower Pond on its southeast bank as sheet flow. As this flow approaches the area to the south of the Lower Pond, it passes over/through material mapped by the USGS as travertine deposit (calcium carbonate) as can be seen on the excerpted USGS map presented as Figure 2-3. The location of this travertine deposit below the current emanation point of the Adit spring indicates that a spring has been located here historically prior to mining of the ore body.

The only known measurement of flow rate for the Adit spring was conducted by Slotton (1995) and was measured at 0.03 cfs in late March of 1995 following an extensive period of storms (Slotton, 1995). As a result of the timing of measurement by Slotton, this flow rate can also likely can be considered on the high side of the range for spring base flow from this location. Evaluation of flow from the Adit spring in summer and late fall based on field observation estimates conducted by SGI are on the order of 5 to 10 gallons per minute (0.011- 0.022 cfs).

The Ore House spring is located near the historic mine Furnace Plant and can be seen in photograph B-5 in appendix B. The Ore House spring is a low flow spring and was not observed to have enough flow during the May sampling event to cause notable overland flow from the spring's emanation point. Flow from this spring currently moves into a drainage ditch and would be channeled with other surface water in the area that ultimately flows into the Upper Pond. The only known measurement of flow rate for the Ore House spring was made by Slotton (1995) and was measured at 0.01 cfs in late March of 1995 following an extensive period of storms (Slotton, 1995). As a result of the timing of measurement by Slotton, this flow rate can likely be considered on the high side of the range for spring base flow at this location.

4.1.4 Pond Histories and Flow

During the period of mining activities, aerial photographs indicate that the Lower Pond and the Middle Pond were historically merged as one pond (Figure 2-10). Remedial actions conducted by Jack Wessman to re-direct storm water around mine waste included a re-configuration of the Lower Pond as discussed in Section 2.7. As a result of this work, storm water surface flow from the upper mine workings that would normally mix with the water in the Lower Pond is routed around the Lower Pond to Dunn creek as indicated on Figure 4-3 (Photograph B-6 in appendix B demonstrates this flow bypass).

4.2 Development of Surface Water Sampling Locations

Sixteen surface water sampling locations were identified to collect data for one of six categories of surface water quality at the Mine Site, including:

- Background Water Quality;
- Spring Water Quality;
- Pond Water Quality;
- Northern Waste Dump Area Runoff Water Quality;
- Bradley Mine Waste Runoff Water Quality; and
- Downstream Water Quality.

Two sampling locations were identified which would be representative of background water quality (i.e., from areas unaffected by current or former operations at the Mine Site). One of the points was on My Creek while the other was on Dunn Creek. Both of these locations sampled water directly from the respective creeks upgradient of historical operations at the Mine Site. The My Creek sample location was identified as SW-12 while the Dunn Creek sample location was identified as SW-16. Table 4-1 provides a surface water sample key correlating sample names with locations. Figure 3-1 depicts all SGI surface water sample locations noted in Table 4-1.

Photographs that depict various surface water sampling locations and mine waste are included in Appendix B.

As discussed above, there are three known springs within the Mine Site, the surface water emanations from which are derived from a groundwater source. It is unknown if the groundwater sources of the springs are related to or otherwise connected to former mining operations (such as underground workings). The first two springs sampled were the Park Spring, located to the south of the Bradley tailings piles, and the Ore House Spring, located adjacent to the former Mine furnace plant building. These spring sample locations are identified as SW-04 and SW-14, respectively. The Adit Spring is the third location, which is interpreted to be spring water derived from where the now buried 165 foot Adit formerly day-lighted. The two sample locations from this area are SW-01 and SW-15.

All three main ponds on the Mine Site were sampled. The largest pond on the Mine Site is the Lower Pond. Most of the surface water runoff from the Mine Site, including those from the Bradley tailings piles, is funneled into this pond. The Lower Pond drains directly into Dunn Creek. The Middle Pond is located just to the north of the Lower Pond and receives overflow water from the Upper Pond. The middle pond drains directly into Dunn Creek. Storm water has been channeled from the upper mine workings area into the Upper Pond via the installation of an assortment of culverts and drainage piping. Each pond was sampled near its overflow outlet point, with the Upper Pond identified as SW-06, the Middle Pond identified as SW-10 and the Lower Pond identified as SW-09 (Figure 3-1).

The northern waste dump area is on a north facing slope which drains into My Creek. Water quality samples were collected at two points along My Creek, including sampling locations SW-11 and SW-13.

Bradley Mining Company waste runoff water quality was sampled from three points on or downgradient from the Bradley tailings piles. Sampling locations SW-02 and SW-03 collected surface water runoff from the upper reaches of the Bradley tailings and the middle of the Bradley tailings, respectively. Sample location SW-05 captures runoff water from the Bradley tailings just prior to entering the Lower Pond.

The downstream water quality sample location was designed to test surface water downgradient of potential significant surface water inputs. Sample location SW-08 is on Dunn Creek downgradient from the contribution from My Creek though still upgradient from the Middle and Lower Ponds. This point was sampled as it should intercept water quality inputs from known Cordero working areas while still upgradient from Bradley work area inputs. Sample location SW-07 is on Dunn Creek downgradient from the contribution from both the Lower Pond and the Mount Diablo State Park Spring. This sample location was designed to determine surface water quality of the combined outflow from all Mine Site sources.

4.3 Surface Water Sampling Results

The April 12 sampling event experienced different environmental conditions relative to the May 27 sampling event. The day of the April sampling event and the day leading up to it combined to produce approximately 1.5 inches of rainfall. Significant quantities of surface water runoff had resulted in outflow from all three ponds and Dunn Creek overflowing its banks. The majority of the flow downstream of the ponds came from the overflowing Dunn Creek.

The day of the May 27 sampling event and the two days leading up to it combined to produce only approximately 0.5 inches of rainfall. There was no outflow from any of the ponds and Dunn Creek was well within its established banks. The volume of surface water runoff was minimal in comparison to the April event with adequate overland flow sampling locations being less abundant.

The results of the sampling allowed for the characterization of each surface water collection location both chemically by analyzing concentrations and ratios of certain cations and anions, and as a source for mercury loading by comparing concentrations.

Table 4-1 provides a sample location key to correlate sample names with sample locations. All of the water quality data collected by SGI in 2010 is summarized on Table 4-2. Complete laboratory reports for both sampling events are included as Appendix C. Figure 4-4 depicts the surface water sampling locations with mercury (including total and dissolved) and methyl mercury sampling results posted for ease of review.

No detectable concentrations of mercury were found in any of the samples from My Creek (SW-11, SW-12, and SW-13) or in the Dunn Creek background sample (SW-16). The Dunn Creek sample below the My Creek drainage (SW-08) had a detectable concentration of total mercury in the April sample, but none in the May sample. All three of the ponds had detectable concentrations of mercury, though the concentrations in the Lower Pond were distinctly higher than those in the Middle Pond and the Upper Pond. The Park Spring and the Ore House Spring samples both contained low but detectable concentrations of mercury. Two samples were collected near the Adit Spring location, with the one higher in elevation (SW-01) showing low mercury concentrations (similar to the other springs) while the lower elevation sample location (SW-15) shows significantly elevated concentrations. The highest concentrations of mercury in surface water samples were found in those from the Bradley tailings piles (SW-02, 03), with sample location SW-03 being the highest on the Mine Site.

During the April and May 2010 sampling events methyl mercury was detected at all sample locations including background locations (Table 4-2). The total/dissolved mercury and methyl mercury concentrations were elevated in areas directly downstream of mine waste areas (Adit Spring, Ponds, Mine Water Runoff). Based on field data collected at the Mine in May 2010 (Table 4-3), dissolved oxygen ranged from 6.0 to 9.5 milligrams per liter (mg/L). My Creek runoff samples were collected freefalling from a pipe or weir within a running creek, which resulted in high

dissolved oxygen levels of 16 to 18.7 mg/L. Although these moderate dissolved oxygen levels do not suggest a significant anoxic environment, the detection of methyl mercury in all the surface water samples indicates limited biomethylation is occurring at the Mine.

The methyl mercury concentrations detected in the mine waste areas (Adit Spring, Ponds, Mine Water Runoff) were above the CRWQCB – San Francisco Bay water quality criteria for methyl mercury in freshwater of 3 nanograms per liter (ng/L; CRWQCB, 2008a). Water quality criteria for methyl mercury was not available in the CRWQCB Central Valley compilation of water quality goals (CRWQCB, 2008b) or USEPA National Recommended Water Quality Criteria (USEPA, 2009). Methyl mercury concentrations did not exceed the water quality criteria at any other sampling locations, including background samples. Statistical analysis of the methyl mercury data for all of the surface water data with the exception of the two background sample locations was conducted to determine the 95-percent upper confidence limit of the mean (95UCL), using a USEPA software package called ProUCL Version 4.00.04. ProUCL and USEPA (2009b) guidance make recommendations for estimating 95UCLs and were developed as tools to support risk assessment. Based on this analysis, the 95UCL for methyl mercury sampled is 2.8 ng/L, which is less than the applicable water quality criteria. The ProUCL output spreadsheet that summarizes this statistical analysis is presented in Appendix D.

Although methyl mercury concentrations immediately downstream of mine waste areas were elevated, methyl mercury was detected at 0.736 and 1.47 ng/L (below water quality criteria) in the furthest downstream sample (SW-07). Once mercury is converted to methyl mercury it is readily absorbed by biota in aquatic ecosystems and concentrates in tissue of fish and other aquatic organisms. Based on the 1995 Slotton study, no benthic invertebrate bioindicators or fish were sampled in the surface water sample locations at or near the Mine because of insufficient concentrations of organisms. In the Slotton studies, aquatic organisms were only collected from areas further downstream from the Mine. The data collected in 2010 indicate that methyl mercury concentrations immediately downstream of the Mine (SW-07) are below water quality criteria and suggest that without the introduction of other sources of mercury, methyl mercury concentrations would continue to decrease further downgradient due to dilution. Consequently, in areas downstream of the Mine Site where there is enough surface water to support aquatic organisms, the methyl mercury concentrations are below water quality criteria.

General water quality parameter data detailed in Table 4-2 were analyzed to evaluate total water quality signatures relevant to the variable locations of the samples. Through the use of Piper and Durov diagrams (Figure 4-5 and Figure 4-6), a graphical representation of the chemical signature of each water sample is plotted relative to the entire set of water samples. In each case, the water chemistry results plotted on the center shape (a diamond in the case of the Piper diagram and a square in the case of the Durov diagram) is a matrix transformation of the ternary graph (the triangle shapes in both diagrams) of select anions (SO_4 , Cl, and HCO_3) and the ternary graph of select cations (Ca, Mg, and Na+K). On both diagrams (Figure 4-5 and Figure 4-6), there are

distinct groupings of sample locations suggesting that the waters from the sixteen sampling locations fall into four primary groups as follows:

- Mine Waste Source Water, surface flow water that has come into contact with mining waste;
- Altered Mine Waste Water, a chemical alteration of mine waste source water after having flowed over travertine deposits;
- Park Spring Water, surface flow water with Park Spring as its source; and
- Background Water, surface flow water that has not contacted mine tailings at the Site.

Focusing on the Piper diagram on Figure 4-5, background water quality is characterized by the highest concentrations of both calcium and bicarbonate. The Park Spring water has a balance of cations and anions, thus plotting in the middle of the Piper diagram. The mine waste water is nearly devoid of bicarbonate and has lower concentrations of calcium than the background or Park Spring water. The altered mine waste water is differentiated by a higher concentration of sodium, potassium and chloride (salts).

A Stiff diagram is a graphical representation of the major ion composition of a water sample. A polygonal shape is created from three parallel horizontal axes extending on either side of a vertical axis. They show the relative ratios of cations (plotted on the left hand side) and anions (plotted on the right hand side) plotted in milliequivalents per liter. These diagrams are useful in making rapid visual comparisons between water samples. Stiff diagrams were created for each of the twenty-three collected samples analyzed and are found in Appendix E. For each of the four characteristic water types identified on the Piper diagram, a characteristic Stiff diagram was selected and displayed on Figure 4-7. For the background sample, the Stiff diagram shows a high ratio of bicarbonate relative to chloride and sulfate, and elevated calcium and magnesium relative to sodium, resulting in an amorphous shape. The Park Spring sample indicates a unique water quality signature in the Stiff diagram with a near balance of both cations and anions, though slightly more bicarbonate and slightly less calcium. Water that has been modified by contact with Mine waste shows a low ratio of sodium and chloride relative to magnesium and especially sulfate, and contains no bicarbonate, with the entire picture looking almost like a boot with the toe pointing to the right (SW-3). Additionally altered mine waste water is similar to the mine waste water above but with a higher ratio of sodium and chloride (SW-5). The boot shape is less pronounced and, in some cases, almost takes on the appearance of two triangles joined at the center of the diagram (Figure 4-7). The following sections provide additional discussion regarding data relevant to the various water types identified based on the water quality signatures discussed above.

4.3.1 Background Water Quality

The Stiff diagrams for the SW-12 and SW-16 samples define the characteristic amorphous shape of the background samples Stiff diagrams as shown on Figure 4-7. In both cases, no mercury was

detected in either sample and pH levels were similar (7.75 in Dunn Creek and 8.20 in My Creek). However, methyl mercury was an order of magnitude higher in Dunn Creek relative to My Creek.

4.3.2 Spring Water Quality

The water quality of the three springs varies in water type. The Park Spring (SW-04) shows a unique signature as demonstrated in its Stiff diagram (Figure 4-7). However, samples from the Ore House Spring (SW-14) and the Adit Spring (SW-01) exhibit boot shaped Stiff diagrams characteristic of mine waste source water (Appendix E). The pH of the three locations is different ranging from the acidic Adit Spring (pH of 3.95) to the nearly neutral Park Spring (pH of 7.69). Mercury concentrations from all three springs were relatively low with the Ore House Spring, the Adit Spring, and the Park Spring showing total concentrations of 1.3, 2.2 and 0.45 micrograms per liter ($\mu\text{g/L}$), respectively.

Sample SW-15 is also considered to be an Adit Spring sample, though it was collected approximately 50-feet downgradient of the SW-01 Adit Spring sample described above. However, the water chemistry and mercury concentrations found in SW-15 are significantly different from those of the SW-01 sample. The SW-15 Stiff diagram resembles that of altered mine waste water. Additionally, the concentration of mercury in SW-15 is 107 $\mu\text{g/L}$ which is significantly higher than that found in SW-01. This leads to the conclusion that the SW-15 water sample may have originated in the Adit Spring, but it was significantly altered by the tailings prior to collection and analysis.

4.3.3 Pond Water Quality

The chemistry of the Upper Pond (SW-06) and the Middle Pond (SW-10) show boot shaped Stiff diagrams (Appendix E) characteristic of mining waste source water. Both contain elevated concentrations of mercury ranging between 18 and 32 $\mu\text{g/L}$ (Table 4-2). However, the sample from the Middle Pond (SW-10) collected in May shows the Stiff diagram with an amorphous shape typical of background water quality, and contained only 0.21 $\mu\text{g/L}$ of mercury. This suggests that, in the absence of significant amounts of surface runoff, the Middle Pond may receive a significant subterranean inflow of water from Dunn Creek altering the chemistry to near that of the Creek water and diluting the mercury.

The chemistry of the Lower Pond is distinct from that of the Upper and Middle Ponds. The Stiff diagram for the Lower Pond indicates a character that is consistent with that of altered mine waste water and the mercury content ranges from between 88 and 94 $\mu\text{g/L}$. The Lower Pond is also acidic (pH of 4.5) when compared to the adjacent Middle Pond, which has a nearly neutral pH. This data is consistent with the fact that the Lower Pond receives direct runoff from the Bradley waste rock and tailings piles to the east, and receives direct flow originating from the Adit spring.

The difference in chemistry and of mercury content between the Lower Pond compared to both the Middle and Upper Ponds suggests different histories (and potentially different sources) of the water in each with the Lower Pond clearly receiving altered mine waste water from the Bradley tailings piles. This is consistent with the recent surface water drainage modifications completed by the current landowner. Surface water runoff from the upper part of the Mine Site (the working area) and from the land above the Mine Site has been directed into the Upper Pond by means of drains and culverts. With the exception of the small area of un-capped Calcine piles, this channeled surface water does not have the opportunity to have significant interaction with uncapped mining waste piles, and thus has a different chemical signature and mercury content relative to the water found in the Lower Pond.

4.3.4 Northern Waste Dump Area Water Quality

The two Northern Waste Dump Area samples, SW-11 and SW-13, exhibit amorphous shaped Stiff diagrams characteristic of background water samples (Figure 4-7). The characterization of these samples as comparable to background water quality is supported by the lack of detected mercury in both samples and the nearly neutral pH readings. These data for the SW-11 and SW-13 samples (Table 4-2) suggest that the Northern Waste Dump is not a significant source of mining waste impacts to surface water.

4.3.5 Mine Waste Runoff Water Quality

Samples of runoff collected from the Bradley tailings piles, SW-02 and SW-03 (Appendix E), demonstrate the characteristic shaped Stiff diagrams indicative of water that has been modified by contact with mining waste, which we have designated as mining waste source water (Figure 4-7). Both samples exhibit high mercury concentrations of 179 and 74 $\mu\text{g/L}$, respectively for SW-02 and SW-03. Additionally, both exhibit acidic pH ranging from 2.23 to 3.13 indicative of contact with exposed mine waste of acid generating potential.

Sample SW-05 was taken from surface water runoff from the Bradley tailings piles just before it enters the Lower Pond directly down-gradient of the Adit spring source emanation. Thus, the water has had a significant run down the slope from the tailings including travel over the travertine coated rocks located just east of the Lower Pond. This trip through the tailings and over the travertine area has altered the water chemistry, which is reflected in its Stiff diagram which is characteristic of altered mine waste water (Figure 4-8). Additionally, the buffering capacity of the travertine (calcium carbonate deposit) has had the effect of raising the pH of the water from the acidic levels found in SW-02 and SW-03 to nearly neutral. Mercury concentrations are less in sample SW-05 relative to SW-02 and SW-03 suggesting that low mercury water from the Adit Spring might be diluting the runoff water from the Bradley tailings.

4.3.6 Downstream Water Quality

The samples from Dunn Creek located downstream of the confluence with My Creek but upstream of the ponds (SW-08) has a Stiff diagram that is characteristic of background water. The pH at this location is nearly neutral and mercury content ranged from 0.6 µg/L to non-detect.

The samples from Dunn Creek (SW-07) located downstream of the Lower Pond and downstream of the confluence with the water from the Park Spring exhibit two different characteristic Stiff diagram shapes (Figure 4-7). The Stiff diagram for the April data showed a background water sample signature reflective of the large flow volumes in Dunn Creek (which had background water chemistry) resulting from the high amount of recent rain (1.5 inches in less than 2 days). This high flow of background quality runoff overwhelmed all of the other chemical signatures that contributed to the outflow to Dunn Creek in April. The Stiff diagram for the May sample data showed signature more indicative of a higher content of water sourced from the Park Spring. This is reflective of the greatly reduced flows in Dunn Creek and that of all the combined outflows down Dunn Creek from the Mine Site, the Park Spring water was the most abundant, thus, dominating the chemical signal. Data from both sampling events showed that pH was nearly neutral and that mercury ranged from 0.74 to 0.64 µg/L.

4.4 Water Quality Criteria Evaluation

The analytical results of the surface water samples collected during the April and May events were also compared to water quality criteria developed for bodies of fresh water by the California CRWQCB (2008) and the US Environmental Protection Agency (2009). Freshwater water quality criteria values exist for many of the tested constituents including mercury (total and dissolved), methyl mercury, pH, and an assortment of water quality parameters and metals. Additionally, there are an alternate set of criteria related to human health for the consumption of water and organism and for the consumption of organisms only. These water quality criteria are found on Table 4-2 along with the analytical results from the April and May 2010 sampling events. The table has been coded to identify the analytical results that exceed one or more of the water quality criteria.

The criteria for mercury is 0.91 µg/L, which was exceeded by samples obtained from the Ore House Spring (SW-14), the Adit Spring (SW-01 and SW-15), all three ponds (SW-06, SW-09, and SW-10), and runoff from the mining waste tailings piles (SW-02, SW-03 and SW-05). The water quality criteria for consumption related to human health were much lower than the analytical method used was able to resolve (i.e. analytical results for total mercury less than 0.20 µg/L was not resolved, while the human health consumption criteria was 0.05 for water plus organism and 0.051 for organism only). The criteria and sample exceedances for methyl mercury was discussed in Section 4.3.

The criteria for arsenic in freshwater is 250 µg/L, which was exceeded by samples from the Adit Spring (SW-15) and from runoff from the mine tailings (SW-03). It is likely that there is naturally

occurring arsenic in the local rocks, and that the pulverized tailings have exacerbated their release into the environment. The water quality criteria for consumption related to human health were much lower than the analytical method used was able to resolve (i.e. analytical results for arsenic less than 10 µg/L was not resolved, while the human health consumption criteria was 0.018 for water plus organism and 0.14 for organism only).

Freshwater water quality criteria additionally exist for tested constituents including pH, alkalinity, total dissolved solids, cadmium, chloride, chromium, iron, lead, nickel, selenium, and zinc. With the possible exceptions of cadmium, lead, and selenium (based on their elevated detection limit thresholds relative to the water quality criteria), all of these constituents exceeded their water quality criteria for one or more samples collected during the April and May sampling events. As the downstream sample (SW-07) represents the combined runoff from the Mine Site, the only freshwater water quality criteria exceeded from this location include alkalinity, total dissolved solids, iron, nickel, and potentially cadmium, lead and selenium. None of the downstream samples exceeded the criteria for mercury, methyl mercury or arsenic.

4.5 Comparison to Historical Data

The sampling results from April and May of 2010 painted a coherent picture of the current state of the surface water flow, the four chemically distinct types of surface water, and of the sources of mercury from the Mine Site. The CRWQCB has been collecting historical water quality data dating back to 1939 from the Mine Site and the surrounding area. In 1995, Slotton collected a round of surface water chemical and flow data from the Mine Site and published his results including mercury loading calculations. The availability of the CRWQCB and the Slotton data allows for the comparison of historic Mine Site conditions to those based on the 2010 data set.

4.5.1 Historic Pond and Other Data

An extensive set of surface water data for the Mine Site and surrounding area, collected by the CRWQCB and other unidentified parties was compiled by Weiss and Wessman (J.L. Iovenitti, Weiss Associates, and J. Wessman, 1989) and can be found in its entirety summarized in Table form in Appendix A. Also included in Appendix A are sample keys indicating the locations of samples detailed in the Table 4-1. Matching historical sample location descriptions with current sampling locations allows for the comparison of the two sets of data. Table 4-4 show historic surface water total mercury and pH results and their dates of collection matched with the best approximate current sampling location equivalent (Figure 4-4). Six sampling locations were identified at which historical data could be compared to the current data set. These locations included:

- The Ore House Spring (SW-14);
- Surface water runoff from tailings above the Lower Pond (SW-05);

- Dunn Creek downstream of the Lower Pond (SW-07);
- Dunn Creek upstream of the Lower Pond (SW-08);
- The Lower Pond outlet to Dunn Creek (SW-09); and
- Park Spring uphill from the mine tailings (SW-04).

Table 4-5 shows the comparison of mercury results between the historical data and the data collected by SGI. Historically, concentrations of mercury have ranged higher than what was collected in 2010. Significant fluctuations in mercury concentrations were found in the data from Dunn Creek (SW-07) which ranged from 4 µg/L in 1978 to 72 µg/L in 1975, and from the Lower Pond Outlet (SW-09) which ranged from 1.8 µg/L in 1978 to 152 µg/L in 1984. However, the consistency lies in the fact that the highest historic concentrations of mercury have been found emanating from mine tailings runoff water.

Figure 4-8 shows the visual comparison of water chemistry results via the use of Stiff diagrams between the historical data and the SGI collected data. In some cases, there is a significant difference between the water chemistry. These differences could indicate that there have been historical changes in drainage or alterations to the chemistry of the springs. However, it is most likely due to differences in sampling locations and runoff conditions during sampling events,

4.5.2 Slotton Data

A three year study of the Marsh Creek Watershed was conducted by Contra Costa County to comprehensively determine the sources of mercury in the Marsh Creek Watershed, both natural and anthropogenic. The results of the 1995 study are summarized in a March 1996, report titled "Marsh Creek Watershed 1995 Mercury Assessment Project – Final Report" prepared by Darell G. Slotton, Shaun M. Ayers, and John E. Reuter (Slotton et. al, 1996). The Slotton report analyzed select water chemistry, sediment loading and flow at eighteen different locations within the Marsh Creek Watershed, with eight of them within the Mine Site itself. Based on the analysis of the data collected, Slotton came to the following conclusions:

- The Lower Pond is not acting to "settle out" a significant portion, if any, of the aqueous mercury flowing into it from the mine tailings;
- Dunn Creek, below the Mine Site, contributes the vast majority of mercury to the downstream reaches of Marsh Creek;
- The great majority of the Dunn Creek mercury load derives specifically from the tailings piles;
- The sampling of Dunn Creek above the ponds indicated minimal sourcing of mercury; and
- The major mitigation focus should be directed toward source reduction from the tailings piles themselves, with subsequent containment of the remaining mercury fraction being a secondary consideration.

Table 2-2 summarizes the data collected by Slotton in the Mine area. Table 4-5 compares the Slotton mercury data with the SGI collected mercury data at the six contemporaneous sampling locations outlined in Section 4.5.1. The comparison between the two datasets show reasonable agreement in mercury concentrations by location. Though source water chemistry comparisons are not possible, the very reasonable agreement between SGI mercury data and that of Slotton adds support to his conclusions.