



D a v i s G r a h a m & S t u b b s L L P

June 3, 2013

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Re: Walker Mine and Walker Mine Tailings Sites, Plumas County
Atlantic Richfield Company Comments on Draft Orders

Gentlemen:

I submit this letter and comments as counsel for the Atlantic Richfield Company ("Atlantic Richfield") in the captioned matter. The Regional Water Quality Control Board for the Central Valley Region (the "Regional Board") on May 1, 2013 served by formal process two draft Cleanup and Abatement Orders (the "Draft CAOs") regarding the Walker Mine Site (the "Mine Site") and Walker Mine Tailings Site (the "Tailings Site" together with the Mine Site, the "Sites").

Atlantic Richfield appreciates the Regional Board's decision to provide Atlantic Richfield the opportunity to comment on the Draft CAOs. Atlantic Richfield regrets, however, that the Regional Board initially required a response to the Draft CAOs by May 20, 2013 when the Draft CAOs were served only 19 days earlier. Although the Regional Board's counsel agreed to extend the May 20 deadline by two weeks to June 3, 2013, the resulting time period for Atlantic Richfield's response (33 days) is not sufficient to prepare a complete response on issues that are legally and factually complex and that relate to events from so long ago. The abbreviated response period makes it particularly challenging to respond to the technical aspects of the Regional Board's conclusions about the Sites; thus, technical comments are not included in this submittal. Atlantic Richfield submits these comments without any express or implied waiver of Atlantic Richfield's right to present any additional evidence or arguments that may later develop.

In addition to the comments offered below, to the extent the Regional Board makes hearings available before finalizing draft cleanup and abatement orders, Atlantic Richfield requests that the Regional Board conduct a hearing and allow Atlantic Richfield to offer expert testimony and

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additional technical evidence to complete the administrative record in support of Atlantic Richfield's challenges to Draft CAOs.

SUMMARY OF COMMENTS

Atlantic Richfield disputes the Regional Board's assertion that Atlantic Richfield should pay for or perform any further remediation activity that may be necessary at the Sites. Neither Atlantic Richfield nor its predecessors (International Smelting & Refining Co. ("IS&R"), which later merged into the Anaconda Copper Mining Company ("Anaconda") owned or operated either Site. Nor has Atlantic Richfield conducted any past remediation at the Sites, which the Regional Board apparently now views as defective. And, as the Regional Board is aware, Atlantic Richfield negotiated a consent decree with the federal government for claims related to the Tailings Site (the "Consent Decree"). The U.S. District Court for the Eastern District of California approved the Consent Decree, including a contribution protection section that is expressly authorized by federal law and that bars claims such as those made in the Draft CAO for the Tailings Site. Thus, if the Regional Board finalizes the Draft CAOs, Atlantic Richfield reserves its right to contest the CAOs before the State Water Resources Control Board and, if necessary, its right to seek judicial review of any effort to enforce the CAOs in appropriate judicial proceedings.

I. Comments Applicable To The Tailings Site.

A. The Consent Decree Between Atlantic Richfield And The U.S. Forest Service Bars The Regional Board's Attempt To Impose Additional Liability On Atlantic Richfield At The Tailings Site.

The U.S. Forest Service ("USFS") has been performing investigatory and remedial work at the Tailings Site since at least 1991. The USFS issued a Record of Decision for the Tailings Site in 1994 (which ROD was later amended in 2001). In 1997, the USFS approached Atlantic Richfield asserting that, pursuant to CERCLA, Atlantic Richfield was a potentially responsible party for conditions at the Tailings Site. Atlantic Richfield disputed the USFS's claims – based in large part on the fact that Atlantic Richfield never owned or operated either the Mine Site or Tailings Site – but eventually resolved the dispute by entering a consent decree with the USFS, which the U.S. District Court for the Eastern District of California approved on June 13, 2005.

For present purposes, the key terms of the Consent Decree were these:

- Atlantic Richfield did not admit any liability arising out of the Tailings Site. (Consent Decree at § I.E.)¹

¹ Because the Regional Board's Draft CAO for the Tailings Site references the Consent Decree, Atlantic Richfield presumes that a copy of the Consent Decree is available to the Regional Board and that none needs be added to the Administrative Record in this case. If the Regional Board does not have a copy of the Consent Decree, Atlantic Richfield will provide one upon request.

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- Atlantic Richfield paid \$2.5 million into an escrow account which the USFS agreed to use “to properly implement the ROD and any amendments to the ROD required to remediate current conditions at the [Tailings] Site.” (Consent Decree at § VI.11.)
- In a section denominated “Effect of Settlement; Contribution Protection,” the parties “agree[d], and by entering th[e] Consent Decree th[e] Court [found], that Settling Defendants are entitled . . . to protection from costs, damages, actions, or other claims (whether seeking contribution, indemnification, or however denominated) for matters addressed in th[e] Consent Decree as provided by (1) CERCLA Section 113(f)(2), and (2) any other applicable law.” (Consent Decree at § IX.19.)

The contribution protection’s scope extends to all “claims . . . however denominated . . . for matters addressed in th[e] Consent Decree.” (*Id.*) The Consent Decree goes on to define “matters addressed” as “all Response Actions taken or to be taken and all Response Costs incurred or to be incurred by the United States *or any other person* with respect to the [Tailings] Site.” (*Id.* (emphasis added).) The Consent Decree further defines “Response Actions” by reference to CERCLA’s definitions of “remedial” and “removal” actions. (Consent Decree at § IV.3 (“‘Response Action’ shall mean remove, removal, remedy and remedial action, as those terms are defined in Section 101 of CERCLA.”).) Those CERCLA definitions, in turn, are exceptionally broad: “The terms ‘remove’ or ‘removal’ means [sic] the cleanup or removal of released hazardous substances from the environment, . . . or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.” 42 U.S.C. § 9601(23); *see also* 42 U.S.C. § 9601(24) (“The terms ‘remedy’ or ‘remedial action’ means [sic] those actions consistent with permanent remedy taken instead of or in addition to removal actions.”).

The Draft CAO unquestionably contemplates activities that constitute Response Actions as defined in the Consent Decree. If finalized as drafted, the CAO for the Tailings Site would require Atlantic Richfield to “investigate, identify, and classify all sources of mining waste,” “submit a work plan and Time Schedule to close and maintain the tailings . . . to remediate the site in such a way to prevent future releases of mining waste,” to “submit regularly quarterly reports documenting progress in completing remedial actions,” and to “complete all remedial actions and submit a final construction report.” (Draft CAO for Tailings Site at p. 9-10.) The “matters addressed” in the Consent Decree thus encompass the Regional Board’s claim that Atlantic Richfield must now perform what amount to additional Response Actions at the Tailings Site.

CERCLA expressly authorizes court approval of contribution protection like that afforded to Atlantic Richfield in the Consent Decree and courts regularly enforce such contribution protection provisions. CERCLA Section 113(f)(2) provides that “[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement

shall not be liable for claims for contribution regarding matters addressed in the settlement.” 42 U.S.C. § 9613(f)(2); *see also id.* at § 9622(g)(5) (making the same provision for *de minimis* settlements). Courts interpreting contribution protection clauses similar to the one here consistently enforce the clauses to bar claims like the Regional Board’s. *See, e.g., United States v. S.E. Pa. Transp. Authority*, 235 F.3d 817, 822-23 (3d Cir. 2000); *City of Waukegan v. Nat’l Gypsum Co.*, No. 07 C 5008, 2009 WL 674347 at *2 (N.D. Ill. Mar. 12, 2009); *Alcan Alum. Corp. v. Butler Aviation-Boston, Inc.*, No. 3-CV-02-0562, 2003 WL 22169273 at *3-4 (M.D. Pa. Sept. 19, 2003). Proceeding with the Draft CAO for the Tailings Site would thus flaunt both the unambiguous terms of the Consent Decree and the plain meaning of federal law.

Proceeding with the Draft CAO for the Tailings Site in spite of Atlantic Richfield’s entitlement to contribution protection would also undermine CERCLA’s purpose of encouraging early settlement and remediation of contaminated sites. CERCLA’s contribution protection “provision was designed to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle.” *United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 92 (1st Cir. 1990). This purpose applies with equal force regardless of what statutory or common law basis the Regional Board asserts for its claims; a contrary rule “would eviscerate § 9613(f)(2) and allow . . . an end run around the statutory scheme.” *Id.* Accordingly, Atlantic Richfield requests that the Regional Board look to the USFS as the responsible party for any response action as the Consent Decree bars any third party claim against Atlantic Richfield related to the Tailings Site.

B. Several Other CERCLA Provisions Bar The Regional Board’s Attempt To Alter Or Supplement The Ongoing Remedial Efforts At The Tailings Site.

In addition to its contribution protection provision, CERCLA contains several other sections that bar the Regional Board’s attempt to impose cleanup obligations in connection with the Tailings Site. CERCLA Section 113(b) states that “the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter.” 42 U.S.C. § 9613(b). Section 113(b)’s exclusive federal jurisdiction provision “cover[s] any ‘challenge’ to a CERCLA cleanup,” even challenges based on state law. *Fort Ord Toxics Project v. California E.P.A.*, 189 F.3d 828, 832 (9th Cir. 1999). An action “challenges” a CERCLA cleanup and violates Section 113(b) “where the plaintiff seeks to dictate specific remedial actions, to postpone the cleanup, to impose additional reporting requirements on the cleanup, or to terminate the RI/FS and alter the method and order of cleanup.” *ARCO Environmental Remediation, LLC v. Dep’t of Health & Environmental Quality of Mont.*, 213 F. 3d 1108, 1115 (9th Cir. 2000) (internal citations omitted).

The Draft CAO for the Tailings Site purports to “dictate specific remedial actions” and therefore violates CERCLA Section 113(b). Even though the Draft CAO leaves open for later decision exactly *what* remedial actions will eventually be required, nonetheless it clearly contemplates *some* additional affirmative remedial action as the Regional Board’s goal. The U.S. Forest Service has been conducting remedial action at the Tailings Site since issuance of the Record of Decision for the Tailings Site in 1994. Any different or additional remedial action the Regional

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Board's CAO may require therefore will "interfere[] with the implementation of a CERCLA remedy." *Broward Gardens Tenants Association v. EPA*, 311 F.3d 1066, 1072 (11th Cir. 2002). CERCLA, thus, bars the Regional Board from issuing a CAO under these circumstances.

CERCLA Section 122(e)(6) also prohibits the Regional Board's proposed CAO: "When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President." 42 U.S.C. § 9622(e)(6). The U.S. Forest Service conducted its remedial investigation and feasibility study for the Tailings Site many years ago, resulting in the 1994 Record of Decision, and the U.S. Forest Service's remedial activities at the Tailings Site are still ongoing. Congress' purpose when enacting Section 122(e)(6) was to "avoid situations" where a party performs "work at a site that prejudices or may be inconsistent with what the final remedy should be or exacerbates the problem." 132 Cong. Rec. S14895-02, 1986 WL 788210 (daily ed., Oct. 3, 1986). The Regional Board's Draft CAO would pose precisely the problem Congress sought to avoid and Section 122(e)(6) therefore bars implementation of the Draft CAO for the Tailings Site.

C. California State Law Also Prohibits The Regional Board's Effort To Impose Additional Liability After Entry Of The Consent Decree.

California Code of Civil Procedure § 877 states: "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect: . . . (b) It shall discharge the party to whom it is given from all liability for any contribution to any other parties." There is no allegation that Atlantic Richfield and USFS entered the Consent Decree in bad faith – indeed, the Court's order approving the Consent Decree included a finding that Atlantic Richfield and USFS had negotiated the Consent Decree in good faith (Consent Decree at § I.O) – so California law as well as federal law prohibits the Regional Board from imposing on Atlantic Richfield additional liability related to the Tailings Site.

II. Comments Applicable To Both Sites.

A. The Regional Board Cannot Hold Atlantic Richfield Responsible For Walker Mining Corporation's Conduct When Atlantic Richfield's Alleged Predecessor Was A Mere Shareholder In Walker Mining Corporation.

Neither Atlantic Richfield nor Atlantic Richfield's predecessors ever owned or operated the Walker Mine. The Walker Mining Corporation owned and operated the Walker Mine. IS&R –

which later merged into Anaconda, which in turn later merged into Atlantic Richfield – was simply a shareholder in the Walker Mining Corporation.

Atlantic Richfield's status as the possible successor to a shareholder means the Regional Board can hold Atlantic Richfield responsible for remediation activities at the Walker Mine only if the Regional Board brings out evidence showing one of two circumstances: (1) IS&R or Anaconda was the alter ego of the Walker Mining Corporation so as to justify piercing Walker Mining Corporation's corporate veil; or (2) IS&R or Anaconda conducted operations specifically related to pollution at Walker Mine. To find that either of these circumstances exists here, the Regional Board's evidence must be "substantial." *In re Alum. Co. of Amer.*, Order No. WQ 93-9, 1993 WL 303166 at *3 (Cal.St.Wat.Res.Bd. July 22, 1993) ("[T]here must be substantial evidence to support a finding of responsibility for each party named.").

The U.S. Supreme Court's decision in *United States v. Bestfoods* is the most frequently cited authority for limiting shareholder liability in the environmental context to the two circumstances just described, *see* 524 U.S. 51 (1998), and those limits apply equally under the California Water Code (the "Water Code"). Water Code § 13304 applies only to a "person 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." A shareholder could not "cause or permit" a discharge without either being the alter ego of the corporation that actually caused the discharge or controlling the aspect of the operations that were the source of the discharge.² *In re Mr. Kelly Engineer / All Star Gasoline, Inc.*, Order WQO-2002-0001, 2002 WL 232806 at *2 (Cal. St. Wtr. Res. Bd. Jan. 23, 2002) (citing *Bestfoods* and remanding because a regional board's order imposing liability on a shareholder "did not adequately show that [the shareholder] was the operator of the facility even though he had created a corporation."); *see also In re Original Sixteen to One Mine, Inc.*, Order WQO 2003-0006, 2003 WL 21224472 at *3 (Cal. St. Wtr. Res. Bd. Apr. 30, 2003) (explaining that shareholder liability under the Water Code can be either direct – if the shareholder "personally participated in the wrongful conduct or authorized that it be done" – or indirect, where the shareholder is the corporation's alter ego).

1. *Neither IS&R Nor Anaconda Was An Alter Ego Of Walker Mining Corporation.*

The United States Bankruptcy Court long ago rejected any claim that Anaconda or IS&R was an alter ego of Walker Mining Corporation. In the course of approving IS&R's claim against the Walker Mining Corporation's bankruptcy estate in 1945, the bankruptcy court found as follows:

² Indeed, even the Regional Board's Draft CAOs implicitly recognize the limits on shareholder liability by charging that "Anaconda was a direct operator of the mine and . . . [i]n the alternative, . . . Anaconda operated Walker as a corporate alter ego." Draft CAO for Mine Site at ¶¶ 36-37.

- “Debtor [*i.e.*, Walker Mining Corporation] is not and has never at any time been an alter ego or instrument or department of Anaconda Copper Mining Company or of International Smelting & Refining Company, hereinafter claimant.”
- “Debtor’s business and affairs have at all times been carried on and conducted in the manner and according to the methods and practice usually employed by corporations free of any domination or control by others.”
- “[N]o act or omission of said Anaconda Copper Mining Company or of said Claimant, their officers, agents and employees, or any of them established by any evidence, constitutes or proves any domination or control by them of any of them over Debtor or any of Debtor’s acts, business or affairs, or constituted fraud, or occasioned damage or prejudice to or violated any right of Debtor or any of its stockholders.” (Exh. 1.)

The bankruptcy court made its findings at a time when the evidence was far fresher than it is now, and nothing in the Regional Board’s recently produced evidence contradicts those findings. To determine that IS&R or Anaconda was an alter ego of Walker Mining Corporation, the Regional Board would have to demonstrate “(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the [shareholder] no longer exist, and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.” *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 Cal. App. 2d 825, 837 (Cal. 1962). As the State Board has explained, such “unity of interest and ownership” is usually found only where “(1) the corporation is under-capitalized to meet its likely obligations, (2) there is a failure to observe a strict separation between corporate and shareholder assets, (3) the corporation appears to have been used as a shell to perpetrate fraud or injustice, and (4) the corporate officers have failed to observe other corporate formalities.” *In re Original Sixteen to One Mine, Inc.*, 2003 WL 21224472 at *3 (citing *Associated Vendors* and summarizing the factors courts consider when considering whether to pierce a corporation’s veil).

The Draft CAOs do not even mention these requirements for alter ego liability. Likewise, the evidence the Regional Board has produced does not relate to Walker Mining Corporation’s capitalization, assets, or its corporate formalities, let alone demonstrate fraud or the treatment of Walker Mining Corporation as a “shell.” The Draft CAOs make the bare allegation that “Anaconda, through International, financed the indebtedness of Walker from at least 1922 through 1944 . . . [and] carried the costs of exploration and development during periods when Walker was not profitable.” Draft CAO for Tailings Site at ¶ 28; Draft CAO for Mine Site at ¶ 37. But the documents the Regional Board recently produced do not appear to directly support these allegations. *Cf.* Draft CAO for Mine Site at ¶ 35 (explaining that “[d]ocuments showing Anaconda’s direct operation of the mine are contained in Attachment E,” but not mentioning documents related to financing). Atlantic Richfield is entitled to review all evidence relied on by the Regional Board in support of its proposed orders. If the Regional Board has relied upon historical documents not previously produced to Atlantic Richfield, Atlantic Richfield requests

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that the Regional Board produce such documents for its review.³ However, based on all evidence of which Atlantic Richfield is aware, there is no substantial evidence to support a Regional Board finding that IS&R or Anaconda was the alter ego of Walker Mining Corporation.

2. *Neither IS&R Nor Anaconda Operated The Tailings Site.*

IS&R and Anaconda did not operate the Tailings Site and it is entirely unclear what basis the Regional Board has for taking the contrary position that IS&R and Anaconda “concurrently operated the mine and tailings from 1918 through at least 1943.” Draft CAO for Tailings Site at ¶ 26. Here again, it appears the Regional Board must be relying on documents or other evidence the Regional Board has not disclosed to Atlantic Richfield. The documents the Regional Board recently produced make no mention of how or where the Walker Mine disposed of tailings or any IS&R or Anaconda participation in those activities. And the earliest of the documents produced by the Regional Board is dated August 31, 1922; there are no documents indicating the extent of IS&R’s or Anaconda’s involvement beginning in 1918. If the Regional Board relied upon documents other than those produced, Atlantic Richfield requests again that the Regional Board immediately make any such additional documents available. Based on all evidence available to Atlantic Richfield, there is no substantial evidence to support the Regional Board’s position that IS&R or Anaconda operated the Tailings Site.

3. *Neither IS&R Nor Anaconda Operated The Mine Site.*

The vast majority of the documentation produced by the Regional Board relates to IS&R’s and Anaconda’s purported involvement with exploration and development work at the Mine Site. That documentation is insufficient to impose liability on IS&R or Anaconda as a shareholder, for at least three reasons, as follows.

First, the documents produced by the Regional Board do not demonstrate IS&R or Anaconda involvement in any mine activities that would have caused pollution, namely “the leakage or disposal of hazardous waste.” *Bestfoods*, 524 U.S. at 67. To be responsible for cleanup operations as a facility operator, IS&R or Anaconda must have “manage[d], direct[ed], or conduct[ed] operations *specifically related to pollution*.” *Id.* at 66 (emphasis added). The documents the Regional Board produced are limited to exploration, development, and, very occasionally, personnel matters at the Walker Mine. The documents do *not* discuss proper removal, disposal, or storage of waste. In fact, the documents say little even about how ore would be removed from the Mine, instead focusing almost exclusively on where more ore could be located. The documents also do not reflect any IS&R or Anaconda participation in the Mine’s closure – an activity that undoubtedly could have prevented much, if not all, of the allegedly

³ In the event that the Regional Board produces additional evidence after Atlantic Richfield submits these comments or otherwise attempts to supplement the administrative record, Atlantic Richfield reserves its right to respond to that additional evidence by supplementing these comments or introducing additional evidence on its own behalf.

ongoing discharges from the Mine – indicating that Walker Mining Corporation alone conducted mine closure activities during that period.⁴

Second, the documents produced by the Regional Board do not demonstrate IS&R or Anaconda control over the facility, but instead relate merely to the relationship between IS&R/Anaconda and Walker Mining Corporation. The critical question for purposes of determining a corporate shareholder's liability for allegedly operating a corporate-owned facility "is not whether the [shareholder] operates the [corporation], but rather whether [the shareholder] operates the facility, and that operation is evidenced by participation in the activities of the facility, not the [corporation]." *Bestfoods*, 554 U.S. at 68. The documents the Regional Board produced, at most, indicate interactions between IS&R/Anaconda and Walker Mining Corporation *regarding* the Walker Mine; the documents do not indicate IS&R/Anaconda directly *operating* the Walker Mine (*i.e.*, the "facility").

Third, the Regional Board's documentation does not actually demonstrate the level of control suggested in the Draft CAOs. In fact, many of the documents indicate that Walker Mining Corporation often refused to heed IS&R or Anaconda's recommendations. For instance, a September 20, 1923 letter between Reno Sales, of Anaconda, and Paul Billingsley, of IS&R, mentions that "the developments at the mine are carried on just about as Hart [the Walker Mine manager at the time] wants them." The letter goes on to say that Hart was not even providing maps of the Mine to Anaconda. On the subject of Anaconda geologists visiting Walker Mine, Mr. Sales states "I think it is absolutely useless for members of the Geological Department to be chasing to the Walker Mine on matters which are of no great moment and for which they are not responsible." Similarly, in a September 22, 1925 letter from another Anaconda geologist to Mr. Billingsley, the geologist recounted being "perturbed" by the Walker Mine manager's refusal to follow Anaconda's recommendations.⁵ It seems highly unlikely that Anaconda would have allowed such disobedience from its mine manager to persist for over two years if "Anaconda operated the [Walker Mine] as it would have any of its directly-owned assets," as the Draft CAO for the Mine Site contends. Draft CAO for Mine Site at ¶ 35.

⁴ Atlantic Richfield notes that the Draft CAOs describe the cause of the alleged discharge at Walker Mine in only the most general terms. See Draft CAO for Mine Site at ¶ 22 ("The apparent source of the continuing elevated levels of copper is leachate being generated by surface water runoff from rainfall and/or snowmelt that comes in contact with the 700 level adit, the ruins of the mill and concentrator, exposed mining waste piles in and around the portal area, mining waste in the Dolly Creek drainage and mining waste in the tailings impoundment."). Without more specific data or information, it is exceptionally difficult to determine specifically what activities at the mine causes the alleged discharges there (and thereby who, if anyone other than Walker Mining Corporation, conducted those activities and could consequently be responsible for cleaning up or abating the alleged discharges). Regardless, based on the information available to Atlantic Richfield, there does not appear to be any substantive evidence of IS&R or Anaconda involvement in pollution-causing activities.

⁵ See also October 25, 1924 letter from Reno Sales to Wm. Wraith, IS&R (saying that "some of the developments in the Walker Mine are not being carried out in accordance with the recommendations of the Geological Department [and] this department cannot be responsible for the manner in which some of the prospecting work has been done."); November 24, 1924 letter from Reno Sales to Wm. Wraith ("I know the Geological Department will not be held responsible for mining operations at the Walker . . . [and] in the final say so as to how it will be done I certainly am always glad and willing to leave it to the mine management.").

For all three of these reasons, the Regional Board cannot hold IS&R or Anaconda responsible for pollution at the Walker Mine based on a direct operator theory. The evidence the Regional Board has produced is insubstantial and does not correlate to the appropriate legal standards.

B. The Water Code Bars Retroactive Liability For Activities That Were Lawful At The Time.

Water Code § 13304(j) clarifies that Section 13304 “does not impose any new liability for acts occurring before January 1, 1981, if the acts were not in violation of existing laws or regulations at the time they occurred.” Walker Mining Corporation stopped operating the Walker Mine in 1941, and thus any acts which the Regional Board seeks to attribute to Atlantic Richfield occurred well before 1981. By speaking in terms of “laws or regulations,” Water Code § 13304(j) evinces the Legislature’s intent to impose liability only for past violations of statutory or regulatory law. *But see In re Petitions of County of San Diego*, 1996 WL 101751 at *3 (Cal. St. Wtr. Res. Bd. 1996) (interpreting Water Code § 13304(j) as imposing liability for any pre-1981 activities deemed to have constituted a nuisance at the time). Yet the Regional Board’s document production reveals no evidence of any unlawful activity at the Mine Site or Tailings Site – nuisance or otherwise – and Water Code § 13304(j) therefore bars any liability.

C. The Regional Board’s Actions Are Time Barred.

The statute of limitations for “[a]n action commenced under the Porter-Cologne Water Quality Control Act (Division 7 (commencing with Section 13000 of the Water Code))” is three years. Cal. Code of Civ. Proc. § 338(i). The limitations period accrues from “the discovery by the State Water Resources Control Board or a regional water quality control board of the facts constituting grounds for commencing actions under their jurisdiction.” *Id.* By the Regional Board’s own admission, it has believed since 1997 that it has grounds for asserting jurisdiction. (Draft CAO for Mine Site at ¶ 31.)

The State Board has previously interpreted Cal. Code of Civ. Proc. § 338(i) as applicable only to “actions” filed in court, as opposed to cleanup and abatement orders. *See In re Trans-Tech Resources*, Order No. WQ 89-14, 1989 WL 110603 at *2 (Cal. St. Wtr. Res. Bd. Aug. 17, 1989). The *Trans-Tech* decision’s rationale is highly suspect, however. In *Trans-Tech*, the State Board at once interpreted the word “action” in Cal. Code of Civ. Proc. § 338(i) as limited to judicial proceedings, and simultaneously interpreted the same word as applicable to both administrative and judicial proceedings when used in a different statute, with the result that the Regional Board’s cleanup and abatement order would stand. Thus, there is substantial question whether the State Board could or should follow its *Tetra-Tech* decision. Consequently, the Regional Board should decline to issue the Draft CAOs in this case given the time passed since the end of the limitations period.

D. The Regional Board Cannot Recover Past Costs Through A Cleanup And Abatement Order.

The Regional Board's Draft CAO for the Mine Site attempts to hold Atlantic Richfield responsible for past costs the Regional Board incurred there. (Draft CAO for Mine Site at p. 11, ¶ 2 ("The Discharger shall reimburse the [Regional Board] for reasonable costs . . . , including the [Regional Board's] previous expenditures for remedial actions, pursuant to Water Code section 13305, subdivision (c)(1)."⁶ The Regional Board cannot collect such past costs using a cleanup and abatement order. In defined circumstances, Water Code § 13304(c)(1) makes "reasonable costs actually incurred in cleaning up . . . waste, abating the effects of . . . waste, . . . or taking other remedial action . . . recoverable *in a civil action*." (Emphasis added.) As previously discussed with regard to the statute of limitations for Water Code liability, current State Board precedent holds that a cleanup and abatement order is *not* a civil action.

E. If Atlantic Richfield Bears Any Responsibility For The Sites, Atlantic Richfield's Liability Must Be Secondary To The Respective Liabilities Of USFS And The Regional Board.

Where the Regional Board seeks to hold multiple parties responsible for the same site, the State Board has suggested that the Regional Board either divide liability between a primary party and secondary parties, *see In re Prudential Ins. Co. of Amer.*, Order No. WQ 87-6 at p. 5 (Cal. St. Wtr. Res. Bd. June 18, 1987), or divide responsibility for different parts of a cleanup and abatement order, *see In re Petition of San Diego Unified Port District*, 1989 WL 118194 at *5 n.6 (Cal. St. Wtr. Res. Bd. Aug. 17, 1989) ("[I]t may be appropriate for the Regional Board to direct the parties to submit a plan specifying the roles of each party in implementing the cleanup and abatement order.").

The Regional Board should designate the USFS as the party primarily liable for any remediation activities at the Tailings Site. USFS is, and always has been, the Tailings Site's owner. USFS also knew of and approved the Tailings Site's use for storage of mine waste from the Mine Site. (Exh. 2.) Furthermore, Atlantic Richfield contributed \$2.5 million in good faith settlement of its purported liability for Tailings Site cleanup in consideration for the USFS' commitment to take all actions necessary to respond to releases of hazardous substances at the Tailings Site. To the extent the Regional Board believes the USFS's remedial actions at the Tailings Site are insufficient to protect human health and the environment, the Regional Board must require the USFS address the deficiencies identified by the Regional Board.

The Regional Board is, itself, the party primarily liable for any remediation activities at the Mine Site. The Regional Board conducted all prior remediation activities at the Mine Site, and appears to have done so with more than \$1 million in funds from other parties who were very clearly

⁶ Presumably, the intended statutory citation here is to Water Code § 13304(c)(1). Water Code § 13305(c) does not include a subsection (c)(1).

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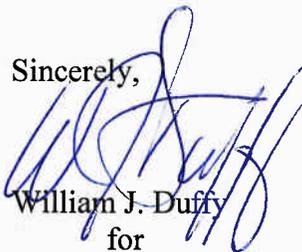
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liable for the condition of the Mine Site as its past owners. When conducting the remediation, the Regional Board had a duty to exercise an appropriate standard of care; if the Regional Board's remedial actions are now failing, it may well be the result of the Regional Board having breached applicable standards of care. The Regional Board may also have liability for conditions at both Sites as an "operator" and/or "arranger" pursuant to Cal. Health & Safety Code § 25363. Thus, primary responsibility for fixing any problems with the Regional Board's prior remedial actions should lie with the Regional Board.

On behalf of Atlantic Richfield, we appreciate the Regional Board's careful consideration of these comments, and respectfully request that the Regional Board withdraw the Draft CAOs. Representatives of Atlantic Richfield are available to meet with Regional Board representatives to explain and discuss the Draft CAOs and the positions set forth in this letter.

Sincerely,


William J. Duffy
for

DAVIS GRAHAM & STUBBS LLP

WJD:lg

cc: James L. Lucari, Esq.
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