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

UNITED STATES DEPARTMENT OF AGRICULTURE,
UNITED STATES FOREST SERVICE'S RESPONSE

I. INTRODUCTION

The California Regional Water Quality Control Board for the Central Valley Region (Water Board) presented a proposed Cleanup and Abatement Order (CAO) to the United States Forest Service (Forest Service) to address mine tailings at Walker Mine Tailings Site (Tailings Site). For the reasons presented below, the Water Board staff's proposed enforcement action is misguided. In particular, the Water Board lacks jurisdiction over the Forest Service. In addition, the proposed enforcement action is untimely. The Forest Service respectfully requests that the Water Board refuse to issue the CAO proposed by its staff.

A. SITE HISTORY

The Walker Mining Company began operating the Walker Mine Complex in the early part of the Twentieth Century and actively mined copper there until 1943. The mining claims were located on the Plumas National Forest pursuant to the 1872 Mining Law, long before the Forest Service's active mining management program was created in the 1970s. Thus, the Forest Service had virtually no control over mining activities anywhere on the Walker Mine Complex, and it did not oversee the mining there.

As allowed under the Mining Law, Walker Mining Company began depositing tailing on Forest Service land in about 1920, and it continued doing so until the Mine Complex was abandoned in the 1940's. Ore from the Walker Mine was processed at the Walker Tailings Site, and the tailings were dumped into Dolly Creek, a small waterway flowing through the mine complex. The one-hundred-acre tailings pond was formed on the Tailings Site when the mine operators dammed the creek. That slowed down the flow of water enough to allow the tailings to settle out, instead of continuing down Dolly Creek and into Little Grizzly Creek.

B. RESPONSE ACTIONS

In the early 1990's, the Forest Service asserted its authority under the Comprehensive Environmental Response, Compensation, and Liability Act[1] (CERCLA) to clean up the Tailings Site. Well before that time, however, it began working with state agencies, including the Water Board, to clean up the environmental problems at the Tailings Site.

In 1994, the Forest Service adopted a CERCLA Record of Decision (ROD) and began remedial action. The work included channel erosion control, development of wetlands, revegetation, and additional wind erosion control.

The ROD was updated in 2001 to divert Dolly Creek through the tailings in a lined channel. That action eliminated the risk that the creek would erode tailings into the waterway, and this response action eliminated the seepage of surface waters into the tailings. Finally, it reduced the seepage of contaminated groundwater from the tailings pond into the creek. The remedial action at the Tailings Site is continuing at the present time, including work to eliminate any residual flows from Dolly Creek's original path.

In 2000, during the Forest Service's active CERCLA response action, the Water Board issued waste discharge requirements (WDRs) for the Tailings Site in accordance with the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (Basin Plan).[2] At the time that the WDRs were issued, the Forest Service objected to the Water Board's assertion of authority over the Forest Service. In 2001, the Forest Service incorporated the WDRs into the cleanup standards for the CERCLA cleanup.

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[1] 42 U.S.C. §§ 9601, *et seq.*
[2] Order No. 5-00-028.

II. ARGUMENT

A. FEDERAL SOVEREIGN IMMUNITY BARS ANY ENFORCEMENT ACTION BY THE WATER BOARD AGAINST THE FOREST SERVICE

The Water Board is precluded from enforcing the CAO against the Forest Service because Federal sovereign immunity has not been waived by Congress. Very much like the State of California itself, the United States is immune from suit unless it has waived its immunity.[3] Without Congress's prior consent, state courts lack subject matter jurisdiction over any claim against the United States.[4] Furthermore, waivers of sovereign immunity must be expressed unequivocally,[5] and statutory waivers of sovereign immunity are not to be liberally construed.[6] Ultimately, "[w]hen the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction."[7]

The Water Board asserts authority in its opening brief under the Clean Water Act (CWA). Like most Federal environmental statutes, the CWA includes a waiver provision.[8] However, there are significant limitations to the waiver—both within the statute itself and in the case law.[9] Because the Water Board asserts that the "[t]he Tailings CAO is based in the Regional

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[3] *Dept. of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999).

[4] *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1173 (9th Cir. 2007).

[5] *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992).

[6] *Id*. at 34.

[7] *United States v. Mottaz*, 476 U.S. 834, 841 (1986).

[8] 33 U.S.C. § 1323(a).

[9] We note that sovereign immunity not only prevents lawsuits entirely but also prevents enforcement of penalty assessments to those penalties "arising under Federal laws or imposed by a state or local court to enforce an order or the process of such court." 33 U.S.C. § 1323(a). Furthermore, while the Act authorizes civil penalties against "any person" in violation, the definition of "person" does not include the United States. 33 U.S.C. § 1362(5). Because there are no current penalties assessed against the Forest Service, we will defer any further discussion of these provisions until necessary.

Board's California Water Code and Federally-delegated Clean Water Act authority",[10] the Water Board must rely on the limited waiver of sovereign immunity within the CWA.

The waiver of sovereign immunity in the CWA has been interpreted narrowly by the United States Supreme Court. In *Department of Energy v. Ohio,*[11] the Court addressed the limitations of the waiver within the CWA and reaffirmed its canon of strict construction of waivers of sovereign immunity.[12] Finding that there was no waiver with respect to punitive fines for past violations of the CWA, the Court emphasized that text of the Act was not unequivocal, and it was unwilling to read more into the text than what was clearly required. [13]

The decisions of Federal appellate courts further demonstrate that the waiver of sovereign immunity in the CWA is limited to the extent of the Act itself. In particular, it does not waive immunity for all potential violations of a state environmental standard not foreseen by the CWA—especially not for alleged nonpoint source pollution.[14] Such a waiver is limited to the relevant requirements of a state's water quality program devised according to the provisions of the CWA, and unequivocally and uniformly enforceable against all entities. As described in more detail below, the Forest Service is not a discharger under the CWA. Therefore, the Water Board cannot enforce any state standard relating to point source discharge against the Forest Service.

In *EPA v. California*,[15] the Supreme Court indicated that state water quality "requirements" which might be applicable to the Federal government under the immunity waiver

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[10] Opening Brief at 4.

[11] *Department of Energy v. Ohio*, 503 U.S. 607 (1992).

[12] *Id.* at 635-6.

[13] *Id*. In so holding, the Court limited liability to only those 'coercive' penalties designed to induce compliance "with injunctions or other judicial orders designed to modify behavior prospectively. 503 U.S. at 613.

[14] *State of Mo. ex rel. Ashcroft v. Dep't of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982).

[15] *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976).

are intended to be objective, quantifiable limits and standards anticipated under the CWA.[16] Applying the Supreme Court's explanation, in *Romero-Barcelo v. Brown* the First Circuit held that the U.S. Navy did not violate Puerto Rico's statute which generally prohibited water pollution because a general prohibition was not specific enough to create a discernable standard under Puerto Rico's statutory framework.[17]

Similarly, in *State of Missouri ex rel. Ashcroft v. Dep't of the Army*, soil erosion resulting from construction of a dam by the Army Corp of Engineers did not constitute point source pollution as defined by the CWA, so the Eighth Circuit likewise held there was no violation of the CWA.[18] Further, the court held that the Federal agencies involved could only be accountable to the state water quality laws related to a discharge from a point source.[19] Therefore, since the Corps was not discharging a pollutant in violation of the Federal CWA, any claim under the Missouri Clean Water Law could not succeed.

This reasoning was affirmed by the Sixth Circuit in *U.S. v. Tennessee*.[20] In that case, the court recognized that Congressional amendments expanding the waiver language of the CWA to include procedural elements did *not* expand on the substantive issues that fall under the waiver. Because the dam was not a point source of pollution under the CWA, the court did not require the Tennessee Valley Authority (a corporation owned by the U.S. government) to comply with permitting requirements.[21] Thus, in a variety of circumstances, the appellate courts have held

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[16] *Id*. at 215 n. 28.
[17] *Romero-Barcelo v. Brown*, 643 F.2d 835, 847 (1st Cir. 1981), *rev'd* on other grounds.
[18] *State of Mo. ex rel. Ashcroft*, 672 F.2d at 1304.
[19] *Id*.
[20] *U.S. ex rel. Tennessee Valley Auth. v. Tennessee Water Quality Control Bd*., 717 F.2d 992 (6th Cir. 1983).
[21] *Id*. at 997.

that, even when sovereign immunity has been waived, the waiver only goes as far as the Federal act containing the waiver provision and not beyond.[22]

B. THE FOREST SERVICE IS NOT ESTOPPED FROM OBJECTING TO THE PROPOSED CAO

Contrary to the Water Board staff's suggestion, the Forest Service has not been subject to the WDRs "for decades."[23] Nor is the Forest Service estopped from objecting to either the WDRs in prior orders, or the Water Board staff's proposed new CAO. Simply stated, the Water Board did not have subject matter jurisdiction over the Forest Service for its prior orders because only Congress can waive sovereign immunity, not the Forest Service's representatives who allegedly failed to object to earlier orders. And at least since the present CERCLA response action started in the early 1990's, the Water Board's earlier orders have faced the same CERCLA preclusion problems as the current proposed order. No doubt because the Water Board recognized its lack of authority for its earlier orders against the Forest Service, it did not attempted to enforce those earlier orders.

Further, the Supreme Court recognizes that "the Government is not in a position identical to that of a private litigant"[24] and approaches collateral estoppel against the government with extreme caution. The United States may not be subject to estoppel as to matters that would

[22] The district court case which preceded Ashcroft stated, "The evidence in the case at bar establishes that operation of the hydroelectric generator at Stockton Dam involves the discharge of several thousand cfs of water into the river channel below the dam, and that the associated rise and fall of the water level in the river dislodges and carries away silt and other material defined as "pollutants" under the FWPCA. The Court does not, however, find that this phenomenon constitutes the "runoff of a pollutant" within the meaning of the [CWA]. This being so, the Corps' operation of the Stockton project is not subject to state and local water quality laws under § 3123(a) of the [CWA]." *Missouri ex rel. Ashcroft v. Department of Army, Corps of Engineers*, 526 F. Supp. 660, 678 (W.D. Mo. 1980).

[23] Opening Brief at 4.

[24] *INS v. Hibi*, 414 U.S. 5, 8 (1973).

establish jurisdiction in a suit to which the government has not consented.[25] A district court has authority to inquire at *any* time whether the conditions under which it may exercise its jurisdiction have been met.[26]

C. CERCLA PREEMPTS THE PRESENT ENFORCEMENT ACTION BY THE WATER BOARD

1. Section 113(b) provides exclusive Federal jurisdiction for any challenge to an ongoing removal or remedial action

Under CERCLA § 113(b), Federal district courts have exclusive original jurisdiction over all controversies related to CERCLA cleanups.[27] Although the Water Board has characterized its proposed CAO as independent of the CERLCA cleanup,[28] the enforcement action is still precluded. As the 9th Circuit has broadly declared in *Fort Ord Toxics Project, Inc. v. California Environmental Protection Agency*, "Congress used language more expansive than would be necessary if it intended to limit exclusive jurisdiction solely to those claims created by CERCLA."[29] The court further emphasized that "congressional intent is best effectuated by reading § 113(b)'s exclusive jurisdiction provision to cover any "challenge" to a CERCLA cleanup."[30] The court reasoned that it did not make sense to believe Congress intended to "preclude dilatory litigation in Federal courts but allow such litigation in state courts."[31] Any attempt to limit the language of § 113(b) in this manner "is inconsistent with the broad language used in §113(b)."[32]

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[25] *Peacock v. U.S.*, 597 F.3d 654 (5th Cir. 2010); see also *Andrade v. Gonzales*, 459 F.3d 538, 545 n. 2 (5th Cir. 2006).

[26] *Broussard v. United States*, 989 F.2d 171, 176 (5th Cir. 1993).

[27] 42 U.S.C. § 9613(b).

[28] Opening Brief at 4.

[29] *Fort Ord Toxics Project, Inc. v. California Environmental Protection Agency*, 189 F.3d 828, 832 (9th Cir. 2000).

[30] *Id.*

[31] *Id.*

[32] *Id.*

But in any case, as is explained in more detail below, the CAO is, on its face, a challenge to an ongoing cleanup. CERCLA's exclusive jurisdiction provision means that the Water Board and state courts lack the jurisdiction to resolve any claim brought here.

2. Section 113(h) of CERCLA prevents review of any challenge to ongoing cleanup actions

In addition to mandating exclusive Federal court jurisdiction, CERCLA prevents the Water Board from pursuing any challenge to the Forest Service's remedial action in Federal court until *after* the cleanup is completed. As noted above, the Forest Service continues to implement a remedial action at the Walker Tailings Site. To date, the Forest Service has performed over a million dollars' worth of cleanup work, and such action is ongoing. For example, the Forest Service and the California Dept. of Conservation are currently finalizing an agreement to work together to revegetate the tailings. The Forest Service is also working on a focused Feasibility Study for further remediation of groundwater and surface water.

Under § 113(h), "[n]o Federal court shall have jurisdiction under Federal law. . .or under State law. . .to review any challenges to removal or remedial action . . ."[33] As the Ninth Circuit noted in *McClellan Ecological Seepage Situation v. Perry* (*MESS*), § 113(h) was passed to protect "the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort."[34] The court has also summarized the interplay of sections 113(b) and 113(h) as follows: "[Section] 113(h), by postponing the jurisdiction of Federal courts, postpones jurisdiction over challenges from the only courts that have jurisdiction to hear such challenges."[35]

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[33] 42 U.S.C. § 9613(h).
[34] *McClellan Ecological Seepage Situation v. Perry (MESS)*, 47 F.3d 325, 329 (9th Cir. 1995).
[35] *Fort Ord*, 189 F.3d at 832.

In an attempt to take advantage of a narrow exception to the jurisdictional bar of § 113(h), the Water Board's staff mischaracterizes the basis of authority for the cleanup action at the Tailings Site.[36] The Forest Service is conducting a remedial cleanup of a privately owned and operated mining site pursuant to § 104. The agency is not attempting to clean up a federally owned and operated facility, like a weapons plant, under CERCLA § 120.

CERCLA § 104 provides authority for the President to commence removal or remedial action to protect the environment.[37] CERCLA defines a removal or remedial action as "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances. . ."[38] "Removal actions are typically described as time-sensitive responses to public health threats. . . [r]emedial actions, on the other hand, are often described as permanent remedies to threats for which an urgent response is not warranted."[39] Even such preliminary action as commencing studies of a release site is sufficient to meet the burden under CERCLA.[40]

On the other hand, § 120 outlines specific rules for "remedial actions" on Federal facilities, like military bases or weapons production facilities or Forest Service work centers. [41] It is understandable that Congress would set up more stringent cleanup requirements where Federal agencies have made their own messes and might have an incentive to minimize their own problems. In the present case, however, the Forest Service never owned or operated the mine.

[36] Opening Brief at 7 (the Board "does not concede that the ROD qualifies as a removal or remedial action selected under section 9604 or as an order issued under section 9606(a). . .because the ROD appears to be a remedial action pursuant to Section 120" (internal citations omitted).

[37] 42 U.S.C. § 9604(a)(1).

[38] 42 U.S.C. § 9601(23)-(24).

[39] *United States v. W.R. Grace & Co*., 429 F.3d 1224, 1227-8 (9th Cir. 2005).

[40] See *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 239 (9th Cir. 1995)(finding that the initiation of remedial investigation studies was sufficient to qualify as a removal action, even when the EPA still had the option of not conducting any additional clean up on the site).

[41] 42 U.S.C. § 9620(d)-(e).

Indeed, at the time the mine did operate, the Forest Service could not even regulate the tailings pond or the mine itself. The Forest Service's sole interest at the Tailings Site, just like for the Water Board, is to clean up the site for the benefit of the public.

Just as in *Shea Homes Limited Partnership v. United States*, the cleanup at the Tailings Site is a remedial action on a Federal property taken under authority of § 104 of CERCLA.[42] In that case, the court expressly declined to extend the narrow exception to the jurisdictional bar carved out of § 113(h) in *Fort Ord*. In *Fort Ord*, the EPA was conducting a remedial action on a Federal facility, namely a military base, listed on the National Priorities list under § 120. In that case, the court found that the jurisdictional bar of § 113(h) only applied to removal actions, not remedial ones, when taken pursuant to the separate grant of authority under § 120.[43]

Next, the Water Board overlooks the established Ninth Circuit case law interpreting the meaning of a challenge under § 113(h). Under the statute, "[n]o Federal court shall have jurisdiction under Federal law. . .or under State law. . .to review any challenges to removal or remedial action . . ."[44] Case law illustrates that the Water Board's action here is a challenge to an ongoing CERCLA cleanup, and enforcement action is precluded.

In this case, the Water Board's draft order itself shows that it is an attempt to take control of the CERCLA cleanup. First, it states that the Forest Service will pay the Water Board's past response costs, just like under CERCLA § 107. Second, the draft order requires the Forest Service to investigate, identify, and classify all sources of mining waste, just as it did in the Remedial Investigation it performed under CERCLA § 104. Third, the CAO requires the Forest Service to submit a series of plans to "remediate the site in such a way to prevent future releases of mining waste. . ." The Forest Service did exactly that in its Feasibility Study and by

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[42] *Shea Homes Limited Partnership v. United States*, 397 F.Supp.2d 1194, 1202 (N.D. Cal. 2005).
[43] *Fort Ord*, 189 F.3d at 834.
[44] 42 U.S.C. § 9613(h).

implementing the RODs. In fact, there is nothing in the draft order that would not be found in a typical cleanup order for a CERCLA site. But most telling of all, the draft order even has a deadline to "complete all remedial actions," just as though the Water Board's CAO was for a CERCLA § 104 remedial action—*which, of course, it is*.

In *MESS*, the plaintiff brought claims under the Clean Water Act and the California Water Code (among others) for alleged violations during the pendency of an ongoing cleanup at a true Federal facility, namely McClellan Air Force Base. Relying on the plain text of the statute, the court found that § 113(h) "amounts to a blunt withdrawal of Federal jurisdiction" and refused to entertain "any challenges" to the cleanup, not just those brought under CERCLA.[45] In that case, plaintiffs sought to compel compliance with reporting and permitting requirements of RCRA. The court found that such "additional reporting requirements. . .would second guess the parties' determination and thus interfere with the remedial actions selected."[46] While not all suits constitute a "challenge," those that are "directly related to the goals of the cleanup itself" certainly do.[47] "What is dispositive [. . .] is the court's inability to fashion any remedy that would not interfere with" the ongoing cleanup actions.[48]

Although the Water Board attempts to bolster its authority because it is a state administrative agency,[49] the court in *MESS* (despite what the prosecution's opening brief suggests) specifically addressed this issue by stating § 113(h) "does not distinguish between

[45] *MESS*, 47 F.3d at 328 (citations omitted).
[46] *Id.* at 330.
[47] *Id.* The court distinguished such suits from those that increase the cost of the cleanup without implicating the underlying goals of the cleanup, such as a dispute over minimum wage. Likewise, a suit involving only citizen's right to access information about a cleanup was not a "challenge" to the cleanup itself. *ARCO Environmental Remediation, L.L.C. v. Dep't of Health & Environmental Quality of Mont.*, 213 F.3d 1108 (9th Cir. 2000). However, even a constitutional challenge can implicate the remediation plan. *Broward Gardens Tenants Association v. EPA*, 311 F.3d 1066 (11th Cir. 2002).
[48] *MESS* at 331.
[49] Opening Brief at 8.

plaintiffs."[50] The court acknowledged that while this "may in some cases delay judicial review for years, if not permanently;"[51] the court held this was Congress' policy choice to make, not the court's.

Similarly, in *Shea Homes* plaintiffs were seeking injunctive relief to "improve" an ongoing cleanup. The court found that because the relief being sought was "plainly related to the goals of the clean-up," it was therefore a challenge for purposes of § 113(h). [52] Likewise, in *Razore*, the court rejected plaintiffs' attempts to compel action under RCRA and the CWA where EPA had commenced investigation of a hazardous waste site. The court denied jurisdiction because such action "attempt[s] to dictate specific remedial actions and to alter the method and order for cleanup."[53]

The Water Board staff's attempts to overlook the overwhelming and established circuit precedent and instead analogize to a Tenth Circuit decision involving an extreme situation must also fail. The factual and legal background in *United States v. Colorado*[54] was far different from the fact pattern here. In *Colorado*, the Tenth Circuit interpreted the applicability of the Resource Conservation and Recovery Act (RCRA) in the context of a CERCLA cleanup of extensive amounts of extremely hazardous waste on an Army-operated manufacturing plant for chemical warfare agents. Simply stated, there are no hazardous waste issues at the Tailings Site.

At the Rocky Mountain Arsenal, the Army produced both mustard gas and Sarin, the most potent nerve gas known, and in making these extremely toxic chemicals, the Army

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[50] *MESS* at 328.

[51] *MESS* at 329.

[52] *Shea Homes*, 397 F.Supp.2d at 1204.

[53] *Razore*, 66 F.3d at 239-240. *See also*, *Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214 (9th Cir. 2011).

[54] *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993).

produced large quantities of liquid hazardous waste. Then the Army leased the facility to Shell Oil Co., where it produced huge quantities of pesticides and much more liquid hazardous waste.

Because the Army stored huge quantities of extremely toxic liquid waste at the Arsenal, it filed a RCRA permit application. By filing the permit, the Army qualified for RCRA's interim status regulations for impoundments and accepted the applicability of the RCRA interim status regulations at the Arsenal. The Army then filed Part B of its application, with a specified closure plan.

Of course, at the Walker Mine, the Forest Service never produced anything. Nor did it operate the facility itself. In addition, there are no hazardous wastes at the Tailings Site, so no one needs a hazardous waste permit for anything there. And even if they did, the Water Board does not have the authority to implement the State RCRA program.

In Colorado, at about the same time the Army voluntarily submitted itself to RCRA enforcement, the EPA authorized the state of Colorado to take over the RCRA program. When the state found the Army's plan deficient, it issued its own closure plan. Only then did the Army attempt to withdraw its existing RCRA permit application and substitute a CERCLA cleanup plan.

Under these extraordinary circumstances, the Tenth Circuit found that Colorado could continue to enforce RCRA while the CERCLA cleanup proceeded. But it is worth noting that the court declined to extend any special consideration to the state's position as a governmental entity. "[T]he language of § [113(h)] does not differentiate between challenges by private parties and challenges by a state. Thus, to the extent a state seeks to challenge a CERCLA response

action, the plain language of [§ 113(h)] would limit a Federal court's jurisdiction to review such a challenge."[55]

So the key question is what constitutes a "challenge?" The Ninth Circuit has answered that question by stating that a challenge can be best identified by the remedy being sought. Here, the remedy that the Water Board is specifically intended to improve upon the ongoing CERCLA cleanup. As in *MESS*, the Water Board seeks a remedy that cannot be separately addressed from the current remediation actions. Imposing such additional requirements would impede and interfere with the Forest Service's selected remedial actions, slow down response, and waste money. In essence, the Water Board's staff wants the Forest Service to finish its "remedial action" and then make it better by implementing another "remedial action," one that they dictate this time.

Finally, further evidence that the draft CAO is a direct challenge to the CERCLA cleanup comes from the fact that the only potential point source discharges alleged in the draft CAO are the "Diversion Channel Outfall" and the improperly named "USFS Dam." Both of these structures are essential parts of the CERCLA remedial action. The Forest Service is currently using these two structures to reduce metals loading into the waterways onsite.

In fact, the diversion channel was created as part of the CERCLA remedial action. It was designed specifically to keep Dolly Creek from being contaminated by mine tailings. The diversion channel is a lined ditch that safely transports the water flowing in Dolly Creek through the Tailings Site. Contaminated groundwater in and below the tailings can no longer leach into the creek, and creek water can no longer saturate the tailings and mobilize the metals there. In a

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[55] *Id.* at 1576.

very similar situation, the United States Supreme Court recently held the outfall of the diversion channel does not constitute a point source discharge under the Clean Water Act.[56]

Second, the mislabeled dam referred to by the Water Board staff's in the proposed CAO was not created by the Forest Service. It was built almost a century ago by the mine operators who impounded the tailings to keep them from flowing down Dolly Creek. In the decades after the miners abandoned the Walker Mine Complex, various entities maintained the tailings dam to keep tailings from flowing down Dolly Creek, thereby improving the water quality in stream.

The dam has continued to serve that function since the early 1990's, when the Forest Service began the present remedial action. That is not to say the agency contemplates leaving the dam in place indefinitely. Now that the diversion channel has been finished, the flow of Dolly Creek no longer goes to the dam. Some water flows in that area occasionally, and Forest Service is currently evaluating in a focused feasibility study how to best eliminate the dam entirely.

D. THE FOREST SERVICE HAS NOT VIOLATED FEDERAL OR STATE WATER QUALITY LAWS BECAUSE IT IS HAS NOT DISCHARGED A POLLUTANT FROM A POINT SOURCE.

1. The Forest Service has not violated the CWA

As a preliminary matter, in order to be a discharger, a party needs to operate a facility in some manner, but the Forest Service never operated the Walker Mine or its tailings pond. The simple fact is, at this site, the Forest Service's activities are exclusively focused on cleaning up the Tailings Site for the benefit of the public. It emphatically is not operating, and has not operated, some kind of business or even a local Forest Service work center at the Tailings Site.

Further, the Forest Service has not discharged contaminants at the Tailings Site from a point source. In general, pollution from a mine site is not from a point source. U.S. Environmental Protection Agency specifically identifies acid drainage from abandoned mines as

[56] *Los Angeles County Flood Control Dist. v. NRDC*, 133 S.Ct. 710, 713 (2013).

a form of nonpoint source pollution, meaning that it is not included under the regulations for point sources.[57]

As noted above, the Water Board's staff has alleged that two structures the Forest Service is using as part of the CERCLA remedial action are point sources that it is entitled to regulate. Congress anticipated jurisdictional conflicts such as this, where historic structures need to be kept in place until a permanent remedy can be implemented. CERCLA provides several defenses for the entities actually performing cleanup to keep them from becoming liable as they work in the public interest.

For example, under § 107(d), "no person shall be liable. . .as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan."[58] Similarly, § 119 provides that '[a] person who is a response action contractor with respect to any release. . .shall not be liable under this subchapter or under any other Federal law."[59] Furthermore, § 121(d) states, '[n]o Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section."[60]

In short, CERCLA acknowledges that cleanups like the one at the Walker Tailings Site may not always be quick and straightforward, and that management of such a site may require outside observers to exercise patience and flexibility as the cleanup proceeds.

That does not mean state agencies have no role in the CERCLA process. In this case, the Water Board properly promulgated stream standards for the creek. The Forest Service has not disputed the Water Board's authority to set those standards, and the latest ROD for the Tailings

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[57] "What is Nonpoint Source (NPS) Pollution?" U.S. Environmental Protection Agency. Available at: http://www.epa.gov/owow/NPS/qa.html.

[58] 42 U.S.C.§ 9607(d)(1).

[59] 42 U.S.C. § 9619(a). This includes governmental employees under §9619(a)(4).

[60] 42 U.S.C. § 9621(e)(1).

Site incorporates those stream standards as some of the relevant and applicable cleanup goals for the Tailings Site. CERCLA provides the necessary flexibility that will allow the Forest Service to reach those goals, knowing that they may not be met until the cleanup is complete. Now is certainly not the time for the Water Board to second-guess the Forest Service's ongoing work.

2. Even if there were no CERCLA cleanup underway, the Water Board should not issue the proposed CAO

First, the Forest Service is not subject to enforcement of general planning documents. For example, in 1998, the Ninth Circuit determined that the U.S. Forest Service was not required to comply with Idaho's anti-degradation water policy.[61] In that case, the court did not apply Idaho's anti-degradation policy to the Forest Service's plan to sell timber because there were insufficient facts to determine if the state's policy had in fact been violated.[62] Most important, the court limited the enforcement of anti-degradation standards in that case to the Federal standard, as set forth in 33 U.S.C. § 1313 and 40 C.F.R. § 131.12.[63]

The Water Board is also attempting to enforce its Basin Plan and policies against the Forest Service. The WDRs "protect beneficial uses. . .[and comply] with water quality objectives (WQOs) and goals."[64] While the State has identified Dolly Creek and Little Grizzly Creek as "impaired water bodies" under the CWA,[65] it has not yet established a Total Daily Maximum Load[66] for those water bodies. These beneficial uses and WQOs merely provide guidance for remediation, and do not supply explicit standards uniformly enforceable against individuals or entities. The Basin Plan further suggests that standards created under its guidelines may never be achievable, and provides the vague guidance that "if restoration of the background water quality

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[61] *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1153 (9th Cir. 1998).
[62] *Id.*
[63] *Id.*
[64] Order No. 5-00-028 at ¶ 15.
[65] Order R5-2014-XXXX at ¶ 29.
[66] Order R5-2014-XXXX at ¶ 30.

cannot be achieved, [the discharger should] abate the effects of the discharge."[67] These policies, guidance documents, and aspirational goals fall far short of an explicit, enforceable standard created under any Federally-delegated CWA authority. By extension, they also fall outside the waiver of sovereign immunity.

A second factor that proscribes the Water Board staff's proposed CAO is that Federal agencies have been accorded great deference when making the difficult policy decisions that affect the natural resources they manage. For example, when evaluating whether the Forest Service's determination to allow mine expansion would violate state water quality standards for selenium levels at a mine in Idaho, the Ninth Circuit again deferred to the agency.[68] The court reaffirmed that agency decisions need to simply be based on a "rational conclusion between the facts found and the conclusions made."[69]

Third, there have been cases where the Ninth Circuit has ignored clear violations of a state's water quality standards by a Federal agency.[70] For example, in *Nat'l Wildlife Fed'n v. United States Army Corps of Eng'rs.*, the court recognized that halting a dam project by the U.S. Army Corp of Engineers would run afoul of Congress' intent for dams to be built, and for the sake of avoiding only possible violation of a state statute, the court decided such a result was unreasonable, and it allowed the dam project to continue.[71]

In this case, the Forest Service does not believe it has violated any California law or regulation. The Water Board claims authority to issue the CAO under § 13304, which applies to "any person who has discharged or discharges waste…in violation of any waste discharge

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[67] Water Quality Enforcement Policy at 36.
[68] *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1149 - 50 (9th Cir. 2010).
[69] *Id.*
[70] *Nat'l Wildlife Fed'n v. United States Army Corps of Eng'rs*, 384 F.3d 1163, 1180 (9th Cir. 2004).
[71] *Id.*

requirement. . . .or who has caused or permitted. . .any waste to be discharged into waters of the state and creates. . .a condition of pollution or nuisance."[72] Section 13267 likewise applies to "any person who has discharged, discharges, or is suspected of having discharged. . ."[73] Liability is assigned to anyone who has discharged waste in violation of state laws, according to § 13350.

In other words, the Water Code limits liability to those who have discharged (or who threaten to discharge) waste, and the Water Code specifically defines a "discharger" as "any entity required to obtain a national pollutant discharge elimination system (NPDES) permit pursuant to the CWA."[74] An entity required to obtain an NPDES permit is one that discharges a pollutant from any point source.[75] The consistent use of this term throughout the Water Code demonstrates that these regulations are meant to apply to point sources of pollution only, not the nebulous standards of the Basin Plan.

Finally, in *Redevelopment Agency v. BNSF Ry.*, the Ninth Circuit Court of Appeals refused to hold a railroad company liable for soil contamination under § 13304 because, "[a]s explained in our nuisance analysis, the Railroads engaged in no active, affirmative or knowing conduct with regard to the passage of contamination through the French drain and into the soil. Therefore, the Railroads did not "cause or permit" the discharge under section 13304."[76]

This case is most instructive because the court recognized that the drain the railroads built was certainly the conduit through which the petroleum traveled to ultimately impair the soil, but because the railroad company was not responsible for the presence of the petroleum in the first place, it could not be found to have permitted discharge. In the district court case which preceded

[72] Cal Wat Code § 13304.
[73] Cal Wat Code § 13267(b)1.
[74] Cal Wat Code § 13263.3(c).
[75] See 33 U.S.C. § 1362, which defines the phrase "discharge of a pollutant" and 33 U.S.C. § 1342, which describes the permit process required to discharge pollutants.
[76] *Redevelopment Agency v. BNSF Ry.*, 643 F.3d 668, 678 (9th Cir. 2011).

Redevelopment Agency, the court reasoned that “the "cause or permit" language [in § 13304] requires either an affirmative act or actual knowledge of the discharge.”[77] Further, the same court determined that “prior owners of property are not responsible for gradual passive migration of contamination that took place during their ownership, because the migration is not a "disposal" under CERCLA.”[78] Such active, affirmative, or knowing conduct does not necessarily require direct, physical discharge of waste by a party for that party to be liable; however, conduct must be sufficiently purposeful.[79]

Similarly, in *City of Modesto Redevelopment Agency v. Superior Court*, the court held that manufacturers of dry cleaning solvents and equipment were not liable for the actions of the cleaners who customarily dumped the waste into the sewer system. Because the solvents and equipment were not “designed to discharge waste in a manner that will create a nuisance, [nor did the manufacturers instruct] a user to dispose of wastes in such a manner,”[80] the manufacturers did not cause or permit the subsequent contamination.

E. THE FOREST SERVICE IS NOT SUBJECT TO ENFORCEMENT BECAUSE IT IS NOT AN OWNER OF THE TAILINGS

The proposed CAO broadly asserts that the Forest Service is named “as owner and as discharger under the current [WDRs].”[81] As explained above, the Forest Service is not a discharger under the WDRs, and is not subject to § 13304. Without a working definition of “ownership” within the Water Code, analogous case law helps illustrate that the Forest Service also should not be liable as an owner, even if a discharge occurred.

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[77] *Redevelopment Agency v. BNSF Ry.*, 2006 U.S. Dist. LEXIS 18319, 11 (E.D. Cal. Apr. 11, 2006). *Rev'd* to the extent that the railroads were found not liable for the contamination on appeal.

[78] *Id.* at 10.

[79] *Id.*

[80] *City of Modesto Redevelopment Agency v. Superior Court*, 119 Cal. App. 4th 28, 41-42 (Cal. App. 1st Dist. 2004)

[81] Opening Brief at 1.

Traditional mining law holds that when minerals are extracted from the ground, they become personal property.[82] And when, as here, the operator of a mine works to impound mine tailings and other material behind barriers, these actions demonstrate intent to retain ownership of the material, perhaps for re-milling at a later date.[83]

Beyond the implications of property law, a recurring problem on public land is that all sorts of personal property accumulates and interferes with other uses of the land by the public. But that does not mean the Forest Service becomes the *de facto* owner of any abandoned property. To prevent unlawful takings of private property and to provide due process for owners, the Forest Service has developed specific regulations for taking control of abandoned property. The regulations essentially provide a process to condemn the property left on the forest and clean up public land.[84] Those regulations provided notice and an opportunity to challenge any impoundment, and the Forest Service must follow that process to take control of the tailings. Needless to say, the Forest Service has not used that process to acquire the tailings in question in this case.

Similarly, courts have found that the Federal government does not automatically become an "owner" or "operator" under CERCLA merely by being the title holder to the land under an abandoned mine site. For example, confronted with this issue in *United States v. Friedland*,[85] the Tenth Circuit explored the notion of 'ownership" in the context of CERCLA's broad liability provisions, and found that bare legal title in the United States was not sufficient to impose owner liability under CERCLA.[86] The court began by reasoning that an unpatented mining claim is "a

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[82] *U.S., George B. Conway, Intervenor v. Grosso*, 53 LD 115, 125-6 (1930).
[83] *See Manson v. Dayton*, 153 F. 258, 263 (8th Cir. 1907); *State v. Superior Court*, 208 Cal. App. 2d 659, 665 (Cal. Ct. App. 1962).
[84] 36 C.F.R. §§ 262.12-262.13.
[85] *United States v. Friedland*, 152 F. Supp. 2d 1234 (D. Colo. 2001).
[86] *Id.* at 1244-1246.

unique form of property."[87] Federal law allows private parties to acquire exclusive possessory interests in Federal land for mining purposes.[88] The court concluded "[b]ecause unpatented mining claimants possess vested property rights (including the right to sell, mortgage, or inherit), are subject to taxation, and cannot be divested of their rights if they demonstrate substantial compliance with maintenance requirements specified in the mining law, I find that the United States is not an "owner" in the fullest sense of the term."[89]

F. ISSUING THE DRAFT ORDER WILL RESULT IN INCONSISTENT RESPONSE ACTIONS

The Water Board proposes to issue the draft CAO against both the Forest Service and Atlantic Richfield at the same time, for contamination at the Tailings Site. Even if the Water Board decides to issue the CAO to Atlantic Richfield alone, the CAO is barred by CERCLA's "inconsistent response" provisions.[90]

Under CERCLA § 122(e)(6), "[w]hen either the President, or a potentially responsible party pursuant to an administrative order or consent decree. . .has initiated a remedial investigation and feasibility study for a particular facility. . .no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President."[91] The Forest Service is actively managing its CERCLA cleanup efforts on the site. The Water Board has no authority to impose additional standards or requirements on potentially responsible parties in the context of an ongoing CERCLA cleanup.

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[87] *Id.* at 1245(citing *Western Mining Council v. Watt*, 643 F.2d 618 (9th Cir.1981)).

[88] *Id.* (citing *United States v. Locke*, 471 U.S. 84, 86 (1985)).

[89] *Id.*at 1246*; see also*, *Coeur D'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094, 1133-34 (D. Idaho 2003); *United States v. Atlantic Richfield Co., Inc.*, No. CV-89-39-BU-PGH (D. Mont. Nov. 1, 1994); *Idaho v. M.A. Hanna Co*., No. 83-4179 (D. Idaho Dec. 12, 1994).

[90] 42 U.S.C. § 9622(e)(6).

[91] *Id.*

III. CONCLUSION

The Water Board and the Forest Service continue to be concerned about the same ultimate issue—how to best clean up the Tailings Site. Like the Water Board, the Forest Service has expended enormous amounts of time and money at the Site, and the Forest Service continues to work there. Rather than work at cross purposes to the Water Board, the Forest Service respectfully requests that it be allowed to continue its remedial action unimpeded.