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Andrew Taurianen
SWRCB Office of Enforcement
via email to: Andrew.Tauriainen@waterboards.ca.gov

Re: Walker Mine—draft cleanup and abatement order

Dear Mr. Taurianen:

This letter is in response to the California Regional Water Quality Control Board's (the Board) draft cleanup and abatement order dated April 29, 2013 with regard to portions of the Walker Mine on the Plumas National Forest. The order also references Order No. 5-00-028, another earlier effort to direct the cleanup efforts on the Walker Mine tailings. Both orders, in essence, challenge the Forest Service's actions in addressing the heavy metals contamination on Federally managed land.

In effect, the Order seeks to replace the President's discretion as delegated under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), with the Board's policies and orders. However, under CERCLA's pre-enforcement review bar, 42 U.S.C. § 9613(h), both challenges to Forest Service's cleanup action are premature.

The effect of this statutory provision is to allow the President or his designee (in this case the Regional Forester) to engage in the removal or remediation actions of his choice without external interference. Only after the Federal agency has completed its actions is the bar against challenges lifted.

Of course, numerous entities have sought in the past to put their own spin on CERCLA cleanups, for a variety of reasons, but courts have not hesitated to enforce section 9613(h)'s jurisdictional ban when other governmental entities attempt to challenge Federal cleanup efforts. For example, in *United States v. City & Cnty. Of Denver*, 100 F.3d 1509 (10th Cir. 1996), the Tenth Circuit concluded that section 9613(h) precluded the City of Denver from challenging the EPA's cleanup decisions at a mine waste disposal site. Denver tried to use its local police powers to interfere with the cleanup selected by EPA. *See also* *Clinton Cnty. Comm'rs v. U.S. E.P.A.*, 116 F.3d 1018, 1024-25 (3d Cir. 1997); *City of Fresno v. United States*, 709 F.Supp.2d 888, 906 (E.D. Cal. 2010); *City of Salina, Kan. v. United States*, 10-2298-CM-DJW, 2011 WL 1107107 (D. Kan. Mar. 25, 2011).

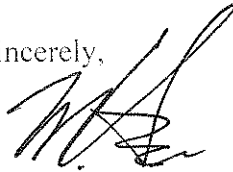
Section 9613(h)'s jurisdictional ban is applicable here because the Forest Service has already initiated remedial and/or remediation efforts and because any attempt to enforce these orders would be considered a challenge of federal cleanup actions. CERCLA offers a broad definition of the term 'remedial', and courts have not imposed rigid standards for agency action to qualify as 'remedial action' under section 9604. For example, "§ 9613(h)'s jurisdiction strip applies, even if the Government has only begun to 'monitor, assess, and evaluate the release or threat of release of hazardous substances.'" *Gates*, 538 F.3d at 1334 (*citing* *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 239 (9th Cir.1995)); *see also* 42 U.S.C. § 9601(23). Forest Service actions on the Walker site also constitute remediation as defined by 42 U.S.C. §9601(24).

As acknowledged in the draft cleanup and abatement order, the U.S. Forest Service, in 1994, adopted a Federal Record of Decision and engaged in certain remedial actions on the Walker Mine tailings site, and work on the Walker site continues today. These steps clearly qualify as remedial action under the broad statutory definition, and foreclose jurisdiction until after the remedial actions have been completed. Section 9613(h), therefore, renders unenforceable the Draft Cleanup and Abatement Order of April 2013.

The orders also qualify as a 'challenge' to Forest Service remedial actions. As the Ninth Circuit explains, section 9613(h) is intended to prevent interference with pending cleanup efforts. Any attempts to improve on or demand more from the ongoing cleanup constitutes interference and will be considered a challenge. *Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220 (9th Cir. 2011). These documents attempt to impose additional substantive cleanup and other requirements on the Forest Service, clearly qualifying as a challenge. The pre-enforcement review provision of § 9613(h) renders these orders unenforceable because CERCLA reserves for the President the first right to select and implement the remedial actions of his choosing. Until the U.S. Forest Service has concluded its remedial action on the Plumas National Forest, any and all efforts to direct the implementation of cleanup actions on the forest are barred by 42 U.S.C. § 9613(h).

That is not to say we disagree on the appropriate extent of cleanup for the Federally managed portion of the Walker Mine. As part of the 2001 ROD Amendment, the Forest Service incorporated the substantive provisions of the earlier Order No. 5-00-028 into the CERCLA decision document. We look forward to working with you further on addressing the environmental contamination at the Walker Mine.

Sincerely,



Michael R. Hope