

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION**

**TECHNICAL AND MONITORING REPORT  
ORDER R5-2010-0048**

**FOR  
TERHEL FARMS, INC., RICHARD L. MILLER, HOLLIDAY FOUNDATION INC.,  
HOMESTAKE MINING COMPANY, BONNEVILLE INDUSTRIES, INC.,  
FILIATRA, INC., ASERA WESTERN CORPORATION**

**CENTRAL, CHERRY HILL, EMPIRE, MANZANITA, AND WEST END MINES  
COLUSA COUNTY**

This Order is issued to Terhel Farms, Inc., Richard L. Miller, Holliday Foundation Inc., Homestake Mining Company, Bonneville Industries, Inc., Filiatra, Inc., and Asera Western Corporation (hereafter collectively referred to as Dischargers) based on provisions of California Water Code (CWC) section 13267, which authorizes the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) to require the submittal of technical and monitoring reports.

The Central Valley Water Board finds:

1. The Central, Cherry Hill, Empire, Manzanita, and West End Mines (hereafter "Mines") are inactive mercury and/or gold mines. Mining waste from the Mines erodes into Sulphur Creek, which is tributary to Cache Creek. The Sulphur Creek streambed and flood plain directly below the Mines contain mining waste. The Mines have discharged and continue to discharge or threaten to discharge mining waste into waters of the state. These discharges have affected water quality, and continuing erosion of mining waste into Sulphur Creek will further affect water quality.
2. The Mines are located in the Wilber Springs hydrothermal area of the Sulphur Creek Mining District (District) of Colusa County, and about 20 miles west of Williams, California. The Mines are located within Colusa County Assessor's Parcel Numbers 018-200-002-000, 018-200-013-000, 018-200-014-000, 018-200-015-000, 018-200-016-000, 018-200-017-000, 018-200-018-000, 018-200-004-000, 018-200-005-000, and 018-200-007-000, in Sections 28 and 29, Township 14 North, Range 5 West, Mount Diablo Base and Meridian (MDBM), as shown in Attachment A, a part of this Order.
3. Mining waste has been discharged at the Mines since mining activities began in the late 1800s. Mining waste has been discharged onto ground surface where it has eroded into Sulphur Creek, resulting in elevated concentrations of metals within the creek. Mining waste discharged onto ground surface has not been evaluated for its potential impact to ground water. The Dischargers, own, have owned, or have operated the mining sites where the Mines are located and where mining waste has been discharged. In its current condition, mining waste is causing or threatens to cause a discharge of pollutants to waters of the state.

4. The Central Valley Water Board's *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, Fourth Edition* (hereafter Basin Plan) states: "By 6 February 2009, the Regional Water Board shall adopt cleanup and abatement orders or take other appropriate actions to control discharges from the inactive mines (Table IV-6.4) in the Cache Creek watershed." Mercury levels are already above applicable objectives in Sulphur Creek and Cache Creek, which constitutes a condition of pollution or nuisance.
5. The Prosecution Team conducted a title review of property records from the Colusa County Records Office. The parties named in this Order as Dischargers are known to presently exist or have viable successors. The basis of liability for each Discharger is addressed below under Dischargers' Liability.
6. This Order may be revised to include additional Dischargers as they become known, and may include additional current or former owners, leaseholders and operators.

### **Mining History**

7. Copper, mercury, sulphur, and gold were all discovered in the District in the late 1800s, and the Mines were developed during that period. This information is described in the *CalFed-Cache Creek Study, Task 5C2: Final Report. Final Engineering Evaluation and Cost Analysis for the Sulphur Creek Mining District*, prepared by Tetra Tech EM Inc., September 2003 (hereafter CalFed Report).

### **The Central and Empire Groups**

8. The Central and Empire mines are located near the Wilbur Springs resort. The Central Mine Group lies to the north of Sulphur Creek and is made up of the historic Central, Dewey, and Little Giant mining claims. The Empire Mine Group lies to the south of Sulphur Creek and is made up of the historic Empire, Mercury Queen, Mercury King, and Hidden Treasure lode mining claims (CalFed Report).
9. Mining started at the Empire mine in the 1870s and at the Central mine in 1891. In 1873, sixty-three flasks of mercury (one flask equals 76 pounds) were produced from ore mined at the Empire mine, but processed at the Wide Awake mine. Sometime between the 1890s and the early 1900s, the Central and Empire groups were operated in conjunction with the Abbott mine. Therefore, it is possible during this time that ore from Central and Empire groups was processed at the Abbott mine facilities. After this period, no significant production from the Central Group occurred until 1926 when \$10,000 worth of mercury (about 107 flasks) was produced. After that, the mines were idle until a small production was reported in 1942. No information was found on any operations after 1942. Total production was approximately 170 flasks. (CalFed Report).
10. The workings of the Central and Empire mines are now caved but are reported to include several hundred feet of underground drifts and crosscuts. The workings of the Central Mine consisted of four short adits, the highest about 400 feet above Sulphur Creek. The Empire Mine may have included at least three adits that where up to 150 feet long (Moisseeff 1966).

A small processing facility remains at Central Mine, and a small retort remains at Empire Mine (CalFed Report).

**The Manzanita Mine Group  
(including the Cherry Hill, West End and Manzanita Mine Sites)**

11. The Manzanita mine is located about one mile west of Wilbur Springs resort. The Manzanita mine has been operated for both gold and mercury over its history. The Cherry Hill gold mine is located southwest of the Manzanita mine and on the south side of Sulphur Creek. The West End gold mine is located on the north side of Sulphur Creek west of the Manzanita mine (CalFed Report).
12. The Manzanita mine was discovered in 1863 and operated as a gold mine for many years (up to 1891). Cinnabar was recovered as a byproduct. From 1902 to 1942, it became primarily a mercury mine with intermittent operations by various companies and lessees, and yielded over 2,500 flasks of mercury. The mine may have been operated in conjunction with the Cherry Hill mine on the south side of Sulphur Creek in the 1920s. No records separating mercury and gold production are available prior to 1900 (CalFed Report).
13. The Manzanita mine consists of numerous tunnels and shafts, most of which are caved and inaccessible. Currently there is one open adit about 45 feet above the floodplain and there are several small open cuts, no more than 50 feet in depth between the adit and the top of the hill. Near the top of the hill is an open vertical shaft of unknown depth. Tailings appear to be exposed in the north stream bank of Sulphur Creek and there is a concrete foundation that may have been part of a crushing facility and stamp battery west of the adit (CalFed Report).
14. At the Manzanita mine, a ten-stamp mill was used to crush the ore, which was then concentrated in blanket sluices followed by two combination pans using sodium amalgam and bluestone amalgam. Three 5-foot Huntington mills, seven Victor concentrators, three 5-foot amalgamating pans, two 8-foot settlers, a No. 1 Gates crusher, and a 65 horse-power engine and boiler were reportedly operated for gold and mercury extraction (CalFed Report).
15. The Cherry Hill Mine workings consist of two short adits that have a maximum length of about 100 feet. The West End mine workings consist of three adits, the extent of which is unknown. The workings at the Cherry Hill Mine are open and accessible. The adits at the West End Mine are equipped with grates to prevent access by humans (CalFed Report).
16. Gold production records for the Cherry Hill Mine are incomplete. Gold production records are not available for West End Mine as this mine was likely operated in conjunction with Cherry Hill Mine. There is no evidence that either mine produced mercury (CalFed Report).
17. Ore processing facilities at the Cherry Hill mine consisted of a stamp mill with coarse gold recovery tables. There is no reported processing operation at the West End Mine. West End ore was reported to be very siliceous and similar in milling quality to Cherry Hill ore and it is inferred that processing of West End ore was done in the Cherry Hill stamp mill.

18. Currently, only various pieces of iron from the mill and concrete foundations remain at Cherry Hill Mine. The mill foundations may be of historical significance (CalFed Report).

### **Mining Waste Description and Characterization Central and Empire Group**

19. Conspicuous waste rock piles with topographic relief are absent at the Central and Empire Mines. However, the slopes above and below the Central mine have a local hummocky appearance and are covered with thick grasses that may conceal small waste piles. In addition, the ground upon which the brick retort is located may contain up to 1,000 cubic yards (CY) of a mixture of tailings and waste rock. In addition, up to 1,000 CY of overburden or waste rock may be present below the cuts above the rotary furnace. Waste rock is also exposed in the slope below the retort at the Empire Mine but it is inconspicuous due to the vegetation. The total volume of this pile may be up to 5,600 CY (CalFed Report).
20. In 2002, Churchill and Clinkenbeard sampled solid materials at the Central and Empire mines. Mercury concentrations were measured at six locations at the Central Mine, and at two locations at the Empire Mine. Results showed mercury concentrations of 150 to 420 parts per million (ppm) in soil and waste materials near ore processing units, and 30 ppm in calcined tailings piles. Complete characterization of background soils and mining waste at the Central and Empire Mines has not been performed (CalFed Report).
21. Churchill and Clinkenbeard (2002) calculated that less than 3 kilograms (kg) of mercury remains in the small calcined tailings pile at the Central Mine, and 700 kg of mercury remains in two waste piles at the Empire Mine. The estimated mercury load from Central Mine is 0.003 to 0.03 kg/yr or 0.16 % of the total mine related mercury load of 4.4 to 18.6 kg/yr to Sulphur Creek. The estimated mercury load from Empire Mine is 0.04 to 0.06 kg/yr or 0.32 % of the total mine related mercury load of 4.4 to 18.6 kg/yr to Sulphur Creek (CalFed Report).

### **Mining Waste Description and Characterization Manzanita Mine Group (including the Cherry Hill and West End Mine Sites)**

22. Waste rock piles at the Manzanita Mine are sparse and are limited to the lower portion of the hill below the area of argillic alteration. Tailings are not conspicuous at the surface near the mine but tailings appear to be exposed in the bank of Sulphur Creek above Jones Fountain of Life and may be buried in the flood plain along Sulphur Creek. The estimated mercury load from Manzanita Mine is 0.3 to 6.5 kg/yr or 34.9 % of the total mine related mercury load of 4.4 to 18.6 kg/yr to Sulphur Creek (CalFed Report).
23. Churchill and Clinkenbeard (2002) conducted solid materials sampling at the Manzanita Mine. Mercury concentrations were measured at 11 locations. Results showed mercury concentrations of 6 to 560 ppm in soil and waste materials near locations believed to be former ore processing units, and 25 to 260 ppm in background soils and sediments. Analysis of solid samples showed sediment in Sulphur Creek adjacent to Manzanita Mine had a

pH of 7, and mine site soils had a pH of approximately 4 to 5. Complete characterization of background soils and mining waste at the Manzanita Mine has not been performed (CalFed Report).

24. Mercury concentrations were measured at six locations at Cherry Hill Mine, and at three locations at West End mine. Results showed mercury concentrations of 47 to 300 ppm in waste piles, and less than 1 to 280 ppm in background soils and sediments. A study by Percy and Petersen (1990) found background mercury concentrations of up to 6,000 ppm. Complete characterization of background soils and mining waste at the Cherry Hill and West End mines has not been performed (CalFed Report).
25. Currently, there is no mine waste rock pile outside of the short adits at Cherry Hill. There is small waste rock pile (about 578 CY) on the Sulphur Creek floodplain about 500 feet northeast of the adits. This pile is of unknown origin. There is currently a waste rock pile at the West End Mine that may contain up to 3,600 CY of waste rock. Assays obtained during this study indicated gold concentrations of up to 0.30 ounces per ton (CalFed Report).
26. The estimated mercury load from Cherry Hill Mine is up to 1 kg/yr or 5.4 % of the total mine related mercury load of 4.4 to 18.6 kg/yr to Sulphur Creek. The estimated mercury load from West End Mine is 0.002 to 1.1 kg/yr or 5.9 % of the total mine related mercury load of 4.4 to 18.6 kg/yr to Sulphur Creek (CalFed Report).

### **Mercury and Sediment Loads to Sulphur Creek**

27. Mine site investigations within the District have estimated mercury and sediment loads from the individual mine sites. Mercury is transported primarily through erosion of mercury-bearing mine wastes, soils, and sediments during storm runoff events. Though natural processes have enriched sediments with mercury, mining activities have increased sediment generation, resulting in increased potential for mercury mobilization from the mine sites (CalFed Report).
28. Annual mercury load estimates from the Mines range from 4.4 to 18.6 kg/yr. Annual sediment load estimates from the Mines range from 5,700 to 60,100 kg/yr (CalFed Report).
29. Aqueous mercury concentrations in Sulphur Creek are among the highest in the Cache Creek watershed, and remain elevated during non-peak flow periods. Active hydrothermal springs constantly discharge into Sulphur Creek, with mercury concentrations ranging from 700 to 61,000 nanograms per liter (ng/L) (CalFed Report).
30. Particulate bound mercury in Sulphur Creek comes mostly from sediments and mercury-bearing mine waste mobilized into the creek during storms. All the mines together are estimated to contribute about 78% of the total mercury load. The Central Mine sub watershed is estimated to contribute about 16 % of the total mercury load. Similar to total and dissolved concentrations, methyl mercury concentrations in Sulphur Creek are among the highest reported for the Cache Creek watershed. Methyl mercury concentrations were as

high as 20.64 ng/L in Sulphur Creek above the confluence with Bear Creek. (*Sulphur Creek TMDL for Mercury, Final Staff Report, January 2007.*<sup>1</sup>).

31. Mercury is a toxic substance, which can cause damage to the brain, kidneys, and to a developing fetus. Young children are particularly sensitive to mercury exposure. Methylmercury, the organic form of mercury that has entered the biological food chain, is of particular concern, as it accumulates in fish tissue and in wildlife and people that eat the fish. Mine waste present at this Mine may also pose a threat to human health due to exposure (dermal, ingestion, and inhalation) through recreational activities (hiking, camping, fishing, and hunting) or work at the site.

### **Regulatory Considerations**

32. Section 303(d) of the Federal Clean Water Act requires states to identify waters not attaining water quality standards (referred to as the 303(d) list). Since 1990, Sulphur Creek has been identified by the Central Valley Water Board as an impaired water body because of high aqueous concentrations of mercury.
33. The Basin Plan designates beneficial uses of the waters of the state, establishes Water Quality Objectives (WQOs) to protect these uses, and establishes implementation policies to achieve WQOs.
34. Studies were conducted that demonstrated that the municipal and domestic supply (MUN) beneficial use and the human consumption of aquatic organisms beneficial use did not exist and could not be attained in Sulphur Creek from Schoolhouse Canyon to the mouth, due to natural sources of dissolved solids and mercury. The Central Valley Water Board, in Resolution R5-2007-0021, adopted a basin plan amendment that de-designated these uses in Sulphur Creek from Schoolhouse Canyon to the mouth. The remaining beneficial uses for Sulphur Creek, a tributary of Cache Creek, are: agricultural supply; industrial service supply; industrial process supply; water contact recreation and non-contact water recreation; warm freshwater habitat; cold fresh water habitat; spawning, reproduction, and/or early development; and wildlife habitat.
35. The beneficial uses of underlying groundwater, as stated in the Basin Plan, are municipal and domestic supply, agricultural supply, industrial service supply, and industrial process supply.
36. The Central Valley Water Board adopted site-specific water quality objectives for Sulphur Creek in Resolution R5-2007-0021. The WQOs now listed in the Basin Plan for Sulphur Creek state that waters shall be maintained free of mercury from anthropogenic sources such that beneficial uses are not adversely affected. During low flow conditions, defined as flows less than 3 cfs, the instantaneous maximum total mercury concentration shall not exceed 1,800 ng/L. During high flow conditions, defined as flows greater than 3 cfs, the instantaneous maximum ratio of mercury to total suspended solids shall not exceed 35

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<sup>1</sup> The report is available at [http://www.swrcb.ca.gov/centralvalley/water\\_issues/tmdl/central\\_valley\\_projects/sulphur\\_creek\\_hg/sulphur\\_creek\\_tmdl.pdf](http://www.swrcb.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/sulphur_creek_hg/sulphur_creek_tmdl.pdf)

mg/kg. Both objectives apply at the mouth of Sulphur Creek. Exceedances of the water quality objective in Sulphur Creek during high flow events are documented in Appendix C (page 24) of the *Staff Report for the Amendment to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins to Determine Certain Beneficial Uses are Not Applicable in and Establish Water Quality Objectives for Sulphur Creek*,<sup>2</sup> dated March 2007, which is part of the administrative record of this Order.

37. Sulphur Creek is tributary to Bear Creek, which is tributary to Cache Creek. Beneficial uses of Bear and Cache Creeks are municipal and domestic supply, agriculture – irrigation and stock watering, contact and non-contact recreation, industrial process and service supply, warm freshwater habitat, spawning – warm and cold, wildlife habitat, cold freshwater habitat, and commercial and sport fishing. Cache Creek is impaired for mercury and therefore has no assimilative capacity. Any discharges of mercury or mercury-laden sediments that reach Cache Creek therefore threaten to cause or contribute to a condition of pollution or nuisance. Cache Creek drains to the Cache Creek Settling Basin, which discharges to the Yolo Bypass and flows into the Sacramento-San Joaquin Delta Estuary. Data documenting exceedances of water quality objectives in Cache and Bear Creeks are found in Table 3.2 (page 9) of the October 2005 staff report entitled *Amendments to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control of Mercury in Cache Creek, Bear Creek, Sulfur Creek, and Harley Gulch*, which is part of the administrative record of this Order.<sup>3</sup>

38. The Cache Creek Watershed Mercury Program, included in the Basin Plan, requires responsible parties to develop plans to reduce existing loads of mercury from mining or other anthropogenic activities by 95% in the Cache Creek watershed (i.e., Cache Creek and its tributaries). The Basin Plan, Chapter IV, page 33.05 states that,

Responsible parties shall develop and submit for Executive Officer approval plans, including a time schedule, to reduce loads of mercury from mining or other anthropogenic activities by 95% of existing loads consistent with State Water Resources Control Board Resolution 92-49. The goal of the cleanup is to restore the mines to premining conditions with respect to the discharge of mercury. Mercury and methylmercury loads produced by interaction of thermal springs with mine wastes from the Turkey Run and Elgin mines are considered to be anthropogenic loading. The responsible parties shall be deemed in compliance with this requirement if cleanup actions and maintenance activities are conducted in accordance with the approved plans. Cleanup actions at the mines shall be completed by 2011.

39. The Basin Plan, Chapter IV, page 33.05 states that,

The Sulphur Creek streambed and flood plain directly below the Central, Cherry Hill, Empire, Manzanita, West End and Wide Awake Mines contain mine waste. After mine cleanup has been

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<sup>2</sup> This report is available at [http://www.swrcb.ca.gov/centralvalley/water\\_issues/tmdl/central\\_valley\\_projects/sulphur\\_creek\\_hg/sulphur\\_creek\\_staff\\_final.pdf](http://www.swrcb.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/sulphur_creek_hg/sulphur_creek_staff_final.pdf)

<sup>3</sup> This report is available at [http://www.swrcb.ca.gov/centralvalley/water\\_issues/tmdl/central\\_valley\\_projects/cache\\_sulphur\\_creek/cache\\_crk\\_hg\\_final\\_rpt\\_oct2005.pdf](http://www.swrcb.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/cache_sulphur_creek/cache_crk_hg_final_rpt_oct2005.pdf)

initiated, the Dischargers shall develop and submit for Executive Officer approval a cleanup and abatement plan to reduce anthropogenic mercury loading in the creek.

40. Under CWC section 13050, subdivision (q)(1), "mining waste" means all solid, semisolid, and liquid waste materials from the extraction, beneficiation, and processing of ores and minerals. Mining waste includes, but is not limited to, soil, waste rock, and overburden, as defined in Public Resources Code section 2732, and tailings, slag, and other processed waste materials...." The constituents listed in Findings No. 19, 22, and 25 are mining wastes as defined in CWC section 13050, subdivision (q) (1).
41. Because the Mines contain mining waste as described in CWC sections 13050, closure of Mining Unit(s) must comply with the requirements of California Code of Regulations, title 27, sections 22470 through 22510 and with such provisions of the other portions of California Code of Regulations, title 27 that are specifically referenced in that article.
42. Under CWC section 13050, subdivision (m) a condition that occurs as a result of disposal of wastes, is injurious to health, or is indecent or offensive to the senses, or is an obstruction to the free use of property, and affects at the same time any considerable number of persons, is a nuisance.
43. Affecting the beneficial uses of waters of the state by exceeding applicable WQOs constitutes a condition of pollution as defined in CWC section 13050, subdivision (l). Mine waste has been discharged or deposited where it has discharged or threatens to discharge to waters of the state and has created, and continues to threaten to create, a condition of pollution or nuisance.
44. CWC section 13304(a) states that:

Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a Regional Water Board or the state board, or 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 Water Board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts. A cleanup and abatement order issued by the state board or a Regional Water Board may require the provision of, or payment for, uninterrupted replacement water service, which may include wellhead treatment, to each affected public water supplier or private well owner. Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant.
45. The State Water Resources Control Board (State Board) has adopted Resolution No. 92-49, the *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under CWC Section 13304*. This Resolution sets forth the policies and procedures to be used during an investigation or cleanup of a polluted site and requires that cleanup levels be consistent with State Board Resolution No. 68-16, the *Statement of Policy With Respect to*



*Maintaining High Quality of Waters in California.* Resolution No. 92-49 and the Basin Plan establish cleanup levels to be achieved. Resolution No. 92-49 requires waste to be cleaned up to background, or if that is not reasonable, to an alternative level that is the most stringent level that is economically and technologically feasible in accordance with California Code of Regulations, title 23, section 2550.4. Any alternative cleanup level to background must: (1) be consistent with the maximum benefit to the people of the state; (2) not unreasonably affect present and anticipated beneficial use of such water; and (3) not result in water quality less than that prescribed in the Basin Plan and applicable Water Quality Control Plans and Policies of the State Board.

46. Chapter IV of the Basin Plan contains the *Policy for Investigation and Cleanup of Contaminated Sites*, which describes the Central Valley Water Board's policy for managing contaminated sites. This policy is based on CWC sections 13000 and 13304, California Code of Regulations, title 23, division 3, chapter 15; California Code of Regulations, title 23, division 2, subdivision 1; and State Water Board Resolution Nos. 68-16 and 92-49. The policy addresses site investigation, source removal or containment, information required to be submitted for consideration in establishing cleanup levels, and the basis for establishment of soil and groundwater cleanup levels.

47. The State Board's *Water Quality Enforcement Policy* states in part:

At a minimum, cleanup levels must be sufficiently stringent to fully support beneficial uses, unless the Central Valley Water Board allows a containment zone. In the interim, and if restoration of background water quality cannot be achieved, the Order should require the discharger(s) to abate the effects of the discharge (*Water Quality Enforcement Policy*, p. 19).

48. CWC section 13267 states that:

- (a) A regional board, in establishing or reviewing any water quality control plan or waste discharge requirements, or in connection with any action relating to any plan or requirement authorized by this division, may investigate the quality of any waters of the state within its region.
- (b) (1) In conducting an investigation specified in subdivision (a), 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, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters 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.

49. The technical reports required by this Order are necessary to ensure the protection of the waters of the state, ensure the protection of the waters of the state, comply with the Basin Plan's requirement for responsible parties to develop plans to reduce existing loads of mercury from mining or other anthropogenic activities by 95% in the Cache Creek watershed

(Basin Plan, Chapter IV, page 33.05, see Finding 37), to further characterize the location of mining wastes, to complete a conceptual site model for the eventual cleanup of the mining sites and determine what cleanup measures are necessary, and to provide additional information about suspected past or future discharges. The Dischargers either own or have owned, leased, or operated the mining sites subject to this Order. Additional findings establishing the liability of each Discharger pursuant to CWC section 13267 are set forth below. While no specific cost for the required reports has been estimated, the need for cleanup is well established. (See, e.g., the Basin Plan's Cache Creek Watershed Mercury Program.) The technical or monitoring report is necessary to accomplish the cleanup. (See, State Water Board Resolution 92-49.) The investigation is as limited as possible, and is consistent with orders requiring investigation or cleanup at other sites.

50. The issuance of this Order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality Act (CEQA) (Pub. Resources Code, section 21000 et seq.), pursuant to California Code of Regulations, title 14, section 15321(a) (2). The implementation of this Order is also an action to assure the restoration of natural resources and/or the environment and is exempt from the provisions of the CEQA, in accordance with California Code of Regulations, title 14 sections 15307 and 15308. The implementation of this Order also constitutes basic data collection, research and/or resource evaluation activities which do not result in a serious or major disturbance to an environmental resource, and is exempt from the provisions of the CEQA, in accordance with California Code of Regulations, title 14 sections 15306.

### **Dischargers' Liability**

51. CWC section 13267 imposes investigation and reporting liability on "any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste ..." Owners of mine property are dischargers with respect to mining waste that erodes, runs off or otherwise discharges from the property. (Opinion 55-116, 26 Ops. Cal. Atty. Gen. 88 (1955); see also, Order WQ 90-3 (*San Diego Unified Port District*)). "Evidence" for purposes of CWC section 13267 "means any relevant evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in a civil action" (CWC § 13267, subd. (e).) There is adequate evidence in the record to support at least a suspicion that each Discharger discharged waste.
52. As established under the findings regarding *Mercury and Sediment Loads to Sulphur Creek*, above, mercury is mobilized by storm water runoff, slope failure, or water-rock interaction from mine waste. In addition, disturbed sediments can migrate across the property and be deposited where they are later discharged to waters of the state. Each of the Dischargers owned the property in question for at least twelve months. The Board takes official notice that there are no years on record during the relevant period of time when it did not rain at all.
53. The Board considered whether interim landowners and lessees should be held liable for passive discharges to surface waters even though the specific discharges during the time of interim ownership may have in the intervening years left the Sulphur Creek/Cash Creek

watersheds. The Board finds that such interim landowners are liable under this Order. As a preliminary matter, the migration of pollutants from soil in one area of the property to soil in another area, from where it may later be discharged into the surface waters, is a discharge for which an interim owner may be liable. Additionally, in accordance with *City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, the Board may look to the law of nuisance to interpret liability in the context of a section 13304 clean-up order. California Civil Code section 3483, which codified the common law duty of successive owners to abate a continuing nuisance, states that every successive owner of property who neglects to abate a continuing nuisance created by a former owner, is liable in the same manner as the one who first created it. In accordance with this principle, interim owners could have been named in a section 13304 order and it is even more appropriate to name them in this section 13267 Order where the Board need only establish that the interim owners are "suspected" of discharging waste.

54. AMERICAN LAND CONSERVANCY (ALC) is not named in this Order. There are two potentially applicable bases of ALC's liability: (i) ALC's Grant of Easement for Conservation Purposes, 10/27/99 ("Easement") in APNs 018-200-005-000, 018-200-007-000, 018-200-013-000, 018-200-014-000, 018-200-015-000, 018-200-016-000, 018-200-017-000, 018-200-018-000 and 018-200-006-000; and (ii) ALC's fee interest in APNs 018-200-005-000 and 018-200-007-000 from June 25, 1999 to October 26, 1999. The Prosecution Team presented no evidence that any activities under the Easement caused or permitted a discharge of mining waste and testified that the Easement was not a basis for liability. With respect to ALC's fee interest, the Board declines to exercise its discretion to require ALC to undertake investigation based on ALC's brief fee interest. The Prosecution Team presented no evidence of rain events during ALC's period of ownership, and presented no other evidence that ALC caused or permitted a discharge during its ownership. In addition, the *Water Quality Enforcement Policy* (2002) requires that regional water boards *should* (not *shall*) "name all dischargers for whom there is sufficient evidence of responsibility as set forth in California Water Code section 13304." The Enforcement Policy includes no similar policy statement for section 13267 orders.

The State Water Board has determined that it is inappropriate to require certain dischargers to participate in a cleanup, even though the dischargers have some legal responsibility for cleanup. (See, State Water Board Order WQ 92-13 (*Wenwest*). Although *Wenwest* was a cleanup order and not a site investigation order, the same reasoning applies to this Order. A consideration of the *Wenwest* factors weighs against requiring ALC to participate in investigation or cleanup of this site. ALC purchased the property solely for the purposes of conveying it to Dr. Miller; the ownership period was brief (four months); Dr. Miller is named in the Order; ALC had nothing to do with the activity that caused the condition of pollution; ALC never engaged in any activity that exacerbated the problem; ALC had incomplete knowledge of the pollution; and numerous other dischargers are named in this Order. Although no cleanup is proceeding, there are other parties named in this Order who are now required to begin site investigation. The Board makes no finding about whether ALC should have known about mercury pollution, or whether mercury pollution was just beginning to become known when ALC acquired the property, but finds that these factors are less significant because ALC acquired the property solely to facilitate the conservation easement and immediate property transfer. In addition to the *Wenwest* factors, in determining not to name

ALC, the Board considered that ALC acquired the property solely to facilitate its acquisition of the conservation easement; holding ALC liable may prevent or discourage ALC's or other entities' future conservation efforts; and ALC's period of ownership was during the summer and early fall, and not during the wet season. The Board will therefore exercise its discretion not to name ALC in this Order.

55. RICHARD L. MILLER is the current owner of all parcels subject to this Order. He purchased various parcels in 1974, 1999 and 2003. He is therefore responsible for investigating and cleaning up waste that is discharging from the property, or that has been or may be deposited where it will discharge from the property. Dr. Miller asserted that he is not responsible because he granted the Easement to ALC. However, Dr. Miller explicitly reserved the obligation to comply with environmental laws (Easement, paragraph 3) and all rights of ownership not prohibited by the Easement (Easement, paragraph 4). The reserved rights of ownership include soil stabilization and erosion control. (Easement, Attachment C, paragraph 4.) Dr. Miller also agreed to comply with laws (Easement, paragraph 9), agreed that ALC would not become an owner or operator (Easement, paragraph 13(b)), and warranted compliance with environmental laws (*ibid*). Although ALC has the right to conduct certain erosion control activities at its sole discretion (Easement, paragraph 2), ALC has no obligation to do so.

Dr. Miller also contended that Regional Water Board staff advised him before he purchased the property that he would not be held liable. This assertion is contradicted by the evidence, including a the Phase I Preliminary Evaluation and Site Assessment (Erler & Kalinowski, 9/18/97) which states that the Central Valley Water Board might require formal closure (i.e., remediation) of the site; mine waste from inactive mines along Sulphur Creek might be a potential source of mercury in Cache Creek; testing was incomplete; and Sulphur Creek flows through the site.

Finally, Dr. Miller contended that holding him responsible for discharges from the site would deter other landowners from granting conservation easements. In light of Dr. Miller's long ownership of and ability to control the property, and the speculative nature of this contention, it is questionable whether the Board has discretion to relieve Dr. Miller of responsibility to investigate or clean up the site on this basis. Even if such discretion is available, the Board finds that it is appropriate to name Dr. Miller named as a discharger for the reasons stated in this paragraph.

56. [This paragraph intentionally left blank.]

57. HOMESTAKE MINING COMPANY owned or leased APNs 018-200-013-000, 018-200-014-000, 018-200-015-000, 018-200-016-000, 018-200-017-000, 018-200-018-000 and 018-200-006-000 from January 6, 1978 until 1999. There is no evidence that Homestake actively mined the site. Homestake provided evidence that its activity on the site was limited to mining exploration activity, including drilling. These activities might have caused discharges due to soil disturbance from equipment moving or drill cuttings. The Board need not determine whether these activities caused discharges, because Homestake's ownership and control over the property is a sufficient basis to require additional investigation. The lease provided that Homestake had exclusive possession of the property for mining purposes and

the lease's scope included control of tailings and waste piles on the mining property. Homestake asserted that its activities did not significantly cause or contribute to the discharge of mining wastes. Under the terms of its lease, Homestake exercised control over the property and had the ability to prevent mine materials and enriched mercury soil from entering waterways or migrating across the sites. Homestake, by holding a leasehold interest giving it control over the property during a time when mining waste was present, assumed responsibility for managing the discharges from the waste. In addition, Homestake owned the property for over ten years. As these wastes were eroding or are suspected of eroding into surface waters during the time that Homestake controlled the property, Homestake is a person who has discharged, discharges, or is suspected of having discharged or discharging wastes into waters of the state.

Homestake asserted that other sources, including naturally occurring conditions, contribute to mercury contamination, and that waste rock located farther from streams discharges only during very heavy rain events. Neither claim is sufficient to overcome the considerable evidence supporting Homestake's status as a discharger or suspected discharger.

Homestake asserted that its liability is divisible and that joint and several liabilities are not appropriate. All dischargers are jointly and severally liable for the discharge of waste. (State Board Order WQ 90-2 [*Union Oil Company*]). At this stage, the Board has not determined the relative mercury contributions of various sources or the relative contributions of various dischargers at any given site. Even were the Board inclined to apportion responsibility, which it is not, apportionment would be premature at this time.

58. TERHEL FARMS, INC., BONNEVILLE INDUSTRIES, INC., FILIATRA, INC. and ASERA WESTERN CORPORATION owned fee interest in owned APNs 018-200-005-000 and 018-200-007-000 between March 6, 1959 and an unknown date, as described below. Part of West End Mine was located on parcel APN 018-200-005-000. Mine waste and a portion of Sulphur Creek are located on parcel APN 018-200-007-000.
59. TERHEL FARMS, INC. owned APNs 018-200-005-000 and 018-200-007-000 from March 6, 1959 until March 3, 1986. Terhel Farms asserted that no mining was conducted during ownership. However, liability is based on the discharge or suspected discharge of mining waste to Sulphur Creek, which continued after active mining ceases. In addition, Terhel Farms, Inc. contended that it sold the entire "hill range" to Bonneville Industries in 1983. This contention is inconsistent with title records showing acquisition and sale on the above dates.
60. BONNEVILLE INDUSTRIES, INC. owned APNs 018-200-005-000 and 018-200-007-000 from March 3, 1986 until some time in 1999. Bonneville Industries asserted no defenses to the proposed Cleanup and Abatement Order presented to the Board on 7 October 2009.
61. FILIATRA, INC. owned APNs 018-200-005-000 and 018-200-007-000 from October 9, 1990 until June 30, 1992; after that, it appears Filiatra retained "all mineral rights, hydrocarbon rights, gravel rights, geothermal rights, water rights, all grazing rights, pasturing rights, hunting rights, and fishing rights" but transferred fee ownership. During the time Filiatra held fee title, mining waste was present on this property; discharged from the property to waters

of the State during rain events; and migrated to other locations from which it may have discharged to waters of the State. Filiatra asserted no defenses to the proposed Cleanup and Abatement Order presented to the Board on 7 October 2009.

62. ASERA WESTERN CORPORATION owned APNs 018-200-005-000 and 018-200-007-000 from June 30, 1992 until an unknown date. Asera Western asserted no defenses to the proposed Cleanup and Abatement Order presented to the Board on 7 October 2009.

63. HELEN HOLLIDAY FOUNDATION, INC. (Holliday Foundation) owned fee title to APN 018-200-004-000 from December 22, 1975 to March 25, 2003. During the time Holliday Foundation owned fee title, mining waste was present on this property; discharged from the property to waters of the State during rain events; and migrated to other locations from which it may have discharged to waters of the State. Holliday Foundation denied liability based on its status as a charitable foundation. However, this does not provide a legal basis to avoid liability. In addition, Holliday Foundation owned the property for over 27 years.

Holliday Foundation contended that it should be secondarily liable for any cleanup requirements. In the context of clean-up orders (CWC section 13304), the Central Valley Water Board may find certain dischargers to be only secondarily liable for clean-up. (See State Board Order WQ 87-6 [*Prudential Ins. Co.*] and State Board Order WQ 86-18 [*Vallco Park, Ltd.*]). Even if the secondary liability concept can be applied in the section 13267 context, it is not appropriate here. The Central Valley Water Board considered whether any named Dischargers should be secondarily liable and has concluded that all Dischargers should be primarily liable. Here, the investigation and cleanup is not proceeding and the parties that actively engaged in the mining operations at the root of the ongoing discharge are no longer in existence. Accordingly, all named Dischargers to the Order stand on essentially the same footing and should be treated alike. (State Board Order WQ 93-9 [*Aluminum Company of America et al.*].)

64. The Executive Officer may add additional responsible parties to this Order without bringing the matter to the Central Valley Water Board for a hearing, if the Executive Officer determines that additional parties are liable for investigation of the mine waste. The Executive Officer may remove Dischargers from this Order if the Executive Officer receives new evidence demonstrating that such Dischargers did not cause or permit the discharge of waste that could affect water quality. All Dischargers named in this Order and any responsible parties proposed to be added shall receive notice of, and shall have the opportunity to comment on, the addition or removal of responsible parties.

**IT IS HEREBY ORDERED** that, the Dischargers, and their agents, assigns and successors, in order to meet the provisions contained in Division 7 of the California Water Code and regulations, plans and policies adopted thereunder, shall:

1. Conduct all work in conformance with the Regional Board's Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (in particular the Policies and Plans listed within the Control Action Considerations portion of Chapter IV).

### Waste Characterization

2. By **26 July 2010**, submit a *Mining Waste Characterization Work Plan* (hereafter *Characterization Plan*) for the mine sites. The Characterization Plan shall assess the nature and extent of mining waste at the site, the nature and extent of mining waste that is discharging or that has the potential to discharge from the site to Sulphur Creek, and the potential threat to water quality and/or human health. The Characterization Plan shall describe the methods that will be used to establish background levels for soil, surface water, and ground water at the site, and the means and methods for determining the vertical and lateral extent of the mining waste.

The Characterization Plan shall also address slope stability of the site and assess the need for slope design and slope stability measures to minimize the transport of mining waste-laden soils to surface water and ephemeral streams. The Characterization Plan shall adopt the time schedule as described below in items 3 through 13 below for implementation of the proposed work.

3. Within **30 days** of staff concurrence with the Characterization Plan, but no later than **27 September 2010**, begin implementing the Characterization Plan in accordance with the approved time schedule, which shall become part of this Order.
4. By **27 January 2011**, submit a *Mining Waste Characterization Report* (hereafter *Characterization Report*) for the Mine. The Characterization Report shall include:
  - a. A narrative summary of the field investigation;
  - b. A section describing background soil concentrations, mining waste concentrations, and the vertical and lateral extent of the mining waste;
  - c. Surface water and ground water sampling results;
  - d. A section describing slope stability and erosion potential and recommendations for slope stabilization;
  - e. An evaluation of risks to human health from site conditions, and;
  - f. A work plan for additional investigation, if needed, as determined by staff. If no additional investigation is needed, this report shall be the Final Characterization Report.
5. By **27 January 2011**, submit a *Surface and Ground Water Monitoring Plan* (hereafter *Monitoring Plan*) for the Mine. The Monitoring Plan shall describe the methods and rationale that will be used to establish background levels for surface water and ground water at the site. The Monitoring Plan shall also address long-term monitoring necessary to confirm the effectiveness of the remedies.

### Water Supply Well Survey

6. By **27 September 2010**, submit the results of a water supply well survey within one-half mile of the site and a sampling plan to sample any water supply well(s) threatened to be polluted by mining waste originating from the site. The sampling plan shall include specific actions

and a commitment by the Dischargers to implement the sampling plans, including obtaining any necessary access agreements. If the Dischargers demonstrate that exceedances of water quality objectives in the water supply well survey discussed above are the result of naturally occurring hydrothermal sources, then the Dischargers may request a waiver of requirements No. 7 and 8 listed below.

7. Within **30 days** of staff concurrence with the water supply well sampling plan, the Dischargers shall implement the sampling plan and submit the sampling results in accordance with the approved time schedule, which shall become part of this Order.
8. Within **30 days** of staff notifying the Dischargers that an alternate water supply is necessary, submit a work plan and schedule to provide an in-kind replacement for any impacted water supply well. The Dischargers shall implement the work plan in accordance with an approved time schedule, which shall become part of this Order.

### **General Requirements**

The Dischargers shall:

9. Pursuant to CWC section 13365, reimburse the Central Valley Water Board for reasonable costs associated with oversight of the investigation of the site. Within 30 days of the effective date of this Order, the Dischargers shall provide the name and address where the invoices shall be sent. Failure to provide a name and address for invoices and/or failure to reimburse the Central Valley Water Board's oversight costs in a timely manner shall be considered a violation of this Order. If the Central Valley Water Board adopts Waste Discharge Requirements (WDRs), review of reports related to writing of the WDRs and all compliance measures thereafter would be subject to the fees required by issuance of the Order and the reimbursement under this requirement would no longer apply.
10. Submit all reports with a cover letter signed by the Dischargers. In the cover letter, the Dischargers shall express their concurrence or non-concurrence with the contents of all reports and work plans.
11. Notify staff at least three working days prior to any onsite work, testing, or sampling that pertains to environmental investigation and is not routine monitoring, maintenance, or inspection.
12. Obtain all local and state permits and access agreements necessary to fulfill the requirements of this Order prior to beginning work.
13. Continue any investigation, reporting or monitoring activities until such time as the Executive Officer determines that sufficient work has been accomplished to comply with this Order. The Executive Officer, with concurrence from the Prosecution Team, and after soliciting comments from the remaining named parties, may determine that a party named to this Order has satisfied or will satisfy their obligations under this Order by performing or agreeing to perform substantial work that results in a more complete understanding of the scope of the problems present at the Site, consistent with the obligations imposed by this 13267 Order. After such a determination has been made, the Prosecution Team will be



directed to compel the remaining named parties to fulfill the remaining obligations under this Order.

### **Investigation of Additional Responsible Parties**

14. Dr. Miller testified at the hearing that Sunoco Energy Development Company conducted activities at the site that did or could have caused soil disturbance leading to off-site migration of mercury-laden sediments. However, the Prosecution Team declined to name this entity in the proposed order.
15. The Prosecution Team shall complete its investigation of other entities that are or may be responsible for investigation or cleanup of the Mine. This investigation shall include, without limitation, the Bureau of Land Management and Sunoco Energy Development Company. The Prosecution Team may issue subpoenas, or may request the Executive Officer to issue orders under section 13267, as appropriate. This directive is without prejudice to any rights of any person to contest such subpoena(s) or order(s). Any person may provide evidence relevant to liability (or lack thereof); whether or not that person is the subject of a subpoena or section 13267 order. The Prosecution Team shall report the results of its investigation to the Executive Officer, with a copy to all parties and interested persons, by 30 November 2010. The Executive Officer may extend this deadline.

Any person signing a document submitted under this Order must make the following certification:

*"I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my knowledge and on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."*

In accordance with California Business and Professions Code sections 6735, 7835, and 7835.1, engineering and geologic evaluations and judgments must be performed by or under the direction of registered professionals competent and proficient in the fields pertinent to the required activities. All technical reports specified herein that contain work plans for, that describe the conduct of investigations and studies, or that contain technical conclusions and recommendations concerning engineering and geology must be prepared by or under the direction of appropriately qualified professional(s), even if not explicitly stated. Each technical report submitted by the Dischargers must contain the professional's signature and, where necessary, his stamp or seal.

The Executive Officer may extend the deadlines contained in this Order if the Dischargers demonstrate that unforeseeable contingencies have created delays, provided that the Dischargers continue to undertake all appropriate measures to meet the deadlines and make the extension request in advance of the expiration of the deadline. The Dischargers shall make any deadline extension request in writing prior to the compliance date. An extension may be

denied in writing or granted by revision of this Order or by a letter from the Executive Officer. Any request for an extension not responded to in writing by the Board shall be deemed denied.

If, in the opinion of the Executive Officer, the Dischargers fail to comply with the provisions of this Order, the Executive Officer may issue a complaint for administrative civil liability. Failure to comply with this Order may result in the assessment of an Administrative Civil Liability of up to \$1,000 per violation per day pursuant to the California Water Code section 13268. The Central Valley Water Board reserves its right to take any enforcement actions authorized by law.

Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Board to review the action in accordance with CWC section 13320 and California Code of Regulations, title 23, sections 2050 and following. 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](http://www.waterboards.ca.gov/public_notices/petitions/water_quality)

or will be provided upon request.

I, Pamela Creedon, do hereby certify that the foregoing is a full, true, and correct copy of an Order issued by the Central Valley Water Board on 27 May 2010.

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PAMELA C. CREEDON, Executive Officer