

Atlanta
Beijing
Brussels
Chicago
Frankfurt
Hong Kong
London
Los Angeles
Milan
New York
Orange County
Palo Alto
Paris
San Diego
San Francisco
Shanghai
Tokyo
Washington, DC

(415) 856-7216
sanjayranchod@paulhastings.com

September 16, 2009

70073.00009

VIA HAND DELIVERY AND E-MAIL

Ken Landau
Assistant Executive Officer
California Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive #200
Rancho Cordova, CA 95670-6114

**Re: Evidence and Policy Statement of Magma Power Company for
Hearing on Draft Cleanup and Abatement Order for Central, Cherry Hill,
Empire, Manzanita, and West End Mines, Colusa County**

Dear Mr. Landau:

The following Evidence and Policy Statement for the Central Valley Regional Water Quality Control Board's ("Regional Board") hearing on the draft Cleanup and Abatement Order for the Central, Cherry Hill, Empire, Manzanita, and West End Mines in Colusa County ("Draft Order") is submitted on behalf of Magma Power Company ("Magma"). This submission is made pursuant to the revised hearing procedures established by the Regional Board Advisory Team for the Draft Order.¹

As explained herein, the Regional Board Prosecution Team's legal argument is fundamentally flawed and it has failed to present the substantial evidence required by law to support a finding that Magma should be held responsible for the alleged contamination. Magma thus requests that the Regional Board remove it as a discharger from the Draft Order and any subsequent version of the order.

I. Introduction

Magma is a geothermal power company that explores for and develops geothermal resources used to generate electric power. Geothermal power is extracted from heat stored in the earth and is a renewable and environmentally-friendly source of energy.

¹ The Regional Board Advisory Team denied without prejudice Magma's objection to the hearing time limits set forth in the revised hearing procedures. Magma is concurrently submitting a request for additional hearing presentation time.

Magma helped lead creation of the U.S. geothermal industry. Magma first drilled for naturally produced steam in the mid-1950s.

The Sulphur Creek Mining District of Colusa County (“District”) has long been recognized as an area of hydrothermal alteration. It is particularly known for mercury and gold mineralization. According to the Draft Order, mercury and gold mining activities in the District began in the late 1800s. (Draft Order, Finding No. 7.) The Central, Cherry Hill, Empire, Manzanita, and West End Mines are inactive mercury and/or gold mines that are located in the Wilbur Springs hydrothermal area of the District. (*Id.*, Finding No. 1.) The Draft Order states that mining waste has discharged from these mines onto the ground surface where it has eroded into Sulphur Creek, allegedly resulting in elevated concentrations of metals within the creek. (*Id.*, Finding No. 3.)

In 1965, Magma entered into a geothermal lease for property in the District. Magma drilled an exploratory geothermal well on this property that was used to evaluate potential geothermal energy development in the Wilbur Springs hydrothermal area. The well was closed in June 1968, by which time Magma had conveyed all its rights under the lease to other parties. Magma had no involvement in mining operations or other activities in the District that caused or contributed to the discharge of mining waste into Sulphur Creek.

The Draft Order indicates that the Regional Board identified Magma as a potential discharger based on the company’s historical leasehold interest in the District. “The parties . . . are known landowners, operators, or leaseholders of the Mine site as determined by Central Valley Water Board staff’s review of property records from the Colusa County Recorders Office.” (Draft Order, Finding No. 5.)²

II. Summary of Argument

In its August 26, 2009 submission of documents and information pursuant to the revised hearing procedures (“Evidence Statement”), the Regional Board Prosecution Team asserts that Magma is subject to the Draft Order because Magma leased property in the District during the time when mining waste piles located on the property were discharging mercury and other pollutants to surface waters, and it “had the ability to cleanup, and abate the discharge of mines waste from the mines.” As explained below, the Prosecution Team’s theory of liability as to Magma is fundamentally flawed and based on incorrect facts.

Under the terms of the Geothermal Lease, Magma’s right to enter and use the surface of the property it leased was limited to the purposes of exploring and developing the

² The Draft Order does not identify the “Mine site” referenced in Finding No. 5, and the term is not defined in the Draft Order. Moreover, characterization of Magma as the lessee of a “Mine site” is misleading because Magma’s leasehold was limited to exploring and developing the subsurface geothermal resource.

subsurface geothermal resource, and the lessor reserved all rights not related to exploration and development of geothermal energy. As a result, contrary to the Prosecution Team's assumption, Magma lacked control over the surface of the property, where waste piles allegedly were located.

Relying on *In re Zoecon Corporation*, Order No. WQ 86-02, 1986 Cal. ENV. LEXIS 4, the Prosecution Team argues that even though Magma did not create the contamination, it is liable under Water Code section 13304 for passive migration of the contamination from property it leased. This decision does not support the Prosecution Team's theory of liability as to Magma. Unlike the petitioner in *Zoecon*, Magma had no ability to control the passive migration of contamination that allegedly was occurring on the property at issue. Moreover, Magma is a former lessee and the holding of *Zoecon* is limited to landowners.

The Prosecution Team also cites *In re Wenwest, Inc.*, Order No. WQ 92-13, 1992 Cal. ENV. LEXIS 19, in which the State Water Resources Control Board ("State Board") established that liability does not attach to a former short-term landowner when equitable factors weigh in favor of the landowner. But here, the *Wenwest* equitable factors weigh decisively in favor of Magma, demonstrating that Magma should not be named as a discharger.

Nuisance law is relevant to the scope of liability under the Porter-Cologne Act and supports this result. Furthermore, analogous federal law under CERCLA provides no support for the notion that liability could be imposed on Magma as an "owner or operator" of a mining site. As explained above, Magma did not "discharge" waste within the well-established definition of the term for purposes of Water Code sections 13304 and 13267, and the *Wenwest* equitable factors strongly favor Magma. In sum, Magma cannot be held liable as a matter of law.

Even if the Prosecution Team's legal argument was not fundamentally flawed, it has failed to present the substantial evidence required by law to support a finding that Magma should be held responsible for the alleged contamination. The Regional Board thus should remove Magma as a discharger from the Draft Order.

III. Factual Background

A. Magma's Historical Leasehold Interest

On June 3, 1965, Magma entered into a geothermal "Lease and Agreement" with Bailey Minerals Corporation and its president J.W. Weightman, as lessor, for approximately 171.3 acres in the District ("Geothermal Lease"). The document includes an Addendum and a Supplemental Agreement, both of which are dated June 3, 1965. A copy of the Geothermal Lease is attached hereto as Exhibit A.

The Geothermal Lease provided Magma with limited rights related directly to exploration and development of subsurface “steam and steam power,” i.e. geothermal energy. (*Id.*)³ These rights were strictly limited and, as explained below, they did not provide Magma with control over the surface of the property. (Declaration of Alexander Schriener, Jr. attached hereto as Exhibit E (“Schriener Decl.”), ¶ 7.)

The Geothermal Lease is one of several documents identified in Attachment B to the Prosecution Team’s Evidence Statement.⁴ According to the Evidence Statement, Attachment B lists documents “showing that Magma Power Company, leased and did drilling on the property.” The other documents described in Attachment B show the following: After entering into the Geothermal Lease, Magma assigned a 50% interest in the lease to Geothermal Resources International, Inc. (“GRI”). In March 1968, Magma and GRI assigned and conveyed all their lease rights from the Geothermal Lease to D.D. Feldman and Cordero Mining. In October 1970, D.D. Feldman and Cordero Mining assigned the lease rights to Geothermal Electric Corporation.

The March 1968 assignment, a copy of which is attached hereto as Exhibit B, terminated Magma’s real property interest in Colusa County. As a result, Magma possessed a leasehold interest in the property for less than three years – between June 1965 and March 1968 – and that interest was limited to geothermal exploration and development rights. Magma’s involvement in any geothermal energy development in the area effectively ended in 1968. (Schriener Decl. ¶ 11.) At no time did Magma own a mining site or any other property in Colusa County. (*Id.* ¶ 9.)

In January 1971, Geothermal Electric Corporation conveyed the lease rights from the Geothermal Lease to the lessor, Bailey Minerals and J.W. Weightman. This conveyance is reflected in a Surrender of Lease between Geothermal Electric Corporation and Bailey Minerals and J.W. Weightman, a copy of which is attached hereto as Exhibit C.

B. Magma Held Limited Rights Under the Geothermal Lease

The Geothermal Lease provided Magma the exclusive right to explore, drill for, produce, remove, and sell “steam and steam power and extractable minerals from, and utilize, process, convert and otherwise treat such steam and steam power upon, said land, and to extract any extractable minerals, during the term hereof, with the right of entry thereon and use and occupancy thereof at all times for said purposes and the furtherance thereof.

³ The Geothermal Lease defines “steam” and “steam power” to include “natural geothermal steam.” (Ex. A at 7.)

⁴ Magma submits by reference each document described in Attachment B to the Prosecution Team’s Evidence Statement, all of which are in the public files of the Regional Board.

...⁵ (Ex. A at 1.) Magma's right of entry and possession of the surface was "sole and exclusive" for the purposes of exploring and developing the subsurface geothermal resource. (*Id.*) This sole purpose is reflected in provisions of the Geothermal Lease providing that Magma could be deemed in default if it failed to complete at least one geothermal well capable of producing geothermal energy sufficient for commercial sale within a certain period of time. (*Id.* at 2-3.)

The Terms of Agreement of the Geothermal Lease further limited Magma's rights by providing that "... Lessee shall utilize for such purpose or purposes only so much of the leased land as shall be reasonably necessary for Lessee's operations and activities thereon and shall interfere as little as is reasonably possible with the use and occupancy of the leased land by Lessor." (*Id.* at 4 (emphasis added).) The Terms of Agreement also include the following language that further restricted Magma's use of the land:

Lessor reserves the right to use and occupy said land, or to lease or otherwise deal with the same, without interference with Lessee's rights, for residential, agricultural, commercial, horticultural or grazing uses, or for mining of minerals lying on the surface of or in vein deposits on or in said land, or for any and all uses other than the uses and rights permitted to Lessee hereunder.

(*Id.* at 1 (emphasis added).) The effect of these and other provisions of the Geothermal Lease was to deprive Magma of control over the surface of the property because the lessor reserved all rights (including mining for minerals) not related to exploration and development of geothermal energy, and to prohibit Magma from engaging in activity not related to exploration and development of geothermal energy.⁶

⁵ References to "minerals" in the Geothermal Lease are to geothermal minerals only, not minerals generally as might be meant in a general minerals lease. (Schriener Decl. ¶ 6.) References to geothermal minerals were included because at the time the Geothermal Lease was entered into, geothermal energy had not yet been defined as a mineral right for purposes of royalty calculation. (*Id.*) Geothermal leases that predated enactment of the Geothermal Steam Act of 1970, 30 U.S.C. §§ 1001-1027, generally reflected this uncertainty and protected the parties' interests by including reference to geothermal minerals. (*Id.*)

⁶ These provisions are consistent with the intention of the parties memorialized in the Recitals of the Geothermal Lease. The Recitals state that the parties intend that "Lessee shall have . . . all rights and power necessary or convenient to carry on the business of developing and utilizing steam power, and, if Lessee deems it warranted, of extracting minerals therefrom." (Ex. A at 1.)

C. Magma Engaged in Limited Geothermal Exploration Operations

Consistent with its limited rights under the Geothermal Lease, Magma's only activity on the 171.3 acres covered by the Geothermal Lease occurred between 1965 and 1968, when Magma drilled and closed an exploratory geothermal well on the north side of Sulphur Creek. The well, known as Magma Power Wilbur-1 or "W-1," was spud on September 22, 1965 and drilled to a depth of 1,226 feet. (Schriener Decl. ¶ 9.) W-1 was completed on December 14, 1965 and operated by Magma. (*Id.*) Magma did not build or otherwise establish a new road for the well. (*Id.* ¶ 11.)

W-1 did not result in geothermal energy development, and Magma closed and abandoned the well on June 19, 1968. (*Id.*) The abandonment was done pursuant to State standards under the approval of the State Division of Oil, Gas & Geothermal Resources ("DOGGR") (then known as the Division of Oil and Gas) and accepted by the agency. (*Id.* ¶ 10.)

By the time W-1 was closed, Magma had conveyed all its real property interests under the Geothermal Lease to other parties and had no subsequent involvement in geothermal energy development in the District.⁷ (*Id.* ¶¶ 11, 13.) Magma had no involvement in mining operations, mercury prospecting, or any other activities in the District that created mining waste or caused or contributed to the discharge of mining waste into Sulphur Creek. (*Id.* ¶ 12.)

IV. **Liability Is Predicated on Factually Incorrect Findings**

The Prosecution Team's July 16, 2009 submission states that the "basic allegations, that the dischargers had a possessory interest in the parcels that are the subject of the proposed Order sufficient to allow them to control the discharge, and that an ongoing discharge is and was occurring, are spelled out in the [Draft Order]." The response specifically references Finding No. 5 of the Draft Order, which states that "[a]ll the parties named in this order either owned the site at the time when a discharge of mining waste into waters of the state took place, or operated the mine, thus facilitating the discharge of mining waste into waters of the state." (Draft Order, Finding No. 5.)

As explained in Magma's July 1, 2009 comments on the Draft Order, Finding No. 5 in the Draft Order is incorrect with respect to Magma, which never has owned mining sites or other land in the District and never has operated a mine or mining site in the District. (Schriener Decl. ¶¶ 12, 13.) This is one of several factually incorrect findings in the Draft

⁷ Magma acknowledged in its July 1, 2009 submission to the Regional Board that in 1964 it entered into a different lease for real property in Colusa County with New Elgin Mine Company as lessor, and that a second exploratory geothermal well on the north side of Sulphur Creek, which was the responsibility of Cordero Mining, was drilled and operated by Cordero Mining.

Order about Magma that belie the weakness of the Prosecution Team's case against Magma.

Finding No. 3 in the Draft Order states that "[t]he Dischargers either own, have owned, or have operated the mining sites where the Mines are located and where mining waste has been discharged." (Draft Order, Finding No. 3.) This finding is similarly incorrect; Magma never has owned mining sites or other land in the District and has had no involvement in mining operations in the District or operating mining sites in the District.⁸ Attachment B to the Draft Order states that Magma had a leasehold interest in one or more parcels from September 15, 1965 to August 12, 1986. This statement also is incorrect; as explained above, Magma has had no real property interest in the District since 1968.

As demonstrated above, critical findings in the Draft Order are simply incorrect with respect to Magma, undermining the Prosecution Team's theory of liability as to Magma. In addition, other material findings in the Draft Order that allegedly support the Regional Board's enforcement action are incorrect. For example, the Draft Order states that beneficial uses for Sulphur Creek include municipal and domestic supply and habitat for fish and wildlife, and that the municipal and domestic supply designation (MUN) also applies to Sulphur Creek. (Draft Order, Finding No. 31.) Recent conclusions of the Regional Board itself flatly contradict this finding, however. In a March 2007 report, Regional Board staff concluded as follows:

Sulphur Creek does not support the MUN beneficial use or the human consumption of aquatic organisms. Naturally occurring concentrations of suspended solids, mercury, and electrical conductivity exceed drinking water criteria and make Sulphur Creek unsuitable habitat for fish and consumable aquatic invertebrates. Total suspended solids and electrical conductivity also exceed the criteria in Resolution 88-63 for excepting the MUN beneficial use designation for surface and ground waters. These uses do not exist and cannot feasibly be attained in the future.

Final Staff Report for Amendment to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins to Determine Certain Beneficial Uses Are Not Applicable in and Establish Water Quality Objectives for Sulphur Creek, Central Valley Regional Water Quality Control Board, March 2007 ("Final Staff Report"), attached hereto as Exhibit D, at i. This Final Staff Report demonstrates that the claimed beneficial uses for Sulphur Creek are unattainable, and that the Regional Board's enforcement action will not enhance beneficial uses.

⁸ Furthermore, Regional Board staff have indicated they are unable to associate Magma with any one of the five mines that are the subject of the Draft Order.

V. Magma Cannot Be Held Liable Because It Is Not A Discharger

The Regional Board's authority to issue a Cleanup and Abatement Order to Magma is based on provisions of the Porter-Cologne Act set forth at Water Code sections 13304 and 13267. (Draft Order at 1.) Liability under both statutory provisions can attach only to a "discharger."

Section 13304 authorizes the issuance of an order to "[a]ny person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into waters of the state and creates, or threatens to create, a condition of pollution or nuisance . . ." Water Code § 13304(a).

Section 13267 authorizes the Regional Board to require that "any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposed to discharge waste within its region . . . shall furnish, under penalty of perjury, technical or monitoring reports which the regional board requires." Water Code § 13267(b)(1).

The concept of "discharging" waste is central to sections 13304 and 13267. In *Lake Madrone Water District v. State Water Resources Control Board* (1989) 209 Cal.App.3d 163, the court defined the term "discharge" for purposes of section 13304 according to its ordinary meaning, to mean "to relieve of a charge, load or burden; . . . to give outlet to: pour forth: EMIT." *Id.* at 174 (quoting Webster's New Int'l Dictionary 644 (3d ed. 1961)).⁹ Accordingly, the State Board has held that when several potentially responsible parties are involved, cleanup liability under section 13304 may extend (depending on the facts of the case) to parties for which there is reasonable evidence of responsibility. *See In re U.S. Cellulose*, Order No. WQ 92-04, 1992 Cal. ENV LEXIS 2, *4. Importantly, however, "[t]here must be substantial evidence to support a finding of responsibility for each party named." *Id.*

A. Lessee Liability

A lessee may be liable under Water Code section 13304 when it controls the property at issue. *See, e.g., In re Stuart*, Order No. WQ 86-15, 1986 Cal. ENV. LEXIS 17 (current lessee held to be a discharger because lease provided sufficient control over property to prevent continuing discharge); *In re Spitzer*, Order No. WQ 89-08, 1989 Cal. ENV. LEXIS 11 (current lessee held to be a discharger because had exclusive possession and control of

⁹ The same definition of "discharger" applies for purposes of Water Code section 13267 because it is set forth in the same division of the Water Code. *See* Water Code § 13050 (defining other terms for purposes of Division Seven).

the property). The key determination in State Board decisions holding a current lessee liable is that the lessee had the legal power to stop or control the contamination, which was a continuing discharge. See *In re Stuart*, 1986 Cal. ENV. LEXIS at *8; *In re Spitzer*, 1989 Cal. ENV. LEXIS at *17.

The mere fact that an entity leased real property does not alone subject the entity to cleanup liability. In *U.S. Cellulose*, the State Board affirmed the Regional Board's removal of a lessee from an order. The State Board rejected arguments that the lessee should be named as a discharger because it was the tenant in possession and had exclusive control over the property because the lessee did not exercise control over the discharging activity. See 1992 Cal. ENV. LEXIS at *4-5. Although the lessee had exclusive control of the property, the lessee refrained from exercising any control over the tanks and had deferred control of the tanks to the property owners. See *id.* Here, similarly, Magma did not – and could not – exercise control over entities that operated the mines or created the waste that allegedly resulted in the contamination at issue, nor did it exercise control over any other discharging party. Moreover, as explained above, Magma did not have control over the surface of the property.

In its Evidence Statement, the Prosecution Team concludes without further explanation that “the scope of Magma’s lease indicates that Magma Power had some degree of ability to control the discharge of wastes” and that Magma “had the ability to cleanup, and abate the discharge of mines waste from the mines.” According to the Draft Order, “[m]ining waste has been discharged onto ground surface where it has eroded into Sulphur Creek” and “[m]ercury is transported primarily through erosion of mercury-bearing mine wastes, soils, and sediments during storm runoff events.” (Draft Order, Finding Nos. 3, 26.) Therefore, it would have been necessary for Magma to control the surface of the property it leased in order to control the alleged discharge of contamination from that property.

Under the terms of its Geothermal Lease, however, Magma lacked control over the surface of the property it leased and could not exercise control over any of the alleged discharges from waste piles on the property it leased. Unlike the lessees deemed liable in *Stuart* and *Spitzer*, Magma did not have control over the continuing discharge allegedly occurring on the property it had leased, and Magma is not a current lessee.¹⁰

¹⁰ The list of activities in the Prosecution Team’s Evidence Statement that Magma allegedly could have undertaken to abate the discharge of mining waste while it leased the property is irrelevant. As explained above, Magma lacked sufficient control over the continuing discharge allegedly occurring on the property to undertake such activities. Furthermore, these activities represent current best practices that were not accepted in the 1960s.

The Prosecution Team relies on *Zoecon* for the proposition that a landowner or lessee is liable under Water Code section 13304 for passive migration of contamination from property the party owned or leased, even though the party did not create the contamination. In *Zoecon*, the State Board determined there was passive migration of contamination at the site sufficient to constitute a discharge by the petitioner Zoecon Corporation, even though it did not create or contribute to the contamination at issue, because it owned and controlled the site. See 1986 Cal. ENV. LEXIS at *2-5. The State Board imposed liability on the current landowner “not because it has ‘deposited’ chemicals on to land where they will eventually ‘discharge’ into state waters, but because it owns contaminated land which is directly discharging chemicals into water.” *Id.* at *6-7.

Zoecon does not support the Prosecution Team’s theory of liability as to Magma. Unlike the petitioner in *Zoecon*, Magma had no ability to control the passive migration of contamination that allegedly was occurring on the property at issue. Moreover, the holding of *Zoecon* is limited to landowners, and the Prosecution Team provides no authority for the proposition that it can be extended to lessees. In contrast to the current landowner in *Zoecon* that was named as a discharger, Magma is a former lessee that never held an ownership interest in the property. The Prosecution Team’s reliance on *Zoecon* is misplaced.

B. Wenwest Equitable Analysis

The *Wenwest* case and its progeny establish that liability does not attach to a former short-term landowner when equitable factors weigh in favor of the landowner. In *Wenwest*, Wendy’s International purchased property with a leaking underground storage tank for the purpose of selling the property to a franchisee that same year, which it did. Years later, the Regional Board named Wendy’s as a responsible party in a cleanup and abatement order. Wendy’s had been aware of the contamination when it purchased the property and took no steps to remediate the contamination. See 1992 Cal. ENV. LEXIS at *6. The State Board assessed the following equitable factors to determine whether the Regional Board had erred in naming Wendy’s as a responsible party:

- (a) purpose
- (b) period of ownership
- (c) availability of other responsible parties
- (d) involvement in activity that caused the discharge
- (e) involvement in activity that exacerbated the contamination (no involvement);
- (f) knowledge of existence of contamination
- (g) public awareness of hazard that caused contamination; and
- (h) status of cleanup

See *id.* at *8. The State Board ruled that Wendy’s should not have been named as a responsible party because all of the factors weighed in favor of the landowner:

Wendy's purchased the property only to convey it to a franchisee; it owned the property for only four months; other parties were named, including the franchisee; Wendy's had no involvement in activity that caused the discharge or activity that exacerbated the contamination; Wendy's knew of a pollution problem at the site but did not know of a continuing discharge; leaking underground storage tanks were just being recognized as a problem; and cleanup at the site was proceeding. *See id.* at *8-9. Importantly, the State Board recognized that "[n]o order issued by this Board has held responsible for a cleanup a former landowner who had no part in the activity which resulted in the discharge of the waste and whose ownership interest did not cover the time during which that activity was taking place." *Id.* at *6. The State Board declined to depart from this precedent.

In *In re County of San Diego*, Order No. WQ 96-02, 1996 Cal. ENV. LEXIS 3, a city agency (a former short-term owner) argued that it should not be named as a discharger under the *Wenwest* equitable analysis. The State Board disagreed, finding that several equitable factors identified in *Wenwest* weighed strongly against the petitioner, including availability of other responsible parties (relatively few other parties available), purpose (actions indicated intent to assume responsibility for cleaning up contamination), and to a lesser extent, period of ownership (two years). *See id.* at *16-17.

A more recent State Board decision, *In re Mohammadian*, Order No. WQ 2002-21, 2002 Cal. ENV. LEXIS 36, confirmed the continuing use of the *Wenwest* equitable analysis to determine whether liability under Water Code section 13304 attaches to a former landowner. In that decision, the State Board held that equitable factors did not relieve Texaco (a former short-term owner) of liability. The State Board focused on Texaco's lack of clean hands (it failed to comply with applicable unauthorized release reporting requirements) and, to a lesser extent, the period of ownership (three years).

Assessment of the *Wenwest* equitable factors shows that, under these circumstances, liability under Water Code section 13304 should not attach to Magma. First, and most importantly, Magma never owned the property and could not be considered a *de facto* owner; it possessed only a geothermal lease with limited rights for a three-year period. Magma's possessory interest thus was far less than Wendy's, and nothing in *Wenwest* supports extending liability to a lessee, let alone a former lessee. Second, Magma's purpose in acquiring any rights in the property was limited to exploration and development of geothermal energy (as reflected in the Geothermal Lease) and, unlike the petitioner in *County of San Diego*, none of Magma's actions indicated intent to assume responsibility for addressing any discharge from the property. Third, other allegedly responsible parties are named in the Draft Order, including one of the lessors in the Geothermal Lease. Fourth, Magma had no involvement in mining or any other activity that caused the alleged discharge. Fifth, none of Magma's limited geothermal operations exacerbated mercury contamination on the property. Sixth, there is no indication that Magma was aware of passive migration, if any, of mercury contamination from waste piles or tailings piles on the property during the leasehold). Seventh, there was little public

awareness of mercury contamination from mining wastes when Magma entered into the two geothermal leases. These factors weigh decisively in favor of Magma.¹¹

Considered together, the *Wenwest* equitable factors discussed above weigh strongly in favor of Magma. Therefore, the equitable analysis establishes that Magma should not be named as a discharger. Furthermore, Magma “had no part in the activity which resulted in the discharge of the waste” and its leasehold interest “did not cover the time during which that activity was taking place.” *Wenwest* at *6. It would be improper for the Regional Board to impose liability on Magma under these facts.

C. Nuisance Law

Liability under nuisance law is relevant to the scope of liability under Water Code sections 13304 and 13267. This is because the Porter-Cologne Water Quality Control Act, which includes sections 13304 and 13267, “appears to be harmonious with the common law of nuisance.” *City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, 37. In fact, “the Legislature not only did not intend to depart from the law of nuisance, but also explicitly relied on it in the Porter-Cologne Act.” *Id.* at 38.

Under Civil Code section 3483, “[e]very successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by the former owner, is liable therefor in the same manner as one who first created it.” Civ. Code § 3483. The cases interpreting nuisance liability established the rule that “a party, not the original creator of a nuisance, must have notice of it and a request to remove it before any action can be brought against him.” *Edwards v. Atchison*, 15 F.2d 37, 38 (9th Cir. 1926) (establishing rule as to grantees and lessees). This rule was later articulated as notice of the fact that one is maintaining a nuisance and a request to remove or abate it are prerequisites to impose liability against a person who merely passively continues a nuisance created by another. *See Reinhard v. Lawrence Warehouse Co.* (1940) 41 Cal.App.2d 741, 746 (citation omitted).

As explained above, the common law of nuisance exempts from liability those parties, whether landowners or lessees, who take possession of property with an existing nuisance and permit the nuisance to remain or continue, as long as they have not been notified or requested to remove the nuisance while they were able to do so. Under nuisance law, then, even if Magma had owned rather than leased the property at issue (which it did not) or could be considered to have constructively owned the property, it would be exempt from nuisance liability because it had not been notified of the nuisance posed by the alleged discharge during the relevant time period, nor had it been directed to address that nuisance.

¹¹ The only factor that may not favor Magma is the lack of ongoing cleanup of the property.

This is consistent with the analysis of liability under Water Code sections 13304 and 13267. While the State Board has held current lessees liable when they had sufficient control over the property at issue, liability under the statutory provisions does not attach to Magma because it lacks legal authority as a former lessee to stop or control the alleged discharge of contamination on the property it formerly leased, Magma lacked sufficient control over the property to do so at the time it leased the property, and the *Wenwest* equitable factors weigh strongly against liability for Magma. Nuisance law, which is relevant to the scope of liability under the Porter-Cologne Act, supports this result.

D. Analogous Federal Law

Finding No. 5 of the Draft Order suggests that Magma can be considered a discharger subject to cleanup liability because it allegedly is an “owner or operator” of a mining site. As explained above, this finding is incorrect with respect to Magma because it never has owned mining sites or other land in the District and never has operated a mine or mining site in the District. Moreover, under federal environmental law that is analogous to the Porter-Cologne statutory scheme, liability would not be imposed on Magma under these facts.

Under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), present and past “owners and operators” of hazardous waste facilities may be held liable as potentially responsible parties. *See* 42 U.S.C. § 9607(a)(1)-(2). Magma would not be considered an “owner” or “operator” for purposes of CERCLA liability. First, “the typical lessee should not be held liable as an owner” under CERCLA unless requisite indicia of ownership are established. *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 331 (2d Cir. 2000). The indicia of ownership inquiry amounts to an assessment of whether the lessee was a *de facto* owner of the property. *See id.* at 330-31. “[F]actors that might transform a lessee into an owner” include whether the lease is for an extensive term, such as 99 years, and whether the lease provides the owner/lessor with no rights to determine how the property is used. *Id.*

Here, the term of the Geothermal Lease was 25 years, the lessee assigned its rights after less than three years, and the lessor retained all rights not related to exploration and development of geothermal energy. (*See* Ex. A.) There are no indicators that Magma was a *de facto* owner of the property. Therefore, Magma could not be subject to “owner” liability under CERCLA.

With respect to “operator” liability under CERCLA, the U.S. Supreme Court found that “for purposes of CERCLA’s concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.” *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998). “This comports with the well-established rule that ‘operator’ liability only attaches if the defendant had authority to control the cause of the contamination at the

time the hazardous substances were released into the environment.” *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 287 F.Supp.2d 1118, 1194 (C.D. Cal. 2003) (quoting *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341 (9th Cir. 1992)).

Magma does not meet any of the aspects of the CERCLA definition of “operator.” The terms of the Geothermal Lease prevented Magma from managing, directing, or conducting the mercury mining operations that created the contamination that is the subject of the Draft Order. In fact, Magma had no involvement in any aspect of mining operations in the District, nor did Magma have any involvement in mercury prospecting or exploration for mercury deposits. To the extent there was any passive discharge of mining waste from the property during Magma’s leasehold, Magma’s operations had no effect on such passive discharge, and Magma lacked authority to control the cause of such contamination. Consistent with its limited rights under the Geothermal Lease, Magma’s only activity on the property involved drilling and closing an exploratory geothermal well on the north side of Sulphur Creek. To the extent Magma made any decisions about compliance with environmental regulation relevant to the District, they would have concerned the DOGGR requirements for closure and abandonment of a geothermal well, not management of any mining waste that existed on the property. Therefore, Magma would not be considered an “operator” for purposes of CERCLA liability.¹²

Under CERCLA, Magma would not be held liable as an “owner or operator” of a mining site. By analogy, discharger liability under the Porter-Cologne Act should not be imposed on Magma as an “owner or operator” of a mining site.

VI. The Prosecution Team Has Failed To Meet Its Evidentiary Burden

The Draft Order states that the Regional Board’s authority to issue a Cleanup and Abatement Order to Magma is based on Water Code sections 13304 and 13267. To hold Magma liable under either section, the Prosecution Team is required to meet the applicable evidentiary burden. As explained below, the Prosecution Team has failed to do so.

A. Evidentiary Burden Under Water Code section 13304

The Prosecution Team bears the burden of presenting “substantial evidence to support a finding of responsibility” for Magma such that it should be named as a discharger. *In re*

¹² In the Ninth Circuit, CERCLA’s “operator” provision had been defined in reference to “the degree of control that party is able to exert over the activity causing the pollution.” *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1342 (9th Cir. 1992) (citation omitted). This formulation yields the same result. The pollution in question, (mercury contamination on the property) was neither created nor utilized by Magma at any stage of its operations under its Geothermal Lease and, as explained above, Magma lacked control over the activity causing the pollution.

U.S. Cellulose, 1992 Cal. ENV LEXIS at *4. In its Evidence Statement, the Prosecution Team asserts that Magma leased a particular parcel, that waste was located on that parcel, that waste was passively discharged from that parcel into Sulfur Creek, and that Magma was able to control this passive discharge of waste. Even if the Prosecution Team's case against Magma under Water Code section 13304 was not fundamentally flawed, it has failed to identify and provide evidence to support a prima facie case as to Magma, let alone the substantial evidence required by law.

First, the Prosecution Team provides no evidence to support the statement in its Evidence Statement that Magma "controlled" (i.e., leased) the parcel that corresponds to APN 018-200-013-000. The reference in the Evidence Statement to "the time of [Magma's] ownership" is incorrect; Magma never owned this parcel or any other land in Colusa County. (Schriener Decl. ¶ 13.)

Second, while the Prosecution Team has identified the parcel that Magma allegedly leased, nowhere in the Draft Order, the Evidence Statement, or any other documents prepared or identified by the Regional Board, is there a precise description or map of the real property that corresponds to APN 018-200-013-000. For example, Attachment A of the Evidence Statement, which shows a parcel map with mine locations, does not identify the parcels by APN or otherwise identify which parcel Magma allegedly leased. Without this basic information, the Prosecution Team cannot make out a prima facie case as to Magma.

Third, the Prosecution Team has not demonstrated that "waste piles are still present on the property" that corresponds to APN 018-200-013-000. The Prosecution Team states that mining waste is located on the mines and mine sites covered by the Draft Order, relying on the "5C2 Report"¹³ for the fact that mine tailings and waste rock are located at and around the mines. This report provides no more specificity as to the locations of mining waste than Finding Nos. 18 through 25 of the Draft Order. The June 2009 photographs included in Attachment C of the Evidence Statement that purport to show mining waste at and around the mines suffer from the same defect. Without a description or designation on a map of the land that corresponds to APN 018-200-013-000, the Prosecution Team cannot identify which mines or mine sites are located on the parcel allegedly leased by Magma. As a result, the Prosecution Team has not – and cannot – demonstrate that mining waste is located on the parcel that Magma allegedly leased.

¹³ CalFed-Cache Creek Study Task 5C2: Final Report, Final Engineering Evaluation and Cost Analysis for the Sulphur Creek Mining District, Colusa and Lake Counties, California, Sept. 2003 ("5C2 Report"). An electronic copy of this document is available at: <http://www.waterboards.ca.gov/centralvalley/water_issues/mining/sulphur_creek/index.shtml>. This document and all others available at the website listed in the previous sentence are in the public files of the Regional Board and are submitted by reference by Magma.

Fourth, the Prosecution Team has not demonstrated that waste was discharged from the parcel allegedly leased by Magma into Sulphur Creek when Magma possessed rights under the Geothermal Lease. Even if the Prosecution Team had demonstrated that mining waste currently is located on the parcel allegedly leased by Magma (which it has not), any such waste may have been moved, relocated, or created since 1968. It is insufficient to assert without supporting evidence that waste piles or tailings piles were present on the property leased by Magma simply because such piles were generally present in the District; the Prosecution Team must provide evidence establishing the existence of mining waste on the parcel during the less than three-year period of Magma's leasehold interest. The April 1971 aerial photograph included in Attachment C of the Evidence Statement that purportedly shows "earth moving or excavation" at various mines does not establish the existence of mining waste on the parcel allegedly leased by Magma during the relevant time. The Prosecution Team has not demonstrated that waste piles or tailings piles were present on the parcel between 1965 and 1968 and thus it cannot prove that such waste or tailings piles were discharging mercury into Sulphur Creek during that time.¹⁴ The Prosecution Team's statement that the 5C2 Report and other unspecified studies determined that discharge was occurring at some point in the past is simply inadequate.

Even if the Prosecution Team could demonstrate that waste was discharged from the parcel allegedly leased by Magma during the relevant time, the Prosecution Team has not provided the Regional Board with the data necessary to evaluate the potential contribution to the pollution condition from such discharge, let alone conclude that such contribution was significant. The lack of data is reflected in the Draft Order's findings about the mercury load from each mine as a portion of the total mercury load – the findings are only estimates. For example, Finding No. 20 states that "[t]he estimated mercury load from Central Mine is 0.003 to 0.03 kg/year or 0.16% of the total mine related mercury load of 4.4 to 18.6 kg/yr to Sulphur Creek." (Draft Order, Finding No. 20.)

Low amounts of estimated mercury loading from the mine sites are particularly problematic for the Prosecution Team's case because the water quality of Sulphur Creek is naturally degraded. "The highest concentrations of mercury and dissolved solids [in Sulphur Creek] are found in water from the [natural hot] springs that enters the creek." Final Staff Report, Ex. D at 3. Furthermore, "[t]he close proximity of mine waste to natural hydrothermal springs complicates differentiation of the source of mercury (natural vs. mine-related) [in the Cache Creek watershed]. 5C2 Report at 1-5. The Prosecution Team has not demonstrated that the mercury contamination in Sulphur Creek is primarily the result of anthropogenic activity and not naturally-occurring mercury, nor has it demonstrated that any contamination in the creek resulted from the parcel allegedly leased by Magma and not from other property or the activities of other parties.

Fifth, the Prosecution Team has failed to demonstrate that Magma had sufficient control over the parcel it leased to stop any passive discharge of contamination that was

¹⁴ The Prosecution Team has not defined the terms "waste piles" and "tailings piles."

occurring. The Prosecution Team's evidence on this point is Magma's Geothermal Lease and related documents. As discussed above, these documents demonstrate that Magma's rights under the Geothermal Lease were limited to those related directly to exploration and development of subsurface geothermal energy, that Magma did not have control over the surface of the property it leased because the Lessor reserved all other rights (including grazing and mining for minerals), and that Magma was prohibited from engaging in activity not related to exploration and development of geothermal energy. Absence of evidence that Magma exercised or could have exercised control over the surface of the property it leased is fatal to the Prosecution Team's case against Magma. The assertions in the Evidence Statement that "the scope of Magma's lease indicated that [it] had some degree of ability to control the discharge of wastes" and that Magma "took responsibility for appropriately managing the discharges from these waste piles to the extent that their lease gave them the ability to do so" are simply wrong, and the Prosecution Team does not identify any specific provision of the Geothermal Lease to support its position.

Furthermore, the Prosecution Team has not provided evidence to support the assertion in its Evidence Statement that Magma developed "a road and pad for drilling." As discussed above, Magma did not build or improve a road in connection with the drilling, operation, or abandonment of the exploratory geothermal well that it drilled. (Schriener Decl. ¶ 10.) The Prosecution Team has provided no evidence that Magma developed a road or drilling pad, nor has it provided any evidence of impacts from these alleged activities.¹⁵

Finally, the Prosecution Team has provided no evidence to indicate that during the 1965 to 1968 time period (a) Magma was aware of mining waste piles on the parcel it leased, if any existed, (b) Magma was aware or should have been aware that contamination was discharging from such waste piles, or (c) Magma was directed by any regulator to do anything about such waste piles or discharge from them. Magma completed the drilling work on its exploratory geothermal well safely and without incident. (Schriener Decl. ¶ 9.) Magma complied with applicable environmental requirements to the extent it was able to do so under the restrictive terms of the Geothermal Lease.

The Prosecution Team has failed to meet its burden to provide substantial evidence that Magma "discharged" waste into the waters of the State as the term has been defined for

¹⁵ Even if soil disturbance was somehow relevant here (which it is not), Magma's drilling activity did not result in significant disturbance of soil, especially in comparison to the activities of other entities. The area and amount of soil in the District disturbed by the road-building operations of CalTrans and the cattle-grazing activities of local ranchers or farmers over decades is far greater than any disturbance resulting from Magma's limited activities during a three-year span. Regional Board staff have stated that these entities will not be named as dischargers in this order. Magma should be treated no differently; it would be unfair to do otherwise.

purposes of Water Code section 13304.¹⁶ Therefore, Magma cannot be held responsible for the alleged contamination and named as a discharger in the Draft Order.¹⁷

B. Evidentiary Burden Under Water Code section 13267

The Draft Order states that the Regional Board's authority to issue a Cleanup and Abatement Order to Magma also is based on Water Code section 13267, which authorizes the Regional Board to require that "any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposed to discharge waste within its region . . . shall furnish, under penalty of perjury, technical or monitoring reports which the regional board requires." Water Code § 13267(b)(1). In requiring these reports, the Regional Board "shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports." *Id.*

As discussed above, Magma cannot be considered a "discharger" for purposes of Water Code section 13304, and the Prosecution Team has failed to identify evidence sufficient to establish liability under section 13304 as to Magma. The same definition of "discharger" applies to Water Code sections 13304 and 13267 because they are set forth within the same division of the Water Code. *See* Water Code § 13050 (defining other terms for purposes of Division Seven). Therefore, Magma cannot be considered a "discharger" for purposes of Water Code section 13267. In addition, liability cannot attach to Magma under section 13267 because the Prosecution Team has failed to identify the evidence required by section 13267(b)(1), nor has it provided Magma with the written explanation

¹⁶ The Prosecution Team asserts that liability for a cleanup under Water Code section 13304 is joint and several and that "it is the responsibility of Magma Power to determine their responsibility [sic] relative to the other named dischargers." As discussed above, Magma is not liable under section 13304. Even if it could be liable, the U.S. Supreme Court recently held that liability under CERCLA is divisible where a party can establish a "reasonable basis" for doing so. *See Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S.Ct. 1870 (2009). CERCLA is analogous to the Porter-Cologne Act, so apportionment of any cleanup liability would be appropriate.

¹⁷ Magma notes that Regional Board staff removed Homestake Mining of California from the draft cleanup and abatement order for the Elgin Mine in Colusa County based on comments submitted by Homestake. Staff's response to comments for that matter states that the Regional Board may reconsider its decision "upon information showing that Homestake has legal responsibility for contamination discharged from land that they controlled." Similarly, there is no information showing that Magma is legally responsible for contamination discharged from land it leased; Magma should be removed from the Draft Order. An electronic copy of the response to comments for the draft order for the Elgin Mine matter is available at: <http://www.waterboards.ca.gov/centralvalley/board_decisions/tentative_orders/0908/elgin_mine/elgin_mine_rtc.pdf>.

required by the statute. As a result, it would be improper for the Regional Board to issue an order to Magma under Water Code section 13267.

VII. Evidence and Witnesses for Hearing

The documentary evidence upon which Magma relies is submitted as exhibits hereto, including exhibits to the Declaration of Alexander Schriener, Jr. attached hereto as Exhibit E, and by reference as stated herein.

Magma intends to call Alexander Schriener, Jr. as a witness at the hearing. Mr. Schriener's qualifications are set forth in Exhibit A to his declaration. Subjects of his proposed testimony may include interpretation of the Geothermal Lease, technical issues related to the Draft Order, Magma's historical activities in Colusa County, and Magma's historical real property interests in Colusa County. Magma reserves the right to offer Mr. Schriener's testimony in rebuttal to argument and/or evidence submitted by the Prosecution Team or any other designated party. Magma estimates that Mr. Schriener's direct testimony will require 15 minutes.

VIII. Conclusion

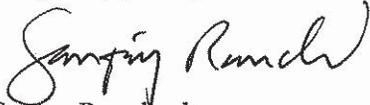
As explained above, Magma did not "discharge" waste within the well-established definition of the term for purposes of Water Code sections 13304 and 13267, and the *Wenwest* equitable factors weigh decisively in favor of Magma. Therefore, Magma cannot be named as a discharger and be held liable as a matter of law.

Even if the Prosecution Team's case against Magma was not fundamentally flawed, it has failed to identify and provide "substantial evidence necessary to support a finding of responsibility" as to Magma, as required by law. Magma had no involvement in mining operations in the District, Magma has owned no land within the District, Magma was a lessor under the Geothermal Lease for less than three years and lacked control over the surface of the property it leased during that time, and Magma has had no real property interest in the District since 1968. In short, there is no basis to name Magma as a discharger in the Draft Order, let alone the "substantial evidence" required by law.

Magma respectfully requests that the Regional Board remove it as a discharger from the Draft Order and any subsequent version of the order. If the Regional Board does not do so, Magma intends to pursue all available legal remedies, including but not limited to filing a Petition for Review and a Petition for Stay of Action with the State Board. Magma reserves all its rights to raise before the State Board and/or any other forum issues and objections related to the Draft Order, whether or not those issues and objections are raised herein.

Ken Landau
September 16, 2009
Page 20

Very truly yours,



Sanjay Ranchod
for PAUL, HASTINGS, JANOFSKY & WALKER LLP

cc: Lori Okun, Senior Staff Counsel, SWRCB (by E-Mail only)
Designated Parties (by E-Mail only, except for
Terhel Farms, Inc. by U.S. Mail only)
Peter H. Weiner

Exhibits

LEGAL_US_W # 62689099.2

Exhibits to Evidence and Policy Statement of Magma Power Company

- Exhibit A: Lease and Agreement between Magma Power Company and Bailey Minerals Corporation and J.W. Weightman, dated June 3, 1965.
- Exhibit B: Assignment and Agreement between Magma Power Company and Geothermal Resources International, Inc. and D.D. Feldman and Cordero Mining Company, Inc., dated March 18, 1968.
- Exhibit C: Surrender of Lease by Geothermal Electric Corporation to Bailey Minerals Corporation and J.W. Weightman, dated January 7, 1971.
- Exhibit D: Final Staff Report for Amendment to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins to Determine Certain Beneficial Uses Are Not Applicable in and Establish Water Quality Objectives for Sulphur Creek, Central Valley Regional Water Quality Control Board, March 2007.
- Exhibit E: Declaration of Alexander Schriener, Jr. (including exhibits thereto)