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U.S. ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
REGIONAL HEARING CLERK

1 UNITED STATES  
2 ENVIRONMENTAL PROTECTION AGENCY  
3 REGION IX  
4 75 HAWTHORNE STREET  
5 SAN FRANCISCO, CA 94105

7 IN THE MATTER OF:

DOCKET NO. CAA-09-2011-0007

8 J.A. SUTHERLAND, INC. AND  
9 WALBERG, INC.,

RESPONDENTS J.A. SUTHERLAND,  
INC.'S AND WALBERG, INC.'S ANSWER  
AND REQUEST FOR HEARING

10 Respondents

12  
13 Request For Hearing

14 Respondents J.A. Sutherland, Inc. and Walberg, Inc. ("Respondents") request a hearing  
15 upon the issues raised by the complaint and answer(s) filed in this matter. See 40 C.F.R. §  
16 22.15(c).

17  
18 Individual Authorized To Receive Service On Behalf Of Respondent

19 The following individual is authorized to receive service on behalf of Respondents in  
20 connection with this matter (see 40 C.F.R. § 22.5(c)(4)):

21 JOHN M. MURRAY - SBN 232419  
22 McCarthy & Rubright, LLP  
23 100 Rio St.  
24 P.O. Box 190  
25 Red Bluff, CA 96080  
(530) 527-0213  
(530) 527-7641 (fax)  
jmurray@mccarthyrubright.com

1 Pursuant to 40 C.F.R. § 22.15, Respondents answer the factual allegations contained in  
2 the Complaint and Notice of Opportunity for Hearing (the "Complaint") filed by the Director of  
3 the Air Division, United States Environmental Protection Agency ("EPA"), Region 9, as follows:

4 1. Respondents admit the allegation contained in the first numbered paragraph of the  
5 Complaint.

6 2. Respondents admit the allegation contained in the second numbered paragraph of the  
7 Complaint.

8 3. Respondents admit the allegation contained in the third numbered paragraph of the  
9 Complaint.

10 4. Respondents admit the allegation contained in the fourth numbered paragraph of the  
11 Complaint.

12 5. Respondents admit the allegation contained in the fifth numbered paragraph of the  
13 Complaint.

14 6. Respondents have no knowledge of the allegation contained in the sixth numbered  
15 paragraph of the Complaint and based thereon deny the allegation.

16 7. Respondents admit the allegation contained in the seventh numbered paragraph of the  
17 Complaint.

18 8. The eighth numbered paragraph of the Complaint does not contain allegations of fact  
19 and no response is required.

20 9. The ninth numbered paragraph of the Complaint does not contain allegations of fact,  
21 but rather legal conclusions, and no response is required. To the extent a response is required,  
22 Respondents deny the allegation.

23 10. Respondents admit the allegation contained in the tenth numbered paragraph of the  
24 Complaint. However, Respondents and each of them were not required to provide written notice  
25 of intention to demolish the Building. Respondent J.A. Sutherland, Inc. hired a Cal-OSHA

1 certified asbestos consultant to test the Building for asbestos containing material prior to  
2 demolition of the Building and none was found. Accordingly, the Building was not a “stationary  
3 source” as defined in 40 C.F.R. § 61.02, and Subpart M of Part 61 of Title 40 of the Code of  
4 Federal Regulations does not apply to demolition of the Building. (See 40 C.F.R. § 61.01 (c)  
5 [stating that Part 61 applies to owner/operator of any “stationary source”].) Additionally,  
6 Respondent J.A. Sutherland, Inc. complied with all city and county notice, review, and  
7 permitting requirements relating to demolition of the Building.

8 11. Respondents deny the allegation contained in the eleventh numbered paragraph of the  
9 Complaint. Respondents, or either of them, were not required to provide written notice of intent  
10 to demolish the Building. Respondent J.A. Sutherland, Inc. hired a Cal-OSHA certified asbestos  
11 consultant to test the Building for asbestos containing material prior to demolition of the  
12 Building and none was found. Accordingly, the Building was not a “stationary source” as  
13 defined in 40 C.F.R. § 61.02, and Subpart M of Part 61 of Title 40 of the Code of Federal  
14 Regulations does not apply to demolition of the Building. (See 40 C.F.R. § 61.01 (c) [stating  
15 that Part 61 applies to owner/operator of any “stationary source”].) Additionally, Respondent  
16 J.A. Sutherland, Inc. complied with all city and county notice, review, and permitting  
17 requirements relating to demolition of the Building.

18 12. Respondents deny that they or either of them, can be, or should be, liable for a civil  
19 penalty in any amount and that any amount of penalty is unreasonable.

20 As Affirmative Defenses to the Complaint, and as the basis for opposing any proposed relief  
21 to the EPA, Respondents allege as follows:

22 1. The Complaint, and each claim therein, fails to state a cause of action against  
23 Respondents or either of them. Prior to demolition of the Building, Respondent J.A. Sutherland,  
24 Inc. hired a Cal-OSHA certified asbestos consultant to test the Building for asbestos containing  
25 material. No asbestos or asbestos containing material was found to be present. This finding was

1 communicated to Respondent Walberg, Inc. prior to demolition of the Building. Accordingly,  
2 the Building did not constitute a "stationary source" as that term is defined in 40 C.F.R. § 61.02  
3 because it did not emit, nor could it have possibly emitted, asbestos. Pursuant to 40 C.F.R. §  
4 61.01(c), Subpart M (National Emission Standard for Asbestos) of Part 61 of Title 40 of the  
5 Code of Federal regulations does not apply, and Respondents, or either of them, were under no  
6 obligation to provide written notice of intent to demolish the Building.

7 2. The imposition of liability and/or civil penalties against Respondents, or either of  
8 them, would violate Respondents', and each of their, procedural and substantive Due Process  
9 rights guaranteed under the federal constitution.

10 3. The regulations on which the alleged liability of Respondents is based are  
11 unconstitutionally vague, incomprehensible, and therefore void.

12 4. The Environmental Protection Agency lacks subject matter jurisdiction because the  
13 Building did not contain any asbestos containing material, and Respondents are informed and  
14 believe that demolition of the Building did not release any other pollutant identified in the Clean  
15 Air Act or its implementing regulations at 40 C.F.R. § 61.01.

16 5. The Clean Air Act and its implementing regulations as set forth in the Complaint are  
17 unconstitutional and void as against public policy.

18 6. Additional affirmative defenses may exist which are presently unknown to  
19 Respondents and each of them, and Respondents and each of them reserve their right to state  
20 additional affirmative defenses in the event they become aware of facts supporting additional  
21 affirmative defenses.

22  
23 DATED: October 26, 2011

**McCARTHY & RUBRIGHT, LLP**

24 By 

JOHN M. MURRAY  
Attorneys for Respondents

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**PROOF OF SERVICE**

I am a citizen of the United States, employed in the City of Red Bluff, County of Tehama. My business address is 100 Rio Street/P.O. Box 190, Red Bluff, California 96080. I am over the age of eighteen years and not a party to the above-entitled action.

On October 27, 2011, I served the following documents:

**RESPONDENTS J.A. SUTHERLAND, INC. AND WALBERT, INC.'S  
ANSWER AND REQUEST FOR HEARING**

**MANNER OF SERVICE**

(U.S. MAIL) By causing a true copy thereof to be served on the parties in this action through the U.S. Mail and addressed as listed below. I am familiar with the procedure of McCarthy & Rubright, LLP whereby mail is to be sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and then is deposited in a U.S. mailbox at the close of each business day.

(PERSONAL SERVICE) On the parties in this action by causing a true copy thereof to be personally delivered by hand to the addressee(s) listed below.

(OTHER) On the parties in this action by causing a true copy thereof to be delivered by and/or through the services of:

- a.  Overnight Delivery via United Parcel Service
- b.  Express Mail
- c.  Facsimile

**PARTIES SERVED AND/OR ADDRESS-FACSIMILE NUMBER:**

Regional Hearing Clerk  
USEPA, Region IX  
75 Hawthorne St.  
San Francisco, CA 94105  
*Via UPS Overnight Delivery*

Carol Bussey  
Assistant Regional Counsel  
Office of Regional Counsel (ORC-2)  
USEPA, Region IX  
75 Hawthorne St.  
San Francisco, CA 94105  
*Via US Mail*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this document is executed at Red Bluff, California on October 27, 2011.

  
PATTY PLEMONS