

HEARING OF THE CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL  
BOARD

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

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

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

1. Evidence

The Prosecution Team is relying upon the evidence now present in the public files of the Central Valley Regional Water Quality Control Board for the Wide Awake Mercury Mine matter, and has not identified any witnesses for presentation with respect to the Wide Awake Mine matter at the hearing scheduled for October 7/8/9, 2009, other than three Regional Board staff. Homestake will rely upon the evidence already present in the public files for the Wide Awake Mine, and in particular those portions of the TetraTech (2003) report and the Assessor Parcel map relied upon by the Prosecution Team in identifying the areas from which alleged discharges have occurred (Attachments 1 and 2).

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

3. Policy Statements

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

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

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

- Homestake has no current connection whatsoever to the Wide Awake Mine Property – which the Prosecution Team does not appear to contest.
- Homestake has no connection to the operations at the Wide Awake Mine that produced the mining waste that the Regional Board seeks to address through this proposed order – which the Prosecution Team also does not appear to contest. Specifically,
  1. Homestake did not own the land or operate the mine at the time the mining wastes at issue were generated (operations at the Wide Awake Mine ended many decades prior to 1978).
  2. Homestake did not operate any mine during the period it held a lease on the Property.
- Homestake's limited exploration activities at the Wide Awake did not involve disturbance of the waste rock or tailings piles on the Wide Awake Property, let alone cause discharge of mercury from those materials into Sulphur Creek. (Affidavit of Karl Burke, Attachment 3).
- As a term lessee for purposes of mining exploration on the Wide Awake Property, Homestake did not have, as a matter of either law or fact, management responsibility for conditions on the Wide Awake Mine Property, where, indeed, Homestake was not a tenant in exclusive possession, with the owner reserving use of the surface for multiple purposes, as well as the right to lease to others for geothermal and oil and gas exploration and development.
- Any liability of Homestake for the discharge of mercury from the Wide Awake Mine Property is reasonably divisible by duration and nature of the activities on the property, from those of other potentially responsible parties named or not named in the proposed CAO.
- More broadly, it is not appropriate for Homestake to be liable for activities resulting in the discharge of mercury to Sulphur Creek for which it demonstrably had no involvement, which certainly excludes liability for mercury from natural sources,

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

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

The Prosecution Team initially suggested that Homestake's exploration work at the Wide Awake Mine Property might have resulted in the discharge of mercury to Sulphur Creek (Attachment 5). However, as shown by the affidavit of Mr. Burke, while Homestake did conduct very limited exploratory activities on the identified Assessor Parcels for the Wide Awake Mine at various times in the period 1978-1992, those activities did not include any road work, and very limited drilling operations -- seven drill pads, none covering an area large than 30 by 50 feet, occupied for a very short period of time, and all reclaimed after use. Moreover, none of the pads or related work entailed disturbance of mine adits, waste rock or tailings piles or the unnamed tributary alleged to be the source of mercury discharges from the Wide Awake Property to Sulphur Creek.

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

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

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

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

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

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

As discussed above, there is no reason to believe Homestake's actual activities under the lease that covered, *inter alia*, the Wide Awake Property, resulted in any actual discharge of mercury to Sulphur Creek. The Prosecution Team, however, contends that Homestake, simply by virtue of its status as a lessee, should be jointly and severally liable with the owners responsible for management of the property. Homestake did not have exclusive possession of the Wide Awake or any of the other parcels covered under its lease with Trebilcote. In the lease at issue here, Trebilcote expressly reserved use of the surface for cattle grazing – identified in the TetraTech report as another activity increasing mercury discharges to Sulphur Creek – and other agricultural activities and related water development. Moreover, Trebilcote not only reserved the right to lease the property to other parties for activities such as exploration and development of geothermal and oil and gas resources, but noted existing leases for such purposes on the lease at the time it was signed by Homestake. (Exhibit C to Attachment 3). The Prosecution Team has not included these lessees as Dischargers on the draft Wide Awake CAO.

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

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

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

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

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

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

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

It should go without saying – but in light of the broad scope of the draft CAOs and the position of the Prosecution Team, it bears repeating – that neither Homestake nor any other party given notice of a Cleanup and Abatement Order for Sulphur Creek should be responsible for addressing the many acknowledged and significant natural sources of mercury to Sulphur Creek. The mercury in Sulphur Creek is not just from anthropogenic sources – which includes not just mining carried out a century ago by persons not party to this proceeding, but also such activities as streambank erosion exacerbated by grazing, and erosion from the forty-five miles of unpaved roads and jeep trails in the Sulphur Creek sub-watershed<sup>2</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

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

contribution from the Wide Awake,<sup>3</sup> and whatever remediation is required, those natural sources will continue to discharge to Sulphur Creek in the future. Indeed, during an on-site inspection of the Central Mine Property carried out in 1997, a staff engineer from the Regional Board offered his opinion that the mercury in the lower portion of Sulphur Creek came from those natural sources, not former mining activities. (Exhibit D to Attachment 4). That contribution from natural sources is reasonably determinable and divisible and it is not something for which Homestake has responsibility.

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

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

## **Conclusion**

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

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

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

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

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



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