

MOUNT DIABLO MERCURY MINE

PROSECUTION TEAM'S REBUTTAL BRIEF –

NEVADA SCHEELITE

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1 Kennametal, Inc. (Kennametal) argues that the Prosecution Team has failed to
2 provide substantial evidence that supports the contention that Kennametal’s wholly
3 owned subsidiary, Nevada Scheelite Corporation (Nevada Scheelite), was present at and
4 performed work at Mount Diablo Mercury Mine. In fact, the Prosecution Team has
5 shown by substantial evidence that Nevada Scheelite was present at the site and as a
6 result of its activities, discharged waste that created pollution.

7 **I. If a Burden of Proof is Applied, it is Kennametal-As the Party**
8 **Challenging the CAO-Who Bears the Burden of Proving the Standards of**
9 **13304 Have Not Been Met.**

10 It is black letter law that the party bringing a lawsuit bears the burden of providing its
11 claims. It is no different in an administrative context; the party challenging an
12 administrative decision bears the burden of proof. “[T]he party challenging the
13 administrative decision bears the burden of convincing the court that the administrative
14 findings are contrary to the weight of evidence.” (*Building Industry Ass’n*, 124
15 Cal.App.4th at 879; *see also Fukuda*, 20 Cal.4th at 812 [“[T]he burden rests on the
16 complaining party to convince the court that the board’s decision is contrary to the weight
17 of the evidence”].) Here, the Dischargers seek to ignore the fact that they are the parties
18 challenging the CAO in an effort to avoid their burden of proof. But if anyone bears the
19 burden of proving the validity of the CAO, it is the Responsible Parties who must show
20 that the lenient standards of Water Code Section 13304 were not met by the Regional
21 Board. In this matter, Kennametal cannot make such a showing.

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1 **II. The applicable State Water Resources Control Board (State Water**
2 **Board) precedents hold that, in order to issue orders under Water Code**
3 **section 13304, the Central Valley Water Board’s findings must be**
4 **supported by “substantial evidence in the record.”**

5 The State Water Board has addressed the applicable legal standard on several
6 occasions, each time holding that the “substantial evidence” standard governs regional
7 board proceedings. For example, in *Exxon Company, USA* (Order No. WQ 85-7), the
8 State Water Board upheld an order by the Central Valley Water Board, noting:

9 [A]ny findings made by an administrative agency in support of an action
10 must be based on substantial evidence in the record. (See, e.g., *Topanga*
11 *Association for a Scenic Community v. County of Los Angeles* (1974) 11
12 Cal.3d 506, 113 Cal.Rptr. 836.) Thus, while we can independently review
13 the Regional Board record, in order to uphold a Regional Board action, we
14 must be able to find that finding of ownership was founded upon
15 substantial evidence.

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

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

6 The California Supreme Court has similarly observed that substantial evidence is
7 evidence of “ponderable legal significance,” which is “reasonable in nature, credible and
8 of solid value.” (*Ofsevit v. Trustees of California State Universities and Colleges* (1978)
9 21 Cal.3d 763, 773, n. 9.) “Substantial evidence” means facts, reasonable assumptions
10 based on facts and expert opinions supported by facts. (*Friends of Davis v. City of Davis*
11 (2000) 83 Cal.App.4th 1004, 1019.)

12 Importantly, an agency may also rely on the opinion of its staff in reaching
13 decisions, and “the opinion of staff has been recognized as constituting substantial
14 evidence.” (*Browning-Ferris Industries v. City Council* (1986) 181 Cal.App.3d 852, 866
15 *citing Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation Com.*
16 (1976) 55 Cal.App.3d 525, 535-536.)

17 State Water Board Resolution 92-49 (Resolution 92-49) further animates the types
18 of evidence that may be considered substantial when naming dischargers in a cleanup and
19 abatement order, including direct or circumstantial evidence. (Resolution 92-49, § I.A.)
20 Such direct or circumstantial evidence applicable in these proceedings includes
21 “documentation of historical or current activities ... as documented by public records ...
22 or other sources of information”. (*Id.*, at § I.A.1.)

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1 **III. The Regional Board has shown by substantial evidence in the record that**
2 **Kennametal, as the sole shareholders of the now dissolved Nevada**
3 **Scheelite, was Present at the Site, Discharged Waste, and Created a**
4 **Condition of Pollution.**

5 Water Code section 13304(a) states:

6 (a) Any person who has discharged or discharges waste into the waters of
7 this state in violation of any waste discharge requirement or other order
8 or prohibition issued by a regional board or the state board, or who has
9 caused or permitted, causes or permits, or threatens to cause or permit
10 any waste to be discharged or deposited where it is, or probably will be,
11 discharged into the waters of the state and creates, or threatens to
12 create, a condition of pollution or nuisance, shall upon order of the
13 regional board, clean up the waste or abate the effects of the waste, . . . “

14 Pursuant to Water Code section 13304, the Regional Quality Control Board has
15 named Kennametal, Inc.’s (Kennametal) as successor in interest to Nevada Scheelite
16 Corporation (Nevada Scheelite). Nevada Scheelite, a wholly owned subsidiary of
17 Kennametal, leased the site from Mount Diablo Quicksilver in 1956. While onsite
18 Nevada Scheelite dewatered the shaft and created unknown disturbances that resulted in
19 the discharge of contaminants into the affected water body. The Regional Board staff has
20 based this finding on a 1958 publication of the California Journal of Mines and Geology,
21 Board meeting minutes of Mount Diablo Quicksilver, staff notes from the time period,

1 and a bid sheet for fuel between Nevada Scheelite and Tidewater Oil Company.¹

2 Specifically the California Journal of Mines and Geology states:

3 In 1956 the Nevada Scheelite Company leased the mine and installed a
4 deep-well pump (550 gallons per minutes) to remove the water which had
5 risen to a point 112 feet below the collar of the shaft. Since the down-
6 stream ranchers objected to the discharge of acid mine water into the creek
7 this work was suspended. Attention was then directed to the open pit
8 where some exploration was done during wagon drills. A small tonnage
9 of retort-grade ore was developed. Since this was not sufficient to satisfy
10 the requirements of the company the lease was relinquished.

11 California Journal of Mines and Geology, Vol. 54, No. 4, October 1958.

12 Mount Diablo Quicksilver Co. meeting minutes from March 25, 1956 and April
13 25, 1956. The March meeting minutes evidence Nevada Scheelite's presence and
14 discharge of waste at the site and the April minutes evidence Nevada Scheelite's lease of
15 the mine. These are party admissions subject to a hearsay exception.

16 The Prosecution Team's evidence is from three separate sources, none of which
17 had anything to gain by stating Nevada Scheelite was present and engaging in activities
18 that discharged waste at the site. In fact, Kennametal's own evidence set forth in Exhibit
19 10 further supports the Prosecution Team's contention that Nevada Scheelite was present
20 at the site.²

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¹ See Exhibits 12, 27, 31 and 39 of the Prosecution Team's Evidence Submission.

² Exhibit 8 of Kennametal's Evidence Submission confirms Mr. Gomes works for Nevada Scheelite and supports statements made by him to the Mount Diablo Quicksilver Board regarding operations of Nevada Scheelite at the site and eventual lease by Nevada Scheelite of Mount Diablo Mercury Mine.

1 Kennametal contends that even if Nevada Scheelite was present at the site and
2 pumped water from the mine in 1956, they cannot be named in the Order because there is
3 nothing in the Order or evidence that claims that the discharge was in violation of
4 existing laws or regulations at the time they occurred or that the activities created or
5 threatened to create a condition of pollution or nuisance. This is not true.

6 First, Kennametal fails to address the current and continued discharge of acid
7 waste at the site that is the result of Nevada Scheelite’s presence and work at the site. As
8 set forth in several State Board decisions, the actions of the Nevada Scheelite at the time
9 of operation at the site created a condition of pollution of nuisance. “A discharge is ‘the
10 flowing or issuing out, of harmful material from the site or the particular operation into
11 the water of the state. The particular operation which produced the harmful material,
12 need not, however, be currently conducted.” (*In the Matter of the Petitions of Arthur
13 Spitzer, et al.*, WQ 89-9, pg. 3 [citing 27 Ops. Att. Gen. 182, 183 (1956)]; *See also Zoecon
14 Corp.*, Order No. 86-2 [defining “discharge” to include passive migration of waste from
15 the soil to the ground water].)³ Given the continuing discharge of acid drainage from
16 Nevada Scheelite’s operations, they are responsible for a current discharge and no
17 retroactive application of Water Code section 13304 is necessary to support naming them
18 in the Order.

19 Second, Kennametal is mistaken in its belief that Water Code section 13304 only
20 applies to discharges of waste that are in violation of regulations and/or existing laws at
21 the time they occurred and therefore is not retroactive. As set forth by the State Board in
22 the *County of San Diego*, Order No. WQ 96-2, California law has prohibited the creation

³ See also, *In re Lindsay Oliver Growers*, Order No. WQ 93-17 (current evidence of Leakage from ponds in which waste was disposed prior to 1981 is sufficient to demonstrate current discharge).

1 or continuation of public nuisance since 1982 (citing Civ. Code section 3490) and the
2 discharge of waste in any manner which would result in a pollution, contamination or
3 nuisance since 1949 (citing Health and Saf. Code section 5411). Thus the creation of
4 waste that resulted in pollution and contamination of the waters set forth in the Order by
5 Nevada Scheelite, even pre-1981, subjects them to regulation under Water Code section
6 13304.

7 Third, the Order and evidence does outline that the waste discharged by Nevada
8 Scheelite did create or threaten to create a condition of pollution or nuisance at the time
9 of its initial operation at the site and has resulted in current discharges. Paragraph 18
10 provides that Nevada Scheelite's Corporation's operation of the mine created acid mine
11 drainage at the time and likely continues to contribute to discharge of waste. Paragraph
12 3 of the Cleanup and Abatement Order states that acid mine drainage containing elevated
13 levels of mercury and other metals is ultimately being discharged into Horse and Dunn
14 Creeks. As noted by the State Board in the *Lindsay Olive* decision, the pollution of
15 water has long been held to constitute a public nuisance. (*City of Lodi v. Randtron*
16 (2004) 118 Cal.App. 4th 337, 357 [citing *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th
17 1090, 1104]; *Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334,
18 241); *see also People v. City of Los Angeles* (1958) 160 Cal.App.2d 494, 503
19 [recognizing regional board's non-exclusive right to initiate action for a public nuisance
20 premised on water contamination].) Therefore, the discharge of waste that is the result of
21 Nevada Scheelite's activities at the site created and continues to create a condition of
22 pollution and/or nuisance.

1 Accordingly, Water Code Section 13304 encompasses Nevada Scheelite’s
2 actions. As a result, Kennametal, Nevada Scheelite’s successor in interest and sole
3 shareholder, is properly named in the order.

4 **IV. Kennametal Fails to Show the Standards of 13304 Have Not Been Met.**

5 Despite the evidence provided, Kennametal, Inc. contends that Nevada Scheelite
6 Corporation was never present and/or operated at Mount Diablo Mercury Mine. This
7 contention is based on internal meeting minutes and testimony from George Heideman, a
8 former employee and Board member of Kennametal, Inc. taken in a separate action. Mr.
9 Heideman stated in his deposition that it was his belief that Nevada Scheelite stated that
10 Nevada Scheelite Corporation never operated or leased the Mount Diablo Mine in
11 California. However, when questioned further about the matter, admitted that he was not
12 involved in the day to day operations at Nevada Scheelite, that his role with the company
13 was purely with respect to financial management, including accounting which was
14 centralized in Latrobe, Pennsylvania, and that he did not have regular contact with the
15 manager of Nevada Scheelite. He also testified that Nevada Scheelite had approximately
16 60-70 employees and he only knew the manager by name.⁴ Therefore, it was possible the
17 individuals who set up the lease with Nevada Scheelite and Mount Diablo Quicksilver
18 were in fact employees of Nevada Scheelite.⁵

19 Kennametal also points to Board Meeting Minutes from April 24, 1956 whereby
20 the President of Nevada Scheelite, Donald C. McKenna, stated that “based on
21 examination of the Mount Diablo Quicksilver Mine at Clayton, California, it has been

⁴ See Exhibit 38 of the Prosecution Team’s Evidence Submission; Exhibit A of the Prosecution Team’s Rebuttal.

⁵ Exhibit 8 of Kennametal’s Evidence Submission confirms Mr. Gomes worked for Nevada Scheelite and supports statements made by them to the Mount Diablo Quicksilver Board regarding activities Nevada Scheelite had engaged in at Mount Diablo Mercury Mine.

1 decided that it would not be advisable for the Corporation to undertake mining operations
2 at that location.”⁶ However, these minutes reference examination of the mine, which
3 based on the Prosecution Team’s evidence, could have included de-watering and
4 pumping water at the site, and doesn’t directly contradict the Prosecution Team’s
5 evidence.

6 Kennametal also claims that the reference to Nevada Scheelite in the California
7 Journal of Mines and Geology refers to a Nevada Scheelite Company, as opposed to its
8 wholly owned subsidiary Nevada Scheelite Corporation. Staff has researched this issue
9 and determined that the reference in the journal was a misprint with respect to the
10 company’s corporate structure. However, the reference to Nevada Scheelite, the time
11 period and work performed is correct. Kennametal’s contention would require the Board
12 to believe that the California Journal of Mines and Geology, the Board Members of the
13 Mount Diablo Quicksilver Co., and Tide Water Oil Company all mistakenly referenced
14 Nevada Scheelite’s work at the site, which is highly improbable.

15 Ultimately, Kennametal has failed to show that the standards of section 13304
16 have not been met. Kennametal fails to show that the Prosecution Team has not
17 presented substantial evidence to name Kennametal for the actions of its wholly owned
18 subsidiary Nevada Scheelite and fails to show that the contamination that occurred at the
19 site as a result of Nevada Scheelite’s activities did not result in a discharge of waste to
20 waters of the state. As such, Kennametal is properly and correctly named in the Order.

21 The Prosecution Team has reviewed Kennametal’s comments and newly
22 presented evidence regarding Nevada Scheelite and work performed at the site as set

⁶ Exhibit 11 of Kennametal’s Evidence Submission.

1 forth on pages 8 and 9 in their brief.⁷ Although the Prosecution Team does not believe
2 any revision to the Order is necessary, to avoid any confusion or misunderstanding it
3 proposes the following language be added to the Order:

4 Nevada Scheelite Corporation, a subsidiary of Kennametal Inc., assumed
5 Cordero Mining Co.'s lease with Mount Diablo Quicksilver Co. and
6 investigated the mine in 1956. Minutes of a 25 March 1956 Mount Diablo
7 Quicksilver Co. Directors' Meeting with managers representing Nevada
8 Scheelite Corp. discussed Nevada Scheelite's lease and operations at the
9 mine. Also, the California Journal of Mines and Geology discusses
10 Nevada Scheelite's activities at the mine. Nevada Scheelite installed a
11 deep-well pump with 550 gallons per minute capacity to dewater the shaft
12 and engaged in a drilling program near the open pit. Down-stream land
13 owners objected to the discharge of acid mine drainage and Nevada
14 Scheelite discontinued de-watering the shaft. The amount of acid mine
15 drainage produced is unknown but any discharge strong enough to
16 generate complaints from the neighbors would likely violate Water Board
17 Resolutions 135 and 53-21. The drilling program did not develop
18 sufficient reserves to meet the company's requirements and the lease was
19 relinquished later in 1956 after discharging an unknown amount of solid
20 mine waste from the drilling program. The solid waste likely remains
21 where it was left and contributes to the total pollution problem.

⁷ The Prosecution Team submits that Regional Board staff asked Kennametal's staff for all information related to Nevada Scheelite and Mount Diablo Mercury Mine in 2009 and were not provided Exhibit 10 and/or 11.

CONCLUSION

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Kennametal has failed to show that the evidence provided by the Prosecution Team is not reasonable in nature, credible, and/or of solid value. The Prosecution Team has provided evidence that goes beyond what is required under the substantial standard of evidence to establish Kennametal’s wholly owned subsidiary Nevada Scheelite’s presence and operation at the Mount Diablo Mercury Mine resulted in the discharge of waste that created pollution or a condition of nuisance. As such, Kennametal is properly named in the Order pursuant to Water Code section 13304.