Appendix D

STAFF RESPONSES TO COMMENTS RECEIVED

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

STAFF RESPONSES TO WRITTEN COMMENTS FOR ITEM 5

July 10, 2013 Board Meeting

Adoption of Time Schedule Order for Cleanup and Abatement Order Amendment R2-2013-0021 for Dischargers at Leona Heights Sulfur Mine, Alameda County

Comments on the Tentative Time Schedule Order (TO) were received from the following parties:

1. Ocean Industries, Inc.(and subsidiaries, represented by Lewis, Brisbois, Bisgaard, and Smith LLP)

2. Alcoa Inc. (for subsidiaries, represented by Farella Braun and Martel LLP)

This response to these comments summarizes comments from both parties (often quoted in italics and sometimes paraphrased for brevity) followed by the Water Board staff (Staff) responses. Section A addresses comments repeated from the May 2013 Board Hearing, and Section B addresses new comments. For the full context and content of each comment, refer to the original comment letters in Appendix C. Staff also initiated minor revisions to the TO.

A. Comments Resubmitted from May Board Hearing

Several comments in the letters submitted by Alcoa Inc. subsidiaries (referred to herein as Alcoa) and Ocean Industries Inc. and subsidiaries (referred to herein as Ocean) were the same as those previously submitted in response to the Cleanup and Abatement Order Amendment and Time Schedule Order packages distributed for the May 2013 Board Hearing. These comments were addressed by Staff in the May 2013 *Response to Written Comments* document included in that Board Hearing package. Therefore, Staff will not reiterate those responses here. Staff have instead summarized our response and cited the applicable sections of the May 2013 *Response to Written Comments*, which is provided for reference in the attachment.

Comment 1:

Alcoa and Ocean both object to being identified as a Discharger.

Response to Comment 1:

The Board has evaluated and confirmed the propriety of naming Alcoa and Ocean as Dischargers on numerous occasions. (See 1992 Waste Discharger Requirements (Order No. 92-105), 1998 Cleanup and Abatement Order (Order No. 98-004), 2003 Amendment to the Cleanup and Abatement Order (Order No. R2-2003-0028) and 2013 Amendment to the Cleanup and Abatement Order (Order No. R2-2013-0021).)

Please see also the sections highlighted below in the attachment:

- Section 2 (written responses to Ocean), Response to Comment 1;
- Section 2 (written responses to Ocean), Response to Comment 2; and
- Section 3 (written responses to Alcoa), Response to Comments 1.

Comment 2:

Ocean objects to the $10,000 per day civil liability, stating it is unfair and disproportionate to Ocean's relationship to the site. Both Alcoa and Ocean requested that only Dr. Mbanugo be subject to any penalties. Ocean pointed out that the penalty in the 2008 Administrative Civil Liability(ACL) issued against Dr. Mbanugo (Order No. R2-2008-0084) was approximately $54 per day, significantly less than the penalty proposed in the Time Schedule Order, and questioned this disparity. Furthermore, Ocean stated that,

> *The possibility of draconian penalties and fines forces Ocean to change its focus from working toward solving the environmental problems at the site to challenging its inclusion in the Revised Tentative TSO as a "Discharger".*

Response to Comment 2:

The purpose of a penalty in a Time Schedule Order is to provide incentive to the discharger to comply. Given the history of orders dating back over 20 years requiring Alcoa and Ocean to

clean up this site, and the lack of progress to date, the maximum penalty is warranted and necessary to compel compliance with the Cleanup and Abatement Order Amendment.

Several factors account for the smaller penalty in the 2008 ACL issued against Dr. Mbanugo. The primary factor is that the maximum penalty for violation of a Water Code section 13267 requirement is $1,000 per day, significantly less than the maximum penalty for violation of a Water Code section 13308 violation contained in a Time Schedule Order ($10,000 per day). Note that the Board has the discretion to reduce a penalty to less than the statuary maximum in both cases. The Board reduced Dr. Mbanugo's ACL from a maximum potential penalty of $3,817,000 to $200,000. Water Code section 13308 allows the Board to evaluate the penalty for a violation of the Time Schedule Order and, if appropriate, make express findings supporting a reduction in the penalty amount.

Ocean's suggestion that the amount of the penalty forces it to challenge the Order rather than work to resolve the environmental problems at the site is counterintuitive. The penalty is zero if the Dischargers comply with the tasks and timeline. The Board was receptive to the Dischargers' proposals to modify the deadlines at the May Board meeting, so there should be no impediment to complying with the tasks and avoiding any penalty.

Please see also the sections highlighted below in the attachment:

- Section 2 (written responses to Ocean), Response to Comment 2;
- Section 2 (written responses to Ocean), Response to Comment 13;
- Section 2 (written responses to Ocean), Response to Comment 14; and
- Section 2 (written responses to Ocean), Response to Comment 15.

Comment 3:

Alcoa and Ocean both object to the History of Non-Compliance section of the TO that suggests they have not initiated cleanup, and assert it is Dr. Mbanugo's responsibility. Specifically, they reference a private agreement reached by the Dischargers in which Alcoa and Ocean contributed funds to an escrow account and Dr. Mbanugo acted as project manager. Both suggest that Alcoa and Ocean have met their contractual obligations, and therefore Dr. Mbanugo is solely responsible for any failure to comply with Orders and should therefore be responsible for future penalties.

Response to Comment 3:

All Dischargers are equally responsible for compliance with Water Board Orders. Therefore, all Dischargers are equally responsible for penalties associated with noncompliance. Furthermore, Alcoa and Ocean subsidiaries were named as Dischargers starting with the 1992 Waste Discharge Requirement. The statements made in the History of Non-Compliance section of the TO are accurate.

Please see also the sections highlighted below in the attachment:

- Section 2 (written responses to Ocean), Response to Comment 6;

- Section 2 (written responses to Ocean), Response to Comment 12;
- Section 2 (written responses to Ocean), Response to Comment 14;and
- Section 3 (written responses to Ocean), Response to Comments 15.

Comment 4:

Ocean suggested that it is inappropriate to name them in a Time Schedule Order, given the history of enforcement on this site. They pointed out that Ocean has not received a notice of violation, while Dr. Mbanugo has received several such notices and an ACL for violation of the 1998 Cleanup and Abatement Order as amended in 2003. Ocean posed the following question,

> *[W]hat has changed that would cause the Board to now seek to impose civil penalties against Ocean when it has done everything it has been asked to do by funding the activities seeking to remediate conditions at the site? The Board correctly focused on the only person who could actually undertake the work at the site – Dr. Mbanugo – in everything it did from 2005 through 2008… The fact that the site remains unremediated… is not the fault of Ocean... [but] the current property owner and imposing civil penalties against Ocean would be unfair and unjustified.*

Response to Comment 4:

Ocean provided an incomplete and inaccurate history of enforcement at this site. Furthermore, the adoption of the May 2013 Amendment and Staff's recommendation for a Time Schedule Order is not a change in enforcement strategy. After adoption of the 2003 Cleanup and Abatement Order Amendment which named Alcoa, Ocean, and Dr. Mbanugo as Dischargers, Staff informally agreed to work with Dr. Mbanugo to oversee cleanup, so long as progress on the project continued. Therefore, when progress slowed, Staff initiated enforcement with a Water Code section 13267 requirement for progress reports required of Dr. Mbanugo alone.

After several notices of violation, the 2008 ACL against Dr. Mbanugo was issued. As Staff specified at the May 2013 Board Hearing and in the May 2013 *Response to Written Comments*; the ACL was for violation of that 13267 requirement (which only Dr. Mbanugo is subject to), not the Cleanup and Abatement Order (which all Dischargers are subject to).

In adopting the 1998 Cleanup and Abatement Order and 2003 and 2013 Amendments, the Board upheld that all Dischargers are responsible for the cleanup. The fact the site remains un-remediated is therefore the fault of all Dischargers, and Staff's efforts to compel action by all Dischargers via a Time Schedule Order is not only within the Water Board's statutory authority, but necessary to encourage compliance and in keeping with the enforcement strategy developed by Staff over a decade ago.

Please see also the highlighted sections below in the attachment:

- Section 2 (written responses to Ocean), Response to Comment 9;
- Section 2 (written responses to Ocean), Response to Comment 12;
- Section 2 (written responses to Ocean), Response to Comment 13;

- Section 2 (written responses to Ocean), Response to Comment 14;
- Section 2 (written responses to Ocean), Response to Comments 15; and
- Section 3 (written responses to Alcoa), Response to Comment 12.

Comment 5:

Alcoa and Ocean both object to civil penalties associated with noncompliance for tasks, and argue that they should not be responsible for the submittal of permit applications because they do not currently own the property.

Response to Comment 5:

Alcoa and Ocean made this same argument to the Board in May. Staff noted in the May *Response to Comments*, and informed the Board in the Staff presentation, that Staff have confirmed with other regulatory agencies that Alcoa and Ocean will be able to apply for permits with Dr. Mbanugo's authorization, and Dr. Mbanugo has so authorized Alcoa and Ocean. The Board upheld that all Dischargers are responsible for compliance with tasks of the Cleanup and Abatement Order when it was adopted in May this year. Because Alcoa and Ocean are responsible for compliance, they are equally responsible for noncompliance and therefore subject to penalties.

Please see also the sections below in the attachment:

- Section 2 (written responses to Ocean), Response to Comment 4;
- Section 2 (written responses to Ocean), Response to Comment 13; and
- Section 3 (written responses to Ocean), Response to Comments 15.

B. New Comments

Comment 1:

Ocean suggested the TO does not address the request made of Staff at the May Board Hearing. Specifically, they stated:

> *[T]he Board advised staff that the proposed TSO* [Time Schedule Order] *contained procedural defects in violation of California Water Code Section 13308 in that it was impermissibly vague in how it set forth the method for assessing penalties… The Revised Tentative TSO still suffers from the improper ambiguities noted by the Board by continuing to use the language "up to" in regard to the assessment of penalties.*

Response to Comment 1:

In the transcript from the May board hearing, the Executive Officer stated that:

> *[W]e find that the Time Schedule Order is a reasonable tool, but we find that there [are] deficiencies in the Revised Tentative Time Schedule Order.*

Yuri Won, the Board's advisory attorney stated:

> *[T]he TSO… doesn't prescribe the penalty that is due, [it] has the language up to$10,000 each day… the statute under Water Code section 13308 requires a specific number.*

Staff interpreted this language as a requirement to prescribe a specific penalty amount, rather than a range. In accordance with this direction, Staff revised the TO by removing "up to" from the prescribed penalty associated with each task, such that the penalty is now $10,000 per day (the maximum allowable). However, Staff recognize that the heading used, "Maximum Civil Liability" on page 5 of the TO before revision, which introduces the penalty for each task, could be construed as allowing a range. Staff have therefore revised the headings to now read "Penalty" to avoid ambiguity.

In addition, on page 4 of the TO, the first paragraph following "It is hereby ordered" also indicated that a penalty "up to" the prescribed maximum shall accrue. To avoid any confusion, Staff revised this paragraph to be consistent with the language in Water Code section 13308.

Comment 2:

Alcoa stated that the Cleanup and Abatement Order Amendment compliance dates, for which the TO prescribes penalties, are *unreasonable and unachievable.*

Response to Comment 2:

The compliance dates in the TO are the dates that the Board modified, with input from the Dischargers, and adopted at the May 2013 Board Hearing.

ATTACHMENT
Response to Written Comments
May 2013

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

RESPONSE TO WRITTEN COMMENTS FOR ITEMS 7 and 8

LEONA HEIGHTS SULFUR MINE, ALAMEDA COUNTY

May 8, 2013 Board Meeting

Item **7. Revised Tentative Cleanup and Abatement Order Amendment:** Amendment of Cleanup and Abatement Order 98-004 as amended by R2-2003-0028 and Rescission of Waste Discharge Requirements Order No. 92-105; and

Item 8. **Revised Tentative Time Schedule Order**

Comments on the Tentative Orders were received from the following parties:

1. Adrienne DeBisschop
2. Ocean Industries, Inc.(and subsidiaries)
3. Alcoa Inc. (for subsidiaries)
4. Peter Mundy
5. California Department of Fish and Wildlife
6. US Army Corps of Engineers
7. Water Board's Advisory Team

This response to these comments summarizes each comment (often quoted in italics and sometimes paraphrased for brevity) followed by the Water Board Cleanup Team staff (Staff) response. For the full context and content of each comment, refer to the original comment letters in Appendix D. Staff also initiated minor revisions to the Tentative Orders.

In this document the following naming conventions are adhered to:

Order	Name used in this document
Revised Tentative Cleanup and Abatement Order Amendment	Amendment
Revised Tentative Time Schedule Order	Time Schedule Order
Cleanup and Abatement Order No. 98-004	1998 CAO
Cleanup and Abatement Order Amendment Order No. R2-2003-0028	2003 CAO Amendment
Waste Discharge Requirements 92-105	1992 WDRs

1. Adrienne DeBisschop

Adrienne DeBisschop, a neighbor of the site, requested information regarding the quality of groundwater on site.

Comment:
If the tailings are sealed, won't there still be water with sulfur in it coming out from the old mine entrance?

Response to Comment:
Significant research on the creek has been conducted by Staff, including a Master's thesis. The data indicate the primary source of sulfur to the creek is dissolution of surface mining waste (also referred to as tailings) on contact with groundwater and stormwater runoff. The objective of cleanup, and the most recently proposed project design, is therefore focused on isolating tailings from the creek and stormwater. It is expected that this remedy will significantly improve water quality. However, monitoring of the creek post-construction to evaluate efficacy of the remedial efforts is a requirement of the 1998 CAO and this Amendment. Should water quality not sufficiently improve for any reason, the Water Board retains the authority to require additional remedial efforts.

2. Ocean Industries, Inc. (and subsidiaries)

(Represented by Lewis, Brisbois, Bisgaard, and Smith LLP)

Comment 1:

Amendment - Ocean Industries, Inc. contends that it and its subsidiaries Ridgemont Development, Inc., Watt Housing Corporation, Watt Industries Oakland, and Watt Residential, Inc. (referred to herein as Ocean for brevity), do not meet the definition of Discharger under California Water Code (CWC) section 13304(a).

Ocean did not at any time operate the Leona Heights Sulfur Mine or own the property… until more than 50 years after mine operations had ended. There is no information that Ocean caused or contributed to waste being discharged into waters of the state as it at no time had any involvement in the mining operations that were conducted at the site and never placed or moved the mine tailings... Throughout its ownership of the property, Ocean's activities at most could be characterized as passive.

Response to Comment 1:

Applicable portions of CWC section 13304(a):

> "Any person who has… caused or permitted… any waste to be discharged or deposited where it is, or probably will be, discharged into water of the state and creates or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste."

In naming dischargers, the Water Board and State Board have repeatedly upheld (including at this specific site in State Board Order 93-9) that the Water Board is authorized by Water Code section 13304 to "mandate cleanup by both past and present dischargers."

Ocean is a past Discharger. Discharges of waste at the site are on-going and have been since mining waste was brought to the surface in approximately 1900. Discharges of solid mining waste (tailings) have continuously occurred at this site due to transport by wind or water. Discharges of liquid mining waste (acid mine drainage) have continuously occurred, because water that comes into contact with tailings generates sulfuric acid, and is transported off-site by runoff or Leona Creek. Ocean was aware of the environmental conditions on the property. Ocean admits in the comment letter that Ocean hired LFR to prepare a remediation plan for the site before selling the property.

Ocean does not have to be an existing property owner to be held responsible. Unless Ocean can demonstrate that neither wind nor water came into contact with tailings and discharged mining waste off-site during the period they owned the property, Ocean is responsible for permitting a discharge of waste, which creates a condition of both pollution and nuisance, and is therefore correctly named a "discharger", and is responsible for cleaning up the waste or abating its effects. As the State Board explained, "The current landowners, like ACS and CDI [and by the same logic Ocean and its predecessor], are considered waste dischargers primarily due to their land ownership. None of these parties actually engaged in the mining activities which resulted in the ongoing discharge. The mine operators, the entity which created the problem, are no longer in existence. Therefore, all of the parties to Order No. 92-105 [1992 WDRs] stand on essentially

the same footing and should be treated alike… those parties who held an ownership interest in the mining site since the creation of the mine drainage can be considered waste dischargers." (WQO 93-9 at pp. 11-12.)

Comment 2:

Amendment - *Ocean sold the property to the current owner (Dr. Collin Mbanugo) in 2001 in "as is" condition with full disclosure of all site conditions. Pursuant to the terms of sale, the current property owner has agreed to be responsible for property maintenance on a going forward basis… the current owner is responsible for and in the best position to take appropriate action for the property he owns.*

Response to Comment 2:

In response to this change in land ownership, the Water Board amended the 2003 CAO Amendment to add Dr. Collin Mbanugo to the list of Dischargers. Dr. Mbanugo's purchase of the property, regardless of the terms of sale, does not absolve Ocean from responsibility for the discharge because Ocean's subsidiaries owned the property during a time of discharge. To the extent the Dischargers have a (dis)agreement regarding allocation of liability or contractual agreements to allocate liability, the State Board noted in WQO 93-9 (p. 11) that, "The private contractual agreements between successive owners of a site are not binding on the Regional [or State Water Boards] and are not determinative of an entity's status as a Discharger.

Comment 3:

Amendment - *While Ocean is in the chain of title for the subject property, numerous other individuals and entities are also included within the chain of title, many of whom are inexplicably not included within the Tentative Order.*

Response to Comment 3:

Prior to adoption of each Order (1992 WDRs, 1998 CAO, 2003 CAO Amendment, and the Amendment and Time Schedule Order under consideration), Staff undertook significant effort to identify and name the appropriate dischargers. In addition, Staff have, on numerous occasions, offered to review any information submitted to demonstrate that an additional party meets the definition of discharger in CWC section 13304. During a meeting with Ocean representatives (in addition to representatives of Alcoa and Dr. Mbanugo) on March 21, 2013, the Dischargers questioned whether Bank of Italy, sold to Bank of America, should be named given they are included in the chain of title. Staff counsel informed the Dischargers that the Bank of Italy/Bank of America should not be named because they acquired the property solely through foreclosure. Historically, the State Board has not supported naming financial institutions in these circumstances. The Dischargers have not submitted the names of any additional potential dischargers and we note that none are included in their respective comment letters. However, Staff are willing to consider any new, relevant information.

Comment 4:

Amendment - *[T]he Tentative Order states that "[t]he Dischargers must obtain all permits required to comply with this Order." As Ocean is not the current property owner, it does not have the appropriate standing to obtain permits…*

Response to Comment 4:
The Amendment does not require the Dischargers obtain permits, but to submit complete applications for permits. The statement quoted above is from Finding 2b, "Reasons for the Amendment" of the Amendment, which is not a requirement but a Finding to explain the purpose of the tasks enumerated later in the Amendment. However, to address the comment and clarify the language in the Amendment, Staff have edited the "Reasons for the Amendment Finding" (2b) by deleting "obtain a number of permits from" and replacing that text with "submit complete permit application packages to."

These edits make Finding 2b consistent with task (B.2.II) which requires the submittal of complete applications for any necessary permit, and lists those identified as necessary (or potentially appropriate as written in the Amendment) by the permitting agencies given the most recent and likely alternative designs. Staff coordinated with each agency to develop this list.

Obtaining some permits will be a necessary step in the completion of a remedy, and in order for the regulatory agencies to issue permits, complete applications must first be submitted by the Dischargers. However, the Dischargers' progress towards site restoration have stalled for some five years during the permitting process, despite a significant amount of coordination and input from the permitting agencies to guide the Dischargers' design team through the process, culminating in an informative letter from the City of Oakland. The letter (attached) included contributions from all permitting agencies, listing the outstanding submittals necessary to obtain permits required for the most recently proposed design.

It is the Dischargers' responsibility to ensure compliance with the Amendment, regardless of current ownership of the property. It is not unusual for a Water Board order to name a former property owner as a Discharger responsible for site cleanup actions. Moreover, Staff have confirmed with the City of Oakland, a permitting agency for the project, that an authorized representative of the land-owner can apply for permits from the City. In a phone call on April 9, 2013, Staff confirmed with Dr. Mbanugo that authorization would be granted to Ocean, Alcoa, and associated representatives. Staff expect good faith effort on the part of the Dischargers to apply for necessary permits to comply with the task.

Comment 5:
Amendment - *[T]he Tentative Order states that "Relocation and restoration of the Leona Creek streambed is a necessary element of the mine remediation project."… Ocean has concerns whether relocation of the streambed is a necessary element of the remediation project… the "remedial action plan that this CAO Amendment requires the Dischargers to execute bears little resemblance to the restoration plans submitted by LFR on behalf of Ocean prior to the sale of the property to Dr. Mbanugo, particularly to the extent it calls for relocation of the streambed which has added substantially to the cost of the proposed project.*

Response to Comment 5:
The Amendment does not require the relocation of Leona Creek. Similar to the situation described in Comment and Response 4, Ocean has quoted a Finding in the Amendment which explains the purpose of required tasks, in this case the "Creek Restoration Design Plan". The most recently proposed design plan calls for relocation of the creek; however no task in the

Amendment requires it. Ocean makes several inaccurate comments in this vein, claiming the Amendment requires specific actions with respect to creek restoration that are in fact descriptions of the most recently proposed design which are referenced, but not required in the Amendment.

To avoid confusion, Staff have deleted "Relocation and" from Reasons for Amendment (2c); the Finding now only refers to restoration to which Ocean had no objection. In addition, in response to Ocean's concerns, Staff have edited the Amendment to remove specific design elements from the Creek Restoration section to allow Ocean more flexibility in proposing a remedial action.

To the extent Ocean claims that the cost of the most recently proposed remedy is far in excess of prior figures, the 1990 Levine Fricke report considered a potential alternative that would have cost $1.263 million plus annual operation and maintenance of $125,000. Alternatives proposed in 2000 ranged from $850,000 to $1.6 million in capital costs, with the preferred plan hovering around $1.1 million in capital costs. The most recently proposed remedial action plan, approved by Staff in 2006, is not substantially different from these proposals dating back 10-20 years.

Comment 6:

Amendment - *[T]he Tentative Order asserts that "Ocean Industries, Inc. has participated in the formulation of the remedial action plan that this CAO Amendment requires the Dischargers to execute." That is not accurate. The current property owner has submitted all remedial plans pursuant to an agreement entered into with Ocean and Alcoa. While Ocean and Alcoa have deposited funds into an escrow account to pay for certain activities as specified by the agreement, the current property owner has been solely responsible for formulating all aspects of the remedial action plan…*

Response to Comment 6:

Staff are aware that Ocean, Alcoa, and Dr. Mbanugo entered into a private agreement, whereby Ocean and Alcoa fund an escrow account used to implement remedial actions on site and Dr. Mbanugo oversees those actions. Ocean's letter admits this fact. As a matter of practice, the Water Board generally considers all Dischargers equally responsible for remediation at the site, regardless of private agreements, including an appointment of one Discharger as a project manager. No action by the Water Board or Staff isolated Ocean or Alcoa from the design process. Water Board records indicate that both Ocean and Alcoa were copied on status and progress reports during project design development. This has been a collaborative effort between Staff, permitting agencies, and the design team hired on behalf of the Dischargers.

Comment 7:

Amendment - *Ocean respectfully requests that the May 8, 2013 hearing before the … Water Board be deferred so as to provide additional time to consider alternative remedial approaches to improve water quality at the subject site.*

Response to Comment 7:
The remedial design does not need to be finalized prior to adoption of the Amendment; in fact, the Amendment requires the Dischargers to submit a revised 100% design plan. Thus, additional alternatives or remedial approaches may be considered after adoption of the Amendment. Staff considers the adoption of the Amendment and Time Schedule Order necessary to compel the Dischargers to implement the most recently proposed remedial design or an alternative.

Comment 8:
Amendment - Ocean listed several reasons that compliance dates were unworkable. Similar arguments were made by Alcoa, and Peter Mundy, the current project designer.

Response to Comment 8:
Staff agree that modification of compliance dates is warranted and adjusted compliance dates as suggested by Ocean, Alcoa and Mr. Mundy, for the following reasons:

- "Mine Remediation and Creek Restoration and Designs": Staff adjusted compliance dates to allow for revisions to the design. Furthermore, we removed specifications regarding the "Creek Restoration Design Plan" to avoid binding the Dischargers to the most recently proposed design. The draft task and compliance dates posted for public comment were chosen under the assumption that the most recently proposed design would be implemented, a reasonable assumption given that the design is nearly complete and was developed with significant input from the permitting agencies, including the Water Board's resident Creek Restoration Specialist, A.L. Riley. Any alternative designs would have to withstand the same multi-agency review and would have to satisfy all design and permitting requirements from those agencies. Staff are concerned that a major overhaul of the existing restoration design would cause another multi-year delay in project implementation.

  While Ocean and Alcoa have been copied on project designs and correspondence including progress and status reports, comments submitted by the two parties make it evident that they voluntarily disengaged from overseeing the details of compliance, resulting in a lack of understanding of the significant effort undertaken to design a remediation and creek restoration plan acceptable to all permitting agencies. Staff are encouraged that Ocean and Alcoa have re-engaged with the process in response to the Amendment and Time Schedule Order and we have therefore revised the Amendment to provide design flexibility to the Dischargers, so long as the changes are acceptable to the appropriate permitting agencies. The compliance dates have also been modified to allow for discussions between all Dischargers, their design team, the permitting agencies, and staff; and for any necessary changes in the design to be developed.

- "Applications for Permits": This task was developed and revised with significant input from the permitting agencies, and is to Staff's knowledge accurate and inclusive of the permits and agreements the Dischargers will likely require in order to implement a remedial action and creek restoration at the site. Staff considers this task a critical requirement for compliance with the 1998 CAO and the 2003 CAO Amendment, given that progress on the project historically broke down over the Dischargers failure to

provide the permitting agencies the information needed to grant permits, and permits are necessary for the most recently proposed and likely alternative project designs. Staff therefore fully engaged the named permitting agencies to produce and revise the "Applications for Permits" requirement in the Amendment. However, Staff have adjusted the compliance date in response to the Dischargers' requests, to allow for potential changes in remedial and creek restoration designs, which might delay submittals of applications to permitting agencies. Please note that we consider it imperative that complete and acceptable permit applications be submitted during 2013.

- "Implementation of Mine Remediation and Creek Restoration Designs": The draft Amendment posted for public comment required construction for the project during the 2013 dry season, based on feedback from permitting agencies that the most recently proposed design plan could be finalized quickly by the Dischargers and permits issued. However, the implementation date must be modified to account for adjustments to compliance dates for plans and applications for permits. During a March 21, 2013, meeting with the Dischargers, the project designer (Peter Mundy) made Staff aware that construction on the project is expected to take 142 days (details in Mr. Mundy's comment letter below). The compliance dates have therefore been adjusted to allow for design changes and applications for permits to be completed in 2013, and project construction during the 2014 dry season.

- "Recordation of Deed Restriction" and "Monitoring and Maintenance Plans": Compliance dates have been adjusted for these requirements according to the new implementation schedule.

Comment 9:

Amendment - *Ocean notes that the current property owner is in violation of an outstanding CAO (R2-2003-0028) and has been ordered to pay $200,000 for his failure to comply with reporting obligations. Ocean is informed that the Regional Board has not taken steps to collect the referenced amount.*

Response to Comment 9:

An Administrative Civil Liability (ACL, R2-2008-0084) was adopted, which leveed a fine of $200,000 against Dr. Collin Mbanugo. However, the ACL was not issued for failure to comply with the 1998 CAO or the 2003 CAO Amendment, as indicated by Ocean. The ACL enforces a separate requirement, pursuant to CWC section 13267, issued to Dr. Mbanugo on December 16, 2005. It is a separate issue from the Tentative Orders and has no bearing on our authority or ability to enforce or amend the CAO.

Comment 10:
Amendment - *The Tentative Order incorrectly quotes a version of paragraph B.2 from the 1998 CAO that was amended in its entirety by Order No. R2-2003-0028. The Order should quote the correct text, as amended in 2003.*

Response to Comment 10:
The requested revision has been made.

Comment 11:
Amendment - Ocean commented on the most recently proposed design plan, questioning the necessity and appropriateness of the creek restoration elements specifically.

Response to Comment 11:
Ocean (and Alcoa) were consistently copied on progress and status reports for the project, and were therefore made aware of the project design as it developed in response to input from the permitting agencies and Staff. Nonetheless, Staff recognize that Ocean and Alcoa now wish to re-engage and more actively participate in the design process. We have revised the "Creek Restoration Design Plan" requirement of the Amendment to ensure that variations on the restoration design can be considered, so long as the needs of the permitting agencies are met.

Comment 12:
Time Schedule Order – *It is correct to state that "cleanup of the site has not been initiated" – if that means construction of the remedy has not begun. It is incorrect to conclude that substantial efforts have not been undertaken to reach a point where construction can begin. Moreover, all of that work has been paid for by Ocean and Alcoa. Ocean is informed that the current property owner has not expended any of his own money towards the work undertaken by his consultants. Rather, those consultants have been paid through the escrow funded by Ocean and Alcoa.*

Response to Comment 12:
It was our intent to state that ground has not been broken at the site for any remedy or restoration and therefore the Dischargers have not complied with the 1992 WDRs, the 1998 CAO, or the 2003 CAO Amendment, all of which require cleanup of the site. Staff recognize and concur that substantial effort has been undertaken and for that reason we have chosen to amend the 1998 CAO rather than initiate enforcement for failure to comply with the 1998 CAO and the 2003 CAO Amendment. Staff's intention in choosing this action is to encourage the Dischargers to collaborate. The Amendment was crafted and revised to support such efforts. However, we also recognize that more than twenty years have passed since the Board initially required cleanup, and during this time the Dischargers have not complied with schedules they specifically proposed. For this reason, we propose enhancing the Water Board's enforcement capability by recommending adoption of the Time Schedule Order.

Comment 13:
Time Schedule Order – *It is fundamentally unfair to subject Ocean to civil liability should the current property owner fail to complete tasks set forth in the Tentative Order.*

Response to Comment 13:
Staff reviewed each task of the Amendment and confirmed that the Dischargers will be able to perform each of the requirements, with the exception of the requirement for a deed restriction. Staff understands Alcoa and Ocean cannot record a deed restriction for the property and the Amendment has been revised to reflect that the current property owner alone is responsible for this task. If authorized by the current property owner, Ocean and Alcoa do have the ability to submit permit applications to the permitting agencies on behalf of the owner; and Dr. Mbanugo has indicated a willingness to grant this authority. Furthermore, in upholding 1992 WDRs, the initial WDR concerning the Leona site, the State Board has already supported this Water Board's order requiring Alcoa's subsidiaries and Ocean's predecessor to clean up the Leona site.

Comment 14:
Time Schedule Order – Regarding the "History of Non-Compliance" section, Ocean commented that the section *inaccurately depicts the circumstances under which deadlines were missed by the current property owner* and reiterated the private agreement amongst the parties regarding funding and project management, stating that *[a]ny non-compliance is solely the responsibility of the current property owner, not Ocean.*

Response to Comment 14:
Staff recognize an agreement exists; however, it is a private agreement between the Dischargers, not an agreement with this agency. A private agreement does not absolve any Discharger from responsibility for compliance with Water Board Orders. (See WQO 93-9 at p. 11.) Each Discharger named on the 1998 CAO and its amendments is responsible for remedying pollution on the site.

Comment 15:
Time Schedule Order – *A Time Schedule Order equally subjecting Ocean, Alcoa and the current property owner to civil penalties for failing to achieve prescribed compliance dates is not an effective means for achieving the desired improvement in water quality from the mine tailings discharges at the site… [T]he current property owner has for an extended period of time not moved this matter forward through no fault of Ocean (or Alcoa). Subjecting Ocean to fines of up to $10,000 a day for tasks over which it has no control in no way fosters compliance. It is requested that the Tentative Order should be modified to impose the compliance dates (and the possibility of civil liability) solely on the current property owner – the only person who has failed to meet his obligations to the Board (and to Ocean and Alcoa). By adopting this modification, Ocean (and Alcoa) can continue to work cooperatively with the Regional Board and its staff in seeking a cost effective solution to the current conditions at the site.*

Response to Comment 15:
Staff concur that subjecting the Dischargers to civil penalties is not the preferred means for achieving the desired improvement in water quality at the site. This is the reason Staff chose to amend the CAO rather than recommend an ACL, despite the fact that the Dischargers are clearly out of compliance.

It is inaccurate to state that only the current property owner has not "moved this matter forward." The Dischargers are collectively responsible for compliance with the Orders and therefore

collectively have failed to meet obligations to the Board and are collectively out of compliance. Staff have attempted to assist compliance by providing the Dischargers yet an additional opportunity to collaborate by amending the 1998 CAO rather than pursuing enforcement. This decision was made in large part because of the significant effort undertaken by all Dischargers at some point during the process, signaling a willingness to complete the project. However, Staff are proposing a Time Schedule Order to expedite the enforcement process should the Dischargers continue to choose to not comply with Water Board Orders.

3. Alcoa Inc. (for subsidiaries)

(Represented by Farella Braun and Martel LLP)

Comment 1:

Amendment - Alcoa Inc. contends that its subsidiaries Alcoa Constructions systems, Inc. (ACS), Challenge Developments, Inc. (CDI), and Alcoa Properties, Inc. (referred to herein as Alcoa for brevity), do not meet the definition of Discharger under CWC section 13304(a).

The Tentative Order correctly states that the State Board found insufficient evidence to hold Alcoa Inc. liable as the alter ego of CDI or ACS, but states that the Board upheld the inclusion of CDI and ACS as dischargers. However, the State Board was reviewing specific contentions made by CDI and ACS… See State Board Order No. WQ- 93-9… ACS had contended that the current property owner acquired for the site was vested in the current property owner when the current property owner acquired the site and that liability incurred by a partnership flowing from a land ownership is retained by the partnership, not the partners. These arguments were likewise rejected by the State Board. Critically, the State Board was not presented with the fundamental question of whether ACS or CDI could be named as dischargers under Water Code Section 13304 when they did not operate or have any involvement with, or connection to, the former mining operations at the property, did not own the property on which the mine was located until decades after the mining operations ceased, did not cause or contribute to the tailings pile at the property, did not cause or contribute to the discharge, only held title to the larger parcel on which the abandoned mine was located; and no longer own the property.

Response to Comment 1:

Staff note that while it is evident that Alcoa permitted the discharge to occur during its period of ownership, Staff are not required to present evidence at this juncture. This action is an amendment to previously adopted Water Board Orders (1998 CAO and 2003 CAO Amendment) and a Time Schedule Order for the amended Orders. The State Board has previously upheld that Alcoa's subsidiaries are properly identified as Dischargers.

Alcoa refers to a petition to the State Board of 1992 WDRs by Alcoa subsidiaries, contending they did not meet the definition of discharger. The State Board upheld naming CDI and ACS, holding that "CDI was unquestionably a waste discharger under the law in effect when CDI held an ownership interest in the mining site… Further, even though CDI ceased being an owner in October, 1980, CDI could legally be required to clean up the site." Water Code Section 13304 authorizes the Water Board to mandate cleanup by both past and present dischargers. (WQO 93-9 at p. 9.) This same logic and conclusion applies to ACS, who, according to the State Board was "properly named in Order 92-105" (1992 WDRs). (See WQO 93-9 at p. 11.)

Comment 2:

Amendment – *The Tentative Order should make clear that the current property owner is responsible for obtaining the permits from regulatory agencies…*

Response to Comment 2:

Please see Response to Comment 4, under Ocean Industries, Inc., which applies equally to Alcoa's subsidiaries.

Comment 3:
Amendment – *This Order should not require relocation as well as restoration of the Leona Creek streambed. The original design for the corrective action did not include relocation.*

Response to Comment 3:
Please see Response to Comment 5, under Ocean Industries, Inc.

Comment 4:
Amendment – *The Tentative Order incorrectly quotes a version of paragraph B.2 from the 1998 CAO that was amended in its entirety by Order No. R2-2003-0028.*

Response to Comment 4:
The requested revision has been made.

Comments 5 through 9:
Amendment – Alcoa states that the compliance dates cannot be met.

Response to Comments 5 through 9:
The compliance dates have been modified. Please see Response to Comment 8 under Ocean Inc.

Comment 10:
Time Schedule Order – *Alcoa Subsidiaries are not "Dischargers" as defined in Water Code Section 13304 and should not be named on this Order. The Regional Water Board has presented no evidence that the Alcoa Subsidiaries caused or permitted the discharge or know of the discharge and had the ability to control it.*

Response to Comment 10:
See Response to Comment 1 in this section.

Comment 11:
Time Schedule Order – *The history of non-compliance fails to accurately reflect the roles of the various parties in complying with Order No. R2-2003-0028. As the Regional Water Board is well aware, Alcoa, Ocean and the current property owner voluntarily entered into an agreement whereby Alcoa and Ocean agreed to deposit funds into an escrow account for use towards the corrective action...*

Response to Comment 11:
See Response to Comment 6 and 14 under Ocean Industries, Inc.

Comment 12:

Time Schedule Order – *The Alcoa subsidiaries strongly oppose a Time Schedule Order that puts them at risk of civil penalty for failing to achieve compliance with the scheduled tasks by the prescribed compliance dates… [T]hey are not the current property owner and as such, have no meaningful ability to even ensure compliance with the terms and deadlines of the Order. Instead, they must necessarily rely upon the actions and commitment of the current property owner, whose track record is one of disregarding prior Board Orders and reneging on contractual commitments…*

Response to Comment 12:

See Response to Comment 15 under Ocean Industries, Inc. Regarding Dr. Mbanugo's disregard for prior Board orders, Staff concur there is an outstanding penalty leveed by ACL Order No. 2008-0084 for violation of a 13267 requirement for technical reports (see Response to Comment 10 under Ocean Industries, Inc.). However, all Dischargers have equally disregarded Board orders in which they are named Dischargers. In addition, in contrast to this depiction of Dr. Mbanugo's relations with Staff, we note that significant effort was undertaken by the design team to develop a remedial and creek restoration plan acceptable to Staff and permitting agencies, largely under Dr. Mbanugo's direction, as recognized in comment letters from both Alcoa and Ocean.

Comment 13:

Time Schedule Order – *The Alcoa Subsidiaries request that the hearing date of these Tentative Orders by the Regional Water Board be deferred to a later regular meeting in July 2013. The Alcoa Subsidiaries have not had sufficient opportunity to obtain the current status from the property owner's project manager or to fully explore alternative approaches to achieving the desired outcome.*

Response to Comment 13:

See Response to Comment 7 under Ocean Industries, Inc. In addition, Staff disagree that Alcoa has not had sufficient opportunity to obtain the current status on the project. Alcoa, like Ocean, was consistently copied on project designs and correspondence including progress and status reports. Furthermore, between February 7 and 11 of 2013, Staff contacted Alcoa, Ocean, and Dr. Mbanugo to inform each party that an amendment to the 1998 CAO and a Time Schedule Order were being drafted.

Staff have addressed remaining comments from Alcoa's subsidiaries in responses to Ocean Industries, Inc.

4. Peter Mundy

Comment:

Mr. Mundy, the project designer, submitted a letter memorializing a conversation between Mr. Mundy, Alcoa representatives, Ocean representatives, and Staff, in which it was discussed that the compliance dates were in conflict with the time needed to complete construction of the most recently proposed design, and that permitting agencies require the work be completed during the dry season.

Response to Comment:
The compliance dates have been modified to allow for design changes and permitting in 2013, and construction during the dry season of 2014.

5. California Department of Fish and Wildlife

The California Department of Fish and Wildlife (CDFW, formerly Fish and Game) expressed support for the Amendment, and noted a perceived contradiction in the language of the requirement to apply for certain permits from CDFW with the language finding a categorical exemption to CEQA. Some permits are necessary only if the final project is not exempt from CEQA. The Water Board considers the project categorically exempt, however the language of the Applications for Permits task has been revised to ensure that the appropriate permits are obtained regardless of exemption status.

Comment:

The Tentative Order… requires the dischargers to submit applications to CDFW for a Lake and Streambed Alteration Agreement (LSAA) and for an Incidental Take Permit (ITP)… If project related activities could cause take (as defined in Fish and Game Code Section 86) of a listed species, the project should not be considered exempt under CEQA…

Response to Comment:

Staff conferred with Marcia Gresfrud of CDFW to revise B.2.II.h of the Amendment to reflect that an Incidental Take Permit application should be submitted, only if appropriate and otherwise revised the task to ensure any necessary permits are obtained. Staff will consider good faith effort on the part of the Dischargers compliance with the task.

6. US Army Corps of Engineers

Comment:

Greg Brown provided input to ensure the language in the Applications for Permits task of the Amendment is correct, with respect to permits required of that agency. He clarified that documents were to be submitted to the US Army Corps of Engineers, who initiates consultation with US Fish and Wildlife, which was not clear in the original Amendment.

Response to Comment:
The language was modified based on the feedback.

The following permitting agencies were contacted and expressed support, verbally, for the Amendment and Time Schedule Order:

US Army Corps of Engineers

California Department of Fish and Wildlife

City of Oakland, Engineering and Construction

City of Oakland, Planning and Zoning

7. Water Board's Advisory Team

Comment:

Staff received comments from the Water Board's advisory team that were editorial in nature.

Response to Comment:
The Amendment and Time Schedule Order were revised to address the majority of comments.

ATTACHMENT

City of Oakland - Planning and Zoning Services. *Leona Heights Sulfure Mine - Abatement Cleanup, Creek Protection Permit Application (Technical Comments on Leona Mine Creek Plan attached).* July 2011

CITY OF OAKLAND

DALZIEL BUILDING • 250 FRANK H. OGAWA PLAZA, SUITE 2114 • OAKLAND, CALIFORNIA 94612-2031

Community and Economic Development Agency
Planning & Zoning Services Division

(510) 238-3911
FAX (510) 238-4730
TDD (510) 238-3254

July 29, 2011

Collin Mbanugo
3300 Webster Street – Suite 900
Oakland, CA 94609

Re: **Leona Heights Sulfur Mine - Abatement and Cleanup**
Creek Protection Permit Application # CP05-106 (filed on 6/27/05)

Location: End of McDonell Ave. (APN: 037A-3151-002-06)

Dear Mr. Mbanugo:

On July 27, 2005, the City of Oakland determined that your Creek Protection Permit application filed on June 27, 2005 as part of the clean-up and abatement of the abandoned Leona Heights Sulfur Mine was INCOMPLETE, and a letter to that effect was sent to you listing the additional information or material needed in order to process the application (see **Attachment A**).

It is City policy to determine a project 'Inactive' if a permit application remains incomplete following 120 days of a written request for additional information. In this case, a request for additional information was sent to you almost 6 years ago. As a result, the project's original Creek Permit Application (CP05-106) has been determined to no longer be an active permit application.

Therefore, a new Creek Protection Permit application and fee must be submitted before the City of Oakland can complete its review of the project, as well as process any additional submittals, such as the: *"Draft Final Leona Heights Restoration Project Workplan"* (dated September 23, 2010).

The following information or material must be submitted to the City before final review of a Leona Heights Sulfur Mine restoration plan can be completed:

1. **New Creek Protection Permit application and fee** - the project's original Creek Permit Application (CP05-106) has been determined to no longer be an active permit application;
2. **A "Technical Memo" in support of a CEQA Categorical Exemption,** summarizing the environmental work of LSA and/or others documenting justification for this project receiving a categorical exemption.
3. **Tree Removal/Protection Plan,** prepared in site plan format, showing all of the following:
   The size (dbh), species, and location of all protected trees* to be removed, and all protected trees* to be preserved located within 10 feet of proposed site alteration and construction activity (as specified in Oakland Municipal Code Chapter 12.36).

*"Protected trees", for the purpose of Oakland's Protected Tree Ordinance (Municipal Code Chapter 12.36), are the following:
1. On any property, Quercus agrifolia (California or Coast Live Oak) measuring four inches dbh or larger, and any other tree measuring nine inches dbh or larger except Eucalyptus and Pinus radiata (Monterey Pine);
2. Pinus radiata (Monterey Pine) trees shall be protected only on city property and in development-related situations where more than five Monterey Pine trees per acre are proposed to be removed. Although Monterey Pine trees are not protected in non-development-related

CITY OF OAKLAND

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July 27, 2005

Collin Mbanugo
3300 Webster Street – Suite 900
Oakland, CA 94609

Re: **Leona Heights Sulfur Mine - Abatement and Cleanup**
Creek Protection Permit -Application # CP05-106 (filed on 6/27/05)

Location: End of McDonell Ave. (APN: 037A-3151-002-06)

Dear Mr. Mbunago:

Section 65943 of the California Code requires a determination in writing as to the completeness of an application for a development project. This letter does not constitute either an approval or a denial of your application.

Your application for a Creek Protection Permit as part of the clean-up and abatement of the abandoned Leona Heights Sulfur Mine has been found to be:

[X] **INCOMPLETE. Additional information or material is needed in order to process your application.** Please submit additional and/or revised application materials that address the specific items listed below:

1. **Construction Staging/Work Plan**, prepared in site plan format, showing in actual location and area all of the following:
   a. Equipment and personnel decontamination facilities;
   b. Location and method for temporary stockpiling of soil and other materials;
   c. Mitigation measures for potential adverse impacts of construction activities on adjacent properties, including but not limited to - noise impacts from operation of heavy equipment, dust from grading, and disruption of traffic flow;
   d. Traffic routing plan - show proposed delivery and off-haul routes (with specific public or private streets, roads, or accessways identified, as applicable), and temporary on-site circulation areas;
   e. Temporary fencing;
   f. Parking areas for construction workers and equipment;
   g. Details of debris removal and disposal; and
   h. Any other work staging functions that require the Engineer's review, acceptance or approval.

2. **Erosion Control Plan**, prepared in site plan format, showing in actual location and area all of the following:
   a. All mechanical and vegetative measures to reduce erosion and sedimentation, including the type and location of all temporary silt fencing (such as sandbags, filter fabric, etc.), and areas to be hydro-seeded and/or landscaped upon project completion.

Technical Comments on Leona Mine Creek Plan

July 13, 2011

Introduction

The discussion provided below reflects the combined comments from staff members of the following four (4) permitting agencies for the Leona Mine Creek project: US Army Corps of Engineers, US Fish and Wildlife Service, San Francisco Bay Regional Water Quality Control Board, and the City of Oakland. While the California Department of Fish and Game (CDFG) agreed to these comments in concept, staff from CDFG was unavailable to review the comments provided below.

1. Use underlying bedrock slope to determine the constructed creek channel

Our understanding is that the creek design is intended to be modified to use the underlying bed rock as the slope for the channel (Personal Communication between Brian Wines and Pete Mundy on April 7, 2011). As discussed, a design relying on the underlying bedrock as the creek slope will provide a more stable channel than one built on top of fill material. Please submit the specifications for the Leona Mine Creek project that delineate the modified design including: 1) excavation of the sediment to bedrock and 2) using existing bedrock as the slope for the new creek channel.

2. Design should provide information on use of cascade design vs. step-pool design for areas with steeper slopes

Figure V in Greg Kamman's March 2006 design memo shows an appropriately designed step pool segment for the average slope through the project site. These earlier design memos (Figure V in Greg Kamman's March 2006 design memo) assumed an average slope through the project site and a step-pool design for that slope. However, until the sediment is excavated and the actual slope of the bedrock is determined, the actual slope is unknown. A steeper channel would require a cascade design, rather than a step-pool design, to remain stable over time.

It is not necessary to gather actual slope data on the subsurface (e.g. using exploratory borings). Instead, as discussed with the project manager, the agencies could review the design from a qualified stream designer that shows appropriate creek designs for the different slopes likely to be encountered at this site (Personal Communication between Brian Wines and Pete Mundy on April 7, 2011). In particular, in steeper sections, a cascade feature is more appropriate than a step-pool design. All stream designs (including the cascade design to be used in steeper slope) should be submitted to, reviewed and approved by the agencies as part of the project design.

8. Revisions needed on the Mitigation & Monitoring Plan

The Mitigation and Monitoring Plan (MMP) dated August 2006 by Olberding Environmental needs to be updated. The MMP identifies: the implementation plan, maintenance during monitoring, final success criteria, the length, frequency and type of monitoring, and contingency measures. Most of this vegetation plan is focused on the re-vegetation effort along the proposed creek channel and associated floodplains. The MMP needs to be updated to reflect the change in channel design to a bedrock controlled channel, without floodplains and the revised planting palette. The plan should also be revised to include geomorphology monitoring of bank and hill slope stability post-construction.

9. More detailed information on staging areas, work areas and vegetation removal for construction

Additional information regarding staging and haul routes was provided by email from Jeff Olberding on 10/17/2008. Please confirm that this is still accurate and also please confirm that the following information is covered in the correspondence including:

- estimates (square feet or acres) of the entire project action area including the project footprint,
- access routes, staging areas, and at least a 100-foot buffer for all areas that will experience direct and indirect effects of the proposed project.
- plans showing which areas will be impacted during construction (staging area, debris piles, etc);
- what equipment will be used on-site;
- any areas of the project area that will have soil, vegetation or tree removal as part of the construction plan. In case of tree removal, each tree proposed for removal should be identified and will need to be permitted by the City of Oakland (and CDFG and the USFWS Migratory Birds Program,) prior to removal.

PLACEHOLDER for ENDANGERED SPECIES REQUIREMENTS

The specific conditions and permitting requirements for addressing threatened and endangered species are still under consideration and are not included in this letter. That being said, all of the commenting agencies recognize that the project must still meet the requirements of Section 7 of the Endangered Species Act for the California red-legged frog and Alameda whipsnake. The agencies also note that the project has the opportunity to provide habitat suitable for the Alameda whipsnake and California red-legged frog.