

HEARING OF THE CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL  
BOARD

PROPOSED CLEANUP AND ABATEMENT ORDER R5-2009-xxxx  
FOR THE CENTRAL MINE, ET AL.  
COLUSA COUNTY, CALIFORNIA

**SUBMISSION OF EVIDENCE AND POLICY STATEMENTS  
BY  
DESIGNATED PARTY HOMESTAKE MINING COMPANY OF CALIFORNIA**

Pursuant to the Hearing Procedures for the above hearing, issued by the Central Valley Regional Water Quality Control Board for a hearing on the proposed Cleanup and Abatement Order for the Central Mine, et al. (Central Mine Property), Colusa County, California, scheduled for October 7/8/9, 2009, Designated Party Homestake Mining Company of California ("Homestake") herewith identifies its evidence, policy statement, and list of witnesses for that proposed hearing.

1. Evidence

The Prosecution Team has stated it is relying upon the evidence now present in the public files of the Central Valley Regional Water Quality Control Board for the Central Mine matter, and has identified only three staff members as witnesses for presentation with respect to the Central Mine matter at the hearing scheduled for October 7/8/9, 2009. Homestake will rely upon the evidence already present in those public files for the Central Mine Property, and in particular the map and TetraTech report (2003) figure relied upon by the Prosecution Team to illustrate the areas from which alleged discharges have occurred (Attachments 1 and 2).

Homestake will also rely upon the affidavit of Karl Burke (Attachment 3) and the Homestake business records identified in and attached to that affidavit.

2. Witnesses

Based on Homestake's current understanding of the Prosecution Team's proposed testimony regarding the Central Mine matter, Homestake does not anticipate lay or expert witnesses at the October 7/8/9 hearing in addition to Mr. Burke. Mr. Burke will be present at the hearing and available for cross-examination and for further testimony in response to evidence of the Prosecution Team, if required. Based on Homestake's current understanding of the Prosecution Team's proposed testimony regarding the Central Mine matter, Homestake does not anticipate that any further testimony by Mr. Burke would exceed fifteen minutes.

3. Policy Statements

Homestake incorporates its prior statement of its position demonstrating that it has no current relationship with the Central Mine Property, and describing the nature and limited duration of its involvement with the Central Mine Property in the past (Attachment 4).

Homestake also reiterates its positions in that statement regarding the timing of activities under the draft CAO and its concern that any characterization of mercury contamination in Sulphur Creek should not be limited to characterization of the mining waste, as currently proposed in the draft CAOs, but should commence with a comprehensive Conceptual Site Model addressing all potential sources of mercury to Sulphur Creek, so that the ultimate outcome of the characterization will allow a rational plan for effective remediation.

On the issue of liability, Homestake also provides the following response to the statement of the Prosecution Team regarding potential Homestake liability for the discharge of mercury from the Central Mine Property to Sulphur Creek:

- Homestake has no current connection whatsoever to the Central Mine Property – which the Prosecution Team does not appear to contest. However, Homestake also notes that the Prosecution Team has not included the U.S. Bureau of Land Management as a Discharger under this draft CAO, although BLM appears to be the current owner of three parcels within the area of the Central Mine Property included under that draft CAO (See Attachment 3, Exhibit K).
- Homestake has no connection to the operations at the Central Mine Property that produced the mining waste that the Regional Board seeks to address through this proposed order – which the Prosecution Team also does not appear to contest. Specifically,
  1. Homestake did not own the land or operate the mine at the time the mining wastes at issue were generated (operations at the Central Mine Property ended many decades prior to 1978).
  2. Homestake did not operate any mine during the period it held a lease on the Property.
  3. However, Bailey Minerals, from which Homestake purchased the portion of the Central Mine Property where it held a fee interest, is alone among the listed Dischargers to be identified as actively engaged in mining at the Property, having “mined the property in early 1970’s, increasing erosion at the site. This includes large land disturbance and partial damming of Sulphur Creek.”(Prosecution Team Statement of Evidence re Bailey Minerals) (Attachment 2)
- Homestake’s exploration activities at the Central Mine Property were all carried out with the knowledge and approval of Colusa County and the Regional Board, and in compliance with requirements from those agencies intended to prevent environmental harm, and which included reclamation of any disturbed areas at the Property, with no direction from the Regional Board to address the existing mining waste. (Attachment 3)
- Any liability of Homestake for the discharge of mercury from the Central Mine Property is reasonably divisible by duration and nature of the activities on the property, from those of other potentially responsible parties named or not named in the proposed CAO.

- More broadly, it is not appropriate for Homestake to be liable for activities resulting in the discharge of mercury to Sulphur Creek for which it demonstrably had no involvement, which certainly excludes liability for mercury from natural sources, upstream anthropogenic activities, or activities occurring at a time during which Homestake had no involvement at the Property.

**A. Homestake activities at the Central Mine property have not contributed to a discharge of mercury to Sulphur Creek.**

As set out in its Response filed with the Board on July 1, 2009, Homestake has no current connection at all to the parcels comprising the Central Mine Property, and had no connection to the operation of the various mines at the Central Mine Property that produced the mining waste that the Regional Board seeks to address through this proposed order. Homestake did own portions of the Central Mine Property from 1978-1999, and did lease or have unpatented claims on other portions of that Property from 1978-1992. However, there was no mining on the Property during that period, and Homestake had no interest whatsoever – neither fee nor leasehold – in the Property during any period of active mining. Indeed, the only active mining in the last fifty years at the Property was apparently engaged in by Bailey Minerals, also named as a Discharger under the draft CAO.

As shown in the attached affidavit of Mr. Burke, Homestake did conduct exploratory activities on the identified Assessor Parcels as part of its Cherry Hill Project at various times in the period 1978-1992. As the description in Mr. Burke's affidavit makes clear, those activities would have had only a minor impact on the Property, and only for a limited period, and included reclamation of any disturbed areas. Moreover, all of those activities, including any roadwork or drilling, were carried out with the prior approval of and pursuant to conditions required by both Colusa County and the Regional Board. That is, aside from the fact that the drilling activities by Homestake would have resulted in minimal disturbance to the land, both in terms of area and duration, the Regional Board was not only aware of, but approved, all of these activities.

Given the absence of any affirmative evidence that Homestake's activities on the Central Mine Property contributed to the discharge of mercury to Sulphur Creek, those activities do not support any imposition of liability on Homestake under Section 13304 of the Water Code.

The Prosecution Team also rests its case for liability on the part of Homestake on the fact that Homestake owned a portion of the Property from 1978-1999. As the owner of a portion of the Property, the Prosecution Team contends, Homestake had an obligation to manage mining waste on that property to prevent any passive migration of mercury from that waste into Sulphur Creek, although the Regional Board never raised that concern on any occasion during its review and approval of Homestake's activities on the Property. Indeed, the Prosecution Team contends that as a consequence of not preventing that passive migration during its period of ownership, Homestake is now jointly and severally liable with the current owners and other past owners and lessees for not only the remediation of those waste piles, but also for all mercury contamination, from whatever anthropogenic source, in Sulphur Creek. The liability web spun by the Water Code may be broad; it is not without limits. The Prosecution Team in this case has exceeded those limits.

**B. Homestake is not responsible under the Water Code for passive migration of mercury from the Central Mine Property to Sulphur Creek.**

More recently, the Prosecution Team has modified its position to address the fact that there is no evidence indicating that Homestake's activities on the Central Mine Property resulted in a discharge of mercury to Sulphur Creek. As discussed above, there has been no affirmative evidence that Homestake's activities at the Central Mine Property resulted in any actual discharge of mercury to Sulphur Creek. The Prosecution Team, however, contends that Homestake, simply by virtue of its status as an owner, should be jointly and severally liable with other owners, including the only respondent Discharger that actually engaged in mining on the Property and is alleged to have increased erosion to Sulphur Creek.

The language of Water Code 13304 addressing liability for those causing or permitting a discharge has been interpreted broadly, but not necessarily with the application of "joint and several liability" suggested by the Prosecution Team for application here. The Board has placed secondary liability on an owner, where the actual activity resulting in the discharge was carried out by a lessee. *In the Matter of Aluminum Company of America*, WQ 93-9, at n. 8. The Board has also declined to impose liability on a lessee whose actions while a lessee did not contribute to the alleged contamination, *In the Matter of U.S. Cellulose*, WQ 92-04 (lessee dropped from order where it did not use the tanks that were the source of contamination on the property it leased). Cf., *City of Modesto Redevelopment Agency v. Superior Court of San Francisco County*, 119 Cal. App. 4<sup>th</sup> 28, 38 (2004) (The critical question in liability for nuisance under the Water Code is whether defendant created or assisted in the creation of the nuisance).

Here, however, the Prosecution Team baldly asserts that Homestake, by virtue of having been a property owner a decade ago, is jointly and severally liable for mercury contamination in Sulphur Creek not only for mercury discharged from the Central Mine Property, but for mercury in Sulphur Creek at or downstream of the mine site, regardless of source. Draft CAO, par. 14.

Water Code 13304, by its terms, does not impose joint and several liability; the decisions of the State Board addressing that concept simply adopt the common law principle of joint and several liability where there are multiple sources resulting in a single and indivisible harm. See discussion in the case cited by the Prosecution Team, *In the Matter of Union Oil Company*, WQ 90-2, at p. 8. As the Supreme Court of the United States discussed in its recent decision of joint and several liability under the federal Superfund statute, the starting point for consideration of joint and several liability is Section 433A of the Restatement (Second) of Torts. *Burlington Northern & Santa Fe Railway Co. v. United States*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1870 (2009). Applying those principles, joint and several liability does not attach where "there is a reasonable basis for determining the contribution of each cause to a single harm." Restatement (Second) of Torts 433A(1)(b), p. 434 (1963-64). *Burlington N. & S.F. R. Co.*, at 1881. The liability issue here is whether there is a reasonable basis for divisibility in addressing sources of mercury to Sulphur Creek. That basis for divisibility is clearly laid out in the evidence and reports before the Regional Board, including the TetraTech report relied upon by the Prosecution Team to establish the sources of mercury to Sulphur Creek. That evidence establishes the relative duration of Homestake's involvement, the nature and location of its activities at the property and their potential for contributing to any discharge of mercury, and an estimate of annual

contribution of mercury from the many natural and anthropogenic sources of mercury to Sulphur Creek.

It should go without saying – but in light of the broad scope of the draft CAOs and the position of the Prosecution Team, it bears repeating – that neither Homestake nor any other party given notice of a Cleanup and Abatement Order for Sulphur Creek should be responsible for addressing the many acknowledged and significant natural sources of mercury to Sulphur Creek. The mercury in Sulphur Creek is not just from anthropogenic sources – which includes not just mining carried out a century ago by persons not party to this proceeding, but also such activities as streambank erosion exacerbated by grazing, and erosion from the forty-five miles of unpaved roads and jeep trails in the Sulphur Creek sub-watershed<sup>1</sup> – but is also from natural sources, including multiple hot springs.

These natural sources have been adding significant quantities of mercury to Sulphur Creek for millennia, at a rate on an annual basis that is as significant as anything estimated as the contribution from the mines on the Central Mine Property,<sup>2</sup> and whatever remediation is required, those natural sources will continue to discharge to Sulphur Creek in the future. That contribution from natural sources is reasonably determinable and divisible and it is not something for which Homestake has responsibility.

Likewise, regardless of the Prosecution Team's theory of the case, Homestake is not liable for any discharges of mercury to Sulphur Creek from mining waste or other anthropogenic sources upstream of property where it had an interest. Those contributions have also been estimated by the earlier studies relied upon by the Prosecution Team, and are as significant, if not larger, than those for sources in lower Sulphur Creek. Indeed, during an on-site inspection of the Central Mine Property carried out in 1997, a staff engineer from the Regional Board offered his opinion that the mercury in that lower portion of Sulphur Creek largely came from those upstream mines. (Exhibit D to Attachment 4). However, the Regional Board in August 2009 issued CAOs to the owners of the Clyde and the Elgin Mines, located two miles upstream of the Central and Wide Awake properties, which, while requiring those owners to address abandoned mines and mining waste discharging to Sulphur Creek, did not impose any obligation on those owners with respect to mercury from anthropogenic sources in Sulphur Creek at or downstream of those mines. Instead, that obligation is included only in the draft orders for the Wide Awake and Central mines, leaving, without explanation, the legacy of substantial upstream contamination entirely to the downstream parties.

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<sup>1</sup> American Land Conservancy, *Final Report to Wildlife Conservation Board*, Grant WC-2016 BT, Sulphur Creek Riparian Habitat Restoration Project, April 28, 2006.

<sup>2</sup> Tetra Tech (2003), at Table 3-5, estimates the annual discharge from the five mines on the Central Mine Property and the Wide Awake as ranging from 0.4-8.2 kg/yr, with the Manzanita Mine alone accounting for 0.3-6.5 kg/yr, i.e., the estimated discharge from all of the mines associated with the Central Mine and Wide Awake Properties, leaving aside the Manzanita, is at worst de minimis. The TetraTech report also estimates the discharge from the Elgin alone as ranging from 3.9 to 9.3 kg/yr. For comparison, the Sulphur Creek TMDL report (Table ES-1) estimates annual discharge of mercury to Sulphur Creek from geothermal springs and non-mining erosion at 2.6 kg, the Lower Watershed mines addressed here (plus "contaminated stream bed") at 5.3 kg, and the upstream Elgin and Clyde Mines at 3.5 kg.

Regardless of the Prosecution Team's theory of the case, Homestake should also not be jointly and severally liable for discharges from the mining waste on the Central Mine Property for discharges during periods when it had literally no connection to the Property. The mining waste originated nearly a century before Homestake even visited the Property. Homestake has had no connection with any portion of the Property since 1999.

## Conclusion

The draft CAO proposed by the Prosecution Team for the Central Mine Property is intended to address mining waste located on that property. The parties primarily liable for addressing that waste should be those parties that have responsibility for discharges from that waste to Sulphur Creek. Homestake did not cause or contribute to either the accumulation of that waste, or to any discharge of mercury from that waste to Sulphur Creek. During the period from 1978-1992, it did engage in some activities on the property, but all of those activities were of short duration and minor impact, and, moreover, were reviewed and approved by the Regional Board, and there is no evidence indicating those activities involved disturbance of the waste rock and tailings piles resulting in or contributing to the discharge of mercury to Sulphur Creek.

Should there be any liability for Homestake with respect to its holding title to property in the Sulphur Creek watershed, moreover, that liability should not be joint and several. The contributions of various sources to mercury in Sulphur Creek have been evaluated by consultants from the Regional Board. The nature of the involvement of the parties responsible for various activities and the duration and impact of those activities is clear, and liability for any remediation of the Property should reflect that relative responsibility.

It is also clear that any contamination in the lower Sulphur Creek area is the result of continuing natural sources as well as many decades of contributions from a variety of anthropogenic sources, with many of the significant sources located upstream of the Central Mine. There is no basis on which the Regional Board can fairly assign responsibility for the areas of Sulphur Creek adjacent to or downstream of the Mine solely to those found liable for that Mine. That provision of the draft CAO is wholly inappropriate and should be removed.

Respectfully submitted this 16<sup>th</sup> day of September, 2009.



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