

1 **LEWIS BRISBOIS BISGAARD & SMITH LLP**

CHRISTOPHER P. BISGAARD, SBN 53164

2 E-Mail: bisgaard@lbbslaw.com

GLENN A. FRIEDMAN, SBN 104442

3 E-Mail: friedman@lbbslaw.com

ALEXANDRA M. OZOLS, SBN 202604

4 E-Mail: ozols@lbbslaw.com

333 Bush Street, Suite 1100

5 San Francisco, CA 94104-2872

Telephone: 415.362.2580

6 Facsimile: 415.434.0882

7 Attorneys for Petitioner

OCEAN INDUSTRIES, INC.

8

9

STATE OF CALIFORNIA

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STATE WATER RESOURCES CONTROL BOARD

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12 IN RE:

NO.

13 ORDER NO. R2-2013-0021 AMENDMENT  
14 OF CLEANUP AND ABATEMENT ORDER  
15 NOS. 98-004 AND R2-2003-0028 AND  
RECISSION OF WASTE DISCHARGE  
REQUIREMENTS (ORDER NO. 92-105)

**PETITION FOR REVIEW**

16

17 Pursuant to Section 13320 of the California Water Code and Section 2050 of Title 23 of  
18 the California Code of Regulations, Petitioner Ocean Industries, Inc. submits this Petition for  
19 Review of Order No. R2-2013-0021 Amendment of Cleanup and Abatement Order Nos. 98-004  
20 and R2-2003-0028 and Recission of Waste Discharge Requirements (Order No. 92-105) ("Order")  
21 adopted by the California Regional Water Quality Control Board, San Francisco Bay Region  
22 ("Regional Board") on May 8, 2013. Petitioner Ocean Industries, Inc. seeks review on behalf of  
23 itself and on behalf of current or former affiliated companies affiliated with it, including  
24 Ridgemont Development Inc., Watt Residential Inc., Watt Industries Oakland and Watt Housing  
25 Corporation, which are also named as dischargers in the Order. Petitioner Ocean Industries, Inc.  
26 collectively references itself and these other entities hereafter as ("Petitioner").

27 Petitioner provides the following information in support of its Petition as required by

28 Section 2050 of Title 23 of the California Code of Regulations:

4819-6965-4548.1

1           1.       Petitioner is Ocean Industries, Inc., and its address is 2716 Ocean Park Boulevard,  
2 Suite 2025, Santa Monica, CA 90405. Petitioner requests that all communications be directed  
3 through its counsel as identified in the caption of this Petition.

4           2.       Petitioner requests that the State Water Resources Control Board ("State Board")  
5 review the above-mentioned Order. A copy of the Order is attached as **Exhibit A** to this Petition.

6           3.       The Regional Board approved the Order at its May 8, 2013 meeting and the Order  
7 was certified and issued by the Regional Board's Executive Officer on May 9, 2013. This Petition  
8 is timely filed.

9           4.       Petitioner submits this petition as a protective filing to ensure that Petitioner's  
10 rights are protected while it seeks to work with the Regional Board to resolve its disputes and  
11 reach agreement on various issues related to the Order. In the event that this Petition is made  
12 active, Petitioner will submit as an amendment to this Petition a full and complete statement of the  
13 reasons that the Order is improper. Briefly, those reasons include, but are not limited to, that  
14 Petitioner is not a "discharger" as described in Water Code Section 13304. Petitioner has not  
15 owned the property since 2001 when it was sold to the current Property Owner. Petitioner never  
16 operated the mine which is the source of the discharge, did not discharge or deposit the mine waste  
17 where it could be discharged into the waters of the State and did not cause or threaten to cause a  
18 condition of pollution or nuisance. Petitioner purchased the property many years after the mine  
19 operations ceased. The Regional Board has presented no facts supporting Petitioner being named  
20 as a discharger other than the fact that it was one of many former owners of the property.  
21 Moreover, the Order should require the current Property Owner, not Petitioner, to obtain permits  
22 from all involved agencies and/or entities for conducting the required work. Finally, the  
23 compliance dates for the required tasks are not reasonable under the circumstances.

24           5.       Petitioner is aggrieved by the Order because compliance with the requirements  
25 therein will result in unnecessary burden and expense to Petitioner, which will continue its efforts  
26 to work with the Regional Board to reach a mutually-agreeable resolution. If those efforts are  
27 unsuccessful, Petitioner will submit an amendment to this Petition which will include, inter alia, a  
28 statement of the manner in which Petitioner is further aggrieved by the Order, as necessary.

1           6.       Petitioner asks that the State Board hold this Petition for Review in abeyance, while  
2 the Petitioner attempts to work cooperatively with the Regional Board to resolve these issues in a  
3 mutually-satisfactory manner. In the event such efforts are unsuccessful, Petitioner will amend  
4 this Petition for Review, as necessary, and inform the State Board of the need for active review of  
5 the Petition for Review.

6           7.       Petitioner will submit to the State Board as an amendment to this Petition a  
7 complete statement of points and authorities in support of this Petition, as necessary.

8           8.       A copy of this Petition for Review and the attached **Exhibit A** have been sent to the  
9 Regional Board, as well as to all parties named as dischargers in the Order for which contact  
10 information is available.

11          9.       Petitioner's concerns regarding the Order were presented in written comments on  
12 the Tentative Order submitted to the Regional Board on April 5, 2013, which are attached as  
13 **Exhibit B** to this Petition). The Tentative Order was amended prior to the Regional Board's May  
14 8, 2013 meeting. Petitioner provided comments on the amended Tentative Order at the May 8,  
15 2013 Regional Board meeting, including the comments summarized herein.

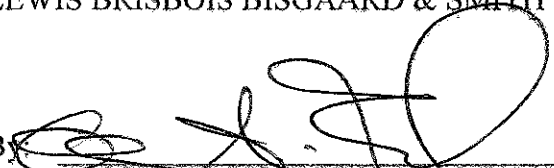
16          For all of the reasons stated herein, Petitioner requests that the State Board accept this  
17 Petition for Review and hold it abeyance while the Petitioner works with the Regional Board to  
18 resolve its disputes. In the event that such efforts are unsuccessful, Petitioner will amend this  
19 Petition for Review.

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Respectfully Submitted,

DATED: June 6, 2013

LEWIS BRISBOIS BISGAARD & SMITH LLP

By 

CHRISTOPHER P. BISGAARD  
GLENN A. FRIEDMAN  
ALEXANDRA M. OZOLS  
Attorneys for Petitioner  
OCEAN INDUSTRIES, INC.

# **EXHIBIT A**

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN FRANCISCO BAY REGION**

ORDER NO. R2-2013-0021

AMENDMENT OF CLEANUP AND ABATEMENT ORDER NOS. 98-004 AND R2-2003-0028  
AND RECISSION OF WASTE DISCHARGE REQUIREMENTS (ORDER NO. 92-105) for:

*ALCOA CONSTRUCTION SYSTEMS, INC., ALCOA PROPERTIES, INC., AP CONSTRUCTION SYSTEMS, INC., CHALLENGE DEVELOPMENTS, INC., DR. COLLIN MBANUGO, F.M. SMITH AND EVELYN ELLIS SMITH, LEONA CHEMICAL COMPANY, OCEAN INDUSTRIES, INC., REALTY SYNDICATE, RIDGEMONT DEVELOPMENT, INC., WATT HOUSING CORPORATION, WATT INDUSTRIES OAKLAND, WATT RESIDENTIAL, INC.*

for the property located at:

*END OF MCDONELL AVENUE  
OAKLAND, ALAMEDA COUNTY*

The California Regional Water Quality Control Board, San Francisco Bay Region (hereinafter Water Board), finds that:

1. **Prior Water Board Orders:** The Leona Heights Sulfur Mine is an inactive pyrite mine in the Oakland Hills (Figure 1). The Water Board adopted a Cleanup and Abatement Order on January 30, 1998 (CAO Order No. 98-004) requiring remediation of the site, which contains exposed mine waste (also referred to as tailings) that degrade the water quality and impact beneficial uses of Leona Creek (Figures 2 and 3). That order was amended with Order R2-2003-0028 on April 14, 2003 to add a discharger, the current property owner, Dr. Collin Mbanugo, and to modify the compliance schedule. This Order further amends Order Nos. 98-004 and R2-2003-0028 for the reasons listed in Finding 2. This Amendment does not rescind Order No. 98-004 or Order No. R2-2003-0028.

The Water Board adopted Waste Discharge Requirements (WDRs) in 1992 (Order No. 92-105). Alcoa, Alcoa Construction Systems, Inc. (ACS) and Challenge Developments, Inc. (CDI) filed petitions to the State Water Resources Control Board (State Board) for review. The State Board found insufficient evidence to hold Alcoa liable as the alter ego of CDI or ACS. The State Board upheld the Water Board's inclusion of CDI and ACS as dischargers and found that both should be considered primarily liable. This Amendment rescinds Order No. 92-105. The water quality requirements of the CAO Order No. 98-004 and its amendments, including this Amendment, will supersede the requirements of Order No. 92-105.

2. **Reasons for Amendment:** This Amendment will accomplish the following objectives:
  - a) Modify Compliance Dates: This Amendment establishes new compliance dates for corrective actions that were required in Order Nos. 92-105, 98-004, and R2-2003-0028, but which have not been implemented or completed.

- b) Clarify Cleanup Requirements: This Amendment clarifies the tasks that are necessary for the Dischargers to successfully implement an approved Corrective Action Plan (CAP). Specifically, before the CAP can be implemented, the Dischargers must submit complete permit applications to regulatory agencies with jurisdiction over various aspects of the project. Because these permits must be obtained in order to implement the CAP, we consider the submittal of complete and acceptable permit application packages to be part of the scope of tasks required by this Amendment and previous Orders. The Dischargers must obtain all permits required to comply with this Amendment.
  - c) Incorporate Requirements for Creek Restoration: Restoration of the Leona Creek streambed is a necessary element of the mine remediation project. Given the site's steep topography, the long-term stability of corrective actions in and adjacent to the streambed are critical to maintaining the beneficial effects on water quality from the corrective actions. Therefore, this Amendment clarifies the requirements related to creek restoration that are necessary to comply with Order Nos. 98-004 and R2-2003-0028.
  - d) Name Additional Discharger: Ocean Industries, Inc. is a successor in interest to Watt Industries, a Discharger named in Order 98-004. Ocean Industries, Inc. has participated in the formulation of the remedial action plan that this Amendment requires the Dischargers to execute. Ocean Industries, Inc. is therefore named a Discharger in this Amendment.
  - e) Rescission of Waste Discharge Requirements: All water quality requirements will be administered via the CAO as amended. WDR Order No. 92-105 is therefore no longer necessary and will be rescinded.
3. **Applicability and Extension of Existing Orders**: Several orders have already been issued by the Water Board to parties legally responsible for environmental remediation at the site. These orders require those responsible parties to perform cleanup actions and to submit technical and monitoring reports. These orders include CAO 98-004 and R2-2003-0028. The obligations contained in this Amendment supersede and replace those contained in prior orders. However, the prior orders remain in effect for enforcement purposes; the Water Board and/or State Board may take enforcement actions (including, but not limited to, issuing administrative civil liability complaints) against responsible parties that have not complied with directives contained in previously issued orders.
4. **CEQA**: This action is an amendment of an order to enforce the laws and regulations administered by the Water Board. As such, this action is categorically exempt from the provisions of the California Environmental Quality Act (CEQA). (Cal. Code Regs., tit. 14, § 15321.) In addition, this CAO contemplates restoration and rehabilitation of an existing facility, activities exempt from CEQA. (*Id.* at § 15301.) The CAO is an action taken by a regulatory agency as authorized by state law to assure the maintenance, restoration, and enhancement of a natural resource and the environment. (*Id.* at §§ 15307 and 15308.) There are no exceptions to these categorical exemptions; there is no reasonable possibility that this

action will have a significant effect on the environment due to unusual circumstances. (Cal. Code Regs., tit. 14, § 15300.2.).

5. **Notification:** The Water Board has notified the Dischargers and all interested agencies and persons of its intent under California Water Code Section 13304 to amend site cleanup requirements for the discharge, and has provided them with an opportunity to submit their written comments.
6. **Public Hearing:** The Water Board, at a public meeting, heard and considered all comments pertaining to this discharge.

**IT IS HEREBY ORDERED** that Order No. 92-105 is rescinded. It is further ordered, pursuant to Section 13304 of the California Water Code, that Order Nos. 98-004 and R2-2003-0028 shall be amended as follows:

On page 4 of 98-004, to Finding 8.B, add:

**8. Ocean Industries, Inc.**

On October 7, 1980, Caballo Hills Development Company (the former name of Ridgemont Development Company) acquired the mine site. Caballo Hills Development Company was formed pursuant to a Partnership Agreement involving Watt Industries, Inc., as a 50% general partner. Caballo Hills Development Company changed its name to Ridgemont Development Company on January 20, 1981. Watt Industries Inc., changed its name to Ocean Industries in 1993. Therefore, Ocean Industries, Inc. is added to the list of Dischargers named in this Amendment.

Effective March 2, 1992, Watt Residential, Inc. assigned its entire partnership interest in Ridgemont Development Company to Watt Industries/Oakland, Inc., the sole remaining party in connection with the dissolution of Ridgemont Development Company. By operation of law, as the sole remaining partner, Watt Industries/Oakland, Inc. (now known as Ridgemont Development, Inc.) succeeded to the ownership of the assets of Ridgemont Development Company, including the real property on which the mine is located. Ridgemont Development, Inc. sold the property at issue to Dr. Mbanugo in 2001.

On page 5 of Order No. 98-004 replace B.2 under Remedial Measures; and on page 2 of R2-2003-0028 replace 2.b. under Amended or Deleted Remedial Measures with:

**2.**

- I. **Mine Remediation and Creek Restoration Designs:** The Dischargers shall submit 100% designs for remediation (i.e., isolation and stabilization) of the mine tailings, and 90% designs for the restoration of Leona Creek that are acceptable to the Executive Officer.
  - a. **Remedial Design Plan:** Submit a 100% design plan for the portions of the project involving stabilization of the mine tailings piles. The proposed plan shall provide for the prevention of further erosion of the mine tailings, and shall encapsulate the mine

tailings in a manner as to best isolate the mining waste from stormwater runoff and contact with groundwater. Previously approved plans may be revised and resubmitted, provided that:

- i. The design plans incorporate all requirements of all regulatory permits that are required for project implementation; and
- ii. The design plans address requirements listed in the Water Board's July 5, 2006 *Conditional Approval of the Revised Summary Design Report and Construction Documents* (Appendix A).

COMPLIANCE DATE: October 15, 2013

- b. **Creek Restoration Design Plan:** Submit a 90% design plan for creek restoration that provides details and specifications for field implementation of creek restoration actions. This design plan must also be included in any application for a Section 401 Water Quality Certification. It is understood that certain details of the creek restoration must be designed on-site during construction to address unknowns with respect to bedrock geology.

COMPLIANCE DATE: October 15, 2013

II. **Applications for Permits:** The Dischargers must submit complete and acceptable applications, including all supporting documents and any associated fees, as required for all permits and agency agreements needed to implement the mine remediation and creek restoration projects. These include, *but may not be limited to:*

- a. A Creek Protection Permit from the City of Oakland;
- b. Encroachment, Grading, and/or Building Permits from the City of Oakland;
- c. A Tree Removal/Protection Plan to the City of Oakland;
- d. A technical memo in support of a CEQA determination to City of Oakland (the lead agency) and other responsible agencies, including the biological justification;
- e. A Section 404 Permit from the US Army Corps of Engineers;
- f. Biological information and technical documents to the US Army Corp of Engineers, to support consultation with US Fish and Wildlife Service regarding the Endangered Species Act;
- g. A Section 401 Water Quality Certification from the Water Board; and
- h. A Lake and Streambed Alteration Agreement from the California Department of Fish and Wildlife (formerly Fish and Game), and if appropriate, an Incidental Take Permit.

If an agency requests additional information or documentation, the Dischargers must fully respond to the request within the time allotted by the agency and inform the Water Board of any such time frames.

COMPLIANCE DATE: November 15, 2013



- III. **Implementation of Mine Remediation and Creek Restoration Designs:** Upon receiving permits and authorization from the appropriate agencies, the Dischargers must implement the designs from Remedial Measure B.1 of the CAO. Remediation construction activities must occur and be completed during the 2014 dry season. A professional engineer familiar with the approved creek restoration design must be on site to direct construction.

COMPLIANCE DATE: September 30, 2014

- IV. **Recordation of Deed Restriction:** The current landowner must submit a report, acceptable to the Executive Officer, documenting that the deed restriction has been duly signed by all parties and has been recorded with the appropriate county recorder. The report shall include a copy of the recorded deed restriction.

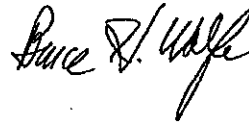
COMPLIANCE DATE: 180 Days after completion of construction

On Page 5 of Order No. 98-004 Replace B.3 under Remedial Measures; and on page 2 of R2-2003-0028 replace 2.c. under Amended or Deleted Remedial Measures with:

3. **Monitoring and Maintenance Plans:** The Dischargers must submit plans, acceptable to the Executive Officer, detailing how the site will be monitored and maintained to ensure water quality improves and the remedial and creek restoration infrastructure is stable. In addition to a water quality monitoring plan, the Dischargers must submit a plan for the Project Designer to examine the site after significant rain events, as it is expected that rocks within and adjacent to the streambed might move in response to high flows, and rocks may need to be repositioned to maintain stability. The plans must include:
- a. A proposed list of monitoring parameters and a plan for monitoring them in the creek;
  - b. Periodic inspections of the capped mine tailings piles;
  - c. Monitoring of the geomorphic integrity of the restored channel, including bed and banks;
  - d. Monitoring the successful establishment of the banks adjacent to the restored creek channel; and
  - e. Monitoring of the stability of the capped mine tailings, and hillsides above the banks of the restored channel.

COMPLIANCE DATE: October 30, 2014

I, Bruce H. Wolfe, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Francisco Bay Region, on May 8, 2013.



Digitally signed  
by Bruce H.  
Wolfe  
Date: 2013.05.09  
16:17:10 -07'00'

Bruce H. Wolfe  
Executive Officer

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**FAILURE TO COMPLY WITH THE REQUIREMENTS OF THIS ORDER MAY SUBJECT YOU TO ENFORCEMENT ACTION, INCLUDING BUT NOT LIMITED TO: IMPOSITION OF ADMINISTRATIVE CIVIL LIABILITY UNDER WATER CODE SECTIONS 13268 OR 13350, OR REFERRAL TO THE ATTORNEY GENERAL FOR INJUNCTIVE RELIEF OR CIVIL OR CRIMINAL LIABILITY**

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**Attachments:**

- Figure 1. Site Location
- Figure 2. Leona Creek, headwaters on mine property
- Figure 3. Leona Creek, discoloration from acidophilic bacteria
- Water Board Letter, *Conditional Approval of the Revised Summary Design Report and Construction Documents* (July 5, 2006)

Order No. R2-2013-0021  
Amendment of Cleanup and Abatement Order Nos. 98-004 and R2-2003-0028

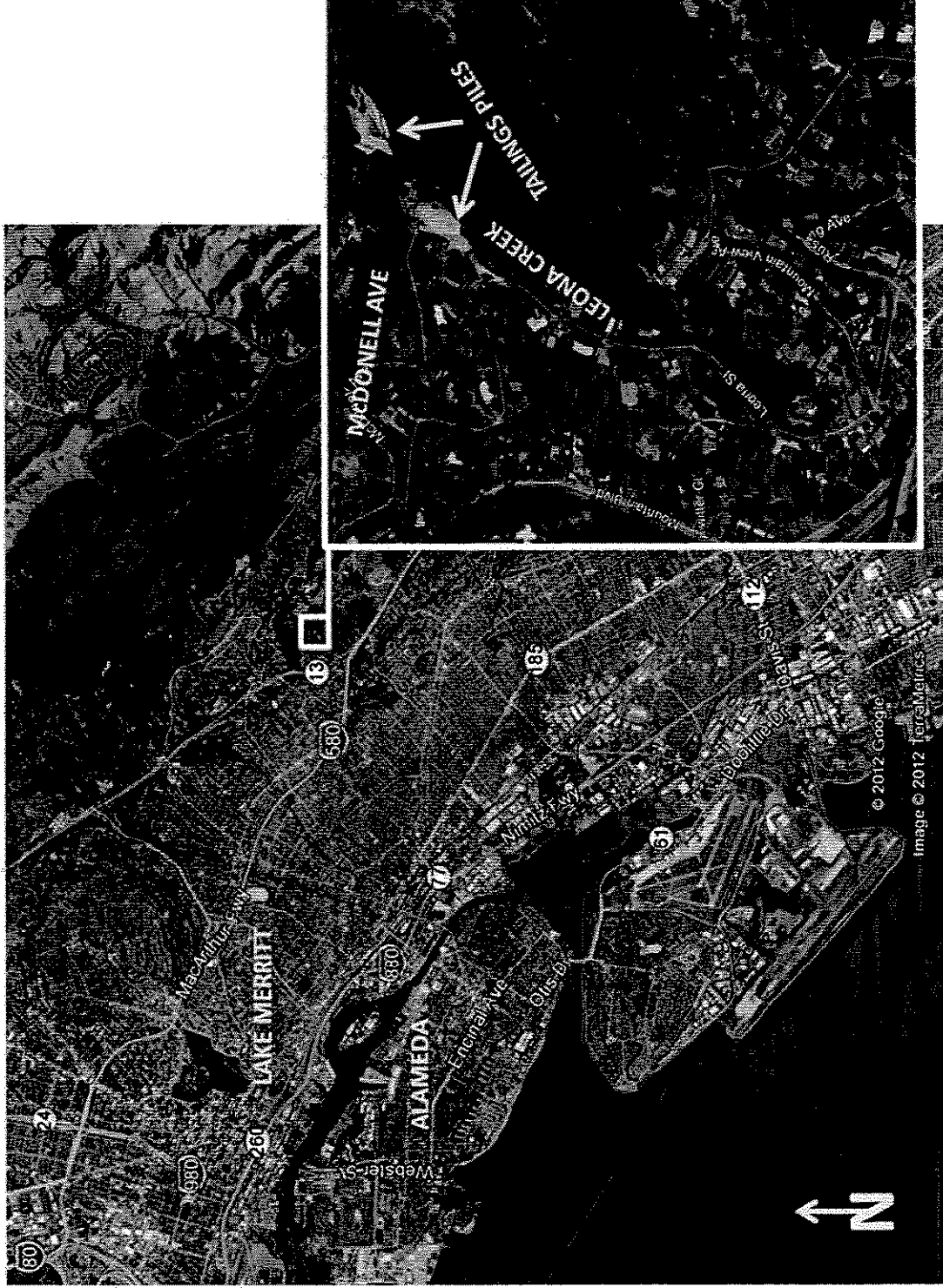


Figure 1. Site location

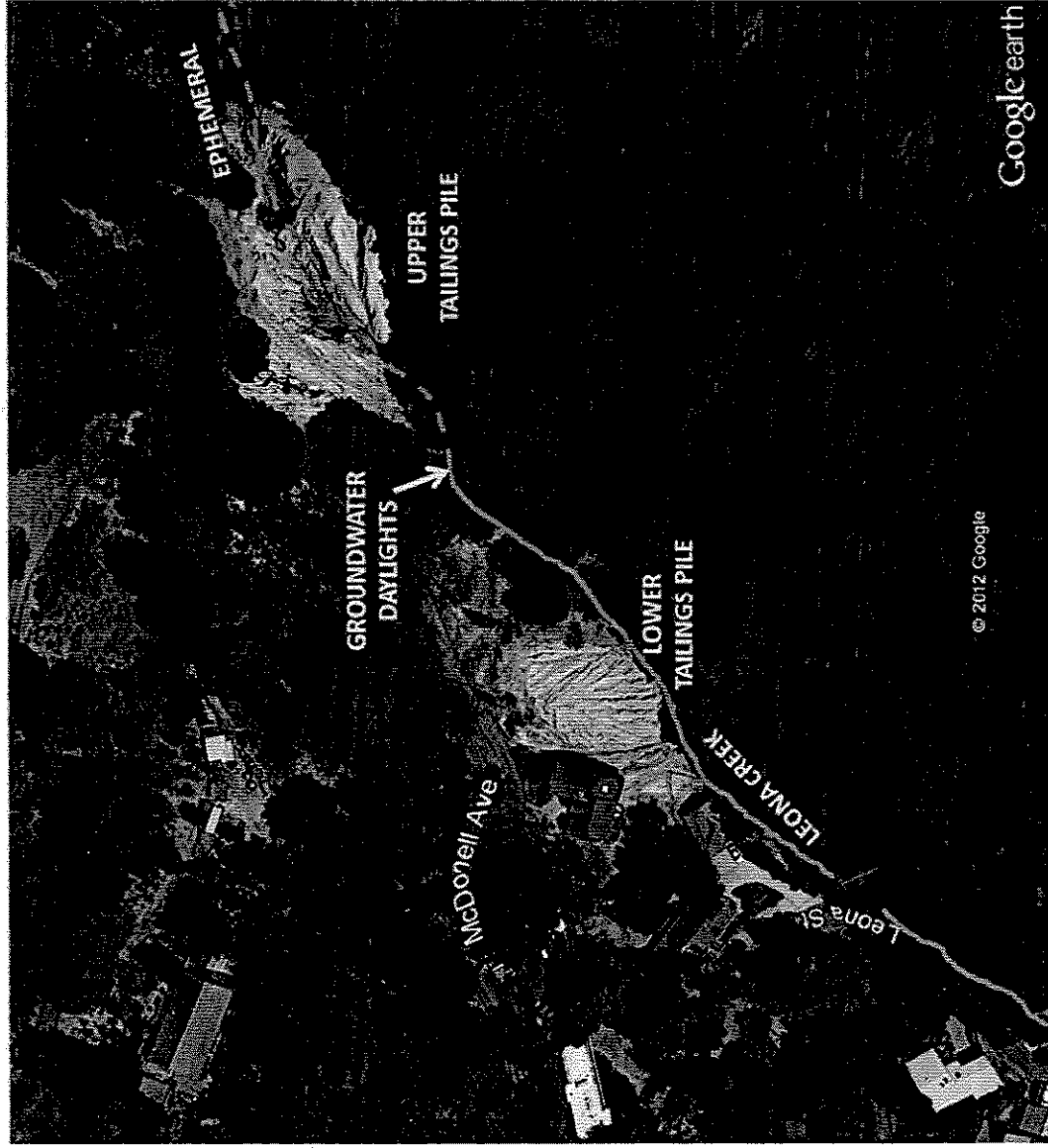


Figure 2. Leona Creek, headwaters on mine property



Figure 3. Leona Creek, discoloration from acidophilic bacteria

# **EXHIBIT B**

**LEWIS  
BRISBOIS  
BISGAARD  
& SMITH LLP**  
ATTORNEYS AT LAW

333 Bush Street, Suite 1100  
San Francisco, California 94104-2872  
Telephone: 415.362.2580  
Fax: 415.434.0882  
www.lbbsslaw.com

CHRISTOPHER P. BISGAARD  
DIRECT DIAL: 208.994.2387  
E-MAIL: [BISGAARD@LBBSSLAW.COM](mailto:BISGAARD@LBBSSLAW.COM)

April 5, 2013

File No.  
8650.16

GLENN A. FRIEDMAN  
DIRECT DIAL: 415.438.6683  
E-MAIL: [FRIEDMAN@LBBSSLAW.COM](mailto:FRIEDMAN@LBBSSLAW.COM)

VIA E-MAIL AND CERTIFIED MAIL

Lindsay Whalin  
California Regional Water Quality Control Board  
1515 Clay Street, Suite 1400  
Oakland, CA 94612

Re: Tentative Orders Amending Cleanup and Abatement Order and Setting Time  
Schedule for Compliance for Leona Heights Sulfur Mine, Oakland, Alameda  
County

Dear Ms. Whalin:

Lewis Brisbois Bisgaard & Smith LLP, as counsel for Ocean Industries, Inc.,  
Ridgemont Development, Inc., Watt Housing Corporation, Watt Industries Oakland and  
Watt Residential, Inc. (hereinafter collectively referred to as "Ocean" for purposes of  
convenience), submit the following comments/objections to the Tentative Order re  
Amendment of Cleanup and Abatement Order 98-004 and Rescission of Waste Discharge  
Requirements (Order No 92-105) and the related Time Schedule Order Prescribing  
Administrative Civil Liability for the property located at the end of McDonell Avenue,  
Oakland, Alameda County and more commonly known as the former Leona Heights Sulfur  
Mine.

I. TENTATIVE ORDER FOR AMENDMENT OF CLEANUP AND ABATEMENT  
ORDER NO. 98-004 AND RECISSION OF WASTE DISCHARGE REQUIREMENTS  
(ORDER NO. 92-105)

Before proceeding to its specific comments/objections regarding the actual orders at  
issue, Ocean generally notes the following regarding the Findings section of the Tentative  
Order:

A. Pursuant to the definition of "Dischargers" set forth in California Water Code Section 13304, Ocean should not be named as a Discharger in the Tentative Orders. Specifically, Section 13304(a) states:

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 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 water of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the affects 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.

Ocean did not at any time operate the Leona Heights Sulfur Mine or own the property where the mine is located until more than 50 years after mine operations had ended. There is no information that Ocean caused or contributed to waste being discharged into the waters of the state as it at no time had any involvement in the mining operations that were conducted at the site and never placed or moved the mine tailings at the property.

During its period of its ownership, Ocean contemplated residential development on other portions of the parcel on which the mine is located. Throughout its ownership of the property, Ocean's activities at most could be characterized as passive.

Ocean sold the property to the current owner (Dr. Colin Mbanugo) in 2001 in "as is" condition with full disclosure of all site conditions. Pursuant to the terms of sale, the current property owner agreed to be responsible for property maintenance on a going forward basis.

Separate and apart from contractual obligations imposed on the current property owner to address site conditions, the current owner is responsible for and in the best position to take appropriate action for the property he owns. There is no information to suggest that Ocean discharged wastes into the waters of the state when it owned the property. After selling the property to the current property owner, Ocean has not "permitted" waste to be discharged into the waters of the state as only the current property owner can take corrective action under the circumstances. Moreover, since the sale of the subject property to Dr. Mbanugo, Ocean has not had the ability to control any discharge of wastes emanating from the property.



Pursuant to the factors identified by Section 13304, Ocean should not be included in the Tentative Order. While Ocean is in the chain of title for the subject property, numerous other individuals and entities are also included within the chain of title, many of whom are inexplicably not included within the Tentative Order. There is no information to suggest that Ocean was aware that mining waste could or would be discharged from the subject property into waters of the state which it owned for a limited number of years decades after the mine operations ceased in the late 1920s. Ocean's unrealized intention to build residences on other portions of the property should not subject it to "Discharger" status under Water Code Section 13304. It is requested that Ocean be removed from the Tentative Order for the reasons set forth above.

B. At Paragraph 2.b) ("Clarify Cleanup Requirements"), the Tentative Order states that "[t]he Dischargers must obtain all permits required to comply with this Order." As Ocean is not the current property owner, it does not have appropriate standing to obtain permits that would affect conditions on property that it does not possess, control or own. Moreover, it has no legal right to bind the property in any respect. Finally, Ocean has no legal right to access the property or commit to improvements that affect the property.

C. At Paragraph 2.c) ("Incorporate Requirements for Creek Restoration"), the Tentative Order states that "Relocation and restoration of the Leona Creek streambed is a necessary element of the mine remediation project." As set forth in more detail below, Ocean has concerns whether relocation of the streambed is a necessary element of the remediation project. In fact, Ocean is concerned that relocation of the streambed may well result in a failure to achieve an environmentally sound solution to the current conditions that exist on the property and may in fact exacerbate those conditions.

D. At Paragraph 2.d) ("Name Additional Dischargers"), the Tentative Order asserts that "Ocean Industries, Inc. has participated in the formulation of the remedial action plan that this CAO Amendment requires the Dischargers to execute." That is not accurate. The current property owner has submitted all remedial plans pursuant to an agreement he entered into with Ocean and Alcoa. While Ocean and Alcoa have deposited funds into an escrow account to pay for certain activities as specified by the agreement, the current property owner has been solely responsible for formulating all aspects of the remedial action plan he has submitted following execution of the agreement with Ocean and Alcoa. Moreover, the "remedial action plan that this CAO Amendment requires the Dischargers to execute" bears little resemblance to the restoration plans submitted by LFR on behalf of Ocean prior to the sale of the property to Dr. Mbanugo - particularly to the extent it calls for a relocation of the streambed which has added substantially to the cost of the proposed project.

E. Based on the considerations set forth in these comments, Ocean respectfully requests that the May 8, 2013 hearing before the Regional Water Quality Control Board be

deferred so as to provide additional time to consider alternative remedial approaches to improve water quality at the subject site, which Ocean believes could more expeditiously result in a more effective resolution. Ocean requests that the hearing be deferred to the Regional Board's meeting in July, 2013.

With the above as a foundation for this response, Ocean's specific comments/objections to the Tentative Order are as follows:

Page 2, Paragraph 2.a) "Modify Compliance Dates":

The compliance dates set forth in the Tentative Order are impossible to achieve. There is a significant amount of planning and design work that needs to be accomplished - even with the proposed remediation plan presented by the current property owner. The design and/or work plans need to be revised to address, among other things, waste rock isolation, waste rock pile stability and creek restoration.

Dr. Mbanugo's environmental consultant, Dr. Peter Mundy, has stated that meeting the milestone dates set forth in the Tentative Order will be impossible to achieve and that construction of the currently proposed remediation plan will take 142 days. Given that information, Ocean respectfully submits that the milestone deadlines set forth in the Tentative Order be changed in recognition that construction of the proposed project cannot begin until the Spring of 2014.

Ocean further submits:

- To achieve 100% design, a site topographic map with finer contour intervals (on the order of 1 ft or 2 ft) is needed; the natural creek location has to be determined; and site surface water and groundwater flow conditions (such as creek flow rates under various storm events, depth to groundwater table and general groundwater flow direction) have to be well understood.
- A site drainage and hydraulic study has yet to be performed for both existing conditions and proposed post-remediation and restoration conditions.
- The impact of the proposed work plan to both groundwater and surface water quality has not been evaluated and properly assessed. For example, the buttresses with engineered fill of the waste rock seem to increase the chance for interaction of waste rock and water.
- The re-routing or alteration of the creek channel location and the alteration of the streambed profile may well be contradictory to the project goal of creek restoration.

- The extensive planting plan over the proposed sloped cap of waste pile may pose stability problems for the cap system by raising the loading on the cap top soil layer and the center of gravity for the top soil layer with the plants.
- Alternatives that have less impact to both surface water quality and groundwater quality should be evaluated.

Permitting time is out of the control of Ocean. Without a complete design, the permitting agencies may not be able to issue permits - certainly not within the time frame set forth in the Tentative Order. Furthermore, some of the permits that have been issued to the current property owner have expired and it will be necessary to re-apply for those permits. Again, when those permits will be applied for and issued is something over which Ocean has no control.

Page 2, Paragraph 2.b) "Clarify Cleanup Requirements":

While Ocean agrees that permits are necessary to ensure completion of the necessary site work, the Tentative Order should impose the responsibility for obtaining applicable permits from all involved regulatory agencies on the current property owner. Ocean does not own the subject property and as such has no ability to obtain permits for a remedial action plan overseen and developed by the current property owner. Moreover, to the extent that decisions need to be made as conditions for obtaining permits or issues posed by the work itself on the subject property or adjoining properties, such decisions are solely within the authority of the current property owner. Accordingly, the Tentative Order should be modified to reflect that only the current property owner is obligated to obtain all permits required by regulatory agencies with jurisdiction over various aspects of the project. It is fundamentally unfair to hold Ocean to compliance dates related to obtaining permits that are outside of its control. It is even more unfair to subject Ocean to administrative civil liability for the failure of the current property owner to meet the milestone deadlines set forth in the Tentative Order.

There are uncertainties inherent in the obtaining of permits such as those necessary to implement any remedial action plan at the site. Ocean is informed that the current property owner has been in negotiations with relevant permitting agencies with respect to the site for five years. Despite that length of time, all necessary permits have not been obtained and there is no certainty as to when they will be. There is clearly no way that anyone, including the current property owner - much less Ocean - can guarantee that all of the relevant permitting agencies will issue the necessary permits within the milestone deadlines set forth in the Tentative Order.

As previously noted, Ocean has significant concerns about the rerouting or alteration of the current streambed. Indeed, such rerouting or alteration may not be

necessary and could be counterproductive. Leaving the streambed in its current location may be the best solution to the current problem - and certainly will be more cost effective. Rather than move the location of the streambed 40 to 50 feet to the south, it could be left in its current location with the tailings isolated from the streambed. This could be accomplished by removing the mine tailings in the streambed and along the banks and placing them outside of the channel area. The areas away from the channel would then be graded (smooth highs and lows) and covered in numerous layers of plastic, topsoil and vegetation. The material removed would be replaced with outside rock/soil placed to duplicate or mirror the former stream topography and profile (slope).

Obtaining permits for a remediation plan that does not call for relocating the streambed with all of its attendant environmental insults may be more achievable than what is presently proposed. This is particularly true with respect to obtaining the Section 404 Permit from the US ACE.

Ocean is informed that the Section 404 permitting process likely will take time well outside of the current milestone deadlines set forth in the Tentative Order. Please refer to the Section 404 permitting website at <http://water.epa.gov/type/oceb/habitat/cwa404.cfm#how>.

Page 2, Paragraph 2.c) "Incorporate Requirements for Creek Restoration":

The corrective action contemplated by the Tentative Order should only be to address potential threats to the environment resulting from mining waste discharges. Relocation of the Leona Creek streambed should not be a required component of the Tentative Order as it may not be necessary and if possible, should be avoided. The main guiding principle of "restoration" should be to minimize alteration and impacts. With less alteration, the permitting process is easier, the project costs are lower and the time to complete implementation of the project will be shorter.

The approved summary design report states that the pre-mining channel location is unknown, that it is believed to be 40 to 50 feet south of the current location and that it will be identified during the channel rerouting excavation. This contradicts the location statement contained in the previous LFR design report, which stated that "the central channel lies roughly in the central trough of the canyon and likely follows the natural drainage path."

There are investigative means (which will cost a lot less than large scale excavation) to determine or confirm the pre-mining streambed location, such as small perpendicular trenches or borings transverse to the current channel. Without the precise creek location, the design cannot be precise, the restoration does not have a clear target and the 100% design plan can not be achieved.

The proposed relocation of the channel may not be feasible to construct or work effectively. The proposed plan requires excavating approximately 10 to 15 feet deep to allow for relocation of the channel. If bedrock is encountered prior to reaching the required depth, channel excavation will be difficult and explosives may need to be used to reach desired depths. Another problem with this relocation design is that the relocation design works against itself. The proposed relocation design calls for straightening the channel. This will increase the overall slope of the channel, thus requiring extensive energy dissipation. The relocation design increases energy which is then dissipated by the use of step pools, which will only be effective in low flow conditions. In high flow conditions, (for example, a 100-year flood), the step pools will become ineffective because the pool storage will fill rapidly and become an ineffective flow area. Filled pools will accelerate flow by providing segments of equivalent smooth channel bottom for effective flow.

Ocean believes that achieving long-term stability for the corrective actions may not require relocation of the channel and should not compromise water quality. Alternatives with less impact to the environment should be evaluated and implemented prior to the Regional Board considering the Tentative Order. It is for that reason, among others, that Ocean requests that the hearing on the Tentative Order be appropriately deferred until less impactful, and potentially more effective remedies, can be fully considered.

Page 2, Paragraph 2.d) "Name Additional Dischargers": As set forth above, Ocean has not participated in the formulation of the remedial action plan that this CAO Amendment requires to be performed.

Page 2, Paragraph 3 "Applicability and Extension of Existing Orders": Ocean objects to any characterization that it is a "part[y] legally responsible for environmental remediation at the site" for the reasons set forth above.

Ocean notes that the current property owner is in violation of an outstanding CAO (R2-2003-0028) and has been ordered to pay \$200,000 for his failure to comply with reporting obligations. Ocean is informed that the Regional Board has not taken steps to collect the referenced amount.

Replacement of Paragraph B.2 of prior orders regarding Remedial Measures.

The Tentative Order incorrectly quotes a version of paragraph B.2 from the 1998 CAO that was amended in its entirety by Order No R2-2003-0028. The Order should quote the correct text, as amended in 2003.

Page 4, Paragraph 2.1.a. "Remedial Design Plan":

Compliance Date of July 1, 2013.

Pursuant to Ocean's consultation with various technical experts, Ocean has been advised that it will not be possible to prepare a 100% remedial design plan by July 1, 2013. Ocean submits that due to the extremely limited time from its receipt of the Tentative Order and the date on which comments were due, it did not have sufficient opportunity to explore an alternative remedial approach which could result in an improvement in water quality and restoration of the creek at lower cost. Ocean submits that additional time to evaluate the potential alternative approach may well lead to an attainable solution with less potential deleterious impacts to the environment.

Based on the limited information now available to Ocean, the previously approved plans may well need to be revised and resubmitted. The relocation of the channel may well need to be abandoned and the regrading plan may have to be revised. The buttress design for stabilizing the waste piles should be re-evaluated to minimize impact to water quality. Additional stabilization measures may be needed with any modification of the buttress design. The gas permeable layer of geo-textile placed right under the HDPE membrane may need to be eliminated due to a lack of opportunity for gas production in waste rock piles which have been in place for many decades.

To be able to complete the 100% design, the following work may well be necessary: A more refined topographic map, a detailed hydrology/hydraulics report for existing conditions and proposed post-remediation condition, a reassessment of the stability of the waste piles, an impact evaluation of the proposed stability measures to groundwater and surface water, and confirmation of the natural channel location.

The July 1, 2013 compliance date is not achievable. Ocean submits that a compliance date of November 1, 2013 would be more appropriate.

Page 4, Paragraph 2.b. "Creek Restoration Design Plan":

Compliance Date of July 15, 2013.

Ocean incorporates herein by reference its comments above concerning the Remedial Design Plan as being equally applicable to the Creek Restoration Design Plan. A July 15, 2013 compliance date is non-attainable under the circumstances. As with the Remedial Design Plan, Ocean submits that additional time is necessary to explore a potential alternative remedial approach which could well be more effective and attainable under the circumstances when compared to the proposed design plan.

The tentatively approved conceptual cascade and step-pool design for creek restoration is not "creek restoration" but is instead creek alteration. Real creek restoration should minimize altering channel alignment and streambed profile (elevations). The step-pool and cascade conceptual design should be fully and carefully re-evaluated. The existing channel at the site does not have regular step-pools and cascades. The step-pools will look unnatural, will obviously be man-made and could prove detrimental to the environment. The proposed re-routing will shorten the length of the channel, increase the overall channel slope and will accelerate creek flow during high flow conditions due to ineffective storage in the step-pools.

Accordingly, the creek "alteration" design plan currently under consideration may well need to be abandoned and a new "restoration" design plan prepared. Any such restoration plan should be based on the creek hydrology and hydraulics that minimize the changes in flow characteristics and channel roughness. The proposed post-restoration channel should have similar flow characteristics and roughness as the pre-restoration channel.

The July 15, 2013 compliance date is insufficient to complete the proposed work. Ocean submits that a compliance date of November 15, 2013 would be more appropriate.

Page 5, Paragraph 2.II "Applications for Permit":

Compliance Date of July 15, 2013.

Based on Ocean's consultations with technical experts, none of them believe that a July 15, 2013 compliance date is attainable under the circumstances. While the current property owner's project manager applied for certain permits in the past, new permits will likely be necessary due to the passage of time since such efforts were last pursued. Moreover, as the various permit applications or approvals require necessary interaction between the numerous involved agencies in various respects, the process can and will be likely delayed through no fault of Ocean, thereby making the July 15, 2013 compliance date unrealistic.

The submittal of all permit applications must be after the design work has been completed.

It is respectfully submitted that a re-design of the currently proposed remediation plan be adopted to achieve a more cost effective and less environmentally disruptive solution to the current conditions at the site. Additional time will be necessary to fully develop and evaluate such an alternative plan.

The July 15, 2013 compliance date is not attainable. Ocean submits that a compliance date of December 1, 2013 would be more appropriate. To the extent possible,

all existing engineering, project design, and studies (submitted in support of the existing tentative plan) would be used in the development of an alternative remedy.

Page 6, Paragraph 2.III "Implement Mine Remediation and Creek Restorations Designs":

Compliance Date of September 15, 2013.

As with the above compliance dates, the September 15, 2013 date is unrealistic and non-attainable under the circumstances. Notwithstanding the time necessary for obtaining permits from all of the necessary regulatory agencies involved with this project, commencing extensive excavation and grading work immediately prior to the rainy season could well lead to negative impacts for the environment. It is clear the construction phase of the project cannot be completed before the rainy season commences in 2013. Under the circumstances, commencement of the actual construction work after the rainy season concludes in the Spring of 2014 should be the preferred approach to implementing the mine remediation and creek restoration.

Permit approval time is not under the control of Ocean. Without permits, the project cannot be implemented. The compliance date should be a specified reasonable time period after the necessary permits are acquired. As the timeframe for construction should occur in the "dry season" (May-October), and in light of the foregoing comments concerning design criteria and permit applications, it is highly unlikely that this project could commence or be completed in the 2013 "dry season." Ocean submits that a reasonable compliance date would be 120 days after acquisition of the necessary permits assuming enough time to begin and complete the construction during the "dry season" months of 2014.

Page 6, Paragraph 3. "Monitoring and Maintenance Plans":

Compliance Date of August 15, 2013.

The compliance date is not attainable under the circumstances as described above. To submit a proper monitoring and maintenance plan, the requirements of the final permits must be addressed. Suggested Compliance Date: 30 days after acquisition of all final permits (prior to implementation).

## II. TIME SCHEDULE ORDER PRESCRIBING ADMINISTRATIVE CIVIL LIABILITY

Page 1, Paragraph 1. "Purpose of the Order":

"Cleanup of the site has not been initiated."



Ocean and Alcoa entered into an agreement with the current property owner to provide \$795,000 towards the obtaining of necessary permits and applications and the construction of an approved remedy for conditions at the site. The subject agreement provides that Ocean and Alcoa shall pay \$150,000 into an escrow account from which Dr. Mbanugo's consultants can draw to pay for the permitting work. When it became clear that additional money would be necessary to obtain the necessary permits, Ocean and Alcoa agreed to make additional funds available so that the work could proceed - even though they had no legal obligation to do so. To date, Ocean and Alcoa have contributed \$515,000 into the escrow account. (Of the \$515,000, over \$120,000 remains in the escrow account.)

It is correct to state that "cleanup of the site has not been initiated" - if that means construction of the remedy has not begun. It is incorrect to conclude that substantial efforts have not been undertaken to reach a point where construction can begin. Moreover, all of that work has been paid for by Ocean and Alcoa. Ocean is informed that the current property owner has not expended any of his own money towards the work undertaken by his consultants. Rather, those consultants have been paid through the escrow funded by Ocean and Alcoa.

"The Dischargers will be subject to civil liability prescribed in this Order should they fail to complete any task of Order No. R2-2013-XXXX, as listed below."

As set forth earlier, it is fundamentally unfair to subject Ocean to civil liability should the current property owner fail to complete the tasks set forth in the Tentative Order. Not only does Ocean have no ability to obtain permits for work to be done on the current property owner's property, the undisputed facts are that Ocean (and Alcoa) have funded all of the work that has been undertaken to date. To subject Ocean to civil liability up to \$10,000 a day for failure to meet milestone deadlines related to pre-construction work over which it has no control (but has paid for - with Alcoa) is just wrong. Should the Tentative Order be issued, it would punish Ocean (and Alcoa) for doing "the right thing" - even though both strenuously object to their being included in any of the orders related to the site as dischargers.

Page 2, Paragraph 3. "Parties Responsible for Discharge":

As indicated above, Ocean should not be named in the Order as it is not a "Discharger" as that term is defined in Water Code Section 13304. Ocean incorporates herein by reference all of the comments/objections set forth above as to why it is not a "Discharger."

"All of the Dischargers knew of the discharge and [had] the ability to control it."

The use of the bracketed language is telling. When it comes to Ocean, it is clear that it does not currently have "the ability to control it." That control rests with the current property owner (who has owned the site for well over a decade).

Page 3, Paragraph 5. "History of Non-Compliance":

This paragraph inaccurately depicts the circumstances under which deadlines were missed by the current property owner pursuant to Order No. R2-2003-0028. As was well-known to the staff and legal counsel for the Regional Water Quality Control Board, Ocean, Alcoa and the current property owner entered into an agreement whereby Ocean and Alcoa deposited funds into an escrow account for the current property owner's implementation of the corrective action. The agreement provided that the current property owner would perform the corrective action and would be responsible for costs above the financial commitments which Alcoa and Ocean had agreed to fund. Ocean and Alcoa have significantly exceeded financial responsibilities imposed on them pursuant to that agreement by depositing funds for the current property owner's design work and permitting applications. Any "non-compliance" is solely the responsibility of the current property owner, not Ocean.

Page 3, Paragraph 6. "Justification for this Order":

Based on the circumstances, a Time Schedule Order equally subjecting Ocean, Alcoa and the current property owner to civil penalties for failing to achieve prescribed compliance dates is not an effective means for achieving the desired improvement in water quality from the mine tailings discharges at the site. As noted above, Ocean (and Alcoa) have already significantly exceeded their contractual obligations with the current property owner, who himself has been solely responsible for non-compliance with previous orders and deadlines. Notwithstanding the substantial financial commitments previously expended by Ocean (and Alcoa), the current property owner has for an extended period of time not moved this matter forward through no fault of Ocean (or Alcoa.)

Subjecting Ocean to fines of up to \$10,000 a day for tasks over which it has no control in no way fosters compliance. (Water Code Section 13308(b).) Indeed, the mere possibility of such fines leaves Ocean with little choice but to assert its legal position that it is not a "Discharger" under Water Code Section 13304 and at the same time seek a stay of any enforcement action against it pending a decision on Ocean's legal position. The possibility of draconian penalties and fines forces Ocean to change its focus from working towards solving the environmental problems at the site to challenging its inclusion in the Tentative Order as a "Discharger."

It is requested that the Tentative Order should be modified to impose the compliance dates (and the possibility of civil liability) solely on the current property owner -

the only person who has failed to meet his obligations to the Board (and to Ocean and Alcoa). By adopting this modification, Ocean (and Alcoa) can continue to work cooperatively with the Regional Board and its staff in seeking a cost effective solution to the current conditions at the site.

Rather than issuing a Time Schedule Order against Ocean, Ocean submits that the Regional Water Quality Control Board should enforce the previously-imposed but not effectuated penalties of \$200,000 against the current property owner. Subjecting Ocean to penalties for the current property owner's unwillingness to comply with previous orders and deadlines reinforces and encourages the current property owner's intransigence and failure to move this matter forward.

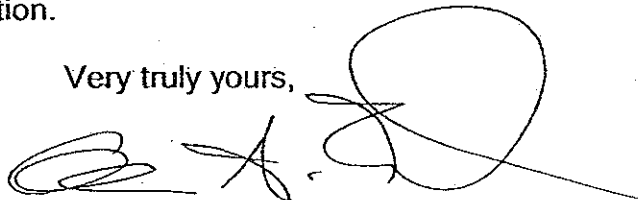
Pages 5 and 6, Paragraph A. "Tasks":

As set forth above, the compliance dates included in this Order cannot be satisfied under the circumstances and should be deferred as requested. Ocean's comments on the Tentative Order amending CAO 98-0024 are incorporated herein as Ocean's comments on this Tentative Order.

### III. CONCLUSION

Ocean respectfully requests that the foregoing comments be considered and implemented on the two Tentative Orders prior to final adoption by the Regional Water Quality Control Board. Moreover, as Ocean has not had sufficient opportunity to investigate alternative approaches to resolving this matter consistent with the comments expressed above, it requests that the public hearing before the Regional Board be continued from May 8, 2013 for approximately 60 days to the Board's regular meeting date in July 2013. Ocean believes that being provided with additional time to evaluate a potential alternative approach using the modified compliance dates set forth above could very well result in a more effective solution.

Very truly yours,



Christopher P. Bisgaard of  
Glenn A. Friedman of  
LEWIS BRISBOIS BISGAARD & SMITH LLP