

1 ELLISON, SCHNEIDER & HARRIS, L.L.P.
2 Christopher M. Sanders [SBN 195990]
3 2600 Capitol Avenue, Suite 400
4 Sacramento, California 95816
5 Telephone: (916) 447-2166
6 Facsimile: (916) 447-3512

7 BABST CALLLAND CLEMENTS AND ZOMNIR, P.C.
8 Robert W. Thomson
9 Two Gateway Center, 6th Floor
10 Pittsburgh, Pennsylvania 15222
11 Telephone: (412) 394-5656
12 Facsimile: (412) 394-6576

13 Attorneys for Petitioner and Named Discharger, Kennametal Inc.

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BEFORE THE

CALIFORNIA CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD

In the Matter of Kennametal Inc.’s Opposition to
Naming Kennametal Inc. in the Regional Water
Quality Control Board Central Valley Region Order
No. R5-2013-0701

KENNAMETAL INC’S OPPOSITION
TO MOTION *IN LIMINE* TO
EXCLUDE EVIDENCE AND LEGAL
ARGUMENTS

Kennametal Inc. (“Kennametal”) hereby opposes the Prosecution Team’s Motion *In Limine* to Exclude Evidence and Legal Arguments as follows:

I. INTRODUCTION

The Prosecution Team’s motion *in limine* is a tardy and procedurally improper attempt to shift to Kennametal the Prosecution’s Team’s burden of proof to support the legal and factual findings of the Regional Water Quality Control Board (“Regional Board”) Cleanup and Abatement Order, specifically, whether there is any legal basis to name Kennametal as a discharger. The motion states that, “Due to the Dischargers failure to raise the issue of corporate succession during the comment period, the Prosecution Team was not provided sufficient time to respond to the discharger’s arguments and did not pursue related discovery and interrogatories.”

1 The motion argues that this alleged omission “unfairly prejudiced” the Prosecution Team (p. 4,
2 ln. 4) and constituted “surprise” information (p. 4, ln. 12). These arguments are dumbfounding.
3 The fundamental premise of the motion must be that Kennametal had an obligation to inform the
4 Prosecution Team on the California law of corporate successor liability. This is the only logical
5 conclusion because Kennametal timely argued *before the CAO was issued* that the Regional
6 Board did not have evidence to conclude that Kennametal is a successor to Nevada Scheelite
7 Corporation. (R. Thomson letter to A. K. Benedict, October 11, 2012 (Kennametal also objected
8 to the order based on the absence of evidence that Nevada Scheelite Corporation ever operated
9 the site).) The Prosecution Team’s motion *in limine* does not cite the comments Kennametal
10 made on the draft CAO, but objects to additional information provided by Kennametal—which
11 supports its position that the CAO lacks proper legal and evidentiary basis—that was discovered
12 and produced *in response* to the Prosecution Team’s subpoena.

13 The Prosecution Team’s motion *in limine* must be denied because it is an improper
14 attempt to limit arguments that demonstrate the Regional Water Quality Control Board
15 (“Regional Board”) lacked the authority to name Kennametal in its Cleanup and Abatement
16 Order and an improper attempt to shift the burden of proof from the Regional Board to
17 Kennametal. All evidence submitted by Kennametal in support of its case and all arguments
18 made in its brief were timely submitted pursuant to the hearing procedures that were proposed,
19 reviewed and approved by the Prosecution Team. Furthermore, those same arguments had
20 earlier been discussed with Counsel for the Prosecution Team on at least two occasions. Finally,
21 these were not new arguments. Kennametal had previously requested the Board to provide its
22 authority to name Kennametal since it neither owned nor operated the Mount Diablo Mercury
23 Mine, and since ownership and control of Nevada Scheelite Corporation does not make
24 Kennametal liable. Kennametal does not have the obligation to educate the Board on the basics
25 of corporate law and the requisite standards to name a parent corporation.

26 **II. FACTUAL ARGUMENT**

27 Kennametal was named a discharger pursuant to Cleanup and Abatement Order No. R5-
28 2013-0701 over its repeated objections that the Regional Board did not have sufficient evidence

1 to name Kennametal as a discharger. The Board provided no hearing before issuing its Order.
2 Kennametal was forced to take an unconventional route to achieve a hearing by making the
3 request during the public comment period of a later held Regional Board meeting. Now, the
4 Prosecution Team wants to preclude Kennametal’s opportunity to be heard. This is despite the
5 fact that the briefs of the Prosecution Team concede that the Order did not have sufficient
6 evidence to name Kennametal as a discharger. The only finding in Order No. R5-2013-0701
7 about any particular relationship between Kennametal and Nevada Scheelite was that Nevada
8 Scheelite was a wholly owned subsidiary of Kennametal. The briefs of the Prosecution Team¹
9 admit that the “ordinary rule of law states that the purchaser does not assume the seller’s
10 liabilities” and that “it is true that generally a parent corporation is not liable for the actions of its
11 subsidiary.”² Because these are the standard rules of law, and Order No. R5-2013-0701 made no
12 findings that alleged exceptions to these rules, Kennametal demanded to know the basis of
13 claims of the Regional Board and demanded a hearing. When the Regional Board failed to
14 provide the basis for determining that Kennametal is a discharger on a successor theory of
15 liability, Kennametal had no choice but seek an evidentiary hearing. The Prosecution Team
16 cannot attempt to preclude the very information Kennametal sought to obtain prior to the
17 issuance of the CAO, which is relevant to Prosecution Team’s burden of proof.

18 **III. LEGAL ARGUMENT**

19 **A. Kennametal Made the Arguments In Its Comments to Draft CAO**

20 Kennametal informed the Board during the comment period for the Order that it was
21 deficient in legal justification to name Kennametal and made the request for hearing for this very
22 reason. In a letter to Anna Kathryn Benedict dated October 11, 2012, Robert Thomson,
23 representing Kennametal, refuted all of the allegations contained within the “Findings” of the
24 proposed order and asked what evidence the Regional Board relied upon to name Kennametal.
25

26 ¹ The Prosecution Team now alleges either *de facto* merger or alter ego, both forms of piercing
27 the corporate veil and both of which are rare exceptions to the normal rule of law. See
28 Kennametal’s Hearing Brief for more details of this argument.

² Page 3 at line 15 and page 6 at line 1, respectively, of the Prosecution Team’s Rebuttal Brief – Corporate
Successor Liability.

1 In that letter, Mr. Thomson informed the Board that Nevada Scheelite Corporation had shut
2 down its mining operations in Nevada in 1956 and dissolved the entire corporation in April 1957.
3 Mr. Thomson also informed the Board that operation and control of Nevada Scheelite
4 Corporation by Kennametal does not make Kennametal liable.

5 **B. Kennametal Submitted All Evidence In Full Compliance With Hearing Procedures**

6 The Prosecution Team has erroneously argued that Kennametal has provided surprise
7 testimony and cites to California Code of Regulations section 648.4. Surprise testimony is
8 testimony that is introduced not in compliance with the hearing procedures. If that occurs, the
9 presiding officer may refuse to admit the proposed testimony or proposed exhibits. 23 Cal. Code
10 of Regs. §648.4(e). Nothing that Kennametal has provided can be considered surprise testimony.
11 Kennametal has submitted its evidence in compliance with the hearing procedures that have been
12 adopted for this hearing and the Prosecution Team has not alleged any differently.

13 **C. Prosecution Team Seeking to Preclude Admission of Evidence Discovered While**
14 **Responding to Prosecution Team’s Subpoena**

15 The Prosecution Team seeks to preclude evidence that was discovered and provided in
16 *response to a subpoena issued by the Prosecution Team* on February 11, 2014. The Prosecution
17 Team is trying to pick and choose which evidence produced in response to its discovery requests
18 are pertinent to this hearing. It relies on some information provided in Kennametal’s subpoena
19 responses,³ and then argues that the new information, “in essence, preclude[s] the Prosecution Team
20 from potentially introducing relevant evidence, thereby violating the Prosecution Team’s evidentiary
21 rights.” (page 4, ln. 8-10.) This argument does not make sense and it is difficult to imagine how
22 the Prosecution Team could be surprised that Kennametal complied with the Prosecution Team’s
23 own subpoena.

24 **D. Kennametal Informed Prosecution Team of Arguments Well Before Hearing**

25 The Prosecution Team argues that it can only be reasonably expected to respond to those
26 comments that are raised during the comment period and that it was deprived of sufficient time
27 to respond to the discharger’s arguments or pursue related discovery and interrogatories. Setting

28 ³ See, e.g., page 5, lines 18-20 of the Prosecution Team’s Rebuttal Brief – Nevada Scheelite.

1 aside the fact that the arguments were raised during the comment period, a claim that additional
2 discovery is necessary demonstrates that the Prosecution Team believes it does not have
3 sufficient evidence to name Kennametal. Furthermore, the Prosecution Team had sufficient time
4 to respond to the arguments of Kennametal and to pursue discovery. Counsel for Kennametal
5 had a conversation with counsel for the Prosecution Team and counsel for Sunoco on August 15,
6 2013 at which time the specifics of Kennametal’s arguments were discussed.⁴ Counsel for
7 Kennametal also met with the entire Prosecution Team on March 4, 2014 at which time the legal
8 position of Kennametal was provided in detail. The Prosecution Team also showed it was aware
9 of the issue when it included in its subpoena to Kennametal dated February 11, 2014, a request
10 for “all documents that refer or relate to Nevada Scheelite Corporation, including any contact
11 with or connection to Kennametal, Inc.” Both the meeting on August 15, 2013 and the subpoena
12 issued by the Prosecution team occurred prior to the deadline for the Prosecution Team to submit
13 its evidence for this hearing. Nothing precluded the Prosecution Team from seeking discovery at
14 any time since the Board granted Kennametal’s request for hearing. The claims alleged within
15 the motion *in limine* are without merit and the motion must be denied.

16 **E. Prosecution Team Not Prejudiced**

17 The Prosecution Team’s reliance on *English v. City of Long Beach*, 35 Cal.2d 155 (1950)
18 is misplaced. In that case, the issue was whether prejudice existed when members of the Board
19 who were to conduct a hearing, took evidence outside the hearing and outside the presence of the
20 petitioner and his attorney, and ultimately relied on this evidence to arrive at their decision.
21 *English* at 157-158. Kennametal has not introduced any evidence that is unknown to the
22 Prosecution Team and has not precluded the Prosecution Team the ability to refute, test or
23 explain the evidence. On the other hand, Kennametal would be prejudiced should the
24 Prosecution Team rely on evidence discovered or produced after the CAO was issued to support
25 findings in the CAO for which the Prosecution Team bears the burden of proof.

26 **F. Prosecution Team Attempting to Alter the Burden of Proof**

27 The Prosecution Team also utilizes *English* to suggest that the burdens of proof have

28 ⁴ See attached declaration of Christopher M. Sanders.

1 been reversed. The Prosecution Team argues that Kennametal has not sufficiently informed the
2 Prosecution Team of the evidence against it. The Prosecution Team makes this argument more
3 clear in its rebuttal brief when it argues that Kennametal has the burden of proving the standards
4 of Water Code section 13304 have not been met. The Prosecution Team confuses a hearing on
5 an appeal of an order to the State Water Resources Control Board with a hearing at the Regional
6 Board to determine whether the order should be issued. The burden still belongs to the Regional
7 Board to provide substantial evidence for each of the elements of the claim.

8 **G. Prosecution Team’s Request is Not Proper Pursuant to a Motion *In Limine***

9 The Prosecution Team requests that the Regional Board continue the hearing should the
10 Prosecution Team be found to have failed to meet its burden of proof. Not only is this an
11 improper request within a motion *in limine*, but it is a *de facto* admission that the Regional Board
12 does not have sufficient evidence to name Kennametal.

13 **H. Regional Board Did Not Provide Sufficient Notice or the Opportunity To Be Heard**

14 Finally, the Prosecution Team seeks to limit comments to those received during the
15 “comment period” it provided to the parties when it issued the draft CAO on September 12,
16 2012. Due process principles require reasonable notice and opportunity to be heard before
17 governmental deprivation of a significant property interest. The Prosecution Team had an
18 obligation to provide sufficient notice and an opportunity to be heard if it was intending to
19 conduct a quasi-adjudicative proceeding. However, the Prosecution Team did not provide
20 adequate notice when it issued a letter seeking comments only “with respect to the parties named
21 in the order” not even the entire Order.⁵ This cannot be considered reasonable notice and the
22 motion *in limine* should be denied if for no other reason than the Board cannot limit comments to
23 a defective notice.

24 **IV. CONCLUSION**

25 Kennametal has not offered evidence or raised new arguments that were not previously
26 raised. Furthermore, Kennametal has complied with the hearing procedures for this hearing in
27 the submission of its evidence and briefing. The Prosecution Team’s claims of surprise are

28 ⁵ See letter from Anna Kathryn Benedict to Mr. Adam Baas, et al, dated September 12, 2012, attached.

1 without merit and Kennametal respectfully requests that the Prosecution Team's motion *in limine*
2 be denied.

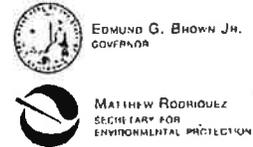
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4 Dated: 24 March 2014

Respectfully submitted,

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7 Christopher M. Sanders
8 ELLISON, SCHNEIDER & HARRIS, LLP

9 Robert W. Thomson
10 BABST CALLAND
11 CLEMENTS AND ZOMNIR. P.C.

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Attorneys for Petitioner, Kennametal Inc.



State Water Resources Control Board

September 12, 2012

(Via Email & Certified Mail)

Mr. Adam Baas
Mr. John D. Edgcomb
Edgcomb Law Group
115 Sansome Street, Suite 700
San Francisco, California 94104
abaas@edgcomb-law.com
CM NO. 7004 2510 0003 9153 3881

Mr. Peter Ton, Esq.
Mr. Jon K. Wactor, Esq.
Wacker & Wick LLP
180 Grand Avenue, Suite 950
Oakland, California 94612
pton@ww-envlaw.com
CM NO. 7004 2510 0003 9153 4383

Ms. Kathryn Tobias
Senior Staff Counsel
California Department of Parks and Recreation
1416 9th Street, 14th Floor
Sacramento, California 95814
ktobias@parks.ca.gov
CM NO. 7004 2510 0003 3898

(Via Certified Mail Only)

Ms. Patricia S. Port
Environmental Office
U.S. Department of Interior – Regional
Jackson Center One
1111 Jackson Street, Suite 520
Oakland, California 94607
CM NO. 7004 2510 0003 9153 3904

Mr. Jack Wessman
Ms. Carolyn Wessman
P.O. Box 949
Clayton, California 94517
CM NO. 7004 2510 0003 9153 3911

Ms. Emily T. Lewis
Counsel for Kennametal, Inc.
BCCZ Corporation
Two Gateway Center
Pittsburgh, Pennsylvania 15222
CM NO. 7004 2510 0003 9153 3928

**RE: DRAFT CLEANUP AND ABATEMENT ORDER FOR THE MOUNT DIABLO
MERCURY MINE LOCATED IN CONTRA COSTA COUNTY**

To All Responsible Parties:

Attached please find the DRAFT Cleanup and Abatement Order for the Mount Diablo Mercury Mine located in Contra Costa County. Please let me know by October 12, 2012, if you have any comments or concerns with respect to the parties named in the order.¹

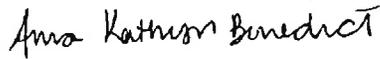
¹ Mt. Diablo Quicksilver, Co., Ltd. is a dissolved entity and, after an exhaustive search, no office, directors, or person having charge of its assets or any agent of process, was identified. Our office will also be providing Mt. Diablo Quicksilver, Co., Ltd. with a copy of the order pursuant to California Corporations Code section 2011, and in accordance with the California Water Code and all other applicable laws and regulations.

CHARLES R. HOPPIN, CHAIRMAN | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | www.waterboards.ca.gov

If you have any questions, please do not hesitate to contact me by telephone at (916) 323-6848, or by email at abenedict@waterboards.ca.gov, or Senior Staff Counsel Julie Macedo by telephone at (916) 323-6847 or by email at jmacedo@waterboards.ca.gov.

Sincerely,



Anna Kathryn Benedict
Senior Staff Counsel
Office of Enforcement

Attachments

cc: *(with attachment)*

Ms. Jan K. Wactor, Esq. *(Via U.S. Mail)*
Wactor & Wick LLP
180 Grand Avenue, Suite 950
Oakland, California 94612

Ms. Lisa A. Runyon, Esq. *(Via U.S. Mail)*
Senior Counsel
Sunoco, Inc.
1735 Market Street, Suite LL
Philadelphia, Pennsylvania 19103-7583

Kennametal Inc. *(Via U.S. Mail)*
1600 Technology Way
Latrobe, Pennsylvania 15650-4647

California Department of Parks and Recreation *(Via U.S. Mail)*
Bay Area District
96 Mitchell Canyon Road
Clayton, California 94517

U.S. Department of Interior DMEA *(Via U.S. Mail)*
1849 "C" Street, N.W.
Washington D.C. 20240

Central Valley Region Water Quality Control Board *(Via email only)*
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670-6114

Pamela Creedon
Executive Officer

Rick Moss
Assistant Executive Officer

Clean up and Compliance Branch
Ross Atkinson
Victor Izzo
Robert Busby

cc: *(continued, without attachment)*

State Water Resources Control Board
Office of the Chief Counsel
Michael Lauffer
Chief Counsel

(Via email only)

Patrick Pulupa
Staff Counsel

Office of Enforcement
Julie Macedo
Senior Staff Counsel

