CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

ORDER NO. R2-2013-0025

TIME SCHEDULE ORDER PRESCRIBING ADMINISTRATIVE CIVIL LIABILITY 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. **Purpose of the Order:** This Order prescribes civil liability for non-compliance with the tasks and schedule contained in Cleanup and Abatement Order (CAO) No. 98-004, as amended by Order Nos. R2-2003-0028 and R2-2013-0021. The Water Board adopted these orders pursuant to section 13304 of the Water Code. Order No. R2-2013-0021 established a schedule for the submittal and implementation of plans to address existing and potential water quality impacts at the Leona Heights Sulfur Mine for protection of water quality and human and environmental health. Although the above named dischargers (collectively, the "Dischargers") have worked cooperatively with Water Board staff to complete a portion of tasks required by CAO No. 98-004 (as amended in 2003), they have not initiated cleanup. The Dischargers will be subject to civil liability prescribed in this Order should they fail to complete any task of Order No. R2-2013-0021, as listed below.

2. **Site Location and Description:** As described in CAO No. 98-004, the Leona Heights Sulfur Mine is an inactive pyrite mine located in the Oakland Hills at the end of McDonell Avenue south of the Montclair District (Figure 1). The mine is located in the upper reach of the Leona Creek watershed, and sulfur-bearing mining waste (also referred to as tailings) fills the stream channel. Water flowing over and through these tailings dissolves sulfur, producing acid mine drainage in Leona Creek. In the dry season, the main source of water to the creek is groundwater that daylights on the property. During rain events, runoff from the watershed above the site forms an ephemeral stream that combines with the daylighted groundwater significantly increasing flows, and therefore increasing acid mine drainage in the creek (Figure 2). The creek has the characteristic orange color associated with acid mine drainage, which also dissolves metals (including cadmium, copper, mercury, nickel, lead, and zinc) and metalloids (arsenic) from surrounding soil and bedrock. Runoff from the site impairs water quality in Leona Creek until it flows into Aliso Lake (also known as Mills College Lake), located approximately 1400 feet downstream of the mine property boundary. No remedial work has been performed at this site, and thus water quality has not changed significantly since CAO No. 98-004 was issued.

3. **Parties Responsible for Discharge:** The site is currently owned by Dr. Collin Mbanugo, who is named as a Discharger in this and the R2-2013-0021 Order. As described in Order No. 98-004, the remaining Dischargers "caused or permitted the discharge of waste that has entered Waters of the State and created a condition of pollution or nuisance. The Dischargers have permitted the discharge of acidic water that contains concentrations of dissolved metals above Water Quality Objectives. All of the Dischargers knew of the discharge and have [or had] the ability to control it."

4. **Regulatory History:** Prior Water Board Orders include:
   a. In 1992, the Water Board adopted Order No. 92-105, prescribing Waste Discharge Requirements for the site. Corrective measures to address the mining waste and resultant pollution were required, however none were submitted, and no corrective measures were taken.
   b. In 1998, the Water Board adopted CAO No. 98-004 for the investigation and cleanup of the site. No tasks were completed.
   c. In 2003, the Water Board amended CAO No. 98-004 (CAO Amendment No. R2-2003-0028) to add the current property owner as a Discharger and amend task due dates. The Dischargers submitted a Corrective Action Plan and Implementation Schedule in partial completion of Task 2, however permits for construction of the remedy were not obtained, and cleanup has not been initiated.
   d. In May of 2013, the Water Board amended CAO No. 98-004 (CAO Amendment No. R2-2013-0021) to add Ocean Industries, Inc., as a Discharger, clarify tasks required to comply, and amend due dates.

5. **History of Non-Compliance:** The Dischargers missed deadlines for the following tasks required of CAO Amendment No. R2-2003-0028:

98-004 Task No.	R2-2003-0028 Action	Description	Due Date (per R2-2003-0028)	Status
B.1	Deleted by 2.a			
B.2	Replaced by 2.b	i. Technical Report Submittal, Corrective Action Plan and Implementation Schedule	May 30, 2003	Submitted April 11, 2006
		ii. Implentation of Corrective Action Plan and Implementation Schedule	Immediately Upon Approval (July 5, 2006)	Not Completed
B.3	Replaced by 2.c	i. Post Construction Monitoring	Upon Completion of Construction	Not Completed
		ii. Post Construction Reporting of Monitoring	Semi-Annually on October 31st and April 30th	Not Completed
B.4	Deleted by 2.d			
B.5		Proper Disposal and Prevention of Erosion of Wastes Onsite	N/A	Not Completed
B.6		Submit Monthly Progress Reports During Implementaion of Corrective Action Activities	N/A	Partially Completed

6. **Justification for this Order:**

   a. The Water Board finds there is an ongoing violation of CAO No. 98-004, as amended by Order No. R2-2003-0028, and a threatened violation of Order No. R2-2013-0021, based upon the Dischargers' history of delayed compliance with Order Nos. 98-004 and R2-2003-0028.

   b. Pursuant to section 13308(a) of the Water Code: "If the Board determines there is a threatened or continuing violation of any Cleanup and Abatement Order, Cease and Desist Order, or any Order issued under section 13267 or 13383, the Board may issue an Order establishing a time schedule and prescribing a civil penalty which shall become due if compliance is not achieved with that schedule."

   c. In view of the ongoing violation of Order Nos. 98-004 and R2-2003-0028 and threatened violation of Order No. R2-2013-0021, issuance of a Time Schedule Order under section 13308(a) of the California Water Code, which establishes tasks, a compliance time schedule, and maximum civil liabilities to be assessed in the event of violation, including delayed compliance, is an appropriate action to ensure timely compliance with CAO No. 98-004 (as amended).

   d. According to section 13308(b) of the Water Code: "The amount of the civil penalty [in a section 13308 Order] shall be based upon the amount reasonably necessary to achieve compliance, and may not include any amount intended to punish or redress previous violations. The amount of penalty may not exceed ten thousand dollars ($10,000) for each day in which the violation occurs."

   e. If the Water Board prosecution staff determines the Dischargers have failed to comply with the time schedule of this Order, it may issue a complaint pursuant to Water Code section 13323(a) alleging the violation(s) of the time schedule and setting forth the amount of civil liability due under this Order. The Dischargers may either pay the civil liability or request a hearing before the Water Board. If the Water Board decides to impose the liability, it may impose a liability that is less than the amount prescribed in this Order if it makes express findings setting forth the reasons for its action based on the specific factors to be considered for administrative civil liabilities in Water Code section 13327 which states:

      > *In determining the amount of civil liability, the regional board, and the state board upon review of any order pursuant to Section 13320, shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.*

   f. Given the lengthy history of non-compliance and the nature and duration of the ongoing discharge, the maximum penalty is warranted and reasonably necessary to achieve compliance and is not intended to punish or redress previous violations.

7. **CEQA:** Adoption of this Order will not have any direct or reasonably foreseeable indirect physical change on the environment since it merely prescribes liabilities that will become due if there is non-compliance with Order No. 98-004, as amended by Order Nos. R2-2003-0028 and R2-2013-0021. As such, this Order is not subject to the California Environmental Quality Act ("CEQA"). (See Cal. Code Regs., tit. 14, § 15060(c)(2). Adoption of the Order falls within the general rule that CEQA only applies to activities that have the potential for causing a significant effect on the environment. Where it can be seen with certainty, as in the case of this Order, that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. (Cal. Code Regs., tit. 14, § 15061(b)(3).)

8. **Notification:** The Water Board has notified the Dischargers and interested agencies and persons of its intent under Water Code section 13308 to adopt a Time Schedule Order for the discharge and has provided them with the opportunity for a public hearing and an opportunity to submit their written comments.

9. **Public Hearing:** The Water Board, at a public meeting, heard and considered all comments pertaining to this discharge.

IT IS HEREBY ORDERED, pursuant to section 13308 of the California Water Code (CWC) that the Dischargers, their assigned agents, successors and assigns, must complete the tasks described in accordance with the task schedule specified in Table 1 of this Order. In the event of non-compliance with a task or task schedule, the respective penalty (or penalties) prescribed by the Order shall become due. Each discharger who fails to achieve compliance in accordance with the schedule established in this Order shall be liable civilly in an amount not to exceed the amount prescribed by the Order. The penalty shall accrue on each day after the due date until the task is completed.

A. TASKS

Each of the following numbered tasks refers to the tasks outlined in Order No. R2-2013-0021.

2.I.a Remedial Design Plan:

COMPLIANCE DATE: October 15, 2013
PENALTY: $10,000 each day the report is late

2.I.b Creek Restoration Design Plan:

COMPLIANCE DATE: October 15, 2013
PENALTY: $10,000 each day the report is late

2.II Application for Permits:

COMPLIANCE DATE: November 15, 2013
PENALTY: $10,000 each day the report is late

2.III Implement Mine Remediation and Creek Restoration Designs:

COMPLIANCE DATE: September 15, 2014
PENALTY: $10,000 each day the remediation and creek restoration is incomplete after compliance date

2.IV Recordation of Deed Restriction:

COMPLIANCE DATE: 180 days after completion of construction
PENALTY: $10,000 each day the report is late

3. Monitoring and Maintenance Plans:

COMPLIANCE DATE: October 30, 2014
PENALTY: $10,000 each day the report is late

I, Bruce H. Wolfe, 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 July 10, 2013.

Digitally signed by Bruce H. Wolfe
Date: 2013.07.10 15:10:52 -07'00'

Bruce H. Wolfe
Executive Officer

Attachments:

- Figure 1. Site Location
- Figure 2. Leona Creek
- Figure 3. Leona Creek, discoloration from acidophilic bacteria and iron oxide

Figure 1. Site location

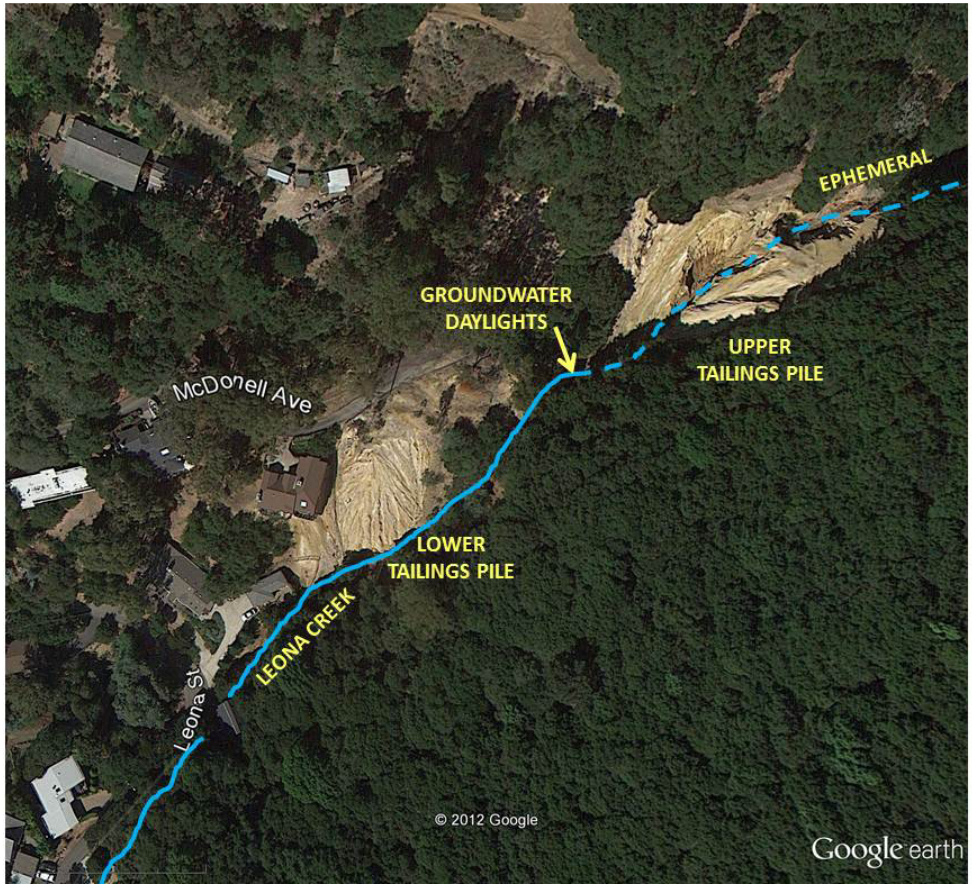

Figure 2. Leona Creek

Figure 3. Leona Creek, discoloration from acidophilic bacteria and iron oxide