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6 SUNOCO, INC.

7
8 STATE WATER RESOURCES CONTROL BOARD

9 STATE OF CALIFORNIA

10 In the Matter of

11 SUNOCO, INC.,

12
13 Petitioner,

14 For Review of Revised Order to Sunoco,
Inc. to Submit Technical Reports in
15 Accordance with Section 13267 of the
California Water Code, Mount Diablo
Mercury Mine, Contra Costa County,
16 dated June 30, 2009

PETITION NO.

**PETITION FOR REVIEW OF
ACTION**

17
18 Pursuant to California Water Code Section 13320 and Title 23 of the California
19 Code of Regulations §§ 2050 *et seq.*, Petitioner Sunoco, Inc. (“Sunoco” or
20 “Petitioner”) hereby petitions the State Water Resources Control Board (“State
21 Board”) for review of the “Revised Order To Sunoco, Inc. To Submit Technical
22 Reports In Accordance With Section 13267 of the California Water Code, Mount
23 Diablo Mercury Mine, Contra Costa County” (“Revised Order”), adopted by the
24 California Regional Water Quality Control Board, Central Valley Region”
25 (“Regional Board”) dated June 30, 2009. The Revised Order establishes timelines
26 for Sunoco to submit: (1) a potentially responsible party (“PRP”) report; (2) a
27 report that supports its “divisibility” contention; (3) a site investigation work plan;
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1 and, (3) a site investigation report. Sunoco requests a hearing in this matter.

2 **I. PETITIONER**

3 The name and address of Petitioner is:

4 Sunoco, Inc.
5 Attn: Lisa A. Runyon, Senior Counsel
6 Sunoco, Inc.
7 1735 Market St., Ste. LL
8 Philadelphia, PA 19103-7583

9 Sunoco can be contacted through its outside legal counsel:

10 John D. Edgcomb
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15 **II. ACTION OF THE REGIONAL BOARD TO BE REVIEWED**

16 Sunoco requests that the State Board review the Regional Board's "Revised
17 Order To Sunoco, Inc. To Submit Technical Reports In Accordance With
18 Section 13267 of the California Water Code, Mount Diablo Mercury Mine, Contra
19 Costa County," which establishes reporting requirements and names Sunoco as a
20 "discharger" with respect to the Mount Diablo Mercury Mine, which is described
21 in the Revised Order only as an "inactive mercury mine on approximately 109
22 acres on the northeast slope of Mount Diablo in Contra Costa County" (the "Site").
23 A copy of the Revised Order is attached as Exhibit 1.

24 This Petition for Review is a protective filing, and pursuant to 23 Cal. Code
25 Regs. § 2050.5(d). **Petitioner requests that this Petition and the Petition for**
26 **Stay of Action filed concurrently herewith be held in abeyance by the State**
27 **Board until further notice from Sunoco.**

1 **III. DATE OF THE REGIONAL BOARD ACTION**

2 The Regional Board adopted the Revised Order on June 30, 2009.

3 **IV. STATEMENT OF REASONS WHY THE REGIONAL BOARD'S**
4 **ACTION IS INAPPROPRIATE OR IMPROPER**

5 As set forth more fully below, Sunoco seeks State Board review of the
6 Revised Order because the action of the Regional Board with respect to Sunoco is
7 illegal and should be revoked or amended in that the Revised Order: 1) is
8 improperly vague and ambiguous in its description of the Site, making compliance
9 with certainty impossible and unnecessary compliance efforts likely; 2) apparently
10 requires Sunoco to “voluntarily” prepare a PRP report and technical reports for
11 large areas of a Site where it was not a “discharger,” and without providing the
12 required reference to the evidence supporting those requirements, meaning the
13 Regional Board is again acting inconsistent with and beyond the scope of its cited
14 statutory authority; and 3) fails to identify known PRPs as respondents on the
15 Revised Order and make them also responsible for furnishing the required reports.

16 **A. Background.**

17 The Revised Order asserts that the “Mt. Diablo Mercury Mine is an inactive
18 mercury mine on approximately 109 acres on the northeast slope of Mount Diablo
19 in Contra Costa County.” (See Declaration of David T. Chapman In Support of
20 Petition for review and Petition for Stay of Action (“Chapman Decl.”), Exhibit 1,
21 Revised Order, at p. 1.) The Revised Order further asserts that “[p]resently, the
22 mine consists of an open exposed cut and various inaccessible underground shafts,
23 adits and drifts. Extensive waste rock piles and mine tailings cover the hill slope
24 below the open cut, and several springs and seeps discharge from the tailings-
25 covered area.” (Id.) The Revised Order also alleges that “[a]cid mine drainage
26 containing elevated levels of mercury and other metals are being discharged to a
27 pond that periodically overflows into Horse and Dunn Creeks” and that “[f]urther
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1 site investigation is required to assess the extent of pollution discharged from the
2 mine site and to evaluate the remedial options to mitigate the discharge.” (Id.)

3 With respect to Sunoco, the Revised Order alleges that “Cordero Mining
4 Company, owned by Sunoco, Inc. in the 1950s, operated the Mt. Diablo Mine from
5 approximately 1954 to 1956 and was responsible for the past discharge of mining
6 waste.” (Chapman Decl., Ex. 1, Revised Order, at p. 1.) The Revised Order also
7 alleges that “. . . Sunoco Inc. is subject to this Order because of its ownership
8 interest in the Cordero Mining Company, which operated Mount Diablo Mercury
9 Mine and discharged waste to waters of the state. Therefore it is a ‘person[s] who
10 [have] discharged . . . waste’ within the meaning of CWC section 13267.” (Id. at p.
11 2; brackets in original.)

12 The Revised Order also identifies Jack and Carolyn Wessman (“Wessmans”)
13 as the current owners of the Site, but does not order them to participate in the
14 preparation of the required reports. (Chapman Decl., Ex. 1, Revised Order, at p. 1.)
15 The Revised Order does not identify any of the other known former owners or
16 operators of the Site as respondents, but does state that if additional PRPs are
17 identified in the required reports, they may be added to this Order or future orders.
18 (Id. at p. 2.)

19 The Revised Order establishes the following Reporting Requirements related
20 to the Site, which are purportedly supported by California Water Code section
21 13267 (“WC § 13267”):

- 22 1. Sunoco will voluntarily submit a PRP report including a spreadsheet of
23 known owners/operators, periods of ownership/operation, and any
24 information regarding financial status (“PRP report”);
- 25 2. Sunoco will submit a report that supports its “divisibility” contention
26 including figures showing the area leased by Cordero extent of
27 operations, and proposed area of study under the Order. This shall
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1 include the total volume of rock removed from the underground working
2 and an estimate of the total volume of broken rock discharged (use a
3 realistic swell factor to calculate the volume of broken rock)

4 (“Divisibility Report”);

- 5 3. Sunoco will submit an investigation work plan covering the area agreed
6 upon by the Regional Water board and Sunoco. Regional Water Board
7 staff must review and consider the divisibility report and reach agreement
8 with Sunoco on the limits, if any, on the Site to be investigated;
- 9 4. Sunoco will submit an investigation report presenting results of the
10 investigation work plan. (Id. at p. 2.)

11 **B. Legal Bases for Sunoco’s Challenge to the Revised Order.**

12 **1. The Revised Order’s Site Description Is Vague and**
13 **Ambiguous.**

14 The Revised Order’s description of the Site is vague and ambiguous, making
15 Sunoco’s ability to comply with it impossible, and also potentially causing Sunoco
16 to over-perform work not intended to be performed by the Regional Board, without
17 further clarification. As noted above, the Revised Order describes the Site only as
18 an inactive mercury mine on approximately 109 acres on the northeast slope of
19 Mount Diablo. However, the Revised Order provides neither a map nor any
20 Assessor Parcel Number(s) (“APNs”) that identify the specific Site boundaries.
21 After the Regional Board issued the original Order on March 25, 2009, on behalf
22 of Sunoco, the Edgcomb Law Group (“ELG”) requested either a map or APNs
23 from the Regional Board to determine the specific “Site” boundaries. (See
24 Chapman Decl., Ex. 2.) In response, the Regional Board provided a reference to
25 APN 78-060-008-6. (Id.) Research of that APN by Sunoco’s title research vendor,
26 however, revealed that it is no longer used by the County Recorder. Moreover, in
27 further investigating this APN, Sunoco’s title research vendor informed ELG there
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1 is some indication that APN 78-060-008-6 became APN 078-060-034. However,
2 according to the relevant Assessor's Map, that parcel consists of only 96.65 acres,
3 not the "109 acres" referenced in the Order. (See Chapman Decl., Ex 3.)

4 Moreover, Sunoco's title research vendor located an older Assessor's Map which
5 indicated that APN 78-060-008-6 referenced by the Regional Board refers to a
6 parcel that was divided into smaller parcels that are now APNs 078-060-013, 078-
7 060-033, and 078-060-032. (See Chapman Decl. Ex. 4.) But these parcels total
8 over 120 acres, and do not appear to cover what one might consider to be the Mt.
9 Diablo Mercury Mine area. (Id.)

10 In summary, insufficient information has been given in the Regional Board's
11 Revised Order to enable Sunoco to comply with the Revised Order with an
12 adequate level of confidence, since the Revised Order requires investigation of a
13 Site without clearly defined boundaries. Moreover, the uncertainty regarding the
14 Site boundaries raises the possibility that Sunoco may needlessly over-investigate
15 property that the Regional Board did not intend be included within its "Site."
16 Accordingly, Sunoco requests the State Board grant relief in part by declaring that
17 the Revised Order does not provide the required, clearly defined Site boundaries,
18 and suspending its enforcement until the Regional Board withdraws or amends the
19 Revised Order to include information establishing clearly defined site boundaries.
20 The newly defined Site boundaries should also reflect the limited area of Cordero's
21 operations, as reflected in Section IV.B.3 of this Petition.

22 **2. Sunoco Should Not Have Been Named as a Discharger or**
23 **Operator Over the Entire Site Referenced in the Revised**
24 **Order Because Cordero's Operations Are Divisible.**

25 The Revised Order's requirements that Sunoco submit a work plan and
26 investigative report related to the Site are substantially overbroad, given that
27 Sunoco's factual research to date demonstrates that Cordero Mining Company
28 ("Cordero") operated on only a small area on Mount Diablo during its

1 approximately one year of intermittent operations (approx. December 1954-
2 December 1955). Sunoco is unwilling, and has no legal obligation, to accept
3 liability for the discharges of others on the Site where it never operated.

4 The Revised Order states that the Site is comprised of approximately 109
5 acres, but even based on conservative estimates, Cordero's operations and
6 discharges occurred on less than 1% of that number of acres. In particular, the
7 Revised Order makes specific reference to the mine consisting "of an open
8 exposed cut and various inaccessible underground shafts, adits and drifts.
9 Extensive waste rock piles and mine tailings cover the hill slope below the open
10 cut, and several springs and seeps discharge from the tailings-covered area."
11 (Chapman Decl., Ex. 1, Revised Order, at p. 1.) Yet, historical mine plans, maps,
12 aerial photographs and other records demonstrate that Cordero's mining activities,
13 which the Revised Order contends occurred from "approximately 1954 to 1956,"
14 came long after those of Bradley Mining Company ("Bradley") and other PRPs
15 between 1867 and 1952, who excavated the "open exposed cut" portion of the
16 mine referenced in the Revised Order until it was partially covered by landslides.
17 (See, e.g. Id., Ex. 5-10.) Therefore, Cordero did not "operate" that portion of the
18 Site and has no "discharger" liability for it. The same information reflects that
19 Cordero's mining activities occurred to the north of, and without discharge to, the
20 "[e]xtensive waste rock piles and mine tailings cover[ing] the hill slope below the
21 open cut." (Id., Ex. 1, Revised Order, at 1). Thus, the Revised Order improperly
22 requires Sunoco to prepare technical reports under WC section 13267 concerning
23 large areas of concern to the Regional Board where Cordero was not a
24 "discharger."

25 Given Cordero's small, divisible "discharge" footprint at the mine site,
26 Sunoco objects to the Revised Order's finding that Cordero "operated the Mt.
27 Diablo Mine from approximately 1954 to 1956" (Chapman Decl., Ex. 1, Revised
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1 Order, at 1.) Cordero's area of operation did not include the open pit mine, and the
2 waste rock piles and mine tailings covering the hill slope below it, that are
3 identified as significant areas of environmental concern in the Revised Order.
4 Moreover, the Regional Board has not presented any evidence that any materials
5 discharged by Cordero resulted in the discharge of any waste sufficient to trigger
6 the authority to require the furnishing of technical reports under WC section
7 13267.

8 On that basis, Sunoco also objects to the Revised Order's requirement that it
9 submit:

- 10 • a site investigation work plan covering the area agreed upon by the
11 Regional Water Board and Sunoco, and;
- 12 • an investigation report presenting results of the investigation work
13 plan.

14 First, it is unclear whether the Regional Board and Sunoco will be able to
15 reach agreement concerning the area to be covered in a site investigation work
16 plan, further making the Revised Order impermissibly vague and ambiguous and
17 impossible to comply with. Moreover, a reading of the plain language of the
18 California Water Code reveals that a "discharger" is only liable for investigating
19 areas to which it discharged. As discussed more thoroughly below, a "discharger"
20 is not liable for investigating and remediating the geographically distant and
21 unrelated discharges of other PRPs. Applied here, that legal principle means
22 Sunoco cannot be required to investigate sources of mercury contamination
23 unrelated to Cordero's activities at the Site, including the open pit mine, and the
24 waste rock piles and mine tailings covering the hill slope below it.¹

25 Moreover, as the Regional Board acknowledges in the Revised Order, WC §
26

27 ¹ Sunoco continues to investigate the facts underlying this divisibility issue, and
28 reserves the right to supplement the record with relevant additional documents and
information.

1 13267 requires the Regional Board to provide Sunoco “with a written explanation
2 with regard to the need for the reports, and shall identify the evidence that supports
3 requiring that person to provide the reports.” (WC § 13267(b); emphasis added.)
4 But the Regional Board’s Revised Order fails to identify any evidence in support
5 of its claim that Cordero “operated the Mt. Diablo Mine.” Thus, the Revised Order
6 fails to meet this requirement of WC § 13267(b). Sunoco submits that the
7 Regional Board cannot meet this requirement since the relevant evidence
8 contradicts this claim. While the Regional Board’s meeting with Sunoco after
9 issuance of the original March 25, 2009 Order resulted in the Revised Order, the
10 Revised Order maintains the same erroneous factual findings as those contained in
11 the original Order.

12 Documentary evidence obtained by Sunoco to date indicates that Cordero
13 operated solely from a mine shaft sunk by contractors operating under contract to
14 the United States Department of Interior’s Defense Minerals Exploration
15 Administration (“DMEA”). (See Chapman Decl., Ex. 11-13, DMEA contract and
16 related documents.) The DMEA shaft was located north of, and is divisible from,
17 the open pit, shafts, adits, and drifts mined extensively by Bradley Mining
18 Company between 1936-1947 and others before and afterwards. (See Id., Ex. 5-
19 10.)

20 On the basis of this evidence, Sunoco requests that the State Board grant
21 relief and order that the Regional Board amend its Revised Order to: 1) provide
22 reference to the evidence on which it relies to order Sunoco to furnish technical
23 reports under WC section 13267 and to either rescind the Revised Order in its
24 entirety or limit the Revised Order’s application to the areas where the evidence
25 demonstrates that Cordero operated and discharged waste of a manner sufficient to
26 trigger the application of WC section 13267; and 2) find that Sunoco cannot be
27 ordered to furnish technical reports for areas where there is no evidence that
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1 Cordero conducted any operations.

2 **A. Legal Bases for Divisibility**

3 Any order requiring Sunoco to investigate and/or remediate the Mount
4 Diablo Mercury Mine (“Site”) should be limited in scope because, as outlined in
5 more detail below: (1) under well-established California law, lessees such as
6 Cordero are not responsible for investigating or remediating continuing nuisances
7 related to discharges by others, and (2) under federal law, the United States
8 Supreme Court has recently held that divisibility is proper where a party such as
9 Cordero can show that a reasonable basis for apportionment exists.

10 The Revised Order states that:

11 “[a]’ discharger has a legal obligation to investigate and remediate
12 contamination. As described above, Sunoco, Inc. is subject to this
13 Order because of its ownership interest in the Cordero Mining
14 Company, which operated Mount Diablo Mercury Mine and
15 discharged waste to waters of the state. Therefore, it is a ‘person[s]
16 who [have] discharged . . . waste’ within the meaning of CWC
17 section 13267. (Chapman Decl., Ex. 1, Revised Order, at p. 2.)

18 While a discharger may have a legal obligation to investigate and remediate
19 contamination they caused, no such obligation exists where another caused the
20 contamination. This is particularly true of alleged dischargers who merely leased,
21 but did not own, a site. Moreover, the Revised Order’s reference to the “Mount
22 Diablo Mercury Mine” is vague, and appears to suggest, without any evidentiary
23 basis, that Cordero mined the entire underground workings and is somehow
24 responsible for all waste mine rock and tailings in the area of the Mount Diablo
25 Mercury Mine, as well as for all historical discharges of mercury contaminated
26 water to a settlement pond at the base of the site and into the Marsh Creek
27 watershed generally. In this regard, the Revised Order appears to suggest that
28 Sunoco is required to investigate waste and discharges known to have been caused
by others (i.e., Bradley Mining Company). The Revised Order states:

1 “[a]cid mine drainage containing elevated levels of mercury and other
2 metals are being discharged to a pond that periodically overflows into
3 Horse and Dunn Creeks” and that “[f]urther site investigation is
4 required to assess the extent of pollution discharged from the mine
5 site and to evaluate the remedial options to mitigate the discharge.”
(Chapman Decl., Ex. 1, Revised Order, at p. 1.)

6 This Petition provides the legal and factual basis for limiting the scope of
7 Sunoco’s Site investigation and any potential subsequent remediation. The
8 Regional Board has not articulated any legal or factual basis for requiring Sunoco
9 to investigate or remediate areas of the Site that were historically operated by other
10 responsible parties, such as Bradley.

11 1. The Regional Board’s Purported Theory of Liability – Passive
12 Migration/ Continuing Nuisance

13 i. In the Matter of the Petition of Zoecon Corporation

14 In discussions with Edgcomb Law Group (outside counsel for Sunoco)
15 regarding Cordero’s alleged liability, Patrick Pulupa, Staff Counsel, State Water
16 Resources Control Board Office of Chief Counsel, stated that the Regional Board
17 is basing Cordero’s liability on a passive migration theory. According to this
18 theory, Cordero’s lease of the mine Site provided it with legal control sufficient to
19 allow it to remediate continuing nuisances in the areas covered in the lease –
20 including discharges caused by other parties. Under California law, however,
21 while subsequent owners may be liable in some instances for passive migration of
22 a continuing nuisance created by a predecessor, lessees such as Cordero cannot be
23 held liable for discharges of another. While the Revised Order generally
24 references sections of the California Water Code, neither the Revised Order nor
25 Mr. Pulupa have specifically articulated any legal authority that might support
26 liability of a lessee under a passive migration theory, although it appears to be
27 loosely and erroneously based on the State Water Resource Control Board decision
28 In the Matter of the Petition of Zoecon Corporation, Order No. WQ 86-02

1 (“Zoecon”).

2 Zoecon applies to site owners and former owners, but not to lessees such as
3 Cordero. Under Zoecon, a current owner may face liability because it has the
4 authority to abate a continuing nuisance resulting from the passive migration of
5 contaminants, even where caused by a predecessor owner. However, nothing in
6 Zoecon supports a finding of liability for former lessees such as Cordero, which
7 neither caused any continuing nuisance resulting from the mining operations of
8 others (i.e., Bradley), nor has any current authority to abate it. In Zoecon, the
9 Regional Board concluded that the petitioner, the current site owner, was legally
10 responsible for conducting the required investigation or remedial action. (Zoecon
11 at p. 2.) The State Board based its decision on a passive migration, continuing
12 nuisance theory, stating:

13 “Therefore we must conclude that there is an actual movement of
14 waste from soils to ground water and from contaminated to
15 uncontaminated ground water at the site which is sufficient to
16 constitute a ‘discharge’ by the petitioner for purposes of Water Code
§13263(a).” (Zoecon at p. 4.)

17 Water Code §13263(a) provides:

18 “(a) The regional board, after any necessary hearing, shall prescribe
19 requirements as to the nature of any proposed discharge, existing
20 discharge, or material change in an existing discharge, except
21 discharges into a community sewer system, with relation to the
22 conditions existing in the disposal area or receiving waters upon, or
23 into which, the discharge is made or proposed. The requirements
24 shall implement any relevant water quality control plans that have
25 been adopted, and shall take into consideration the beneficial uses to
be protected, the water quality objectives reasonably required for that
purpose, other waste discharges, the need to prevent nuisance, and the
provisions of Section 13241.” (CWC §13263(a).)

26 Zoecon also states, “...here the waste discharge requirements were imposed
27 on Zoecon not because it had ‘deposited’ chemicals on to land where they will
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1 eventually ‘discharge’ into state waters, but because it *owns* contaminated land
2 which is directly discharging chemicals into water.” (Zoecon at p. 5; emphasis
3 added.) Similarly, in Zoecon the Regional Board made the “determination that
4 property *owner* is a discharger for purposes of issuing waste discharge
5 requirements when wastes continue to be discharged from a site into waters of the
6 state.” (Id.; emphasis added.)

7 Later, Zoecon states, in explaining why a New Jersey court’s conclusion
8 regarding application of the common law nuisance doctrine would probably not be
9 applied by a California court, that, “[t]his is because California Civil Code §3483
10 provides that every successive *owner* of property who neglects to abate a
11 continuing nuisance upon, or in the use of, such property, created by a former
12 owner, is liable therefore in the same matter as the one who first created it.”
13 (Zoecon at p. 10; emphasis added). Zoecon acknowledged that “[c]ommon law
14 governs in California only to the extent that it has not been modified by statute.”
15 (Id. at p. 10, n 6.) In this regard, Zoecon recognized that the California legislature
16 specifically excluded lessees from liability in codifying nuisance law, since Civil
17 Code §3483 only applies to “owners,” and not lessees. Thus, Zoecon does not
18 apply to lessees such as Cordero, and to the extent the Revised Order attempts to
19 require Sunoco to investigate and remediate waste discharged by others such as
20 Bradley, it is inappropriate and unsupported by the facts and law.

21 ii. Under California Civil Code §3483 Lessees Such As Cordero Are Not
22 Liable For Nuisances Created Prior To The Leasehold.

23 California Civil Code §3483 assesses continuing nuisance liability only
24 upon owners and former owners, not lessees. The plain language of §3483 reveals
25 that the legislature explicitly excluded lessees from liability for continuing
26 nuisance:

27 “Every successive *owner* of property who neglects to abate a
28 continuing nuisance upon, or in the use of, such property, created by a

1 former owner, is liable therefor in the same manner as the one who
2 first created it.” (Cal. Civ. Code § 3483; emphasis added.)

3 Even if the Regional Board were to somehow find that Cordero was a
4 constructive owner of the Site (which it was not), Cordero would still not face
5 liability under California law, because it is well-established that “. . . *there is no*
6 *dispute in the authorities that one who was not the creator of a nuisance must*
7 *have notice or knowledge of it before he can be held [liable].”* (Reinhard v.
8 Lawrence Warehouse Co., 41 Cal.App.2d 741 (1940) (emphasis added), citing
9 Grigsby v. Clear Lake Water Works Co., 40 Cal. 396, 407 (1870); Edwards v.
10 Atchison, T. & S. F. R. Co., 15 F.2d 37, 38 (1926).) Moreover, “[i]t is a
11 prerequisite to impose liability against a person who merely passively continues a
12 nuisance created by another that he should have notice of the fact that he is
13 maintaining a nuisance and be requested to remove or abate it, or at least that he
14 should have knowledge of the existence of the nuisance.” (Reinhard, supra, at
15 746.)

16 The Revised Order’s allegation that “[a]cid mine drainage containing
17 elevated levels of mercury and other metals are being discharged to a pond that
18 periodically overflows into Horse and Dunn Creeks” (RO at p. 1), is insufficient to
19 trigger liability on the part of Cordero since, in addition to it never having been an
20 owner, no evidence is presented proving that Cordero was on notice of the fact that
21 it was maintaining a nuisance and had been requested to remove or abate it, or that
22 it had knowledge of the existence of the nuisance. Indeed, records indicate that
23 during Cordero’s leasehold, the State Water Pollution Control Board specifically
24 noted that Cordero was not maintaining any nuisance related to soil or water
25 discharge of any contaminant, and in fact commended Cordero for its beneficial
26 water management practices. Moreover, if the Regional Board is now asserting
27 that a nuisance was occurring at the time Cordero held its leasehold, it begs the
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1 question as to why the Regional Board did not require investigation or remediation
2 of this alleged nuisance at the time, some 60 years ago. If the Regional Board was
3 not aware of the nuisance at the time, there is no reason to believe that Cordero
4 should have had knowledge that a continuing nuisance – created by it or any other
5 lessee or owner of the Site – existed on its leased property at the time.

6 Simply put, the Regional Board fails to provide any legal or factual basis for
7 the conclusion that Cordero has legal liability as an “owner” and, therefore, a
8 discharger, under a passive migration/continuing nuisance theory. Thus, the
9 Revised Order’s attempt to name Cordero as a party responsible for the
10 discharge(s) of others at the Mount Diablo Mercury Mine Site is unsupported by
11 California law.

12 iii. Under Federal Law, Divisibility Is Proper Because Sunoco Can Show
13 A Reasonable Basis For Apportionment

14 The United States Supreme Court recently held that divisibility is
15 appropriate where a party can show a reasonable basis for apportionment.
16 (Burlington Northern & Santa Fe Railway Co. et al. v. United States, (2009) 129 S.
17 Ct. 1870.) In Burlington, neither the parties nor the lower courts disputed the
18 principles that govern apportionment in CERCLA cases, and both the District
19 Court and Court of Appeals agreed that the harm created by the contamination of
20 the Arvin site, although singular, was theoretically capable of apportionment. (Id.
21 at 1881.) Thus, the issue before the Court was whether the record provided a
22 “reasonable basis” for the District Court’s conclusion that the Railroads were
23 liable for only 9% of the harm caused by contamination at the Arvin facility. (Id.)
24 Despite the parties’ failure to assist the District Court in linking the evidence
25 supporting apportionment to the proper allocation of liability, the District Court
26 ultimately concluded that this was “a classic ‘divisible in terms of degree’ case,
27 both as to the *time period in which defendants’ conduct occurred*, and ownership
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1 existed, *and as to the estimated maximum contribution of each party's activities*
2 *that released hazardous substances that caused Site contamination.*" (Id. at 1882;
3 emphasis added.)

4 Consequently, the District Court apportioned liability, assigning the
5 Railroads 9% of the total remediation costs. (Id.) The Supreme Court concluded
6 that the facts contained in the record reasonably supported the apportionment of
7 liability, because the District Court's detailed findings made it abundantly clear
8 that the primary pollution at the Arvin facility was contained in an unlined sump
9 and an unlined pond in the southeastern portion of the facility most distant from
10 the Railroads' parcel and that the spills of hazardous chemicals that occurred on
11 the Railroad parcel contributed to no more than 10% of the total site
12 contamination, some of which did not require remediation. (Id. at 1882-3) Thus,
13 the Supreme Court recognized that ". . . *if adequate information is available,*
14 *divisibility may be established by 'volumetric, chronological, or other types of*
15 *evidence,' including appropriate geographic considerations*" (Id. at 1883;
16 emphasis added.) Although the evidence adduced by the parties did not allow the
17 court to calculate precisely the amount of hazardous chemicals contributed by the
18 Railroad parcel to the total site contamination or the exact percentage of harm
19 caused by each chemical, the evidence did show that fewer spills occurred on the
20 Railroad parcel and that of those spills that occurred, not all were carried across the
21 Railroad parcel to the B&B sump and pond from which most of the contamination
22 originated. (Id.) Because the District Court's ultimate allocation of liability was
23 supported by the evidence and comported with general apportionment principles,
24 the Supreme Court reversed the Court of Appeals' conclusion that the Railroads
25 are subject to joint and several liability for all response costs arising out of the
26 contamination of the Arvin facility. (Id.)

27 It is well-established that "litigants may not invoke state statutes in order to
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1 escape the application of CERCLA’s provisions in the midst of hazardous waste
2 litigation.” (Fireman’s Fund Insurance Company v. City of Lodi, 303 F.3d 928,
3 947 n. 15 (9th Cir. 2002).) Similarly, because “[f]ederal conflict preemption
4 [exists] where ‘compliance with both the federal and state regulations is a physical
5 impossibility,’ or when the state law stands as an ‘obstacle to the accomplishment
6 and execution of the full purposes and objectives of Congress’” (Id. at 943), the
7 Regional Board may not – in an attempt to assess joint and several liability – assert
8 any state law provisions that would fly in the face of Burlington, and applying its
9 holding to the facts outlined herein related to Cordero’s operations at the Mount
10 Diablo Mercury Mine Site, apportionment is appropriate and there is no basis for
11 the Regional Board to find Cordero jointly and severally liable for mercury
12 contamination caused by any other discharger at the Site.

13 Specifically, Cordero can show adequate information to support divisibility
14 “by volumetric, chronological, or other types of evidence, including appropriate
15 geographic considerations.” Cordero can make a reasonable showing based on
16 records of its operations produced by the United States Geological Survey
17 (“USGS”), that: (1) Cordero is only responsible for 1% of the total volume of mine
18 related waste at the Site; (2) Cordero’s operations did not result in the processing
19 of any mercury ore, which means that it generated no calcine tailings, unlike the
20 extensive tailings generated by Bradley and others; (3) Cordero discharged or
21 otherwise treated its mine water to the satisfaction of the State Water Pollution
22 Control Board (which specifically did not find any nuisance) and disposed of it to
23 the west of the Mt. Diablo Mine Site, which drained into the Dunn Creek
24 watershed – which is unrelated to areas of concern identified in the *Marsh Creek*
25 *Watershed 1995 Mercury Assessment Project – Final Report* (“Slotton Report”);
26 and (4) Cordero dumped its waste mine rock to the north of the DMEA mine site,
27 away from the Bradley waste rock and tailings (which the Slotton Report identify
28

1 as the source of mercury contamination) on the eastern side of the site. Thus,
2 based on all relevant facts, Cordero has demonstrated a reasonable basis for
3 apportionment and divisibility, and cannot be required under state or federal law to
4 investigate or remediate any continuing nuisance caused by other lessees, owners,
5 or operators of the Mount Diablo Mercury Mine Site.

6 **3. The Regional Board Should Add Other PRPs to the**
7 **Order and Require Their Participation.**

8 After requiring the Regional Board to limit Sunoco's responsibility for
9 furnishing technical reports to the areas on which it can present evidence that
10 Cordero operated and discharged waste of a nature sufficient to trigger the
11 application of WC section 13267, Sunoco further requests that the State Board
12 require the Regional Board to add other known PRPs for any such area identified
13 in the Revised Order and require them to cooperate with Sunoco in the preparation
14 and funding of the required technical reports. At this time, those other PRPs would
15 include, at a minimum, the DMEA and its contractors, which the relevant evidence
16 indicates funded and/or conducted mining operations in the same area as Cordero.
17 (See Chapman Decl., Ex. 10-12). DMEA has already been found liable under
18 CERCLA in federal court as a responsible party under similar circumstances at
19 another mine site. (See Chapman Decl., Ex. 13, copy of relevant, excerpted 2003
20 District Court of Idaho decision). Other PRPs would include the Wessmans,
21 whom the existing Revised Order identifies as the current owners of the Site.

22 As for other areas of the Mt. Diablo Mine Site where Cordero did not
23 operate, as noted in its Revised Order, the Regional Board can issue new
24 investigation orders under WC section 13267 to other PRPs, such as Bradley
25 Mining Company, to furnish technical reports. Such areas include, but are not
26 limited to, the open pit mine and the waste rock piles and mine tailings covering
27 the hill slope below it that are incorrectly referenced as being within the scope of
28

1 the current Revised Order to Sunoco.

2 **V. THE MANNER IN WHICH PETITIONER HAS BEEN AGGRIEVED**

3 Sunoco has been aggrieved by the Regional Board's actions because Sunoco
4 will be subjected to provisions of an arbitrary and capricious Revised Order
5 unsupported by the evidence in the record or applicable legal authority. Absent a
6 better definition of the Site, Sunoco is subject to an inability to comply and a
7 potentially arbitrary and capricious enforcement of the Revised Order.

8 The Regional Board's Revised Order as it pertains to Site description is also
9 vague and ambiguous because it provides no objective standards to determine
10 Sunoco's compliance, leaving Petitioner to guess as to the scope of the Regional
11 Board's requirements, in violation of Sunoco's due process rights. (Connally v.
12 General Construction Co., 269 U.S. 385, 391 (1926) (“[A] statute which either
13 forbids or requires the doing of an act in terms so vague that men of common
14 intelligence must necessarily guess at its meaning and differ as to its application,
15 violates the first essential of due process of law”); Gatto v. County of Sonoma, 98
16 Cal. App. 4th 744, 773-774 (2002); Papachristou v. City of Jacksonville, 405 U.S.
17 156, 162 (1972) (law was unconstitutionally vague for failure to give fair notice of
18 what constituted a violation; “all persons are entitled to be informed as to what the
19 State commands or forbids”).)

20 Moreover, as a result of being named the sole discharger at the Site, and
21 made solely responsible for furnishing all of the requested technical reports
22 required in the Revised Order covering the entire Site, despite contrary evidence
23 regarding the divisible nature of Cordero's Site activities, Sunoco will be forced to
24 shoulder significant and inappropriate costs of compliance, a heavy burden of
25 regulatory oversight, and other potentially serious economic consequences.
26 Further, by naming Sunoco as the sole discharger for the entire Site, at least three
27 other PRPs known to the Regional Board, namely Bradley Mining Company, Jack
28

1 and Carolyn Wessman, and the U.S. Government (DMEA), (all of which either
2 caused the majority of mercury contamination, operated, or own portions of the
3 Site), are unfairly avoiding their fair share of costs in conducting the required
4 investigations.

5 **VI. STATE BOARD ACTION REQUESTED BY PETITIONER**

6 As discussed above, Sunoco requests that this Petition and its concurrently
7 filed Petition for Stay be held in abeyance. If it becomes necessary for Sunoco to
8 pursue this Petition and its Petition for Stay of Action, Sunoco will request that the
9 State Board stay enforcement of the Revised Order and determine that the
10 Regional Board's adoption of the Revised Order was arbitrary and capricious or
11 otherwise inappropriate and improper, and will request that the State Board amend
12 the Revised Order as follows: (1) provide an accurate description of the "Site"
13 boundaries so that Sunoco can comply with the Revised Order; (2) require
14 references to the evidence on which the Regional Board relies to name Sunoco as a
15 discharger over whatever area it identifies as the "Site" covered by the Revised
16 Order; (3) limit the scope of its Revised Order by changing the area identified as
17 the "Site" to be limited to areas where it can establish through identified evidence
18 that Cordero discharged waste of a nature sufficient to trigger the application of
19 WC section 13267; and (4) name other known PRPs for any area so identified,
20 including but not limited to Bradley, the United States (DMEA), and Jack and
21 Carolyn Wessman, and require them to participate in any required investigations.

22 **VII. STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF** 23 **LEGAL ISSUES RAISED IN THE PETITION**

24 For purposes of this protective filing, the Statement of Points and
25 Authorities is subsumed in Sections IV and V of this Petition. If Sunoco elects to
26 pursue this Petition, Sunoco reserves the right to file a Supplemental Statement of
27 Points and Authorities, including references to the complete administrative record
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1 and other legal authorities and factual documents and testimony, which Sunoco is
2 still assembling. Sunoco also reserves its right to supplement its evidentiary
3 submission and reiterates its request for a hearing to allow the State Board to
4 consider testimony, other evidence, and argument.

5 **VIII. STATEMENT REGARDING SERVICE OF THE PETITION ON**
6 **THE REGIONAL BOARD**

7 A copy of this Petition is being sent to the Regional Board, to the
8 attention of Pamela C. Creedon, Executive Director by email and U.S. Mail. By
9 copy of this Petition, Sunoco is also notifying the Regional Board of Sunoco's
10 request that the State Board hold the Petition and the concurrently filed Petition for
11 Stay of Action in abeyance.

12 **IX. STATEMENT REGARDING ISSUES PRESENTED TO THE**
13 **REGIONAL BOARD/REQUEST FOR HEARING**

14 The substantive issues and objections raised in this Petition were not raised
15 before the Regional Board before it acted in issuing the Revised Order because
16 Sunoco had no notice from the Regional Board that it was issuing the Revised
17 Order, Sunoco was not provided with a draft version of the Revised Order, Sunoco
18 was not provided with any opportunity to comment upon a draft version of the
19 Revised Order or to appear before the Board to present comments.

20 Sunoco requests a hearing in connection with this Petition, should Sunoco
21 activate it from its current "in abeyance" status.

22 For all the foregoing reasons, if Sunoco pursues its appeal, Sunoco
23 respectfully requests that the State Board review the Revised Order and grant the
24 relief as set forth above.

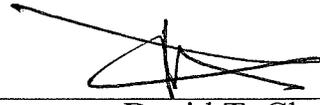
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Respectfully submitted,

DATED: July 30, 2009

EDGCOMB LAW GROUP

By: _____



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Attorneys for Petitioner
SUNOCO, INC.

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5 Attorneys for Petitioner
6 SUNOCO, INC.

7
8 STATE WATER RESOURCES CONTROL BOARD

9 STATE OF CALIFORNIA

10 In the Matter of

11 SUNOCO, INC.,

12
13 Petitioner,

14 For Review of Revised Order to Sunoco,
Inc. to Submit Technical Reports in
15 Accordance with Section 13267 of the
California Water Code, Mount Diablo
16 Mercury Mine, Contra Costa County,
dated June 30, 2009

PETITION NO.

**PETITION FOR STAY OF
ACTION**

17
18 Pursuant to Section 13321 of the California Water Code and Section 2053 of Title
19 23 of the California Code of Regulations (“CCR”), Sunoco, Inc. (“Sunoco” or
20 “Petitioner”) hereby petitions the State Water Resources Control Board (“State
21 Board”) to stay the California Regional Water Quality Control Board for the
22 Central Valley Region’s (“Regional Board”) implementation of the “Revised Order
23 To Sunoco, Inc. To Submit Technical Reports In Accordance With Section 13267
24 of the California Water Code, Mount Diablo Mercury Mine, Contra Costa County”
25 (“Revised Order”), dated June 30, 2009.

26 Petitioner has concurrently filed a Petition for Review of the Revised Order
27 with this Petition for Stay of Action.
28

1 **I. STANDARD OF REVIEW**

2 Water Code section 13321 authorizes the State Board to stay the effect of
3 Regional Board decisions. Title 23, CCR § 2053 requires that a stay shall be
4 granted if a petitioner alleges facts and produces proof of:

5 (1) Substantial harm to petitioner or to the public interest if a stay is
6 not granted;

7 (2) A lack of substantial harm to other interested persons and to the
8 public if a stay is granted; and,

9 3) Substantial questions of fact or law regarding the disputed action.
10 (Title 23, CCR § 2053(a).)

11 The State Board’s granting of a stay is equivalent to a preliminary
12 injunction. The California Supreme Court has stated that the standard for a
13 preliminary injunction is as follows:

14 In deciding whether to issue a preliminary injunction, a court must weigh
15 two “interrelated” factors: (1) the likelihood that the moving party will ultimately
16 prevail on the merits and (2) the relative interim harm to the parties from issuance
17 or nonissuance of the injunction. (Butt v. California (1992) 4 Cal. 4th 668, 678
18 (citation omitted).)

19 The trial court’s determination must be guided by a “mix” of the potential-
20 merit and interim-harm factors; the greater the plaintiff’s showing on one, the less
21 must be shown on the other to support an injunction. (Id.; citation omitted)).
22 Sunoco, as detailed below, has satisfied the requirements of both tests. Therefore,
23 the State Board should grant a stay of the Revised Order.

24 **II. ARGUMENT**

25 The Regional Board’s adoption of the Revised Order was an erroneous
26 action that poses substantial harm to Petitioner and the public interest. First, the
27 Revised Order requires Petitioner to prepare work plans related to the Mount
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1 Diablo Mercury Mine (“Site”), but has provided only a vague and ambiguous
2 description of that Site, making compliance with certainty impossible and
3 unnecessary compliance efforts likely. Secondly, the Revised Order incorrectly
4 assumes Petitioner operated the entire Site identified, which is false, requires the
5 Petitioner to furnish technical reports covering the entire site, which is unjustified,
6 fails to identify the evidence on which it relies to make the unjustified demands as
7 required, and improperly fails to name known PRPs for the relevant portion of the
8 Site and require them to participate in the work required to furnish the required
9 reports. Thus, Sunoco has a high likelihood of success on the merits of its appeal.

10 **A. Substantial and Irreparable Harm to Petitioner and the**
11 **Public Interest Will Result if the Revised Order is Implemented**
12 **Without Modification.**

13 The public interest and Petitioner will be substantially harmed by
14 implementation of the Revised Order. Because Sunoco cannot be forced to
15 investigate or remediate discharges to which it has no nexus at the Site, the
16 Revised Order’s failure to name the appropriate PRPs for those discharges may
17 result in needless litigation and delay, and allow the responsible parties to avoid
18 their fair share of response costs at the Site. Moreover, a failure to stay pending
19 State Board review would burden Petitioner by forcing it to begin implementing an
20 inadequate and illegal Revised Order that may be vacated upon judicial review.

21 Furthermore, a stay is proper because there is a lack of substantial harm to
22 other interested persons and the public interest if it is granted. First, while a stay
23 would prevent enforcement of the Revised Order against Sunoco, the Regional
24 Board could focus on identifying and issuing one or more orders to the parties
25 having legal responsibility for creating the conditions over much of the Site that
26 are of concern to the Regional Board as well as the current owner(s). The
27 Regional Board could thereby achieve the response action it seeks over the entire
28 Site (wherever that is) much sooner than it can by incorrectly and illegally forcing

1 only Sunoco to perform all such work, when Sunoco is not legally responsible for
2 the entire Site.

3 The other responsible parties that the Regional Board should name in such
4 new orders cannot claim unjustified substantial harm because they are the correct
5 parties to be performing this work, not Sunoco.

6 **B. A Stay of the Revised Order Will Not Result in Substantial Harm**
7 **to Other Interested Persons or the Public.**

8 While there may be some delay to the performance of the investigations
9 sought by the Regional Board as a result of the requested stay, that delay and any
10 resulting harm are not substantial given that: 1) the Regional Board can issue
11 orders to other, actually responsible parties to perform the studies sought to be
12 furnished in a relatively short time frame; 2) the Regional Board has been
13 generally aware of the site conditions it now seeks to address for 50 years or more
14 already, without issuing any such orders to Sunoco's knowledge; 3) any such harm
15 is substantially outweighed by the harm to be suffered by Sunoco in the absence of
16 a stay as a result of the Revised Order improperly requiring only Sunoco to furnish
17 studies on extensive Site areas for which Sunoco is not responsible.

18 The record on file with the State Board in relation to the concurrently filed
19 Petition for Review contains the relevant supporting documents to this Petition for
20 Stay of Action, which Sunoco reserves the right to – and will – supplement, if and
21 when it activates the Petition for Review and this Petition for Stay from their
22 current “in abeyance” status.

23 As set forth more fully in Sunoco's Petition for Review and the Declaration
24 of David T. Chapman in Support of Petition for Review and Petition for Stay
25 (“Chapman Declaration”) being filed herewith, a stay is appropriate because the
26 action of the Regional Board with respect to Sunoco is illegal and should be
27 revoked or amended in that the Revised Order: 1) is improperly vague and
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1 ambiguous in its description of the Site, making Sunoco's compliance impossible
2 and unnecessary compliance efforts likely; 2) apparently requires Sunoco to
3 prepare a PRP report and technical reports for large areas of a Site where it was not
4 a "discharger," and without providing the required reference to the evidence
5 supporting those requirements, meaning the Regional Board is again acting
6 inconsistent with and beyond the scope of its cited statutory authority; and 3) fails
7 to identify known PRPs as respondents on the Revised Order and make them
8 responsible for preparing the required reports. Sunoco hereby incorporates all of
9 the facts and arguments set forth in that Petition for Review and the accompanying
10 Chapman Declaration, including any and all supplemental submissions made by
11 Sunoco in support of that Petition.

12 **C. The Regional Board's Action Raises Substantial Questions of Law on**
13 **Which Petitioners are Likely to Prevail.**

14 The Petition for Review of the Revised Order has been filed
15 contemporaneously with this Petition and delineates Sunoco's arguments regarding
16 the legal questions on which Sunoco is likely to prevail. The Revised Order
17 clearly violates requirements set forth in the Porter-Cologne Water Quality Act and
18 is wholly unsupported by existing law and the factual record. The State Board
19 should therefore stay the Revised Order and prevent the implementation of a
20 decision that is illegal and sets an inappropriate precedent. (The Petition for
21 Review is hereby incorporated by reference.)

22 **III. CONCLUSION**

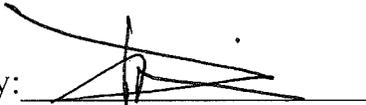
23 Sunoco and the public interest will be substantially and irreparably harmed
24 by the implementation of the Revised Order, while other Site PRPs and the public
25 interest will not suffer from a stay and, in fact, may benefit by a clarification of the
26 vague regulatory requirements in the Revised Order, which may otherwise result in
27 their involvement in litigation and delay issuance of orders to other, more
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1 appropriate PRPs. Thus, the balance of harms at issue in the Petition heavily
2 favors the granting of a stay. In addition, the Revised Order has raised substantial
3 questions of fact and law, which, upon review in accordance with the historical
4 record and provisions of the California Water Code are highly likely to be resolved
5 in favor of Sunoco. Therefore, the State Board should issue a stay of the Revised
6 Order.

7
8 Respectfully submitted,

9
10
11 DATED: July 30, 2009

EDGCOMB LAW GROUP

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15 By: 
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17 dchapman@edgcomb-law.com
18 Attorneys for Petitioner
19 SUNOCO, INC.
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6 SUNOCO, INC.

7
8 STATE WATER RESOURCES CONTROL BOARD

9 STATE OF CALIFORNIA

10 In the Matter of

11 SUNOCO, INC.,

12
13 Petitioner,

14 For Review of Revised Order to Sunoco,
Inc. to Submit Technical Reports in
15 Accordance with Section 13267 of the
California Water Code, Mount Diablo
16 Mercury Mine, Contra Costa County,
dated June 30, 2009

PETITION NO.

**DECLARATION OF DAVID T.
CHAPMAN IN SUPPORT OF
PETITION FOR REVIEW AND
PETITION FOR STAY OF
ACTION**

17
18 I, the undersigned David T. Chapman, declare as follows:

19 1. I am an attorney admitted to practice law in the State of
20 California. Edgcomb Law Group (“ELG”) are acting as attorneys for respondent
21 Sunoco, Inc. (“Sunoco”) in connection with the response of Sunoco to the “Revised
22 Order To Sunoco, Inc. To Submit Technical Reports In Accordance With
23 Section 13267 of the California Water Code, Mount Diablo Mercury Mine, Contra
24 Costa County” (“Revised Order”), adopted by the California Regional Water
25 Quality Control Board, Central Valley Region” (“Regional Board”) dated June 30,
26 2009.

1 2. I have personal knowledge of the facts set forth herein or am
2 familiar with such facts from: 1) my personal involvement in all aspects of this
3 matter since 2008; 2) my review of the files, records and aerial; photos obtained
4 from public agencies and other public sources of information.

5 3. Attached hereto as **Exhibit 1** is a true and correct copy of the
6 Regional Board's June 30, 2009 Order.

7 4. Attached hereto as **Exhibit 2** is a true and correct copy of email
8 correspondence between ELG and the Regional Board dated April 3, 2009.

9 5. Attached hereto as **Exhibit 3** is a true and correct copy of
10 Assessor's Map, Book 78, Page 6 Contra Costa County, CA, last modified in July
11 1992, obtained from ELG's title research vendor.

12 6. Attached hereto as **Exhibit 4** is a true and correct copy of an
13 older version of Assessor's Map, Book 78, Page 6 Contra Costa County, CA,
14 obtained from ELG's title research vendor.

15 7. Attached hereto as **Exhibit 5** is a true and correct copy of a
16 topographic map of Mount Diablo Mine dated January 1953, obtained from the
17 Department of the Interior, U.S. Geological Survey ("USGS").

18 8. Attached hereto as **Exhibit 6** is a true and correct copy of a
19 topographic map of Mount Diablo Mine reflecting changes to the site after work by
20 the Defense Minerals Exploration Administration ("DMEA"), obtained from ELG's
21 consultant.

22 9. Attached hereto as **Exhibit 7** is a true and correct copy of a map
23 of the underground workings of Bradley Mining Company at the Mount Diablo
24 Mine Site, obtained from the Department of the Interior, USGS.

25 10. Attached hereto as **Exhibit 8** is a true and correct copy of a map
26 of the underground workings of the DMEA and Cordero Mining Company at the
27 Mount Diablo Mine Site, obtained from the Department of the Interior, USGS.
28

1 11. Attached hereto as **Exhibit 9** is a true and correct copy of two
2 aerial photographs of the site, the first dated October 9, 1952 and the second dated
3 May 16, 1957, obtained from ELG's consultant.

4 12. Attached hereto as **Exhibit 10** is a true and correct copy of a
5 DMEA "Report of Examination by Field Team Region III" dated March 13, 1953,
6 obtained from the Department of Interior, USGS.

7 13. Attached hereto as **Exhibit 11** is a true and correct copy of the
8 Exploration Project Contract between Ronnie B. Smith, Jene Harper and James
9 Dunnigan and the U.S. Department of the Interior DMEA for the Mt. Diablo
10 Mercury Mine, dated June 5, 1953. This document was obtained from the
11 Department of Interior, USGS.

12 14. Attached hereto as **Exhibit 12** is a true and correct copy of the
13 Assignment of Lease signed by Ronnie Smith, Jene Harper and James Dunnigan
14 and John Johnson and John Jonas for the Mt. Diablo Mercury Mine, dated
15 November 1, 1953. This document was obtained from ELG's title research vendor.

16 15. Attached hereto as **Exhibit 13** is a true and correct copy of
17 *Coeur D'Alene Tribe v. Asarco Incorporated*, 280 F. Supp. 1094 (D. Idaho 2003).
18

19 I declare under penalty of perjury under the laws of the State of California
20 and the United States of America that the foregoing is true and correct.

21 Executed this 30th day of July, 2009 in San Francisco, California.

22
23 By: _____


David T. Chapman

EXHIBIT 1



California Regional Water Quality Control Board

Central Valley Region

Karl E. Longley, ScD, P.E., Chair



Linda S. Adams
Secretary for
Environmental
Protection

11020 Sun Center Drive #200, Rancho Cordova, California 95670-6114
Phone (916) 464-3291 • FAX (916) 464-4645
<http://www.waterboards.ca.gov/centralvalley>

Arnold
Schwarzenegger
Governor

30 June 2009

Lisa A. Runyon, Senior Counsel
Sunoco, Inc.
1735 Market Street. Ste. LL
Philadelphia PA 19103-7583

Jack and Carolyn Wessman
PO Box 949
Clayton, CA 94517

REVISED ORDER TO SUNOCO INC. TO SUBMIT TECHNICAL REPORTS IN ACCORDANCE WITH SECTION 13267 OF THE CALIFORNIA WATER CODE, MOUNT DIABLO MERCURY MINE, CONTRA COSTA COUNTY

~~YOU ARE LEGALLY OBLIGATED TO RESPOND TO THIS ORDER, PLEASE READ THIS ORDER CAREFULLY~~

This Order revises and replaces a previous Order adopted on 25 March 2009.

Mt. Diablo Mercury Mine is an inactive mercury mine on approximately 109 acres on the northeast slope of Mount Diablo in Contra Costa County. Acid mine drainage containing elevated levels of mercury and other metals are being discharged to a pond that periodically overflows into Horse and Dunn Creeks. Further site investigation is required to assess the extent of pollution discharged from the mine site and to evaluate the remedial options to mitigate the discharge. This site investigation and subsequent remedial option evaluation are needed to select the remedial option to restore the impacted waters of the state and to protect public health and the environment.

Presently, the mine consists of an exposed open cut and various inaccessible underground shafts, adits, and drifts. Extensive waste rock piles and mine tailings cover the hill slope below the open cut, and several springs and seeps discharge from the tailings-covered area. Three surface impoundments at the base of the tailings capture most spring flow and surface runoff. However, during winter the ponds commonly spill into Horse and Dunn Creeks, which drain to the Marsh Creek watershed.

Jack and Carolyn Wessman are the current owners of the Mount Diablo Mercury Mine property and are considered to be dischargers. The Wessmans have made some improvements to reduce surface water exposure to tailings and waste rock, including the construction of a clean fill cap over parts of the tailings/waste rock piles. Although improvements have been made without an engineering design or approved plan, these improvements may have reduced some of the impacts from the mine site. However, discharges that contain elevated mercury levels continue to impact the site and site vicinity.

Cordero Mining Company, owned by Sunoco, Inc. in the 1950s, operated the Mt. Diablo Mine from approximately 1954 to 1956 and was responsible for the past discharge of mining waste.

California Environmental Protection Agency

Cordero was dissolved in 1975. Because Cordero Mining Company operated the mine, and due to the interrelationship between Sunoco and Cordero Mining Company, the United States Environmental Protection Agency (USEPA), Region IX, named Sunoco Inc. a responsible party for Mt. Diablo Mine site in the Unilateral Administrative Order for the Performance of a Removal Action, USEPA Docket No. 9-2009-02. Sunoco, Inc. is considered a discharger at this site.

Pursuant to California Water Code (CWC) section 13267, Sunoco, Inc. is hereby required to submit the following reports:

1. **By 1 August 2009**, Sunoco will voluntarily submit a PRP report including a spreadsheet of known owners/operators, periods of ownership/operation, and any information regarding current financial status.
2. **By 1 August 2009**, Sunoco will submit a report that supports its "divisibility" contention including figures showing the area leased by Cordero, extent of operations, and proposed area of study under the Order. This shall include the total volume of rock removed from the underground working and an estimate of the total volume of broken-rock discharged (use a realistic-swell-factor-to-calculate-the volume of broken rock).
3. **By 1 October 2009**, Sunoco will submit an investigation work plan covering the area agreed upon by the Regional Water Board and Sunoco. Regional Water Board staff must review and consider the divisibility report and reach agreement with Sunoco on the limits, if any, on the Site to be investigated.
4. **By 1 February 2010**, Sunoco will submit an investigation report presenting results of the investigation work plan.

Information in these reports may be used to set time schedules and/or identify additional responsible parties who may be added to this or future orders. Also, please submit a copy of all reports to Ms. Jerelean Johnson at USEPA, Region 9 in San Francisco.

CWC section 13267 states, in part:

(b)(1) In conducting an investigation . . . , 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 . . . 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.

A discharger has a legal obligation to investigate and remediate contamination. As described above, Sunoco Inc. is subject to this Order because of its ownership interest in the Cordero Mining Company, which operated Mount Diablo Mercury Mine and discharged waste to waters of the state. Therefore, it is a "person[s] who [have] discharged ... waste" within the meaning of CWC section 13267.

The reports are necessary for the reasons described in this Order, to assure protection of waters of the state, and to protect public health and the environment. Failure to submit the required reports by their due dates may result in additional enforcement action, which may include the imposition of administrative civil liability pursuant to CWC section 13268. CWC section 13268 states, in part:

- (a)(1) Any person failing or refusing to furnish technical or monitoring program reports as required by subdivision (b) of Section 13267 . . . or falsifying any information provided therein, is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b). (b)(1) Civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.

Any person aggrieved by this action of the Central Valley Regional Water Board may petition the State Board to review the action in accordance with CWC section 13320 and California Code of Regulations, title 23, section 2050. 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 or will be provided upon request.

Reimbursement of the Central Valley Water Board for reasonable costs associated with oversight of the investigation and remediation of the site will be required. Information will be provided in the next several weeks on the cost recovery program.

If you have any questions, please contact Ross Atkinson at (916) 464-4614 or via e-mail at ratkinson@waterboards.ca.gov.



JOSEPH MELLO

Acting Supervising Engineering Geologist
Title 27 Permitting and Mining Unit

cc: Patrick Palupa, Office of the Chief Counsel, SWRCB, Sacramento
California Dept of Parks and Recreation, Bay Area Dist., San Francisco
Jerelean Johnson, Site Assessment, Superfund Div. USEPA Region 9, San Francisco
Larry Bradfish, Asst. Regional Counsel, USEPA Region 9, San Francisco
Janet Yocum, On-Scene Coordinator, USEPA Region 9, San Francisco
R. Mitch Avalon, Contra Costa County Flood Control, Martinez
William R. Morse, Sunoco, Inc. Philadelphia, PA
David Chapman, Edgcomb Law Group, San Francisco.

EXHIBIT 2

David Chapman

From: Ross Atkinson [ratkinson@waterboards.ca.gov]
Sent: Friday, April 03, 2009 4:34 PM
To: David Chapman
Subject: 3/25/2009 Order to Sunoco Inc. to Submit Technical Reports Re:Mount Diablo Mercury Mine

David -

Our files are incomplete on this site and at this time the Regional Water Board does not have a complete property map for Mount Diablo Mine.

The 109 acres in the Order refers to the approximately 109 acres originally sold to Mr. Wessman (assessor parcel #78060008-6).

If further investigation determines that nearby property was disturbed by mining and contributes to surface water contamination, then that property and it's past and present owners or operators can be added to the Order or future Orders. Our goal is to identify all potentially responsible parties and include them in a cleanup plan.

Hope this helps, please feel free to contact me with any questions.

I will be out of the office on Monday, I will be in the office all day Tuesday.

Thanks

Ross

Ross Atkinson
Associate Engineering Geologist
Waste Discharge to Land Unit
Central Valley RWQCB - Sacramento
ph. (916) 464-4614
email: ratkinson@waterboards.ca.gov

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>>> "David Chapman" <dchapman@edgcomb-law.com> 4/3/2009 10:58 AM >>>

Dear Mr. Atkinson,

My name is David Chapman and I am an attorney with Edgcomb Law Group ("ELG") in San Francisco.

ELG is outside counsel for Sunoco, Inc. ("Sunoco"), and is representing Sunoco in relation to the California Regional Water Quality Control Board's ("CRWQCB's") "Order to Sunoco Inc. To Submit Technical Reports In Accordance With Section 13267 Of The California Water Code, Mount Diablo Mercury Mine, Contra Costa County" ("Order") dated March 25, 2009.

The Order provides in the final paragraph that you are the contact person in the event Sunoco has any questions.

The purpose of this email is to request from you a map of the Mt. Diablo Mercury Mine ("Site").

According to the Order, the "Mt. Diablo Mercury Mine is an inactive mercury mine on approximately 109 acres on the northeast slope of Mount Diablo in Contra Costa County." (Emphasis added.)

Could you please forward to me at your earliest convenience a map (or give APN's) reflecting what, exactly, the CRWQCB contends is the "mine site," so that Sunoco has a comprehensive understanding regarding the area to which the Order applies.

Please do not hesitate to contact me via email or at the number listed below should you have any questions concerning the above.

I appreciate your assistance in this matter and thank you in advance for your anticipated cooperation.

Very truly yours,

David

David T. Chapman † Edgcomb Law Group

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EXHIBIT 3