

**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**

**PROSECUTION TEAM'S OPENING BRIEF
AND RESPONSE TO DISCHARGERS' 3 JUNE 2013 COMMENTS
ON DRAFT CLEANUP AND ABATEMENT ORDERS**

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I. Introduction

Before the Central Valley Water Board are two proposed cleanup and abatement orders (CAOs) regarding the Walker Mine (R5-2013-YYYY) and the Walker Mine Tailings (R5-2013-XXXX), an abandoned underground copper mine complex in Plumas County. The site requires two CAOs because the Mine is privately-owned while the Tailings are on United States Forest Service land. Atlantic Richfield Company (Atlantic Richfield or ARCO) is named to both CAOs as successor to the former mine operators. The Forest Service is named to the Tailings CAO as owner and as discharger under the current waste discharge requirements for the Tailings. Atlantic Richfield and the Forest Service are collectively referred to as "Dischargers." This brief supports the Prosecution Team's case-in-chief for the 27/28 March 2014 hearing and, where indicated, provides responses to the Dischargers' 3 June 2013 comments on the draft CAOs.

II. Applicable Legal Standards

The Regional Board or the Executive Officer may issue a cleanup or abatement order to any person who discharges waste into waters of the state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who discharges or threatens to discharge waste where it is, or probably will be, discharged into waters of the state and creates, or threatens to create, pollution¹ or nuisance². (Water Code § 13304, subd. (a).)

The Regional Board or the Executive Officer may require that any person who has discharged, discharges, or is suspected of having discharged or discharging waste, or who proposes to discharge waste within its region, shall furnish, under penalty of perjury, technical or monitoring program reports which the Regional Board requires. The burden, including costs, shall bear a reasonable relationship to the need for the report and the benefits to be obtained. (Water Code § 13267, subd. (b)(1).)

Board actions must be supported by substantial evidence. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506.) A party asserting something in the affirmative has the burden of proving the affirmative matter with substantial evidence. (See, e.g., Evidence Code § 115; *Topanga Assn.*, at 521 [party seeking variance has burden of proving entitlement to variance].) Substantial evidence

¹ "Pollution" "means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either ... waters for beneficial uses or ... facilities which serve these beneficial uses." (Water Code § 13050, subd. (l).)

² "Nuisance" "means anything which meets all of the following requirements: (1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. (2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. (3) Occurs during, or as a result of, the treatment or disposal of wastes." (Water Code § 13050, subd. (n).)

"means credible and reasonable evidence." (*In re: Sanmina Corp*, State Water Resources Control Board Order No. WQ 93-14.)

All liability under Water Code section 13304 is joint and several, but the Board need not address the liability of other dischargers at the same hearing. (*In the Matter of the Petition of Union Oil Company of California*, State Water Resources Control Board Order No. WQ 90-2, at 8.)

III. Issues Framed by the Mine CAO (R5-2013-YYYY)

Acid mine drainage and other pollutants (notably copper) from the Mine site discharge or threaten to discharge to Dolly Creek and other waters of the state and of the United States within the Little Grizzly Creek watershed, violating the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (Basin Plan), impairing beneficial uses and creating or threatening to create a condition of pollution or nuisance. The Mine CAO describes the extensive history of the site, as well as recent discharges, threatened discharges and violations. The Prosecution Team submits recent Central Valley Water Board staff inspection reports and water quality laboratory analyses showing recent discharges in violation of the applicable water quality objectives. (Prosecution Team Exhibits 23 through 46³.) Jeffrey Huggins, Water Resources Control Engineer for the Central Valley Regional Water Board, authenticates the Exhibits and will testify as to the current conditions and discharge violations at the site.

The mine operated from approximately 1915 until 1941, when the dewatering pumps were removed and the site was abandoned. The site likely began discharging waste immediately through surface runoff over the abandoned mining waste. The mine likely began discharging polluted groundwater to surface waters shortly thereafter, when groundwater flooding the underground mine workings reached the unsealed 700 level mine portal and flowed into Dolly Creek and then Little Grizzly Creek. By 1947, the Department of Fish and Game documented that waste discharges of toxics and silt from the mine and tailings had destroyed all fishing and recreation uses on Little Grizzly Creek for a distance of about 10 miles, to the confluence of Indian Creek. (Central Valley Water Board Resolutions 58-180 and 58-181 and Trumbull Report dated October 5, 1957 [Prosecution Team Exhibits 18, 19 and 20].) These discharges continued unabated while the Central Valley Water Board attempted to work with the site owners.

By 1986, the Central Valley Water Board decided to seal the 700 level mine portal under authority of Water Code section 13305. (Central Valley Water Board Resolution 86-057 [Prosecution Team Exhibit 13].) This stopped the discharge of acid mine drainage and copper from the underground workings into Dolly Creek and downstream, and allowed aquatic life to return to Little Grizzly Creek. (See USFS Biological Monitoring Report, dated 2006 [an electronic copy of this report is included in the

³ All Exhibits are attached to the Prosecution Team's Evidence List. Except as otherwise noted, all Exhibits are authenticated through the Declaration and testimony of Jeffrey Huggins.

Prosecution Team's Case-in-Chief submittal CD, in the folder "USFS Tailings Monitoring Reports"].) However, the surface of the mine site contains mining waste, which is the source of ongoing unlawful discharges of copper and other waste into Dolly Creek and downstream. Moreover, the mine seal impounds significant amounts of highly acidic, copper-laden groundwater, which remains a threat to surface waters requiring ongoing monitoring and maintenance. Finally, the mine site contains adits and other mine-related surface disturbances which pose safety hazards and potential sources of discharge.

Since 1986, the Central Valley Regional Water Board has borne the costs associated with securing and monitoring the seal and monitoring water quality throughout the site. The Board has also taken action to rehabilitate the portal tunnel, and to install drainage channels to reduce the amount of surface runoff into adits and other mine openings above the portal, each at significant cost.

The purpose of the Mine CAO is to compel Atlantic Richfield (ARCO) to assume responsibility for operation and maintenance of the mine seal, as well as to take necessary action to clean up and abate active and threatened discharges from the rest of the site. Atlantic Richfield is the sole remaining viable responsibility party. The liability of the current and former owners and other potentially responsible parties has been resolved through prior Board action and litigation. (See Prosecution Team Exhibits 16 and 17 [Judgments regarding prior lawsuits].)

Atlantic Richfield is liable because its predecessors, Anaconda Copper Company (Anaconda) and International Smelting and Refining Company (International), operated the Walker Mine and Tailings concurrently with their subsidiary, Walker Mining Company, thus triggering "operator" liability (also called "direct" liability) under *United States v. Bestfoods* (1998) 524 U.S. 51. Atlantic Richfield concedes its status as successor to Anaconda and International, but challenges whether Anaconda or International operated the mine and tailings.

The Prosecution Team submits documents obtained from the Anaconda Copper Company's Geological records archived at the University of Wyoming and other historical documents that show how Anaconda directed specific pollution-causing activities at the mine sufficient to trigger operator liability. (Prosecution Team Exhibit 1 [index and documents].⁴) The Prosecution Team also submits the expert declaration (Prosecution Team Exhibit 2) and testimony of Dr. Fredric Quivik, an historian specializing in early industrial practices with significant expertise regarding Anaconda's mining activities. Dr. Quivik has extensive experience testifying in litigation against

⁴ Prosecution Team Exhibit 1 contains indexed records from the American Heritage Center's Anaconda Geological Documents Collection archive and the Montana Historical Society. The Anaconda Geological Collection documents are authenticated through the letter from Rachael Dreyer (Prosecution Team Exhibit 4) as well as the Declaration and testimony of Jeffrey Huggins. The Montana Historical Society documents are authenticated through the Declaration and testimony of Jeffrey Huggins (Prosecution Team Exhibit 2).

Atlantic Richfield and others in similar matters involving the same or similar legal theories. Dr. Quivik's *curriculum vitae* is attached to his declaration, and together with his declaration demonstrates sufficient specialized knowledge and expertise on the subject of Anaconda's operations to be qualified as an expert here. Dr. Quivik has reviewed the Prosecution Team's evidence and concludes that Anaconda and International concurrently operated the Walker Mine from about 1918 until 1941. (Quivik Declaration, Prosecution Team Exhibit 2, at 8.) The Prosecution Team's direct liability legal theory, supporting evidence and Dr. Quivik's findings are discussed in Section VII.d below.

IV. Issues Framed by the Tailings CAO (R5-2013-XXXX)

Copper and other mine waste from the Tailings site discharge and threaten to discharge to Dolly Creek and Little Grizzly Creek, in violation of the Forest Service's waste discharge requirements (WDRs) Order No. 5-00-028 (Prosecution Team Exhibit 9), and in violation of the Basin Plan. The Tailings CAO describes the site history, discharges, threatened discharges and violations. In support, the Prosecution Team offers the same inspection reports, laboratory analyses and other evidence and testimony submitted to demonstrate discharge violations from the Mine, described in the previous section.

The Forest Service has been subject to Central Valley Water Board WDRs at the Tailings for decades, but the Forest Service now argues that the Board cannot regulate it due to the ongoing (and decades old) CERCLA action at the Tailings. The Forest Service mischaracterizes the Tailings CAO and CERCLA. The Tailings CAO is based in the Regional Board's California Water Code and federally-delegated Clean Water Act authority. CERCLA allows state agencies to enforce federally-delegated state authority against federal agencies operating CERCLA sites. The Prosecution Team addresses the Forest Service's arguments in Section VI.b below.

Atlantic Richfield is liable at the Tailings through its predecessors Anaconda and International under the same legal theory and evidence as for the Mine CAO, as discussed in the previous section and in Section VII.d below.

V. Dischargers' Comments on Draft CAOs

On 29 April 2013, the Prosecution Team served copies of the draft Tailings CAO to the Forest Service and Atlantic Richfield, and a copy of the draft Mine CAO to Atlantic Richfield. The Dischargers received all attachments referenced in the drafts. The draft CAOs, without attachments, are Prosecution Team Exhibit 5 (draft Tailings CAO) and Exhibit 6 (draft Mine CAO).

The Dischargers each provided written comments on the draft CAOs on 3 June 2013. Dischargers' comments are Prosecution Team Exhibit 7 (Forest Service Comments) and Exhibit 8 (Atlantic Richfield Comments). The following sections respond to those comments and describe the resulting changes in the CAOs.

VI. Responses to Forest Service Comments

a. The Forest Service cannot challenge Order R5-00-028 through the Tailings CAO

The Forest Service's comments address only the Tailings CAO. The Forest Service first describes Central Valley Water Board Order R5-00-028 as a "challenge [to] the Forest Service's actions in addressing the heavy metals contamination on Federally managed land." (Forest Service Comments, at 1.) The Forest Service refers to its ongoing CERCLA (42 USC § 9601 *et seq.*) action at the Tailings, which commenced in 1994.

Central Valley Water Board Order R5-00-028, dated 28 January 2000, sets waste discharge requirements for the Tailings and names the Forest Service as discharger. Order R5-00-028 directs the Forest Service to achieve "full compliance with Receiving Water Limitations" by 1 October 2008. (Order R5-00-028 [Prosecution Team Exhibit 9], at 8.) As the Tailings CAO explains, the Forest Service did not meet that deadline and discharges from the Tailings continue to violate Basin Plan Receiving Water Limitations.

The Forest Service was aware of Order R5-00-028 when it was adopted. The Forest Service was named discharger for WDRs pertaining to the Tailings in 1986 (Order R5-86-073) and again in 1991 (Order R5-01-017). The Forest Service submitted comments on the tentative order that became Order R5-00-028. (Forest Service's 18 December 1999 Comments Regarding Tentative Order Revising Waste Discharge Requirements Walker Mine Tailings [Prosecution Team Exhibit 10]). The Forest Service's 1999 comments make no CERCLA-based objections, and instead state that provisions of the order "will become a part of the amended [CERCLA] Record of Decision (ROD) for treatment of the site." (*Id.* at 1.) The Forest Service ultimately incorporated the substantive provisions of Order R5-00-028 into the 2001 ROD Amendment. (Forest Service Comments, at 2.)

To the extent that the Forest Service now argues that Order R5-00-028 is a challenge to the ongoing CERCLA action, such arguments are barred under the doctrine of collateral estoppel, which precludes a party to an action from relitigating in a second proceeding matters that were litigated and determined in a prior proceeding. (*Lucido v. Superior Court* (1998) 51 Cal.3d 335, 341.) The Forest Service could have challenged Order R5-00-028 upon issuance, but it did not and the time for doing so has passed. (Water Code § 13320, subd. (a).) The Forest Service cannot challenge Order R5-00-028 here.

b. CERCLA does not bar the Tailings CAO

The Forest Service argues that the Tailings CAO is a "challenge[] to Forest Service's cleanup action" barred by CERCLA section 113(h), 42 USC § 9613(h). (Forest Service Comments, at 1.) This mischaracterizes both the Tailings CAO and CERCLA.

i. The Tailings CAO is based on Water Code authority

Water Code section 13304 authorizes the Central Valley Water Board to compel the Forest Service and Atlantic Richfield to clean up and abate the effects of the waste at the Tailings to prevent the discharge of waste into waters of the state and of the United States. This authority arises in part from the Clean Water Act (See 33 USC § 1311, subd. (a) [prohibiting unauthorized discharge of pollutants]), which the United States Environmental Protection Agency (EPA) delegated to the State of California. The Forest Service is subject to the Central Valley Water Board's Clean Water Act authority over discharges from the Tailings. (33 USC § 1323, subd. (a).) If the Forest Service fails to comply with the Tailings CAO, the Attorney General for the State of California may seek injunctive relief from the superior court. (Water Code § 13304, subd. (a).)

ii. CERCLA does not preempt the Water Code

CERCLA does not preempt the Central Valley Water Board's Water Code authority over discharges from the Tailings. CERCLA reserves such authority to the State:

Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

(CERCLA Section 114(a), 42 USC § 9614, subd. (a).)

CERCLA reserves authority to all federal and State laws regarding discharges of pollutants:

Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants....

(CERCLA Section 302(d), 42 USC § 9652, subd. (d).)

Moreover, CERCLA specifically allows states to enforce state cleanup laws against federal agencies at federal sites:

State laws concerning removal and remedial action, *including State laws regarding enforcement*, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States....

(CERCLA Section 120(a)(4), 42 USC § 9620, subd. (a)(4) [emphasis added].)

Where State standards have been incorporated into a CERCLA cleanup action, the State may – but is not required to – enforce those standards in federal court:

A State *may* enforce any Federal or State standard, requirement, criteria, or limitation to which the remedial action is required to conform under this chapter in the United States district court for the district in which the facility is located....

(CERCLA Section 121(e)(4), 42 USC § 9621, subd. (e)(4) [emphasis added].)

iii. CERCLA § 113(h) does not limit California's Clean Water Act enforcement authority over federally managed CERCLA sites

CERCLA Section 113(h) provides, in relevant part, that:

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except [CERCLA-based actions]....

(42 USC § 9613, subd. (h).)

The Forest Service issued the CERCLA Record of Decision (ROD) for the Tailings in 1994, and amended the ROD in 2001. To date, the Forest Service has implemented all or essentially all of the remedial actions described in the ROD, but the remedial action remains open. Discharges from the Tailings continue to violate WDR Order R5-00-028 and applicable Basin Plan Receiving Water Limitations, which have been incorporated into the ROD as “applicable or relevant and appropriate” standards pursuant to 42 USC section 9621.

The Central Valley Water 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)” as those terms are used in Section 113(h), because the ROD appears to be a remedial action pursuant to Section 120, 42 USC § 9620. (See *Fort Ord Toxics Project, Inc. v. California EPA* (9th Cir. 1999) 189 F.3d 838, 833-34 [Section 120 remedial actions fall outside Section 104 and thus are not subject to Section 113(h)].) However, even assuming for argument that the ROD does so qualify, the Tailings CAO is not a “challenge” to it, and the Central Valley Water Board is free to utilize the administrative and judicial enforcement processes authorized under the Water Code.

The Forest Service ignores the plain meaning of the relevant CERCLA sections and the only case interpreting them under nearly identical facts. In *United States v. Colorado*

(10th Cir. 1993) 990 F.2d 1565,⁵ the Army challenged the State of Colorado's action to enforce provisions of the Resource Conservation and Recovery Act (RCRA), 42 USC § 6901 et seq., which had been delegated to Colorado by the EPA. The Army argued that because its facility was the subject of an ongoing CERCLA remediation action, Section 113(h) barred Colorado from issuing an administrative compliance order regarding the facility under state law. Citing CERCLA sections 114 (a) and 302(d), the court rejected the Army and held that "an action by Colorado to enforce the ... compliance order, issued pursuant to its EPA-delegated RCRA authority, is not a 'challenge' to the Army's CERCLA response action." (990 F.2d at 1575.) Moreover, the court held that Section 113(h) is not a bar because "Colorado can seek enforcement of the ... compliance order in state court" rather than in federal court. (*Id.* at 1579.)

Most of the cases cited by the Forest Service Comments are distinguishable in that they involve CERCLA lawsuits by private citizens or local agencies brought in federal court. (See *Pakootas v. Teck Cominco Metals, Ltd.* (9th Cir. 2011) 646 F.3d 1214 [citizen suit brought in federal district court]; *Clinton v Cnty. Comm'rs v. EPA* (3rd Cir. 1997) 116 F.3d 1018 [local government commissioners and private group brought citizen suit in federal district court]; *City of Fresno v. United States* (E.D. Cal. 2010) 709 F.Supp.2d 888 [city filed citizen suit in federal court]; *City of Salina, Kan. v. United States* (D.Kan. Mar. 25, 2011) 10-2298-CM-DJW, 2011 WL 1107107 [same].) The last case, *United States v. City & County of Denver* (10th Cir. 1996) 100 F.3d 1509, is distinguishable in that it involves a federal agency challenge to a city's cease and desist order issued under local ordinances. None of the cases address CERCLA's reservations of authority, and none involve federal challenge to state administrative action under federally-delegated state authority.

Other Ninth Circuit cases similarly fail to support the Forest Service. *McClellan Ecological Seepage Situation (MESS) v. Perry* (9th Cir. 1995) 47 F.3d 325, holds only that a citizens group could not bring Clean Water Act and other state claims in federal court for sites covered under a Department of Defense CERCLA action, as such claims amounted to a challenge barred under Section 113(h). *MESS* does not address the question presented here, namely, whether a state agency can issue an enforcement order under federally-delegated law to a federal agency operating a CERCLA site on federal land.

In *Shea Homes Limited Partnership v. United States* (N.D. Cal. 2005) 397 F.Supp.2d 1194, the Northern District Court rejected a citizen group's attempt to rely in *United States v. Colorado*, noting that "*Colorado* is clearly distinguishable in that the Court premised its ruling on the fact that the party asserting the RCRA claim was a state, rather than a private party." (397 F.Supp at 1204.) Indeed, the federally-managed CERCLA site at issue in *Shea Homes* had already been the subject of San Francisco Bay Regional Water Board waste discharge requirements and a cleanup and abatement order, apparently without challenge by the federal agency. (397 F.Supp. at 1197.) (See

⁵ Prosecution Team Exhibit 11 is a courtesy copy of the *United States v. Colorado* decision.

Prosecution Team Exhibit 47 [San Francisco Regional Water Board Orders R2-1996-0113 and R2-2001-0113].)

The Central Valley Water Board's position here is the same as Colorado's in *U.S. v. Colorado* – a state agency acting pursuant to state law to enforce a federal statute, under authority delegated to it by the EPA, against a federal agency operating a CERCLA site. Such actions are not “challenges” to ongoing CERCLA actions. And, like Colorado, the Central Valley Water Board is acting pursuant to state administrative procedures reviewable in state court without any need to seek redress in federal court. Section 113(h) does not bar the Tailings CAO.

VII. Responses to Atlantic Richfield Comments

a. The Consent Decree between the Forest Service and Atlantic Richfield does not alter Atlantic Richfield's status as discharger for the Tailings CAO

Atlantic Richfield argues that it cannot be a discharger in the Tailings CAO because the Consent Decree⁶ involving Atlantic Richfield and the Forest Service contains contribution protection language subject to CERCLA section 113(f)(2). (Atlantic Richfield Comments, at 2-4.) Atlantic Richfield mischaracterizes CERCLA and the Consent Decree. The Consent Decree has no bearing on the Tailings CAO.

CERCLA Section 113(f)(2) provides in relevant part 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 USC § 9613, subd. (f)(2).)

Atlantic Richfield ignores that the term “claims for contribution” used in Section 113(f)(2) means only those claims brought pursuant to Section 113(f)(1), which authorizes:

Any person [to] seek contribution from any other person who is liable or potentially liable under [Section 107(a)] during or following any civil action under [Sections 106 or 107(a)]... Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [Sections 106 or 107(a)].

(42 USC § 9613, subd. (f)(1).)

⁶ Consent Decree entered June 13, 2005, United States District Court for the Eastern District of California, Case No. 2:05-cv-00686-GEB-DAD (Prosecution Team Exhibit 12). The Central Valley Water Board may take official notice of the fact stipulations in the Consent Decree pursuant to Title 23, California Code of Regulations, section 648.2. The Prosecution Team requests that the Board take such notice.

The Consent Decree resolved an action brought by the Forest Service against Atlantic Richfield under CERCLA Section 107(a) regarding contamination at the Tailings.⁷ Section 113(f)(2) would protect Atlantic Richfield only if the Central Valley Water Board: (1) was a potentially responsible party (PRP) at the Tailings; and (2) is now seeking contribution as contemplated under Section 113(f)(1). Neither is present here.

Atlantic Richfield's cited cases (on page 4 of its comments) are inapposite because they all involve CERCLA contribution claims by parties who themselves were PRPs, and in each case the state was a party to the relevant consent decree. None involved a challenge to a non-party state agency proceeding commenced pursuant to federally delegated state authority.

Finally, Atlantic Richfield ignores language within the Consent Decree recognizing that non-parties are unaffected:

Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a liable Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this decree may have under applicable law.

(Consent Decree, IX.18, p. 14.)

The Consent Decree does not shield Atlantic Richfield from administrative enforcement actions brought under the Water Code because the Central Valley Water Board was not a party to Consent Decree. CERCLA does not authorize the Forest Service or a federal court to independently discharge Atlantic Richfield's liability under the Water Code. Instead, Section 302(d) and the other sections quoted above reserve the Central Valley Water Board's authority to enforce the Water Code at the Tailings despite the ongoing CERCLA action.

b. Atlantic Richfield's other CERCLA citations are not relevant

Atlantic Richfield cites CERCLA Section 113(b) for the proposition that the federal court has exclusive jurisdiction over all remedial actions at the Tailings. (Atlantic Richfield Comments, at 4-5.) Section 113(b) grants federal district courts "exclusive original jurisdiction over all controversies arising under [CERCLA]." (42 USC. § 9613, subd. (b).) When read in conjunction with Section 113(h), Section 113(b) makes clear that federal district courts are the sole venue to hear "challenges" to CERCLA remedial actions. (*Fort Ord Toxics Project v. California EPA* (9th Cir. 1999) 189 F.3d 828, 832.) But the

⁷ There is no CERCLA action at the Mine. The Consent Decree addresses only contamination at "the Walker Mine Tailings Site, encompassing approximately 100 acres, located in the Plumas National Forest in Plumas County." (Consent Decree, at p. 8.)

Tailings CAO does not arise under CERCLA and, as described above, is not a "challenge" to the ongoing CERCLA action. Section 113(b) does not apply.

Atlantic Richfield's discussion of Section 112(e)(6) is perplexing because that section prohibits potentially responsible parties from undertaking CERCLA remedial action at facilities unless such action has been authorized by the President. (42 USC § 9622, subd. (e).) The Tailings CAO directs the Forest Service and Atlantic Richfield to achieve compliance with California water quality standards pursuant to Water Code authority. The Tailings CAO does not purport to dictate CERCLA remedial action. Section 112(e)(6) does not apply.

c. The Consent Decree does not trigger Code of Civil Procedure § 877 protection for Atlantic Richfield against the Central Valley Water Board's Water Code authority

Atlantic Richfield cites California Code of Civil Procedure section 877 for the proposition that the Consent Decree shields it from Water Code liability at the Tailings. (Atlantic Richfield Comments, at 5.) Section 877 provides that settlement releases or covenants not to sue may shield settling parties from contribution claims by joint tortfeasors. Neither the Tailings CAO nor the Consent Decree arise in tort, so section 877 is per se inapplicable. Moreover, Atlantic Richfield does not explain how the Consent Decree's settlement of CERCLA liability can have any effect on Atlantic Richfield's Water Code liability. The Central Valley Water Board is not a party to the Consent Decree and the Forest Service cannot independently absolve Atlantic Richfield's Water Code liability. The Consent Decree is not a bar to the Tailings CAO.

d. Atlantic Richfield is liable for the Walker Mine and Tailings as successor to Anaconda Copper Company and International Smelting and Refining Company, who directed pollution-causing activities at the Mine and Tailings

The Walker Mining Company (Walker) acquired the mine in 1915, and began mining around 1916. International Smelting and Refining Company (International) acquired the controlling interest in Walker in 1918. International was a wholly-owned subsidiary of, and later merged into, the Anaconda Copper Mining Company (Anaconda). Atlantic Richfield is Anaconda's successor by merger.⁸

⁸ Atlantic Richfield's status as successor to the liabilities of Anaconda and International is not at issue. Atlantic Richfield concedes such status here. (See Atlantic Richfield Comments, at 2 [referring to International and Anaconda as Atlantic Richfield's "predecessors"] and pp. 4-5 [noting that "[International]... merged into Anaconda, which later merged into Atlantic Richfield..."]; see also Consent Decree entered June 13, 2005 (Prosecution Team Exhibit 8), at Part I.G ["[a]fter the Walker Mine closed, International merged into Anaconda, and Anaconda merged into Atlantic Richfield Company..."].) Moreover, Atlantic Richfield's successor status has been the subject of prior court decisions, including *Hudson Riverkeeper Fund, Inc. v. Atlantic Richfield Company* (S.D. New York 2001) 138 F.Supp. 2d 482 at 484, 487). The Central Valley Water Board may take official notice of the fact stipulations in the Consent Decree and prior court decisions pursuant to 23 CCR § 648.2.

A “bedrock principle” of corporate law provides that a corporation and its stockholders (even where the only stockholder is a parent corporation) are generally to be treated as separate entities and that limited liability is the rule. (*United States v. Bestfoods* (1998) 524 U.S. 51, 61.) However, *Bestfoods* describes that parent corporations may be liable for the acts of subsidiaries in either of two situations: (1) when the subsidiary is the “alter ego” of the parent (this is often called the “indirect” liability theory); or (2) when the parent is the operator of the pollution-causing activities (this is often called the “operator” or “direct” liability theory).

Atlantic Richfield is liable under the operator liability theory because Anaconda and International operated the mine concurrently with Walker and directed activities that resulted in the condition of discharge and threatened discharge at the Mine and Tailings.

i. A parent corporation is liable as an operator where it directs pollution-causing activities at a subsidiary's facility

Under *Bestfoods*, operator liability occurs where the parent corporation operated the subsidiary's facility and directed the activities that caused the pollution. The critical question is “not whether the parent operates the subsidiary, but rather whether it operates the facility, and that operation is evidenced by participation in the activities of the facility, not the subsidiary.” (*Bestfoods*, 54 U.S. at 68 [internal citations omitted].) “Participation” includes directing the physical operations underlying the alleged liability. (*Bestfoods*, at 66-67.)

Parent corporations are not liable where their activities are consistent with “norms of corporate behavior” befitting the parent's status as an investor, such as monitoring performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures. (*Bestfoods*, at 71-72.)

On the other hand, parent corporations are liable where their activities go beyond acceptable norms of corporate behavior, for example, where the parent operates alongside the subsidiary at the facility (e.g., in a joint venture), a dual officeholder acts on the parent's behalf at the facility, or where an employee or agent of the parent directs activities at the facility. (*Bestfoods*, at 71.)

Operator liability “attaches if the defendant had authority to control the cause of the contamination at the time the hazardous substances were released into the environment” and actually exercised such control. (*Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.* (9th Cir. 1992) 976 F.2d 1338, 1341-42; see also *Long Beach Unified School District v. Dorothy B. Godwin California Living Trust* (9th Cir. 1994) 32 F.3d 1364, 1367 [operator liability attaches where an entity plays an active role in running a facility].) The degree of control required for operator liability depends on the

facts, and requires consideration of the totality of the circumstances. (*Coeur D'Alene Tribe v. ASARCO Inc.* (D.Idaho 2003) 280 F.Supp.2d 1094, 1127.)

Atlantic Richfield argues on page 8 of its Comments that the Board must provide evidence that Anaconda or International specifically directed the placement of mine waste at the Mine or Tailings. Atlantic Richfield reads the cases too narrowly. Substantial evidence in the record demonstrates that Anaconda and International specifically directed the development and mining operations which created the waste at issue here, and that is sufficient to trigger operator liability.⁹ Moreover, substantial evidence in the record demonstrates that Anaconda and International's control was so pervasive that it is reasonable to assume that they *did* direct placement of waste at the Mine and Tailings.

ii. Pollution-causing activities at the Walker Mine and Tailings

The Walker Mine was an underground drift mining operation. "Drifts" and cross-cuts are the operational faces of the underground mine workings where raw ore is collected for removal through tunnels and portals. Drifts and other underground mine workings are placed and aligned according to the results of exploration and development activities, which take place throughout the period of mining as a necessary component of keeping the mine operating. At Walker, the ore was processed in an above-ground onsite concentrator before being shipped to Utah for smelting. Thus, exploration, development, drifts and other mining operations are the sources of all mine waste at Walker Mine and Tailings. In addition, the abandoned underground mine workings are now conduits by which groundwater becomes acid mine drainage (AMD) through contact with exposed ore and mine waste within the underground workings, and by which the AMD and other waste would reach the surface but for the mine seal in the 700 level adit.

iii. Anaconda and International directed exploration and mine operation activities resulting in the discharge and threatened discharge of waste at Walker Mine and Tailings

Atlantic Richfield argues that the record does not demonstrate that Anaconda or International actually controlled the Walker Mine (Atlantic Richfield Comments, at 9-10). Atlantic Richfield is incorrect. Substantial evidence in the record demonstrates that Anaconda and International directed specific exploration and development activities at Walker Mine beginning in at least the early 1920s and continuing until such activities ceased in approximately 1941. Moreover, substantial evidence in the record shows that Anaconda and International directed specific mining operations, e.g., the location and direction of mining drifts and other underground workings. These activities went far

⁹ In contrast, the alter ego theory requires evidence of a unity of interest and ownership plus evidence of fraud, injustice or inequity sufficient to "pierce the corporate veil." Atlantic Richfield argues that it cannot be subject to liability under the alter ego theory. (Atlantic Richfield Comments, at 6-8.) The earlier draft Mine CAO references the alter ego theory in the alternative. Based on the available evidence, the Central Valley Water Board has removed those references from the proposed final CAO, but reserves the right to bring such claims.

beyond normal corporate oversight and created the current discharge and threatened discharge at the Mine and Tailings.

1. The record consists of Anaconda and International's business records, other relevant documents and expert testimony regarding those records

The Central Valley Water Board has long been concerned about discharges from Walker Mine and Tailings. As described in the Mine CAO, the Central Valley Water Board earlier reached legal settlements with the available owners and prior owners of the Mine. The Board proposed to name Atlantic Richfield alongside the Forest Service as a discharger for the Tailings, and as sole discharger at the Mine, in the late 1990s, but Atlantic Richfield resisted. Based on the evidence available at that time, the Board did not press the issue. But the discharge and threatened discharge continued.

Central Valley Water Board staff has since undertaken the laborious task of identifying and gathering historical records documenting Anaconda and International's involvement at the Walker Mine. This search uncovered a large number of records not previously before the Board which demonstrate that Anaconda and International were directly involved in operating the Walker Mine. These records come primarily from the Montana Historical Society, and the Anaconda Geological Documents Collection at the University of Wyoming's American Heritage Center. (Declaration of Jeff Huggins in Support of Walker Mine and Tailings Cleanup and Abatement Orders [Huggins Declaration], at ¶¶ 7-12.) A large number of the most relevant records are indexed with Prosecution Exhibit 1. All of the archive documents are included electronically in the record.

The Montana Historical Society is a state agency tasked with acquiring and preserving historical records, and with making such records available for public review. Central Valley Water Board staff obtained documents from the Montana Historical Society by contacting the Historical Society and searching the Society's indexed records. (Huggins Declaration, at ¶ 8.) Relevant documents obtained from the Montana Historical Society are listed in the Index to Prosecution Exhibit 1 as Items 5-9, 13, 69 and 71-73.

The Anaconda Geological Documents Collection is a public archive of Anaconda's business records documenting geological exploration and development work in the United States and beyond. The Collection contains records of mining and exploration studies, reports, data, maps and correspondence relating to Anaconda's activities. (Huggins Declaration, at ¶ 9.) The University of Wyoming accepted the collection in approximately 1987 (donated by Atlantic Richfield), and maintains a searchable online index of the Collection for public access, funded by membership fees. Central Valley Water Board staff obtained a membership to the Collection, and obtained the documents listed in the Index to Prosecution Exhibit 1 as Items 1-339 (except Items 5-9, 13, 69 and 71-73). (Huggins Declaration, at ¶¶ 10-12.)

The Anaconda Geological Documents Collection contains documents from Anaconda's Geological Department, and as such the Collection tends to focus on Anaconda and International's control over exploration and development activities (e.g., identifying areas of ore and plotting drifts to reach it) at the Walker Mine. But a number of the documents also discuss Anaconda and International's control over mining operations (e.g., extracting ore through drifts).

Taken as a whole, the documents in Exhibit 1 constitute substantial evidence that Anaconda and International staff directed pollution-causing activities and operated the Walker Mine and Tailings concurrently with Walker staff, and in most cases with greater authority than Walker staff. This conclusion is supported by Dr. Fredric Quivik, the Central Valley Water Board's expert witness. Dr. Quivik's expert qualifications and findings are set forth in his Statement (Prosecution Exhibit 2) and are incorporated by reference here. Dr. Quivik has reviewed the documents in Prosecution Exhibit 1 and concludes, among other things, that:

[T]he Anaconda Copper Mining Company developed a tightly-managed corporate structure that allowed top managers of the parent corporation to direct the operations of its several subsidiaries and far-flung operations. Anaconda's top managers in the areas of geology, mining, and metallurgy directed those facets of operations in [Anaconda's] subsidiaries, including the Walker Mining Company.... In this respect, [Anaconda] and its subsidiary International managed the Walker mine concurrently with the Walker Mining Company from 1918 to 1941.

(Quivik Declaration, at 8.)

2. Anaconda and International directed specific pollution-causing exploration and mine operation activities at the Walker Mine beginning in at least the early 1920s

International owned 50.4% of Walker Mining Company's stock beginning in 1918; Anaconda owned 100% of International's stock and controlled all aspects of International's operations. (Quivik Declaration, at 13 [Anaconda exercised its option to purchase 630,000 out of 1,250,000 shares in the Walker Mining Company on 1 October 1918].) Mine development and operations began almost immediately after acquisition. (*Id.* at 13-15.)

By the early 1920s, Anaconda and International had established a clear practice of directing specific activities at the mine. (See, e.g., Quivik Declaration, at 15-16 [describing pattern of activities].) Anaconda and International management and staff (who were not also management or staff at Walker Mining Company) regularly visited the facility to provide highly specialized geological services for mine development and operations. These services were not in the manner of mere technical consultation. Instead, Anaconda and International continuously directed specific development and

mining activities. For example, correspondence from Paul Billingsley, of International, to J.O. Elton,¹⁰ dated 12 December 1923 (Exhibit 1, Item 17), describes site visits and provides specific direction regarding development and operation of mining drifts. The letter also describes site visits and directions from Murl Gidel, of Anaconda, and attaches specific direction from him, approved by Billingsley.

A similar letter from Billingsley to V.A. Hart, Walker's on-site manager, provides specific direction regarding placement of specific drifts and cross-cuts and closes by directing that the letter served as "authorization to start the above work." (Letter from Paul Billingsley to V.A. Hart, Exhibit 1, Item 16, at 2.) The record is filled with similar examples where Billingsley regularly visited the Walker Mine and provided specific direction regarding the development of mining drifts on behalf of International.

Anaconda staff also directed specific activities at Walker Mine during this period. Reno Sales served as Chief Geologist for Anaconda throughout the operation of the Walker Mine, and, like Billingsley, regularly visited the site and directed specific activities. (See, eg, letters from Sales to Elton and Tunnell [Walker's then-onsite manager] dated 6 July 1925 [Exhibit 1, Item 32] [providing specific direction regarding mining claims] and letter from Sales to B.B. Thayer dated 20 July 1925 [Exhibit 1, Item 34] [describing site visits and providing direction for ore development steps].)

Reno Sales was a geologist and manager of substantial renown, and the chain-of-command he maintained over Walker through Billingsley was quite rigid. As Atlantic Richfield points out, V.A. Hart occasionally disobeyed directives from Sales and Billingsley, and was chastised for it. The 20 September 1923, letter from Sales to Billingsley (Exhibit 1, Item 15) describes how Sales expected Hart to obey Anaconda's direction, and that Walker staff should come directly to Sales with geological questions or problems, rather than going through Elton.¹¹ V.A. Hart was removed from the Walker Mine by 1925, and later onsite managers apparently obeyed directives from Anaconda and International.

Perhaps what is most telling about the record from the 1920s is the degree to which decisions were made and specific direction given by and between Anaconda and International staff without input from Walker staff. For example, the 29 March 1926 letter from Billingsley to William Daly, Anaconda's Manager of Mines (Exhibit 1, Item 57), provides a detailed account of Billingsley's directions regarding development operations at Walker Mine, far beyond any definition of corporate oversight. A letter dated 9 February 1926, from Sales to Billingsley describes a site visit made by Daly, who was responsible for operational matters, and notes that Kelley, Anaconda's then-Vice President, authorized specific work at Walker Mine. (Exhibit 1, Item 53). A similar series

¹⁰ J.O. Elton worked for International and served as Vice President and Director of the Walker Mining Company.

¹¹ Notably, Elton wrote to Walker's onsite manager on January 18, 1924 (Exh. 1, Item 18), reiterating Sales' directive to "adhere strictly" to Billingsley's recommendations. The same letter describes how Walker onsite managers sought and obtained via telegram authorization from International to change drift direction. The use of telegram indicates the urgency of the matter and the importance of International's authorization.

of correspondence took place on 5, 12 and 23 May 1925 (Exhibit 1, Items 29-31). These directives were generally passed directly to Walker staff without being passed through J.O. Elton, who under a normal corporate parent-subsidiary relationship would have been the appropriate conduit for such communications; Anaconda and International staff routinely provided direction to Walker staff without going through Elton. (Quivik Declaration, at 27.)

The record also shows that Anaconda, International and Walker occasionally used joint letterhead during this period (e.g., Exhibit 1, Item 13), which further demonstrates that Anaconda and International operated the Mine concurrently with Walker. (See also Quivik Declaration, at 30 [describing that the use of joint letterhead demonstrates “how fully the Walker Mining Company was integrated into the International operations management system.”].)

3. Anaconda and International continued to direct specific exploration and mine operation activities at the Walker Mine into the early 1940s

Anaconda and International's direct involvement in Walker Mine development and operations appears to have strengthened through time. By 1939, the onsite manager at Walker Mine regularly sought specific approval from International and Anaconda regarding development and operational matters. For example, a letter dated 25 January 1939, from S.K. Droubay (Walker's geologist) to Tom Lyon (International) seeks Lyon's approval for development recommendations. (Exhibit 1, Item 151.) Letters from Reno Sales to Elton and Droubay later in 1939 and 1940 provide similar direction and approvals. (Exhibit 1, Items 167 & 168 [1939 letters] and Item 217 [1940 letter].) Droubay continued to seek direction from Anaconda and International. (See letter dated 19 December 1939 [Exhibit 1, Item 211] [seeking direction regarding drift placement].)

Clyde Weed, Anaconda's General Manager of Mines (responsible for mine operations) was also directly involved during the period. In a letter to Elton dated 8 May 1940, Weed directed Walker staff to follow specific direction from Sales. (Exhibit 1, Item 234.) Weed and Sales regularly discussed the Walker Mine development and operations, and provided specific direction, most notably regarding the placement of drifts. (Exhibit 1, Item 244.) The Anaconda Geological Collection's records for the later period (~1939-1941) contain numerous examples of specific direction to Walker from Anaconda's Mining and Geological departments. (See, eg, Exhibit 1, Items 140-160, 168-204; see also Quivik Declaration, at 37 [“In the late 1930s, Reno Sales continued to direct work routinely in the Walker mine based on his position as [Anaconda's] chief geologist.”].)

Dr. Quivik succinctly summarizes the operational structure during this time as “three men, Sales, Gidel, and Weed, who had no official roles at the Walker Mining Company, were deciding the course of development at the Walker mine, and they informed a fourth, Tom Lyon, of their decisions. As with the other three, Lyon was a man in

authority [with International], but he held no office in the Walker Mining Company.” (Quivik Declaration, at 37.)

4. Walker continually sought specific direction from Anaconda and International on urgent matters

The regular correspondence in the record is, by itself, sufficient to demonstrate that Anaconda and International operated the mine concurrently with Walker. The record also contains numerous examples instances where Walker sought and obtained specific authorization and direction from Anaconda and International via wire telegram and air mail in emergency situations. For example, in a series of telegrams on 1 and 2 January 1940 (Exhibit 1, Items 216-217), Walker sought and obtained specific direction and authorization directly from Reno Sales regarding placement of drilling holes in urgent circumstances. Other examples include telegrams and air mail dated 18 January 1924 (Item 18), 16 April 1926 (Item 61), 31 May 1926 (Item 63), 1 June 1926 (Item 64), 16 November 1939 (Item 204), 19&20 December 1939 (Items 211-212), and multiple instances in January 1941 (Items 215-217). Air mail and telegrams were extraordinary means of communication at the time, and would not be used for routine communications between general technical consultants and clients. (See Quivik Declaration, at 42 [describing the November 1939 urgent matter, and noting that “[o]nce the immediate situation was resolved, Sales and Droubay continued normal correspondence through the mail, with Lyon participating.”].) The air mail and telegram communications in the record here further demonstrate that Walker considered Anaconda and International staff to be directly involved in Walker Mine development and mining operations throughout the entire period of mining operations.

e. Water Code § 13304(j) does not apply because the operators created a public nuisance

Atlantic Richfield cites Water Code section 13304, subdivision (j), for the proposition that Atlantic Richfield cannot be held liable for acts occurring before 1981. (Atlantic Richfield Comments, at 10.) Section 13304(j) provides that “This 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.” (Water Code § 13304, subd. (j).)

Atlantic Richfield ignores that California law has prohibited the creation or continuation of a public nuisance since 1872 (Civil Code § 3490) and that water pollution is a public nuisance. (*People v. Truckee Lumber Co.* (1897) 116 Cal. 397; see also *Carter v. Chotiner* (1930) 210 Cal. 288, 291 [“[t]here is no doubt that pollution of water constitutes a nuisance.”].) Moreover, it has long been established as a matter of California law that the creation of the original condition leading to the nuisance is not necessary for liability. (*City of Turlock v. Bristow* (Cal. App. 3 Dist. 1930) 103 Cal.App. 750, 755 [“Every successive owner of real property who neglects to abate a continuing nuisance upon, or

in the use of such property created by the former owner, is liable therefore in the same manner as the one who first created it.”]; see also Cal. Civ. Code § 3483.)

Atlantic Richfield also ignores that the State Water Resources Control Board has repeatedly held parties situated similarly to Atlantic Richfield to be liable under similar circumstances. (See *In the Matter of the Petitions of Aluminum Company of America; Alcoa Construction Systems, Inc.; and Challenge Developments, Inc.* (July 22, 1993) Cal.St.Wat.Res.Bd., Order No. WQ 93-9, 4 [1993 WL 303166] [holding that the retroactive bar now set forth in 13304(j) does not apply even though the mine had ceased operations around 1930]; and *In the Matter of the Petitions of County of San Diego, City of National City, and City of National City Community Development Commission* (Feb. 22, 1996) Cal.St.Wat.Res.Bd. Order No. WQ 96-2, 4 [1996 WL 34481302] [operator of a landfill from 1960 to 1963 is a discharger under section 13304 because the continuing release of pollutants from the landfill into groundwater violated California law at the time].)

The record contains substantial evidence that Atlantic Richfield's predecessors operated the Walker Mine and Tailings from approximately 1918 through 1941, and that Atlantic Richfield's predecessors operated and abandoned the Mine and Tailings in a condition that created a public nuisance, i.e., a continuing discharge of copper and mine waste from the Walker Mine and Tailings, including discharges that eradicated all life in Little Grizzly Creek for several miles downstream prior to installation of the mine seal. Section 13304(j) is not a bar here.

f. California Code of Civil Procedure § 338(i) does not apply to cleanup and abatement orders

Atlantic Richfield cites California Code of Civil Procedure section 338(i) for the proposition that the Central Valley Water Board is time barred from issuing the Mine and Tailings CAOs. (Atlantic Richfield Comments, at 10.) Atlantic Richfield acknowledges State Water Resources Board precedent, *In re Trans-Tech Resources*, Order No. WQ 89-14, holding that Section 338(i) does not apply in administrative cases. (*Id.*) Atlantic Richfield suggest that *In re Trans-Tech* should be overturned, but fails to cite any authority in support. Moreover, Atlantic Richfield completely ignores *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 48, which supports the *In re Trans-Tech* holding. There is no basis for overturning *In re Trans-Tech*, and Section 338(i) is not a bar here.

g. Water Code § 13304(c)(1) allows recovery of past costs through administrative proceedings

Atlantic Richfield argues that the Central Valley Water Board cannot recover past costs through the Mine CAO. (Atlantic Richfield Comments, at 11.) Water Code section 13304, subdivision (c)(1), authorizes the Central Valley Water Board to file a court action to recover unpaid costs, but it does not require a court action. Rather, Water

Code section 13304 provides the framework for administrative orders regarding both cleanup and cost recovery. The Mine CAO properly provides for recovery of the Central Valley Water Board's past costs and future oversight costs.

h. There is no basis to allocate liability

Atlantic Richfield argues that the Forest Service and the Central Valley Water Board should be the "primary" responsible parties for the Tailings CAO and Mine CAO, respectively. (Atlantic Richfield Comments, at 11.) Atlantic Richfield cites State Water Board decisions suggesting that, where appropriate, the Regional Board may specify the roles of responsible parties under cleanup and abatement orders. But Atlantic Richfield ignores the general intent that liability under section 13304 be applied jointly and severally. (See *In the Matter of the Petition of Union Oil Company of California*, Order No. WQ 90-2, at 4 ["[W]e consider all dischargers jointly and severally liable of discharges of waste...."].) The Central Valley Water Board is not required to allocate liability, and in any event the circumstances here do not suggest that Atlantic Richfield should be secondarily liable.¹² Both the Forest Service and Atlantic Richfield are equally responsible for the Tailings, and Atlantic Richfield is the only remaining responsible party at the Mine.¹³

Moreover, the Central Valley Water Board is not a discharger at the Mine. The Central Valley Water Board installed the mine seal pursuant to Resolution No. 86-057 [Prosecution Team Exhibit 13] in order to halt waste discharges from the underground workings through the mine's portal. The Central Valley Water Board's activities have since been limited to inspections of the seal and water quality sampling throughout the Mine and Tailings, in addition to rehabilitation of the portal tunnel and installing drainage ditches to reduce surface inflow to the upper mine openings. None of the Board's activities have caused discharge, and therefore do not create discharger liability.

VIII. Changes to the final CAOs

The Prosecution Team's Submittal CD contains redline versions of the proposed CAOs showing changes made since the 3 June 2013 comment drafts.

¹² State Water Resources Control Board orders regarding allocation all support the conclusion that Atlantic Richfield, as successor to the operator, should be primarily liable. Such orders distinguish between those parties who are considered responsible solely due to their land ownership (or status as lessee) and those parties who actually operated the facility or otherwise caused the discharge in question. See Order Nos. WQ 86-11 (landowner and operator named in waste discharge requirements; operator primarily responsible for compliance); 86-18 (landowner and manufacturer of semiconductors named in site cleanup requirements; manufacturer primarily responsible); 87-5 (landowner and operator named in waste discharge requirements; mine operator primarily responsible); 92-13 (landowners held secondarily liable in cleanup and abatement order; operators considered primarily liable). This distinction is made primarily for equitable reasons – to hold the party who created the discharge to be initially responsible for cleanup. (See Order No. WQ 89-1, p. 4.)

¹³ As described in the Mine CAO, the Central Valley Water Board has previously reached settlements with the other viable responsible parties at the Mine.

a. Changes to Tailings CAO based on Forest Service Comments

The Tailings CAO has been amended to reflect the Forest Service's comments and incorporate these responses (new finding 45), and to describe the Forest Service's continuing failure to comply with Order R5-00-028 (revised findings 18, 19 and 21).

b. Changes to the Mine and Tailings CAOs based on Atlantic Richfield's Comments

The Tailings CAO and Mine CAO have been amended in light of Atlantic Richfield's comments to delete reference to the "alter ego" theory of corporate liability (former finding 28 of the Tailings CAO and former finding 37 of the Mine CAO). Paragraph 2 of the Tailings Order and Paragraph 3 of the Mine Order have been revised to reference Water Code section 13304, subdivision (c)(1), rather than section 13305.

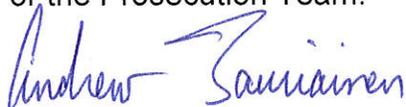
c. Other changes to the Mine and Tailings CAOs

The Walker Mine title report has been moved from Attachment E of the Mine CAO to Prosecution Exhibit 48. The historical archive documents have been moved from the CAO attachments to Prosecution Exhibit 1. The compliance dates in both CAOs have been updated to reflect the timing of issuance. Finding 24 in the Tailings CAO and finding 25 in the Mine CAO have been added to describe drift mining operations. Findings 35 through 37 (formerly 34 through 36) of the Mine CAO and findings 27 through 29 (formerly 26 through 28) of the Tailings CAO have been revised to address specific findings regarding Anaconda and International. Findings 41 and 42 of the Tailings CAO have been revised to clarify the Forest Service's violation of Order R5-00-028, and to clarify scope of the necessary actions. Both CAOs have been revised to incorporate this Response to Comments document (new finding 46 of the Tailings CAO and new finding 55 of the Mine CAO). The CEQA review language and the Order sections of both CAOs have been revised to the current CAO format.

IX. Conclusion

For the reasons stated above, the Central Valley Water Board should adopt the Walker Mine CAO (R5-2014-YYYY) and Walker Mine Tailings CAO (R5-2014-XXXX) as proposed.

For the Prosecution Team:



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