

1 GERALD F. GEORGE (SBN 142573)
WAYNE M. WHITLOCK (SBN 130163)
2 PILLSBURY WINTHROP SHAW PITTMAN LLP
50 Fremont Street
3 Post Office Box 7880
San Francisco, CA 94120-7880
4 Telephone: (415) 983-1000
Facsimile: (415) 983-1200

5
6 Attorney for Homestake Mining Company of California

7
8

9 STATE OF CALIFORNIA
10 STATE WATER RESOURCES CONTROL BOARD

11 _____)
12 In re:) SWRCB/OCC File No.
13 Technical and Monitoring Report Order R5-)
2010-xxxx for the Wide Awake Mercury)
14 Mine, Colusa County, California (Central)
Valley Regional Water Quality Control)
15 Board))
16 _____)

17
18

19 Petitioner Homestake Mining Company of California (“Homestake”) submits this
20 Petition for Review of the Technical and Monitoring Report Order for the Wide Awake
21 Mercury Mine, Colusa County, California, issued by the Central Valley Regional Water
22 Quality Control Board (“Regional Board”) on May 27, 2010. This Petition for Review is
23 filed in accordance with Section 13320 of the California Water Code and Section 2050 of
24 Title 23 of the California Code of Regulations.

- 25 1. Section 2050(a) requires that a petition for review contain certain information,
26 which is set forth below.
27 2. Petitioner is Homestake Mining Company of California. Petitioner’s address is 136
28 E. South Temple, Suite 1800, Salt Lake City, Utah 84111. Communication concerning this

1 matter should be sent to Petitioner's attorneys at the address provided in the caption of this
2 petition.

3 3. Homestake requests that the State Board review the Regional Board's May 27, 2010
4 decision to adopt the Technical and Monitoring Report Order for the Wide Awake Mercury
5 Mine ("Order"), Colusa County, California. A copy of the Order is attached as Exhibit A.

6 4. The Regional Board adopted the Order at a public hearing held on May 27, 2010.

7 5. The Regional Board adopted the Order pursuant to California Water Code Section
8 13267, which authorizes the Regional Board to require submittal of technical and
9 monitoring reports.

10 6. On April 29, 2010, Homestake submitted objections to the proposed Order to the
11 Regional Board, raising the same substantive issues addressed by this Petition for Review.
12 Homestake's objections are attached as Exhibit B. The Regional Board, in issuing its Order
13 on May 27, 2010, under Water Code 13267, had determined to accept a recommendation of
14 a panel of the Board, after a hearing in November 2009, that the full Board reject an earlier
15 proposed Clean-up and Abatement Order ("CAO") and substitute the instant Order.

16 Accordingly, Homestake's April 29, 2010 objections expressly incorporated objections
17 submitted to the Regional Board on September 16, 2009, regarding the Regional Board's
18 earlier proposed CAO for the Wide Awake Mine. Those objections are attached as Exhibit
19 C. In this petition, Homestake also references attachments to that submission which are
20 part of the record before the Regional Board but which are not attached to this petition,
21 including the affidavit of Karl Burke, which is Attachment 3 to the September 16, 2009
22 submission.

23 7. Homestake objects to its inclusion as a potentially responsible party in the Order
24 because Homestake is not a proper party to such Order. Homestake has had no connection
25 whatsoever to the Wide Awake Mine property for over fifteen years, and had no connection
26 to the operations of the Wide Awake Mine property that produced the mining waste that the
27 Regional Board seeks to address through the Order. In addition, any liability of Homestake
28

1 for discharge of mercury from mining-related sources would be reasonably divisible from
2 the liability of other potentially responsible parties named or not named in the Order.

3 8. The State Board's regulations require submission of a memorandum of points and
4 authorities in support of the legal issues raised in a petition. 23 Cal. Code Regs.
5 § 2050(a)(7). Petitioner's statement of points and authorities in support of the issues raised
6 by this Petition commences below. However, because the complete administrative record
7 in this matter is not yet available, it is not possible to prepare a thorough memorandum.
8 Therefore, this document is intended to serve as a preliminary memorandum and Petitioner
9 reserves the right to supplement this memorandum.

10 **STATEMENT OF POINTS AND AUTHORITIES**

11 Petitioner incorporates Paragraph 7 as the basis for this appeal, request for hearing,
12 and request to hold the appeal in abeyance.

13 **I. BACKGROUND**

14 9. The mining history for the Wide Awake Mine property and the description and
15 characterization of the mining waste at issue are presented in the attached Order (Exhibit
16 A).

17 10. Homestake was a lessee of the mineral rights to Assessor's Parcel Number 018-200-
18 003-000 from July 20, 1978 to May 20, 1993. However, the Regional Board's Order
19 admits that Homestake is not now and was not an owner of the parcel during that time
20 period, is not a current lessee at the parcel, and there is no evidence that Homestake ever
21 operated any mine on the site, or created the mining materials addressed by the Order.

22 11. The Regional Board's Order found that all parties it has designated as dischargers
23 ("Designated Parties") are considered jointly and severally liable for carrying out the
24 investigative activities required under the Order at the Wide Awake Mine property, despite
25 the fact that the Designated Parties did not actively cause the alleged discharges of mercury
26 to surface water.

27
28

1 12. The Order also declined to find that any Designated Parties should be secondarily
2 liable, and found that all Designated Parties are primarily liable, and should be treated alike,
3 regardless of the duration or nature of their connection with the Site.

4 13. The Regional Board based its finding of liability on the part of Homestake on a
5 provision in Homestake's lease, stating that Homestake had exclusive control over the
6 property for mining purposes.

7 14. The Order requires all Designated Parties to submit specified reports for the Wide
8 Awake Mine property. These include a Characterization Plan, Mining Waste
9 Characterization Report, a Surface and Ground Monitoring Plan, and results of a water well
10 survey. The Order also requires reimbursement of the Regional Board for investigative
11 costs related to the Wide Awake Mine property.

12 II. LEGAL STANDARD

13 15. The California Supreme Court has held that:

14 A court will uphold the agency action unless the action is arbitrary,
15 capricious, or lacking in evidentiary support. A court must ensure that an
16 agency has adequately considered all relevant factors, and has demonstrated
17 a rational connection between those factors, the choice made, and the
18 purposes of the enabling statute. *California Hotel and Motel Assoc. v.*
19 *Industrial Welfare Commission*, 25 Cal. 3d 200, 212 (1979).

20 16. In addition, pursuant to Water Code section 13320, in reviewing a decision of the
21 Regional Board, the State Board is required to exercise an independent review of the
22 Regional Board record and "any other relevant evidence." Cal. Water Code § 13320. To
23 uphold the challenged action of the Regional Board, the State Board must conclude that the
24 action was "based on substantial evidence." *In re Exxon Co., U.S.A.*, Cal. St. Wat. Res. Bd.
25 Order No. WQ 85-7, p.10, citing *id.*

26 17. Finally, under Water Code section 13267, the authority upon which the Regional
27 Board relies for issuing this Order, the burden, including costs, of providing any technical
28 reports and information required must bear a reasonable relationship to the need for the
report and the benefits to be obtained from the reports. This section also requires the
Regional Board to provide a written explanation of the need for the reports, and shall

1 identify the evidence that supports requiring that person to provide the reports. Cal. Water
2 Code § 13267(b)(1).

3 18. Homestake asserts that the Regional Board's Order violates each of these standards.

4 **III. ARGUMENT**

5 19. On the issue of liability, Homestake has no current connection whatsoever to the
6 Wide Awake Mine property — which the Regional Board does not appear to contest.

7 20. Homestake has no connection to the operations at the Wide Awake Mine property
8 that produced the mining waste that the Regional Board seeks to address through the Order
9 — which the Regional Board also does not appear to contest.

10 21. Specifically, Homestake did not own the land or operate the mine at the time the
11 mining wastes at issue were generated (operations at the Wide Awake Mine ended many
12 decades prior to 1978), and Homestake did not operate any mine during the period it held a
13 non-exclusive lease on the property.

14 22. Homestake's limited exploration activities at the Wide Awake Mine property did
15 not involve disturbance of the waste rock or tailings piles on the Wide Awake Mine
16 property, let alone cause discharge of mercury from those materials into Sulphur Creek.
17 (*See* September 16, 2009 Submission, Affidavit of Karl Burke, Attachment 3).

18 23. As a term lessee for purposes of mining exploration on the Wide Awake Mine
19 property, Homestake did not have, as a matter of either law or fact, management
20 responsibility for conditions on the Wide Awake Mine property, where, indeed, Homestake
21 was not a tenant in exclusive possession. The owner expressly reserved use of the surface
22 for multiple purposes, as well as the right to lease to others for geothermal and oil and gas
23 exploration and development.

24 24. Any liability of Homestake for the discharge of mercury from the Wide Awake
25 Mine property would be reasonably divisible by duration and nature of the activities on the
26 property, from the liability of other potentially responsible parties named or not named in
27 the Order.

28

1 25. More broadly, it is not appropriate for Homestake to be liable for activities resulting
2 in the discharge of mercury to Sulphur Creek from sources with which it demonstrably had
3 no involvement. This certainly excludes liability for mercury from natural sources,
4 upstream anthropogenic activities, or activities occurring at a time during which Homestake
5 had no involvement at the property. In particular, it is not appropriate to require
6 Homestake, which has had no connection to the Wide Awake property for over fifteen
7 years, to carry out investigative activities at properties it does not own or control, and with
8 which it has no current connection.

9 ***The Order Violates Section 13267 because Homestake is not a Proper Recipient of***
10 ***the Order***

11 26. Water Code section 13267 provides that a Regional Board may require that any
12 person who has discharged, currently discharges, is suspected of discharging, or who
13 proposes to discharge waste shall furnish technical or monitoring program reports. Section
14 13267 requires that before any information may be required “[t]he burden, including costs
15 of these reports shall bear a reasonable relationship to the need for the report and the
16 benefits to be obtained from the reports.”

17 27. The State Water Board, in reviewing a Regional Board order pursuant to section
18 13267, must first determine if the party to whom the technical or monitoring program report
19 is directed has discharged, is discharging, is suspected of discharging, or proposes to
20 discharge waste. If the State Water Board determines that the Regional Board’s order is
21 defective “it may remand the action to the Regional Board, refer the matter to another state
22 agency with jurisdiction, or take appropriate action itself.” *In re Pacific Lumber Company*
23 *and Scotia Pacific Company*, WQ 2001 at p. 10.

24 28. As discussed in more detail below, there is no evidence that Homestake has
25 discharged, is discharging, is suspected of discharging, or proposes to discharge waste to
26 Sulphur Creek from the Wide Awake Mine property. Therefore, pursuant to section 13267,
27 Homestake is not a proper recipient of the Order issued by the Regional Board.

28

1 *Homestake activities at the Wide Awake Mine property have not contributed to a*
2 *discharge of mercury to Sulphur Creek.*

3 29. Homestake did not have exclusive possession of the Wide Awake property during
4 the term of its lease, and was not even continuously on the property. Homestake did
5 conduct very limited exploratory activities on the identified Assessor Parcels for the Wide
6 Awake Mine property at various times in the period 1978-1992.¹ Those activities involved
7 extremely limited drilling to collect cores and drill cuttings for later analysis — it is not
8 contested that the activities involved small diameter (4-6 inches) borings at only seven drill
9 pads, none covering an area larger than 30 by 50 feet, occupied for a very short period of
10 time (2 days), and all reclaimed after use, including revegetation. (See September 16, 2009
11 Submission, Affidavit of Mr. Burke, Attachment 3). Moreover, none of the pads or related
12 work entailed disturbance of mine adits, waste rock or tailings piles or the unnamed
13 tributary alleged to be the source of mercury discharges from the Wide Awake Mine
14 property to Sulphur Creek. (Id.)

15 30. In addition, all of these activities were carried out with the prior approval of and
16 pursuant to environmental conditions required by both Colusa County and the Regional
17 Board. Pursuant to those requirements, Homestake completed reclamation, including
18 revegetation, at all areas disturbed by the minor exploration activities it carried out on the
19 Wide Awake Mine property. Accordingly, aside from the fact that Homestake had no
20 involvement whatsoever in the generation of the waste that is the subject of the Regional
21 Board's concern, Homestake's only activities on the property were conducted with the
22 knowledge and approval of the Regional Board, and there is nothing in the description of
23 those activities as carried out that would suggest they would have resulted in or contributed
24 to the discharge of mercury to Sulphur Creek.

25

26

27 ¹ See September 16, 2009 Submission, Affidavit of Karl Burke, Attachment 3, describing
28 the activities, which were carried out in 1979, 1987 and 1991.

1 31. Liability under Section 13267 of the Water Code is dependent on some reason to
2 believe that a party caused or contributed to the alleged discharge to Sulphur Creek. The
3 Wide Awake Order is not based on any evidence demonstrating that Homestake caused or
4 contributed to any alleged discharge of mercury to Sulphur Creek based on its activities at
5 the Wide Awake Mine property.

6 ***Homestake is not responsible under the Water Code for passive migration of***
7 ***mercury from the Wide Awake Mine property to Sulphur Creek.***

8 32. The Regional Board's position is that Homestake, by virtue of its mining lease with
9 the land owner — Edith Trebilcott and later the Trebilcott Trust — had management
10 responsibility for that property, and has become jointly and severally liable with the owners
11 of the Wide Awake Mine property, as a “passive discharger” of mercury in the form of
12 discharges to Sulphur Creek that may have resulted from the erosion of waste rock or
13 tailings piles on the Wide Awake Mine property during the period of Homestake's lease.

14 33. As discussed above, there is no reason to believe Homestake's actual activities
15 under the lease that covered, *inter alia*, the Wide Awake Mine property, resulted in any
16 actual discharge of mercury to Sulphur Creek. The Order contends that Homestake, simply
17 by virtue of its status as a lessee, should be jointly and severally liable with the owners
18 responsible for management of the property. Homestake did not have exclusive possession
19 of the Wide Awake or any of the other parcels covered under its lease with Trebilcott. In
20 the lease at issue here, Trebilcott expressly reserved use of the surface for cattle grazing —
21 identified in reports relied upon by the Regional Board as an activity increasing mercury
22 discharges to Sulphur Creek — and other agricultural activities and related water
23 development. Moreover, Trebilcott not only reserved the right to lease the property to other
24 parties for activities such as exploration and development of geothermal and oil and gas
25 resources, but identified existing leases for such purposes on the lease at the time it was
26 signed by Homestake. (*See* September 16, 2009 Submission, Attachment 3 at Exhibit C).
27 The Regional Board has not included these lessees as Dischargers in the Order, although it
28

1 did, after argument before a panel of the Board, direct the Prosecution Team to at least
2 consider adding other parties.

3 34. The language of Water Code 13304 addressing liability for those causing or
4 permitting a discharge, which mirrors that in Water Code 13267 relied upon by the Board,
5 has been interpreted to place liability on an owner, where the actual activity resulting in the
6 discharge was carried out by a lessee. *In the Matter of Aluminum Company of America*,
7 WQ 93-9, at n. 8. It has not been applied to impose liability on a lessee when that lessee
8 did not contribute to the alleged contamination. *In the Matter of U.S. Cellulose*, WQ 92-04
9 (lessee dropped from order where it did not use the tanks that were the source of
10 contamination on the property it leased). Liability certainly should not be imposed on
11 Homestake in the situation here, where, as lessee, it did not even have exclusive possession
12 of the property by virtue of its lease (and, indeed, is not even a current leaseholder, where
13 the Regional Board might arguably be concerned with rights of access). *See City of*
14 *Modesto Redevelopment Agency v. Superior Court of San Francisco County*, 119 Cal. App.
15 4th 28, 38 (2004) (The critical question in liability for nuisance under the Water Code is
16 whether defendant created or assisted in the creation of the nuisance).

17 35. The Regional Board argues that, under decisions of the State Board applying Water
18 Code 13304, liability may attach to an owner by virtue of its failure to act, as the owner can
19 be said to have assumed responsibility for the conditions on the property. Whatever the
20 validity of that position, however, Homestake's lease at the Wide Awake only gave it a
21 limited right to take actions on the property; that lease did not transfer to Homestake
22 responsibility for administering, overseeing, or maintaining the property. In the absence of
23 evidence that its actual activities under the lease resulted in or contributed to the discharge
24 of mercury to Sulphur Creek, Homestake cannot be held liable by virtue of that lease
25 relationship, i.e., it is not liable simply by virtue of the fact that passive migration of
26 mercury resulting from erosion may have occurred on the Property during the term of its
27 lease.

28

1 36. The Regional Board, recognizing the tenuous connection between the mining
2 materials at the Site and the mercury concentrations found in Sulphur Creek, has already
3 retreated from the initial proposal of a Clean-Up and Abatement Order. That tenuous
4 connection to mercury concentrations in Sulphur Creek established by the record here
5 should also not be the basis for an order directing all of the Designated Parties to carry out
6 complex and expensive site investigations. If such an order is to be issued, it should
7 properly be issued only to the current owners of the Site or to those directly responsible for
8 creating the conditions of concern at the site, to determine first whether the existing
9 conditions at the Wide Awake Mine property require any further action under the Water
10 Code.

11 ***Homestake should not be jointly and severally liable for discharges of mercury to***
12 ***Sulphur Creek.***

13 37. The Order asserts that Homestake is jointly and severally liable for mercury
14 contamination in Sulphur Creek.

15 38. The Water Code, by its terms, does not impose joint and several liability; the
16 decisions of the State Board addressing that concept simply adopt the common law
17 principle of joint and several liability where there are multiple sources resulting in a single
18 and indivisible harm. *See In the Matter of Union Oil Company*, WQ 90-2, at p. 8. As the
19 Supreme Court of the United States discussed in its recent decision of joint and several
20 liability under the federal Superfund statute, the starting point for consideration of joint and
21 several liability is Section 433A of the Restatement (Second) of Torts. *Burlington Northern*
22 *& Santa Fe Railway Co. v. United States*, __ U.S. ___, 129 S. Ct. 1870 (2009). Applying
23 those principles, joint and several liability does not attach where “there is a reasonable basis
24 for determining the contribution of each cause to a single harm.” Restatement (Second of
25 Torts 433A (1)(b), p. 434 (1963-64). *Burlington N. & S.F. R. Co.*, at 1881. The liability
26 issue here is whether there is a reasonable basis for divisibility in addressing sources of
27 mercury discharged to Sulphur Creek. That basis for divisibility is clearly laid out in the
28 evidence and reports before the Regional Board, including the very reports relied upon by

1 the Prosecution Team to establish the sources of mercury discharged to Sulphur Creek.
2 That evidence establishes the relative duration of Homestake's involvement, the nature and
3 location of its activities at the property and their potential for contributing to any discharge
4 of mercury, and an estimate of annual contribution of mercury from the many natural and
5 anthropogenic sources of mercury discharged to Sulphur Creek.

6 39. As the reports relied upon by the Regional Board confirm, the mercury in Sulphur
7 Creek is not just from anthropogenic sources — which includes mining carried out a
8 century ago by persons not party to this proceeding, as well as such activities as streambank
9 erosion exacerbated by grazing — but is also from natural sources, including multiple hot
10 springs. Neither Homestake nor any other party subject to the Regional Board's Order
11 should be responsible for addressing the many acknowledged and significant natural
12 sources of mercury to Sulphur Creek.

13 40. These natural sources have been adding significant quantities of mercury to Sulphur
14 Creek for literally thousands of years, at a rate on an annual basis that is as significant as
15 anything estimated as the contribution from the Wide Awake,² and whatever remediation
16 might ultimately be required, those natural sources will continue to discharge to Sulphur
17 Creek in the future. Indeed, during an on-site inspection of the Central Mine properties
18 carried out in 1997, a staff engineer from the Regional Board offered his opinion that the
19 mercury in the lower portion of Sulphur Creek came largely from those natural sources, and
20 not from former mining activity. (See September 16, 2009 Submission, Attachment 4 at
21 Exhibit D). That contribution from natural sources is reasonably determinable and divisible
22 and it is not something for which Homestake, or any other alleged Discharger, has
23 responsibility.

24

25

26 ² The Report largely relied on by the Regional Board, TetraTech (2003), at Table 3-9,
27 estimates the annual discharge from the Wide Awake Mine property as ranging from
28 0.02-0.44 kg/yr. The Sulphur Creek TMDL report (Table ES-1) estimates annual
discharge of mercury from geothermal springs and non-mining erosion at 2.6 kg, and the
discharge from the Wide Awake as 0.8 kg.

1 41. Likewise, Homestake is not liable for any discharges of mercury to Sulphur Creek
2 from mining waste or other anthropogenic sources upstream of property where it had an
3 interest. Those contributions have also been estimated by the earlier studies relied upon by
4 the Regional Board, and are as significant, if not larger, than those for sources in lower
5 Sulphur Creek. For example, the Regional Board in August 2009 issued CAOs to the
6 owners of the Clyde and the Elgin Mines, located two miles upstream of the Central and
7 Wide Awake Mine properties, which have been contributing mercury to lower Sulphur
8 Creek for over a century.

9 42. Homestake should also not be jointly and severally liable for discharges from the
10 mining waste on the Wide Awake Mine property during periods when it had literally no
11 connection to the property. The mining waste originated nearly a century before
12 Homestake even visited the property. Homestake has had no connection with the property
13 since 1993.

14 43. The Order does not directly address Homestake's argument that if it were to be
15 liable at all for the Wide Awake Mine property, it should not be jointly and severally liable,
16 because the alleged harm is reasonably divisible. However, the modified factual statements
17 in the Order add support to the position asserted by Homestake in both its September 2009
18 and April 2010 submissions to the Regional Board.

19 44. The Order states at Par. 50 that all of the Designated Parties at the Wide Awake
20 Mine are "essentially on the same footing." Homestake would agree that is a largely
21 accurate characterization except that it ignores the obvious equitable consideration that
22 interim Designated Parties, unlike the current owners, will not benefit in any way from site
23 investigation and cleanup. Accordingly, it is particularly unfair to place the obligation for
24 characterization of the Site upon parties who are at worst "passive dischargers" and who
25 also no longer have any interest in the property as either owner or lessee.

26 45. However, even starting from the premise that all current and former owners and
27 lessees are "essentially on the same footing," there is an obvious reasonable basis for
28 divisibility in terms of any Designated Party's contribution to the alleged harm: the period

1 of time during which it, either alone or with other Designated Parties, allegedly had the
2 “control” of the property that the Prosecution Team alleges as the basis for liability. It is
3 not premature or unreasonable to consider that basis for divisibility in this matter. The
4 Regional Board has already used estimates of the annual contribution of mercury from the
5 Site in connection with its load and waste allocations for the Sulphur Creek TMDL. While
6 it is certainly true that the estimates used by the Board are imprecise, and, in the view of
7 Homestake, among others, greatly overestimate the contribution from mining material
8 sources, that simply means that the use of those estimates here would present a “worst case”
9 for Homestake’s potential liability, not that the use of those estimates is so “unreasonable”
10 as to preclude their use to establish divisible liability shares.

11 46. If those estimates can be used by the Regional Board for the Sulphur Creek Mercury
12 TMDL, they can properly be applied to the period beginning in the 1870’s during which the
13 mining materials have been present at the Wide Awake Mine property, to identify the
14 proportionate share of responsibility for the harm assigned to the owners, operators, and
15 lessees during each time period. That evaluation precludes placing liability for site
16 investigation and cleanup on interim owners, operators, or lessees as “passive dischargers”
17 for releases that occurred over the course of a hundred year period prior to their connection
18 to the site, or that occurred after they ceased any connection to the property.

19 47. Because discussions with the Regional Board are ongoing regarding these matters,
20 Homestake hereby requests, pursuant to California Code of Regulations, Title 23, Section
21 2050.5(d), that the State Board hold this Petition in abeyance until December 31, 2010, or
22 until otherwise notified by Petitioner. Petitioner has notified the Regional Board of this
23 request. Regional Board staff counsel have informed counsel for Homestake that they had
24 no objection to this request for abeyance.

25 48. Petitioner reserves the right to request a stay of the Regional Board’s order, and to
26 request a hearing in this matter and an opportunity to present additional evidence that might
27 later come to light.

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. REQUEST FOR RELIEF

Petitioner will frame the specific relief it is seeking from the State Board when and if this Petition is activated. For present purposes, Petitioner requests the following relief:

49. Petitioner requests that the State Board set aside and reverse the Regional Board's May 27 Order or direct the Regional Board to set aside and reverse the May 27 Order, and provide such other relief as the State Board may deem just and proper.

Dated: June 28, 2010

Respectfully submitted,

By: 

Gerald F. George
Wayne M. Whitlock
Attorneys for Petitioner
Homestake Mining Company of California

EXHIBIT A

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

TECHNICAL AND MONITORING REPORT ORDER R5-2010-0049
FOR

HOMESTAKE MINING COMPANY, EMMA G. TREBILCOTT TRUST,
ROBERT LEAL, NBC LEASING, INC.,
CAL SIERRA PROPERTIES, ROY WHITEAKER AND GLADYS WHITEAKER, DAVID G.
BROWN, ROY TATE, AND MERCED GENERAL CONSTRUCTION

THE WIDE AWAKE MERCURY MINE
COLUSA COUNTY

This Order is issued to Homestake Mining Company, Emma G. Trebilcott Trust, Robert Leal, NBC Leasing, Inc., Cal Sierra Properties, Roy Whiteaker and Gladys Whiteaker, David G. Brown, Roy Tate, and Merced General Construction (hereafter collectively referred to as Dischargers) based on provisions of California Water Code (CWC) section 13267, which authorizes the Central Valley Water Quality Control Board (Central Valley Water Board or Board) to require the submittal of technical and monitoring reports.

The Central Valley Water Board finds, with respect to the Dischargers' acts or failure to act, the following:

1. The Wide Awake Mine (hereafter "Mine") is an inactive mercury mine with mining waste that includes in part, mine cuts, waste rock, and tailings that erode, or threaten to erode, into a Sulphur Creek tributary during storm runoff conditions. These wastes have eroded into drainage swales, ditches, and a tributary to Sulphur Creek, which is tributary to Cache Creek. The Mine has discharged and continues to discharge or threatens to discharge mining waste into waters of the state. These discharges have affected water quality, and continuing erosion of mining waste into Sulphur Creek will further affect water quality.
2. The Mine is located in the Sulphur Creek Mining District (District) of Colusa County, about one mile southwest of the Wilber Springs resort and about 26 miles southwest of Williams. The 100-acre property is described by Assessor's Parcel Numbers 018-200-010-000, 018-200-11-000, and 018-200-12-000 in Sections 28 and 29, Township 14 North, Range 5 West, Mount Diablo Base and Meridian (MDBM), as shown in Attachment A, a part of this Order.
3. Mining waste has been discharged at the Mine since mining activities began in the 1870s. Mining waste has been discharged onto ground surface where it has eroded into Sulphur Creek, resulting in elevated concentrations of metals within the creek. Mining waste discharged onto ground surface has not been evaluated for its potential impact to ground water. The Dischargers either own, lease or operate, or have owned, leased, or operated the mining site where the Mine is located and where mining waste has been discharged. In its current condition, mining waste is causing or threatens to cause a discharge of pollutants to waters of the state.
4. The Central Valley Water Board's *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, Fourth Edition* (hereafter Basin Plan) states: "By 6 February 2009, the Regional Water Board shall adopt cleanup and abatement orders or take other

appropriate actions to control discharges from the inactive mines (Table IV-6.4) in the Cache Creek watershed." Basin Plan p. IV-33.05. Mercury levels are already above applicable objectives in Sulphur Creek and Cache Creek, which constitutes a condition of pollution or nuisance.

5. The Prosecution Team conducted a title review of property records from the Colusa County Recorders Office. The parties named in this Order as Dischargers are known to presently exist or have a viable successor. The basis of liability for each Discharger is addressed below under Dischargers' Liability.
6. This Order may be revised to include additional Dischargers as they become known, and may include additional current or former owners, leaseholders, and operators.

Mining History

7. Mercury was discovered in the District in the 1870s, and the mine was developed at that time. The Mine was opened in the 1870s and may have been originally known as the Buckeye Mine, a name retained until the 1890s, at which time it was renamed the Wide Awake Mine. This information is described in the *CalFed-Cache Creek Study, Task 5C2: Final Report. Final Engineering Evaluation and Cost Analysis for the Sulphur Creek Mining District*, prepared by Tetra Tech EM Inc., September 2003 (hereafter CalFed Report).
8. Early production was from shallow workings and later, in the 1870s, a 500-foot vertical shaft was sunk with levels at 190, 290, and 390 feet below the ground surface. During shaft dewatering, water flowing to Blank Spring, a small local thermal spring 400 meters to the northwest of the Mine, was intersected. Efforts were made to drain the shaft by driving a drainage tunnel, but operations ceased shortly thereafter. Some ore from the nearby Empire mine was probably processed at the Mine during this period (CalFed Report).
9. The mine was worked extensively for several years in the 1870s with a reported output of approximately 1,800 flasks of mercury (one flask equals 76 pounds). Ore processing facilities in the 1870s included a Knox-Osborne 10-ton furnace and two small retorts. A small amount of production is reported during the 1890s and early 1900s (CalFed Report).
10. In the late 1890s and early 1900s, an effort was made to rehabilitate the vertical shaft and extensive surface facilities were constructed, including a 24-ton Scott furnace, enclosed hoist house, and bunkhouses (CalFed Report).
11. Some work was done in 1932 and 1943, and a moderate production was reported. The production in 1943 may have been in conjunction with mining and processing of ore from the nearby Manzanita mine to the north at a facility that was constructed on the Wide Awake property by the operators of the Manzanita mine (CalFed Report).
12. Total mercury production at the mine was probably not much greater than 1,800 flasks, most of which was produced in the 1870s (CalFed Report).

13. The Wide Awake Mine is intermediate in size and production relative to other mines in the Sulphur Creek Mining District. Remains of the Scott furnace and the rotary furnace with condenser coils remain largely intact on-site (CalFed Report).

Mining Waste Description and Characterization

14. Mining waste at the Mine includes mercury-bearing material from mine cuts, waste rock, tailings, waste around the perimeter of and within the processing facilities, and contaminated sediment within drainage swales, and ditches. Mining waste at the Mine erodes or threatens to erode into a Sulphur Creek tributary with stormwater runoff (CalFed Report).
15. The Mine contains about 20,000 cubic yards (CY) of processed tailings spread over an area of approximately 1.25 acres. An estimated 8,000 CY of waste rock is immediately adjacent to and within the tributary to Sulphur Creek. Another waste rock dump exposed in the eastern stream bank below the rotary furnace may contain up to 11,000 CY. An estimated 400 kilograms (kg) of mercury remains at the Mine, almost entirely within the mixed calcine (tailings) and waste piles (CalFed Report).
16. In 2002, waste extraction tests were conducted on mining waste. The results exceeded water quality objectives for the metals antimony, arsenic, chromium, mercury, and nickel. Maximum concentrations detected were: antimony - 107 micrograms per liter (ug/L), arsenic - 24.6 ug/L, chromium - 33.3 ug/L, mercury - 21 ug/L, and nickel - 102 ug/L. The potential for water-rock interaction to mobilize mercury from tailings is thought to be minimal based on analysis of waste extraction test (WET) leachates. However, water-rock interaction likely mobilizes mercury based on detection of mercury in a WET leachate sample from waste rock approximately 250 feet downstream from the 1940s furnace (CalFed Report). Complete characterization of the soil and mining waste at the site has not been performed.
17. The Mine waste rock and tailings are susceptible to erosion from uncontrolled stormwater runoff. Surface water runoff transports mercury-laden sediment into a tributary to Sulphur Creek, which is tributary to Cache Creek. Approximately 8 tons/year of sediment from the Mine is estimated to erode from mining waste located immediately adjacent to and within the tributary to Sulphur Creek. The estimated mercury lode from this Mine is 0.02 to 0.44 kg/yr or 2.4% of the total mine related mercury lode of 4.4 to 18.6 kg/yr. to Sulphur Creek. It is estimated that the Mine contributes 1.53% of the mine related mercury lode from the District (CalFed Report).
18. Mercury concentrations detected in mining waste at the Mine range from 5.0 to 1,040 milligrams per kilogram (mg/kg). Site background concentrations range from 2.37 to 90 mg/kg (CalFed Report).
19. Aqueous mercury concentrations in Sulphur Creek are among the highest in the Cache Creek watershed, and remain elevated during non-peak flow periods. Active hydrothermal springs constantly discharge into Sulphur Creek, with mercury concentrations ranging from 700 to 61,000 nanograms per liter (ng/L) (CalFed Report).

20. Particulate bound mercury in Sulphur Creek comes mostly from sediments and mercury-bearing mine waste mobilized into the creek during storms. All the mines together are estimated to contribute about 78% of the total mercury load. The Wide Awake Mine sub watershed is estimated to contribute about 7 % of the total mercury load. Similar to total and dissolved concentrations, methyl mercury concentrations in Sulphur Creek are among the highest reported for the Cache Creek watershed. Methyl mercury concentrations were as high as 20.64 ng/L in Sulphur Creek above the confluence with Bear Creek. (*Sulphur Creek TMDL for Mercury, Final Staff Report, January 2007.*¹).
21. Mercury is a toxic substance, which can cause damage to the brain, kidneys, and to a developing fetus. Young children are particularly sensitive to mercury exposure. Methyl mercury, the organic form of mercury that has entered the biological food chain, is of particular concern, as it accumulates in fish tissue and in wildlife and people that eat the fish. Mine waste present at this Mine may also pose a threat to human health due to exposure (dermal, ingestion, and inhalation) through recreational activities (hiking, camping, fishing, and hunting) or work at the site.

Regulatory Considerations

22. Section 303(d) of the Federal Clean Water Act requires states to identify waters not attaining water quality standards (referred to as the 303(d) list). Since 1990, Sulphur Creek has been identified by the Central Valley Water Board as an impaired water body because of high aqueous concentrations of mercury.
23. The Basin Plan designates beneficial uses of the waters of the state, establishes Water Quality Objectives (WQOs) to protect these uses, and establishes implementation policies to achieve WQOs.
24. Studies were conducted that demonstrated that the municipal and domestic supply (MUN) beneficial use and the human consumption of aquatic organisms beneficial use did not exist and could not be attained in Sulphur Creek from Schoolhouse Canyon to the mouth, due to natural sources of dissolved solids and mercury. The Central Valley Water Board, in Resolution R5-2007-0021, adopted a basin plan amendment that de-designated these uses in Sulphur Creek from Schoolhouse Canyon to the mouth. The remaining beneficial uses for Sulphur Creek, a tributary of Cache Creek, are: agricultural supply; industrial service supply; industrial process supply; water contact recreation and non-contact water recreation; warm freshwater habitat; cold fresh water habitat; spawning, reproduction, and/or early development; and wildlife habitat.
25. The beneficial uses of underlying groundwater, as stated in the Basin Plan, are municipal and domestic supply, agricultural supply, industrial service supply, and industrial process supply.

¹ The report is available at http://www.swrcb.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/sulphur_creek_hg/sulphur_creek_tmdl.pdf

26. The Central Valley Water Board adopted site-specific water quality objectives for Sulphur Creek in Resolution R5-2007-0021. The WQOs now listed in the Basin Plan for Sulphur Creek state that waters shall be maintained free of mercury from anthropogenic sources such that beneficial uses are not adversely affected. During low flow conditions, defined as flows less than 3 cfs, the instantaneous maximum total mercury concentration shall not exceed 1,800 ng/L. During high flow conditions, defined as flows greater than 3 cfs, the instantaneous maximum ratio of mercury to total suspended solids shall not exceed 35 mg/kg. Both objectives apply at the mouth of Sulphur Creek. Exceedances of the water quality objective in Sulphur Creek during high flow events are documented in Appendix C (page 24) of the *Staff Report for the 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*² dated March 2007 which is part of the administrative record of this Order.
27. Sulphur Creek is tributary to Bear Creek, which is tributary to Cache Creek. Beneficial uses of Bear and Cache Creeks are municipal and domestic supply (MUN), agriculture – irrigation and stock watering, contact and non-contact recreation, industrial process and service supply, warm freshwater habitat, spawning – warm and cold, wildlife habitat, cold freshwater habitat, and commercial and sport fishing. Cache Creek is impaired for mercury and therefore has no assimilative capacity. Any discharges of mercury or mercury-laden sediments that reach Cache Creek therefore threaten to cause or contribute to a condition of pollution or nuisance. Cache Creek drains to the Cache Creek Settling Basin, which discharges to the Yolo Bypass and flows into the Sacramento-San Joaquin Delta Estuary. Data documenting exceedances of water quality objectives in Cache and Bear Creeks are found in Table 3.2 (page 9) of the October 2005 staff report entitled *Amendments to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control of Mercury in Cache Creek, Bear Creek, Sulfur Creek, and Harley Gulch*, which is part of the administrative record of this Order.³
28. The Cache Creek Watershed Mercury Program, included in the Basin Plan, requires responsible parties to develop plans to reduce existing loads of mercury from mining or other anthropogenic activities by 95% in the Cache Creek watershed (i.e., Cache Creek and its tributaries). The Basin Plan, Chapter IV, page 33.05 states that,

Responsible parties shall develop and submit for Executive Officer approval plans, including a time schedule, to reduce loads of mercury from mining or other anthropogenic activities by 95% of existing loads consistent with State Water Resources Control Board Resolution 92-49. The goal of the cleanup is to restore the mines to premining conditions with respect to the discharge of mercury. Mercury and methylmercury loads produced by interaction of thermal springs with mine wastes from the Turkey Run and Elgin mines are considered to be anthropogenic loading. The responsible parties shall be deemed in compliance with this requirement if cleanup actions

² This report is available at http://www.swrcb.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/sulphur_creek_hq/sulphur_creek_staff_final.pdf

³ This report is available at http://www.swrcb.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/cache_sulphur_creek/cache_crk_hq_final_rpt_oct2005.pdf

and maintenance activities are conducted in accordance with the approved plans. Cleanup actions at the mines shall be completed by 2011.

29. The Basin Plan, Chapter IV, page 33.05 states that,

The Sulphur Creek streambed and flood plain directly below the Central, Cherry Hill, Empire, Manzanita, West End and Wide Awake Mines contain mine waste. After mine cleanup has been initiated, the Dischargers shall develop and submit for Executive Officer approval a cleanup and abatement plan to reduce anthropogenic mercury loading in the creek.

30. Under CWC section 13050, subdivision (q)(1), "mining waste" means all solid, semisolid, and liquid waste materials from the extraction, beneficiation, and processing of ores and minerals. Mining waste includes, but is not limited to, soil, waste rock, and overburden, as defined in Public Resources Code section 2732, and tailings, slag, and other processed waste materials...." The constituents listed in Findings No. **Error! Reference source not found.** and **Error! Reference source not found.** are mining wastes as defined in CWC section 13050, subdivision (q) (1).

31. Because the site contains mining waste as described in CWC sections 13050, closure of Mining Unit(s) must comply with the requirements of California Code of Regulations, title 27, sections 22470 through 22510 and with such provisions of the other portions of California Code of Regulations, title 27 that are specifically referenced in that article.

32. Affecting the beneficial uses of waters of the state by exceeding applicable WQOs constitutes a condition of pollution as defined in CWC section 13050, subdivision (l).

33. Under CWC section 13050, subdivision (m) a condition that occurs as a result of disposal of wastes, is injurious to health, or is indecent or offensive to the senses, or is an obstruction to the free use of property, and affects at the same time any considerable number of persons, is a nuisance.

34. Mine waste has been discharged or deposited where it has discharged to waters of the state and has created, and continues to threaten to create, a condition of pollution or nuisance.

35. CWC section 13304(a) states that:

Any 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 Water 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 the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the Regional Water Board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts. A cleanup and abatement order issued by the state board or a Regional Water Board may require the provision of, or payment for, uninterrupted replacement water service, which may include wellhead treatment, to each affected public water supplier or private well owner. Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to

comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant.

36. The State Water Resources Control Board (State Board) has adopted Resolution No. 92-49, the *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under CWC Section 13304*. This Resolution sets forth the policies and procedures to be used during an investigation or cleanup of a polluted site and requires that cleanup levels be consistent with State Board Resolution No. 68-16, the *Statement of Policy With Respect to Maintaining High Quality of Waters in California*. Resolution No. 92-49 and the Basin Plan establish cleanup levels to be achieved. Resolution No. 92-49 requires waste to be cleaned up to background, or if that is not reasonable, to an alternative level that is the most stringent level that is economically and technologically feasible in accordance with California Code of Regulations, title 23, section 2550.4. Any alternative cleanup level to background must: (1) be consistent with the maximum benefit to the people of the state; (2) not unreasonably affect present and anticipated beneficial use of such water; and (3) not result in water quality less than that prescribed in the Basin Plan and applicable Water Quality Control Plans and Policies of the State Board.
37. Chapter IV of the Basin Plan contains the *Policy for Investigation and Cleanup of Contaminated Sites*, which describes the Central Valley Water Board's policy for managing contaminated sites. This policy is based on CWC sections 13000 and 13304, California Code of Regulations, title 23, division 3, chapter 15; California Code of Regulations, title 23, division 2, subdivision 1; and State Water Board Resolution Nos. 68-16 and 92-49. The policy addresses site investigation, source removal or containment, information required to be submitted for consideration in establishing cleanup levels, and the basis for establishment of soil and groundwater cleanup levels.
38. The State Board's *Water Quality Enforcement Policy* states in part:
- At a minimum, cleanup levels must be sufficiently stringent to fully support beneficial uses, unless the Central Valley Water Board allows a containment zone. In the interim, and if restoration of background water quality cannot be achieved, the Order should require the discharger(s) to abate the effects of the discharge (Water Quality Enforcement Policy, p. 19).
39. CWC section 13267 states that:
- (a) A regional board, in establishing or reviewing any water quality control plan or waste discharge requirements, or in connection with any action relating to any plan or requirement authorized by this division, may investigate the quality of any waters of the state within its region.
 - (b) (1) In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. 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. 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.

40. Each Discharger named in this Order "has discharged, discharges, or is suspected of having discharged or discharging . . . waste" within the region of the Central Valley Water Board. The Dischargers own, lease, or operate, or have owned leased, or operated the mining sites subject to this Order. Additional findings establishing the liability of each Discharger pursuant to CWC section 13267 are set forth below in Findings 53-62.
41. The technical reports required by this Order are necessary to ensure the protection of the waters of the state, comply with the Basin Plan's requirement for responsible parties to develop plans to reduce existing loads of mercury from mining or other anthropogenic activities by 95% in the Cache Creek watershed (Basin Plan, Chapter IV, page 33.05, see Finding 28), to further characterize the location of mining wastes, to complete a conceptual site model for the eventual cleanup of the mining sites and determine what cleanup measures are necessary, and to provide additional information about suspected past or future discharges. While no specific cost for the required reports has been estimated, the need for cleanup is well established. (See, e.g., the Basin Plan's Cache Creek Watershed Mercury Program.) The technical or monitoring report is necessary to accomplish the cleanup. (See, State Water Board Resolution 92-49.) The investigation is as limited as possible, and is consistent with orders requiring investigation or cleanup at other sites.
42. The issuance of this Order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality Act (CEQA) (Pub. Resources Code, section 21000 et seq.), pursuant to California Code of Regulations, title 14, section 15321(a) (2). The implementation of this Order is also an action to assure the restoration of natural resources and/or the environment and is exempt from the provisions of the CEQA, in accordance with California Code of Regulations, title 14 sections 15307 and 15308. The implementation of this Order also constitutes basic data collection, research and/or resource evaluation activities which do not result in a serious or major disturbance to an environmental resource, and is exempt from the provisions of the CEQA, in accordance with California Code of Regulations, title 14 sections 15306.

Dischargers' Liability

43. The meaning of "discharge" under Porter-Cologne includes not only the initial introduction of waste into the environment, but also the continued migration and spread of the contamination, including the migration of waste from soil to water. (State Board Order WQ 86-2 [*Zoecon Corp.*]; State Board Order WQ 92-13 [*Wenwest, Inc., et al.*]; see also 26 Ops.Atty.Gen. 88, Opinion No. 55-116, [1955]). Waste piles at the mining sites have and continue to discharge, and threaten to discharge, mercury and other pollutants to surface waters as stated in Findings 14-21 above.

44. Owners, lessees, and operators of a property that is a source of passive discharge of pollutants are liable for the discharge even if they did not own, lease, or operate the property at the time of initial discharge of pollutants. (State Board Order WQ 86-2 [*Zoecon Corp.*]; State Board Order WQ 92-13 [*Wenwest, Inc., et al.*]; State Board Order WQ 89-8 [*Spitzer et al.*]). An owner, lessee, or operator has the ability to control the passive release of pollutants from the property. The Dischargers may have prevented mine materials and enriched mercury soil from entering surface waters through a number of measures including, but not limited to: relocating material piles away from waterways, placing barriers, such as grass covered berms, between mine materials and waterways, recontouring and revegetating material piles and areas of surface disturbance by mining activity to reduce erosion, redirecting storm runoff around material piles and areas of surface disturbance to reduce erosion, stabilizing of stream banks containing enriched mercury alluvium to minimize erosion during storm events. An owner, lessee, or operator may have knowledge of a passive discharge by notification in a deed or lease, even if the owner, lessee, or operator never observes the discharge. The mining claim was listed on county Assessor's Parcels for the mine property.
45. The Central Valley Water Board has the authority under Water Code section 13267 to require a technical report from any individual or entity "suspected" of having discharged or discharging waste. Each of the owner, leaseholder, or operator Dischargers is subject to the Central Valley Water Board's section 13267 authority because, based on evidence in the record, they have or had an ownership, tenancy, or operation interest in the mining sites during a time period when waste piles were discharging or are suspected of discharging mercury and other pollutants to surface waters.
46. "Evidence" for purposes of CWC section 13267 "means any relevant evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in a civil action" (CWC § 13267, subd. (e).) There is adequate evidence in this case that each Discharger had an ownership, leasehold, or operator interest in the property and to suspect that each Discharger discharged waste.
47. As established in Findings 14-21 mercury is mobilized by storm water runoff, slope failure, or water-rock interaction from mine waste. In addition, disturbed sediments can migrate across the property and be deposited where they are later discharged to waters of the state. Each of the Dischargers owned the property in question for at least twelve months. Although the Board did not consider rain data for each year at the Hearing, the Board takes official notice that there are no years on record during the relevant period of time when it did not rain at all.
48. The State Water Board has held that all dischargers are jointly and severally liable for the discharge of waste. (State Board Order WQ 90-2 [*Union Oil Company*]). At this stage, the Board has not determined the relative mercury contributions of various dischargers. Even if the Board was inclined to apportion responsibility, which it is not, apportionment would be premature at this time.

49. The State Water Board has determined that it is inappropriate to require certain dischargers to participate in a cleanup, even though the dischargers have some legal responsibility for cleanup. (See, State Water Board Order WQ 92-13 (*Wenwest*). In *Wenwest*, the State Board held that an interim owner of a property with passive discharge would be released from being named as a responsible party under the specific facts of that case including (1) that the discharger had only owned the property for a short period of time, (2) the ownership was for the limited purpose of conveyance to a transferee, (3) the ownership occurred at a time when there was limited understanding of the problems associated with the passive discharge, (4) the discharger did not conduct any activities which might have exacerbated the problem, (5) clean-up was already proceeding, and (6) there were several additional responsible parties. Several Dischargers named in this Order argue that they should not be liable for clean-up under the *Wenwest* factors. However, this Order is limited to site investigation. Even assuming the *Wenwest* factors apply to site investigations, the Board finds none of the named Dischargers satisfy the *Wenwest* factors because no clean-up is currently proceeding at the mine site and the Dischargers that caused the initial discharges during mining operations are no longer in existence and cannot be held liable for the investigation or clean-up.
50. In the context of clean-up orders (CWC section 13304), the Central Valley Water Board may find certain dischargers to be only secondarily liable for clean-up. (See State Board Order WQ 87-6 [*Prudential Ins. Co.*] and State Board Order WQ 86-18 [*Vallco Park, Ltd.*]). Even if the secondary liability concept can be applied in the section 13267 context, it is not appropriate here. The Central Valley Water Board considered whether any named Dischargers should be secondarily liable and has concluded that all Dischargers should be primarily liable. Here, the investigation and cleanup is not proceeding and the parties that actively engaged in the mining operations at the root of the ongoing discharge are no longer in existence. Accordingly, all named Dischargers to the Order stand on essentially the same footing and should be treated alike. (State Board Order WQ 93-9 [*Aluminum Company of America et al.*])
51. The Board considered whether interim landowners and lessees should be held liable for passive discharges to surface waters even though the specific discharges during the time of interim ownership may have in the intervening years left the Sulphur Creek/Cash Creek watersheds. The Board finds that such interim landowners are liable under this Order. As a preliminary matter, the migration of pollutants from soil in one area of the property to soil in another area, from where it may later be discharged into the surface waters, is a discharge for which an interim owner may be liable. Additionally, in accordance with *City of Modesto Redevelopment Agency v. Superior Court* ((2004) 119 Cal.App.4th 28), the Board may look to the law of nuisance to interpret liability in the context of a section 13304 clean-up order. California Civil Code section 3483, which codified the common law duty of successive owners to abate a continuing nuisance, states that every successive owner of property who neglects to abate a continuing nuisance created by a former owner is liable in the same manner as the one who first created it. In accordance with this principle, interim owners could have been named in a section 13304 order and it is even more appropriate to name them in this section 13267 Order where the Board need only establish that the interim owners are "suspected" of discharging waste.

52. Cal Sierra and Merced Construction asserted that the Order may be barred by the doctrine of laches. In order to prevail on a defense of laches in an administrative proceeding, the defendant must establish an unreasonable delay in bringing the action, "plus either acquiescence in the act about which the complainant complains or prejudice to the party asserting the equitable defense resulting from the delay." (*Chemical Specialties Manufacturers Assn., Inc. v. Deukmejian* (1991) 227 Cal.App.3d 663, 672). Here, the discharges being investigated are continuous and therefore there is no unreasonable delay in bringing an Order for investigation of the conditions of the ongoing discharge. Furthermore, the Board has been diligently working toward addressing the discharge of mercury in the Cache Creek watershed through several complex and time-intensive regulatory steps, including preparation of the Cal-Fed Report (see Findings 7-21) and two Basin Plan amendments (Findings 24-28). There is no evidence in the record that the Board acquiesced in the discharges, or that Cal Sierra or Merced Construction relied specifically on any inaction on the part of the Board in deciding to purchase, sell, or operate the mine property.
53. The property on which Wide Awake Mercury Mine was located has been identified as Assessor's Parcel Number 018-200-003-000 until 16 October 1995 and Assessor's Parcel Numbers 0180-200-010-000, 018-200-011-000, and 018-200-012-000 from 16 October 1995 to the present. The Dischargers named in this Order have owned or leased the relevant parcels as follows in Findings 55-62.
54. At least one Discharger named in this Order has argued that mining waste was not present on the specific parcel it owned. Evidence in the record indicates that all three parcels created after the 16 October 1995 split of Assessor's Parcel Number 0180-200-003-000 were part of the mine property, but the CalFed Report does not reference individual parcels. There is sufficient evidence before the Board to suspect that each Discharger owned property that discharged mine waste because each Discharger owned, leased, or operated a parcel that constituted part of the mine property. If the Board concludes, based on the technical reports required by this Order that a particular parcel was not a source of waste discharges, the affected Dischargers will have no further responsibility for clean-up. Similarly, affected Dischargers will not have further clean-up responsibility if the timing of waste discharges relative to property ownership or control was such the Discharger(s) did not cause or permit the discharge of waste.
55. EMMA G. TREBILCOTT TRUST: The Emma G. Trebilcott Trust (Trust) owned Assessor's Parcel Number 018-200-003-000 from 28 March 1988 to 5 December 1989. The property was placed in the Trust by court order following the death of Emma G. Trebilcott, the previous owner of the parcel. At its creation, the Trust did not assume any liabilities that arose during the lifetime of Ms. Trebilcott. Within two months, the Trust entered into a listing agreement with a realty company for sale of the property and held the property pending its eventual sale in December 1989, without developing or improving the property during its ownership. The Trust assets are now held by Wells Fargo Bank, NA, for the benefit of four charities. The Trust retained the mineral rights to the parcel following its sale, leasing the rights during its ownership of the parcel and through 20 May 1993 to Homestake Mining Company. It appears that the mineral rights have been retained by the Trust to date; however, liability under this Order is being imposed due to the Trust's ownership of the

parcel until its 5 December 1989 sale and not under its retention of the mineral rights because this Order only addresses surface discharges. The Trust, by taking title to the property where mining waste was present, assumed responsibility for appropriately managing the discharges from the waste. As these wastes were eroding or suspected of eroding into surface waters during the time that the Trust held title to the property, the Trust is a person who has discharged, discharges, or is suspected of having discharged or discharging wastes into waters of the state.

56. HOMESTAKE MINING COMPANY: Homestake Mining Company (Homestake) was a lessee of the mineral rights to Assessor's Parcel Number 018-200-003-000 from 20 July 1978 to 20 May 1993. Homestake was not an owner of the parcel during this time period and there is no evidence that Homestake operated any mine on the site. Homestake has provided evidence that its activity on the site was limited to mining exploration activity consisting primarily of seven drill pads of dimensions 30 by 50 feet or less, all of which were subsequently reclaimed, and that no road work took place under its lease. However, the lease provided that Homestake had exclusive possession of the property for mining purposes and the lease's scope included control of tailings and waste piles on the mining property. The owner reserved surface rights for livestock grazing and other agricultural uses only and water development incidental to such use. Under the terms of its lease, Homestake exercised control over the property and had the ability to prevent mine materials and enriched mercury soil from entering waterways. Homestake, by holding a leasehold interest giving it control over the property during a time when mining waste was present, assumed responsibility for managing the discharges from the waste. As these wastes were eroding or are suspected of eroding into surface waters during the time that Homestake held a leasehold interest in the property, Homestake is a person who has discharged, discharges, or is suspected of having discharged or discharging wastes into waters of the state.

57. ROBERT LEAL: Robert Leal owned the parcel on which the mine was located (variously numbered Assessor's Parcel Number 018-200-03-000 until 16 October 1995, and Assessor's Parcel Numbers 018-200-011-000 and 018-200-012-000 thereafter) from 28 February 1990 to 1 November 1995. Leal owned the mine property during this time period and leased it to another party not named in this order for grazing. Leal did not own the mineral rights to the property. Leal entered an easement agreement with Homestake for Homestake's access to the property. Leal, by taking title to the property where mining waste was present, assumed responsibility for managing the discharges from the waste. As these wastes were eroding or are suspected of eroding into surface waters during the time that Leal held title to the property, Leal is a person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state.

The Board finds that Leal should not be released from this Order under the *Wenwest* factors. In addition to the reasons laid out in Finding 49 (no clean-up is currently proceeding at the mine site and the Dischargers that caused the initial discharges during mining operations are no longer in existence), Leal's ownership extended over several years and was not for a short period of time and his ownership of the property was not for the limited purpose of conveyance to a transferee.

Leal has argued that this Order may constitute a "taking" of property without just compensation. A regulatory action may constitute a taking when it deprives a property owner of all economically beneficial use of that property. (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)). Leal does not currently own the mine property. This Order may impose certain costs on Leal, but does not deprive him of economically beneficial use of any property.

58. CAL SIERRA PROPERTIES, ROY WHITEAKER AND GLADYS WHITEAKER: Cal Sierra Properties (Cal Sierra) held an ownership interest in Assessor's Parcel Number 018-200-010-000 from 16 October 1995 to 10 September 1999 and Assessor's Parcel Numbers 018-200-011-000 and 018-200-012-000 from 1 November 1995 to approximately 1 January 2004. Cal Sierra did not own the mineral rights to those parcels. Cal Sierra, by taking title to the property where mining waste was present, assumed responsibility for managing the discharges from the waste. As these wastes were eroding or are suspected of eroding into surface waters during the time that Cal Sierra held title to the property, Cal Sierra is a person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state. Cal Sierra was a general partnership that has been dissolved. Roy and Gladys Whiteaker were general partners, and are therefore personally liable for Cal Sierra's obligations.
59. NBC LEASING, INC.: NBC Leasing, Inc. (NBC Leasing) held an ownership interest in Assessor's Parcel Number 018-200-003-000, upon which the mine was located, from 15 August 1990 to 16 October 1995. After that parcel was split into three, NBC Leasing continued to own Assessor's Parcel Number 018-200-010-000 until 7 March 1996 and has continued in its ownership of parcel numbers 018-200-011-000 and 018-200-012-000 to date. NBC Leasing did not and does not own the mineral rights to the parcels. NBC Leasing, by taking title to the property where mining waste was present, assumed responsibility for appropriately managing the discharges from the waste. As these wastes were eroding or are suspected of eroding and continue to erode into surface waters during the time that NBC Leasing held title and continues to hold title to the property, NBC Leasing is a person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state.
60. DAVID G. BROWN. David G. Brown is a current owner of Assessor's Parcel numbers 018-200-010-000, 018-200-011-000 and 018-200-012-000. Brown has had an ownership interest in parcel 018-200-010-000 since 10 September 1999 and in parcels 018-200-011-000 and 018-200-012-000 since approximately 1 January 2004. Brown does not own the mineral rights to the parcels. Brown, by taking title to the property where mining waste was present, assumed responsibility for appropriately managing the discharges from the waste. As these wastes were eroding or are suspected of eroding and continue to erode into surface waters during the time that Brown has held title to the property, Brown qualifies a person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state.

61. ROY TATE. Roy Tate is a current owner of Assessor's Parcel numbers 018-200-010-000, 018-200-011-000 and 018-200-012-000. Tate has owned parcel 018-200-010-000 since 10 September 2009 and parcels 018-200-011-000 and 018-200-012-000 since approximately 1 January 2004. Tate does not own the mineral rights to the parcel. Tate, by taking title to the property where mining waste was present, assumed responsibility for appropriately managing the discharges from the waste. As these wastes were eroding or are suspected of eroding and continue to erode into surface waters during the time that Tate has held title to the property, Tate is a person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state.
62. MERCED GENERAL CONSTRUCTION, INC: Merced General Construction, Inc. (Merced General) is a current owner of Assessor's Parcel number 018-200-010-000 and has owned the parcel since approximately 1 January 2005. Merced General does not own the mineral rights to the parcel. Merced General, by taking title to the property where mining waste was present, assumed responsibility for appropriately managing the discharges from the waste. As these wastes were eroding or were suspected of eroding and continue to erode into surface waters during the time that Merced General has held title to the property, Merced General is a person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state.
63. The Executive Officer may add additional responsible parties to this Order without bringing the matter to the Central Valley Water Board for a hearing, if the Executive Officer determines that additional parties are liable for investigation of the mine waste. The Executive Officer may remove Dischargers from this Order if the Executive Officer receives new evidence demonstrating that such Dischargers did not cause or permit the discharge of waste that could affect water quality. All Dischargers named in this Order and any responsible parties proposed to be added shall receive notice of, and shall have the opportunity to comment on, the addition or removal of responsible parties.

IT IS HEREBY ORDERED that, the Dischargers, and their agents, assigns and successors, in order to meet the provisions contained in Division 7 of the California Water Code and regulations, plans and policies adopted thereunder,:

1. Conduct all work in conformance with the Regional Board's Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (in particular the Policies and Plans listed within the Control Action Considerations portion of Chapter IV).

Waste Characterization

2. By **26 July 2010**, submit a *Mining Waste Characterization Work Plan* (hereafter *Characterization Plan*) for the Mine site. The Characterization Plan shall assess the nature and extent and location of mining waste discharged at the site and the potential threat to water quality and/or human health. The Characterization Plan shall describe the methods that will be used to establish background levels for soil, surface water, and ground water at the site, and the means and methods for determining the vertical and lateral extent of the mining waste.

The Characterization Plan shall also address slope stability of the site and assess the need for slope design and slope stability measures to minimize the transport of mining waste-laden soils to surface water and ephemeral streams. The Characterization Plan shall adopt the time schedule as described below in items 3 through 13 below for implementation of the proposed work.

3. Within **30 days** of staff concurrence with the Characterization Plan, but no later than **27 September 2010**, begin implementing the Characterization Plan in accordance with the approved time schedule, which shall become part of this Order.
4. By **27 January 2011**, submit a *Mining Waste Characterization Report* (hereafter *Characterization Report*) for the Mine. The Characterization Report shall include:
 - a. A narrative summary of the field investigation;
 - b. A section describing background soil concentrations, mining waste concentrations, and the vertical and lateral extent of the mining waste;
 - c. Surface water and ground water sampling results;
 - d. A section describing slope stability and erosion potential and recommendations for slope stabilization;
 - e. An evaluation of risks to human health from site conditions, and;
 - f. A map and description of the current or historic location of mining waste, including waste that has eroded or migrated over land to a location where it was, or could be, discharged to waters of the State;
 - g. A work plan for additional investigation, if needed, as determined by staff. If no additional investigation is needed, this report shall be the Final Characterization Report.
5. By **27 January 2011**, submit a *Surface and Ground Water Monitoring Plan* (hereafter *Monitoring Plan*) for the Mine. The Monitoring Plan shall describe the methods and rationale that will be used to establish background levels for surface water and ground water at the site. The Monitoring Plan shall also address long-term monitoring necessary to confirm the effectiveness of the remedies.

Water Supply Well Survey

6. By **27 September 2010**, submit the results of a water supply well survey within one-half mile of the site and a sampling plan to sample any water supply well(s) threatened to be polluted by mining waste originating from the site. The sampling plan shall include specific actions and a commitment by the Dischargers to implement the sampling plans, including obtaining any necessary access agreements. If the Dischargers demonstrate that exceedances of water quality objectives in the water supply well survey discussed above are the result of naturally occurring hydrothermal sources, then the Dischargers may request a waiver of requirements No. 7 and 8 listed below.
7. Within **30 days** of staff concurrence with the water supply well sampling plan, the Dischargers shall implement the sampling plan and submit the sampling results in accordance with the approved time schedule, which shall become part of this Order.

8. Within **30 days** of staff notifying the Dischargers that an alternate water supply is necessary, submit a work plan and schedule to provide an in-kind replacement for any impacted water supply well. The Dischargers shall implement the work plan in accordance with an approved time schedule, which shall become part of this Order.

General Requirements

The Dischargers shall:

9. Pursuant to CWC section 13365, reimburse the Central Valley Water Board for reasonable costs associated with oversight of the investigation of the site. Within **30 days** of the effective date of this Order, the Dischargers shall provide the name and address where the invoices shall be sent. Failure to provide a name and address for invoices and/or failure to reimburse the Central Valley Water Board's oversight costs in a timely manner shall be considered a violation of this Order. If the Central Valley Water Board adopts Waste Discharge Requirements (WDRs), review of reports related to writing of the WDRs and all compliance measures thereafter would be subject to the fees required by issuance of the Order and the reimbursement under this requirement would no longer apply.
10. Submit all reports with a cover letter signed by the Dischargers. In the cover letter, the Dischargers shall express their concurrence or non-concurrence with the contents of all reports and work plans.
11. Notify staff at least three working days prior to any onsite work, testing, or sampling that pertains to environmental remediation and investigation and is not routine monitoring, maintenance, or inspection.
12. Obtain all local and state permits and access agreements necessary to fulfill the requirements of this Order prior to beginning work.
13. Continue any investigation, reporting or monitoring activities until such time as the Executive Officer determines that sufficient work has been accomplished to comply with this Order. The Executive Officer, with concurrence from the Prosecution Team, and after soliciting comments from the remaining named parties, may determine that a party named to this Order has satisfied or will satisfy their obligations under this Order by performing or agreeing to perform substantial work that results in a more complete understanding of the scope of the problems at the Site, consistent with the obligations imposed by this 13267 Order. After such a determination has been made, the Prosecution Team will be directed to compel the remaining named parties to fulfill the remaining obligations under this Order.

Investigation of Additional Responsible Parties

14. The Prosecution Team shall complete its investigation of other entities that are or may be responsible for investigation or cleanup of the Mine. This investigation shall include, without limitation, the Bureau of Land Management. The Prosecution Team may issue subpoenas, or may request the Executive Officer to issue orders under section 13267, as appropriate. This directive is without prejudice to any rights of any person to contest such subpoena(s)

or order(s). Any person may provide evidence relevant to liability (or lack thereof); whether or not that person is the subject of a subpoena or section 13267 order. The Prosecution Team shall report the results of its investigation to the Executive Officer, with a copy to all parties and interested persons, by 30 November 2010. The Executive Officer may extend this deadline.

Any person signing a document submitted under this Order must make the following certification:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my knowledge and on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

In accordance with California Business and Professions Code sections 6735, 7835, and 7835.1, engineering and geologic evaluations and judgments must be performed by or under the direction of registered professionals competent and proficient in the fields pertinent to the required activities. All technical reports specified herein that contain work plans for, that describe the conduct of investigations and studies, or that contain technical conclusions and recommendations concerning engineering and geology must be prepared by or under the direction of appropriately qualified professional(s), even if not explicitly stated. Each technical report submitted by the Dischargers must contain the professional's signature and, where necessary, his stamp or seal.

The Executive Officer may extend the deadlines contained in this Order if the Dischargers demonstrate that unforeseeable contingencies have created delays, provided that the Dischargers continue to undertake all appropriate measures to meet the deadlines and make the extension request in advance of the expiration of the deadline. The Dischargers shall make any deadline extension request in writing prior to the compliance date. An extension may be denied in writing or granted by revision of this Order or by a letter from the Executive Officer. Any request for an extension not responded to in writing by the Board shall be deemed denied.

If, in the opinion of the Executive Officer, the Dischargers fail to comply with the provisions of this Order, the Executive Officer may issue a complaint for administrative civil liability. Failure to comply with this Order may result in the assessment of an Administrative Civil Liability of up to \$1,000 per violation per day pursuant to the California Water Code section 13268. The Central Valley Water Board reserves its right to take any enforcement actions authorized by law.

Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Board to review the action in accordance with CWC section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day.

Copies of the law and regulations applicable to filing petitions may be found on the Internet at:
http://www.waterboards.ca.gov/public_notices/petitions/water_quality
or will be provided upon request.

I, Pamela Creedon, do hereby certify that the foregoing is a full, true, and correct copy of an
Order issued by the Central Valley Water Board on 27 May 2010

A handwritten signature in cursive script that reads "Pamela C. Creedon". The signature is written in black ink and is positioned above a horizontal line.

PAMELA C. CREEDON, Executive Officer

Attachment A
Location Map

Wide Awake Mine

Technical and Monitoring Report
Order No. R5-2010-0049

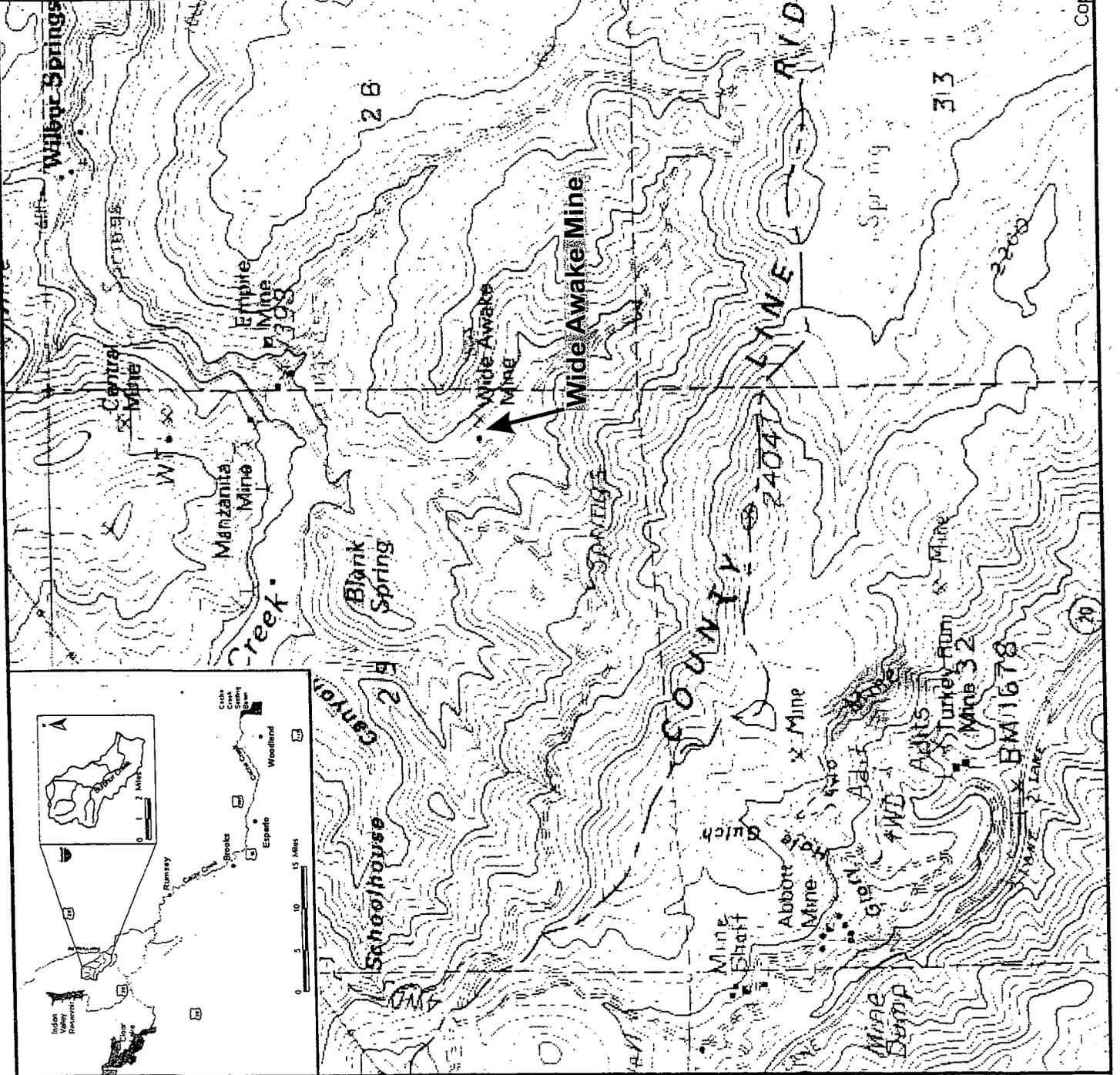


EXHIBIT B

HEARING OF THE CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL
BOARD

PROPOSED TECHNICAL AND MONITORING REPORT ORDER R5-2010-xxxx
FOR THE WIDE AWAKE MERCURY MINE
COLUSA COUNTY, CALIFORNIA

**SUBMISSION OF COMMENTS
BY
DESIGNATED PARTY HOMESTAKE MINING COMPANY OF CALIFORNIA**

Pursuant to the Hearing Procedures established for the above matter by the Central Valley Regional Water Quality Control Board ("CVRWQCB"), Designated Party Homestake Mining Company of California ("Homestake") herewith submits its comments on the Proposed Technical and Monitoring Report Order ("Draft Order") for the Wide Awake Mercury Mine, Colusa County, California, scheduled for hearing by the CVRWQCB on May 26/27/28, 2010.

Homestake appreciates the decision to substitute this draft Technical and Monitoring Report order under Water Code 13267 ("Draft Order") for the draft Cleanup and Abatement Order ("Proposed CAO") originally proposed for consideration by the CVRWQCB. The written submissions and testimony at the hearing held on October 7, 2009, firmly established that the technical data offered in support of that Proposed CAO were inadequate to establish the need for, and the scope of, active remediation at the Site. That hearing also demonstrated that additional investigation was required to assure that all potentially liable parties, under the broad liability theories offered by the Prosecution Team, were included in proceedings before the CVRWQCB and subject to the order. That obligation is expressly incorporated in this Draft Order.

Homestake continues to object to its inclusion as a Designated Party with respect to the Wide Awake Mine, for the reasons set out in its objection to the Proposed CAO, and incorporates those objections fully in this response. However, pursuant to the instructions of the CVRWQCB, Homestake will limit its comments for the May 2010 hearing to the redlined changes to the Proposed CAO.

In many of those changes, the Draft Order addresses the objections expressed by several parties to the assertion that current and interim owners, operators and lessees are jointly and severally liable at this Site despite the fact that the Designated Parties did not actively cause the alleged discharges to surface water. The responses of the Prosecution Team are insufficient to overcome those objections.

To begin with, in that response, the Draft Order simply cites prior decisions of the State Water Resources Board. Draft Order, par. 44. However, with regard to the application of the Water Code to Homestake, the response completely ignores the conclusion of the State Board that an interim lessee that did not cause releases, although in exclusive possession and control of the property during the time that releases occurred, was not liable for those releases. *In the Matter of U.S. Cellulose, WQ 92-04*. As discussed in Homestake's September 16, 2009 filing, that is Homestake's posture with respect to its activities at the Wide Awake Mine, except that Homestake, unlike the lessee in *U.S. Cellulose*, did not even have exclusive possession and

control of the property. There is no basis in the record to justify a finding that Homestake is liable under the Water Code at the Wide Awake Mine.

The Draft Order does recognize that the factual record establishes that none of the Designated Parties is directly responsible for the mining waste at the Site that is the alleged source of mercury discharges to Sulphur Creek, and acknowledges that all Designated Parties are only "passive dischargers." Put more directly, just as the Draft Order states clearly that "as much as 90%" of the total mercury in Sulphur Creek is dissolved mercury released by the active hydrothermal system, as opposed to particulate-bound mercury from sediments and mercury-bearing mine waste (Draft Order, par. 20), the Draft Order also states clearly that the Designated Parties did NOT even produce the mining waste conditions that have allegedly resulted in the releases of mercury to Sulphur Creek. The tenuous connection to mercury concentrations in Sulphur Creek established by the record here should not be the basis for an order directing the Designated Parties to carry out complex and expensive site investigations.

The Draft Order does not directly address Homestake's argument that if it were to be liable at all for the Wide Awake, it should not be jointly and severally liable, because the alleged harm is reasonably divisible. However, the modified factual statements in the Draft Order add support to Homestake's position.

The Draft Order states at Par. 50 that all of the Designated Parties at the Wide Awake Mine are "essentially on the same footing."¹ Starting from that premise, there is an obvious reasonable basis for divisibility in terms of any Designated Party's contribution to the alleged harm: the period of time during which it, either alone or with other Designated Parties, allegedly had the "control" of the property that the Prosecution Team alleges as the basis for liability.

It is not premature or unreasonable to consider that basis for divisibility in this matter. The CVRWQCB has already used estimates of the annual contribution of mercury from the Site in connection with its load and waste allocations for the Sulphur Creek TMDL. While it is certainly true that the estimates used by the Board are imprecise, and, in the view of Homestake, among others, greatly overestimate the contribution from mining material sources, that simply means that the use of those estimates here would present a "worst case" for Homestake's potential liability, not that the use of those estimates is so "unreasonable" as to preclude their use to establish divisible liability shares.

If those estimates can be used by the CVRWQCB for the TMDL, they can properly be applied to the period beginning in the 1870's during which the mining materials have been present at the Site, to identify the proportionate share of the harm assigned to the owners, operators and lessees during each time period. That evaluation precludes placing liability for site investigation and cleanup on interim owners, operators or lessees as "passive dischargers" for releases that occurred over the course of a hundred year period prior to their connection to the site, or that occurred after they ceased any connection to the property.

¹ Homestake would agree that is a largely accurate characterization except that it ignores the obvious equitable consideration that interim Designated Parties, unlike the current owners, will not benefit in any way from site investigation and cleanup.

Respectfully submitted this 29th day of April, 2010.



Gerald F. George
Counsel for Homestake Mining Company
Of California

cc: Kenneth Landau, Assistant Executive Officer
Lori Okun, Senior Staff Counsel
Prosecution Team
All Designated Parties

EXHIBIT C

HEARING OF THE CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL
BOARD

PROPOSED CLEANUP AND ABATEMENT ORDER R5-2009-xxxx
FOR THE WIDE AWAKE MERCURY MINE
COLUSA COUNTY, CALIFORNIA

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

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

1. Evidence

The Prosecution Team is relying upon the evidence now present in the public files of the Central Valley Regional Water Quality Control Board for the Wide Awake Mercury Mine matter, and has not identified any witnesses for presentation with respect to the Wide Awake Mine matter at the hearing scheduled for October 7/8/9, 2009, other than three Regional Board staff. Homestake will rely upon the evidence already present in the public files for the Wide Awake Mine, and in particular those portions of the TetraTech (2003) report and the Assessor Parcel map relied upon by the Prosecution Team in identifying the areas from which alleged discharges have occurred (Attachments A and B).

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

2. Witnesses

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

3. Policy Statements

Homestake incorporates its prior statement of its position demonstrating that it has no current relationship with the Wide Awake Mine Property, and describing the limited nature and duration of its involvement with the Wide Awake Mine Property in the past (Attachment D –

Letter to Pamela Creedon, July 1, 2009). Homestake also reiterates its positions in that statement regarding the timing of activities under the draft CAO and its concern that any characterization of mercury contamination in Sulphur Creek should not be limited to characterization of the mining waste, as currently proposed in the draft CAOs, but should commence with a comprehensive Conceptual Site Model addressing all potential sources of mercury to Sulphur Creek, so that the ultimate outcome of the characterization will allow a rational plan for effective remediation.

On the issue of liability, Homestake also supplements its July 1 submission and provides the following response to the statement of the Prosecution Team regarding potential Homestake liability for the discharge of mercury from the Wide Awake property to Sulphur Creek:

- Homestake has no current connection whatsoever to the Wide Awake Mine Property – which the Prosecution Team does not appear to contest.
- Homestake has no connection to the operations at the Wide Awake Mine that produced the mining waste that the Regional Board seeks to address through this proposed order – which the Prosecution Team also does not appear to contest. Specifically,
 1. Homestake did not own the land or operate the mine at the time the mining wastes at issue were generated (operations at the Wide Awake Mine ended many decades prior to 1978).
 2. Homestake did not operate any mine during the period it held a lease on the Property.
- Homestake's limited exploration activities at the Wide Awake did not involve disturbance of the waste rock or tailings piles on the Wide Awake Property, let alone cause discharge of mercury from those materials into Sulphur Creek. (Affidavit of Karl Burke, Attachment C).
- As a term lessee for purposes of mining exploration on the Wide Awake Property, Homestake did not have, as a matter of either law or fact, management responsibility for conditions on the Wide Awake Mine Property, where, indeed, Homestake was not a tenant in exclusive possession, with the owner reserving use of the surface for multiple purposes, as well as the right to lease to others for geothermal and oil and gas exploration and development.
- Any liability of Homestake for the discharge of mercury from the Wide Awake Mine Property is reasonably divisible by duration and nature of the activities on the property, from those of other potentially responsible parties named or not named in the proposed CAO.
- More broadly, it is not appropriate for Homestake to be liable for activities resulting in the discharge of mercury to Sulphur Creek for which it demonstrably had no involvement, which certainly excludes liability for mercury from natural sources,

upstream anthropogenic activities, or activities occurring at a time during which Homestake had no involvement at the Property.

A. Homestake activities at the Wide Awake property have not contributed to a discharge of mercury to Sulphur Creek.

The Prosecution Team initially suggested that Homestake's exploration work at the Wide Awake Mine Property might have resulted in the discharge of mercury to Sulphur Creek (Attachment E). However, as shown by the affidavit of Mr. Burke, while Homestake did conduct very limited exploratory activities on the identified Assessor Parcels for the Wide Awake Mine at various times in the period 1978-1992, those activities did not include any road work, and very limited drilling operations -- seven drill pads, none covering an area large than 30 by 50 feet, occupied for a very short period of time, and all reclaimed after use. Moreover, none of the pads or related work entailed disturbance of mine adits, waste rock or tailings piles or the unnamed tributary alleged to be the source of mercury discharges from the Wide Awake Property to Sulphur Creek.

In addition, all of these activities were carried out with the prior approval of and pursuant to environmental conditions required by both Colusa County and the Regional Board. Pursuant to those requirements, Homestake completed reclamation, including revegetation, at all areas disturbed by the exploration activities on the Wide Awake property. Accordingly, aside from the fact that Homestake had no involvement whatsoever in the generation of the waste that is the subject of the Regional Board's concern, Homestake's only activities on the Property were conducted with the knowledge and approval of the Regional Board, and there is nothing in the description of those activities as carried out that would suggest they would have resulted in or contributed to the discharge of mercury to Sulphur Creek.

Liability under Section 13304 of the Water Code is dependent on demonstration that a party caused or contributed to the alleged discharge to Sulphur Creek. The Prosecution Team has presented no evidence demonstrating liability by Homestake based on its activities at the Wide Awake Property.

B. Homestake is not responsible under the Water Code for passive migration of mercury from the Wide Awake property to Sulphur Creek.

More recently, the Prosecution Team has modified its position to address the fact that there is no evidence indicating that Homestake's activities on the Wide Awake property resulted in a discharge of mercury to Sulphur Creek. The current position is that Homestake, by virtue of its mining lease with the land owner, Edith Trebilcot and later the Trebilcot Trust, had management responsibility for that property, and has become jointly and severally liable with the owners of the property for mercury discharges to Sulphur Creek that may have resulted from the erosion of waste rock or tailings piles on the Wide Awake property. Indeed, the Prosecution Team even seeks to impose such liability on Homestake with respect to sources of mercury to Sulphur Creek wholly unrelated to the Wide Awake, imposing an obligation in the draft CAO to

address all anthropogenic sources of mercury to Sulphur Creek at or below the location of the mine.¹ This is an unprecedented and unwarranted expansion of liability under the Water Code.

1. Homestake is not liable under the Water Code for discharges of mercury to Sulphur Creek occurring as a result of passive migration from pre-existing waste rock and tailings piles on the Wide Awake property.

As discussed above, there is no reason to believe Homestake's actual activities under the lease that covered, *inter alia*, the Wide Awake Property, resulted in any actual discharge of mercury to Sulphur Creek. The Prosecution Team, however, contends that Homestake, simply by virtue of its status as a lessee, should be jointly and severally liable with the owners responsible for management of the property. Homestake did not have exclusive possession of the Wide Awake or any of the other parcels covered under its lease with Trebilcote. In the lease at issue here, Trebilcote expressly reserved use of the surface for cattle grazing – identified in the TetraTech report as another activity increasing mercury discharges to Sulphur Creek – and other agricultural activities and related water development. Moreover, Trebilcote not only reserved the right to lease the property to other parties for activities such as exploration and development of geothermal and oil and gas resources, but noted existing leases for such purposes on the lease at the time it was signed by Homestake. (Exhibit C to Attachment C). The Prosecution Team has not included these lessees as Dischargers on the draft Wide Awake CAO.

The language of Water Code 13304 addressing liability for those causing or permitting a discharge has been interpreted to place liability on an owner, where the actual activity resulting in the discharge was carried out by a lessee. *In the Matter of Aluminum Company of America*, WQ 93-9, at n. 8. It has not been applied to impose liability on a lessee whose actions while a lessee did not contribute to the alleged contamination, *In the Matter of U.S. Cellulose*, WQ 92-04 (lessee dropped from order where it did not use the tanks that were the source of contamination on the property it leased). That liability certainly should not be imposed in the situation here, where the lessee did not even have exclusive possession of the property by virtue of its lease (and, indeed, is not even a current leaseholder, where the Regional Board might arguably be concerned with rights of access). See *City of Modesto Redevelopment Agency v. Superior Court of San Francisco County*, 119 Cal. App. 4th 28, 38 (2004) (The critical question in liability for nuisance under the Water Code is whether defendant created or assisted in the creation of the nuisance).

As the Prosecution Team asserts, under the decisions of the State Board applying Water Code 13304, liability may attach to an owner– Trebilcote and/or the current owners – by virtue of its failure to act, as the owner can be said to have assumed responsibility for the conditions on the property. However, Homestake's lease at the Wide Awake only gave it a limited right to take actions on the property; that lease did not transfer to Homestake responsibility for administering, overseeing, or maintaining the property. In the absence of evidence that its actual activities under the lease resulted in or contributed to the discharge of mercury to Sulphur Creek, Homestake cannot be held liable by virtue of that lease relationship, i.e., simply by virtue of the

¹ Draft CAO, Wide Awake Mine, par. 14: "By 30 April 2012, the Dischargers shall develop and submit for Executive Officer approval a cleanup and abatement plan to reduce anthropogenic mercury loading in the creek at and downstream of the mine site as described in Finding No. 27 above."

fact that passive migration of mercury resulting from erosion may have occurred on the Property during the term of its lease.

2. Homestake is not jointly and severally liable for discharges of mercury to Sulphur Creek.

The Prosecution Team baldly asserts that Homestake is jointly and severally liable for mercury contamination in Sulphur Creek. Not only for mercury discharged from the Wide Awake Property, but for mercury in Sulphur Creek at or downstream of the mine site, regardless of source. Draft CAO, par. 14.

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

It should go without saying – but in light of the broad scope of the draft CAOs and the position of the Prosecution Team, it bears repeating – that neither Homestake nor any other party given notice of a Cleanup and Abatement Order for Sulphur Creek should be responsible for addressing the many acknowledged and significant natural sources of mercury to Sulphur Creek. The mercury in Sulphur Creek is not just from anthropogenic sources – which includes not just mining carried out a century ago by persons not party to this proceeding, but also such activities as streambank erosion exacerbated by grazing, and erosion from the forty-five miles of unpaved roads and jeep trails in the Sulphur Creek sub-watershed² – but is also from natural sources, including multiple hot springs.

These natural sources have been adding significant quantities of mercury to Sulphur Creek for millennia, at a rate on an annual basis that is as significant as anything estimated as the

² American Land Conservancy, *Final Report to Wildlife Conservation Board*, Grant WC-2016 BT, Sulphur Creek Riparian Habitat Restoration Project, April 28, 2006.

contribution from the Wide Awake,³ and whatever remediation is required, those natural sources will continue to discharge to Sulphur Creek in the future. Indeed, during an on-site inspection of the Central Mine Property carried out in 1997, a staff engineer from the Regional Board offered his opinion that the mercury in the lower portion of Sulphur Creek came from those natural sources, not former mining activities. (Exhibit D to Attachment D). That contribution from natural sources is reasonably determinable and divisible and it is not something for which Homestake has responsibility.

Likewise, regardless of the Prosecution Team's theory of the case, Homestake is not liable for any discharges of mercury to Sulphur Creek from mining waste or other anthropogenic sources upstream of property where it had an interest. Those contributions have also been estimated by the earlier studies relied upon by the Prosecution Team, and are as significant, if not larger, than those for sources in lower Sulphur Creek. However, the Regional Board in August 2009 issued CAOs to the owners of the Clyde and the Elgin Mines, located two miles upstream of the Central and Wide Awake properties, which, while requiring those owners to address abandoned mines and mining waste discharging to Sulphur Creek, do not require the owners to address mercury from anthropogenic sources in Sulphur Creek at or downstream of those mines. That obligation is included only in the draft orders for the Wide Awake and Central mines, leaving, without explanation, the legacy of this upstream contamination entirely to the downstream parties.

Regardless of the Prosecution Team's theory of the case, Homestake should also not be jointly and severally liable for discharges from the mining waste on the Wide Awake property for discharges during periods when it had literally no connection to the property. The mining waste originated nearly a century before Homestake even visited the property. Homestake has had no connection with the property since 1993.

Conclusion

The draft CAO proposed by the Prosecution Team for the Wide Awake Mine Property is intended to address mining waste located on that property. The parties liable for addressing that waste should be those parties that have responsibility for discharges from that waste to Sulphur Creek, or responsibility for the management of that property. Homestake did not cause or contribute to either the accumulation of that waste, or to any discharge of mercury from that waste to Sulphur Creek. As holder of a lease allowing exploration and development work on that property for the period from 1978-1992, it did engage in some activities on the property, but all of those activities were reviewed and approved by the Regional Board, and none of those activities involved disturbance of the waste rock and tailings piles on the property. Moreover, that lease did not give Homestake exclusive possession of the property or in any sense make it a manager of that property. That lease cannot serve as a proxy for legal fee title, for the purpose of making Homestake liable for the cleanup of the Wide Awake Mine Property.

³ TetraTech (2003), at Table 3-9, estimates the annual discharge from the Wide Awake as ranging from 0.02-0.44 kg/yr. The Sulphur Creek TMDL report (Table ES-1) estimates annual discharge of mercury from geothermal springs and non-mining erosion at 2.6 kg, and the discharge from the Wide Awake as 0.8 kg.

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

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

Respectfully submitted this 16th day of September, 2009.



Gerald F. George
Counsel for Homestake Mining Company
Of California

cc: Kenneth Landau, Assistant Executive Officer (e-mail and 3 copies by overnight mail)
Lori Okun, Senior Staff Counsel (e-mail and overnight mail)
Prosecution Team (e-mail and overnight mail)
All Designated Parties (overnight mail, and via e-mail if address available)

bcc: Edward Grandy, Esq.
Karl Burke