REBUTTAL BRIEF APPENDIX I

OVERVIEW OF ATLANTIC RICHFIELD'S PREHEARING BRIEF AND PREHEARING MOTIONS

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

CLEANUP AND ABATEMENT ORDER NO. R5-2014-XXXX

ATLANTIC RICHFIELD COMPANY
UNITED STATES DEPARTMENT OF AGRICULTURE,
UNITED STATES FOREST SERVICE

WALKER MINE TAILINGS
PLUMAS COUNTY

CLEANUP AND ABATEMENT ORDER NO. R5-2014-YYYY
ATLANTIC RICHFIELD COMPANY

WALKER MINE
PLUMAS COUNTY

This is A Unique Matter Which the Board Cannot Adjudicate.

- CERCLA Section 113 Precludes Issuance of Both Clean Up and Abatement Orders

- Moreover, the Board is A Responsible Party and Cannot, Consistent with Constitutional Due Process and the Water Code, Use the CAOs as a Means to Bring a Contribution Claim Against Atlantic Richfield

Introduction – Atlantic Richfield Never Owned or Operated Either Site

- Atlantic Richfield's Predecessor (International Smelting & Refining Co.) Was Merely a Shareholder in the Walker Mining Company

- Shareholders Almost Never Are Liable for the Acts of the Corporations in Which They Invest

- In 1945, When Fact Witnesses and Additional Documentary Evidence Were Still Available, a Federal Bankruptcy Court Ruled that IS&R's and Anaconda's Relationship with Walker Mining Company Was Appropriate and There Was No Reason to Impose Walker Mining Company's Liabilities on IS&R or Anaconda

- The Prosecution Team Has No Evidence of IS&R or Anaconda Participation in Pollution-Causing Activities to Justify a Different Ruling Today

- Atlantic Richfield Seeks Rulings on Nine Prehearing Motions:

    1. Atlantic Richfield Company's Prehearing Motion No. 1 Requesting A Regional Board Ruling That CERCLA Prohibits The Regional Board From Issuing The CAOs

    2. Atlantic Richfield Company's Prehearing Motion No. 2 Requesting A Regional Board Ruling That The Regional Board Is A Discharger At The Sites

    3. Atlantic Richfield Company's Prehearing Motion No. 3 Requesting A Regional Board Ruling That The Doctrine Of Laches Precludes The Board From Issuing The Draft CAOs

    4. Atlantic Richfield Company's Prehearing Motion No. 4 Requesting A Regional Board Ruling That Due Process Requires The Board To Recuse Itself

    5. Atlantic Richfield Company's Prehearing Motion No. 5 Requesting A Regional Board Ruling That The Prosecution Team's Claim For Contribution Cannot Be Adjudicated In An Administrative Hearing

6. Atlantic Richfield Company's Prehearing Motion No. 6 Requesting A Regional Board Ruling That The Prosecution Team Has The Burden To Prove Each Element Of Its Case Seeking Each Proposed Clean Up And Abatement Order By A Preponderance Of The Evidence

7. Atlantic Richfield Company's Prehearing Motion No. 7 Requesting A Regional Board Ruling That Atlantic Richfield Cannot Be Jointly And Severally Liable For Clean Up And Abatement Of The Mine And/Or Mine Tailings Sites

8. Atlantic Richfield Company's Prehearing Motion No. 8 Requesting A Regional Board Ruling That Past Costs Are Not Recoverable In This Proceeding

9. Atlantic Richfield Corporation's Prehearing Motion No. 9 Requesting A Regional Board Ruling That Certain Opinions Of Dr. Fredric Quivik Are Excluded And Stricken From The Record

Factual Background

I. The First 38 Years: The Walker Mining Company and the Walker Mine

- During the 1918 – 1945 Time Period During Which IS&R Owned Stock in Walker Mining Company, Neither IS&R Nor Anaconda Participated in Any Pollution-Causing Activities at the Sites.

II. The Next 70 Years: Subsequent Owners and the Regional Board

- Multiple Owners and Operators Have Owned and Operated Both the Mine and Tailings Sites Since Walker Mining Company Ceased Mine Operations in 1941.

- The Board Assumed Liability From Many of the Mine's Former Owners and also has Operated the Mine Site for Over Three Decades.

Burden of Proof

- The Prosecution Team Bears the Burden to Prove the Requirements for a CAO by a Preponderance of the Evidence

Argument

I. Atlantic Richfield is Not Liable Under the Water Code for any Discharges at Either the Mine or Tailings Site

A. *United States v. Bestfoods* Permits Only Two Narrow Exceptions To The Ordinary Rule of Shareholder Non-Liability.

B. The Prosecution Team Misapplies The *Bestfoods* Standard And Much Of Its Evidence Is Therefore Irrelevant.

C. The "Control" Alleged By the Prosecution Team Does Not Meet the Alter Ego Test Required To Establish Derivative Liability.

D. The Prosecution Team has Failed to Offer Evidence That The Anaconda Companies Directed Pollution-Causing Activities on Either Site.

E. The Prosecution Cannot Supplant a Lack of Evidence Of Pollution-Causing Activity With Evidence Related to Non-Pollution Causing Exploration and Development Activities.

F. It Is Impermissible to Assume that the Anaconda Companies Directed Pollution-Causing Activities

G. The Prosecution Team's Theory that the Anaconda Companies Exercised "Pervasive Control" is Particularly Weak with Respect to the Tailings Site.

II. Apportionment: Considering, Solely for the Sake of Argument, that the Board Found the Requirements for Either CAO Were Present, Any CAO Would Have to Be Modified to Allocate Liability Among All Responsible Parties – Including this Regional Board.