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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 Central Mine, Et al., )  
14 Colusa County, California (Central Valley )  
Regional Water Quality Control Board) )  
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16 \_\_\_\_\_ )

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

26 1. Section 2050(a) requires that a petition for review contain certain information,  
27 which is set forth below.  
28

1 2. Petitioner is Homestake Mining Company of California. Petitioner's address is 136  
2 E. South Temple, Suite 1800, Salt Lake City, Utah 84111. Communication concerning this  
3 matter should be sent to Petitioner's attorneys at the address provided in the caption of this  
4 petition.

5 3. Homestake requests that the State Board review the Regional Board's May 27, 2010  
6 decision to adopt the Technical and Monitoring Report Order for the Central Mines, et al.  
7 ("Order"). A copy of the Order is attached as Exhibit A.

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

9 5. The Regional Board adopted the Order pursuant to California Water Code Section  
10 13267, which authorizes the Regional Board to require submittal of technical and  
11 monitoring reports.

12 6. On April 29, 2010, Homestake submitted objections to the proposed Order to the  
13 Regional Board, raising the same substantive issues addressed by this Petition for Review.  
14 Homestake's objections are attached as Exhibit B. The Regional Board, in issuing its Order  
15 on May 27, 2010, under Water Code 13267, had determined to accept a recommendation of  
16 a panel of the Board, after a hearing in November 2009, that the full Board reject an earlier  
17 proposed Clean-up and Abatement Order and substitute the instant Order. Accordingly,  
18 Homestake's April 29, 2010 objections expressly incorporated objections submitted to the  
19 Regional Board on September 16, 2009, regarding the Regional Board's earlier proposed  
20 Clean-up and Abatement Order ("CAO") for the Central Mine properties. Those objections  
21 are attached as Exhibit C. In this petition, Homestake also references attachments to that  
22 submission which are part of the record before the Regional Board but which are not  
23 attached to this petition, including the affidavit of Karl Burke, which is Attachment 3 to the  
24 September 16, 2009 submission.

25 7. Homestake objects to the inclusion of Homestake as a potentially responsible party  
26 in the Order because Homestake is not a proper party to such Order. Homestake has no  
27 current connection whatsoever to the Central Mine properties, and had no connection to  
28 the operations at the Central Mine properties that produced the mining waste that the

1 Regional Board seeks to address through the Order. In addition, any liability of  
2 Homestake for discharge of mercury from mining-related sources would be reasonably  
3 divisible from the liability of other potentially responsible parties named or not named in  
4 the Order.

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

12 **STATEMENT OF POINTS AND AUTHORITIES**

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

15 **I. BACKGROUND**

16 9. The mining history for the Central Mine properties and the description and  
17 characterization of the mining waste at issue are presented in the attached Order (Exhibit  
18 A).

19 10. Homestake was a lessee of the mineral rights on portions of Assessor's Parcel  
20 Numbers 018-200-013-000, 018-200-014-000, 018-200-015-000, 018-200-016-000, 018-  
21 200-017-000, 018-200-018-000, and 018-200-006-000 from January 6, 1978 until 1992,  
22 and held fee ownership of a portion of those parcels from 1978 until 1999, when it donated  
23 its fee interest to the American Land Conservancy. However, the Regional Board's Order  
24 admits that there is no evidence that Homestake operated any mine on the property. It is  
25 also uncontested that Homestake has no current interest in or connection to any portion of  
26 the Central properties, and has had none for at least a decade.

27 11. The Regional Board's Order found that all parties it has designated as dischargers  
28 ("Designated Parties") are considered jointly and severally liable for carrying out the

1 investigative activities required under the Order at the Central Mine properties, despite the  
2 fact that, with the exception of one Discharger — Bailey Minerals — the record does not  
3 show that the Designated Parties actively caused the alleged discharges to surface water.

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

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

## 12 II. LEGAL STANDARD

13 14. The California Supreme Court has held that:

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

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

24 16. Finally, under Water Code section 13267, the authority upon which the Regional  
25 Board relies for issuing this Order, the burden, including costs, of providing any technical  
26 reports and information required must bear a reasonable relationship to the need for the  
27 report and the benefits to be obtained from the reports. This section also requires the  
28 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 17. Homestake asserts that the Regional Board's Order violates each of these standards.

4 **III. ARGUMENT**

5 18. On the issue of liability, Homestake has no current connection whatsoever to the  
6 Central Mine properties — which the Regional Board does not appear to contest.

7 19. Homestake has no connection to the operations at the Central Mine properties that  
8 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 20. Homestake did not own the land or operate the mine at the time the mining wastes at  
11 issue were generated (significant operations at the Central Mines, et al. ended many  
12 decades prior to 1978), and Homestake did not operate any mine during the period it held  
13 fee title to or non-exclusive leases on portions of the property.

14 21. Therefore, pursuant to Water Code Section 13267, Homestake is not the proper  
15 recipient of the Order directing investigation activities on properties Homestake does not  
16 own, or control, concerning mining waste and discharges it played no role in creating.

17 22. Bailey Minerals, from which Homestake purchased the portion of the Central Mine  
18 properties where it held a fee interest, is alone among the Designated Parties in being  
19 identified by the Regional Board as having actively engaged in mining at the property,  
20 having “mined the property in early 1970’s, increasing erosion at the site. This includes  
21 large land disturbance and partial damming of Sulphur Creek.” (See Exhibit C, September  
22 16, 2009 Submission, Attachment 3 at Exhibit A).

23 23. Homestake also notes that the U.S. Bureau of Land Management (“BLM”) is not  
24 listed by the Regional Board as a Discharger under the Order, although BLM appears to be  
25 the current owner of three parcels within the area of the Central Mine properties included  
26 under the Order. (See September 16, 2009 Submission, Attachment 3 at Exhibit K).

27 24. Homestake’s exploration activities at the Central Mine properties were all carried  
28 out with the knowledge and approval of Colusa County and the Regional Board, and in

1 compliance with requirements from those agencies intended to prevent environmental  
2 harm, and included reclamation of any disturbed areas at the Central Mine properties, with  
3 no direction from the Regional Board to address the existing mining waste. (See September  
4 16, 2009 Submission, Affidavit of Mr. Burke, Attachment 3).

5 25. Any liability of Homestake for the discharge of mercury from the Central Mine  
6 properties would be reasonably divisible by duration and nature of the activities on the  
7 property, from the liability of other potentially responsible parties named or not named in  
8 the Order.

9 26. More broadly, it is not appropriate for Homestake to be liable for activities resulting  
10 in the discharge of mercury to Sulphur Creek in which it demonstrably had no involvement.  
11 This certainly excludes liability for mercury from natural sources, upstream anthropogenic  
12 activities, or activities occurring at a time during which Homestake was not involved at the  
13 Central Mine properties.

14 ***The Regional Board Order Violates Section 13267 because Homestake is not a***  
15 ***Proper Recipient of the Order***

16 27. Water Code section 13267 provides that a Regional Board may require that any  
17 person who has discharged, currently discharges, is suspected of discharging, or who  
18 proposes to discharge waste shall furnish technical or monitoring program reports. Section  
19 13267 requires that before any information may be required “[t]he burden, including costs  
20 of these reports shall bear a reasonable relationship to the need for the report and the  
21 benefits to be obtained from the reports.”

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

1 29. As discussed in more detail below, there is no evidence that Homestake has  
2 discharged, is discharging, is suspected of discharging, or proposes to discharge waste to  
3 Sulphur Creek from the Central Mine properties. Therefore, pursuant to section 13267,  
4 Homestake is not a proper recipient of the Order issued by the Regional Board.

5 ***Homestake activities at the Central Mine properties have not contributed to a***  
6 ***discharge of mercury to Sulphur Creek.***

7 30. Homestake has no current connection at all to the parcels comprising the Central  
8 Mine properties, and had no connection to the operation of the various mines at the Central  
9 Mine properties that produced the mining waste that the Regional Board seeks to address  
10 through this proposed order. Homestake did own portions of the Central Mine properties  
11 from 1978-1999, and did lease or have unpatented claims on other portions of that property  
12 from 1978-1992. However, there was no mining on the property during that period, and  
13 Homestake had no interest whatsoever — neither fee nor leasehold — in the property  
14 during any period of active mining. Indeed, the only active mining in the last fifty years at  
15 the property was apparently engaged in by Bailey Minerals, also named as a Designated  
16 Party under the Order.

17 31. Homestake did conduct exploratory activities on the identified Assessor Parcels as  
18 part of the Cherry Hill Project at various times in the period 1978-1992. However, those  
19 activities would have had only a minor impact on the identified Assessor Parcels, and only  
20 for a limited period, and included reclamation, including revegetation, of any disturbed  
21 areas. (See September 16, 2009 Submission, Affidavit of Mr. Burke, Attachment 3).

22 32. Moreover, all of those activities, including any roadwork or drilling, were carried  
23 out with the prior approval of and pursuant to environmental conditions required by both  
24 Colusa County and the Regional Board. That is, aside from the fact that the drilling  
25 activities by Homestake would have resulted in minimal disturbance to the land, both in  
26 terms of area and duration, the Regional Board was not only aware of, but approved, all of  
27 these activities.

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1 33. Given the absence of any affirmative evidence that Homestake's activities on the  
2 Central Mine properties contributed to the discharge of mercury to Sulphur Creek, those  
3 activities do not support any imposition of liability on Homestake under Section 13267 of  
4 the Water Code.

5 34. The Order also bases liability on the fact that Homestake owned a portion of the  
6 Central Mine properties from 1978-1999. As the owner of a portion of the properties, the  
7 Order contends, Homestake had an obligation to manage mining waste on that property to  
8 prevent any passive migration of mercury from that waste into Sulphur Creek, although the  
9 Regional Board never raised that concern on any occasion during its review and approval of  
10 Homestake's activities on the property. Indeed, the Order contends that as a consequence  
11 of not preventing that passive migration during its period of ownership, Homestake is now  
12 jointly and severally liable with the current owners and other past owners and lessees for  
13 not only the characterization of those waste piles, but also of all mercury, from whatever  
14 source, in Sulphur Creek. The liability web spun by the Water Code may be broad; it is not  
15 without limits. The Regional Board in this case has exceeded those limits.

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

18 35. As discussed above, there is no affirmative evidence that Homestake's activities at  
19 the Central Mine properties resulted in any actual discharge of mercury to Sulphur Creek.  
20 The Order contends that Homestake, simply by virtue of its status as an owner, should be  
21 jointly and severally liable as a "passive discharger" with the other owners, including the  
22 only Designated Party that actually engaged in mining alleged to have increased erosion to  
23 Sulphur Creek.

24 36. The Order approved by the Regional Board recognizes that the factual record  
25 establishes that none of the Designated Parties, with the exception of Bailey Minerals, was  
26 directly responsible for the mining waste at the Central Mine properties that is the alleged  
27 source of mercury discharges to Sulphur Creek, and acknowledges that these Designated  
28 Parties are only "passive dischargers." The Order also specifically states that there is no

1 evidence that Homestead actively mined the Central Mine properties, and admits that  
2 Homestake did *not* even produce the mining waste conditions that have allegedly resulted  
3 in the releases of mercury to Sulphur Creek. Likewise, the Order does not dispute  
4 Homestake's assertion that naturally occurring conditions contribute significantly to any  
5 mercury present in Sulphur Creek.

6 37. The Regional Board, recognizing the tenuous connection between the mining  
7 materials at the Site and the mercury concentrations found in Sulphur Creek, has already  
8 retreated from the initial determination that a Clean-Up and Abatement Order is required.  
9 That tenuous connection to mercury concentrations in Sulphur Creek established by the  
10 record here should also not be the basis for an order directing all of the Designated Parties  
11 to carry out complex and expensive site investigations. If such an order is to be issued, it  
12 should properly be issued only to the current owners of the properties, or to parties directly  
13 responsible for the conditions of concern at those properties, to determine first whether the  
14 existing conditions at the Site would even require any further action under the Water Code.

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

17 38. The Order asserts that Homestake is jointly and severally liable for mercury  
18 contamination in Sulphur Creek. Order, par. 56.

19 39. However, the Order declines to deal substantively with Homestake's argument that  
20 if it were to be liable at all for the mercury releases from mining waste located at the  
21 Central Mine properties, it should not be jointly and severally liable, because the alleged  
22 harm is reasonably divisible.

23 40. The Water Code, by its terms, does not impose joint and several liability; the  
24 decisions of the State Board addressing that concept simply adopt the common law  
25 principle of joint and several liability where there are multiple sources resulting in a single  
26 and indivisible harm. *See In the Matter of Union Oil Company*, WQ 90-2, at p. 8. As the  
27 Supreme Court of the United States discussed in its recent decision of joint and several  
28 liability under the federal Superfund statute, the starting point for consideration of joint and

1 several liability is Section 433A of the Restatement (Second) of Torts. *Burlington Northern*  
2 *& Santa Fe Railway Co. v. United States*, \_\_ U.S. \_\_\_, 129 S. Ct. 1870 (2009). Applying  
3 those principles, joint and several liability does not attach where “there is a reasonable basis  
4 for determining the contribution of each cause to a single harm.” Restatement (Second of  
5 Torts 433A(1)(b), p. 434 (1963-64). *Burlington N. & S.F. R. Co.*, at 1881. The liability  
6 issue here is whether there is a reasonable basis for divisibility in addressing sources of  
7 mercury discharged to Sulphur Creek. That basis for divisibility is clearly laid out in the  
8 evidence and reports before the Regional Board, including the very reports relied upon by  
9 the Prosecution Team to establish the sources of mercury discharged to Sulphur Creek.  
10 That evidence establishes the relative duration of Homestake’s involvement, the nature and  
11 location of its activities at the property and their potential for contributing to any discharge  
12 of mercury, and an estimate of annual contribution of mercury from the many natural and  
13 anthropogenic sources of mercury discharged to Sulphur Creek.

14 41. Neither Homestake nor any other party subject to the Regional Board’s Order  
15 should be responsible for addressing the many acknowledged and significant natural  
16 sources of mercury to Sulphur Creek. As the reports relied upon by the Regional Board  
17 confirm, the mercury in Sulphur Creek is not just from anthropogenic sources — which  
18 include mining carried out a century ago by persons not party to this proceeding, as well as  
19 such activities as streambank erosion exacerbated by grazing — but is also from natural  
20 sources, including multiple hot springs.

21 42. These natural sources have been adding significant quantities of mercury to Sulphur  
22 Creek for literally thousands of years, at a rate on an annual basis that is as significant as  
23 anything estimated as the contribution from the Central Mine properties, and whatever  
24 remediation might ultimately be required, those natural sources will continue to discharge  
25 to Sulphur Creek in the future. Indeed, during an on-site inspection of the Central Mine  
26 properties carried out in 1997, a staff engineer from the Regional Board offered his opinion  
27 that the mercury in the lower portion of Sulphur Creek came largely from those natural  
28 sources, and not from former mining activity. (*See Exhibit C, September 16, 2009*

1 Submission, Attachment 4 at Exhibit D). That contribution from natural sources is  
2 reasonably determinable and divisible and it is not something for which Homestake, or any  
3 other alleged discharger, has responsibility.

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

12 44. Homestake should also not be jointly and severally liable for discharges from the  
13 mining waste on the Central Mine properties during periods when it had literally no  
14 connection to the property. The mining waste originated nearly a century before  
15 Homestake even visited the property. Homestake has had no connection with any portion  
16 of the property since 1999.

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

22 46. The Order states at Par. 62 that all of the Designated Parties at the Central Mine site  
23 are "essentially on the same footing." Homestake would agree that this is a largely accurate  
24 characterization, except that it ignores the obvious equitable consideration that interim  
25 Designated Parties, unlike the current owners, will not benefit in any way from site  
26 investigation and cleanup. Accordingly, it is particularly unfair to place the obligation for  
27 characterization of the Site upon parties who are at worst "passive dischargers" and who  
28 also no longer have any interest in the property as either owner or lessee.

1 47. However, even starting from the premise that all of the Designated Parties are on  
2 equal footing, there is an obvious reasonable basis for divisibility in terms of any  
3 Designated Party's contribution to the alleged harm: the period of time during which it,  
4 either alone or with other Designated Parties, allegedly had the "control" of the property  
5 that the Prosecution Team alleges as the basis for liability.

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

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

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

28

1 51. Petitioner reserves the right to request a stay of the Regional Board's order, and to  
2 request a hearing in this matter and an opportunity to present additional evidence that might  
3 later come to light.

4 **IV. REQUEST FOR RELIEF**

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

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

10 Dated: June 28, 2010

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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 R5-2010-0048**

**FOR  
TERHEL FARMS, INC., RICHARD L. MILLER, HOLLIDAY FOUNDATION INC.,  
HOMESTAKE MINING COMPANY, BONNEVILLE INDUSTRIES, INC.,  
FILIATRA, INC., ASERA WESTERN CORPORATION**

**CENTRAL, CHERRY HILL, EMPIRE, MANZANITA, AND WEST END MINES  
COLUSA COUNTY**

This Order is issued to Terhel Farms, Inc., Richard L. Miller, Holliday Foundation Inc., Homestake Mining Company, Bonneville Industries, Inc., Filiatra, Inc., and Asera Western Corporation (hereafter collectively referred to as Dischargers) based on provisions of California Water Code (CWC) section 13267, which authorizes the Central Valley Regional 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:

1. The Central, Cherry Hill, Empire, Manzanita, and West End Mines (hereafter "Mines") are inactive mercury and/or gold mines. Mining waste from the Mines erodes into Sulphur Creek, which is tributary to Cache Creek. The Sulphur Creek streambed and flood plain directly below the Mines contain mining waste. The Mines have discharged and continue to discharge or threaten 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 Mines are located in the Wilber Springs hydrothermal area of the Sulphur Creek Mining District (District) of Colusa County, and about 20 miles west of Williams, California. The Mines are located within Colusa County Assessor's Parcel Numbers 018-200-002-000, 018-200-013-000, 018-200-014-000, 018-200-015-000, 018-200-016-000, 018-200-017-000, 018-200-018-000, 018-200-004-000, 018-200-005-000, and 018-200-007-000, 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 Mines since mining activities began in the late 1800s. 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, own, have owned, or have operated the mining sites where the Mines are 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." 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 viable successors. 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. Copper, mercury, sulphur, and gold were all discovered in the District in the late 1800s, and the Mines were developed during that period. 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).

### **The Central and Empire Groups**

8. The Central and Empire mines are located near the Wilbur Springs resort. The Central Mine Group lies to the north of Sulphur Creek and is made up of the historic Central, Dewey, and Little Giant mining claims. The Empire Mine Group lies to the south of Sulphur Creek and is made up of the historic Empire, Mercury Queen, Mercury King, and Hidden Treasure lode mining claims (CalFed Report).
9. Mining started at the Empire mine in the 1870s and at the Central mine in 1891. In 1873, sixty-three flasks of mercury (one flask equals 76 pounds) were produced from ore mined at the Empire mine, but processed at the Wide Awake mine. Sometime between the 1890s and the early 1900s, the Central and Empire groups were operated in conjunction with the Abbott mine. Therefore, it is possible during this time that ore from Central and Empire groups was processed at the Abbott mine facilities. After this period, no significant production from the Central Group occurred until 1926 when \$10,000 worth of mercury (about 107 flasks) was produced. After that, the mines were idle until a small production was reported in 1942. No information was found on any operations after 1942. Total production was approximately 170 flasks. (CalFed Report).
10. The workings of the Central and Empire mines are now caved but are reported to include several hundred feet of underground drifts and crosscuts. The workings of the Central Mine consisted of four short adits, the highest about 400 feet above Sulphur Creek. The Empire Mine may have included at least three adits that where up to 150 feet long (Moisseeff 1966).

A small processing facility remains at Central Mine, and a small retort remains at Empire Mine (CalFed Report).

**The Manzanita Mine Group  
(including the Cherry Hill, West End and Manzanita Mine Sites)**

11. The Manzanita mine is located about one mile west of Wilbur Springs resort. The Manzanita mine has been operated for both gold and mercury over its history. The Cherry Hill gold mine is located southwest of the Manzanita mine and on the south side of Sulphur Creek. The West End gold mine is located on the north side of Sulphur Creek west of the Manzanita mine (CalFed Report).
12. The Manzanita mine was discovered in 1863 and operated as a gold mine for many years (up to 1891). Cinnabar was recovered as a byproduct. From 1902 to 1942, it became primarily a mercury mine with intermittent operations by various companies and lessees, and yielded over 2,500 flasks of mercury. The mine may have been operated in conjunction with the Cherry Hill mine on the south side of Sulphur Creek in the 1920s. No records separating mercury and gold production are available prior to 1900 (CalFed Report).
13. The Manzanita mine consists of numerous tunnels and shafts, most of which are caved and inaccessible. Currently there is one open adit about 45 feet above the floodplain and there are several small open cuts, no more than 50 feet in depth between the adit and the top of the hill. Near the top of the hill is an open vertical shaft of unknown depth. Tailings appear to be exposed in the north stream bank of Sulphur Creek and there is a concrete foundation that may have been part of a crushing facility and stamp battery west of the adit (CalFed Report).
14. At the Manzanita mine, a ten-stamp mill was used to crush the ore, which was then concentrated in blanket sluices followed by two combination pans using sodium amalgam and bluestone amalgam. Three 5-foot Huntington mills, seven Victor concentrators, three 5-foot amalgamating pans, two 8-foot settlers, a No. 1 Gates crusher, and a 65 horse-power engine and boiler were reportedly operated for gold and mercury extraction (CalFed Report).
15. The Cherry Hill Mine workings consist of two short adits that have a maximum length of about 100 feet. The West End mine workings consist of three adits, the extent of which is unknown. The workings at the Cherry Hill Mine are open and accessible. The adits at the West End Mine are equipped with grates to prevent access by humans (CalFed Report).
16. Gold production records for the Cherry Hill Mine are incomplete. Gold production records are not available for West End Mine as this mine was likely operated in conjunction with Cherry Hill Mine. There is no evidence that either mine produced mercury (CalFed Report).
17. Ore processing facilities at the Cherry Hill mine consisted of a stamp mill with coarse gold recovery tables. There is no reported processing operation at the West End Mine. West End ore was reported to be very siliceous and similar in milling quality to Cherry Hill ore and it is inferred that processing of West End ore was done in the Cherry Hill stamp mill.

18. Currently, only various pieces of iron from the mill and concrete foundations remain at Cherry Hill Mine. The mill foundations may be of historical significance (CalFed Report).

### **Mining Waste Description and Characterization Central and Empire Group**

19. Conspicuous waste rock piles with topographic relief are absent at the Central and Empire Mines. However, the slopes above and below the Central mine have a local hummocky appearance and are covered with thick grasses that may conceal small waste piles. In addition, the ground upon which the brick retort is located may contain up to 1,000 cubic yards (CY) of a mixture of tailings and waste rock. In addition, up to 1,000 CY of overburden or waste rock may be present below the cuts above the rotary furnace. Waste rock is also exposed in the slope below the retort at the Empire Mine but it is inconspicuous due to the vegetation. The total volume of this pile may be up to 5,600 CY (CalFed Report).

20. In 2002, Churchill and Clinkenbeard sampled solid materials at the Central and Empire mines. Mercury concentrations were measured at six locations at the Central Mine, and at two locations at the Empire Mine. Results showed mercury concentrations of 150 to 420 parts per million (ppm) in soil and waste materials near ore processing units, and 30 ppm in calcined tailings piles. Complete characterization of background soils and mining waste at the Central and Empire Mines has not been performed (CalFed Report).

21. Churchill and Clinkenbeard (2002) calculated that less than 3 kilograms (kg) of mercury remains in the small calcined tailings pile at the Central Mine, and 700 kg of mercury remains in two waste piles at the Empire Mine. The estimated mercury load from Central Mine is 0.003 to 0.03 kg/yr or 0.16 % of the total mine related mercury load of 4.4 to 18.6 kg/yr to Sulphur Creek. The estimated mercury load from Empire Mine is 0.04 to 0.06 kg/yr or 0.32 % of the total mine related mercury load of 4.4 to 18.6 kg/yr to Sulphur Creek (CalFed Report).

### **Mining Waste Description and Characterization Manzanita Mine Group (including the Cherry Hill and West End Mine Sites)**

22. Waste rock piles at the Manzanita Mine are sparse and are limited to the lower portion of the hill below the area of argillic alteration. Tailings are not conspicuous at the surface near the mine but tailings appear to be exposed in the bank of Sulphur Creek above Jones Fountain of Life and may be buried in the flood plain along Sulphur Creek. The estimated mercury load from Manzanita Mine is 0.3 to 6.5 kg/yr or 34.9 % of the total mine related mercury load of 4.4 to 18.6 kg/yr to Sulphur Creek (CalFed Report).

23. Churchill and Clinkenbeard (2002) conducted solid materials sampling at the Manzanita Mine. Mercury concentrations were measured at 11 locations. Results showed mercury concentrations of 6 to 560 ppm in soil and waste materials near locations believed to be former ore processing units, and 25 to 260 ppm in background soils and sediments. Analysis of solid samples showed sediment in Sulphur Creek adjacent to Manzanita Mine had a

pH of 7, and mine site soils had a pH of approximately 4 to 5. Complete characterization of background soils and mining waste at the Manzanita Mine has not been performed (CalFed Report).

24. Mercury concentrations were measured at six locations at Cherry Hill Mine, and at three locations at West End mine. Results showed mercury concentrations of 47 to 300 ppm in waste piles, and less than 1 to 280 ppm in background soils and sediments. A study by Percy and Petersen (1990) found background mercury concentrations of up to 6,000 ppm. Complete characterization of background soils and mining waste at the Cherry Hill and West End mines has not been performed (CalFed Report).
25. Currently, there is no mine waste rock pile outside of the short adits at Cherry Hill. There is small waste rock pile (about 578 CY) on the Sulphur Creek floodplain about 500 feet northeast of the adits. This pile is of unknown origin. There is currently a waste rock pile at the West End Mine that may contain up to 3,600 CY of waste rock. Assays obtained during this study indicated gold concentrations of up to 0.30 ounces per ton (CalFed Report).
26. The estimated mercury load from Cherry Hill Mine is up to 1 kg/yr or 5.4 % of the total mine related mercury load of 4.4 to 18.6 kg/yr to Sulphur Creek. The estimated mercury load from West End Mine is 0.002 to 1.1 kg/yr or 5.9 % of the total mine related mercury load of 4.4 to 18.6 kg/yr to Sulphur Creek (CalFed Report).

#### **Mercury and Sediment Loads to Sulphur Creek**

27. Mine site investigations within the District have estimated mercury and sediment loads from the individual mine sites. Mercury is transported primarily through erosion of mercury-bearing mine wastes, soils, and sediments during storm runoff events. Though natural processes have enriched sediments with mercury, mining activities have increased sediment generation, resulting in increased potential for mercury mobilization from the mine sites (CalFed Report).
28. Annual mercury load estimates from the Mines range from 4.4 to 18.6 kg/yr. Annual sediment load estimates from the Mines range from 5,700 to 60,100 kg/yr (CalFed Report).
29. 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).
30. 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 Central Mine sub watershed is estimated to contribute about 16 % 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.*<sup>1</sup>).

31. 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. Methylmercury, 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

32. 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.
33. 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.
34. 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.
35. 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.
36. 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

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<sup>1</sup> The report is available at  
[http://www.swrcb.ca.gov/centralvalley/water\\_issues/tmdl/central\\_valley\\_projects/sulphur\\_creek\\_hg/sulphur\\_creek\\_tmdl.pdf](http://www.swrcb.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/sulphur_creek_hg/sulphur_creek_tmdl.pdf)

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*,<sup>2</sup> dated March 2007, which is part of the administrative record of this Order.

37. 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, 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.<sup>3</sup>

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

39. 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

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<sup>2</sup> 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](http://www.swrcb.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/sulphur_creek_hq/sulphur_creek_staff_final.pdf)

<sup>3</sup> 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](http://www.swrcb.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/cache_sulphur_creek/cache_crk_hq_final_rpt_oct2005.pdf)

initiated, the Dischargers shall develop and submit for Executive Officer approval a cleanup and abatement plan to reduce anthropogenic mercury loading in the creek.

40. 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. 19, 22, and 25 are mining wastes as defined in CWC section 13050, subdivision (q) (1).

41. Because the Mines contain 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.

42. 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.

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

44. 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.

45. 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.

46. 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.

47. 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).

48. 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.

49. The technical reports required by this Order are necessary to ensure the protection of the waters of the state, 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 37), 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. The Dischargers either own 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. 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.

50. 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**

51. CWC section 13267 imposes investigation and reporting liability on "any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste ..." Owners of mine property are dischargers with respect to mining waste that erodes, runs off or otherwise discharges from the property. (Opinion 55-116, 26 Ops. Cal. Atty. Gen. 88 (1955); see also, Order WQ 90-3 (*San Diego Unified Port District*)). "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 the record to support at least a suspicion that each Discharger discharged waste.
52. As established under the findings regarding *Mercury and Sediment Loads to Sulphur Creek*, above, 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. 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.
53. 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.

54. AMERICAN LAND CONSERVANCY (ALC) is not named in this Order. There are two potentially applicable bases of ALC's liability: (i) ALC's Grant of Easement for Conservation Purposes, 10/27/99 ("Easement") in APNs 018-200-005-000, 018-200-007-000, 018-200-013-000, 018-200-014-000, 018-200-015-000, 018-200-016-000, 018-200-017-000, 018-200-018-000 and 018-200-006-000; and (ii) ALC's fee interest in APNs 018-200-005-000 and 018-200-007-000 from June 25, 1999 to October 26, 1999. The Prosecution Team presented no evidence that any activities under the Easement caused or permitted a discharge of mining waste and testified that the Easement was not a basis for liability. With respect to ALC's fee interest, the Board declines to exercise its discretion to require ALC to undertake investigation based on ALC's brief fee interest. The Prosecution Team presented no evidence of rain events during ALC's period of ownership, and presented no other evidence that ALC caused or permitted a discharge during its ownership. In addition, the *Water Quality Enforcement Policy* (2002) requires that regional water boards *should* (not *shall*) "name all dischargers for whom there is sufficient evidence of responsibility as set forth in California Water Code section 13304." The Enforcement Policy includes no similar policy statement for section 13267 orders.

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*). Although *Wenwest* was a cleanup order and not a site investigation order, the same reasoning applies to this Order. A consideration of the *Wenwest* factors weighs against requiring ALC to participate in investigation or cleanup of this site. ALC purchased the property solely for the purposes of conveying it to Dr. Miller; the ownership period was brief (four months); Dr. Miller is named in the Order; ALC had nothing to do with the activity that caused the condition of pollution; ALC never engaged in any activity that exacerbated the problem; ALC had incomplete knowledge of the pollution; and numerous other dischargers are named in this Order. Although no cleanup is proceeding, there are other parties named in this Order who are now required to begin site investigation. The Board makes no finding about whether ALC should have known about mercury pollution, or whether mercury pollution was just beginning to become known when ALC acquired the property, but finds that these factors are less significant because ALC acquired the property solely to facilitate the conservation easement and immediate property transfer. In addition to the *Wenwest* factors, in determining not to name

ALC, the Board considered that ALC acquired the property solely to facilitate its acquisition of the conservation easement; holding ALC liable may prevent or discourage ALC's or other entities' future conservation efforts; and ALC's period of ownership was during the summer and early fall, and not during the wet season. The Board will therefore exercise its discretion not to name ALC in this Order.

55. RICHARD L. MILLER is the current owner of all parcels subject to this Order. He purchased various parcels in 1974, 1999 and 2003. He is therefore responsible for investigating and cleaning up waste that is discharging from the property, or that has been or may be deposited where it will discharge from the property. Dr. Miller asserted that he is not responsible because he granted the Easement to ALC. However, Dr. Miller explicitly reserved the obligation to comply with environmental laws (Easement, paragraph 3) and all rights of ownership not prohibited by the Easement (Easement, paragraph 4). The reserved rights of ownership include soil stabilization and erosion control. (Easement, Attachment C, paragraph 4.) Dr. Miller also agreed to comply with laws (Easement, paragraph 9), agreed that ALC would not become an owner or operator (Easement, paragraph 13(b)), and warranted compliance with environmental laws (*ibid*). Although ALC has the right to conduct certain erosion control activities at its sole discretion (Easement, paragraph 2), ALC has no obligation to do so.

Dr. Miller also contended that Regional Water Board staff advised him before he purchased the property that he would not be held liable. This assertion is contradicted by the evidence, including a the Phase I Preliminary Evaluation and Site Assessment (Erler & Kalinowski, 9/18/97) which states that the Central Valley Water Board might require formal closure (i.e., remediation) of the site; mine waste from inactive mines along Sulphur Creek might be a potential source of mercury in Cache Creek; testing was incomplete; and Sulphur Creek flows through the site.

Finally, Dr. Miller contended that holding him responsible for discharges from the site would deter other landowners from granting conservation easements. In light of Dr. Miller's long ownership of and ability to control the property, and the speculative nature of this contention, it is questionable whether the Board has discretion to relieve Dr. Miller of responsibility to investigate or clean up the site on this basis. Even if such discretion is available, the Board finds that it is appropriate to name Dr. Miller named as a discharger for the reasons stated in this paragraph.

56. [This paragraph intentionally left blank.]

57. HOMESTAKE MINING COMPANY owned or leased APNs 018-200-013-000, 018-200-014-000, 018-200-015-000, 018-200-016-000, 018-200-017-000, 018-200-018-000 and 018-200-006-000 from January 6, 1978 until 1999. There is no evidence that Homestake actively mined the site. Homestake provided evidence that its activity on the site was limited to mining exploration activity, including drilling. These activities might have caused discharges due to soil disturbance from equipment moving or drill cuttings. The Board need not determine whether these activities caused discharges, because Homestake's ownership and control over the property is a sufficient basis to require additional investigation. 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. Homestake asserted that its activities did not significantly cause or contribute to the discharge of mining wastes. 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 or migrating across the sites. 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. In addition, Homestake owned the property for over ten years. As these wastes were eroding or are suspected of eroding into surface waters during the time that Homestake controlled the property, Homestake is a person who has discharged, discharges, or is suspected of having discharged or discharging wastes into waters of the state.

Homestake asserted that other sources, including naturally occurring conditions, contribute to mercury contamination, and that waste rock located farther from streams discharges only during very heavy rain events. Neither claim is sufficient to overcome the considerable evidence supporting Homestake's status as a discharger or suspected discharger.

Homestake asserted that its liability is divisible and that joint and several liabilities are not appropriate. 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 sources or the relative contributions of various dischargers at any given site. Even were the Board inclined to apportion responsibility, which it is not, apportionment would be premature at this time.

58. TERHEL FARMS, INC., BONNEVILLE INDUSTRIES, INC., FILIATRA, INC. and ASERA WESTERN CORPORATION owned fee interest in owned APNs 018-200-005-000 and 018-200-007-000 between March 6, 1959 and an unknown date, as described below. Part of West End Mine was located on parcel APN 018-200-005-000. Mine waste and a portion of Sulphur Creek are located on parcel APN 018-200-007-000.
59. TERHEL FARMS, INC. owned APNs 018-200-005-000 and 018-200-007-000 from March 6, 1959 until March 3, 1986. Terhel Farms asserted that no mining was conducted during ownership. However, liability is based on the discharge or suspected discharge of mining waste to Sulphur Creek, which continued after active mining ceases. In addition, Terhel Farms, Inc. contended that it sold the entire "hill range" to Bonneville Industries in 1983. This contention is inconsistent with title records showing acquisition and sale on the above dates.
60. BONNEVILLE INDUSTRIES, INC. owned APNs 018-200-005-000 and 018-200-007-000 from March 3, 1986 until some time in 1999. Bonneville Industries asserted no defenses to the proposed Cleanup and Abatement Order presented to the Board on 7 October 2009.
61. FILIATRA, INC. owned APNs 018-200-005-000 and 018-200-007-000 from October 9, 1990 until June 30, 1992; after that, it appears Filiatra retained "all mineral rights, hydrocarbon rights, gravel rights, geothermal rights, water rights, all grazing rights, pasturing rights, hunting rights, and fishing rights" but transferred fee ownership. During the time Filiatra held fee title, mining waste was present on this property; discharged from the property to waters

of the State during rain events; and migrated to other locations from which it may have discharged to waters of the State. Filiatra asserted no defenses to the proposed Cleanup and Abatement Order presented to the Board on 7 October 2009.

62. ASERA WESTERN CORPORATION owned APNs 018-200-005-000 and 018-200-007-000 from June 30, 1992 until an unknown date. Asera Western asserted no defenses to the proposed Cleanup and Abatement Order presented to the Board on 7 October 2009.

63. HELEN HOLLIDAY FOUNDATION, INC. (Holliday Foundation) owned fee title to APN 018-200-004-000 from December 22, 1975 to March 25, 2003. During the time Holliday Foundation owned fee title, mining waste was present on this property; discharged from the property to waters of the State during rain events; and migrated to other locations from which it may have discharged to waters of the State. Holliday Foundation denied liability based on its status as a charitable foundation. However, this does not provide a legal basis to avoid liability. In addition, Holliday Foundation owned the property for over 27 years.

Holliday Foundation contended that it should be secondarily liable for any cleanup requirements. 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.*].)

64. 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, shall:

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 sites. The Characterization Plan shall assess the nature and extent of mining waste at the site, the nature and extent of mining waste that is discharging or that has the potential to discharge from the site to Sulphur Creek, 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 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 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 present 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. Dr. Miller testified at the hearing that Sunoco Energy Development Company conducted activities at the site that did or could have caused soil disturbance leading to off-site migration of mercury-laden sediments. However, the Prosecution Team declined to name this entity in the proposed order.
15. 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 and Sunoco Energy Development Company. 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](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.



PAMELA C. CREEDON, Executive Officer



# **EXHIBIT B**

HEARING OF THE CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL  
BOARD

PROPOSED TECHNICAL AND MONITORING REPORT ORDER R5-2010-xxxx  
FOR THE CENTRAL MINE, ET AL.  
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 Central, Cherry Hill, Empire, Manzanita, and West End Mines, Colusa County, California, R5-XXXX, 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 for the Central Mine, et al., sites ("Central Mine Group"). 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. However, Homestake believes it would be more appropriate and more consistent with the views of the CVRWQCB members expressed at the October 7, 2009 hearing, to continue to include Magma Power Company, Cordero Mining Company and Sunoco Energy Development Company as Designated Parties subject to later decision by the Executive Officer at the completion of the investigation directed by the Draft Order.

Par. 4 of the Draft Order states that "Mercury levels are already above applicable objectives in Sulphur Creek..., which constitutes a condition of pollution or nuisance." It is not clear in the record what "applicable objectives" are referred to in that statement. Likewise, it is not clear what evidence in the record establishes that any "applicable objective" for Sulphur Creek has been exceeded, or that such exceedance is due to discharges of mercury from mining waste. The statement should be clarified, and the specific source and data supporting the statement should be identified.

Homestake continues to object to its inclusion as a Designated Party with respect to the Central Mine Group, 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.

The Draft Order recognizes that the factual record establishes that none of the Designated Parties, with the exception of Bailey Minerals, is directly responsible for the mining waste at the Site that is the alleged source of mercury discharges to Sulphur Creek, and specifically states that there is no evidence that Homestake actively mined the Site.

Likewise, the Draft Order does not dispute Homestake's assertion that naturally occurring conditions contribute significantly to any mercury present in Sulphur Creek, and in fact states expressly 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. 29). However, the Draft Order declines to deal substantively with Homestake's argument that if it were to be liable at all for the mercury releases from mining waste located at the Central Mine Group, it should not be jointly and severally liable, because the alleged harm is reasonably divisible.

Indeed, the modified factual statements in the Draft Order add support to Homestake's position. The Draft Order at Par. 62, in the course of addressing the liability of the Helen Holliday Foundation, states expressly that all of the Designated Parties at the Central Mine Group "stand on essentially the same footing."<sup>1</sup> Starting from that premise (and the Draft Order's assumption that it has rained every year), 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. It is disingenuous to say, as is done in Par. 56 of the Draft Order, that the Board has not determined the relative contributions from sources or various dischargers at the site, given the Board's use of the estimates in the TMDL report to establish loading allocations. 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

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<sup>1</sup> 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.

that the use of those estimates is "unreasonable" so 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.

Respectfully submitted this 29<sup>th</sup> 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 CENTRAL MINE, ET AL.  
COLUSA COUNTY, CALIFORNIA

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

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

1. Evidence

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

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

2. Witnesses

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

3. Policy Statements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

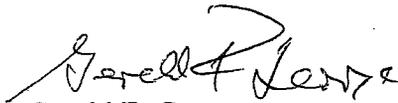
## Conclusion

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

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

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

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



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