**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD**
**CENTRAL VALLEY REGION**

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**CLEANUP AND ABATEMENT ORDER NO. R5-2014-XXXX**

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

**WALKER MINE TAILINGS**
**PLUMAS COUNTY**

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**CLEANUP AND ABATEMENT ORDER NO. R5-2014-YYYY**

**ATLANTIC RICHFIELD COMPANY**

**WALKER MINE**
**PLUMAS COUNTY**

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# PROSECUTION TEAM'S REBUTTAL BRIEF

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# I. Introduction

This brief provides the Prosecution Team's rebuttal to the Forest Service's 20 February 2014 Response (Response) and to Atlantic Richfield's (ARCO's) 21 February 2014 Prehearing Brief (ARCO Brief). The Forest Service and ARCO are collectively referred to as Dischargers.

# II. Rebuttal to the Forest Service's Response

## a. Summary

The Forest Service did not put the mine waste on the Tailings site, ARCO's predecessors did. But the Forest Service authorized the use of the site for tailings disposal, it owns and operates the site, and it discharges waste in violation of WDR Order No. R5-00-028. The Forest Service is properly named to the Tailings CAO.

The Central Valley Water Board has jurisdiction over the Forest Service for waste discharges from the Tailings, despite what the Forest Service argues in its Response. The Forest Service has been willingly subject to the Board's authority for decades, before and after commencement of the CERCLA action at the Tailings site, without any objection until now. Notably, the Forest Service accepted Order R5-00-028 well after the initial CERCLA Record of Decision (ROD) for the Tailings site, and immediately prior to adopting the amended ROD. Order R5-00-028 required the Forest Service to comply with specific Receiving Water Limitations no later than 1 October 2008. Despite some remedial efforts under the ROD, the Forest Service still has not complied.

It is long past time for the Forest Service to comply with Order R5-00-028. The Tailings CAO is consistent with the ongoing CERCLA process, and it is not a challenge or impairment to the CERCLA process in any way. The Forest Service and ARCO presumably will work together to bring the discharges from the Tailings into compliance with the Receiving Water Limitations, which will only enhance any CERCLA actions.

## b. The Clean Water Act's waiver of sovereign immunity allows injunctive orders such as the Tailings CAO against the Forest Service

The Forest Service disputes the Board's authority and dramatically misstates the Clean Water Act's waiver of federal sovereign immunity on pages 3-6 of its Response. The Clean Water Act's sovereign immunity waiver is codified at 33 U.S.C section 1323, subdivision (a), and provides that

> Each department, agency, or instrumentality of the ... Federal Government ... shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same

> manner ... as any nongovernmental entity.... The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.... [Emphasis added.]

It is beyond reasonable dispute that the Forest Service must comply with California's water quality permitting authority regarding discharges of waste from the Tailings.

The United States Supreme Court has interpreted the sovereign immunity waiver only to prohibit punitive civil fines for past water quality violations. (*United States Department of Energy* (*DOE*) *v. Ohio* (1992) 503 U.S. 607, 622-624.) In fact, the *DOE* federal agency conceded that states have authority to issue permits and injunctive orders and coercive fines against federal agencies to protect water quality. (*Id*. at 613.)

The Tailings CAO is an injunctive order requiring the Forest Service to take steps to cleanup and abate unlawful discharges from the Tailings, and is well within the meaning of "any process and sanction" to which the Forest Service "shall be subject" under 33 U.S.C. section 1323, subdivision (a).

The Forest Service's attempt to evade Board jurisdiction here is perhaps explained by the 2005 Consent Decree between it and ARCO regarding the Tailings (PT Exhibit 12). In that Decree, the Forest Service apparently agreed to indemnify ARCO for costs and damages relating to claims including, perhaps, the Tailings CAO. (*Id*., at pp. 14-15, ¶ 19.) Although the Consent Decree does not affect the Board's ability to bring the Tailings CAO against ARCO (*id.*, at p. 14, ¶ 18), the indemnification provision does suggest that the Forest Service would be required to pay any punitive fines issued to ARCO for failure to comply with the Tailings CAO.[1] While the Board must now presume that the Dischargers will comply with the Tailings CAO, the relationship established by the Consent Decree suggests that the Board's ability to enforce the Tailings CAO is not as limited as the Forest Service would like.

### c. The Walker Tailings remains a significant source of waste to Dolly Creek and Little Grizzly Creek

WDR Order R5-00-028 requires that the Forest Service comply with all Receiving Water Limitations by 1 October 2008. (PT Exhibit 9, at p. 8.) The applicable Receiving Water Limitation for copper in Order No. R5-00-028 is 5.0 µg/l.[2] (PT Exhibit 9, at p. 5.) Despite

[1] The Prosecution Team does not concede or even suggest that the Forest Service must necessarily indemnify ARCO, but the relationship between ARCO and the Forest Service is not for the Board to decide, so it is necessary to name them both to the Tailings CAO.

[2] The Receiving Water Limitations are exactly the type of objective standard applicable to the Federal government contemplated in *EPA v. California ex rel. State Water Resources Control Board* (1976) 426 U.S. 200, 215 n. 28.

having taken some action under the CERCLA ROD, the Forest Service is regularly out of compliance with the Receiving Water Limitations (see, e.g., PT Exhibits 24-46) and threatens to continue to remain out of compliance.

The Forest Service asserts that the Dolly Creek Diversion Channel and the USFS Dam do not discharge waste from the Tailings into Dolly Creek and Little Grizzly Creek. (Forest Service Response, at pp. 14-15.) The evidence shows otherwise. Board staff conducts twice-yearly site visits to collect water quality samples and visually observe the Tailings. (PT Exhibit 3, ¶¶ 2-4.) The water quality samples indicate that the Tailings site regularly adds copper to Dolly Creek and Little Grizzly Creek. (PT Exh 51, at ¶¶ 2-4; see also Tailings CAO, Figures 1-2.)

Despite the Forest Service's assertions, the Dolly Creek Diversion Channel has not eliminated flows through the original Dolly Creek channel and over the USFS Dam. (See PT Exh 51, ¶ 3, and PT Exhibit 52, Photograph 6.[3]) The old Dolly Creek channel is unlined and water regularly flows through mine waste for several thousand feet before discharging over the dam. (*Id*., see also Tailings CAO, Attachment C.) Discharges over the USFS Dam continue to violate Receiving Water Limitations even after the Diversion Channel was installed. (Tailings CAO, Figure 2 [WM-6 is the USFS Dam sampling site].) The Forest Service itself regularly collects water quality samples from the USFS Dam flows. (PT Exh 51, at ¶ 4.)

The Dolly Creek Diversion Channel itself picks up waste from the Tailings through wind-borne dust and perhaps other vectors, and discharges from the Channel Outfall to Little Grizzly Creek regularly violate the Receiving Water Limitations. Prosecution Team Exhibit 43 (Photos 23 and 24) shows wind-borne dust at the Tailings in June 2013. That dust enters Dolly Creek and Little Grizzly Creek. (PT Exhibit 43, Photos 26 and 27 [showing fine tailings in the Dolly Creek Diversion Channel and Outfall to Little Grizzly Creek].) Despite the Forest Service's attempts to install wind rows, wind-blown dust is a regular occurrence at the Tailings. (See PT Exhibit 51, at ¶ 2, and PT Exhibit 52, Photographs 1-5 [showing wind-blown dust in 2010].)

The Forest Service's actions to date have not halted unlawful discharges from the Tailings, and those discharges will likely continue absent the Tailings CAO. In addition, the Dolly Creek Diversion Channel Outfall and probably the USFS Dam are point sources likely subject to the Clean Water Act and the Water Code. Order No. 5-00-028 was issued before construction of the Diversion Channel Outfall, and thus does not propose NPDES permit coverage for the Outfall. Given that the Outfall and the Dam regularly discharge waste to Little Grizzly Creek, Board staff will examine the possibility of including NPDES coverage in the next round of waste discharge permitting.

[3] Exhibit 52 includes photographic evidence directly rebutting the Forest Service's assertions that the Tailings and the USFS Dam do not discharge waste to Dolly Creek. Exhibit 51 is the Supplemental Declaration of Jeff Huggins authenticating the photographs.

### d. The Forest Service cannot challenge Order No. R5-00-028

The Forest Service's denies that the Board has ever had regulatory authority over it at the Tailings, despite decades of Board waste discharge requirements (see, e.g., Orders R5-86-073 and R5-01-017). Contrary to its assertions in the Response, the Forest Service has not objected to Board regulation until this proceeding. The record indicates that the Forest Service has been willingly subject to the Board's authority even after the CERCLA process had been well underway. (See PT Exhibit 10.) The Forest Service cannot challenge Order No. R5-00-028.

### e. The Tailings CAO is not a challenge to the CERCLA action

The Forest Service's Response largely retreads prior arguments that the Tailings CAO is a challenge to the CERCLA process at the Tailings, and continues to rely on distinguishable court cases. (Response, at pp. 7-15.) The Prosecution Team's Opening Brief (at pages 6-9) describes how CERCLA does not preempt the Board's Water Code authority. That discussion need not be repeated here except to address the Forest Service's new CERCLA arguments.

The Forest Service completely ignores the reservations of authority to the State set forth in CERCLA Sections 114(a), 302(d), 120(a)(4) and 121(e)(4). In addition, the Forest Services' cited cases all address only circumstances where third party groups have filed citizen suits in federal court challenging CERCLA actions.[4] Those cases clearly involve challenges to CERCLA actions, but that is not what is happening here.

It is hard to imagine a set of facts more squarely on point than those in *United States v. Colorado* (10th Cir. 1993) 990 F.2d 1565, which the Forest Service gives short shrift. There, a Colorado agency issued a compliance order to the Army for a site that was subject to the State's regulation under EPA-delegated RCRA authority, and the court held that such an action is not a challenge to the CERCLA response. (990 F.2d at 1575.) The Tailings site is subject to the Board's regulation under EPA-delegated Clean Water Act authority and under the Clean Water Act's general waiver of sovereign immunity. As in *Colorado*, the Tailings CAO is an injunctive order requiring the Forest Service to comply with State and federally-delegated law.

The *United States v. Colorado* court took pains to assess whether the State's compliance order sought to halt the federal agency's CERCLA action. The court found that the compliance order sought to ensure the federal agency's compliance with State law during the course of the CERCLA action, "[t]hus, Colorado is not seeking to delay

[4] Notably *McClellan Ecological Seepage Situation v. Perry* (9th Cir. 1995) 47 F.3d 325, *Shea Homes Limited Partnership v. United States* (N.D. Cal. 2005) 397 F.Supp.2d 1194 and *Ford Ord Toxics Project, Inc. v. California Environmental Protection Agency* (9th Cir. 2000) 189 F.3d. 828. The Prosecution Team discusses these cases on pages 7 and 8 of the Opening Brief. The Forest Service still conveniently ignores the fact that *Shea Homes* involved a federally-operated CERCLA site where the federal agency had been willingly subject to both San Francisco Bay Regional Water Board permits and cleanup and abatement orders. (PT Exhibit 47.)

the cleanup, but merely seeking to ensure that the cleanup is in accordance with state laws which the EPA has authorized Colorado to enforce…. In light of [CERCLA Sections 302(d) and 114(a)], which expressly preserve a state's authority to take such action, we cannot say that Colorado's efforts to enforce its EPA-delegated RCRA authority is a challenge to the Army's undergoing CERCLA response action." (*Id*. at 1576.) "While we do not doubt that Colorado's enforcement of the final amended compliance order will 'impact the implementation' of the Army's CERCLA response action, we do not believe that this alone is enough to constitute a challenge to the action as contemplated under [Section 113(h)]." (*Id*. at 1577.)

Like the Colorado compliance order, the Tailings CAO here does not seek to delay the cleanup at the Tailings. The Tailings CAO seeks to ensure that the Forest Service complies with the Water Code and EPA-delegated Clean Water Act authority, particularly the specific Receiving Water Limitations in WDR Order 5-00-028. While the Forest Service's compliance with the Tailings CAO will undoubtedly impact the CERCLA response action to some extent, it is difficult to see how requiring the Forest Service to comply with the Water Code will impair the CERCLA action in any way. In this way, the Tailings CAO is consistent with the CERCLA action at the site.

### f. The Board should reject the Forest Service's suggestion to ignore the ongoing Water Code violations

The Forest Service suggests, astoundingly, that the Board should ignore the ongoing Water Code violations. (Response, at pp. 15-20.) The Forest Service's arguments are preposterous and without merit. The Forest Service is a responsible party because it authorized the use of the site as a tailings pond, it owns and controls and operates the site now, and it knowingly discharges waste in violation of the specific numeric Receiving Water Limitations set forth in Order No. R5-00-028. CERCLA does not preempt the Clean Water Act, and Congress has ensured that the Forest Service is subject to the Board's Clean Water Act authority.[5]

The Forest Service then suggests, on pages 20-22 of its Response, that it is not a responsible party because the mine waste at the Tailings is personal property, presumably belonging to ARCO. This assertion can be dismissed because the Forest Service operates the USFS Dam and the Dolly Creek Diversion Outfall, and has incorporated Order R5-00-028 into the CERCLA ROD. This degree of ownership and control is more than sufficient to trigger liability under Water code section 13304. Moreover, the 2005 Consent Decree raises the question whether the Forest Service has assumed some of ARCO's responsibility for the site, such that the Forest Service and ARCO both must be named to the Tailings CAO.

[5] The CERCLA defenses described on page 16 of the Forest Service's response do not apply here because the USFS is itself conducting the remedial action and knowingly discharges waste offsite into waters of the State and waters of the United States.

## III. Rebuttal to ARCO's Prehearing Brief

### a. Summary

ARCO's predecessors, Anaconda Copper Company (Anaconda) and International Smelting and Refining Company (International) managed, directed and conducted mine development and operations and other activities at the Walker Mine facility which are directly related to the present conditions of pollution and nuisance at the Mine and Tailings sites. ARCO is properly named to the Mine and Tailings CAOs.

In an attempt to distract from its liability, ARCO makes a number of misguided legal and factual arguments. ARCO first asserts that the wrong legal standard applies to cleanup and abatement orders, when every authority holds that the Board's findings on the proposed CAOs must be supported by substantial evidence in the record. ARCO then makes a series of arguments about Anaconda and International's corporate oversight and management of the Walker Mining Company. These arguments can be ignored because the true inquiry here is whether Anaconda and International operated, managed and directed pollution-causing activities the Walker Mine *facility* (which includes the Mine and Tailings sites). Some of ARCO's evidence supports the Prosecution Team's proposed findings. Finally, ARCO continues to argue for allocation of liability where no basis for apportionment exists.

ARCO has long opposed any efforts by the Board to impose liability for the Walker Mine and Tailings. But the Board's staff has done a remarkable job recently in investigating historical records and building a strong record showing that ARCO is liable for the actions of its predecessors. It is well past time for ARCO to assume responsibility for the mining waste and to cleanup and abate the condition of pollution and nuisance and the unlawful discharges from the Walker Mine and Tailings.

### b. Regarding ARCO's prehearing motions

ARCO submitted nine prehearing motions, seeking a wide range of legal rulings. (Prehearing Motions Nos. 1 through 9.) The Prosecution Team submitted Responses to each motion, and anticipates that at least some of the motions will be addressed in prehearing rulings. In the event that any of the issues are left for hearing, the Prosecution Team incorporates each Response fully here by reference.

### c. The Board's findings on the proposed Mine and Tailings CAOs must be supported by "substantial evidence in the record"

ARCO argues that the Prosecution Team must prove the elements required to support the CAOs by a "preponderance of evidence." (ARCO Brief, at pp. 8-9.[6]). ARCO's point

[6] ARCO makes the same argument in its Prehearing Motion No. 6, and the Prosecution Team's Response to that motion is incorporated by reference here.

seems to be to try to hold the Prosecution Team to a higher legal standard than that necessary to support the Board's findings, or maybe ARCO just wants to cause confusion.

State Water Resources Control Board (State Water Board) precedents clearly hold that the Central Valley Water Board's findings in orders under Water Code section 13304 must be supported by "substantial evidence in the record" and not a "preponderance of evidence." (See *Exxon Company, USA*, Order No. WQ 85-7, at p. 6; *Stinnes-Western Chemical Corp.*, Order No. 86-16, *Aluminum Company of America*, Order No. WQ 93-9; *In re: Sanmina Corp*., Order No. WQ-93-14.)

Substantial evidence means "credible and reasonable evidence." (*In re: Sanmina Corp*, Order No. WQ 93-14.) "Substantial evidence does not mean proof beyond a doubt or even a preponderance of evidence. Substantial evidence is evidence upon which a reasoned decision may be based." (*In re: Robert S. Taylor, et al. and John F. Bosta, et al.*, Order No. WQ 92-14, at p. 5; see *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1019 ["Substantial evidence" means facts, reasonable assumptions based on facts and expert opinions supported by facts.].) Staff opinion can be substantial evidence. (*Browning-Ferris Industries v. City Council* (1986) 181 Cal.App.3d 852, 866 [internal citation omitted].) Substantial evidence can also be direct or circumstantial evidence of historical activities from public records or other sources. (State Water Board Resolution 92-49, at § I.A.1.)

In its attempt to confuse the issue, ARCO does not even define what "preponderance of the evidence" means. "Preponderance of evidence usually means that one body of evidence has more convincing force than the evidence opposed to it." (Cal. Admin. Hearing Practice, 2d Ed., § 7.51 [internal citations omitted]; see also BAJI No. 2.60; *People v. Miller* (1916) 171 Cal. 649, 652-653 ["'preponderance of evidence' [means] such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests."].) "The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the *quality* of the evidence. The *quantity* of evidence presented by each side is irrelevant." (*Glage v Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324-325 [italics in original].)

ARCO's claim that a higher legal standard applies to the Prosecution Team is a fallacy because the Board makes express or implied determinations regarding the quality and convincing force of evidence each time it adopts findings in an Order. The parties in any contested proceeding usually submit contrary evidence. The Board hears the evidence, determines what evidence is credible and reasonable, and adopts findings accordingly. The Board may choose to make an express determination that the evidence in support of any finding is of more convincing force than the evidence in opposition, but such a determination is always at least implied.

In other words, the Board determines with each finding which party has proved its claim by a preponderance of the evidence. The Board's determination regarding the convincing force or persuasiveness of any evidence is not subject to appeal. The Prosecution Team is not held to any artificially high standard.

### d. The Prosecution Team's evidence is substantial and persuasive

ARCO's misconceptions about the applicable standard so thoroughly permeate and confuse the rest of their arguments that is necessary to briefly reiterate the applicable law and evidence. The Mine CAO and Tailings CAO arise under Water Code sections 13304 and 13267. Section 13304 requires that the Board find substantial evidence that a discharger (1) causes or permits, or threatens to cause or permit, (2) a discharge of waste that is or probably will be discharged into waters of the State, and (3) creates, or threatens to create, pollution or nuisance. (Water Code § 13304, subd. (a).) Section 13267 requires that the Board find substantial evidence that a person has discharged, discharges, or is suspected of having discharged or discharging waste, or who proposes to discharge waste within its region. (Water Code § 13267, subd. (b)(1).)

The Prosecution Team has submitted substantial evidence in the form of staff reports and water quality sample analyses demonstrating that the Mine and Tailings sites are discharging waste and threatening to discharge waste in violation of Order R5-00-028 (for the Forest Service at the Tailings) and in violation of Basin Plan prohibitions and creating a condition of pollution or nuisance (for ARCO at both sites).[7] (PT Exhibits 3, 24-46.) ARCO has not submitted any evidence to counter the staff reports and water quality sample analyses (in fact some of ARCO's' evidence is harmonious), nor has ARCO submitted any evidence to generally show that the ongoing and threatened discharges from the Mine and Tailings sites are lawful.

The Prosecution Team has submitted substantial evidence that the current conditions of discharge and threatened discharge were caused primarily by ARCO's predecessors, Anaconda and International, who directed, operated, managed or controlled pollution causing activities at the Walker Mine facility between approximately 1918 and 1941. This evidence includes numerous archive documents from the Anaconda Geological Collection and elsewhere demonstrating, directly and circumstantially, that Anaconda and International directly operated and managed the Walker Mine facility alongside the Walker Mining Company. (PT Exh 1 and complete University of Wyoming Documents and Montana Historical Society documents submitted electronically by reference).

The Prosecution Team has also submitted the expert witness statement and testimony of Dr. Fredric Quivik, who reviewed the archive documents and concluded that "Anaconda's top managers in the areas of geology, mining, and metallurgy directed

[7] Although the Forest Service has not challenged the Prosecution Team's evidence supporting the Tailings CAO, nor has the Forest Service submitted any evidence of its own, the staff reports and water quality sample analyses also demonstrate that the Tailings site is discharging copper in excess of the Receiving Water Limitation set forth in the Forest Service's Order No. R5-00-028. This meets the Water Code section 13304 and 13267 elements.

those facets of operations in the [Anaconda's] subsidiaries, including the Walker Mining Company [and Anaconda] and its subsidiary International managed the Walker Mine concurrently with the Walker Mining Company from 1918 to 1941." (Quivik Declaration, PT Exh 2, at p. 8; see also, e.g., PT Exh 1, Items 226 through 234 [correspondence between Anaconda and International managers directing and managing ongoing development activities at the Walker Mine facility].)

The Prosecution Team's evidence shows a decades-long pattern of Anaconda and International employees managing, directing and operating geological, mining and metallurgical activities at the Walker Mine facility. These activities generated the mine waste on the surface of the Mine and Tailings sites which currently discharges and threatens to discharge to Dolly Creek and Little Grizzly Creek. Anaconda and International's activities also created the underground mine workings, which are the conduits by which acid mine drainage (AMD) and other waste would reach the surface but for the mine seal. Thus, ARCO's predecessors were responsible for causing the conditions of pollution and nuisance present on the Mine and Tailings sites today.

The Prosecution Team's evidence is substantial, and has more convincing force and demonstrates a far greater probability that ARCO's predecessors operated the Walker Mine *facility* than does ARCO's evidence, which is geared more towards Anaconda's operation of the *corporate affairs* of the Walker Mining Company and thus addresses the wrong legal theory. Moreover, much of ARCO's technical evidence tends to support the Prosecution Team's proposed findings.

### e. ARCO's legal arguments about how Anaconda and International did or did not manage the corporate affairs of the Walker Mining Company should be ignored as irrelevant to direct operator liability

ARCO acknowledges on page 11 of its Brief that the Prosecution Team's theory of liability is "direct operator liability" resulting from Anaconda and International's actions at the Mine *facility*.[8] But ARCO spends much of its Brief arguing that Anaconda and International did not manage the *corporate affairs* of the Walker Mining Company in such a way as to trigger derivative liability. (See, e.g., ARCO Brief, at pp. 12-13, 15-17.)

ARCO's arguments about derivative liability should be ignored because this is not a derivative liability case. ARCO is well aware that the Supreme Court in *United States v. Bestfoods* specifically held that "any person who operates a polluting facility is directly liable for the costs of cleaning up the pollution." (*United States v. Bestfoods* (1998) 524 U.S. 51, 65.) Direct operator liability occurs "regardless of whether that person is the facility's owner, the owner's parent corporation or business partner… If any such act of operating a corporate subsidiary's facility is done on behalf of a parent corporation, the

[8] For the purposes of determining direct operator liability, the Walker Mine *facility* includes both the Mine site and the Tailings site. As ARCO correctly points out, the Mine and Tailings were managed as one unit during Anaconda's operation of the site. The sites are named in separate CAOs now because of the different ownership.

existence of the parent-subsidiary relationship under state corporate law is simply irrelevant to the issue of direct liability." (*Id*. at 65-66 [internal citations omitted].)

ARCO's derivative liability arguments appear to be intentionally misleading away from the clear definition of "operator" applied in *Bestfoods*:

> [A]n operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

(*Bestfoods*, 524 U.S. at 66-67 [emphasis added].) The term "operation" "must be read … as including the exercise of direction over the facility's activities." (*Id*. at 71.)

Under the *Bestfoods* direct operator theory, ARCO is liable for the conditions of pollution or nuisance at the Walker Mine and Tailings sites if Anaconda and/or International: 1) directed, managed or conducted activities at the Walker Mine *facility*[9]; and 2) Anaconda/International's management, direction or operation of the Walker Mine *facility* was specifically related to the conditions of pollution or nuisance at the Walker Mine and Tailings sites now.[10]

*Bestfoods* provides examples of what types of involvement at a facility may trigger a parent's liability: 1) where the parent operates alongside the subsidiary at the facility (e.g., in a joint venture); 2) where a dual officeholder acts on the parent's behalf at the facility; or 3) where an employee or agent of the parent directs activities at the facility. (*Bestfoods*, 524 U.S. at 71.) Such actions, the Court held, go beyond the "norms of corporate behavior" and subject the parent to direct operator liability.[11] (*Id*.) ARCO is liable here under the third *Bestfoods* example, because employees and agents of Anaconda and International directed, managed, and conducted mining operation,

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[9] Anaconda/International's oversight of the *corporate affairs* of the Walker Mining *Company* is irrelevant. *Bestfoods* clearly distinguished between inquiries into operation of the facility and derivative liability, "The 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. Control of the subsidiary, if extensive enough, gives rise to indirect liability under piercing doctrine, not direct liability under the statutory language." (*Bestfoods* 524 U.S. at 67-68 [internal quotations omitted].)

[10] ARCO is wrong to argue that Anaconda/International needed to direct waste disposal activities to be liable now. "Once affirmative acts [of direction, management and activities at a facility] have been found to render someone an operator, it is no defense to liability for that operator to say it was not the actor responsible for proper management of their facilities…" (*United States v. Township of Brighton*, 153 F.3d at 315; see also *Litgo New Jersey Inc. v. Comm'r New Jersey Dep't of Envtl. Prot.* (3d Cir. 2013) 725 F.3d 369, 382 [accord].)

[11] The *Bestfoods* Court defined activities within the norms of corporate behavior as being those acts 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*, 524 U.S. at 71-72.) It is beyond question that Anaconda and International did much more than that here.

development and other activities at the Walker Mine *facility* specifically related to the current conditions of pollution or nuisance at the Mine and Tailings sites.

Contrary to ARCO's assertions, the holding in *Long Beach Unified School District v. Godwin Living Trust* is in line with *Bestfoods*, "to be an operator … a party must … play an active role in running the facility, typically involving hands-on day-to-day participation in the facility's management." (*Long Beach Unified School District v. Godwin Living Trust* (9th Cir. 1994) 32 F.3d 1364, 1366.) *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.* (9th Cir. 1992) 976 F.2d 1338, 1341-42, is also still good law to the extent that operator liability occurs where individuals working on behalf of the parent corporation actually exercised control over pollution-causing activities at the facility.

Following *Bestfoods*, courts have noted that additional indicators of operator liability include, but are not limited to, "establishment and design of the facility; participation in the opening and closing of a facility; hiring or supervision of employees involved in activities related to pollution; determination of the facility's operational plan; monitoring and control over hazardous waste disposal; and public declarations of responsibility over the facility and/or its hazardous waste disposal." (*United States v. Township of Brighton* (6th Cir. 1998) 153 F.3d 307, 327 [citing *United States v. Stringfellow*, 20 Envtl. L. Rep. 20656, 20658 (C.D.Cal. Jan 9, 1990) (citing *Rockwell Int'l Corp. v. IU Int'l Corp.* (N.D.Ill. 1988) 702 F.Supp. 1384, 1390-91)].)

In a case involving ARCO and the precise question presented here, namely whether ARCO should be liable for Anaconda's operation of a subsidiary's mine facility, the District Court for Arizona looked to historical evidence of Anaconda's involvement in geological, engineering, metallurgical, exploration, planning, purchasing and transportation activities at the subsidiary's facility. (*Pinal Creek Group v. Newmont Mining Corp.* (D.Ariz. 2005) 253 F.Supp.2d 1037, 1047.) The court specifically concluded that "[t]he operator analysis in *Best Foods* allows the considerations of Anaconda's involvement in [such] activities … in determining operator liability." (*Id*.) The *Pinal Creek* court found Dr. Fredric Quivik's proposed testimony on these issues to be relevant to the direct operator liability question. (*Id*.) Dr. Quivik is the Prosecution Team's expert witness, and his testimony here addresses similar evidence.

ARCO's comparison of the Walker Mine to *United States v. Friedland* is misplaced. There, the court found that the evidence primarily addressed the parent corporation's involvement in managing the subsidiary *corporation*, rather than managing the pollution-causing activities at the *facility*. (*United States v. Friedland* (D.Colo. 2001) 173 F.Supp.2d 1077, 1098.) *Friedland* involved only one document where an individual on behalf of the parent purported to direct activities at the polluted facility. (*Id*.) Here, on the other hand, there are many hundreds of documents demonstrating that, for decades, individuals working only for Anaconda or International managed, operated or controlled the pollution-causing activities at the Walker Mine facility. This case is more comparable to *United States v. Meyer* (W.D.Mich. 1999) 120 F.Supp.2d 635 (shareholder liable for participation in construction of sewer lines that leaked heavy metals).

This case is even more comparable to *United States v. Newmont USA Ltd*. (E.D.Wash. 2008) CV-05-020-JLQ, 2008 WL 4621566, where the court found the parent (Newmont) liable for operating the Dawn Mine facility because, among other things, the parent always determined the onsite personnel at the facility, and:

> [A]s *Bestfoods* advises, investor status wanes when agents of the parent with no subsidiary hat to wear make decisions involving the facility which exceed the norms of general oversight.[12] As part of Newmont's management practices, Newmont developed corporate expertise in various disciplines needed for mining operations and used these expertise … to facilitate the management of its subsidiary operations. This meant, in the case of Dawn, that at times Newmont officials with no Dawn titles performed critical functions: for example, they negotiated the first mining contract with the AEC; they designed the first Dawn mill; they negotiated sales contracts, which in turn affected the pace of mining operations required for each year; they played a significant role in rehabilitating the Dawn mill for the second operating period; and they determined transfers of Newmont personnel between other Newmont operating subsidiaries and Dawn, particularly during the periods of significant operational change.

(*United States v. Newmont USA Ltd*., CV-05-020-JLQ, 2008 WL 4621566 (E.D. Wash. Oct. 17, 2008) [emphasis added].) Citing similar evidence, the court in *United States v. Sterling Centrecorp* (E.D.Cal. 2013) 08-CV-02556-MCE-JFM, 2013 WL 3166585, found that the parent corporation (Sterling) directly operated Lava Cap Mine, even though the Mine itself was owned by a wholly-owned Sterling subsidiary (Keystone). (*Id* at *40-48.) The courts in *Sterling Centrecorp* and *Newmont* each made these findings based on the expert testimony of Dr. Fredric Quivik.[13]

### f. ARCO's evidentiary submittals regarding corporate governance issues should be ignored as not relevant to direct operator liability

ARCO attacks its corporate derivative liability theory straw man argument headlong with the Expert Report of William Haegele, a Certified Public Accountant with purported expertise in "distressed entities and creditors, corporate restructurings, mergers and acquisitions, forensic accounting, fraud investigations, and similar accounting services." (Haegele Statement, at p. 2.) Mr. Haegele's purported experience includes "evaluating and analyzing complex accounting and financial matters, including evaluating and

[12] Recall that the acceptable norms of corporate behavior for a parent include only those in line with 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*, 524 U.S. at 71-72.)

[13] The Prosecution Team submitted courtesy copies of the slip copies of the *United States v. Sterling Centrecorp* and *United States v. Newmont USA* decisions with its Case-in-Chief Submittal CD, in the electronic folder marked "Walker Electronic Records Submitted by Reference."

advising on corporate restructurings, business combinations, acquisitions, bankruptcy, creditor and shareholder rights, fraudulent transfers, and insolvency… SEC financial reporting investigations and restatement projects … financial statement audits" and retail accounting. (*Id*.).

It is clear from Mr. Haegele's Statement, the ARCO Exhibits it references, and the associated discussion in ARCO's Brief, that the primary purpose for Mr. Haegele's involvement here is to address the *Bestfood*s "alter ego" corporate derivative liability theory. (Haegele Statement, pp. 3-11. The proposed CAOs, the Prosecution Team's Opening Brief and this Rebuttal Brief make clear that the Prosecution Team is not pursuing "alter ego" corporate derivative liability at this time. Mr. Haegele's entire testimony in this regard should be ignored.

To the limited extent that Mr. Haegele addresses anything even remotely relevant to direct operator liability, his opinions are neither substantial nor persuasive. Mr. Haegele concludes that Anaconda provided "typical investor monitoring and oversight of their investment" Walker Mining Company, and cites to evidence showing that Anaconda and International executives and directors sat on Walker Mining Company's board of directors, and that International occasionally provided financial assistance. (Haegele Statement, pp. 9-11.) The Prosecution Team does not deny that the currently available evidence tends to show that Anaconda and International may have maintained the proper corporate governance structures in managing the Walker Mining *Company*. That is why the Prosecution Team is not pursuing liability under the "alter ego" derivative liability theory now.[14]

But ARCO cannot contend that Anaconda and International did not operate pollution-causing activities at the Walker Mine *facility* just because Anaconda and International acted as corporate investors over the Walker Mining *Company*. The evidence here clearly shows that "employees of [Anaconda] and [International] directed, managed and conducted mining operations, development and other activities at the Walker mine facility." (PT Exh 57, Expert Rebuttal Statement of Fredric L. Quivik, PhD., at p. 1.) In this respect, Anaconda and International employees went well beyond what is expected of a typical corporate investor, thus triggering *Bestfoods* direct operator liability.

To the extent that Mr. Haegele draws conclusions about the extent to which Anaconda and International were involved in the Walker Mine facility, those conclusions are apparently based on a handful of records indicating that Walker Mining Company sometimes paid for administrative services and funded portions of the geological departments at Anaconda and International. Those records do not support any conclusion that Anaconda and International employees were not also directing, managing and conducting operations at the Walker Mine *facility*.

[14] The Prosecution Team has also submitted the Expert Rebuttal Report of Dr. Fredric Quivik (PT Exh 57) to address ARCO's misconstruction of his testimony as focusing on "alter ego" derivative corporate liability.

Mr. Haegele also offers opinion testimony regarding the significance of the "recommendation sheets" sent from Anaconda/International to Walker. (Haegele Statement, at p. 13-15.) As an initial matter, it appears that such opinion is beyond the scope of Mr. Haegele's accounting expertise. But, more importantly, Mr. Haegele minimizes the extent to which the "recommendation sheets" directly controlled the activities at the Walker Mine *facility*. Simply put, nothing happened at the Walker Mine *facility* without direction, management or control by Anaconda or International.[15]

### g. ARCO's evidentiary submittals tend to support elements of the Prosecution Team's allegations

ARCO's Exhibits show that Anaconda and International took a prominent and public role in controlling, managing and directing activities at the Walker Mine facility. ARCO's Exhibit 36 is a journal article dated May 5, 1924, describing "Anaconda's Walker Mine and Mill." This article shows that those involved considered Anaconda to be in control of the Walker Mine facility:

> The control of the property as a whole is in the hands of the Anaconda Copper Mining Co., through its subsidiary, the International Smelting Co. V.A. Hart is the general manager; C.W. Page is the mill superintendent; J.S. Finlay, general superintendent and D. Mackenzie, master mechanic. H.N. Geisendorfer is mine foreman. F.C. Torkelson, of the Anaconda Copper Mining Co., superintended the construction of the milling plant, and Julius Kurtz, of the International Smelting Co., of Tooele, installed the electrical equipment. Acknowledgment is gladly made of the assistance of these men in obtaining information for the preparation of this article.

(ARCO Exhibit 36, at p. 6 [page 730 of the journal, emphasis added]; see also ARCO Exhibit 33, at p. 3 [quoting J.R. Walker in 1922: "I believe that the minority stockholders should be congratulated on having a highly efficient organization like the Anaconda Mining company in charge of development and exploitation of the property."].)

ARCO's evidence also shows that Anaconda and International played a prominent, public role in establishing the Tailings site. ARCO's Exhibit 8 contains a letter from Hart, Walker's site manager, dated February 7, 1919, to the Forest Service regarding the construction of the tailings pond. This letter was written on International's letterhead, which demonstrates that International was directly involved in managing the Tailings site, or at least put itself out in public as managing the site. In all, ARCO's Exhibits 8-27 demonstrate that International and Anaconda were deeply involved in obtaining authorization to construct the tailings impoundment.

[15] Mr. Haegele himself cites evidence showing the degree to which Anaconda/International managed and directed such activities at the Walker Mine facility, "[recommendation sheets from Anaconda/International] are forwarded to the mine-foremen for execution." (Haegele Statement, at p. 13 [quoting International's geologist Billingsly].)

ARCO's Exhibit 51 shows that, by as early as 1926, "the tailings pond [was] so full that next spring high water will carry much tailings down the creek with the possibility that they will clog irrigation ditches at Genessee and cause trouble there and also with the Debris and Fish and game Commissions." This tends to show that the Tailings site was discharging or threatening to discharge waste to cause a condition of public nuisance even as soon as a few years after it was constructed.

ARCO's Exhibit 54, page 8 indicates that, in 1927, the mine operators removed 2,719 pounds (1.36 tons) of copper from the mine discharge with the "cementation" method. Page 7 of that Exhibit indicates that the operators milled 340,156 tons of ore for the year. Page 7 also indicates that the average grade of the tails, percent copper (tailings) was 0.1154% copper. So the Mine operators discharged approximately 393 tons of copper to the tailings in 1927, while recovering about 0.344% of what they discharged. This demonstrates that the Mine facility discharged enormous quantities of copper, and related waste, to the Tailings even under the best of circumstances. (PT Exh 51, ¶ 11.)

ARCO's Exhibit 72 is the Walker Mining Company Annual Report for 1932. Mining and milling was suspended on February 28 for the remainder of that year, so copper precipitates (presumably from precipitating mine water) was a large part of the copper produced that year. 60 tons x 63% copper is 38 tons of copper recovered from the mine discharge. But the operators milled 34,741 tons and, using the 1927 average grade of the tails (percent copper (tailings) of 0.1154% copper), the operators discharged to the tailings 40 tons of copper. This demonstrates that the Mine facility discharged copper to the Tailings even in years when little mining took place. (PT Exh 51, ¶ 12.)

ARCO's Expert Report of Marc Lombardi concludes, on page 3 (#3), that "Water quality in Dolly Creek and Little Grizzly Creek near the Walker Mine is impaired by contaminants resulting from AMD, primarily elevated concentrations of copper, released from sources related to mining and processing of ore. Sources of contaminants from mining and processing ore to surface water are: mine drainage, tailings at the mill site, and tailings in the tailings impoundment area." The Lombardi Report also concludes that "the sulfide-bearing ore, mine waste, and mill tailings are the source of AMD at the Walker Mine." (Lombardi Report, at p. 5.) These conclusions are directly in line with the Prosecution Team's evidence and arguments regarding the causes and current conditions of pollution and nuisance on the Mine and Tailings sites.

The following statements in the Lombardi Report also agree with the Prosecution Team's evidence and proposed findings regarding current conditions of pollution and nuisance at the Mine and Tailings sites:

- Page 7, paragraph 3. "Recent analytical data collected by the Regional Board staff and others shows that surface water in the vicinity of the mine and tailings impoundment area is impacted by AMD from the 700 Level Adit portal, tailings in the mill site area, the settling pond in the mill site area, and the lower tailings impoundment."

- Page 7, paragraph, last paragraph. "There are three primary sources of copper in the former mill area that contribute to stream loading. These are the continued direct discharge from the portal, dissolved copper in the settling pond, and copper leaching from the mill tailings area."

- Page 8, Paragraph 3. "The tailings in the mill site area have elevated concentrations of both total and leachable copper and hence are a source of copper to surface water."

- Page 9, paragraph 1. "This drainage (the old Dolly Creek Channel) contributes an ongoing and significant copper load to Little Grizzly Creek as evident in the sampling results at monitoring location WM-6 (Figure 4.)"

- Page 9, paragraph 2. "Downstream locations along Little Grizzly Creek but upstream of the confluence of Dolly Creek (WM-7C and WM-7) have slightly higher mean dissolved concentrations relative to location WM-5. This increase is likely due to groundwater infiltration through the lower tailings impoundment and discharge to the creek along the southwestern boundary of the lower tailings impoundment."

- Page 9, paragraph 3. "Although consistently high dissolved copper concentrations in groundwater in the tailings are not indicated, some dissolved copper loading to Little Grizzly Creek due to groundwater discharge from the lower tailings impoundment cannot be ruled out."

- Pages 9-10, Little Grizzly Creek Downstream of the Tailings Impoundment. "Sample location WM-9 is the compliance point of the USFS WDRs relative to meeting the WQPS of 5 ug/L. These data show that the standard is not being met at the compliance point."

The Lombardi Report also concludes, on page 3 (#8), that the water quality issues at the Mine and Tailings are interrelated such that it will be necessary to coordinate efforts between the sites to attain water quality objectives in Dolly Creek and other surface waters. The Prosecution Team agrees with this statement, and that is why both CAOs are before the Board, and why ARCO is named to both.

### h. ARCO has not demonstrated any basis for allocation of liability

ARCO argues that liability *must* be apportioned among responsible parties. (ARCO Brief, at pp. 7-8, 30-32.) ARCO makes no attempt to distinguish the legal authorities cited by the Prosecution Team in its Opening Brief (pp. 11 and 20), nor does ARCO offer any legal authority of its own. Instead, ARCO rehashes the same unsound arguments that its predecessors did not operate the Walker Mining Company's corporate affairs and that the Board and the Forest Service are responsible for the sites.

But the evidence shows that Anaconda and International were responsible for nearly all of the mining activities and tailings which cause the current conditions of pollution and nuisance at the sites. Moreover, the Board is not a responsible party, and there is no there is no legal basis to apportion ARCO anything less than joint and several liability.[16]

## IV. Revisions to the proposed Mine CAO based on the briefs

The Prosecution Team now submits a revised proposed Mine CAO (R5-2014-YYYY) with the following suggested clarifying modifications to the Findings and Ordered sections in response to ARCO's Prehearing Motion Nos. 2 and 8:

Finding 28: Striking references to "hold harmless" provisions in the 1991 stipulated judgment against Calicopia Corporation and others and including a description of the effect of the stipulated judgment and citations to specific language in PT Exhibit 16.

Finding 29: Striking references to "hold harmless" provisions in the 1999 settlement agreement involving and including a description of the effect of the settlement agreement and citations to specific language in Prosecution Exhibit 54.

Ordered Paragraph No. 5: Striking references to previous expenditures with respect to cost recovery.

## V. Conclusion

For the reasons stated above and in the Prosecution Team's Opening Brief, 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:

ANDREW TAURIAINEN
Senior Staff Counsel
MAYUMI OKAMOTO
Staff Counsel
Office of Enforcement

[16] ARCO's Prehearing Motion No. 2 asserts that the Board is a discharger at both the Mine and Tailings, and Prehearing Motion No. 7 asserts that ARCO cannot be held jointly and severally liable. The Prosecution Team's Responses to those Motions explain why ARCO is wrong on both counts, and those Responses are incorporated by reference here.