ATLANTIC RICHFIELD COMPANY'S REBUTTAL TO UNITED STATES FOREST SERVICE'S RESPONSE

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

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INTRODUCTION

Atlantic Richfield Company ("Atlantic Richfield") provides this Rebuttal to the United States Forest Service's ("USFS") Response to the Draft CAOs. This Rebuttal (1) emphasizes that CERCLA Section 113 bars any CAO for both the Tailings Site and the Mine Site; (2) explains why USFS is liable as the Tailings Site's current owner and operator; and (3) explains further how the Prosecution Team has put forward an unconstitutional theory of retroactive liability and failed, even according to its own theory, to offer sufficient proof of Atlantic Richfield's liability. Atlantic Richfield places these rebuttal arguments within the context of the arguments it has previously presented in its Prehearing Brief and Prehearing Motions as reflected in Appendix I hereto.

ARGUMENT

I. CERCLA Section 113 Prohibits the Board from Entering the Draft CAO for Either Site.

As both USFS and Atlantic Richfield explained in their respective prehearing submissions, CERCLA Section 113(b) gives federal courts "exclusive original jurisdiction" over actions that challenge an ongoing CERCLA cleanup. *See* 42 U.S.C. §§ 9601 *et seq*. Further, under CERCLA Section 113(h), a federal court cannot review such a challenge until the CERCLA cleanup is complete. 42 U.S.C. § 9613(h). The Prosecution Team does not question these fundamental precepts, nor does it question the fact that USFS owns the Tailing Site and that USFS is operating a CERCLA cleanup at that Site,[1] but claims instead that ordering Atlantic Richfield and USFS to undertake a further cleanup at one or both of the Sites does not "challenge" the current cleanup. In its prehearing brief, USFS explains how the Tailings Site CAO *does* impermissibly challenge USFS's CERCLA cleanup. (*See* USFS Response at pp. 10-12, 14-15 (establishing how the Draft CAOs seek to "dictate specific remedial actions," would "alter the method

[1] To the extent the Prosecution Team intended to argue that the USFS cleanup at the Tailings Site is not a CERCLA Section 104 cleanup entitled to Section 113 protection from interference, USFS has established why that argument must fail. *See* USFS Response at pp. 9-10 (explaining the basis for USFS authority to remediate conditions at the Tailings Site pursuant to presidentially delegated authority under CERCLA Section 104).

and order of the cleanup," would "interfere with the remedial actions [previously] selected," and "seek[s] . . . to improve [the] ongoing cleanup," all of which are circumstances that courts have interpreted as prohibited "challenges" to CERCLA cleanups).) Atlantic Richfield agrees with USFS's presentation of the CERCLA precedents prohibiting the Board from challenging USFS's ongoing cleanup through the Tailings Site CAO; Atlantic Richfield provides additional comment here to underscore why USFS's comments about the Tailings Site CAO apply equally to the Mine Site CAO.

The Tailings Site and the Mine Site "have closely linked hydrology." (Lombardi Rpt. at p. 22.) Hydrogeology expert, Marc Lombardi, explains in his expert report (submitted with Atlantic Richfield's Prehearing Brief) that: "changes in surface water or groundwater systems in the mine and mill area will affect conditions in the lower tailings impoundment area, regardless of administrative boundaries." (*Id.*) Thus, "changes to surface water or groundwater conditions at the mine site have the potential to interfere with the success of response actions at the lower tailings impoundment area." (*Id.* at p. 21.) In other words, because of the unquestionable link between the two Sites, there is potential for either CAO to interfere with USFS's cleanup.

USFS and Atlantic Richfield have both explained that even potential interference with the ongoing CERCLA cleanup at the Tailings Site is impermissible: Congress included Section 113 in CERCLA "to protect 'the execution of a CERCLA plan during its pendency from lawsuits that *might* interfere with the expeditious cleanup effort.'" (USFS Response at p. 8 quoting *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995) (emphasis added).) Indeed, a lawsuit's "potential to interfere" with a CERCLA remedy was precisely the reason the Ninth Circuit ruled in *Pakootas v. Teck Cominco Metals, Ltd.*, that CERCLA Section 113 barred the lawsuit from going forward. 646 F.3d 1214, 1222 (9th Cir. 2011) (holding that a lawsuit for past penalties had "potential to interfere with ongoing cleanup efforts, because of its potential effect on the responsible party's ability to perform the cleanup"). Given the connection between the Sites' natural systems that Mr. Lombardi identifies, and the resulting

potential for actions at the Mine Site "to interfere with the success of response actions at the lower tailings impoundment area," the Draft CAO for the Mine Site is just as much a "challenge" to a CERCLA cleanup as is the Tailings Site CAO. CERCLA therefore bars the Board from considering either Draft CAO.

II. USFS Is Liable for Conditions at the Tailings Site.

If the Board enters a CAO for either of the Sites – although, for the many reasons explained in Atlantic Richfield's prehearing submissions, the Board should not do so – the Board must include USFS as a liable party. Hoping to avoid such liability, USFS's Response understates the consequences flowing from its ownership of the Tailings Site and also its participation in Walker Mining Company's activities there. In fact, the USFS's connection to the Sites is far more direct than Atlantic Richfield's. The Board therefore cannot allow USFS to avoid liability for any CAO it enters for the Sites.

USFS asserts in its Response that it "had virtually no control over mining activities anywhere on the Walker Mine Complex." (USFS Response at p. 1.) This assertion is not accurate. In order to deposit tailings at what is now known as the Tailings Site, Walker Mining Company applied to and obtained approval from the USFS to locate a tailings repository on public lands. When local officials denied Walker Mining Company the permission it sought, Walker Mining Company appealed to Department of Interior ("DOI") officials in Washington, D.C. The DOI officials then approved as a "right of way" Walker Mining Company's use of USFS property for a tailings impoundment. (*See* Exs. 8-22, 24.)[2]

Far from lacking control, DOI conditioned its approval of the right of way on Walker Mining Company's acceptance of numerous stipulations. (Ex. 24.) Among other conditions, DOI required Walker Mining Company to indemnify USFS for activities on the property, pay USFS for any saleable timber on the land, build any roads or trails USFS requested, and construct its tailings dam to certain specifications. (*Id.*) USFS was thus an active and integral participant in establishing what has become

[2] Exhibits cited herein refer to the Exhibits submitted as Appendix II to Atlantic Richfield's Prehearing Brief and, in the case of Exhibits 294 - 301, submitted as an Appendix to this Rebuttal Brief.

the Tailings Site. And, of course, USFS continues to play an active role at the Tailings Site as the operator of all remedial activities there.

Regardless of how the Board decides to interpret the Water Code – *i.e.*, with or without reference to the Clean Water Act – the USFS's activities at the Tailings Site create liability there for USFS. First, Water Code Section 13304 imposes liability on anyone who "causes or permits" a discharge. If the Board were to reject USFS's argument that Section 13304 must be interpreted with reference to the Clean Water Act, then certainly it follows that USFS "causes or permits" the discharges originating on land USFS owns and from remedial features that USFS operates. Second, even when Section 13304 is properly interpreted with reference to the Clean Water Act, USFS still must be liable. USFS does not question that the dam at the Tailings Site constitutes a point source for Clean Water Act purposes, and instead seeks to avoid liability by dissociating itself from the dam's construction and explaining that its current operation of the dam functions to "improve[e] the water quality in the stream." (USFS Response at p. 15.) As explained above, USFS *did* participate in the construction of the tailings dam on USFS land. And further, numerous courts have rejected arguments under both the Clean Water Act and CERCLA that USFS and other environmental agencies can avoid liability simply because they are acting in their regulatory capacities. *See, e.g., W.Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 166 (4th Cir. 2010) ("[B]oth the text of the CWA and the EPA's implementing regulations squarely reject any exemption for state agencies."); *Nu-West Mining, Inc. v. United States*, 768 F. Supp. 2d 1082, 1089 (D. Idaho 2011) (rejecting USFS's "regulatory defense" and holding USFS liable as an operator and arranger under CERCLA).[3]

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[3] As explained elsewhere, the Regional Board is similarly responsible for remediating the Mine Site. Multiple records from the Board's own files reveal that this matter has been opened to obtain a ruling by the Board that would free itself of financial responsibility for remediating the Mine or Tailings Site. *See, e.g.*, Exhibits 294 - 301. As argued elsewhere, it does not seem proper for this Board to consider a case such as this where it has a direct financial stake in the outcome.

Finally, if the Board looks to CERCLA precedents regarding ownership liability (as USFS urges), USFS's arguments against liability still fail. First, USFS's argument that it does not own the tailings themselves – as opposed to the underlying property – is inconsequential. When polluting conditions originate on a piece of land, neither the Water Code nor any other environmental statute exempts the land owner from liability simply because the conditions are attributable to some separately owned piece of personal property or a fixture on the same lands. Notably, USFS cites no authority to the contrary. Second, the authority USFS does cite (for the proposition that "bare legal title" is an insufficient basis on which to premise CERCLA liability), arose from factual circumstances distinguishable from those at issue here. (Response at pp. 21-22.) The *Friedland* case relied on the fact that the land at issue was subject to an unpatented mining claim, effectively giving the mine operator a type of ownership right in the property. 152 F. Supp. 2d 1244-46 (D. Colo. 2001). Here, however, the stipulations required by the DOI refer to Walker Mining Company's interest in the property as merely a right of way, which would leave USFS as the only party properly characterized as an "owner." Black's Law Dictionary, at p. 1440 (9th ed. 2009) (defining "right of way" as "[t]he right to pass through *property owned by another*" and "[t]he right to build and operate a railway line or a highway on *land belonging to another*" (emphasis added)). Further, the *Friedland* court expressly conditioned its holding on findings that "the United States receives no financial benefit from its lands subject to unpatented mining claims and . . . has no ability to set the boundaries of the conveyance or establish the terms of sale." *Id.* at 1246. Here, by contrast, USFS did receive financial benefits from allowing Walker Mining Company a right of way and did, in fact, set several terms governing that agreement. Consequently, there is no basis on which USFS can avoid the obvious – USFS owns the Tailings Site.

III. The USFS is Correct that Water Code 13304 Cannot be Invoked Against the Forest Service in this Matter, But its Analysis Does Not Go Far Enough.

In its Response, USFS focuses on the definition of discharger as the lynchpin to establishing liability for the Draft CAOs. Neither USFS nor Atlantic Richfield are "Dischargers" within the context of

USFS's argument. Therefore, the Board cannot invoke Section 13304 against either USFS, or Atlantic Richfield, as the basis for issuing any Clean Up and Abatement Order. But USFS should have proceeded further to consider subsection (j) to Section 13304 as an additional basis for the inapplicability of Section 13304. Section 13304(j) provides that, "[t]his section 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."

Subsection (j) is an exclusion to liability, not a defense to liability, under Section 13304. It cannot be disputed that all acts allegedly attributable to IS&R and Anaconda, and thus to Atlantic Richfield, occurred "before January 1, 1981". Therefore, the Prosecution Team bears both the burden of production and the burden of persuasion to prove by a preponderance of the evidence that the alleged acts were "in violation of existing laws or regulations" as of the dates they allegedly occurred, that is, between 1918 and 1941. See Evid. Code §§ 115 and 500. The Prosecution cannot, and does not, attempt to allege that Atlantic Richfield's predecessors violated any water code in effect during the time. Indeed, neither the Porter-Cologne Water Quality Control Act of 1969, nor the Dickey Water Pollution Act of 1949, was in effect at any time between 1918 and 1941. Instead, The Prosecution Team vaguely asserts that Atlantic Richfield is liable for some sort of "public nuisance." The interpretation of Section 13304(j) on which the Prosecution Team relies is unconstitutional, and the facts the Prosecution Team posits as its basis for meeting Section 13304(j)'s requirements are insufficient.

A. Interpreting Water Code Section 13304(j) As Allowing Retroactive Liability in These Circumstances Would Violate the Constitution.

The Board cannot constitutionally hold Atlantic Richfield liable under Water Code Section 13304 for conduct that occurred decades before the Section's enactment based on the Prosecution Team's unsupported theory that activities at the Walker Mine constituted a public nuisance. (Pros. Open. Br. at p. 18). It is well-established in California that a statute must not be given retroactive effect unless the Legislature made very clear that it intended to make the statute retroactive. *Evangelatos v. Superior*

Court, 44 Cal. 3d 1188, 1207 (1988); *see also Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223, 230 (2006); *Elsner v. Uveges*, 34 Cal. 4th 915, 936 (2004); *Myers v. Philip Morris Companies, Inc.*, 28 Cal. 4th 828, 840 (2002); *Tapia v. Superior Court*, 53 Cal. 3d 282, 287 (1991); *Aetna Cas. & Surety Co. v. Indus. Accident Comm'nMd. Acc. Com.*, 30 Cal. 2d 388, 393 (1947); *Jones v. Union Oil Co.*, 218 Cal. 775, 777 (1933); *In re Cate*, 207 Cal. 443, 448 (1929); *Pignaz v. Burnett*, 119 Cal. 157, 168 (1897). Indeed, "the first rule of statutory construction is that legislation must be considered as addressed to the future, not to the past...." *Evangelatos*, 44 Cal. 3d at 1207.

Thus, if a statute is at all ambiguous as to whether it is retroactive or not, it must be interpreted to be prospective only. *See, e.g., Myers*, 28 Cal. 4th at 841 (citing *INS v. St. Cyr*, 533 U.S. 289, 320-321, n. 45 (2001) ("[A] statute that is ambiguous with respect to retroactive application is construed...to be unambiguously prospective.") and *Lindh v. Murphy*, 521 U.S. 320, 328, n. 4 (1997)). This principle of statutory construction is so well-established because it is grounded in Constitutional concerns. As the California Supreme Court has stated:

> In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions. [¶] It is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution. The Ex Post Facto Clause flatly prohibits retroactive application of penal legislation.... The Fifth Amendment's Takings Clause[, and] [t]he Due Process Clause also protect[] the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the [Due Process] Clause 'may not suffice' to warrant its retroactive application.

Myers, 28 Cal. 4th at 841 (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 265-266 (1994) and *St. Cyr*, 533 U.S. at 316). In other words, it is a basic right of parties to "have liability-creating conduct evaluated under the liability rules in effect at the time the conduct occurred." *Californians for Disability Rights*, 39 Cal. 4th at 233 (citations omitted).

The Prosecution Team urges the Board to interpret Section 13304(j) as allowing liability for a CAO when a party caused a public nuisance at some time in the past. (Pros. Open. Br. at p. 18 (relying

on State Board decisions interpreting Section 13304(j) in this manner).) That interpretation is incorrect, however. Section 13304(j) refers only to liability for "violation[s] of existing laws or regulations at the time they occurred." That language does not evidence a legislative intent to impose liability based on such vague, common-law tort doctrines as public nuisance. As detailed below, establishing a public nuisance requires proof as to a list of elements and, most importantly, proof that a party's conduct fell short of the applicable standard of care in existence at the time. There is no unambiguous intent in Section 13304(j) to incorporate such standards, and to interpret Section 13304(j) as imposing retroactive liability for a public nuisance therefore would be unconstitutional.

B. Even if the Board Could Constitutionally Impose Liability Based on a Public Nuisance Theory, the Prosecution Team Has Proved No Public Nuisance Here.

Even if the common-law tort doctrine of Public Nuisance could be used against Atlantic Richfield here, the Prosecution has not met its burden of production or persuasion on this doctrine.

Civil Code § 3479, which has been amended only once since 1883, in a way that does not impact this analysis, codifies the acts constituting nuisance as,

> "Anything which is injurious to health . . . or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

In addition, to prove a public nuisance, the Prosecution Team must prove that the nuisance affects "at the same time an entire community or neighborhood, or any considerable number of persons." Cal. Civil Code §3480. Further, "not every interference with collective social interests constitutes a public nuisance. To qualify, and thus be enjoinable, the interference must be both *substantial* and *unreasonable*." *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1105 (1997) (emphasis in original).

The Prosecution Team has not offered to prove any of the elements necessary to establish such a public nuisance under the laws effective in 1918 through 1941. First, the Prosecution Team offers no evidence that IS&R or Anaconda did anything injurious to health or caused an obstruction to the free

use of property so as to interfere with the comfortable enjoyment of life or property between 1918 and 1941. Second, the Prosecution Team has done nothing to prove that any conduct allegedly constituting a nuisance was either substantial or unreasonable according to applicable standards of care then in effect. Indeed the Prosecution Team has not even informed the Board of the elements required for the Prosecution Team to prove a public nuisance under the laws of 1918 – 1945. The Prosecution Team thus cannot meet its burdens of production and persuasion to overcome the exclusion from liability found in subsection (j) of Section 13304. The language of the statute itself bars the imposition of liability for any Clean Up and Abatement Order upon Atlantic Richfield.

CONCLUSION

In sum: (1) Both USFS and Atlantic Richfield have established why CERCLA Section 113 bars the Board from challenging USFS's CERCLA cleanup at the Tailings Site and Atlantic Richfield has established here and in its Prehearing Motion No. 1 why this principle bars the Board from entering either CAO; (2) If the Board elects to exceed its jurisdiction by entering a CAO for the Tailings Site, it must hold USFS liable as the Site's owner and current operator; and (3) the Board should rule that the Prosecution Team's public-nuisance theory of retroactive Water Code liability is unconstitutional or, at least, that the Prosecution Team has failed to prove a public nuisance and therefore failed to meet its burden under Water Code Section 13304(j).

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