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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

CENTRAL VALLEY REGION

In the matter of:

DRAFT CLEANUP AND ABATEMENT ORDER

THE WIDE AWAKE MERCURY MINE

COLUSA COUNTY

**OPPOSITION TO ALLEGATIONS OF LIABILITY
SUBMITTED BY MR. AND MRS. ROBERT AND JILL LEAL**

September 15, 2009

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1. INTRODUCTION

Robert Leal is a farmer. His wife Jill is a housewife. He stands accused of owning the Wide Awake Mine Site (the “Site”) for six months—between February 28, 1990 and August 15, 1990. He did not own the mining rights, which were owned by the Trebilcott Trust and leased to Homestake Mining. He did not and does not know anything about mercury mining, and never conducted any activities on the property. He visited the area only once, and appears not to have been to the Site itself, because he did not see the facilities and waste piles shown in the photographs provided by Regional Board staff. (Amended Declaration of Robert Leal (attached as Exhibit 1), ¶¶ 9-10.)

Earlier this year, Regional Board staff asked for comments on the proposed cleanup and abatement order (the “Draft Order”), and Mr. and Mrs. Leal submitted extensive comments (the “Comments”) in July 2009. The Comments, with all their exhibits, have already been submitted as part of this proceeding, and are incorporated here in full by reference. For the convenience of the reader of this opposition brief, the Comments (without all their exhibits) are attached as Exhibit 2.

In the Comments, Mrs. Leal explained that she had never owned any interest in the Site. Regional Board staff have now concurred, and have removed her name from the order. In section 2, below, Mrs. Leal thanks staff for that correction.

The Comments also provided many reasons why Mr. Leal should not be held liable. Regional Board staff did not respond to the great majority of reasons and arguments provided by the Comments, and have thereby conceded them.

The hearing procedures established for the Draft Order required Regional Board staff (referred to as the “Prosecution Team”) to submit, by August 26, 2009, “All evidence” other than witness testimony, and “All legal and technical arguments or analysis”. (Revised Hearing Procedures, attached to e-mail from L.Okun dated August 3, 2009, at 6-8.) The hearing procedures emphasized that, in accordance with regulations, “the Central Valley Water Board endeavors to avoid surprise testimony.” (*Id.* at 7.) Regional Board staff have therefore had their opportunity to present all their evidence and make all their arguments.

Particularly notable is the absence of any argument, by the Prosecution Team, that Mr. Leal had notice of the alleged nuisance. Both case law and State Board orders hold that a former owner of property cannot be held liable when that person was not on notice of the nuisance. As explained in section 3, below, Mr. Leal’s name should be removed from the Draft Order because he was not on notice, and for the many other arguments asserted in the Comments.

Regional Board staff argue that Mr. Leal should be held liable in accordance with the *Wenwest* decision of the State Board. But that case that a former owner could be held liable only if he had notice, as explained in section 3 below. And then it went on to hold that a former

owner should not be held liable, even if it had notice, if it had no part in the activity that caused the waste, and if other factors argued in favor of no liability. These factors also exonerate Mr. Leal, as explained in section 4 below.

Regional Board staff rely on the language of Water Code § 13304. But a close look at § 13304, and at the evidence staff have submitted, show that the language of the section is not sufficient to hold Mr. Leal liable, as explained in section 5 below. The Draft Order is not directed at cleaning up any past discharges that may have occurred during Mr. Leal's ownership, but rather is directed only at preventing future discharges. Mr. Leal has no responsibility for any discharges that occurred after he sold the property.

To obtain an order under § 13304, staff must show that the discharges at issue have caused a condition of pollution or nuisance. But, remarkably, they have not been able to show any condition of pollution or nuisance. They have asserted that the discharges caused water quality objectives to be exceeded, but the argument is not supported by any identification of any objective that has been exceeded.

If Mr. Leal is held liable at all, he should be held secondarily liable, as explained in section 6 below.

Finally, in section 7 below, Mr. Leal identifies the witnesses he will call and requests a total of 3.5 hours for direct examination, cross-examination, and argument.

For all these reasons, Mr. Leal is not liable for the discharges covered by the Draft Order. His name should be removed from the order.

2. MRS. LEAL THANKS THE REGIONAL BOARD STAFF

In the Comments, Mrs. Leal explained that she has never owned the Site. (Comments at 3.) Regional Board staff responded by removing her name from the list of persons that would be subject to the cleanup and abatement order. Mrs. Leal thanks the Regional Board staff for removing her name.

3. STAFF CONCEDE THAT MR. LEAL IS NOT LIABLE BECAUSE HE DID NOT RECEIVE NOTICE OF THE NUISANCE

Regional Board staff do not dispute most of the legal arguments in the Comments. By declining to present any evidence or argument in response, staff have implicitly conceded many of the arguments made in the Comments. In particular, they have conceded that Mr. Leal is not liable because he was not aware that Site conditions were allegedly creating a nuisance.

The Comments explained that Water Code § 13304 "must be construed in light of common law principles . . . of public nuisance". (Comments at 4, quoting *City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, 38, quotation marks removed; excerpts from the case, with key language highlighted, are attached as Exhibit 3.) The section must also be construed consistent with State Board decisions about § 13304.

The Comments explained that, under both case law and State Board decisions, a former owner cannot be held liable if that owner did not have notice of the nuisance. The Comments first quotes the California Supreme Court, which in 1870 held that “a party who is not the original creator of a nuisance is entitled to notice that it is a nuisance, and a request must be made, that it may be abated, before an action will lie for that purpose”. (Comments at 6, quoting (*Grigsby v. Clear Lake Water Works Co.* (1870) 40 Cal. 396, 407; case excerpts attached as Exhibit 4.)

The same requirement—a former owner must have “knowledge” to be held liable—was adopted by the State Board in the *Wenwest* decision:

. . . we apply a three-part test to former owners: . . . (2) did they have knowledge of the activities which resulted in the discharge?

(Comments at 13, quoting *Petitions of Wenwest, Inc.*, Order No. WQ 92-13 (1992) 1992 Cal. ENV LEXIS 19, at *5; case excerpts attached as Exhibit 5.)

Here Mr. Leal did not have notice, or knowledge, of the activities that resulted in the discharge. Regional Board staff are asserting that the discharge was from piles of waste rock. Staff have not submitted any evidence that Mr. Leal was aware of these conditions, and have not argued that he was aware.

In fact, Mr. Leal was not aware that mercury was being discharged from the Site. (Amended Leal Decl., ¶ 11.)

In short, both case law and State Board decisions make clear that Mr. Leal cannot be held liable for discharges from the Site because he was not aware of them at the time he owned an interest in it.¹

¹ Regional Board staff also do not dispute that former landowners are generally not liable for dangerous conditions on the land (Comments at 5-6), there is no evidence that the site was causing a nuisance in the early 1990s, or is causing a nuisance now (Comments at 7-10, see section 5.B below), Mr. Leal did not neglect to abate a continuing nuisance (Comments at 10-11), any mercury discharged in the early 1990s is long gone (Comments at 11-12), Mr. Leal should not be singled out for harsh treatment (Comments at 16), Mr. Leal, if he is named at all, should be named as secondarily liable (Comments at 16, see section 6 below), Mr. Leal is not liable under Water Code § 13267 (Comments at 18-19), and that the draft order is a “taking” in violation of the Constitution (Comments at 20). By not submitting any argument or evidence in response to these assertions, Regional Board staff have implicitly conceded them. Mr. Leal should be found not liable, and his name removed from the order, for all these reasons in addition to those set out in the text.

**4. MR. LEAL IS ALSO NOT LIABLE BECAUSE
OF THE WENWEST FACTORS**

Regional Board staff cite the *Wenwest* decision of the State Board as one of the cases they are relying on. In *Wenwest*, the State Board decided that some former owners should *not* be held liable:

No order issued by this Board has held responsible for a cleanup a former landowner who had no part in the activity which resulted in the discharge of the waste and whose ownership interest did not cover the time during which that activity was taking place. . . .

In this case, the gasoline was already in the ground water and the tanks had been closed prior to the brief time Wendy's owned the site. They were told about the pollution problem . . . They took no steps to remedy the situation. On the other hand, they did nothing to make the situation any worse. Had a cleanup been ordered while Wendy's owned the site, it would have been proper to name them as a discharger. Under the facts as presented in this case, it is not.

(Comments at 14, quoting *Wenwest* at *6-7.) One of the key factors was Wendy's innocence:

* Wendy's had nothing to do with the activity that caused the leaks. (In previous orders in which we have upheld naming prior owners, they have been involved in the activity which created the pollution problem.)

(Comments at 14, citing *Wenwest* at *7-8.) Here, Mr. Leal is in the position that Wendy's was in (only he is even more innocent, because he did not know about the contamination, whereas Wendy's did). Mr. Leal did not put the waste rock where it is, or do anything else that might have made conditions worse. For the same reasons that Wendy was found not to be liable, Mr. Leal is not liable.

5. MR. LEAL IS NOT LIABLE UNDER SECTION 13304

Regional Board staff asserts that Mr. Leal is subject to a cleanup and abatement order under Water Code § 13304 because he "held title to the property during the time when the waste piles were discharging mercury and other pollutants to surface waters, which caused exceedances of water quality objectives." (Staff's submission for Robert Leal ("Staff Submission"), as attached to an e-mail from P. Pulupa dated August 26, 2009, at section entitled Legal Theory [etc].) Note that the alleged discharge is *from the waste piles* into surface waters. For several reasons, however, Mr. Leal is not liable under § 13304.

The authority to issue a cleanup and abatement order comes from Water Code § 13304, which provides as follows:

Any person . . . 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 board, clean up the waste or abate the effects of the waste

(Water Code § 13304(a).) This language establishes that § 13304 (1) applies only to people who have caused or permitted waste to be discharged to waters of the state, or deposited where it will be discharged, (2) applies only when the waste creates or threatens a condition of pollution or nuisance, and (3) authorizes the Regional Board only to order cleanup of *that waste*. Here the draft order does not apply to Mr. Leal because he did not cause or permit the waste rock at issue to be discharged or deposited, and because Regional Board staff have not shown that the waste caused any exceedance of water quality objectives, or any other condition of pollution or nuisance.

A. Mr. Leal Did Not Discharge Or Deposit The Waste Rock At Issue

Regional Board staff have confused two different wastes. Mr. Leal stands accused of discharging mercury *from the waste piles to surface waters*. The wastes he is accused of discharging, therefore, are wastes that *left the site* nearly twenty years ago and are long gone. But the Draft Order does not require the named parties to investigate or abate any *offsite* wastes. Instead, the Draft Order is directed only at the *onsite* waste piles.

Staff do not accuse Mr. Leal of discharging or depositing the waste piles themselves, which are described as “waste rock” and “processed mill tailings”. (Staff Submission at sections entitled Legal Theory, Waste Located on the Site.) Mr. Leal did not discharge or deposit these waste piles at the site. (Amended Leal Decl., ¶ 7.)

In short, Mr. Leal has not “caused or permitted” these waste piles to be deposited onsite. He is therefore not subject to § 13304, which allows a Regional Board to order someone to “clean up the waste” *only* when that person has “caused or permitted” *that waste* to be “discharged to waters of the state, or deposited where it will be discharged”. Mr. Leal has not caused or permitted *the waste piles* to be discharged or deposited, and therefore is not responsible *for those piles*.²

Staff rely on the *Zoecon* decision, but *Zoecon* is readily distinguishable. First, *Zoecon* imposed liability on the *current owner*, not on a past owner. *Zoecon* explained that current owners may be issued waste discharge requirements—the case did not involve cleanup and abatement orders—because there is a continuing discharge of groundwater. The law

²Put another way, the Draft Order is directed only at abating *future discharges* from the waste piles. It is not directed at cleaning up *past discharges* from the waste piles. Mr. Leal is not responsible for any future discharges from the waste piles, and therefore should not be named in the Draft Order.

distinguishes between a current owner and a past owner. A current owner who “neglects to abate a continuing nuisance” is liable for that nuisance. (Civil Code § 3483.) However, with limited exceptions not relevant here, “liability is terminated upon termination of ownership and control”. (Comments at 5, quoting *Preston v. Goldman* (1986) 42 Cal. 3d 108, 110.)

Second, *Zocon* concluded that the current landowner could be held liable because the groundwater at issue in that case continued to discharge, and the landowner could be held liable for the current discharge. Here staff assert that the waste piles continue to discharge. *Zocon* supports the proposition that the current owner is liable for discharges from those waste piles into waters of the state. But it does not support the proposition that former owners can be held liable, because the former owners are no longer discharging anything from the Site.

B. Staff Have No Evidence Of A Condition Of Pollution Or Nuisance

Water Code § 13304 applies only when the waste “creates, or threatens to create, a condition of pollution or nuisance”. Staff assert that “the waste piles were discharging mercury and other pollutants to surface waters, which caused exceedances of water quality objectives.” (Staff Submission at section entitled Legal Theory.) But in their papers, staff do not identify which water quality objective is being exceeded. They do not provide any evidence of any exceedances, and do not make any argument in support of any exceedances.

Mr. Leal, in his Comments, explained that Regional Board staff had not provided any evidence of any exceedance of any water quality objectives, and the assertions made in the Draft Order are wrong, because the numerical “limits” identified are not Regional Board limits and plainly do not apply to Sulphur Creek. (Comments at 7-10.)

Regional Board staff did not respond, and have therefore waived any argument to the contrary.

In short, Mr. Leal is not liable under § 13304 because the Draft Order is directed only at discharges for which Mr. Leal is not responsible, and because Regional Board staff have not presented any evidence that any discharges cause a condition of pollution or nuisance.

6. IF MR. LEAL IS HELD LIABLE, HE SHOULD BE HELD SECONDARILY LIABLE

In the Comments, Mr. Leal argued that if he is held liable, he should be held secondarily liable. (Comments at 16.) Regional Board staff have not responded, and have therefore conceded this issue.

7. WITNESS IDENTIFICATION AND REQUEST FOR ADDITIONAL TIME

Counsel for Mr. Leal expects to call and cross-examine the following witnesses:

Witness	Subject	Time
Robert Leal	Knowledge of property and alleged nuisance	20 minutes
Jill Leal	If needed	10 minutes
Victor Izzo	Cross-examination about lack of Regional Board evidence on key issues, and in response to issues raised on direct	45 minutes
Other Regional Board witnesses	Cross-examination in response to issues raised on direct	15 minutes

In addition, counsel for Robert Leal requests 2 hours for argument, for a total of 3.5 hours of argument, direct examination, and cross-examination. This time is needed because Mr. Leal has submitted more than 25 single-spaced pages of argument, much of it undoubtedly new to members of the Regional Board. Mr. Leal will need time to explain the legal concepts to Regional Board members, who are mostly not lawyers. He will then need to apply the legal concepts to the evidence, or lack of evidence, in a way that is both accurate and understandable to non-lawyers. Regional Board staff will have the advantage of familiarity, and Mr. Leal will need extra time to compensate for their home-court advantage. He will also need extra time to respond to questions and concerns of members of the Regional Board, who will undoubtedly be hearing some of the issues raised for the first time.

8. CONCLUSION

Mr. Leal's name should be removed from the Draft Order.

Dated: September 15, 2009

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By: _____

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