

Central Valley Regional Water Quality Control Board
27 May 2010 Board Meeting

Advisory Team Staff Report and
Response to Comments on Hearing Panel Recommendation

for

THE WIDE AWAKE MERCURY MINE
and
CENTRAL, CHERRY HILL, EMPIRE, MANZANITA, AND WEST END MINES

COLUSA COUNTY
prepared by the Advisory Team

On 7 October 2009, a hearing panel consisting of board members Karl Longley, Kate Hart, Dan Odenweller and Sandra Meraz (Hearing Panel) conducted an evidentiary hearing on two proposed cleanup and abatement orders for mercury in Sulphur Creek. One order required cleanup of the former Wide Awake Mine, and the other covered the Central, Cherry Hill, Empire, Manzanita, and West End Mines. The latter are referred to as the "Central Mine Group."

Sulphur Creek is tributary to Bear Creek, which is tributary to Cache Creek. Cache Creek drains to the Cache Creek Settling Basin, which discharges to the Yolo Bypass and flows into the Sacramento-San Joaquin Delta Estuary. The Cache Creek Watershed Mercury Program, included in the Basin Plan, requires responsible parties to develop plans to reduce existing loads of mercury from mining or other anthropogenic activities by 95% in the Cache Creek watershed (i.e., Cache Creek and its tributaries).

A hearing panel must report its proposed decision and order to the full Board, which then takes action based on the record. This Staff Report and the proposed Technical and Monitoring Report Orders constitute the Hearing Panel's recommendation. In addition, the Advisory Team has provided a response to comments following the staff report.

After hearing the evidence, the Hearing Panel determined that it was more appropriate to require continued investigation of mercury discharges and cleanup options, than to issue cleanup and abatement orders. The Hearing Panel concluded that additional information is needed about the precise locations of mining waste and the timing of discharges relative to site ownership. The Hearing Panel also determined that American Land Conservancy should be removed from the Central Mine Group order. The Advisory Team concluded that Gladys Whiteaker should be added to the Wide Awake Mine order based on her status as a general partner of Cal Sierra Properties. The Prosecution Team had previously determined that there was insufficient evidence

to name Magma Power Company, Cordero Mining Company, and Sunoco Energy Development Company in the Central Mine Group order; and that Glenn Mills should be removed from the Wide Awake Mine order.¹ The proposed Orders include these revisions. The Prosecution Team was also investigating whether the U.S. Bureau of Land Management should be added to either order. The proposed Orders have been modified to require the Prosecution Team to complete this investigation. Finally, the proposed Orders have been modified to specify the basis of liability for each discharger, and to make clarifications in response to comments.

The Board is not required to take additional evidence or allow additional comments when it considers a hearing panel's recommendation, unless the hearing panel proposes significant modifications to the orders as currently proposed. In such case, the Board may limit additional comments to the changes. In this case, the Hearing Panel's changes do the following: (i) clarify the basis of liability for each discharger, and add findings responding to all defenses asserted in the proceedings; (ii) make clarifying findings about the Basin Plan and beneficial uses; (iii) add a statement that the Board will take official notice that it has rained every year since 1954 in the vicinity of the Mines; (iv) modify the proposed Orders so that they are limited to requiring additional investigation and reporting, but not cleanup; (v) extend the due dates, which were based on a presumed 7 October 2009 effective date; and (vi) require the Prosecution Team to complete its investigation of other responsible parties. The Hearing Notice for the May 2010 meeting allowed parties and interested persons to comment on these changes. To avoid having to continue the item should the full Board decide to issue cleanup and abatement orders in lieu of the Hearing Panel's recommended Order, the Hearing Notice also listed the changes to the proposed Orders that would be needed to convert them to cleanup and abatement orders.

Water Code section 13304 imposes liability on dischargers of waste, if the discharges cause, contribute to, or threaten to create a condition of pollution or nuisance. Section 13267 allows the Board to require any person who is suspected of discharging waste to provide technical or monitoring reports, but does not require a showing of an actual or threatened pollution or nuisance. Staff therefore deleted some findings that the named dischargers were causing, contributing to or threatening pollution or nuisance. The parties should not infer that the hearing panel or the Board has determined that pollution or nuisance does not exist, or that any Discharger is not responsible for causing or contributing to a condition or threat of pollution or nuisance. Mercury levels regularly exceed applicable objectives in Sulphur Creek and Cache Creek, which constitutes a condition of pollution or nuisance. The Board will make any necessary pollution or nuisance findings in future phases of the investigation and eventual cleanup.

¹ The record indicates that Glenn Mills only owned a security interest in the site securing a loan, and did not operate or control the site. The lender liability exemption in Health and Safety Code sections 25548-25548.7 therefore relieves Glenn Mills of cleanup liability.

The Hearing Panel recommends adoption of the proposed Technical and Monitoring Report Orders for the Wide Awake and Central Mine group in lieu of the proposed cleanup and abatement orders.

Rain Data

The Prosecution Team presented evidence that mercury-laden sediments are mobilized during rain events and discharge into Sulphur Creek, but did not present evidence that rain events occurred every year. The Central Valley Water Board's advisors (Ken Landau, P.E. [Assistant Executive Officer] and Chris Foe, Ph.D. [Environmental Scientist IV]) obtained public rain data showing that rain events occurred every year since 1954, the first year for which data are readily available. The Hearing Notice allowed parties to rebut or object to this evidence. No rebuttals or objections were received.

The proposed Orders include a finding that the Board takes official notice that there are no years on record that it did not rain in the vicinity of the Mines. The California Department of Water Resources maintains an online data system called the California Data Exchange Center (CDEC), which includes precipitation data at sites throughout California. The following precipitation data sites were located in CDEC.

- Clear Lake Highlands (CLH) in Clear Lake Highlands, Lake County, monthly precipitation data from 10/1/1954 to present
- Whispering Pines (WSP) in Middletown, Lake County, with precipitation data from 1/1/1984 to present

The Clear Lake Highlands data (Attachment 1) set shows rainfall in Lake County since 1954 with the exceptions of two time periods when the CLH data set has no recorded data – winter 1985-86 and winter 2006-07. Note that the data set does not indicate that there was no rainfall during these time periods; the data set simply has no data for these time periods.

The Whispering Pines daily incremental rainfall data for the period 1 September 2006 through 1 May 2007 (Attachment 2) shows that rainfall did occur in the area during winter 2006/2007.

The Whispering Pines hourly incremental rainfall data for the period 1 October 1985 through 1 April 1986 (Attachment 3) shows that rainfall did occur in the area during winter 1985/1886.

Attachments 1-3 consist of Excel downloads from CDEC. Attachments 2 and 3 were copied to Word files and put into columns to reduce the number of pages.

ADVISORY TEAM RESPONSE TO COMMENTS ON PROPOSED TECHNICAL OR MONITORING REPORT ORDERS

Timely comments were received from the Prosecution Team, Homestake Mining Company, Helen W. Holliday Foundation, Magma Power Company on the Central Group order, and from the Prosecution Team, Homestake Mining Company, Robert Leal and the Emma G. Trebilcot Trust on the Wide Awake Mine order. In accordance with the Notice of Public Hearing, these were posted on the Board's website on 29 April 2010.

As required by the Notice of Public Hearing, the Prosecution Team provided a timely explanation of the basis for concluding that the Helen W. Holliday Foundation (Foundation) is properly named in the proposed Order. The Foundation submitted a short statement on 3 May 2010 denying responsibility. Since the statement appears to be in response to the Prosecution Team's submittal (and therefore could not have been submitted earlier), and cannot prejudice any party, the Chair has accepted the comment.

Bailey Minerals Corporation submitted comments on 30 April 2010 and did not respond to two emails from counsel stating that Bailey Minerals must demonstrate good cause in order to submit late comments. The Chair has rejected the late comments, without prejudice to Bailey Minerals' ability to provide oral comments at the hearing.

Some of the comments submitted by Homestake Mining Company, the Emma G. Trebilcote Trust, and Robert Leal, were duplicative of comments made in writing and before the Hearing Panel at the October hearing. Responses are being provided to most of these comments because they relate to sections of the Proposed Order that were revised or added following the October hearing. Where the comments are merely duplicative of previous comments and the hearing panel has already considered them and incorporated findings into the Proposed Order, the responses reference the relevant findings.

COMMENTS ON CENTRAL GROUP PROPOSED ORDER:

HOMESTAKE MINING COMPANY

COMMENT 1: Homestake Mining Company (Homestake) argues that Magma Power Company, Cordero Mining Company and Sunoco Energy Development Company should be named as dischargers in the Proposed Order.

RESPONSE: The Prosecution Team declined to name these entities in the proposed order. The Prosecution Team has been directed to complete its investigation of other entities that are or may be responsible for investigation or

cleanup of the mine, including specifically Magma Power Company, Cordero Mining Company, and Sunoco Energy Development Company (paragraph 15 under “It is hereby ordered”), and the Executive Officer may add additional responsible parties to the Order (Finding 63).

COMMENT 2: Homestake asserts that the record is not clear that applicable objectives for Sulphur Creek have been exceeded or that such exceedance is due to discharges of mercury from mining waste.

RESPONSE: (Note: The proposed Orders included revised findings stating that applicable objectives are exceeded in Sulphur and Cache Creeks.) The water quality objective for Sulphur Creek states:

...during low flow conditions, defined as flows less than 3 cfs, the instantaneous maximum total mercury concentration shall not exceed 1,800 ng/l. During high flow conditions, defined as flows greater than 3 cfs, the instantaneous maximum ratio of mercury to total suspended solids shall not exceed 35 mg/kg. Both objectives apply at the mouth of Sulphur Creek.

(Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, Fourth Edition (hereafter Basin Plan), III-5.00.)

Mercury in the Sulphur Creek watershed is from both natural (springs and mercury enriched soils) and anthropogenic (mine waste) sources. The water quality objective attempts to account for and give credit to dischargers for the high natural background mercury concentration in the watershed. The *Staff Report for the Amendment to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins to Determine Certain Beneficial Uses are Not Applicable in and Establish Water Quality Objectives for Sulphur Creek*, dated March 2007 (hereafter 2007 Basin Plan Amendment Staff Report)², which is part of the administrative record in this matter, explains the rationale for the objective as follows:

During summer, low-flow conditions, the only sources of mercury to Sulphur Creek are natural. The 1,800 ng/L objective represents the maximum measured total mercury concentration measured by Central Valley Water Board staff during low-flow conditions (Appendix C).

During high flow conditions, mercury sources to Sulphur Creek are associated with sediment runoff from the surrounding watershed.

² The 2007 Basin Plan Amendment Staff Report is available at http://www.swrcb.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/sulphur_creek_hg/sulphur_creek_staff_final.pdf

These sources include both naturally mercury-enriched soils and mine sites. As such, the proposed objective represents the runoff-associated mercury as measured by the ratio between mercury and total suspended solids. Available data show a statistically significant correlation between total mercury and total suspended solids (Hg/TSS). The maximum measured Hg/TSS ratio is 116 mg/kg during high flow conditions defined as greater than 3 cfs (Appendix C). The mine sites contribute 75% of the mercury load to Sulphur Creek (CVRWQCB, 2007). Central Valley Water Board staff estimates that remediation of the mine sites would reduce mercury loads from the mines to the creek by approximately 95% (this is not 100% because these sites likely were naturally mercury-enriched above regional background prior to mining). To account for this, the maximum Hg/TSS ratio was reduced by 71% (95% of the estimated contribution of mercury load from mine sites) to 35 mg/kg to estimate natural conditions prior to mining.

Exceedances of the water quality objective in Sulphur Creek during high flow events are documented in Appendix C (page 24) of the 2007 Basin Plan Amendment Staff Report. The compliance point for the determination of exceedances was at the USGS stream gauge site at the mouth of Sulphur Creek.

Additionally, water quality objectives are exceeded in Cache Creek. Sulphur Creek is tributary to Bear Creek, which is tributary to Cache Creek. The applicable water quality objective for both Bear Creek and Cache Creek is “average methyl mercury concentrations shall not exceed 0.12 and 0.23 mg methyl mercury/kg wet weight of muscle tissue in trophic level 3 and 4 fish, respectively”. (Basin Plan, III-5.01.) Data documenting exceedances of water quality objectives in Cache and Bear Creeks are found in Table 3.2 (page 9) of the October 2005 staff report entitled *Amendments to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control of Mercury in Cache Creek, Bear Creek, Sulfur Creek, and Harley Gulch*,³ which is part of the administrative record for this matter.

Going forward, the requirements for mine owners and operators for clean up also recognize the distinction between anthropogenic sources of mercury and naturally occurring mercury. With regard to control of mercury in Cache Creek, the Basin Plan states:

Responsible parties shall develop and submit for Executive Officer approval plans, including a time schedule, to reduce loads of mercury from mining or other anthropogenic activities by 95 % of

³ This report is available at http://www.swrcb.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/cache_sulphur_creek/cache_crk_hg_final_rpt_oct2005.pdf

existing loads consistent with State Water Resources Control
Board Resolution 92-49.

(Basin Plan IV-33.05.)

Additional language has been added to Findings 35 and 36 of the Proposed Order to provide citations to the data documenting exceedances of water quality objectives. Although Homestake has not specifically commented on this issue for the Wide Awake Order, the same language has been added to Findings 26 and 27 of the Wide Awake Proposed Order for consistency and clarification.

COMMENT 3: Homestake notes that the proposed Order does not dispute that a significant amount of mercury is naturally occurring, and cites findings in the proposed Order stating that as much as 90% of the total mercury load in Sulphur Creek is dissolved mercury from active hydrothermal systems.

RESPONSE: Table 5.1 (page 38) of the staff report entitled *Sulphur Creek TMDL for Mercury* dated January 2007⁴ estimates mercury loads from the different sources in Sulphur Creek. The total annual mercury load is 11.8 kg/yr. All the mines together are estimated to contribute 9.2 kg/yr or 78% of the total load. Figure 2.1 (page 16) of the same report breaks the mining loads down into sub watersheds. The Central Mine sub watershed is estimated to contribute 1.9 kg/yr or about 16 % of the total, the Wide Awake Mine sub watershed 0.8 kg/yr or 7% of the total. Geothermal springs, non-mine site erosion, and atmospheric deposition are estimated to contribute 2.6 kg/yr or about 22% of the load.

The originally proposed Finding 29 lacked a citation, and the Advisory Team cannot find a basis for this finding in the record. The Advisory Team has reviewed the data in the CalFed Report regarding dissolved mercury concentrations in Sulphur Creek and sees no basis for Finding 29. Accordingly Finding 29 has been revised to reflect the data described in this response.

Additionally, in reviewing the findings in response to Homestake's comment, the Advisory Staff noted one error in Finding 27, regarding the range of annual mercury load estimates from the Mines. That correction has been made to reflect the correct estimates which are from 4.4. to 18.6 kg/yr.

COMMENT 4: Homestake argues that it is not jointly and severally liable, because the liability is reasonably divisible.

⁴ The report is available at
http://www.swrcb.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/sulphur_creek_hg/sulphur_creek_tmdl.pdf

RESPONSE: The State Board has held that all dischargers are jointly and severally liable for the discharge of waste. (State Board Order WQ 90-2 [*Union Oil Company*]). At this stage, the Board has not determined the relative mercury contributions of various dischargers at any given site. The TMDL does not break down the load allocations by responsible party. Even were the Board inclined to apportion responsibility, which it is not, apportionment would be premature at this time.

MAGMA POWER COMPANY

COMMENT Delete reference to Magma in first paragraph of Investigation of Additional Responsible Parties section because the transcript does not show that Dr. Miller referenced Magma.

RESPONSE: The proposed Order has been revised to delete references to both Magma and Cordero in this section. Both entities' ability to access or control the property appear to have terminated by 1968. Dr. Miller first acquired in interest in 1974, and did not testify that he observed either entity conducting soil-disturbing activities.

HELEN HOLIDAY FOUNDATION

COMMENT Helen Holliday submitted general comments stating that the Prosecution Team submitted no evidence that mining activities actually took place on property formerly owned by the Foundation.

RESPONSE: See Prosecution Team statement dated 29 April 2010.

COMMENTS ON WIDE AWAKE MINE PROPOSED ORDER:

HOMESTAKE MINING COMPANY

COMMENT 1: Homestake argues that the findings in the Proposed Order are not sufficient to overcome the assertion that current and interim owners, operators and lessees are liable for discharges they did not actively cause. In particular, the findings do not address the holding of the State Board in WQ Order 92-04 (*U.S. Cellulose*).

RESPONSE: Finding 44 of the Proposed Order addresses the assertions of several dischargers that they should not be liable for passive discharges. With regard to the State Board decision in WQ Order 92-04 (*U.S. Cellulose*), Homestake relies too narrowly on a holding based on the unique facts of that case. Moreover, Homestake already raised this issue before the Panel at the October hearing. In Order 92-04, the State Board clearly reiterated that "landowners and tenants may be characterized as dischargers despite the lack of any direct action causing a discharge." (State Board Order 92-04 at 4.) However,

the State Board did not find liability for one tenant because, although it had exclusive control of the leased premises, it did not use, nor did it exercise any control over, the tanks that were the source of the discharge. Here, the Hearing Panel of the Central Valley Water Board considered the scope of Homestake's leasehold interest in the mine property and concluded that Homestake exercised sufficient control over the mine piles and tailings to have liability for passive discharge and, at a minimum, that it is appropriate to name Homestake as a discharger under the investigation provisions of Water Code Section 13267. See Finding 56 in the Proposed Order.

COMMENT 2: Homestake asserts that as much as 90% of the total mercury load in Sulphur Creek is dissolved mercury from active hydrothermal systems.

RESPONSE: See response to Homestake's Comment 3 to the Central Group Proposed Order. Finding 20 of the Proposed Order has been amended consistent with that response.

COMMENT 3: Homestake argues that it is not jointly and severally liable, because the liability is reasonably divisible.

RESPONSE: See response to Homestake's Comment 4 to the Central Group Proposed Order and Finding 48 of the Wide Awake Proposed Order, which states that all dischargers are jointly and severally liable for the discharge of waste under State Board precedent. Language has been added to Finding 48 to further clarify this issue.

EMMA G. TREBILCOTT TRUST

COMMENT 1: The Emma G. Trebilcott Trust (Trust) argues that the Trust should have been released from the Proposed Order on equitable grounds, based on the factors in State Board Order No. WQ 92-13 (*Wenwest et al.*) In particular the Trust points out that the Trust received ownership of the property through a court order, listed the property for sale within two months and sold it within twenty months, and never developed or improved it. The Trust further argues that the four charities that rely on the Trust's funding have never had any ownership or control over the property.

RESPONSE: The *Wenwest* decision and factors are discussed in the Proposed Order at Finding 49. The Trust made this argument before the Hearing Panel at the October hearing. The Panel of the Central Valley Water Board considered the Trust's argument and concluded that it would not recommend that the Board release the Trust on equitable grounds under the *Wenwest* decision. There is no clean-up currently proceedings at the mine property and the dischargers who initially caused the discharges during mining operations are no longer in

existence and all the dischargers are essentially on equal footing. While the Trust did not acquire the property voluntarily and did put it up for sale quickly, it exercised ownership of the property for twenty months. Finally, the Proposed Order is limited to site investigation and the costs of the investigation should be spread among all suspected dischargers.

Minor changes have been made to Finding 49 to clarify the Board's authority to release a party from a clean up and abatement order on equitable grounds.

ROBERT LEAL

COMMENT 1: Leal argues that there is no evidence of any mine shaft or open mine on the sites which he owned and that the Board is confusing the Wide Awake Mine site with the site of the Buckeye Mine.

RESPONSE: This comment is duplicative of arguments Leal raised prior to the panel hearing. Even if it can be shown that there is no mine shaft or open mine on the lots previously owned by Leal, the mercury discharges occur as a result of the presence of waste rock, tailings, and contaminated sediment. Evidence in the record shows that parcels owned by Leal were part of the mine property (see Finding 57 in the proposed Order) and accordingly, there is sufficient evidence before the Board to suspect that Leal owned property that discharged mine waste. If the Board concludes, based on the technical reports required by the proposed Order that a particular parcel was not a source of waste discharges, the affected Dischargers will have no further responsibility for clean-up. See Finding 54 of the proposed Order.

COMMENT 2: Leal argues that there is insufficient evidence in the record to show that Leal is liable for nuisance and that by modifying the order to remove the imposition of any requirement under authority of Water Code section 13304, the Board is conceding that there is insufficient evidence to hold the responsible parties liable for nuisance. Leal also argues that the Board has not sufficiently considered the applicable law on nuisance and that Leal did not have notice of any nuisance.

RESPONSE: The issuance of a section 13267 order does not require a finding of nuisance. See Findings 39, 45, and 46 of the Proposed Order. However, the modification of the Order to remove the clean-up requirements under section 13304 in no way constitutes a concession that there is insufficient evidence in the record to show that the dischargers created or threatened to create a condition of nuisance. To the contrary, Finding 27 of the proposed Order states that any discharges of mercury or mercury-laden sediments that reach Cache Creek threaten to cause or contribute to a condition of pollution or nuisance because Cache Creek is already impaired for mercury. See also Finding 34, and the response to Homestake's Comment 2 to the Central Group Proposed Order which references the exceedances of water quality objectives in Sulphur Creek

and Cache Creek, including the additional language added to Findings 26 and 27 in response to the comment. A sentence has been added to Finding 4 to emphasize that mercury levels in Sulphur Creek and Cache Creek constitute a condition of pollution or nuisance.

The Board has laid out its findings regarding the relevant law governing nuisance under section 13304 and the liability of interim landowners and lessees for that nuisance, including the question of notice, in Findings 33, 44, 49, and 51.

COMMENT 3: Leal argues that there is not sufficient information that the mercury levels in the piles are at harmful levels or that the mine parcels are in fact a factor in contributing to a pollution or nuisance.

RESPONSE: See Response to Comment 2 of Homestake on the Central Group Proposed Order.

COMMENT 4: Leal argues that liability for discharges is not joint and several.

RESPONSE: See Response to Comment 4 of Homestake on the Central Group Proposed Order.

COMMENT 5: Leal argues that under section 13267, the technical reports must be related to the specific discharge by Leal during his time of ownership. Additionally, Leal argues that the Regional Board has not provided an analysis that the burden of the report bears a reasonable relationship to the need for the Report.

RESPONSE: All responsible parties, including the interim owners, are jointly and severally liable for the discharges of mercury from the mine property. State Board Order WQ 90-2 [*Union Oil Company*]. The technical and monitoring reports being required under the Proposed Order are related to the discharge of mercury from the mine property. A separate investigation of mercury-laden sediments that discharged during Leal's ownership, or that migrated or were disturbed during Leal's period of ownership and discharged or threaten to discharge subsequently, is likely to be more costly than a joint investigation, not less, because it will duplicate other dischargers' investigations.

The need for the technical and monitoring report is laid out in Finding 41 or the proposed Order. The technical and monitoring requirements were unchanged from the original proposed Order, so this comment is outside the scope of the hearing notice, which limited comments to revisions. In addition, while no specific cost for the required reports has been estimated, the need for cleanup is well established. (See, e.g., the Basin Plan's *Cache Creek Watershed Mercury Program*.) The technical or monitoring report is necessary to accomplish the cleanup. (See, State Water Board Resolution 92-49.) The investigation is as limited as possible, and is consistent with orders requiring investigation or cleanup at other sites.

COMMENT 6: Leal argues that the Board has read the *Wenwest* decision too narrowly and that Leal should not be held liable based on equitable factors, even if technically liable.

RESPONSE: This comment is duplicative of arguments Leal raised prior to the panel hearing. The Board fully considered the *Wenwest* decision and the factors laid out in that decision and concluded that there was no reason to release Leal from being a responsible party on equitable grounds. In addition to the reasons laid out in Finding 49 (no clean-up is currently proceeding at the mine site and the Dischargers that caused the initial discharges during mining operations are no longer in existence), Leal's ownership extended over several years and was not for a short period of time, and his ownership of the property was not for the limited purpose of conveyance to a transferee. Minor changes have been made to Finding 49 to clarify the *Wenwest* holding and language has been added to Finding 57 in response to this comment to further clarify the basis for the Hearing Panel's recommendation not to release Leal on equitable grounds.

COMMENT 7: Leal argues that the proposed Order incorrectly states that the Board did not acquiesce in the discharge because the Regional Board visited the property in the 1990s, took samples, and prepared a report.

RESPONSE: This comment is duplicative of arguments Leal raised prior to the panel hearing. Board staff's investigation of the discharge in the 1990s is in no way an acquiescence in the continued discharge of mercury-laden sediment from the property.

COMMENT 8: Leal argues that, contrary to the Board's finding, a taking will occur under the requirements of the proposed Order, because the Order imposes too great a burden on private property.

RESPONSE: Leal does not currently have any property interest in the property at question in the Order. Accordingly, the proposed Order cannot constitute a taking of his property. The proposed Order addresses Leal's taking argument at Finding 57 and a sentence has been added to that finding for further clarification.

COMMENT 9: Leal argues that the proposed Order does not comply with the California Environmental Quality Act (CEQA).

RESPONSE: The finding regarding CEQA in the proposed Order has not been modified from the Orders before the Board in October, except for the removal of the last sentence which is only relevant to a clean-up action. Therefore, comments on the CEQA finding are outside the scope of the Hearing Procedures.

COMMENT 10: Leal argues that he should have been provided more than two weeks' notice of the comment deadline under the Hearing Procedures and that under due process, California statutes, and State Board regulations, he should have an opportunity to present his arguments up to and including the hearing.

RESPONSE: The Hearing Procedures provided two weeks for designated parties and interested persons to submit written comments to the Central Valley Water Board regarding modifications to the proposed Order, and further provided that written materials submitted after the deadline would not be accepted absent a ruling by the Board Chair. The Advisory Team reasonably limited the duration of the written comment period in order to have an opportunity to respond to the comments in writing prior to the Hearing and to provide the Board with an opportunity to review the comments and responses. Leal also had the opportunity to present written evidence and comments prior to the panel hearing and oral argument at the panel hearing, and may provide brief comments at the May board meeting. As noted above, Leal's comments primarily address provisions in the proposed Order that have not changed since the panel hearing.

Attachments:

1. Clear Lake Highlands rainfall data since 1954.
2. Whispering Pines daily incremental rainfall data for 1 September 2006 through 1 May 2007.
3. Whispering Pines hourly incremental rainfall data for 1 October 1985 through 1 April 1986.