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1 July 2009

*By E-Mail and Federal Express*

California Regional Water Quality Control Board  
Central Valley Region  
11020 Sun Center Drive #200  
Rancho Cordova, California 95670-6114

Attn: Victor J. Izzo  
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**Subject:** Wide Awake Mine

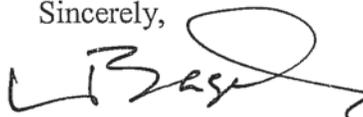
Dear Mr. Izzo:

I am submitting these comments and request for an evidentiary hearing, on behalf of Mr. and Mrs. Robert and Jill Leal, in response to your letter of 10 June 2009 and the draft cleanup and abatement order transmitted by that letter.

I assume that Mr. Pulupa is the prosecuting lawyer for the Regional Board on this matter. Please let me know which lawyer is advising the Board. If there are communications between the prosecuting and advising lawyers, I would like to be informed about them and participate.

Thank you for this opportunity to comment, and please call or e-mail me with any questions.

Sincerely,



Lawrence S. Bazel

cc: P. Pulupa (by e-mail and Federal Express)

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MR. AND MRS. ROBERT and JILL LEAL

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

CENTRAL VALLEY REGION

In the matter of:

DRAFT CLEANUP AND ABATEMENT ORDER  
THE WIDE AWAKE MERCURY MINE  
COLUSA COUNTY

**COMMENTS ON DRAFT ORDER  
AND REQUEST FOR EVIDENTIARY HEARING  
SUBMITTED BY MR. AND MRS. ROBERT AND JILL LEAL**

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## 1. INTRODUCTION

On June 11, 2009, staff of the California Regional Water Quality Control Board, Central Valley Region (the "Regional Board") e-mailed counsel for Mr. and Mrs. Robert and Jill Leal a revised draft, identified in a footer as "Rev 06-10-09", of a cleanup and abatement order for the Wide Awake Mine in Colusa County (the "Draft Order"). Mr. and Mrs. Robert and Jill Leal are named in that order, and are referred to as "Dischargers". (Draft Order at 1, unnumbered heading, and 2, ¶ 5.) Mr. and Mrs. Leal request that their names be removed from the order before it is issued in final.

Mr. and Mrs. Leal request an evidentiary hearing and the Constitutional protections of due process they are entitled to, as explained in sections 2 and 3 below.

Although Mr. and Mrs. Leal are identified in the Draft Order as a corporation, they are actually real living people, as explained in section 4.

Mrs. Leal should be removed from the order because she never owned the Site, as explained in section 5. She should also be removed for the same reasons that Mr. Leal should be removed.

Mr. Leal should be removed from the order for many reasons. In particular, he should be removed because Water Code § 13304 implements common-law principles of nuisance, and Mr. Leal is not liable under these principles, as explained in section 6. He is therefore not liable under § 13304, as explained in section 7. He should be removed from the order consistent with decisions of the State Water Resources Control Board ("State Board"), as explained in section 8, and should not be singled out for harsh treatment when other individuals are let go, as explained in section 9. If his is named he should be named as secondarily liable, as explained in section 10.

The Draft Letter appears to assume that the named parties are all "jointly" liable for any abatement work. But because they did not act together, there are only "severally" liable, meaning liable only for their share, as explained in section 11. Mr. Leal's share should be set at zero.

Water Code § 13304 allows the Regional Board, in some circumstances, to require dischargers to clean up *their* wastes. But Mr. Leal is not being ordered to clean up *his* waste; he is being ordered to clean up someone else's waste. The Draft Order therefore exceeds the Regional Board's authority under § 13304, as explained in section 12.

The Draft Order also cites Water Code § 13267 for authority, but Mr. Leal is not liable under § 13267, as explained in section 13.

The Draft Order is directed either at mercury *now* leaving the area where the Wide Awake Mine was, or at mercury waste brought out of the mine and placed on the surface in the nineteenth century. Either way, Mr. Leal is being unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. The Regional Board is therefore "taking" Mr. Leal's property (i.e. his money) in violation of the Constitution, as explained in section 14. The Regional Board should reimburse him for any costs incurred.

## **2. THE REGIONAL BOARD MUST PROVIDE DUE PROCESS AND AN EVIDENTIARY HEARING**

The issuance of a cleanup and abatement order is a quasi-judicial action, and due process applies:

In considering the applicability of due process principles, we must distinguish between actions that are legislative in character and actions that are adjudicatory. In the case of an administrative agency, the terms “quasi-legislative” and “quasi-judicial” are used to denote these differing types of action. . . .quasi-judicial acts involve the determination and application of facts peculiar to an individual case. Quasi-legislative acts are not subject to procedural due process requirements while those requirements apply to quasi-judicial acts regardless of the guise they may take. . . .

(*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal. App. 4th 1160, 1188, citations omitted.) In *Beck Development*, the Department of Toxic Substances Control attempted “to restrict the use of Beck's property based upon facts peculiar to that property”, which, the court concluded, was “unquestionably quasi-judicial in nature and must comport with requirements of due process.” Here the determination of facts related to whether Mr. and Mrs. Leal are responsible for an alleged nuisance is unquestionably quasi-judicial.<sup>1</sup>

Because the issuance of the Draft Order is quasi-judicial, the provisions of 23 CCR § 648 et seq. apply. Consistent with these provisions, Mr. and Mrs. Leal request a formal evidentiary hearing and an opportunity to cross-examine witnesses.

They also request an opportunity to consider and respond to any evidence or argument submitted by Regional Board staff in response to these comments.

## **3. THE REGIONAL BOARD HAS THE BURDEN OF PROOF**

Regional Board staff sometimes respond to evidence offered by private parties by saying that they are not convinced. In the *Beck Development* case, DTSC “insisted that Beck had failed to convince it that the property is nonhazardous.” (*Beck Development*, 44 Cal.App.4<sup>th</sup> at 1206.) Here, it will not be enough for Regional Board staff to say that they are not convinced, because they have the burden of proof. They must submit sufficient evidence to prove that the Regional Board has authority to order Mr. and Mrs. Leal to conduct the cleanup and abatement activities required by the order.

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<sup>1</sup> Chief Counsel for the State Board has confirmed that cleanup and abatement orders are adjudicative. (Memo from M. Lauffer, Chief Counsel, State Water Resources Control Board (August 2, 2006), attached as Exhibit 1 at 2.)

#### 4. MR. AND MRS. LEAL ARE PEOPLE, NOT CORPORATIONS

The Draft Order asserts that “The parties listed in Attachment B . . . are known landowners . . . of the Mine site”. (Draft Order at 2, ¶ 5.) Attachment B incorrectly lists “Robert and Jill Leal” as “Owner”, for specified intervals, of Parcels 3, 9, 11, and 12. In the last column of Attachment B, which asks whether the owner is a “State Registered Corporation”, the answers given are “Yes—current agent” for Parcel 3, “Yes” for Parcel 9, and “Yes—active” for Parcels 11 and 12. These answers are all wrong, because Mr. and Mrs. Leal are not a corporation. They are individual people.

#### 5. MRS. LEAL NEVER OWNED ANY INTEREST IN THE PROPERTY

A person “cannot be held liable for the defective or dangerous condition of property which it did not own, possess, or control.” (*Preston v. Goldman* (1986) 42 Cal. 3d 108, 119, quoting *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 134.) Mrs. Leal does not own, possess, or control any of the property at issue, and never has. She therefore cannot be held liable for any condition on that property, and her name should be removed from the Draft Order.

Numbering of the parcels involving the “Wide Awake Mercury Mine Property” has changed over the years. According to Attachment B to the Draft Order, the mine property was originally part of assessor parcel number 018-200-003-000 (“Parcel 3”).<sup>2</sup> In May 1993 Parcel 3 was split into smaller parcels, and parcel 018-200-009-000 (“Parcel 9”) became what Attachment B refers to as the “Mine Property” (the “Site”). In 1995 Parcel 9 was split into three smaller parcels, 018-200-010-000 (“Parcel 10”), 018-200-011-000 (“Parcel 11”), and 018-200-012-000 (“Parcel 12”). A figure showing Parcels 10, 11, and 12 (i.e. the Site) is attached as Exhibit 2.

Attachment B incorrectly lists “Robert and Jill Leal” as “Owner”, for specified intervals, of Parcels 3, 9, 11, and 12. Mrs. Leal never owned any interest in any of the parcels. Attached as Exhibit 3 is the deed by which Mr. Leal received his interest in part of Parcel 3. As you can see, the interest was granted to “ROBERT LEAL, a married man, as his sole and separate property”. As a matter of law, when a man obtains property as his “separate” property, he alone owns the property, and his wife does not own any part of it. (Cal. Family Code § 752 (“[e]xcept as otherwise provided by statute, neither husband nor wife has any interest in the separate property of the other”); *Huber v. Huber* (1946) 27 Cal.2d 784, 791 (“[r]eal property purchased with the separate funds of the husband is his separate property”).)

The Regional Board’s files contain no deed showing any conveyance of any interest in the Site to Mrs. Leal. Mr. Leal never conveyed any part of the Site to Mrs. Leal. (Declaration of Jill Leal, attached as Exhibit 4, ¶ 2; Declaration of Robert Leal, attached as Exhibit 5, ¶ 2.) At no time did anyone convey any interest in the Site to Mrs. Leal. (Ex. 4, ¶ 2.) Mrs. Leal never owned any interest of any nature in the Site. Mrs. Leal, therefore, never had any ownership interest in the Site. Nor did she operate the Site or conduct operations of any nature on the Site. (*Id.*)

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<sup>2</sup> But see footnote 4 below.

The Draft Order is therefore wrong when it asserts that “[a]ll of the parties named in this order either owned the site at the time when a discharge of mining waste into the waters of the state took place, or operated the mine, thus facilitating the discharge of mining waste into waters of the state.” (Draft Order at 2, ¶ 5.) Mrs. Leal neither owned the Site nor operated it.

Regional Board staff may have been misled by the deeds *from* Mrs. Leal to Mr. Leal. The Regional Board files include three deeds of this type, and they are attached as Exhibits 6, 7, and 8. These deeds were issued not because Mrs. Leal actually had any interest to transfer to Mr. Leal, but because title companies demand these deeds when a married man sells his property. (Declaration of Richard J. Wallace, attached as Exhibit 9, ¶¶ 4-6.) Title companies believe that deeds of this type protect them against the hypothetical possibility that the wife might have an interest that might not be transferred when the husband sells. They reason that *if* the wife has an interest, the deed will transfer it to the husband, who will then transfer it as part of the sale; and if the wife does not have an interest, she cannot object to signing a deed that gives away nothing. That is what happened here. (Ex. 4, ¶ 3; Ex. 5, ¶ 3.) In each case, the deed transferred nothing, because Mrs. Leal had never obtained any interest in any of the parcels from Mr. Leal or anyone else. (Ex 4, ¶ 2.)

In short, Mrs. Leal should be taken off the order because she never owned or operated the Site.

Mrs. Leal should also be taken off the order for the reasons her husband’s name should be taken off, as described in sections 6-14 below.<sup>3</sup>

## **6. MR. LEAL IS NOT APPROPRIATELY NAMED IN THE ORDER BECAUSE HE IS NOT LIABLE UNDER THE COMMON LAW OF NUISANCE**

In 2004, the California Court of Appeal concluded that Water Code § 13304 “must be construed ‘in light of common law principles bearing upon the same subject’—here the subject of public nuisance”. (*City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4<sup>th</sup> 28, 38, quoting *Leslie Salt Co. v. San Francisco Bay Conservation And Development Commission* (1984) 153 Cal. App. 3d 605, 619.) In *Leslie Salt*, the court “emphasized” that the act it was construing “represents the exercise by government of the traditional power to regulate public nuisances”:

It needs to be emphasized at this point that the [act] is the sort of environmental legislation that represents the exercise by government of the traditional power to regulate public nuisances. Such legislation constitutes but a sensitizing of and refinement of nuisance law. Where, as here, such legislation does not expressly purport to depart from or alter the common law, it will be

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<sup>3</sup> As explained in her declaration, Mrs. Leal lacks any knowledge about mining, mercury, and their consequences. Nothing put her on notice that the Site might be causing a nuisance. (Ex. 4, ¶¶ 4-9.)

construed in light of common law principles bearing upon the same subject.

(*Leslie Salt* at 618-619, citations and quotation marks omitted.) Now that *City of Modesto* has established that § 13304 “must be construed in light of common law principles bearing upon . . . public nuisance”, the Regional Board must consider these common-law principles. (See *City of Modesto* at 38, quotation marks omitted.) To the extent that decisions of the State Board are contrary to these common-law principles (see section 8 below), the State Board decisions are no longer good law.

Common-law principles establish that Mr. Leal is not liable for the nuisance identified in the Draft Order. The following sections explain that former landowners are generally not liable for dangerous conditions on the property, and that the exception for continuing public nuisances does not apply to Mr. Leal.

**A. Former Landowners Are Generally Not Liable For Dangerous Conditions On The Land**

In the *Goldman* case, the California Supreme Court concluded that former owners are generally not liable for dangerous conditions on property they no longer own, even if the danger was created by their own negligence:

Should former owners, allegedly negligent in constructing an improvement on their property, be subject to liability for injuries sustained on that property long after they have relinquished all ownership and control? The Restatement Second of Torts proposes that *liability is terminated upon termination of ownership and control* except under specified exceptions, and we agree.

(*Preston v. Goldman* (1986) 42 Cal. 3d 108, 110, emphasis added.) After a full review of the Restatement and case law, the Supreme Court concluded that it “should not depart from the existing rules restricting liability of predecessor landowners.” (*Id.* at 125.)

Here, Mr. Leal is a former part-owner of the Site.<sup>4</sup> Under the *Preston* rule, he is no longer liable for conditions on the property unless an exception applies.

The only exception that may be relevant here is found in Civil Code § 3483, which provides that “Every 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 the one who first created it.” (Civil Code § 3483, emphasis added.) The following

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<sup>4</sup> The Site, as referred to in the Draft Order, consists of Parcels 10, 11, and 12. (See section 5 above.) The deed with which Mr. Leal obtained his interest did not include what are now Parcels 11 and 12. (Ex. 9, ¶ 3.) There is no other evidence that Mr. Leal ever owned what is now Parcels 11 and 12. He therefore is not responsible for any discharges or activities related to that portion of the Site.

sections explain why Mr. Leal is not liable under this section. First, he did not receive notice of the nuisance, which is required for liability. Second, the alleged nuisance did not come into being until after Mr. Leal sold the property. Third, even assuming that there was a continuing nuisance, he did not “neglect” to abate it. Fourth, any mercury discharged during the early 1990s cannot be causing the alleged nuisance.

## **B. Mr. Leal Is Not Liable Because He Did Not Receive Notice Of The Nuisance**

The California Supreme Court decided long ago that a person may not be held liable for a continuing nuisance without notice of the nuisance:

The rule seems to be well established that a party who is not the original creator of a nuisance is entitled to notice that it is a nuisance, and a request must be made, that it may be abated before an action will lie for that purpose, unless it appear that he had knowledge of the hurtful character of the erection. This rule . . . is adopted for the reason that it would be a great hardship to hold a party responsible for consequences of which he may be ignorant.

(*Grigsby v. Clear Lake Water Works Co.* (1870) 40 Cal. 396, 407.) As discussed in section 8 below, State Board decisions have recognized that a person cannot be held liable without notice. Here, Mr. Leal did not receive notice “that it is a nuisance”.

Mr. Leal is a farmer. (Ex. 5, ¶ 4.) He has never studied mining, and has no knowledge about mining issues. He does not have any specific knowledge about mercury, its occurrence or movement in soil or water, its chemistry or biochemistry, or its toxicology or risk to human health or the environment. (*Id.*)

Mr. Leal did not know that there was a former mine on the Site when he purchased his interest in the property. (*Id.*, ¶ 5.) He purchased a larger area of property (the “Property”), of which the Site was a relatively small portion, for investment purposes. He learned about the Property from Tom Nevis, who controlled Goshute Corporation. Mr. Nevis had arranged to purchase the property from Wells Fargo Bank, but needed money to complete to transaction. Mr. Leal provided that money, and in return received a half interest in the Property. The other half interest went to NBC Leasing, another corporation controlled by Mr. Nevis.

Mr. Leal never operated any of the Property, but rather leased it out to the Harter Land Company, which used it for grazing. (*Id.*, ¶ 6.)

Mr. Leal did not learn that there was a former mine on the Site until he was trying to sell his part interest to the U.S. Bureau of Land Management. (*Id.*, ¶ 7.) After Mr. Leal found out about the former mine, he went to look for it. He had assumed that it was a gold mine, and did not understand that it was a mercury mine. He was taken to the Site by Roy Whiteaker, who was the real estate broker trying to sell the Site, and who owns Cal Sierra Properties, which eventually bought the Site to use for hunting. During that visit, Mr. Leal never saw anything that looked like a mine. All he saw was a remnant of a brick structure. He did not see any piles of rock or other materials. He did not, and still does not, know what “tailings” are. Grass had grown over the area, and there was not much to see. He did not see anything that seemed like it

might contain mercury. He did not, and still would not, know what mercury looked like even if he saw it. Other than that one visit, he has never been to the Site. (*Id.*, ¶ 8.)

During the time Mr. Leal partly owned the Site he did not know that mercury might be leaving the Site. He did not know that anything on the Site might be causing a nuisance. No one ever informed him, during the time of his part ownership, that mercury might be leaving the Site or that anything on the Site might be causing a nuisance. He had absolutely no idea that he should be doing anything on the Site to protect public health or the environment. (*Id.*, ¶ 9.)

The condition of the Site, therefore, did not put Mr. Leal on notice of any nuisance, and no one informed him that there might be a nuisance.<sup>5</sup>

**C. There Is No Evidence That The Site Was Causing A Nuisance In The Early 1990s—Or That It Is Causing A Nuisance Now**

The nuisance alleged in the Draft Order is not the kind that could have been observed by Mr. Leal, or by anyone else, during the time he partly owned the Site. The Draft Order provides no evidence that the Site was causing a nuisance in the early 1990s—there is no evidence, in fact, that it is causing a nuisance *now*.

The Regional Board did not establish numerical criteria for mercury in Sulphur Creek until 2007. (Resolution No. R5-2007-0021.)<sup>6</sup> That resolution established two standards, one for low-flow conditions (1,800 ng/L of total mercury), and one for high-flow conditions (ratio of mercury to total suspended solids not to exceed 35 mg/kg). (*Id.*, Attachment 1 at 2.)

The Draft Order does not mention either of these criteria. The only reasonable conclusion is that there is no evidence that either of these criteria is being exceeded.

Instead, the Draft Order identifies four “limits” that are imported from agencies other than the Regional Board. (Draft Order at 5, ¶ 26.) The Draft Order asserts that these “numerical limits for [methylmercury, total mercury, and inorganic mercury] implement the Basin Plan objectives for mercury and methylmercury in Sulphur Creek.” This statement is plainly incorrect, because the real Basin Plan objectives have no relationship to these four “limits”. Worse still, the four “limits” plainly *do not apply* to Sulphur Creek.

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<sup>5</sup> Regional Board staff may be tempted to argue that Mr. Leal is liable, even though he did not receive notice during the time of his ownership, because he has received notice *now*. But Mr. Leal does not *now* own any interest in the Site. If he is to be held liable for a nuisance resulting from his part ownership of the Site, he must have received notice while he was part owner. Anything else would violate *Grigsby*, which explained that notice is required because “it would be a great hardship to hold a party responsible for consequences of which he may be ignorant”. (*Grigsby*, 40 Cal. at 407.)

<sup>6</sup> Resolution available at [http://www.waterboards.ca.gov/centralvalley/board\\_decisions/adopted\\_orders/resolutions/r5-2007-0021.pdf](http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/resolutions/r5-2007-0021.pdf)

These limits are intended to protect supplies of *drinking water* and the human consumption of fish.<sup>7</sup> But the Regional Board has made clear that natural conditions in Sulphur Creek preclude the use of the creek for drinking-water supply or fish consumption:

Studies have been completed evaluating the attainability of the municipal and domestic supply (MUN) beneficial use and the human consumption of aquatic organisms, which concluded that these beneficial uses are not existing and cannot be attained in Sulphur Creek from Schoolhouse Canyon to the mouth due to natural sources of dissolved solids and mercury.

(Resolution R5-2007-0021 at 1, ¶ 8.)

The table in ¶ 26 should therefore be removed from the Draft Order. It imposes only requirements designed to protect drinking water and fish consumption, but Sulphur Creek is not used for drinking water or fish consumption. Nor is it protected for these uses, because natural conditions prevent their attainment.

So what *is* the nuisance being alleged in the Draft Order? Note that the former mine itself is not alleged to be causing a nuisance. It has apparently been sealed. The only concern identified in the Draft Order is the erosion of material from piles of mining wastes into Sulphur Creek. (*Id.* at 3-4, ¶¶ 14-20.) The Draft Order identifies, in particular, about 20,000 cubic yards of “tailings” and up to 8,000 cubic yards of “waste rock” at the Site.

According to the Draft Order, mercury eroded from the Site causes Sulfur Creek to exceed its water-quality objectives. The named parties have “caused or permitted waste to be discharged”, and this waste has affected Sulphur Creek by “exceeding applicable” water-quality objectives, thereby creating “a condition of pollution or nuisance”. (Draft Order at 6, ¶ 32.) The exceeded water-quality objectives, however, are those four numbers, discussed above, that cannot apply to Sulphur Creek. So this argument is plainly wrong.

Although the Draft Order argues that the four numbers in the table “implement the narrative objectives”, the Draft Order never asserts that discharges from the Site cause violations of the narrative objectives themselves. (*See* Draft Order at 5, ¶ 26.) The relevant narrative objective, as it exists now, specifies that “All waters shall be maintained free of toxic substances in concentrations that produce detrimental physiological responses in human, plant, animal, or aquatic life.” (Basin Plan<sup>8</sup> at III-8.01.) This narrative criterion does not require that Sulphur

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<sup>7</sup> The first “limit” in the table is identified as “a drinking water standard”. The second is for “fish tissue”. The third is for “human health protection”, which considers exposure through both drinking water and fish consumption. The fourth is a “public health goal”, which applies to drinking water. Public health goals are goals, not enforceable limits.

<sup>8</sup> The Water Quality Control Plan (Basin Plan) For The California Regional Water Quality Control Board Central Valley Region, Fourth Edition, Revised October 2007 (with Approved Amendments), The Sacramento River Basin And The San Joaquin River Basin ([http://www.swrcb.ca.gov/rwqcb5/water\\_issues/basin\\_plans/sacsjr.pdf](http://www.swrcb.ca.gov/rwqcb5/water_issues/basin_plans/sacsjr.pdf))

Creek be maintained free of all toxic substances, which of course would be impossible, but only free of toxic substances that are present “in concentrations that produce detrimental physiological responses”. The Draft Order does not identify any “detrimental physiological responses”, and does not assert that the Site causes any detrimental physiological responses in Sulphur Creek.

The reason, no doubt, is that Regional Board staff do not have evidence to prove a causal connection between *particulate* mercury from the mines, which is a relatively minor concern, and *methylmercury* in fish, which might produce the “detrimental physiological response” required for a violation of the narrative criterion. Any connection between the two would depend on complicated reactions that vary from site to site:

Historic mining activities in the Cache Creek watershed have discharged and continue to discharge large volumes of inorganic mercury (termed total mercury) to creeks in the watershed. . . .

Total mercury in the creeks is converted to methylmercury by bacteria in the sediment. The concentration of methylmercury in fish tissue is directly related to the concentration of methylmercury in the water. The concentration of methylmercury in the water column is controlled in part by the concentration of total mercury in the sediment and the rate at which the total mercury is converted to methylmercury. The rate at which total mercury is converted to methylmercury is variable from site to site, with some sites (i.e., wetlands and marshes) having greatly enhanced rates of methylation.

(*Id.* at IV-33.04.) In Sulphur Creek fish do not appear to be present, and people do not drink the water. As a result, there does not appear to be anything that would demonstrate a “detrimental physiological response”.

It is also difficult to blame the mines for the mercury in Sulphur Creek, because most of the mercury in the water comes from natural hot springs:

Active hydrothermal springs constantly discharge into Sulphur Creek, with mercury concentrations ranging from 700 to 61,000 nanograms per liter . . . .

. . . dissolved mercury comprises as much as 90 percent of the total mercury in Sulphur Creek. Dissolved mercury appears to be released by the active hydrothermal system, whereas particulate-bound mercury . . . comes from sediments and mercury-bearing mine waste mobilized into the creek during storms.

(Draft Order at 3-4, ¶¶ 19-20.) With so much mercury coming from natural sources, and because there appears to be nothing in the creek that might suffer a “detrimental physiological response”, Regional Board staff cannot demonstrate that discharges from the Site cause the narrative

criterion to be violated. They cannot demonstrate a causal connection now, and they certainly cannot demonstrate a causal connection from the early 1990s, when there were no data.<sup>9</sup>

The Draft Order also asserts that “[m]ine waste at this Mine may also pose a threat to human health due to exposure (dermal, ingestion, and inhalation) through recreational activities (hiking, camping, fish, and hunting) or work at the site.” (Draft Order at 4, ¶ 21.) But there is no evidence that the public uses the Site for hiking, camping, and hunting, which of course would be a trespass on private property. The Regional Board can safely assume that no one uses the Site for fishing, because there is no water on the Site. It is also a distance from Sulphur Creek, which in any case does not appear to maintain sport fish. Without considerable public use, there cannot be a *public* nuisance, as that term is used in the Civil Code, because a public nuisance “affects at the same time an entire community or neighborhood, or any considerable number of persons”. (Civil Code § 3480.) The Water Code uses this same language to define “nuisance”. (Water Code § 13050(m), (m)(2).) There must, in short, be evidence of considerable public use of the Site to establish an onsite nuisance that would be subject to a cleanup and abatement order. There is certainly no evidence of any public use of the Site in the early 1990s, and it therefore cannot have created an onsite nuisance then.

#### **D. Mr. Leal Did Not “Neglect” To Abate A Continuing Nuisance**

As noted in section 6.A above, Civil Code § 3483 holds a successor landowner who *neglects* to abate a continuing nuisance liable for that nuisance. The word “neglect” carries a connotation that the person was negligent or otherwise at fault. (*See Delaney v. Baker* (1999) 20 Cal. 4th 23, 34 (statute defines nursing-home neglect as a “negligent failure”).) Here there is no evidence of any negligence or fault by Mr. Leal.

Mr. Leal never conducted any mining operations, or any other operations, on the Site. He leased the property out to someone who used it for grazing. Mr. Leal did not know the former mine existed until he tried to sell the Site. When he visited the Site he saw nothing to suggest that the Site was causing any sort of problem. No one ever notified him that the Site could be causing a nuisance. (Ex. 5, ¶ 9.)

In 2003, CalFed published a study on mercury loading from former mines in the area, and on measures needed to abate the loading. (CalFed Cache Creek Study, Task 5C2 (September 2003)<sup>10</sup>.) The report concluded that an interim action was *not* needed: “Mitigation of mercury loading using an interim action is not warranted due to the anticipated small load reduction.” (*Id.* at 9-32.) If interim action was not appropriate even in 2003, when sufficient data had been

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<sup>9</sup> If the Site were so clearly causing a nuisance in 1995, then why didn’t Regional Board staff put Mr. Leal on notice of the nuisance? By 1995, the Regional Board was working with a Cache Creek group, in a collaborative process, to determine “water quality goals” for mercury, understand “transport and fate of mercury”, and “identify and evaluate source releases”. (Webpage describing Delta Tributaries Mercury Council, attached as Exhibit 10, at 1-2.)

<sup>10</sup> Report available at <http://mercury.mlml.calstate.edu/wp-content/uploads/2008/12/finalrpt-task-5c2-final-scnd-ecca-sept-2003.pdf>

collected to evaluate the issue, Mr. Leal can hardly have been at fault for not instituting interim action before any of the data were collected.

Because Mr. Leal did not “neglect” to abate a continuing nuisance during his ownership, he cannot be held liable now.

**E. Any Mercury Discharged In The Early 1990s Is Long Gone**

Mr. Leal can only be held liable for mercury discharged during the time of his partial ownership:

Whether liability is based upon nuisance or negligence, the scope of that liability has been similarly measured: It extends to damage which is proximately or legally caused by the defendant's conduct, not to damage suffered as a proximate result of the independent intervening acts of others.

(*Martinez v. Pac. Bell* (1990) 225 Cal. App. 3d 1557, 1565.) Here there is no evidence that any mercury that left the Site in the early 1990s still remains in Sulphur Creek. The mercury present comes from the intervening acts of others, and Mr. Leal cannot be held liable for it.

The Draft Order explains that the named parties were chosen because they “either owned the site at the time when a discharge of mining waste into the waters of the state took place, or operate the mine, thus facilitating the discharge of mining waste into waters of the state.” (Draft Order at 2, ¶ 5.) The discharge at issue takes place when stormwater carries mining waste into the creek:

The Mine waste rock and tailings are susceptible to erosion from uncontrolled stormwater runoff. Surface water runoff transports mercury-laden sediment to a tributary to Sulphur Creek . . . . The estimate mercury [load] from this Mine is 0.02 to 0.44 kg/yr or 2.4% of the total mine related mercury [load] of 4.4 to 18.6 kg/yr to Sulphur Creek.

(*Id.*, ¶ 17.) Note that this percentage is only for “mine related mercury”. Background loadings may be as high as 57 kilograms per year, which more than three times as much as all the mines in the area put together—according to the CalFed study from which the Draft Order takes it figures. (CalFed, Task 5C2, Table 3-9, page 2, attached as Ex. 11.) If background loadings were added in, the Site loading would be only about 0.6% of the entire mercury load to Sulphur Creek.

And all these numbers are small compared to the San Francisco Bay, which receives about 1,220 kilograms per year of mercury, of which 440 kilograms per year come from the

Central Valley. (Total Maximum Daily Load (TMDL) Proposed Basin Plan Amendment and Staff Report (2004) at 34, excerpt attached as Exhibit 12.<sup>11</sup>)

Any waste discharge attributable to Mr. Leal would have taken place not less than 14 years ago, when he sold the Site. And where is that waste now? There is no reason to believe that the waste is still in Sulphur Creek, and nothing in the Draft Order suggests otherwise.

Only erodible waste—i.e. material small enough to be picked up by rainwater running off the property—could have been discharged to Sulphur Creek during the time Mr. Leal partly owned the Site. If it was not erodible, it would not have been discharged. Erodible material, by its nature, is carried downstream by storms. Mining wastes generated within the last 160 years (i.e. since 1849) are now moving through San Francisco Bay and out the Golden Gate. (*Id.*) Because 160 miles may be used as a rough upper estimate of the distance these wastes have traveled, it would be fair to conclude that these wastes have been moving at a rate of at least one mile per year. Up in the mountains, when the slopes are steeper, a better estimate would be several miles per year.

Wastes from Wide Awake Mine enter Sulphur Creek roughly one mile above the point where it flows into Bear Creek. (Sulphur Creek TMDL For Mercury, Final Staff Report (2007), Figs. 1.2 and 1.3, attached as Ex. 13.) If mines wastes in the area are moving several miles a year, then any wastes discharged 14 years ago would have long ago been flushed out of Sulphur Creek. As a result, there is no reason to believe that any mercury discharged from the Site during the time that Mr. Leal partly owned it still remains in the creek.

In short, there is no evidence that any mercury discharged from the Site before 1995, when Mr. Leal party owned it, remains in Sulphur Creek. If mercury discharged before 1995 is no longer in the creek, it cannot be causing a problem in the creek. The alleged nuisance is limited to conditions in the creek. Therefore, there is no evidence that any mercury that might be attributable to Mr. Leal is causing the alleged nuisance.

In summary, Mr. Leal should be removed from the Draft Order because § 13304 was intended to implement the common law of nuisance, and Mr. Leal is not liable under the common law of nuisance. Former landowners are generally not liable, and the exception for owners who neglect to abate a continuing nuisance does not apply because Mr. Leal did not receive notice, because there was no neglect, and because there is no evidence that any discharges from the Site from the early 1990s are causing the alleged nuisance.

## **7. MR. LEAL IS NOT SUBJECT TO WATER CODE § 13304**

The Draft Order cites Water Code § 13304 for the authority to issue a cleanup and abatement order. (Draft Order at 1, introductory paragraph, and at 6, ¶ 33.) But Mr. Leal is not subject to § 13304, which applies to people who have “caused or permitted” waste to be discharged or deposited:

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<sup>11</sup> Full report available at [http://www.swrcb.ca.gov/rwqcb2/board\\_info/agendas/2004/september/09-15-04-10\\_appendix\\_c.pdf](http://www.swrcb.ca.gov/rwqcb2/board_info/agendas/2004/september/09-15-04-10_appendix_c.pdf).

Any person . . . 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 the waters 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 . . . .

(Water Code § 13304(a).) Mr. Leal is not subject to § 13304 because he did not cause or permit waste to be discharged.

As noted in section 6.A above, § 13304 “must be construed” consistent with “common law principles bearing upon . . . public nuisance”. (*City of Modesto Redevelopment Agency*, 119 Cal.App.4<sup>th</sup> at 38.) The phrase “caused or permitted” can easily be construed consistent with common law. Those who “caused” the nuisance are those who were its actual cause-in-fact. Those who “permitted” the nuisance are those who neglect to abate it as required by Civil Code § 3483. (See section 6.D above.) To be liable as someone who “permitted” the discharge under § 13304, therefore, the person must have (1) received notice of the nuisance, and (2) neglected to act through negligence or other fault. (*Id.*)

The phrase “caused or permitted” cannot be given a broader meaning without violating the U.S. Constitution. In the *Heitzman* case, the California Supreme Court considered whether the phrase “causes or permits”, as used in a statute prohibiting elder abuse, met “constitutional standards of certainty”. (*People v. Heitzman* (1994) 9 Cal. 4th 189, 193.) The Supreme Court concluded that “the broad statutory language at issue here fails to provide fair notice” and that that prohibition on *permitting* elder abuse “would be unconstitutionally vague absent some judicial construction clarifying its uncertainties.” (*Id.*)

Here § 13304 would not provide fair notice, and therefore would be unconstitutionally vague, if it were applied to past owners of property who had no notice during their ownership that their properties were causing a nuisance. If, however, § 13304 is interpreted consistent with common-law principles of public nuisance, then there is no constitutional infirmity.

Because Mr. Leal is not liable for the alleged nuisance under common-law principles, he is not a person whom § 13304 identifies as having “caused or permitted”.

## **8. MR. LEAL IS NOT LIABLE UNDER STATE BOARD DECISIONS**

*Wenwest* is the leading State Board decision on when former landowners may be held liable under § 13304. (*Petitions of Wenwest, Inc.*, Order No. WQ 92-13 (1992) 1992 Cal. ENV LEXIS 19.) *Wenwest* identified a three-part rule applicable to former owners:

. . . we apply a three-part test to former owners: (1) did they have a significant ownership interest in the property at the time of the discharge?; (2) did they have knowledge of the activities which resulted in the discharge?; and (3) did they have the legal ability to prevent the discharge?

(*Id.* at \*5.) When a former owner “passes” all three parts of the test, it is held liable.

Here Mr. Leal cannot pass the test because he cannot satisfy the second part. He did not have knowledge of the activities that resulted in the discharge. Because he did not receive notice, he is not liable under the common law. (See section 6 above.) He is also not liable under State Board precedent.

The *Wenwest* decision did not stop there, however. It considered the situation of Wendy's, who had owned the property for a short time but had not contributed to the contamination, and concluded that it was not appropriate to hold Wendy's liable:

No 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. . . .

In this case, the gasoline was already in the ground water and the tanks had been closed prior to the brief time Wendy's owned the site. They were told about the pollution problem . . . They took no steps to remedy the situation. On the other hand, they did nothing to make the situation any worse. Had a cleanup been ordered while Wendy's owned the site, it would have been proper to name them as a discharger. Under the facts as presented in this case, it is not.

(*Id.* at \*6-7.) The State Board did not set out a clear test for exonerating Wendy's. Its conclusion depended "on a number of considerations", and list of nine items was presented, not all of which weighed in Wendy's favor. Two key factors emphasized Wendy's innocence:

- \* Wendy's had nothing to do with the activity that caused the leaks. (In previous orders in which we have upheld naming prior owners, they have been involved in the activity which created the pollution problem.)

- \* Wendy's never engaged in any cleanup or other activity on the site which may have exacerbated the problem.

(*Id.* at \*7-8.) Wendy's had some knowledge of the contamination, but the State Board did not find the knowledge sufficient blameworthy to require liability:

- \* While Wendy's had some knowledge of a pollution problem at the site, the focus at the time was on a single spill, not an on-going leak.

- \* Wendy's purchased the site in 1984 at a time when leaking underground tanks were just being recognized as a general problem and before most of the underground tank legislation was enacted.

(*Id.* at \*8.) Two other factors suggest equitable reasons for leniency:

\* Wendy's purchased the site specifically for the purpose of conveying it to a franchisee.

\* Wendy's owned the site for a very brief time.

(*Id.* at \*7.) The final three factors seem to relate to the convenience of the State Board:

\* The franchisee who bought the property from Wendy's is on the order.

\* There are several other responsible parties who are properly named in the order.

\* The cleanup is proceeding.

(*Id.* at \*7-8.)<sup>12</sup> Note that one factor *not* included in the list is whether Wendy's continued discharging during its ownership. The State Board long ago decided that the natural movement of groundwater through the soil is a discharge. Wendy's therefore continued to "discharge", as the State Board has construed that term.

When these factors are applied to Mr. Leal, he should be found not liable. Once again, the key factor is his factual innocence. He had nothing to do with the activity that is causing the nuisance. Unlike Wendy's however, he had no knowledge that there might be a problem. He knows nothing about mining, did not purchase the property with the intent to obtain any benefit from the mine, and never owned any mineral rights at the Site. The seller and purchasers are on the order, and there are sufficient other parties to expect that the abatement will proceed without him.

In addition, Mr. Leal had received a memo prepared by Charles W. Whitcomb, the District Geologist of the U.S. Bureau of Land Management. (Attached as Exhibit 14.) Mr. Whitcomb, who clearly was an impartial expert in these matters, examined the Site and concluded that Site risks were not significant:

The danger of there being large amounts of hazardous mercury at this site is probably minor. The waste rock from the mine and furnace on the mine dump would contain *little or no mercury*.

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<sup>12</sup> These last three factors appear to depend not on the duty or fault of the party, but on the convenience of the regulatory agency, and therefore appear inappropriate for the determination of liability. (*See People v. Heitzman*, 9 Cal. 4th at 206 ("whether or not the lack of statutory clarity has opened the door to arbitrary or discriminatory enforcement of the law" is part of inquiry into constitutionality of statute), 207 ("under the statute as broadly construed, officers and prosecutors might well be free to take their guidance not from any legislative mandate embodied in the statute, but rather, from their own notions".))

(Ex. 14, at 2, emphasis added.) Mr. Leal, who knows nothing about mining or the environmental consequences of mercury, can hardly be faulted for not taking action when an expert from the federal government inspected the Site and found nothing that would require action.

Mr. Leal should therefore be removed from the Draft Order.

#### **9. MR. LEAL SHOULD NOT BE SINGLED OUT FOR HARSH TREATMENT**

It is not fair to name Mr. Leal while letting others go. Tom Nevis, who sold him the Site and held the other half-interest in it, is not named in the Draft Order. Nor are his corporations, Goshute and NBC Leasing. Roy Whiteaker, who bought Mr. Leal's interest in the Site through Cal Sierra Properties, is also not named. If these individuals, who are no less responsible than Mr. Leal for any problem caused by the Site, are not sufficiently liable to be named, then neither is Mr. Leal.

The Draft Order does not even name the Ralph M. Parsons Company, which now does business as Parsons and is "an engineering and construction firm with revenues exceeding \$3.4 billion in 2008". (<http://www.parsons.com/about/default.asp>.) Regional Board files include an assignment to Parsons of a lease dated January 28, 1965 and signed by Ms. Gibson and Ms. Trebilcott. This lease appears to refer to the Site, or to the mineral rights for the Site. Parsons would have understood, far better than Mr. Leal, about mercury at the Site.

For reasons of equity, therefore, Mr. Leal should not be named in the Draft Order.

#### **10. IF MR. LEAL IS NAMED, HE SHOULD BE NAMED AS SECONDARILY LIABLE**

In *Wenwest* the State Board concluded that Wenwest and the current owner of the property, Susan Rose, should be secondarily liable. It explained that secondary liability puts "the landowner in a position where it would have no obligations under the order unless and until the other parties defaulted on [theirs]." (*Id.* at \*9.) In *Wenwest* the State Board concluded that Susan Rose and Wenwest should be secondarily liable because "While she is the current landowner, it is clear that she neither caused nor permitted the activity which led to the discharge", and because "Wenwest had nothing to do with the activity which caused the discharge". (*Id.* at \*9-10.)

Here Mr. Leal had nothing to do with the mining activities that caused the discharge. If he is named, he should be secondarily liable.<sup>13</sup>

#### **11. IF MR. LEAL IS LIABLE, HE IS SEVERALLY LIABLE**

When several persons, acting independently, cause harm, each is "individually and separately liable for his proportionate share of the damage". (*Slater v. Pacific American Oil Co.* (1931) 212 Cal. 648, 655.) The concept that individuals are liable only for their share of the

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<sup>13</sup> This argument is made in the alternative, without waiving any other argument.

harm is known as “several” liability, as opposed to “joint” liability, in which any individual may be required to pay for all the damage caused.

Here Mr. Leal’s proportionate share is zero, because there is no evidence that any mercury that entered the creek in the early 1990s still is there.

Here any obligation to abate a nuisance would arise from a party’s understanding of the potential for nuisance. The only parties who would have understood the potential for nuisance are those who understood mercury mining, which would have been the mineral-rights owners and lessees, and the government: Homestake Mining, the Trebilcot Trust, Parsons, and the U.S. Bureau of Land Management.

## 12. THE DRAFT ORDER EXCEEDS THE AUTHORITY OF § 13304

Even assuming that Mr. Leal is liable, § 13304 limits what he can be ordered to do. Under § 13304, a person who has caused or permitted “waste to be discharged” can be ordered to “clean up *the waste* or abate *the effects of the waste* . . .” (Water Code § 13304(a), emphasis added.) Here Mr. Leal allegedly discharged mercury from the Site during the early 1990s. But the Draft Order does not order him to clean up *that* waste, nor does it order him to abate the effects of *that* waste. That waste, as explained above, is long gone. Instead, it requires him to *prevent additional waste* from being discharged from the property. (Draft Order at 9-10, ¶¶ 9-14 (requiring remediation of onsite wastes).) Mr. Leal is plainly not liable for waste that has not yet been discharged, and the Draft Order therefore exceeds the authority provided by § 13304.

To be sure, § 13304 also holds liable persons who caused or permitted “any waste to be . . . *deposited* where it is, or probably will be, discharged into the waters of the state”. (Water Code § 13304(a), emphasis added.) But Mr. Leal did not deposit the tailings piles or waste rock at the Site. They were there when he bought it. Regional Board staff may argue that Mr. Leal “permitted” waste to be “deposited” when rain carried erodible material from the piles into drainage ditches at the Site. But this reading would threaten the constitutionality of § 13304, as described in section 7 above. In any case, there is no evidence of any deposits made into any ditches on the Site during the early 1990s. Any erodible materials that were carried into the drainage ditches in before 1995 would have been carried into the creek soon afterwards, and are long gone. (See section 6.E above.) As a result, there is no evidence that during the time that Mr. Leal partly owned the site there were any deposits of waste that is now, “or probably will be, discharged into the waters of the state”. (Water Code § 13304(a).)<sup>14</sup>

Nor is there any evidence that discharges from the Site in the early 1990s caused groundwater contamination. Because groundwater in this area is so naturally high in mercury,

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<sup>14</sup> The Regional Board recognizes that it does not have sufficient evidence to require abatement of instream sediments. The Basin Plan concludes that “further assessments are needed”, and notes that “Responsible Parties that could be required to conduct feasibility studies include the U.S. Bureau of Land Management (USBLM), State Lands Commission (SLC); California Department of Fish and Game (CDFG); Yolo, Lake, and Colusa Counties, mine owners, and private landowners.” (Basin Plan at IV-33.08.)

there is no reason to believe that any surface activity could have any significant effect. The Draft Order does not specifically refer to groundwater contamination. It argues, however, that “water-rock interaction likely mobilizes mercury based on detection of mercury in a WET leachate sample from waste rock . . . (CalFed Report).” (Draft Order at 3, ¶ 16.) But the CalFed report does not support this argument. On the contrary, it reaches the opposite conclusion and exonerates the Site from any concerns related to leachate:

Mine waste at Wide Awake Mine was not found to leach mercury at a concentration [above regulatory requirements]; therefore, the waste is considered a Group C mine waste. A Group C mine waste does not require control of the generation and migration of leachate to surface water and groundwater. Therefore, implementation of the final mitigation action at Wide Awake Mine does not require control [of] generation and migration of leachate to the tributary to Sulphur Creek.

(CalFed Cache Creek Study, Task 5C2, at 9-32.) Note that this conclusion—that leachate levels are too low to be of concern—eliminates not only the question of groundwater contamination, but also the question of whether leachate from the mine wastes are contaminating Sulphur Creek.

The Draft Order exceeds the authority of § 13304 by ordering Mr. Leal to abate onsite waste when there is no evidence that he is responsible for any onsite waste that is being discharged or may be discharged to Sulphur Creek.

### 13. MR. LEAL IS NOT LIABLE UNDER § 13267

The Draft Order also cites as authority Water Code § 13267. (Draft Order at 1, unnumbered introductory paragraph, and at 7, ¶¶ 37-38.) This section authorizes the Regional Board to demand “technical or monitoring program reports”:

. . . the regional board may require that any person who has discharged . . . shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires.

(Water Code § 13267(b)(1).) This section, however, goes on to limit the Regional Board’s authority to those reports whose burden bears a reasonable relationship to the benefits:

The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports.

(*Id.*) The section also limits the Regional Board’s authority by imposing conditions. The Regional Board must provide a written explanation and identify the evidence “requiring that person to provide the reports”:

In requiring those 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.*) Here the Draft Order makes only the most minimal attempt to satisfy these requirements. Here is the Draft Order's showing, in full:

The technical reports required by this Order are necessary to ensure compliance with this Cleanup and Abatement Order, and to ensure the protection of the waters of the state. The Dischargers either own, have owned, operated, or have operated the mining site subject to this Order.

(Draft Order at 7, ¶ 38.) This showing is insufficient to impose the Draft Order's requirements on Mr. Leal.

To begin with, the Draft Order requires much more than technical reports. It requires actual cleanup and abatement. (Draft Order at 9-10, ¶¶ 9-14.) Nothing in § 13267 requires a former discharger to clean up and abate mining waste.

In any case, the Draft Order exceeds the authority of § 13267 because it imposes requirements on Mr. Leal unrelated to any discharge he may be responsible for. It should be obvious that § 13267 authorizes the Regional Board to require persons who have discharged to submit reports *related to their discharges*. The Regional Board can hardly contend that because Mr. Leal may have discharged in Colusa County he is therefore required to provide technical reports related to someone else's discharge in, for example, San Diego County. The Draft Order requests only reports related to existing conditions at the Site and at any water-supply wells within a half mile of the Site (of which there may be none). (Draft Order at 8-9, ¶¶ 2-8.) Because the reports are related only to existing conditions at the Site, not to any discharges that may have occurred during the early 1990s, § 13267 does not provide authority to require Mr. Leal to provide them.

The principal need for the requested reports, according to the Draft Order, is that they "are necessary to ensure compliance with this Cleanup and Abatement Order". (Draft Order at 7, ¶ 38.) In other words, the reports are necessary to support the abatement actions ordered under the authority of § 13304. But Mr. Leal is not subject to § 13304, and he should therefore not be subject to any reports requires in support of that section. (See section 7 above.) The burden on Mr. Leal greatly outweighs the benefit.

The remainder of the Draft Order's explanation does not satisfy the requirements of § 13267. In particular, it does not identify "the evidence that supports requiring that person to provide the reports". The Draft Order identifies only the status of the named persons as owners, operators, or former owners or operators. That is not enough. At the very least, the Draft Order should explain why someone who may have been associated with the property long ago should be required to provide information, unrelated to that ownership, now.

#### 14. THE DRAFT ORDER IS A "TAKING" IN VIOLATION OF THE CONSTITUTION

The United States Constitution requires a public agency pay compensation when it "takes" private property for public use:

"compensation is required only if considerations . . . suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." (*Yee v. Escondido* (1992) 502 U.S. 519, 522-523.)

(*Arcadia Development Company v. City of Morgan Hill* (2008) 169 Cal.App.4<sup>th</sup> 253, 265, parallel citation omitted.)

Here the Draft Order is directed either at mercury *now* leaving the area where the Wide Awake Mine was, or at mercury waste brought out of the mine and placed on the surface in the nineteenth century. More generally, it is part of a response to a problem caused by a combination of natural conditions and acts that took place, throughout large parts of the Central Valley, in the nineteenth century. As a result, the Draft Order unfairly singles out Mr. Leal, a former part owner of property who did nothing on the property and certainly never caused any problem, and requires him to pay costs that should properly be borne by the public as a whole. The Regional Board should therefore reimburse Mr. Leal for any costs he incurs as a result of the Draft Order and any final order.

#### 15. CONCLUSION

Mrs. Jill Leal should be removed from the order because she never owned the property, and also for the reasons that Mr. Robert Leal should be removed.

Mr. Leal should be removed because he is not liable under common-law principles of nuisance (section 6); he is therefore not liable under § 13304 (section 7); removal is consistent with State Board decisions (section 8); he should not be singled out for harsh treatment (section 9); if named he should be only secondarily liable (section 10); he is only severally liable, and only for a share of zero (section 11); the Draft Order exceeds the authority of the Regional Board (section 12); he is not liable under § 13267 (section 13), and issuing the order would be a "taking" in violation of the Constitution (section 14).

Dated: July 1, 2009

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