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6 SUNOCO, INC.

7
8 STATE WATER RESOURCES CONTROL BOARD

9 STATE OF CALIFORNIA

10 In the Matter of

11 SUNOCO, INC.,

12
13 Petitioner,
For Review of Revised Order To Submit
14 Investigative Reports Pursuant To Water
Code Section 13267, Mount Diablo Mine,
15 Contra Costa County, dated December 30,
2009

PETITION NO.

**SUNOCO, INC.'S PETITION FOR
REVIEW AND RESCISSION OF
REVISED TECHNICAL
REPORTING ORDER NO. R5-
2009-0869**

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17 **I.** Pursuant to California Water Code Section 13320 and Title 23 of the
18 California Code of Regulations §§ 2050 *et seq.*, Petitioner Sunoco, Inc. (“Sunoco”
19 or “Petitioner”) hereby petitions the State Water Resources Control Board (“State
20 Board”) for review and rescission of the “Revised Technical Reporting Order R5-
21 2009-0869 issued pursuant to Section 13267 of the California Water Code
22 regarding the Mount Diablo Mine, Contra Costa County,” originally issued on
23 December 1, 2009, and revised and reissued on December 30, 2009 (“Rev.
24 Order”), by the Regional Water Quality Control Board, Central Valley Region”
25 (“Regional Board”). Sunoco requests a hearing in this matter.
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II. PETITIONER

The name and address of Petitioner is:

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III. ACTION OF THE REGIONAL BOARD TO BE REVIEWED AND RESCINDED

Sunoco requests that the State Board review and rescind the Regional Board's Rev. Order, which requires the submission of: 1) a Mining Waste Characterization Work Plan; 2) a Mining Waste Characterization Report; and 3) a Mine Site Remediation Work Plan (collectively, the "Work"). Sunoco is one of four (4) "dischargers" named in the Rev. Order. The Rev. Order describes the site as an "inactive mercury mine, located on approximately 109 acres on the northeast slope of Mount Diablo in Contra Costa County" ("Mine Site"). The Order also describes the Site as: "consist[ing] 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 pile capture most spring flow and surface runoff..." (Declaration of

1 David T. Chapman In Support of Petition for Review and Petition for Stay of
2 Action (“Chapman Decl.”), Exh. 1, p. 1.)

3 **IV. DATE OF THE REGIONAL BOARD ACTION**

4 The Regional Board adopted the original order on December 1, 2009, and
5 issued the Rev. Order on December 30, 2009.

6 **V. STATEMENT OF REASONS WHY THE REGIONAL BOARD’S**
7 **ACTION IS IMPROPER**

8 The State Board should review and rescind the Rev. Order because: (1) it is
9 improperly vague and ambiguous in its description of the Mine Site; (2) it requires
10 Sunoco to conduct Work on large areas of the Mine Site where Sunoco was not –
11 and is not – a “discharger,” in violation of established state and federal law; and (3)
12 it violates CWC § 13267(b)(1) by failing to provide Sunoco “with a written
13 explanation with regard to the need for the reports, and [fails to] identify the
14 evidence that supports requiring [Sunoco] to provide the reports.”

15 **A. Background.**

16 **1. Prior Regional Board Order to Sunoco**

17 The Rev. Order supersedes a June 30, 2009 order (“June 30 Order”) to
18 Sunoco, which required Sunoco (but no other alleged discharger), to submit a
19 “Divisibility Report” supporting Sunoco’s contention that the operations at the
20 Mine Site of its predecessor in interest, Cordero Mining Company (“Cordero”),
21 were “divisible” from those of others. (Chapman Decl.; Exh. 2, p. 2.) The
22 Divisibility Report was to include figures showing the Cordero lease area, the
23 extent of Cordero’s operations, including the total volume of rock removed from
24 the underground workings, an estimate of the total volume of broken rock
25 discharged, and a proposed area of study. (*Id.*) The June 30 Order also required
26 Sunoco to “submit an investigation work plan covering the area agreed upon by the
27 Regional Water Board and Sunoco.” (*Id.*) The June 30 order further provided that
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1 the "Regional Water Board staff must review and consider the divisibility report
2 and reach agreement with Sunoco on the limits, if any, on the Site to be
3 investigated." (*Id.*; emphasis added.) The June 30 Order also required Sunoco to
4 "voluntarily" provide the Regional Board with a Potentially Responsible Party
5 ("PRP") report identifying other parties that were owners and/or operators at the
6 Site that also should be named as dischargers on any future order. (*Id.*)

7 **2. Sunoco's Compliance with the June 30 Order.**

8 Sunoco complied with the June 30 Order by submitting its "Divisibility
9 Position Paper" ("Divisibility Report") and "Voluntary PRP Report" ("PRP
10 Report") to the Regional Board on July 31, 2009. (Chapman Decl., Exhs. 3 & 4.)

11 **3. Findings of the PRP Report**

12 In its PRP Report, Sunoco identified more than 20 former owners and
13 operators that the Regional Board failed to name as dischargers on its June 30
14 Order to Sunoco, including Bradley Mining Company ("Bradley Mining") and the
15 United States Department of Interior ("DOI"). (Chapman Decl., Exh. 3.)

16 **4. Findings of the Divisibility Report**

17 Sunoco's Divisibility Report detailed numerous key findings based upon its
18 technical consultant's review of historical records, maps and aerial photos that
19 establish a reasonable basis for divisibility of the Mine Site among those identified
20 in the PRP Report. (Chapman Decl., Exh. 4.) The findings most relevant to this
21 Petition are set forth below.

22 Well before Cordero began operating at the Site in 1955, Mt. Diablo
23 Quicksilver Mining Company ("Mt. Diablo Quicksilver") operated the Site
24 between 1930 and 1936, producing approximately 739 flasks of mercury.
25 (Chapman Decl., Exh. 4, p. 2-1.) Bradley Mining conducted surface and extensive
26 underground mining operations between 1936 and 1951, producing over 10,000
27 flasks of mercury. Later in 1951, the Ronnie B. Smith partnership ("Smith")
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1 surface mined mercury ore which they processed on Site to produce yet more
2 flasks of mercury. (Id., p. 2-1.) Together these three PRPs extracted significant
3 volumes - almost 11,000 flasks - of mercury. (Id., p. 2-1).

4 Of critical importance to this Petition is the fact that the mercury-bearing ore
5 processed onsite by these three PRPs generated extensive waste rock and tailings
6 piles in the south east and south central portions of the Site, where they remain.
7 (Id., Figs. 5-1, 5-4.) These are the “[e]xtensive waste rock piles and mine tailings
8 [that] cover the hill slope below the open cut,” from which “several springs and
9 seeps discharge” that are the primary concern of the Rev. Order. (Id., Exh. 1, p. 1.)

10 In contrast to the extensive mining, milling, and tailings generation and
11 disposal activities of these three PRPs operating between 1930 and 1951 (21
12 years), DOI, its contractors, and Sunoco’s predecessor in interest, Cordero,
13 conducted exclusively underground mining operations, in a separate location (the
14 DMEA Shaft), sporadically over a three-year period (1953-55). (Chapman Decl.,
15 Exh. 4.) Moreover, there is no evidence they **processed any mercury ore,**
16 **produced any flasks of mercury, or discharged any mill tailings.**

17 The DOI, through its Defense Minerals Exploration Agency (“DMEA”),
18 commenced the development of the “DMEA Shaft” by granting Smith a loan to
19 explore the deeper parts of a shear zone that Bradley previously explored.
20 (Chapman Decl., Exh. 4, p. 2-1, Exhs. 5-7.) Between approximately August 15,
21 1953 and January 16, 1954, Smith excavated a 300-foot-deep shaft, but never
22 encountered any mercury ore. (Id.) The DMEA Shaft is located over 200 feet
23 north of the open pit, shafts, adits, and drifts mined extensively by Mt. Diablo
24 Quicksilver, Bradley, and Smith. (See Id., Exhs. 5, 8-12.)

25 Under contract to DMEA, Smith constructed rail tracks for ore cars to dump
26 waste rock from the DMEA Shaft to the north, across the road (away from the pre-
27 existing tailings piles) to an “unlimited location,” believed to be on the north-
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1 facing slope in the Dunn Creek watershed where geologist E. M. Pampeyan
2 (“Pampeyan”) of the California Division of Mines and Geology (“CDMG”)
3 mapped a large waste rock dump in 1963. (*Id.*) In January 1954, Smith assigned
4 his lease and DMEA contract to PRPs Jonas and Johnson, who extended the
5 DMEA Shaft cross-cut to 120 feet, but ceased mining after encountering water and
6 gas. (*Id.*) The DMEA Shaft flooded on February 18, 1954. (*Id.*)

7 Cordero leased the Site from Mt. Diablo Quicksilver on November 1, 1954.
8 (Chapman Decl., Exhs. 4, 16.) After reconditioning the flooded DMEA Shaft,
9 Cordero drove a new series of cross-cut tunnels a total of 790 feet from the DMEA
10 Shaft towards the shear zone previously mined by Bradley, albeit at a depth below
11 Bradley’s extensive workings. (Chapman Decl., Exh. 4, p. 2-2, Figs. 3-1 to 3-4.)
12 Cordero intermittently operated from the DMEA Shaft for one year, from
13 approximately December 1954-December 1955, and made only a single
14 connection between its westernmost tunnel at the 360’ level with the bottom of the
15 vertical “Main Winze” shaft previously excavated by Bradley. (Chapman Decl., p.
16 2-1, Exh. 4, p. 3-1, Fig. 3-3; Exh. 10.) Any hydraulic connection or groundwater
17 movement between those tunnels in the past or at present is speculative.

18 Aboveground, Cordero rehabilitated the furnace and constructed a trestle
19 from the DMEA Shaft to the ore bin, near the furnace. (Chapman Decl., Exh. 4, p.
20 4-2, Fig. 4-1). However, there is no evidence Cordero ever used the furnace.
21 Cordero also conducted water handling and treatment operations extending from
22 the DMEA Shaft to a pond 1,350 feet to the west. (Chapman Decl., Exh. 4, p. 4-2,
23 Figs. 4-1, 4-2). Water pumped to this location either evaporated or drained to
24 Dunn Creek, to the satisfaction of the then-named Water Pollution Control Board,
25 which inspected and approved of Cordero’s water handling facilities. (*Id.*, Exh. 4,
26 pp. 5-2 – 5-4, Fig. 5-3, Exhs. 8-12.) The area Cordero used for water disposal is
27 not hydraulically connected to the “[e]xtensive waste rock piles and mine tailings
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1 [that] cover the hill slope below the open cut,” from which “several springs and
2 seeps discharge” that are the primary concern of the Rev. Order. (Id., Exh. 4 pp. 5-
3 4.)

4 The total volume of waste rock generated by Cordero from its underground
5 workings at the DMEA Shaft during its one year of intermittent operations was
6 approximately 1,228 cubic yards, using a 20% bulking factor. (Chapman Decl.,
7 Exh. 4, p. 5-1.) This contrasts with the tailings piles that preexisted Cordero,
8 which total approximately **105,848 cubic yards** of tailings and waste rock
9 resulting from the operations of all PRPs. (Chapman Decl., Exh. 4, p. 43, Tbl. 1.)

10 Near the end of its one year operational period, Cordero encountered small
11 zones of ore that it excavated and stockpiled for sampling and assaying, amounting
12 to approximately 100-200 tons of ore, or about 50-100 cubic yards. (Chapman
13 Decl., Exh. 4, p. 5-1.) A January 1953 topographical map prepared by Pampeyan
14 for the CDMG shows “dump” materials (i.e., tailings) and other features of the
15 Mine Site, including the location of prior surface mined areas and related mining
16 buildings. (Id., Exh. 4, p. 5-1, Fig. 5-1.) The January 1953 CDMG map also
17 shows the location of the DMEA’s “proposed shaft.” (Id.) In an exhibit to the
18 Divisibility Report, Sunoco’s consultant highlighted the locations of the pre-
19 existing waste rock/tailings piles and the proposed DMEA Shaft on the map. (Id.)
20 In 1956/57, following the mining by the DMEA contractors and Cordero,
21 Pampeyan updated this topographical map by, in part, **adding a pile of waste rock**
22 **adjacent to the DMEA shaft.** (Id., Exh. 4, p. 5-1, Fig. 5-2; Exh. 5.) Site
23 inspections in 2008 by Sunoco’s consultant Paul D. Horton (“Horton”) revealed
24 that this waste rock pile originally mapped around the DMEA shaft was no longer
25 present. Current Site owner Jack Wessman (“Wessman”) informed Horton that he
26 used the waste rock adjacent to the DMEA Shaft to backfill it. (Horton Decl. ¶ 8.)
27 Additional waste rock extracted from the DMEA Shaft, if any, was likely dumped
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1 on the north facing slope (“Northern Dump”) in the Dunn Creek watershed, using
2 the rail line that Smith constructed from the DMEA Shaft for that purpose.
3 (Chapman Decl., Exh. 4, p. 5-2, Fig. 5-2.) During a 2009 Site visit, Sunoco’s
4 consultant Horton observed smaller waste rocks on the Northern Dump typical of
5 the mining waste that could have been transported from the DMEA Shaft via
6 Smith’s rail line. (Horton Decl., ¶ 8.)

7 Complimenting Cordero’s limited area of operations and waste rock
8 disposal, no evidence in the record indicates that Cordero milled any of the small
9 amount of ore it mined. Nor is there any evidence that Cordero generated any
10 tailings, or added even a single rock to the pre-existing “[e]xtensive waste rock
11 piles and mine tailings [that] cover the hill slope below the open cut,” that are the
12 primary concern of the Rev. Order. (Chapman Decl., Exhs. 1, 4, at p. 3-1, Fig. 5-
13 2)(pre-existing waste rock/tailings piles highlighted in blue.) DMEA records
14 reveal that Cordero’s operations were unsuccessful, resulting in *no mercury*
15 *production*. (Chapman Decl., Exh. 14.)

16 Based on the foregoing facts, and as required in the June 30 Order, Sunoco
17 presented in the Divisibility Report a figure depicting Cordero’s former area of
18 operations within the much larger Mine Site, which it designated as the proposed
19 area of study. (Chapman Decl., Exhs. 2, 3, & 4 at p. 5-1.)

20 **5. The Regional Board Rejects Sunoco’s Well-Documented** 21 **Divisibility Report and Proposed Study Area.**

22 Despite the detailed factual presentation set forth in Sunoco’s Divisibility
23 Report, the Regional Board issued its October 30, 2009 Divisibility Response,
24 which stated that “Board staff disagree that there is a reasonable basis for
25 apportioning liability.” (Chapman Decl., Exh. 13, p. 1). Instead of meeting with
26 Sunoco to devise a study area, as contemplated in the June 30 Order, the Regional
27 Board rejected Sunoco’s divisibility argument and issued the Rev. Order, which
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1 implicitly finds Sunoco jointly and severally liable with three other alleged
2 dischargers for investigating and developing a remediation work plan for the entire
3 Mine Site.

4 The Regional Board's Divisibility Response letter relies on two primary
5 grounds in rejecting Sunoco's Divisibility Report. First, the Regional Board
6 assumes, without any evidentiary basis, that the "790 feet of underground tunnels
7 constructed by Cordero connect with, and thus contribute contaminated water to,
8 the earlier underground tunnels [excavated by Bradley] via the Main Winze."
9 (Chapman Decl., Exh. 13, p. 1.) There is no evidence that the connection to the
10 Main Winze in 1955 exists today, or that it existed for any duration post-1955,
11 since such mine shafts are prone to collapse and require constant rehabilitation.
12 (Horton Decl., ¶ 9.) Similarly, there is no evidence that water in the 360' level
13 Cordero tunnels was contaminated, or that it ever traveled 200 feet upwards
14 through the Main Winze and then several hundred feet horizontally out of the
15 drainage portal adit at 165' level adit. Records indicate that water emanated from
16 the 165' level adit long before Cordero operated on the Site. (Id.)

17 Second, the Regional Board contends that "no evidence in the files indicates
18 where the waste rock [from the DMEA shaft] was discharged." (Chapman Decl.,
19 Exh. 13, p. 1.) This contention is contradicted by Sunoco's Divisibility Report, in
20 which Sunoco provided the Regional Board with documented evidence of: (1)
21 CDMG topographical maps showing the Cordero waste rock piled adjacent to the
22 DMEA Shaft; (2) construction of a short stretch of rail leading from the DMEA
23 Shaft in the opposite direction of the preexisting open pit and tailings on the
24 southern portions of the Site toward the Northern Dump area in the Dunn Creek
25 drainage north of the DMEA Shaft; and (3) current Site owner Jack Wessman's
26 acknowledgment to Sunoco's consultant that he moved some or all of that adjacent
27 waste rock pile back into the DMEA Shaft, consistent with Mr. Horton's
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1 observations that the DMEA Shaft is now filled (Chapman Decl., Exh. 4, p. 5-1;
2 Horton Decl., ¶ 7.) Moreover, the existence of the short waste rock disposal rail
3 line reasonably suggests that Cordero placed other waste rock, if any, from the
4 DMEA Shaft in the Northern Dump area, just as Smith did. Finally, Sunoco's
5 consultant observed waste rock at the area near the end of where the short line rail
6 formerly existed that is typical of the mining waste excavated from the DMEA
7 Shaft. (Horton Decl., ¶ 8.) In contrast, the Regional Board's Divisibility Response
8 presents *no evidence* that Cordero disposed *any* waste rock or ore anywhere other
9 than next to the DMEA Shaft or in the Northern Dump area

10 **6. The Rev. Order Assumes Joint and Several Liability Among**
11 **the Named Dischargers.**

12 The Rev. Order alleges that “[t]he Cordero Mining Company operated the
13 Mine Site from approximately 1954 to 1956, and was responsible for sinking a
14 shaft, driving underground tunnels that connected new areas to pre-existing mine
15 workings, and discharging mine waste,” and names Sunoco as a “discharger”
16 because Cordero allegedly “discharged waste at the Mine Site through [its] actions
17 and/or by virtue of [its] ownership of the Mine Site...” (Chapman Decl., Exh. 1,
18 pp. 1-2.)

19 The Rev. Order identifies three other “dischargers” required to prepare
20 reports: (1) Jack and Carolyn Wessman (“Wessmans”)(current Mine Site owners);
21 (2) Bradley Mining; and (3) the DOI. (Chapman Decl., Exh. 1, p. 2.) The Rev.
22 Order identifies several other PRPs, but does not name them as “dischargers.” (Id.)
23 The Rev. Order fails to mention the State of California, a PRP that owns property
24 containing tailings discharging mercury contaminated waste to the waters of the
25 State of California.

26 The Revised Order requires the four named dischargers to submit, pursuant
27 to California Water Code section 13267 (“WC § 13267”) the following:
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- 1 1. Mining Waste Characterization Work Plan;
- 2 2. Mining Waste Characterization Report; and
- 3 3. Mine Site Remediation Work Plan. (Chapman Decl., Exh. 1, Rev.
- 4 Order, at pp. 4-5.)

5 The Rev. Order implicitly requires the four named dischargers to comply
6 with its terms, and apparently presumes them to be jointly and severally liable.

7 **B. Legal Bases for Sunoco's Challenge to the Rev. Order.**

8 **1. The Rev. Order's Mine Site Description Is Vague and** 9 **Ambiguous.**

10 The Rev. Order's description of the Mine Site is vague and ambiguous,
11 making compliance impossible and possibly resulting in unnecessary compliance
12 efforts not required by the Regional Board. While the Rev. Order describes the
13 Mine Site as "an inactive mercury mine, located on approximately 109 acres on the
14 northeast slope of Mount Diablo in Contra Costa County," it does not provide a
15 map nor any Assessor Parcel Number(s) ("APNs") that identify the specific Mine
16 Site boundaries. (See Chapman Decl., Exh. 1.) After the Regional Board issued
17 the first Site Order on March 25, 2009, Sunoco requested either a map or APNs
18 from the Regional Board to determine the specific "Mine Site" boundaries to be
19 investigated. (Id., at Exh. 15.) The Regional Board then referenced APN 78-060-
20 008-6, but the County Recorder no longer uses that number. Instead, it appears
21 that APN 78-060-008-6 became APN 078-060-034, but the Assessor's Map for
22 that APN consists of only 96.65 acres, not the Rev. Order's "109 acres." (Id., at
23 Exh. 20.) An older Assessor's Map indicates that APN 78-060-008-6 refers to a
24 parcel that was divided into smaller parcels that are now APNs 078-060-013, 078-
25 060-033, and 078-060-032, which total over 120 acres, and do not appear to cover
26 what is arguably the Mt. Diablo Mercury Mine area. (See Chapman Decl., Exh.
27 17.)

1 In sum, the Rev. Order's insufficient Mine Site description makes Sunoco's
2 compliance difficult if not impossible and could result in a futile and unnecessarily
3 costly investigation. Sunoco requests the State Board grant relief by rescinding the
4 Rev. Order and requiring the Regional Board to specify properly the boundaries of
5 the Mine Site.

6 **2. Sunoco Should Not Have Been Named as a Discharger or**
7 **Operator Over the Entire "Mine Site" Referenced in the**
8 **Rev. Order Because Cordero's Operations Are Divisible.**

9 The Rev. Order's requirements that Sunoco and the other three PRPs submit
10 an investigation work plan, an investigative report, and a remedial workplan
11 related to the Mine Site, (whatever area that encompasses), are substantially
12 overbroad, since Cordero operated on only a small portion of the Mine Site during
13 its one year of intermittent operations and did not produce any mercury flasks or
14 tailings. While Sunoco is willing to join with other PRPs to investigate and
15 prepare a remedial action workplan, if necessary, for areas where it formerly
16 operated, it is unwilling to do so for areas on which it did not operate or cause any
17 discharge to, including the majority of the Site such as the open pit mining area to
18 the south and southwest of the DMEA Shaft, the related large waste rock and
19 tailings piles on the southeast and south central portions of the Mine Site, or the
20 settlement ponds farther to the east. (Chapman Decl., Exh. 4, Fig. 5-1 (pre-
21 Cordero tailings piles highlighted in blue).)

22 The Rev. Order states that the Mine Site is comprised of approximately 109
23 acres, but even based on conservative estimates, Cordero operated on less than
24 10% of that area. (Horton Decl., ¶ 10.) The Rev. Order also asserts that the Site
25 consists "of an exposed open cut and various inaccessible underground shafts, adits
26 and drifts. Extensive waste rock piles and mine tailings cover the hill slope below
27 the open cut, and several springs and seeps discharge from the tailings-covered
28 area." (Chapman Decl., Exh. 1, at p. 1.) Yet, historical mine plans, maps, aerial

1 photographs and other records demonstrate that Cordero's mining activities in
2 1955 came well after those of Mt. Diablo Quicksilver., Bradley Mining and Smith
3 between 1936-1951, who excavated the "open exposed cut" portion of the mine
4 referenced in the Rev. Order, until landslides partially covered the area. (Id., Exhs.
5 9-12.) Cordero did not "operate" that area of the Mine Site and has no
6 "discharger" liability for it. The Divisibility Report reflects that Cordero mined to
7 the north of, and without discharge to, the "[e]xtensive waste rock piles and mine
8 tailings cover[ing] the hill slope below the open cut." (Id., Exh. 1, at 1.) Thus, the
9 Rev. Order improperly requires Sunoco to prepare technical reports related to large
10 areas where Cordero was not a "discharger."

11 Given Cordero's small, divisible "discharge" footprint at the Mine Site,
12 Sunoco objects to the Rev. Order's overbroad finding that Cordero "operated the
13 Mt. Diablo Mine from approximately 1954 to 1956." (Chapman Decl., Exh. 1, at
14 2.) No evidence suggests that Cordero operated the open pit mine or discharged
15 anything to the waste rock piles and mine tailings covering the hill slope below it,
16 which the Rev. Order identifies as significant areas of environmental concern.
17 (See Id. at p. 1.) Instead, the evidence shows where Cordero is known to have
18 operated, namely the DMEA Shaft and related Cordero tunnels, refurbishing of the
19 furnace, the waste rock pile formerly adjacent to the DMEA Shaft, the settling
20 pond area approximately 1,350 feet north of the DMEA Shaft, and the Northern
21 Dump at the end of Smith's rail spur from the DMEA Shaft. (Chapman Decl., Exh.
22 4.) CWC § 13267 only authorizes the Regional Board to order Sunoco to
23 investigate and prepare reports for those areas.

24 Sunoco therefore objects to the Rev. Order's requirement that it submit work
25 plans and a report concerning the entire Mine Site.

26 The plain language of the California Water Code reveals that a "discharger"
27 is only liable for investigating areas to which it discharged. A "discharger" is not
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1 liable for investigating and remediating the geographically distant and unrelated
2 discharges of other PRPs. This legal principle means that the Regional Board
3 cannot require Sunoco to investigate sources of mercury contamination unrelated
4 to Cordero's activities, such as the open pit mine, and the waste rock piles and
5 mine tailings covering the hill slope below it.¹

6 Moreover, the Revised Order acknowledges that CWC § 13267 requires the
7 Regional Board to provide Sunoco "with a written explanation with regard to the
8 need for the reports, and shall identify the evidence that supports requiring that
9 person to provide the reports." (WC §13267(b); emphasis added.)(Chapman Decl.,
10 Exh. 1, at p. 3.) The Rev. Order fails to identify *any* evidence in support of its
11 claim that Cordero "operated the Mt. Diablo Mine" generally, or that it specifically
12 discharged any of the mining waste that is the subject to the Rev. Order. Thus, the
13 Rev. Order fails to – and cannot – meet this requirement of CWC § 13267(b) in
14 light of the evidence.

15 The record reveals that Cordero operated solely from the DMEA Shaft north
16 of, and divisible from, the open pit, shafts, adits, and drifts mined extensively by
17 Bradley and others before and afterwards. (See Chapman Decl., Exhs: 4, 6, 8-12,
18 16.)

19 Moreover, there is no evidence that any of Cordero's waste rock would
20 cause the discharge of mercury, or that Cordero deposited it on the extensive
21 Bradley tailings piles that are the primary concern of the Rev. Order. The record
22 shows that Cordero placed its waste rock adjacent to the DMEA Shaft, and that
23 that current Site owner Jack Wessman used it to refill the shaft, or, it was discarded
24 on the Northern Dump over the ridge, into the Dunn Creek drainage, using the
25 Smith's rail track from the DMEA Shaft. (Chapman Decl., Exh. 4, 5, 8 at p. 5-1,
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27 ¹ Sunoco continues to investigate the facts underlying this divisibility issue, and
28 reserves the right to supplement the record with relevant additional documents and
information.

1 Figs. 5-2 -- 5-3; Horton Decl., ¶¶ 7-8.) Waste rock now in that location is typical of
2 the mining waste from the DMEA Shaft. (Horton Decl., ¶ 8.)

3 There is evidence that Cordero extracted a small amount of low-grade ore,
4 but never processed it because it was not commercially viable. (See Chapman
5 Decl., Exh. 19.) There is no evidence that Cordero ever produced any mercury or
6 any tailings. Thus, the Regional Board has no evidentiary basis for requiring
7 Cordero to investigate the extensive tailings piles ("mine waste") known to have
8 been generated by Mt. Diablo Quicksilver, Bradley, and Smith or the groundwater
9 ("seeps") emanating from them.

10 While Cordero connected at the 360' level to the bottom of Bradley's Main
11 Winze shaft, there is no evidence that water in the Cordero tunnels was or is
12 contaminated, or that it rose 200 feet from the bottom of the Main Winze at the
13 360' level to then travel several hundred feet before exiting at the 165' foot level
14 adit. There is only an evidentiary basis for requiring Sunoco to investigate its
15 underground tunnel system, the water, if any, within it, and its former connection
16 the Main Winze, to determine whether its former workings could be discharging
17 contaminants out the 165' adit. Even so, the State Board should limit the scope of
18 Sunoco's liability for this investigation, since water emanated from the 165' level
19 adit before Cordero's operations and considering that any acid mine drainage in
20 that area likely results from the operations of Bradley and others.

21 Sunoco requests that the State Board grant relief and order rescission of the
22 Rev. Order and require the Regional Board to provide reference to the evidence on
23 which it relies to order Sunoco to furnish technical reports under CWC §13267,
24 and that the Regional Board should limit any revised Order to Sunoco to the areas
25 where evidence shows that Cordero actually operated and discharged wastes.
26 Those areas are described in Sunoco's Divisibility Report. (Chapman, Decl., Exh.
27 4, Fig. 4-1.)
28

1 **A. Legal Bases for Divisibility**

2 Any order requiring Sunoco to perform Work at the Mine Site should be
3 limited in scope because: (1) under well-established California law, lessees such as
4 Cordero are not responsible for investigating or remediating continuing nuisances
5 related to discharges by others, and (2) the United States Supreme Court has
6 recently held that divisibility, not joint and several liability, is proper where a party
7 such as Cordero can show that a reasonable basis for apportionment exists.

8 The Rev. Order states that:

9 As described in Findings Nos. 4 - 7, the Dischargers are named in this
10 Order because all have discharged waste at the Mine Site through
11 their actions and/or by virtue of their ownership of the Mine Site. The
12 reports required herein are necessary to formulate a plan to remediate
13 the wastes at the Mine Site, to assure protection of waters of the state,
14 and to protect public health and the environment. (Chapman Decl.,
15 Exh. 1, Rev. Order, p. 2.)

16 While a discharger may have a legal obligation to investigate and remediate
17 contamination they caused, no such obligation exists where another caused the
18 contamination. This is particularly true of alleged dischargers who leased, but did
19 not own, a site. Here, the Rev. Order's reference to the "Mount Diablo Mercury
20 Mine" is vague, and appears to suggest, without any evidentiary basis, that Cordero
21 mined the entire underground workings and is somehow responsible for all acid
22 mine drainage and waste mine rock and tailings at the Mine Site, as well as for all
23 past discharges of mercury contaminated water to a settlement pond at the Site.
24 The Rev. Order appears to suggest that Sunoco must investigate others' discharges
(i.e., Bradley Mining's).

25 This Petition provides the legal and factual basis for limiting the scope of the
26 Work to be performed by Sunoco at the Mine Site. The Rev. Order articulates no
27 legal or factual basis for requiring Sunoco to investigate or remediate areas
28 operated by other PRPs.

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1. The Regional Board's Purported Theory of Liability – Joint & Several Through Passive Migration/Continuing Nuisance

a. In the Matter of the Petition of Zoecon Corporation

The Regional Board asserts in its Divisibility Response that it "...maintain[s] 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." (Chapman Decl., Exh. 13, at p. 2.) While the Rev. Order generally references sections of the California Water Code, it does not specifically articulate any legal authority supporting the liability of a lessee under a passive migration theory, although it appears to be loosely and erroneously based on the State Water Resources Control Board's decision In the Matter of the Petition of Zoecon Corporation, Order No. WQ 86-02 ("Zoecon"). However, Zoecon is inapplicable to Sunoco, a mere former lessee.

According to this theory, Cordero's lease of a portion of the Mine Site provided it with legal control sufficient to allow it to remediate continuing nuisances in the areas covered in the lease – including the discharges of others. Under California law, subsequent *owners* may be liable for passive migration of a continuing nuisance created by another, but lessees such as Cordero cannot be held liable for those discharges. Zoecon applies to Mine Site owners and former owners, but not to lessees such as Cordero. Under Zoecon, a current owner may face liability because it has the authority to abate a continuing nuisance resulting from the passive migration of contaminants, even where the original discharge was caused by a predecessor owner. However, nothing in Zoecon supports a finding of liability for former lessees such as Cordero, that neither caused any continuing nuisance resulting from the mining operations of others, nor has any current authority to abate it. In Zoecon, the State Board concluded that the petitioner, the

1 current site owner, was legally responsible for conducting the required
2 investigation or remedial action, basing its decision on a passive migration,
3 continuing nuisance theory;

4 Therefore we must conclude that there is an actual movement of waste
5 from soils to ground water and from contaminated to uncontaminated
6 ground water at the site which is sufficient to constitute a 'discharge'
7 by the petitioner for purposes of Water Code §13263(a). (Zoecon at p.
8 4.)

9 Water Code §13263(a) provides:

10 (a) The regional board, after any necessary hearing, shall prescribe
11 requirements as to the nature of any proposed discharge, existing
12 discharge, or material change in an existing discharge, except
13 discharges into a community sewer system, with relation to the
14 conditions existing in the disposal area or receiving waters upon, or
15 into which, the discharge is made or proposed. The requirements
16 shall implement any relevant water quality control plans that have
17 been adopted, and shall take into consideration the beneficial uses to
18 be protected, the water quality objectives reasonably required for that
19 purpose, other waste discharges, the need to prevent nuisance, and the
20 provisions of Section 13241. (CWC §13263(a).)

21 Zoecon also states, "...here the waste discharge requirements were imposed
22 on Zoecon not because it had 'deposited' chemicals on to land where they will
23 eventually 'discharge' into state waters, but because it *owns* contaminated land
24 which is directly discharging chemicals into water." (Zoecon at p. 5; emphasis
25 added.) Similarly, in Zoecon the State Board made the "determination that the
26 property *owner* is a discharger for purposes of issuing waste discharge
27 requirements when wastes continue to be discharged from a site into waters of the
28 state." (Id.; emphasis added.)

Later, Zoecon explains that a New Jersey court's application of the common
law nuisance doctrine would probably not be followed by a California court
"because California Civil Code §3483 provides that every successive *owner* of

1 property who neglects to abate a continuing nuisance upon, or in the use of, such
2 property, created by a former owner, is liable therefore in the same matter as the
3 one who first created it.” (Zoecon at p. 10; emphasis added). Zoecon
4 acknowledged that “[c]ommon law governs in California only to the extent that it
5 has not been modified by statute,” (id. at p. 10, n 6), thereby recognizing that the
6 California legislature specifically excluded lessees from liability in codifying
7 nuisance law, since Civil Code §3483 only applies to “owners,” and not lessees.
8 Thus, Zoecon does not apply to lessees such as Cordero, and to the extent the Rev.
9 Order attempts to require Sunoco to investigate and remediate waste discharged by
10 others such as Bradley Mining, it is inappropriate and unsupported by law.

11 b. Under California Civil Code §3483, Lessees Such As Cordero Are
12 Not Liable For Nuisances Created Prior To The Leasehold.

13 California Civil Code §3483 assesses continuing nuisance liability only
14 upon owners and former owners, not lessees. The plain language of §3483 reveals
15 that the legislature explicitly excluded lessees from liability for continuing
16 nuisance:

17 “Every successive *owner* of property who neglects to abate a
18 continuing nuisance upon, or in the use of, such property, created by a
19 former owner, is liable therefor in the same manner as the one who
20 first created it.” (Cal. Civ. Code § 3483; emphasis added.)

21 Even if the Regional Board were to somehow find that Cordero was a
22 constructive owner of the Mine Site (which it cannot), Cordero would still not face
23 liability under California law, because it is well-established that “. . . *there is no*
24 *dispute in the authorities that one who was not the creator of a nuisance must*
25 *have notice or knowledge of it before he can be held [liable].”* (Reinhard v.
26 Lawrence Warehouse Co., 41 Cal.App.2d 741 (1940) (emphasis added), citing
27 Grigsby v. Clear Lake Water Works Co., 40 Cal. 396, 407 (1870); Edwards v.
28 Atchison, T. & S. F. R. Co., 15 F.2d 37, 38 (1926).) Similarly, “[i]t is a

1 prerequisite to impose liability against a person who merely passively continues a
2 nuisance created by another that he should have notice of the fact that he is
3 maintaining a nuisance and be requested to remove or abate it, or at least that he
4 should have knowledge of the existence of the nuisance.” (Reinhard, supra, at
5 746.)

6 The Rev. Order’s allegation that “[a]cid mine drainage containing elevated
7 levels of mercury and other metals are being discharged to a pond that periodically
8 overflows into Horse and Dunn Creeks” is insufficient to trigger liability on the
9 part of Cordero since, in addition to it never having been an owner, no evidence
10 shows that Cordero had notice that it was maintaining a nuisance, that any agency
11 asked Cordero to remove or abate it, or that even knew of the nuisance. (Chapman
12 Decl., Exh. 1, at p. 3.) Instead, the record indicates that during Cordero’s
13 leasehold, *the State Water Pollution Control Board specifically noted that Cordero*
14 *was not maintaining any nuisance related to soil or water discharge of any*
15 *contaminant, and in fact commended Cordero for its beneficial water management*
16 *practices.* (Chapman Decl., Exh. 4, at p. 5-2; Exh. 18.) If the Regional Board now
17 asserts that a nuisance was occurring at the time of Cordero’s lease of part of the
18 Mine Site, it begs the question as to why the Regional Board did not require
19 investigation or remediation of this alleged nuisance at the time, some 60 years
20 ago. If the state regulators were not aware of the nuisance at the time, there is no
21 reason to believe that Cordero knew or should have known about it.

22 The Regional Board provides no legal or factual basis for the conclusion that
23 Cordero has legal liability as an “owner” and, therefore, a discharger, under a
24 passive migration/continuing nuisance theory. Thus, the Rev. Order’s attempt to
25 name Cordero as a party responsible for the discharge(s) of others at the Mine Site
26 is unsupported by California law.

27 iii. Divisibility Is Proper Because Sunoco Can Show A Reasonable Basis
28 For Apportionment

1 a. Joint & Several Liability after the Burlington Northern case.

2 The United States Supreme Court recently held that divisibility is
3 appropriate where a party can show a reasonable basis for apportionment.
4 (Burlington Northern & Santa Fe Railway Co. et al. v. United States, (2009) 129 S.
5 Ct. 1870.) In Burlington, neither the parties nor the lower courts disputed the
6 principles that govern apportionment in CERCLA cases, and both the District
7 Court and Court of Appeals agreed that the harm created by the contamination of
8 the Arvin facility, although singular, was theoretically capable of apportionment.
9 (Id. at 1881.) Thus, the issue before the Court was whether the record provided a
10 “reasonable basis” for the District Court’s conclusion that the railroad defendants
11 were liable for only 9% of the harm caused by contamination at the Arvin facility.
12 (Id.) Despite the parties’ failure to assist the District Court in linking the evidence
13 supporting apportionment to the proper allocation of liability, the District Court
14 ultimately concluded that this was “a classic ‘divisible in terms of degree’ case,
15 both as to the *time period in which defendants’ conduct occurred*, and ownership
16 existed, *and as to the estimated maximum contribution of each party’s activities*
17 *that released hazardous substances that caused Mine Site contamination.*” (Id. at
18 1882; emphasis added.)

19 Consequently, the District Court apportioned liability, assigning the railroad
20 defendants 9% of the total remediation costs. (Id.) The Supreme Court concluded
21 that the facts contained in the record reasonably supported the apportionment of
22 liability, because the District Court’s detailed findings made it abundantly clear
23 that the primary pollution at the Arvin facility was contained in an unlined sump
24 and an unlined pond in the southeastern portion of the facility most distant from
25 the railroads’ parcel and that the spills of hazardous chemicals that occurred on the
26 railroad parcel contributed to no more than 10% of the total Mine Site
27 contamination, some of which did not require remediation. (Id. at 1882-3) Thus,
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1 the Supreme Court recognized that “. . . *if adequate information is available,*
2 *divisibility may be established by ‘volumetric, chronological, or other types of*
3 *evidence,’ including appropriate geographic considerations”* (Id. at 1883;
4 emphasis added.) Although the evidence adduced by the parties did not allow the
5 court to calculate precisely the amount of hazardous chemicals contributed by the
6 railroad parcel to the total Mine Site contamination, or the exact percentage of
7 harm caused by each chemical, the evidence did show that fewer spills occurred on
8 the railroad parcel and that of those spills that occurred, not all were carried across
9 the railroad parcel to the sump and pond from which most of the contamination
10 originated. (Id.) Because the District Court’s ultimate allocation of liability was
11 supported by the evidence and comported with general apportionment principles,
12 the Supreme Court reversed the Court of Appeals’ conclusion that the railroads are
13 subject to joint and several liability for all response costs arising out of the
14 contamination of the Arvin facility. (Id.)

15 b. The Regional Board may not circumvent Burlington Northern.

16 It is well-established that “litigants may not invoke state statutes in order to
17 escape the application of CERCLA’s provisions in the midst of hazardous waste
18 litigation.” (Fireman’s Fund Insurance Company v. City of Lodi, 303 F.3d 928,
19 947 n. 15 (9th Cir. 2002).) Similarly, because “[f]ederal conflict preemption
20 [exists] where ‘compliance with both the federal and state regulations is a physical
21 impossibility,’ or when the state law stands as an ‘obstacle to the accomplishment
22 and execution of the full purposes and objectives of Congress”” (Id. at 943), the
23 Regional Board may not – in an attempt to assess joint and several liability – apply
24 any state law provisions in a manner that conflict with Burlington. Applying the
25 Burlington holding to the facts outlined herein concerning Cordero’s operations
26 compel the conclusion that apportionment, not joint and several liability, is
27 appropriate at this Site.

1 Here, Sunoco has shown adequate evidence to support divisibility "by
2 volumetric, chronological, or other types of evidence, including appropriate
3 geographic considerations," and that a reasonable basis exists for dividing liability
4 because: (1) Cordero is only responsible for 1% of the total volume of mine related
5 waste at the Site; (2) Cordero dumped its waste mine rock adjacent to or to the
6 north of the DMEA Shaft, away from the Bradley Mining waste rock and tailings
7 on the eastern side of the Mine Site; (3) Cordero's operations did not result in the
8 processing of any mercury ore, meaning it generated no tailings, unlike the
9 extensive tailings generated by Bradley Mining and others; (4) Cordero discharged
10 or otherwise treated its extracted mine water to the satisfaction of the State Water
11 Pollution Control Board (which specifically did not find any nuisance) and
12 disposed of it to the west of the Mine Site, an area not hydraulically connected to
13 the "[e]xtensive waste rock piles and mine tailings [that] cover the hill slope below
14 the open cut," from which "several springs and seeps discharge" that are the
15 primary concern of the Rev. Order. (Chapman Decl., Exh. 1, at p. 1; Exh. 4, pp. 5-
16 4); and (5) there is no evidence that any groundwater exists in the former Cordero
17 underground workings, or that if it does, it is contaminated, and even if it is, that it
18 migrated 200' vertically upwards in the Main Winze before exiting several
19 hundred feet away at 165' level adit.

20 Sunoco has shown a reasonable basis for apportionment, and the Regional
21 Board cannot require it under state or federal law to investigate or remediate any
22 continuing nuisance caused by other PRPs.

23 **VI. THE MANNER IN WHICH PETITIONER HAS BEEN**
24 **AGGRIEVED**

25 The Regional Board's actions have aggrieved Sunoco because the Rev.
26 Order is arbitrary and capricious, vague and ambiguous, and unsupported by the
27 facts or law. Absent a better Site definition, Sunoco cannot reasonably comply,
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1 resulting in potentially unwarranted enforcement of the Rev. Order. The Rev.
2 Order's subjective Mine Site description relegates Sunoco's uncertain obligations
3 thereunder to a guessing game in violation of Sunoco's due process rights.
4 (Connally v. General Construction Co., 269 U.S. 385, 391 (1926) (“[A] statute
5 which either forbids or requires the doing of an act in terms so vague that men of
6 common intelligence must necessarily guess at its meaning and differ as to its
7 application, violates the first essential of due process of law”); Gatto v. County of
8 Sonoma, 98 Cal. App. 4th 744, 773-774 (2002); Papachristou v. City of
9 Jacksonville, 405 U.S. 156, 162 (1972) (law was unconstitutionally vague for
10 failure to give fair notice of what constituted a violation; “all persons are entitled to
11 be informed as to what the State commands or forbids”).)

12 Also, despite Sunoco's strong divisibility argument, by naming Sunoco a
13 discharger purportedly jointly and severally liable for conducting the Work over
14 the entire Site required by the Rev. Order, the Regional Board attempts to impose
15 on Sunoco significant and unjustified compliance costs.

16 VII. STATE BOARD ACTION REQUESTED BY PETITIONER

17 Sunoco requests that the State Board immediately stay enforcement of the
18 Rev. Order and determine that the Rev. Order is arbitrary and capricious or
19 otherwise without factual or legal bases, and rescind it on the following grounds:
20 (1) it violates Sunoco's due process by providing an inaccurate description of the
21 “Mine Site” boundaries, making compliance impossible; (2) it violates state and
22 federal law by imposing joint and several liability and thus failing to limit
23 Sunoco's liability to areas where Sunoco operated the Site; and (3) it violates CWC
24 § 13267(b)(1) by failing to provide Sunoco “with a written explanation with regard
25 to the need for the reports, and [fails to] identify the evidence that supports
26 requiring [Sunoco] to provide the reports.
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1 **VIII. STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF**
2 **LEGAL ISSUES RAISED IN THE PETITION**

3 For purposes of this protective filing, the Statement of Points and
4 Authorities is subsumed in Sections V and VI of this Petition. Sunoco reserves the
5 right to file a Supplemental Statement of Points and Authorities, including
6 references to the complete administrative record and other legal authorities and
7 factual documents and testimony, as well as to supplement its evidentiary
8 submission.

9 **IX. STATEMENT REGARDING SERVICE OF THE PETITION ON**
10 **THE REGIONAL BOARD AND NAMED DISCHARGERS**

11 A copy of this Petition is being sent to the Regional Board, to the
12 attention of Pamela C. Creedon, Executive Officer, by email and U.S. Mail. By
13 copy of this Petition, Sunoco is also notifying the Regional Board of Sunoco's
14 Petition and the concurrently filed Petition for Stay of Action. A copy of this
15 Petition is also being sent by U.S. Mail to the three other dischargers named in the
16 Rev. Order.

17 **X. STATEMENT REGARDING ISSUES PRESENTED TO THE**
18 **REGIONAL BOARD/REQUEST FOR HEARING**

19 Sunoco raised the substantive issues and objections raised in this Petition
20 before the Regional Board in both a the prior petition filed in abeyance and served
21 on the Regional Board, and in Sunoco's Divisibility Report. The Regional Board
22 provided no notice that it was issuing the Rev. Order, did not provide Sunoco with
23 a draft of the Rev. Order, and provided no comment period for a draft version of
24 the Rev. Order or opportunity to discuss it with the Regional Board.

25 Sunoco requests a hearing in connection with this Petition.

26 For all the foregoing reasons, Sunoco respectfully requests that the State
27 Board review the Revised Order and grant the relief as set forth above.

1 Respectfully submitted,

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3 DATED: January 29, 2010

EDGCOMB LAW GROUP

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5 By: _____


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SUNOCO, INC.

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SUNOCO, INC.

STATE WATER RESOURCES CONTROL BOARD
STATE OF CALIFORNIA

In the Matter of
SUNOCO, INC.,

Petitioner,

For Stay of Revised Order To Submit
Investigative Reports Pursuant To Water
Code Section 13267, Mount Diablo
Mine, Contra Costa County, dated
December 30, 2009

PETITION NO.

**SUNOCO, INC.'S PETITION FOR
STAY OF REVISED TECHNICAL
REPORTING ORDER NO. R5-
2009-0869**

Pursuant to California Water Code § 13321 and 23 Cal. Code of Regs. § 2053, Sunoco, Inc. (“**Sunoco**” or “**Petitioner**”) hereby petitions the State Water Resources Control Board (“**State Board**”) to stay implementation of the “Revised Technical Reporting Order R5-2009-0869 issued pursuant to Section 13267 of the California Water Code regarding the Mount Diablo Mine, Contra Costa County,” originally issued on December 1, 2009, and revised and reissued on December 30, 2009 (“**Rev. Order**”), by the Regional Water Quality Control Board, Central Valley Region (“**Regional Board**”).

Petitioner has concurrently filed a Petition for Review and Rescission of the Rev. Order with this Petition for Stay of Action.

1 **I. STANDARD OF REVIEW**

2 Water Code section 13321 authorizes the State Board to stay the effect of
3 Regional Board decisions. Title 23, CCR § 2053 requires that a stay shall be
4 granted if a petitioner alleges facts and produces proof of:

5 (1) Substantial harm to petitioner or to the public interest if a stay is
6 not granted;

7 (2) A lack of substantial harm to other interested persons and to the
8 public if a stay is granted; and,

9 3) Substantial questions of fact or law regarding the disputed action.
10 (23 CCR § 2053(a).)

11 The State Board’s granting of a stay is equivalent to a preliminary
12 injunction. The California Supreme Court has stated that the standard for a
13 preliminary injunction is as follows:

14 In deciding whether to issue a preliminary injunction, a court must weigh
15 two “interrelated” factors: (1) the likelihood that the moving party will ultimately
16 prevail on the merits and (2) the relative interim harm to the parties from issuance
17 or non-issuance of the injunction. (Butt v. California (1992) 4 Cal. 4th 668, 678
18 (citation omitted).) The trial court’s determination must be guided by a “mix” of
19 the potential-merit and interim-harm factors; the greater the plaintiff’s showing on
20 one, the less must be shown on the other to support an injunction. (Id.; citation
21 omitted). Sunoco, as detailed below, has satisfied the requirements of both tests.
22 Therefore, the State Board should grant a stay of the Rev. Order.

23 **II. ARGUMENT**

24 The Regional Board’s adoption of the Rev. Order was an erroneous action
25 that poses substantial harm to Petitioner and the public interest for the following
26 reasons: (1) it requires Petitioner to prepare work plans and an investigation report
27 related to the Mount Diablo Mercury Mine (“**Mine Site**”), but has provided only a
28

1 vague and ambiguous description of the Mine Site, making compliance with
2 certainty impossible and unnecessary compliance efforts likely. Secondly, the
3 Rev. Order incorrectly assumes Petitioner operated the entire Mine Site identified,
4 which is false, requires the Petitioner to furnish work plans, conduct an
5 investigation and provide a technical report covering the entire Mine Site, which is
6 unjustified, and fails to identify the evidence on which it relies to make the
7 unjustified demands as required by CWC § 13267. Thus, Sunoco has a high
8 likelihood of success on the merits of its appeal.

9 **A. Substantial and Irreparable Harm to Petitioner and the**
10 **Public Interest Will Result if the Rev. Order is Implemented Without**
11 **Modification.**

12 The public interest and Petitioner will be substantially harmed by
13 implementation of the Rev. Order. Because Sunoco cannot be forced to investigate
14 or remediate discharges to which it has no nexus at the Mine Site, a failure to stay
15 pending State Board review would unfairly and illegally burden Petitioner by
16 forcing it to conduct the extensive and expensive work required under the Rev.
17 Order that may be vacated upon judicial review. Further, having had these costs
18 unfairly imposed upon it, Sunoco may have no means of recovering such costs
19 since many of the parties having actual legal liability for the discharges to which
20 the work Sunoco is being required to undertake appear to be without sufficient
21 financial resources to reimburse Sunoco.

22 Furthermore, a stay is proper because there is a lack of substantial harm to
23 other interested persons and the public interest if it is granted. First, while a stay
24 would prevent enforcement of the overly broad Rev. Order against Sunoco, the
25 Regional Board could focus on preparing properly tailored orders to the parties
26 having legal responsibility for operations and discharges on various sub-areas of
27 the Mine Site that are of concern to the Regional Board. The Regional Board
28 could thereby avoid protracted litigation and move closer to achieving the response

1 actions it seeks over the entire Mine Site much sooner than it can by attempting to
2 illegally require Sunoco to perform all such work, when Sunoco is not legally
3 responsible for the entire Mine Site.

4 **B. A Stay of the Rev. Order Will Not Result in Substantial Harm to**
5 **Other Interested Persons or the Public.**

6 While there may be some delay to the performance of the investigations
7 sought by the Regional Board as a result of the requested stay, that delay and any
8 resulting harm are not substantial given that: (1) the Regional Board can issue
9 orders to other, actually responsible parties to perform the studies sought to be
10 furnished; (2) the Regional Board has been generally aware of the site conditions it
11 now seeks to address for 50 years or more, without issuing any similar orders to
12 Sunoco's knowledge; (3) any ongoing environmental harm is substantially
13 outweighed by the harm to be suffered by Sunoco in the absence of a stay as a
14 result of the Rev. Order improperly requiring Sunoco to prepare work plans,
15 perform an investigation, and furnish a report on the entire Mine Site area, for
16 much of which Sunoco is not responsible; and (4) the public interest is well-served
17 by insuring that only fair and just orders, supported by facts and law, are issued by
18 the Regional Board.

19 The record on file with the State Board in relation to the concurrently filed
20 Petition for Review contains the relevant supporting documents to this Petition for
21 Stay of Action, which Sunoco reserves the right to – and will – supplement.

22 As set forth more fully in Sunoco's Petition for Review and the
23 Declaration of David T. Chapman in Support of Petition for Review and Petition
24 for Stay ("Chapman Declaration") being filed herewith, a stay is appropriate
25 because the action of the Regional Board with respect to Sunoco is illegal and
26 should be revoked or amended in that the Rev. Order: (1) is improperly vague and
27 ambiguous in its description of the Site, making Sunoco's compliance impossible
28

1 and unnecessary compliance efforts likely; and (2) requires Sunoco to prepare a
2 mine waste investigation work plan, conduct the mine waste investigation, prepare
3 a mine waste investigation report, and then prepare a proposed remediation work
4 plan, for large areas of a Mine Site where it was not – and is not – a “discharger,”
5 and without providing the required reference to the evidence supporting those
6 requirements, inconsistent with and beyond the scope of its cited statutory
7 authority. Sunoco hereby incorporates all of the facts and arguments set forth in
8 that Petition for Review and the accompanying Chapman Declaration and Horton
9 Declaration, including any and all supplemental submissions made by Sunoco in
10 support of that Petition.

11 **C. The Regional Board’s Action Raises Substantial Questions of Law on**
12 **Which Petitioners are Likely to Prevail.**

13 The Petition for Review of the Rev. Order has been filed contemporaneously
14 with this Petition and delineates Sunoco’s arguments regarding the legal questions
15 on which Sunoco is likely to prevail. The Rev. Order clearly violates requirements
16 set forth in the Porter-Cologne Water Quality Act and is wholly unsupported by
17 existing law and the factual record. The State Board should therefore stay the Rev.
18 Order and prevent the implementation of a decision that is illegal and sets an
19 inappropriate precedent. (The Petition for Review is hereby incorporated by
20 reference.)

21 **III. CONCLUSION**

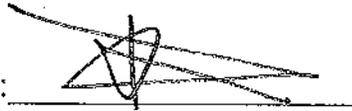
22 Sunoco and the public interest will be substantially and irreparably harmed if
23 Sunoco is required to fully implement the Rev. Order, while other potentially
24 responsible parties (“PRPs”) and the public interest will not significantly suffer
25 from a stay and, in fact, may benefit by a clarification of the vague requirements in
26 the Revised Order, which may otherwise result in their involvement in litigation
27 and delay issuance of orders to other, more appropriate PRPs. Thus, the balance of
28

1 harms at issue in the Petition favors the granting of a stay. In addition, the Rev.
2 Order has raised substantial questions of fact and law, which, upon review in
3 accordance with the historical record and provisions of the California Water Code,
4 are highly likely to be resolved in favor of Sunoco. Therefore, the State Board
5 should issue a stay of the Rev. Order.

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7 Respectfully submitted,

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9
10 DATED: January 29, 2010

EDGCOMB LAW GROUP

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