

Central Valley Regional Water Quality Control Board

HEARING PROCEDURE
FOR RECONSIDERATION OF CLEANUP AND ABATEMENT ORDER
R5-2013-0701

ISSUED TO
SUNOCO, INC., KENNAMETAL INC., et al.
Mt. Diablo Mercury Mine

Contra Costa County

SCHEDULED FOR June 5/6, 2014

PLEASE READ THIS HEARING PROCEDURE CAREFULLY. FAILURE TO COMPLY WITH THE DEADLINES AND OTHER REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF YOUR DOCUMENTS AND/OR TESTIMONY.

Overview

On June 5/6, 2014, the Central Valley Regional Water Quality Control Board ("Board") will conduct a hearing to reconsider Cleanup and Abatement Order R5-2013-0701 ("CAO"). The Prosecution Team proposes that the Board affirm the CAO in its entirety, which requires the dischargers named in the CAO to investigate and clean up the Mount Diablo Mercury Mine site ("Site") in accordance with the guidelines and tasks set forth in the order. Sunoco, Inc. and Kennametal, Inc. have separately requested that they be removed from the CAO, arguing they have been erroneously named as dischargers. The hearing is currently scheduled to be conducted before the Board during its June 5/6, 2014 meeting.

The purpose of the hearing is to consider relevant evidence and testimony regarding the CAO. This CAO was previously issued by the Executive Officer on April 16, 2013. At a Board meeting on July 25, 2013, counsel for Kennametal requested the Board to hold a hearing on the issuance of this CAO. The Board by letter dated August 8, 2013 granted the request for the Board to reconsider the CAO. At this hearing, the Board will consider whether to affirm adoption of the CAO, whether to modify the CAO or remand the CAO to the Executive Officer, or whether to rescind the CAO. The public hearing will commence at 8:30 a.m. or as soon thereafter as practical, or as announced in the Board's meeting agenda. The meeting will be held at:

11020 Sun Center Drive, Suite 200, Rancho Cordova, California.

An agenda for the meeting will be issued at least ten days before the meeting and posted on the Board's web page at:

http://www.waterboards.ca.gov/centralvalley/board_info/meetings

Hearing Procedure

The hearing will be conducted in accordance with this Hearing Procedure, which has been approved by the Board Chair for the adjudication of such matters, and the California Code of Regulations, title 23. The procedures governing adjudicatory hearings before the Central Valley Water Board may be found at California Code of Regulations, title 23, section 648 et seq., and are available at

<http://www.waterboards.ca.gov>

Copies will be provided upon request. Except as provided in Section 648(b) and herein, Chapter 5 of the Administrative Procedures Act (Gov. Code, § 11500 et seq.) does not apply to this hearing.

The parties shall attempt to resolve objections to this Hearing Procedure BEFORE submitting objections to the Advisory Team.

Separation of Prosecutorial and Advisory Functions

To help ensure the fairness and impartiality of this proceeding, the functions of those who will act in a prosecutorial role by presenting evidence for consideration by the Board (the "Prosecution Team") have been separated from those who will provide legal and technical advice to the Board (the "Advisory Team"). Members of the Advisory Team are: Ken Landau, Assistant Executive Officer, Alex MacDonald, Senior Water Resource Control Engineer, David Coupe, Senior Staff Counsel, Office of Chief Counsel, and Alex Mayer, Staff Counsel, Office of Chief Counsel. Members of the Prosecution Team are: Pamela Creedon, Executive Officer, Robert Busby, Supervising Engineering Geologist, Andrew Altevoigt, Assistant Executive Officer, Ross Atkinson, Associate Engineering Geologist, and Anna Kathryn Benedict, Senior Legal Counsel, Office of Enforcement.

Any members of the Advisory Team who normally supervise any members of the Prosecution Team are not acting as their supervisors in this proceeding, and vice versa. Pamela Creedon regularly advises the Central Valley Water Board in other, unrelated matters, but is not advising the Central Valley Water Board in this proceeding. Other members of the Prosecution Team act or have acted as advisors to the Central Valley Water Board in other, unrelated matters, but they are not advising the Central Valley Water Board in this proceeding. Members of the Prosecution Team have not had any ex parte communications with the members of the Central Valley Water Board or the Advisory Team regarding this proceeding.

Hearing Participants

Participants in this proceeding are designated as either "Designated Parties" or "Interested Persons." Designated Parties may present evidence and cross-examine witnesses and are subject to cross-examination. Interested Persons may present non-evidentiary policy statements, but may not cross-examine witnesses and are not subject to cross-examination. Interested Persons generally may not present evidence (e.g., photographs, eye-witness testimony, monitoring data). At the hearing, both Designated Parties and Interested Persons may be asked to respond to clarifying questions from the Central Valley Water Board, staff, or others, at the discretion of the Board Chair.

The following participants are hereby designated as **Designated Parties** in this proceeding:

1. **Central Valley Water Board Prosecution Team**
2. **Sunoco, Inc. and**
3. **Kennametal, Inc.**

Requesting Designated Party Status

Persons who wish to participate in the hearing as a Designated Party, and have not already been named as a Designated Party by this Hearing Procedure, must request designated party status by submitting a request in writing so that it is received no later than the deadline listed under "Important Deadlines" below. The request shall include an explanation of the basis for status as a Designated Party (i.e., how the issues to be addressed at the hearing affect the person, the need to present evidence or cross-examine witnesses), along with a statement explaining why the parties listed above do not adequately represent the person's interest. Any objections to these requests for designated party status must be submitted so that they are received no later than the deadline listed under "Important Deadlines" below.

Primary Contacts**Advisory Team:**

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Prosecution Team:

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Designated Parties:

Sunoco, Inc.
Represented by Edgcomb Law Group LLP
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Adam P. Baas
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Kennametal Inc.
Represented by Ellison Schnieder & Harris, L.L.P.
Christopher M. Sanders
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Sacramento, California 95816

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Ex Parte Communications

Designated Parties and Interested Persons are forbidden from engaging in ex parte communications with a Board Member or a member of the Board's Advisory Team regarding this matter. An ex parte communication is a written or verbal communication related to the investigation, preparation, or adoption of the Cleanup and Abatement Order between a Designated Party or an Interested Person and a Board Member or a member of the Board's Advisory Team (see Gov. Code, § 11430.10 et seq.). However, if the communication is copied to all other persons (if written) or is made in a manner open to all other persons (if verbal), then the communication is not considered an ex parte communication. Communications regarding non-controversial procedural matters are also not considered ex parte communications and are not restricted.

Hearing Time Limits

To ensure that all participants have an opportunity to participate in the hearing, the following time limits shall apply: Sunoco, Inc. and Kennametal, Inc. will each have **30 minutes** to present evidence (including evidence presented by witnesses called by the Designated Party), to cross-examine witnesses (if warranted), and to provide a closing statement. The Prosecution shall have **1 hour** to present evidence (including evidence presented by witnesses called by the Designated Parties), to cross-examine witnesses (if warranted), and to provide a closing statement. Each Interested Person shall have 3 minutes to present a non-evidentiary policy statement. Participants with similar interests or comments are requested to make joint presentations, and participants are requested to avoid redundant comments. Participants who would like additional time must submit their request to the Advisory Team so that it is received no later than the deadline listed under "Important Deadlines" below. Additional time may be provided at the discretion of the Advisory Team (prior to the hearing) or the Board Chair (at the hearing) upon a showing that additional time is necessary. Such showing shall explain what testimony, comments, or legal argument requires extra time, and why it could not have been provided in writing by the applicable deadline.

A timer will be used, but will not run during Board questions or the responses to such questions, or during discussions of procedural issues.

Submission of Evidence and Policy Statements

The Prosecution Team and all other Designated Parties must submit the following information in advance of the hearing:

1. All evidence (other than witness testimony to be presented orally at the hearing) that the parties would like the Board to consider. Evidence and exhibits already in the public files of the Board may be submitted by reference, as long as the exhibits and their location are clearly identified in accordance with California Code of Regulations, title 23, section 648.3. Board members will not generally receive copies of materials incorporated by reference unless copies are provided, and the referenced materials are generally not posted on the Board's website.
2. All legal and technical arguments or analysis.
3. The name of each witness, if any, whom the parties intend to call at the hearing, the subject of each witness' proposed testimony, and the estimated time required by each witness to present direct testimony.
4. The qualifications of each expert witness, if any.

Prosecution Team: The Prosecution Team's information must include the legal and factual basis for its claims against Sunoco, Inc. and Kennametal, Inc. (and any additional Designated Party); a list of all evidence on which the Prosecution Team relies, which must include, at a minimum, all documents cited in the CAO, Staff Report, or other material submitted by the Prosecution Team; and the witness information required under items 3-4 for all witnesses, including Board staff, no later than the deadline listed under "Important Deadlines" below.

Designated Parties: All Designated Parties shall submit comments regarding the CAO, along with any additional supporting evidence not cited by the Prosecution Team, no later than the deadline listed under "Important Deadlines" below.

Rebuttal: Any Designated Party that would like to submit evidence, legal analysis, or policy statements to rebut information previously submitted by other Designated Parties shall submit this rebuttal information so that it is received no later than the deadline listed under "Important Deadlines" below. "Rebuttal" means evidence, analysis or comments offered to disprove or contradict other submissions. Rebuttal shall be limited to the scope of the materials previously submitted. Rebuttal information that is not responsive to information previously submitted may be excluded. Rebuttal information that is untimely may be excluded.

Copies: Board members will receive copies of all submitted materials. The Board Members' hard copies will be printed in black and white on 8.5"x11" paper from the Designated Parties' electronic copies. Designated Parties who are concerned about print quality or the size of all or part of their written materials should provide an extra nine paper copies for the Board Members. For voluminous submissions, Board Members may receive copies in electronic format only. Electronic copies will also be posted on the Board's website. Parties without access to computer equipment are strongly encouraged to have their materials scanned at a copy or mailing center. The Board will not reject materials solely for failure to provide electronic copies.

Other Matters: The Prosecution Team will prepare a summary agenda sheet (Summary Sheet) and will respond to all significant comments. The Summary Sheet and the responses shall clearly state that they were prepared by the Prosecution Team. The Summary Sheet and the responses will be posted online, as will revisions to the proposed Order.

Interested Persons: Interested Persons who would like to submit written non-evidentiary policy statements are encouraged to submit them to the Advisory Team as early as possible, but they must be received by the deadline listed under "Important Deadlines" to be included in the Board's agenda package. Interested Persons do not need to submit written comments in order to speak at the hearing.

Prohibition on Surprise Evidence: In accordance with California Code of Regulations, title 23, section 648.4, the Board endeavors to avoid surprise testimony or evidence. Absent a showing of good cause and lack of prejudice to the parties, the Board Chair may exclude evidence and testimony that is not submitted in accordance with this Hearing Procedure. Excluded evidence and testimony will *not* be considered by the Board and will not be included in the administrative record for this proceeding.

Presentations: Power Point and other visual presentations may be used at the hearing, but their content shall not exceed the scope of other submitted written material. These presentations must be provided to the Advisory Team at or before the hearing both in hard copy and in electronic format so that they may be included in the administrative record.

Witnesses: All witnesses who have submitted written testimony shall appear at the hearing to affirm that the testimony is true and correct, and shall be available for cross-examination.

Request for Pre-hearing Conference

A Designated Party may request that a pre-hearing conference be held before the hearing in accordance with Water Code Section 13228.15. A pre-hearing conference may address any of the matters described in subdivision (b) of Government Code Section 11511.5. Request must contain a description of the issues Proposed to be discussed during that conference, and must be submitted to the Advisory Team, with a copy to all other designated parties, as early as practicable.

Evidentiary Objections

Any Designated Party objecting to written evidence or exhibits submitted by another Designated Party must submit a written objection to the Advisory Team and all other designated parties so that it is received by 5 p.m. on March 14. Any party responding to the objection must submit a written response to the Advisory Team and all other designated parties so that it is received by 5 p.m. on March 24, 2014. The Advisory Team will notify the parties about further action to be taken on such objections and when that action will be taken.

Evidentiary Documents and File

The CAO and related evidentiary documents are on file and may be inspected or copied at the Central Valley Water Board office at 11020 Sun Center Drive, Rancho Cordova, CA 95670. The CAO is hereby incorporated by reference into the administrative record for this Matter. "Related evidentiary documents" and comments received shall be considered part of the official administrative record for this hearing to the extent a designated party or interested person (as applicable) submit the document(s) or comments or incorporates them by reference, in accordance with "Submission of Evidence and Policy Statements," above. This file shall be considered part of the official administrative record for this hearing. All timely submittals received for this proceeding will be added to this file and will become a part of the administrative record, absent a contrary ruling by the Board's Chair. Many of these documents are also posted on-line at:

http://www.waterboards.ca.gov/centralvalley/board_decisions/tentative_orders/index.shtml

Although the web page is updated regularly, to assure access to the latest information, you may contact Ross Atkinson (contact information above) for assistance obtaining copies.

Questions

Questions concerning this proceeding may be addressed to the Advisory Team attorney (contact information above).

IMPORTANT DEADLINES

All required submissions must be received by 5:00 p.m. on the respective due date.

January 24, 2014	<p>§ Objections due on Hearing Procedure.</p> <p>§ Deadline to request “Designated Party” status.</p> <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
January 28, 2014	<p>§ Deadline to submit opposition to requests for Designated Party status.</p> <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
February 4, 2014	<p>§ Advisory Team issues decision on requests for designated party status.</p> <p>§ Advisory Team issues decision on Hearing Procedure objections.</p>
February 21, 2014	<p>§ Prosecution Team’s deadline for submission of information required under “Submission of Evidence and Policy Statements,” above.</p> <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons</p> <p><u>Electronic and Hard Copies to:</u> Advisory Team Primary Contact, Advisory Team Attorney</p>
March 14, 2014	<p>§ Designated Parties’ (other than Prosecution Team) deadline to submit all information required under “Submission of Evidence and Policy Statements” above. This includes all written comments regarding the CAO.</p> <p>§ Interested Persons’ comments are due.</p> <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
March 20, 2014	<p>§ Prosecution Team shall submit its rebuttal evidence, any rebuttal to legal arguments and/or policy statements, and all evidentiary objections.</p> <p>§ Deadline to submit requests for additional time.</p> <p>§ If rebuttal evidence is submitted, all requests for additional time (to respond to the rebuttal at the hearing) must be made within 3 working days of <i>this</i> deadline.</p> <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
March 24, 2014	<p>§ All Designated Parties’ deadline for responding to evidentiary objections.</p>
March 25, 2014 [†]	<p>§ Prosecution Team submits Summary Sheet and responses to comments.</p> <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons</p> <p><u>Electronic and Hard Copies to:</u> Advisory Team Primary Contact, Advisory Team Attorney</p>
June 5/6	<p>§ Hearing</p>

[†] This deadline is set based on the date that the Board compiles the Board Members’ agenda packages. Any material received after this deadline will not be included in the Board Members’ agenda packages.