

MOUNT DIABLO MERCURY MINE

PROSECUTION TEAM'S REBUTTAL BRIEF –

NEVADA STATUTE OF LIMITATIONS DOES NOT APPLY

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1 Kennametal, Inc. (Kennametal) argues that because its wholly owned subsidiary were
2 incorporated and dissolved pursuant to Nevada law, that Nevada’s statute of limitations should apply to a
3 California cleanup and Abatement Order. This is not true and unsupported by the law in California or
4 Nevada and is essentially just another attempt at avoiding liability or in the alternative an apportionment.

5 **I. California Law Provides That There is No Statute of Limitations for Administrative**
6 **Proceedings.**

7 As set forth above, this action to name the Responsible Parties in the subject Cleanup and
8 Abatement Order is an administrative proceeding. There is no statute of limitations with respect to
9 naming a Responsible Party in a Cleanup and Abatement Order pursuant to California Water Code
10 Section 13304. Accordingly, the statutes of limitations in the Code of Civil Procedure apply to cases filed
11 in court, not administrative proceedings such as this one. (See *City of Oakland v. Public Employees*
12 *Retirement System* (2002) 95 Cal.App.4th 29, 48; *Robert F. Kennedy Medical Center v. Department of*
13 *Health Services* (1998) 61 Cal.App.4th 1357, 1361-1362; *Little Company of Mary Hospital v. Belshe*
14 (1997) 53 Cal.App.4th 325, 329; *Bernd v. Eu* (1979) 100 Cal.App.3d 511, 515; 3 Witkin, Cal. Procedure
15 (4th ed. 1996) Actions, § 405(2), p. 510.)

16 Therefore, all of the Responsible Parties can be named in the Cleanup and Abatement Order
17 issued in this matter and there is no statute of limitations that prevents such action by the Regional Board.

18 **II. California Law Controls with respect to a Cleanup and Abatement Order Issued**
19 **Pursuant to California Water Code Section 13304, which holds Dissolved**
20 **Companies’ Shareholders Liable Even after Dissolution.**

21 California Water Code Section 13304 gives the State and Regional Boards jurisdiction to issue cleanup
22 and abatement orders against “any person.” The California Water Code defines “person” as “any person,
23 firm, association, organization, partnership, business trust, corporation, limited liability company, or
24 company.” (Wat. Code, § 19.) The definition of “person” encompasses corporations and does not
25 discriminate between domestic and foreign corporations or intact corporations and dissolved corporations.

1 The Regional Board had the authority to issue the Cleanup and Abatement Order. Kennametal
2 owned 100% of the stock of the entities that discharged and contributed to the contamination at the site
3 and because the subsidiary was dissolved and the assets distributed to the Kennametal the Prosecution
4 Team contends that Kennametal stand in the shoes of their wholly owned subsidiary for purposes of
5 naming them in this order.¹ As such, pursuant to section 13304 they are properly named to a Cleanup and
6 Abatement Order issued by a California Regional Water Quality Board.

7 Kennametal fails to address applicability of the Water Code, and instead argue that because its
8 wholly owned subsidiary incorporated in Nevada, that they are shielded from being named in a California
9 Cleanup and Abatement Order by Nevada Revised Statute 78.585.

10 Kennametal bases its entire argument on the holding in *Greb v. Diamond Intl. Corp.* (2013) 56
11 Cal.4th 243, that “the capacity of a foreign corporation to be sued in the State of California shall be
12 determined by the laws of the state in which the corporation was formed.” However, a careful reading of
13 *Greb* illustrates that Kennametal’s interpretation is not entirely correct because *Greb* and is, in fact,
14 limited to actions or suits, which are different from an administrative proceeding, making Kennametal’s
15 entire analysis inapplicable and irrelevant.

16 The issue before the court in *Greb* was the interpretation of California Corporations Code Section
17 2010 and whether it applied to foreign corporations. (*Greb, supra*, 56 Cal.4th at p. 245.) The plaintiff
18 argued that Section 2010 should be interpreted to mean that foreign corporations are bound by the same
19 rules as corporations incorporated in California. (*Greb, supra*, 56 Cal.4th at p. 262.) In rejecting this
20 argument, the court found there was no legislative intent for the same rules to apply to foreign
21 corporations and such a dramatic result would lead to an “elaborate and litigation-intensive scheme” that
22 the court was not willing to unilaterally impose. (*Ibid.*) The court also rejected similar arguments based
23 on case law and the California Constitution. (*Id.* at pp. 263-70.)

24 It is important to highlight the scope of the Court’s holding. First, it was limited to an issue
25 regarding interpretation of the California Corporations Code, not the Water Code. Second, it was focused

¹ See Prosecution Team Rebuttal Exhibit A, the deposition transcript of George Heideman stating that Nevada Scheelite Corporation’s assets at the time of dissolution, including the mine, was transferred to Kennametal.

1 solely on lawsuits and actions², not administrative proceedings, which have long been held as a separate
2 and distinct. In fact, Kennametal’s own brief only discusses the ability of Nevada Scheelite to be sued in
3 California and does not address administrative proceedings. Finally, the court held that Section 2010
4 does not apply to foreign corporations; it did not say, as Kennametal claims, that the capacity of foreign
5 corporations to be sued in California is determined by the laws of the state in which it was formed. Even
6 if the court limited a dissolved corporation’s ability to be sued in California, that limitation would not
7 apply to the Cleanup and Abatement Order because this is not an action or suit.

8 This brings us back to California Water Code section 13304, which allows us to name both
9 Sunoco and Kennametal in an order requiring cleanup and abatement at a site where their wholly owned
10 subsidiaries discharged or were suspected of discharging waste. Sunoco has admitted that Cordero
11 discharged at the site and the evidence provided by the Prosecution Team meets the burden of showing
12 Nevada Scheelite was also present and contributed to contamination at the site. As such, both are named
13 on the order.

14 **III. Nevada Law Regarding Statute of Limitations for Suing Dissolved Nevada**
15 **Corporations Does Not Apply to Administrative Proceedings in California.**

16 Kennametal posit that because their wholly owned subsidiaries were incorporated and eventually
17 dissolved in Nevada, Nevada law controls with respect to their ability to be sued and by extension be
18 named in a cleanup and abatement order. Specifically, Kennametal cites to Nevada Revised Statutes
19 (NRS) 78.585. As has been set forth above, this statute is inapplicable to a Cleanup and Abatement Order
20 issued by a California Regional Board. Although the Prosecution Team disputes this interpretation, even
21 if Nevada law was applied, the NRS does not bar California from issuing a cleanup and abatement order
22 in this matter.

23 Nevada Revised Statutes 78.585 provides that:

² Action is a term that is defined as “an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.” (Code Civ. Proc., section 22.) The Regional Boards and the Office of Chief Counsel have routinely held that resolutions of an ACL Complaint and Cleanup and Abatement Orders are not “actions.”

1 The dissolution of a corporation does not impair any remedy or cause of action available
2 to or against it or its directors, officers or stockholders commenced within 2 years after
3 the date of the dissolution with respect to any remedy or cause of action in which the
4 plaintiff learns, or in the exercise of reasonable diligence should have learned of, the
5 underlying facts on or before the date of dissolution, or within 3 years after the date of
6 dissolution with respect to any other remedy or cause of action. Any such remedy or
7 cause of action not commenced within the applicable period is barred. The corporation
8 continues as a body corporate for the purpose of prosecuting and defending suits, actions,
9 proceedings and claims of any kind or character by or against it and of enabling it
10 gradually to settle and close its business, to collect its assets, to collect and discharge its
11 obligations, to dispose of and convey its property, to distribute its money and other
12 property among the stockholders, after paying or adequately providing for the payment of
13 its liabilities and obligations, and to do every other act to wind up and liquidate its
14 business and affairs, but not for the purpose of continuing the business for which it was
15 established.

16 While NRS 78.585 does provide a statute of limitations for suing dissolved Nevada corporations
17 in Nevada, Nevada only has the ability to limit suits within its own jurisdiction; it does not have the
18 authority to place such procedural limitations in other jurisdictions. Such an interpretation would mean
19 that the state of Nevada could affect and in effect trump California Water Board Orders. The state of
20 Nevada does not govern California Water Board actions.

21 Even if Nevada Revised Statutes 78.585 governs the capacity of Nevada Scheelite in California, it
22 does not prohibit the State Board from approving the Cleanup and Abatement Order. The corporate
23 continuation language quoted above states that the corporation will continue for purposes of prosecuting
24 and defending proceedings against it, but does not place a time limit on continuation. (NRS 78.585.)
25 “Proceedings” are not mentioned in the statute of limitations language, they are only mentioned in the
26 continuation language. Since the Nevada legislature did not include “proceedings” within the statute of

1 limitations language when it knew how to do so, the Nevada legislature intended for the corporation to
2 continue to defend proceedings, such as this Cleanup and Abatement Order, after the two or three-year
3 statute of limitations for remedies and causes of action. Thus, the State Board is not prohibited under
4 Nevada law from approving the Cleanup and Abatement Order.

5 **IV. Public Policy Dictates Holding Kennametal Responsible for Contamination and**
6 **Damage to Water Quality caused by its Wholly Owned Subsidiary Operating in**
7 **California.**

8 California has an interest in protecting water quality. The legislature has declared that “the state
9 must be prepared to exercise its full power and jurisdiction to protect the quality of the waters in the state
10 from degradation . . .”. (Water Code Section 13000, see generally, *United States v. State Water*
11 *Resources Control Board* (1986) 182 Cal.App.3d 82, 227 Cal.Rptr. 161.) The Legislature has established
12 the Regional Boards to protect water quality and has prescribed specific administrative procedures for
13 achieving that goal through enforcement actions prescribed by the Water Code. (Water Code Division 7,
14 commencing with Section 13000, the Porter-Cologne Water Quality Control Act.) The Cleanup and
15 Abatement order is one of those legislatively prescribed procedures. (Water Code Section 13304.) To
16 interpret California Corporations Code or Nevada Revised Statutes so that a discharger escaped liability
17 would undermine the legislative purpose of Water Code section 13304.

18 In addition, the state has an interest in assuring codefendants jointly liable for damages are not
19 required to pay the share of damages attributable to a dissolved corporation.³ The Responsible Parties’
20 theory would allow dischargers to escape liability through corporate structuring, which isn’t in the state’s
21 interest.

22 Finally, such a finding would obligate the other Responsible Parties to absorb Kennametal’s share
23 of liability for cleanup costs. Essentially, the Regional Board would impose increased participation from
24 the other parties without allowing those parties to adequately present a defense. Such defense would have
25 required at a minimum, formal discovery by the parties, including depositions and motion practice.

³ State Water Board Order, WQ-89-14, *In the Matter of Trans-Tech Resources*.

1 Essentially, Kennametal is attempting to have its share or contribution apportioned to zero (0) percent by
2 the Board. Because Cleanup and Abatement Orders impose joint and several liability this is not done by
3 the Regional or State Boards.

4 **CONCLUSION**

5 The Prosecution Team contends that California law, which does not impose a statute of
6 limitations on administrative proceedings, applies to this Cleanup and Abatement Order. As such,
7 Kennametal is properly named on the Cleanup and Abatement Order.